

Health and Other Legislation Amendment Bill (No. 2) 2023

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Submission to Health and Other Legislation Amendment Bill (no2) 2023

My name is Karleen Gribble. I am an Adjunct Associate Professor in the School of Nursing and Midwifery at Western Sydney University. My expertise includes children's rights; the impact of breastfeeding on child health and maternal behaviour; infant and young child feeding in emergencies, the treatment of infants and young children and their mothers within the child protection, immigration detention, and criminal justice systems; and sexed and desexed language in relation to female reproduction. I have published research on these subjects in peer-reviewed professional psychological, social work, and health journals. I have engaged in the training of health professionals, social workers, and humanitarian workers on these subjects. I am a respected, and internationally recognised, academic in the infant nutrition and maternal and child health fields. The following is my submission in response to the Health and Other Legislation Amendment Bill (no2) 2023 inquiry.

I would like to provide comment on the proposal that the Termination of Pregnancy Act 2018 and Criminal Code Act 1899 and related provisions in the Powers of Attorney Act 1998 be desexed with 'woman' replaced with 'person.'

As detailed below, I advocate against this change because:

1. It inappropriately genders the term 'woman' in relation to pregnancy.
2. It makes invisible the fact that all of those who may become pregnant are female.
3. It may contribute to moves to desex the language of women's health more generally, harming the most vulnerable.

4. It is not of benefit to trans and gender diverse people to obscure their sex in health care settings.

As also detailed below, I would suggest that clarity regarding inclusion of female trans and gender diverse people in these pieces of legislation is best achieved through a clear definition of the term 'woman.'

1. Replacing 'woman' with 'people' inappropriately genders the term 'woman' in relation to pregnancy

The term 'woman' can be used in a sexed or gendered meaning. Until recently, the sexed meaning of 'woman' to mean an 'adult female human being' was the only usage. The Oxford English Dictionary contains examples of the sexed usage of 'woman' extending back a millennia¹. It is clear that usages of 'woman' in the Termination of Pregnancy Act 2018 and Criminal Code Act 1899 and related provisions in the Powers of Attorney Act 1998 are intended to be understood in a sexed meaning. As will be later discussed, a definition already makes this explicit in the Termination of Pregnancy Act 2018 and Criminal Code Act 1899.

More recently, 'woman' has been used in a different way and with a new meaning, that is to describe a person who has the gender identity of 'woman.' Gender identity can be described as an inner sense of oneself as masculine or feminine, both masculine and feminine or neither masculine or feminine or an inner sense of oneself as a man, a woman, both a man and a woman, or neither a man nor a woman^{2,3}. An individual's gender identity can change over time³ and gender identity is not a concept that everyone applies to themselves^{4,5}. Gender identity, is also a relatively new concept⁶. Use of 'woman' to reflect someone's gender identity is so new that neither the Oxford English Dictionary nor the Macquarie Dictionary contain this gendered definition. However, there is increasing pressure being placed on organisations and individuals to switch from understanding and use of 'woman' in its sexed meaning to understanding and use of 'woman' in a gendered sense.

The Explanatory Notes and the Statement of Compatibility for the Health and Other Legislation Amendment Bill (no2) 2023 assume that the term 'woman' in the Termination of Pregnancy Act 2018 and Criminal Code Act 1899 and related provisions in the Powers of Attorney Act 1998 should be understood in a gendered meaning and use the term 'woman' in a gendered meaning.

The Explanatory Notes for the Bill explain that this change is proposed because, *'not all pregnant persons are, or identify as, a woman. As such, the terminology is not inclusive of all persons who may seek or require termination-of-pregnancy services, for example, transgender men or non-binary adults who retain the capacity to fall pregnant.'*

The Statement of Compatibility for the Bill further describes this change as 'inclusive language' and explains, *'Replacing references to 'woman' with 'person' in the Termination of Pregnancy Act 2018 and Criminal Code, as well as related provisions in the Powers of Attorney Act 1998, will align with government efforts for more inclusive legislation. The use of gender-neutral language will ensure the legislation recognises and applies to people with gender diverse identities who seek a termination of pregnancy and promote the right to recognition and equality before the law.'*

Neither the Explanatory Notes nor the Statement of Compatibility provide an explanation for why 'woman' should be interpreted in the new gendered meaning. The Statement of Compatibility inaccurately describes replacing 'woman' with 'people' as making the legislation 'gender-neutral' when in fact that change desexes the legislation. While it is undoubtedly true that not everyone who is female has a gender identity of 'woman,' only females can become pregnant and may seek a pregnancy termination. In fact, gender identity is not relevant to pregnancy and I cannot see any justification to gender pregnancy. Rather sexed language should be maintained.

2. Replacing 'woman' with 'people' makes invisible the fact that all of those who may become pregnant are female

The exclusively female nature of pregnancy and pregnancy termination means that sexed language is most appropriate in this legislation. I refer you to a paper I co-authored which states, *'It is well established that the sex of individuals should be made visible when it is relevant and should not be invoked when it is not. This facilitates avoidance of sex stereotyping while ensuring that sex-based needs and issues are not overlooked'*⁷. The use of 'woman' in its sexed meaning in the Termination of Pregnancy Act 2018 and Criminal Code Act 1899 and related provisions in the Powers of Attorney Act 1998 is aligned with this fundamental, human-rights based, principle.

3. Replacing 'woman' with 'people' may contribute to moves to desex the language of women's health more generally harming the most vulnerable

The Committee should pay heed to women's health consumers, clinicians, and organisations who have made submissions on this Bill. These groups have the expertise and understanding of the importance of ensuring that women's needs and experiences are made visible, including via the use of sexed language in relation to health care.

This Bill is not the first time those concerned with women's health have encountered desexed language. Organisations and individuals are increasingly being pressured to desex the language of health care, including health communication and including in Queensland. This is to the detriment of individual and population health. For example, in public health communications regarding cervical cancer screening the word 'women' may be replaced with 'anyone with a cervix.' This language change can be reasonably predicted to present a barrier to understanding by women who have low literacy, low health literacy or low English proficiency. The Australian Department of Health National Cervical Screening

Toolkit says to use 'plain language rather than medical terms' when discussing cervical cancer screening⁸. Nonetheless, the Queensland Department of Health now invites 'persons with a cervix' for cervical cancer screening in their health promotion materials⁹. This is despite research showing that poor understanding of cervical cancer screening is a major reason why, for example, immigrant women in Australia participate in cervical cancer screening programs at lower rates than Australian born women¹⁰. It also ignores the fact that low health literacy is a challenge in Australia's Indigenous population. Indigenous women are less likely to be screened for cervical cancer (including specifically in Queensland¹¹), more likely to develop cervical cancer, and more likely to die from cervical cancer than other women¹². Thus, desexed language steps away from the evidence-based health communication principle of plain language, reduces inclusivity, presents a barrier to healthcare provision and further disadvantages the most vulnerable sections of the population^{13 15}.

These language changes are occurring without an impact assessment. The Parliament of Queensland should not be encouraging the desexing of language in health contexts, including in legislation regulating health care.

4. It is not of benefit to trans or gender diverse people to obscure their sex in health care settings

I think it likely that a belief it is better for trans and gender diverse people to avoid references to their sex, including via use of sexed language, may partly underly the suggestion that 'woman' should be replaced with 'person' in the Termination of Pregnancy Act 2018 and Criminal Code Act 1899 and related provisions in the Powers of Attorney Act 1998. I would argue that this is incorrect. In fact, there is evidence that not recognising the sex of trans and gender diverse people in health care settings risks their health.

For example, there are an increasing number of case studies published documenting how incorrect sex markers in health records or general lack of clarity

regarding a transgender person's sex have harmed their health. In the United States of America (USA), confusion in a hospital emergency department regarding a person's sex resulted in a delayed diagnosis of pregnancy, labour, and a prolapsed umbilical cord, with the ultimate result being fetal death¹⁶. Again, in the USA, a trans man who was seriously injured in a car accident was intubated for a protracted period of time with an endotracheal tube of a size typically used for males and generally considered too large for females. As a result, they experienced severe tracheal stenosis and required repeated procedures and surgeries over months¹⁷. In the United Kingdom, results of testing for Kells antibodies in the blood of a pregnant trans man were initially incorrect because paternal rather than maternal testing was undertaken, as a result of the blood being incorrectly labelled as being from a male¹⁸. This resulted in a significant delay in provision of specialist support. For trans men, being recorded as male in health records has been identified as a barrier to cervical cancer screening, as reminders may not be sent¹⁹. Lack of participation in cervical cancer screening is strongly associated with cervical cancer diagnosis²⁰.

The problem of inaccurate recording of sex for pathology testing is increasingly being recognised. The NSW LGBTIQ+ Health Strategy highlights this and describes the need for collection of accurate data on biological sex for pathology testing alongside gender identity²¹. The Strategy proposes that explanations be provided to staff and patients on why it is important that accurate data on sex be recorded in health records, stating that they are developing '*communications for community and staff to explain why sex assigned at birth matters for some pathology tests and is included on pathology request forms*'²¹.

In summary, it is not of benefit to trans or gender diverse people not to recognise their sex.

The Termination of Pregnancy Act 2018 and Criminal Code Act 1899 already include a definition making it clear that 'woman' in these Acts is used in its sexed meaning. A definition could be inserted into the Powers of Attorney Act 1998 to similarly provide clarity.

The Explanatory Notes and the Statement of Compatibility for the Health and Other Legislation Amendment Bill (no2) 2023 describe the importance of ensuring that trans and gender diverse people who may become pregnant are covered by the Termination of Pregnancy Act 2018 and Criminal Code Act 1899 and related provisions in the Powers of Attorney Act 1998. However, the Termination of Pregnancy Act 2018 and the Criminal Code Act 1899 already include definitions making it clear that 'woman' is used in its sexed meaning in these pieces of legislation. The definition in both states, '*woman* means a female person of any age.'

The Powers of Attorney Act 1998 does not contain a definition of 'woman,' but the same one used in the Termination of Pregnancy Act 2018 and the Criminal Code Act 1899 could be inserted.

Definitions could be expanded to make inclusion of female trans and gender diverse people more explicit.

If it is deemed desirable to make it more explicit that trans and gender diverse people who are female are included in the definition of 'woman,' the definition could be expanded. A suitable definition may be along the lines of, '*Woman means a female of any age and includes people who have a gender identity that means they do not identify as women but who are female and may become pregnant.*'



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