



Legal Issues Bulletin

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Transgender students in schools – legal rights and responsibilities

The Department of Education and Communities is committed to providing safe and supportive learning environments that respect and value diversity and are free from violence, discrimination, harassment and vilification. Research shows the supportive environment schools provide can have a lasting impact on both the educational and lifelong outcomes for students.

Most people express the gender that corresponds with their biological sex. There are some people whose gender identity or expression is different from that traditionally associated with an assigned sex at birth. This is known as being transgender. This can occur at any age.

All students, including those who identify as transgender have a right to be treated equitably and with dignity. The Department has a number of resources that support these rights including the [Student Welfare Policy](#) and the [Bullying: Preventing and Responding to Student Bullying in Schools Policy](#). These resources promote a proactive approach to the development of positive school environments in which every student is respected and valued. Additionally schools have a legal duty to protect students from foreseeable risk of harm and to do what is reasonably practicable to ensure their safety.

The following information is general in nature. It is important, to structure any support specifically to the individual needs of the student within a particular school. Not all students who identify as transgender will require a plan to support them but it is necessary to assess the likelihood of any risk to each transgender student and where required plan for their support.

What legal rights or protections exist for a student who has identified as transgender?

A student who has identified as transgender enjoys the same legal rights or protections afforded to all students under the duty of care, education and work health and safety laws. Additional protections apply to such students under discrimination law. For example in NSW the Department of Education and Communities is prohibited from [unlawfully discriminating](#) against a student *on transgender grounds*:

- (a) by refusing or failing to accept the person's application for admission as a student, or
- (b) in the terms on which it is prepared to admit the person as a student.

The Department is also prohibited from [unlawfully discriminating](#) against a student *on transgender grounds*:

- (a) by denying the student access, or limiting the student's access, to any benefit provided by the educational authority, or
- (b) by expelling the student or subjecting the student to any other detriment.

It does not follow that an application for enrolment from a transgender student can never be declined or that a transgender student can never be expelled. Rather, the law requires the student is not subjected to unlawful discrimination when such decisions are made. **Further information about discrimination on transgender or gender identity grounds is found at [Attachment A](#).**

What rights or protections does the student have under privacy legislation?

Most, if not all, of the information collected about a transgender student will be personal or health information. This information is protected by privacy legislation.

While privacy legislation will not necessarily prevent school or other departmental staff from using or disclosing information for a lawful purpose (for example in the discharge of the duty of care or for child protection purposes), it is important wherever practicable to discuss how it is intended information will be used or disclosed with the student. This issue should also be discussed with the student's parent(s) or carer unless the principal believes on reasonable grounds that it is not in the student's best interests to do this (for example a court order has removed a parent's parental responsibility for that student).

School and other departmental staff should seek legal advice in circumstances where parents or carers and/or the student object to the proposed use or disclosure of a student's personal and/or health information.

What name and gender should be used and recorded for the student at school?

Generally students are enrolled at school under the name and gender on their birth certificate. There are exceptions to this position, however, including where a student is transgender and seeks to change the way their first name is used and recorded by the school. Principals may wish to review [Legal Issues Bulletin 20](#) for advice about the process to follow when this issue arises.

Students should then be referred to by the name they are enrolled under. The pronoun used to describe the student (he/she, him/her) should be consistent with the gender now recorded by the school. The Department's [Code of Conduct](#) and the individual school's discipline and welfare policy should be utilised where staff or students deliberately or repeatedly use names or pronouns other than the one identified by the student concerned.

What uniform should the student wear at school?

The Department's [School Uniform Policy](#) encourages schools to consider individual student circumstances when considering the school's uniform. Many schools have developed unisex uniforms that are not gender specific. Students who identify as transgender should be allowed to choose from the uniform options available at the school.

All students are required to wear items identified as necessary for particular activities, e.g. closed in shoes for practical food technology classes. A school uniform should meet requirements of work health and safety and anti-discrimination legislation.

What should schools consider when planning to support a student who has identified as transgender?

Support needs will vary from student to student. **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** (for example a court order has removed a parent's parental responsibility for that student).

Where reasonably practicable, the student should be treated on the same basis as other students of the same identified gender.

Consideration should be given to each activity the student is involved in at school. It is important to consider and as necessary plan ahead for any key transition points in the student's schooling.

Risks arising from these activities should be identified and assessed and strategies to eliminate or minimise the identified risks should be implemented so far as is reasonably practicable. **Staff must be consulted where they are also potentially at risk.** Activities to be considered may include:

- Use of toilet and change room facilities;
- Excursions including overnight excursions;
- School sport;
- Curriculum;
- Health care planning; and
- Gender transitioning while at school.

A sample plan for a high school student who has identified as transgender is found at [Attachment B](#). This is a sample only – the strategies it contains will not apply in all circumstances. The actual strategies required to support a student will vary according to their individual circumstances and the school they attend.

Use of toilets and change room facilities

Toilets, showers and change rooms are specific to each school. An assessment of the risk posed to the student by using the toilets of their identified gender must be undertaken. If an identified risk to the student cannot be satisfactorily eliminated or minimised then other arrangements should be made. The need for the student to be safe is a paramount concern in these circumstances.

Students should not be required to use the toilets and change rooms used by persons of the sex they were assigned at birth if they identify as a different gender. Alternative arrangements may include using staff toilets or unisex toilets where possible. The exclusion of students who identify as transgender from the toilet or change rooms of their identified gender must be regularly reviewed to determine its continuing necessity.

If other students indicate discomfort with sharing single-sex facilities (toilets or change rooms for example) with a student who identifies as transgender, this should be addressed through the school learning and support team.

Excursion including overnight excursions

An assessment of risk is normal procedure for all excursions. Ordinarily a student who identifies as transgender should use the facilities of their identified gender or unisex facilities when available. In some circumstances it may be appropriate to arrange private sleeping quarters.

School Sport

A student who identifies as transgender should be permitted to participate in most school based sports as their identified gender. Where the sport is competitive and the student is under 12 they should compete as their identified gender. Most students will be able to continue to participate in competitive sport in their identified gender after they have turned 12.

It may be lawful to exclude students aged 12 and over from competing in certain sports at the elite level in certain circumstances. Confidential case-by-case evaluation should occur. More information is available at:

http://www.ausport.gov.au/supporting/integrity_in_sport/resources/national_member_protection_policy_template

Curriculum

All teachers should be respectful and inclusive of all students' individual learning identity. Gender identity may be discussed in many curriculum areas including Personal Development, Health and Physical Education (PDHPE) classes following syllabus guidelines. Teachers should treat the topic in a manner that is respectful, inclusive and positive. Information for PDHPE teachers can be found at the Department's [Curriculum Support Site](#).

Health care planning

Students undergoing a gender transitioning process will do so over time and in consultation with health care professionals. The process may or may not include medical treatment. The [Student Health in NSW Public Schools](#) policy should be applied by schools in relation to medication or any other health care needs the student may have.

Gender transitioning while at school

When a student advises of their intention to gender transition, schools need to provide a safe and supportive environment. It is often useful to set a date of gender transition for the student (in consultation with the student and their parent/carer) at the point of return from holidays. This allows an immediate visible change even though the personal process of change will occur over a longer period of time.

The school counsellor is likely to have an important role to play in supporting the student and their family. This could include liaising with the school and health professionals, especially in cases where the student may be experiencing difficulties in their personal relationships with family and friends. Staff may need additional professional development to enable them to successfully support the student.

The welfare and educational needs of the student are of primary importance and should be the focus of all actions taken by the school.

What communication strategies may need to be implemented to support the student?

Communication strategies should potentially be developed and implemented for:

- the school and the student and his or her parents or carers;
- the student and his or her friendship group;
- other students and school staff;
- the broader school community; and (potentially) the media.

The student and his or her parents or carers

Ongoing, open and transparent communication between the school, and the student and their parents or carers is an essential part of providing the student with a safe and successful education unless the principal believes on reasonable grounds that it is not in the student's best interest to involve the parents or carers (for example a court order has removed a parent's parental responsibility for that student). A point of contact should be established within the school and the parents/carers and student encouraged to provide the school with relevant information. Parents and the student should be encouraged to promptly advise the school of any new or changed information, issues or incidents that occur at the school.

It is also important to encourage parents and the student to advise the school of any relevant incidents that occur outside of school. For example it is important for the school to be advised if there has been an incident involving the student and other students on the weekend or a public holiday in order to review any plans for supporting the student at school.

The student and his or her friendship group

A student who identifies as transgender may need to discuss issues with the school counsellor (or staff member nominated by that student) such as informing friendship groups and other peers if they choose to do so. Depending on the circumstances it may also be necessary to provide support to students in the friendship group.

Other students

Students may be curious, or confused if one of their peers discloses that they identify as transgender. They should be reassured that the student deserves the same respect and courtesy that they would extend to any other person.

Other students may have questions about the student who has identified as transgender, particularly when the student has transitioned while they are at the same school. Staff should be provided with a suggested response to these questions. This response should promote acceptance but will vary according to the student's individual circumstances. The school counsellor and/or District Guidance Officer can assist in developing this response. The Legal Services Directorate may be of assistance if legal issues arise.

Consideration should be given to how gender diversity is currently dealt with in the school and whether further action is necessary to reinforce the need for tolerance and respect for diversity.

Staff

It is important to identify the staff who need to have more detailed knowledge about the student in order to provide them a safe and supportive learning environment. This is likely to include the principal, school counsellor and year advisor (where the student is in high school). Depending on the circumstances it may also include classroom teachers and other staff that need the information in order to safely provide the student with learning and support.

It is important to remind staff that a student who identifies as transgender has the same rights to learning in a safe and supportive environment as all other students and that additional support for the student may be necessary. It is also important to remind staff of their professional obligations in their dealings with all students and particularly with students who may be more vulnerable.

Staff may need additional professional development to support the student. Consideration should be given to what professional development staff may need while planning for the student's enrolment and/or transition. Assistance can be obtained from the Student Engagement and Interagency Partnership Directorate in identifying possible sources of professional development.

The broader school community

On occasions it is helpful if school staff are provided with a school-developed response to enquiries from the broader school community. The school should consult with the student who identifies as transgender and their parents to develop this response.

Media

The school should respond to any external enquiries about students who identify as transgender with respect for the student's privacy, as with enquiries about all students. Any media enquiries should be referred to the Media Unit on (02) 9561 8501.

What support should be offered to any siblings, or the extended family of the student who has identified as transgendered?

Siblings and the student's extended family may find the student's transition challenging and be adversely affected by the impact of the student's transition on their family. Siblings and other family members can also experience bullying behaviour from peers and others as a consequence of the student's transition. Strategies to address this should be implemented across the schools in which the student who has identified as transgender or their affected family members are known to have enrolled.

When a sibling, or a member of the student's extended family, attends a non-government school it may be helpful to work with that school to coordinate support for the student and their family. Consent should ordinarily be sought from the student's parents or carers or to allow this information exchange and coordination to occur.

Where this consent is not able to be obtained and information related to the safety, welfare or wellbeing of the student or his/her siblings or extended family is needed to help with decision making, planning, assessment or service provision then *the Children and Young Persons (Care and Protection) Act 1998* can be used to seek and/or provide information and also to coordinate services. The school counsellor may be able to assist in this regard. See [Legal Issues Bulletin 50](#) for more information about this process.

What reporting requirements may apply to this situation?

On rare occasions a parent's or carer's response to a student identifying as being transgender could give rise to a reasonable suspicion that the student is at suspected risk of harm. This could relate to the parent's stated response to their child identifying as transgender but other risk factors may be present. School staff should inform their principal of any concerns about a student who may be at suspected risk of harm.

Principals need to consider whether a report to Community Services or contact with the Department's Child Wellbeing Unit or some other action is required. The [Mandatory Reporter Guide](#) can help with this decision. If in doubt or if assistance is required contact can be made with the Department's Child Wellbeing Unit. The Department's [Protecting and Supporting Children and Young People Policy and Procedures](#) also provides guidance about responding to child protection issues.

What if I am the principal of a single sex school?

If the student is seeking enrolment at a single sex school, a decision about their eligibility to enrol should be made on the basis of his or her identified gender. If the student is already attending school advice should be sought from the Legal Services Directorate.

What record keeping requirements apply to this situation?

It is critically important to maintain appropriate official records when supporting a student who has identified as being transgender. These include records of:

- information provided by health care professionals or other professionals involved in providing support to the student;
- meetings of the school learning and support team, copies of programs and where applicable units of work from year advisors or other staff used to raise awareness amongst students;
- staff training and orientation (including briefing of casual staff);
- consultation with parents or carers, students, staff and others as appropriate during the development of learning and support plans for the student; and
- the development and implementation of plans to provide the student with learning and support (including any health care planning) and their later review. It is also important to keep a record of who has been provided with the current version of the plan.

Schools must observe any requirements imposed by privacy legislation with most records other than risk assessment and management strategies being kept secure and accessible only to those staff that need to see them. Staff should contact the [Records Management Centre of Expertise \(CoE\)](#) (Intranet only) if they have specific records-related queries.

What assistance is available to schools within the Department to support them through this process?

The Principal Education Officer, Learning and Engagement Coordinator can be contacted to provide advice. Legal Services can also be contacted for legal advice.

What resources are available to support schools through this process?

- An Anti-Discrimination Board Factsheet, Transgender Discrimination http://www.antidiscrimination.lawlink.nsw.gov.au/agdbasev7wr/adb/documents/pdf/transgender_discrimination_0311.pdf
- A Gender Centre factsheet, Gender Variant Students: For teachers dealing with transgender students <http://www.gendercentre.org.au/documents/fact-sheets/old/gender-variant-students.pdf>
- A Department Student Engagement and Interagency Partnerships guide, [Bias based bullying](#)

How is the issue of discrimination on the basis of gender identity dealt with in Commonwealth and State legislation?

Commonwealth Sex Discrimination Act 1984

The Commonwealth Sex Discrimination Act 1984 (the Commonwealth Act) defines gender identity as meaning *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*. It provides that a person is unlawfully discriminated against on the ground of their gender identity if by reason of:

- (a) their gender identity; or
- (b) a characteristic that appertains generally to persons who have the same gender identity; or
- (c) a characteristic that is generally imputed to persons who have the same gender identity;

the transgender person is treated less favourably than, in circumstances that are the same or are not materially different, a person who has a different gender identity would be treated.

A person may also be unlawfully discriminated against if a condition, requirement or practice that has, or is likely to have, the effect of disadvantaging persons who have the same gender identity as the aggrieved person is imposed (or proposed to be imposed) on that person unless the condition, requirement or practice is reasonable in the circumstances. The matters that are taken into account in deciding whether a condition, requirement or practice is reasonable in the circumstances include:

- (a) the nature and extent of the disadvantage resulting from the imposition, or proposed imposition, of the condition, requirement or practice; and
- (b) the feasibility of overcoming or mitigating the disadvantage; and
- (c) whether the disadvantage is proportionate to the result sought by the person who imposes, or proposes to impose, the condition, requirement or practice.

NSW Anti-Discrimination Act 1977

The NSW Anti-Discrimination Act (the NSW Act) defines a transgender person as including persons who identify as a member of the opposite sex by living or seeking to live as a member of the opposite sex or who being of indeterminate sex identify as a member of a particular sex by living as a member of that sex.

The NSW Act provides that a person is unlawfully discriminated against on transgender grounds if, *on the grounds that they are transgender*:

- they are treated less favourably than in the same circumstances (or circumstances which are not materially different) than a person who is not transgender;
- they are required to comply with a requirement or condition with which a substantially higher proportion of persons who are not transgender persons comply or are able to comply being a condition that is not reasonable having regard to the circumstances of the case and with which the transgender person does not or is not able to comply.

Attachment B – Sample Support and Risk Management Plan¹

Student Name:

<p>Name of school: Name of Principal: Date(s)(and subject to regular review): Group/class:</p>	<p>Number in group/class: Name of contact person: Contact number: Relevant staff:</p>
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Activity/Issue	Hazard Identification & Associated Risk Type/Cause	Assess Risk use matrix	Elimination or Control Measures	Who	When
Record Keeping	Potential for identification of sex at birth	High	<p>Amend all school information (including ERN and other electronic record systems maintained by the school) to reflect student's preferred name and identified gender once approved.</p> <p>Any card identifying the student (e.g. the school library card) should be reissued</p> <p>Bus and train passes adjusted to reflect preferred name and identified gender.</p>	P	Now
Need for current information	<p>School unaware of changes in the student's situation that place him or her at risk</p> <p>School unaware of issues that may affect the wellbeing of sibling currently in Year X</p>	High	<p>One point of family contact to be established within school (Mr/Ms X). If Mr/Ms X is unavailable and matter is urgent contact to be made with the Principal.</p> <p>Parents to keep school informed of any relevant developments and/or issues.</p> <p>Parents to contact school with concerns they may have regarding student or sibling.</p> <p>School to have access to relevant medical information including contact with health care professionals to support for student.</p> <p>Regular scheduled meetings to review plan and student issues with parent and student.</p>	<p>HT(W)</p> <p>YA</p> <p>P</p> <p>P</p>	<p>Now</p> <p>Ongoing</p> <p>Monthly or as needed</p>
Curriculum	Potential for student intolerance through a lack of understanding	Medium	Review PDHPE curriculum Stage 4/5 to ensure that issues related to difference; gender; prejudice and discrimination are highlighted and addressed.	DP(C)	Now and ongoing

¹ This is a sample plan for a high school student. It should be modified to suit the needs of the individual student at the particular school

Activity/Issue	Hazard Identification & Associated Risk Type/Cause	Assess Risk use matrix	Elimination or Control Measures	Who	When
Playground	<p>Identification of biological sex</p> <p>Bullying of student and/or friendship group</p> <p>Bullying of sibling</p>	Medium	<p>Staff to monitor playground.</p> <p>Student given a safe place to go.</p> <p>Assist student and sibling in developing strategies to deal with comments from other students.</p> <p>Student made aware of contact person in the school and how this person can help them.</p> <p>Sibling given a safe place to go.</p> <p>Counsellor support available at the school.</p>	<p>All</p> <p>Counsellor</p> <p>Counsellor</p>	Now and ongoing
Use of toilet and change rooms	<p>Potential for identification of biological sex</p> <p>Potential for other students to be embarrassed or angered</p>	High	<p>Student to use male change room facilities</p> <p>Doors provided to change room cubicles of their identified gender</p> <p>Student must change in cubicle</p> <p>Staff to monitor length of time in change room</p> <p>Staff and student to report any incidents in the change room to Principal</p> <p>Student to use toilet of identified gender – strategies discussed with HT(W) as above</p> <p>Zero tolerance to “skylarking” in change rooms. Teachers to report to DP in the first instance</p>	<p>P</p> <p>Staff P</p>	<p>Now</p> <p>Ongoing</p> <p>Ongoing</p>
Puberty	Potential for identification of biological sex	High	<p>Access to separate toilet facilities in school administration block during monthly menstruation. Personal hygiene products kept in this facility exclusively for use by student.</p> <p>Separate change room facilities available during PE lessons at this time.</p> <p>Counsellor support available at school</p>	Counsellor	<p>Now</p> <p>Ongoing and as needed</p>
Sport	<p>Potential for identification of biological sex</p> <p>Issue of swimming</p>	High	Discussion with student and family as appropriate about strategies to ensure confidentiality and safety when participating in sports such as swimming. Subsequent plan and strategies to be communicated to relevant school personnel.	P	Ongoing
Overnight Excursions	Potential for identification of biological sex	High	Student to be given the opportunity to participate in overnight excursions – full risk management to incorporate strategies for supporting and maintaining confidentiality, including strategic discussions with and his family prior to the excursion and consideration to any health care needs.	P	As needed

Peer group	Alienation from peer group where the group becomes aware of biological sex; dealing with sense of betrayal from those who did not know the student's birth gender.	High	<p>Student to be involved with peers of his identified sex in any activities that may be segregated by sex such as sport and health education</p> <p>Staff to be reminded of the school anti-bullying and anti-discrimination policies.</p> <p>Assist student in developing communication strategy with friendship group.</p> <p>New or revised risk management plan to be devised in response to situational changes or developments.</p> <p>Group discussions of differences and tolerance; prejudice and discrimination if awareness of birth gender becomes an issue. Involvement of school counsellors in developing a process should the need arise.</p>	<p>DP(C)</p> <p>P</p> <p>Counsellor</p> <p>P & Counsellor</p> <p>YA</p>	<p>Now & review T1 2009</p> <p>As needed</p> <p>As needed</p> <p>As needed</p> <p>As needed</p>
Staff	Inappropriate talk amongst students and/or staff Inadvertent discrimination	Medium	<p>All staff briefed and made aware of the privacy legislation and the confidentiality of the information disclosed to them. Staff should also be reminded of their obligations under the Code of Conduct.</p> <p>Staff briefed on group discussions and strategies in place should birth gender of student become common knowledge among students</p> <p>Script developed (in consultation with Educational Services staff, Student Engagement and Interagency Partnership, and Legal Services) for staff in responding to questions from other students.</p> <p>Statement of school values made available to all staff including casual staff.</p>	<p>P</p> <p>P</p> <p>P/ Counsellor</p>	<p>Now, & beg. each semester</p> <p>As needed</p> <p>As needed</p> <p>Now</p>
Community	Disclosure of student's situation to students and community	High	Developed media strategy in consultation with DEC Media Unit	P	Now

Plan prepared by:

Position:

Date:

Prepared in consultation with:

Communicated to:

Monitor and Review - Monitor the effectiveness of controls and change if necessary. Review the risk assessment if an incident or a significant change occurs.

About Legal Services Directorate

Legal Services Directorate provides legal support and advice to staff in schools, colleges, state office directorates, senior staff and specialist boards and authorities. It arranges for the Department and TAFE NSW to be represented before a range of courts and tribunals and assists with the preparation of legal documents. It is also available to provide legal advice in respect of any departmental policies or procedures that may have a legal complexion.

The Legal Services Directorate can provide legal advice to departmental staff only. It is not able to provide legal advice or assistance to parents, students or members of the public.

The Legal Services Directorate posts a large amount of information on the Department's intranet. This includes:

- all current Legal Issues Bulletins
- questions the Legal Services Directorate most frequently encounters
- announcements about what's new
- guidelines about family law and the school
- information about the Government Information (Public Access) Act
- information concerning the operation of NSW Privacy legislation, including Privacy Bulletins
- information about copyright
- links to other related legal web-sites
- other information for the use of schools and TAFE

The Legal Services Directorate continues to offer its telephone advice service to DoE and TAFE NSW personnel.

The service is available between **9.00am to 5.00pm** weekdays.