Adolescent Gender Identity and the *Sex Discrimination Act*: The Case for Religious Exemptions

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There is a lot of controversy about section 38(3) of the Sex Discrimination Act 1984 *(Cth) ('*SDA*') which permits discrimination by faith-based schools against students on the basis of their sexual orientation and gender identity. This article explains the background to this provision, which in its present form was the result of amendments in 2013. It also explains the problems that would arise if the subsection were repealed without making other amendments to the* SDA.

Faith leaders have consistently made it clear that they do not want the right to expel or discipline students on the basis of sexual orientation or gender identity and so support the repeal of s 38(3). However, other amendments are needed to protect the rights of faith-based schools. These are, in any event, necessary to buttress the (very doubtful) constitutional validity of the 2013 amendments insofar as they concern gender identity.

There is also a need for broader changes to the SDA *to address the confusion about how the law on gender identity applies to children and adolescents. It is unclear when a child gains a legally protected gender identity; whether a clinical diagnosis of gender dysphoria is needed; what respect needs to be given to the views of parents, even with a Gillick-competent adolescent; and what professional discretion can be exercised by school principals when they consider that supporting the social transition of an adolescent is not in his or her best interests. The* SDA *needs to be amended to make clear that it does not require schools to support and affirm the 'social transition' of a young person against the wishes of a parent or when the school considers in good faith that this is not in the best interests of the young person. Difficult pastoral issues need to be left to professional judgment, drawing upon the best advice available from the young person's treating medical and mental health practitioners.*

INTRODUCTION

In late 2021 and early 2022, the Parliament of Australia was once again embroiled in controversy about the religious exemptions given to faith-based schools in the *Sex Discrimination Act 1984* (Cth) *('SDA').* These allow schools to discriminate against students on the basis of their sexual orientation or gender identity.

The relevant provision, s 38(3) of the *SDA,* is as follows:

> Nothing in section 21 renders it unlawful for a person to discriminate against another person on the ground of the other person's sexual orientation, gender identity, marital or relationship status or pregnancy in connection with the provision of education or training

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> by an educational institution that is conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed, if the first-mentioned person so discriminates in good faith in order to avoid injury to the religious susceptibilities of adherents of that religion or creed.[1]

While this does not specifically give faith-based schools a right to expel a child on the basis of sexual orientation or gender identity, were a school to do so, it would not risk a discrimination action under federal law.

This article explains the origins of this subsection and the controversy which has surrounded it in recent years. The article goes on to focus on the issue of gender identity. It explains the difficulties that would arise if the subsection were entirely repealed, without making other substantial amendments to the provisions of the *SDA*, so far as they concern discrimination on the basis of gender identity.

BACKGROUND: THE INCLUSION OF GENDER IDENTITY AS A PROTECTED CATEGORY

The sexual orientation and gender identity provisions of the *SDA*, in their current form, are the result of the *Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Act 2013* (Cth) *('Amendment Act'),* passed in the twilight days of the then Labor government. The *Amendment Act* prohibited discrimination on the basis of sexual orientation, gender identity and intersex status. It also added 'relationship status' to the existing prohibition on marital status.

A *Exemptions in the Legislation*

The 2013 *Amendment Act* provided various exemptions that were already contained in the legislation insofar as discrimination concerned sex. So, for example, s 21 of the *SDA* prohibits discrimination in educational institutions. Prior to 2013, this section referred to discrimination on the basis of 'sex, marital status, pregnancy or potential pregnancy, or breastfeeding'. As a result of the amending legislation, the prohibition extended to 'sex, sexual orientation, gender identity, intersex status, marital or relationship status, pregnancy or potential pregnancy, or breastfeeding'. An exemption is contained in s 21(3) of the *SDA* to protect single-sex schools; after the 2013 amendments, this exemption was extended to the larger list of prohibited characteristics.

The religious exemptions for faith-based schools were amended in a similar way. Prior to 2013, s 38(3) provided that:

> Nothing in section 21 renders it unlawful for a person to discriminate against another person on the ground of the other person's marital status or pregnancy in connection with the provision of education or training by an educational institution that is conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed, if the first-mentioned person so discriminates in good faith in order to avoid injury to the religious susceptibilities of adherents of that religion or creed.

As with many other sections of the *SDA*, s 38 was amended by omitting the words 'marital status' and substituting 'sexual orientation, gender identity, marital or relationship status'. So, the religious exemptions now applied to a larger list of prohibited characteristics. Intersex

[1] *Sex Discrimination Act 1984* (Cth) s 38(3) *('SDA').*

status was not included, presumably because there was no known issue about intersex status that required any religious exemption.

B *The Constitutional Problem*

There is reason for serious doubt whether the 2013 legislation is constitutional, at least insofar as it deals with gender identity. Prior to these amendments, the *SDA* was only concerned with discrimination on the basis of sex and related matters such as breastfeeding, and gave effect to Australia's international commitments under the *Convention on the Elimination of All Forms of Discrimination Against Women* ('*CEDAW*').[2] This gave the legislation a clear constitutional basis under the external affairs power.[3]

Likewise, the 2013 amendments relied on the external affairs power for their constitutional validity; but these new protected categories of sexual orientation, gender identity and intersex status were not supported by any specific international convention to which Australia is a signatory. This is a problem, because as Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ explained in *Victoria v Commonwealth*:

> To be a law with respect to 'external affairs', the law must be reasonably capable of being considered appropriate and adapted to implementing the treaty.[4]

It is not sufficient that an issue is a matter of international concern.[5]

It is doubtful that a law could be validly enacted pursuant to the external affairs power by reference to just one article of the *International Covenant on Civil and Political Rights* ('*ICCPR*') taken in isolation, since this is not implementing a treaty.[6] International law recognises that human rights are not only universal and indivisible, but also interdependent and interrelated.[7] So legislation that cherry picks art 26 concerning equal protection from discrimination, ignoring other rights guaranteed by the *ICCPR*, cannot be a proper implementation of that Convention. Article 26 must be read in the light of other articles in this Convention, including, for example, art 18 (freedom of thought, conscience and religion), art 22 (freedom of association) and art 27 (rights of ethnic, religious of linguistic minorities).

In the Explanatory Memorandum to the *Amending Act*, the government based the constitutionality of the provision mainly on art 26 of the *ICCPR* and other conventions of international law that support the goal of promoting equality and non-discrimination. The drafters explained:

> [A]rticle 26 of the ICCPR is a 'free-standing' bar on discrimination, prohibiting discrimination in law or in practice in any field regulated by public authorities. The list of grounds in article 26 is not exhaustive and decisions by the United Nations Human Rights Committee suggest that a clearly definable group of people linked by their

[2] *Convention on the Elimination of All Forms of Discrimination Against Women*, opened for signature 17 July 1980, 1249 UNTS 13 (entered into force 3 September 1981) ('*CEDAW*').
[3] *Australian Constitution* s 51 (xxix).
[4] (1996) 187 CLR 416, 487.
[5] *Alqudsi v Commonwealth* [2015] NSWCA 351, [147] (Leeming JA).
[6] *International Covenant on Civil and Political Rights,* opened for signature 16 December 1966, 999 UNTS 172 (entered into force 23 March 1976) art 26 ('*ICCPR*').
[7] *Vienna Declaration and Programme of Action*, UN GAOR, World Conf on Hum Rts, 48th sess, 22d plen mtg, part I, 5, UN Doc A/CONF.157/24 (1993).

> common status is likely to fall within 'other status'. 'Other status' has been found by the Committee to include age, sexual orientation and marital status.[8]

Even if the reference to 'other status' is sufficient as a constitutional basis for the prohibition of discrimination on the basis of sexual orientation, it seems very difficult to find a similar constitutional basis for the amendments concerned with gender identity.[9] The Explanatory Memorandum made no attempt to justify it beyond this general appeal to non-discrimination in art 26 of the *ICCPR*.

Part of the difficulty in treating gender identity as an 'other status' is that the legislation is so broad. It does not apply only to transgender people who have completed sex reassignment surgeries, and who might arguably be covered by the prohibition of sex discrimination on the basis of medically reassigned and legally recognised sex. The prohibition on discrimination is not even limited to those who have been clinically diagnosed with gender dysphoria, and therefore a recognised medical condition. There is also no need to have taken any medical steps to align the person's body more closely with the external characteristics of the sex with which he or she identifies.[10] The Act protects the gender identity of anyone who declares himself or herself to have one.

If the provisions on gender identity do have a valid basis as an implementation of the *ICCPR*, or insofar as employment is concerned, as implementation of an International Labour Organisation Convention,[11] then it is arguably necessary for the legislation to situate the prohibition of discrimination within a broader framework of human rights in order to buttress that constitutional platform. Currently, the legislation engages art 18 as well as art 26. If the religious exemptions concerning gender identity are stripped from the *SDA,* then the already very tenuous constitutional platform for the gender identity provisions in the 2013 legislation collapses. If other protections for religious freedom are introduced at the same time as removing s 38(3), then there would be less of a constitutional problem.

FAITH-BASED SCHOOLS AND THE EXPULSION ISSUE

Section 38(3) of the *SDA* attracted little or no attention until the recommendations of the Expert Panel report on religious freedom,[12] chaired by the Hon. Philip Ruddock, were made known in the latter part of 2018.

A *After Ruddock*

Recommendation 7 of the Expert Panel was as follows:

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[8] Explanatory Memorandum, Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Bill 2013 (Cth) 5.

[9] United States law might be thought to provide some limited support. In *R.G. & G.R. Harris Funeral Homes Inc, v. Equal Employment Opportunity Commission*, 139 S Ct 1599 (2019) the Supreme Court interpreted the sex discrimination provisions of the *Civil Rights Act 1964* to include those who identify as transgender, since discrimination on the basis of transgender identity was in effect, discrimination on the basis of sex. However, the *SDA* clearly distinguishes between sex and gender identity as two different protected attributes, and so this interpretative route to constitutional validity does not seem open.

[10] '"[G]ender identity" means the gender-related identity, appearance or mannerisms or other gender-related characteristics of a person (whether by way of medical intervention or not), with or without regard to the person's designated sex at birth.': *SDA* s 4(1).

[11] *Discrimination (Employment and Occupation) Convention,* 1958, 111 ILO (entered into force 15 June 1960).

[12] Expert Panel, Department of Prime Minister and Cabinet, *Religious Freedom Review* (Report, 13 December 2018) <https://pmc.gov.au/domestic-policy/religious-freedom-review>.

> The Commonwealth should amend the Sex Discrimination Act to provide that religious schools may discriminate in relation to students on the basis of sexual orientation, gender identity or relationship status provided that:
>
> (a) the discrimination is founded in the precepts of the religion
>
> (b) the school has a publicly available policy outlining its position in relation to the matter
>
> (c) the school provides a copy of the policy in writing to prospective students and their parents at the time of enrolment and to existing students and their parents at any time the policy is updated, and
>
> (d) the school has regard to the best interests of the child as the primary consideration in its conduct.[13]

This represented a narrowing of the broad-based exemption contained in s 38(3) of the *SDA*, and to that extent a diminution in the religious freedom of faith-based educational institutions. Nonetheless, the Panel recognised that the retention of a religious exemption was an important and justifiable expression of Australia's commitment to religious freedom and parental choice in schooling.

However, in the press, a quite different view gained traction. It seems to have come as a great surprise to many people that religious schools were allowed to expel gay or lesbian students at all, whether or not in practice, any of them did so. Hurriedly, two Bills were introduced into the federal Parliament by opposition parties to eliminate the right of faith-based educational institutions to discriminate on the basis, inter alia, of sexual orientation or gender identity. One of those Bills, introduced on behalf of the Greens, sought the removal of any discrimination in schools (whether in application to students or staff).[14] The other, introduced by Labor frontbencher Senator Penny Wong, sought to remove any right to discriminate in relation to students by repealing s 38(3).[15]

Church leaders supported the removal of s 38(3), provided other changes to the Act were made to deal with issues arising in consequence of that removal. For example, the Anglican Archbishop of Sydney at the time, Glenn Davies, explained to a Senate Inquiry in 2019:

> Our Anglican schools do not discriminate against LGBT students, and legislation which gives them the right to discriminate against any student is deeply problematic.[16]

With support from churches and organisations representing faith-based schools, the Government moved amendments to ensure that religious institutions could impose reasonable rules in good faith and in the best interests of students, consistently with their religious ethos. They also sought to ensure that schools could maintain their faith-based teachings on sexuality and gender without coming into conflict with discrimination laws.[17]

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[13] Ibid 2.
[14] Discrimination Free Schools Bill 2018 (Cth), introduced by Senator Di Natale (Greens), 16 October 2018.
[15] Sex Discrimination Amendment (Removing Discrimination Against Students) Bill 2018 (Cth), introduced by Senator Wong (Labor), 29 November 2018.
[16] Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, *Sex Discrimination Amendment (Removing Discrimination Against Students) Bill 2018* (Report, February 2019) 26 [3.75].
[17] Ibid 8-9.

Such was the complexity involved in amending the *SDA* to achieve these outcomes, that the majority of the Senate Committee reviewing the Bill recommended that the issues be referred to the Australian Law Reform Commission,[18] as subsequently occurred. The Commission was required to conduct an inquiry into the religious exemptions in anti-discrimination laws generally.[19] However, the Government subsequently decided to change its timetable for reporting so that the Australian Law Reform Commission was not to do further work on the subject until after a Religious Discrimination Bill was passed. It was unfortunate that the limited *SDA* issues, involving largely technical drafting problems, were not resolved soon after the 2019 election.

B *The SDA and the Religious Discrimination Bill*

The Religious Discrimination Bill was finally introduced on 25 November 2021, at a time when few parliamentary sitting days were left before an election was called in April 2022. As part of a deal to get members of the Government's backbench onside, the Government agreed to amend the *SDA* to address the issue of discrimination against students in religious schools. The Prime Minister wrote to the Leader of the Opposition on December 1 2021, indicating the Government's intention to introduce an amendment removing s 38(3).[20] Subsequently when the amendment was introduced to the Human Rights Legislation Amendment Bill 2021 (Cth) (a Bill which formed part of a legislative package with the Religious Discrimination Bill) it was much more limited. It provided only that faith-based schools could not expel students on the basis of their sexual orientation. It did not repeal s 38(3) in its entirety and nor did it remove the exemption in relation to gender identity.

Labor, with support from five Liberal MPs, successfully moved an amendment in the House of Representatives, repealing s 38(3). As a consequence, the Government decided it would not proceed to debate the legislative package in the Senate. The *SDA* remains unamended at the time of finalisation of this article.

The situation, then, is one in which all the major parties have agreed that religious schools should not have the right to discriminate against students on the basis of sexual orientation or gender identity, but there are differences between the parties on what consequential amendments, if any, are required to address the concerns of some faith-based schools about their position if s 38(3) is repealed.

THE RELIGIOUS CASE FOR EXEMPTIONS ON THE BASIS OF GENDER IDENTITY

In the *SDA*, and the various state and territory laws that provide religious exemptions,[21] the relevant exemption is not based upon the religious character of the institution but rather on the basis of acts of discrimination which conform to the doctrine of the religion, or where the

[18] Ibid 28 [3.86].
[19] Australian Law Reform Commission, *Review into the Framework of Religious Exemptions in Anti-discrimination Legislation* (Terms of Reference, April 2019) <https://www.alrs.gov.au/inquiry/review-into-the-framework-of-religious-expemptions-in-anti-disdcrimation-legislation/terms-of-reference/>.
[20] Letter on file with the author.
[21] Tasmania only allows faith-based schools to discriminate in employment on the basis of religious belief: *Anti-Discrimination Act 1998* (Tas) s 51(2). In Victoria, religious exemptions concerning sexual orientation and gender identity were removed from the *Equal Opportunity Act 2010* (Vic) by the *Equal Opportunity (Religious Exceptions) Amendment Act 2021* (Vic).

discrimination is necessary to 'avoid injury to the religious susceptibilities of adherents'.[22] Thus, there must be a religious basis to justify discrimination.

If the question is asked whether there is a religious case for being permitted to expel students on the basis of their sexual orientation or gender identity, it should almost certainly be answered in the negative. Organisations representing faith-based schools have endeavoured to make it clear that they do not wish to expel any student on the basis of sexual orientation or gender identity, and are guided by an ethic of care and concern for all their students, whatever their characteristics.[23] This ought to be unsurprising. In conservative faith traditions, the relevant prohibitions relate to sexual acts,[24] not to sexual orientation, and if a school has rules about its students' sexual activity, justifying disciplinary action of some kind, then to be consistent with Christian teaching the rule needs to apply equally to heterosexual and same-sex activity. There is no Christian basis for treating same-sex attracted young people in any adverse way. Catholic teaching is clear about condemning discrimination against same-sex attracted people,[25] and this is significant in Australia given it is the Church with which the largest number of Australians identify,[26] and has the largest non-public school system.[27]

A *Gender Identity and Christian Teaching on Discrimination*

Theological reflection on gender identity is much more recent, but to similar effect.[28] The Vatican's Congregation for Catholic Education criticises unjust discrimination against those who identify as transgender, and acknowledges that "through the centuries forms of unjust discrimination have been a sad fact of history and have also had an influence within the Church".[29] A Committee of the Anglican Diocese of Sydney also expresses its strong opposition to discrimination. It advocates for the compassionate care of all those with gender identity issues.[30] It is therefore a complete misunderstanding of Christian teaching, at least, to think that there is a theological basis for treating any child or young person adversely either because of their sexual orientation or gender identity.[31]

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[22] See, eg, the law in NSW: *Anti-Discrimination Act 1998* (NSW) s 56. In NSW, a similar exemption applies to all private schools, whether or not religious. For a review of the exemptions in the various laws, see Sarah Moulds, 'Drawing the Boundaries: The Scope of the Religious Bodies Exemptions in Australian Anti-Discrimination Law and Implications for Reform' (2020) 47(1) *University of Western Australia Law Review* 112.

[23] See, eg, John Sandeman, 'Missing: Schools that Expel Gay Students' (October 2018) *Eternity News*, <https://www.eternitynews.com.au/australia/missing-schools-that-expel-gay-students>; Russell Powell, 'Anglican Educators Write Open Letter to MPs' (October 2018) *SydneyAnglicans* <https://sydneyanglicans.net/news/anglican-educators-write-open-letter-to-mps>.

[24] See, eg, Libreria Editrice Vaticana, *Catechism of the Catholic Church* (United States Conference of Catholic Bishops, 2nd ed, 2000) [2357].

[25] Ibid [2358].

[26] See Chara Scroope, 'Religion: Australian Culture', SBS *Cultural Atlas* (online, 2019) <https://culturalatlas.sbs.com.au/australian-culture/australian-culture-religion#australian-cultre-religion>.

[27] Australian Bureau of Statistics, *Schools* (Catalogue No 4221.0, 23 February 2022) <https://www.abs.gov.au/statistics/people/education/schools/latest-release>.

[28] For a more detailed examination of theological positions on gender identity, see Patrick Parkinson, 'Gender Identity Discrimination and Freedom of Religion' *Journal of Law and Religion* (forthcoming).

[29] Congregation for Catholic Education, For Educational Institutions *'Male and Female He Created Them': Towards A Path Of Dialogue On The Question Of Gender Theory In Education* (2019) 9 [15] <http://www.vatican.va/roman_curia/congregations/ccatheduc/index.htm>.

[30] Anglican Diocese of Sydney, Social Issues Committee, *Gender Identity* (Report, 2017) 11

[31] Understanding of this is not universal in the Christian Church in Australia, as the controversy concerning Citipointe Christian College in early 2022 demonstrated: <https://www.theguardian.com/australia-news/2022/feb/03/brisbanes-citipointe-christian-college-withdraws-anti-gay-contract-but-defends-statement-of-faith>.

B *Protection for Religious Beliefs*

That does not mean that s 38(3) can be deleted without any other changes. One of the protections that faith-based schools might need, in this context, is clarity that nothing in the *SDA* should be understood as preventing the school from teaching in accordance with its religious and scientific understanding that *Homo sapiens* is a sexually dimorphic species. In essence, for the species to reproduce, it takes a male's sperm to fertilise a female's egg. There are only two sexes, male and female, and while a very small number of babies are born with intersex conditions,[32] these are examples of the natural variations known to many species, and not indicative of any third sex or gender.

The larger question though, is what the law requires of schools when a child or young person, with or without support from a parent or parents, declares a gender identity that is incongruent with natal sex and demands that the school accommodates his or her changed identity. Is it discriminatory, under the *SDA,* not to affirm the adolescent's new gender identity?

DOES THE LAW REQUIRE AFFIRMATION OF AN ADOLESCENT'S GENDER IDENTITY?

This question may be explored through asking what the responsibilities of the school are, as a matter of law, if 15 year old Chris identifies as a member of the opposite sex and wishes to be treated as such. What if the parents object, or one of them does so while the other is supportive? What about the role of medical professionals? How should the school take account of impacts upon other students? On all these issues, the *SDA* is vague or silent.

In seeking to be treated as a member of the opposite sex, and making gender-related changes to pronouns, registration of gender at school, and uniform, Chris wants to engage in what is called a 'social transition'. If children or young people make a social transition, this does not mean, necessarily, that they will go on to live permanently as another gender, nor even that they will take steps to transition medically, through taking puberty blockers, cross-sex hormones or undertaking major surgeries. However, social transition is typically a major step along the pathway to medical transition, particularly if the responses of the most important adults in the young person's life are to affirm his or her new gender identity unequivocally, and to support medical transition.

Once a decision to transition socially is made, the child or young person may have difficulty reverting to their natal sex. As Ristori and Steensma explain:

> The rationale for supporting social transition before puberty is that children can revert to their originally assigned gender if necessary since the transition is solely at a social level and without medical intervention. Critics of this approach believe that supporting gender transition in childhood may indeed be relieving for children with [gender dysphoria] but question the effect on future development. The debate thereby focuses on whether a transition may increase the likelihood of persistence because, for example, a child may 'forget' how to

[32] The presence of both ovarian and testicular tissues at birth is very uncommon. See G Krob, A Braun and U Kuhnle, 'True Hermaphroditism: Geographical Distribution, Clinical Findings, Chromosomes and Gonadal Histology' (1994) 153(1) *European Journal of Paediatrics* 2. There are other disorders of sexual development that can be included within a very broad definition of being 'intersex': see Amar Y Rawal and Paul F Austin, 'Concepts and Updates in the Evaluation and Diagnosis of Common Disorders of Sexual Development' (2015) 16(12) *Current Urology Reports* 83.

> live in the original gender role and therefore will no longer be able to feel the desire to change back; or that transitioned children may repress doubts about the transition out of fear that they have to go through the process of making their desire to socially (re)transition public for a second time.[33]

For these reasons, the Interim Report of the Cass Review in England (an independent review commission by the National Health Service) has made it clear that social transitioning is not a 'neutral act'. As the report noted, 'it may have significant effects on the child or young person in terms of their psychological functioning.'[34] The decision to make a social transition requires sufficient maturity to be able to understand the implications and potential consequences.

A *When Does a Child or Young Person have a Legally Protected Gender Identity?*

An initial question is when does a child or young person have a gender identity that is protected by law? Does a small child, for example, have a legally protected gender identity, and if so, who determines this and in accordance with what threshold? On this, the *SDA* is silent.

If a four-year-old boy likes playing with dolls and wearing a dress when playing 'dress-ups', does this mean he has a legally protected gender identity that is incongruent with his natal sex? The common-sense answer to this is no. It cannot yet be said that there is anything in the child's play that would justify the drastic step of treating him as other than a boy. Indeed, in the past, a substantial majority of children who have been patients of specialist gender clinics have resolved these issues before or around the time of puberty. Most go on to be gay or lesbian adults.[35]

One answer to the question of when a child has a legally-protected gender identity might be if he or she is clinically diagnosed with gender dysphoria. The *Diagnostic and Statistical Manual of Mental Disorders* defines 'Gender Dysphoria' in children as involving 'a marked incongruence between one's experienced/expressed gender and assigned gender, of at least 6 months' duration' and evidenced by at least six of eight criteria. [36] An essential criterion is A1: '[a] strong desire to be of the other gender or an insistence that he or she is the other gender (or some alternative gender different from one's assigned gender)'.[37] There are different criteria used for diagnosing gender dysphoria in adolescence and adulthood.[38]

Having a clinical diagnosis of gender dysphoria would at least offer some rational basis for determining the point at which it could become discriminatory, as a matter of law, to take particular actions or fail to take such actions in a way that adversely impacts upon the child or

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[33] Jiska Ristori and Thomas D Steensma, 'Gender Dysphoria in Childhood' (2016) 28(1) *International Review of Psychiatry* 13, 17 (citations omitted) ('Gender Dysphoria in Childhood').
[34] 'Principles of Evidence Based Service Development' in *Independent Review of Gender Identity Services for Children and Young People: Interim Report* (February 2022) 62 -63. The report observed that 'better information is needed about outcomes': at 63.
[35] See, eg, Kelley Drummond et al, 'A Follow-up Study of Girls with Gender Identity Disorder' (2008) 44(1) *Developmental Psychology* 34; Thomas Steensma et al, 'Factors Associated with Desistence and Persistence of Childhood Gender Dysphoria: A Quantitative Follow-Up Study' (2013) 52(6) *Journal of the American Academy of Child and Adolescent Psychiatry* 582; Ristori and Steensma 'Gender Dysphoria in Childhood'(n 33); Devita Singh, Susan Bradley and Kenneth Zucker, 'A Follow-Up Study of Boys with Gender Identity Disorder' (2021) 12 *Frontiers in Psychiatry* 632784.
[36] American Psychiatric Association, 'Gender Dysphoria' in *Diagnostic and Statistical Manual of Mental Disorders: DSM-5*, (5th ed, 2013) 302.6 (F64.2) ('Gender Dysphoria').
[37] Ibid.
[38] Ibid 302.85 (F64.0).

young person. By not referencing gender dysphoria at all, the *SDA* creates confusion about the application of the law to children.

B *What About the Rights of Parents?*

In the hypothetical posited, Chris is 15. What if the parents are opposed to Chris's wish to engage in a social transition? Arguably, Chris has a legally protected gender identity at the point at which he or she has the legal capacity to make a decision about social transition independently of the parents. Such a view would be based upon the common law principle explained by the House of Lords in *Gillick v West Norfolk and Wisbech A.H.A,* ('*Gillick'*)[39] that young people gain some legal capacity to give their own consent to medical treatment, and by analogy therefore, other decisions, if they have sufficient maturity to understand all the issues involved.[40]

However, it is an error to suppose that Gillick-competence, as it is known, displaces parental authority entirely.[41] In the related area of medically assisted transition, Watts J of the Family Court of Australia[42] has made it clear in *Re Imogen (no 6)*, that parents have a continuing role until the child turns 18.[43] Justice Watts held that, notwithstanding the Full Court's decision in *Re Kelvin*,[44] court approval is needed if a parent disputes either the Gillick-competence of an adolescent, a diagnosis of gender dysphoria, or the proposed treatment. Even if Chris is deemed Gillick-competent, the parents, or either of them, still have the right to go to court to question the diagnosis or treatment, should Chris seek the prescription of cross-sex hormones. In the exercise of its *parens patriae* jurisdiction, a state or territory Supreme Court may override the wishes of a Gillick-competent minor,[45] and there is an analogous power in s 67ZC of the *Family Law Act 1975* (Cth).

The issue of Gillick-competence is far from straightforward when a child or young person wants to make very important decisions with potentially long-term implications. Many of the adolescents attending gender clinics and seeking prescriptions for puberty blockers or cross-sex hormones are on the autism spectrum.[46] Many also have serious psychiatric comorbidities.[47] Research conducted at the Children's Hospital at Westmead, Sydney, indicates that many of the young people seeking medical treatments for gender dysphoria have

[39] [1986] AC 112 ('*Gillick*')
[40] The decision in *Gillick* concerned the capacity of teenage girls under 16 to give consent to the prescription of the contraceptive pill without their parents' knowledge.
[41] See further, Patrick Parkinson, 'Reconsidering Kelvin: Cross-Sex Hormone Treatment as a Response to Adolescent Gender Dysphoria', *Australian Journal of Family Law* (in press).
[42] This Court is now known as the Federal Circuit and Family Court of Australia.
[43] [2020] FamCA 761.
[44] [2017] FLC ¶ 93-809.
[45] *X and Others v The Sydney Children's Hospital Network* (2013) 85 NSWLR 294. The court authorised a blood transfusion on a Gillick-competent 17 year old notwithstanding his refusal of that treatment.
[46] Annelou de Vries et al, 'Autism Spectrum Disorders in Gender Dysphoric Children and Adolescents' (2010) 40(8) *Journal of Autism and Developmental Disorders* 930; Vicky Holt, Elin Skagerberg and Michael Dunsford, 'Young People with Features of Gender Dysphoria: Demographics and Associated Difficulties' (2016) 21(1) *Clinical Child Psychology and Psychiatry* 108. See also Doug VanderLaan et al, 'Do Children with Gender Dysphoria Have Intense/Obsessional Interests?' (2015) 52(2) *Journal of Sex Research* 213.
[47] Riittakerttu Kaltiala-Heino et al, 'Two Years of Gender Identity Service for Minors: Overrepresentation of Natal Girls with Severe Problems in Adolescent Development' (2015) 9(1) *Child and Adolescent Psychiatry and Mental Health* 9; Tracy Becerra-Culqui et al, 'Mental Health of Transgender and Gender Nonconforming Youth Compared with Their Peers' (2018) 141(5) *Pediatrics* 1.

suffered adverse childhood events, family dysfunction or disordered attachments.[48] The application of the Gillick-competence test to adolescents with poor mental health, and who may be on the autism spectrum, is not nearly as straightforward as the question whether a healthy and intelligent fifteen year old could consent to an appendectomy in the absence of parental consent.[49]

It follows that it is far from simple to say that an adolescent gains a legally protected gender identity when he or she is Gillick-competent. That just begs the question of who gets to decide the issue of Gillick-competence. When psychiatric illness or a neurobiological disorder such as autism is involved, what qualifications does the adult need who is being relied upon to assess Gillick-competence?

C *What if the School Thinks the Gender Identity is Likely to be Transient?*

It would not be responsible for a school to facilitate social transition if it were of the view that this is a temporary phase. There is reason for great caution before accepting that Chris was assigned to the 'wrong' gender at birth, that he or she was born in the wrong body,[50] that he or she should be encouraged from henceforth to identify as the opposite sex, and that others should treat Chris as the gender with which he or she identifies.

There is now a lot of evidence that peer and social influences are playing a role in persuading at least some young people that they are transgender. It used to be the case that the gender dysphoria was mostly diagnosed in natal males, with signs of gender incongruence identifiable from early childhood.[51] Now, a substantial majority of adolescents seeking medical transition to another gender identity are adolescent females,[52] and there has been a massive increase in

[48] Kasia Kozlowska et al, 'Attachment Patterns in Children and Adolescents with Gender Dysphoria' (2021) 11 *Frontiers in Psychology* 582688; Kasia Kozlowska et al, 'Australian Children and Adolescents with Gender Dysphoria: Clinical Presentations and Challenges Experienced by a Multidisciplinary Team and Gender Service' (2021) 1(1) *Human Systems: Therapy, Culture and Attachments* 70.

[49] Gillick (n 39) 201 (Lord Templeman [dissenting in the outcome] but not on this point). See further, Parkinson (n 41).

[50] This is the popular idea that while a person's body may be unequivocally one sex, their brains are wired to identify as the opposite sex. The search for a physiological basis for transgender identification has provided limited support for such a view: see Sven C Mueller, Griet De Cuypere and Guy T'Sjoen, 'Transgender Research in the 21st Century: A Selective Critical Review from a Neurocognitive Perspective' (2017) 174(12) *American Journal of Psychiatry* 1155. The authors observe: 'Despite intensive searching, no clear neurobiological marker or "cause" of being transgender has been identified': at 1158. See also Jack Turban and Diane Ehrensaft, 'Research Review: Gender Identity in Youth: Treatment Paradigms and Controversies' (2018) 59(12) *Journal of Child Psychology and Psychiatry* 1228; But see Aruna Saraswat, Jamie Weinand and Joshua Safer, 'Evidence Supporting the Biologic Nature of Gender Identity' (2015) 21 *Endocrine Practice* 199. These authors were unable to assign specific biological mechanisms for gender identity and noted the need for caution due to small sample sizes.

[51] For international statistics, see Griet De Cuypere et al, 'Prevalence and Demography of Transsexualism in Belgium' (2007) 22(3) *European Psychiatry* 137.

[52] Hayley Wood et al, 'Patterns of Referral to a Gender Identity Service for Children and Adolescents (1976–2011): Age, Sex Ratio, and Sexual Orientation' (2013) 39(1) *Journal of Sex and Marital Therapy* 1; Madison Aitken et al, 'Evidence for an Altered Sex Ratio in Clinic-Referred Adolescents with Gender Dysphoria' (2015) 12(3) *Journal of Sexual Medicine* 756; Nastasja de Graaf et al, 'Sex Ratio in Children and Adolescents Referred to the Gender Identity Development Service in the UK (2009–2016)' (2018) 47(5) *Archives of Sexual Behavior* 1301.

adolescents seeking that treatment.[53] No research-based explanation has emerged for why this inversion has occurred.[54]

The increase in cases ought not to be surprising. In recent years a high profile has been given to transgender issues. Popular figures on YouTube promote a somewhat rosy view of the transition journey.[55] Media reporting about transgender issues has also been shown to have significant impact on referrals to gender clinics in England and Australia.[56] Yet how many of these young people really have a condition that justifies supporting them in a social transition, let alone a medical transition? Does the huge and rapid increase in adolescents, but not adults, identifying as 'trans' have anything to do with 'social contagion'?[57]

Lisa Littman, in a landmark study,[58] provided evidence that this is so. She surveyed parents who reported that their child had a sudden or rapid onset of gender dysphoria, occurring during or after puberty. There were responses from 256 parents. Nearly 83% of the young people concerned were female and on average were 15 years old at the time they announced a new gender identification. The majority had been diagnosed with at least one mental health disorder or neuro-developmental disability prior to the onset of their gender dysphoria. None of them, based on parents' reports, would have met diagnostic criteria for gender dysphoria in childhood. Nearly half had been formally assessed as academically gifted. Over 40% expressed a non-heterosexual sexual orientation prior to identifying as transgender. Nearly half had experienced a traumatic or stressful life event prior to the onset of their gender dysphoria such as parental divorce, sexual assault or hospitalisation for a psychiatric condition.

For 45% of these young people, parents reported that at least one of the members of their friendship group came to identify as transgender. The average number of individuals who became transgender-identified was 3.5 per group; for 37% of the young people, the majority of friends in the group had come to identify as transgender. Parents reported that about 60% of the young people experienced increased popularity within their friendship group when they announced that they now identified as transgender. A similar proportion of the parents reported that the friendship groups were known to mock people who did not identify as LGBTQI+.

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[53] Kenneth Zucker, 'Adolescents with Gender Dysphoria: Reflections on Some Contemporary Clinical and Research Issues' (2019) 48(7) *Archives of Sexual Behavior* 1983.

[54] Gary Butler et al, 'Assessment and Support of Children and Adolescents with Gender Dysphoria' (2018) 103(7) *Archives of Disease in Childhood* 631.

[55] Elin Lewis, 'Transmission of Transition via YouTube' in Michele Moore and Heather Brunskell-Evans (eds) *Inventing Transgender Children and Young People* (Cambridge Scholars Publishing, 2019) 180.

[56] Ken Pang et al, 'Association of Media Coverage of Transgender and Gender Diverse Issues with Rates of Referral of Transgender Children and Adolescents to Specialist Gender Clinics in the UK and Australia' (2020) 3(7) *JAMA Network Open* e2011161.

[57] Lisa Marchiano, 'Outbreak: On Transgender Teens and Psychic Epidemics', (2017) 60(3) *Psychological Perspective* 345.

[58] Lisa Littman, 'Parent Reports of Adolescents and Young Adults Perceived to Show Signs of a Rapid Onset of Gender Dysphoria' (2018) 13(8) *Plos One* e0202330 (as amended, 2019). The article was amended post-publication following pressure from transgender activists. The amendments were required by the editor following reviews by senior members of the journal's editorial team, two Academic Editors, a statistics reviewer, and an external expert reviewer. However, the journal editors stood by the article and refused to retract it. For some criticisms and the author's response, see Arjee Restar, 'Methodological Critique of Littman's (2018) Parental-respondents Accounts of "Rapid-onset Gender Dysphoria' (2020) 49(1) *Archives of Sexual Behavior* 61; Lisa Littman, 'The Use of Methodologies in Littman (2018) Is Consistent with the Use of Methodologies in Other Studies Contributing to the Field of Gender Dysphoria Research: Response to Restar (2019)' (2020) 49(1) *Archives of Sexual Behavior* 67.

The majority of parents reported that when the young person disclosed the belief that he or she was transgender, the language came word for word from online sites. More than half had very high expectations that transitioning would solve their social, academic, occupational or mental health problems.

Sudden, post-pubertal identification as transgender, influenced by social media and peers, helps to explain the very high rates at which adolescents now identify as transgender, and in particular the increase in the number of teenage girls.[59] For example, a study of responses of over 3000 9th-12th graders in Pittsburgh, Pennsylvania in 2018 found that 9.2% identified as a gender other than their natal sex, choosing one or more of 'trans girl', 'trans boy' 'genderqueer', 'nonbinary' and 'another identity'.[60] Thirty-nine percent were natal males identifying as female, 30% of these were natal females identifying as male, and 31% were non-binary 'genderqueer', choosing another identity or adopting more than one descriptor. The DSM-5 records gender dysphoria as occurring in between 0.005% to 0.014% of natal adult males, and 0.002% to 0.003% of natal females.[61] Unless rates of gender identity disorder, as it used to be known, or gender dysphoria, were massively undiagnosed in the past, it is likely that for the vast majority of these teenagers in Pittsburgh, the transgender or non-binary identification is either fad or fantasy. The huge increase in transgender identification among teenagers has simply not been matched by a similar increase amongst adults, suggesting that generalised lack of diagnosis in the past is not the issue.

None of this is to deny the real and painful experiences of those who are exploring their gender identity or those diagnosed with gender dysphoria. No great harm is done if transgender or 'genderqueer' identification is little more than a way of getting status in a peer support group and the student does not make major changes by way of social transition. However, if social transition leads to requests for cross-sex hormones and surgery, such as a double mastectomy, the implications are much greater. An increasing number of young adults are now regretting the irreversible changes to their bodies that they demanded as teenagers, thinking they were trans.[62]

D *What Can Parents Expect from State Schools?*

Given all this, there is reason for schools to be very cautious about affirming Chris's self-declared gender identity, at least without requiring careful mental health evaluation as is required by even those medical organisations most supportive of assisting people to transition medically.[63] However, state education department policies may not reflect that need for caution. One reason is because they understand the *SDA*, and related state anti-discrimination

[59] Abigail Shrier, *Irreversible Damage: The Transgender Craze Seducing Our Daughters* (Regnery Publishing, 2020). See also Anna Hutchinson, Melissa Midgen and Anastassis Spiliadis, 'In Support of Research into Rapid-Onset Gender Dysphoria' (2020) 49(1) *Archives of Sexual Behavior* 79.

[60] Kacie Kidd et al, 'Prevalence of Gender-Diverse Youth in an Urban School District' (2021) 147(6) *Pediatrics* e2020049823.

[61] DSM-5 (n 36) 454.

[62] Lisa Littman, 'Individuals Treated for Gender Dysphoria with Medical and/or Surgical Transition Who Subsequently Detransitioned: A Survey of 100 Detransitioners' (2021) 50(8) *Archives of Sexual Behavior* 3353; Elie Vandenbussche, 'Detransition-Related Needs and Support: A Cross-Sectional Online Survey' (2021) *Journal of Homosexuality* <https://doi.org/10.1080/00918369.2021.1919479>. For a different view of reasons for detransition, see Jack Turban et al, 'Factors Leading to ''Detransition'' Among Transgender and Gender Diverse People in the United States: A Mixed-Methods Analysis' (2021) 8(4) *LGBT Health* 273.

[63] See e.g. World Professional Association for Transgender Health *Standards of Care for the Health of Transsexual, Transgender, and Gender Nonconforming People* (version 7, 2012) 23-24 (referring to adults) <https://www.wpath.org/publications/soc>.

laws, to require affirmation of a child's gender identity. In essence, the message of some of these documents is that not to support Chris to change gender identity, at least in school, could constitute unlawful discrimination.

AFFIRMATION OF GENDER IDENTITY – THE GUIDANCE FROM GOVERNMENTS

A *The Safe Schools Coalition Guidance*

Clearest on this position are the publications of the Safe Schools Coalition, which was for some time funded by the federal Department of Education. Selected publications remain on the federal Government's website and therefore have some level of official imprimatur. One of those publications is its guidance to schools on helping young people transition to a new identity.[64] At least some of its advice purports to be based upon what the *SDA* requires. Remarkably, there is almost no mention of consultation with parents or the rights of parents as decision-makers about their children's lives. Teachers and school principals are advised that:

> Consideration should be given to the age and maturity of the student and *whether it would be appropriate* to involve the students' parent(s) or guardian(s) in each decision.[65]

There is mention of getting parental consent for information about the child's transition to be shared if the student is 'unable to give explicit consent' but there is no guidance on when the child might have reached that threshold of independence as a matter of law. Under the heading, 'Prepare for community responses' school leadership teams are advised to 'be prepared to respond to questions or concerns from parents'. If parents are known not to be supportive of the child or young person's desire to transition to a new name and gender, then the school should proceed anyway:

> If a student does not have family or carer support for the process, a decision to proceed should be made based on the school's duty of care for the student's wellbeing and their level of maturity to make decisions about their needs.[66]

It is difficult to see how this could be done without a massive and continuing deception of the parents (for example school reports continuing to be issued in the child's legal name) or taking actions that could lead to the breakdown of the parent-child relationship. Nowhere in this document is there any reference to the need for any advice from a psychologist, doctor or psychiatrist.

The document also recommends changes that have consequences for other students, such as use of bathrooms and changing rooms and participation in gender-segregated sports, without reference to the needs and concerns of those other students. In particular, no mention is made of the rights and needs of female students who may consider their bodily privacy is compromised if a male-bodied person uses their changing rooms or is permitted to sleep in female-only accommodation on camps.

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[64] Roz Ward et al, 'The Student Wellbeing Hub' *Safe Schools Coalition Australia and Foundation for Young Australians* (Web Page) <https://studentwellbeinghub.edu.au/educators/resources/supporting-a-student-to-affirm-or-transition-gender-identity-at-school/>.

[65] Guide to Supporting a Student to Affirm or Transition Gender Identity at School' *Safe Schools Coalition Australia and Foundation for Young Australians* (Web Page) <guide-to-supporting-a-student-to-affirm-or-transition-gender-identity-at-school_oct-2015.pdf (studentwellbeinghub.edu.au)> (emphasis added).

[66] Ibid.

It is unsurprising that many parents were concerned about the Safe Schools program. By way of illustration, the Chinese-Australian population in New South Wales circulated a petition against the program in 2016, complaining that it promoted a particular ideology which was contrary to their culture and beliefs. It attracted over 17,000 signatures.[67]

B *State Education Department Policies*

Some education department policies reflect the radicalism of the Safe Schools Coalition. Typically, these policy documents refer to the need to work with parents, and some emphasise this strongly;[68] but others are rather more equivocal. For example, the legal guidance in NSW, based upon its interpretation of discrimination laws (including the *SDA*), is that:

> It is important to consult with the student and their parents or carers where practicable when planning for the student's support unless the principal *believes on reasonable grounds that it is not in the student's best interests to do this*.[69]

In a similar vein, Victoria's state education department policy, referencing state law and the *SDA*, states that 'gender affirmation student support plans' 'should be developed in consultation with the student and their parents or carers, where possible.'[70] On the issue of parental consent, the guidance is specific:

> There may be circumstances in which students wish or need to undertake gender transition without the consent of their parent/s (or carer/s), and/or without consulting medical practitioners. If no agreement can be reached between the student and the parent/s regarding the student's gender identity, or if the parent/s will not consent to the contents of a student support plan, it will be necessary for the school to consider whether the student is a mature minor. If a student is considered a mature minor they can make decisions for themselves without parental consent.[71]

There is further guidance on whether the child or young person is a mature minor, but this is rather casually left as a decision of the school, without consultation with a child psychologist or even a requirement that the decision be made at senior management level within the Department.[72] Principals or others working with students in schools can decide that the student is capable of making their own decision on the basis that the student has sufficient maturity, understanding and intelligence to understand the nature and effect of their particular decision.

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[67] Danuta Kozaki, 'Safe School: Australian Chinese community petition against anti-bullying program lodged in NSW', *ABC News* (online , 23 August 2016) <https://www.abc.net.au/news/2016-08-23/safe-schools-mp-lodges-petition-against-program-signed-by-17000/7777030>.

[68] See, eg, 'Gender Diverse and Intersex Children and Young People Support Procedure' *Department for Education South Australia* (Web Page, 4 February 2022) 6 <https://www.education.sa.gov.au/doc/gender-diverse-and-intersex-children-and-young-people-support-procedure>; 'Diversity in Queensland Schools – Information for Principals' *Education Queensland* (Fact sheet) <https://education.qld.gov.au)>.

[69] New South Wales Government-Education, 'Transgender Students in Schools – Legal Rights and Responsibilities', *Legal Issues Bulletin No 55* (Web Page, December 2014) <https://education.nsw.gov.au/about-us/rights-and-accountability/legal-issues-bulletins/transgender-students-in-schools> (emphasis added).

[70] Department of Education and Training Victoria, 'LGBTIQ Student Support' *Policy and Advisory Library* (Web Page, 15 June 2020) <https://www2.education.vic.gov.au/pal/lgbtiq-student-support/policy>.

[71] Ibid.

[72] Department of Education (Vic), 'Mature Minors and Decision Making' *Policy and Advisory Library* (Web Page, 15 June 2020) <https://www2.education.vic.gov.au/pal/mature-minors-and-decision-making/policy>.

There are three issues with these policies. The first, is that to the extent it relies on an interpretation of what is legally required to avoid discriminating against a student, it elides two quite different obligations. The first is an obligation not to treat the young person adversely. That is what the arguments about discrimination and the exemptions under s 38(3) have been all about. There is an understandable revulsion against the idea that faith-based schools should be allowed to expel students who identify as transgender. However, that is surely different from requiring the school to facilitate the young person's transition to another gender based upon nothing more than that this is what the child or young person wants to do.

Properly understood, the *SDA* does not provide that gender identity should be equated with sex. The issue can be tested by asking whether it is discriminatory to refuse enrolment to a natal male who now identifies as female and wants to be admitted to a single-sex girls' school. Section 21 of the *SDA* makes clear that an educational institution can refuse to admit a student who identifies as the opposite sex if it is conducted solely for students of a different sex from the applicant. Nothing in the *SDA* states that an educational institution must treat any student as a different sex because their gender identity differs from their natal sex. However, on this issue, state education department policies and the guidance of the Safe Schools Coalition have caused confusion.

The second issue concerns the role of parents in decision-making about their children. The guidance from the Safe Schools Coalition and the Department of Education in Victoria indicates that parents need not be informed at all of the actions the school is taking to facilitate the social transition. This conflicts with the position stated in *Re Imogen (no 6)* that the consent of both parents must be obtained before a doctor prescribes cross-sex hormones to a child under 18, even if some other adult says the child is Gillick-competent, because each parent must be given the opportunity to go to court to challenge this finding, or the proposed medical treatment. It would be surprising therefore, if the *SDA* could be interpreted to say that the school is discriminating against Chris if it declines to go along with his or her wishes to transition at school without telling the parents. Yet the *SDA* has been interpreted to support social transition without parental knowledge or consent.

The third issue concerns the role of mental health professionals. A surprising aspect of the legal and policy guidance available from state governments is the absence of a requirement that important decisions about social transition be made with expert guidance from clinicians and on the basis of a clinical diagnosis of gender dysphoria. Specifically, Victoria's policy provides that while a letter from a gender identity specialist may be requested by the school to support it in developing a student's transition plan, such a letter is not a conditional requirement for the school in providing support to the student.[73]

This reflects the very controversial view that gender incongruence should not be seen as a medical issue at all,[74] and mental health professionals should not become gatekeepers to interventions that assist children and young people to transition.[75]

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[73] See above n 70.

[74] This position can be found, for example, in the Yongyarta Principles, drawn up by non-government human rights specialists in 2006. Principle 18 states: "Notwithstanding any classifications to the contrary, a person's sexual orientation and gender identity are not, in and of themselves, medical conditions and are not to be treated, cured or suppressed . . ." <https://yogyakartaprinciples.org/principle-18/>.

[75] See, eg, Anastacia Tomson, 'Gender-affirming Care in the Context of Medical Ethics – Gatekeeping v Informed Consent' (2018) 11(1) *South African Journal of Bioethics and Law* 24; Florence Ashley, 'Gatekeeping Hormone Replacement Therapy for Transgender Patients is Dehumanising' (2019) 45(7) *Journal of Medical Ethics* 480.

CONCLUSION: REFORMING THE *SDA*

The *SDA*, at least as it is interpreted by influential communities of interpretation, may lead school principals and other decision-makers to make decisions about a child's request for social transition which are not in the child's best interest, or respectful of the role of parents. It also treats gender identity as an attribute requiring legal protection without reference to medical understanding of gender incongruence and gender dysphoria.

If the *SDA* were interpreted as requiring only that children and young people who have a gender identity that is incongruent with natal sex should not be expelled from school or be subjected to any other disciplinary consequence, based upon their gender identity, then it would be entirely uncontroversial to delete s 38(3) of the Act. However, that is not how it has been interpreted.

There is a need for a comprehensive review of gender identity discrimination laws in Australia which examines the medical and scientific evidence that is now emerging concerning the aetiology of gender incongruence among adolescents – particularly those with significant psychiatric comorbidities or neurobiological disorders. In the absence of an overhaul of these laws generally, the faith-based schools provide an alternative option to parents who are deeply concerned about what is being taught and done in state schools and who can afford an alternative. Many of these schools have quite low fees, and so are affordable to many.

The case for religious exemptions on the basis of gender identity, then, is not only that the law needs to recognise the right of faith-based schools to adhere to their understanding that *Homo sapiens* is a sexually dimorphic species, but also to provide an alternative to parents, who may not be deeply religious at all, who are worried by the ideological capture of state education departments. As the controversies about the Safe Schools program a few years ago demonstrated, there is significant concern in the community about some aspects of school programs which present new theories and ideas about gender identity which many would regard as unscientific and which conflict with parents' culture and beliefs.

There is therefore both a religious and rational case for religious exemptions to continue — not to allow the expulsion or discipline of students based upon sexual orientation or gender identity, but to allow parents an alternative to state education policies that conflict with either their religious beliefs or their wish to be involved in all major decisions affecting their children's lives.

If s 38(3) is to be repealed, then various other amendments to the *SDA* are essential. Section 21 needs an additional provision to the effect that nothing in the Act requires a school to treat a child or young person as having a sex that is congruent with their gender identity or to support a child or young person to adopt a new gender identity without parental knowledge or consent. This then leaves it up to school principals and other leaders to use their best professional judgments in responding to a request of a young person to undertake a social transition, respecting the views of parents. A pastoral approach, unconstrained by the influence of poorly considered anti-discrimination laws, will take into account issues of mental health and suicidal ideation in working out the most sensitive and caring pastoral response to the student in the circumstances, working hand in hand with the young person's treating medical and mental health practitioners.

Free from legislative coercion, a Christian school principal may, after due consideration, decide that the most compassionate response to a young person who seeks to change gender is not to embrace his or her newly found gender identity, or not yet. That may be for many reasons, including concerns about the rapid onset of gender dysphoria, observable influences in the young person's friendship group, awareness of other mental health disorders and concern that those other mental health issues may not receive the attention they warrant if transitioning is seen as the answer to all the young person's difficulties. At the very least, a Principal's interpretation of his or her duty of care may lead to an insistence upon a program of counselling, or expert diagnosis together with advice to affirm the young person's gender identity, before agreeing to the transition she or he wishes to make.

All schools ought to have an absolute defence to a claim of discrimination against a young person under the age of 18 that they acted in good faith on the basis of what they considered at the time to be in the best interests of the child. Without such a provision, an educational professional may be unable to reconcile his or her duty of care towards the child with the requirements of the *SDA*. It would be contrary to fundamental principles of child protection if the law compelled, or was understood to compel, a professional with a duty of care towards a child to make decisions that are contrary to what he or she considers are the child's best interests and which could cause them harm.

The law could also be more clearly stated so that people realise that gender identity is not to be equated with biological sex when it comes to the use of sex-segregated facilities or sex-segregated activities, except insofar as the law specifically provides. Such clarification in the law would go a long way to resolving the dilemmas now being created by laws which base changes to gender identity on nothing more than self-declaration.

The *SDA* would also need to make clear that it is not indirect discrimination against any student for a faith-based educational institution to teach in accordance with its beliefs or to maintain school rules consistent with those beliefs. Putting in new protections for religious freedom into the *SDA* to replace s 38(3) would reduce the vulnerability of the 2013 amendments to constitutional challenge as being inadequately based upon implementation of a treaty.

People of faith have long been dissenters from prevailing secular worldviews. Being grounded in beliefs that are ancient, they tend to be unpersuaded by newly fashionable ideas that cannot be reconciled with those beliefs. Religious exemptions need to remain, insofar as they allow faith-based organisations the freedom not to have to treat someone as a gender different to their natal sex, and for the sake of parents who want the option to educate their children at a school consistent with their own beliefs.