

# Current and emerging threats to trans and gender diverse human rights

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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
- Rights of people in detention, including equal access to health care for asylum seekers (the Asylum Seeker Health Rights Project)
- Improving outcomes for people under the National Disability Insurance Scheme
- Truth-telling and government accountability
- Climate change and social justice

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The Public Interest Advocacy Centre office is located on the land of the Gadigal of the Eora Nation

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# 1. Current and emerging threats to trans and gender diverse human rights

PIAC has a long history of involvement in litigation, policy and law reform in relation to the human rights of lesbian, gay, bisexual, transgender, intersex and queer (LGBTIQ) Australians generally, including the rights of trans and gender diverse (TGD) people specifically.

This includes a focus on anti-discrimination and vilification law reform, at NSW and Commonwealth levels, through advocacy for discrimination laws that cover all TGD people, for the protection of LGBTQ students and teachers in religious schools against discrimination, and for effective hate speech prohibitions (discussed at 3, below).

In NSW, we have also been involved in support for the Equality Legislation Amendment (LGBTIQA+) Bill 2023 (aka the 'Equality Bill'), introduced by Independent Member for Sydney Alex Greenwich and currently being considered by a Parliamentary Inquiry, which includes essential birth certificate reforms (discussed at 2, below).

Our strategic litigation team has also represented TGD clients who have been held in custody by police and/or corrections, who have experienced misgendering and deadnaming as well as other forms of mistreatment (discussed at 4, below).

## 2. Birth certificate reform

PIAC supports access by TGD people to birth certificates and other forms of identity documentation reflecting 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 TGD 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'<sup>1</sup>, defined as:<sup>2</sup>

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

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<sup>1</sup> Section 32B(1)(b), *Births, Deaths and Marriages Registration Act 1995* (NSW).

<sup>2</sup> Section 32A.

(b) to correct or eliminate ambiguities relating to the sex of the person.<sup>3</sup>

In 2024, no other Australian jurisdiction retains genital surgical intervention as a pre-requisite for TGD 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 TGD 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 (including because of a lack of funding through Medicare), 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 have 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 TGD people.

The restrictive approach to identity documentation contained in the *Births, Deaths and Marriages Registration Act 1995* has serious impacts on the human rights of TGD people.

This includes a lack of respect for the human dignity of TGD people and their right to live their daily lives as themselves. The inability of many TGD 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 has supported the Equality Bill, as introduced to NSW Parliament by the Independent Member of Sydney Alex Greenwich, which would 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 declaration<sup>4</sup> by the TGD person themselves where it is:<sup>5</sup>

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<sup>3</sup> 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 TGD people also cause to intersex people.

<sup>4</sup> Clause 32B(2)(b), Equality Legislation Amendment (LGBTIQA+) Bill 2023 (NSW).

<sup>5</sup> 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.

The Equality Bill is currently subject of a NSW Parliamentary Inquiry. PIAC continues to urge the NSW Government to pass this legislation, including its amendments to the *Births, Deaths and Marriages Registration Act 1995*, to realise the human rights of TGD people in NSW.

Finally, we also support repeal and replacement of the *Gender Reassignment Act 2000* (WA), which, in its text, contains many similar provisions to the outdated NSW law. Thankfully, the High Court has ruled that,<sup>6</sup> under the WA law:

a surgical procedure to alter the genitals or other gender characteristics is not required of an applicant for a [gender] recognition certificate. The definition of 'reassignment procedure' refers to a 'medical *or* surgical procedure [emphasis in original].

Despite this beneficial interpretation, Western Australia remains the only other domestic jurisdiction that requires TGD people to undergo physical medical treatment (which may include hormone therapy) prior to obtaining updated identity documents, as well as denying access to gender markers other than male or female. The Western Australian Government should therefore urgently implement its long-standing but as yet-unfulfilled promise to reform birth certificate laws.

### **3. Anti-discrimination and vilification reform**

PIAC supports a range of important reforms to NSW and Commonwealth law to protect the human rights of TGD people to live their lives free from discrimination and hate speech.

#### **3.1 Ensuring all TGD people are protected against discrimination**

PIAC has long advocated for the *Anti-Discrimination Act 1977* (NSW) to be repealed and replaced with legislation fit for the 21<sup>st</sup> century.<sup>7</sup>

One aspect of the legislation most in need of reform and modernisation is its approach to gender identity. Its relevant protected attribute is 'transgender' status, is defined in section 38A as a person:

(a) who identifies as a member of the opposite sex by living, or seeking to live, as a member of the opposite sex, or

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<sup>6</sup> *AB v Western Australia; AH v Western Australia [2011] HCA 42*, 6 October 2011.

<sup>7</sup> Including in our report '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/>

- (b) who has identified as a member of the opposite sex by living as a member of the opposite sex, or
- (c) who, being of indeterminate sex, identifies as a member of a particular sex by living as a member of that sex...<sup>8</sup>

This therefore excludes from the Act's coverage people whose gender identity is non-binary or otherwise gender diverse, leaving them without protection against both discrimination and civil vilification.<sup>9</sup>

This is a serious gap, and one which the Equality Bill also seeks to address, by replacing 'opposite sex' in section 38A with 'another sex', and replacing para (c) entirely with 'who identifies as a particular sex that is not exclusively male or female by living as a member of that sex'.

We note this definition is not best practice, but has been adopted because of concerns about both the archaic structure of the *Anti-Discrimination Act*, and its use of the 'comparator' test (rather than the preferred 'treats unfavourably' or 'detriment' test).<sup>10</sup>

We therefore support prompt passage of the Equality Bill's provisions in this area as an important interim step, until a new Act with a more inclusive protected attribute of 'gender identity' is, hopefully, adopted as an outcome of the comprehensive review of the Act currently being undertaken by the NSW Law Reform Commission (NSWLRC).

### 3.2 Protecting TGD students and teachers against discrimination

PIAC has also long advocated for the removal of exceptions allowing religious schools to discriminate against students, teachers and other workers on the basis of gender identity.

These exist under both the *Sex Discrimination Act 1984* (Cth),<sup>11</sup> and *Anti-Discrimination Act 1977* (NSW),<sup>12</sup> and are a violation of the human rights to education, and to non-discrimination including in relation to employment, for TGD people.

At the Commonwealth level, we note the recommendations of the recent Australian Law Reform Commission (ALRC) report<sup>13</sup> into this issue, which supported the removal of exceptions allowing

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<sup>8</sup> With these provisions in relation to TGD people once again inappropriately conflating gender identity and sex characteristics, to the detriment of intersex people.

<sup>9</sup> As well as creating inconsistency with the offence of 'threatening or inciting violence' in section 93Z of the *Crimes Act 1900* (NSW), which covers 'gender identity' defined broadly and therefore protects all TGD people against the much-narrower criminal hate speech offence.

<sup>10</sup> See for example section 8(2), *Discrimination Act 1991* (ACT).

<sup>11</sup> Section 38.

<sup>12</sup> Sections 38K(3) re students, and 38C(3)(c) re staff, noting these exceptions in fact apply to all private schools, not just those that are religious.

<sup>13</sup> Australian Law Reform Commission, 'Maximising the Realisation of Human Rights: Religious Educational Institutions and Anti-Discrimination Laws', Report 142, December 2023.



religious educational institutions to discriminate on the basis of sex, sexual orientation, gender identity, marital or relationship status or pregnancy.<sup>14</sup>

We continue to urge the Commonwealth Government to fulfil its clear May 2022 election promise to protect LGBTQ students and teachers in religious schools by implementing the ALRC's straight-forward recommendations as a matter of priority.

At the NSW level, we support the Equality Bill and its provisions which would remove exceptions allowing private educational authorities to discriminate against TGD students and teachers.

Currently, there is no NSW Government promise to remove these exceptions, either through passage of the Equality Bill or otherwise, although we hope the current NSWLRC review of the *Anti-Discrimination Act* will lead to these special privileges to discriminate being abolished.

Finally, while the exceptions allowing religious schools to discriminate against LGBTQ people have received the most public attention, PIAC also supports the removal of these exceptions as they apply to other religious organisations delivering what are essentially public, and usually publicly-funded, services across health, housing, disability and aged care.<sup>15</sup>

This would support the human right to non-discrimination for TGD Australians broadly.

### **3.3 Protecting TGD people against hate speech**

Australian vilification laws in relation to gender identity are an incomplete patch-work. Nowhere is this more apparent than in NSW.

As noted above, only some TGD people are covered by the civil vilification provisions in the *Anti-Discrimination Act 1977* (NSW), leaving non-binary and other gender diverse people unprotected, whereas all TGD people are included for the purposes of the 'threatening or inciting violence' criminal offence in section 93Z of the *Crimes Act 1900* (NSW).

The largest gap, however, exists at Commonwealth level, with no prohibitions on vilification on the basis of gender identity (or sexual orientation or intersex status/sex characteristics) in the *Sex Discrimination Act 1984* (Cth).

The absence of such prohibitions has become more notable, and problematic, given the rise in transphobic hate speech from early 2023 onwards, including the infamous example of neo-Nazis attending an anti-trans rights rally on the steps of Victorian Parliament in March last year, performing Nazi salutes, intimidating trans counter-protestors while carrying a banner saying 'destroy paedo freaks'.<sup>16</sup> The rise of transphobic violence and harassment has been detailed in

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<sup>14</sup> Recommendations 1 and 7, *ibid*.

<sup>15</sup> Section 37(1)(d), *Sex Discrimination Act 1984* (Cth), and section 56(d), *Anti-Discrimination Act 1977* (NSW).

<sup>16</sup> 'What's behind the 'terrifying' backlash against Australia's queer community?', *Guardian Australia*, 25 March 2023, available at: <https://www.theguardian.com/australia-news/2023/mar/25/whats-behind-the-terrifying-backlash-against-australias-queer-community>

the Trans Justice Project's August 2023 report, *Fuelling Hate: Abuse, Harassment, Vilification and Violence Against Trans People in Australia*.<sup>17</sup>

The 12 months since has seen Drag Story Time events in local libraries and community venues across the country shut down, because police could not guarantee participant safety following right-wing extremist protests, including threats of intimidation and violence.<sup>18</sup>

We acknowledge drag is not synonymous with transgender, although that distinction is not shared by the people opposed to these gatherings, as demonstrated by the repeated use of the derogatory term 'tranny', and condemnation of 'transgender ideology' at a protest outside a Cumberland Council meeting that debated, and ultimately banned, Story Times in Council facilities.<sup>19</sup> It is clear far-right threats against Drag Story Times are also threats against TGD people.

In our view, the Commonwealth Government needs to take these threats seriously, including by introducing a prohibition against vilification on the basis of gender identity in the *Sex Discrimination Act*, modelled on section 18C of the *Racial Discrimination Act 1975* (Cth). This should proceed at the same time as any ban on religious vilification, given the adverse impacts on both sets of communities are similar.

#### **4. Misgendering and deadnaming in criminal legal institutions**

PIAC has a long history of working with people experiencing disadvantage in the criminal legal system. Our legal casework has involved representing TGD clients against NSW Police, Corrective Services NSW and the Justice Health and Forensic Mental Health Network ('Justice Health') in unlawful sex discrimination complaints made on the ground of gender identity.

We have also observed evidence of anti-TGD abuse and discrimination where we have advised clients on claims in tort. Our clients have experienced the criminal legal process as 'offenders' and 'prisoners'.

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<sup>17</sup> Trans Justice Project, 'Fuelling Hate: Abuse, Harassment, Vilification and Violence Against Trans People in Australia', August 2023, available at: <https://transjustice.org.au/wp-content/uploads/2023/08/Fuelling-Hate-Anti-Trans-Abuse-Harassment-and-Vilification-WEB-SINGLES-1-1.pdf>

<sup>18</sup> Including deaths threats against ABC employees involved in planning a subsequently-cancelled Drag Story Time that was to be held in conjunction with Sydney Gay & Lesbian Mardi Gras: 'ABC boss details abuse staff received over Drag Queen Storytime event', *Out-in-Perth*, 14 February 2023, available at: <https://www.outinperth.com/abc-boss-details-abuse-staff-received-over-drag-queen-storytime-event/>

<sup>19</sup> As viewed in this tweet by @RamiNguyen on 28 February 2024: <https://twitter.com/RamiNguyen/status/1762761523745919399>

Our TGD clients have had hurtful, humiliating and distressing interactions with police officers in NSW. Some clients have experienced violent physical abuse; other clients have been emotionally abused (eg called hurtful names, presumed to be mentally unwell, threatened with the prospect of sexual assault in prison) and deliberately misgendered (where clients have requested police use their legal/preferred name and gender identity, and police have expressly refused).

As first responders and the interface between the community and the criminal legal system, police conduct has a significant influence on trust and feelings of safety and security. Moreover, how police officers record a TGD person's gender establishes how that person will be processed thereafter.

NSW Police's system allows police to update names, gender markers and pronouns in its record system. Despite this, our clients' experience is that police officers have deliberately used their discretion to misgender and deadname on police records, such as on court attendance notices, fact sheets, warrants, etc. If not corrected during the court process, this misidentification can have harmful consequences if the charges proceed to a prison sentence.

Corrective Services NSW and Justice Health use the name, pronouns and gender markers on the court order for imprisonment. They are currently unable to update a person's records to reflect gender identity and legal name change.

If a person is misgendered when charged and sentenced to imprisonment, that person will be incarcerated in a prison that is inappropriate for their gender identity. Corrective Services NSW has a policy aimed at ensuring TGD persons are managed according to their gender identity, which allows prisoners to be transferred between men's and women's prisons. However, when our clients have been placed in inappropriate accommodation, they have found it difficult to be transferred.

Staff working for Corrective Services NSW and Justice Health have demonstrated a reluctance to use gender-affirming language toward our clients. For instance, records obtained from these institutions have referred to TGD persons 'claiming' and 'alleging' to be their gender. TGD clients have also reported officers of a different gender conducting strip searches on them, despite protestations from clients (eg male officers searching trans women).

Further, in response to the increased risk of harm TGD people face in prison (including from other prisoners), Corrective Services NSW have placed our TGD clients in segregation. Segregation – often experienced as solitary confinement – is a serious deprivation of liberty which restricts a person from leaving one's cell, potentially for extended periods of time. The harm caused by the practice is well-recognised.

Finally, poor access to healthcare in prison is a live risk for all incarcerated persons. This is particularly pronounced for TGD persons, as gender-affirming treatments can be difficult to obtain and Justice Health staff are not properly equipped to deliver gender-affirming care.

(2497 words)