Submission No 42

EQUALITY LEGISLATION AMENDMENT (LGBTIQA+) BILL 2023

Organisation: Pride in Protest

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Submission to the Inquiry into Equality Legislation Amendment (LGBTIQA+) Bill

April 2024

About Pride in Protest

Pride in Protest is a community collective of queer people and others that support queer justice, which predominantly works on Gadigal Country. We do grassroots organising around issues that impact the lives of queer and trans people, and other related social and economic justice issues.

Introduction

This submission addresses the provisions of the Equality Legislation Amendment (LGBTIQA+) Bill ('the Equality Bill') as per section (1) of the Terms of Reference, and provides further recommendations to improve the safety and wellbeing of the LGBTIQA+ (queer) community as per section (3) of the Terms of Reference.

In writing this submission, Pride in Protest has drawn on the knowledge and experience of a diverse collective of members of the queer community, including community workers, health workers, educators, policy & advocacy workers, academics, sex workers and more.

This submission advocates for the immediate passage, in full, of the Equality Bill. It provides recommendations to further strengthen the right to gender affirmation, recommendations to further increase protections from discrimination, and strongly endorses the full decriminalisation of sex work. It also makes several suggestions to further improve queer safety outside of the scope of the Equality Bill as it stands:

- Introduce a mandatory Safe Schools program to protect queer and trans children and young people from queerphobia and transphobia at school.
- Overturn the anti-democratic and draconian anti-protest laws that target and criminalise protestors, including queer and trans protestors.

- Restrict the power of the police to commit violence, harassment and intimidation, introduce real consequences for police violence and overreach, and disarm, disempower, defund and dismantle the NSW Police.
- End NSW Government support for Israel's genocide—including of queer and trans Palestinians—in Gaza.

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2. Support the right to gender affirmation.

Recommendation 2: Pass amendments to the *Births, Deaths & Marriages Registration Act 1995* to enable self-ID as a matter of urgency. Should the Equality Bill not pass in full, these changes must be prioritised.

Recommendation 3: Remove costs associated with changing sex under the *Births, Deaths and Marriages Registration Act 1995*. At minimum, remove costs for people under 18 to change sex under the *Births, Deaths and Marriages Registration Act 1995*.

Recommendation 4: Make gender markers on NSW Government identity documents optional.

Recommendation 5: Pass amendments to the *Children and Young Persons (Care and Protection) Act 1998* to facilitate children and young people's access to transition care as a matter of urgency. Should the Equality Bill not pass in full, these changes must be prioritised.

Recommendation 6: Introduce a program or scheme under NSW Health to subsidise or fully fund hormone replacement therapy and surgery for trans and nonbinary people. Transition care should be entirely funded under Medicare. Until the federal government makes gender-affirming healthcare free through Medicare, the NSW Government has a responsibility to ensure trans people can access the healthcare they need.

Recommendation 7: Provide 6 weeks' annualised gender affirmation leave for state and local government workers in NSW. Require similar measures of companies the NSW Government contracts for services. This should be available to all workers in Australia, but until the federal government implements this, the NSW Government should lead by example.

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3. Strengthen protections from discrimination.

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Recommendation 11: Repeal the *Religious Vilification Bill 2023* and ensure that LGBTIQ+ people and Muslims are not targeted by the review of Section 93Z of the *Crimes Act 1900*.

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Recommendation 16: Give unions and relevant peer-run service providers investigation powers in cases of suspected discrimination.

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4. Fully decriminalise sex work

Recommendation 17: Remove all offences related to sex work from the *Summary Offences Act 1988*, in line with what is put forth in the Equality Bill. If the bill is to be split up and handled in pieces, the changes to the *Summary Offences Act 1988* must be prioritised as urgent.

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5. Protect the rights of children born through surrogacy

Recommendation 18: Pass the changes in the Equality Bill relating to surrogacy.

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6. Keep queer and trans kids safe at school.

Recommendation 19: Fund and introduce a mandatory 'Safe Schools' program to every NSW school, to reduce homophobic and transphobic bullying and increase safety and support for queer and trans children and young people.

Recommendation 20: Immediately introduce additional mandatory training for NSW public school teachers on best supporting queer and trans young people.

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7. Wind back draconian restrictions on the ability for us to protest for our rights.

Recommendation 21: Immediately repeal section 214A of the *Crimes Act 1900*.

Recommendation 22: Drop all current charges under the anti-protest laws.

Recommendation 23: Provide compensation to all protestors charged under the anti-protest laws for their time and money spent and emotional damage as a result of these charges.

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8. Restrict the power of police to commit violence, harassment and intimidation.

Recommendation 24: Repeal the *Mandatory Disease Testing Act 2021*.

Recommendation 25: Increase funding to peer-run organisations for the goal of ending HIV transmissions by 2025.

Recommendation 26: Strengthen legislative provisions governing the reasonable use of force by police officers in NSW. Publish and promote use of force guidelines along with clear instructions for how victims of police force can make a complaint against the officer(s) involved.

Recommendation 27: Make police officers personally liable for misconduct settlements.

Recommendation 28: Stand down and withhold pensions from officers found to have used excessive force or committed discrimination or other misconduct.

Recommendation 29: Introduce community oversight of policing. No more cops investigating cops.

Recommendation 30: Decriminalise drug possession.

Recommendation 31: Decriminalise offences driven by poverty, including fare evasion, shoplifting and begging.

Recommendation 32: Disarm the NSW Police. Ban police use of firearms, tasers, OC spray and batons; disband the Mounted Police Unit and end the use of dogs for drug sniffing and crowd control.

Recommendation 33: Disempower the NSW Police. Ban police strip searches, end police use of facial recognition technology at public protests and other 'proactive policing' measures, and restrict police officers' ability to conduct bail checks. Examine and abolish other police powers used to target, violate, harass and intimidate.

Recommendation 34: Defund the NSW Police. Redirect funding saved through disarming and disempowering the police to programs, services and infrastructure that actually provide community safety, such as public housing, affordable food and medicine, domestic violence services, social workers and mental health workers.

Recommendation 35: Dismantle the NSW Police. Examine the functions currently performed by the NSW Police, and end those that only cause harm. Hand over remaining functions (and associated funding) to more appropriate entities to carry out in a way that prioritises safety and wellbeing rather than violence, control and punishment.

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9. End NSW Government support for genocide in Gaza.

Recommendation 36: Protect queer and trans Palestinians by sanctioning Israel. Ban companies owned by or tied to the Israeli Defence Force from operating within NSW. Ban the manufacturing of weapons or weapons parts for sale to Israel within NSW.

1. Equality delayed is equality denied: pass the Equality Bill.

The Equality Bill will bring changes that will save queer, trans and sex worker lives. Every day that this bill is delayed puts the lives and safety of people all across NSW at risk. There have been inquiries and debates federally and in every state and territory, escalating since 2017, on anti-discrimination and birth certificate reform. Despite the passage of a limited ban on conversion practices in late March, NSW still trails far behind other states and territories when it comes to queer rights. Passing the Equality Bill would bring NSW further into line with other states and territories, and bring us into compliance with international law. The United Nations[1] expressly asked Australia to "provide information on any steps taken to reform anti-discrimination legislation at the federal and the state levels with a view to addressing the protection gaps in the existing legislation." In the years since this request NSW has taken no steps.

The Equality Bill has support from the Greens, Animal Justice Party and independents. If NSW Labor were to support it, it could pass immediately. This delay for yet another consultation only opens up our community to harmful commentary from those who wish us harm and would deny us our rights.

There are some elements of the Equality Bill that are not what Pride in Protest would have suggested: Sections that do not go far enough, or implement solutions to problems for which Pride in Protest would suggest different approaches. Despite this, Pride in Protest understands how important the protections are that this bill will bring, how long our community has waited for them, and how much our safety is at risk every day this bill is delayed.

We have heard, and reject, arguments that because of some overlapping subject matter the Equality Bill (or some of its elements) should be delayed to account for debates happening at the federal level regarding 'religious freedoms,' and for the review of the NSW *Anti-Discrimination Act 1977*. Neither of these are reasons to delay the crucial protections the Equality Bill will provide to the NSW queer community.

This consultation is not a genuine attempt to engage with the people and communities most harmed by discrimination and violence—the inflexible survey format is inaccessible for those who do not have hours spare to read and comprehend 20 pieces of legislation, and does not allow for people to share their experiences, stories and opinions in any meaningful way. If the NSW Government truly wished to consult the community to strengthen this bill, this is not the way it would have been done. We understand this 'consultation' as yet another delaying tactic, to appease those who oppose our rights and safety. The bill must be passed immediately and in full.

Recommendation 1: Pass the Equality Bill immediately and in full.

[1] Committee on Economic, Social, and Cultural Rights, *List of issues prior to submission of the Sixth Periodic Report of Australia*, 70th sess, UN Doc E/C. 12/AUS/QPR/6 (7 April 2022) [9]

2. Support the right to gender affirmation.

The changes to the *Births, Deaths and Marriages Registration Act 1995* put forth in the Equality Bill are much-needed and far beyond due. The requirement in place that a person must undergo surgery in order to change sex marker is violent and transphobic. Many trans people do not ever wish to undergo surgery, for a range of reasons. Many who do, are entirely unable to afford the surgery, or find themselves on years-long waiting lists. All the while, these people are unable to change their legal sex marker.

The policy in NSW sits in conflict with every other district in the country. The Federal Government, during the Gillard-Rudd years, implemented self-ID through passports and in the wake of marriage equality nearly every state and territory took the opportunity to review their legislation governing birth certificates. This has created an inconsistency where trans people born in NSW may be recognised by the Federal Government but not the NSW Government, and may have contradictory identity documents. It also means that someone who was born in another state but resides in NSW can have accurate documentation, while someone who lives in a state with self-ID but who was born in NSW still cannot access accurate documentation.

Beyond the deep psychological harm many trans people experience as a result of their legal documentation incorrectly gendering them on a daily basis, this can also cause significant physical harm and violence for some in our community. The most egregious example of this is when transgender women are locked away in men's prisons because their legal documentation does not accurately represent their gender. Many transgender women who have been sent to men's prisons report horrific levels of sexual and physical violence at the hands of corrections staff and other inmates. Often the proposed 'solution' is placing the transgender woman in lengthy periods of solitary confinement for her 'protection' – essentially punishing her for the violence other people and the state are enacting upon her.

For as long as the Equality Bill is delayed, unnecessary violence like this will continue.

Changes to allow trans people to change sex marker without requiring surgery, to allow young people to change their sex marker without parental involvement, and to allow children to change their sex marker without parental consent where parents are not supportive, are very welcome.

Recommendation 2: Pass amendments to the Births, Deaths & Marriages Registration Act 1995 to enable self-ID as a matter of urgency. Should the Equality Bill not pass in full, these changes must be prioritised.

There remains a fee associated with changing sex marker, which may make this out of reach for children and young people. In the ACT, it is free for people under 18 to change their sex marker. Changing a sex marker should be free for everyone. Trans people earn, on average, lower incomes than cisgender counterparts, and trans women in particular are far more likely than cisgender people to be living below the poverty line due to transphobia and other systemic

barriers.[2] Cost should not create a barrier for any trans person wishing to ensure their legal documentation accurately reflects their identity.

Recommendation 3: Remove costs associated with changing sex under the *Births, Deaths and Marriages Registration Act 1995*. At minimum, remove costs for people under 18 to change sex under the *Births, Deaths and Marriages Registration Act 1995*.

Many people – trans and cis – may not want their identity documents to list a sex at all. People should have the right to choose whether or not to include a sex marker on their documentation.

Recommendation 4: Make gender markers on NSW Government identity documents optional.

While many trans people do not wish to get surgery as part of their transition, many do. Changes to enable children and young people to access medical transition are extremely welcome, and will be life-saving for many trans children and young people.

Recommendation 5: Pass amendments to the *Children and Young Persons (Care and Protection) Act 1998* to facilitate children and young people's access to transition care as a matter of urgency. Should the Equality Bill not pass in full, these changes must be prioritised.

Many trans people who do want surgical gender affirmation are financially unable to do so. This can be a source of great distress for some people. The two main financial barriers to surgical gender affirmation procedures are the cost of the procedures themselves, and the lack of paid leave at most workplaces to recover following surgery.

Right now, many gender-affirming surgeries are exorbitantly expensive, with very little, if any, Medicare contribution. At the federal level, gender affirming medical procedures must be fully funded and free under Medicare. While this change is outside of the NSW jurisdiction, there are measures the NSW Government can and should take to ease the cost of medical transition care for trans people, such as through setting up a program or scheme under NSW Health to subsidise (or fully fund) hormone replacement therapy and surgery for trans people.

Recommendation 6: Introduce a program or scheme under NSW Health to subsidise or fully fund hormone replacement therapy and surgery for trans and nonbinary people.

The NSW Government must also ensure trans workers are not penalised in the workplace for medically transitioning. Right now, many trans people are in workplaces where they cannot take transition leave – even unpaid – with a guarantee that there will still be a job for them when they return. Many more are in workplaces where any leave would be unpaid. At the federal level, the

[2] Department of Prime Minister and Cabinet (2023), *Gender Diverse, including LGBTIQA+, Phase One Consultation: National Strategy to Achieve Gender Equality Introduction*, https://www.pmc.gov.au/sites/default/files/2023-03/Roundtable-Discussion-Paper_Gender-Diverse.docx

government should mandate that all employers provide paid gender affirmation leave, in the same way that paid domestic violence leave is now mandatory after a long union campaign to make it such. At the state level, the NSW Government must take the lead by introducing strong annualised gender affirmation leave policies for all state and local government workers, and requiring similar measures of companies that they contract for services.

Recommendation 7: Provide 6 weeks' annualised gender affirmation leave for state and local government workers in NSW. Require similar measures of companies the NSW Government contracts for services.

3. Strengthen protections from discrimination.

We support the changes the Equality Bill makes to the *Anti-Discrimination Act 1977* ('the ADA') to be more inclusive of nonbinary, asexual, bisexual, intersex people and sex workers. These are important changes, and it is right to make them now rather than wait for the comprehensive review of the ADA, which could take many years to complete.

Anti-discrimination law reform, in particular on the question of the right of faith based organisations to discriminate, is one of the most reviewed and analysed legislative questions in recent history. The NSW Government first referred the ADA to the NSW Law Reform Commission in 1991, and after 8 years of consultation it came back with over 100 recommendations which included largely abolishing the right of faith-based employers, service providers, and private schools to discriminate, repealing the small business exception, and abolishing exceptions in superannuation. These recommendations and proposed wording of legislation have not been enacted by the NSW Government in the subsequent 25 years.

Since that time the academic, legal, and political consensus in support of anti-discrimination reform has only grown. There have been reforms and changes in nearly every state and territory following lengthy and repeated consultations where LGBTIQ+ organisations, trade unions, legal organisations, academics, and health organisations have been largely unanimous in desiring reform and an end to religious exceptions. This has been reflected in polling commissioned by just.equal and Fairfax which suggests that there is majority support for these changes by voters of all parties, and a report from the Australian Law Reform Commission taking a similar position.

Now this committee is reviewing these changes in the Equality Bill, and deciding whether some of its reforms should be deferred again to the NSW Law Reform Commission. There is nothing new to consider as the wording for these changes has been provided in the Equality Bill, and consultation on support of these reforms has been ongoing for nearly 30 years while returning the same consistent answers. Action must be taken now.

We support amendments in line with Unions NSW's submission on anti-discrimination reform to remove exemptions based on business size. No business or institution should have the right to discriminate, and nobody should have to experience discrimination, no matter the size of the organisation discriminating against them.

Recommendation 8: Remove anti-discrimination exemptions based on business size.

We are concerned about the extremely narrow scope of the ADA as it stands, as there are a number of settings in which, where discrimination based on a protected attribute occurs, the victim cannot access recourse under the Act. One key example is in police custody. Being in police custody is not education, employment or the provision of a service. This means that the

many queer and trans people who experience queerphobic and transphobic discrimination from police officers while in custody struggle to seek justice for this discrimination under the law.

Recommendation 9: Expand the definition of 'services' within the *Anti-Discrimination Act 1977* to enable people to access recourse under the Act for discrimination occurring in a broader range of settings, including while in police custody.

Faith-based organisations collectively represent one of the largest sources of jobs for workers in Australia including aged care, early childhood education, shelters, schools, community housing providers, adoption agencies and hospitals. These are significant and essential services that the public relies upon, and are funded by public money in order to maintain these services.

In some sectors of essential services, faith-based organisations employ a larger share of the labour force and service a larger part of the population than the public sector. Early childhood education is one example, with 3% run by the state government, 8% run by local councils, and the remainder being private institutions including sizable religious-run franchises. Families seeking care for their child are often going to be restricted to what's locally available, but current exceptions in anti-discrimination legislation provide little remit if a rainbow family is turned away.

This is a problem that continues throughout the education system with approximately 25% of schools being private institutions. This means educators may need to make the decision to stay in the closet for their career. Some schools also take explicit positions on 'gender ideology', which undermines the safety of both the students and the educators required to maintain these ideas. If tertiary educators seek employment at a university like Australian Catholic University or Notre Dame, then these problems can continue.

Religious discrimination similarly undermines confidence in the healthcare system. A trans person seeking gender affirming care should not have to ask themselves whether they will experience legally endorsed discrimination at a religious hospital, nor should an LGBTIQ+ senior question going back into the closet before aged care. We need to ensure that staff in hospitals, aged care or other health settings are hired on merit, not based on their gender or sexuality (or ability to pass as cisgender and straight). Our community needs overt guarantees of support and protection.

There is significant public support amongst voters of all parties for religious exceptions to end, and a clear consensus from trade unions, legal associations, LGBTIQ+ community groups, and academics. The latest report from the Australian Law Reform Commission (ALRC) also indicates that ending exceptions presents no genuine threat to religious wellbeing, and legislation to protect those of faith is not required before ending these exceptions[3]. The ALRC

[3] Australian Law Reform Commission (2023). Chapter 5. Implications of Law Reform. In *Maximising the Realisation of Human Rights: Religious Educational Institutions and Anti-Discrimination Laws* (p143 -165) https://www.alrc.gov.au/wp-content/uploads/2024/03/ALRC-ADL-Final-Report-142.pdf

were unable to find evidence of a single example of detriment experienced by religious institutions in districts without the right to discriminate, despite requesting this from religious institutions[4]. This has been proven in practice by the long standing anti-discrimination protections in Tasmania, which have protected those seeking services or employment from bigotry for decades.

These protections should be available to workers and students at the point of applying for work or study to guarantee fair and equitable hiring and enrolment processes. It would legitimise discrimination to only implement protections for those who are currently employed or enrolled in education.

Recommendation 10: Abolish the right to discriminate by faith-based organisations, private educational institutions, adoption agencies, and charities.

The *Religious Vilification Bill 2023* was passed by parliament, and its amendments to the ADA are now in place. The proposed intent of the bill was to ensure that religious minorities would have a civil remedy to vilification and abuse, but its scope is sufficiently broad that, like the failed Religious Freedoms Bill proposed by Mark Latham, it presents a risk for gender and sexual minorities.

The bill unfortunately mimics clauses from other legislation of the inalienable right for minorities to be free from contempt or ridicule. This sounds reasonable on the surface, but in the question of religion this may provide protection for institutions, who are themselves political actors, given the lack of definition of 'persons'.

A clause that prohibits, or potentially prohibits, people from expressing severe criticism or contempt of the Catholic Church's handling of sexual violence, Christian Lives Matters' street violence toward queer people, or the Australian Jewish Association's commentary about 'gender ideology' and Palestinians is deeply regressive. These views are inherently contestable in the way that the existence of trans people is not.

We are further concerned about this bill's protection of religious activity. It is supportable and just that a Muslim woman has a remedy for the vilification she may receive for wearing garb associated with her faith. It is not supportable for us that right wing radicals under the guise of religion are marching upon abortion clinics during the 'Day of the Unborn Child' and that this clause would broadly protect their actions.

Lastly, we are concerned that subsequent reviews of Section 93Z of the *Crimes Act 1900* will – under the guise of eliminating 'antisemitism' seen in the falsified footage of a protest for Palestine – lead to worse outcomes for both LGBTIQ+ and Muslim communities. Political

[4] Australian Law Reform Commission (2023). Chapter 4. Exceptions in Anti-Discrimination Law - Sex Discrimination Act Grounds. In *Maximising the Realisation of Human Rights: Religious Educational Institutions and Anti-Discrimination Laws* (p85-141) https://www.alrc.gov.au/wp-content/uploads/2024/03/ALRC-ADL-Final-Report-142.pdf

expression in support of Palestinian people against genocide is not antisemitic. The *Religious Vilification Bill 2023* stands less with religious minorities and more with political convenience.

Recommendation 11: Repeal the *Religious Vilification Bill 2023*, and ensure that LGBTIQ+ people and Muslims are not targeted by the review of Section 93Z of the *Crimes Act 1900*.

The ADA is not clear on indirect and systematic discrimination nor does it address additive discrimination, and this undermines cases brought by complainants. Bias may cause unwitting discriminatory practices by a firm or person, especially when it can seem connected with a secondary attribute. Protected categories must be expanded to properly protect LGBTIQ+ people from discrimination.

Accommodation status, for example, must be added as a protected attribute. Surveys in 2017 indicated that 22% of trans and gender diverse youth had experienced homelessness, and lesbian, gay, and bisexual people were two to three times more likely than heterosexual people to be sleeping rough, or in crisis accommodation. This means a service provider which discriminates against homeless people, or those experiencing housing insecurity, would have a comparatively adverse impact upon LGBTIQ+ people even if they otherwise thought themselves to be accepting of the LGBTIQ+ community.

Another clear example of this is the status of being, or having been, a sex worker. Sex work and sex workers are not currently protected attributes on the ADA, and this leaves current and former sex workers vulnerable to evictions from rental properties, firing from unrelated forms of employment, closures of bank accounts, denial of accommodation, services, goods and education and turnaways from registered clubs. Sex workers and sex work must be added as recognised attributes under the ADA in line with other protected statuses.

The definition of sex work and sex worker applied to the proposed ADA amendments must be inclusive of all forms of sex work, including the full range of in-person services (stripping, massage parlour, topless waitressing, 'full service' sex work), in addition to non-contact, online and other emergent formats, as well as the provision of sexual services in return for non-monetary compensation. Pride in Protest follows the recommendations of the Sex Workers Outreach Project (SWOP) NSW in its proposed definition of 'sex work' and 'sex worker':

> *Sex worker is defined as a aperson who performs sex work. . . . Sex work is defined as the provision of services that involve participating in sexual activity, including erotic entertainment, in return for payment or reward.*

Protections of sex workers and sex work under the ADA must extend to those previously been, currently 'doing' (i.e when profiled or presumed to be working by police or others), or having characteristics imputed to sex workers. Sex workers must be able to protect their identity and exercise discretion throughout the complaint process under the ADA.

There should be no exceptions to the protection of sex workers under proposed ADA amendments. Any exceptions that may be proposed, such as relating to public health, services such as insurance, religious organisations or private educational or charitable bodies should be accepted.

Current exemptions are in the ADA under section 54 'statutory authority'; these should be limited where practicable. Application of discrimination law should be expanded to incorporate acts of discrimination by government bodies and authorities and their representatives, the police and workers within the carceral system.

We also broadly support the inclusion of irrelevant criminal record, surviving domestic or sexual violence, and intersex status as protected attributes, as is covered in other states and territories. Similarly we support recommendations by Aboriginal groups and legal services to include kinship responsibilities and cultural practices.

Recommendation 12: Add sex workers, sex work history, and other categories such as accommodation status, irrelevant criminal record, surviving domestic or sexual violence, and intersex status, as protected attributes under the *Anti-Discrimination Act 1977*.

The current process for anti-discrimination complaints requires complainants to bring a case to the Anti-Discrimination Board NSW, and provide evidence using the 'comparator test' that they were discriminated against. The Anti-Discrimination Board NSW is under-resourced and slow to respond, and the 'comparator test' is widely discredited. For example, former High Justice Michael Kirby refers to the test as 'conceptual shackles'.

Recommendation 13: Abolish the comparator test.

Complainants need to be able to bring complaints about systemic discrimination against individuals, and organisations, as is permissible before the Fair Work Commission. Furthermore, complainants need to be able to do so with the support and representation of organisations such as trade unions, or peer service providers like SWOP and Scarlet Alliance. This would be a method of protecting the privacy of individual complainants, minimising the issue of outing or reprisals in the workplace, and reduces the individual burden that evidence collection can place upon individuals.

This approach was supported by the Queensland Human Rights Commission in their recent report into anti-discrimination reform, *Building Belonging*. They believed that organisations should be able to bring good faith complaints in the name of justice and their members' needs. We also note that this is a view reflected by the Australian Muslim Advocacy Network in their submission to the NSW LRC.

Recommendation 14: Enable trade unions and other organisations to bring anti-discrimination complaints on both individual and systemic discrimination.

The Industrial Relations Commission (IRC) should be added as an option for hearing anti-discrimination cases at work. This would not only be a simpler process for ordinary people as the IRC has a quicker response time than the Anti-Discrimination Board NSW, but it is a one step alternative to going through the Anti-Discrimination Board and then to NCAT. This is not an alternative to further resourcing of the Anti-Discrimination Board, which is vital, but by providing both as an option it would further enable ordinary people to have their complaints heard in a timely manner.

Recommendation 15: Enable complainants or their representatives to bring anti-discrimination cases to the Industrial Relations Commission (IRC).

Finally, we believe that it is important to prevent discrimination using these legal tools rather than simply providing an option for complaint once harm has been done. This means putting a positive obligation on employers, service providers, and others to be inclusive, and that unions have rights of entry and investigation for workplaces suspected of discrimination. This incentivises compliance by employers who may otherwise rely on their employee's lack of knowledge of the law. There are cases where other peer organisations that represent specific marginalised communities may take a similar role such as SWOP.

Recommendation 16: Give unions and relevant peer-run service providers investigation powers in cases of suspected discrimination.

4. Fully decriminalise sex work

Sex work must be completely decriminalised. Pride in Protest supports removing all offences related to sex work from the *Summary Offences Act 1988* ('the Summary Offences Act'), in particular the full removal of 'Part 3 Prostitution'. We support the sections of the submission made by SWOP regarding the Summary Offences Act.

The current clauses under 'Part 3' of the Summary Offences Act include draconian measures that criminalise aspects sex work and any likely activities sex workers may engage in order to work – such as restrictions upon advertising, limitations on where sex workers can work, including restrictions to solicitation and advertising, and the criminal penalisation of dependents, partners or family living off the earnings of a sex worker.

We note that many of these clauses are remnants of a legislative model pre-decriminalistion, and therefore are in contravention of *Disorderly Houses Amendment Act 1995*, which partially decriminalised sex work in NSW.

Recommendation 17: Remove all offences related to sex work from the *Summary Offences Act 1988*, in line with what is put forth in the Equality Bill. If the bill is to be split up and handled in pieces, the changes to the *Summary Offences Act 1988* must be prioritised as urgent.

5. Protect the rights of children born through surrogacy

We broadly support legislative changes to improve the rights and best interests of children born through surrogacy. We are not experts in the field of surrogacy but we are committed to the rights of children, as well as to the rights of workers – including commercial surrogates. We support the changes as put forth in the Equality Bill regarding surrogacy.

Recommendation 18: Pass the changes in the Equality Bill relating to surrogacy.

6. Keep queer and trans kids safe at school.

The NSW Government can and should do more to protect queer kids at school. In 2021, over two fifths of queer young people reported experiencing harassment on the basis of their sexuality or gender identity in the past 12 months.[5] School is the place where the most homophobic and transphobic bullying of children and young people happens. Four fifths of queer kids aged 17-17 report high or very levels of psychological distress, as compared to a quarter of the general population aged 16-17.[6]

The 'Safe Schools' program was an $8m federally-funded national program that began in 2013 with bipartisan support. It grew out of a Victorian scheme to create safe and supportive schools for queer children and young people. After controversy in early 2016, the federal government commissioned a review which supported the content of Safe Schools but suggested minor changes. Subsequent government changes went far beyond these recommendations, including restricting Safe Schools to secondary schools and requiring parental consent for students to participate. Federal funding expired in 2017 and has not been renewed.

In 2020, NSW Education minister Sarah Mitchell de-registered a range of teacher accreditation courses in response to requests from then One Nation MLC Mark Latham. This meant that a range of courses that teachers take were no longer eligible to be taken for National Educational Standards Authority re-accreditation, including many which supported professional development on inclusion. This in particular undermined the ability of the Teachers Federation NSW and Independent Education Union to provide these courses free of charge to their members.

The NSW Government must fund and introduce a mandatory 'Safe Schools' program to every NSW school. Under the program, schools would be required to make a range of changes to ensure safe and affirming educational settings for queer and trans children and young people, including (but not limited to):

- Replacing chaplains with counsellors accredited under the National Educational Standards Authority.
- Introducing gender- and sexuality-affirming sex education.
- Restoring pride courses for teacher accreditation.

Queer and trans people exist everywhere. As such, *all* schools have an obligation to maintain support for queer and trans children and young people, so a new Safe Schools program must be mandatory, not voluntary. All children deserve to be protected, affirmed and kept safe from

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[5] Hill A.O., Lyons A., Jones J., McGowan I., Carman M., Parsons M., Power J., Bourne A. (2021). *Writing themselves in 4: The health and wellbeing of LGBTQA+ young people in Australia*. La Trobe University. https://www.latrobe.edu.au/__data/assets/pdf_file/0010/1198945/Writing-Themselves-In-4-National-report.pdf

[6] Ibid.

queerphobic bullying, regardless of the political views of those in charge of the school they attend.

The Safe Schools program should be made part of educators' normal course of duties: it should not be individual teachers' responsibility to arrange Safe Schools training, and the program should not rely on external organisations coming to a school for one-off sessions. This program should be embedded in teachers', teachers aides', and school counsellors' own education. The NSW Government has the power to embed mandatory training for public sector workers at any point: they should use this power to mandate training for all teachers on best supporting queer and trans young people.

The Safe Schools program should be developed by the queer and trans community, based on lived experience and the most comprehensive research available. Queer and trans adults were once queer and trans schoolchildren, and (along with relevant academic research) are best placed to know what schools need to do to keep queer and trans children and young people safe. The Safe Schools program should be developed by members of the queer and trans community, who are paid for their time, and should be consistently re-assessed and improved as further research becomes available.

Recommendation 19: Fund and introduce a mandatory 'Safe Schools' program to every NSW school to reduce homophobic and transphobic bullying and increase safety and support for queer and trans children and young people.

Recommendation 20: Immediately introduce additional mandatory training for NSW public school and pre-school teachers and support staff on best supporting queer and trans young people.

7. Wind back draconian restrictions on the ability for us to protest for our rights.

The 1969 Stonewall Riots in New York are widely recognised as a watershed moment for the queer rights movement. On this continent, the first Mardi Gras, in 1978, was an unauthorised street-based protest against police brutality towards our community. Taking to the streets to protest has been a foundation of all progressive social and legislative change we have won when it comes to queer rights.

And yet, in NSW, successive governments have determinedly undermined our right to protest. Section 214A of the *Crimes Act 1900*, ('the anti-protest laws'), with maximum penalties of 2 years' jail and/or $22,00 fines, are the most authoritarian and repressive laws criminalising protest in Australia. These laws were undemocratically rushed through NSW Parliament in under 48 hours in 2022, in the face of significant community opposition.

November 2023 and March 2024 protests in support of Palestine at Port Botany have seen widespread use of anti-protest laws charges, including against a large number of queer and trans protestors. These people now face months if not years of court dates, the stress of potentially significant sentences hanging over their heads, being subjected to restrictive bail conditions and resultant impositions on their privacy, and much more.

We understand laws criminalising protest as laws that enable police to enact brutal violence on us with impunity. Every law that increases criminalisation of protest activity is inherently a law that increases police power, resourcing and social licence to assault, harass, intimidate and surveil protestors.

Two sections of the anti-protest laws were in late 2023 found unconstitutional by the NSW Supreme Court, and yet the NSW Government has left these laws in place.

Laws like the anti-protest laws that criminalise protest are a threat to queer safety.

Kai's[7] story

Kai is a trans protestor who was arrested in Port Botany in November 2023 and charged under the anti-protest laws. They had been arrested previously at a protest, many years ago, under their pre-transition name ('deadname'). They legally changed their name as part of their gender transition three years ago.

[7] Pseudonym

Upon being arrested at Port Botany Kai gave the police their details including their current legal name. Despite this, the entire time in police custody, police officers insisted on using their deadname for all interactions. They requested their name be changed in their paperwork multiple times, and police officers refused. They told police they had an ID listing their correct name in their bag, but they were ignored. They were pressured by police into signing documents listing the wrong name. They found the process humiliating, violent and malicious.

At each court appearance following the arrest, their matter was listed under their deadname. They found it deeply distressing to have to keep responding to their deadname. Their lawyer requested for their name to be changed by the court on several occasions, beginning from their very first court appearance, when they were told that no, the court would not correct their name.

In March 2024 – after they had been told their name should have now been corrected – they answered a knock on their door late at night to find a police officer, asking for them yet again under their deadname, for a bail check. They responded with their correct name, provided their NSW Government ID to back this up, and a back-and-forth ensued. They were conscious that this officer was armed, far larger than them, and that they were home alone. Kai was forced to argue about their name and gender identity with an armed police officer, in the middle of the night, as a result of the anti-protest laws.

In the months since their arrest, Kai has had to take quite a few days off work to attend court, and quite a few more days off as mental health leave as a direct result of the immense stress of the anti-protest laws charges. They ended up dipping into negative leave balance.

Kai has top surgery scheduled for later this year – which was scheduled a year in advance to allow time for leave accrual and savings. Now that they have had to use all of their leave because of the anti-protest laws case, they are seriously considering cancelling or pushing back their surgery because they do not have the leave they will need to recover.

The anti-protest laws are driving state-sanctioned transphobia and may deny Kai their transition care.

Recommendation 21: Immediately repeal section 214A of the *Crimes Act 1900*.

Recommendation 22: Drop all current charges under the anti-protest laws.

Recommendation 23: Provide compensation to all protestors charged under the anti-protest laws for their time and money spent and emotional damage as a result of these charges.

8. Restrict the power of police to commit violence, harassment and intimidation.

8.1 Policing brings harm, not safety. Carceral solutions are not the answer.

The institution of the police was set up to protect the interests of the powerful and rich, and to protect the status quo, at the expense of everyone else's safety and wellbeing.

In England, the early police were tasked with enforcing the will of the king on the people through violence. In the US, early predecessors to the police were the slave patrols, whose job was to repress slave uprisings and capture and punish runaway slaves, for white property owners and politicians.

On this continent, policing was first introduced explicitly as a tool of colonial repression, to target and kill Aboriginal and Torres Strait Islander people. Since the earliest days of colonisation, militarised, armed and mounted police units have been deployed to govern First Nations communities antagonistically through criminalisation, to stifle First Nations self-determination and enable the colony to expand. The NSW Police Force was officially established for this very purpose under the *Police Regulation Act in 1862*.

Police Forces across Australia engaged in officially sanctioned massacres of First Nations people until as recently as under 100 years ago. The Coniston Massacre, led by Northern Territory Police Constable William George Murray, took place from 14 August to 18 October 1928. Over 60 women, men and children of the Warlpipri, Anmatyerre and Kaytete nations were killed by an official party of police officers and civilians.

The 1996 Australian Human Rights Commission report into Indigenous Deaths in Custody found that First Nations people are disproportionately placed in custody for trivial offences, often for 'offensive language,' or because they 'resist arrest' and 'assault police': the 'trifecta phenomenon.' Once arrested, First Nations people are far less likely to be granted bail than non-First Nations people, and far more likely to be killed in custody.

The Northern Territory Emergency Response, brought in by Howard in 2007, and continued under Rudd, supposedly to address child sex abuse in remote First Nations communities in the NT, was used to massively expand police resourcing and powers. In 2008-09 the NT had the largest police workforce per capita. The government built extra stations, sent out extra federal police officers, and implemented racist policies like regulating welfare payments, seizing Aboriginal land, and blanket bans on alcohol and gambling. Criminalisation of low-level offences increased, and police were given extra powers to enter First Nations homes and land without warrants. Empowering police to enter homes and private spaces has directly led to the police murders of people like Kumanjayi Walker, Joyce Clarke, Mark Mason and Patrick Fisher.

The NSW Police abuse drug laws to criminalise First Nations people and other minorities. Between 2013 and 2017, the NSW Police pursued more than 80% of First Nations people found with small amounts of cannabis through the courts while letting others off with warnings. This forces many young First Nations people into a criminal justice system that is difficult to escape from. This is a deliberate choice by the NSW Police, driven by its systemic racism, to target and criminalise Aboriginal people. Police similarly use drug laws to target other people of colour and people from other marginalised communities including queer and trans people and sex workers.

Strip searches are state-sanctioned sexual violence. This violence is disproportionately used to target, humiliate and violate First Nations people, along with queer and trans people and sex workers. Redfern Legal Centre's recently released report on strip searches of children by NSW Police said that over seven years (from July 2016 to June 2023), a total of 1,546 children were subjected to an invasive strip search by NSW Police. 45% of these were First Nations children, despite being only 6.2% of the population aged 10-17 in NSW, and included children as young as 10 years old. Strip searches of girls have also increased by over 50% across the 2022/23 financial year. Police often strip search First Nations people in public places, strip-searches are often not recorded, and often no charges are laid. Police very often also target queer and trans people and sex workers with strip-searches, through targeted policing efforts at queer events, festivals and other spaces police can target these demographics.

Police responses to people experiencing mental health crises are often violent and can be lethal. The Memorandum of Understanding between NSW Health and NSW Police admits that ‘for the most part, attendance by police at non-urgent mental health related incidents is associated with poor outcomes for mental health consumers and should be a last resort’. Yet, cops almost always show up to mental health ambulance calls. Fully armed cops often outnumber medical staff, and very often escalate rather than abate the situation.

In 2018, a group of 6 cops chased down a nonviolent mental health patient who had run away from the Royal Prince Alfred Hospital, and violently attacked him, tasing him multiple times and pepper spraying him. He lost consciousness, stopped breathing and died. This is not an isolated incident—police shootings of people in mental health crises are at an all-time high.

Police disproportionately target minority groups, strip-search them, and push them into poverty and homelessness, to only then criminalise. Police aren’t a solution and do not protect communities. The only minority that police protect are the state and ruling class. People will only be kept safe when communities are empowered and police institutions are obsolete.

It is for these reasons and more that Pride in Protest remains ambivalent towards the three changes in the Equality Bill that propose carceral solutions: the changes to the *Crimes Act 1900* , the *Crimes (Domestic and Personal Violence) Act 2007* and the *Crimes (Sentencing Procedure) Act 1999*.

We understand the intention of these changes are, respectively, to:

- Add HIV/AIDS and sex work to the list of attributes for which a person is guilty of an offence if they publicly threaten or incite violence towards a person or group on the basis of that attribute.
- Include threats to out a person's sexual orientation, gender history, HIV diagnosis, variations in sex characteristics or sex work as a form of domestic abuse for the purpose of making an AVO/APVO.
- Add queer and trans people to the list of people against whom crimes motivated by hatred for the group can be an aggravating factor in sentencing.

We understand the intention is to update these laws to respond to the very real danger queer and trans people, sex workers, and people living with HIV/AIDS face from discrimination, hatred and violence, and potentially to deter people from committing violence against these groups. However, we do not view carceral solutions as effective responses to bigotry.

Prisons are not rehabilitative spaces, and in fact can be extremely bigoted spaces that stoke people's existing prejudices further. Imprisonment will not solve a person's queerphobia.

Rather than increasing the power and resources given to police and prisons (themselves deeply homophobic institutions) to punish people after the fact, we should be looking to preventative measures – approaches that will decrease the prevalence of homophobia, transphobia, anti-sex worker bias and bigotry towards people living with HIV/AIDS in the community. This can include a multitude of approaches, including things like:

- An expanded and mandatory Safe Schools program, as discussed above, to ensure all people are taught about gender and sexual diversity from a young age, normalised through the school system.
- Universal gender affirmation leave and fully funded medical transition care on Medicare, to enable all trans people to access the medical transition care they want and need and to normalise gender transition
- Addressing the housing and cost-of-living crises so that people don't end up susceptible to misinformation about marginalised groups being to blame for their problems and acting out violently out of desperation and powerlessness.

Despite our belief that the changes put forth in the Equality Bill to the *Crimes Act 1900* , the *Crimes (Domestic and Personal Violence) Act 2007* and the *Crimes (Sentencing Procedure) Act 1999* are not ideal, we do not oppose them, and we maintain that the Equality Bill must be passed, immediately and in full rather than split up and nitpicked over, causing further delay.

8.2 Mandatory disease testing enables police to violate and discriminate against marginalised communities, and must end.

Pride in Protest put a submission to the recent review of the Mandatory Disease Testing Act 2021 ('the MDT Act'), and we continue to hold grave concerns about the harm the MDT Act brings to our community.

The MDT scheme stigmatises HIV positive people and people with hepatitis. This is heavily linked to homophobia and transphobia, as well as stigmatisation of sex workers and intravenous drug users. Stigma and discrimination lead to poorer, not better, health outcomes.

We strongly support the promotion of regular disease testing. The queer community – particularly gay men and transgender women – was devastated by the AIDS epidemic and knows more than most the importance of regular testing for blood-borne diseases. Australia has some of the highest rates per capita in the world of the use of the HIV prevention pill PrEP (pre-exposure prophylaxis). This is largely due to successful peer-driven campaigns, and has not been achieved through authoritarian mandates. Any framing of community opposition to the MDT scheme as being anti-safety, anti-worker or anti-testing is false and insulting.

Many of the frontline workers that this act claims to protect are sceptical or opposed to this act in contributing to their safety. We draw your attention to the submission by the Australian Services Union (ASU) during the 2020 inquiry to this bill, who stated that it was "an unjustifiable attack on the human rights and civil liberties of people who may have specific vulnerabilities, and those who are most likely to be stigmatised." The Nurses & Midwives Association and the Australian Salaried Medical Officers Federation both expressed in their submissions that the involvement of law enforcement in taking blood meant this act further undermined their workplace safety. This act not only stigmatises people with HIV, and the LGBTIQ+ community, but is anti-worker.

The MDT scheme may discourage people from seeking medical treatment. Forcing people to give blood samples for government testing could make them lose trust in health workers or not seek treatment when they need it. Stoking this type of fear can undermine the ability to test safely, and could increase the risk of infections in the community.

The MDT scheme may cause complacency. Some diseases take time to show up in a test. Someone tested under the MDT Act soon after infection may return a negative result despite having been infected. They may then not seek treatment, and may infect others unknowingly. Testing schemes should be based on best-practice health policy, which the MDT scheme is not.

The MDT scheme is unnecessary for protecting workers. There have been zero cases of a health worker in NSW being infected with HIV after workplace exposure since 1994. Forced blood tests are not found elsewhere in society, even in contexts where risk of disease transmission is much higher. Early childhood educators, for example, regularly get bitten and spat at but neither the children involved nor the workers are subjected to forced blood testing. Nurses similarly

experience spitting and biting with patients and yet are generally opposed to the MDT scheme for a range of reasons – including that it does not protect workers.

This law is not motivated by safety concerns, and is not a matter of the queer community against frontline workers. We do not oppose testing; we oppose people being forced to submit to a discriminatory testing scheme that violates autonomy and does not benefit anyone's health or safety.

We know that the NSW police profile and target members of communities against which they hold biases, including the queer community, intravenous drug users and sex workers – the MDT scheme only empowers the police to further target these groups and more, and violate their bodily autonomy.

History has shown us that the fight against blood-borne diseases – such as the AIDS crisis – has always been made more difficult by policing and authoritarian involvement. If a determination has been made that more must be done to prevent transmission of blood-borne diseases, then the government should look to community-based solutions to keep us safe and healthy.

Recommendation 24: Repeal the *Mandatory Disease Testing Act 2021*

Recommendation 25: Increase funding to peer-run organisations for the goal of ending HIV transmissions by 2025

8.3 Hold police accountable for overreach, violence and discrimination.

Many who oppose calls to disempower, disarm and defund the police argue that excessive use of force by police is only perpetrated by 'a few bad apples' and that by disciplining those individuals, the problem will go away. This defence has been drawn upon in many cases.[8] For instance, after US police fatally shot black teenager Michael Brown in Ferguson in 2014, triggering a wave of #BlackLivesMatter protests, the Mayor of Ferguson James Knowles III, said 'We've seen that there's been some bad apples out there, but I don't think that is indicative of the entire police department.'[9]

This misunderstands the violence inherent in police systems. Across the world, including in NSW, the law systematically errs in favour of allowing police to use excessive force.[10]

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[8] See, eg, "Bad apples exist in law enforcement and deserve prosecution and incarceration, but he also said that many officers suffer post-traumatic stress after deadly encounters" (https://abc7.com/1427071/); See also https://www.latimes.com/archives/la-xpm-1991-03-07-me-3138-story.html; https://twitter.com/CNNSotu/status/1267091151556947968?s=20

[9] https://www.nbcnews.com/storyline/michael-brown-shooting/ferguson-mayor-james-knowles-n323166

[10] Disproportionate outcomes of policing do not need to be discussed in depth. They are well known. See e.g. https://www.theguardian.com/australia-news/series/deaths-inside

The key statutory provision for allowable use of force by police in NSW is in sections 230 and 231 of *Law Enforcement (Powers and Responsibilities) Act 2002 (NSW)* ('LEPRA').[11]

> *230 Use of force generally by police officers*
>
> *It is lawful for a police officer exercising a function under this Act or any other Act or law in relation to an individual or a thing, and anyone helping the police officer, to use such force as is reasonably necessary to exercise the function.*
>
> *231 Use of force in making an arrest*
>
> *A police officer or other person who exercises a power to arrest another person may use such force as is reasonably necessary to make the arrest or to prevent the escape of the person after arrest.*

Both sections rely on the objective test of reasonable necessity to limit police officers' use of force. This is an imprecise standard and hard for non-legally trained members of the public to understand. It is also subject to different community perceptions of what constitutes sensible use of force. As the NSW Ombudsman argued in the context of administrative decisions, 'what is fair and reasonable depends a lot on your perspective.'[12]

What is 'reasonably necessary' in any situation is contextual. However when police use of force is challenged in court, precedent suggests it is rare for a court to find that the use of force was beyond that which is reasonably necessary.[13] One reason for this is that courts evaluate police conduct in light of 'the pressure of the events and agony of the moment' and not by reference to hindsight.[14] However, the same 'pressure of events' lens is seldom applied to an analysis of the behaviour of non-police persons. Instead, if an arrestee resists in any way, police officers can legally increase their use of force.[15]

As Connor J stated in McIntosh v Webster:[16]

> *[Arrests] are frequently made in circumstances of excitement, turmoil and panic [and it is] altogether unfair to the police force as a whole to sit back in the comparatively calm and leisurely atmosphere of the courtroom and there make minute retrospective criticisms of*

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[11] https://www.legislation.nsw.gov.au/#/view/act/2002/103/part18/sec231

[12] https://www.ombo.nsw.gov.au/__data/assets/pdf_file/0011/50006/What-is-fair-and-reasonable-depends-a-lot-on-your-perspective.pdf

[13] For a small body of the relevant authorities, see e.g. *Ussher v State of NSW* [2017] NSWDC 189; *State of New South Wales v Ouhammi* [2019] NSWCA 225; *Charara v New South Wales* [2009] NSWDC 263; *Reznytska v State of New South Wales* [2012] NSWCA 103; *Wessell v State of NSW* [2017] NSWDC 235; *Reilly v State of New South Wales* [2016] NSWDC 234

[14] http://www8.austlii.edu.au/cgi-bin/viewdoc/au/cases/nsw/NSWCA/2001/35.html

[15] RW Harding, The Law of Arrest in Australia (eds Duncan Chappell and Paul Wilson) p 254 of Australian Criminal Justice System 1977 cited in http://www8.austlii.edu.au/cgi-bin/viewdoc/au/cases/nsw/NSWDC/2010/243.html?context=1;query=%22leara2002451%20s230%22;mask_path=

[16] (1980) 43 FLR 112 at 123

> *what an arresting constable might or might not have done or believed in the circumstances.*

Section 230 is underpinned by an implied understanding that police officers must discharge their duties, including conducting arrests, even if there is significant risk of injury to a suspect or bystander. Courts have found that police officers should not be limited by the fear of liability to 'suspected criminals, victims or bystanders because that will impede the discharge of those duties.'[17]

Section 230 is also underpinned by an assumption that 'the community requires a strong and energetic police force to enforce criminal law by preventing crime and protecting members of the public from injury to their person and damage to their property.'[18] Under this 'policing as crime prevention framework', a stricter approach to the use of force is out of the question because it would render policing 'unduly defensive and therefore inefficient, and, as a consequence, members of the community would be put at risk.'[19]

This reinforces the sense that police officers are constantly operating in situations of urgency, and that options like de-escalation, diffusion or issuing cautions are rarely 'reasonably appropriate.' Instead force is the primary, and 'reasonable' option.[20] Through this lens, everything from a 'sudden movement'[21] to walking towards the officers[22] can present unpredictable intention and justify the use of force in the moment.

Most police conduct that falls short of unilateral or pre-emptive use of force is invariably characterised as reasonably necessary.[23] Unlike some parts of the United States,[24] in NSW there is no general principle that the use of force should be a 'last resort'. The principle of arrest as a last resort in LEPRA is a narrower articulation of that principle.[25]

NSW Police Force guidelines for acceptable use of particular weaponry are not publicly accessible or contained in statute but have been developed and drafted by Police without legislative oversight or public debate.

Criminal Defence Lawyers Australia notes:

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[17] *State of New South Wales v McMaster* [2015] NSWCA 228 at [26] (Beazley P)

[18] *Australian Capital Territory v Crowley* [2012] ACTCA 52 at [271] (Lander, Besanko and Katzmann JJ)

[19] http://www8.austlii.edu.au/cgi-bin/viewdoc/au/cases/nsw/NSWCA/2013/334.html [19] and [34]

[20] *State of New South Wales v Ouhammi* [2019] NSWCA 225 at [198]-[201] (Simpson AJA)

[21] Ibid

[22] http://classic.austlii.edu.au/cgi-bin/sinodisp/au/cases/nsw/NSWDC/2017/235.html?stem=0&synonyms=0&query=nsw%20consol_act%20leara2002451%20s230

[23] See, eg, *Cuthbertson v State of New South Wales* [2017] NSWDC 367

[24] https://www.nj.com/camden/2019/08/camden-police-launch-strict-last-resort-use-of-force-policy-chief-wants-it-to-be-national-model.html

[25] https://www.parliament.nsw.gov.au/bill/files/1600/A10302.pdf – Hansard, NSWLA LEPRA 17 September 2002; See also https://www.legalaid.nsw.gov.au/__data/assets/pdf_file/0004/28543/Police-powers-of-arrest-and-detention-Feb-2018.pdf Shopfront Youth Legal Centre, Part 7 'Arrest as a Last Resort.'

> *Within NSW Police's Tactical Options Model (TOM), tactical options, in ascending order of severity regarding force, include officer presence, communication, 'contain and negotiate', tactical disengagement, weaponless control, capsicum spray, baton, taser and firearm.*
>
> *According to the TOM, in assessing what tactical option is undertaken considerations of the number of other parties present and their age, gender, size, fitness, and skill level compared to that of the officers' present are required.*
>
> *Officers must continually reassess the situation to appropriately escalate or de-escalate the amount of force used, with instructions to use the minimum amount of force required.*[26]

According to the NSW Police website, the 'Weapons and Tactics Training Unit' is responsible for instruction, assessment and curriculum development in respect of Operational Safety and Tactics. The weapons and tactics taught include weapon-less control, batons, handcuffs, oleoresin capsicum spray (OC), Conducted Electronic Weapon (CEW – Taser) and firearms. The website does not provide any further specifics on the curriculum.[27]

A 2016 NSW Police Force Document, Use of Conducted Electrical Weapons (Taser), illustrates the 'Tactical Options Model'. The model sets out guidelines for use of various control tactics by the NSW Police Force, including the deployment of lethal and non-lethal weapons and other use of force. The document states that:

> *Officers should familiarise themselves with the Tactical Options Model as outlined in Annexure A. This model will form the framework for use of force decision making by officers. In particular, 'communication': which is the hub of the wheel and therefore should be used as a component of all other tactical options. Force should only be used where de-escalation or negotiation have not been successful, or where circumstances do not allow any reasonable opportunity to attempt these techniques.*[28]

In theory, the fact that communication is central to the model and force only recommended where de-escalation or negotiation have not been successful is positive. However, in practice the guidelines set no clear, enforceable rules for when use of each tactic or weapon is reasonable or appropriate. This means the guidelines are unenforceable and open to subjective interpretation by individual officers. It also means it is difficult for people who have experienced police violence to understand their rights and whether and how they can access recourse.

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[26] Poppy Morandin & Jimmy Singh., 'Law on Police Use of Pepper Spray in NSW', *Criminal Defence Lawyers Australia,* 12 June 2020, https://www.criminaldefencelawyers.com.au/blog/law-on-police-use-of-pepper-spray-in-nsw/

[27] NSW Police Force, 'Weapons and Tactics Training Unit', *NSW Government*, https://www.police.nsw.gov.au/recruitment/the_training/associate_degree_in_policing_practice/operational_skills

[28] Major Events & Incidents Group, *Use of Conducted Electrical Weapons (Taser),* New South Wales Police Force, 1 July 2016, https://www.police.nsw.gov.au/__data/assets/pdf_file/0010/583705/taser-use-public-information.pdf

Further, policing varies greatly according to race[29] and socio-economic status.[30] Taken together, these factors multiply the value judgments police must make and result in significant variations in the use of force and weapons by police officers.

An example of this model failing or being ignored by police officers was the 6 June 2020 OC spraying of a large number of peaceful protestors, including many young teenagers, in the Central Station tunnel in Sydney. This spraying happened very suddenly, with no communication to the protestors that the spray was about to be deployed.[31]

There are some straightforward changes the NSW Government should make now to protect the community from use of excessive force by police officers. The Government should strengthen legislative provisions governing the reasonable use of force by police officers in NSW, and use of force guidelines should be made publicly available in accessible formats and promoted widely along with clear instructions for anyone who is a victim of police use of force about how they can make a complaint against the officer(s) involved.

Recommendation 26: Strengthen legislative provisions governing the reasonable use of force by police officers in NSW, and publish and promote use of force guidelines along with clear instructions for how victims of police force can make a complaint against the officer(s) involved.

Complaints against police can be lodged with the Law Enforcement Conduct Commission (LECC), which can undertake an investigation and conduct further enquiries. However, the LECC does not seek to achieve a personal remedy for a person reporting serious misconduct. For a personal remedy, the person must take legal action.

Under 6(1) of the *Crown Proceedings Act 1998*, civil claims for police misconduct can be brought against the State of NSW.[32] Proceedings can also be commenced against the Commissioner of Police, NSW Police Force and individual police officers or employees.

According to the Guardian, NSW Police has paid out more than $236 million in legal liability.[33] [34] According to the 2018-19 NSW Police Annual Report, the contingent liabilities (which are

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[29] https://www.pnas.org/content/115/37/9181

[30] https://www.smh.com.au/national/nsw/nsw-police-database-unlocked-the-where-when-and-why-officers-used-force-20190917-p52s1p.html

[31] Caitlin Fitzsimmons, 'What really happened at Central on the night of Black Lives Matter rally', *Sydney Morning Herald,* 14 June 2020, https://www.smh.com.au/national/nsw/what-really-happened-at-central-on-the-night-of-black-lives-matter-rally-20200611-p551ov.html

[32] http://classic.austlii.edu.au/au/legis/nsw/consol_act/cpa1988193/s6.html

[33] https://www.theguardian.com/australia-news/2020/feb/13/nsw-police-treated-millions-in-damages-for-misconduct-as-cost-of-doing-business

[34] https://www.parliament.nsw.gov.au/tp/files/77199/Special%20Report%2020%2001%20-%20Complaint%20by%20Commissioner%20for%20Oversight%20of%20LECC%20against%20Chief%20Commissioner.pdf

estimates of anticipated legal expenses, legal claim liabilities and associated legal expenses arising from civil claims against NSW Police) totalled $8,184,000 for the 18/19 financial year.[35]

This system ensures that police officers who use excessive force generally face no financial consequences. By covering the costs of civil suits and settlements against particular officers, the State undermines any potential deterrent function of settlement or judgement costs to specific officers and shields those officers from opportunities for behavioural development and education to prevent future misconduct. This is especially true where unit commanders are not informed of findings made against officers under their command.[36] To protect the community from excessive police violence, police officers should be made personally liable for misconduct settlements.

Recommendation 27: Make police officers personally liable for misconduct settlements.

Excessive force is one of the most common complaints at Redfern Legal Centre's police accountability advice clinic.[37] Excessive force is often deployed against people committing offences that present little to no risk or damage to the community, including offensive language and refusing directions from police. These offences resulted in the most forceful interactions with NSW Police between 2014-18.[38]

Members of the NSW Police Service who were employed before 1988 have access to superannuation via a number of different schemes, including the Police Superannuation Scheme. In 2017, Police News estimated that pooled unfunded superannuation liability amounted to approximately $20 billion, with the NSW Government due to pay out the liabilities by 2030.[39] Currently, the majority of NSW Police are members of the First State Super Scheme. The Police Superannuation Scheme has led to substantial costs for the State. In 2010, the Sydney Morning Herald reported nearly two-thirds of retired police were receiving the pension 15 years before retirement age.[40] Limits or conditions on superannuation and pension access should be placed on officers involved in excessive force.

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[35] https://www.police.nsw.gov.au/__data/assets/pdf_file/0010/658513/NSW POLICE FORCE_2018-19_Annual_Report.pdf, p 69

[36] https://www.theguardian.com/australia-news/2020/feb/13/nsw-police-treated-millions-in-damages-for-misconduct-as-cost-of-doing-business

[37] https://www.smh.com.au/national/nsw/nsw-police-database-unlocked-the-where-when-and-why-officers-used-force-20190917-p52s1p.html

[38] Ibid.

[39] https://pansw.org.au/downloads/Fact_Sheets/Super_and_NSW_Police.pdf

[40] https://www.smh.com.au/national/nsw/police-retire-early-on-full-pension-20101110-17npr.html

Recommendation 28: Stand down and withhold pensions from officers found to have used excessive force or committed discrimination or other misconduct.

Right now, most complaints against police officers or departments are investigated by police institutions themselves. This will never bring about justice for people harmed by police. There are a range of alternative models for oversight and accountability for police, and Pride in Protest does not here make specific recommendations about what a proper community oversight of policing model should look like, however principles must include:

- No resourcing to police institutions for police complaints handling: resourcing for police oversight should go 100% to non-police bodies.
- Stringent conflict of interest requirements for any entity given police oversight powers: no former police officers, spouses of police officers or similar should be given the power to investigate police complaints.
- Explicitly prioritise support for the victim(s) of police misconduct: acknowledge the immense trauma police violence and overreach can cause to people and take active steps to minimise the re-traumatisation that a complaint process can cause, such as by reducing the burdens of requiring victims to repeatedly re-tell their story, limiting the ability of police to cross-examine or intimidate victims, and proactively providing mental health and other supports to victims.

Recommendation 29: Introduce community oversight of policing – no more cops investigating cops.

8.4 Decriminalise victimless ‘crimes’ and those that criminalise poverty, homelessness, queerness and other axes of marginalisation.

Many things that are criminalised ought not to be. A clear example is the criminalisation of drugs, which – as discussed above – is overwhelmingly used by police to target First Nations people and other minority groups.

The criminalisation of drugs is one of the major contributors to our prison system. There were 1749 prisoners in NSW due to illicit drug offences, and the academic consensus is that prison is not effective in rehabilitation following drug use. The methods used to discover drug possession are also ineffective, with strategies like sniffer dogs and so-called ‘pro-active policing’ mostly failing to detect drugs despite leading to intimidation of minorities. It is also common for police to target queer events in the search for drug users suggesting that these laws are applied selectively, and not for social benefit.

Similarly, criminalisation will never solve ‘crimes’ driven by poverty, such as fare evasion, begging and shoplifting. Threats of police violence are unlikely to deter a single mother in poverty from stealing the formula her baby needs to stay alive from Woolies, or hopping on a bus without paying to get her child to a medical appointment.

Many of these policies have only created further burdens that harm everyone. The minimal revenue raised for the state by enforcing fares on public transport does not even fund the inspectors employed to enforce the fares. This is a role that could instead be re-deployed to meaningfully support passengers, rather than to hassle poor people for nobody's gain.

The solution to these 'crimes' is not to empower and resource police officers to criminalise and violate people, but to address the root causes through disinvestment in police and investment in preventative, community wellbeing measures.

Recommendation 30: Decriminalise drug possession.

Recommendation 31: Decriminalise offences driven by poverty, including fare evasion, shoplifting and begging.

8.5 Disarm, disempower, defund and dismantle the NSW Police. Reinvest savings into community solutions that actually provide safety.

In February 2024, a NSW Police officer allegedly used his police-issued firearm to commit a double murder. The officer had a known history of excessive force and violence using police weapons – including a well-publicised incident of tasing an Aboriginal man in the face with his police taser while on-duty – but had been allowed to retain his badge and access to police weaponry. Sadly, this incident was not an outlier. It is just the latest example of the institutional racism, queerphobia and violence of the NSW Police Force.

The police are a racist, violent institution that doesn't protect queer people or victim-survivors of domestic and family violence.

There have been over 560 Aboriginal and Torres Strait Islander deaths in custody since the 1991 Royal Commission, including the tragic death of Sistergirl Veronica Baxter after she was incarcerated in a men's prison. The NSW Special Commission of Inquiry into LGBTIQ hate crimes found that there is "shameful homophobia, transphobia and prejudice" within NSW Police. Intimate partner violence is under-reported nationwide, and reporting of abuse committed by police officers is practically non-existent. The NSW Law Enforcement Conduct Commission 2023 inquiry into NSW Police Force responses to domestic and family violence incidents found that incidents of abuse are deliberately and routinely mishandled when the accused offender is a police officer.

These are just some of the examples that make it clear: the police are not keeping the community safe. Police have too much access to weapons and other resources. They use these to brutalise us, not bring safety.

Access to particular weapons varies across different police units. The standard equipment issued for a non-specialist NSW police officer can include a semi-automatic Glock 22 pistol, conducted electricity weapon (TASER), pepper spray, baton and handcuffs. Specialist police

units like the Public Order and Riot Squad have even greater access to weaponry. Police in Australia are becoming increasingly militarised, with officers trained in military-style tactics and thinking, and being granted an expanded weapons arsenal. This includes semi-automatic weapons which have greater velocity than regular guns, are more indiscriminate and can cause greater collateral injuries; as well as other public order and riot weaponry like a water cannon. Beyond representing immense capacity to cause harm and death, this arsenal is also extremely expensive.

It is not only firearms that the NSW Police use to kill people. "Less lethal" weapons such as tasers, batons and pepper spray were supposedly introduced to reduce police use of lethal weapons. However, this has not been the case. Research shows no reduction in lethal firearm use by police officers when they have access to these "less lethal" alternatives. Further, these alternative weapons are not non-lethal. There are multiple recorded incidents of police killing people with tasers and bean bag rounds – often, people who have harmed nobody and are experiencing mental health crises. Weapons like pepper spray, police horses and dogs are routinely deployed towards peaceful protestors, causing injury. This includes the 2020 police deployment of pepper spray inside Central Station towards a crowd predominantly made up of young people and children, and the 2023 weaponising of police horses to charge into a crowd of peacefully seated community members in Botany.

There is no link between weaponry used and reduced safety risks. Academic literature suggests that disarming police is key to the safety of not only the public, but also police officers themselves. When police officers carry guns, it can incite feelings of fear, conflict and anxiety in members of the public, particularly those from highly policed demographics. Arming police with lethal firearms may erode public trust in law enforcement,[41] increase an officer's testosterone and aggressive thoughts and behaviour,[42] expose police to greater risks,[43] and result in gun-wielding officers perceiving risks that do not exist.[44] Use of force scholars often repeat the adage "to a man with a hammer, everything looks like a nail."[45] This can make interactions between officers and members of the public more tense, and ultimately may lead to an increased likelihood of violence.[46] In 18 countries, including the United Kingdom and New Zealand, police do not ordinarily carry guns.[47] [48] Removing police weapons is also consistent

[41] https://www.pnas.org/content/115/37/9181

[42] http://faculty.knox.edu/fmcandre/guns-testo-aggress.pdf?fbclid=IwAR1A6cs7WJ4jksSB7AcmQJBdE1yi82P11SSAD9b_Tn0UwCp_jwOZcLNvQ08

[43] https://academic.oup.com/policing/article-abstract/8/2/183/1508846

[44] https://www3.nd.edu/~jbrockm1/WittBrockmole_inPress_JEPHPP.pdf

[45] Chevigny P 1995 Edge of the Knife: Police Violence in the Americas The New Press New York

[46] https://academic.oup.com/policing/article-abstract/8/2/183/1508846

[47] https://www.sbs.com.au/news/the-feed/what-if-police-didn-t-carry-guns

[48] https://www.statista.com/chart/10601/where-are-the-worlds-unarmed-police-officers/

with the Royal Commission into Aboriginal Deaths in Custody's recommendation for community policing practices.[49]

Recommendation 32: Disarm the NSW Police. Ban police use of firearms, tasers, OC spray and batons; disband the Mounted Police Unit and end the use of dogs for drug sniffing and crowd control.

It is not only access to weapons that police use to commit violence, it is also the types of powers they are given to enact violence and control over people's bodies. A clear example explored above is the power police officers have to strip-search, often with little to no reasoning, and often in a targeted manner. Police should not have the power to sexually abuse people.

There are a huge range of measures that can and should be taken to remove powers that police use to cause harm, to target, to harass and to intimidate people. Some further examples include the broad scope police often have to carry out bail checks in a targeted and intimidatory manner, broadly deploy facial recognition technology at public protests, and more. These powers must be examined and abolished.

Recommendation 33: Disempower the NSW Police. Ban police strip searches, end police use of facial recognition technology at public protests and other 'proactive policing' measures, and restrict police officers' ability to conduct bail checks. Examine and abolish other police powers used to target, violate, harass and intimidate.

The over-equipping of the police results in ever-expanding police budgets. According to the NSW Budget, the NSW Police Force cost the people of NSW $5.5 billion in 2022-23. They have since been allocated $5.7 billion for 2023-24. This is a dangerous overspend of money that should be diverted to preventative, non-violent safety initiatives.

Arming and empowering the police threatens the safety of people and communities – and even undermines the safety of police officers themselves. It just brings more violence. And it's diverting billions of dollars away from the types of things that actually keep communities safe.

We know what keeps us safe, and it's not cops. A racist, homophobic, armed, violent gang will never keep us safe. We know what we need to feel and be safe. We need to be able to afford a stable roof over our head, and put food on the table without worrying we won't be able to afford our medication that month. We need to know that if we experience domestic violence there'll be well-funded services like shelters, social workers, community legal centres, and other supports that can immediately give us comprehensive free help. We need to know that if we or others in our community experience a mental health crisis, there'll be a compassionate, effective, nonviolent response aiming to heal rather than criminalise.

[49] http://www.austlii.edu.au/au/other/IndigLRes/rciadic/national/vol5/5.html

A core element of police abolition is a focus on preventative measures to reduce and eliminate socio-economic drivers of crime. This means taking seriously a commitment to ending poverty, providing housing for all, adopting a health-based, harm-minimisation approach to substance abuse, eliminating racial and gender inequality and implementing consent and healthy relationships education in schools.

Recommendation 34: Defund the NSW Police. Redirect funding saved through disarming and disempowering the police to programs, services and infrastructure that actually provide community safety, such as public housing, affordable food and medicine, domestic violence services, social workers and mental health workers.

The NSW Police are given a variety of functions, many of which are obsolete or harmful, and none of which they do well. Functions like criminalising poor people, targeting and locking up Aboriginal kids, and over-policing protests calling for justice and human rights, are functions that can simply cease to exist. Other functions currently given to the police may have some utility, but the police are an inappropriate entity to be carrying out these functions. This includes responding to mental health crises and domestic violence. In these situations, some response is required but police responses almost always lead to more harm, violence or even death. Functions like these should be handed over to more appropriate entities to carry out in a way that prioritises safety and wellbeing rather than violence, control and punishment.

Recommendation 35: Dismantle the NSW Police. Examine all functions currently performed by the NSW Police, and end those that only cause harm. Hand over remaining functions (and associated funding) to more appropriate entities to carry out in a way that prioritises safety and wellbeing rather than violence, control and punishment.

9. End NSW Government support for genocide in Gaza.

Since October 2023, Israel has murdered over 40,000 Palestinians, including over 16,000 Palestinian children. When we speak of LGBTI+ safety, we must include the safety of the LGBTI+ Palestinians being massacred, including with weapons from Australia.

We reject colonial attempts to 'pinkwash' the occupation, apartheid and genocide of Palestine and its people. 'Pinkwashing' refers to the co-option of queer rights movements by Israel. Israel presents itself as a progressive state which promotes the rights and liberties of queer people, and uses this to distract from, and even attempt to legitimise, its violence against Palestine.

Israel attempts to erase the lives and dignity of all Palestinians, whether they are trans, gay, cis or straight, by asking people to believe that the presence of queerphobia in Palestine justifies a genocide. Queerphobia is everywhere – as every queer and trans person well knows – and never justifies (and is never solved by) an indiscriminate massacre. The greatest threat to queer and trans Palestinians is, by far, Israel and the IDF, backed by other colonial forces like Australia, the UK and the US.

Israel has made it clear that its so-called 'progressive' values do not extend to Palestinians. Whilst they are killing Palestinians of all genders and sexualities by the thousands, the IDF has posted pictures of soldiers smiling at the scene of a war crime, holding a rainbow flag with "in the name of love" written across it. Violence, occupation and genocide is never in the name of love, and is never in the name of queer people. To quote an open letter from Queers in Palestine:

> *There is no possibility of any liberatory political and social movement to achieve life and dignity if it is aligned with the genocidal death machine of Israel. Israel is founded on blood and is sustained through blood.*

We urge all those reading this submission to spend some time looking at *Queering the Map* where plenty of queer and trans Palestinians have shared their stories of queer joy, queer love, and queer heartbreak. Here are some words from a queer Palestinian whose love was ripped from them by Israeli state violence:

> *I've always imagined you and me sitting out in the sun, hand and hand, free at last. We spoke of all the places we would go if we could. Yet you are gone now. If I had known that bombs raining down on us would take you from me, I would have gladly told the world how I adored you more than anything. I'm sorry I was a coward.*

Israel's genocidal efforts in Palestine did not begin on October 7 2023, this has been a 75-year project, but the world has been watching the egregious escalation of Israel's violence these past few months. Meanwhile, we've seen our own government not only fail to take any action to stop it, but in fact act to help those committing the mass murders.

Over the past 6 years the Australian government has approved 332 defence exports to Israel, and in October 2023 deployed Australian troops and equipment to Israel to assist in their war on

Gaza. Australian arms and ammunition exports to Israel have totalled $13m in value over the past five years. The Australian government is and has long been intimately tied to the IDF and to the Israeli arms industry.

There are factories in NSW manufacturing weapons, or parts for weapons, that Israel is using to kill Gazans. Protestors who take action to slow or halt the production of these weapons (to slow Israel's massacre of Palestinian people) are arrested and criminalised.

While diplomatic relations between Australia and Israel are a federal issue, there are many things the NSW Government can and should do to protect the safety of LGBTI+ people in Palestine.

Recommendation 36: Protect queer and trans Palestinians by sanctioning Israel. Ban companies owned by or tied to the Israeli Defence Force from operating within NSW. Ban the manufacturing of weapons or weapons parts for sale to Israel within NSW.

Contact

Thank you for taking the time to consider our submission. Please get in touch for more information or if you would like to speak further.

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