

**Submission
No 48**

EQUALITY LEGISLATION AMENDMENT (LGBTIQA+) BILL 2023

Organisation: Australian Lawyers for Human Rights

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Mr Clayton Barr MP
Chair of NSW Committee
Committee on Community Services
By email: communityservices@parliament.nsw.gov.au.

Dear Mr Barr

INQUIRY INTO EQUALITY LEGISLATION AMENDMENT (LGBTIQA+) BILL

Australian Lawyers for Human Rights (**ALHR**) is grateful for the opportunity to make the following submission to the inquiry into the Equality Legislation Amendment (LGBTIQA+) Bill (the **Equality Bill**). We note that the Committee is to inquire and report on:

1. The provisions of the Equality Bill.
2. Operational issues for government agencies raised by the Equality Bill.
3. Additional ways of improving the safety and wellbeing of the LGBTIQA+ community.

Equality Bill - Welcome Advancements for LGBTIQ+ People in NSW

ALHR welcomes and supports this Bill. New South Wales (**NSW**) has lagged in key human rights reforms affecting the LGBTIQA+ community as compared to other states, in key areas including:

1. Ensuring trans and gender diverse people can access ID that matches their identity without facing cruel and unnecessary legal barriers.
2. Necessary amendments to Anti-Discrimination legislation to ensure protections for all LGBTIQA+ people.
3. Ensuring rights of children born to parents (including LGBTIQA+ people) who have formed their family via international commercial surrogacy.

4. Removing barriers to access to gender affirming care.

ALHR wishes to specially address the committee on the following:

1. The Equality Bill amendments to the *Anti-Discrimination Act 1977* (NSW) (the **Discrimination Act**); and
2. Implications arising from the Equality Bill amendments to the *Children and Young Persons (Care and Protection) Act 1998*, which necessitate re-drafting of the s174A of the Bill (whilst noting ALHR's strong support for the spirit of this provision).

ALHR also wishes to draw the Committee's attention to the submission of Mr Stephen Page in his personal capacity. Mr Page is a member of the LGBTIQ+ Subcommittee of ALHR and his extensive experience in the area of fertility law and the rights of children born through surrogacy are recorded in that submission.

ALHR otherwise endorses the submission of Equality Australia and, subject to the proposed amendments to s 174A of the Bill, commends the Equality Bill to the Committee as legislation which will genuinely improve the lives of LGBTIQ+ people living in NSW, in accordance with international human rights principles.

Discrimination Act Amendments

ALHR supports the human right to non-discrimination¹ for all communities in Australia, including LGBTIQ+ people. This includes support for effective legal prohibitions on discrimination on the basis of sexual orientation, gender identity and sex characteristics, across all areas of public life.

Unfortunately, these rights and protections are not currently reflected in the Discrimination Act , with major deficiencies in this legislation across the following areas:

1. Who is protected against discrimination and civil vilification.
2. Failure to protect LGBTQ students and teachers against discrimination.
3. Excessively broad exceptions for other faith-based organisations.
4. Other excessive and/or unnecessary exceptions.

We welcome the Equality Legislation Amendment (LGBTIQ+) Bill 2023 (**Equality Bill**), including its amendments to the Discrimination Act addressing these deficiencies, as detailed below.

Who is protected against discrimination and civil vilification

¹ Article 26, *International Covenant on Civil and Political Rights*.

Currently, only gay men, lesbians and some transgender people (those with 'binary' gender identities) are explicitly protected against discrimination and civil vilification in NSW.²

That means bisexual people, non-binary people and intersex people are omitted from the Act's protections against both discrimination, and civil vilification. In the case of bisexual people, NSW is the only jurisdiction in Australia that fails to specifically protect this cohort. For non-binary and intersex people, NSW is joined only by Western Australia.

The Equality Bill would rectify this situation in the following ways:

1. updating the existing protected attribute of homosexuality to sexuality, with a definition³ that explicitly includes both bisexuality and asexuality;
2. updating the definition of the existing protected attribute of transgender⁴ to explicitly include people who are non-binary and gender diverse; and
3. introducing a new protected attribute of variations of sex characteristics⁵, to protect intersex people against discrimination.

These attributes and definitions are not best practice – but have been specifically drafted to fit within the current structure of the Act, as well as to assist the Act's use of the 'comparator' test to determine direct discrimination.⁶

If and when the Discrimination Act is modernised to adopt the preferred 'treats unfavourably' test adopted elsewhere – hopefully as a consequence of the current NSW Law Reform Commission review of the Act – these attributes should be updated to reflect best practice attributes and definitions of sexual orientation, gender identity and sex characteristics.

Nevertheless, the Equality Bill's amendments to the protected attributes of (homo)sexuality and transgender status, and addition of variations of sex characteristics, are necessary interim measures to ensure all LGBTIQ people are protected against discrimination and civil vilification.

Failure to protect LGBTQ students and teachers against discrimination

The Discrimination Act currently fails to respect the right of all students to learn free from the fear of discrimination, and the right of teachers to work without discrimination on the basis of irrelevant attributes.

² Some people with innate variations of sex characteristics (intersex people) may be protected as a result of section 38A(c) of the Act's interpretation of transgender to include a person 'who, being of indeterminate sex, identifies as a member of a particular sex by living as a member of that sex'. However, not only is this terminology outdated and offensive, it would not offer protection for most intersex people in most situations.

³ Amended section 49ZF(1).

⁴ Amended section 38A, especially section 38A(c).

⁵ Defined in proposed section 38T, with protections across new Part 3B.

⁶ See for example section 38B(1)(a) in relation to direct discrimination on the basis of transgender status.

Indeed, the exceptions allowing discrimination in education are broader in NSW than any other Australian jurisdiction in two key ways:

1. They apply to all 'private educational authorities', rather than just religious educational institutions, and
2. They provide blanket exceptions for this discrimination, without requiring an educational authority seeking to discriminate to satisfy any test whatsoever.⁷

The Equality Bill seeks to remove those provisions which specifically allow educational institutions to discriminate on the basis of (homo)sexuality and transgender status, both in relation to students, and teachers and other workers.

We support these changes to better protect the rights of LGBTIQ people in NSW, while also noting that they are consistent with the recommendations of the recently released Australian Law Reform Commission inquiry into the issue of anti-discrimination exceptions in religious educational institutions.⁸

Excessively broad exceptions for other faith-based organisations

The Discrimination Act's general religious exceptions, especially those in subsections 56(c)⁹ and (d)¹⁰, allow for discrimination against LGBTQ+ people in NSW in wide range of situations.

Indeed, the NSW Court of Appeal has found that subsection 56(d) permitted a faith-based foster care agency to discriminate against an application by a gay male couple on the grounds of their homosexuality.¹¹

This is not a balanced approach, reflecting both the ability of religious organisations to deliver services to their communities while respecting the right to non-discrimination of LGBTQ+ people, but a one-sided approach prioritising the rights of religious organisations to mistreat others on the basis of their sexual orientation or gender identity.

The Equality Bill seeks to replace these provisions with a much more-balanced approach, seeking to protect the rights of all groups, in the following way:

Nothing in this Act affects-

⁷ See for example section 49ZO(3) which provides that 'Nothing in this section applies to or in respect of a private educational authority.'

⁸ Australian Law Reform Commission, 'Maximising the Realisation of Human Rights: Religious Educational Institutions and Anti-Discrimination Laws', Report 142, December 2023, especially Recommendations 1 and 7.

⁹ Providing that 'Nothing in this Act affects... the appointment of any other person in any capacity by a body established to propagate religion.'

¹⁰ Providing that 'Nothing in this Act affects... any other act or practice of a body established to propagate religion that conforms to the doctrines of that religion or is necessary to avoid injury to the religious susceptibilities of the adherents of that religion.'

¹¹ *OV & OW v Members of the Board of the Wesley Council [2010] NSWCA 155* (6 July 2010).

(1) (c) the selection or appointment of a person to exercise functions in relation to, or otherwise participate in, a religious observance or practice, or (d) another act or practice of a body established to propagate religion that-

(i) is reasonable and proportionate in the circumstances, (ii) conforms to the doctrines of the religion, and

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

(2) Subsection (1)(d) does not apply in relation to-(a) employment and education by religious educational institutions, or (b) employment and the provision of goods, services or accommodation by religious bodies providing goods, services or accommodation to the general public.

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

Importantly, as well as better protecting LGBTQ+ people against discrimination, it would protect the rights of other groups too, given section 56 as currently operates applies to all protected attributes in the Act – including race, sex, marital or domestic status, disability and age – rather than just homosexuality and transgender status.

Other excessive and/or unnecessary exceptions

ALHR supports other amendments in the Equality Bill that repeal or narrow other excessive and unnecessary exceptions in the Discrimination Act, including:

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

Parental Consent provisions in Children and Young Persons (Care and Protection) Act 1998

With the caveat that the Intersex Human Rights Australia submission below is adopted, ALHR supports the proposal to amend the *Children and Young Persons (Care and Protection) Act 1998* to allow minors who have capacity to consent to medical treatment ie to codify the common law principles developed in *Gillick v West Norfolk and Wisbech AHA* [1986] AC 112

¹² This amendment is consistent with amendments passed in 2023 in the ACT: section 44(10)(b), *Discrimination Amendment Act 2023* (ACT).

and affirmed in *Secretary, Department of Health and Community Services v JWB and SMB (Marion's case)* [1992] HCA 15.

The capacity to provide full and informed consent to medical interventions is fundamental to the enjoyment of bodily autonomy and integrity and to achieving the highest attainable standard of health.¹³ As a signatory to the United Nations Convention on the Rights of the Child (**UNCRC**), Australia has committed to assuring that a child who is capable of forming their own views has the right to express those matters freely in all matters affecting the child, and those views be given due weight in accordance with the age and maturity of the child.¹⁴

ALHR supports, subject to amendments proposed by Intersex Human Rights Australia, the proposed amendments introducing:

1. s174A(1) - such that it will allow young people (those aged 16 and 17 years) to consent to medical and dental treatment.
2. Section 174A(2) - such that it will allow children (those under the age of 16) to consent to treatment if they have Gillick capacity and the treatment is in their best interests. It will protect those who provide medical and dental services from liability for trespass as long as the consenting child is able to understand the nature, consequences and risks of the treatment.

ALHR also supports the principle that the requirement for court authorisation of gender-affirming treatment for Gillick-competent children if one parent does not consent to treatment, as determined in *Re Imogen*¹⁵, should be removed. ALHR recognises the financial and emotional burden for families forced to bring such an application in the Federal Circuit and Family Court of Australia, together with concerns as to delays in such a process when access to gender affirming care for young people is time sensitive. The requirement for a child or family to be sufficiently resourced to engage in this process does not accord with provisions of the UCRC.¹⁶ ALHR there endorses the spirit of this amendment, noting the below.

ALHR thanks Intersex Human Rights Australia for the opportunity to consult on this issue, and supports and endorses their submission in relation to the proposed redrafting of s174A of the Bill, and their ultimate recommendations, as follows:

*IHRA believes that **the proposed provision is in need of redrafting to achieve the desired result. The current drafting of s174A creates significant problems and fails to conform to the Human Rights Commission Report recommendation that 'Laws and practices concerning medical interventions to modify the sex characteristics of people born with variations in sex characteristics should be guided by a human rights***

¹³ Australian Human Rights Commission, *Protecting the Human Rights of People Born with Variations in Sex Characteristics*. A child's right to the highest attainable standard of health being protected by Article 24 of the International Convention on the Rights of the Child.

¹⁴ Article 12, International Convention on the Rights of the Child.

¹⁵ *Re Imogen (No 6)* (2020) 61 Fam LR 344.

¹⁶ For example, Article 24 ICRC

framework based on the ... principles [of bodily integrity, childrens' agency, the precautionary principle, medical necessity, and independent oversight].¹⁷ A proposal to provide unfettered authority to a parent to consent to any and all medical treatment on their child is a deeply concerning move away from a human rights-based decision-making framework.

Arguably, this provision would **allow parental consent to override the refusal of treatment by a Gillick-competent child**. It would unarguably **authorise parental consent** to medical treatment that was **opposed by a child who was not yet Gillick competent**. This would be a regression from the child-focussed principles of common law.

As it stands, parental consent under s174A(2)(a) is not limited even by the requirement that parents exercise their authority to consent to treatment in the child's **best interests**. This needs to be addressed.

The proposed provision will give legal and moral legitimisation for egregious clinical practices of invasive and irreversible medical interventions to alter the sex characteristics of minors, including infants and very young children, to 'normalise' their appearance for purported psycho-sexual reasons. Such interventions are routinely performed on children too young to consent, and consent is provided by parents or guardians. The interventions are highly contentious and are strongly opposed by international and national human rights experts, advocates, academics, medical professionals and those with lived experience.

In 2016, Forrest J of the Family Court handed down a decision in *Re Carla*[3] which authorised sterilisation, hormone intervention, and future genital surgery such as vaginoplasty, on a five year old child, and commented favourably on clitoral reduction surgery that had already been performed.¹⁸ Justice Forrest further found that medical interventions on children with innate variations of sex characteristics, including 'normalising' procedures, are 'therapeutic,' thereby falling within the bounds of 'permissible parental authority' and obviating the need for court authorisation.

In response to that and other decisions approving 'normalising' practices on children with innate variations of sex characteristics, and following a three-year inquiry, the Australia Human Rights Commission released a report¹⁹ recommending the introduction of a protection scheme to regulate unnecessary and deferable medical interventions aimed at normalising the bodies of intersex children before they are able to consent.

¹⁷ Australian Human Rights Commission (AHRC), *Ensuring Health and Bodily Integrity; Protecting the Human Rights of People Born with Variations in Sex Characteristics in the Context of Medical Interventions*(2021) | (Final Report, 18 October 2021), Recommendation 1. <<https://humanrights.gov.au/intersex-report-2021>>.

¹⁸ 'Surgery already performed on Carla has enhanced the appearance of her female genitalia' *Re Carla* FamCA 7, [2]

¹⁹ Above n 17

In 2022 the ACT introduced legislation enacting such as scheme to govern the medical treatment of people born with sex characteristics that do not fit the typical definitions for male or female bodies.²⁰ The Act gives protections to people with variations in sex characteristics. It allows them to make their own decisions about non-essential medical treatments that affect their bodies when they can. Victoria has committed to enact a similar scheme.²¹

*It is important that NSW should legislate for human-rights based regulation of medical interventions on minors with innate intersex variations who are too young to consent. **In the absence of a protective regulatory scheme**, the operation of both state and federal law on consent for medical treatment of minors is, for intersex children, permissive and precarious. The proposal to remove all fetters from parental consent, and to unambiguously validate existing permissive parental consent processes, is deeply problematic.*

It is acknowledged that to date the ‘best interests’ restriction has been inadequate to protect minors with innate variations of sex characteristics from human rights abuses in a medical setting, as noted in the Australian Human Rights Commission report. [8] However, legal reform in Australia should be guided by the need to promote human rights, not to strip back protections, even those that have not been fully effective in protecting all citizens.

On that basis, IHRA opposes the inclusion of s174A as it is drafted. We recommend that the provision be re-drafted, taking into account the following considerations

- 1. Consider one means to address the limitations imposed in Re Imogen by **restricting the operation of s174A(2)(a) to gender-affirming treatment**. Since this is the only treatment to which such restrictions (ie the need for consent from both parents) apply, this should be the only circumstance in which the consent of one parent must be explicitly made sufficient.*
- 2. Parental authority should be fettered by a need to make decisions in the **best interests** of the child.*
- 3. Laws touching on consent to medical treatment must be guided by **human rights principles** and implement a framework that is protective of the rights of children, including children born with innate variations of sex characteristics*
- 4. NSW must enacted a human rights-based framework to guide medical decision-making on procedures to modify the sex characteristics of a minor without their personal consent.*

²⁰ [Variation in Sex Characteristics \(Restricted Medical Treatment\) Act 2023](#) (ACT)

²¹ Department of Health Victoria, *(I) Am Equal* (2021, State Government of Victoria) Accessed April 9, 2024. <https://www.health.vic.gov.au/publications/i-am-equal>.

On 4 April 2024 the Human Rights Council adopted a resolution calling on Member States to enhance efforts to combat discrimination, violence and harmful practices against Intersex people. This is the first statement of its kind from the Council. The resolution requests Member States to address the root causes of harm to Intersex people, such as stereotypes, spread of misconceptions and inaccurate information, stigma and taboo, and to work to fulfil the enjoyment of the highest attainable standard of physical and mental health for persons with innate variations in sex characteristics.

Next Steps - a Human Rights Act for New South Wales

Without undermining ALHR's strong support of the Equality Bill, ALHR ultimately presses that the human rights of all people in NSW, including the LGBTIQ+ community, are best protected when our international human rights obligations are enshrined in legislation - a Human Rights Act.²² Human Rights Acts have been passed in Victoria, the Australian Capital Territory and Queensland. ALHR is hopeful that following safe passage of the Equality Bill, members of the Committee will turn their attention to the necessity for a Human Rights Act in NSW.



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ALHR was established in 1993 and is a national association of Australian solicitors, barristers, academics, judicial officers and law students who practise and promote international human rights law in Australia. ALHR has active and engaged National, State and Territory committees and specialist thematic committees. Through advocacy, media engagement, education, networking, research and training, ALHR promotes, practices and protects universally accepted standards of human rights throughout Australia and overseas.

Any information provided in this submission is not intended to constitute legal advice, to be a comprehensive review of all developments in the law and practice, or to cover all aspects of the matters referred to. Readers should take their own legal advice before applying any information provided in this document to specific issues or situations.

²² ALHR is a member of Human Rights for NSW - an alliance of community organisations working together to achieve stronger human rights protections for everyone in New South Wales.
<https://humanrightsformsw.org/what-we-do>