University of Sydney Policy Reform Project

Research Paper for Australian Human Rights Commission: *Access to Justice: What Experiences and Barriers do LGBTQIA+ Individuals Face when Seeking Legal Redress for Discrimination?*

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Acknowledgement of Country

We acknowledge the traditional custodianship and law of the Country on which the University of Sydney campuses stand, in particular the Gadigal people of the Eora Nation. We pay our respects to those who have cared and continue to care for Country, Aboriginal and Torres Strait Islander Elders past, present and emerging. Sovereignty was never ceded. It always was and always will be Aboriginal land.

About the Sydney Policy Reform Project

The Sydney Policy Reform Project ('Project') facilitates University of Sydney students to write research papers for policy organisations, and submissions to government inquiries, under supervision from University of Sydney academics. The Project is a volunteer, extra-curricular activity. The Project is an initiative of the Student Affairs and Engagement Team within the Faculty of Arts and Social Sciences, and the Division of Alumni and Development, at the University of Sydney. The Project is funded by a donor to the University of Sydney. Any inquiries about the Project or about this paper should be directed to the Administrator, Ms Maeve Cairns, at the following email address: <fass.studentaffairsandengagement@sydney.edu.au>.

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Policy Brief

Paper	Topic	Academic Supervisor
1AHRC	**Access to Justice – Experiences and Barriers Faced by LGBTIQ+ Individuals**	Dr Allen George

About Australian Human Rights Commission

We protect and promote human rights in Australia and internationally. The Australian Human Rights Commission (the Commission) is an independent statutory organisation, established by an act of Federal Parliament. The Commission is Australia's National Human Rights Institution.

Every person has inherent dignity and value. Human rights help us to recognise and respect this in ourselves and in each other. You can find further information on our trans and gender diverse (TGD) Human Rights Project at: https://humanrights.gov.au/our-work/lgbti

Information about our work in sex discrimination: https://humanrights.gov.au/our-work/sex-discrimination Further information about the Commission can be found on our website: https://humanrights.gov.au/about

Background

Discrimination based on sexual orientation, gender identity, and expression, as well as other intersecting factors, has not been adequately addressed through the legal system historically. Although efforts have been made to address this through legal amendments, both overt and inadvertent discrimination persists. The progress in protecting and enshrining LGBTIQA+ rights is recent (1980s) meaning that concepts of justice for these communities are not yet fully embedded in the education and practice of law. This gap has significant implications for the experiences of LGBTIQA+ individuals when seeking justice and redress.

Investigating the journey for LGBTIQA+ people seeking redress, the knowledge of legal protections, awareness, and capacity within the justice system, and the impact of compounded marginalised identities is critical for evaluating the success of existing legislation and provides valuable insights for advocacy and policy development.

For instance, findings from the inquiry into historical hate crimes against LGBTIQA+ people in NSW suggest that significant attitudinal barriers to reporting discrimination persist.

Furthermore, Australia's Federal Court only recently heard its first case of discrimination based on gender identity (Tickle v Giggle), despite the inclusion of Sexual Orientation, Gender Identity, and Intersex (SOGII) attributes in the Sex Discrimination Act over a decade ago, in 2013.

In light of rising challenges to LGBTIQA+ equality, it is crucial to evaluate the capacity and success of the systems and processes in place to handle and resolve issues of discrimination, including reporting, mediation and investigation, and the court system.

Research questions

Access to Justice: What experiences and barriers do LGBTIQ+ individuals face when seeking legal redress for discrimination?

1. What does current scholarship and research say about:
    - the success rate of LGBTIQA+ individuals utilising anti-discrimination law in Australia
    - the test of "reasonableness" and its application in discrimination law levels of understanding and awareness of LGBTIQA+ experiences within the justice system
2. How have cases in state and territory jurisdictions compared to Commonwealth case law?
3. What’s happening in jurisdictions overseas?
4. How do compounded marginalised identities influence legal outcomes in LGBTIQ anti-discrimination cases?

Parameters of the Research Question

Definition of Terms:

- **LGBTIQA+:** Lesbian, Gay, Bisexual, Transgender, Intersex, Queer, Asexual, and other sexual orientations and gender identities.
- **SOGII:** Sexual Orientation, Gender Identity and Intersex
- **Anti-discrimination law:** Legal frameworks designed to prevent discrimination based on various attributes, including but not limited to sexual orientation and gender identity.
- **Compounding marginalised identities:** Intersecting identities that may exacerbate discrimination, such as being from a culturally and linguistically diverse background (CALD) or culturally and racially marginalised (CARM), Aboriginal and/or Torres Strait Islander, and/or having a disability.

Jurisdictional Focus:

- Criminal Law, Federal Discrimination Law, Family Court

Time Period:

- Recent literature and data from the year 2000 onwards.

Research Priorities:

- Understanding and awareness levels within the justice system and contributing factors to these levels.
- Knowledge and awareness levels of legal protections among LGBTIQA+ communities.
- Impact of "reasonableness" comparison in legal outcomes.
- Influence of compounded marginalised identities on barriers and legal outcomes.

Inclusion/Exclusion Criteria:

- Include both academic and grey literature.
- Ensure diversity in sources to cover various aspects of the research question.
- **Exclude** outdated sources (pre-2000) unless highly relevant.

Key Deliverables

The research paper should provide an overview of the current barriers to justice for LGBTIQA+ people in Australia, including case studies to highlight experiences and outcomes, understanding, bias and capacity in the Justice system and those practicing within it, discussion of the impact of a ‘reasonableness’ standard.

The research paper should include case studies of LGBTIQA+ individuals' experiences with anti-discrimination law in Australia. Where you are unable to identify any, or a sufficient number of, relevant case studies within Australia, you should look for examples in other jurisdictions with similar legal frameworks, such as Canada, the United Kingdom, or New Zealand.

The paper could also include discussion of knowledge gaps in existing research and areas for further investigation.

Additional outputs: Summary of existing research on LGBTIQA+ discrimination and legal protections in Australia.

Executive Summary

This report examines the varied experiences and systemic barriers faced by LGTBQIA+ people seeking legal redress for discrimination. It highlights that these barriers primarily stem from institutional shortcomings within the Australian legal system in accommodating for or protecting the experience of LGBTQIA+ individuals. This can lead LGTBQIA+ people to avoid using a system that is not fully safe or considerate of their experiences.

The report outlines that fundamental challenges for LGTBQIA+ people seeking legal redress for discrimination follow from the historical role of Australian legal systems in enacting and contributing to LGTBQIA+ discrimination. As such, LGTBQIA+ people may be mistrustful as a result of exacerbated distress from legal proceedings. Contemporary protections for LGBTQIA+ rights are inconsistent across state jurisdictions as well as between state and federal laws, further impeding consistent access to redress nationwide. Inadequate penalties for discriminatory behaviours under civil proceedings, and ignorance of interpersonal discrimination in the private sphere are also explored as barriers to redress. For LGBTQIA+ complainants, engagement with a culturally unsafe system often engenders greater mental distress, and sometimes further violence. The report highlights that, in each of these shortcomings, LGBTQIA+ people with compounding intersectional vulnerabilities are particularly negatively affected. In the Australian context, these groups include but are not limited to transgender youth, LGBTQIA+ asylum seekers, and Aboriginal Brotherboys/Sistergirls. In addition to systemic barriers to redress, societal barriers comprise a general lack of awareness of and training around LGBTQIA+ discrimination and its proceedings, leading to inadvertent avoidance of pathways to justice.

The report concludes by exploring several recommendations to promote direct legal changes and shift societal attitudes. These will enable LGTBQIA+ people to seek legal redress for discrimination in more comprehensive and successful ways. These recommendations are categorised into four broad umbrellas guiding practical steps to reforms, as follows:

1. Promoting direct legal changes, such as reforming religious exemptions and ‘trans panic’ defence.

2. Addressing the power imbalance between complainants and perpetrators of discrimination by increasing collaboration with LGTBQIA+ communities and promoting LGTBQIA+-specialised legal services.

3. Building public awareness of anti-discrimination legal processes through alternative redress models and exploring options for transparent redress reporting.

4. Increasing education on LGBTQIA+ discrimination and anti-discrimination among legal professionals through compulsory educational modules on LGBTQIA+ issues.

These proposals would effectively break down the persistent and unique barriers to legal redress for LGBTQIA+ individuals. They address gaps between seemingly progressive Australian rhetoric of equality into practical actions that can allow LGTBQIA+ people to access truly fair, just, and inclusive legal services, to not only be protected but *feel* protected under the law.

Introduction

Grounded in cultural shifts instigated by the social movements of the 1960s and 70s, the rights of LGBTQIA+ individuals and their treatment in society has seen significant progress. Recent developments, including the decriminalisation of same-sex marriage under the Marriage Equality Act 2017 have driven major legal and policy reforms for LGBTQIA+ rights, such as the federal recognition of “non-specific sex” on birth certificates in 2014, and increased access to puberty blockers, hormone therapy, and gender-affirming surgical treatment, no longer requiring Court approval (Genovese 2023, 652). Although formally transformative for queer lives, Australia cannot be complacent lest such legislation become “an illusory and theatrical form of equality” where queer rights are validated to a limited extent in line with cis-heteronormative standards of common law (Genovese 2023, 653). The growing awareness around LGBTQIA+ issues and progressive policy changes leads to complacency in addressing persistent social discrimination. Debates over LGBTQIA+ rights are shaped by the inconsistent logic of “cisgender supremacy” which, for example, excludes transgender women from women’s sports because they possess “unfair physical advantages” compared to cisgender women, yet leaves them unprotected from harassment in male-delegated spaces (Sharrow 2021). Therefore, strengthening and expanding anti-discrimination law and its implementation is vital to dismantling trans-hostile and other anti-LGBTQIA+ discourse, especially given a globally resurgent conservatism and gradual erosion of trans rights worldwide. Most recently, the UK Supreme Court ruled the legal definition of a woman as based on ‘biological sex’, pushing back decades of LGBTQIA+ campaigning for legal protection and social freedom (Hatton 2025). Under the enduring influence of similarly essentialist beliefs, Australian anti-discrimination laws fail to account for intersectional disadvantages facing LGBTQIA+ individuals. Structured around fixed, protected categories of discrimination, they offer insubstantial protection and may even reinforce social norms about groups disempowered in the LGBTQIA+ community itself, including people of colour, Indigenous people, and youth (Blackham & Temple 2020, 775). Any engagement with the legal system, therefore, becomes an extremely stigmatised and painful process for LGBTQIA+ people, taking a significant toll on their already limited economic, financial, and social capital (Mazel 2022, 143). To prevent further escalation

of the issue, it is urgent that systemic barriers to seeking culturally safe legal redress for the LGBTQIA+ community are directly confronted, addressed, and overcome.

Methodology

This report adopts a qualitative, desktop-based approach to critically analyse the experiences and barriers faced by LGBTQIA+ individuals in accessing justice in Australia. Our primary methodologies involve doctrinal research and analysis, supported by a literature review. Doctrinal analysis critically examines existing legislation and case law related to LGBTQIA+ discrimination and access to justice, including key statutes, family court and refugee tribunal cases, and workplace and criminal justice contexts. Our literature review encompasses legal and socio-legal academia, reports by advocacy groups and professional organisations, news media reports, and legal commentary. Our methodological approach acknowledges that legal frameworks are not neutral but have historically been shaped by heteronormative and Anglo-centric understandings of gender and sexuality, which continue to influence legal interpretation and judicial decision-making. Reflexivity was maintained throughout the project to acknowledge biases inherent in legal doctrines and the research process.

Limitations

There are several methodological limitations stemming from broader systemic exclusions in researching access to justice for LGBTQIA+ individuals.

The absence of a federal Bill of Rights in Australia means anti-discrimination protections rely primarily on legislative rather than constitutional safeguards. This has resulted in a fragmented body of case law across Australia's state and territory jurisdictions, making it difficult to track consistent legal trends or establishing binding national precedents on LGBTQIA+ rights. Historical mistrust in legal institutions and systemic underreporting contribute to data scarcity (The Conversation 2017; Williams and Lassalle-Klein 2024; Lee and Ostergard 2017), with a particular gap in data on the experiences of transgender, gender-diverse, and intersex people. This lack of specific and reliable data poses a significant barrier to policy research and reform, as it obscures patterns of discrimination and violence, limits the ability to assess the effectiveness of evidence-based, targeted protections for LGBTQIA+ communities.

Since the social movements of the 1960s and 1970s, there have been rapid changes in social understanding and treatment of issues like gender equality and sexuality (Johnson 2015). This is reflected in the shifting gender and sexuality discourse among academic and legal institutions and broader society, highlighting that even as legal cases are decided and published, societal understandings of gender and sexuality may have shifted, limiting legal findings' long-term applicability. Judicial reasoning is also evolving apace, as many LGBTQIA+ rights cases in Australia have only emerged in recent decades.

Definitions of Key Terms and Acronyms

FWA: The Fair Work Act 2009 (Cth).

LGBTQIA+: An acronym denoting 'lesbian, gay, transgender, queer, intersex, asexual, and further gender and sexual identities beyond cis-heteronormative identities. Used as an umbrella term to refer to non-heterosexual and non-cisgender individuals and communities.

Reasonableness: The benchmark against which allegedly anti-social or criminal behaviour is assessed in legal process. A comparative test to ascertain whether a certain action, behaviour or decision is justified by considering whether an 'average', 'reasonable' individual would conduct themselves in the same manner in the given situation.

SDA: The Sex Discrimination Act 1984 (Cth).

SOGII: An acronym denoting 'sexual orientation, gender identity and intersex'.

TGD: An acronym denoting 'transgender and gender diverse'. Sometimes, an 'I' is added to include intersex individuals (i.e. TGDI).

Please see Appendix for a more comprehensive list of definitions and acronyms.

Analysis

Historical Discrimination leading to Distrust and Avoidance

The Legal System's History of Anti-LGBTQIA+ Discrimination and Violence

Western liberal democracies worldwide have historically criminalised same-sex relations and reacted violently to those who do not abide (Mitchell et al. 2022). In line with this, homosexual acts were illegal across all states in Australia until as recently as 1997 in Tasmania. Federal legislation changed only recently with the *Human Rights (Sexual Conduct) Act 1994*. Before decriminalisation, anti-homosexuality laws facilitated the violent targeting and harassment of LGBTQIA+ people, contributing to an embedded distrust and fear of the legal system by LGBTQIA+ communities. Tracing this back to its beginnings in Australia, the sex imbalance among the first settler-colonialists (overwhelmingly male) particularly led to paranoia around homosexual relations in the colony, engendering severe punishments for sodomy (Cushing 2022, 125). As mechanisms involved in colonisation, laws punishing homosexual behaviour and non-traditional gender expression also impacted Indigenous LGBTQIA+ people by way of control and oppression (Spurway et al., 2022). The forcible removal of Aboriginal and Torres Strait Islander children from their families onto Christian missions as part of colonisation also had a hugely negative impact on Indigenous LGTQIA+ youth, since these Christian missions had not only racist but "binary, heterosexist values" (Spurway et al. 2022, p. 141).

While Australia's legal system has made significant progress from these narrow beginnings, the enduring presence of this discriminatory origin abides. For example, it is these very racially exclusive, cis-normative and heteropatriarchal norms that inform the figure of the 'reasonable person' central to legal decision making. Legal scholars deploying feminist and critical race frameworks have argued that 'reasonable person' - originally the 'reasonable man' - is middle-class, white, and straight (Abraham 2022, p. 58). This can skew legal decisions in discriminatory ways against LGTBQIA+ people. Also, the violence and discrimination historically enabled by the legal system (Russell 2019) continues to disproportionately affect LGBTQIA+ individuals today, with almost two-thirds (57%) of LGBTQIA+ people experiencing discriminatory treatment

on the basis of sexual orientation, and more than three-quarters (77.5%) on the basis of gender identity (La Trobe 2020). Despite efforts to address this violence, some forms of harassment have increased in the past decade (Figure 1).

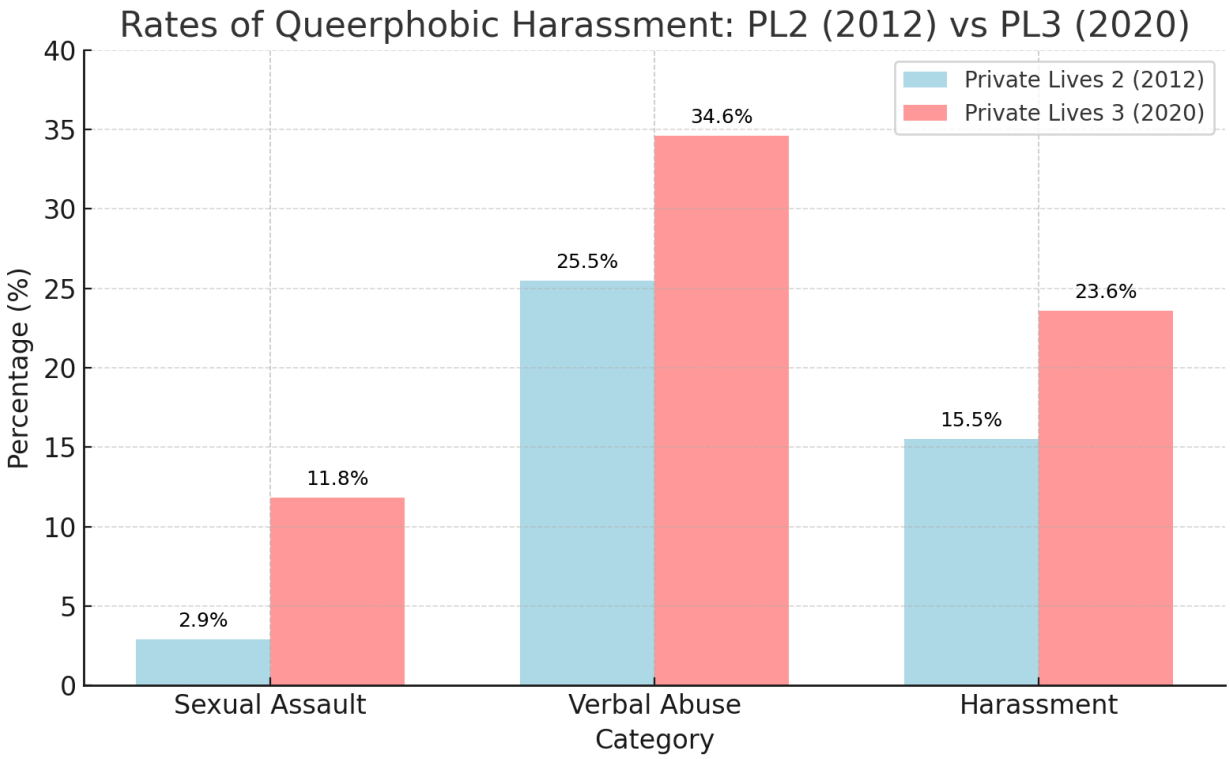

Figure 1: Rates of Queerphobic Harassment (La Trobe 2012, La Trobe 2020)

In the face of this disproportionate discrimination, many LGBTQIA+ individuals distrust and avoid seeking support through the legal system because of a common experience of homophobia at the hands of this system itself (LGBTIQ Legal Needs Analysis 2020, 43; Mahowald and Medina 2023). The impact of historical discrimination enabled by the legal system, and subsequent community distrust, on a lack of redress for discrimination thus cannot be understated.

Case Study: The Gay/Trans Panic Defence

A notable example of the enduring influence of historical prejudice and resultant LGBTQIA+ distrust of legal redress today is shown in the historical ‘gay panic defence’ and its contemporary offshoot, the ‘trans panic defence’. The ‘gay panic defence’, known as the ‘homosexual advance defence’ (HAD) in Australian law, was a provocation defence that existed in state common law across Australia up until 2020. This defence criminalised LGBTQIA+ individuals, justifying violent and lethal

behaviour based on the victim's LGTBQIA+ identity (Tomei et al. 2020). Research shows that jurors are more likely to excuse violence or murder if it happens in an 'LGBTQIA+ provocation' scenario (Michalski et al. 2022). Although HAD has been overturned throughout Australia, we have no explicit laws preventing a 'trans panic defence' - a very similar provocation defence well-documented in trans violence cases in the USA (Andresen 2022). This is despite increasing anti-trans violence worldwide and in Australia, as outlined in the Introduction. Furthermore, in 2023, a case in NSW of a man murdering a trans sex worker, Kimberly McRae, involved the defendant claiming that after discovering McRae was transgender, he was "scared and in panic" (McPhee, 2023). This led to her murder (McPhee, 2023). Whilst not explicitly described as using a 'trans panic defence', this case clearly exemplifies the progression of trans panic defence rhetoric into the Australian legal landscape. In the context of a historically discriminatory legal system then, to have hate crime legislation but no safeguards against potential anti-trans discrimination in legal spaces sends contradictory messages to trans people about their fair treatment by legal systems and their chances of successful redress for violent discrimination (Andresen 2022, 220).

Major Weaknesses of Australia's Legal System in Combatting Anti-LGBTQIA+ Discrimination

Inconsistency Across Jurisdictions and Intersectional Ignorance

SOGII-based discrimination is covered in both federal and state-level legislation in Australia. On the national level, unlike other protected categories (e.g. disability, race, age), SOGII identities are not covered under a dedicated federal Act. Instead, provisions for LGBTQIA+ anti-discrimination are included under a relatively recent (2013) amendment to the *SDA.* Beyond the federal *SDA* and *FWA*, each state and territory also has its own discrimination laws, which are not entirely consistent among themselves or with the federal Acts. Specific references to more marginal queer identities, like pansexual or nonbinary communities, are only present in some jurisdictions. For example, while the Discrimination Act 1991 (ACT) makes explicit mention of bisexual/pansexual orientations, NSW and Victoria's equivalents do not, creating inconsistency in the capacity of bisexual/pansexual individuals to seek redress for discrimination in the workforce on a national level.

While a dedicated SOGII discrimination Act would reflect a proportionally serious response to the discrimination faced by LGBTQIA+ Australians, separate discrimination Acts can create other complexities. Current best-practice understandings of LGBTQIA+ anti-discrimination and its mitigation centre Crenshaw's seminal theory of intersectionality, which acknowledges that individuals most disadvantaged in society are those who inhabit 'intersections' of sociocultural margins, such as queer women of colour. These layered marginalised identities do not just multiply disadvantage but create a "unique compoundedness" (Crenshaw 1991, 64); intersectional marginalisation recognises both the specific and magnified nature of discrimination. This complexity is relevant to the contemporary Australian context; analysis of ABS data from 2014 concludes that Australians do not experience discrimination "in a simple or straightforward way: in practice [discrimination] is multiple, overlapping and complex" (Blackham and Temple 2020, 796). Despite the importance of an intersectional approach to regulating discrimination, intersectionality is rarely seen in Australian legal frameworks, at federal and state levels (Blackham, Ryan and Ruppanner 2023, 3). At the federal level, there is a disconnect between the distinct 'grounds' of discrimination Acts and the lived reality of intersectional discrimination (Blackham and Temple 2020, 774).

Act	**All Sexual Orientations Covered** (incl. bisexuality)	**All TGDI Identities Covered** (incl. trans, intersex, diverse)	**HIV/AIDS Protected Grounds**	**'Association with a person who has these attributes'**	**Vilification on SOGII basis**
Federal (*SDA*)	✗	✗	✗	✓	✗
ACT	✓	✓	✓	✓	✓
NSW	✗	—	✓	✓	✓
NT	✓	✓	✓	✗	—
QLD	✓	✓	✗	✓	✓
SA	✓	✓	✗	✓	✓
TAS	✓	✓	✗	✓	✓
VIC	✓	✓	✗	✓	✗
WA	✓	✗	✗	✓	✗

Figure 2: Broad comparison between LGBTQIA+ provisions made in federal vs state-level anti-discrimination legislation. Note that where acts cover 'all sexual orientations including bisexuality', they usually define sexuality as "heterosexuality, homosexuality or bisexuality", an imperfect and limited definition. However, by including bisexuality there is a nominal provision for 'non-binary' sexualities. Jurisdictions such as Victoria, using a broader definition of "emotional, affectional and sexual attraction to, or intimate or sexual relations with, persons of a different gender or the same gender or more than one gender", set a better standard for inclusive sexuality provisions. The blue lines indicate partial fulfilment: in NSW, intersex people could be covered under the 'transgender' clause, which includes persons who, "being of indeterminate sex, identifies as a member of a particular sex by living as a member of that sex", but this is ambiguous. In the Northern Territory, the *Anti-Discrimination Act 1992* currently covers vilification, but the government is now trying to repeal this clause (NTADC 2025).

Religious Exemptions

Religious discrimination exemptions in the SDA and the FWA represent legally protected discrimination - some of the most concrete shortcomings of Australian legislature in this context. While disingenuous, these exemptions are unsurprising. As Australia's largest religion, Christian organisations function as another enduring network maintaining cis- and heteronormative hierarchies. Equality Australia's national report on LGBTQIA+ discrimination in faith-based schools and organisations attests that the religious loophole is responsible for "Commonwealth laws offer[ing] LGBTQ+ people and the people who love, support and affirm us...the weakest protections against discrimination" (Equality Australia 2024, vii). Sections 37 and 38 of the SDA have faced extensive criticism from legal and advocacy bodies, including the AHRC itself, for their exemption of religious bodies and faith-based schools from the obligation to non-discrimination against LGBTQIA+ communities (AHRC 2017, ALRC 2024). For LGBTQIA+ staff of faith-based schools, for example, these exemptions endanger their jobs if their school deems LGBTQIA+ identity to be incompatible with stipulations to be a 'practicing' Christian (a requirement in as many as 1 in 3 Australian independent schools), with no remit for redress (Equality Australia 2024, 24-25). This is compounded by the hypocrisy of Australia's acknowledgement of faith-based LGBTQIA+ persecution as legitimate grounds for seeking asylum, and the state's simultaneous validation of faith-based discrimination. The continued resistance of successive administrations to closing religious loopholes to anti-LGBTQIA+ discrimination can be interpreted as an enduring fear response to the perceived erosion of conservative ideals.

Case Study: LGBTQIA+ Asylum Claims

The inconsistency of discrimination laws' application is also visible in Australia's treatment of LGBTQIA+ asylum seekers, which highlights a stark contradiction between its international human rights commitments and domestic immigration practices. Those seeking safety in Australia often encounter policies replicating the persecution they escaped with Offshore detention being a prime example (Dawson, 2017). In Papua New Guinea (PNG), where same-sex acts are criminalized, Australia has ignored risks to queer refugees. In 2016, Immigration head Mike Pezzullo stated it was "no concern" if gay refugees faced persecution in PNG, reflecting institutional

indifference. Reports from Amnesty International detail cases where refugees were warned to hide their identities, violating both Australian and UNHCR guidance, and contradicting principles set by the landmark UK case HJ (Iran) and HT (Cameroon) (2010), affirming the right to live openly (Dawson, 2017). Discrimination also extends into the asylum claims process, where applicants face invasive, inappropriate questioning to "prove" their identity. Despite international guidelines prohibiting such practices, Australia persists. While its Migration and Refugee Division advises focusing on personal experience rather than sexual acts, enforcement is weak. Australia's approach to asylum claims breaches obligations under the 1951 Refugee Convention and human rights treaties, prioritising deterrence over dignity. Addressing this demand is thus a fundamental rethinking of Australia's human rights commitments.

Civil vs. Criminal Law

The fractured, inadequate and inconsistent treatment of LGBTQIA+ protection against discrimination across Australian legislative jurisdictions reflects the fact that SOGII-based discrimination is not taken seriously. The proscription of discrimination under civil law, rather than criminal law, contributes to this societal attitude. Australia has provisions for hate crimes under criminal law (*Criminal Code Act 1995 (Cth)*), which strengthens criminal penalties for crimes motivated by hatred towards individuals because of sexual orientation, gender identity or intersex status. However, anti-discrimination cases are dealt with under civil law, often through dispute resolution outside the courts, avoiding serious repercussions for discriminatory behaviour. Civil proceedings also place enormous legal, financial, and administrative burden on the complainant which, especially for under-resourced populations like LGBTQIA+ people, significantly impede access to justice. The recent amendment to the *Criminal Code* that imposes criminal penalties for inciting/promoting violence against groups including on a SOGII basis is a welcome development towards closing this gap. However, the narrow scope of recent hate speech/incitement law reforms focusing on combating anti-Semitism such as the NSW *Crimes Amendment (Inciting Racial Hatred) Bill 2025*, raise the question of why the scope should not be expanded to cover "all attributes currently protected by law" (Equality Australia, 2025).

Private Spheres Limitations

The community-specific experiences of discreet discrimination against LGBTQIA+ people in private spheres are not adequately addressed through the current legal system. As documented by Haines et al. (2017, 1143-1145), these experiences of discrimination are seen in interpersonal relationships, where conversations, comments or choices made by individuals can reflect their gender prejudices. In a discrimination complaint, the AHRC outlines that “the onus of proof is on the claimant to prove the case”, however, the ‘microaggressive’ nature of this discrimination can make it difficult to meet such a standard of proof (Haines et al. 2017). This is exacerbated when LGBTQIA+ people have multiple intersecting identities (Nadal et al. 2015). For example, transgender people of colour often experience microaggressions against their queer identity in conjunction with racist remarks. ‘Double discrimination’ also occurs within families where cultural and ethnic norms are most visibly enforced against their queer identities (Nadal et al. 2015).

Furthermore, in 2019, 3 in 5 LGBTQIA+ respondents in *Private Lives 3* (La Trobe 2020) had ever experienced intimate partner violence (IPV) (AIHW, 2025). However, occurring outside of dominant understandings of gendered power dynamics in private relationships, it is less likely that reports of IPV by LGTBQIA+ people will be taken seriously by legal actors than reports of IPV made by straight complainants (Russell 2018; Human Rights Campaign, 2022). LGBTQIA+ individuals can be threatened with being ‘outed’ if they leave their abusive relationships (Human Rights Campaign 2022). The heteronormative conceptualisation of a ‘normal’ private sphere thus fails to accommodate the unique contexts of interpersonal discrimination against LGBTQIA+ folks.

Cultural Unsafety

Exacerbating Distress

A history of violence and marginalisation in Australian justice systems creates cultural unsafety within legal institutions for LGBTQIA+ individuals. These residual prejudices, or perceptions of such, are perpetuated by the inconsistencies and weaknesses noted above, which combine to facilitate LGBTQIA+ community fears and avoidance of

engagement with avenues for redress post-discrimination. Cultural unsafety, particularly fear of or actual experiences of discrimination, engenders avoidance behaviour (Mahowald and Medina 2023). Additionally, legal proceedings often have negative effects on mental health (Clemente and Padillas-Racero 2020). Theories of minority stress and intersectionality assert that these consequences are heightened for groups with accumulating disadvantage, including Indigenous or disabled LGBTQIA+ individuals (McConnell et al. 2018; Spurway et al. 2022; Kempapidis et al. 2024). Therefore, vicious cycles of poor mental health emerge, with the embedded discrimination and unsafety of institutions, including the legal system, contributing to much higher levels of mental distress among LGBTQIA+ populations (ABS 2024). These communities must then either engage with justice systems to address anti-discrimination, thereby worsening their mental health, or avoid engaging with justice systems to avoid exacerbating distress.

LGBTQIA+ Communities and the Police

While not always involved in civil discrimination proceedings, in criminal discrimination matters, the police are often LGBTQIA+ individuals' first point of contact with the justice system. This constitutes a significant barrier to accessing legal redress and engaging with legal systems more broadly, given the history of direct and indirect violence towards LGBTQIA+ communities by Australian police.

As an archetype of hegemonic masculinity in Western societies (Connell 1995), police function as a state agent that regulate and marginalise queerness (Steinþórsdóttir and Pétursdóttir 2021). Policing maintains 'the national space as heterosexual space' a normative intersection exemplified in the experiences of Aboriginal Sistergirls and Brotherboys (Russell 2019, 20). While queer Aboriginal and Torres Strait Islander peoples are most disproportionately affected by police interactions, they remain underrepresented in LGBTQIA+ studies on policing that preference white LGBTQIA+ Australians (Russell 2019, 30), reinforcing the need for intersectional approaches to affect meaningful change in anti-discrimination work. Further, Australian police occupy a historical role in over-surveillance and harassment of queer spaces. At the 1978 Mardi Gras (Donoughue et al. 2023), police violently suppressed protesters, and broadly engaged in agent provocateur activities to 'entrap' homosexual behaviour (Dalton 2007) during that time. Lackadaisical police investigation has neglected to

investigate or prosecute crimes against LGBTQIA+ individuals, including innumerable hate crimes against gay men in the period 1970s-2000s left under- or uninvestigated (Sackar 2023). While the Special Commission into LGBTIQ hate crimes brought attention to historic hate crimes in NSW, similar nationwide negligence has not been institutionally re-examined (Whittaker 2016). LGBTQIA+ community interaction with police is often sensationalised by media narratives, perpetuating stereotypes (e.g. that queer people are 'overdramatic') that enable police to continue to disregard the seriousness of anti-LGBTQIA+ harassment or discrimination (Dwyer et al. 2021). The power of media narrative contributes to difficulties in shifting 'boys club' culture in police forces (Mann 2018). Despite measures to mend rifts with LGBTQIA+ communities through 'Liaison Officers', LGBTQIA+ individuals continue to report low confidence in police support, shown in Figure 3.

Table 33: Service to which intimate partner or family violence was reported the most recent time it occurred and proportion reporting feeling supported (n = 4,731)

Service to which assault was reported the most recent time	Number	%	Felt supported (%)
Counselling service or psychologist	886	18.7	89.4
Police (including LGBTIQ liaison officers)	279	5.9	45.0
Doctor or hospital	210	4.4	68.4
Lawyer, legal service, court system	119	2.5	57.1
Telephone helpline	117	2.5	58.6
Domestic or family violence service	109	2.3	65.1
Employer	80	1.7	71.3
Teacher or educational institution	84	1.8	69.9
Sexual assault service	44	0.9	79.6
LGBTIQ organisation	46	1.0	73.9
Religious or spiritual community leader or elder	37	0.8	64.9
Other	206	4.4	84.3
I did not report this abusive behaviour	**3,406**	**72.0**	**-**

Figure 3: Level of felt support from services to which LGBTQIA+ individuals reported intimate partner violence (La Trobe 2020, 75). Note "Police" has the lowest proportion of feelings of support (emphasis added).

Gaps in Awareness and Implementation of Protections

Institutional ignorance of the diversity and intersectionality of LGBTQIA+ experiences of discrimination contribute both to LGBTQIA+ avoidance of seeking redress and to the capacity of justice systems to provide it. An overreliance on stereotypical beliefs about LGBTQIA+ communities, matched by inadequate dedicated education on the

reality of LGBTQIA+ experience and discrimination, creates adverse consequences for LGBTQIA+ appellants. These include stereotyping and bias in lines of question with appellants, unawareness of potentially traumatic settings and language, and invasive lines of questioning about sexual history and intimate details. For example, process records of asylum requests, including cases brought to the Refugee Review and Administrative Appeals Tribunals, reflect "sexually explicit and stereotypical lines of questioning", with some appellants feeling obligated to recount intimate and explicit 'evidence' (Dawson 2017). Several contemporary refugee cases reveal an insensitivity by staff to cultural differences in the experience of LGBTQIA+ identity; despite the DHA's updated training materials (2017), recent cases reflect the problem is ongoing (e.g. *DDM17 v Minister for Home Affairs [2019] FCA 1510*). Insufficient training also results in a lack of nuanced understanding of LGBTQIA+ identity by officers of the law – for example, internalised homophobia or transphobia, misogyny, or the fallacious conflation of gender and sexuality, with intra-community hate crime going unrecognised as a result. These unaddressed biases contribute to the cultural unsafety of legal systems. For example, *Re: Imogen* (2020) ruled that youth access to gender affirming care required consent from all parental parties involved, neglecting confidentiality concerns for trans youth, whose family circumstances can often be complicated by transphobia (Swannell 2022; Schafer 2015). Finally, while progress has been made in provisions for LGBTQIA+ engagement in justice systems, often these are inconsistently implemented by staff. For example, while most state/territory carceral policies reflect best-practice in using self-identification as their benchmark for trans identity, in practice inmates can be forced to obtain updated birth certificates to be gendered correctly in the carceral system (OmbudsmanSA 2018). In summary, justice bureaus exhibit a concerning lack of awareness around cultural considerations, compounding vulnerabilities, and distressing histories with the law that enable ongoing cultural unsafety for LGBTQIA+ individuals seeking redress for discrimination.

Despite the problematic treatment of LGBTQIA+ appellants, alternative support for legal engagement is sparse; while some community legal centres exist, there is a nationwide lack of LGBTQIA+-specific such services. LGBTQIA+ individuals may also be unaware of the paths to redress available to them, or how to go about accessing such services without support, especially given the significant costs associated with legal process.

Recommendations

This report's recommendations to the AHRC can be categorised into four broad umbrellas of action:

I. promoting direct legal changes,

II. addressing the power imbalance between complainants and perpetrators of discrimination,

III. building awareness of anti-discrimination legal process among the public, and

IV. increasing education on LGBTQIA+ discrimination and anti-discrimination among legal professionals.

I: Promoting direct legal changes

1. Advocate for reform legislation to close religious discrimination exemptions.

These exemptions not only allow religious organisations to legally discriminate but also foster a culture of exclusion that discourages LGBTQIA+ individuals from engaging with the legal system. This is particularly harmful for those already marginalised within religious environments, compounding experiences of stigma and distress. Religious exemptions are inconsistent with Australia's international human rights obligations and undermine the principle of equal protection under the law (ALRC Interim Report 127). The AHRC could take an active leadership role by advocating for removal of these exemptions, especially in critical settings such as faith-based schools, healthcare services, and organisations receiving public funding. Internationally, the United Kingdom's Equality Act 2010 strictly limits the scope of religious exemptions that prevent discrimination in schools and workplaces except in very narrow circumstances (EHRC 2020). Similarly, in Canada, while religious freedom is protected under the Canadian Charter of Rights and Freedoms, courts have repeatedly held that religious exemptions cannot justify discrimination in areas like employment, housing, education, and service delivery. Publicly funded religious schools and services are required to comply with provincial human rights codes, making it unlawful to discriminate against LGBTQIA+ people (Smith 2019). These examples demonstrate that it is both possible

and necessary to limit religious exemptions in a way that respects religious freedom while prioritising the fundamental rights and dignity of LGBTQIA+ individuals. Australia should adopt a similarly constrained and right-focused framework ensuring that publicly funded institutions and services uphold inclusive, non-discriminatory standards in line with contemporary human rights principles.

2. Advocate for a direct and comprehensive ban on the 'trans panic' defence.

There is an immediate need to advocate for uniform national legislation explicitly banning a 'trans panic defence' in all jurisdictions in Australia. Current policy and legislative actions worldwide and in Australia have removed protections for trans safety, which has historically increased rates of violence against trans people (Veldhuis et al. 2018). They also normalise transphobia, which could result in jurors perceiving a 'trans panic defence' as more acceptable. To prevent this, policymakers can examine specific instances, such as those in Andresen (2022), where defendants raised a 'trans panic defence' and identify recurring themes to ensure the development of legislation is comprehensive, consistent, and responsive to reality (Andresen 2022, 238). Australian policymakers can also draw on international examples of current 'trans panic defence' bans: in the USA states like California (2014), Illinois (2017), and New York (2019) have enacted this. Reforms in Australia should pre-emptively ensure that a 'trans panic defence' cannot be considered adequate provocation for violent crime (Lee 2020, 1468).

II: Addressing power imbalances

3. Collaborate with LGBTQIA+ community leaders and experts to expand alternative justice models.

Given the high levels of cultural unsafety and distress that LGBTQIA+ individuals suffer from engaging with the legal system, alternative models of justice are worth pursuing. Therapeutic jurisprudence is a beneficial approach for the LGBTQIA+ community in this regard because it emphasizes the "psychological and social effects" that such an engagement can exert on either a previously convicted person or one seeking redress (George 2023, 69). More importantly, its "interdisciplinary applicability" better suits the intersectional nature of discrimination against LGBTQIA+

people (George 2023, 69). For example, it can be a tool to mediate between social, medical and legal debates over gender-affirming healthcare for youth. The AHRC has a good foundation on which to build these procedures, especially in light of its role in alternative dispute resolution.

4. Support the establishment of an increased number of permanent, specialized LGBTQIA+ legal services and centres.

An essential move towards increasing the use of anti-discrimination laws is increasing the available resources and support that LGBTQIA+ people can access in this process. Considering the lack of awareness in this sphere, and the mentally distressing impacts that legal processes can have on LGTBQIA+ people, specialized bodies of justice will provide the necessary cultural expertise and safety that improve their "subjective use and experience of redress" (McCloud 2023, 66). This is especially pertinent in the case that Recommendation 5 is unable to be implemented. LGBTQIA-specific legal services should engage in partnerships with community organizations and peak bodies such as the National Aboriginal and Torres Strait Islander Legal Services, The Gender Centre, and so forth to ensure they fully consider and address the intersectional legal needs of this demographic (LGBTIQ Legal Needs Analysis 2020).

5. Investigate restructuring options that would enable greater freedom for strategic enforcement of anti-discrimination redress.

While a much more substantial reform, Allen (2010) makes a convincing argument for 'equality commissions' like the AHRC to stop handling discrimination complaints so as to assist complainants in redress cases. This would require complaints handling to be delegated to a different body, e.g. a tribunal. Equality commissions like the AHRC and its state-level equivalents would then be better placed to undertake campaigns of 'strategic enforcement' in assisting complainants, financially and by litigating on their behalf (Allen 2010, 106). While the AHRC can currently provide limited assistance to complainants, such delegation would greatly expand this capacity. Strategic enforcement would entail the AHRC assisting in select cases that could contribute to the development of LGBTQIA+ legal protections, whether by encouraging amendments to law, highlighting topical issues, or raising the profile of the law,

showing it is enforced and so deterring discriminatory behaviour. In line with extant 'hot button' issues, strategic enforcement could focus on religious exemption cases and cases concerning gender-affirming healthcare for youth.

III: Building awareness of anti-discrimination legal redress among the public

6. Investigate options to enable greater transparency in resolving some discrimination complaints

Confidentiality concerns, especially the risk of being 'outed' through legal process, is a significant deterrent to LGBTQIA+ people (particularly LGBTQIA+ youth) seeking redress for discrimination (Schafer 2015). However, the lack of transparency around any complaint resolution is damaging. It facilitates the data scarcity around discrimination, contributes to societal blindness to LGBTQIA+ discrimination, and empowers perpetrators to discriminate, knowing their reputation will suffer minimal damage even if victims pursue justice (Williams and Lassalle-Klein 2024). Greater exposure to LGBTQIA+ people seeking redress for discrimination could evoke greater public awareness of and seriousness about LGBTQIA+ discrimination and encourage more LGTBQIA+ people to engage with this process. Similar to Snapp et al.'s (2016) recommendations for optional LGTBQIA+ identity disclosure in education settings, the AHRC should investigate pathways that would allow *willing* complainants to resolve their disputes with greater openness. Consent would be essential, and anonymity could be an option (Snapp et al. 2016). It could also enable the AHRC or community legal centres to create an accessible database of types of cases for the reference of legal actors, policymakers and advocacy groups (Snapp et al. 2016) – this data should also note intersectional considerations of the cases and complainants.

IV: Increasing education on LGBTQIA+ discrimination and anti-discrimination among justice system personnel

7. Investigate steps to adjust definitions of a ‘reasonable person’ for greater clarity, to prevent discriminatory usage.

The reasonable person standard is often characterised as ‘legal fiction’ because of its lack of definition, but it is also often perceived as narrow in its ideologically-informed designation of normalcy (Abraham 2022). By specifically outlining what constitutes a reasonable standard within the discrimination realm, and ensuring this definition is vastly inclusive and intersectional, subjectivity and vagueness could be reduced to decrease the potential of weaponising this standard in xenophobic ways (Abraham 2022). In the case of discrimination claims being bought before judges and juries, conciliations forums or any other type of discrimination hearing, this definition could be read before proceedings begin to ensure consistent understandings of this idea amongst those involved and minimise internal bias. Abraham also suggests that diversifying the composition of the jury can assist in this, promoting “the possibility that more viewpoints will be incorporated into the reasonable person… [thereby] ensuring that the reasonable person is indeed a person and not a man in a third-person gender-neutral trench coat disguise” (2022, 25).

8. Create and distribute a comprehensive educational module on LGBTQIA+ discrimination and anti-discrimination law for legal professionals

One of our strongest recommendations is that the AHRC develop a comprehensive educational package for professionals engaged in legal systems (lawyers and court professionals, police staff, asylum claims processors, corrections staff, etc.) to remedy these gaps. Such a module would include a clear breakdown of federal and state and territory laws around anti-LGBTQIA+ discrimination (including in employment and healthcare fields) and their differences, enabling legal professionals transferring between jurisdictions to understand their shifting legal context. It should also cover intersectional understandings of discrimination, including compounding vulnerabilities and cultural differences in understandings of LGBTQIA+ identities. Ideally, this module would be a compulsory seminar or short course. To encourage early uptake, the AHRC could work with universities and government to subsidise this course if taken

during university, while graduates would have to pay an out-of-pocket price. For students choosing to take discrimination law units, this course would be waived.

Conclusion

This report has given a broad-ranging overview of the state of affairs for LGBTQIA+ communities engaging with Australian justice systems, and traced the ways these challenging experiences impede their access to justice in seeking redress for discrimination. Australian legal systems continue to neglect addressing their oppressive normative roots in Anglo-centric imperial traditions, and their violent and neglectful historical conduct towards LGBTQIA+ individuals. These historical and cultural legacies continue to haunt the contemporary Australian legal system. As a result, legal systems are ill-equipped to carry out their justice goals in substantial ways for LGBTQIA+ communities, especially individuals experiencing compounding vulnerabilities or marginalities. At the same time, the cultural unsafety of engagement with legal systems contributes to avoidance on the part of LGBTQIA+ individuals, who may feel discouraged from seeking redress, or unsupported in being able to do so.

Our research has highlighted particularly problematic inconsistencies between Australia's federal, state/territory, and international legal provisions and commitments to LGBTQIA+ anti-discrimination. Normative prejudices endure in the legal standard of the 'reasonable person', the ambiguous role of the 'trans panic' defence, and the ongoing tensions between LGBTQIA+ communities and police forces. An intersectional approach is vital to addressing the complex lived experience of discrimination and attendant paths to redress, as legal systems largely do not reflect the compounding reality of discrimination. In order to address this tangled network of historical, institutional and cultural barriers, we have recommended the AHRC promote direct legal change where it can, pursue alternative justice frameworks to align with intersectional and emerging understandings of justice, and promote comprehensive education among legal personnel.

While the nature of this report emphasises a broad overview of the problematic legal and judicial landscape of LGBTQIA+ discrimination and redress, this should not be taken to endorse a lukewarm approach to action. This is far from the first report of its kind; despite methodological limitations, there is a wealth of evidence demonstrating the seriousness of LGBTQIA+ communities' precarity. In the current global climate, this precarity may well worsen. Australia holds equality and fairness as key values in

its national character. In the case of LGBTQIA+ discrimination, it is time for us to live up to these standards and walk the talk.

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Appendix A: Comprehensive List of Definitions

AAT: The Administrative Appeals Tribunal.

Anglo-centric: Reflecting a foundation in norms and institutions emerging from the United Kingdom/England and its legal, social, and cultural traditions.

Brotherboy/Brothaboy: A term used by Aboriginal and Torres Strait Islander people to describe a gender-diverse individual who identifies with male spirit or energies. Often used to describe transgender Indigenous men (AHRMC, Macquarie University 2019).

Cisnormativity: The societal and institutional assumption that all individuals identify with the gender they were assigned at birth, and with the gender binary more broadly. Further refers to the societal privileging of cisgender identity as natural, and the reflection of this belief in institutional processes (e.g. healthcare, legislation, etc.).

Compounding vulnerabilities: Term stemming from medical literature, referring to the complex and cumulative effect of lifestyle and identity factors on individuals' vulnerability to discrimination, harassment, violence, and other adverse experiences.

HAD: The 'homosexual advance defence' - otherwise known as the 'gay panic' defence, this was an acceptable provocation defence in Australian jurisdictions until 2020.

Heteronormativity: The societal and institutional assumption that all individuals identify as heterosexual. Further refers to the societal privileging of heterosexual identity as natural, and the reflection of this belief in institutional processes such as (e.g. healthcare, legislation, etc.).

Intersectionality: Theoretical framework referring to the interactive and compounding experiences of discrimination by individuals situated at the 'intersections' of several marginalities (e.g. black women, disabled trans people, etc.).

Sistergirl/Sistagirl: A term used by Aboriginal and Torres Strait Islander people to describe a gender-diverse individual who identifies with female spirit or energies. Often used to describe transgender Indigenous women (AHRMC, Macquarie University 2019).