

Equality Legislation Amendment (LGBTIQA+) Bill 2023

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About the Public Interest Advocacy Centre

The Public Interest Advocacy Centre (PIAC) is leading social justice law and policy centre. Established in 1982, we are an independent, non-profit organisation that works with people and communities who are marginalised and facing disadvantage.

PIAC builds a fairer, stronger society by helping to change laws, policies and practices that cause injustice and inequality. Our work combines:

- legal advice and representation, specialising in test cases and strategic casework;
- research, analysis and policy development; and
- advocacy for systems change and public interest outcomes.

Our priorities include:

- Reducing homelessness, through the Homeless Persons' Legal Service
- Access for people with disability to basic services like public transport, financial services, media and digital technologies
- Justice for First Nations people
- Access to sustainable and affordable energy and water (the Energy and Water Consumers' Advocacy Program)
- Fair use of police powers and the rights of people in detention
- Improving outcomes for people under the National Disability Insurance Scheme.

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Recommendations

Recommendation 1 – Amendments to the Anti-Discrimination Act 1977

That NSW Parliament support the Equality Bill's amendments to the Anti-Discrimination Act 1977, including to:

- Ensure all LGBTIQ people are protected against discrimination and civil vilification,*
- Protect LGBTQ students and teachers in religious schools against discrimination, and*
- Ensure any exceptions permitting LGBTIQ discrimination are narrow and targeted.*

Recommendation 2 – Amendments to the Births, Deaths and Marriages Registration Act 1995

That NSW Parliament support the Equality Bill's amendments to the Births, Deaths and Marriages Registration Act 1995, including to:

- Replace the current requirement for trans and gender diverse people to undertake genital surgery to access new identity documentation with a framework allowing people aged 16 and over to apply based on a statutory declaration and support statement*
- Provide a separate process for young people aged less than 16 to access new identity documentation with the support of their parent(s) or approval from NCAT, and*
- Allow for the recording of 'sex descriptors' beyond male or female, such as non-binary.*

1. Introduction

PIAC welcomes the opportunity to provide this submission in support of the Equality Legislation Amendment (LGBTIQA+) Bill 2023 (the 'Equality Bill'), introduced to NSW Parliament by the Independent Member for Sydney Alex Greenwich MP.

We do so as a community legal centre with a long history of litigation, policy and law reform work in the area of anti-discrimination law, including in how it protects, or in many cases fails to protect, lesbian, gay, bisexual, transgender, intersex and queer (LGBTIQ) people against mistreatment.

In recent years, this has included frequent engagement in parliamentary inquiries and public debates about the issue of protecting LGBTQ students and teachers in religious schools against discrimination, alongside advocating for Commonwealth and NSW legislative prohibitions on discrimination on the basis of religious belief, without undermining the rights of other groups in the community, including LGBTIQ people (alongside women, people with disability and others).

In 2021, we released the report 'Leader to Laggard: The case for modernising the NSW Anti-Discrimination Act',¹ which highlighted the range of serious deficiencies in this legislation, including its failures to adequately protect LGBTIQ people in NSW against discrimination in a wide range of situations, and called for a comprehensive review of the *Anti-Discrimination Act*.

We therefore welcomed the NSW Government's referral of the entire Act to the NSW Law Reform Commission (NSWLRC) for comprehensive review in mid-2023. We will continue to be active participants in that inquiry.²

At the same time, we welcome and support the Equality Bill's amendments to the *Anti-Discrimination Act* as an important interim measure. The proposals contained in the Equality Bill - to protect bisexual, non-binary and intersex people against discrimination, and to remove a range of exceptions which allow discrimination against LGBTIQ people in NSW - are measures which can and should be passed while the NSWLRC process is ongoing to remedy obvious deficiencies and reflect community standards.

This submission primarily focuses on the proposed amendments to the *Anti-Discrimination Act* (see part 2, below). It then briefly discusses, and supports, the Equality Bill's proposed amendments to the *Births, Deaths and Marriages Registration Act 1995* (NSW), which would improve access to accurate identity documentation for trans and gender diverse people (see part 3, below).

¹ Public Interest Advocacy Centre, 'Leader to Laggard: The case for modernising the NSW Anti-Discrimination Act', August 2021, available at: <https://piac.asn.au/2021/08/06/leader-to-laggard-the-case-for-modernising-the-nsw-anti%E2%80%90discrimination-act/>

² Public Interest Advocacy Centre, 'Preliminary Submission to the NSW Law Reform Commission Review of the Anti-Discrimination Act 1977 (NSW)', 13 October 2023, available at: <https://piac.asn.au/2023/10/13/preliminary-submission-to-the-nsw-law-reform-commission-review-of-the-anti-discrimination-act-1977-nsw/>

We note there are a range of other important amendments contained in the Equality Bill, including reforms to:

- provide better legal protection and recognition to children born through overseas commercial surrogacy;
- treat threats to 'out' a person's sexual orientation, gender identity, intersex, sex worker or HIV status as forms of domestic and inter-personal violence;
- clarify provisions surrounding access to gender-affirming health care for trans and gender diverse young people; and
- update and make inclusive interpretative provisions across a large number of statutes.

Overall, we endorse these changes in principle, while deferring to the views of groups advocating for LGBTIQ rights generally, such as Equality Australia, on the majority of these provisions, and to the views of intersex community organisations like Intersex Human Rights Australia on any provision which affects the rights of people with innate variations of sex characteristics.

2. Amendments to the *Anti-Discrimination Act 1977*

PIAC supports the Equality Bill's proposed amendments to the *Anti-Discrimination Act* as necessary and long-overdue reforms to better protect LGBTIQ people in NSW against discrimination. These should be progressed as interim measures while the NSW Law Reform Commission reviews the Act in its entirety.

2.1 Protecting all LGBTIQ people against discrimination

NSW is the only jurisdiction in Australia which does not protect bisexual people against discrimination – a consequence of *the Anti-Discrimination Act's* use of the outdated protected attribute of 'homosexuality' as well as its narrow definition (with section 4 providing it 'means male or female homosexual').³

The Act also excludes protections for non-binary people, and for people with innate variations of sex characteristics (intersex people) – one of only two states to still do so, alongside Western Australia. The Equality Bill addresses all three of these gaps.

³ Public Interest Advocacy Centre, 'Leader to Laggard: The case for modernising the NSW Anti-Discrimination Act', August 2021, p4, available at: <https://piac.asn.au/2021/08/06/leader-to-laggard-the-case-for-modernising-the-nsw-anti%E2%80%90discrimination-act/>

Protecting bisexual people

The Equality Bill would ensure bisexual people are finally protected under the Act, by replacing the existing protected attribute of 'homosexuality' with a new protected attribute of 'sexuality', defined in section 49ZF(1) as: '(a) homosexuality, or (b) bisexuality, or (c) asexuality.'⁴

Protecting non-binary people

The Equality Bill would also modernise the protected attribute of 'transgender' status, in Part 3A of the Act (as well as removing the largely obsolete definition of 'recognised transgender person' in the Act's definitions in section 4).

It does this by replacing the phrase 'opposite sex', with the term 'another sex', in the interpretive section (s38A) and elsewhere, and by using new wording in s38A(c) to ensure it includes a person 'who identifies as a particular sex that is not exclusively male or female by living as a member of that sex.'

These changes would ensure that people with non-binary gender identities are finally protected under the Act.

Protecting intersex people

The Equality Bill would also help to ensure intersex people are finally protected against discrimination by introducing a new Part of the Act (Part 3B), applying to an entirely new protected attribute of 'variations of sex characteristics', defined in clause 38T as:

A reference in this part to a person having a variation of sex characteristics:

(a) means a person who has an innate variation of primary or secondary sex characteristics that differ from norms for female or male bodies, and

(b) includes a reference to the person being thought of as having a variation of sex characteristics, whether the person has, or had, a variation of sex characteristics.

Interim solution pending further reform

PIAC supports all three amended and/or new protected attributes, to ensure all members of the LGBTIQ community are best protected against discrimination within the framework of the current Act.

Ultimately, as we recommended in our preliminary submission to the NSWLRC review,⁵ the *Anti-Discrimination Act* should be amended to adopt a modern structure, and especially to replace the 'comparator' test for direct discrimination with a 'treats unfavourably' (detriment) approach. If and when that

⁴ As with other attributes, section 49ZF(2) then adds that 'A reference to a person's sexuality includes a reference to a person being thought to have a particular sexuality, whether or not the person does in fact have that sexuality or not.'

⁵ Public Interest Advocacy Centre, 'Preliminary Submission to the NSW Law Reform Commission Review of the Anti-Discrimination Act 1977 (NSW)', 13 October 2023, available at: <https://piac.asn.au/2023/10/13/preliminary-submission-to-the-nsw-law-reform-commission-review-of-the-anti-discrimination-act-1977-nsw/>

occurs, the attributes described above should be revised to instead be sexual orientation, gender identity and sex characteristics drafted broadly, consistent with best-practice in contemporary discrimination law.⁶

Nevertheless, the attributes and definitions proposed in the Equality Bill are appropriate to ensure all lesbian, gay, bisexual, transgender, intersex and queer people are covered by the current Act, and should be adopted as an interim measure.

2.2 Protecting LGBTIQ students and teachers in religious schools against discrimination

LGBTQ students in all schools should have the right to learn and to grow, free from the fear of discrimination on the basis of who they are. LGBTQ teachers and other staff should have the right to have decisions about their employment – including hiring and firing – made on the basis of their qualifications, skills and experience, rather than their sexual orientation or gender identity.

These principles are not reflected in the provisions of the *Anti-Discrimination Act*. Indeed, NSW has the broadest exceptions permitting discrimination in educational settings of any jurisdiction in Australia.

This is because the exceptions such as those applying to transgender students⁷ and teachers:⁸

- apply to all ‘private educational authorities’; and
- are blanket exceptions which do not impose *any* restriction on this ability to discriminate, such as requiring that discrimination by religious schools is proportionate and necessary to comply with the doctrines of the religion.

Recent research has demonstrated that the impact of this is felt by LGBTQ students and teachers in NSW schools.⁹

Thankfully, the Equality Bill would abolish the exceptions that allow private educational authorities to discriminate on the basis of (homo)sexuality and transgender status, while Part 3B applying to variations of sex characteristics contains no equivalent exceptions either.

Passage of the Bill would help to support the right of LGBTIQ students to education and the right of LGBTIQ teachers and other staff to employment, without discrimination.

⁶ See, for example, amendments to the *Anti-Discrimination Act 1991* (Qld), as passed in the *Births, Deaths and Marriages Registration Act 2023*, but not yet commenced, which add an updated definition of ‘gender identity’ and new attribute and definition of ‘sex characteristics’ in the Queensland *Anti-Discrimination Act’s* Dictionary.

⁷ Section 38K(3).

⁸ Section 38C(3)(c).

⁹ See Equality Australia, ‘Dismissed, Denied and Demeaned: A national report on LGBTQ+ discrimination in faith based schools and organisations’, 25 March 2024, available at:

<https://equalityaustralia.org.au/resources/denied-and-demeaned-a-national-report-on-lgbtq-discrimination-in-faith-based-schools-and-organisations/>

It would also be consistent with the recent Australian Law Reform Commission inquiry¹⁰ into the issue of anti-discrimination exceptions in religious educational institutions, which recommended the removal of specific exceptions under the *Sex Discrimination Act 1984* (Cth) allowing religious schools to discriminate against students and teachers on the basis of sexual orientation and gender identity (as well as sex, marital or relationship status and pregnancy).

2.3 Reforming the general religious exception in ss 56(c) and (d)

While the specific issue of exceptions allowing religious schools to discriminate against LGBTQ students and teachers has attracted the most scrutiny in recent years, broader exceptions allowing religious organisations to discriminate across a wide range of other areas – health care, housing, disability, aged care and other community services – also warrant close attention and action.

The general religious exception in the *Anti-Discrimination Act* is found in section 56, including:

- sub-section (c), which provides that: ‘Nothing in the Act affects... the appointment of any other person in any capacity by a body established to propagate religion’; and
- sub-section (d), which provides: ‘Nothing in this Act affects... any other act or practice of a body established to propagate religion that conforms to the doctrines of that religion or is necessary to avoid injury to the religious susceptibilities of the adherents of that religion.’

The general religious exception has been interpreted broadly by the Courts, with the Court of Appeal finding that it permitted a religious foster care agency to reject an application by the couple because of their homosexuality.¹¹

Significantly, this exception not only permits discrimination on the basis of homosexuality and transgender status, it in fact applies across all protected attributes covered by the Act, including race, sex, marital or domestic status, disability and age.

Reform of the general religious exception is therefore a high priority to improve the protections offered by the Act to all communities in NSW, not just LGBTIQ people, and bring the Act in line with community standards.

The Equality Bill would replace the existing ss 56(c) and (d) of the Act, with the following:

(1) (c) the selection or appointment of a person to exercise functions in relation to, or otherwise participate in, a religious observance or practice, or

(d) another act or practice of a body established to propagate religion that-

(i) is reasonable and proportionate in the circumstances, and

¹⁰ Australian Law Reform Commission, ‘Maximising the Realisation of Human Rights: Religious Educational Institutions and Anti-Discrimination Laws’, Report 142, December 2023, especially Recommendations 1 and 7.
¹¹ *OV & OW v Members of the Board of the Wesley Council [2010] NSWCA 155* (6 July 2010).

(ii) conforms to the doctrines of the religion, and

(iii) is necessary to avoid injury to the religious susceptibilities of the adherents of the religion.

(2) Subsection (1)(d) does not apply in relation to-

(a) employment and education by religious educational institutions, or

(b) employment and the provision of goods, services or accommodation by religious bodies providing goods, services or accommodation to the general public.

This redrafted provision draws on the successful model implemented elsewhere in Australia, including in Victoria (through section 82 of their *Equality Opportunity Act 2010*, reformed in 2021).

This exception is carefully and appropriately drafted to respect the ability of religious organisations to operate in accordance with their faith for the benefit of members of their faith, and the right of other members of the community to participate in areas of public life, including education, employment and access to community services, free from the fear of discrimination on the basis of who they are.

As noted above, this would not just protect LGBTIQ members of the community, but also people at risk of discrimination on the basis of other protected attributes.

2.4 Reforming other exceptions

PIAC supports the Equality Bill's reforms to other exceptions under the *Anti-Discrimination Act*, including:

- repeal of section 59A, which provides a specific exception allowing faith-based adoption agencies to discriminate in the provision of adoption services;
- repeal of section 38Q, which allows superannuation providers to discriminate on the grounds of transgender status; and
- narrowing the exception in relation to the participation of transgender people in sport, so that it does not apply to children aged 12 and under, and so that any discrimination must be reasonable and proportionate in the circumstances'.¹²

2.5 Protecting all LGBTIQ people against civil vilification

Because of the limited existing protected attributes in the *Anti-Discrimination Act*, only gay men, lesbians and some transgender people currently have access to the Act's civil vilification protections.

¹² This approach is consistent with amendments passed in 2023 in the ACT: section 44(1)(b), *Discrimination Amendment Act 2023* (ACT).

The Equality Bill's proposed expansion of the Act to cover sexuality, the expansion of the definition of transgender, and the addition of the new attribute of variations of sex characteristics – with its own civil vilification provisions in clause 38ZI – would ensure all members of the NSW LGBTIQ are protected from vilification.

Importantly, this would achieve greater consistency with the criminal offence of threatening or inciting violence in section 93Z of the *Crimes Act 1900* (NSW), which already covers sexual orientation, gender identity and intersex status broadly.

Recommendation 1 – Amendments to the Anti-Discrimination Act 1977

That NSW Parliament support the Equality Bill's amendments to the Anti-Discrimination Act 1977, including to:

- *Ensure all LGBTIQ people are protected against discrimination and civil vilification,*
- *Protect LGBTQ students and teachers in religious schools against discrimination, and*
- *Ensure any exceptions permitting LGBTIQ discrimination are narrow and targeted.*

3. Amendments to the *Births, Deaths and Marriages Registration Act 1995*

PIAC supports access by trans and gender diverse people to birth certificates and other forms of identity documentation that reflect their gender identity without the need for surgery or other forms of medical interventions, or medical approval. This also includes access to gender markers beyond male or female, such as non-binary.

Unfortunately, these principles are not reflected in NSW law, with the *Births, Deaths and Marriages Registration Act 1995* (NSW) imposing the highest barriers for trans and gender diverse people to access accurate birth certificates of any such law in Australia. This includes a requirement that a person must have 'undergone a sex affirmation procedure'¹³, defined as:¹⁴

a surgical procedure involving the alteration of a person's reproductive organs carried out -

(a) for the purpose of assisting a person to be considered a member of the opposite sex, or

¹³ Section 32B(1)(b), *Births, Deaths and Marriages Registration Act 1995* (NSW).

¹⁴ Section 32A.

(b) to correct or eliminate ambiguities relating to the sex of the person.¹⁵

No other Australian jurisdiction retains genital surgical intervention as a pre-requisite for trans and gender diverse people to obtain a new birth certificate.

The law should not require people to undergo surgery to have their gender identity accepted.

This is surgery many trans and gender diverse people do not wish to undertake. All surgery carries risks to health and surgery is not necessary for people to live according to their affirmed gender identity. Because surgery to a person's reproductive organs effectively causes sterilisation, it also infringes on the human right to reproduction, and to found a family, for this to be a requirement to obtain a birth certificate consistent with a person's gender identity.

For those who do wish to undertake surgery, its cost, and limited access to domestic specialists who perform it, may mean they are unable to access it.

As can be seen from the wording of section 32A outlined above, the Act also restricts options to having birth certificates updated from one sex to 'the opposite sex' [sic], with no legislative right to update documents to reflect other gender identities, such as non-binary. NSW is one of only two jurisdictions in Australia (the other being Western Australia) which still denies this option to trans and gender diverse people.

The restrictive approach to identity documentation contained in the *Births, Deaths and Marriages Registration Act* has serious impacts on the human rights of trans and gender diverse people.

This includes a lack of respect for the human dignity of trans and gender diverse people and their right to live their daily lives as themselves. The inability of many trans and gender diverse people to produce accurate birth certificates, which are increasingly requested in relation to a range of contemporary situations (such as security, financial, housing and even employment), also exposes them to being unnecessarily 'outed' to other people, and through that to potential discrimination and mistreatment.

For these reasons, PIAC supports the provisions of the Equality Bill that amend the *Births, Deaths and Marriages Registration Act 1995* to bring it into line with the laws of Victoria and Queensland.

Specifically, it would allow for the inclusion of 'sex descriptors' beyond male and female, as well as recognition of updated sex descriptors on the basis of a statutory declaration¹⁶ by the trans and gender diverse person themselves, where they are 16 years of age or older, and where it is:¹⁷

¹⁵ While sub-clause (b) does not apply directly to TGD people, we note the stigmatising language used here in relation to people with innate variations of sex characteristics, and the harm that the same laws which restrict the rights of trans and gender diverse people also cause to intersex people.

¹⁶ Clause 32B(2)(b), Equality Legislation Amendment (LGBTIQA+) Bill 2023 (NSW).

¹⁷ Clause 32B(2)(c).

accompanied by a support statement by an adult who has known the applicant for at least 12 months stating that (i) the adult believes the person is making the application in good faith, and (ii) the adult supports the person in making the application.

We also welcome the provisions of the Bill which allow for young people under the age of 16 to access identity documentation reflecting their gender identity, with the support of their parent(s) or with approval from NCAT.¹⁸

Importantly, these applications will require that the young person has had counselling in relation to the application, while any NCAT decision must be based on the best interests of the child.

The Equality Bill's amendments to the *Births, Deaths and Marriages Registration Act* are important changes that will help realise the human rights of trans and gender diverse people in NSW, allowing them to live their daily lives free from unnecessary barriers and the threat of 'outing'.

Recommendation 2 – Amendments to the Births, Deaths and Marriages Registration Act 1995

That NSW Parliament support the Equality Bill's amendments to the Births, Deaths and Marriages Registration Act 1995, including to:

- *Replace the current requirement for trans and gender diverse people to undertake genital surgery to access new identity documentation with a framework allowing people aged 16 and over to apply based on a statutory declaration and support statement*
- *Provide a separate process for young people aged less than 16 to access new identity documentation with the support of their parent(s) or approval from NCAT, and*
- *Allow for the recording of 'sex descriptors' beyond male or female, such as non-binary.*

¹⁸ Clauses 32C, 32D and 32E.