



Births, Deaths and Marriages Registration Bill 2022

Submission to Legal Affairs and Safety Committee

11 January 2023

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Summary

1. The Queensland Human Rights Commission (the **Commission**) supports the passage of the Births, Deaths and Marriages Registration Bill 2022 (the **Bill**). As noted in the Explanatory Notes, the government consulted with the Commission in developing the Bill and subordinate legislation.
2. The Bill delivers reforms which are essential to ensure the privacy, freedom of expression, and equality before the law of people accessing Queensland's birth registration system, and in particular:
 - trans and gender diverse people; and
 - diverse families including same-sex parent families.
3. The Bill also implements aspects of the Commission's recent *Building Belonging Report – Review of Queensland's Anti-Discrimination Act 1991 (Building Belonging)* by updating protected attributes¹ and removing a redundant and offensive exemption regarding working with children in the *Anti-Discrimination Act 1991*.²

Recommendations

4. The Commission recommends that the Bill be passed subject to the following recommendations:
 - a. Following the passage of the Bill, an audit of Queensland legislation should be completed to identify occurrences of the terms 'sex', 'gender', and other gender-specific language such as 'woman', 'man', 'sister', and 'father' to ensure equal recognition and treatment of trans, gender diverse and intersex people in all of Queensland's laws.
 - b. The Committee should seek clarification from Queensland Corrective Services (QCS) about why the approval process for change of sex for 'restricted persons' is necessary and justifiable, and how these provisions will work in practice.

Introduction

5. The Commission is a statutory authority established under the Queensland *Anti-Discrimination Act 1991 (AD Act)*.

¹ Queensland Human Rights Commission, *Building belonging – Review of Queensland's Anti-Discrimination Act 1991* (July 2022) Recommendation 22.1, Recommendation 28.1.

² Queensland Human Rights Commission, *Building belonging – Review of Queensland's Anti-Discrimination Act 1991* (July 2022) Recommendation 43.1.

6. The Commission has functions under the AD Act and the *Human Rights Act 2019 (HR Act)* to promote an understanding and public discussion of human rights in Queensland, and to provide information and education about human rights.
7. The Commission deals with complaints of discrimination, sexual harassment, vilification, and other objectionable conduct under the AD Act, including on the basis of sexuality and gender identity. The Commission also deals with complaints made by prisoners, including trans and gender diverse prisoners.

Changing record of sex

8. Ensuring fair and equitable access for transgender and gender-diverse people to change their record of sex upholds rights protected by the HR Act – the right to recognition and equality and the right to privacy.³ As stipulated by the *Yogyakarta Principles*,⁴ people of diverse gender identities should be able to enjoy legal capacity in all aspects of life without the need for surgery, hormone treatment, or sterilisation as a prerequisite for legal recognition.⁵
9. For the last decade, the Commission has raised concerns about the existing unreasonable requirement for a person to undergo ‘sexual reassignment’ surgery to change the sex on their birth certificate.⁶ Firstly, surgery or other medical interventions, such as hormone therapy, may not be desirable for or accessible to all trans and gender-diverse people. Secondly, this medicalised approach is inconsistent with the AD Act which recognises self-identification of gender through the current definition of gender identity.⁷ Thirdly, it may be questioned whether the law as it stands is compatible with the HR Act, which protects the right to recognition and equality before the law and the right to privacy, including the right to bodily integrity and autonomy.

³ *Human Rights Act 2019 (Qld)* ss 15, 25.

⁴ The *Yogyakarta Principles* (2006) and *Yogyakarta Principles Plus 10* (2017) are a set of principles that apply human rights law to diversity of gender, sexuality, and sex characteristics, and were developed by a panel of human rights experts to ensure binding international legal standards.

⁵ International Panel of Experts in International Human Rights Law and on Sexual Orientation and Gender Identity, *The Yogyakarta Principles: Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity* (March 2007), Principle 3.

⁶ Anti-Discrimination Commission Queensland, ‘Submission to Review of the *Births, Deaths and Marriage Registration Act 2003*’, 17 December 2013; Anti-Discrimination Commission Queensland, ‘Submission to Inquiry into the *Births, Deaths and Marriages Registration Amendment Bill 2008*’, 16 March 2018.

⁷ *Anti-Discrimination Act 1991 (Qld)*, Dictionary (definition of ‘gender identity’).

10. Providing new legal processes to alter the record of sex for children and young people – where previously there were limited options for this occur – promotes the right to equality and privacy, and the child’s right to special protection, without discrimination, that is needed by the child and is in the child’s best interest.⁸
11. The benefits of these reforms will be felt at both a systemic and individual level by:
 - a. ensuring that the birth register contains information that is as accurate and complete as possible; and
 - b. ensuring a person can engage with society in a way that limits exposure to stigma and discrimination and improves their participation in areas of public life including work and education.
12. The reforms to birth registration legislation proposed by the Bill will modernise the law, align Queensland’s laws with most Australian jurisdictions, and address potential human rights incompatibility in the current legislation.

Modern family and parenting structures

13. Ensuring that parents recorded on a child’s birth certificate can be registered as ‘mother’, ‘father’, or ‘parent’ promotes the right to protection of families as a fundamental unit in society.⁹
14. Currently, only one parent may be listed as mother or father, which does not reflect the diversity of contemporary parenting arrangements, including same-sex parented families. The current definition of ‘birth’ also means that those who do not identify as a ‘mother’, including trans or gender diverse birth parents, must be registered in a role that does not match their identity or the way in which they present in the community.¹⁰
15. International human rights law takes a broad interpretation of what family and caring relationships include,¹¹ extending the meaning beyond a

⁸ *Human Rights Act 2019* (Qld) ss 15, 25, 26(2).

⁹ *Human Rights Act 2019* (Qld) s 26(1).

¹⁰ *Coonan v Registrar of Births, Deaths and Marriages* [2020] QCAT 434.

¹¹ United Nations Human Rights Committee, *CCPR General Comment No 16: Article 17 (Right to Privacy) The Right to Respect of Privacy, Family, Home and Correspondence, and Protection of Honour and Reputation*, 32nd sess (8 April 1988). United Nations Human Rights Committee, *General Comment No 19: Article 23 (The Protection of the Family, the Right to Marriage and Equality of the Spouses*, 39th sess (27 July 1990). See also *Hendriks v Netherlands* (201/85), *X v Colombia* (1361/05), *Balaguer Santacana v Spain* (417/90), *Hopu and Bessert v France* (549/93).

traditional family unit based on biological connections or marriage.¹² The Explanatory Notes to the Human Rights Bill 2018 state that ‘family’ is understood broadly and would extend to different cultural understandings of ‘family’.¹³

16. The approach in the Bill provides better recognition of all kinds of families in line with Queensland’s human rights obligations.

Implementing discrimination reforms

17. The Commission commends the government for moving quickly to implement some of the recommendations in the *Building Belonging* report that relate to gender-diverse and intersex people.
18. The Commission’s *Building Belonging* report recommended changes to attributes in the AD Act to ensure all people who experience discrimination on the basis of their gender identity or sex characteristics are covered by the law. The Commission recommended protecting the additional attribute of ‘sex characteristics’¹⁴ and updating the definition of ‘gender identity’¹⁵ to ensure comprehensive coverage for gender diversity and expression, and to align the definition with the *Public Health Act 2005* (Qld) definition.¹⁶
19. *Building Belonging* also recommended the removal of the existing ‘work with children’ exemption. This exemption is not necessary or justifiable because of the existing mechanism of the blue card system, and the implication that people in their role as employees are a risk to children simply because of their protected attributes is offensive and stigmatising.¹⁷

Effect of altering record of sex

20. In principle, the Commission supports the provisions in the Bill which mean that once a person’s record of sex is altered, the person is thereafter a person of the sex as altered in the register for the purposes of state laws (**effect provisions**).¹⁸

¹² This was recognised by Queensland Civil and Administrative Tribunal in *NN and IN v Department of Child Safety, Youth and Women* [2020] QCAT 126, 22-28.

¹³ Explanatory Notes, Human Rights Bill 2018 (Qld), 22.

¹⁴ Queensland Human Rights Commission, *Building belonging – Review of Queensland’s Anti-Discrimination Act 1991* (July 2022) 315.

¹⁵ Queensland Human Rights Commission, *Building belonging – Review of Queensland’s Anti-Discrimination Act 1991* (July 2022) 280.

¹⁶ *Public Health Act 2005* (Qld) s 213G.

¹⁷ Queensland Human Rights Commission, *Building belonging – Review of Queensland’s Anti-Discrimination Act 1991* (July 2022) 398.

¹⁸ Births, Deaths and Marriages Registration Bill 2022 cls 47, 58, 128.

21. The Explanatory Notes confirm that for the purpose of Queensland laws trans or gender diverse people will generally be treated in accordance with their registered sex, providing two examples under electoral and photo identification laws.¹⁹ However, the notes further state that the *effect provisions* are intended to be applied in a way that takes into account an ‘express contrary intent’ in other legislation, so that the Births, Deaths and Marriages Registration Act can be read alongside other legislation, whether enacted before or after the Bill.²⁰ In the absence of a thorough audit of legislation to identify the contexts in which the term ‘sex’ and other gendered language appears, the consequences of this are unclear.
22. The Commission is unsure of the intended meaning of the example provided in the Explanatory Notes regarding ‘anatomical capacity’.²¹ The Commission anticipates situations where it could be beneficial to trans and gender diverse people to have flexible interpretations of other legislation which contains gendered terms. For example, a trans or gender diverse person may have the capacity to carry and birth a child for the purposes of surrogacy or to terminate a pregnancy under relevant laws.²² However, the provisions and notes as currently drafted could lead to interpretations that are adverse for trans and gender diverse people, for example in relation to search powers in correctional settings and policing legislation.
23. It may be beneficial to expand the Explanatory Notes to provide examples of legislation where an express contrary intention may override the Births, Deaths, and Marriages Registration Act, and to clarify that the legislation is intended to be interpreted in a beneficial way consistent with the High Court’s decision in *AB v WA*.²³
24. The wording of the *effect provisions* appears to be based on the equivalent Tasmanian Act that was updated in 2019.²⁴ Further reforms to ensure the recent changes are functional and achieve the objective of reducing discrimination and trauma of intersex and gender-diverse Tasmanians have been recommended by the Tasmanian Law Reform Institute (TLRI). A comprehensive review by the TLRI led to recommendations spanning several areas including law enforcement, health and safety, adoption, mental health, and corrections.²⁵ The

¹⁹ Explanatory Notes, Births, Deaths and Marriages Registration Bill 2022, 12.

²⁰ Explanatory Notes, Births, Deaths and Marriages Registration Bill 2022, 13.

²¹ Explanatory Notes, Births, Deaths and Marriages Registration Bill 2022, 13.

²² For instance, the *Termination of Pregnancy Act 2018* s 10 states that a ‘woman’ does not commit an offence for termination on herself; *Surrogacy Act 2010* s 7 refers to a surrogacy arrangement between a ‘woman’ and another person or persons.

²³ *AB v WA* [2011] HCA 42.

²⁴ *Births, Deaths and Marriages Registration Act 1999* (Tas) s 28D, as amended by the *Justice and Related Legislation (Marriage and Gender Amendments) Act 2019*.

²⁵ Tasmanian Law Reform Institute, *Legal Recognition of Sex and Gender* (Final Report No. 31, June 2020). See, in particular, Appendix 3.

Commission considers it may be necessary to take the same methodical approach in Queensland and make required amendments to other legislation once the Bill has passed.

Approvals for ‘restricted persons’

25. To protect the safety and welfare of people in custody, community safety, and the good order and security of prisons, the Bill amends the *Corrective Services Act 2006* (CS Act) and the *Dangerous Prisoners (Sexual Offenders) Act 2003* (DPSO Act) to introduce a requirement for people in custody of the State to make an application to change their sex. Approval processes already apply when prisoners wish to register a change of name,²⁶ an intention to marry, or enter a civil partnership.
26. As noted in the Statement of Compatibility, the additional process required to register a change of sex is indirectly discriminatory because sex and gender identity are protected attributes under the AD Act. It also limits the right to equality before the law under the HR Act.²⁷
27. The Statement of Compatibility indicates that prisoners will continue be treated in accordance with Queensland Corrective Services (QCS) procedures, including being acknowledged in prison as their ‘preferred sex’ and use of correct pronouns.²⁸ The Statement of Compatibility recognises that for those whose applications are refused, they would ‘not be able to lawfully identify’ as their sex, and this may have an impact on their ‘psychological integrity’.²⁹
28. The legitimate purposes for the limitation on rights cited in the Statement of Compatibility include the need to: assess the welfare and safety of trans and gender diverse persons, the community, and the place of residence/custody; prevent secondary gain or activity; and prevent the registration of a change of sex that would cause harm to a victim of crime.³⁰ The Commission does not dispute that these are legitimate purposes that may justify limitations on rights generally.

²⁶ Noting that the existing change of name process in section 25 *Corrective Services Act 2006* is also amended by the Bill in cl 164 to amend the wording and to expand the relevant considerations.

²⁷ Statement of Compatibility, Births, Deaths and Marriages Registration Bill 2022, 21.

²⁸ Statement of Compatibility, Births, Deaths and Marriages Registration Bill 2022, 21.

²⁹ Statement of Compatibility, Births, Deaths and Marriages Registration Bill 2022, 24.

³⁰ Statement of Compatibility, Births, Deaths and Marriages Registration Bill 2022, 22.

29. However, it is unclear from the Statement of Compatibility:
- what, specifically, the potential negative impact is on the community or victims of crime that would result from a person changing their record of sex;³¹
 - what, specifically, the potential negative impact is on the 'good order and security' of correctional facilities, should a prisoner change their record of sex while detained;³²
 - how the QCS Chief Executive will make a determination about whether the proposed 'change of sex process is legitimate'.³³
30. Victoria appears to be the only other Australian jurisdiction that requires restricted persons, including prisoners, to seek approval for change of sex records.³⁴ Most jurisdictions only require this approval process for a change of name.³⁵ The potential for misuse, offense, and harm to victims and the community is more obvious for a change of name, but less clear how a change of sex would have similar adverse effects.
31. The Bill inserts a new section 27AB in the *Corrective Services Act*. The effect of this is that even if permission is granted to a prisoner to change their record of sex, it does not limit the QCS Chief Executive's powers in any way, including in relation to placement decisions and transfer of prisoners.³⁶
32. The Statement of Compatibility and the Explanatory Notes do not address how section 27AB is intended to apply,³⁷ such as whether it is intended to apply only to the period between approval and the application being registered, or once registration has occurred. This leaves some doubt as to how QCS will treat prisoners who are approved and proceed to change their record of sex. One example might be how QCS deals with a request to transfer to a women's correctional environment from a prisoner who has been given permission to change their record of sex to female.
33. The Commission is also uncertain from the Explanatory Notes and Statement of Compatibility what discretion will remain with QCS in making decisions for the safe placement and searches of prisoners who have

³¹ Statement of Compatibility, Births, Deaths and Marriages Registration Bill 2022, 23-24.

³² Statement of Compatibility, Births, Deaths and Marriages Registration Bill 2022, 22, 24.

³³ Statement of Compatibility, Births, Deaths and Marriages Registration Bill 2022, 23.

³⁴ *Births, Deaths and Marriages Registration Act 1996* (Vic) ss 30FB, 30FC, 30FD; *Corrections Act 1986* (Vic) Part 6 Div 6, Div 6A.

³⁵ E.g., Tasmania, Western Australia, Australian Capital Territory, Northern Territory, South Australia have approval processes for change of name only.

³⁶ In the Bill these are provided as examples of powers of the chief executive that would not be limited by the fact of giving written permission, in section 27AB.

³⁷ Explanatory Notes, Births, Deaths and Marriages Registration Bill 2022, 72 – the Explanatory Notes only restate that the fact of giving permission does not limit any powers of the chief executive.

changed their sex *prior* to entering the corrections environment. One example might be a man who was assigned female at birth and has a preference to be placed in a women's prison, and/or concerns that he may not be safely housed in a male correctional facility.

34. Provided that safety, security, and good order of the correctional environment is not compromised, the legislative and policy framework should allow people to be placed in accommodation based on their identified sex, taking into account all relevant factors including the safety and preference of the individual. In the Commission's view, while these issues could be settled through policy development, there must be a clear legislative framework to underpin any updated QCS policy and procedures.
35. The Committee should seek the advice of the QCS about how these provisions will work in practice. The Commission recommends that more information is provided by QCS to the Committee to clarify:
 - a. why the additional process for prisoners is necessary and justifiable, including how the community and victims may be negatively impacted by a prisoner changing their record of sex; and
 - b. how the changes to record of sex will have an impact on QCS decision-making in relation to currently detained prisoners and prisoners who may be detained in the correctional environment after changing their record of sex; and
 - c. whether these matters are intended to be settled through creating new policies, practices, and procedures, and how QCS will develop these in consultation with stakeholders.

Conclusion

36. Thank you for the opportunity to comment on the Bill which we support, subject to the above recommendations.