

Anti-Discrimination NSW

Submission: Current and emerging threats to trans and gender diverse human rights in Australia

12 April 2024



Anti-Discrimination
New South Wales

Acknowledgement of Country

Anti-Discrimination NSW acknowledges the Traditional Custodians of the lands where we work and live. We celebrate the diversity of Aboriginal peoples and their ongoing cultures and connections to the lands and waters of NSW.

We pay our respects to Elders past, present and emerging and acknowledge the Aboriginal and Torres Strait Islander people that contributed to the development of this document.

Submission: Current and emerging threats to trans and gender diverse human rights in Australia

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Introduction

Anti-Discrimination NSW (**ADNSW**) thanks the **Australian Human Rights Commission** for inviting submissions into mapping current and emerging threats to trans and gender diverse human rights.

About Anti-Discrimination New South Wales

ADNSW administers the *Anti-Discrimination Act 1977* (ADA) which makes it unlawful to discriminate in specified areas of public life against a person on grounds which include their sex, race, age, disability, homosexuality, marital or domestic status, transgender status and carer's responsibilities. Sexual harassment, as well as vilification on the ground of race and religion, homosexuality, transgender status, and HIV/AIDS status is also unlawful.

ADNSW strives to eliminate discrimination in NSW by:

- Answering enquiries
- Resolving complaints
- Raising awareness about discrimination and its impacts
- Managing applications for exemptions from the ADA
- Advising the government about discrimination issues

In July 2023, the NSW Attorney General asked the NSW Law Reform Commission (NSW LRC) to undertake a broad review of the ADA, to consider whether the Act could be modernised and simplified to better promote the equal enjoyment of rights and reflect contemporary community standards. The review is currently ongoing.¹

Protection of trans and gender diverse people in the ADA

Discrimination on transgender grounds is unlawful under section 38B of the ADA:

- (1) A person (the perpetrator) discriminates against another person (the aggrieved person) on transgender grounds if the perpetrator—
 - (a) on the ground of the aggrieved person being transgender or a relative or associate of the aggrieved person being transgender, treats the aggrieved person less favourably than in the same circumstances (or in circumstances which are not materially different) the perpetrator treats or would treat a person who he or she did not think was a transgender

¹ [Anti-Discrimination Act review](#), NSW Law Reform Commission, accessed 28 March 2024.

person or who does not have such a relative or associate who he or she did not think was a transgender person, or

(b) requires the aggrieved person to comply with a requirement or condition with which a substantially higher proportion of persons who are not transgender persons, or who do not have a relative or associate who is a transgender person, comply or are able to comply, being a requirement which is not reasonable having regard to the circumstances of the case and with which the aggrieved person does not or is not able to comply, or

(c) treats the aggrieved person, being a recognised transgender person, as being of the person's former sex or requires the aggrieved person, being a recognised transgender person, to comply with a requirement or condition with which a substantially higher proportion of persons of the person's former sex comply or are able to comply, being a requirement or condition which is not reasonable having regard to the circumstances of the case and with which the aggrieved person does not or is not able to comply.

(2) For the purposes of subsection (1) (a), something is done on the ground of a person being transgender if it is done on the ground of the person being transgender, a characteristic that appertains generally to transgender persons or a characteristic that is generally imputed to transgender persons.

Commonwealth religious educational institutions and Anti-Discrimination Laws

On 21 March 2024, the Australian Law Reform Commission's report on *Maximising the Realisation of Human Rights: Religious Educational Institutions and Anti-Discrimination Laws* (ALRC Report 142) was tabled in the Parliament following an inquiry into Religious Educational Institutions and Anti-Discrimination Laws. The report recommends legislative reforms designed to ensure that the Australian Government's policy when enacted as Commonwealth laws, will be consistent with Australia's international obligations.² The report recommended that the amendments of *Sex Discrimination Act 1984 (cth)*, the *Fair Work Act 2009 (Cth)* and the *Australian Human Rights Commission Act 1986 (Cth)* would be the substantial reforms to maximise the realisation of human rights overall. The recommended reforms will operate in a way that ensures any restriction to the realisation of some rights will be justifiable under international law.

ADA exceptions for 'private educational authorities' and in sport in relation to transgender persons

There are a significant number of exceptions in the ADA, many of which are outdated and do not align with current community and societal expectations. Many exceptions are also inconsistent with anti-discrimination legislation in other jurisdictions and across different grounds in the ADA which makes it difficult for practitioners and the public to understand and navigate

² [Australian Law Reform Commission, Maximising the Realisation of Human Rights: Religious Educational Institutions and Anti-Discrimination Laws \(ALRC Report 142\)](#), accessed 29 March 2024.

the law. ADNSW supports reconsidering many of the current exceptions, particularly those affecting trans and gender diverse people.

Exceptions for 'private educational authorities'

ADNSW supports a review of the scope and breath of the exceptions for 'private educational authorities' in the ADA.³ For example, sections 38C(3)(c) and 38K(3) allow private educational institutions to discriminate in areas of employment and education on the grounds of transgender status. It is important to highlight that NSW is the only jurisdiction in Australia that allows private educational institutions to discriminate based on those grounds.

Exceptions in sport in relation to transgender persons

[Section 38P](#) provides a broad exception permitting the exclusion of transgender persons from participating in any sporting activity for members of the sex with which the transgender person identifies. The exception does not extend to the coaching or administration of sporting activity. Other jurisdictions have narrower exceptions, such as allowing discrimination in competitive sporting activity for people aged 12 and over where the strength, stamina or physique of competitors is relevant.⁴

The ADA also contains other exceptions permitting discrimination on the ground of transgender status in various areas of public life.⁵ ADNSW is of the view that all the ADA'S exceptions, and in particular [section 38P](#), need to be reconsidered.

Trans and gender diverse complaints and vilification at ADNSW

Abuse, discrimination, harassment, vilification and violence

A core function of ADNSW is to provide free and impartial investigation and conciliation services in relation to discrimination complaints. In common with other federal, state and territory anti-discrimination and human rights agencies in Australia, ADNSW collects and analyses data relating to complaints made under anti-discrimination legislation, which may be useful in measuring experiences of anti-trans and gender diverse abuse, discrimination and vilification.

In 2022-2023, ADNSW received 21 complaints of transgender vilification (up from 4 in 2021-2022). In the 5-year period between July 2018 and June 2023, ADNSW received a total of 113 transgender discrimination complaints and vilification. The most frequent area of complaint was the provision of goods and services (68 complaints or 60.17% of all complaints on transgender

³ [Anti-Discrimination NSW Submission to the NSW Law Reform Commission, Anti-Discrimination Act Review.](#)

⁴ *Sex Discrimination Act 1984* – section 42, *Equal opportunity Act (Vic)* – section 72(3), *Anti-Discrimination Act (Qld)* – section 111.

⁵ Section 38F(2); section 38C(3)(a)(b)(c)

grounds). It is important to note that those statistics likely only reflect a very small proportion of issues arising within the trans and gender diverse community and may not consistently show the levels of discrimination experienced by trans and gender diverse people in NSW. Studies consistently show that despite pervasive discrimination on a number of grounds, reporting rates remain very low. There are many reasons why people might not report discrimination and harassment⁶ – they may not have confidence in existing systems or are afraid of recriminations. Even when people do report, a recurrent trend in complaints received by ADNSW is an imbalance of power between complainants and respondents. Complainants may not feel confident going through the conciliation process, particularly when they are not legally represented.

During the [LGBTIQA+ Safety Summit in February 2024 hosted by the City of Sydney in collaboration with ACON](#), participants highlighted the pain and anguish they felt when facing homophobia, transphobia and discrimination in their communities. They spoke of increasing levels of abuse and threatening behaviour, and the failure of police to intervene and respond to their calls for help. This contributes toward a lack of trust in the police to protect LGBTIQA+ communities.

Anti-trans mobilisation, dis-and misinformation, and extremism and radicalisation

During the course of ADNSW's community engagement activities, ADNSW regularly receives reports about anti-trans mobilisation and misinformation, which have sometimes led to formal complaints. During the 2023 World Pride Conference and Mardi Gras annual event, queer-affirming faith communities faced homophobic vandalism and assaults on queer-inclusive faith spaces; this was a strong reminder of the ongoing threats to safety experienced by LGBTIQA+ communities in general and trans and gender diverse people in particular.⁷

Much of the discrimination and violence that trans and gender diverse people face is based on myths and misunderstanding. According to an article from University of Melbourne, these myths include a belief that being trans is a mental illness, that all trans people want a 'complete sex change', that transgender children are subjected to irreversible medical treatments and that regret and detransition are common.⁸

These myths reinforce media sensationalism and provide a misleading representation of the lives of trans and gender diverse people, which has an enormous impact on their physical and mental health.

⁶ [Do-your-employees-feel-safe-reporting-abuse-and-discrimination](#)

⁷ [Homophobic-bigots-fail-to-stop-sydney-churchs-pride-celebrations](#)

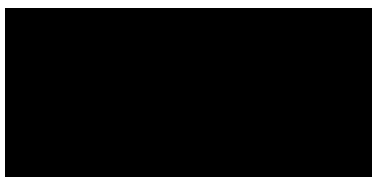
⁸ [Dispelling the myths about transgender people](#)

A report from La Trobe University on the health and wellbeing of LGBTIQ+ people in Australia indicates that over 60% of trans and gender diverse people have experienced thoughts about suicide in the past 12 months.⁹

Trans and gender diverse people face many barriers in their daily lives, and many of their challenges, harassment and experiences of discrimination go unreported for various reasons. Poor legal protections and outdated anti-discrimination laws make the process of complaining difficult which, in combination with broad legal exemptions and exceptions in sport and religious educational institutions, may contribute to a lack of confidence in legal remedies. In addition, myths, misinformation, violence and abuse present significant threats to the health and wellbeing of LGBTIQ+ people. It is therefore clear that action, education and law reform are needed to better protect their health, safety and lives to ensure their full enjoyment of the full range of human rights for a safe and inclusive society.

ADNSW thanks the Australian Human Rights Commission for the opportunity to contribute to the national project for mapping threats to trans and gender diverse (TGD) human rights in Australia.

Kind regards,



Jackie Lyne
Manager, Governance & Advice
Anti-Discrimination NSW

⁹ Hill, A. O., Bourne, A., McNair, R., Carman, M. & Lyons, A. (2020). *Private Lives 3: The health and wellbeing of LGBTIQ people in Australia*, pge 88.

We are committed to eliminating discrimination and promoting equality and equal treatment for everyone in New South Wales, including by resolving enquiries and complaints, raising awareness about discrimination and its impacts, and taking action to influence change.

Enquiries and complaints

Phone (02) 9268 5544

Toll free number 1800 670 812

complaintsadb@justice.nsw.gov.au

Telephone interpreter service

131 450

Website

antidiscrimination.nsw.gov.au

Head office

Locked Bag 5000, Parramatta NSW 2124



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New South Wales