



Committee Secretary  
Legal Affairs and Community Safety Committee  
Queensland Parliament House  
George St  
Brisbane, 4000, Queensland  
17 March, 2018

Rainbow Rights Watch  
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By email to: [lacsc@parliament.qld.gov.au](mailto:lacsc@parliament.qld.gov.au)

Dear Committee Secretary,

**Re: Births, Deaths and Marriages Registration Amendment Bill 2018**

Rainbow Rights Watch welcomes the opportunity to comment on the *Births Deaths and Marriages Registration Amendment Bill 2018*. Rainbow Rights Watch is a national not-for-profit social justice organisation dedicated to ending discrimination, inequality and violence against transgender Australians.

Rainbow Rights Watch has previously provided feedback to Law Reform Committees and various State and Federal government departments on laws affecting gender diverse Australians - including in relation to laws governing gender diverse Australians' ability to obtain legal and documentary recognition of their sex or gender.

Birth certificates are cardinal identity documents which determine, for legal purposes, what a person's sex or gender is. The designation of a person's sex recorded on their birth certificate affects various legal rights including under various States' Anti-Discrimination Acts. As such, the designation of sex on a person's birth certificate is particularly important to gender diverse individuals.

Rainbow Rights Watch believes the *Births Deaths and Marriages Registration Act 2003* (the "**Act**") (Qld) contains a number of provisions that codify various forms of systemic and institutionalised discrimination against gender diverse Australians based on archaic conceptions of sex and gender.

Whilst the amendment of Section 22 to remove the divorce requirement provides a degree of improvement, Rainbow Rights Watch is strongly of the view that any reform of the Act should be premised on eradicating all forms of institutionalised human rights violations. Queensland's birth certificate laws already lag well behind other States of Australia. A narrow reform that disposes only of the divorce requirement is not a progressive or innovative step in the recognition of human rights. Rather, it is the absolute bare minimum reform necessary to prevent a conflict arising with federal law. Such an approach to reform would leave gender diverse Queenslanders substantially disadvantaged compared to other gender diverse Australians whose birth is registered in another State. It would also leave other serious human rights violations intact.

Rainbow Rights Watch notes that the existing Act is also the subject of a Queensland Department of Justice discussion paper. The "discussion" process is likely to result in protracted delays in realising human rights for gender diverse Queenslanders. Moreover, it is unnecessary and wasteful of justice resources and public funding. The issues relating to birth certificates and gender diverse Australians have already been the subject of numerous law reform reviews in multiple jurisdictions, including a review conducted by the Queensland Attorney General less than five years ago. Each of these reviews has recited similar issues and drawn similar conclusions. Examples of recent reviews include:

- the Australian Human Rights Commission's 2009 report, "Sex Files",
- the ACT Law Reform Advisory Council's report "Beyond the Binary: Legal Recognition of Sex and Gender Diversity in the ACT",

- the South Australian Law Reform Institute's report "LGBTIQ Discrimination in legislation: Legal Registration of Sex and Gender and Laws Relating to Sex and Gender Reassignment",<sup>1</sup>
- The Queensland Attorney-General's Internal Legislative Review of 2013
- The Open Society Foundation's "Legal Gender Recognition Issue Brief"
- The Council of Europe's Paper, "Protecting the Human Rights of Transgender Persons - A Short Guide to Legal Gender Recognition"

Yet another review or discussion paper adds further unnecessary delay to equality and is unlikely to uncover any new information or perspectives. What is required is substantive legislative reform rather than further reviews arriving at the same consensus conclusions. Gender diverse Queenslanders should not have to endure continuing human rights violations while waiting patiently for government departments to convene endless discussions about their most basic of human rights.

### **Gender Diverse Queenslanders**

Gender is a multi-dimensional construct involving inter-related aspects of identity, biology, self-expression, social roles, and social structures of power.

Sex assignment is a determination, made by a physician at the time of birth, about the sex of an infant. The infant's sex is recorded on the birth certificate. In most, but not all cases, the infant's physiology is unambiguously male or female. The assignment of a child's sex documented on the birth certificate goes on to affect the child's legal rights and the social expectations placed on them over the course of their life.

Society often prescribes particular identity attributes, behaviours, roles, and expectations to particular individuals on the basis of their assigned sex. Particular traits and behaviours are considered appropriate or desirable for particular people based on actual or perceived sex assignment. These expectations set the groundwork for the social construct of 'gender' with the prescribed gender roles often falling into dichotomous categories of 'masculine' and 'feminine'.

Gender identity describes a person's self-perception of having a particular gender. It is an integral and foundational aspect of a person's identity. There is a clear consensus amongst researchers that a person's innate sense of gender is solidified and immutable (gender formation) by the age of three. Attempts to change or modify a person's gender identity beyond this age frequently result in gender dysphoria, and are now widely viewed as unethical.

A transgender person is someone who experiences a dissonance between their gender identity and the sex they were assigned at birth. Some, but not all, transgender people experience gender dysphoria, which is distress about their primary and secondary sex characteristics. A person's gender identity is distinct from their sexual orientation, and transgender individuals can be romantically or sexually attracted to people of a variety of genders.

According to the American Psychological Association, "There is no single explanation for why some people are transgender. The diversity of transgender expression and experiences argues against any simple or unitary explanation. Many experts believe that biological factors such as genetic influences, prenatal hormone levels and early life experiences may all contribute to the development of transgender identities."<sup>2</sup> A study published by Zhong et al in 2006 showed that in laboratory mice, prenatal exposure of the brain in utero to particular hormones correlated with lifelong behaviours typical of a mouse of the opposite biological sex. Irrespective of the biological or sociological basis of gender identity, there seems to be a general consensus that gender identity is immutable and cannot be changed.

"Gender dysphoria" is a medical diagnosis characterised by distress arising from an incongruence between between a person's gender identity and their primary and secondary sex characteristics. It is a medical condition that is recognised in the diagnostic manual of the World Health Organisation, of which Australia is a member. Treatment

<sup>1</sup> [https://law.adelaide.edu.au/research/law-reform-institute/documents/bdm\\_sra\\_report.pdf](https://law.adelaide.edu.au/research/law-reform-institute/documents/bdm_sra_report.pdf)

<sup>2</sup> <http://www.apa.org/topics/lgbt/transgender.aspx>

approaches to gender dysphoria include counselling, social role changes, and hormonal and surgical interventions intended make a person's primary and secondary sex characteristics more congruent with their identity. Attempts to change a person's identity to conform better with gender stereotypes has been attempted in the past without success. These approaches to treatment, known as "conversion therapies" increase morbidity factors and amplify suffering. They are now considered medically unethical by most major medical associations and are expressly outlawed in several States of Australia.

Intersex variations are distinct from transgender identities. Intersex, as a category, involves biological variations whereby an individual's chromosomal sex, genitals, hormonal sex and secondary sex characteristics do not all unambiguously align as male or female. These variations in sex characteristics relate to the diversity of human bodies rather than identities, and people who have these variations will experience their gender identity in ways similar to the broader population. Many Births, Deaths and Marriages Registries of Australia are able to issue a birth certificate that recognises a person as neither male nor female.

Intersex people can experience a range of gender identities. If an intersex person experiences a gender identity that is different from the sex they were assigned at birth, they may also consider themselves transgender.

**(Gender Diverse Queenslanders and Human Rights)**

The case for reforming the Act to provide for proper legal recognition of gender diverse individuals (without coercive sterilisation or divorce) is neatly summarised by the Honorable Michael Kirby AC CMG:

*"Transgender persons are a small minority in their communities who do not share a strictly binary (male/female) gender identity and heterosexual orientation defined by reference to their bodily features at birth. Transgender people experience some of the highest levels of hostility, violence and discrimination. This is because others regard the demand of transgender people to be themselves, and to act in ways that appear normal and rational to themselves, as challenging to the heteronormative binary division of humanity into male and female categories, predetermined by their bodily attributes established at birth.*

*The opponents and critics of [legal recognition of transgender people] regard this binary division of humanity as immutable – ordained by God or nature and thus not to be denied or challenged by individual conduct, advocacy or law. At its worst, these attitudes deny any legal recognition to transgender identities.*

*At the heart of the hostility and opposition towards transgender people is an insistence that those who feel themselves transgender should either deny it; suppress it; pretend that they do not experience it; or go somewhere else where they will not confront others with the actuality of their lives as they claim to experience them.*

*Because transgender characteristics are a variation in nature, however caused, and are present in all societies and are recorded in ancient as well as modern times, the resulting identity is a form of gender or sex as such. It is therefore entitled to respect, recognition and protection, including by the law.*

*The law should cease to oblige self-denial, deception and pretence, extracted from transgender people in many countries as a price of avoiding violence, hostility and discrimination. The law should provide protection to transgender people from violence, hostility and discrimination. The object of the law should be to ensure individual harmony with society and the creation of a broader society that is in harmony of the lives experienced by all its people, including the transgender and intersex minorities. Sexual and gender minorities are part of nature. They should be recognised, supported and protected, as such, by the law."<sup>3</sup>*

<sup>3</sup><https://www.michaelkirby.com.au/images/stories/speeches/2015/2745A%20TRANSGENDER%20PERSONS%20-%20LEGAL%20DISHARMONY%20AND%20ATTITUDINAL%20CHANGE.pdf>

### (The Divorce Requirement)

Section 22 of the Act establishes that a person must be unmarried to obtain legal recognition of their sex or gender.

The requirement that an applicant be unmarried to obtain legal recognition appears to be premised on the belief that two people of the same sex or gender should not be legally married. The provision appears to be anchored in moral condemnation of particular types of loving relationships rather than any conceivable public benefit.

It is, however, important to distinguish between marriage equality for same-sex couples and the marriage requirements affecting gender recognition laws. Conflating these issues is inappropriate, because in the case of gender-recognition laws, the rights of an already lawfully married couple are at stake.

The Section 22 divorce requirement puts many gender diverse Queenslanders in a difficult position of being required to choose between legal recognition of their marriage, and legal recognition of their sex or gender. It also places gender diverse Queenslanders at a relative disadvantage to gender diverse Australians of other States who already enjoy simultaneous legal recognition of both their gender and marital state.

Even if a gender diverse Queenslander decides to prioritise the legal recognition of their sex or gender over their marriage, the only practical pathway for a married person to become unmarried is through process of annulment or divorce. However, annulment is only available on very limited grounds, and divorce is not available to a couple in a loving, harmonious relationship.

Section 48 of the *Family Law Act 1975* (Cth) provides that:

- (1) An application under this Act for a divorce order in relation to a marriage shall be based on the ground that the marriage has broken down irretrievably.*
- (2) Subject to subsection (3), in a proceeding instituted by such an application, the ground shall be held to have been established, and the divorce order shall be made, if, and only if, the court is satisfied that the parties separated and thereafter lived separately and apart for a continuous period of not less than 12 months immediately preceding the date of the filing of the application for the divorce order.*
- (3) A divorce order shall not be made if the court is satisfied that there is a reasonable likelihood of cohabitation being resumed.*

Nothing in the *Family Law Act 1975* (Cth) allows for a divorce to be granted on the grounds that one of the parties to the marriage has transitioned their sex or gender and the law of another jurisdiction requires them to be unmarried to obtain legal recognition.

Many gender diverse Queenslanders are in loving, committed marriages. The only viable method for such individuals to become unmarried is to perjure themselves by declaring that their marriage “has broken down irretrievably” to obtain divorce. In addition to perjuring themselves, the parties to the marriage lose all spousal privileges under State and Federal law.

Additionally, applicants for divorce must also satisfy the court that the parties to the marriage have separated and lived apart for a period of not less than 12 months. As such, Section 22 of the Act has the *de facto* effect of breaking up loving marriages merely because they involve a gender diverse Queenslander who seeks legal recognition of their sex or gender. Rainbow Rights Watch believes marriage is a civil contract, a solemn promise, and a celebration of love, commitment, unity, mutuality and family. It is not the job of the Queensland government to break up long-term loving families merely because a party to the marriage chooses to transition their gender. Love and family is something to be celebrated in all its forms and there is no public interest to be served by such a provision.

The effects of coerced separation also has consequences extending beyond the parties to the marriage. For example, in married families with children, the effects of coerced separation may be adverse to the personal development, and emotional, physical and financial security of children of the marriage.

### **(Legality of Divorce Requirement)**

In our view, the divorce requirement is vulnerable to challenge under both international human rights laws and also domestic law.

The legality of equivalent divorce provisions in NSW have already been challenged and deemed a violation of international human rights laws. In 2006, a transgender individual applied for a registration of change of sex in NSW. The relevant department declined to process the application because the individual was married. The Applicant filed a complaint with the United Nations Human Rights Committee, contending that the government's refusal to amend the applicant's birth certificate violated several human rights treaties which had been ratified by Australia. The Council held that the divorce requirement violated an individual's (a) right to privacy and family, and (b) right to nondiscrimination. The Human Rights Council held that NSW was required,

*"to provide the author with a birth certificate consistent with her sex. The State party is also under an obligation to prevent similar violations in the future. In this regard, ... the State party should revise its legislation to ensure compliance with the Covenant."<sup>4</sup>*

Rainbow Rights Watch is of the view that the *ratio decidendi* from the Human Rights Council's determination similarly applies to the Queensland divorce requirement, and as such, the existing Section 22 of the Act is vulnerable to challenge in the United Nations Human Rights Commission.

The divorce requirement is also expressly condemned under other United Nations instruments. For instance, Article 3 of the Yogyakarta Principles provides that "No status, such as marriage or parenthood, may be invoked as such to prevent the legal recognition of a person's gender identity".

It is also anticipated that the existing divorce requirement may also become vulnerable to challenge under Australia's Sex Discrimination Act 1984 ("**SDA**") (Cth) in the future. Section 40(5) of the SDA currently ensures that an action for discrimination cannot be brought against a State for refusing to "make, issue or alter an official record of a person's sex if a law of a State or Territory requires the refusal because the person is married." The provision is scheduled for automatic repeal on 9 December 2018 by force of Schedule 2 of the *Marriage Amendment (Definitions and Religious Freedoms) Act 2017* (Cth). Rainbow Rights Watch is of the view that Queensland's divorce requirement may become vulnerable to a claim of discrimination under Division 2 of the SDA if it is not repealed before 9 December 2018.

As well as being inhumane and destructive to the fundamentals of family, the divorce requirement may be vulnerable to various legal and human rights challenges, both now and in the future.

### **(International Perspectives on Divorce Requirement)**

International comparative analysis suggests that Queensland's divorce requirement provisions are amongst the most regressive in western democracy.

The statutory divorce requirement has already been abolished in all States of Canada.

In Europe, the divorce requirement has already been abolished (or never existed) in Austria, Belgium, Denmark, Estonia, Georgia, Germany, Iceland, France, Luxembourg, Netherlands, Norway, Portugal, Romania, Spain, Sweden, Ireland, Spain, United Kingdom, and Switzerland.

<sup>4</sup> [http://tbinternet.ohchr.org/Treaties/CCPR/Shared%20Documents/AUS/CCPR\\_C\\_119\\_D\\_2172\\_2012\\_25976\\_E.pdf](http://tbinternet.ohchr.org/Treaties/CCPR/Shared%20Documents/AUS/CCPR_C_119_D_2172_2012_25976_E.pdf)

In relation to the few outstanding States, the European Commissioner for Human Rights has found that “any restriction on the right of transgender persons to remain in an existing marriage following a recognized change of gender” must be removed.<sup>5</sup>

The divorce requirement was abolished in New Zealand in 2013.

Rainbow Rights Watch has not been able to identify any State in the USA that imposes a divorce requirement. Legal commentators suggest that such a requirement would, in all likelihood, be unlawful under domestic law in light of *Obergefell v. Hodges*<sup>6</sup> and numerous authorities over-ruling the principle of *Littleton v. Prange*.<sup>7</sup>

In Australia, the divorce requirement has already been abolished in South Australia and the Australian Capital Territory, and Rainbow Rights Watch understands that legal reform has commenced in WA, Victoria and New South Wales.

By comparative standards, Queensland’s divorce requirements are outdated and ill conceived.

### **(Coercive Surgical Sterilisation)**

Sections 22 and 23(4)(b)(i) of the Act establish that a person must have undergone “sex reassignment surgery” as a prerequisite to amending their birth certificate.

The term “sex reassignment surgery” is misleading insofar as it reinforces binary and simplistic conceptions of sex and gender through the primitive and purient lens of genital essentialism. There are many Queenslanders who are unable to perform the reproductive role of either males or females. There are many gender diverse Queenslanders, particularly intersex Queenslanders, who are capable of performing the reproductive role of one sex, but possess the external genitals of another, or neither, sex. Binary conceptions of sex in legal instruments are un-necessary and further marginalises these individuals. Accordingly, Rainbow Rights Watch prefers the term “Genital Reconstructive Surgery” (“GRS”).

GRS is a medical procedure. The underlying indication is a diagnosis of Gender Dysphoria accompanied by particular distress about an individual’s own genital shape. Where properly indicated and performed on properly evaluated individuals, GRS has a high rate of medical efficacy with most patients obtaining relief from dysphoria. It is a treatment approach that should remain available to properly evaluated Queenslanders who give informed consent for the procedure.

However GRS is an expensive, highly invasive procedure with a long recovery time and lifelong maintenance. It renders the patient infertile. It is irreversible, and carries some significant risks.

Rainbow Right Watch believes that the decision whether or not to undergo a particular medical procedure should be a decision made between a doctor and patient without external influences. Requiring an individual to sterilise themselves to obtain legal recognition of their identity is both coercive and inhumane. Treatments for a recognised medical condition must urgently be decoupled from the process to recognise a person’s identity and place in society.

As the Honorable Michael Kirby AC CMG has articulated,

*“Essentially, law reform should facilitate comfort with each person’s experienced gender identity. It should not impose violence, discrimination or disproportionate obligations such as undesired or unnecessary subjection to [surgeries or other unwanted or contraindicated medical treatments]”.*

Laws that require a transgender person to choose between their gender and their fertility are inhumane and degrading.

<sup>5</sup> <https://rm.coe.int/1680492119>

<sup>6</sup> 576 U.S. (2015)

<sup>7</sup> 9 S.W.3d 223 (1999)



### **(Surgery Should Be A Medical Decision)**

There are good reasons why a transgender person might be unwilling or unable to undergo GRS.

Firstly, GRS is expensive. Only limited coverage is provided by Medicare for some parts of the procedure (which is particularly inhumane given that some States require it). Full GRS for transgender women can cost between \$15,000 and \$40,000. Hysterectomy for transgender men can cost as much as \$8,000 and phalloplasty can be as much as \$80,000. Many transgender individuals will also incur travel costs to foreign countries to receive best practice treatment from experienced surgeons. The nearest country that offers phalloplasty surgery is Serbia. Many self-employed individuals will also lose income during the recovery period which can be as long as 12 weeks. The cost barrier is exacerbated by the fact that transgender people are often disproportionately affected by poverty, unemployment and unstable employment. Beyond Blue found in a 2013 report that transgender individuals experienced discrimination:

*“in a wide range of settings, including healthcare, their workplace, and educational institutions... Participants had difficulty securing employment, and some reported losing their job after announcing their intent to transition, or during the transition process. Some participants resigned from work because their peers made life unbearable for them.”<sup>8</sup>*

Unemployment, poverty and low income are major barriers to many transgender Queenslanders undergoing surgery, even where it is desired and medically indicated.

Medical contraindications can also be a barrier to surgery, even where it is desired and affordable. GRS is a highly invasive procedure. Whilst the determination of contraindications varies by surgeon and hospital, some teams will decline to operate on a patient who experiences heart irregularities, obesity, old age, respiratory irregularities, coagulation complications, HIV or other communicable blood-borne diseases. Other individuals are unable to obtain psychiatric approval for surgery because of comorbid mental health conditions. Some lack the legal capacity to consent. These individuals are left with no redress to obtain legal recognition of their gender.

GRS is a risky procedure. The risk is unacceptable to some individuals. A recent meta-study found that 18% of transgender women who undergo GRS experience lifelong sexual dysfunction, with most being unable to achieve orgasm. Other complications include permanent urinary incontinence, infection, serious blood loss, coma and death. Anal-Vaginal fistulas are a further complication affecting some patients. Aesthetic complications are also reasonably common.

GRS for transgender women also commits the patient to a lifelong maintenance regime of vaginal dilation which some patients are unable to meet. Failure to dilate most likely results in a loss of depth and width of the vaginal vault with the patient permanently losing all ability to have penetrative intercourse after approximately 12 months.

Being able to afford GRS and being willing to accept the risks does not make a person's gender more valid or legitimate than another person's. Transgender people should not be granted *de facto* preference in the legal recognition of their gender merely because they are young, slim, healthy, and wealthy.

### **(Non-Uniformity of State Laws)**

Several progressive States of Australia have already implemented substantive legislative reforms to abolish coercive sterilisation requirements. South Australia and the ACT have paved the way with innovative reforms, whilst the sterilisation requirement has also been read down in Western Australia. The *Births, Deaths and Marriages Registration Act 1996* (SA) and the *Births Deaths and Marriages Registration Act 1997* (ACT) reflect international

<sup>8</sup>[https://www.beyondblue.org.au/docs/default-source/research-project-files/bw0288\\_the-first-australian-national-trans-mental-health-study---summary-of-results.pdf?sfvrsn=2](https://www.beyondblue.org.au/docs/default-source/research-project-files/bw0288_the-first-australian-national-trans-mental-health-study---summary-of-results.pdf?sfvrsn=2)

best practice in legal recognition of transgender individuals. The reforms followed the principles set out in the “Zappone Proposal” and draw on the guidance of International Human Rights agencies.

The current state of the Act in Queensland places gender diverse Queenslanders at a relative disadvantage to gender diverse Australians whose birth was registered in South Australia or the ACT. Rainbow Rights Watch recently explained the issue of non-uniformity in the following way:

*“Consider a hypothetical situation involving two next door neighbours living in Sydney. Quentin, a transgender man born in Queensland, was assigned female at birth and underwent hormonal and social transition to male at the age of 15. He has lived most of his life as a male, and society perceives him to be male.*

*Sam lives next door to Quentin. Sam is a transgender man born in South Australia. He also transitioned to male at a young age and has lived most of his life as a man.*

*Both men use hormonal medication under the supervision of an endocrinologist to suppress their menstrual cycle. Both men are happily married. They both aspire to raise children one day. Neither has undergone any surgical procedure to remove their uterus or render them permanently sterile.*

*In 2018, Sam applied to amend his birth certificate to be legally recognised as male. He sought to amend his birth certificate because he often experienced discrimination when using his birth certificate to prove his identity. He also sought to amend his birth certificate because the NSW Anti-Discrimination Act 1977 provides particular protections from discrimination to individuals who have amended their birth certificate. For instance, Section 38B makes it unlawful to treat a person “as their former sex” if they have amended their birth certificate.*

*Because Sam’s birth is registered in South Australia, his marriage and his surgical status do not affect his application to amend his birth certificate. He submits the relevant documents and he is provided with a new birth certificate.*

*Quentin seeks similar protections from discrimination. He applies to the Queensland Registry for a new birth certificate. Quentin receives a letter from the Registry stating that his application has been declined. The Registry advises Quentin that if he wishes to obtain legal recognition as a male, he must first separate and divorce from his spouse, and he must also undergo surgery to irreversibly sterilise himself. Quentin does not want, and cannot afford, surgery. His doctor does not consider it to be medically necessary or beneficial to his health. Quentin continues to experience discrimination when using his birth certificate. Quentin is not protected in the same way Sam is under the NSW Anti-Discrimination Act if an employer or service provider requires him to use the female bathrooms or accommodations, which in turn ‘outs’ him as transgender and attracts further prejudice.”*

Rainbow Rights Watch believes a person should not be disadvantaged under law, or subject to additional discrimination, merely because their birth was registered in Queensland. The location of a person’s birth is never a matter of their own choosing.

#### **(Legality of Coercive Surgical Sterilisation)**

The morality and legality of provisions requiring gender diverse individuals to sterilise themselves in order to obtain legal recognition has been the subject of consideration by International Human Rights agencies.

In 2014, the **United Nations** released an interagency statement on “Eliminating Forced, Coercive and Otherwise Involuntary Sterilisation”. The report was published by the **World Health Organisation**, and prepared by OHCHR, UN Women, UNAIDS, UNDP, UNFPA, UNICEF, and WHO. In relation to transgender individuals, the statement reads:



*“In many countries, transgender and often also intersex persons are required to undergo sterilization surgeries that are often unwanted, as a prerequisite to receiving gender affirmative treatment and gender-marker changes.*

*According to international and regional human rights bodies and some constitutional courts, and as reflected in recent legal changes in several countries, these sterilization requirements run counter to respect for bodily integrity, self-determination and human dignity, and can cause and perpetuate discrimination against transgender and intersex persons.”<sup>9</sup>*

In a 2012 Global Commission Report, the **United Nations Development Program** called on Member States to:

*“ensure transgender people are able to have their affirmed gender recognised in identification documents, without the need for prior medical procedures such as sterilisation, sex reassignment surgery or hormone therapy.”<sup>10</sup>*

The **World Professional Association for Transgender Health** declared more than seven years ago:

*“No person should have to undergo surgery or accept sterilization as a condition of identity recognition. If a sex marker is required on an identity document, that marker could recognize the person’s lived gender, regardless of reproductive capacity.”<sup>11</sup>*

According to the **Council of the European Human Rights Commissioner**, coercive sterilization of transgender individuals,

*“clearly runs counter to the respect for the physical integrity of the person... States which impose intrusive physical procedures on transgender persons effectively undermine their right to found a family.”<sup>12</sup>*

The UN Special Rapporteur on Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment has specifically called out the coercive sterilisation of transgender citizens, demanding all states:

*“outlaw forced or coerced sterilization in all circumstances and provide special protection to individuals belonging to marginalized groups.”<sup>13</sup>*

The **UN Committee on the Elimination of All Forms of Discrimination against Women** expressed its condemnation of

*“specific health problems experienced by transgender women, in particular the compulsory sterilization they should undergo to get their birth certificates changed.”<sup>14</sup>*

Speaking specifically about gender recognition documents, **Parliamentary Assembly of the Council of Europe’s** Rapporteur Pasquier stated in 2013 that :

*“neither forced nor coerced sterilizations or castrations can be legitimated in any way in the 21st century – they must stop.... even where consent is ostensibly given, [even] in written form, it can be invalid if the victim has been misinformed, intimidated, or manipulated with financial or other incentives.”<sup>15</sup>*

<sup>9</sup><http://www.unwomen.org/-/media/headquarters/attachments/sections/news%20and%20events/stories/forced%20sterilization%20document%20pdf.pdf?la=en>

<sup>10</sup> United Nations Development Programme, *Global Commission on HIV and the Law, Risks, Rights & Health* (New York, 2012).

<sup>11</sup> [http://www.wpath.org/uploaded\\_files/140/files/Identity%20Recognition%20Statement%206-6-10%20on%20letterhead.pdf](http://www.wpath.org/uploaded_files/140/files/Identity%20Recognition%20Statement%206-6-10%20on%20letterhead.pdf)

<sup>12</sup> Hammerberg, Issue paper “Human Rights and Gender Identity” [2009] pp 19-21.

<sup>13</sup> [http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session22/A.HRC.22.53\\_English.pdf](http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session22/A.HRC.22.53_English.pdf)

<sup>14</sup> Concl. Obs., Netherlands, CEDAW/C/NLD/CO/5, 5. February 2010, § 46.

<sup>15</sup> <http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=19984&lang=en>

In the opinion of Rainbow Rights Watch, Queensland's coercive sterilisation requirements violate individual human rights to bodily autonomy, privacy and self-determination. In our view, the *ratio* from *Nunez v. France*<sup>16</sup> is also bad law and is vulnerable to being overturned in the next five years in light of rapidly changing conceptions of human rights and social recognition.

### **(International Perspectives on Coercive Surgical Sterilisation)**

Queensland's coercive sterilisation requirements are amongst some of the most regressive in western democracy.

In Canada, the requirement for surgery has already been abolished in Alberta, British Columbia, Manitoba, New Brunswick, Newfoundland and Labrador, Northwest Territories, Nova Scotia, Nunavut, Ontario, Prince Edward Island, Saskatchewan and Yukon. As of July 2017, there were no States remaining in Canada that required divorce or sterilisation as a prerequisite to birth certificate amendment

In *'Michael' v Registrar-General of Births, Deaths and Marriages*<sup>17</sup> the New Zealand Family Court determined that Section 28 of *Births, Deaths, Marriages and Relationships Register Act 1995* does not require genital reconstructive surgery as a precondition to amending the birth certificate of a transgender person whose birth was registered in New Zealand.

Many States of the USA have already abolished the surgical sterilisation requirement. Surgical sterilisation is not required to amend the gender marker on birth certificates issued in California, Connecticut, Delaware, District of Columbia, Hawaii, Illinois, Indiana, Iowa, Maryland, Massachusetts, Minnesota, Montana, Nevada, New Hampshire, New York, North Dakota, Oregon, Pennsylvania, Rhode Island, South Dakota, Utah, Vermont, Virginia, Washington and Wyoming.

The situation in Europe is also considerably more progressive than Australia. In 2012, Sweden's Administrative Court of Appeal held that forced sterilization "intrudes on a person's physical integrity and cannot be seen as voluntary."<sup>18</sup> In Germany, the Federal Constitutional Court held that permanent sterilisation could no longer be a precondition for birth certificate amendment. The Court held that "such surgeries were deemed incompatible with the right to sexual self-determination and physical integrity."<sup>19</sup> In 2009, the Constitutional Court in Austria ruled that "proof of gender reassignment surgery was not required for legal gender recognition."<sup>20</sup> In 2014, the Norwegian Equality Body found that there was no legal basis for coercive sterilization requirements in its gender recognition law. In 2012, Switzerland rejected coercive sterilisation stating that it "always and directly violates the physical integrity of the person concerned and is therefore highly problematic for legal reasons."<sup>21</sup> Surgical sterilisation requirements have also been abolished in Portugal, Spain, Hungary, Finland, Ireland, the UK and Denmark.

Other countries that do not impose coercive sterilisation upon transgender citizens include Botswana, South Africa, Malta, Argentina, and Colombia.

In Australia, the surgical sterilisation requirements have already been abolished or read down in South Australia, Western Australia and the Australian Capital Territory.

### **(Requirement of Submitting to Bodily Examination)**

Currently, a person seeking recognition of their gender is required by Section 23(b)(i) to submit themselves to medical examination by two separate doctors. The doctors must declare in a declaration witnessed by a justice of the peace, a commissioner for declarations, a notary public under the law of the state, the Commonwealth or another

<sup>16</sup> (Application no. 18367/06) [27 April 2008].

<sup>17</sup> (2008) 27 FRNZ 58.

<sup>18</sup> Open Society Foundation (2015) *License To Be Yourself: Forced Sterilisation*, 9.

<sup>19</sup> Ibid.

<sup>20</sup> Ibid.

<sup>21</sup> Regional Court of Bern-Mittelland Case CIV 12 1217 JAC (decided on 12 September 2012).

state, a lawyer, a conveyancer or another person authorised to administer an oath under the law of the state, the Commonwealth or another Australian state, that the individual has undergone a surgical procedure involving the alteration of a person's reproductive organs carried out either (a) to help the person be considered to be a member of the opposite sex, or (b) to correct or eliminate ambiguities about the sex of the person.

The process to apply for gender recognition currently involves a greater degree of medical oversight and authorisation than required to procure a pregnancy termination. The requirement that a person subject themselves to an intrusive forensic procedure is invasive and violates the individual right to bodily autonomy. Intrusive forensic procedures involving intimate body parts are only available under the *Police Powers and Responsibilities Act 2000* ("PPRA") (Qld) if a Court authorises the procedure because it has grounds to suspect a serious indictable offense. The PPRA requires the Magistrate to balance the "rights and liberties of the person and the public interest" in performing the procedure.

A person should not have to submit their genitals to examination in order to obtain legal recognition of their gender. The requirement of coercive medical examination should be removed from the Act.

#### **(Recommendations on Requirement for Recognition of Gender)**

Rainbow Rights Watch recommends that the requirement of "sex reassignment surgery" be substituted with a broader requirement that respects bodily autonomy by allowing gender changes following either invasive or non-invasive treatment approaches. Legal recognition should be provided where a person has undergone "appropriate clinical treatment" for sex reassignment. Appropriate clinical treatment could be constituted, for example, by (a) hormonal or surgical interventions, (b) counselling if the applicant has received sufficient amount of counselling (to a given threshold to be determined), or (c) any other form of invasive or non-invasive treatment that is considered medically effective.

In order to safeguard against fraud and abuse of process, it may also be reasonable to impose a restriction on how frequently a person can apply to amend their birth certificate, as well as a restriction on the total number of times a person can amend their birth certificate over the course of their life without special case handling.

This approach respects the person's right to determine what happens to their own body, whilst also ensuring the reassignment process is not subject to fraud or abuse.

#### **(Recognition Process for Residents Whose Birth Registered in Another Jurisdiction)**

The current iteration of the Act does not provide any process for legal recognition of a person who resides in Queensland but whose birth was registered in another jurisdiction. This is particularly prejudicial to residents whose birth was registered in a foreign jurisdiction where there is no process for amendment of birth certificates whatsoever. The Act does not provide for the recognition of the gender of a resident who has undergone surgery, is unmarried, and who would otherwise meet all the requirements to be recognised if their birth had occurred in Queensland.

Consequently, the Act leads to disparate outcomes between various residents of Queensland.

Rainbow Rights Watch believes that legal provision should be made for a gender recognition certificate to be available to a person who (a) has resided in Queensland for 12 months or more, (b) was born outside Queensland, (c) has attained the age of 18 years, and (d) otherwise meets the requirements for the issuance of an amended birth certificate in Queensland. A gender recognition certificate should convey all the same rights and privileges under law as an amended birth certificate.

#### **(Absence of Recognition of Non-Binary Identities)**

Nothing in the Act or the corresponding Regulations specifies what constitutes a permissible sex or gender for designation on a birth certificate. However, Rainbow Rights Watch notes that the Registry currently provides no process allowing a registration or amendment to a sex or gender other than Male or Female.

Rainbow Rights Watch is of the view that the unavailability of intersex and non-binary sex markers violates the human rights of intersex and non-binary Queenslanders and may be vulnerable to challenge on the precedent of *NSW Registrar of Births, Deaths and Marriages v Norrie*<sup>22</sup>. Designations of “Intersex / Indeterminate” and “Non-Binary” should be added to the available sex descriptors.

**(Other Recommendations)**

Rainbow Rights Watch recommends that the definition of “child” in Schedule 2 be amended to “the expulsion or extraction of a child from its parent”. This amendment expands the definition to accommodate for gender diverse parents.

Rainbow Rights Watch also endorses and expands on the human rights guiding principles set out by Kohler, Recher & Ehrh<sup>23</sup> for amendments to legal recognition of gender. Any reforms to the Queensland process for gender recognition must ensure that:

1. Separate procedures are available for change of name and change of registered gender.
2. The institution or department in charge (BDM Registry) is clearly indicated in the text of the regulation.
3. The procedure is quick, and the maximum duration is clearly and explicitly regulated.
4. The procedure is accessible to anyone, irrespective of their economic or other capacity.
5. Access of persons with limited legal capacities (minors or those under guardianship) is regulated explicitly.
6. Access to the procedure for citizens living abroad is regulated explicitly.
7. Recognition of foreign decisions for residents or citizens is regulated explicitly.
8. Access to the procedure for foreign residents is regulated explicitly.
9. The department provides a process for legal recognition of change of name and registered gender for resident of the jurisdiction whose birth was registered in another jurisdiction.
10. The privacy of the applicant is ensured during and after the procedure.
11. Professionals who disclose private information about the applicant without explicit permission of the person concerned are held accountable.
12. The involvement or interference of spouses, children, work colleagues or other third parties in the procedure is barred.
13. Grounds for refusal, such as fraudulent intention, are limited and explicitly listed.
14. The applicant is free in the choice of names, including gender-neutral names.
15. The possibility for an applicant to appeal the decision is clearly indicated, including the body to whom to address the appeal. Enforcement of the legislation for its correct implementation is supervised. A remedy or review mechanism is in place where practice does not correspond to the legislation.
16. The self-determination of the applicant is the sole basis for the gender recognition.

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<sup>22</sup> [2014] HCA 11.

<sup>23</sup> Kohler, Recher, Ehrh (2013) Legal Gender Recognition in Europe, TGEU, 57-59.

17. No interference or opinion of a third party, neither professional (mental health expert , etc.) nor private (parents, spouses, children, work colleagues, etc), is requested.
18. A request for proof of surgical procedure, hormonal therapy or any of her medical or psychological treatment or status is omitted.
19. The procedure is fully accessible for young and elderly applicants , irrespective of their age.
20. The procedure is fully accessible for applicants who are married or in a registered partnership. An existing marriage or registered partnership prevails and does not need to be altered. However, the applicant and their partner can, if freely chosen, transfer their marriage into a registered partnership and vice versa (where available).
21. The procedure is fully accessible for an applicant, who is a parent or has custody of, guardianship over or visiting rights with children (independent of their age).
22. The procedure is fully accessible to an applicant who has a criminal conviction.
23. The applicant is not required to have lived for a certain time in their gender identity (so called “real-life experience“) or have used the requested name.
24. No other personal characteristics, such as physical appearance, sexual orientation, disability, health or social status may pose a valid ground for refusal or delay.
25. Upon the decision, the applicant is considered a member of the registered gender for all intents and purposes.
26. Equity provisions aiming at protecting the applicant on grounds of their gender identity are explicitly regulated. (For example, both prostate and breast cancer check-ups should be made available for trans women on a non-discriminatory basis.)
27. Upon the decision, the applicant enjoys all (gendered) rights and duties at par with others of the same registered gender.
28. A change of name and gender marker leads to an automatic (ex officio) change in all held registries without a trace, where feasible.
29. Available gender markers to include Male, Female, Indeterminate (only available at birth), Intersex and Non-Binary.
30. Once a decision is in force, the name(s) and gender marker that were in use prior to such a decision may not be made public or searchable, unless there is an overriding interest or the applicant consents.
31. A change of name leads to the right to be addressed in all official documents as belonging to the corresponding gender.
32. State and non-state actors are obliged to rectify gendered information, including letter and number combinations on working references, educational certificates, etc. without a trace, also retroactively.
33. Existing rights and acquired privileges relating to a marriage or registered partnership remain unaffected.
34. Acquired pension rights, and/ or similar recurring benefits remain unaffected.

35. Entitlements under a will, trust or other instrument are not affected by name or gender change unless the will, trust or instrument provides otherwise.
36. Next-of-kin relationships, especially custody and visitation rights regarding children, remain unaffected (neither can they be prerequisites for changes to gender identity).
37. Transitional provisions are made to deal with applications that are already under consideration.

**(Conclusion)**

Queensland's existing laws relating to gender reassignment are antiquated and violate the individual right to privacy, bodily autonomy, freedom from torture, and the right to equal status before the law. Sections 22 to 24 break up loving families, coerce people to perjure themselves, and subject gender diverse Queenslanders to invasive and unwanted medical procedures that result in infertility. All this is done for no public benefit, but to reinforce historical stereotypes of gender.

The issues with the approach followed by Queensland have already been illuminated in numerous Law Reform Committee reviews. The issues are also highlighted in the determinations and statements of International Human Rights bodies.

What is needed is not further reviews or departmental discussion papers. The Queensland government cannot in good conscience continue to subject gender diverse people to inhumane treatments whilst entertaining further debate that is unlikely to uncover new evidence or viewpoints. The coercive divorce and sterilisation requirements must be repealed immediately.

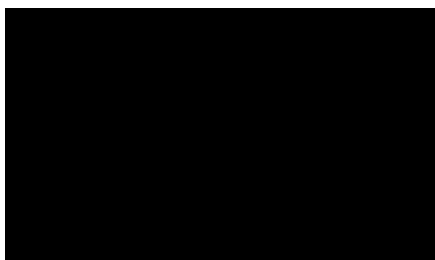
**(Interest Statement)**

Our position takes account of members of our organisation who are (a) currently prevented from obtaining legal recognition of their gender because of the divorce requirement, (b) currently prevented from obtaining legal recognition of their gender because of the sterilisation requirement, and (c) have undergone genital reconstructive surgery, but deplore the coercive influence the sterilisation requirement had on their decisions to undergo surgery.

Rainbow Rights Watch may be contacted to clarify any aspect of our submission by post at the above address or by email at [contactus@rainbowrightswatch.org.au](mailto:contactus@rainbowrightswatch.org.au).

Thank you for considering our submissions.

Your Sincerely,



**Lilian Dean**