

**Submission
No 47**

EQUALITY LEGISLATION AMENDMENT (LGBTIQA+) BILL 2023

Organisation: Greens NSW

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**Greens NSW submission to the
Equality Legislation Amendment (LGBTIQIA+) Bill 2023 Inquiry**

14 April 2024

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1. Introduction

NSW has the worst laws in the country for LGBTIQIA+ people. The Equality Legislation Amendment (LGBTIQIA+) Bill 2023 addresses a number, but not all, of these issues.

The Greens are committed to action being taken in this Parliamentary term to achieve the protection of rights, dignity and equality of all LGBTIQIA+ people in our state. We are also supportive of reforms to ensure protections for people living with HIV and sex workers.

For decades, the NSW Greens have been working with and for those seeking to advance equality and strengthen discrimination protections - both in Parliament and on the streets - and we will not stop until we see this realised.

Laws that allow for discrimination in society - whether in education, health services, aged care or workplaces - are unacceptable. While we welcome recent reforms and those underway and under consideration, we express our disappointment that successive Liberal/National and Labor governments in NSW have failed to act before now.

The Greens support the Equality Bill, and appreciate the opportunity to contribute to the inquiry, including additional support and protections that could be provided for LGBTIQIA+ people in NSW.

We would welcome the opportunity to speak to any part of this submission as part of the Inquiry, and can be contacted via the office of Dr Amanda Cohn MLC at amanda.cohn@parliament.nsw.gov.au.

2. Self-Determination for Identity Documents

The Greens strongly support a repeal of requirements for surgical procedures to alter state records of sex. NSW is the last jurisdiction that requires surgery for trans and gender diverse people to change their birth certificates and other official documents - this means that people are being forced to undergo medically unnecessary genital surgery, including significant cost, recovery time, and health risks - for the sake of documentation. Everyone must be able to alter their sex or gender on all official documents, consistent with who they are, how they live, and how they identify, without paternalistic and violating requirements for proof of a 'sex affirmation procedure'.

In a variety of situations, people are unnecessarily put at risk of discrimination or violence because the gender listed on their identification does not match their perceived gender. People who have updated federal documents but not been able to update state documents have been prevented access to entitlements like superannuation because of inconsistencies in identification.

The Greens note that opponents of this reform have adopted alarmist rhetoric that echoes the framing of same-sex-attracted people by opponents of the decriminalisation of homosexuality decades ago. It is clear from the experience of every other Australian jurisdiction that these concerns are completely unfounded and serve to further marginalise and stigmatise trans and gender diverse people.

3. Protection from Discrimination

The Greens recognise and support the need for a holistic review of the NSW Anti-Discrimination Act (ADA) by the Law Reform Commission. However, this should not delay urgent amendment to extend protections under the ADA to people who are bisexual, asexual, non-binary, have variations of sex characteristics or are sex workers.

Further to this, there are a number of exceptions in the Anti-Discrimination Act that allow for ongoing discrimination against LGBTQIA+ people. The Greens in the NSW Parliament first introduced a Bill to remove exceptions for religious bodies, private education authorities and small workplaces over 18 years ago - and this is more urgent than ever.

The ADA as it stands has an inconsistent approach to protection. While the Act protects some community members from discrimination and vilification, it does not encompass the full range of attributes that warrant protection. The non-exhaustive range of attributes protected by the Act results in an uneven level of protection across our communities - sending a dangerous political message of whose interests and rights are considered worthy of protection over others.

While s93(7) of the *Crimes Act 1900 (NSW)* makes “publicly threatening or inciting violence on the grounds of [...] sexual orientation, gender identity, intersex status, or HIV/AIDS status” a criminal offence, no similar civil protections for these groups are conferred by the ADA.

Indeed, the limited scope of protections for certain members of the LGBTQIA+ community under the ADA is cause for serious concern. The ADA only confers protection from discrimination and vilification on the basis of “homosexuality”, in effect making NSW the only Australian jurisdiction in which bisexual people are not protected from discrimination and vilification.

Beyond this, the ADA presently does not grant protections to people with innate variations of sex characteristics, who are covered by equivalent legislation in Tasmania, the ACT, and South Australia, in addition to the *Sex Discrimination Act 1984 (Cth)*. It also limits protections on the basis of transgender status in s38A only to people who identify “as a member of the opposite sex”, and thereby falls short of protecting people who identify as non-binary or gender diverse.

These omissions leave a significant portion of the LGBTQIA+ community exposed to the risk of vilification and discrimination, and undermine the significant expansion of LGBTQIA+ rights in the years since the introduction of the ADA.

We wish to make specific mention of issues of discrimination in sport. Sport has enormous physical and mental health benefits, brings people together and builds community cohesion. But sport is not a safe place for everyone, as shown in the damning rates of homophobic and transphobic violence reported by LGBTQIA+ players. The Bill as drafted will harmonise protection from discrimination in sport with Commonwealth law and other states and territories, which is a step in the right direction, but does not go far enough to ensure safety, inclusion, and participation in sport for trans and gender diverse people. In particular, the Bill as passed would allow discrimination against trans and gender diverse people in activities that are part of a competition and where the strength, stamina or physique of a person competing is relevant. Many community level participatory activities could inadvertently be captured by these criteria for lawful discrimination. The Greens recommend the criterion relating to 'competition' be amended to activities that are elite, representative or professional where peak sporting bodies have appropriate protocols in place to guide the participation of trans and gender diverse athletes, as many currently do.

In relation to people living with HIV, it is notable that s 49ZXB of the ADA only establishes protections against vilification on the basis of HIV/AIDS status, with no parallel protections against discrimination. It is critical that this oversight is corrected, and protections on this basis extended to include discrimination.

The ADA also fails to establish protections on the basis of a person's profession, trade or occupation attributes that are protected in other Australian jurisdictions. The former is of particular concern for people who work in industries that remain highly contested and marginalised. While sex work in NSW has been largely decriminalised, the ADA has not been updated to reflect this shift and extend necessary protections to sex workers.

In 2020, the Greens introduced the Anti-Discrimination Amendment (Sex Workers) Bill into the NSW Parliament to address the discrimination specifically faced by sex workers.¹

As the Sex Workers Outreach Project wrote in a 2022 submission to the Queensland Human Rights Commission:

*"As we approach thirty years of improved laws, in NSW we are acutely aware that the honourable intentions of these legislative improvements are routinely undermined by the lack of adequate anti-discrimination protections for sex workers. Despite law reform, sex workers in NSW still regularly experience discrimination in relation to education, provision of goods and services, professional qualification/membership, employment, housing, banking, and vilification. Our lesson from New South Wales is that Anti-Discrimination protections are essential to sex workers accessing the full benefits of decriminalisation."*²

¹ Abigail Boyd MLC, Anti-Discrimination Amendment (Sex Workers) Bill 2020, available at: https://www.abigailboyd.org/anti_discrimination_amendment_sex_workers_bill_2020

² Sex Workers Outreach Project, Submission: Review of the Anti Discrimination Act - Queensland, p2, available at: https://www.qhrc.qld.gov.au/_data/assets/pdf_file/0007/38617/Sub.121-Sex-Workers-Outreach-Project-Inc-SWOP-NSW_Final.pdf

A 2020 survey of sex workers conducted by Scarlet Alliance, the Australian Sex Workers Association, in partnership with the UNSW Centre for Social Research in Health found that 96% of sex workers had experienced stigma or discrimination in relation to their occupation in the twelve months prior.³ In spite of this, sex workers who are subject to discrimination or vilification currently have no avenues of recourse under the Act or other legislation.

Protections from discrimination should be accompanied by the removal of remaining summary offenses for sex work that perpetuate discrimination and stigma, as well as posing a direct threat to the welfare and autonomy of sex workers. Repealing these offences will improve the safety and dignity of sex workers.

4. No Exceptions for Discrimination

As the NSW Council for Civil Liberties said in August 2023: “We want an Anti-Discrimination Act that does not discriminate.”⁴ While in theory this is a simple proposition, Part 6 of the ADA carves out a number of avenues for discrimination, providing what The Guardian Australia reported as “the widest exceptions to discrimination of any act in the country.”⁵ This is particularly the case for non-government educational institutions, which are afforded more leeway in NSW than in any other State or Territory to discriminate against students and staff on the basis of sex, disability, transgender status, homosexuality, and marital or domestic status.

The Greens are opposed to the provision of any exceptions to the blanket obligation not to discriminate or vilify. We do not believe that piecemeal exceptions should be carved out of the Act to allow institutions or individuals to discriminate. This approach enables the granting of exceptions particularly to those with the wherewithal and means to lobby lawmakers and other stakeholders to allow them to ‘legally’ discriminate.

The Greens support the removal of exceptions from the Act, and instead support a requirement for all individuals, groups, or institutions wishing to gain an exemption from the Act, on whatever basis, to apply to Anti-Discrimination NSW. Taking this approach will make it clear that the ADA is there first and foremost to protect people from discrimination. We recognise that there may be some legitimate reasons for exemptions, but do not support blanket exceptions that allow whole sectors or types of organisations to discriminate against whole sections of the population.

³ Scarlet Alliance and UNSW Centre for Social Research in Health, Stigma Indicators Monitoring Project, January 2021, available at:
<https://www.unsw.edu.au/content/dam/pdfs/unsw-adobe-websites/arts-design-architecture/ada-faculty/csrh/2022-01-stigma-indicators-summary-sw-2021.pdf>

⁴ NSW Council for Civil Liberties, Guardian Aus: NSW Council for Civil Liberties says religious vilification bill allows organisations ‘to discriminate against others’, 1 August 2023, available at:
https://www.nswccl.org.au/guardian_au_nsw_council_for_civil_liberties

⁵ Christopher Knaus, Advocates say NSW anti-discrimination laws are failing vulnerable, 6 August 2023, available at:
<https://www.theguardian.com/australia-news/2021/aug/06/advocates-say-nsw-anti-discrimination-laws-are-failing-vulnerable>

5. Access to health care

The Bill proposes to legislate what is already accepted practice for health practitioners, known as “Gillick competency,” which is that young people can make decisions about their own medical or dental treatment from 16 years old and in some circumstances from 14 years old where they are assessed as having the capacity to understand the risks and benefits of a treatment and are able to give informed consent.

The Greens support this proposal which will go some way to reduce barriers to health care for young people. However, stigma and discrimination in health care settings persist, with significant impact on the health and well-being of LGBTIQIA+ people in NSW. In particular, a number of studies have shown that trans and gender diverse people frequently avoid seeking necessary medical care due to fear of discrimination in health care settings, and are missing out on key preventive health measures like cancer screening⁶.

It will take dedicated effort to ensure cultural safety in mainstream health services. In the meantime, it is critical that specialised health services, such as the ACON Health Centre, are supported and expanded to reach regional communities. Further work including resourcing is required to implement the NSW LGBTIQIA+ Health Strategy. In addition, LGBTIQIA+ inclusive practices within NSW Health could be improved by ensuring electronic medical records are set up to use patient-directed names and pronouns, and for gender markers to provide the most clinically relevant information.

Gender-affirming health care is health care, and should be regulated in the same way as any other kind of medical treatment, without additional potentially stigmatising legislative requirements that also serve as barriers for practitioners to engage with the significant health needs of trans and gender diverse people.

Despite attempts by anti-trans hate groups to portray gender affirming care as contested, the Australian Medical Association have advocated for the urgent enhancement of access to beneficial gender-affirming treatment that people who are trans and gender diverse have given consent for, and to ensure that medical practitioners who provide gender affirming care to patients are protected and supported in the provision of gender affirming care⁷.

In response to increasing media and political attention to gender affirming care for young people, The Royal Australian College of Physicians have stated that “Ensuring children and adolescents with gender dysphoria can access appropriate care and treatment regardless of where they live, should be a national priority. Withholding or limiting access to care and

⁶ Kerr, L., Fisher, C.M., Jones, T. 2019. TRANScending Discrimination in Health & Cancer Care: A Study of Trans & Gender Diverse Australians, (ARCSHS Monograph Series No. 117), Bundoora: Australian Research Centre in Sex, Health & Society, La Trobe University. Available at:

https://www.latrobe.edu.au/__data/assets/pdf_file/0005/1065866/TRANScending-Discrimination-in-Health-and-Cancer-Care.pdf

⁷ Australian Medical Association, LGBTQIASB+ Health Position Statement, 6 February 2024, Available at: <https://www.ama.com.au/articles/lgbtqiasb-health-position-statement>

treatment would be unethical and would have serious impacts on the health and wellbeing of young people.”⁸

Despite significant media interest in the topic of regret following gender-affirming surgical procedures, platformed by advocates for banning such treatments, the evidence suggests that less than 1% of transgender people who undergo gender-affirming surgery report regret. This is striking when compared to the 14.4% of the broader population who report regret after similar types of surgery including facial reconstruction, chest or genital surgery.⁹

Finally, the Greens support the addition of gender identity and expression to the list of conduct that does not indicate a mental illness for the purpose of the Mental Health Act. This is in line with international diagnostic standards for mental illness including the Diagnostic and Statistical Manual of Mental Disorders. This is an important step to reduce stigma for trans and gender diverse people.

6. Strengthening our Laws to Provide Equality and Justice

Legislation should use language that is clear, unbiased, and accurate. The Greens support all interim and enduring changes to legislation to this end, including, for example, correcting references to “suffering from HIV” to “living with HIV”.

The Greens support the recognition of parents for children born out of commercial surrogacy outside of NSW, as well as the formal recognition of co-parenting arrangements to reduce the stigma experienced by rainbow families. As was widely platformed during the 2017 marriage equality plebiscite, formal recognition of families, relationships and parents provides security that benefits the health and well-being of children.

The Equality Bill amends the Children and Young Persons (Care and Protection) Act and the Children's Guardian Act to include gender identity and variations in sex characteristics as principles for protection, aligning with the primary objectives of these Acts. The Greens support these amendments to protect children and young people in NSW.

The Greens support the amendments to the Crimes (Sentencing Procedure) Act proposed by the Bill to ensure that all LGBTIQIA+ people are captured by sentencing laws recognising that crimes motivated by hatred or prejudice because a person belongs to a particular group can be aggravating factors.

⁸ Royal Australian College of Physicians, “RACP statement on gender dysphoria”, March 6 2020, Available at: <https://www.racp.edu.au/news-and-events/media-releases/racp-statement-on-gender-dysphoria>

⁹ Harry Barbee, Bashar Hassan and Fan Liang. “Transgender regret? Research challenges narratives about gender-affirming surgeries” The Conversation, January 23 2024, Available at: <https://theconversation.com/transgender-regret-research-challenges-narratives-about-gender-affirming-surgeries-220642#:~:text=Evidence%20suggests%20that%20less%20than,gender%2Daffirming%20surgery%20report%20regret>

The Greens also support the inclusion of threats to 'out' a person's sexuality, gender history, HIV status or variations in sex characteristics as a form of abuse for the purposes or apprehended violence or personal violence orders.

The Greens support the addition of trans and gender diverse people and people with variations of sex characteristics to the list of disadvantaged groups for the purposes of the Government Sector Employment Act 2013.

The recently passed ban on harmful conversion practices could be improved by the introduction of a third-party reporting mechanism. The system as it has been set up lacks a direct and accessible reporting route for third parties, relying instead on the Anti-Discrimination Board's broader investigative powers. Survivors of conversion practices often take years to recognise their experiences as harmful and seek help, with many never realising they are survivors at all. Conversion practice survivors deserve better harm prevention and support, rather than merely providing redress after the fact. A third-party reporting mechanism would create an entry point into the civil complaints scheme similar to that established by the Victorian Equal Opportunity and Human Rights Commission.

7. Additional ways of improving the safety and wellbeing of LGBTIQIA+ people in NSW

The Greens are extremely concerned about the rise in far-right extremism in NSW targeting marginalised communities including LGBTIQIA+ people. In particular, local events promoting inclusion and diversity have been threatened with violence, and in some cases cancelled by organisers in response. Event organisers including local councils need support to be able to confidently support LGBTIQIA+ residents with safe opportunities for local connection and community participation. Negative public attention and pressure from hate groups has had a measurable negative impact on the mental health and well-being of LGBTQ people¹⁰.

Medically unnecessary procedures performed on intersex people that modify sex characteristics without personal consent have had lifelong negative consequences for intersex people. The Greens note the Variation in Sex Characteristics (Restricted Medical Treatment) Act 2023, which came into effect in the ACT last year, protects intersex people from being harmed by inappropriate medical interventions, and that Victoria is considering similar legislation. We recommend that the government work with intersex people in consultation with relevant practitioners to progress similar reform in NSW.

The Special Commission of Inquiry into LGBTIQ hate crimes highlighted the grossly inadequate responses of the NSW Police Force to LGBTIQ communities, historically and to the present day. The implementation of its recommendations is needed urgently. In particular, there is a need for

¹⁰ Jewel Topsfield, 'You live with fear constantly': LGBTQ calls to mental health services surge, The Sydney Morning Herald, May 16, 2023. Available at <https://www.smh.com.au/national/you-live-with-fear-constantly-lgbtq-calls-to-mental-health-services-surge-20230516-p5d8nn.html>

external scrutiny given the “adversarial or unnecessarily defensive” engagement of the NSW Police Force with the Inquiry itself¹¹.

The Greens strongly opposed the Mandatory Disease Testing Bill 2020, in line with the overwhelming expert evidence that was received during its inquiry¹². Health experts warned the bill would undermine decades of evidence-based public health efforts by re-stigmatising blood-borne viruses. The Greens believe that the Mandatory Disease Testing Act 2021 should be repealed.

8. Conclusion

In conclusion, we wish to acknowledge and thank all of the individuals, groups, activists, organisations and experts who have been part of pushing for these reforms over so many decades - we know that this has been a collective effort by so many, and we offer them our respect and gratitude.

We also wish to highlight the need for ongoing resourcing of community organisations, groups and services who work with the vast range of communities impacted by this Bill. Law reform is never in isolation sufficient for meaningful change, and to be effective it must always be supported by community information campaigns, support services and education.

LGBTQIA+ people across NSW need a whole-of-government approach to ensuring well-being and equality. There are Ministers for a variety of populations who require attention across portfolios such as women, youth, seniors, veterans, people with disability, and multiculturalism. To this end, the Greens recommend the establishment of a dedicated Ministry and Minister. The Greens also support the establishment of an adequately resourced State Office for the Status of LGBTQIA+ People to ensure adequate data collection about NSW LGBTQIA+ communities and to coordinate initiatives across portfolios.

We remain committed to seeing full equality in our laws in NSW and will continue to work in Parliament and on the streets with communities until this is achieved.

¹¹ Special Commission of Inquiry into LGBTIQ hate crimes, Premier's Department, 19 December 2023, Available at: <https://www.nsw.gov.au/the-cabinet-office/resources/special-commissions-of-inquiry/lgbtiq-hate-crimes>

¹² HIV AIDS Legal Centre submission to the Inquiry into the Mandatory Disease Testing Bill 2020. Available at: <https://halc.org.au/wp-content/uploads/2021/05/2020-Submissions-to-the-NSW-Legislative-Council-Standing-Committee-on-Law-and-Justice-Inquiry-into-the-Mandatory-Disease-Testing-Bill-2020-Inquiry.pdf>