

Supporting Transgender Student Inclusion in a Changing Legal Environment

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Introduction

Transgender students are those whose gender assigned at birth does not match their gender identity. In this paper we will be focusing on transgender students who fall within the gender binary, that is who identify as male or female. We will use the word transgender in this discussion, though it is important to acknowledge that there are other identities to which this article may apply, including Māori and Pacifica gender identities, which we have not directly discussed for reasons of expertise and scope.

Around Aotearoa New Zealand, thousands of transgender students walk through our school gates every morning; about 4% of New Zealand secondary school students identify as transgender or are unsure of their gender¹. While public knowledge of transgender issues has increased manifold in the last decade, many educators are unfamiliar with both the needs of transgender students and the framework of laws that shape their student life. It is essential to the wellbeing and success of transgender young people that our teachers, principals and schools are equipped to support these students to thrive.

Outside of home life, schools have the most impact on a young person's development; however for transgender students the barriers they face at school can also make it a primary site of trauma. Key stressors for transgender students include contending with gendered school uniforms, use of in/appropriate pronouns, barriers to participation in sports and cultural activities, access to appropriate and comfortable toilet facilities, and vulnerability to bullying and social exclusion. These hurdles can represent a formidable barrier to transgender student's enjoyment and success at school; transgender students report that attending school is one of the most traumatic aspects of their life growing up. Routine stigmatization culminates in some students resorting to dropping out of school altogether; this is especially true of those who are also lacking support at home².

This is the story of a fourteen year old transgender girl, shared in the Human Rights Commission's 2008 Report "The Inquiry into Discrimination Experienced by Transgender People". While her classmates easily adapted to her new female name and pronouns, her teacher complained it was too difficult to adjust, and continued to use her previous male name and pronouns. The teacher's failure to respond positively eventually wore the student down to the point that she dropped out of school³. It is generally recognised that the longer a transgender student is not affirmed, the more significant and long-lasting the negative consequences can become; including loss of interest in school, heightened risk for alcohol and drug abuse, poor mental health and suicide⁴.

¹ Faculty of Medical and Health Sciences – The University of Auckland "Youth'12: Fact Sheet about Transgender Young People" (<https://www.fmhs.auckland.ac.nz/assets/fmhs/faculty/ahrg/docs/Youth12-transgender-young-people-fact-sheet.pdf>).

² Arnold Grossman and Anthony D'Augelli "Transgender Youth: Invisible and Vulnerable" 51 (2006) JoH, 111 at 125.

³ NZ Human Rights Commission (2008): "To Be Who I Am *Kia noho au ki tōku anō ao*" at 3.14.

⁴ Asaf Orr and Joel Baum "Schools In Transition" (2015) American Civil Liberties Union at 8. (https://www.aclu.org/sites/default/files/field_document/schools.in_transition.2015.pdf)

Some educators have not come across transgender students in their school, and assume measures to implement transgender friendly policies are not something they need to consider. It is important to understand that many young people who have questions around their gender are not at a stage where they are ready to disclose this to everyone in their life; nor should they be compelled to share such private details where they are not comfortable to. About half of transgender students had wondered about being transgender before the age of 12, however just a third had disclosed this to someone⁵.

Thus, to be provided with equal opportunity, transgender young people depend on schools to ensure that their rights to education and to learn in a safe and accepting environment are proactively understood and protected.

Discrimination

The discrimination young transgender people face in their lives can be harsh and pervasive, affecting them in every facet of their lives. The impact of this discrimination is well established; there is a direct causal relationship between discrimination and severely compromised health outcomes for transgender youth. The Youth 2012 Health and Wellbeing survey documents that 40 percent of transgender students had significant depressive symptoms and one in five had attempted suicide in the last year⁶.

School is central to young people's lives, and by this token has the potential to either contribute to these toxic experiences of discrimination, or to cultivate a climate of respect and inclusion that supports the wellbeing of students of every gender.

Furthermore, opposing discrimination against transgender students has positive consequences for all students: all young people benefit from a school culture that encourages diversity and champions human rights.

New Zealand's legal protections against discrimination toward transgender people have their basis in the Human Rights Act 1993, which provides the right to be free from discrimination on the basis of sex⁷. A Crown Law opinion has asserted that gender identity is included as part of the sex discrimination ground, stating there is '*no reason to suppose that "sex discrimination" would be construed narrowly to deprive transgender people of protection under the Human Rights Act*'⁸. This finding is consistent with jurisprudence in the United Kingdom, Europe and Canada on this question⁹. In light of this opinion the Human Rights Commission has found that section 21(1)(a) of the Human Rights Act 1993 should be amended to state clearly that sex includes gender identity, as there must be no doubt as to the protection of transgender people from discrimination¹⁰. There is no case law in Aotearoa/New Zealand yet on this point, however considering the Crown Law opinion there is little doubt that transgender people would be protected.

⁵ University of Auckland, above n1

⁶ University of Auckland, above n1

⁷ s.21 Human Rights Act 1993

⁸ Cheryl Gwyn, Deputy Solicitor-General, Crown Law Opinion (2 August 2006) at 7.30 (<https://www.beehive.govt.nz/sites/all/files/SG%20Opinion%202%20Aug%202006.pdf>)

⁹ Above n8, at 2 & 5.

¹⁰ NZ Human Rights Commission, above n3, at 9.8.

The protection against discrimination on the basis of 'sex' protects students in public areas of life, such as schools and other educational establishments. A school can only discriminate on the basis of sex when deciding whether to admit a student¹¹. This being said, once a student is admitted to a certain school, the student must not be discriminated against because they are transgender. Given the high incidence of mental distress experienced by transgender students as a result of exposure to discrimination, and a school's obligations under the Health and Safety at Work Act 2015 and Human Rights Act 1993, it would be prudent for schools to proactively consider school policies across the board to ensure school is a space free from discrimination, and safe for all students. Schools are perhaps unique in their opportunity to effect positive change in the lives of students struggling with experiences of gender identity related minority stress¹², and enjoy a special capacity to model celebration of gender diversity to the students in their care.

Where problems do arise the Human Rights Commission provides an avenue for transgender students who have experienced discrimination within their school or educational institution, or any area of public life covered by the Human Rights Act 1993. Complaints are handled confidentially, at no cost, and can include mediation. Where this process does not succeed in resolving the dispute, the matter can be taken to the Human Rights Review Tribunal, a judicial body independent to the Human Rights Commission and administered by the Ministry of Justice, who have the power to award damages and costs¹³. While the Human Rights Commission provides space for complaints to be resolved, they are also a resource for schools wanting to make space for gender diversity to be supported in their school.

What can be usefully noted in the context of discrimination in schools is that to require a different standard of proof of sex or gender of transgender students compared to cisgender students (whose self-identity conforms with the gender that corresponds to their biological sex) would be considered discrimination. For example, requiring a transgender student to prove their gender via birth certificate when all other students are allowed to either self-select their gender or to use their passport would be considered discrimination in the context of the above discussion of New Zealand human rights law¹⁴.

A further example where human rights law can be applicable is in the context of school balls. Schools that restrict students to attending with opposite-sex partners or otherwise discriminate against students on the basis of gender or sexual orientation are in breach of the Human Rights Act and must work to develop policies that do not violate the human rights of their students. A further point to note with respect to school balls and other social events is that although schools are allowed to have rules and policies about the display of public affection at school, they cannot enact different rules for same sex couples¹⁵.

Pronouns

The use of appropriate pronouns is a delicate and important matter for transgender students. If a transgender student's name has not been legally changed, the school should ask what name and pronouns they prefer and use these in all documents, regardless of what

¹¹ s.57 Human Rights Act 1993

¹² NZ Human Rights Commission: "Trans People Fact Sheet A: FAQ: Supporting Trans Students"

¹³ Human Rights Commission: <https://www.hrc.co.nz/enquiries-and-complaints/how-make-complaint/>

¹⁴ s.33 Births, Deaths, Marriages and Relationship Registration Act 1995

¹⁵ Human Rights Commission: <https://www.hrc.co.nz/enquiries-and-complaints/faqs/school-ball/>

appears on their official documents. They should also instruct teachers to use the students preferred name and pronouns at all times. From a prevention of bullying perspective and a health and safety perspective¹⁶ this is preferred in order to ensure all reasonable steps are taken to protect a transgender students mental health (also see bullying section of this paper). It is important that senior management leads this action. As the Post Primary Teachers Association/Te Wehengarua (PPTA) notes this is critical to the whole school climate: *“If senior management, especially the principal, is seen to take a clear position affirming diversity and challenging prejudice in all forms, including homophobia and transphobia, outcomes for staff and students will be far more positive”*¹⁷

Once the transgender student’s name has been legally changed, all school records, including past records, must be updated with their new name¹⁸. Some schools are confused about when they should change their transgender students ‘sex’ or ‘gender’ in records they keep. New Zealand does not have a single point of law that defines gender. Part 5 of the Births, Deaths, Marriages and Relationship Registration Act 1995 (BDMRR Act) allows the Family Court to change the sex of a person listed on their birth certificate. However s.33 BDMRR Act states that *“Notwithstanding this part, the sex of every person shall continue to be determined by reference to the general law of New Zealand”*. Due to s.33 BDMRR Act the tests for changing sex set out in s.28 and s.29 BDMRR Act are not generally applicable. Under this Act the test for people under 18 is that their birth is or can be registered in New Zealand, that their guardian thinks it is in the child’s best interests to be raised in their nominated sex (chosen sex) and their guardian intends to raise the child in the nominated sex and that either, the child has undergone some form of medical treatment generally considered desirable by medical professionals, or that it is possible for the child to undergo such treatment according to medical opinion. For those over 18, a guardian has no power over the gender recorded on the Birth Certificate but all medical treatment must be underway at the time of application.

Because the BDMRR Act tests are only relevant for birth certificates, we must look elsewhere for guidance determining sex for record keeping purposes. All law in New Zealand needs to be read so that, as far as possible, it is consistent with the Human Rights Act 1993. As stated above the Human Rights Act prohibits discrimination on the basis of being transgender, therefore to require a different standard of proof of gender for transgender students than for cisgender students is likely to be a breach of the Human Rights Act 1993 under the prohibited ground of ‘sex’. Therefore the way schools currently allow cisgender students to prove their gender would be a good starting point for how they allow transgender students to prove their gender for the purpose of record keeping. Many institutes allow self-selection; some require a general form of proof of identity (e.g. passport).

Schools could also look at what government departments require when they request proof to change sex on an identity document. The Department of Internal Affairs requests a statutory declaration for people who wish to change their sex on their passports and the New Zealand Transport Agency has the same standard for drivers licences. Statutory Declarations are generally very cheap and easy to do if a student and their supportive family

¹⁶ s.30 Health and Safety At Work Act 2015

¹⁷ Post Primary Teachers’ Association, *Affirming Diversity of Sexualities and Gender Identities in the School Community: Guidelines* (2012) at p.2

¹⁸ Privacy Act 1993

has access to a Community Law Centre. A statutory declaration can be made by a young person alone as long as they have capacity to understand the declaration they are making.

If a school requires a parent or guardian to elect the sex of the child as proof of sex – depending on the age and capacity of the child, this may be a breach of the Privacy Act 1993 (see below for a discussion on the Privacy Act 1993). In addition a refusal to correct records, when provided with adequate evidence that the new information is correct, can also be a breach of the Privacy Act 1993¹⁹.

Uniforms

Traditionally, schools with uniforms have divided uniforms into ‘male’ and ‘female’ options – for example, requiring male students to wear trousers and female students to wear skirts. This can present difficulties for transgender students, especially if they are made to wear the uniform of their biological gender. It can be “[a barrier] to education and participation in school life”²⁰.

There is no legal requirement for schools to have uniforms or to provide separate male and female options. School boards have broad discretion to manage their schools, including making rules requiring students to wear uniforms and maintain particular standards of appearance. However, these rules do not need to operate to the exclusion of transgender students. Schools may be inclusive of transgender students by either allowing them to wear the uniform of the gender they identify with or providing gender-neutral uniform options.

School uniforms must not unreasonably inhibit movement and must not discriminate between genders. The rule against discrimination was last examined in 1991, when the Human Rights Commission found that requiring female students to wear skirts amounted to discrimination on gender grounds. However, in that case, the issue was resolved by allowing female students to wear culottes (shorts that look like skirts). The school was still allowed to have different uniform requirements for male and female students.

While the law has not been tested since then, the Human Rights Commission states that “*trans students should be allowed to wear the uniform that matches their gender identity*”²¹. Schools may choose to either allow transgender students to wear the uniform matching their gender identity or to offer gender-neutral uniforms for all students.

¹⁹ Privacy Commissioner “Case note 264435 [2015] NZ PrivCmr 8: Immigration New Zealand (INZ) refuses to correct birth date” (2015) (<http://www.privacy.org.nz>)

²⁰ NZ Human Rights Commission, above n3, at 3.11

²¹ NZ Human Rights Commission: “Trans People Fact Sheet A: FAQ: Supporting Trans Students”

Wearing the uniform matching gender identity

Transgender students may want to wear the uniform of the gender they identify with, rather than their sex assigned at birth.

It may be easier to accommodate students' uniform needs at a co-educational school, where more than one type of clothing is acceptable. Logistically, there should be few problems with a transgender student choosing to wear the uniform of the gender they identify with, rather than their sex assigned at birth.

Uniforms may be more problematic in single sex schools, where there may be fewer clothing options offered. However, this does not need to be a barrier to an inclusive uniform policy. Schools may choose to allow transgender students to modify part of the uniform, for example by wearing grey dress pants rather than a skirt.

Gender neutral uniforms

The Human Rights Commission recommends this, saying: *“Ideally schools will also have a gender-neutral uniform as this may be the most appropriate uniform and preferred option for some trans students”*²². This is also supported by the Ministry of Education, which has suggested that schools consider offering a gender-neutral option when uniforms come up for review²³.

Gender neutral uniforms may include gender-neutral clothing items, such as shorts, or may simply classify uniforms by type of clothing rather than gender – for example, by providing “skirts” and “trousers” rather than a “girl’s uniform” and “boy’s uniform”.

An advantage of this option is that it applies to all students, not just transgender students. This means all students can choose the clothing they are most comfortable in, and does not single out transgender students as an exception. This has the added benefit of providing an inclusive environment for non-binary students.

Beyond uniforms

Beyond clothing options, there may be other difficulties for transgender students, with school staff, students, or policies.

Transgender students should not be punished for wearing the uniform they choose. Bullying, either from staff or students, should not be tolerated. Broader than just the items of clothing, uniform policies should not discriminate against transgender students. For example, a female-identifying student at a co-educational school should not only be able to wear the clothing items of the female uniform (for example, a skirt) but should also be subject to the same rules surrounding hair, nails and jewellery as biologically female students. In the United Kingdom, some 80 schools have rewritten their uniform policies to be more inclusive, for example by removing references to “boys” and “girls” and applying rules equally, regardless of gender.

²² NZ Human Rights Commission, above n20

²³ Ministry of Education *“Sexuality Education Guidelines”* (2015) (<http://health.tki.org.nz/Teaching-in-HPE/Policy-guidelines/Sexuality-education-a-guide-for-principals-boards-of-trustees-and-teachers>)

Being proactive

Some schools may argue that it is unnecessary for them to alter their uniform policy, as they do not have any transgender students. However, schools ought to be proactive about ensuring they have an inclusive policy. There may be transgender students enrolled at the school who has not come out. Transgender students may wish to enrol in the future. One of the eight principles of the New Zealand Curriculum is inclusion – to be “*non-sexist, non-racist and non-discriminatory*” and ensure “*that students’ identities, languages, abilities and talents are recognised and affirmed*”²⁴. A proactive inclusive uniform policy is a way to be consistent with this principle and set positive expectations of students at school.

Involvement in sport

Participating in sport is acknowledged as an important part of many young people’s lives, offering them opportunities to stay active and healthy, learn the important skills of teamwork and fair sportsmanship, and to enjoy time outdoors with family and friends. The same opportunities to enjoy these benefits should be made available to young people of all genders, and to this end health considerations for transgender students considered sensitively.

From a legal perspective, there are potential risks to the mental and physical health of transgender youth participating in sports and physical education. Schools must address these in order to comply with their duties under the Health and Safety at Work Act 2015. The legal standard schools must meet when applying this legislation is that any barriers to a transgender student’s health or safety are eliminated. Where that is not reasonably practical, the legal standard proscribes that they must be minimised²⁵.

In practice for schools this can include ensuring transgender students have access to the changing rooms they feel most comfortable using, that they can wear a physical education uniform that is comfortable for them, and that they are excused from activities that are unsafe for them for medical reasons. In line with the discussion of general uniforms for transgender students, it is essential that their physical education uniform is comfortable for them: this means they should be allowed to alter their physical education uniform to meet their needs, or if that is not possible, to wear something from home in the same colour for example. Transgender students must also be able to change into sportswear or physical education uniforms either in the changing room of their gender identity, or in a unisex changing room which allows them to feel safe. The students comfort with the arrangements is crucial here, in order that they are not effectively excluded or disadvantaged, which would violate discrimination protections under the Human Rights Act 1993²⁶. With regards to changing rooms what is discussed in regards to toilets also applies (see below).

If a transgender student wishes to be excused from Physical Education, this must be balanced against the New Zealand Curriculum requirement to provide PE, remember there is some discretion in how PE is provided²⁷. A school needs to consider support letters from doctors, though, that, for example, find that certain activities are not possible due to

²⁴ Ministry of Education, New Zealand Curriculum, *Inclusion Principle*

²⁵ s.30 Health and Safety At Work Act 2015

²⁶ s.57 Human Rights Act 1993

²⁷ Ministry of Education, above n23, *Health and Physical Education, Learning Area Structure*

treatment, the need to wear a binder which may limit breathing, or negative mental health effects. Swimming in particular can be an area of the physical education programme that requires additional sensitivity from schools and teachers teaching transgender youth, in part because swimwear is often gendered and can be experienced as too revealing. LGBTI youth organisation 'Inside Out' recommends in its resource 'Making Schools Safer for Trans and Gender Diverse Youth' that young people should be excused from swimming where they are not comfortable participating²⁸.

In regards to the participation of transgender students in sports teams, the Human Rights Commission suggests²⁹ that under 12 year olds should be allowed to play in the team of their chosen gender. For older students too, playing in a sports team aligned with their gender identity is sensible from a legal perspective, in that it protects against both discrimination and health and safety concerns. Ideally this is possible in all sporting situations, and schools have the capacity to advocate for students' rights to be involved in sports as the gender they identify with. A possible source of guidance could be the International Olympic Committee's standards. The IOC Consensus Meeting on Sex Reassignment and Hyperandrogenism agreed that those who transition from female to male are eligible to compete in the male category without restriction, those who transition from male to female must demonstrate that their total testosterone level in serum has been below 10nmol/L for at least 12 months³⁰ (which for a lot of people is just being on testosterone blockers for a year). However, it seems a disproportionate response to invoke Olympic sport level regulations when considering high school level involvement. Since high school level competition is generally lower stakes than Olympic level competition, schools should probably apply a lower or less intensive standard. Ideally schools would not require a student to have undertaken any steps toward 'medical transition' in order to qualify their involvement in any sporting activities, especially considering the importance of respecting the decisions and pace of young people's choices regarding engaging in any medical components of transition

Toilets

Transgender students can face serious difficulties from being made to use the bathroom of a gender they do not identify with. They might be bullied or harassed for being in the wrong bathroom. Their physical well-being can also be affected, as some students avoid using the toilet for the entire school day. In a study published by the UCLA School of Law, 54 percent of transgender respondents reported physical problems from avoiding using gendered bathrooms³¹. These problems included dehydration, urinary tract infections, kidney

²⁸ Tabby Besley and others "Making Schools Safer for Trans and Gender Diverse Youth" (2016) InsideOut [at 16](http://insideout.org.nz/wp-content/uploads/2016/03/Safer-Schools.pdf)(<http://insideout.org.nz/wp-content/uploads/2016/03/Safer-Schools.pdf>)

²⁹ NZ Human Rights Commission, above n20

³⁰ International Olympic Committee "Consensus Meeting on Sex Reassignment and Hyperandrogenism" (November 2015) - https://stillmed.olympic.org/Documents/Commissions_PDFfiles/Medical_commission/2015-11_ioc_consensus_meeting_on_sex_reassignment_and_hyperandrogenism-en.pdf

³¹ Jody L. Herman "Gendered Restrooms and Minority Stress: The Public Regulation of Gender and its Impact on Transgender People's Lives" (June 2013) UCLA School of Law at 75. (<http://williamsinstitute.law.ucla.edu/wp-content/uploads/Herman-Gendered-Restrooms-and-Minority-Stress-June-2013.pdf>)

infections and other kidney-related problems. The New Zealand Human Rights Commission has reported an instance of a transgender man using bed-wetting medication to avoid using the toilets at his polytechnic³².

Earlier this year, a 16 year old transgender student, Stefani Muollo-Gray, enrolled at Marlborough Girls' College. Naturally, as a girl, she used the girls' toilets. However, she was quickly confronted by staff who told her to use the boys' toilets. Stefani started an online petition to be able to use the girls' toilets, and gained almost 7,000 signatures. The school approached the Ministry of Education, the Human Rights Commission and Tranzaction (a Christchurch community group that provides support and advocacy for transgender people) for advice. The school decided that all students could use the toilets for whichever gender they identified with, and that it would provide several options of toilets so all students could feel comfortable.

Currently, many schools offer mainly single sex bathrooms, meaning many transgender students will be facing the same issue as Stefani. Not all students will be able to advocate for themselves in the way Stefani did, so it is important that schools are proactive in their approach.

In New Zealand, the Ministry of Education has stated that schools should consider reviewing their toilet facilities to ensure all students have a choice of a safe space³³.

There are two main options for schools. The first is to keep separate male and female toilets, but to allow transgender students to use the toilet of the gender with which they identify. The second option is to provide gender neutral toilets.

The first option is in line with best practice in Canada and the United States. In January 2016, Education Minister of Alberta, Canada, David Eggen issued guidelines stating that school policies must explicitly protect lesbian, gay, bisexual, trans, queer, questioning and gender-diverse students³⁴. This includes allowing students to choose which toilet to use and uniform to wear. In May 2016, the Obama administration issued a directive to US public schools that transgender students must be allowed to use the bathroom of their choice.

There has been some opposition to this option on the basis that it could have negative effects on other students, including harassment. The Human Rights Act does allow for discrimination in public facilities on the basis of public decency and public safety. However, a US survey of the 17 largest school districts found no reported incidents of harassment or inappropriate behaviour as a result of allowing transgender students to access their chosen facilities. As such it would seem there is little evidence to suggest that the discrimination is justified. Further, transgender students are at much greater risk of harassment and bullying than cisgender students and the requirements of the Health and Safety Act must also be considered in making this decision.

³² NZ Human Rights Commission, above n3, at 3.29

³³ Ministry of Education "*Sexuality Education Guidelines*" (2015) (<http://health.tki.org.nz/Teaching-in-HPE/Policy-guidelines/Sexuality-education-a-guide-for-principals-boards-of-trustees-and-teachers>)

³⁴ Jodie Sinnema "*New Alberta guidelines go beyond bathroom use by transgender students*" (14 January 2016) Edmonton Journal (<http://edmontonjournal.com/news/politics/new-resource-will-help-alberta-schools-create-healthy-environment-for-lgbtq-community>)

This option is obviously preferable to forcing transgender students to use the bathroom of their sex assigned at birth. However, it still singles transgender students out, as the same rule does not apply to all students.

The second option is to provide gender neutral (unisex) bathrooms at school. A school could offer some gender neutral toilets, or even entirely gender neutral facilities – there is no requirement for schools to provide separate male and female toilets.

In New Zealand, gender neutral toilets must comply with the New Zealand Building Code³⁵, which states that each facility must be in a self-contained unit with full-height doors and walls to maintain privacy, and must contain a toilet, basin, and sanitary item disposal area³⁶. This eliminates any privacy or harassment concerns. Katrina Casey, Head of Sector Enablement and Support at the Ministry of Education said self-contained unisex bathrooms were easy to incorporate into school design and were becoming increasingly common³⁷.

A major advantage of this option is that the same rules apply to everyone. No one has to think about their own or others' genders before using the bathroom. An Icelandic primary school removed gender signs from its toilets to make them accessible for all. The principal said that this made school just the same as home, where everyone uses the same bathroom regardless of gender³⁸.

Bullying

Nearly one in five transgender students in New Zealand experiences bullying at school on a weekly (or more frequent) basis. Bullying can include physical attacks, verbal bullying, gossip, name calling, being shamed in front of others, and being excluded socially. More than half of transgender students have reported being afraid that someone at school would hurt or bother them, and approximately forty percent suffer from significant depressive problems which can be caused or exacerbated by bullying. Being the target of bullying increases emotional distress and academic difficulties, and can lead to substance abuse, which is also likely to have an effect on schooling. It also has long lasting effects, including decreased life satisfaction as an adult and being half as likely to pursue tertiary education as students who have not been bullied.

Schools are responsible for protecting all students from bullying, but it is particularly important that they are aware of bullying of transgender students, who are bullied five times more than other students. Schools' obligations are found in education policy, health and safety laws and teachers' ethical duties.

School boards are required by education policy to "*provide a safe physical and emotional environment for students*"³⁹. To comply with this, all schools should already have anti-

³⁵ Compliance Document for the New Zealand Building Code cl G1 Personal Hygiene

³⁶ Most accessible bathrooms would already meet these criteria.

³⁷ Jennifer Eder and Elena McPhee "*Marlborough transgender student's bathroom battle brings about change*" (1 July 2016) Stuff (<http://www.stuff.co.nz/national/81590796/Marlborough-transgender-students-bathroom-battle-brings-about-change>)

³⁸ Jess Staufenberg "*Iceland primary school introduces gender-neutral toilets*" (27 January 2016) Independent (www.independent.co.uk/news/world/europe/iceland-primary-school-introduces-gender-neutral-toilets-a6834916.html)

³⁹ Ministry of Education, *Bullying Prevention and Response: A Guide For Schools* (2015), Foreword

bullying policies, but they should also strongly consider having specific policies relating to bullying of transgender and other LGBTQ students. Schools should aim to educate all students and model an inclusive environment.

The Health and Safety at Work Act 2015 requires schools to do what is reasonably practicable to eliminate or minimise risks to health and safety. Such risks include behaviour of other students. Schools that are aware of bullying and fail to adequately address it could face prosecution under this Act. Under the new law, not only boards could face prosecution, but also principals.

Teachers are also responsible for reducing bullying. The Education Council's Code of Ethics places an ethical obligation on teachers to "*promote the physical, emotional, social, intellectual and spiritual wellbeing of learners.*"⁴⁰ This means that students must not bully or harass students, and also that they should respond to bullying by other students.

The Children's Commission has set expectations that when a school becomes aware of bullying, it should listen to and support the victim with sensitivity, respond appropriately to the problem, and protect students from any negative consequences that may arise from reporting the bullying.

Transgender students should expect to be allowed to identify with their chosen gender, without being harassed or bullied. Aside from meeting their legal obligations when bullying arises, schools can take steps to prevent it from occurring. For example, it has been found that having LGBTQ-straight alliance groups at schools has a positive effect, with fewer suicides reported in schools with these groups.

Transitioning at a single sex school

Some students may not start school expressing their true gender identity, i.e. when they start school they may be closeted. This could be for many reasons, age, convenience, pressure or fear regarding the reaction of family, friends or the wider community. As their circumstances change it may become possible for a student to come out and begin their transition. Sometimes this will happen when a student is enrolled in a single sex school. As already discussed above it is important to provide support for transgender students in school, to alleviate bullying and reduce negative health effects in the future.

New Zealand law allows for boys' schools, girls' schools and co-educational schools. If someone is, for example, attending a girls' school and transitioning from female to male, they may wish to remain at their current school. It is not illegal for them to attend – the Minister of Education can allow a certain number of boys to enrol at a girls' school and vice versa. However, a student may need to talk to the school, as the Education Act sets out a process to follow⁴¹.

In addition the school cannot exclude or expel a student who chooses to transition while at a single sex school. Schools can only discriminate on the basis of gender when choosing whether to admit a student or not⁴². Once a student is enrolled a school cannot

⁴⁰ NZ Education Council, Code of Ethics, clause 1 "*Commitment to Learners*"

⁴¹ s.146A Education Act 1989

⁴² s.58 Human Rights Act 1993

discriminate⁴³, they cannot deny or restrict access to any benefits or services provided by the establishment or exclude a student on the basis of sex. In addition any exclusion needs to comply with the reasons and processes set out in the Education Act⁴⁴. Transitioning at school is unlikely to meet the standard of continual disobedience or gross misconduct on the basis that expressing your true gender cannot be considered disobedience or misconduct, nor is there any indication that it provides a harmful example to other students.

The law regarding agender, non-binary and gender non-conforming students is generally untested. However, it seems that it would be inconsistent with the following policies underpinning the education sector to exclude such students from their school of choice:

- The National Education Goals provide for equal educational opportunity for all by removing barriers to achievement⁴⁵.
- The Ministry of Education encourages schools to test stereotypes and assumptions about gender and sexuality and to operate an inclusive environment which recognises and affirms all students' identities
- The New Zealand Curriculum is based on values including diversity, equity, integrity and respect for human rights.

Privacy

Not all students who are out as transgender at school will be out to their parents or guardians. Accidentally outing a student to their guardians could have unforeseen and negative consequences for the student. As such it is important to consider a student's right to privacy when discussing their status with parents or guardians.

Even at a young age students have a right to privacy. Often parents will exercise this right on their behalf, but technically the right applies to the young person. Therefore a student's privacy should be considered when disclosing their transgender status, even if that disclosure is to their parents or caregivers. The student's privacy should also be considered when disclosing their status to other students or the wider school community. You have the right to withhold information from parents requesting it on behalf of a young person if the young person is under 16 but the disclosure would not be in the young person's interests⁴⁶. This ground is usually relied on by health professionals to withhold sensitive health information.

Young people have also been able to withhold information from parents in the past, for example there are cases of a young girl being allowed to withhold school information from a non-custodial parent and a different young girl being allowed to withhold medical information from her parents⁴⁷. As such a parent may not be entitled to all information about a student.

⁴³ s.57 Human Rights Act 1993

⁴⁴ s.14 Education Act 1989

⁴⁵ National Education Goal 2

⁴⁶ s.29(1)(d) Privacy Act 1993

⁴⁷ Kathryn Dalziel "Privacy in Schools" (2009) Office of the Privacy Commissioner

(<https://www.privacy.org.nz/assets/Files/Brochures-and-pamphlets-and-pubs/Privacy-in-Schools-September-2009.pdf>)

When a student discloses their transgender status to a teacher or other staff member then the context of disclosure and the privacy statement and information collection principles of the school come into play. Whether broader disclosure is possible or allowed will generally depend on the wording of a school's privacy statement (Privacy Act 1993). Ideally a student should be able to come out at their own pace rather than being outed by staff members to the broader school community, as such consideration should be given to this when making arrangements to accommodate any requirements a transgender student needs. Conversely some students will be happy to be out.

Under Privacy Principle 7 a student has a right to correct their records. As discussed already in the discrimination section, requiring a different standard of proof of gender for transgender students than cisgender students is generally considered a breach of the Human Rights Act. As such where a transgender student requests their records are updated they should only be asked for the same standard of proof that a cisgender student would be.

Conclusion

Transgender people face discrimination in several areas of life and have to conquer serious barriers to enjoy the same rights and responsibilities as other New Zealanders⁴⁸. To ensure transgender students' right to learn in a safe and accepting school environment is upheld, schools must create an inclusive, safe and supportive environment that is free of gender bias, welcoming of gender expansive youth and that respects as well as affirms gender diversity⁴⁹.

Since gender-based bullying negatively affects all students, not only transgender students will benefit from such an open environment, but the entire student body. Not only does this encourage a greater acceptance of diversity and discourage children from expressing judgments about people based on factors like race, class, sexuality, gender, family structure, ethnicity and religion, but it also empowers all students to be themselves⁵⁰.

While in this paper we have focused primarily on transgender students who fall within the gender binary much of this legal discussion can be applied to non-binary, agender, and other students who do not fall within the gender binary. For example the health and safety and bullying discussions are applicable to other gender minority groups.

Finally, New Zealand cannot afford to have an entire pool of bright and inspiring young people cut from the system. Instead, we need to foster their talents and interests, so that, together, we are able to create a progressive country setting an example to the rest of the world.

⁴⁸ NZ Human Rights Commission, above n3, at 9

⁴⁹ Joseph G. Kosciw, Emily A. Greytak, Neal A. Palmer and Madeley J. Boesen "The 2013 National School Climate Survey: The Experiences of Lesbian, Gay, and Transgender Youth in Our Nation's Schools" (2014) GLSEN at xxiv (<https://www.glsen.org/download/file/NjA1MQ==>)

⁵⁰ Asaf Orr and Joel Baum, ACLU, above n4, at 11