

SUBMISSION TO THE AUSTRALIAN HUMAN RIGHTS COMMISSION THREATS TO TRANS AND GENDER DIVERSE RIGHTS

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This submission focuses on the rights of transgender children, and in particular, their right to legal recognition of their gender identity.

While in the majority of Australian states and territories, there is a mechanism by which children can gain legal recognition of their preferred gender, the requirements for this differ from state to state, and often fail to protect children's rights as recognised in the UN Convention on the Rights of the Child (UNCRC).

This submission will focus on four key areas: (1) the pathologisation of transgender children; (2) age limits on gender recognition; (3) parental involvement and evolving capacities; and (4) the involvement of children in decision-making.

1. Pathologisation of transgender children

While in Tasmania and Victoria, no medical treatment is necessary for a child to have their gender legally recognised, in the ACT, NSW, NT, SA and WA, evidence of medical treatment is required as a precondition for legal gender recognition, leading to a pathologisation¹ of transgender people.

The requirement that transgender children must be diagnosed with a medical illness and undergo medical treatment before they can obtain a legal change of gender runs counter to the clear position adopted by core international health and human rights bodies. In 2019, the International Classification of Diseases (ICD-11) was amended such that identifying as transgender is no longer classified as a 'mental illness' but, rather, is included in a separate chapter on sexual health.² The UN Special Rapporteur on the Right to Health, and the Independent Expert on Protection Against Violence, Discrimination based on Sexual Orientation and Gender Identity have called on states to review their medical classifications and adopt strong proactive measures to eliminate the social stigma associated with gender diversity³ – a call that was echoed by Human Rights Watch, who stated that '[g]overnments should swiftly reform national medical systems and laws that require this now officially outdated diagnosis.'⁴

¹ 'Pathologisation' 'is a term used to describe the manner in which non-standard identities are defined by authorities as being medically disordered' (Cal Horton, 'Depathologising diversity: Trans children and families' experiences of pathologisation in the UK' (2023) 37 *Children & Society* 3, 753.

² United Nations Press Release, 'A major win for transgender rights: UN health agency drops "gender identity disorder", as official diagnosis' (30 May 2019), <<https://news.un.org/en/story/2019/05/1039531>>, accessed 28 March 2024.

³ United Nations Press Release, "UN experts hail move to 'depathologise' trans identities" (*United Nations*, 29 May 2019), <<https://www.ohchr.org/en/press-releases/2019/05/un-experts-hail-move-depathologise-trans-identities>>, accessed 2 August 2023.

⁴ BBC News, "Transgender no longer recognised as 'disorder' by WHO" (*BBC News*, 29 May 2019) <<https://www.bbc.co.uk/news/health-48448804>>, accessed 2 August 2023.

The pathologisation of transgender children is problematic as it may force medical or surgical treatment or other bodily changes on children in order to have their change of gender recognised. Compelling a child to undergo medical treatment before they can legally transition also undermines their right to identity – being forced to adopt a physical persona against one's wishes in order to express one's gender identity infringes on the child's right to bodily integrity, as well as the right to the highest attainable standard of living, their right to identity, and the right to be free from inhuman and/or degrading treatment.⁵

While the pathologisation of gender identity is of concern for all transgender individuals, it is particularly problematic in relation to children. This is because children are still undergoing significant physical and psychological development, and the evidence remains unclear as to whether the benefits of medical transition for children outweigh the potential risk of harm.⁶

Moreover, it is questionable whether 'consent' given by a transgender youth to medical treatment which they feel compelled to provide in order to obtain legal recognition of their gender can constitute freely given consent.

2. Age limits

While an application for legal recognition of gender can be brought in respect of a person of any age (either themselves or through those who have parental responsibility for them) in NSW, Queensland, SA, Victoria, WA and NT, only those over the age of 12 can gain legal recognition. Such a restriction violates children's rights – a decision to preclude capacitous children below the age of 12 from the ability to have their gender recognised is discriminatory.

Article 12 of the UNCRC makes clear that children who are capable of forming their own views must be able to express these freely in all matters affecting them, and their views must be given due weight in accordance with the child's age *and maturity*. This is mirrored in the Preamble to the Yogyakarta Principles. 'Any decision that does not take into account the child's views or does not give their views due weight according to their age and maturity, does not respect the possibility for the child or children to influence the determination of their best interests.'⁷

Age cannot be the sole criterion for deciding whether a child has the capacity to seek legal recognition of their gender. Instead, we must also look to their maturity and decision-making ability. In particular:

- Does the child have the ability to understand the information relevant to the decision?
- Can they use or weigh that information as part of the process of making the decision?
- Can they assess the implications of the matter in question?

⁵ See, UNCRC, Articles 8, 24 and 37. Other rights treaties are similarly applicable including, for instance, the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

⁶ See, for example, The Cass Review, *Independent Review of Gender Identity Services for Children and Young People: Interim Report* (February 2022) <https://cass.independent-review.uk/publications/interim-report/>.

⁷ Committee on the Rights of the Child, *General Comment No. 14 (2013)*, [53].

To answer these questions, we must also consider the impact that legal recognition will have on the child – the greater the impact, the higher the threshold for autonomous decision-making.

This begs the question of how we characterise the decisions that children are making. On the one hand, a legal change of gender affects an individual's core relationship with the state, and how they are viewed before the law. However, in a country such as Australia, where men and women have equal rights, marriage equality is recognised, and legal obligations are (largely) the same, it can be argued that the impact is not so great. On this view, the decision is not a very complex one – the importance of legal recognition lies not in its far-reaching legal consequences, but in its social implications and the acceptance and affirmation it brings to an individual in expressing their gender identity. It does not significantly change an individual's obligations or entitlements.

Having said this, it is clearly not a decision that can be taken by *any* child – just after birth, for example, a child would be highly unlikely to have sufficient decision-making capacity. But the Committee on the Rights of the Child has emphasised that a child should not be required to prove their capacity; rather the State should start with the assumption that the child is capable, and have the burden of proof in showing that they are not.⁸ Moreover, the capacity to make a decision will necessarily be affected by the quality of the information provided to the child, and by any subjective biases of the information provider. This places a positive obligation on the State to provide children with access to age-appropriate information and support in making decisions with respect to their legal gender.

3. Parental involvement and evolving capacities

Parental involvement in decision-making is important, and under Article 5 UNCRC parents have a responsibility to provide guidance for children in the exercise of their evolving capacities. However, it is vital that a lack of parental support cannot block a child from obtaining legal recognition, especially given the difficulties transgender children often face within the family setting.

Empirical evidence suggests that families can be both a source of great support, but also of violence and harassment for transgender children.⁹ In a 2018 study by Human Rights Campaign, only 24 per cent of LGBTQ youth felt they could “definitely” be themselves as an LGBTQ person at home,¹⁰ while trans youth are twice as likely to be taunted or mocked by

⁸ Committee on the Rights of the Child, *General Comment No. 12 (2009) on the right of the child to be heard* (20 July 2009), [20].

⁹ See, for instance, the literature review conducted by Annie Pullen Sansfaçon et al, “Parents’ Journeys to Acceptance and Support of Gender-diverse and Trans Children and Youth” (2020) 41 *Journal of Family Issues* 8: “Family-based rejection, stigma, and discrimination are known to be detrimental to trans and gender-diverse youth (hereafter ‘trans youth’)... Research has also shown that trans youth who benefit from family acceptance, support, and affirmation of their gender identity experience greater overall quality of life and positive well-being and lower rates of self-harm, depression, and suicidality... They also experience positive mental health outcomes comparable to those of their cisgender peers...” (1216)..

¹⁰ Human Rights Campaign, *LGBTQ Report* (2018), <https://assets2.hrc.org/files/assets/resources/2018-YouthReport-NoVid.pdf?_ga=2.60854188.1803853770.1535801770-800460236.1533907004> accessed 2 August 2023, 4.

their family for their identity than cisgender LGBTQ youth.¹¹ An Australian study found nearly three-quarters of participants had experienced discrimination from their families, including refusing to use a person's correct pronouns and names, excluding them from family events, and responding to them in pathologising ways.¹²

Given this evidence, it is concerning that in the majority of Australian jurisdictions, parental/guardian consent is necessary for an application for legal recognition of gender to be approved. This can be seen in the WA, ACT (for children under 12), NSW, NT, Victoria and Tasmania (under 16). In these jurisdictions, there is no possibility for parental/guardian consent to be dispensed with, and without it, the application will fail. Indeed, in NSW, NT, Tasmania and Victoria, it is the parent/guardian who must make the application – the child cannot initiate the process themselves.

It is clear that the majority of states place too much power in the hands of parents, and in doing so, deny the child's own human rights.

4. The Involvement of the Child

As discussed above, Article 12 of the UNCRC requires that a child who is capable of forming their own views has the right to express those views freely in all matters affecting them. These views must be given due weight in accordance with the age and maturity of the child: participation is not dependent on capacity – it is dependent only on whether the child is able to hold their own views or not.

Children can be involved in the decision-making process in three ways. First, they can make the application themselves. Second, the child may be asked to consent to the application before it can be approved. Or third, they can have their wishes and feelings taking into consideration as part of the decision-making process, in line with their evolving capacities. These mechanisms are not mutually exclusive, and several jurisdictions allow participation through multiple avenues, as is set out in the table below.

Table 1: Participation of Children in Proceedings

Child can bring the application	Child gives consent, or makes a declaration	Child's wishes and feelings are considered
Australian Capital Territory South Australia Queensland (over 16)	Northern Territory South Australia Tasmania (with capacity) Victoria	South Australia Tasmania (without capacity)

¹¹ Ibid, 5

¹² DW Riggs, H von Doussa, and J Power, "The family and romantic relationships of trans and gender diverse Australians: An exploratory survey" (2015) 30(2) *Sexual and Relationship Therapy* 243.

There is only one jurisdiction in Australia where it appears that the child is not involved in the process. In New South Wales, the parent(s) must make the application, based on statutory declarations that the child has undergone a “sex affirmation procedure”. The legislation does not include any provision to facilitate the child’s participation: the parents make the application; there is no requirement that the child consent and no mechanism in the legislation which requires the child’s wishes and feelings to be taken into account. This also seems to be the case under the relevant legislation in Western Australia which requires that a parent or guardian make an application for any child under 18 years of age and there is no explicit provision for the child’s participation. However, regulations relating to WA’s statute and the relevant application form indicate that the child can appear at the hearing of the application and make submissions to the Board.¹³

To the extent that there is no scope for the child to be involved in the process relating to the legal recognition of their gender, this is contrary to the requirements of Article 12 of the UNCRC, which requires that children be able to participate in all decision-making concerning them, with their wishes and feelings given due weight in line with their age and maturity.

5. Conclusions

While Australia is ahead of much of the world in its mechanisms for legal gender recognition for transgender children, it nevertheless has some way to go before children’s rights are fully protected in this area.

It is vital that children can access gender-concordant documents no matter what their age, and whether or not their parents/guardians agree with them. They must be able to participate in all decision-making, and should not be forced to undergo unnecessary medical examination or treatment as a pre-requisite to gender recognition.

¹³ Gender Reassignment Regulations 2001 (WA), Schedule 1, Form 2; Government of Western Australia Department of Justice, ‘Application for Recognition Certificate for a Child’ < https://grb.justice.wa.gov.au/files/GRB_Apply_Recognition_Cert_Child.pdf > accessed 28 March 2024.