LGB ALLIANCE AUSTRALIA

Preliminary Submission to the Review of the Anti-Discrimination Act 1977 (NSW)

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About LGB Alliance Australia

Our Vision

Lesbians, gay men and bisexuals living free from discrimination or disadvantage based on their sexual orientation.

Our Mission

To advance lesbian, gay and bisexual rights

We advance the interests of lesbians, gay men and bisexuals, and stand up for our right to live as same-sex attracted people without discrimination or disadvantage.

We will ensure that the voices of lesbians, gay men and bisexuals are heard in all public and political discussions affecting our lives.

To highlight the dual discrimination faced by lesbians

We amplify the voices of lesbians and highlight the dual discrimination experienced by lesbians as women who are same-sex attracted in a male-dominated society.

To protect children who may grow up to be lesbian, gay, or bisexual

We work to protect children from harmful, unscientific ideologies that may lead them to believe either their personality or their body is in need of changing. Any child growing up to be lesbian, gay or bisexual has the right to be happy and confident about their sexuality and who they are.

To promote free speech on lesbian, gay and bisexual issues

We promote freedom of speech and informed dialogue on issues concerning the rights of lesbians, gay men and bisexuals. We assert that different opinions, even those we may disagree with, should be heard as part of the public debate.

You can find out more about us on our website – www.lgballiance.org.au
You can get in contact with us on email – contact@lgballiance.org.au

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Introduction

New South Wales was the first jurisdiction in Australia to include homosexuality as a protected attribute in 1982. Whilst this important piece of legislation has made an important contribution towards protecting the lesbian and gay community in NSW, ad hoc amendments to discrimination law now threaten these important protections.

LGB Alliance Australia believes that the Anti-Discrimination Act requires careful reconsideration as current discrimination law has inadvertently created a conflict of rights and an unofficial hierarchy of rights, where the rights of the heterosexual (sometimes queer-identified) majority have superseded the rights of the homosexual minority.

LGB Alliance Australia is deeply concerned that the legislature and the bureaucratic support system has been heavily influenced by activist language and ideology, emanating from the third sector. This language, much of which has no evidential basis, has contributed to misinformation and legal fictions in discrimination law. For example, the Department of Communities & Justice (NSW) are current paid members of ACON Pride in Diversity. The advice that the DCJ is receiving from ACON is frequently erroneous, inaccurate, and based on gender identity ideology.

LGB Alliance Australia is deeply concerned that current discrimination law is being used by a small minority to coerce and to persecute lesbians and gay men, as the recent preliminary ruling of the AHRC against the Lesbian Action Group attests.

The GLBTIQ, Equality Australia, LGBTI Legal Service Inc, the Trans Justice Project, Transcend Australia and Transgender Victoria combined with other organisations to act against the Lesbian Action Group, using discrimination law. This is an instance of how discrimination law has been weaponised against a minority, by a minority, for political and ideological ends.

It is very important that the legislature not allow discrimination law to be politicized or used in a prosecutorial manner. It is imperative that discrimination law be used as a shield against extreme prejudice, and not as a tool to enforce homogeneity, or compliance with gender stereotypes.

LGB Alliance Australia believes that reform of the ADA is required to ensure that sex-based definitions and categories are retained in law, to ensure the fair and equal protection of rights for all citizens of NSW.

It is now necessary for the NSW government to provide clarity in discrimination law, in relation to sexuality, sex and gender, so that members of the LGB community can be assured of their rights and protections in law.

Modernising and simplifying the ADA to better promote the equal enjoyment of rights and reflect contemporary community standards

The *Anti-Discrimination Act 1977 (*ADA) 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. Vilification on the grounds of race, homosexuality, transgender status, or HIV/AIDS status is also unlawful.

Homosexuality - Section 49ZG

Under the current regime, lesbians and gay men are not receiving equal and fair treatment, nor the full enjoyment of our rights to free association and freedom of expression.

The rights of lesbian and gay people are not being widely respected or considered, as the rights of the (largely heterosexual) Trans and Gender Diverse community are seen to take precedence. This has resulted in the unequal application of discrimination law, against homosexual people.

The legislature must be aware that community attitudes towards issues of sex and gender are notoriously difficult to capture, as there are widespread misconceptions about contemporary terminology. For example, the ABS recently attempted to incorporate activist language on sex, sexuality and gender in the last census. The result was unusable, corrupted data, as the general population struggled to understand the concept of "gender identity."

It is the position of LGB Alliance Australia that all language in relation to sex and sexuality must be unambiguous and readily understood by the wider population.

For example, the current definition of homosexual in the ADA, meaning 'male or female homosexual' must be retained. It is impossible to secure the rights of same-sex attracted people without this sex-based definition. Homosexual people are NOT attracted to people of the same 'gender.' Gender has no application in relation to sexual orientation.

Transgender Status – Section 38B

Section 38A of the ADA defines a person being transgender or a transgender person, whether or not the person is a recognised transgender person, who:

- identifies as a member of the opposite sex by living, or seeking to live, as a member of the opposite sex; or
- has identified as a member of the opposite sex by living as a member of the opposite sex; or

- being of indeterminate sex identifies as a member of a particular sex by living as a member of that sex,

The above definition includes a reference to a person who is thought of as a transgender person, whether the person is, or was, in fact a transgender person.

Under NSW anti-discrimination legislation, a person is recognised as transgender if any of the following applies:

- in accordance with Section 32DA of the *Births, Deaths, and Marriages Registration Act* (1995) a new birth certificate has been issued to the person specifying the person's **gender;**
- an amended **birth certificate** or an equivalent document known as an 'interstate recognition certificate' has been issued to the person by another Australian State or other Australian jurisdiction.

A recognised transgender person must be treated as a member of the **gender** recorded on their **birth certificate**.

The ad-hoc development of discrimination law over the last forty years has resulted in incoherent and inconsistent discrimination law in relation to sex, sexuality, and gender.

The NSW legislature has apparently been confused and/or misled as to the nature and fundamental characteristics of sex and gender. This confusion is leading to discrimination against LGB people. The NSW legislature must resolve the legal inconsistencies in this area.

For example, a person's natal sex is recorded at birth, NOT their gender identity or gender marker. The NSW government will be aware that it is not possible for human beings to change sex. Humans are gonochoric, meaning that individuals are either male or female through the life cycle.

However, the NSW legislature has created a conflict of rights in discrimination law by defining a ***recognised transgender person*** as 'a person **the record of whose sex is altered** under Part 5A of the *Births, Deaths and Marriages Registration Act 1995* or under the corresponding provisions of a law of another Australian jurisdiction.'

The attempted definition of a transgender person as a person whose sex is "altered" is therefore a highly misleading legal fiction which has created problems for the LGB community, insofar as natal males are now identifying themselves as female and lesbian, and natal females are identifying themselves as male and gay. Such identity claims undermine the sexual boundaries of LGB people.

The NSW legislature and the Law Reform Commission need to urgently review the definition of a transgender person in order to provide clarity for both the LGB and the TGD communities. LGB people and TGD people are two very different and distinct communities, with different interests, needs and aims, which are fundamentally irreconcilable. It is incumbent upon the Law reform Commission and the NSW legislature

to recognise these differences and to NOT treat LGB people and TGD people as a single entity in law. We strongly recommend the separation of the LGB from the TGD for definitional reasons, and for reasons of clarity.

Furthermore, sex-reassignment surgery is not the goal for the majority of trans people. Most trans-identified people will not seek to alter their natal sex through surgery. A transgender person cannot, therefore, be defined as a person whose sex is "altered."

Neither the ADA nor the SDA requires a transgender person to have undergone surgical modification, in order to be considered protected as a transgender person. Yet, the exact criteria for what exactly constitutes "transgender" status or "gender identity" remains undefined by the ADA and SDA.

The NSW legislature should be aware that it is not dealing with biological sex in relation to transgenderism, but with gender identity claims.

Similarly, the phrase "living as the opposite sex" (Section 38B) holds no meaning in relation to gender identity claims. The law is confused on this point.

For example, it is currently the case that male people are using the definition of "living as a member of the opposite sex," as a legal right to participate in women's sports, to access women's changing rooms, bathrooms, domestic violence shelters and all other public services and provisions intended for females. This definition entirely erases the categories of women and female for public service provision.

The NSW legislature needs to define gender and transgenderism on their own terms, without recourse to sexed definitions.

By conflating sex self-identification with the attribute of "gender identity," amendments to both the ADA and SDA have effectively collapsed sexed categories in law, resulting in the loss of sexed-based rights, as the categories of "male" and "female" have been rendered meaningless under the legally endorsed process of sex self-declaration.

LGB Alliance Australia is concerned that the NSW legislature does not repeat the categorial error contained in the SDA. If the original intention of the Gillard government was to give transgender people the ability to change one's gender markers to better reflect one's appearance and sense of self, the mechanism should not have been the ability to change one's "legal sex."

Even if cross-sex hormones are administered and cosmetic surgery is undertaken, a transgender person does not change their natal sex in any meaningful way. A transgender person may change their external appearance or presentation. But cosmetic changes to the body do NOT alter the fundamental cellular determinants of sex. Consequently, the description of a transgender person as someone whose sex is "altered" is fundamentally inaccurate, untruthful, and misleading.

Whilst LGB Alliance Australia firmly believes that all members of the community deserve equal rights and protections, it simply must be the case that those rights are based on truthful and accurate definitions. Legal fictions regarding sex-based rights harm the LGB community.

Definitions of Sex and Gender, ADA Section 24

In order to secure the rights of same-sex attracted people, it is essential that the NSW government retain the original definitions of man and woman, as sex-defined categories:

man means a member of the male sex irrespective of his age.

woman means a member of the female sex irrespective of her age.

Only by retaining the original biological definitions of sex in law, can the rights of LGB people be guaranteed.

One of the core objectives of the *Sex Discrimination Act* (1984) is to "eliminate…discrimination against persons on the basis of sex." The SDA is named after sex, and not gender, for the very important reason that women are discriminated against in society on the basis of their femaleness, and NOT on the basis of their ability to conform to stereotypes or gender presentation.

However, the inclusion of "gender identity" as a protected characteristic in the SDA has confused matters, as gender now sits alongside sex, despite the conceptual incoherence.

Sex and gender, though related, are entirely different concepts.

Any proposed legislation must provide precise definitions of both sexual orientation (same-sex attraction) and gender identity, and their root concepts of sex and gender. The current terminology is imprecise and heavily favours gender.

LGB Alliance Australia insists on a definition of homosexuality as same-sex attraction (not same-gender attraction). LGB Alliance Australia rejects any definition of gender identity that relies on regressive sex stereotypes, including social roles.

LGB Alliance Australia suggests an alternative terminology of sex, and gender, which conforms with earlier definitions in the ADA:

- ***man*** means a member of the male sex irrespective of his age.
- ***woman*** means a member of the female sex irrespective of her age.
- ***Homosexual*** means a male or female homosexual.

For clarity LGB Alliance Australia would ask the Law Commission and the NSW legislature to consider:

- Lesbian = "A homosexual woman"; "characterized by sexual activity between women; or sexual or romantic attraction between women" (Oxford English Dictionary, Third Ed. Online, 2023)
- Bisexual = "Characterized by sexual or romantic attraction to, or sexual activity with, people of both sexes" (OED, Third Ed.)
- Transgender = "A transgender person is a person who is transsexual or transvestite" (OED, Third Ed.)
- Sexual orientation = "orientation with respect to a sexual goal, potential mate, partner" (OED, Third Ed.)
- Gender identity = "An individual's personal sense of being or belonging to a particular gender or genders, or of not having a gender" (OED, Third Ed.)

Another possible definition of transgenderism is offered by Oxford Reference:

Transgender: "Describes a person whose lifestyle appears to conflict with the gender norms of a society or culture. Such a person might express a different gender in their clothing or in how they present themselves." (Oxford reference, A Dictionary of Human Resource Management, Oxford University Press)

It is imperative that legal definitions be clear and understood by the wider community. Despite the claims of activists, gender identity is a concept NOT widely understood in the community.

Further, the Law Commission should be aware that there have been concerted efforts on behalf of activists to change dictionary definitions of sex, sexuality and gender. However, these ideological efforts do not emanate from the community, but are driven by ideological interest groups.

It is therefore essential that the NSW legislature clearly differentiate gender identity and sexual orientation, and their root concepts of gender and sex, in law. "Sex," "Gender" and "Gender Identity" are not synonymous terms.

The erroneous conflation of sex and gender in the ADA, SDA and BDMA has created a conflict of rights, whereby sex-based rights are undermined by gender identity claims.

The Human Rights Commissioner has recently argued that the 'word "sex" is not a biological concept…Nor is it a binary concept, limited to the "male" or "female" sex.' However, the legal sophistry of the Human Rights Commissioner is factually incorrect and appears to be informed by activist language. There is no third sex. There is no third gamete. Biological sex is both immutable and binary, and subject to natural variations and disorders, *within the binary*. Disorders of sexual development do not constitute a "third" sex, nor do they indicate that biological sex exists on a "spectrum." Biological sex in humans is binary.

Consequently, there is no such status as "non-binary." Non-binary is not a sexed category. Non-binary is a belief in one's indeterminate and changeable feelings on gender. The legislature should use extreme caution in attempting to legislate feelings as legal fact.

The NSW legislature must not be seduced by the language of social constructivism on this point. The legislature must be guided by empirical reality. The wider community will lose all confidence in the legislature if the NSW government presents evident falsehoods as fact.

If, on the other hand, the NSW government, and the Human Rights Commissioner, in particular, has evidence that biological sex is not immutable and that human beings can indeed change sex from female to male, and vice versa, on a cellular level, then this remarkable evidence should be presented to the Australian public.

As it stands, both the SDA and the definition of a "transgender" person as contained in the ADA is fundamentally flawed, as both Acts confuse the ability to change one's external appearance, which is possible, with the ability to change sex, which is impossible.

If the government wishes to legislate for discrimination based on external appearance it should do so independently of references to sex.

The legislature must also carefully consider what it means by "community standards" on this point. Put simply, the legislature must consult with, and receive submissions from, a wide variety of community groups in order to ensure impartiality. For example, it is currently the case that legacy LGBTQI+ organisations no longer represent the interests, needs and concerns of LGB people. The LGB Alliance was established in order to fill this data and information gap.

As we represent LGB people from all age ranges and backgrounds, LGB Alliance Australia would be grateful for the opportunity to formally contribute to the review of the ADA, and to assist in clarifying current confused language.

Protecting the community by expanding the range of attributes protected against discrimination

Sexuality and Sexual Orientation

LGB Alliance Australia supports the retention of homosexuality in the ADA, as it is currently defined. LGB Alliance Australia would welcome the introduction of discrimination based on sexual orientation on the basis that "sexual orientation" is limited to: "heterosexuality, homosexuality and bisexuality."

The NSW legislature should be very cautious about redefining sexuality and sexual orientation in law, so as not to include aberrant sexual behaviours that are rightly illegal in NSW.

LGB Alliance Australia support the recognised sexual orientations of heterosexual, homosexual and bisexual. No further expansion of sexuality or sexual orientation is required as there is simply no evidence to support the claim that persons suffer discrimination on the basis of asexuality, for example.

Homophobia remains a problem in Australian society for which there is substantive, peer-reviewed evidence. Despite the claims of activists, there is very little evidence for widespread transphobia, or prejudice based on gender-identity claims. In considering amendments to the law, the NSW government should place a heavy emphasis on verified, replicable evidence of systematic prejudice to inform legislation.

Gender Identity

LGB Alliance Australia believes that the legislature should refrain from including "gender identity" as a protected attribute, as "Gender identity" is an unstable ideological concept, and not a physical or biological attribute.

Dr Alex Byrne notes that the etymology of the term 'gender identity' is very recent and very confused. As Byrne points out with reference to the World Professional Association for Transgender Health (WPATH) Standards of Care, the supposed experts in this area cannot agree whether 'gender' is a synonym for 'sex,' or whether it has another meaning entirely:

> *The original clear definition of "gender identity" as "the sense of knowing to which sex one belongs" has now been lost. WPATH's latest Standards of Care, for example, defines "gender identity" as "a person's deeply felt, internal, intrinsic sense of their own gender" (Coleman et al., 2022, p. S252). If "gender" here means "sex" then this would approximate Stoller and Greenson's definition, but it doesn't. WPATH's glossary entry for "gender" gives three options, none of which is sex: "gender may reference gender identity, gender expression, and/or social gender role, including understandings and expectations culturally tied to people who were assigned male or female at birth" (p. S252). WPATH does not say which of these is the operative meaning in the definition of*

> *"gender identity." Clearly "gender" in WPATH's definition cannot mean "gender identity," because then the definition would be circular. It also seems unlikely that people have a "deeply felt, internal, intrinsic sense of their own" gender expression or social gender role, especially since these are heavily culturally infected.*

(Byrne, A. 'The Origin of "Gender Identity".' *Archives of Sexual Behaviour* (2023). https://doi.org/10.1007/s10508-023-02628-0).

As Byrne suggests, if "gender" is to be considered as an innate physical attribute, where does "gender identity" reside in the body? Is 'gender identity' stable and reflective of a permanent state? Or is gender identity changeable and subject to variation over the lifespan? If the legislature cannot adequately answer these questions, then the Law Reform Commission and the NSW legislature should not be attempting to define and to legislate this nebulous concept in law.

Despite claims from proponents of gender-identity ideology, there is no evidence of a physical manifestation for "gender identity." For example, there is no substance or truth to the claim that trans-identified males have "female" brains. Such a claim would require irrefutable scientific evidence in the form of replicable systematic reviews, across cultures. There is none.

It is extremely important that the legislature has total clarity on this point, as to claim that gender identity is a physical attribute is to legislate a fiction into law.

Most importantly, gender identity ideology is inimical to same-sex attraction and homosexuality. It erases same-sex attraction by substituting the concept of gender over sex in law. LGB Alliance Australia vehemently rejects this ideologically loaded terminology, and we ask the NSW legislature to reject this language in law.

Whereas homosexuality can be objectively defined as same-sex sexual attraction, "gender identity" is a complex series of psychological and emotional beliefs that cannot be objectively defined. For example, the SDA conspicuously fails to adequately define both gender and gender identity. The NSW legislature must not repeat this error.

If the legislature intends to amend the definitions of sexual orientation and gender identity in the ADA, it is essential that the legislature de-couple both sex and sexual orientation from gender identity in this legislation. The NSW legislature must not compound current confusion.

If the legislature wishes to protect non-conforming gender presentation or appearance, it must do so on the basis of external appearance, and not on the basis of an innate, physical attribute.

The legislature must understand, and provide evidence for, the substantive difference between innate attributes and cosmetic alterations to one's external appearance. A feeling is not a fact.

Areas of public life in which discrimination should be reformed

Lesbians and gay men must be able to enjoy equal access to public spaces, services and provisions on our own sex-based terms. Lesbians and gay men must be allowed to exclude members of the opposite sex from same-sex events, services and provisions. To do so is equitable and reasonable in order to advance the equality of sexual minorities.

LGB Alliance Australia have recently conducted a detailed survey of our membership which has revealed the difficulties and challenges now facing the LGB community. A summary of our key findings:

- 99% of our respondents **did NOT support** "legislation that would give male people the 'right' to self-identify into female/lesbian only spaces, or female people the right to identify in to gay/male only spaces."
- 95% of our respondents were deeply concerned for the "rights of LGB youth and adults today, and for the future."
- The top policy priority for the LGB Alliance Australia membership is **a campaign to secure same-sex spaces and events.**
- 84% of members told us that there were **no single-sex LGB events** where they live.
- Over two-thirds of our membership (68%) did NOT feel "welcome and supported by the wider LGBTQ+ community".

Additional comments to the survey from members:

"If I were a teenager in this current era I would absolutely have been a victim of gender identity ideology and mutilation. I was a traumatised, sexually abused girl and I struggled to accept myself as a lesbian till my late 20s. I am extremely fearful for young LGB people today, and I also fear for myself and my career if someone found out I have gender critical views."

"I think organisations such as the LGB Alliance Australia are so important for representing the needs of LGB people. Gay people have been pushed out of mainstream orgs and our needs ignored in favour of Trans and Queer-identifying people. As an already marginalised community, LGB people need spaces, places and campaigns which focus on our needs, and not the needs of the heterosexual majority, however they identify."

LGB Alliance Australia are ready and willing to work with the NSW government on any reforms relating to sexuality and gender, and the current review of the Sex Discrimination Act. Please make use of our extensive knowledge and expertise.

There is overwhelming evidence that lesbians and gay men still suffer from homophobia and sexual shaming, despite recent advances in the rights of LGB people. It is harmful to

the well-being of lesbian and gay people to compel us to socialise with the opposite sex. Lesbians and gay men require same-sex spaces in order to safely build community, friendships and relationships, without the scrutiny and demands of others. It is proportional and reasonable for lesbians and gay men to exclude trans people from same-sex spaces and events for this reason.

A recent report from the UK, 'Lesbians Without Liberty,' produced by the organisation Sex Matters illustrates this point:

https://sex-matters.org/posts/single-sex-services/lesbians-without-liberty-2/

Similar research concerning the restrictions on the rights of LGB people is urgently required in Australia.

At LGB Alliance Australia we regularly receive testimony that lesbians are vilified on social media as 'transphobic' for rejecting self-identified 'lesbians with penises.' We are informed that gay men are vilified for refusing to have sexual relations with women who identify as men. We have received multiple reports that lesbians and gay men are being removed from dating applications and social media groups for stating their preferences for the same-sex. Queer spaces have become openly hostile to LGB people who hold gender-critical views, and many of our members have been doxed and harassed on this basis. The NSW legislature should make itself aware of the intense, coercive pressure that gay men and lesbians now feel to include the opposite sex in their dating pools on the grounds of "inclusivity."

Unfortunately, the confused language of the SDA has effectively undermined the ability of sexual minorities to justifiably exclude trans-identified people from same-sex spaces, services, and provisions. As the example of the Victorian Pride Centre so ably demonstrates, trans people rightly enjoy multiple events, services and spaces for trans people, ***and,*** trans people are given access to same-sex services, spaces and events, typically reserved for lesbians and gay men. This cannot be correct, as it is an unequal application of the law. Indeed, the AHRC appears to have developed an unofficial hierarchy of rights, with trans rights at the pinnacle.

The queer organisations who press for "inclusive" discrimination laws DO NOT represent the majority of LGB people. LGB people are reliant on sex-based laws to secure our rights. Without very clear sex-based protections in law, LGB people, and lesbians in particular, will be unable to secure our rights to freely associate, and to describe ourselves and our needs in sex-based terms.

This point is again evidenced by the preliminary ruling by the AHRC against the Lesbian Action Group for an exemption to hold same-sex events in Victoria. The exemption was denied on the basis that the Commission was "not persuaded that it is appropriate and reasonable to make distinctions between women based on their cisgender and transgender experience." This is the language of trans activists, and it is openly lesbophobic in character. Put simply, the AHRC can no longer be relied upon to act

impartially or fairly in the administration of discrimination law. With this single preliminary ruling, the AHRC has lost all credibility in the eyes of the LGB community.

Similarly, the refusal of Tasmania's Anti-Discrimination Commissioner to allow a lesbian-only event to exclude "people with penises" who self-identify as lesbians, has removed the rights of lesbians to free association under discrimination law. Lesbians are currently being discriminated against by the misapplication of Anti-Discrimination laws.

This case represents the unintended consequences of including "gender identity" into the SDA. No natal male should ever attend a lesbian-only event, and lesbians should never have to apply to the Australian Human Rights Commission to hold a same-sex event. The simple fact that lesbians have to apply is, in itself, discriminatory. The NSW government should not repeat the mistakes of the Victorian government by enacting laws which create a rights conflict between lesbians and the TGD community.

Clear, inclusive tests for discrimination, reflective of modern understandings of discrimination

It is the position of LGB Alliance Australia that the current tests for direct and indirect discrimination are sufficient.

Similarly, LGB Alliance Australia believes that the "comparator" test is still required, in order to maintain objectivity in discrimination cases. The comparator test is particularly evident in cases relating to sex, sexuality and gender.

The legislature must use caution in trying to redefine tests for discrimination in "modern" terms, as such tests may only be reflective of social trends, rather than community values. For example, inclusivity is not the law, nor should it be, as distinct categories are essential to ensure both diversity and safeguarding.

The activist language of the NSW legislature is deeply troubling on this point. Inclusivity should not form part of a legal test for discrimination, as it would constitute a form of state-sponsored coercion. For example, no minority group, such as lesbians or gay men, should be compelled to accommodate the interests of the heterosexual majority on the basis of "inclusivity." To do so would constitute a form of state-sponsored gay conversion.

The NSW legislature will have to clearly elaborate upon what it means by "modern understandings of discrimination," as the test appears to assume that the community is aware of the amendments made to both the SDA, and the intended changes of the ADA.

The LGB Alliance Australia would like the NSW legislature to produce evidence to demonstrate community awareness of the 2013 amendments to the SDA, and the proposed changes to the ADA in NSW, specifically on the point of sex self-identification.

Adequacy of protections against vilification, including (but not limited to) whether these protections should be harmonised with the criminal law

Any changes to vilification laws **will regulate free speech and opinion** and thereby curtail the established human rights of NSW citizens. The LGB Alliance Australia cannot support anti-vilification laws on this basis, as they are potentially anti-democratic.

One of the key problems in the proposed amendments will be the definition of 'harm.' LGB Alliance Australia is very concerned that the ever-expanding definition of 'harm,' which may include psychological and emotional distress, is far too diffuse for a legal statute and may impinge on freedom of speech, opinion and association. The NSW government needs to accurately define and to determine 'harm' as an objective state, and not a subjective feeling.

The NSW government should NOT seek to criminalise those whose words or opinions cause emotional or psychological distress. This is a deeply concerning overreach by the legislature.

There should be no criminal law response to alleged instances of vilification. The only response that should be considered by the legislature is an educative one.

For a society to be both inclusive and diverse, a plurality of perspectives is required. LGB Alliance Australia does not believe that there should be a single, sanctioned perspective on complex social issues. **The NSW legislature must therefore be mindful that "offence" is not "hate," and feeling offended does not equate with "harm." The NSW legislature should be wary of a lurch towards "safetyism."**

The legislature must take account of how political opponents and governments might (ab)use anti-vilification laws when in office. For example, similar proposals currently before the Irish Oireachtas would make it a criminal offence for a person to simply *possess* material that is "likely to incite violence or hatred." For example, a 70-year-old grandmother could be arrested for being in possession of feminist books, critical of male sexual violence. This is an absurd proposal to control the thoughts, speech and actions of Irish citizens, which would have incredibly serious unintended consequences. The NSW legislature must never seek to police the thoughts and beliefs of its citizenry in this manner.

The ADA must exempt LGB community organisations which seek to offer support to people distressed about their sexuality and/or gender. In the UK the LGB Alliance was persecuted by the trans activist charity Mermaids, which tried to have the LGB Alliance's charitable status revoked for simply advocating for same-sex attracted people.

The LGB Alliance cannot support increased legal measures on vilification, as many from the LGB community have experience of such measures being used against us.

For example, in 2018, amendments to the Crimes Act 1900 (NSW) created an "offence of publicly threatening or inciting violence on grounds of race, religion, sexual orientation, gender identity, intersex status or HIV/AIDS status," with a maximum penalty of three years imprisonment.

The 2018 amendments of the Crimes Act have produced troubling inconsistencies with the ADA, which have had a profound "chilling effect" on the LGB community by effectively silencing gender-critical beliefs, for fear of prosecution.

Many lesbians and gay men share "gender-critical" beliefs, including the scientifically evidenced belief that sex is biologically based and immutable; that human beings cannot change their sex, and that sex is distinct from gender-identity. But if a lesbian (a female homosexual) were to describe a heterosexual male, who self-identifies as a lesbian, as a "man," the lesbian woman may be accused of hate speech for simply stating biological facts.

It cannot be the case that discrimination law enforces legal fictions and prosecutes scientific fact.

Reforms of the ADA should not seek criminal prosecution for vilification, on the basis that motivated activists could use such provisions to silence and to criminalise political opponents.

Protections against sexual harassment

The current meaning of "sexual harassment" in the ADA is that 'a person sexually harasses another person if—

(a) the person makes an unwelcome sexual advance, or an unwelcome request for sexual favours, to the other person, or

(b) the person engages in other unwelcome conduct of a sexual nature in relation to the other person, in circumstances in which a reasonable person, having regard to all the circumstances, would have anticipated that the other person would be offended, humiliated or intimidated.

Because of the current confusion in discrimination law, it is now very difficult for lesbians to describe themselves as being **"offended, humiliated or intimidated"** by a heterosexual male person, who self-identifies as a lesbian (or transbian), entering a lesbian-only space and making sexual advances towards them. Lesbians are currently compelled to accept the sexual advances of male persons identifying as lesbians, or else risk accusations of discrimination and/or transphobia. To avoid the risk of prosecution, lesbians have had no choice but to self-exclude from "queer" spaces and are, instead, forced to meet and to organise in secret.

As the AHRC preliminary ruling against the Lesbian Action Group demonstrates, current discrimination law actively prevents the full participation of lesbians in public life.

Similarly, gay men are coming under pressure from heterosexual females, who identify themselves as trans gay men, and who are now entering traditionally gay male only spaces, services and events. Under the current regime, gay men risk accusations of transphobia if they reject the sexual advances of a woman who self-identifies as a man. It is therefore very difficult for gay men to make the case that they feel **"offended, humiliated or intimidated"** by sexual advances from natal females. As a result, current discrimination, which aggressively favours the rights of transgender people, effectively removes the right of LGB people to assert sexual boundaries and erodes our rights to consent.

It is reasonable and proportional for homosexual people to hold same-sex events, in order to advance equality. It is also reasonable and proportional for homosexual people to exclude transgender people of the opposite sex from such events.

In short, current discrimination legislation has entirely disempowered the lesbian and gay community to object to sexual harassment. LGB Alliance Australia requests that the legislature carefully considers sexual harassment and include explicit protections for LGB people.

Positive obligations and reasonable adjustments

Discrimination law should act as a shield against egregious acts of prejudice. Discrimination law should not be used to redefine the social contract.

Whilst LGB Alliance Australia acknowledges that "positive obligations" may be useful particularly in the areas of disability, pregnancy, family responsibilities and employment, the legislature should be wary of using discrimination law as a form of engineering of social attitudes.

The legislature should be mindful that administrations of different stripes could use "positive obligations" to impose their views and values on the wider community. The notion of positive obligations could therefore have very serious unintended consequences for minority groups.

For example, many workplaces and public venues that follow ACON's Pride in Diversity and ACON's AWEI Schemes promote the rights of transgender people over those of all other sexual minority groups. Such schemes misrepresent discrimination law and demand positive obligations for one group, over the others.

Exceptions, special measures and exemption processes

The ADA should be designed to exclude services, spaces and provisions delivered to one specific group from counting as discriminatory, when those services advance the group's equality. However, the current exemptions for sexual minorities are not functioning on a state nor Federal level, as is evidenced by the example of the Lesbian Action Group who applied to the Victorian Pride Centre to hold a same-sex only lesbian event and were denied on the basis of exclusivity. It should not be the case that sexual minorities groups have to repeatedly apply for exemptions in order to secure our basic rights in law. Discrimination law must explicitly guarantee the rights of LGB people, without the necessity of exemptions.

Importantly, the legislature must ensure that the threat of prosecution under discrimination law does not suppress and effectively remove all gender-critical views from the public sphere.

LGB Alliance Australia is concerned that under current exemptions in the ADA that private educational institutions are allowed to discriminate against students, lecturers, teachers and other staff on the basis of sex, disability, homosexuality, transgender status and marital or domestic status. The Religious Freedom Review issued by the Commonwealth Government in 2018 also highlighted concerns about the ability of religious schools to discriminate against LGBT students.

Whilst LGB Alliance Australia supports protections against discrimination specifically on the basis of sex, homosexuality or sexual orientation, LGB Alliance Australia cannot support any measures that would create legal obligations on schools to undertake the **social transitioning, or gender affirmation** of transgender students. To do so would place burdensome duties and obligations on other students. For example, should a fifteen-year-old male, who identifies as a girl but who has (rightly) undergone no hormonal or surgical interventions, be allowed to shower and change with teenage girls, or use the same bathrooms? No. The female students are entitled to same-sex spaces on the basis of privacy, dignity and security. The transgender student should be accommodated in a neutral, third space.

Furthermore, the social transitioning of a transgender student (otherwise known as gender-affirmation) requires staff to participate in complex medical and psychological processes that are simply beyond the scope of staff expertise. The social transitioning of transgender students is not a neutral act, as it frequently leads to medical and surgical interventions. The staff in educational institutions are simply unqualified and ill-equipped to deal with the mental health complexities and the implications of social transition.

The issue of protecting transgender students in schools is a fraught and complex area that requires careful consideration and consultation. For example, in seeking to enforce the rights of a transgender student to access provisions and services in alignment with

their self-declared gender-identity, school authorities may be in breach of requirements to provide same-sex services and provisions to all other students.

Similarly, a school or educational institution must not compel speech, in terms of enforcing preferred pronouns. Enforcing the use of preferred pronouns compels the speech of students and staff, and creates burdensome obligations, which will open all students and staff to accusations of "misgendering" and "transphobia" if the personal preferences of students are not met *at all times* and under all circumstances, including medical emergencies.

The NSW government should urgently reflect on the comparable situation in the UK, where the EHRC has just released new schools' guidance regarding transgender students.

https://www.equalityhumanrights.com/en/publication-download/technical-guidance-schools-england

This guidance also refers to the contentious issue of "misgendering."

Making anti-discrimination protections accessible to the community

The NSW legislature should be aware that the LGB community is rapidly losing confidence in the ability of the ADNSW to arbitrate fairly and reasonably in matters relating to sex, sexuality and gender.

LGB Alliance Australia has lost all confidence in the AHRC, as their recent ruling was openly lesbophobic and openly ignorant of basic biology and scientific facts.

It is clear to many within the LGB community that the AHRC have taken a biased view in rights conflicts between the LGB and TGD communities, in favour of the TGD community (the "queer" heterosexual majority).

The ADNSW will need to instil confidence within the LGB community that the rights of LGB individuals will not only be respected but will be considered in an impartial manner.

LGB Alliance Australia believes that the Anti-Discrimination Board of NSW has failed to understand and to address the concerns of LGB people, and address homophobia within the wider community. The Board should have already issued clarifying advice to say that gay men and lesbians are entitled to single-sex spaces, services and provisions on the basis of their sexual minority status. But they have chosen not to do so.

As the Board appears to have a limited understanding of the conflict in rights between sex, sexual orientation and gender identity, it is difficult to justify any extension of their current powers and functions.

It is essential that the NSW government and Commonwealth Government urgently provide clarity to discrimination law in relation to sex, sexuality and gender. The distinct and separate needs of each group must be recognised in law, or else the law will not impartially protect the rights of all members of the community.

As it stands, discrimination law allows for sexism, homophobia and sexual harassment, and fails to protect the sex-based rights of same-sex attracted people. Discrimination law is currently serving the heterosexual majority, however they identify, at the expense of women, children and the LGB community.

The NSW legislature must not bow to external pressure to be "in-step" with other laws, purely on the basis of consistency. The poorly considered amendments to the Sex Discrimination Act (2013), including the insertion of "gender identity" as an undefined protected attribute, have had a disastrous impact on the LGB community across Australia. Similar laws will have serious unintended consequences for sexual minorities in NSW.

LGB Alliance Australia considers the 2013 amendments to the SDA to have been overtly hostile and homophobic to the LGB community. It would be very unwise for the NSW legislature to enact similarly poor legislation.