LGB ALLIANCE AUSTRALIA

SUBMISSION

NSW Law Reform Commission review of Anti-Discrimination Act 1977

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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.

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NSW Law Reform Commission:
Review of Anti-Discrimination Act 1977

LGB Alliance Australia is Australia's largest organisation advocating solely for the rights of lesbian, gay and bisexual individuals. Our vision is that lesbians, gay men and bisexuals live free from discrimination based on their sexual orientation.

We welcome the opportunity to respond to the consultation paper by the NSW Law Reform Commission: 'Review of the Anti-Discrimination Act 1977 (NSW) - Unlawful conduct'. As we explained our position in detail during the preliminary consultation process, our response here is high-level.

Discrimination can have a serious adverse impact on many areas of an individual's life. For example, in a 2023 survey, we found that more than a third of our members had experienced discrimination in their workplace or school because of their same-sex attraction. Their experiences ranged from gossip and discriminatory language to harassment, being ordered by employers to remain closeted, and being denied promotion or fired. Almost half of our members believed their mental or physical health or wellbeing had been impacted by discrimination due to same-sex attraction. Their accounts of stress, hyper-vigilance, mental ill-health, secrecy, AOD use, and social ostracism were distressing to read.

We strongly support anti-discrimination laws to address such issues. However, for such laws to be effective, they must be framed in clear, factual terms based on accurate understanding of the nature of this discrimination.

To this end, we support some of the consultation paper's proposed directions for reforming the ADA in relation to sex and sexual orientation, but we caution against most of them. Our recommendations are as follows and we have responded to the relevant consultation questions in more depth below.

Recommendations:

1. Ensure anti-discrimination and anti-vilification protections explicitly encompass homosexuality (including lesbianism), bisexuality and heterosexuality, as well as HIV/AIDS status.
2. Do not adopt framings that are vague (e.g. 'sexuality'), confusing (e.g. 'affectional attraction'), boundless (e.g. 'LGBTQIA+') or inaccurate and offensive (e.g. 'same gender attraction').
3. Ensure the Anti-Discrimination Act (ADA) defines women as members of the female sex and men as members of the male sex, in line with biological reality and near-universal public understanding.
4. Do not introduce specific protections on grounds of 'sex characteristics'. Protections for individuals born with differences of sexual development (which we support) should be included in a broader category of 'health status' or similar.
5. Do not introduce an open-ended list of protected attributes into the ADA.

6. Do not introduce a ‘harm-based’ test for civil vilification without, at minimum, providing a much clearer blueprint for how this approach would be implemented equitably, consistently, and with widespread community support.
7. Do not introduce measures to outlaw expressions of hostility, contempt or ridicule in public beyond existing criminal and civil measures. Rather, we call for investment in social cohesion initiatives at a grassroots level and improved resourcing for police, courts, civil tribunals, mediation services, work safety authorities and community legal services to respond promptly and effectively to breaches of existing laws.
8. Make provision for 'special measures' under the ADA to enable LGB people to access single-sex services, spaces and events in recognition that many LGB people find these necessary in order to enjoy our human rights to freedom of assembly, rest and leisure, and participation in the cultural life of the community without harassment.

Question 4.4: Discrimination based on homosexuality: What changes, if any, should be made to the way the ADA expresses and defines the protected attribute of ‘homosexuality’?

We support extending protections to cover bisexuality and heterosexuality as well as homosexuality. The ADA should also recognise explicitly that homosexuality includes lesbianism.

We do not support the removal of explicit protection for homosexuality. This would constitute a clear weakening of the legal standing of gay and lesbian individuals.

Nor do we support the other changes proposed. Protection on grounds of ‘sexuality’ or ‘sexual orientation’ alone – without clarification that this refers to homosexuality, bisexuality and heterosexuality – raises several risks.

Most serious is the risk that individuals (most likely women) will be threatened with legal punishment for ‘discrimination’ if they object to sexually inappropriate behaviours – e.g. men wearing ‘fetish’ clothing in a workplace or declaring disturbing identities such as ‘adult babies’ or ‘minor attracted persons’. It would be dangerously naïve to assume that individuals with nefarious intentions will not use weaknesses in the legal system to advance their own ends.

Another risk – albeit less severe – is that protections for undefined categories of ‘sexuality’ and ‘sexual orientation’ will lead to courts being expected to rule on cases of alleged discrimination against identity cohorts which are highly novel, changeable, and subjective and social in nature, such as ‘aromantic’, ‘demisexual’, ‘sapiosexual’ and ‘grey ace’.

We have not seen credible evidence of meaningful discrimination against such cohorts. If a plausible case can be made that such discrimination is indeed occurring to the extent that a change to the law is needed – which we highly doubt – it would make more sense to incorporate such protections under broader protections for social, political or faith-based groups.

An individual identifying as ‘autosexual’ or ‘abrosexual’ is making a subjective declaration based on their own belief system. This has nothing in common with the measurable realities of having a same sex partner.

Nor do we support introducing into the ADA the convoluted language of 'emotional, affectional and sexual attraction'. These are already natural parts of homosexuality, bisexuality and heterosexuality. Such language is unnecessary and, to most Australians, baffling.

Finally, we oppose any attempt to replace recognition of the biological reality of same-sex attraction with the ludicrous concept of 'same-gender attraction'. LGB people are not attracted to our partners on their grounds of their pronouns or their adherence to archaic sexist stereotypes ('gender roles'). Our attraction is based on sex. Changing the law to deny this reality would not be 'inclusive' or 'kind'; it would be ignorant and offensive.

Question 4.7: Sex discrimination: What changes, if any, should be made to the way the ADA expresses and defines the protected attribute of 'sex'?

We oppose unequivocally any attempts to erase the biological reality of sex in anti-discrimination law and to replace it with the subjective belief system of 'gender identity'.

The harm this approach causes to LGB people has been demonstrated at a federal level in the case of the Lesbian Action Group, where the Australian Human Rights Commission made the extraordinary decision to ban lesbians from holding public events unless biological males were permitted to attend. This decision – which we believe is nothing short of legalised sexual harassment – was enabled by the 2013 decision to remove sex definitions from the Sex Discrimination Act 1984 and to insert a (vague and garbled) definition of 'gender identity'.

Such developments have had the effect of re-criminalising our community. Lesbians who wish to gather in social groups must now do so covertly in 'private parties' and 'membership clubs' – a return to 1960s-style secrecy and marginalisation.

Without protection for biological sex, there can be no protection for same-sex attraction. It is ridiculous to claim that LGB people are attracted to our partners the basis of their 'personal and social identity' or 'how they feel' or 'present themselves', as the consultation paper puts it. These are meaningless terms, based mostly on outdated sexist stereotypes – e.g. the notion that girls play with dolls and boys play with trucks. LGB people have long rejected such narrow social roles.

Lesbians did not lose custody of their children because their partners wore dresses and enjoyed ballet. Gay men were not entrapped and beaten by the police because their partners had short hair and watched football. LGB people's experiences of discrimination are rooted in our relationships with members of our own biological sex, which is a measurable, immutable reality.

Question 5.2: Potential new attributes: Should any protected attributes be added to the prohibition on discrimination in the ADA? If so, what should be added and why?

We do not support the proposal to introduce protections into the ADA on grounds of 'sex characteristics'. If the intent is to protect people born with differences of sexual development (sometimes referred to as 'intersex' conditions) these should be included in a broader category of 'health status' or similar. We would support such an inclusion.

If a specific protected category of ‘sex characteristics’ were introduced, we think it very likely that it would be used as another pretext to undermine LGB people’s access to single-sex spaces – e.g. by asserting that a gay men’s sauna which denies access to female patrons is discriminating against ‘people with vaginas’.

Question 5.3: An open-ended list: Should the list of attributes in the ADA be open-ended to allow other attributes to be protected? Why or why not?

It is impossible to imagine how an open-ended approach could be enforced or promoted consistently and fairly in the long term. Such a vague system would surely risk empowering vexatious cohorts and individuals – for example, disaffected ultra-conservative groups who believe that marriage equality ‘discriminates’ against heterosexuals.

Question 8.1: Protected attributes: (1) What changes, if any, should be made to the way the ADA expresses and defines the attributes currently protected against vilification? (2) Should the ADA protect against vilification based on a wider range of attributes? If so, which attributes should be covered and how should these be defined?

We have outlined earlier why we believe protections for sexual orientation should be framed clearly in terms of homosexuality, bisexuality and heterosexuality. Other framings offered by this consultation paper are either unclear or unacceptably risky.

This also applies to the consultation paper’s framing of anti-vilification protections for ‘LGBTIQA+’ individuals. This framing is unworkable for two reasons. Firstly, it groups together many diverse cohorts who have no single, unifying characteristic in common. Secondly, it is unbounded: the '+' symbol means this category can encompass anyone at all. Such vague terminology has no place in the law.

Question 8.2: The test for vilification: (1) Should NSW adopt a ‘harm-based’ test for civil vilification? If so, should this replace or supplement the existing ‘incitement-based’ test? (2) What, if any, other changes should be made to the incitement-based test for civil vilification?

The proposal to replace the ‘incitement-based’ test for vilification with a 'harm-based' test appears to be rife with potential problems. It is curious that the consultation paper offers this as a solution to the problem of the current system being 'unclear' and 'difficult to prove', as a 'harm-based' approach would surely be equally, or more, so.

The consultation paper proposes that a harm-based test could focus on whether the conduct ‘would be reasonably likely to be considered by a reasonable person with the protected attribute to be hateful, seriously contemptuous, or reviling or seriously ridiculing of the targeted person or group’, stating that the aim would be to ‘focus on the impact on the targeted group, not a third-party audience’.

But the intent of the law is surely not to appeal to a third-party audience or to specific identity groups, but to a shared, reasonable community standard. While we acknowledge this can be a very difficult task with imperfect results, we cannot support abandoning it in favour of an approach based on hyper-subjectivity – i.e. the belief that anyone has suffered harm if they say they have. Such an approach would surely be highly contested and impossible to enforce

equitably, consistently, and with widespread community support – not the least because different social groups hold divergent and clashing beliefs about what they consider to be harmful. In practice, we fear this would mean the threshold for enforcement would be set by the most vocal cohorts or individuals with the most powerful support bases.

Even more concerning is the consultation paper's proposal to make it unlawful under the ADA to 'commit a public act that expresses (rather than incites) hostility against, brings into contempt or ridicules a person with a protected attribute'. Such a measure runs the risk of becoming draconian and, again, very difficult to enforce fairly across the board.

We are deeply aware of the distress that individuals can feel when vilified in public. For example, more than two-thirds of our members told us they had been subject to homophobic or biphobic slurs or jokes, and almost 4 in 10 had been physically threatened or attacked because of their sexuality. However, we are very wary of proposals to further restrict speech, as we fear these could lead to new harms.

LGB individuals obtained equal rights before the law after a very vocal public struggle, where we gathered together and made our arguments to diverse (and often hostile) audiences – from parliamentarians and police officers to workmates and family members. We listened to arguments against equality, evaluated them, and countered them – for the most part, successfully. In other words, equality for LGB people was achieved through our exercise of freedoms of thought, speech and association. We are not convinced our lives will be improved now by restriction of such rights.

Moreover, we are confident, unfortunately, that any new laws to penalise the critical discussion of 'gender identity' will be deployed by gender identity activists to criminalise, harass and silence LGB individuals who speak about the reality and importance of biological sex to our own lives.

We have detailed numerous cases of such 'lawfare' in other jurisdictions – for example, a lesbian artist in Norway threatened with three years' imprisonment for tweeting that men cannot be lesbians, and a British lesbian interrogated by police for a 'non-crime hate incident' after she took a photograph of a sticker that read 'Keep Males Out Of Women-Only Spaces'.

Such measures are both sinister and a waste of public money. Ironically, for reforms meant to reduce discrimination, they appear to be deployed disproportionately towards women.

We believe better results for the whole community would be delivered by investing in grassroots social cohesion initiatives to prevent serious hostilities from developing in local areas. We would also like to see improved resources for police, courts, civil tribunals, mediation services, work safety authorities and community legal services, many of which are struggling to deal with their current workloads in a timely fashion.

Question 11.2: Special measures: (1) Should the ADA generally allow for special measures? Why or why not? (2) If so, what criteria for a special measure should the ADA apply? (3) If a general special measures section is added to the ADA, should it replace the existing exemption and certification processes? Why or why not?

The consultation paper states that 'special measures' are 'benefits, programs or policies that support some or all members of a disadvantaged group. They are implemented for the sole purpose of promoting substantive equality and redressing historical disadvantage … the purpose of a special measure is to secure the advancement of the group, so they can exercise and enjoy human rights and fundamental freedoms equally with others.'

'Special measures' could be valuable to LGB individuals if they functioned to enable the provision of single-sex services, spaces and events for same-sex attracted individuals. Our members have told us that their biggest priority for LGB Alliance Australia is campaigning for single-sex spaces and events. More than 8 out of 10 said there were no such events or spaces where they lived. 3 out of 10 said this had affected their ability to find a partner, while half said it had affected their mental or physical health or wellbeing.

We would warmly welcome such 'special measures' if the ADA enabled them. However, at present such measures are being undermined around the country by the replacement of the legal category of sex with 'gender identity'.

Finally, we express our concern at the consultation paper's frequent unquestioning use of the language and concepts of critical theory – e.g. 'intersectionality', 'substantive equality', 'inclusive', 'binary', 'cisgender'. These are highly contested concepts (imported largely from American Ivy League universities) which have very little to do with the original intent of the ADA. We were surprised to hear such language used by a law reform commission and hope this approach will be reconsidered.

We would be glad to discuss any of these concepts further with you. Please contact: contact@lgballiance.org.au