

EQUALITY LEGISLATION AMENDMENT (LGBTIQA+) BILL 2023

STATEMENT OF PUBLIC INTEREST *Clerk of the Parliaments**17 / 10 / 2024***Need: Why is the policy needed based on factual evidence and stakeholder input?**

As an openly gay man who represents the strongest LGBTIQA+ community in the country, the Member for Sydney regularly hears from LGBTIQA+ people from across the state about discrimination that impacts on their daily lives.

In March 2022, the NSW LGBTIQ+ Health Strategy 2022-2027 was released. It identified significant poor health and wellbeing as a result of chronic exposure to discrimination and stigma and set targets for improvement.

In response, the Member for Sydney committed to removing discrimination in state law. This Bill is the result of a lengthy process engaged in to achieve this outcome and improve the lives of LGBTIQA+ people in this State, whilst respecting the diverse beliefs that exist across our New South Wales community.

Objectives: What is the policy's objective couched in terms of the public interest?

Objective 1: allow people to update their birth certificate without surgery

New South Wales is the only jurisdiction to require sex affirmation surgery before a person can alter their record of sex. Many trans and gender diverse people don't want or are not able to get surgery because of a range of factors including the cost and potential risks.

Documentation that doesn't reflect a person's lived gender may force trans and gender diverse people to reveal their private information and personal experiences whenever they need to show a birth certificate, for example when applying for a job, a loan, or a course, or accessing services, exacerbating already high rates of stigma and discrimination and making everyday tasks a challenge.

All New South Wales residents need correct identity documentation to get on with their lives. The Bill will allow a person to update their sex descriptor on their birth certificate with a statutory declaration and an affirming statement from an adult who has known them for at least 12 months, and without the need for surgical intervention.

The parents of children will also be able to apply to change their child's sex descriptor, with pathways depending on whether the application has the support of one or both parents.

Objective 2: extra time to register a birth if variations of sex characteristics are present

In NSW, parents have 60 days to register the birth of their child. For some children born with variations of sex characteristics, extra time may be needed so parents can consider how best to record the particulars required for birth registration. An additional 120 days will provide additional time to assess development and undertake tests and ensure this process is not unnecessarily time pressured.

Objective 3: remove the offence for living off the earnings of a sex worker, which prevents sex workers from financially supporting family members and other third parties

Sex work is legal work and sex workers have families. The current offence could capture a partner who becomes incapacitated, an adult child who lives at home while studying or an elderly parent. Other offences already protect sex workers from "pimping", including offences where coercion or undue influence is used to force a sex worker to surrender their earnings and sexual servitude offences.

Objective 4: amend existing principles to be considered when making decisions about a child or young person's care and streamline court processes

Guiding principles already exist in relation to decisions made about a child or young person's care that include a requirement that account be taken of the child or young person's sexuality, but not their gender identity and variation of sex characteristics, which should be included to ensure they can be taken into account.

'Special Medical Treatment' requires Civil and Administrative Tribunal approval for persons under 16, to ensure that it is in the child's best interests, regardless of whether informed consent and parental approval is provided. The Family Court can rule on whether Special Medical Treatment is in a child's best interests and if it has determined the treatment should proceed, also requiring NCAT to consider the treatment is unnecessary duplication.

Objective 5: threats to out person's LGBTIQ+ status and sex work history can be a form of harassment

LGBTIQ+ people and sex workers can experience a unique form of harassment, which is a type of intimidation, from threats to out them. In recognising this form of abuse, LGBTIQ+ people will be able to seek protections like an apprehended violence order before abuse escalates. Such conduct will also, depending on the circumstances, be captured in the criminal offences for intimidation and for coercive control.

Objective 6: provide a pathway for children born out of overseas commercial surrogacy arrangements to have their parents recognised

New South Wales does not allow parentage orders for children born of international commercial surrogacy arrangements. As a result, a child's parents may not be legally recognised as such. New South Wales law recognises their birth mother and her partner as the parents, even if the birth mother has relinquished responsibility for the child through a process in her jurisdiction. This leaves the child vulnerable in, for example, medical emergencies or if a parent dies. The situation punishes children for the circumstances of their birth.

The bill will create a pathway for parentage orders for children born of international commercial surrogacy arrangements, but will not lift the ban on commercial surrogacy in this state or remove the geographical nexus for offences. The Bill will also preserve existing preconditions which aim to protect the interests of the birth mother.

Objective 7: ensuring appropriate sentencing to recognise offences motivated by hate

Crimes motivated by hate for a group are subject to an existing aggravating factor under s 21A(2)(h) of the *Crimes (Sentencing Procedure) Act 1999*. The law makes it clear that this includes religion, racial or ethnic origin, language, sexual orientation or age, or having a particular disability. Trans and gender diverse people and some people with variations of sex characteristics are vulnerable to prejudice and hate crimes and need clear protections in law, which the Bill will provide.

Objective 8: Outdated and stigmatising language used to describe people living with HIV or AIDS updated

State laws still reflect archaic and stigmatising language against people with HIV and AIDS, using terms like "infected" or "suffering from". Modernising language for HIV/AIDS will promote dignity, respect and public health outcomes.

Objective 9: amend the *Mental Health Act 2007* to make clear that gender identity and gender expression are not mental illnesses and are not reasons to detain someone.

The Bill will make it clear that gender identity and gender expression do not indicate mental illness, adding them to the list of conduct that is specifically excluded for the purpose of treating someone under the Mental Health Act. This is supported by the Diagnostic and Statistical Manual of Mental Disorders and the World Health Assembly of the World Health Organization.

Options: What alternative policies and mechanisms were considered in advance of the bill?

The policy outcomes sought to be achieved by this Bill can only be achieved through legislative amendment.

Development of the Bill was informed by stakeholder consultation (further detail outlined below) and the Legislative Assembly Committee on Community Services inquiry into the Bill, which received 66 submissions, held two hearings, and tabled its report in June 2024.

Analysis: What were the pros/cons and benefits/costs of each option considered?

As recognised by the report of the Legislative Assembly Committee on Community Services inquiry into the Bill, the measures in the Bill are the subject of significantly divergent views. These views were outlined in the report of the Committee, the submissions received by the Committee, and in consultation with stakeholders, and were carefully considered in the development of the Bill.

Pathway: What are the timetable and steps for the policy's rollout and who will administer it?

The Bill will commence on the earlier of a day or days to be appointed by proclamation or 1 July 2025.

This will allow for arrangements to be made to support the implementation of the measures in the Bill across Government.

Consultation: Were the views of affected stakeholders sought and considered in making the policy?

In April 2022, the Member for Sydney began a consultation process in relation to how to remove discrimination impacting the LGBTIQ+ community from NSW legislation. Over 20 organisations made submissions and Equality Australia made two comprehensive submissions endorsed by 32 organisations, 22 of which had not made separate submissions.

There was strong consensus for, relevant to this Bill:

- Access to accurate state identity documentation for people who are trans and gender diverse;
- Decriminalisation of sex workers' lives;
- Recognition of parentage for children born out of overseas commercial surrogacy;
- To make threats to out a person's LGBTIQ+ status and sex work history recognised in domestic violence legislation;

A number of other reforms were raised including the need to update language to make it inclusive.

A bill was drafted and introduced into Parliament on 24 August 2023. On 13 March 2024 it was referred to the Legislative Assembly Committee on Community Services, which conducted an inquiry and reported in June 2024.

The bill has been amended adopting feedback from the inquiry, including the large number of submissions received by the inquiry.

Relevant internal NSW Government agencies were also consulted.