

**Submission
No 13**

EQUALITY LEGISLATION AMENDMENT (LGBTIQA+) BILL 2023

Organisation: NSW Government

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The Hon Michael Daley MP
Attorney General



Ref: SGM24/3182

Mr Clayton Barr MP
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By email: communityservices@parliament.nsw.gov.au

Dear Mr Barr,

NSW Government submission – Inquiry into the Equality Legislation Amendment (LGBTIQA+) Bill 2023

Thank you for the opportunity to make a submission to the Legislative Assembly Standing Committee on Community Services Inquiry into the Equality Legislation Amendment (LGBTIQA+) Bill 2023.

Please find enclosed a copy of the NSW Government's submission, which we hope is useful to the deliberations of the Committee. The submission is not a statement of Government policy. The Government will determine its position on the Equality Bill following the outcome of the Inquiry.

Sincerely,


Michael Daley MP
Attorney General

Encl. NSW Government Submission to the Legislative Assembly Standing Committee on Community Services Inquiry into the Equality Legislation Amendment (LGBTQIA+) Bill

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NSW Government Submission

Legislative Assembly Standing Committee on
Community Services inquiry into the Equality
Legislation Amendment (LGBTQIA+) Bill

April 2024

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Introduction

Purpose of submission

The NSW Government welcomes the opportunity to make a submission to the Legislative Assembly Standing Committee on Community Services' Inquiry into the Equality Legislation Amendment (LGBTIQ+) Bill 2023 (the **Equality Bill**), introduced by Mr Alex Greenwich MP.

The purpose of this submission is to provide advice on:

- The effect of the provisions of the Equality Bill
- Any operational risks and potential unintended consequences in relation to the proposed amendments in the Equality Bill. The submission also sets out current Government election commitments, reviews and related work which may impact on the amendments proposed by the Equality Bill.
- Other NSW Government initiatives to improve the safety and wellbeing of the LGBTIQ+ community.

This submission is not a statement of Government policy. The Government will determine its position on the Equality Bill following the outcome of the Inquiry.

Summary

This submission is structured to mirror the Equality Bill and comments are provided on each Schedule to the Bill.

However, the NSW Government's submissions in relation to the proposed amendments in the Equality Bill can be summarised as follows:

Proposed amendments to Acts or provisions that are currently subject to review by the NSW Law Reform Commission

The *Anti-Discrimination Act 1977* (Schedule 1) and section 93Z of the *Crimes Act 1900* (Schedule 6) have both been separately referred to the NSW Law Reform Commission for review. The Government is committed to considering the recommendations of the NSW Law Reform Commission reviews in due course.

Reforms to the Anti-Discrimination Act and the section 93Z of the Crimes Act raise considerable complexities. There would be advantages to considering these reforms with the benefit of the NSW Law Reform Commission's consideration.

Amendments to the *Births, Deaths and Marriages Registration Act 1995*

The Equality Bill proposes substantive amendments to the *Births, Deaths and Marriages Registration Act 1995* (**BDMR Act**) to enable trans and gender diverse people to register a change of sex through an administrative process without the need to undergo a surgical procedure. NSW is the only remaining jurisdiction in Australia to require a trans or gender diverse person to undergo a surgical procedure before registering a change of sex.

However, a number of operational complexities and inconsistencies with other related provisions of the BDMR Act have been identified with the amendments proposed in the Equality Bill.

The NSW Government made an election commitment that has alignment to these amendments and that was to review Part 5A of the BDMR Act in consultation with the community and trans and gender diverse communities.

Amendments to search powers

The Equality Bill proposes to amend the *Court Security Act 2005* (Schedule 5), *Crimes (Administration of Sentences) Act 1999* (Schedule 7), the *Crimes (Forensic Procedures) Act 2000* (Schedule 9), the *Law Enforcement (Powers and Responsibilities) Act 2002* (Schedule 15), and the *Sheriff Act 2005* (Schedule 17) to provide alternative arrangements for the search of transgender or intersex people.

As drafted, the proposed amendments may have unintended consequences and present operational risks. However, it may be possible to mitigate these risks through amended drafting.

Amendments to apprehended violence orders

The Equality Bill proposes to amend the *Crimes (Domestic and Personal Violence) Act 2007* to ensure coverage of 'outing a person' can form grounds to make an apprehended violence order and expand certain procedural protections currently provided on the basis of specified attributes to individuals on the basis of sex work.

Some of these amendments may have unintended consequences and present operational risks. However, some risks may be able to be mitigated through amended drafting.

Amendments to Surrogacy Act

The Bill proposes amendments to the *Surrogacy Act 2010* (Schedule 19) that will alter the treatment of international commercial surrogacy under the law and the requirements for making parentage orders.

These changes raise complex policy issues.

The NSW Government has made an election commitment to review the Surrogacy Act and the *Status of Children Act 1996*. This review process may be the preferable avenue to consider amendments to the Surrogacy Act holistically, because of the complexity of the policy and operational landscape.

Amendments to modernise language or clarify legislation

The Equality Bill includes clarifying and modernising reforms, which either do not raise concerns for the NSW Government or raise minor concerns that may be addressed through minor amendments. These include:

- updating decision making principles to include consideration of gender identity and variations in sex characteristics¹ under the *Children and Young Persons (Care and Protection) Act 1998* (Schedule 3[1]) and the *Children's Guardian Act 2019* (Schedule 4)
- reducing duplication in certain court proceedings related to the *Children and Young Persons (Care and Protection) Act 1998* (Schedule 3[3])
- clarifying that in sentencing, it is an aggravating factor in sentencing that the crime was motivated by hatred or prejudice for people who are transgender, gender diverse or intersex under the *Crimes (Sentencing Procedure) Act 1999* (Schedule 10)

¹ 'People with variations of sex characteristics' or people who are 'intersex' are people who are born with anatomical, chromosomal and hormonal characteristics that are different from medical and conventional understandings of female and male bodies.

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- updating terminology in the *Drugs Misuse and Trafficking Act 1985* (Schedule 11) and the *Workers Compensation Act 1987* (Schedule 20) to replace terms such as “HIV infection” and “suffering with AIDS” to “living with HIV/AIDS”
- clarifying that under the *Mental Health Act 2007* (Schedule 16) the expression of, or a refusal or failure to express, a particular gender identity or gender expression may not indicate mental illness or disorder.

Reforms that raise complexities or have potential unintended consequences

Certain proposed amendments may introduce complexities and/or may have potential unintended consequences. These include the amendments to:

- the *Children and Young Persons (Care and Protection) Act 1998* that give decision making capacity to young people aged 16 and 17 in relation to medical or dental treatment (Schedule 3[2]), as there may be wide ranging impacts in the health services sector requiring further consideration
- the *Government Sector Employment Act 2013* (Schedule 12) and the *Government Sector Employment General Rules* (Schedule 13) relating to diversity requirements
- the *Interpretation Act 1987* (Schedule 14) around the definition of gender, as any changes to this Act will have flow on impacts to all NSW legislation that need to be carefully examined
- the *Summary Offences Act 1988* (Schedule 18) to repeal the offences relating to sex work, to enable further consultation to ensure any reforms do not carry unintended consequences, including for the safety of sex workers.

Initiatives to improve the safety and wellbeing of LGBTIQ+ communities

The NSW Government proudly supports LGBTIQ+ communities.

We recognise there are legal, social and health issues that continue to impact the safety and wellbeing of people of diverse sexualities and genders, and people with innate variations of sex characteristics in NSW.

The NSW Government made a number of key commitments for the LGBTIQ+ community in response to issues highlighted by a coalition of nine LGBTQ+ community organisations, led by Equality Australia and ACON, and Intersex Human Rights NSW.

Key NSW Government initiatives to significantly improve LGBTIQ+ communities’ safety and wellbeing include:

- introducing legislation to ban LGBTQ+ conversion practices;
- establishing a NSW LGBTIQ+ Advisory Council and a Cross-Portfolio Standing Committee; and
- developing a whole of government LGBTIQ+ Inclusion Strategy for NSW.

Banning LGBTQ+ Conversion Practices

The *Conversion Practices Ban Act 2024* passed the NSW Parliament on 22 March 2024. This legislation gave effect to the NSW Government election commitment to ban LGBTQ+ conversion practices. Conversion practices, which can include so-called “conversion therapy” and suppression practices, are formal or

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informal practices based on the false ideology that LGBTQ+ people have a 'disorder' or require treatment. Evidence shows that conversion practices are dangerous and damaging.

The legislation makes conversion practices prohibited under both criminal and civil law. The legislation also includes exclusions which ensure that general conversations around religious beliefs, or how religious beliefs might be reflected in a person's life are not conversion practices. This includes conversations between parents and children, with siblings and the wider family and even friends. This legislation has been carefully designed to protect LGBTQ+ people, while acknowledging and respecting longstanding religious and cultural beliefs and practices. The legislation will commence in 12 months to enable community education.

Establishing a LGBTIQ+ Advisory Council

The NSW Government will establish a LGBTIQ+ Advisory Council (the Council) and Cross-Portfolio Standing Committee (the Committee), led by the Premier's Department.

The LGBTIQ+ Advisory Council will be comprised of diverse individuals representing LGBTIQ+ communities and provide a mechanism for ongoing community consultation and engagement.

The Council will provide ongoing advice to the NSW Government as it delivers on a range of initiatives and commitments designed to promote equality and inclusion for LGBTIQ+ communities. In particular, it will be tasked to support the development and implementation of a whole-of-government LGBTIQ+ inclusion strategy and to identify opportunities for greater collaboration between the government and LGBTIQ+ communities. Through this process, Council members will have the opportunity to consider initiatives to strengthen LGBTIQ+ communities' safety and wellbeing.

The Council will help, guide, and advise our government to ensure the policies and programs we enact make sure LGBTIQ+ people are recognised, heard, and treated with dignity and respect.

Establishing a LGBTIQ+ Cross-Portfolio Committee

The Cross-Portfolio Standing Committee will be comprised of senior-level representatives from across the NSW Government and include community representation.

The Committee will drive the strategic policy direction and efforts of NSW Government to support LGTBQI+ communities. It will be tasked with coordinating efforts, enhancing investment in partnerships, and information sharing about programs and services that focus on key populations experiencing intersecting inequities.

The Committee will support and work closely with the Council and play a key role in understanding and improving coordination of initiatives across government to address LGBTIQ+ people's safety and wellbeing.

Developing a LGBTIQ+ Inclusion Strategy

The NSW LGBTIQ+ Inclusion Strategy will bring together initiatives, under agreed objectives, to overcome a range of issues and barriers for LGBTIQ+ communities. NSW Government will work closely with the Council to develop the LGBTIQ+ Inclusion Strategy.

Initiatives and investments to improve health and wellbeing in LGBTIQ+ communities

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Since the launch of the NSW LGBTIQ+ Health Strategy in 2022, NSW Health has invested in community partners and health care services to help improve the health and wellbeing of LGBTIQ+ community members, including:

- \$4.2 million to ACON, as one off funding, to support them to establish a new LGBTIQ+ health centre where they will deliver primary care including general practice, mental health, sexual health, and cancer screening services.
- \$4.9 million annually for NSW Health's Specialist Trans and Gender Diverse Health Service to provide specialist multidisciplinary health services for trans and gender diverse young people and their families through a state-wide service.
- \$2.3 million to ACON, Twenty10 and Equality Australia to boost mental health and suicide prevention initiatives in LGBTIQ+ communities for up to 4 years.

The Ministry of Health has also implemented a project to investigate options to improve the collection of gender, sexuality, variations of sex characteristics, and other variables in NSW Health data collection systems. The next stage of the project will look at the recommendations made and consider the feasibility and resource requirements needed for the implementation of potential system improvements.

The Equality Bill – NSW Government Submission

Schedule 1: Proposed amendments to the *Anti-Discrimination Act 1977*

Effect of proposed amendments

Schedule 1 of the Equality Bill proposes major changes to the *Anti-Discrimination Act 1977* in relation to its exemptions and grounds of discrimination. The key substantive amendments proposed are to:

- Remove exemptions for private educational authorities or religious institutions;
- Extend grounds of discrimination to include sex work and variations in sex characteristics.

This Act is administered by the Attorney-General.

NSW Law Reform Commission Review

The NSW Government has referred review of this Act to the NSW Law Reform Commission, which was an election commitment. The NSW Law Reform Commission has commenced its review and public consultation. Preliminary submissions closed on 29 September 2023. 92 submissions were received and most have been published on the Law Reform Commission website².

The Government is committed to considering the recommendations of the NSW Law Reform Commission in due course. Changes to exemptions and to grounds of discrimination are foundational changes and likely to be very contentious.

Furthermore, the Australian Law Reform Commission has recently completed its review of the framework of religious exemptions in federal anti-discrimination laws, including the *Sex Discrimination Act 1984* and the *Fair Work Act 2009 (Cth)*³. The findings, and the Commonwealth response to the report, may be relevant when considering the appropriate scope of exemptions in NSW law. Direct inconsistency between Commonwealth and state and territory discrimination laws may raise constitutional questions.

Given these complexities, there may be an advantage in considering any major changes to the Anti-Discrimination Act through the NSW Law Reform Commission's a holistic, comprehensive review.

Schedule 2: Proposed amendments to the *Births, Deaths and*

² Available at <https://lawreform.nsw.gov.au/current-projects/anti-discrimination-act-review/preliminary-submissions.html>

³ Published on 21 March 2024. Available at <https://www.alrc.gov.au/publication/adl-report-142/>

Marriages Registration Act 1995

Effect of proposed amendments

The Equality Bill proposes substantive amendments to the *Births, Deaths and Marriages Registration Act 1995* (**BDMR Act**) to enable trans and gender diverse people⁴ to register a change of sex through an administrative process without the need to undergo a surgical procedure.

Currently, Part 5A of the BDMR Act requires a person to have undergone a surgical 'sex affirmation procedure' to be able to apply to change their registered sex. The Equality Bill proposes to repeal and replace this Part to remove requirements to undergo surgery or medical treatment.

Under the Equality Bill:

- A person aged 16 and over would be able to apply to change their registered sex through an administrative process. Under this administrative process, a person could submit an application to change their registered sex supported by a statutory declaration from the applicant and a supporting statement from an adult who has known the applicant for 12 months.
- For children aged under 16 years, both parents or a sole parent would be able to make an application to change the child's sex. The application must be supported by a statutory declaration from the child or a statement by the applicants stating that the applicant believes the application is in the child's best interests and a statement by 'a person who has provided counselling to the child' stating that the child has undergone counselling in relation to the making of the application and the implications of altering the child's registered sex. The counselling is to be provided by a person who the applicant considers has suitable qualifications, training or experience.
- The NSW Civil and Administrative Tribunal (NCAT) would be empowered to consider applications from:
 - One parent for an order that their child's registered sex be changed in the event of a dispute between parents.
 - A child under 16 seeking an order that their registered sex be altered, where there is no parental support. The Equality Bill provides that NCAT must notify the parents if an application is made by a child under 16.
- A single application may be made to alter the record of a person's sex and name.
- The Registrar would have the ability to issue birth certificates and marriage certificates reflecting the alteration in a person's recorded sex.
- Parents of children who display variations of sex characteristics that do not allow for an easy assignment of sex have 180 days to register their child's birth. This is an extension of time to the current 60 days allows to register a child's birth. This proposal raises no concerns.

This Act is administered by the Attorney-General and the Minister for Customer Service and Digital Government.

⁴ 'Trans and gender diverse' is an umbrella term used to refer to people whose assigned sex at birth does not match their internal gender identity.

Relevant legislation in other States and Territories

NSW is the only remaining jurisdiction in Australia to require a trans or gender diverse person to undergo a surgical procedure before registering a change of sex.⁵ All other States and Territories have reformed in this area.

Trans and gender diverse people may choose to affirm their gender in various ways, including through social, medical and legal pathways. The path chosen is unique to each person. The LGBTIQ+ Health Strategy⁶ notes that transgender people may position ‘being trans’ as a history or experience, rather than an identity, and consider their gender identity as simply being female, male or a non-binary identity.

Not all trans and gender diverse people will want, or be able, to undergo surgery given its high cost, limited availability and significant health risks. The current requirements in the BDMR Act limit access to identity documents that align with the lived identity of trans and gender diverse people. The discrepancy between a person’s gender and their identity documents may lead to discrimination, stigma or other problems when applying for a job or accessing government services, where the production of a birth certificate is required. These experiences can contribute to poor health and wellbeing outcomes for trans and gender diverse people.

Victoria, Queensland and Tasmania have all moved to a self-declaration model, under which no clinical treatment is required before a person can change their registered sex.

The following table provides a snapshot of the requirements to change a person’s registered sex in each State and Territory:

Requirements for change of sex	NSW	VIC	WA	QLD ⁷	SA	NT	ACT ⁸	TAS
Surgical procedure	✓	✗	✗	✗	✗	✗	✗	✗
Clinical treatment	✗	✗	✓	✗	✓	✓	✗	✗
Supporting statement by health professional	✓	✗	✗	✗	✓	✓	✗	✗
Supporting statement by adult known to applicant	✗	✓	✗	✓	✗	✗	✗	✗
Self-declaration only	✗	✓	✗	✓	✗	✗	✓	✓
Applicants must be 18 or older	✓	✓	✓	✗	✓	✓	✗	✗
Applicants must be 16 or older	✗	✗	✗	✓	✗	✗	✓ Applicant must be 14+	✓
Children may apply to Court/Tribunal	✗	✗	✗	✓ Child aged 12 - 15	✓ Child under 18	✗	✓ Child aged 12 - 13	✗
One parent may apply to Court/Tribunal	✗	✓ Child under 18	✗	✓ Child under 16	✓ Child under 18	✗	✓ Child under 12	✓ Child under 16

⁵ On 14 June 2023 Queensland passed the *Births, Deaths and Marriages Registration Act 2023* which introduces a self-declaration model for changing a person’s registered sex. The Act has yet to commence.
⁶ NSW LGBTIQ+ Health Strategy 2022 – 2027, pg. 43, available at: <https://www.health.nsw.gov.au/lgbtiq-health/Publications/lgbtiq-health-strategy.pdf>
⁷ Information reflects position once the *Births, Deaths and Marriages Registration Act 2023* (Qld) commences.
⁸ On 29 March 2024, the *Births, Deaths and Marriages Registration Amendment Act 2024* commenced, amending the requirements to alter recorded sex.

Election commitment to review Part 5A of the BDMR Act

The NSW Government made an election commitment to review Part 5A of the BDMR Act in consultation with the community and trans and gender diverse communities.⁹ Work on this election commitment has been on hold pending Government consideration of the Equality Bill.

Key operational issues in relation to the proposed amendment to the BDMR Act

The NSW Government has identified a number of areas in which the proposed amendments to the BDMR Act do not align with other provisions of the BDMR Act, pose operational issues or may allow for exploitation of the birth registration system.

Single application for altering record of sex and name

Schedule 2[4] of the Equality Bill proposes that a single application may be made for altering a record of a person's sex and name. This provision may allow changes of name to be registered without complying with the requirements set out in Part 5 of the BDMR Act which govern change of name applications, including the requirement to disclose criminal history (s 29A) and restricting the number of times a person may change their name. These requirements have been developed to prevent identity fraud. Any provision which allows a change of name to be processed without compliance with Part 5 of the BDMR Act may reduce identity fraud protections in NSW.

Restrictions on changes of name

The Equality Bill does not prescribe the same restrictions on change of sex applications as are applicable to change of name applications. The Registrar has indicated that changes to sex do not have the same identity security considerations as changes of name and therefore applications do not need to be subject to some of the restrictions that apply to changes of names including requiring disclosure of criminal history (s 29A) and preventing a person from changing their name if they have changed their name in the previous 12 months or have changed their name three or more times (s 29B).

However, Part 5, Division 3 of the BDMR Act also precludes 'restricted persons' (including, but not limited to, inmates, parolees and persons subject to a supervised order) from making an application to register a change of name without the approval of the supervising authority. No such restrictions have been included in the Equality Bill which may present operational concerns for supervising authorities, such as Corrective Services NSW and NSW Police. Public safety considerations around allowing certain 'restricted persons' to change their registered sex without appropriate oversight should also be considered.

Sex descriptors

The Equality Bill allows applicants to nominate a sex descriptor, which is defined as 'male, female or any other descriptor of sex', provided it is not a 'prohibited sex descriptor'.

A 'prohibited sex descriptor' is defined as a sex descriptor that:

- Is obscene or offensive; or
- Could not practicably be established by repute or usage because it is too long, consists of or includes symbols without phonetic significance or for some other reason.

⁹ Labor Response to Equality Australia Pre-Election Survey

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This is slightly inconsistent with the definition of 'prohibited name' in section 4 of the BDMR Act, which is a name that:

- Is obscene or offensive; or
- Could not practicably be established by repute or usage because it is too long, consists of or includes symbols without phonetic significance or for some other reason; or
- Includes or resembles an official title or rank; or
- Is contrary to the public interest for some other reason.

Further, the implications and potential complexities around data collection and analytics flowing from these amendments should be considered.

Administrative applications to change registered sex made by persons 16 and over

The Equality Bill proposes to allow persons aged 16 and over to make an administrative application to BDM to have the record of their sex altered. This is inconsistent with the age limit of 18 for applications to register a change of name under section 27 of the BDMR Act. However, the Registrar and NSW Police have advised that there are no identity security concerns with allowing persons aged 16 and 17 to apply directly to BDM to register a change of sex. The inconsistency and interaction with the age limit that applies to change of name provisions would need to be considered.

Administrative applications on behalf of children under 16 – who can apply

The Equality Bill proposes to allow both parents, persons with parental responsibility or a sole parent to apply on behalf of a child under 16 to have the record of the child's sex altered. Under proposed section 32D, one parent of a child may make an application if "it is not practicable or reasonable to obtain the consent of the child's other parent". This is inconsistent with section 28 of the BDMR Act, which establishes the framework for applying to register a change of a child's name. Further, this would require the Registrar to make a subjective assessment on a case by case basis as to whether it is not 'reasonable' to obtain the consent of the other parent.

Proposed section 32D(1) also provides that applicants with sole parental responsibility to "make decisions about major long-term issues" may apply for a change of sex in relation to their child. However, this would result in inconsistency between when a sole parent can apply to change their child's sex and when they can apply to change a child's name under section 28. There are advantages to ensuring consistency between these provisions to reduce confusion and avoid a situation where it is possible for a parent to change some of their child's registered particulars but not others.

Administrative applications on behalf of children under 16 – evidentiary requirements

The Equality Bill proposes that an application on behalf of a child is to be accompanied by a statement by a person who has provided counselling to the child.

Under proposed section 32D, there is no requirement for the counselling to be performed by a qualified or accredited counsellor or other professional. It instead provides for a subjective assessment by the applicant that the counsellor has 'suitable qualifications, training or experience to provide the counselling'. This may leave children and young people vulnerable to the influence of persons who are unable or unwilling to advise them in their best interests. Additionally, as there is no requirement that the counsellor needs to reach a particular view in relation to the application, any statement is unlikely to have any evidentiary value.

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An alternative approach would be to provide that the counselling be performed by a 'qualified person'. The criteria for what constitutes a 'qualified person' (including appropriate professional qualification) could be prescribed in regulations. Consideration should also be given to the content of the statement and whether it is appropriate for the counsellor to reach a particular view in the statement, for example, about whether the child understands the implications of the application.

Disputed applications – jurisdiction of NCAT

The Equality Bill proposes that disputed applications will be decided by the NSW Civil and Administrative Tribunal (**NCAT**). A person would be able to apply to NCAT in the following circumstances:

- A person under the age of 16 whose birth is registered in NSW; or
- A parent of a child under the age of 16, if the other parent does not agree to apply to the Registrar to change the child's registered sex.

NCAT currently has jurisdiction to decide administrative disputes arising under the BDMR Act. NCAT members are experienced at weighing up competing evidence as to what constitutes the correct and preferable administrative decision. However, under the Equality Bill NCAT would be required to make a primary decision relating to altering a child's registered sex. This is inconsistent with NCAT's current jurisdiction under the BDMR Act. NCAT presently has no permanent members who are qualified or experienced in assessing whether a change to the sex registered on a child's birth certificate is in the child's best interests.

An alternative approach would be to allow another court with jurisdiction over such matters. For example, under section 28 of the BDMR Act, if there is a dispute between parents regarding changing a child's name, the District Court may approve a proposed change of name for the child if satisfied that the change is in the child's best interests.

Disputed applications – child initiated applications

The Equality Bill provides that a child under 16 may make an application to NCAT seeking an order that the Registrar alter their registered sex. This is at odds with the longstanding principle that persons under the age of 18 lack legal capacity to commence legal proceedings.

Under r 7.14 of the Uniform Civil Procedure Rules 2005, a person under a legal incapacity cannot commence proceedings in any court in NSW except by their tutor. Section 3 of the *Civil Procedure Act 2005* defines a person under legal incapacity as including a child under the age of 18. This reflects the common law position that a person under the age of 18 years old lacks legal capacity, on the basis that a child does not have capacity to conduct and be bound by the outcome of legal proceedings.

Disputed applications – requirement to notify parents

Under the Equality Bill, if a child under 16 applies on their own behalf, NCAT must take reasonable steps to notify the child's parents of the application.

Operational difficulties are likely to arise with the requirement to notify the child's parents. For example, it is not clear to what extent NCAT (or any other dispute resolution forum) would be required to take steps to identify and locate the applicant's parents. Further, consideration needs to be given to whether notification alone is appropriate in circumstances where a child makes an application without parental support, or whether formal service should be required.

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If this function is conferred on NCAT, it would likely require significant additional funding.

Disputed applications – evidentiary requirements

The Equality Bill appears to envision applications made under by a person under 16 pursuant to clause 32C to be straightforward and administrative in nature. The Equality Bill provides that an application submitted by a person under 16 must be accompanied by a statement ‘from a person who has provided counselling to the applicant’ stating that the applicant has received counselling in relation to whether or not the application ought to be made and the implications of the alteration of the record of the applicant’s sex. However, the Bill does not specify that the counsellor needs to reach any particular view in relation to the application. This is unlikely to assist the relevant forum to reach a view about what is in the best interests of the child.

Affidavit and/or expert evidence would likely be required to assist the relevant forum with forming a view as to the best interests of the child. Any requirement for affidavit and/or expert evidence would increase the complexity of proceedings.

Obligation to provide reasons

If the Registrar determines an application by refusing to make an alteration or an entry in the Register, the Equality Bill requires the Registrar to provide reasons for the refusal to the applicant. The BDMR Act contains dispute resolution provisions that provide an avenue to appeal a decision of the Registrar. Under s 56 of the BDMR Act, a person will be able to apply to NCAT for administrative review of a decision to refuse an application. Under s 49 of the *Administrative Decisions Review Act 1997*, an applicant may make a written request for the reasons of a decision by the Registrar.

Effect of alteration of record of person’s sex

The Equality Bill provides that a person whose record of sex is altered, whether by way of registration, acknowledgement or recognition certificate, is taken to be a person of the sex as altered for the purposes of a law of NSW. This is slightly inconsistent with section 32J of the BDMR Act, which provides that “a person the record of whose sex is altered under this Part is, for the purposes of, *but subject to*, any law of New South Wales, a person of the sex as so altered”.

The inclusion of the words ‘but subject to’ in the BDMR Act allows for an express contrary intent to be expressed in other legislation, for example, in provisions that use gendered language directed to the anatomical capacity of a person irrespective of what that person’s registered sex might be.

Access to previous birth certificate

The Equality Bill does not provide a mechanism for an applicant or any other person to request a copy of a birth certificate that shows a person’s previous registered sex. This is inconsistent with section 32F of the BDMR Act, which allows a child of a person whose sex has been altered, or a person prescribed in the Regulation, to apply to the Registrar for a birth certificate that show’s the person’s sex before the record was altered.

There are various reasons why an applicant or other prescribed person may wish to obtain a copy of a previous birth certificate. For example, an applicant may require this information to serve as a bridging document to verify their new identity and update records held by other agencies or organisations.

Amended marriage certificates and implications for other certificates

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The Equality Bill proposes to allow the Registrar to issue an amended marriage certificate that reflects a change of sex if an application is made by both spouses. Under section 34 of the BDMR Act, a marriage is registered by lodging a certificate of marriage issued under the *Marriage Act 1961* (Cth) (**Marriage Act**) with the Registrar. An entry is then made on the Register by reference to that marriage certificate.

The Registrar has no discretion or legal authority to amend a marriage registration in a manner that would conflict with the details contained in a certificate of marriage issued under the Marriage Act. If the Registrar had such a power, this may raise an inconsistency issue under section 109 of the Constitution. This is consistent with the findings of the Court of Appeal in *Attorney General for NSW v FJG* [2023] NSWCA 34.

The implications of a change of registered sex by a parent on the parental descriptor on their child's birth certificate may also require consideration.

Schedule 3: Proposed amendments to the *Children and Young Persons (Care and Protection) Act 1998*

Effect of proposed amendments

The Equality Bill proposes to amend the *Children and Young Persons (Care and Protection) Act 1998* to:

- extend the existing principles to be considered when making a decision about a child or young person's care to include the child's gender identity and variations of sex characteristics.
- insert a new provision which provides that a young person (16-17 years old) may make a decision about their own medical or dental treatment as validly and effectively as an adult, and that a child (under 16 years old) may make a decision about the person's own medical or dental treatment in certain circumstances.
- make clear that approval of special medical treatment by NCAT is not required where a court (such as the Federal Circuit and Family Court) has already approved the treatment.

This Act is administered by the Minister for Families and Communities.

Further consideration is required on the proposal allowing young people to make decisions in relation to health and dental treatment

Currently, a person under 18 years of age may consent to a medical procedure if medical professionals have formed the view that they have sufficient maturity and understanding to give valid consent to the procedure. This is known as the Gillick competence test.

The proposal to enable young people to make their own medical or dental decisions as validly and effectively as adults departs from the common law Gillick competence test and presumes instead that a young person will have capacity to consent to medical or dental treatment by default.

The Equality Bill also creates a new test for children seeking access to medical or dental treatment. A child will be able to consent to medical or dental treatment if the medical practitioner or dentist determines that the child can understand the nature, consequences and risks of the treatment, and that the treatment is in the best interests of the child's health and wellbeing. The requirement to consider the best interests of child the is not part of the current law and, in practice, may be difficult to apply.

It is also unclear how the proposal interacts with other laws relating to the treatment of young people and children. For example, it is not clear whether the proposal would override section 174 of the *Children and Young Persons (Care and Protection) Act*, which provides that life-saving treatment can be carried out on a child or young person without the consent of the child or young person or their parent. Further, it is not clear how the proposal would interact with requirements under the *Family Law Act 1975 (Cth)* and case law before the Family Court of Australia relating to the treatment of children and young people.

If implemented, the proposal would have wide implications for the health services sector. It is not clear why these changes are needed, and the proposal would benefit from further consideration and consultation.

The other proposals do not raise major concerns.

Schedule 4: Proposed amendments to the *Children’s Guardian Act 2019*

Effect of proposed amendments

The Equality Bill proposes amendments to expand the guiding principles of this Act to require account to be taken of the variations of sex characteristics of the child, and if relevant, of the person with parental responsibility.

This amendment will ensure alignment with the *Children and Young Persons (Care and Protection) Act 1998*. The close interaction of these two Acts means it is preferable that they are consistent where possible.

This Act is administered by the Minister for Families and Communities.

Schedule 5: Proposed amendments to the *Court Security Act 2005*

Effect of proposed amendments

The Equality Bill proposes amendments to:

- provide that this Act does not limit the application of the *Anti-Discrimination Act 1977*
- require that when conducting a personal search of an intersex or transgender person, the search must be conducted by a particular officer or class of officer to carry out the search if the intersex or transgender person has expressed such a preference and if such an officer is available.

This Act is administered by the Attorney General.

As drafted, the proposed amendments present operational risks

The proposed amendment relating to the application of the *Anti-Discrimination Act 1977* may conflict with the paramount need to ensure safety and good order of the community or specific location. Any limits or extension of the *Anti-Discrimination Act 1977* to other legislation may benefit from an opportunity to consider the recommendations of the NSW Law Reform Commission review.

The proposed amendments in relation to arrangements for personal search appear intended to ensure transgender and intersex people are treated with dignity and respect. However, the proposed amendments would enable a person being searched to select a specific officer. This is inappropriate from an operational security perspective and may create staff risks. Selecting a ‘class of officer’ may also result in ambiguity, because this term is undefined and could be misused to effectively require a specific officer.

An alternative option which may be considered to meet the spirit of the amendment would be to enable the nomination of an officer of a particular sex or gender where practicable.

Schedule 6: Proposed amendments to the *Crimes Act 1900*

Effect of proposed amendments

The Equality Bill proposes amendments to amend section 93Z to extend the offence for publicly threatening or inciting violence on grounds of race, religion, sexual orientation, gender identity or intersex or HIV/AIDS status to also include sex work as a protected attribute.

This Act is administered by the Attorney General.

NSW Law Reform Commission Review

The offence in section 93Z is currently subject to a NSW Law Reform Commission review, announced in January 2024. Additionally, the amendments made by the *Crimes Amendment (Prosecution of Certain Offences) Act 2023* to this offence are subject to a statutory review, which is due to report in December 2024. Reform of section 93Z may benefit from consideration of the findings of the NSW Law Reform Commission.

Further, the treatment of sex work as a protected attribute for this offence mirrors its treatment as a ground of discrimination under the proposed amendments to the *Anti-Discrimination Act 1977* under Schedule 1 of the Equality Bill. As such, any proposed amendments in relation to protected attributes may benefit from consideration of the recommendations of the NSW Law Reform Commission review.

Schedule 7: Proposed amendments to the *Crimes (Administration of Sentences) Act 1999*

Effect of proposed amendments

The Equality Bill proposes amendments to:

- amend the definition of ‘non invasive sample’ to include:
- the breasts of a female person or person with breasts
 - a person’s chest area for a transgender male person or a person who is neither male nor female
 - provide that this Act does not limit the application of the *Anti-Discrimination Act 1977*
- require that when conducting a personal search of an intersex or transgender person, the search must be conducted by a particular officer or class of officer to carry out the search if the intersex or transgender person has expressed such a preference and if such an officer is available.

This Act is administered by the Minister for Corrections.

As drafted, the proposed amendments present operational risks

The proposed amendments may have unintended consequences and may not be able to be operationalised appropriately as drafted:

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- the definition of breasts or chest area may unintentionally capture cisgender male people (who may, in some cases, be said to have breast tissue) and exclude transgender female people (noting some may not have breasts) and non-binary people.
- the provision relating to the application of the *Anti-Discrimination Act 1977* may conflict with the paramount need to ensure safety and good order of the community or specific location. Any limits or extension of the *Anti-Discrimination Act 1977* may benefit from consideration of the recommendations of the NSW Law Reform Commission review.
- The proposed amendments in relation to arrangements for personal search appear intended to ensure transgender and intersex people are treated with dignity and respect.
- However, the proposed amendments would enable a person being searched to select a specific officer. This is inappropriate from an operational security perspective and may create staff risks. Selecting a 'class of officer' may also result in ambiguity, because this term is undefined and could be misused to effectively require a specific officer. An alternative option which may be considered to meet the spirit of the amendment would be to enable the nomination of an officer of a particular sex or gender where practicable.

Schedule 8: Proposed amendments to the *Crimes (Domestic and Personal Violence) Act 2007*

Effect of proposed amendments

The Equality Bill proposes amendments to:

- insert an example into the definition of 'domestic abuse' that 'threatening to out a person' is a form of sexually coercive conduct
- expand the grounds to make apprehended violence orders to include fear of threats to be outed
- expand protections which apply in cases of harassment on certain protected attributes to also include sex work as a protected attribute
- expand the list of prohibitions or restrictions which can be made as part of apprehended violence orders to include prohibiting the defendant from outing the protected person.

This Act is administered by the Attorney General.

Proposed amendments relating to threatening to 'out a person'

Outing a person is known to be a form of harmful conduct used against members of the LGBTQIA+ community, and it can result in potential safety risks for victims. The Equality Bill seeks to address this by amending the definition of 'domestic abuse' to including 'outing a person' as an example. However, this may unintentionally limit the application of the example. This is because outing a person would only be recognised in the statute as abusive where the victim and the perpetrator have a 'domestic relationship' under section 5 of the *Crimes (Domestic and Personal Violence) Act 2007*.

An alternative which may achieve similar policy outcomes could be to locate this example as a form of intimidation as defined in section 7 of the *Crimes (Domestic and Personal Violence) Act 2007*. For instance, intimidation is defined to include at section 7(1)(a) harassment or molestation of a person, which may more

appropriately reflect the nature of outing a person, rather than sexual coercion as currently proposed. Relevantly, intimidation as defined in the Act:

- is not limited to any relationship types, so it can be committed by those who might not have a domestic relationship with the victim (in the case of outing a person, this might be a co-worker or a friend).
- would still be covered under the definition of ‘domestic abuse’ under section 6A, as section 6A(2)(f) refers to ‘intimidation’ as an example of conduct that could constitute domestic abuse.
- is already an existing ground to make an apprehended violence order, which covers the proposed amendments in Schedules 8[3] and 8[4].

Proposed amendments to extend protections to sex workers

Extending the protections provided to certain protective attributes to also include sex work mirrors its treatment as a ground of discrimination under the proposed amendments to the *Anti-Discrimination Act 1977* under Schedule 1 of the Equality Bill. As such, any proposed amendments in relation to protected attributes may benefit from consideration of the recommendations of the NSW Law Reform Commission review.

Expanding list of prohibitions or restrictions that can be made as part of apprehended violence orders is not necessary

Amendments to the list of prohibitions or restrictions that can be made as part of an apprehended violence order are not necessary, as the relevant provision is an open list and courts have wide ranging discretion. Amendment as proposed by the Equality Bill may have resourcing implications through necessary systems updates.

Schedule 9: Proposed amendments to the *Crimes (Forensic Procedures) Act 2000*

Effect of proposed amendments

The Equality Bill proposes amendments to:

- amend the definition of ‘private parts’ to refer to a new definition of ‘private upper body parts’ that includes:
 - the breasts of a female person or person with breasts
 - a person’s chest area for a transgender male person or a person who is neither male nor female
- provide that this Act does not limit the application of the *Anti-Discrimination Act 1977*
- require that when conducting an intimate forensic procedure of an intersex or transgender person, the procedure must be conducted by a particular officer or class of officer to carry out the search if the intersex or transgender person has expressed such a preference and if such an officer is available.

This Act is administered by the Attorney General.

As drafted, the proposed amendments present operational risks

The proposed amendments may have unintended consequences and may not be able to be operationalised appropriately as drafted:

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- the definition of breasts or chest area may unintentionally capture cisgender male people (who may, in some cases, be said to have breast tissue) and exclude transgender female people (noting some may not have breasts) and non-binary people.
- the provision relating to the application of the *Anti-Discrimination Act 1977* may conflict with the paramount need to ensure safety and good order of the community or specific location. Any limits or extension of the *Anti-Discrimination Act 1977* may benefit from consideration of the recommendations of the NSW Law Reform Commission review.
- The proposed amendments in relation to arrangements for personal search appear intended to ensure transgender and intersex people are treated with dignity and respect. However, the proposed amendments would enable a person being searched to select a specific officer. This is inappropriate from an operational security perspective and may create staff risks. Selecting a ‘class of officer’ may also result in ambiguity, because this term is undefined and could be misused to effectively require a specific officer. An alternative option which may be considered to meet the spirit of the amendment would be to enable the nomination of an officer of a particular sex or gender where practicable.

Schedule 10: Proposed amendments to the *Crimes (Sentencing Procedure) Act 1999*

Effect of proposed amendments

The Equality Bill proposes amendments to clarify that aggravating factors in sentencing crimes motivated by hatred or prejudice for a particular class of people include hatred or prejudice for people who are trans, gender diverse or intersex.

This Act is administered by the Attorney General.

These factors are likely already aggravating factors under the Act

It is likely that motivation due prejudice towards trans, gender diverse or intersex people would already be covered as an aggravating factor under the existing provision, so the amendment would clarify rather than alter existing settings.

Section 21A(2)(h) of this Act contains a non-exhaustive list, providing an aggravating factor for sentencing if “the offence was motivated by hatred for or prejudice against a group of people to which the offender believed the victim belonged (such as people of a particular religion, racial or ethnic origin, language, sexual orientation or age, or having a particular disability).”

The section has been interpreted to include other specific groups including Aboriginal people (*R v KZ* [2022] NSWDC 643) (racially motivated); Shiite Muslims (*Regina v Amir Ibrahim El Mostafa* [2007] NSWDC 219) (religious and political opinions); and women (*R v I.D. & O. N.* [2007] NSWDC 51).

In *R v Valencia Valencia* (No 3) [2023] NSWSC 780, it was clear that the court accepted that section 21A(2)(h) could apply to hatred towards transgender people (but the court refused to make this finding because Crown could not establish this beyond reasonable doubt).

Schedule 11: Proposed amendments to the *Drugs Misuse and Trafficking Act 1985*

Effect of proposed amendments

The Equality Bill proposes an amendment to replace references to 'HIV infection' with 'HIV'. This amendment is a minor update to modernise language. It does not raise concerns.

This Act is administered by the Attorney General, Minister for Police and Counter-terrorism, Minister for Health, Minister for Regional Health and Minister for Mental Health.

Schedules 12 and 13: Proposed amendments to the *Government Sector Employment Act 2013* and Government Sector Employment General Rules

Effect of proposed amendments

The Equality Bill proposes amendments to expand on diversity requirements for the NSW public service.

The instruments are administered by the Premier.

Proposed amendments are not legally necessary

With regards to Schedule 12, the proposed amendments may not be legally necessary as the definition of workforce diversity is already expressed to be non-exhaustive, and the Public Service Commissioner already has a power to give a direction to the head of a government sector agency in relation to a specific matter in relation to employees of that agency. The Public Service Commission (**PSC**) has commenced collecting data about sexual orientation and variations of sex characteristics, including recently through the People Matter Employment Survey and the Workforce Profile. These data collections will continue to be built upon and over time will be able to provide an extensive picture of the public sector workforce diversity, and provide evidence for further Government action, if required.

With regards to Schedule 13, the government sector employment rules, including rules dealing with workforce diversity, are made by the Commissioner and not Parliament (see definition of "government sector rules" in s 3(1), see also section 12 and 63(3) of the *Government Sector Employment Act 2013*). In any event, the proposed amendment to the rules is not legally necessary, as the definition of eligible person provides that eligible person includes a person who belongs to a group of persons designated by the Commissioner as being disadvantaged in employment. The Commissioner has the power to amend or repeal a government sector employment rule by a further rule.

It is important that future extension of the definition of eligible person be supported by strong evidence as to disadvantage in accessing employment, to ensure agencies do not breach anti-discrimination legislation. The PSC continues to collect relevant data and intends to undertake further enhancements of the PMES survey to align with proposed new ABS standards in relation to gender identity, sexual orientation and variations of sexual characteristics.

Schedule 14: Proposed amendments to the *Interpretation Act 1987*

Effect of proposed amendments

The Equality Bill proposes amendments to the *Interpretation Act 1987* to provide that:

- references to a gender include all genders
- references to a person do not exclude a reference to a corporation
- references to a person does not exclude a reference to an individual.

This Act is administered by the Premier.

Proposed amendments require careful consideration and may have unintended consequences

The stated intention of the amendments is to “include interim measures to expand interpretation principles for gendered language under the Interpretation Act 1987 to ensure references to relationships and body attributes or capacities through gendered terms are inclusive of all relevant relationships and people, regardless of gender.”¹⁰

However, it is not clear whether there is a particular concern regarding the interpretation of NSW legislation which requires addressing. Amendments to the Interpretation Act would have implications across the statute book that would benefit from careful consideration, particularly in relation to transitional provisions.

Schedule 15: Proposed amendments to the *Law Enforcement (Powers and Responsibility) Act 2002*

Effect of proposed amendments

The Equality Bill proposes amendments to:

- inserts a new definition of ‘private upper body parts’ that includes:
 - the breasts of a female person or person with breasts
 - a person’s chest area for a transgender male person or a person who is neither male nor female
- provide that this Act does not limit the application of the *Anti-Discrimination Act 1977*
- require that when conducting a personal search of an intersex or transgender person, the search must be conducted by a class of officer to carry out the search if the intersex or transgender person has expressed such a preference and if such an officer is available.

This Act is administered by the Attorney General and the Minister for Police and Counter-terrorism.

As drafted, the proposed amendments present operational risks

The proposed amendments may have unintended consequences and may not be able to be operationalised appropriately as drafted:

¹⁰ NSW Legislative Assembly Hansard, 24 August 2023, Second Reading Speech by Alex Greenwich MP (<https://www.parliament.nsw.gov.au/Hansard/Pages/HansardResult.aspx#/docid/'HANSARD-1323879322-134163'>)

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- the definition of breasts or chest area may unintentionally capture cisgender male people (who may, in some cases, be said to have breast tissue) and exclude transgender female people (noting some may not have breasts) and non-binary people.
- the provision relating to the application of the *Anti-Discrimination Act 1977* may conflict with the paramount need to ensure safety and good order of the community or specific location. Any limits or extension of the *Anti-Discrimination Act 1977* may benefit from consideration of the recommendations of the NSW Law Reform Commission review..
- The proposed amendments in relation to arrangements for personal search appear intended to ensure transgender and intersex people are treated with dignity and respect. However, the proposed amendments would enable a person being searched to select a specific officer. This is inappropriate from an operational security perspective and may create staff risks. Selecting a 'class of officer' may also result in ambiguity, because this term is undefined and could be misused to effectively require a specific officer. An alternative option which may be considered to meet the spirit of the amendment would be to enable the nomination of an officer of a particular sex or gender where practicable.

Schedule 16: Proposed amendments to the *Mental Health Act 2007*

Effect of proposed amendments

The Equality Bill proposes amendments to clarify that the expression of, or a refusal or failure to express, a particular gender identity or gender expression may not indicate mental illness or disorder. This proposal does not raise concerns.

This Act is administered by the Minister for Health, the Minister for Regional Health and the Minister for Mental Health.

Schedule 17: Proposed amendments to the *Sheriff Act 2005*

Effect of proposed amendments

The Equality Bill proposes amendments to:

- provide that this Act does not limit the application of the *Anti-Discrimination Act 1977*
- require that when conducting a personal search of an intersex or transgender person, the search must be conducted by a particular officer or class of officer to carry out the search if the intersex or transgender person has expressed such a preference and if such an officer is available.

This Act is administered by the Attorney General.

As drafted, the proposed amendments present operational risks

The proposed amendments may have unintended consequences and may not be able to be operationalised appropriately as drafted:

- the provision relating to the application of the *Anti-Discrimination Act 1977* may conflict with the paramount need to ensure safety and good order of the community or specific location. Any limits or

extension of the *Anti-Discrimination Act 1977* may benefit from consideration of the recommendations of the NSW Law Reform Commission review..

- The proposed amendments in relation to arrangements for personal search appear intended to ensure transgender and intersex people are treated with dignity and respect. However, the proposed amendments would enable a person being searched to select a specific officer. This is inappropriate from an operational security perspective and may create staff risks. Selecting a 'class of officer' may also result in ambiguity, because this term is undefined and could be misused to effectively require a specific officer. An alternative option which may be considered to meet the spirit of the amendment would be to enable the nomination of an officer of a particular sex or gender where practicable.

Schedule 18: Proposed amendments to the *Summary Offences Act 1988*

Effect of proposed amendments

The Equality Bill proposes amendments to repeal Part 3 of the *Summary Offences Act 1988*, which sets out offences relating to prostitution:

- s. 15 – living on earnings of prostitution
- s. 15A – causing or inducing prostitution
- s. 16 – prostitution or soliciting in massage parlours etc
- s. 17 – allowing premises to be used for prostitution
- s. 18 – advertising premises used for prostitution
- s. 18A – advertising for prostitutes
- s. 19 – soliciting clients by prostitutes
- s. 19A – soliciting clients by prostitutes
- s. 20 – public acts of prostitution

Sections 14 and 21 in Part 3 provide for relevant definitions and procedures for granting search warrants in relation to the ss 16 and 17 offences respectively.

This Act is administered by the Attorney General.

Proposed amendments may carry some risks of unintended consequences

Given sex work has been decriminalised, repealing these offences may be an appropriate step towards recognising sex work as a legitimate commercial enterprise and treating sex work consistently with other forms of employment. However, further consideration would be warranted to determine whether there may be any unintended consequences or operational risks, including whether any of the offences may serve legitimate purposes, such as the protection of sex workers from exploitation. For example, the offence under section 15A of this Act criminalises the act of causing or inducing another person to commit an act of prostitution. This offence is directed to the exploitation or coercion of people into sex work, and not the participation in sex work per se.

Schedule 19: Proposed amendments to the *Surrogacy Act 2019*

Effect of proposed amendments

The Equality Bill proposes amendments to:

- clarify that a birth mother has the same rights to manage her pregnancy and birth as any other pregnant woman
- limit the application of the offence of entering into a commercial surrogacy arrangement to arrangements in NSW, so NSW residents entering into international commercial surrogacy arrangements would no longer be committing an offence under the Act
- change the test for allowing a Court to make a parentage order if non-mandatory preconditions have not been met from ‘exceptional circumstances’ to ‘it is in the best interests of the child to make the parentage order’
- enable courts to make parentage orders if the child were born of a commercial surrogacy arrangement
- enable courts to make a parentage order for a person who is over 18

This Act is administered by the Attorney General.

Election Commitment to review the *Surrogacy Act* and *Status of Children Act 1996*

The incoming NSW Labor Government made an election commitment noting that it did not support commercial surrogacy but would review the *Surrogacy Act 2010* and the *Status of Children Act 1996*. This review process may be the most appropriate avenue to consider amendments to the *Surrogacy Act*, because of the complexity of the policy and operational landscape.

The prevention of commercial surrogacy is one of the objectives of the Act

The prevention of commercial surrogacy is one of the policy objectives of the *Surrogacy Act*.

The 2016 *Surrogacy Matters Report*, published by the Commonwealth Parliament’s Standing Committee on Social Policy and Legal Affairs, noted:

‘First and foremost, the Committee recommends that the practice of commercial surrogacy remain illegal in Australia. This recommendation was informed by the view that, even with the best of regulatory intentions, there is still significant potential for the exploitation of surrogates and children to occur.’¹¹

The 2018 NSW Statutory Review of the *Surrogacy Act* stated that the policy objective of preventing commercial surrogacy aims to ‘prevent exploitation, preserve the dignity of children and women and prevent the commodification of women and children.’¹² The review concluded that the objective of the *Surrogacy Act* to prevent commercial surrogacy remained valid.

Currently, no other state or territory allows courts to make a parentage order in respect of children born through commercial surrogacy arrangements.¹³ This is consistent with the Principles for Australian Surrogacy

¹¹ *Surrogacy Matters: inquiry into the regulatory and legislative aspects of international and domestic surrogacy arrangement*, pg. v, available at: https://www.apf.gov.au/-/media/02_Parliamentary_Business/24_Committees/243_Reps_Committees/SPLA/Surrogacy_Inquiry/FullReport.pdf

¹² *Statutory Review of the Surrogacy Act 2010*, pg. 8, available at: <https://www.parliament.nsw.gov.au/tp/files/73919/Review%20of%20Surrogacy%20Act%202010.pdf>

¹³ On 31 October 2023, the Parentage (Surrogacy) Amendment Bill 2023 was tabled in the ACT Parliament. Among other amendments, under special circumstances the Bill will allow the Supreme Court to grant parentage orders for children born through commercial surrogacy, if a child is facing a pressing disadvantage. The Bill has yet to be passed.

Laws, endorsed in 2009 by the former Standing Committee of the Attorneys-General and Health and Disability Services Ministers.¹⁴

All jurisdictions provide that it is a criminal offence to participate in or undertake commercial surrogacy (noting there are no known cases where penalties have been applied). However, approaches vary across jurisdictions as to whether international commercial surrogacy is expressly a criminal offence. Victoria, WA, SA, Tasmania and NT, do not expressly extend commercial surrogacy offences to conduct engaged in overseas.

Surrogacy raises complex ethical and legal questions and affects a wide range of stakeholders

Surrogacy is of interest to a wide range of stakeholders including legal stakeholders, human rights experts, modern slavery and trafficking experts, the medical profession, religious organisations, LGBTIQ+ groups, women and children groups, surrogacy peak bodies as well as individuals who have been parties to surrogacy arrangements or wish to conceive through surrogacy.

It is a contentious area and stakeholders hold divergent views. Even groups that are generally supportive of surrogacy may be critical of the approach to remove the prohibition on international commercial surrogacy and continue to prohibit domestic commercial surrogacy.

There will be a strong expectation that the Government undertake careful and considered reform informed by consultation, particularly in light of the election commitments made and previous review processes.

Surrogacy is a highly specialised area and expert advice would be required on how any amendments should be designed to ensure protection of birth mothers and children and practicability for intended parents.

There are implications for Commonwealth Government agencies, particularly as an increase in international commercial surrogacy may result in increased demand on visa and passport applications, on consular assistance overseas, and because there may be implications for obligations under international treaties.

All pregnant women have the right to manage their own pregnancy and birth (including surrogate mothers)

All pregnant women currently have the right to manage their own pregnancy and birth at law (subject to the woman having capacity). However, the Equality Bill introduces amendments to the Surrogacy Act that expressly provides that ‘a birth mother has the same rights to manage her pregnancy and birth as any other pregnant woman’.

This proposal suggests that, but for the amendment, a birth mother involved in a surrogacy arrangement does not have this right, which is not correct. The proposal may also give the impression that, but for the amendment, a surrogacy arrangement has effect in relation to a birth mother’s ability to make decisions in relation to the pregnancy and birth.

Schedule 20: Proposed amendments to the *Workers Compensation Act 1987*

Effect of proposed amendments

The Equality Bill proposes amendments to updates language in the Act to replace terms such as “HIV infection” and “suffering with AIDS” to “living with HIV/AIDS”.

¹⁴ Principle A11. The Principles are set out in full in Appendix 1 to the Statutory Review of the *Surrogacy Act 2010*, cited at note 11 above.

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This Act is administered by the Minister for Better Regulation and Fair Trading and the Minister for Work Health and Safety.

As drafted, the proposed amendment may have unintended consequences

The proposal to update the Act to replace terms such as “HIV infection” and “suffering with AIDS” to “living with HIV/AIDS” does not raise any concerns.

However, Schedule 20[2] as drafted would omit a provision currently in the Act (section 67A(2)). Section 67A(2) currently provides that “[s]ection 68 does not apply to a loss that is HIV infection or AIDS”. Section 68 was repealed by the *Workers Compensation Legislation Amendment Act 2001*.

Nevertheless, section 67A(2) may have a substantive impact on historical claims. Further consideration of this is required.

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