

SENATE JUDICIARY COMMITTEE
Senator Thomas Umberg, Chair
2021-2022 Regular Session

AB 1084 (Low)
Version: July 1, 2021
Hearing Date: July 13, 2021
Fiscal: Yes
Urgency: No
TSG

SUBJECT

Gender neutral retail departments

DIGEST

This bill requires large retail department stores which sell toys or other childcare items to maintain a gender neutral section or area, subject to a civil penalty for noncompliance beginning on January 1, 2024.

EXECUTIVE SUMMARY

In recent years, California law and policy has begun to reflect that, for many people, longstanding, binary conceptions about gender are both inaccurate and oppressive. In relation to drivers' licenses, birth certificates, and restroom facilities, California has created systems and spaces where those who do not identify as male or female can simply be themselves. In many aspects of life, however, rigid and old-fashioned gender norms continue to predominate and can cause harm. Though there are notable exceptions, retail marketing to children still largely falls into this latter category. Such marketing places artificial constraints on the clothes and toys and other things children might otherwise gravitate to in the absence of product placement based on gender stereotypes. Even more detrimentally, such marketing suggests to non-binary children that they do not quite fit in; that there is something wrong with them. This bill endeavors to mitigate some of these harms by requiring large retailers who market goods to children to maintain a gender-neutral section.

The bill is sponsored by The Phluid Project. Support comes from consumer and civil rights advocates. Opposition comes from proponents of limited government who assert that the bill inappropriately regulates the retail shopping experience. The bill passed out of the Senate Business, Professions and Economic Development Committee by a vote of 8-3.

PROPOSED CHANGES TO THE LAW

Existing law:

- 1) Entitles all Californians, pursuant to the Unruh Civil Rights Act, to full and equal accommodations, advantages, facilities, privileges, or services in all business establishments, thus prohibiting discrimination on any arbitrary basis, including but not limited to sex, race, color, religion, ancestry, national origin, disability, medical condition, genetic information, marital status, sexual orientation, citizenship, primary language, or immigration status. (Civ. Code § 51.)
- 2) Prohibits business establishments, pursuant to the Gender Tax Repeal Act, from charging different prices for services of similar or like kind based on the consumer's gender. (Civ. Code § 51.6(b).)
- 3) Provides that any person who denies, aids or incites a denial, or makes any discrimination or distinction contrary to the Unruh Civil Rights Act or to the Gender Tax Repeal Act, is liable for each and every offense for the actual damages and any amount that may be determined by a jury, or a court sitting without a jury, up to a maximum of three times the amount of actual damage, but in no case less than \$4,000, and any attorney's fees that may be determined by the court. (Civ. Code § 52(a).)
- 4) Establishes that it is unlawful for a person, at the time of sale of commodity, to do any of the following:
 - a) charge an amount greater than the price, or to compute an amount greater than a true extension of a price per unit, that is then advertised, posted, marked, displayed, or quoted for that commodity;
 - b) charge an amount greater than the lowest price posted on the commodity itself or on a shelf tag that corresponds to the commodity, notwithstanding any limitation of the time period for which the posted price is in effect. (Bus. & Prof. Code § 12024.2.)

This bill:

- 1) Makes findings and declarations that:
 - a) unjustified differences in similar products that are traditionally marketed either for girls or for boys can be more easily identified by the consumer if similar items are displayed closer to one another in one, undivided area of the retail sales floor; and
 - b) keeping similar items that are traditionally marketed either for girls or for boys separated makes it more difficult for the consumer to compare the products and incorrectly implies that their use is only appropriate for one gender.

- 2) Requires a retail department store to maintain a gender-neutral section or area displaying a reasonable selection of the items and toys for children that it sells if the retail department store:
 - a) is physically located within California
 - b) has a total of 500 or more employees across all California retail department store locations; and
 - c) sells childcare items or toys.
- 3) Subjects a retail department store that fails to comply with (2), above, to liability for a civil penalty, not to exceed two hundred fifty dollars (\$250) for a first violation or five hundred dollars (\$500) for a subsequent violation, as specified, beginning on January 1, 2024.

COMMENTS

1. Background on harms from marketing exclusively to “boys” and “girls”

The author and proponents of the bill assert that the bill is designed to address three types of harm.

The first harm relates to parents and children who do not necessarily identify as either male or female. For these individuals, having a gender-neutral location within a retail establishment validates their experience of their gender identity and affirms that their presence is welcome. This is no small matter. There is ample evidence, tragically, that youth whose gender identity does not align with the traditional girl/boy binary often experience depression and are more likely to commit suicide than their peers.¹ Fortunately, there also appears to be evidence that welcoming spaces of the sort proposed by this bill can help youth feel secure in themselves and reduce these mental health challenges accordingly.²

The second harm that the bill seeks to address is the imposition of gender stereotypes on children. Even where a child firmly identifies with the male or female gender they were assigned at birth, he or she may not necessarily be interested in wearing, playing with, or otherwise associating with the sorts of toys, clothes, activities, and interests that are stereotypically associated with that gender and that will be reflected in what products appear in the boys or girls sections of a retail store. The author highlights, for example, anecdotes in which parents and girls looking for science, technology, engineering, and math (STEM) related children’s merchandise were forced to go looking for it in the boys’ department, since none were available in the girls’ section.

¹National Survey on LGBTQ Youth Mental Health 2021, The Trevor Project <https://www.thetrevorproject.org/wp-content/uploads/2021/05/The-Trevor-Project-National-Survey-Results-2021.pdf> (as of Jun. 29, 2021) at p. 3.

²*Id.* at p. 10.

Finally, in obliging retailers to maintain a gender-neutral section, the author seeks to make it more difficult for retailers to engage in gender-based pricing discrimination. As at least one study has documented,³ manufacturers and retailers sometimes mark up the price of goods marketed to women and girls, even though the actual product itself is essentially identical to goods offered at a lower price to men and boys. Gender-based pricing discrimination of this sort is easier for consumers to detect if the products are together in the same location in the store, instead of being isolated in the boys' or girls' departments, respectively. Maintaining a gender-neutral area in retail stores should enable this sort of comparison shopping, at least in some instances.

2. Flexible standards

The bill requires of large retailers that they must “maintain a gender neutral section or area.” This area is to be labeled “at the discretion of the retailer,” and must contain a “reasonable selection” of children’s items. The bill contains no specifications about how big the gender-neutral area must be, where it must be located, what constitutes a “reasonable selection,” or how customers are to know when they are in the gender-neutral section.

Ordinarily, well-draft legislation avoids language that is open to interpretation. In that way, those compelled to comply with the law know what they must do, and those charged with enforcing the law have a strong sense for whether or not a violation has been committed. In this instance, however, the open-ended language appears to be a deliberate choice on the part of the author. Presumably the idea is to push retailers toward the end goal of providing a space within the store that will be welcoming to non-binary children and parents seeking to avoid gender stereotypes, while giving those retailers wide latitude about how to go about it. It certainly appears that the major retailers who would be subject to this bill are confident in their ability to comply with its terms, judging by the fact that their industry representatives have withdrawn their opposition to the bill.

3. Limited remedies; modest penalties

The enforcement mechanisms proposed by the bill are quite modest. There is no private right of action. Only the Attorney General or the local district or city attorney are empowered to bring suit against a retailer who is out of compliance, and the consequence for the retailer – \$250 for the first violation and \$500 for subsequent violations – is vanishingly small in comparison to the revenues of the retailers who are subject to the bill. The greater deterrent, therefore, is likely to be the prospect of having

³From *Cradle to Cane: The Cost of Being a Female Consumer* (Dec. 2015) New York City Department of Consumer Affairs <https://www1.nyc.gov/assets/dca/downloads/pdf/partners/Study-of-Gender-Pricing-in-NYC.pdf> (as of Jun. 29, 2021).

pay the enforcing entity's reasonable attorney's fees and costs, which the bill authorizes a court to award.

Though these enforcement mechanisms could be accurately described as a light touch, that may be appropriate from a policy perspective, in light of the somewhat vague requirements being imposed. Ultimately, the author's aim seems to be a mandate that retailers are not at liberty to ignore entirely, but that they have significant flexibility in meeting.

4. Arguments in support of the bill

According to the author:

Unjustified differences in similar products that are traditionally marketed either for girls or for boys can be more easily identified by the consumer if similar items are displayed closer to one another in one, undivided area of the retail sales floor.

Combining boy's and girl's departments at retail stores with 500 or more employee's into a "kids" department will most definitely make all kids feel welcomed. The kids department can be set up at the discretion of the retailer. For example, items may be displayed by type, size, style, color, etc.

Kids also don't have the right to shop for themselves and are often at the will of their guardian to make the choices. A generally labeled area allows for a freer shopping experience for both children and the guardians to shop for the items the children would like to purchase without societal pressures. This is about kids not feeling bad about what they choose to purchase because of the store section it was purchased from.

As sponsor of the bill, The Phluid Project writes:

The rising voice of today's youth reject gender binaries and desires an all-encompassing space, both physically and virtually, that allows us to wear what makes us feel good and to express ourselves with freedom and authenticity. This bill will allow consumers, both parents and children more freedom of self-expression. Keeping similar items that are traditionally marketed either for girls or for boys separated makes it more difficult for the consumer to compare the products and incorrectly implies that their use by one gender is inappropriate. This limitation has the potential to cause emotional anxiety and gender dysphoria. California, leading this issue, will have a profound impact on

individuals and society as a whole that is rooted in gender stereotypes, limiting growth and potential. AB 1084 will not only help create a more inclusive space for non-binary and transgender youth but will have a profound impact on gender stereotypes.

In support, Equality California writes:

The California Legislature has an important legacy of leading the nation in breaking down barriers people experience when trying to live authentically, regardless of sexual orientation, gender identity, or gender expression. [...] Implying or stating that certain children's products are only appropriate for certain genders stifles the ability of California's youth to grow as their authentic selves, reinforces harmful gender stereotypes in the minds of people of all ages, and has measurable mental health implications. [...] During a time when transgender youth are under attack across the country, AB 1084 sends an important message that discrimination and bias will not stand in California.

5. Arguments in opposition to the bill

In opposition to the bill, the Pacific Justice Institute writes:

[I]t remains abundantly clear that the author's intent is to impose a de-gendered ideology and viewpoint on retailers. This approach is both paternalistic and also communicates to Californians a disconnect with the real-world challenges of parenting in an increasingly dangerous and less free society. AB 1084 commits much the same fallacy as the legislation that attempted to keep violent video games away from children but was struck down in *Brown v. Ent. Merchants Ass'n*, 564 U.S. 768 (2011). As was true in that debate, parents do not need politicians' help to pick out appropriate toys for their children.

In further opposition to the bill, the California Family Council writes:

A bill like this opens the door to a never-ending number of complaints from activist groups who don't like the way stores are marketing their products to one sex or another. Retail stores have a right to be left alone to decide how to best market their products to their customers based on what market research tells them consumers want. It will not be perfect. They will get it wrong sometimes. But when they get it wrong, that product will not sell. The market will do a better job of meeting public needs than your

law will. In a democracy that protects the rights of free expression like ours, no one individual or legislator has the right to tell a company owner what messages about gender they can use to sell their products.

SUPPORT

The Phluid Project (sponsor)
Consumer Federation of California
Equality California

OPPOSITION

California Family Council
Capitol Resource Institute
Eagle Forum of California
Pacific Justice Institute
Siskiyou Conservative Republicans
Southwest California Legislative Council

RELATED LEGISLATION

Pending Legislation: AB 1287 (Bauer-Kahan, 2021) would prohibit the charging of different prices for any two goods that are substantially similar, if those goods are priced differently based on the gender of the individuals for whom the goods are marketed and intended. AB 1287 is currently pending consideration before the Assembly Appropriations Committee.

Prior Legislation:

SB 873 (Jackson, 2020) would have extended the Gender Tax Repeal Act's prohibition on gender-based price discrimination to the sale of consumer goods. This bill was never considered by a policy committee due to impacts of the COVID-19 pandemic on the legislative session.

AB 2826 (Low, 2020) was substantially similar to this bill. AB 2826 was never considered by a policy committee due to impacts of the COVID-19 pandemic on the legislative session.

SB 320 (Jackson, 2019) was substantially similar to SB 873. This bill failed passage in the Senate Judiciary Committee.

AB 1732 (Ting, Ch. 818, Stats. 2016) required businesses, places of public accommodation, or state or local government agencies that offer a single-user toilet facility to be designated as an all-gender toilet facility, as specified, and authorizes an inspector, as specified, to inspect for compliance.

AB 1576 (Levine, 2017) would have prohibited a business from discriminating with respect to the price charged for the same, or substantially similar, goods because of the gender of the targeted user of the good, as specified. The bill would have limited enforcement of its terms to the Attorney General, a district attorney, or a city attorney through prosecution of a civil action for preventive relief. AB 1576 was subsequently gutted and amended to address other matters.

SB 899 (Hueso, 2016) would have prohibited a business from discriminating with respect to the price charged for the same, or substantially similar, goods because of the gender of the targeted user of the good, as specified. SB 899 died in the Senate Appropriations Committee.

AB 1100 (Speier, Ch. 866, Stats. 1995) specifically prohibited businesses from engaging in price discrimination based on gender with respect to services of a like or similar kind, while also clarifying that the prohibition does not apply to price differentials based upon the amount of time, difficulty, or cost of providing the service.

PRIOR VOTES:

Senate Business, Professions and Economic Development Committee (Ayes 8, Noes 3)

Assembly Floor (Ayes 51, Noes 18)

Assembly Appropriations Committee (Ayes 10, Noes 4)

Assembly Judiciary Committee (Ayes 7, Noes 3)

Assembly Business and Professions Committee (Ayes 11, Noes 4)
