Submission No 54

EQUALITY LEGISLATION AMENDMENT (LGBTIQA+) BILL 2023

Organisation: Law Society of NSW

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THE LAW SOCIETY
OF NEW SOUTH WALES

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15 April 2024

The Hon. Clayton Barr MP
Committee Chair
Committee on Community Services
Parliament House, Macquarie Street
Sydney NSW 2000

By email: communityservices@parliament.nsw.gov.au

Dear Mr Barr,

Inquiry into the Equality Legislation Amendment (LGBTIQA+) Bill 2023

Thank you for the opportunity to make a submission to the Committee on Community Services (**Committee**) in response to the Inquiry into the Equality Legislation Amendment (LGBTIQA+) Bill 2023. The Law Society's Human Rights, Children's Legal Issues and Criminal Law Committees have contributed to this submission.

The Law Society notes the importance of providing full equality for LGBTIQA+ persons under New South Wales law by updating and strengthening existing provisions that are discriminatory. While we are supportive in-principle of the majority of the proposals contained within the Bill, we note that the scope of law reform issues covered is very broad. It is possible that some proposals, while worthy of further consideration, could be considered as beyond the legislative objective of modernising laws and advancing equality for LGBTIQA+ persons in NSW.

We consider certain amendments in the Bill may require further analysis and targeted consultation in order that they are considered comprehensively in their own context and do not result in any unintended consequences or piecemeal reform. Our submission does not consider each Schedule of the Bill in detail, but rather sets out our preliminary views on why certain proposals may require more in-depth consideration.

Anti-discrimination and anti-vilification law in context

Amendments to the Anti-Discrimination Act 1977

As the Committee will be aware, there is currently an ongoing review of the *Anti-Discrimination Act 1977* (**ADA**) by the New South Wales Law Reform Commission (**NSWLRC**). The Law Society advocated for such a review, noting that the Act in its current form has not kept pace with changes in societal understandings of discrimination. Further, we have emphasised the need to ensure that protections in NSW are strengthened and modernised, including in relation to the LGBTIQA+ community.

The Law Society notes that, frequently, amendments to the ADA have been made in a piecemeal fashion that has resulted in an Act that is structurally and conceptually complicated. While we continue to advocate for a comprehensive redraft of the ADA, we acknowledge that

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the Bill does contain what have been described as 'interim legislative protections within the current framework' that address specific vulnerabilities faced by members of the LGBTIQA+ community at this time.

We consider there is significant benefit in many of the proposed amendments, including updates to the language around sexual orientation, gender identity and HIV/AIDS; introduction of new grounds for discrimination on the basis of innate variations of sex characteristics and sex work, and the removal of s 59A of the ADA concerning the provision of adoption services by faith-based organisations.

We anticipate that the proposed amendment to narrow the exemptions available to religious bodies may be a point of tension for some stakeholders, considering that it involves the balancing of the right to freedom of religion, and the right to non-discrimination and equality before the law. In its consideration of the drafting of changes to s 56, we suggest that this Committee have regard to the way in which other state jurisdictions have sought to strike an appropriate balance. Sections 81-83A of the *Victorian Equal Opportunity Act 2010* (Vic) may provide greater clarity on those situations where a divergence from anti-discrimination protections by religious bodies is permitted compared with the draft amendments. Tasmania's *Anti-Discrimination Act 1998* (Tas) follows a similar approach to the Victorian law, specifying certain circumstances at Division 8 where religious bodies are exempt from the Act.

Hate Crimes and Vilification

The Committee will also be aware that the NSWLRC is currently undertaking an expedited review of s 93Z of the *Crimes Act 1900* as it pertains to serious racial and religious vilification in NSW.

In our view, it is preferable that amendments to s 93Z are assessed in the context of the broader framework of criminal and civil provisions that are designed to address vilification in NSW. While we support the principle that persons who live with HIV or AIDS and persons who are or have been a sex worker should be protected from vilification, we note that s 93Z is not the only provision available to respond to this kind of conduct. Other offences that form part of the broader framework include, for example, offences of intimidation,[1] affray,[2] and assault occasioning actual bodily harm,[3] which all carry higher maximum penalties than an offence under section 93Z.

While the proposed amendments to this provision are directed to persons with HIV or AIDS and sex workers, in our view, it would be more prudent to consider, in a holistic way, the operation of the section in context and practice, and whether it should be expanded to other protected attributes, including, for example, persons with disability.

Amendments that may require further analysis or inquiry

In our view, there are several amendments proposed in the Bill that may be appropriate for further analysis or standalone review. These include the following:

Amendments to the Crimes (Domestic and Personal Violence) Act 2007

Schedule 8[3] and [4] provide that a court may make an apprehended domestic violence order or an apprehended personal violence order if it is satisfied on the balance of probabilities that a person has reasonable grounds to fear, and in fact fears, the engagement of another person in conduct in which the other person 'threatens to out the person'. 'Out a person' is defined as disclosing, without the person's consent, the person's sexual orientation, gender history, a

[1] *Crimes (Domestic and Personal Violence) Act 2007,* s 13;
[2] *Crimes Act 1900,* s 93C.
[3] *Crimes Act 1900,* s 59.

variation in the person's sex characteristics, whether the person lives with HIV/AIDS, or whether the person engages or has engaged in sex work.

The Law Society supports these amendments in principle. However, we consider that it may be useful for this Committee to take evidence on a broader range of conduct from which protection is necessary which might provide a basis to empower the Court to make an apprehended violence order. An example may be disclosure without consent of the sexual history of a person, regardless of whether that person identifies as heterosexual or LGBTIQA+. A further example is threats of doxxing i.e., maliciously disclosing a person's personal details, usually online, including address, contact details, ID numbers, etc. We note that the Commonwealth Government is currently conducting consultation on the issue of doxxing.

Amendments to the Children and Young Persons (Care and Protection) Act 1998

Proposed s 174A(1) provides that a person over the age of 16 may make a decision about their own medical or dental treatment as validly and effectively as an adult. Proposed s 174A(2) provides that a medical practitioner may administer medical or dental treatment to a child under the age of 16 if a parent consents, or if (a) the child consents and (b) in the opinion of the treating clinician, the child is capable of understanding the nature, consequences and risks of the treatment, and the treatment is in the best interests of the child's health and well-being.

The Law Society agrees with the NSWLRC in its *Report on Young People and Consent to Health Care*[4] that there is scope for clarification of the law regarding the consent of young people to health care. The English common law test for competency, which has been adopted in Australian law, is that a young person is capable of consenting to their own health care if and when they have sufficient understanding and intelligence to allow them to understand the care that is proposed.[5] However, ambiguities in the common law remain, for example as to the level of understanding required, and as to the residual rights of parents.[6] The common law test sits alongside s 49 of the *Minors (Property and Contracts) Act 1970* (NSW), and Part 5 of the *Guardianship Act 1987* (NSW) (for those aged 16-17 years). We note the NSWLRC's view that, while the common law chiefly governs the assessment of a young person's competence, the operation of these provisions against the common law is unclear.[7]

There is also uncertainty as to the extent of the Supreme Court's *parens patriae* jurisdiction, and the jurisdiction of the Federal Circuit and Family Court of Australia (**FCFCOA**)[8] and Children's Court[9] as to the ability of the state to interfere with a young person's decisions regarding their medical and dental treatment. The High Court has held that the FCFCOA has jurisdiction to authorise treatment for gender dysphoria if one of the parents or a treating doctor disputes the young person's competence, the diagnosis and / or the treatment, although if the Court is satisfied of the young person's competence and that is the only issue, the Court's authorisation is not required.[10]

In our view, the draft provisions do not clarify this complex area and appear inconsistent with the NSWLRC's recommendations for reform. For example, the NSWLRC recommends that a competent young person should have the ability to accept or refuse health care,[11] while

[4] NSW Law Reform Commission, *Report 119: Young People and Consent to Health Care*, October 2008, https://lawreform.nsw.gov.au/documents/Publications/Reports/Report-119.pdf.
[5] *Gillick v West Norfolk and Wisbech Area Health Authority* [1986] AC 112; *Marion's case* (1991) 175 CLR 218.
[6] NSW Law Reform Commission, above n 4, 69, 70.
[7] Ibid, 67.
[8] *Family Law Act 1975* (Cth) s 67ZC.
[9] *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 174.
[10] *Re Imogen (No. 6)* [2020] FamCA 761.
[11] NSW Law Reform Commission, above n 4, Recommendation 4.

proposed s 174A(2) additionally requires treatment to be in the best interests of their health and well-being. There also appears to be uncertainty as to the test for competence and the approach in rebutting a presumption of competence. Moreover, the Law Reform Commission's recommendations were made more than 15 years ago, and it may be timely to reconsider this contentious area of the law more comprehensively before moving forward with law reform. In our view, the provisions require further detailed examination before any legislative change is enacted.

The Law Society also queries the appropriateness of including these reforms in the Bill, as they are not directly connected to equality for LGBTIQA+ persons, and may have broader unintended consequences for the law on the consent of young persons to medical treatment.

Body searches

Amendments to the *Court Security Act 2005*, the *Crimes (Administration of Sentences) Act 1999*, the *Crimes (Forensic Procedures) Act 2000*, the *Law Enforcement (Powers and Responsibilities) Act 2002* and the *Sheriff Act 2005* propose important provisions in relation to the way in which searches are conducted of people who are transgender or people who have an innate variation in sex characteristics. We support these changes which are beneficial and inclusive.

It may be a worthwhile exercise to consider whether this range of legislation, which governs the way in which body searches are conducted in different contexts, is also reviewed to ensure that it is fit-for-purpose and suitable for other marginalised groups, for example, persons with disabilities.

Summary Offences Legislation

We support further consideration of the amendments to the *Summary Offences Act 1988*, which could further enhance the benefits derived from the framework of decriminalisation in the context of sex work. We are conscious that these provisions are rarely used and, in cases where they are engaged, can impact on the most vulnerable sex workers. However, this aspect of the Bill is arguably not directly related to advancing equality for LGBTIQA+ persons in NSW, and should be considered as a separate piece of legislation.

Thank you again for the opportunity to contribute to this inquiry. Should you require any further information, please contact Sophie Bathurst, policy lawyer on 02 9926 0285 or email sophie.bathurst@lawsociety.com.au.

Yours sincerely,

Brett McGrath
President