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Submission to Legal Affairs and Safety Committee

Births, Deaths and Marriages Registration Bill 2022

Thank you for the opportunity to comment on this important bill. My comments are provided as a private citizen.

My comments will address some general issues relating to the Births Deaths and Marriages Registration Bill 2022 and then some more specific issues with the interaction of those changes with the Anti-Discrimination Act 1991.

Part1. General Comments

The changes proposed in the Bill, it still read as a work in progress that is being rushed. They give the impression that the logical impacts of the legislation have not been fully considered, especially in relation to whether the legislation can be effectively implemented in its present form, and not result in confusing or adverse outcomes. Overall there is a lack of clarity and transparency as to what the Bill is intended to achieve,

The Attorney-General herself appears to be unclear on how the Bill will work in practice and what its main objective is. In her reading speech of 2 December 2022, the Attorney-General stated:

“across all of these conversations is a simple desire to have their identity documents match their identity. **Without this, they face the prospect of outing themselves every time they apply for a job, go for a rental property or enrol in university.** Most of us take for granted that our birth certificate accurately reflects our lived identity, but for many people that is not the case.”

The portion I have bolded is a clear statement that the changes will allow transgender people to provide an identity document that aligns with how they present themselves in society, a document that does not reveal a person is transgender. Or, to paraphrase the the Attorney-General, an identity document that does not “out them as transgender.”

Given the potential for discrimination that transgender people face, this is a reasonable higher level objective for the Bill.

However, the Attorney-General later states in the reading speech:

“To properly recognise the full scope and spectrum of identities, this framework allows people to nominate the sex descriptor that is best for them. Some of the more common sex descriptors a trans or gender diverse person may nominate include: **trans man or [trans] woman, agender, genderqueer or non-binary.** “

It is likely obvious to the Committee, that there is a contradiction between this statement (my bolding) and the higher level objective that the changes allow a transgender person not to out themselves when providing identity documents. If the identity document provides a sex descriptor of “trans man”, “trans woman”, “agender” etc as the Attorney-General suggests, then the document provided will definitely “out” the person as transgender.

It seems more likely that the majority of transgender people will choose a sex descriptor which does not identify them as transgender. Instead transgender people will seek to affirm the gender identity that they feel. In the case of a trans women, the common choice of gender descriptor will likely be “female” and for a “trans man” the sex descriptor chosen will likely be “male” as that is how they are choosing to present to and live in society. They are not choosing to present as a “trans man” or a “trans woman”. That is a descriptor that the rest of society places upon them, not how they see themselves.

The actual amendment to the Act allows for the descriptor of “male” and “female” to be chosen. It is hoped that the Attorney-General recognises that “male” and “female” will be chosen by transgender people and not some newly nominated sex descriptors such as “trans man” and “trans woman” (even though these are allowed under the changes).

However, the fact the sex descriptors chosen by transgender people will often be “male” and “female” will lead to issues under the Discrimination Act which appear not to have been given full consideration. These issues are addressed in the section 2 of this submission.

Another more general issue is the lack of reference to gender dysphoria in the Bill. There is no requirement for a transgender person to provide a statement with respect to their medical condition of gender dysphoria as part of the process to have their birth certificate amended. This is a missed opportunity in two respects:

- firstly, such a requirement would go a long way in satisfying many in the general community who believe that safe-guarding issues have not been adequately taken into account; and
- secondly, and most importantly, the requirement to provide a medical certificate from the applicant’s treating doctor / medical professional will ensure that transgender people are in fact seeking, and receiving, the care

they need. This will also avoid people self-diagnosing as having gender dysphoria and seeking to change their birth certificate in error. (Self-diagnosis is all too prevalent these days in relation to a vast array of medical conditions due to non-professional advice obtained from the internet.)

Related to this last point is the issue of whether the Government is protected from any future liability arising from these legislative changes. There are cases of people who regret having transitioned and claim that medical authorities made the transitioning process all too easy and that they have suffered considerable adverse consequences as a result. A question to be considered is that if the Government's legal process for changing one's legal sex is too easy – could the Government be considered to have contributed to such a person making an incorrect decision to transition, and be legally liable for adverse consequences that arise.

Part 2. Impact on the Sex Discrimination Act 1991

2.1 Relationship between sex and gender identity for people who change sex descriptors

The confusion around the choice of sex descriptors mentioned above arises from the conflation of two different classes of descriptors being used interchangeably in the Bill. On the one hand we have the biological sex classes of male and female which describe the nature of the bodies of nearly all adult humans, barring the small population with developmental sexual disorders (often referred to as intersex).

On the other hand we have a vast array of gender classifications which have arisen to describe the feeling of gender which for transgender people is contrary to their sex. Much of the modern literature around gender argues that gender and sex classes are two different things and should be viewed separately. For example, this distinction allows clear statements to be made, such as, only males can become trans women and only females can become trans men. It is not possible for a person who is born female to become a trans woman nor for a person born male to become a trans man.

Is it the intention of the Bill that gender becomes sex and sex becomes gender for the purposes of Queensland law? That is, the law effectively creates the legal fictions that trans women are females and trans men become males for the purposes of Queensland laws. It would seem impossible that the legislation – as a result of these – changes is actually acknowledging the radical notion that trans women are females and have always been females. And that trans men are males and have always been males.

Outside the binary discussions of male and female, man and woman, things become even more confusing when other sex descriptors are nominated. For example, if a person nominates their sex descriptor as agender or non-binary, do these gender classifications become the person's sex? And how would the administrators of the law be able to decide what living as agender or non-binary entailed.

The conflation of sex and gender is very problematic for the administration of the Anti-Discrimination Act 1991. There are a number of issues which have not been addressed in the legislation, the regulations and the accompanying memoranda.

The issues that arise are probably best explained with examples. Jane is a trans women. Her birth certificate shows that she is a male with the name John. She applies to have that changed and chooses the name Jane and the sex descriptor of “female”.

Under the Anti-Discrimination Act currently, Jane is protected from discrimination on the basis of her sex as a male and protected on the basis of her gender identity which is female (as gender identity is defined in that Act).

Under the new legislation Jane will be female for the purposes of the law and presumably female for the purposes of the Anti-Discrimination Act. Jane is protected from discrimination on the basis of her sex – female – but is Jane still protected from discrimination on the basis of her gender identity (trans woman)? That is, although Jane has satisfied the requirements of the new Births Deaths and Marriages legislation to be a female under Queensland law, is she also still a trans woman for the purposes of the Anti-Discrimination Act? This is far from being clear. The obvious question arises: is how can Jane be both a female and a trans woman at the very same time? By contrast, where Jane chooses “trans woman” as her sex descriptor, she will not be a “female” for the purposes of the Anti-Discrimination Act but will retain protection against discrimination under the gender identity category. Arguably, as this category matches more closely Jane’s reality, it will provide better protection.

Perhaps even more importantly would be the case of Jack who is a trans man. Jack has changed their sex descriptor to male and identifies as male. For the purposes of Queensland law they are male. Do they also have a gender identity of “trans man” that remains protected under the Anti-Discrimination Act? The more worrying fact here is that as a male, Jack (who is, as a fact of biology, female) would lose any protections from being discriminated against on the basis of having a female. The Government may considered this to be a reasonable outcome but it is certainly not clear that it has been considered as such.

2.2 Impact on Exemptions under the Anti-Discrimination Act

The Anti-Discrimination Act allows for exemptions where discrimination on the basis of sex is allowable in certain specified instances such as sport, education and work-related areas.

For sport the exemption may be allowed so that a person may restrict participation in a competitive sporting activity to either males or females, if the restriction is reasonable having regard to the strength, stamina or physique requirements of the activity. There are numerous issues of fairness and safety underlying this important exemption.

But if a trans woman changes their sex descriptor to “female” there would seem to be no way that this exemption could apply. Becoming female under the law means that they could not be restricted on the basis of strength, stamina or physique. This law is applied, for example, to restrict the competition to females and they will be female for the purposes of the law. This will become further conflicting if the person also retains a gender identity of trans woman - as it has been considered reasonable to apply the exemption on the basis of gender identity (it is what the law allows for). Thus the exemption will apply to one category they belong to but not the other. Is this the intention?

In regards to work-related areas, trans women could be employed on the basis of their sex being legally female where body searches of women (born female in reality) are required. This is probably not intentional but how could the exemption be applied to somebody who is only female under the law but remains male in their biology?

Will schools that offer same sex education be impacted when a transgender person has their sex descriptor changed to that of the opposite sex. This is a situation which could work two ways for transgender youth. Will it still be possible to exclude a trans girl from a girls high school and a trans boy from a boys high school? Perhaps more difficult is the issue of whether a high school student can be excluded from their same sex high school if they choose to change their sex descriptor while still at school. That is, they may change from a female to male and now become a boy who is attending an all girls school. Under the law they become male – not just a female identifying as a boy. Should this student be required to move to a boys only school or a mixed sex school.

While amendments to the Anti-Discrimination Act are covered in the Bill, none seem to address any of the issues raised above.

Concluding Comments

There are many other issues that could have been address and I am sure they will be in other submissions presented to the Committee. The issues raised above, as well as being important in their own right, are also illustrative of the fact that the legislation gives the appearance of having been rushed and a large number of implications not having been considered carefully enough.

There is already much confusion in the community around the issues of sex and gender. The legislation while seeking to resolves some of the issues creates a legal fiction that conflates sex and gender and will only add further to the confusion.

The key question in relation to the Anti-Discrimination Act is whether women will be able to access exclusively same-sex spaces in society based on their biological sex being female. Or do the changes in the Bill lead to all “females” – those who are born female and those who change their sex descriptor to female – being treated exactly the same under Queensland laws. The concept of “spaces” here is a broad one inclusive of change rooms, toilets, sports teams, equal opportunity incentives, women-only awards, and protection from male violence – basically anything that has been put aside for the access,

use and safety of biological females only. (The same issues in principle apply in relation to males.)

If this is the case, the legislative changes have strayed very far from the primary objective of providing transgender people with identity documents that “reflect one’s sense of identity’ (Explanatory Speech 2 December 2022). They have effectively become a type of medical treatment for transgender people, with the Birth, Deaths and Marriages Act becoming part of an affirmation therapy used to affirm a person’s transgender identity as the opposite sex to which they were born. Arguably such legislation should not be used in this manner, but should in fact describe the reality of the situation. To do this requires a distinction between sex classes and gender classes to be established in the legislation.

But if this Bill is primarily about providing identity documents that reflect current lived experience, then there are simpler ways to achieve this aim than changing a historical document which is factually correct.

Being born one sex and wishing, at a later date, to identify as the opposite sex does not mean the birth certificate is in error. Instead of changing history, a current identity document could be issued – perhaps with photo ID – that declares the person to have been born on a certain date, and includes details such as current legal name. Address, etc. It would not necessarily need to include any reference to gender or sex, as this is not necessarily essential when proving identity. This is especially the case if photo ID is included as part of the document. (A similar approach has already been taken with Queensland driving licenses.)

This approach would allow a transgender person to access state issued identity documentation that the law recognises in the same way as a birth certificate is recognised without the actual birth certificate being changed. It avoids the very contentious issue that the law somehow is magically turning females into males and males into females.

Signed

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28 December 2022

A brief resume of relevant experience in policy administration is below:

- 1998 – 1992: Manager of Policy, Department of Social Security (NSW State Office)
- 1992 – 2001 (various positions at Director level relating to family welfare and retirement incomes policy – Department of Social Security Canberra)
- 2001 to 2011 – Manager of Policy, Research and Evaluation (Queensland Department of Housing)

