

Current and emerging threats to trans and gender diverse human rights

Victoria Legal Aid submission to the Australian Human Rights Commission

26 April 2024



Acknowledgement of Country

This submission was written on the lands of the Wurundjeri and Bunurong peoples of the Kulin Nation. We acknowledge and pay our respects to Aboriginal and Torres Strait Islander peoples and Traditional Custodians throughout Victoria, including Elders past and present. We also acknowledge the strength and resilience of First Nations trans and gender diverse people.

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Executive Summary

In line with Victoria Legal Aid's (VLA) vision for a fair, just, and inclusive society, we are committed to ensuring trans and gender diverse (TGD) human rights are properly respected, protected, and fulfilled.

TGD communities are extraordinarily resilient in the face of heightened risks of homelessness, poverty and unemployment, and high levels of discrimination and transphobia experienced across legal and social systems.¹ This is reflected in the various structural and systemic barriers faced when interacting with these systems, such as the application of a gender binary and lack of TGD-inclusive policies and laws.

Through our client experience we see how these barriers and experiences harm TGD people's physical and psychological health, impose barriers to safety and financial security, and restrict their full participation in society.

In 2022–23, VLA provided assistance to approximately 200 trans and gender diverse clients.² This includes assistance in areas where TGD people experience discrimination and transphobia, including the criminal justice system, family violence, housing and healthcare. Where legal protections exist, our specialist discrimination and harassment lawyers assist TGD clients to uphold their human rights under the *Equal Opportunity Act 2010* (Vic) and *Charter of Human Rights and Responsibilities Act 2006* (Vic).

As such, this submission broadly outlines the following intersecting issues:³

- Discrimination and socio-cultural issues that underpin systemic injustices for TGD people within the outlined legal and non-legal systems, and
- The impact of an inconsistent national human rights and anti-discrimination framework on TGD people's ability to assert their human rights through courts or tribunals, in situations where these rights have not been respected.

In our view, these threats should be urgently interrogated to ensure TGD people are protected from harm, discrimination, disadvantage and breaches of their human rights, and are supported to fully participate in society. We see a critical need to drive change across legal and social systems to promote cultural and attitudinal shifts in the broader community, and look forward to engaging further with the Commission as this mapping project progresses.

A note on data

There is a significant lack of data and evidence that captures TGD disadvantage and discrimination, and in particular TGD experiences within the justice system and broader social systems. We see specific limitations in legislation, consultation processes and systems, including insufficient data recording practices of key agencies such as Victoria Police, Corrections Victoria, Youth Justice and

¹ See, for example, data and experiences outlined in the Victorian Government's 2022-32 LGBTIQ strategy, available online at: <https://www.vic.gov.au/pride-our-future-victorias-lgbtqi-strategy-2022-32/current-outcomes-lgbtqi-victorians>.

² We note this is likely an underrepresentation of VLA's actual number of TGD clients, including because TGD clients may choose and prefer to select the option that affirms their gender (i.e., man/woman) rather than selecting gender diverse.

³ We recognise there are broader threats that influence these outcomes as well, which other expert groups may speak to, including the recent UK Cass review and campaigns instigated by the anti-trans movement that seek to reinforce, rather than dismantle, this entrenched discrimination and transphobia.

the Adult Parole Board. This presents barriers to TGD people reporting their gender identity and leads to the erasure of TGD people in data and other reports, and gives rise to related challenges in identifying current and emerging threats to TGD human rights.

Systemic transphobia and discrimination in legal and non-legal systems

The following section outlines TGD discrimination and disadvantage we see through our practice and client and consumer experience in legal and non-legal systems.

i. Mental health

TGD people and communities experience higher rates of mental health issues and suicidality⁴, including due to transphobia, discrimination, violence and conversion or suppression practices (which are now prohibited inconsistently across Australia).⁵ Concerningly, when TGD consumers engage with the mental health system they often report adverse experiences, including in mental health services. This includes misgendering and binary gendered wards, and pathologisation of trans and gender diverse identities, including issues of families who do not support their trans or gender diverse child and who may pathologise their child's gender and subsequently support compulsory mental health treatment.

ii. Family violence intervention orders

Our practice experience aligns with recent research from Monash University⁶ that outlines LGBTIQ+ victim-survivors experiences of Family Violence Intervention Order police applications in Victoria, including the heightened risk of misidentification as primary aggressors by police in family violence situations, discriminatory attitudes by police, and the lack of recognition of the needs of TGD people experiencing intimate partner and/or family violence. Through our work, we see the impacts of being wrongly listed as a respondent are significant and life changing, and can include criminal charges, impacts on visa and residency status, stigma and mental health distress.

iii. Transphobic policies and practices in areas of public life

Through our discrimination practice we see discriminatory policies and practices in schools, universities and workplaces, which impose barriers to TGD people's ability to live safe, financially secure and fulfilling lives. For example, our clients have been subject to discriminatory policies at school, including around accommodation at school camps, bathroom use, and uniforms. Further, clients' birth names/dead names are used on university systems and are difficult to change; we spoke to a client who was unable to graduate because the qualification was in her birth name/dead name and the university would not change it. We also regularly speak to clients experiencing discrimination in the form of consistent misgendering in the workplace.

⁴ Amos N, Lim G, Buckingham P, Lin A, Liddlelow-Hunt S, Mooney-Somers J and Bourne A (2023): Rainbow Realities: In-depth analyses of large-scale LGBTQA+ health and wellbeing data in Australia. La Trobe University. Report: [Rainbow Realities, Australian Research Centre in Sex, Health and Society, La Trobe University](#), p46-71.

⁵ See, for example, the final report by the Royal Commission into Victoria's Mental Health System, Volume 1, p632, Volume 2, p85, 439. [Royal Commission into Victoria's Mental Health System - final report | vic.gov.au \(www.vic.gov.au\)](#), and the DHHS 2018 report, *Development of trans and gender diverse services in Victoria*, available online at: [development-of-trans-and-gender-diverse-services.pdf \(health.vic.gov.au\)](#).

⁶ Reeves E and Scott B (2022): 'Can't you girls work this out?': LGBTQ+ victim-survivors' experiences of Victoria's family violence intervention order system. Monash University. Report: <https://doi.org/10.26180/21530898>.

iv. Custody, prisons, and parole

Systemic transphobia and discrimination cause TGD people to be overrepresented in the criminal justice system⁷. This is compounded by a failure to acknowledge and respond to the unique needs and experiences of TGD people when they interact with this system, including through cis-normative and transphobic prejudices embedded in policies, practices and system infrastructure. This includes issues with:

- **Placement of TGD people in a binary prison system.** Trans women continue to be held in men's prisons, trans men in women's prisons, and non-binary and gender diverse people in binary prisons. While Victorian prisons have policies in place for TGD people to have input into whether they are held in a men's or women's prison, in practice, the operation and management of prisons are underpinned by a culture of transphobia. Although there is a lack of data, our practice experience is that where TGD people are incarcerated in the prison system that aligns with their gender, they are frequently held in solitary confinement.⁸
- **Inadequate and unsafe healthcare.** TGD people frequently experience significant barriers to accessing lifesaving medical and psychological care, including hormone treatment, other gender affirming medication, surgery, and safe and inclusive counselling.
- **Barriers to gender affirmation in custody.** TGD people seeking to change their Births, Deaths and Marriages registration while incarcerated face significant delays (in some cases, more than two years), and must seek consent from multiple government decision-makers. They also encounter a legislative requirement to consider whether a change of name or acknowledgement of sex marker⁹ would be 'offensive' to the victim or a portion of the community, which is inconsistent with community standards and applicable laws. Discrepancies between a person's legal name and sex marker, and their gender, creates barriers for TGD people from getting parole, accessing housing, social security, education and work.
- **Failure to provide access to gender affirming products.** Our clients, particularly trans women incarcerated in men's prisons, report barriers to accessing clothes and make-up that affirm their gender in prison, which causes deep harm, distress and dysphoria.
- **Harmful and distressing use of strip searches.** Strip searches continue to be used in both men's and women's prisons, although less frequently in women's prisons. Strip searching is particularly harmful and distressing to TGD people in prison due to disproportionate experiences of sexual violence, dysphoria, and invalidation of their gender through the allocation of female and male guards to carry out various parts of the strip search.¹⁰
- **Disproportionate use of solitary confinement.** Trans women incarcerated in women's prisons are disproportionately subject to standard long term solitary confinement, irrespective of charges, history, hormone access or gender-affirming surgery. This ranges from six weeks to

⁷ Mitchell M, McRory A, Skaburskis I and Appleton, B (2022): Criminalising Gender Diversity: Trans and Gender Diverse People's Experiences with the Victorian Criminal Legal System. *International Journal for Crime, Justice and Social Democracy*. <https://doi.org/10.5204/ijcjsd.2225>.

⁸ This standardised use of solitary confinement for TGD peoples is in breach of the *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, the *Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (OPCAT) (ratified by Australia in December 2017) and the United Nations *Standard Minimum Rules for the Treatment of Prisoners*, also known as the *Nelson Mandela Rules*.

⁹ The language of "acknowledgement of sex" is used in the legislation, and refers to updating a person's "sex marker" as listed on their Births, Deaths and Marriages registration.

¹⁰ Commissioner's Requirements, *Management of Prisoners who are Trans, Gender Diverse or Intersex*, March 2021, 11 [6.13.2].

indefinite solitary confinement. In men's prisons, trans women are acutely unsafe and are often held in solitary confinement 'for their protection'.

- **Lack of access to education and work programs, reintegration programs and transitional support for TGD persons who are incarcerated, especially trans women and non-binary people incarcerated in male prisons.** Noting that broader education and employment options are often available in women's prisons.

v. Courts and tribunals

TGD people experience ongoing issues when interacting with courts and tribunals, such as people not being referred to by their names, pronouns and identity on court documents and in interactions with court staff and the judiciary. This creates an environment that is a danger to TGD people interacting with the criminal legal system, particularly given their overrepresentation within these systems.¹¹

While there is no official data available, our practice experience shows that some incarcerated TGD people also identify as First Nations. We note the above issues all have a compound effect on First Nations TGD people and communities, particularly since they are subject to both racist and transphobic profiling and treatment. This contributes to higher rates of misidentification as the perpetrator in criminal and family matters, a lack of protection from police, and leads to a greatly increased risk of death or serious harm in custody, as well as a significant risk of harm due to isolation from community, including being separated from family, brotherboys and sistergirls, which can have a significant effect on health, safety and wellbeing.

Impact of inconsistent national human rights and anti-discrimination frameworks

The need for a federal Human Rights Act

We see firsthand the risks to our clients when laws are passed, or policies or decisions are made, which do not adequately take human rights into account. VLA supports a national Human Rights Act as the preferred model for positive human rights protections under Federal laws. A national Human Rights Act would play a crucial role in instilling a rights-respecting culture within government, improving the quality of government decision-making, incorporating human rights (including the rights of TGD people) considerations into new laws and policies, and providing an important accountability mechanism to ensure federal laws are interpreted and applied consistently with human rights.¹²

We see how human rights legislation, such as the acts and charters introduced in Victoria, Queensland, and the ACT, can provide important corrective functions to ensure that people can assert their human rights, including in some cases through courts or tribunals in situations where these rights have not been respected. While these instruments have brought about a gradual but noticeable improvement in the human rights culture of government in these jurisdictions, we also see limitations in the existing instruments, and support the AHRC's recommendation that a national

¹¹ Mitchell M, McRory A, Skaburskis I and Appleton, B (2022): Criminalising Gender Diversity: Trans and Gender Diverse People's Experiences with the Victorian Criminal Legal System. *International Journal for Crime, Justice and Social Democracy*. <https://doi.org/10.5204/ijcjsd.2225>.

¹² National Legal Aid, *Inquiry into Australia's Human Rights Framework*. National Legal Aid submission to Parliamentary Joint Committee on Human Rights (2023). Available at <https://library.vla.vic.gov.au/firstms/fullRecord.jsp?recnoListAttr=recnoList&recno=65135>.

instrument should include a direct cause of action, an accessible complaint pathway, and damages for breaches of human rights.¹³

Marnie's story

VLA's client Marnie began transitioning during her incarceration, so was registered with Births, Deaths and Marriages under her dead name and with the sex marker "male." Under Victorian law,¹⁴ Marnie was required to seek written approval from the Secretary of the Department of Justice and Community Safety before applying to Births, Deaths and Marriages to have this information changed. In early 2021, Marnie submitted an application to the Secretary for approval.

By the time her VLA lawyer spoke to Marnie in late 2022, it had been well over a year since the application had been submitted and, despite a number of enquiries being made by Marnie and her social workers, no decision had been made. In the absence of a decision, Marnie was frequently deadnamed and misgendered by prison officials. Marnie was also concerned that re-entering the community without changing her identity documents would undermine her prospects of reintegration and cause her further psychological distress.

VLA wrote to the Secretary, emphasising (among other factors) their obligation to make a decision consistent with Marnie's human rights under the Victorian Charter of Human Rights and Responsibilities, and in particular her rights to equality, protection from cruel, inhuman and degrading treatment, and to humane treatment when deprived of liberty. Subsequent to VLA's letter, the Secretary approved Marnie's application.¹⁵

Limitations and challenges of existing anti-discrimination laws

We consider there is a need to strengthen both federal and Victorian state laws in relation to anti-discrimination protections for TGD people.

i. Federal anti-discrimination and employment laws

Federal anti-discrimination and employment laws, including the *Sex Discrimination Act 1984* (Cth) and the *Fair Work Act 2009* (Cth), prohibit discrimination in a number of settings, including on the basis of sexual orientation and gender identity. However, these laws currently provide broad exceptions for religious educational institutions, including early childhood education centres, schools, colleges, and universities, to discriminate on the basis of these grounds when the discrimination is 'in good faith' and 'in order to avoid injury to the religious susceptibilities of adherents of that religion or creed.'¹⁶

¹³ [A National Human Rights Act for Australia | Australian Human Rights Commission](#), p267-92.

¹⁴ *Corrections Act 1986* (Vic) ss 47I and 47P (which apply to incarcerated persons); *Corrections Act 1986* (Vic) ss 79C and 79HD (which apply to persons on parole); *Serious Offenders Act 2018* (Vic) ss 260 and 265D (which apply to serious offenders); *Children Youth and Families Act 2005* (Vic) ss 488K and 488Q (which apply to children in youth detention).

¹⁵ We note that Marnie has continued to face other legislative barriers to having her gender acknowledged by post-sentence authorities.

¹⁶ The definition of 'educational institution' in s 4 of the *Sex Discrimination Act 1984* (Cth) is 'a school, college, university or other institution at which education or training is provided'. The relevant exceptions apply to educational institutions 'conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed': *ibid* s 38. In the *Fair Work Act*, the relevant exceptions apply more broadly to 'an institution that is conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed': *Fair Work Act 2009* (Cth) ss 153(2)(b), 195(2)(b), 351(2)(c), 772(2)(b).

There are no equivalent exceptions for religious educational institutions in relation to staff or students in Victoria. We see a need for federal laws to be consistent with Victorian state laws (and other similar legislation in the ACT, Northern Territory, Queensland, South Australia and Tasmania, and in line with reforms proposed in Western Australia) in order to protect the fundamental human rights and freedoms of TGD students and staff.

In principle, VLA supports the inclusion of protection from discrimination on the basis of religious belief or activity under federal anti-discrimination laws. In doing this, federal anti-discrimination laws should be updated and amalgamated to remove inconsistencies and unnecessary complexity to make it easier for duty holders to understand their obligations and for clients to understand their rights. VLA has previously recommended that federal anti-discrimination laws be consolidated and modernised into a single Equality Act to promote fairness, consistency and certainty for our clients.¹⁷ In addition to the legislative improvements outlined, Australia's discrimination law framework requires strong and well-resourced enforcement architecture to be effective and a positive duty to eliminate discrimination on the grounds of all protected attributes.

ii. Victorian anti-discrimination laws

A current challenge with the Victorian *Equal Opportunity Act 2010* (Vic) is a gap in protections between private and public schools, and a lack of clarity about exemptions that apply to single-sex schools, and exemptions in relation to standards of uniform. We consider that these provisions and exemptions should be clarified in order to further strengthen protections for TGD students.

We also see the need to amend the *Equal Opportunity Act* to include administration of state laws and practices as a protected area of life, to capture discrimination that occurs by police and prisons not already covered by discrimination laws.

iii. Victorian anti-vilification laws

We routinely advise clients seeking advice about discrimination on the basis of sexual orientation and gender identity, including the use of derogatory terms to denigrate TGD individuals. Depending on the circumstances and the setting, hate speech may amount to unlawful discrimination.¹⁸ However, hate speech is often not captured by our anti-discrimination laws and we routinely advise clients that there is no suitable avenue for a remedy where they have suffered hate speech on the basis of characteristics other than race or religion.

Given the prevalence of hate speech experienced by people not currently protected under existing Victorian anti-vilification law, we were pleased to see the Victorian Inquiry into anti-vilification laws recommend that the law be amended to extend anti-vilification protections to the LGBTIQ+ community, using the same terms and related definitions in the *Equal Opportunity Act*, namely gender identity, sex characteristics, and sexual orientation.¹⁹ We continue to advocate for the implementation of this recommendation, which the Victorian Government has accepted in principle.²⁰

¹⁷ Victoria Legal Aid, *Religious Discrimination Bill 2019 – Victoria Legal Aid submissions* (2019, 2020, 2021). Available at <https://library.vla.vic.gov.au/firsttrms/fullRecord.jsp?recnoListAttr=recnoList&recno=61578>.

¹⁸ E.g. *Dirckze v Holmesglen Institute* (Human Rights List) [2015] VCAT 1116 and *Jemal v ISS Facility Services Pty Ltd* [2015] VCAT 103.

¹⁹ See the Inquiry report and government response at: <https://www.vic.gov.au/response-inquiry-anti-vilification-protections>

²⁰ Victoria Legal Aid, *Strengthening Victoria's laws to prevent hate and harm: Submission in response to Consultation on Strengthening Victoria's laws against hate speech and hate conduct, Papers 1 – 3 by the Department of Justice and Community Safety* (2023). Available at <https://library.vla.vic.gov.au/firsttrms/fullRecord.jsp?recnoListAttr=recnoList&recno=65834>.

Appendix: About Victoria Legal Aid

Who are we?

Victoria Legal Aid (VLA) is a statutory authority established under the *Legal Aid Act 1978* (Vic). We are responsible for providing information, advice, and assistance in response to a broad range of legal problems. We provide statewide assistance to people every day and night in courts and tribunals in Victoria across both federal and state jurisdictions. VLA is funded by both state and federal governments. As a statutory agency, we are part of government.

What do we do?

We assist people with legal problems in a range of areas including criminal law, family breakdown, child protection, family violence, mental health, discrimination, disability, tenancy, fines, social security, immigration, guardianship and administration, debt, and assistance for victims of crime. We do this through our specialist legal teams and allied professionals, working with our legal assistance sector partners in the private profession, community legal centres, and Aboriginal community-controlled organisations.

In 2022-23, VLA assisted 86,321 unique clients, provided 78,751 in-house duty lawyer services, and responded to 138,969 requests for assistance through Legal Help.

Why do we do it?

In line with our values – fairness, care, courage and inclusion – VLA provides services and coordinates the provision of legal information to improve access to justice, support people to develop stronger legal capability and have a voice in the legal problems they face. We also pursue systemic change to address injustices by advocating to reform laws and systems to improve equality for clients and the community. The *Legal Aid Act* requires us to pursue innovative means of providing legal aid to reduce the need for individual legal services.

How do we do it?

We provide information and advice, prevention, early intervention, dispute resolution, and ongoing assistance and representation. The range of services we offer include:

- Legal Help phone and webchat service for information and advice
- Community legal education and information
- Family dispute resolution mediation service
- Help before court for criminal charges
- Early resolution service for family violence matters
- Help at courts and tribunals through duty lawyer services and grants of legal assistance
- Family advocacy and support services
- Independent mental health advocacy and family advocacy support services
- Legal representation in a range of civil, family and criminal law matters.

We also use our practice and evidence base to address systemic injustices and inequality for clients and communities through strategic litigation and advocacy as well as policy and law reform. We aim to promote the voices of clients and address the impacts of discrimination by advocating for fairer laws and systems.

Our clients

Service snapshot

Our clients **86,321** unique clients **▲7%**

70%

Metropolitan
Melbourne

30%

Regional
Victoria

Assistance with a case **41,320¹** grants of legal assistance **▲1%**

15%

In-house

83%

Private
practitioners

2%

Community
legal
centres

Duty lawyer services **111,236²** duty lawyer services **▲54%**

71%

In-house

12%

Private
practitioners

17%

Community
legal
centres

1 This total figure includes grants for community legal centres (which aren't included in our Budget Paper 3 reporting) and family violence services.

2 Adjusted by +7,438 duty lawyer services. The total figure includes services provided by community legal centres (which aren't included in our Budget Paper 3 reporting) and family violence services.

Early intervention and early engagement and resolution

Legal Help

138,969 requests for help responded to **▲16%**, **73%** of total incoming requests

Average wait time of **8:54 minutes** (phone line and webchat) **▼22%**

112,198¹ information sessions **▲17%**

14,280² advice sessions **▲9%**

Help Before Court

9,545 services **▼8%**

Early Resolution Service

11,758 services **▲31%**

Family Dispute Resolution Service

839 conferences **▼24%**

80% settlement rate **▼2%**

Independent Family Advocacy Service

2,011 information and referral sessions **▲10%**

2,327 advocacy and self-advocacy sessions **▼1%**

Independent Mental Health Advocacy

25,658 information and referral sessions **▲2%**

18,280 advocacy and self-advocacy sessions **▲38%**

Community legal education and information

213 education sessions **▲84%**

162,038 publications distributed **▲107%**

Due to identified underreporting in our data, some figures have been adjusted to better reflect the number of services delivered. Percentage increases and decreases are in comparison to 2021-22 data.

1 Adjusted by +4,033 information sessions.

2 Adjusted by +741 advice sessions.

Who our clients are

37%
women

62%
men

Under 1%
gender
self-described

Under 1%
gender
diverse

13%
in custody,
detention or
psychiatric
care

8%
identify as **First
Nations** people

53%
receiving
some **form of
government
benefit**

8%
at risk of
homelessness

34%
disclosed
having a
**disability or
mental illness**

3%
required the
**assistance
of an
interpreter**

32%
with **no
income***

30%
living in
**regional
Victoria**

12%
under
**19 years
of age**

28%
from **culturally
and linguistically
diverse
backgrounds****

These figures do not include clients seen by a private practitioner or who accessed information services.

* Examples include children and young people, people experiencing homelessness, people in custody and immigration detention, and psychiatric patients.

** Based on the Australian Bureau of Statistics definition of people from culturally and linguistically diverse backgrounds. Includes people who speak a language other than English at home and people who were born in a non-English speaking country.