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17 January 2023

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').

At the outset, we commend the Queensland Government for the manner in which you have consulted with relevant stakeholders in the formation of the Bill. We also acknowledge the significant work undertaken to date by the Department of Justice and Attorney-General to ensure the Bill reflects contemporary community values and expectations.

Pride in Law is Australia's first and only national non-political legal association, aimed at connecting lesbian, gay, bisexual, transgender, queer, questioning, intersex, and asexual ('LGBTQIA+') members of the legal community and their allies. We work to increase visibility, education and advocacy on LGBTQIA+ issues in the law and legal profession. This submission has been compiled by our Queensland Chapter, whose members have expertise on the law as it affects the LGBTQIA+ community in Queensland.

Pride in Law acknowledges the many diverse views that exist in our society, but ultimately believes that LGBTQIA+ people, like everyone in Queensland, deserve to feel safe and respected. This includes equal protection under the law and the fundamental right to recognition before the law.¹

We endorse the Bill's policy objective to remove the need for a medicalised procedure and provide a simple administrative process by which transgender and gender diverse people can access documents, systems and processes that accurately reflect their individual experience of identity. We also support the Bill's recognition of contemporary family and parenting structures.

Recommendations

The Bill represents significant and long overdue change for Queenslanders and we recommend it be passed.

However, we do consider the Bill as currently drafted may give rise to some unintended consequences; specifically, a lack of clarity around key concepts like sex and gender, and the implications that may flow as a result of this ambiguity.

¹ *Human Rights Act 2019* (Qld) s 15(1).

To address this, we recommend:

- a mandatory statutory review of the Bill be undertaken no later than three years after its commencement;
- a whole of Government strategy be developed to ensure all Government staff and other institutions are adequately trained and empowered to properly implement the reforms;
- appropriate funding and support be put in place to ensure young people can practically access the application process to alter their record of sex; and,
- further consideration be given to a holistic review of other laws that affect same-sex and gender diverse families, to ensure these families can practically access the changes proposed in the Bill.

We elaborate on the rationale for each of these recommendations below.

Ambiguity in key definitions (sex and gender)

While we support the implementation of a simple administrative process by which transgender and gender diverse people can access identity documents that appropriately reflect their experience of identity, we are concerned about the lack of definition of the key concepts of sex and gender in the Bill. The distinction between sex and gender is recognised by the *Australian Government Guidelines on the Recognition of Sex and Gender*, as well as other Australian bodies,² Australian jurisdictions,³ the World Health Organisation,⁴ and other international jurisdictions, such as the United Kingdom⁵ and Canada.⁶ In its consideration of similar issues, the Tasmanian Law Reform Institute ('TLRI') saw value in maintaining a distinction between sex and

² Australian Human Rights Commission, *Resilient Individuals: Sexual Orientation, Gender Identity & Intersex Rights* (National Consultation Report, 2015) 5, definitions of 'sex' and 'gender'.

³ 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>. 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].

⁴ 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.

⁵ 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).

⁶ 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.

gender and recommended the Government work to 'eliminate discriminatory application of laws by careful and deliberate use of the appropriate terms.'⁷

These terms appear to be conflated in the Bill, which defines a 'sex descriptor' as 'male', 'female', or 'any other descriptor of sex' and provides 'agender', 'genderqueer' and 'nonbinary' as examples of any other descriptor of sex. These examples are more closely associated with concepts of gender and gender identity.

This is further complicated by the proposed new definitions to be inserted into the *Anti-Discrimination Act 1991* (Qld) of 'gender identity', which relates to the person's individual experience of gender, and 'sex characteristics', which is taken to mean the person's physical features and development related to the person's biological sex.

Without further consideration of these key concepts, we are concerned about the unintended consequences that will flow from the Bill's implementation. In particular, we have significant concerns about cl 47 of the Bill. Clause 47 provides that a person who has their record of sex altered in the register will be taken to be a person of the sex as altered 'for the purposes of, but subject to, a law of the State'. However, the Explanatory Notes provide that 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.'

This clause has the potential to override a person's alteration of record of sex and render it unable to be enforced. For example, we query how this will be interpreted where a person alters their record of sex from male to female but was assigned male at birth. Where the person is required to undergo a personal (i.e. strip) search under the *Police Powers and Responsibilities Act 2000* (Qld), which provides that a search must be conducted by an officer 'of the same sex as the person to be searched',⁸ will the person be searched by a male or female officer? What about situations where the officer themselves has altered their record of sex but was assigned a different sex at birth? Similarly, the *Mental Health Act 2016* (Qld) refers to searches by someone of the same 'gender' as the person being searched. How will these provisions (and processes) manage situations where a person is registered as a sex other than male or female (i.e. as 'non-binary' or 'gender queer')?

Accordingly, we recommend a mandatory statutory review be included in the Bill, to be undertaken in consultation with LGBTQIA+ stakeholders, no later than three years after its implementation. A statutory review will allow any unintended consequences to be identified and ameliorated through further legislative amendment and reform.

We also recommend a whole of Government strategy be developed to include a comprehensive public awareness campaign, and development of educational tools to ensure public-facing staff at relevant institutions (for example, Government departments, financial institutions etc.) are educated on correct terminology and are empowered to properly implement the reforms arising out of the Bill.

⁷ Tasmanian Law Reform Institute (n 3) 19 [2.2.28].

⁸ *Police Powers and Responsibilities Act 2000* (Qld) s 624(2).

Registration of intersex variations at birth

We welcome cl 10(2)(a) of the Bill to provide an extended period of time (being 180 days) for a birth to be registered where variations of sex characteristics have been identified. This will be helpful for some parents of intersex children, providing them more time to ensure the birth registration is accurate. However, we note in other cases an extended period of time will not prove helpful, where ‘parents may still make a binary decision where a binary choice does not, in reality, exist. It may also unintentionally impose a gender identity or expression that can be very challenging for a child if they grow up expressing a gender that does not fit with the sex imposed upon them.’⁹

On this issue, the TLRI considered whether an additional category of sex on birth registration forms should be available to the parents of intersex children: ‘The availability of additional categories can relieve pressure on parents of intersex children to determine their child’s sex within the registration timeframe. It also reflects the reality that a wide variety of sex characteristics exist that can defy binary categorisation.’¹⁰ It was also recognised, however, that such a move might work to further alienate and ‘otherise’ intersex people.¹¹

Ultimately, the TLRI was ‘not convinced that the registration of sex should be limited to male or female. In fact, this is problematic in that it requires the recording of inaccurate information where a baby’s sex cannot be assigned or is most accurately described as intersex or as having intersex variations of sex characteristics.’¹² The TLRI recommended an additional birth registration, ‘Unspecified’ be available to allow parents who, after 120 days, are not in a position to nominate the sex of their child as either male or female.¹³ Other Australian jurisdictions have similarly adopted, or recommended, a practice of allowing sex to be recorded at birth in a nonbinary category, such as Intersex,¹⁴ Indeterminate,¹⁵ or Unspecified.¹⁶

We also refer to the Darlington Statement by Australian and New Zealand intersex organisations, which provides:

Regarding sex/gender classifications, sex and gender binaries are upheld by structural violence. Additionally, attempts to classify intersex people as a third sex/gender do not respect our diversity or right to self-determination. These can inflict wide-ranging harm regardless of whether an intersex person identifies with binary legal sex assigned at birth or not.¹⁷

Accordingly, we do not oppose the approach taken in the Bill, but recommend this issue be included in a statutory review of the Bill not later than three years after its commencement. Such review should suitably include consultation with intersex people and a review of the experiences of other jurisdictions which allow the recording of a nonbinary category of sex at birth.

⁹ Tasmanian Law Reform Institution (n 3) 23 [2.2.59].

¹⁰ Ibid 23 [2.2.62].

¹¹ Ibid 24 [2.2.63].

¹² Ibid 25 [2.2.71].

¹³ Ibid.

¹⁴ However, we acknowledge the views of Intersex Human Rights Australia who recommend against the use of the term ‘Intersex’ because of its ability to constrain the rights of intersex people to self-determination.

¹⁵ The NSW Birth Registration Statement (Registry of Births Deaths and Marriages, NSW) allows sex to be registered as male, female, intersex or indeterminate. The Law Reform Commission of Western Australia has also recommended the inclusion of ‘Indeterminate’ as a category on the Birth Registration Statement.

¹⁶ South Australia and the Northern Territory allow sex to be recorded as ‘Unspecified’

¹⁷ Intersex Human Rights Australia, Darlington Statement (March 2017) 3 [8].

Young people

We celebrate the proposed ability of young people over the age of 12 to access a framework in which they can make an application (with or without parental support) to alter their registration of sex. We support the ability of young people to alter their registration of sex separately to any process to access medical treatment.

It is, however, vital that young people and their supporters can practically access the pathways set out in the Bill to alter their record of sex. In this respect, we recommend appropriate funding and support be allocated to community legal centres and other advocacy groups to ensure young people are supported through this process.

We recommend, in respect of all applications to alter a record of sex, that an application and simultaneous name change application be accepted by the registry with no charge. This will mitigate the cost barriers trans and gender diverse people and young people may face when going through this process.

Registration of parentage details

We welcome the proposal (as set out in cl 12 of the Bill) to facilitate 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 as detailed in cl 107 of the Bill to allow: (a) a same-sex couple to correct a parenting label on their child's birth registration which was registered prior to the reforms; and, (b) a parent who changes their sex after the child's birth to update their parenting label on their child's birth registration.

However, the Bill must operate in a way that creates legal certainty for same-sex parented families and other diverse family structures in Queensland. We are of the view that further consideration must be given to a holistic review of other laws that affect same-sex and gender diverse families, to ensure these families can practically access the changes proposed in the Bill. This includes review of Queensland's surrogacy laws and parentage presumptions.

Different parentage presumptions arise in relation to children born of same-sex marriages in Queensland, which may impact (among others) a child's inheritance rights. Section 24 of the *Status of Children Act 1978* (Qld) ('Status of Children Act') sets out parentage presumptions which arise from marriage, but refers only to a 'woman and her husband'.¹⁸ There is a similar presumption on co-habitation, but again this refers to a man and a woman. There is no equivalent presumption in relation to a 'woman and her wife' or a 'man and his husband'.

We also point to s 60H of the *Family Law Act 1975* (Cth) ('Family Law Act'), which sets out how the Family Law Act recognises children born as a result of artificial conception procedures. In particular, s 60H(1) provides that if:

- 'a child is born to a woman as a result of the carrying out of an artificial conception procedure while the woman was married to, or a de facto partner of, another person (the other intended parent); and,
- either:

¹⁸ *Status of Children Act 1978* (Qld) s 24.

- the woman and the other intended parent consented to the carrying out of the procedure, and any other person who provided genetic material used in the procedure consented to the use of the material in an artificial conception procedure; or
- under a prescribed law of the Commonwealth or of a State or Territory, the child is a child of the woman and of the other intended parent;

then whether or not the child is biologically a child of the woman and of the other intended parent, for the purpose of the Family Law Act, the child is the child of the woman and of the other intended parent.¹⁹

In this way, the Family Law Act does not distinguish between sex or gender in relation to the “other intended parent”. We recommend the relevant provisions of the Status of Children Act be reviewed and updated accordingly, to ensure there is legal certainty for same-sex parented families in respect of their children’s parentage presumptions (which flow through to a child’s inheritance rights under the *Succession Act 1981* (Qld)). We also recommend the Status of Children Act be updated to ensure it is gender non-specific, such that it recognises gender fluidity and persons who identify as a gender other than female may give birth. Further, we recommend a review of Queensland’s surrogacy laws to provide legal certainty to same-sex and gender diverse families.

Again, we thank the Committee for the opportunity to provide feedback on the Bill and remain ready to assist the Government in its implementation. If you have any queries regarding the contents of this letter, please contact us by phone on [REDACTED] or by email at [REDACTED]

Yours sincerely,

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¹⁹ *Family Law Act 1975* (Cth) s 60H(1).