

[Act 1996 No 22]



New South Wales

Transgender (Anti-Discrimination and Other Acts Amendment) Bill 1996

Explanatory note

This explanatory note relates to this Bill as introduced into Parliament.

Overview of Bill

The objects of this Bill are:

- (a) to amend the *Anti-Discrimination Act 1977* to make discrimination and vilification on transgender grounds unlawful, and
 - (b) to amend the *Births, Deaths and Marriages Act 1995* to enable the record of a person's sex in the registration of the person's birth in the Register under that Act to be altered if the person has undergone sexual reassignment surgery and is not married, and
 - (c) to amend the *Crimes Act 1900* to recognise that sexual assault offences may be perpetrated against persons who have undergone sexual reassignment surgery, and
 - (d) to amend the *Wills, Probate and Administration Act 1898* to provide that a beneficiary under a will is not (unless the will expressly provides otherwise) disinherited merely because the beneficiary is a transgender person.
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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 a day or days to be appointed by proclamation.

Clause 3 is a formal provision giving effect to the Schedule of amendments to the *Anti-Discrimination Act 1977*.

Clause 4 is a formal provision giving effect to the Schedule of amendments to the *Births, Deaths and Marriages Registration Act 1995*.

Clause 5 is a formal provision giving effect to the Schedule of amendments to the *Crimes Act 1900*.

Clause 6 is a formal provision giving effect to the Schedule of amendments to the *Wills, Probate and Administration Act 1898*.

Schedule 1 Amendment of Anti-Discrimination Act 1977

Schedule 1 [1] inserts a definition of *recognised transgender person* to mean a person the record of whose sex is altered under Part 5A (to be inserted by **Schedule 2 [4]**) of the *Births, Deaths and Marriages Act 1995* or under a corresponding law of another Australian jurisdiction.

Schedule 1 [4] inserts Part 3 8 (Discrimination on transgender grounds) into the Act. The Part makes it unlawful to discriminate against a transgender person (or a relative or associate of a transgender person) on transgender grounds in the circumstances described in the Part. Part 3A follows the pattern established in the Act for the other forms of discrimination that are made unlawful by its provisions. The Part contains the following provisions:

Part 3A Discrimination on transgender grounds

Division 1 General

Proposed section 38A explains that a reference to a transgender person is to be read as a reference to a person who identifies as a member of the opposite sex by living, or seeking to live, as a member of the opposite sex or who has identified, and lived, as a member of the opposite sex.

Proposed section 38B states what constitutes discrimination on transgender grounds.

Division 2 Discrimination in work

Proposed section 38C renders it unlawful for an employer to discriminate against an employee or an applicant for employment on transgender grounds. The proposed section does not apply in relation to employment within a private household, or where the number of persons employed does not exceed 5, or to employment by a private educational authority.

Proposed section 38D renders it unlawful for a principal to discriminate against a commission agent or a prospective commission agent on transgender grounds.

Proposed section 38E renders it unlawful for a principal to discriminate against a contract worker on transgender grounds.

Proposed section 38F renders it unlawful for a firm consisting of 6 or more partners, or persons proposing to form a firm consisting of 6 or more partners, to discriminate against a partner or prospective partner on transgender grounds.

Proposed section 38G renders it unlawful for local government councillors to discriminate against another councillor on transgender grounds.

Proposed section 38H renders it unlawful for an industrial organisation to discriminate against a member of such an organisation, or an applicant for membership, on transgender grounds.

Proposed section 38I renders it unlawful for an authority or body that is empowered to confer, renew or extend a professional, trade or other occupational qualification to discriminate on transgender grounds against a person who holds or seeks to hold that qualification.

Proposed section 38J renders it unlawful for an employment agency to discriminate on transgender grounds against a person who seeks the services of the agency.

Division 3 Discrimination in other areas

Proposed section 38K renders it unlawful for an educational authority to discriminate against students or applicants for admission as students on transgender grounds. The proposed section does not apply to a private educational authority. **Schedule 1 [2]** amends section 31A (which preserves the right to conduct single sex schools) to provide that the admission of a transgender person as a student does not affect the single sex status of the school.

Proposed section 38L renders it unlawful to discriminate against another person on transgender grounds in the provision of access to public places and vehicles.

Proposed section 38M renders it unlawful for a person to discriminate against another person on transgender grounds in the provision of goods and services.

Proposed section 38N renders it unlawful for a person to discriminate against another person on transgender grounds in the provision of accommodation. The proposed section does not apply to accommodation in which the person providing the accommodation, or a near relative of that person, lives and the accommodation is for no more than 6 persons.

Proposed section 38O renders it unlawful for a registered club to discriminate on transgender grounds against persons who apply for membership of the club, or against members of the club in relation to the provision of benefits. **Schedule 1 [3]** amends section 34A (which preserves the right to conduct a registered club for members of a single sex) to provide that the admission of a transgender person as a member does not affect the single sex status of the club.

Division 4 Exceptions to Part 3A

Proposed section 38P provides that it is not unlawful to exclude a transgender person from participating in a sporting activity for members of the sex with which the transgender person identifies.

Proposed section 38Q provides that it is not unlawful in the administration of a superannuation scheme to treat a transgender person as being of the opposite sex to the sex with which the transgender person identifies.

Division 5 Transgender vilification

Proposed section 38R inserts a definition of public act for the purposes of the Division.

Proposed section 38S renders it unlawful for a person, by a public act, to incite hatred towards, serious contempt for, or severe ridicule of another person or persons on transgender grounds. The proposed section does not apply to a fair report of a public act, material that has the protection of absolute privilege under the *Defamation Act 1974* or a public act done reasonably and in good faith in the public interest.

Proposed section 38T makes it an offence to engage in transgender vilification involving the threat of physical harm to transgender persons or their property. The offence may only be prosecuted with the consent of the Attorney General.

Schedule 1 [5] and [6] make consequential amendments.

Schedule 2 Amendment of Births, Deaths and Marriages Registration Act 1995

Schedule 2 [4] inserts Part 5A (Change of sex) into the Act. The Part contains the following provisions:

Part 5A Change of sex

Proposed section 32A defines *birth certificate* and *sexual reassignment surgery* for the purposes of the Part.

Proposed section 32B enables an unmarried adult who has undergone sexual reassignment surgery and whose birth is registered in New South Wales to apply for the alteration of the record of the person's sex in the registration of the person's birth. A similar application may be made by the parents or guardian of an unmarried child who satisfies the same requirements.

Proposed section 32C requires such an application to be accompanied by medical verification of the sexual reassignment surgery.

Proposed section 32D enables the Registrar of Births, Deaths and Marriages to determine an application and, if appropriate, to alter the record of the person's sex.

Proposed section 32E enables the Registrar, if the record of a person's sex is altered, to issue a new birth certificate showing the person's sex as altered.

Proposed section 32F specifies the circumstances in which the Registrar may, if the record of a person's sex is altered, issue a birth certificate showing the person's sex before the record was altered.

Proposed section 32G makes it an offence for a person to produce, for the purposes of the law of another jurisdiction, a new birth certificate issued for a transgender person unless the law of that jurisdiction expressly allows the new certificate to be produced or the person, in producing the new certificate, informs the person to whom it is produced of the transgender person's change of sex.

Proposed section 32H makes it an offence for a person to produce, with intention to deceive, an old birth certificate issued for a transgender person.

Proposed section 32I provides that a person the record of whose sex is altered under the Part is, for the purposes of, but subject to, New South Wales law, a person of the sex as so altered. The proposed section also enables the recognition in New South Wales of a sex change effected under the law of another Australian jurisdiction.

Schedule 3 Amendment of Crimes Act 1988

Schedule 3 amends sections 61H and 80A of the Act to add to certain definitions relating to sexual assault offences specific references to surgically constructed vaginas so as to recognise that sexual assault offences may be perpetrated against persons who have undergone sexual reassignment surgery.

Schedule 4 Amendment of Wills, Probate and Administration Act 1898

Schedule 4 inserts proposed section 14 into the Act to provide that a beneficiary under a will is not (unless the will expressly provides otherwise) disinherited merely because the beneficiary is a transgender person.