



New South Wales

Transgender (Anti-Discrimination and Other Acts Amendment) Act 1996 No 22

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New South Wales

Transgender (Anti-Discrimination and Other Acts Amendment) Act 1996 No 22

Act No 22, 1996

An Act to amend the *Anti-Discrimination Act 1977* to make discrimination and vilification on transgender grounds unlawful; to amend the *Births, Deaths and Marriages Registration Act 1995* to provide for the recognition of a change of sex; to amend the *Crimes Act 1900* and the *Wills, Probate and Administration Act 1898*; and for related purposes. [Assented to 19 June 1996]

The Legislature of New South Wales enacts:

1 Name of Act

This Act is the *Transgender (Anti-Discrimination and Other Acts Amendment) Act 1996*.

2 Commencement

This Act commences on a day or days to be appointed by proclamation.

3 Amendment of Anti-Discrimination Act 1977 No 48

The *Anti-Discrimination Act 1977* is amended as set out in Schedule 1.

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

The *Births, Deaths and Marriages Registration Act 1995* is amended as set out in Schedule 2.

5 Amendment of Crimes Act 1900 No 40

The *Crimes Act 1900* is amended as set out in Schedule 3.

6 Amendment of Wills, Probate and Administration Act 1898 No 13

The *Wills, Probate and Administration Act 1898* is amended as set out in Schedule 4.

Schedule 1 Amendment of Anti-Discrimination Act 1977

(Section 3)

[1] Section 4 Definitions

Insert in alphabetical order in section 4 (1):

recognised transgender person means 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.

[2] Section 31A Education

Insert after section 31A (3):

- (4) The admission into any such school, college, university or other institution of a transgender person as referred to in Part 3A who identifies with the sex of persons for whom the school, college, university or other institution is conducted does not, for the purposes of subsection (3) (b), affect its status as a school, college, university or other institution conducted solely for students of the same sex.

[3] Section 34A Registered clubs

Insert after section 34A (3):

- (3A) The admission into any such registered club of a transgender person as referred to in Part 3A who identifies with the sex of persons for whom membership of the registered club is available does not, for the purposes of subsection (3), affect its status as a registered club the membership of which is available to persons of the same sex only.

[4] Part 3A

Insert after Part 3:

Part 3A Discrimination on transgender grounds

Division 1 General

38A Interpretation

A reference in this Part to a person being transgender or a transgender person is a reference to a person, whether or not the person is a recognised transgender person:

- (a) who identifies as a member of the opposite sex by living, or seeking to live, as a member of the opposite sex, or
- (b) who has identified as a member of the opposite sex by living as a member of the opposite sex, or
- (c) who, being of indeterminate sex, identifies as a member of a particular sex by living as a member of that sex,

and includes a reference to the person being thought of as a transgender person, whether the person is, or was, in fact a transgender person.

38B What constitutes discrimination on transgender grounds

- (1) A person (*the perpetrator*) discriminates against another person (*the aggrieved person*) on transgender grounds if, on the ground of the aggrieved person being transgender or a relative or associate of the aggrieved person being transgender, the perpetrator:
 - (a) treats the aggrieved person less favourably than in the same circumstances (or in circumstances which are not materially different) the perpetrator treats or would treat a person who he or she did not think was a transgender person or who does not have such a relative or associate who he or she did not think was a transgender person, or

- (b) requires the aggrieved person to comply with a requirement or condition with which a substantially higher proportion of persons who are not transgender persons, or who do not have a relative or associate who is a transgender person, comply or are able to comply, being a requirement which is not reasonable having regard to the circumstances of the case and with which the aggrieved person does not or is not able to comply, or
 - (c) treats the aggrieved person, being a recognised transgender person, as being of the person's former sex or requires the aggrieved person, being a recognised transgender person, to comply with a requirement or condition with which a substantially higher proportion of persons of the person's former sex comply or are able to comply, being a requirement or condition which is not reasonable having regard to the circumstances of the case and with which the aggrieved person does not or is not able to comply.
- (2) For the purposes of subsection (1) (a), something is done on the ground of a person being transgender if it is done on the ground of the person being transgender, a characteristic that appertains generally to transgender persons or a characteristic that is generally imputed to transgender persons.

Division 2 Discrimination in work

38C Discrimination against applicants and employees

- (1) It is unlawful for an employer to discriminate against a person on transgender grounds:
- (a) in the arrangements the employer makes for the purpose of determining who should be offered employment, or
 - (b) in determining who should be offered employment, or
 - (c) in the terms on which employment is offered.

- (2) It is unlawful for an employer to discriminate against an employee on transgender grounds:
 - (a) in the terms or conditions of employment that are afforded to the employee, or
 - (b) by denying the employee access, or limiting the employee's access, to opportunities for promotion, transfer or training, or to any other benefits associated with employment, or
 - (c) by dismissing the employee or subjecting the employee to any other detriment.
- (3) Subsections (1) and (2) do not apply to employment:
 - (a) for the purposes of a private household, or
 - (b) if the number of persons employed by the employer (disregarding any persons employed within the employer's private household) does not exceed 5, or
 - (c) by a private educational authority.
- (4) For the purposes of subsection (3) (b), a corporation is regarded as the employer of the employees of any other corporation which, with respect to the firstmentioned corporation, is a related body corporate within the meaning of the *Corporations Law*.

38D Discrimination against commission agents

- (1) It is unlawful for a principal to discriminate against a person on transgender grounds:
 - (a) in the arrangements the principal makes for the purpose of determining who should be engaged as a commission agent, or
 - (b) in determining who should be engaged as a commission agent, or
 - (c) in the terms on which the principal engages the person as a commission agent.

- (2) It is unlawful for a principal to discriminate against a commission agent on transgender grounds:
- (a) in the terms or conditions that are afforded to the commission agent, or
 - (b) by denying the commission agent access, or limiting the commission agent's access, to opportunities for promotion, transfer or training, or to any other benefits associated with his or her position as a commission agent, or
 - (c) by terminating the commission agent's engagement or subjecting the commission agent to any other detriment.

38E Discrimination against contract workers

It is unlawful for a principal to discriminate against a contract worker on transgender grounds:

- (a) in the terms on which the contract worker is allowed to work, or
- (b) by not allowing the contract worker to work or continue to work, or
- (c) by denying the contract worker access, or limiting the contract worker's access, to any benefit associated with the work performed by the contract worker, or
- (d) by subjecting the contract worker to any other detriment.

38F Partnerships

- (1) It is unlawful for a firm consisting of 6 or more partners, or for any one or more of 6 or more persons proposing to form themselves into a partnership, to discriminate against a person on transgender grounds:
- (a) in the arrangements made for the purpose of determining who should be offered a position as partner in the firm, or

- (b) in determining who should be offered a position as partner in the firm, or
 - (c) in the terms on which the person is offered a position as partner in the firm.
- (2) It is unlawful for a firm consisting of 6 or more partners to discriminate against a partner on transgender grounds:
- (a) by denying the partner access, or limiting the partner's access, to any benefit arising from membership of the firm, or
 - (b) by expelling the partner from the firm, or
 - (c) by subjecting the partner to any other detriment.

38G Discrimination by local government councillors

It is unlawful for any member or members of a council of a local government area when acting (whether alone or together) in the course of the member's or members' official functions to discriminate against another member of the council on transgender grounds.

38H Industrial organisations

- (1) It is unlawful for an industrial organisation to discriminate on transgender grounds against a person who is not a member of the industrial organisation:
- (a) by refusing or failing to accept the person's application for membership, or
 - (b) in the terms on which it is prepared to admit the person to membership.
- (2) It is unlawful for an industrial organisation to discriminate against a member of the organisation on transgender grounds:
- (a) by denying the member access, or limiting the member's access, to any benefit provided by the organisation, or
 - (b) by depriving the member of membership or varying the terms of his or her membership, or
 - (c) by subjecting the member to any other detriment.

38I Qualifying bodies

It is unlawful for an authority or a body which is empowered to confer, renew or extend an authorisation or a qualification that is needed for or facilitates the practice of a profession, the carrying on of a trade or the engaging in of an occupation to discriminate against a person on transgender grounds:

- (a) by refusing or failing to confer, renew or extend the authorisation or qualification, or
- (b) in the terms on which it is prepared to confer the authorisation or qualification or to renew or extend the authorisation or qualification, or
- (c) by withdrawing the authorisation or qualification or varying the terms or conditions on which it is held.

38J Employment agencies

It is unlawful for an employment agency to discriminate against a person on transgender grounds:

- (a) by refusing to provide the person with any of its services, or
- (b) in the terms on which it offers to provide the person with any of its services, or
- (c) in the manner in which it provides the person with any of its services.

Division 3 Discrimination in other areas

38K Education

- (1) It is unlawful for an educational authority to discriminate against a person on transgender grounds:
 - (a) by refusing or failing to accept the person's application for admission as a student, or
 - (b) in the terms on which it is prepared to admit the person as a student.

- (2) It is unlawful for an educational authority to discriminate against a student on transgender grounds:
 - (a) by denying the student access, or limiting the student's access, to any benefit provided by the educational authority, or
 - (b) by expelling the student or subjecting the student to any other detriment.
- (3) Nothing in this section applies to or in respect of a private educational authority.

38L Access to places and vehicles

It is unlawful for a person to discriminate against another person on transgender grounds:

- (a) by refusing to allow the other person access to or the use of any place or vehicle that the public or a section of the public is entitled or allowed to enter or use, for payment or not, or
- (b) in the terms on which the person is prepared to allow the other person access to or the use of any such place or vehicle, or
- (c) by refusing to allow the other person the use of any facilities in any such place or vehicle that the public or section of the public is entitled to use, for payment or not, or
- (d) in the terms on which the person is prepared to allow the other person the use of any such facilities, or
- (e) by requiring the other person to leave or cease the use of any such place or vehicle or any such facilities.

38M Provision of goods and services

It is unlawful for a person who provides (whether or not for payment) goods or services to discriminate against another person on transgender grounds:

- (a) by refusing to provide the person with those goods or services, or

- (b) in the terms on which the other person is provided with those goods or services.

38N Accommodation

- (1) It is unlawful for a person, whether as principal or agent, to discriminate against another person on transgender grounds:
 - (a) by refusing the person's application for accommodation, or
 - (b) in the terms on which he or she offers the person accommodation, or
 - (c) by deferring the person's application for accommodation or giving the person a lower order of precedence in any list of applicants for that accommodation.
- (2) It is unlawful for a person, whether as principal or agent, to discriminate against another person on transgender grounds:
 - (a) by denying the person access, or limiting the person's access, to any benefit associated with accommodation occupied by the person, or
 - (b) by evicting the person or subjecting the person to any other detriment.
- (3) Nothing in this section applies to or in respect of the provision of accommodation in premises if
 - (a) the person who provides or proposes to provide the accommodation or a near relative of that person resides, and intends to continue to reside, in those premises, and
 - (b) the accommodation provided in those premises is for no more than 6 persons.

38O Registered clubs

- (1) It is unlawful for a registered club to discriminate on transgender grounds against a person who is not a member of the registered club:
 - (a) by refusing or failing to accept the person's application for membership of the club, or
 - (b) in the terms on which it is prepared to admit the person to membership of the club.
- (2) It is unlawful for a registered club to discriminate on transgender grounds against a member of the registered club:
 - (a) by denying the member access, or limiting the members' access, to any benefit provided by the club, or
 - (b) by depriving the member of membership or varying the terms of his or her membership, or
 - (c) by subjecting the member to any other detriment.

Division 4 Exceptions to Part 3A

38P Sport

- (1) Nothing in this Part renders unlawful the exclusion of a transgender person from participation in any sporting activity for members of the sex with which the transgender person identifies.
- (2) Subsection (1) does not apply:
 - (a) to the coaching of persons engaged in any sporting activity, or
 - (b) to the administration of any sporting activity, or
 - (c) to any sporting activity prescribed by the regulations for the purposes of this section.

38Q Superannuation

A person does not discriminate against a transgender person (whether or not a recognised transgender person) on transgender grounds if, in the administration of a superannuation or provident fund or scheme, the other person treats the transgender person as being of the opposite sex to the sex with which the transgender person identifies.

Division 5 Transgender vilification

38R Definition

In this Division:

public act includes:

- (a) any form of communication to the public, including speaking, writing, printing, displaying notices, broadcasting, telecasting, screening and playing of tapes or other recorded material, or
- (b) any conduct (not being a form of communication referred to in paragraph (a)) observable by the public, including actions and gestures and the wearing or display of clothing, signs, flags, emblems and insignia, or
- (c) the distribution or dissemination of any matter to the public with knowledge that the matter promotes or expresses hatred towards, serious contempt for, or severe ridicule of
 - (i) a person on the ground that the person is a transgender person, or
 - (ii) a group of persons on the ground that the members of the group are transgender persons.

38S Transgender vilification unlawful

- (1) It is unlawful for a person, by a public act, to incite hatred towards, serious contempt for, or severe ridicule of:
 - (a) a person on the ground that the person is a transgender person, or
 - (b) a group of persons on the ground that the members of the group are transgender persons.
- (2) Nothing in this section renders unlawful:
 - (a) a fair report of a public act referred to in subsection (1), or

- (b) a communication or the distribution or dissemination of any matter comprising a publication referred to in Division 3 of Part 3 of the *Defamation Act 1974* or which is otherwise subject to a defence of absolute privilege in proceedings for defamation, or
- (c) a public act, done reasonably and in good faith, for academic, artistic, scientific, research or religious discussion or instruction purposes or for other purposes in the public interest, including discussion or debate about and expositions of any act or matter.

38T Offence of serious transgender vilification

- (1) A person must not, by a public act, incite hatred towards, serious contempt for, or severe ridicule of, a person on the ground that the person is a transgender person, or a group of persons on the ground that the members of the group are transgender persons, by means which include:
 - (a) threatening physical harm towards, or towards any property of, the person or group of persons, or
 - (b) inciting others to threaten physical harm towards, or towards any property of, the person or group of persons.

Maximum penalty:

In the case of an individual—10 penalty units or imprisonment for 6 months, or both.

In the case of a corporation—100 penalty units.

- (2) A person is not to be prosecuted for an offence under this section unless the Attorney General has consented to the prosecution.

[5] Section 87 Definitions

Insert “, 38S” after “20C” in the definition of *vilification complaint* in section 87.

[6] Section 89B Prosecution for serious vilification

Insert “, 38T” after “20D” wherever occurring in section 89B.

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

(Section 4)

[1] Section 3 Objects of Act

Insert “and the recording of changes of sex” after “name” in section 3 (c).

[2] Section 3 (d)

Omit “and changes of name”.

Insert instead “, changes of name and changes of sex”.

[3] Section 20 Alteration of details after birth registration

Insert after section 20 (2):

- (3) In this section, *registrable information* does not include information relating to a person’s change of sex.

[4] Part 5A

Insert after Part 5:

Part 5A Change of sex

32A Definitions

In this Part:

birth certificate means a certificate issued under section 32E or 49 certifying particulars contained in an entry in the Register of a person’s birth.

sexual reassignment surgery means a surgical procedure involving the alteration of a person's reproductive organs carried out:

- (a) for the purpose of assisting a person to be considered to be a member of the opposite sex, or
- (b) to correct or eliminate ambiguities relating to the sex of the person.

32B Application to alter register to record change of sex

- (1) A person who is 18 or above:
 - (a) whose birth is registered in New South Wales, and
 - (b) who has undergone sexual reassignment surgery, and
 - (c) who is not married,

may apply to the Registrar, in a form approved by the Registrar, for alteration of the record of the person's sex in the registration of the person's birth.

- (2) The parents of a child (or a parent if the applicant is the sole parent), or the guardian of a child:
 - (a) whose birth is registered in New South Wales, and
 - (b) who has undergone sexual reassignment surgery, and
 - (c) who is not married,

may apply to the Registrar, in a form approved by the Registrar, for alteration of the record of the child's sex in the registration of the child's birth.

32C Application must be accompanied by declarations by doctors

An application under section 32B must be accompanied by:

- (a) statutory declarations by 2 doctors, or by 2 medical practitioners registered under the law of any other State, verifying that the person the subject of the application has undergone sexual reassignment surgery, and

- (b) such other documents and information as may be prescribed by the regulations.

32D Alteration of register

- (1) The Registrar is to determine an application under section 32B by making the alteration or by refusing to make the alteration.
- (2) Before altering the record of a person's sex in the registration of the person's birth, the Registrar may require the applicant to provide such particulars relating to the change of sex as may be prescribed by the regulations.
- (3) An alteration of the record of a person's sex must not be made if the person is married.

32E Issuing of new birth certificate

- (1) After the record of a person's sex is altered under this Part, a birth certificate issued by the Registrar for the person must, unless otherwise requested by the person, show the person's sex in accordance with the record as altered.
- (2) Any such birth certificate must not include a statement that the person has changed sex.

32F Issuing of old birth certificate

- (1) The child of a person the record of whose sex is altered under this Part, or a person prescribed by the regulations, may apply to the Registrar for a birth certificate for the person that shows the person's sex before the record was so altered.
- (2) Despite section 32E, the Registrar may issue such a birth certificate to the child or prescribed person.

32G Use of new birth certificate

A person who knows that the record of the sex of a person, being that person or another person (the *transgender person*), has been altered under this Part

must not produce to another person, for the purposes of a law of another jurisdiction, a birth certificate issued for the transgender person (or a copy of or extract from such a birth certificate) that shows the transgender person's sex after the record was so altered unless:

- (a) the laws of that other jurisdiction expressly allow such a certificate (or copy or extract) to be so produced, or
- (b) the person, when producing the certificate (or copy or extract) informs the person to whom it is produced that the record of the transgender person's sex has been altered to the sex shown in the certificate (or copy or extract).

Maximum penalty: 100 penalty units or 2 years imprisonment, or both.

32H Use of old birth certificate

A person the record of whose sex is altered under this Part must not, with intention to deceive, produce to another person a birth certificate (or a copy of or extract from a birth certificate) issued for the person that shows the person's sex before the record was so altered.

Maximum penalty: 100 penalty units or 2 years imprisonment, or both.

32I Effect of alteration of register and interstate recognition certificates

- (1) A person the record of whose sex is altered under this Part is, for the purposes of, but subject to, any law of New South Wales, a person of the sex as so altered.
- (2) A person to whom an interstate recognition certificate relates is, for the purposes of, but subject to, any law of New South Wales, a person of the sex as stated in the certificate.
- (3) An *interstate recognition certificate* is a certificate issued under the law of another State that is prescribed by the regulations for the purposes of this section.

Schedule 3 Amendment of Crimes Act 1900

(Section 5)

[1] Section 61H Definition of sexual intercourse and other terms

Insert “(including a surgically constructed vagina)” after “genitalia” in section 61H (1) (a).

[2] Section 80A Sexual assault by forced self-manipulation

Omit “of any person” from the definition of *self-manipulation* in section 80A (1).

Insert instead “(including a surgically constructed vagina)”.

Schedule 4 Amendment of Wills, Probate and Administration Act 1898

(Section 6)

Section 14

Insert after section 13:

14 Operation of wills relating to transgender persons

A beneficiary under a will does not, except in so far as the will may otherwise expressly provide, lose any right or entitlement under the will merely because the beneficiary is a transgender person as referred to in Part 3A of the *Anti-Discrimination Act 1977*.

[Minister's second reading speech made in—
Legislative Assembly on 1 May 1996
Legislative Council on 30 May 1996]