

10 January 2023

Legal Affairs and Safety Committee  
Queensland Government

**Submission: Queensland Births, Deaths and Marriages Registration Bill 2022**

Thank you for the opportunity to comment on the Bill.

**It is essential that this Bill is redrafted.**

Queensland needs clear overarching legislative and regulatory frameworks that can take account of 'sex', without conflating and confusing it with 'gender identity'. Such legislation and frameworks should meet the needs of both women, and transgender and non-binary people, without the assumption that these needs are identical or require the same responses.

**Sex needs to remain a stable referent in order that gender identity that is defined in relation to sex can be a meaningful category. This is a necessary basis for legislation that can effectively meet the needs of all citizens.** Creating a legal fiction, as this Bill does when it positions sex as the same thing as gender identity, creates significant administrative problems that women bear the cost of.

Sex refers to the categories of biological female and biological male. The Births, Deaths and Marriages Registration Bill should record sex on registers to reflect this. There are alternative ways that gender identity could be recorded on registers, and identification documents, and these should be pursued. Ensuring meaningful categories with stable referents is fundamental to having reliable statistics and effective policy making.

The Bill creates a system where the category of sex becomes effectively meaningless:

Sex = Sex or Gender Identity

This leads to:

Female = Female and Males who identify as women

Male = Males and Females who identify as men

Gender Identity = how any Female or Male may choose to identify

It would be better if the Bill supported a categorical system where:

Sex = Sex

Gender Identity = Gender Identity

This would lead to:

Sex = Female or Male

Gender Identity = how any Female or Male chooses to identify

### Underlying principles – freedom of expression for all people, and protection for vulnerable groups

In legislation and in practice, transgender people should be protected from discrimination – that is, people should not be able to discriminate against anyone because they are transgender. Trans people should be free to live and express themselves how they want. The right, and protection, related to ‘gender identity’ should not, however, be automatically extended to mean the person *also* has access to the rights and protections of the ‘sex’ that they identify with. Sex and gender identity should not be conflated or understood to have interchangeable rights and protections.

Put simply, the freedom for a male person to identify as a woman or as non-binary without discrimination in any mixed-sex situations is protected through the attribute of gender identity. This should not be extended, through conflating gender identity with sex, to mean that a male person also has the rights of the (female) sex he identifies with.

Single-sex spaces, services and provisions exist for women for three main reasons: safety, privacy, and equity – and these reasons prevail regardless of whether a man identifies as a woman. Single-sex, dedicated women’s spaces or services do not exist for the purpose of affirming anyone’s sense of self – and women should not be expected to pay the unacceptable costs of ‘inclusion’ in this way.

It is possible that transwomen also require dedicated spaces, free from men, for reasons of safety, privacy and equity – and where required these should be provided as a matter of urgency. This includes services such as health services, homelessness services, refuges, sexual assault services, dedicated safe prison facilities, as well as access to dedicated equity opportunities such as prizes / quotas / bursaries to the extent these are needed to address inequalities between transwomen and men.

The Legal Affairs and Safety Committee should seek to set out a sophisticated analysis of where interests align and where they are different for the purposes of legally recognising a person’s sex.

Lesbian women, gay men, transgender people themselves, and people who have de-transitioned, are expressing support for relationships of solidarity, rather than assimilation, between women and transgender women, but these alternative LGBT+ voices are routinely ignored by actions that remove any biological distinction between men and women for the purposes of legally recognising a person’s sex.

The Legal Affairs and Safety Committee should look to international cases to help it navigate the tensions between protecting both ‘sex’ and ‘gender identity’ attributes in legislative and policy frameworks.

- The US Supreme Court has acknowledged that biological ‘sex’ is a conceptual prerequisite, a referent, in order to define what ‘homosexuality’ or ‘transgender’ means in practice.<sup>1</sup> The decision protected transgender status (within the workplace) whilst not precluding women preserving sex-segregated realms.
- In the UK, the Government did not take forward a proposal to redefine ‘sex’ as a matter of self-identification after consulting on the Gender Recognition Act (2004), stating “The Equality Act 2010 clearly protects transgender people from discrimination. The same act allows service providers to restrict access to single sex spaces on the basis of biological sex

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<sup>1</sup> Bostock v Clayton County, No. 17-1618 (U.S. Jun 15, 2020) [https://www.supremecourt.gov/opinions/19pdf/17-1618\\_hfci.pdf](https://www.supremecourt.gov/opinions/19pdf/17-1618_hfci.pdf)

if there is a clear justification”.<sup>2</sup>

- In Scotland, the effect of conflating the protected characteristics of ‘gender reassignment’ and ‘sex’, through expanding the definition of woman from ‘female of any age’ to include transgender women, was recently considered, and rejected on appeal as breaching equalities law.<sup>3</sup> Recent legislation for gender self-identification in Scotland may face challenge under a Section 35 Order for adversely impacting on the Equality Act. (see also comments by the UN special rapporteur on violence against women, set out below).

In looking to a broad range of international cases, attention should be paid to Australia’s obligations under the UN *Convention on the Elimination of Discrimination Against Women* that protects women’s sex-based rights, rather than the Yogyakarta Principles that are not legal binding. The Yogyakarta Principles have informed the legal conflation of sex and gender identity in the Bill as currently drafted, and in the recent amendments to the *Public Health Act*, but these Principles should not be given the weight of binding legislative status.

Reem Alsalem UN special rapporteur on violence against women and girls, raised serious concerns about the Scottish Parliament’s move to self ID gender laws that apply to many aspects of the Queensland Bill.<sup>4</sup> The fact that others, like Victor Madrigal-Borloz who is an Independent Expert to the UN on protection against violence and discrimination on sexual orientation and gender identity, supports self-identification for legal purposes does not absolve legislators in Scotland or Queensland from paying close attention to the harm gender self-identification has on women and girls.

It is essential that legal clarity is provided to support the provision of single-sex spaces and services to women and girls. In practice, single-sex service providers (such as refuges, rape crisis services) around the world are providing highly appropriate, case-by-case service responses to transgender women which may involve referral or service delivery (regardless of sex recorded on identification documents) in ways that can prioritise the management of the impact on women. Giving self-identified gender identity the legal status of sex will remove the discretionary capacity of single-sex service providers to provide professional and appropriate responses – instead they will be legally required to respond to the demands of men, if they identify as women, regardless of the impact this has on women service users.

#### State responsibility to children

The State Government has a special responsibility to protect the interests of children in line with obligations under the UN *Convention on the Rights of the Child*.

#### *Changing sex of children on registers*

Childhood is a time for children to grow and express themselves. Many children are gender non-conforming – and this should not be aligned with, or suggestive of, being the ‘wrong sex’. Puberty and young adulthood is a time of physical and mental maturation when young people are developing their

<sup>2</sup> <https://www.gov.uk/government/speeches/response-to-gender-recognition-act-2004-consultation>

<sup>3</sup> <https://www.judiciary.scot/home/sentences-judgments/judgments/2022/02/18/for-women-scotland-v-the-la-the-scottish-ministers>

<sup>4</sup> Mandate of the Special Rapporteur on violence against women and girls, its causes and consequences Re: OL GBR/14/2022 dated 29 November 2022.

<https://spcommreports.ohchr.org/TMResultsBase/DownloadPublicCommunicationFile?gId=27681>

personalities, likes, interests, beliefs and finding their place in the world. It is by its very nature a time of change.

Gender non-conforming children, that is, children who reject or resist social norms or sex-based stereotypes (such as, girls may be strong, assertive and like trucks, boys may be caring, like colourful or fun clothes) *may* be same sex attracted, rather than heterosexual, when they reach a developmentally appropriate age when sexual orientation is a relevant factor. It should go without saying that being gay or lesbian does not require any changes to a person's body, or sex.

Other groups of children and young people who are disproportionately impacted by social pressure to transition include those who are autistic, and those who are experiencing dysphoria or mental health or histories of abuse, including sexual abuse.

The Legal Affairs and Safety Committee should pay attention to lesbian women and gay men, and affected parents, and medical practitioners including psychiatrists and psychologists, who have identified the ways children and young people who are gender non-conforming are facing expectations and pressure to transition.

The proposed Bill in effect reduces the ability of children to choose how they express themselves – it comes from the premise that children should be free to choose what sex they are (with gendered stereotypes and norms defining what sex is). This raises the stakes and costs to children who are then subjected to a normative pathway that the Bill's provision for children to legally change their sex implies, as part of what is frequently described as 'authentic expression' by some advocacy organisations who have vested interests. The Bill has the effect of cementing rigid stereotypes about what it is to be a boy or a girl rather than taking the position that children should choose how to express themselves (regardless of their biological sex). Rather than being progressive this is a deeply conservative position. Policy that is based on sex-based (or gender) stereotypes ignores feminist analysis and winds back hard-won gains for children made by the women's liberation movement.

The proposed Bill's requirement for a 'developmentally informed practitioner' to assess a child is an inadequate safeguard given the explanatory notes state 'the assessment is not intended to question the appropriateness of a child's transition', but rather to determine if the child 'understands the effect of changing their identity documents to reflect their preferred name and sex within school or other environments' (p 7).

Legislation should reflect the developmental differences between children and adults, and any changes to the Bill that are made to create an official State record of an individual's decision to express a gender identity should be facilitated after 16 or 18 years of age. This approach would reflect the protections that the UN *Convention on the Rights of the Child* expects States to extend to children.

#### *Recording parents on registers and birth certificates*

It is in the best interests of the child that their records are accurate, and that it is clear who gave birth to them. The option for mother or birth parent should be provided for recording the details of the person who gave birth. The option of father or parent should be provided for the parent who did not give birth. These options give the greatest amount of flexibility for parents regardless of their sex or how they identify, at the same time as recognising that biological sex is fundamental to reproduction and birth, and that accurate records matter to children who are born.

### Operational issues with proposed Bill

The proposed 'safeguards' outlined in the Bill relating to incarcerated people applying to alter records of sex do not set out *how* the chief executive of corrective services should determine whether a prisoner's rights to change sex should be permitted or not. Whilst the explanatory notes outline 'why' such safeguards are required 'to prevent applications that may harm another person, be made for secondary gain, or that may perpetuate a person's offending behaviour' (p 13) they provide no guidance on assessing risk, or any rationale for why these safeguards do not apply to non-incarcerated people.

Put simply, single sex spaces and services exist to address the safety, privacy and equity needs for women that exist because of the risk posed by men as a group, regardless of whether men identify as women, or are incarcerated, or present a risk as individuals. Signing a statutory declaration does not change the risk.

The safeguards applied to incarcerated people simply highlight that the proposed Bill is underwritten by the fundamentally flawed assumption that sex and gender identity can be legally considered the same thing for all practical purposes without risk or consequence. They further highlight the failure of the State to understand its human rights obligations with respect to the differences between men and women, and the requirement for legal protection of single-sex spaces and services to ensure safety, privacy and equity of women (inside and outside of prison). Women in prisons are, of course, uniquely vulnerable, and male-bodied prisoners should always be accommodated separately (in ways in that protect the male person's safety) – this should not be discretionary but mandatory.

The proposed 'safeguard' that prohibits substitute decision-makers from applying to alter records of sex on behalf of a person who has impaired capacity also highlights the logical inconsistencies in how vulnerable people's rights are upheld and are protected (p 13). The explanatory notes do not make clear if a person who has impaired capacity is able to apply themselves to have their records changed.

The explanatory notes further outline that the Registrar may produce a policy about how the registrar exercises their discretion to change the parenting descriptor in the register for the birth of a child, if a parent changes their own record of sex after their child's birth (p 17). The Bill provides no guidance on how this discretion should be approached within the possible policy. The decision of a parent to change their own sex records should not result in changes to primary records about children. Children are unique individuals with their own human rights, they do not exist for the purposes of affirming their parent's chosen identities. It is an abrogation of responsibility of the Legislature if the Bill delegates responsibility of developing the necessary policy to respond to the implications of poorly drafted legislation to the Registrar.

The explanatory notes outline that the Bill introduces new expectations that the Registrar needs to seek to prevent fraud (p 18) but provides no guidance on what can be considered fraud for the purposes of changing sex on registers. Given the Bill's underlying assumption that gender identity and sex are the same for legal purposes, and that they can be freely chosen and changed annually, it is unclear what, if anything, could be legitimately considered to constitute fraud. This ambiguity places unfair responsibility on a Registrar to respond to the implications of poor drafting.

Similar issues sit with making the Registrar responsible for deciding what is a prohibited sex descriptor 'that could not be established by repute or usage'. Different gender identity labels are used in different ways by different people. It is unclear, within the Bill, how any boundaries can be applied to what people should be able to choose from in order to describe themselves.

Definition of 'gender identity'

The definition the Bill proposes is:

*gender identity*, of a person—

- (a) is the person's internal and individual experience of gender, whether or not it corresponds with the sex assigned to the person at birth; and
- (b) without limiting paragraph (a), includes—
  - (i) the person's personal sense of the body; and
  - (ii) if freely chosen - modification of the person's bodily appearance or functions by medical, surgical or other means; and
  - (iii) other expressions of the person's gender, including name, dress, speech and behaviour.

The key feature of this definition of gender identity is that it describes personal 'beliefs and activities' about gender that can be held regardless of the sex of the person holding them. In a categorical sense, it is most helpful to understand 'gender identity' as operating in a similar way to how 'religious beliefs' are understood to operate in society. For example, some people have deeply held religious beliefs, some people do not. People hold a variety of different religious beliefs. People who hold religious beliefs should not be discriminated against because of their beliefs. Because a person holds a religious belief it does not mean they can expect other people to hold that same belief.

It would make sense to amend part (a) to make this clear – (see additional words in italics as follows):

- (a) is the person's internal and individual *beliefs, activities*, and experience, about gender,

Additionally, part (a) needs to replace the section that says 'whether or not it corresponds with the sex assigned to the person at birth ...' with either 'regardless of a person's sex' or 'whether or not it corresponds with the sex observed at birth'.

Biological sex is not assigned, it is observed and recorded at birth (it can be observed in utero).

The impact of including the words 'assigned' in the proposed definition of gender identity is to remove the stability of the sex referent. The term 'assigned' forces the reference to sex to be read as 'gender identity', and this results in a circular definition – in effect gender identity is being defined in reference to gender identity. This highlights the problem with the underlying assumption of the Bill as currently drafted – that is, that sex and gender identity can be treated as the same thing for legal purposes.

People cannot change biological sex, (gender reassignment surgery doesn't change a person's biological sex, it changes the appearance of reproductive anatomy and secondary sex characteristics). The fact that legislation and guidelines (particularly the *Australian Government Guidelines on the Recognition of Sex and Gender 2015*<sup>5</sup>, and the *Sex Discrimination Act 1984* in Australia have conflated 'sex' and 'gender' since 2013, using these terms interchangeably, and further conflating them with 'gender identity' has led to the situation where within 10 years the ABS, in order to support those dealing administratively with conflated categories, has produced the *Standard for Sex, Gender, Variations of Sex Characteristics and Sexual Orientation Variables* (released January 2021)<sup>6</sup>. The

<sup>5</sup> <https://www.ag.gov.au/rights-and-protections/publications/australian-government-guidelines-recognition-sex-and-gender>

<sup>6</sup> <https://www.abs.gov.au/statistics/standards/standard-sex-gender-variations-sex-characteristics-and-sexual-orientation-variables/2020>

Standard sets out a nominal definition of 'sex' as: 'A person's sex is based upon their sex characteristics, such as their chromosomes, hormones and reproductive organs. While typically based upon the sex characteristics observed and recorded at birth or infancy, a person's *reported sex* can change over their lifetimes and may differ from their sex recorded at birth' (italics added). This means statistical data collections are faced with managing data relating to a person's 'sex', and a person's 'reported sex' when what is really needed is State and Commonwealth legislation that uses a clear conception of gender identity and doesn't codify gender identity as a legal 'sex', or 'reported sex'.

The State can enable gender identity to be a protected attribute under the *Anti-Discrimination Act* and enable gender identity to be recorded on official registers, and on identification documents, without conflating it with sex.

#### Alternative ways of achieving policy objectives

The explanatory notes state 'there are no alternative ways to achieve the policy objectives' (p 21). This is clearly incorrect and represents an abrogation of responsibility of those who prepared the explanatory notes and should not be accepted by the Committee or Parliament.

Trans, nonbinary and gender non-conforming people deserve better legislation, representation and practices than this Bill can deliver.

#### Consultation

The Bill, and the explanatory notes, demonstrate a fundamental failure to adequately consider the detrimental impact on women, or to appropriately consult with women and women's services.

#### Conclusion

It is essential that the Bill is redrafted. I wish the Committee well in its very important consideration of this Bill.

R. Harrison.

January 2023.

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