



New South Wales

Equality Legislation Amendment (LGBTIQA+) Bill 2023

Explanatory note

This explanatory note relates to this Bill as introduced into Parliament.
The *Conversion Practices Prohibition Bill 2023* is cognate with this Bill.

Overview of Bill

The object of this Bill is to provide full equality for LGBTIQA+ communities in New South Wales by amending the following—

- (a) the *Anti-Discrimination Act 1977*,
- (b) the *Births, Deaths and Marriages Registration Act 1995*,
- (c) the *Children and Young Persons (Care and Protection) Act 1998*,
- (d) the *Children's Guardian Act 2019*,
- (e) the *Court Security Act 2005*,
- (f) the *Crimes Act 1900*,
- (g) the *Crimes (Administration of Sentences) Act 1999*,
- (h) the *Crimes (Domestic and Personal Violence) Act 2007*,
- (i) the *Crimes (Forensic Procedures) Act 2000*,
- (j) the *Crimes (Sentencing Procedure) Act 1999*,
- (k) the *Drug Misuse and Trafficking Act 1985*,
- (l) the *Government Sector Employment Act 2013*,
- (m) the *Government Sector Employment (General) Rules 2014*,
- (n) the *Interpretation Act 1987*,

- (o) the *Law Enforcement (Powers and Responsibilities) Act 2002*,
- (p) the *Mental Health Act 2007*,
- (q) the *Sheriff Act 2005*,
- (r) the *Summary Offences Act 1988*,
- (s) the *Surrogacy Act 2010*,
- (t) the *Workers Compensation Act 1987*.

Outline of provisions

Clause 1 sets out the name, also called the short title, of the proposed Act.

Clause 2 provides for the commencement of the proposed Act on the date of assent to the proposed Act.

Schedule 1 **Amendment of Anti-Discrimination Act 1977 No 48**

Schedule 1[1] inserts the definition of *sexuality* and omits the definition of *homosexual*. Schedule 1[1] also omits the definition of *recognised transgender person* which required a transgender person to alter their sex under the *Births, Deaths and Marriages Registration Act 1995* or under the corresponding provisions of a law of another Australian jurisdiction to be considered a recognised transgender person. **Schedule 1[2] and [6]** make consequential amendments.

Schedule 1[3]–[5] provides that for the *Anti-Discrimination Act 1977* a transgender person is a person who lives as a member of another sex. **Schedule 1[7] and [8]** make consequential amendments.

Schedule 1[10] and [11] remove exceptions for a private educational authority to discriminate against an employee, an applicant for employment, an applicant for admission as a student or a student on transgender grounds. **Schedule 1[9]** makes a consequential amendment.

Schedule 1[12] provides that it is lawful to exclude a transgender person from participation in a sporting activity for members of the sex the person lives, seeks to live or identifies with if—

- (a) the person is over the age of 12 years, and
- (b) the sporting activity is part of a competition, and
- (c) the strength, stamina or physique of a person competing is relevant, and
- (d) the exclusion of the person is reasonable and proportionate, and
- (e) the person is not acting as an umpire or referee.

The provision also removes an exception that allows a person to treat a transgender person as being of the opposite sex to the sex with which the transgender person identifies in the administration of a superannuation or provident fund or scheme.

Schedule 1[13] inserts proposed Part 3B to provide for discrimination on the ground of variations of sex characteristics.

Proposed Division 1 sets out what it means for a person to have a variation of sex characteristics and what constitutes discrimination on the ground of a variation of sex characteristics.

Proposed Division 2 provides the particulars in which it is unlawful to discriminate against a person on the ground of a variation of sex characteristics in relation to work for the following—

- (a) employers and applicants,
- (b) employers and employees,
- (c) principals and commission agents,
- (d) principals and contract workers,

- (e) partners in a firm,
- (f) members of a council of a local government area,
- (g) industrial organisations and applicants for membership,
- (h) industrial organisations and members,
- (i) qualifying bodies,
- (j) employment agencies.

Proposed Division 3 provides the particulars in which it is unlawful to discriminate against a person on the ground of a variation of sex characteristics for the following—

- (a) educational authorities and applicants for admission as a student,
- (b) educational authorities and students,
- (c) providers of goods or services, whether or not for payment,
- (d) principals or agents that provide accommodation,
- (e) registered clubs and applicants for membership,
- (f) registered clubs and members.

Proposed Division 4 makes it unlawful for a person, by public act, to incite hatred towards, serious contempt for or severe ridicule of a person or group on the ground the person or a member of the group have variations of sex characteristics. The proposed division also sets out exceptions to an offence under the proposed division. Proposed section 38ZH defines *public act* for the proposed division.

Schedule 1[14]–[17] removes an exception for a private educational authority to discriminate against an employee, an applicant for employment, a student or a person applying for admission as a student on the ground of marital or domestic status.

Schedule 1[18] and [19] remove an exception for a private education authority to discriminate against an employee or an applicant for employment on the ground of disability.

Schedule 1[20] provides that an educational authority may refuse to accept a person’s application for a school, college, university or other institution that is conducted solely for students who have a disability that is not the same as the disability of the person.

Schedule 1[21] updates wording in relation to HIV.

Schedule 1[23] updates Part 4C to provide for discrimination on the ground of sexuality. **Schedule 1[22], [24]–[28], [33] and [34]** make consequential amendments.

Schedule 1[29] corrects a minor drafting error. **Schedule 1[30]** makes a consequential amendment.

Schedule 1[31] and [32] remove an exception for a private educational authority to discriminate against an employee, an applicant for employment, a student or a person applying for admission as a student on the ground of sexuality.

Schedule 1[37] updates wording in relation to HIV/AIDS. **Schedule 1[35] and [36]** make consequential amendments.

Schedule 1[38] removes an exception for a private educational authority to discriminate against a student or a person applying for admission as a student on the ground of age.

Schedule 1[39] inserts proposed Part 4H to provide for discrimination on ground a person is or has been a sex worker.

Proposed Division 1 defines *public act* and *sex worker* for the proposed part and sets out what constitutes discrimination on the ground a person is, or has been, a sex worker.

Proposed Division 2 provides the particulars in which it is unlawful to discriminate against a person on the ground the person is, or has been, a sex worker for the following—

- (a) employers and applicants,
- (b) employers and employees,
- (c) principals and commission agents,
- (d) principals and contract workers,
- (e) partners in a firm,
- (f) members of a council of a local government area,
- (g) industrial organisations and applicants for membership,
- (h) industrial organisations and members,
- (i) qualifying bodies,
- (j) employment agencies.

Proposed Division 3 provides the particulars in which it is unlawful to discriminate against a person on the ground the person is, or has been, a sex worker for the following—

- (a) educational authorities and applicants for admission as a student,
- (b) educational authorities and students,
- (c) providers of goods or services, whether or not for payment,
- (d) principals or agents that provide accommodation,
- (e) registered clubs and applicants for membership,
- (f) registered clubs and members.

Proposed Division 4 makes it unlawful for a person, by public act, to incite hatred towards, serious contempt for or severe ridicule of a person or group on the ground the person or a member of the group is, or has been, a sex worker. The proposed division also sets out exceptions to an offence under the proposed division.

Schedule 1[40] provides that the *Anti-Discrimination Act 1977* does not affect the selection or appointment of a person to exercise functions in relation to religious observance or practice or a practice to propagate religion in certain circumstances. However, this provision clarifies that the Act does continue to apply in relation to employment and education by religious educational institutions and employment and the provision of goods, services or accommodation by religious bodies.

Schedule 1[41] removes an exception to the *Anti-Discrimination Act 1977*, Parts 3A and 4C for organisations established or controlled by a religious organisation concerning the provision of adoption services under the *Adoption Act 2000*.

Schedule 1[42] provides that a vilification complaint includes a complaint in respect to contraventions of proposed sections 38ZI and 50AO, relating to sex characteristics and sex work.

Schedule 1[43] inserts proposed Part 9C to require government sector agencies to include options on forms that allow a person's sex to be described in a non-binary way and to allow a person to describe their relationship with another person in a way that accords with each person's identified sex or without indication of either person's sex.

Schedule 2 Amendment of Births, Deaths and Marriages Registration Act 1995 No 62

Schedule 2[2] and [3] provide that a live birth of a child where variations of sex characteristics do not allow for the easy assignment of sex must be registered within 180 days after the date of the birth with a maximum penalty of 10 penalty units.

Schedule 2[4] provides that if a person alters their record of sex and name on the register under proposed Part 5A, the person's change of name is to be considered registered under the *Births, Deaths and Marriages Registration Act 1995*, section 27 or 28.

Schedule 2[5] replaces Part 5A to provide for a person to alter the record of the person's sex.

Proposed Division 1 defines *prohibited sex descriptor*, *recognition certificate* and *sex descriptor* for the proposed part. **Schedule 2[1]** makes a consequential amendment.

Proposed Division 2 provides—

- (a) a person 16 years of age or more may apply to the Registrar of Births, Deaths and Marriages to have a record of the person's sex altered if the person's birth is registered in New South Wales and the particulars of the application, and
- (b) a person under 16 years of age may apply to the NSW Civil and Administrative Tribunal (*NCAT*) to have a record of the person's sex altered if the person's birth is registered in New South Wales and the particulars of the application, and
- (c) the circumstances in which NCAT must take reasonable steps to notify each parent, or other person with parental responsibility for the person, about such an application.

Proposed Division 3 provides for the parents or guardians of a child to apply to the Registrar of Births, Deaths and Marriages to alter a record of sex in relation to the child if the child's birth is registered in New South Wales and the particulars of the application. The alteration in the record of the sex must be approved by NCAT if not all the parents or guardians of the child wish to apply to alter the record, and in certain other circumstances, under the proposed division.

Proposed Division 4 provides for applications for the registration of an acknowledgement of a person's sex if the person's birth is not registered in New South Wales and the particulars of an application.

Proposed Division 5 provides that after receiving an application for an alteration of a record of sex or the registration of an acknowledgement of sex in relation to a person under proposed Part 5A, the Registrar must update certain particulars in the Register or refuse to register the sex as the registered sex in relation to the person and the requirements for the Registrar to refuse an application. The proposed division also provides that for an application made to NCAT, NCAT may approve or reject an application, and the requirements for NCAT to approve or reject an application.

Proposed Division 6 provides that a person who alters the record of sex in New South Wales is taken to be the sex stated in the record. The Registrar must, on application by a person in the approved form, issue a certificate certifying particulars in an entry by reference to the changed sex or name.

Schedule 3 Amendment of Children and Young Persons (Care and Protection) Act 1998 No 157

Schedule 3[1] provides that the *Children and Young Persons (Care and Protection) Act 1998* is to be administered under the principle that in all actions and decisions made under the Act that significantly affect a child or young person, account must be taken of the gender identity and variations of sex characteristics of the child or young person and, if relevant, those with parental responsibility for the child or young person.

Schedule 3[2] provides that a person who is aged 16 years or above but who is under the age of 18 years may make a decision about the person's own medical or dental treatment as validly and effectively as an adult. For a person under the age of 16 years, a decision about the person's medical treatment may be made with the consent of one of the person's parents. A person under the age of 16 years may make a decision about the person's own medical or dental treatment in certain circumstances.

Schedule 3[3] makes it clear that the consent of NCAT to the carrying out of special medical treatment on a child under section 175 is not required if a court has already consented to or approved the treatment.

Schedule 4 Amendment of Children’s Guardian Act 2019 No 25

Schedule 4 provides that the *Children’s Guardian Act 2019* is to be administered under the guiding principle that in all actions and decisions made under the Act that significantly affect a child, account must be taken of any variations of the sex characteristics of the child and, if relevant, those with parental responsibility for the child.

Schedule 5 Amendment of Court Security Act 2005 No 1

Schedule 5[1] inserts definitions of *intersex person* and *transgender person*.

Schedule 5[2] provides that for the *Court Security Act 2005* a reference to a member of a different sex or a member of the same sex, for a transgender person, is taken to be a different or the same sex to the sex with which the transgender person identifies.

Schedule 5[3] provides that the *Anti-Discrimination Act 1977* is not limited by the *Court Security Act 2005*, including in relation to the conduct of a court security officer.

Schedule 5[4] provides that for a search conducted by a security officer of any intersex person or transgender person under the *Court Security Act 2005*, section 10, if the person expresses a preference for a particular security officer or a security officer of a particular class, the search must be conducted by the particular security officer or a security officer of the particular class, if reasonably available.

Schedule 6 Amendment of Crimes Act 1900 No 40

Schedule 6[3] provides that a person is guilty of an offence if the person, by a public act, threatens or incites violence towards another person or group on the following grounds—

- (a) whether the other person or a member of the group lives with HIV or AIDS,
- (b) whether the other person or a member of the group is, or has been, a sex worker.

Schedule 6[1], [2] and [4] make consequential amendments.

Schedule 7 Amendment of Crimes (Administration of Sentences) Act 1999 No 93

Schedule 7[1] provides that for a female person, other person with breasts, a transgender male person or other person whose gender is neither exclusively male nor female, a sample of sweat taken from the breast area or chest area by swab or washing is not a non-invasive sample.

Schedule 7[2] inserts definitions of *intersex person* and *transgender person*.

Schedule 7[3] clarifies that the *Anti-Discrimination Act 1977* is not limited by the *Crimes (Administration of Sentences) Act 1999*, including in relation to the exercise of functions by a correctional officer.

Schedule 7[4] provides that for a search conducted by a correctional officer of any intersex person or transgender person under the *Crimes (Administration of Sentences) Act 1999*, section 253I, if the person expresses a preference for a particular security officer or a security officer of a particular class, the search must be conducted by the particular security officer or a security officer of the particular class, if practicable.

Schedule 8 Amendment of Crimes (Domestic and Personal Violence) Act 2007 No 80

Schedule 8[1] inserts definitions of *gender history* and *out a person*.

Schedule 8[2] provides that for the meaning of *domestic abuse*, an example of behaviour that is coercive is threatening to disclose a person's sexual orientation, gender history, variation of sex characteristics, whether the person lives with HIV or whether the person is, or has been, a sex worker.

Schedule 8[3] and [4] provides that a court may make an apprehended domestic violence order or an apprehended personal violence order if it is satisfied on the balance of probabilities that a person reasonably fears the engagement of another person in conduct in which the other person threatens to disclose the person's sexual orientation, gender history, a variation in the person's sex characteristics, whether the person lives with HIV or whether the person is, or has been, a sex worker.

Schedule 8[5] provides that if an application for an apprehended violence order is made to a court to protect a person, in determining whether there is a good reason not to refer a matter to mediation, the court must consider whether the defendant has engaged in conduct amounting to harassment in relation to—

- (a) the protected person's race, religion or disability, or
- (b) the protected person's sexual orientation or gender history, or
- (c) the protected person's variation of sex characteristics, or
- (d) the protected person being a person living with HIV/AIDS, or
- (e) the protected person being a person who engages in, or has engaged in, sex work.

Schedule 8[6] provides that an apprehended violence order may impose a prohibition or restriction on the defendant from disclosing the protected person's sexual orientation, gender history, a variation in the person's sex characteristics, whether the person lives with HIV or whether the person is, or has been, a sex worker.

Schedule 8[7] provides that an authorised officer or a Registrar must not, without compelling reasons, refuse to issue process in an apprehended personal violence order matter if the application discloses allegations of harassment in relation to—

- (a) the protected person's race, religion or disability, or
- (b) the protected person's sexual orientation or gender identity, or
- (c) the protected person's variation of sex characteristics, or
- (d) the protected person being a person living with HIV/AIDS, or
- (e) the protected person being a person who engages in, or has engaged in, sex work.

Schedule 9 Amendment of Crimes (Forensic Procedures) Act 2000 No 59

Schedule 9[1] defines *intersex person*, *private parts*, *private upper body parts* and *transgender person* and omits the definition of *recognised transgender person*. **Schedule 9[2], [3] and [8]** make consequential amendments.

Schedule 9[4] and [5] provides that for the *Crimes (Forensic Procedures) Act 2000*, a reference to a person of a different sex to a transgender person means a person of a different sex with which the transgender person identifies.

Schedule 9[6] clarifies that the *Anti-Discrimination Act 1977* is not limited by the *Crimes (Forensic Procedures) Act 2000*, including in relation to the exercise of functions by a police officer.

Schedule 9[7] requires that forensic procedures must not be carried out in the presence or view of a person who is of a different sex to the suspect.

Schedule 9[9] provides that for an intersex or transgender suspect, including if the suspect is a child, an intimate forensic procedure is to be carried out by a particular person or a person of a particular class the suspect has expressed a preference for, if practicable.

Schedule 9[10] provides that if a person is asked to help carry out a forensic procedure on an intersex or transgender suspect, including if the suspect is a child, the person is to be a person or a person of a particular class the suspect has expressed a preference for, if practicable.

Schedule 9[11] provides that a self-administered buccal swab may be carried out by a suspect in the presence or view of another person, whether of the same sex as the suspect or of a different sex.

Schedule 9[12] provides that where the presence of a police officer is reasonably necessary to ensure a forensic procedure is carried out effectively and in accordance with the Act on an intersex or transgender suspect, including if the suspect is a child, the police officer is to be a particular police officer or a police officer from a particular class the suspect has expressed a preference for. This requirement does not apply if it is not practicable for the particular officer or an officer of that particular class to attend within a reasonable time.

Schedule 10 Amendment of Crimes (Sentencing Procedure) Act 1999 No 92

Schedule 10 provides that an aggravating factor the court must take into account in determining the appropriate sentence for an offence includes if the offence was motivated by hatred for or prejudice against a group of people to which the offender believed the victim belonged in relation to the gender identity or particular variations of sex characteristics.

Schedule 11 Amendment of Drug Misuse and Trafficking Act 1985 No 226

Schedule 11 removes a redundant word.

Schedule 12 Amendment of Government Sector Employment Act 2013 No 40

Schedule 12[1] provides that sexual orientation and variations of sex characteristics are included in the definition of *workforce diversity*.

Schedule 12[2] provides that the Public Service Commissioner may publish a diversity and inclusion standard that provides for minimum diversity and inclusion standards for government sector agencies. A diversity and inclusion standard may include specific targets and quotas. The government sector employment rules may also deal with workforce diversity in any government sector agency. The head of a government sector agency must ensure the agency complies with a diversity and inclusion standard and any workforce diversity obligations under the government sector employment rules that apply to the agency.

Schedule 13 Amendment of Government Sector Employment (General) Rules 2014

Schedule 13 provides that an *eligible person* includes an intersex person and a transgender person for the purpose of workplace diversity for a government sector agency.

Schedule 14 Amendment of Interpretation Act 1987 No 15

Schedule 14 provides that a word or expression that indicates one or more particular genders is taken to include every other gender. A word or expression that indicates a person's relationship with another person by reference to the person's gender is taken to include any person in the same

relationship, regardless of gender. A word or expression that indicates one or more physical or body attributes or body capacity by reference to a particular gender are taken to be a reference to every person with the physical or body attribute, regardless of gender. Furthermore, references to a person do not exclude a reference to an individual, or corporation, merely because elsewhere in the Act or instrument there is a particular reference to an individual, or corporation, however expressed.

Schedule 15 Amendment of Law Enforcement (Powers and Responsibilities) Act 2002 No 103

Schedule 15[1] inserts definitions of *intersex person* and *transgender person*.

Schedule 15[2] and [3] provides that for the *Law Enforcement (Powers and Responsibilities) Act 2002*, a reference to a person of a different sex to a transgender person means a person of a different sex with which the transgender person identifies.

Schedule 15[4] provides that the *Anti-Discrimination Act 1977* is not limited by the *Law Enforcement (Powers and Responsibilities) Act 2002*, including in relation to the exercise of functions by a police officer.

Schedule 15[6] provides that for a search conducted by a police officer of any intersex person or transgender person under the *Law Enforcement (Powers and Responsibilities) Act 2002*, Part 4, if the person expresses a preference for a particular police officer or a police officer of a particular class of persons to conduct the search, the search must be conducted by the particular police officer or a police officer of the particular class, if reasonably available. **Schedule 15[7]** makes a consequential amendment.

Schedule 15[8] inserts the definition of *private upper body parts*. **Schedule 15[5]** makes a consequential amendment.

Schedule 15[9] provides that a strip search must not be conducted in the presence or view of a person who is a different sex to the person being searched, except for a parent, guardian or personal representative of the person being searched, or a medical practitioner, with the consent of the person being searched.

Schedule 15[10] provides that for a search of an intersex person or a transgender person on board or about to board an aircraft under the *Law Enforcement (Powers and Responsibilities) Act 2002*, section 44, if the person expresses a preference for a person of a particular class of persons to conduct the search, the search must be conducted by a person of the particular class, if reasonably available.

Schedule 16 Amendment of Mental Health Act 2007 No 8

Schedule 16 provides that a person is not a mentally ill person or a mentally disordered person merely because the person expresses or fails to express a particular gender identity or gender expression.

Schedule 17 Amendment of Sheriff Act 2005 No 6

Schedule 17[1] inserts definitions of *intersex person* and *transgender person*.

Schedule 17[2] provides that for the *Sheriff Act 2005* a reference to a member of a different sex or a member of the same sex, for a transgender person, is taken to be the same or different sex to the sex with which the transgender person identifies. Proposed section 3B clarifies that the *Anti-Discrimination Act 1977* is not limited by the *Sheriff Act 2005*, including in relation to the exercise of functions by a sheriff's officer.

Schedule 17[3] provides that for a search conducted by a sheriff's officer of any intersex person or transgender person under the *Sheriff Act 2005*, section 7B, if the person expresses a preference

for a particular sheriff's officer or a sheriff's officer of a particular class of persons to conduct the search, the search must be conducted by the particular sheriff's officer or a sheriff's officer of the particular class, if reasonably available.

Schedule 18 Amendment of Summary Offences Act 1988 No 25

Schedule 18 removes offences related to prostitution from the *Summary Offences Act 1988*.

Schedule 19 Amendment of Surrogacy Act 2010 No 102

Schedule 19[1] provides that a birth mother for a surrogacy arrangement has the same rights to manage the birth mother's pregnancy as any other pregnant woman.

Schedule 19[2] provides that for a prohibited commercial surrogacy arrangement under the *Surrogacy Act 2010*, Division 2, a person who is ordinarily a resident or domiciled in New South Wales does not commit an offence if the commercial surrogacy arrangement occurs outside New South Wales.

Schedule 19[3] provides that the Supreme Court of New South Wales (the *Court*) may make a parentage order in relation to a surrogacy arrangement if the Court is satisfied that it is in the best interests of the child to make the parentage order. **Schedule 19[4]** makes a consequential amendment.

Schedule 19[5] clarifies that the Court must have regard to the wishes of the child, if the child is of sufficient maturity to express the child's wishes and the Court considers it appropriate to take those wishes into account, when making a parentage order.

Schedule 20 Amendment of Workers Compensation Act 1987 No 70

Schedule 20[1], [3]–[5] and [7] updates wording in relation to HIV and HIV/AIDS.

Schedule 20[2] removes a redundant provision.

Schedule 20[6] replaces the definitions of *AIDS* and *HIV*.