

## Submission to the Portfolio Committee on the Education Legislation Amendment (Parental Rights) Bill 2020

February 2021

### 1 Introduction

Anti-Discrimination NSW (**ADNSW**) makes this submission to the Portfolio Committee on the *Education Legislation Amendment (Parental Rights) Bill 2020* (the **Bill**).

ADNSW thanks the Committee for the opportunity to provide comments on the Bill and the proposed changes to the *Education Act 1990* (**Education Act**), the *Education Standards Authority Act 2013* (**Education Standards Authority Act**) and the *Teacher Accreditation Act 2004* (**Teacher Accreditation Act**).

ADNSW administers the *Anti-Discrimination Act 1977 (NSW)* (**ADA**), which makes it unlawful to discriminate in specified areas of public life against a person on grounds which include their sex, race, age, disability, homosexuality, marital or domestic status, transgender status and carer's responsibilities. Vilification on the grounds of race, homosexuality, transgender status or HIV/AIDS status is also unlawful.

It should be noted that transgender status is recognised under the ADA. ADNSW has concerns about the effect of the Bill on discrimination against, and the alleviation of discrimination against, transgender and gender diverse people in the NSW education system.

ADNSW does not have human rights jurisdiction. ADNSW's comments do not extend to questions of parental rights, the acknowledged human right of parents to educate their children in religious and moral matters in conformity with their own convictions.<sup>1</sup>

### 2 About Anti-Discrimination NSW

ADNSW strives to eliminate discrimination in NSW by responding to enquiries; investigating and conciliating complaints; and raising awareness about discrimination and its impacts.

### 3 Current protections for transgender persons in the ADA

Part 3A of the ADA includes provisions making it unlawful to discriminate against a person on the basis of their transgender status in the areas of employment, education, the provision

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<sup>1</sup> International Covenant on Civil and Political Rights, Article 18(4).

of goods and services, accommodation and in registered clubs. Unlawful discrimination against transgender persons under the ADA includes:

- Being treated unfairly on the basis of being transgender or being identified as transgender
- 'Recognised transgender person(s)' being treated as their former sex
- A person being forced to follow a rule or requirement as their former sex
- A relative, friend or colleague of a person who is transgender or a person who is assumed to be transgender being treated unfairly

Part 3A, Division 5 of the ADA also makes transgender vilification unlawful. Transgender vilification is defined as a public act that could incite hatred, serious contempt or ridicule towards transgender people.

#### **4 Prohibition on 'gender fluidity' in schools**

The Bill proposes to amend the Education Act, the Education Standards Authority Act and the Teacher Accreditation Act to prohibit schools, teachers and training courses from teaching 'gender fluidity'. The Bill seeks to amend these Acts to include the following definition of 'gender fluidity':

*a 'belief there is a difference between biological sex (including people who are, by their chromosomes, male or female but are born with disorders of sexual differentiation) and human gender and that human gender is socially constructed rather being equivalent to a person's biological sex'.*

Not only is this definition inconsistent with recognised transgender status in the ADA, ADNSW also has some difficulty with this definition in terms of clarity and content. There is further difficulty with the expression 'disorders of sexual differentiation' in the definition. This expression is not necessarily commonly used, and further, ADNSW notes that the terminology used to describe people born with variations in sex characteristics is contested.<sup>2</sup>

Furthermore, the definition may be inconsistent with the reasoning in decisions of the High Court in *NSW Registrar of Births, Deaths and Marriages v Norrie* [2014] HCA 11) and *AB v State of Western Australia* [2011] HCA 42.

The proposals contained in the Bill to prevent the teaching of gender fluidity may well, in certain factual situations such as sex education, amount to discrimination against transgender people.

The Bill seeks amend the Education Act to insert s. 17C which makes the prohibition on the teaching of 'gender fluidity' apply to:

*any teaching, instruction, counselling and advice provided to students by:*

*(a) non-teaching school executives;*

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<sup>2</sup> ['Protecting the Human Rights of People Born with Variations in Sex Characteristics in the context of Medical Interventions'](#), Australian Human Rights Commission, Consultation Paper, July 2018, pp. 6 – 7.

*(b) non-teaching school counsellors,*

*(c) non-teaching staff, contractors, advisors and consultants of a school,*

*(d) non-school based staff, contractors, advisors and consultants of a school, and*

*(e) volunteers at a school.*

As an example, if a student is experiencing physiological or mental health issues in association with their transgender status and seeks assistance from a school counsellor, under this Bill the counsellor would be prohibited from providing any sort of counselling or advice in relation to 'gender fluidity'. The denial of such a service to students who experience gender fluidity or have identified as transgender would seem to constitute discrimination contrary to the ADA.

## **5 Effect of the Bill on Current Protections**

ADNSW is concerned to avoid discrimination in NSW on the grounds enumerated in the ADA.

### **Discrimination against transgender people**

ADNSW is concerned that the effect of the Bill is to undermine the legislative protections under the ADA given to transgender persons. Discrimination against this vulnerable group, and against intersex persons, has been reported to result in harassment and bullying and resultant high levels of mental health issues.

### **The *Anti-Discrimination Act 1977* and *Sex Discrimination Act 1984***

ADNSW notes that there are current protections against discrimination for transgender and gender diverse people in state and federal law.

#### *The Anti-Discrimination Act 1977*

As noted above, the ADA contains protections against discrimination and vilification on the basis of transgender status. Section 38K of the ADA makes it unlawful for an educational authority to discriminate against a student on transgender grounds:

- 'by denying the student access, or limiting the student's access, to any benefit provided by the educational authority'<sup>3</sup> or
- 'by expelling the student or subjecting the student to any other detriment'.<sup>4</sup>

ADNSW does note that s. 54 of the ADA provides an exception for acts performed in order to comply with state legislation. However, ADNSW has concerns that transgender people in NSW schools, if subject to action taken by a person in accordance with the Bill, may be unable to access the current protections against discrimination in the ADA.

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<sup>3</sup> *Anti-Discrimination Act 1977*, s. 38K(2)(a)

<sup>4</sup> *Anti-Discrimination Act 1977*, s. 38K(2)(b)

### *The Sex Discrimination Act 1984*

Furthermore, discrimination on the basis of 'gender identity' and 'intersex status' is unlawful under federal law. In 2013 the Commonwealth Government broadened the protections in the *Sex Discrimination Act 1984 (SDA)* to cover sexual orientation (whether towards persons of the same and/or a different sex), gender identity (gender-related characteristics, regardless of a person's sex at birth), intersex status (people born with physical sex characteristics that do not fit medical and social norms for female or male bodies), and marital or relationship status. Discrimination on the basis of gender identity and intersex status is unlawful in the areas of education and employment in the SDA.<sup>5</sup>

As stated above, the SDA prohibits discrimination on the basis of gender identity and intersex status in the area of education and applies to NSW public schools.<sup>6</sup> Teachers and school providers are obliged to comply with the provisions of the SDA.

ADNSW does not comment on constitutional questions that may arise. ADNSW is concerned that the passing of this Bill will lead to confusion among staff and students in NSW schools about what their rights and responsibilities are under the law.

Anti-Discrimination NSW

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<sup>5</sup> *Sex Discrimination Act 1984*, ss. 14, 16 and 21.

<sup>6</sup> *Sex Discrimination Act 1984*, s. 21.