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Office of the President

21 December 2022

Our ref: BT-MC

Committee Secretary
Legal Affairs and Safety Committee
Parliament House
George Street
Brisbane QLD 4000

By email: lasc@parliament.qld.gov.au

Dear Committee Secretary

Births, Deaths and Marriages Registration Bill 2022

Thank you for the opportunity to provide feedback on the Births, Deaths and Marriages Registration Bill 2022 (**Bill**). The Queensland Law Society (**QLS**) appreciates being consulted on this important piece of legislation and supports the Bill's objective to strengthen the legal recognition of trans and gender diverse people and better recognise contemporary family and parenting structures.

This response has been compiled by the QLS Health & Disability Law Committee, Succession Law Committee, and Criminal Law Committee, whose members have expertise relevant to the matters addressed in the Bill.

Inappropriate timeframe for meaningful consultation

At the outset, we are concerned with continually short timeframes to respond to important legislation. The Bill was introduced on Friday, 2 December 2022 and responses are requested by the Committee by noon, 11 January 2023, in the middle of the traditional business closure period of 24 December 2022 to 9 January 2023. Almost all of our volunteer legal policy committee members are away during this period.

While we acknowledge the Government has consulted with stakeholders over a lengthy period, the Bill differs to previous consultation drafts and requires a fresh and detailed review. The reforms proposed in the Bill are significant and will have wide-ranging implications for Queenslanders. It is in all our best interests to ensure proposed laws work as effectively and efficiently as possible, and this requires meaningful and robust consultation with stakeholders. Short consultations held during the Christmas and New Year shut down period will not yield the best legislation for the people of Queensland.

In light of the short timeframes, and with the assistance of available expert volunteer committee members, we have prepared a response focusing on the key issues.

There are likely a wide range of other issues which we have not had the time nor opportunity to consider in detail. If we have not commented on other aspects of the Bill, it should not be taken as assent or support.

Births, Deaths and Marriages Registration Bill 2022

Executive Summary

QLS supports the Bill's objective to strengthen the legal recognition of trans and gender diverse people and better recognise contemporary family and parenting structures. We also acknowledge the significant work done to date by the Department of Justice and Attorney-General to ensure the Bill reflects contemporary community values and expectations.

However, we do consider the Bill as currently drafted may give rise to some unintended consequences. We set out below our key recommendations and then address each relevant part of the Bill in more detail.

Recommendations:

1. An audit should be undertaken of all Queensland legislation and associated Government policies and procedures referring to "sex" or "gender" to examine whether any consequential amendments are required as a result of the ability to register a sex descriptor of any kind.
2. The Bill should be subject to mandatory statutory review, to be conducted no later than three years after the Bill commences.
3. We seek clarification on whether QPRIME will be updated to align with the new process for altering a record of sex (i.e. whether it will ensure a person can self-identify with their chosen sex descriptor).
4. We seek further clarification on how verification of identity processes are to be managed in the absence of a sex descriptor appearing on a person's birth certificate, where current procedures refer to "gender".
5. Clause 8(2)(b) should be amended to expressly recognise situations where a child is born in Queensland and only the birth parent is in Queensland, with the other parent overseas and not practically able to sign the application within the timeframe.
6. Consideration should be given to reducing the 12 month residency requirement for change of name for humanitarian entrants, or expressly noting this as an exceptional circumstance under cl 26(2) (and the corresponding provision in cl 28 of the Bill as it relates to children).
7. The registrar should be required to re-register the person or child's relevant event upon successful change of name registration, without the requirement to make a new application or at the very least, to pay an additional administrative fee (cl 36).
8. Clause 41 (and corresponding cl 52) should be amended to remove the need for an assessment by a developmentally informed practitioner.
9. Consideration should be given to amending the definition of "assessment" to ensure the assessment is practically useful to the court when deciding an application.
10. The Government should allocate appropriate funding to community legal centres and relevant health services to ensure children under 16 can practically access assessments by a developmentally informed practitioner and the ability to make an application to the Childrens Court.
11. Clause 47(3) should be amended on the basis that unless there is a contrary intention, the document creating the entitlement is to be construed on the basis of the person's sex at the time the document was drafted/settled or the entitlement arose if by operation of law.

Recommendations (cont'd):

12. The chief executive of corrective services' discretion to refuse an application to alter a record of sex relating to a restricted person should be removed from the Bill. In the alternative, the starting point for any application to alter a record of sex made by a restricted person should require the application to be approved by the chief executive unless there are exceptional circumstances to warrant its denial. We also consider the chief executive should be obliged to take all reasonable steps to mitigate any risk such that the application can be approved.

Removal of distinction between sex and gender

Previous consultation drafts of the Bill contemplated that sex and gender would be distinct concepts with different meanings and protections, where a person who registers a gender would not be deemed to have changed their biological sex for legal purposes (leaving this to a separate process, namely amending their record in the registry). The distinction between sex and gender is consistent with the *Australian Government Guidelines on the Recognition of Sex and Gender*, as well as other Australian bodies,[1] the World Health Organisation,[2] and other international jurisdictions, such as the United Kingdom[3] and Canada,[4] all of which acknowledge a distinction between sex and gender.

This distinction is also suitably acknowledged in a number of Australian jurisdictions.[5] As the Tasmanian Law Reform Institute (**TLRI**) has highlighted, [t]here is increasing acceptance that sex and gender are different concepts, and that neither concept is confined to binary

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[1] Australian Human Rights Commission, *Resilient Individuals: Sexual Orientation, Gender Identity & Intersex Rights* (National Consultation Report, 2015) 5, definitions of 'sex' and 'gender'.

[2] The World Health Organisation provides that '[g]ender is used to describe the characteristics of women and men that are socially constructed, while sex refers to those that are biologically determined': World Health Organisation, 'Gender: definitions' <https://www.euro.who.int/en/health-topics/health-determinants/gender/gender-definitions>. See also, Department of Gender, Women and Health, World Health Organisation, *Gender mainstreaming for health managers: a practical approach* (Facilitator's Guide, 2011) 43-44.

[3] The UK government defines sex as 'referring to the biological aspects of an individual as determined by their anatomy, which is produced by their chromosomes, hormones and their interactions; generally male and female; and, something that is assigned at birth' and gender as 'a social construction relating to behaviours and attributes based on labels of masculinity and femininity; gender identity is a personal, internal perception of oneself and so the gender category someone identifies with may not match the sex they were assigned at birth; and, where an individual may see themselves as a man, a woman, as having no gender, or as having a non-binary gender – where people identify as somewhere on a spectrum between man and woman': Office for National Statistics, United Kingdom, 'What is the difference between sex and gender?' (21 February 2019).

[4] The Government of Canada distinguishes between sex and gender, where sex is taken to refer to 'biological characteristics, such as male, female or intersex' and gender is taken to refer to 'a social identity, such as man, woman, non-binary or two-spirit': Government of Canada, 'Modernizing the Government of Canada's Sex and Gender Information Practices' (Summary Report, 8 April 2019) <https://www.canada.ca/en/treasury-board-secretariat/corporate/reports/summary-modernizing-info-sex-gender.html>. This accords with the Canadian Institutes of Health Sciences, which also attributes different meanings to sex and gender, despite both terms often being used interchangeably: Canadian Institutes of Health Sciences, 'Science is Better with Sex and Gender' (Strategic Plan 2018-2023) <https://cihr-irsc.gc.ca/e/51310.html> 6.

[5] For example, the Northern Territory Government website states 'sex refers to a person's biological sex. Gender is part of a person's social and personal identity, the way they present and are recognised in the community': https://nt.gov.au/law/bdm/register-a-change-of-sex-or-gender-on-a-birth-certificate. In South Australia, residents can register a change of 'sex or gender identity' and must select from the options of male, female, non-binary, or indeterminate/intersex/unspecified: Consumer and Business Services, Government of South Australia, 'Application to record a change of sex or gender identity for an adult' (August 2019) <https://www.cbs.sa.gov.au/sites/default/files/changeofsexorgenderform_adult_1.pdf?timestamp=1670469554240>

classifications. However, there is often a lack of understanding of the breadth of variation of sex characteristics and gender identity'.[6]

The TLRI has undertaken a significant amount of work on these issues, highlighting the range of factors determining sex, 'including chromosomal patterns, genital anatomy, internal reproductive organs and hormone patterns', can make accurate distinctions between a male/female binary difficult.[7] The TLRI specifically distinguished between 'gender', 'gender identity' and 'sex or sex characteristics',[8] and these definitions flow through to Tasmania's recently amended *Births, Deaths and Marriages Registration Act 1999* (Tas).

The TLRI acknowledged conflicting views regarding the value of maintaining a distinction between sex and gender, but ultimately recommended the distinction be maintained and the focus be on working to 'eliminate discriminatory application of laws by careful and deliberate use of the appropriate terms.'[9]

The Society maintains its agreement with this approach, and acknowledges references to a person's biological sex may remain the relevant identity marker in a very limited number of circumstances; for example, in certain health settings or participation in sports.[10]

We note the Bill diverges from this approach, instead opting to remove any legal distinction between sex and gender and allow a person to self-identify with their chosen sex descriptor, which broadly follows the approach taken in Victoria. We acknowledge this approach removes the need for further consideration of the effect of a legal distinction between sex and gender, and the possibility that such a distinction may entrench a hierarchy of legal rights for trans people depending on whether or not they choose to undergo sexual reassignment surgery after the proposed reforms are introduced.

However, we do note there seems to be a conflation of the two concepts in both the Bill and the Explanatory Notes. For example, the Explanatory Notes refer to transgender and gender diverse people, and the process of a gender transition, but refers to same-sex parents. Similarly, the definition of "sex descriptor" in the Bill is taken to mean "male", "female" or "any other descriptor of sex", but the examples provided in the Bill for any other descriptor of sex are more closely associated with concepts of gender and gender identity (specifically, agender, genderqueer, and nonbinary). This distinction also reflected in cl 157 of the Bill which inserts defined terms into the *Anti-Discrimination Act 1991* (Qld), where "gender identity" relates to the person's individual experience of gender, and "sex characteristics" is taken to mean the person's physical features and development related to the person's sex.

Without further consideration of the distinction between the two concepts, especially as applied across the current Queensland statute book, there may be unintended consequences that flow from the implementation of the Bill in its current form. The following examples illustrate these unintended consequences.

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[6] As the Tasmanian Law Reform Institute has highlighted, [t]here is increasing acceptance that sex and gender are different concepts, and that neither concept is combined to binary classifications. However, there is often a lack of understanding of the breadth of variation of sex characteristics and gender identity': Tasmania Law Reform Institute, *Legal Recognition of Sex and Gender* (Final Report No. 31, June 2020) 1 [1.1.6].
[7] Ibid 9 [1.5.8].
[8] Ibid 10-11 [1.5.19].
[9] Ibid 19 [2.2.28].
[10] We acknowledge the participation of transgender athletes, and the extent to which they may or may not enjoy an advantage, continues to be debated amongst sporting associations and scientists. Inclusive participation in sport is a complex issue that pre-dates discussion of the Bill.

Legislation using gendered terms

We note cl 47 of the Bill provides that a person who has their record of sex altered in the register is taken to be a person of the sex as altered for 'for the purposes of, but subject to, a law of the State'. The Explanatory Notes provide: 'From a general standpoint, in most instances where other legislation refers to "sex", a trans or gender diverse person is to be treated for the purposes of that law in accordance with the sex as altered with the registrar.' However, the Explanatory Notes also state cl 47 'will facilitate provisions in other Acts which use gendered terms that are directed to the anatomical capacity of a person to be interpreted in a way that captures a person if that person retains the anatomical characteristics necessary regardless of what the person's registered sex may be.'

We are concerned this means, effectively, that a person's sex registration may be overridden and unable to be enforced. For example, what is the intended interpretation of the personal search powers under *Police Powers and Responsibilities Act 2000* (Qld), which require personal searches to be conducted by a police officer 'of the same sex as the person to be searched',[11] where a person alters their record of sex from male to female but retains the anatomical capacity of a male?

Further, clause 47 makes no reference to situations where the legislation refers to "gender". The *Mental Health Act 2016* (Qld) refers to a personal search being required to be conducted by a searcher of 'the same gender as the person'.[12] Where a person is registered as a sex other than male or female, this arguably requires the search to be conducted by a person of the same registered sex, and such a requirement could prove unduly restrictive. Consideration should be given to whether any consequential amendments are required to the *Acts Interpretation Act 1954* (Qld).

Gender options on bench charge sheets

We are also concerned that unintended consequences may arise where certain Government departments or agencies retain gender as the relevant identity marker. In the criminal context, for example, a Magistrate will identify a person charged with an offence by reference to the bench charge sheet. Currently, bench charge sheets note the person's gender, which may be described as "male", "female" or "other". We are also informed it is not possible for a person to change their gender in QPRIME unless they have undergone sex reassignment surgery (aligning with the current sex change process under the *Births, Deaths and Marriages Registration Act 2003*). This leads to difficulties for Magistrates when addressing a person in court, where the person presents as a gender different to that noted on the bench charge sheet.

We seek clarification on whether QPRIME will be updated to align with the new process for altering a record of sex (i.e. whether it will ensure a person can self-identify with their chosen sex descriptor).

Verification of identity processes

Further, we query how the absence of a sex descriptor on a birth certificate will be managed in the various verification of identity processes. For example, the current Land Titles Practice Manual (at 61.2310) requires a witness to undertake further steps to verify the identity of the individual where 'the individual executing the instrument does not appear to be the person to

[11] *Police Powers and Responsibilities Act 2000* (Qld) s 624(2).
[12] *Mental Health Act 2016* (Qld) ss 399, 400.

which the identity documents relate, for example because the individual appears not to be of the same gender as the current registered owner or holder of the interest…'.

Accordingly, we maintain our previous recommendation that an audit be undertaken of all Queensland legislation and associated Government policies and procedures that refer to "sex" or "gender" to thoroughly examine whether any consequential amendments are required as a result of the ability to register a sex descriptor of any kind. Additionally, we recommend the Bill be subject to a mandated statutory review, to be conducted no later than three years after the Bill commences.

Recommendations:

1. An audit should be undertaken of all Queensland legislation and associated Government policies and procedures referring to "sex" or "gender" to examine whether any consequential amendments are required as a result of the ability to register a sex descriptor of any kind.
2. The Bill should be subject to mandatory statutory review, to be conducted no later than three years after the Bill commences.
3. We seek clarification on whether QPRIME will be updated to align with the new process for altering a record of sex (i.e. whether it will ensure a person can self-identify with their chosen sex descriptor).
4. We seek further clarification on how verification of identity processes are to be managed in the absence of a sex descriptor appearing on a person's birth certificate, where current procedures refer to "gender".

Part 2 Births

8 Responsibility to apply to have birth registered

We support the registrar's ability in cl 8(2) to accept an application completed by only 1 of the parents if the registrar is satisfied either: (a) the applicant is unable or unwilling to give information as to the other parent's identity or whereabouts; or (b) the other parent is unable, unwilling or unlikely to sign the application; or (c) the requirement for the other parent to apply to register the birth would cause the applicant unnecessary distress.

However, we are concerned the examples included in cl 8(2)(b) are too narrow. While we understand these are not to be interpreted as exhaustive or limiting, in practice, we consider their narrowness may impact the exercise of the registrar's discretion. We recommend amending cl 8(2)(b) to expressly recognise situations where a child is born in Queensland and only the birth parent is in Queensland, with the other parent overseas and not practically able to sign the application within the timeframe. Our members report there are a number of humanitarian entrants in this category, and the current requirements would present a barrier to the making of a proper application. Certainty these amendments will be broad enough to address these circumstances would be very welcome.

Recommendation:

5. Clause 8(2)(b) should be amended to expressly recognise situations where a child is born in Queensland and only the birth parent is in Queensland, with the other parent overseas and not practically able to sign the application within the timeframe.

12 How parentage details may be registered

We support cl 12 and welcome the proposal to facilitate the registration of multiple combinations of parental descriptors (including mother/father, mother/mother, father/father, mother/parent, father/parent, or parent/parent), along with the corrections process set out in cl 107 to allow:

- a same-sex couple to correct a parenting label on their child's birth registration which was registered prior to the reforms; and
- a parent who changes their sex after the child's birth to update their parenting label on their child's birth registration.

Part 4 Change of name

26 Application to register change of adult person's name

We consider the requirement that an adult born outside Australia must have ordinarily been resident in Queensland for at least 12 consecutive months before making an application to change their name (unless exceptional circumstances exist or a condition in subsection (3) is met) too broad. This is the same in relation to children under cl 28 of the Bill.

This condition can be highly problematic for humanitarian entrants. Our members report many of these people arrive with incorrect names recorded, or have only one name recorded on arrival, but want to add a shared family last name. In these situations, the family must wait until they have lived in Queensland for 12 months until they are able to correct the situation. By that time, many do not have a case manager to assist them in navigating the process. For trans and gender diverse refugees who have transitioned, the waiting process compounds the trauma they have experienced as part of their refugee journey (which can include persecution in their country of origin). There may also be difficulties with securing evidence of residency in Queensland for 12 months.

We recommend consideration be given to reducing the 12 month residency requirement for change of name for humanitarian entrants, or expressly noting this as an exceptional circumstance under cl 26(2) (and the corresponding provision in cl 28 of the Bill as it relates to children).

Recommendation:

6. Consideration should be given to reducing the 12 month residency requirement for change of name for humanitarian entrants, or expressly noting this as an exceptional circumstance under cl 26(2) (and the corresponding provision in cl 28 of the Bill as it relates to children).

33 Registration of change of name

We support the registrar's power under cl 33 (and cl 35) to require further evidence that a change of name is not sought for a fraudulent or other improper purpose, and the requirement to refuse to register a change of name where the registrar reasonably suspects that the change of name is sought for a fraudulent or other improper purpose. We consider this more robust framework will assist in minimising abuse and exploitation of the system, such as people changing their name multiple times to avoid detection by law enforcement authorities or for other fraudulent or improper purposes.

36 Re-registration of relevant event after change of name registered or noted

Cl 36 requires a person or child who has registered a change of name to apply to re-register the person or child's relevant event, being the most recent of birth, adoption or change of parentage for the person. Upon application, the registrar will re-register the person's relevant event by:

(a) making a new entry in the register that includes–
  (i) all the information that was in the entry for the person's relevant event (the **closed entry**) in a new entry in the relevant child register, other than information that has been superseded; and
  (ii) a note that the new entry was made under this section; and
(b) noting on the closed entry–
  (i) that the relevant event has been re-registered under this section; and
  (ii) a reference to the new entry made under paragraph (a).

We consider the requirement to make an application to re-register the person's relevant event after an application to register a change of name is an unnecessary administrative step that will require people to pay additional registration fees.

We note this second application is inconsistent with cl 43(4) which notes the registrar alters the record of sex of the person by re-registering the person's relevant event.

Accordingly, we recommend the registrar be required to re-register the person or child's relevant event upon successful change of name registration.

Recommendations:

7. The registrar should be required to re-register the person or child's relevant event upon successful change of name registration, without the requirement to make a new application or at the very least, to pay an additional administrative fee (cl 36).

Part 5 Acknowledgement of sex

Division 2 Persons whose birth or adoption is registered in Queensland

39 Application to alter record of sex of person 16 years or more in relevant child register

Subject to our earlier comments, we are broadly supportive of the proposed new registration framework for persons 16 years and over, which will remove key legislative barriers to allow trans and gender diverse people to access a birth certificate that reflects their gender identity. This process reflects the individual rights enshrined in the *Human Rights Act 2019* (Qld) which relevantly provide every person with the right to: recognition as a person before the law;[13] equal and effective protection against discrimination;[14] and, privacy and reputation.[15] The Bill also adopts best practice by ensuring official identity documents include sex or gender information only where relevant, reasonable, and necessary.

[13] *Human Rights Act 2019* (Qld) s 15(1).
[14] Ibid s 15(4).
[15] Ibid s 25.

We support the simple application process to be adopted, which will require an application to the registrar and:

- a declaration by the person that the person identifies as the sex specified in the application and lives, or seeks to live, as a person of that sex; and
- a 'supporting statement' made by a person who is at least 18 years old and who has known the person making the application for at least 12 months which states that the person making the supporting statement believes that the person making the application does so in good faith, and supports the application.

This administrative process suitably acknowledges that not all trans and gender diverse people are able to, or want to, undergo sexual reassignment surgery (for cost, availability, health or other reasons). The process also recognises a person can identify with a particular gender (or multiple genders, or no gender) without needing to go through a medicalised process.

Further, we support cl 39(4) which facilitates a name change simultaneously with an application to alter a record of sex.

40 Application to alter record of sex of child under 16 years in relevant child register

We are broadly supportive of the proposed framework for children under 16, particularly the ability for persons 'with parental responsibility' for a child to make the relevant application on the child's behalf.

41 Form of application to alter record of sex of child under 16 years

The Bill proposes that an "assessment" of the child by a "developmentally informed practitioner" is a key element of the two pathways available for children between the ages of 12 and 16 when applying to alter the record of sex. The Explanatory Notes provide the assessment 'is not intended to question the appropriateness of a child's transition. Rather, it is geared towards genuine engagement with a child and learning where the child is at in their journey and their understanding of their identity and the effect of changing their identity document to reflect their preferred name and sex within school or other environments.'[16] The Explanatory Notes also state the assessment requirement 'provides an important safeguard for the child's health and wellbeing and takes into account the particular vulnerability of children.'[17]

While we acknowledge the importance of a child's engagement with relevant health and other practitioners, we do not see how the requirement for the assessment provides any substantive safeguard. Where the application is supported by the child's parents/persons with parental responsibility (or one parent/person with parental responsibility where that person is the child's only parent/person with parental responsibility), there is no requirement for the registrar to take the assessment into account when deciding whether to accept an application to alter a record of sex.

In such circumstances, and given there is no ability for the assessment to question the appropriateness of a child's transition, we consider this requirement an unnecessary additional step. Further, the need to find a 'developmentally informed practitioner' who can conduct such assessments may present a significant barrier to access for people in regional, rural and remote areas.

[16] Explanatory Notes, 8.
[17] Ibid 9.

Accordingly, we recommend cl 41 be amended to remove the need for an assessment.

Recommendation:

8. Cl 41 (and corresponding cl 52) should be amended to remove the need for an assessment by a developmentally informed practitioner.

43 Action by registrar

We support the registrar's power to refuse to alter the record of sex if:

(a) the alteration would result in the recorded sex being a prohibited sex descriptor; or
(b) the registrar reasonably suspects that the alteration is sought for a fraudulent or otherwise improper purpose; or
(c) a record of the person's sex has been altered under this part within the 12 months immediately preceding the day when the application is made.

Part 5, Division 2, Subdivision 3 Applications to Childrens Court

44 Application to Childrens Court by parent or other person

We welcome the proposed involvement of the Childrens Court as the most appropriate forum in which to hear applications for children under 16. We also support the factors to which the Childrens Court may have regard when deciding whether making the order is in the child's best interests.

Again, however, we question the utility of an assessment by a developmentally informed practitioner if there is no ability for the practitioner to question the appropriateness of the child's transition. We suggest consideration be given to amending the definition of "assessment" to ensure the assessment is practically useful to the court when deciding an application. For example:

assessment, of a child, means a written assessment of the child by a developmentally informed practitioner who has a relationship with the child, stating–

(a) for an application made under division 2–
    (a) whether and on what basis the application is supported by the developmentally informed practitioner; and
    (b) whether and on what basis the developmentally informed practitioner considers the child understands the meaning and legal implications of the alteration of the record of sex of the child in the relevant child register; and
    (c) the information prescribed by regulation; or
(b) for an application made under division 3–
    (a) whether and on what basis the application is supported by the developmentally informed practitioner; and
    (b) whether and on what basis the developmentally informed practitioner considers the child understands the meaning and legal implications of the alteration of the record of sex of the child in the relevant child register; and
    (c) the information prescribed by regulation.

Recommendation:

9. Consider amending the definition of "assessment" to ensure the assessment is practically useful to the court when deciding an application.

45 Application to Childrens Court by child

We raise for further consideration the need to ensure children under 16 can practically access an assessment by a developmentally informed practitioner and the ability to make an application to the Childrens Court on their own under cl 45, which contemplates situations where the child has no supportive parent or person with parental responsibility. This will likely require the allocation of appropriate funding to relevant community legal centres.

Recommendation:

10. The Government should allocate appropriate funding to community legal centres and relevant health services to ensure children under 16 can practically access assessments by a developmentally informed practitioner and the ability to make an application to the Childrens Court.

46 Dispensing with service of application

We support the inclusion of cl 46 (and corresponding cl 57), in particular the threshold that must be satisfied for the Childrens Court to make an order dispensing with the requirement for service (i.e. that a child is not adversely affected only because 1 or more of the respondents does not support the alteration of the record of sex of the child and the lack of support causes discomfort to the child).

Part 5, Division 2, Subdivision 4 Effect of alteration of record of sex

Cl 47 provides that a person whose sex is altered in the register is a person of the sex as altered for the purposes of, but subject to, a law of the State. Cl 47 also provides:

(2) Subsection (3) applies to a person who has an entitlement–
  (a) under a will; or
  (b) under a trust; or
  (c) otherwise by operation of law.

(3) The person does not, except as otherwise provided under the will, the trust or by the law conferring the entitlement, lose the entitlement only because the record of the person's sex has been altered in the relevant child register.

We have significant concerns about the current drafting of this provision. Wills may leave class gifts to children by gender; for example, "I leave my jewellery to my daughters" and "I leave my shares in XYZ Pty Ltd to my sons". On its current drafting, a testator's child who alters their record of sex from male to female will: (a) gain an entitlement by virtue of cl 47(1); and, (b) retain (or not "lose") an entitlement by virtue of cl 47(3). This means the child would not only be entitled to the testator's jewellery as a daughter, they would retain their entitlement to the shares and in doing so, dilute the entitlement of other members of the relevant class.

We recommend cl 47(3) be amended on the basis that unless there is a contrary intention, the document creating the entitlement is to be construed on the basis of the person's sex at the time the document was drafted/settled or the entitlement arose if by operation of law.

Recommendation:

11. Clause 47(3) should be amended on the basis that unless there is a contrary intention, the document creating the entitlement is to be construed on the basis of the person's sex at the time the document was drafted/settled or the entitlement arose if by operation of law.

Part 5 Acknowledgement of sex

Division 3 Queensland residents born elsewhere

We support the inclusion of cl 50(4) to restrict people born in other Australian States or Territories from applying to change their name at the same time as they request to alter their sex on the record, to minimise abuse of the change of name system.

Part 12 Amendment of legislation

Divisions 5 and 6 Restricted persons

Amendment of Corrective Services Act 2006 and Dangerous Prisoners (Sexual Offenders) Act 2003

The Bill includes additional criteria to be satisfied prior to altering the record of sex for persons in the custody of the chief executive of corrective services (**chief executive**) under the *Corrective Services Act 2006* (Qld) (**Corrective Services Act**), except prisoners released on parole, as well as prisoners released under a supervision order or interim supervision order (released prisoners) under the *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld) (**DPSOA**) (referred to in the Explanatory Notes as **restricted persons**).

Restricted persons are required to obtain the written permission of the chief executive prior to making an application to the registrar to alter their record of sex or for the issue of a recognised details certificate. The Explanatory Notes provide this requirement 'is designed to protect the safety and welfare of the individual concerned, support community safety and ensure the good order and security of the correctional environment. It also aims to prevent applications that may harm another person, be made for secondary gain, or that may perpetuate a person's offending behaviour.'[18]

We express reservations about the requirement that persons in custody must obtain the chief executive's permission to apply to alter a record of sex. This requirement is at odds with the existing QCS policy regarding trans and gender diverse prisoners, which recognises the distinction between biological sex and gender, but sets the default position as accepting (at face value) a person's expressed gender identity where it differs from their biological sex, and requires a risk-management approach to be taking in relation to accommodating those prisoners (with the preference being that they are housed in a prison aligning with their expressed gender).

In particular, we are concerned this requirement may amount to a breach of person's fundamental human right to equality before the law. The Explanatory Notes highlight that reforms in the Bill are 'underpinned by human rights discourse that views sex as one of the core elements of a person's identity and of the manner in which a person perceives and understands themselves.'[19] Arguably, this view should be extended to all persons equally, regardless of their status in a corrective services environment.

We note, in particular, the factors to which the chief executive *must* give consideration when deciding whether to give the permission either under the Corrective Services Act or the DPSOA. We are concerned these factors feed stereotypes that trans and gender diverse people: (a) seek to change their sex or gender to further unlawful activity (for example, to enter sex specific spaces for the purpose of the commission of a crime); and, (b) are more likely to be sex

[18] Explanatory Notes, 13.
[19] Explanatory Notes, 13.

offenders. In this respect, we warn against the approach taken in the Bill because it casts undue suspicion on an individual's motives for stating a particular sex or gender.

While we acknowledge there are specific complexities that must be overcome in a corrective services environment, we do not agree that restricted persons should be subject to additional threshold criteria when making an application to alter their record of sex. We recommend the chief executive's discretion to refuse an application be removed from the Bill.

If the discretion to refuse an application is retained, then we recommend the starting point for any application by a restricted person should require the application to be approved by the chief executive unless there are exceptional circumstances to warrant its denial. We also consider the chief executive should be obliged to take all reasonable steps to mitigate any risk such that the application can be approved.

We are also concerned about the potential for refusal of a request through delay, initial refusal, and then the need for the restricted person to seek reasons for refusal and apply for a review of the decision. If the current discretion is retained, we consider it necessary to require that a denial of permission must be accompanied by reasons for the refusal. Even though such a decision would be subject to a request for a statement of reasons on review, this requires an additional step which prisoners may not be aware of unless they access legal advice.

Recommendations:

12. The chief executive of corrective services' discretion to refuse an application to alter a record of sex relating to a restricted person should be removed from the Bill. In the alternative, proposed new s 27AA(2) of the Corrective Services Act should be amended to read:

(2) The chief executive must give the permission unless the chief executive considers there is a significant risk of any of the following–
  (a) the good order or security of a corrective services facility;
  (b) the safety and welfare of the person and other persons;
  (c) the use of the proposed alteration of record of sex or recognised details certificate to further unlawful activity or purpose;
  (d) physical, mental or emotional harm to a victim of a crime or an immediate family member of a deceased victim of crime.

(3) In deciding whether to give the permission, the chief executive must take all reasonable steps to reduce any risks mentioned in subsection (2).

13. The chief executive of corrective services' discretion to refuse an application to alter a record of sex relating to a restricted person should be removed from the Bill. In the alternative, proposed new s 43ABA(2) of the DPSOA should be amended to read:

(2) The chief executive must give the permission unless the chief executive considers there is a significant risk of any of the following–
  (a) the safety and welfare of the person and other persons;
  (b) the person's rehabilitation or care or treatment;
  (c) the use of the proposed alteration of record of sex or recognised details certificate to further unlawful activity or purpose;
  (d) physical, mental or emotional harm to a victim of a crime or an immediate family member of a deceased victim of crime.

(3) In deciding whether to give the permission, the chief executive must take all reasonable steps to reduce any risks mentioned in subsection (2).

Division 7 Amendment of Guardianship and Administration Act 2000

175 Amendment of sch 2, s 3 (Special personal matter)

We support cl 175 to treat an application to alter a record of sex as a special personal matter in relation to which a guardian or attorney is not empowered to make decisions. In practice, this will mean a person, with support if necessary, can make such an application, but it would not be able to be done on their behalf on a substituted decision-making basis (meaning the legislation will treat altering a record of sex similarly to how it treats 'cultural recognition orders').

If you have any queries regarding the contents of this letter, please do not hesitate to contact our Legal Policy team via [redacted] or by phone on [redacted].

Yours faithfully

[redacted]

Kara Thomson
President