

**Submission
No 52**

EQUALITY LEGISLATION AMENDMENT (LGBTIQA+) BILL 2023

Organisation: Institute for Civil Society

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**Submission to the NSW Legislative Assembly
Committee on Community Services inquiry into the
Equality Legislation Amendment (LGBTIQA+) Bill 2023**

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Contact:

Mark Sneddon

Executive Director

Institute for Civil Society



Who we Are

The Institute for Civil Society (ICS) is a social policy think tank. ICS seeks to:

- Promote recognition and respect for the institutions of civil society that exist between individuals and the government. Included in this space are clubs, schools, religious organisations, charities and NGOs.
- Uphold traditional rights and liberties, including the freedoms of association, expression, conscience and religion.
- Promote a sensible and civil discussion about how to balance competing rights and freedoms in Australian society.

Mark Sneddon is the Executive Director of ICS. He has been an Associate Professor of Law at the University of Melbourne, a partner in Clayton Utz, Crown Counsel Advisings to the Attorney-General and the Office of the Premier of Victoria. He currently leads the ICS and his own law firm, where he advises a range of clients. This submission has also been contributed to by Dr Sharon Rodrick, a lawyer and research associate at ICS.

Parts of the Bill Addressed in this Submission

The *Equality Legislation Amendment (LGBTIQA+) Bill 2023 (Bill)* is a complex and ambitious Bill, which seeks to embed gender ideology in multiple ways throughout the New South Wales statute book. The Bill's provisions are complicated and interlinked. Because of the interlocking way the different parts of this bill operate, there is no safe way of splitting this Bill, or passing parts of it, without risking significant unintended consequences. This is shown in part by our analysis of some of the changes in Schedule 2.

We adopt the submission of Freedom of Faith in relation to the confusion and incoherence about sexuality and gender identity in the Bill. We make some additional submissions about the problems in Schedule 2 on Sex Self ID.

The Committee should reject the *Schedule 1 amendments to the Anti-Discrimination Act 1977* because the government has referred a full review of that Act to the NSWLRC, which is a better forum for assessing changes to the Act from a range of perspectives, including that of Mr Greenwich.

The Committee should reject the *Schedule 2 amendments to the Births, Deaths and Marriages Registration Act 1995*, including those relating to "Sex Self ID" because they are incoherent and will produce great confusion and difficulty for many people and organisations in the administration of the law.

Schedule 1 amendments to the Anti-Discrimination Act 1977

The proposed amendments are intended to advance Mr Greenwich and Equality Australia's perspective of what is appropriate law reform for people who identify as LGBTIQ+. Given that the government has referred a full review of the Act to the NSW LRC where all perspectives can be considered and balanced, it is not appropriate for the Parliament to advance the perspective of one sector before the NSW LRC has reported.

In addition, some of the proposed amendments in Schedule 1 are incoherent, inconsistent or illogical. As Freedom for Faith has pointed out in its submission the definitions of transgender and sexuality are incoherent, inconsistent or illogical.

"18. Some of the proposed amendments are incoherent, inconsistent or illogical. For example the proposed amendments to section 38A are shown in markup below.

38A Interpretation

A reference in this Part to a person being transgender or a transgender person is a reference to a person, ~~whether or not the person is a recognised transgender person—~~

(a) who identifies as a member of ~~the opposite~~ **another** sex by living, or seeking to live, as a member of ~~the opposite~~ **another** sex, or

(b) who has identified as a member of ~~the opposite~~ **another** sex by living as a member of ~~the opposite~~ **another** sex, or

(c) ~~who, being of indeterminate sex, identifies as a member of a particular sex by living as a member of that sex, who identifies as a particular sex that is not exclusively male or female by living as a member of that sex,~~

and includes a reference to the person being thought of as a transgender person, whether the person is, or was, in fact a transgender person.

19. The phrase "another sex" is incoherent – "another" with reference to what?

This definition is further problematised by the proposed self sex id legislation in Schedule 2. If a person legally changes their "sex descriptor" on their birth certificate, then arguably they no longer fall within section 38A, because it is not "another" sex anymore. It is also inconsistent with definitions elsewhere – see for example Schedule 5[2], which inserts a new section that provides that references to the 'same sex' and 'different sex' means a person of the same or different sex to the sex with which a transgender person identifies.

20. The new (c) is unclear: What exactly is a "a particular sex that is not exclusively male or female"? Furthermore, the new definition no longer applies to an intersex person (i.e., someone who is of indeterminate sex, but who chooses to live as (say) male) – presumably because the new Part 3B, which covers discrimination on ground of variations of sex characteristics. But instead of simply removing (c), it has been replaced for a protection for someone who is *not* intersex but who identifies as intersex and lives as intersex. Does this occur, and if so, with sufficient frequency to warrant legislative inclusion?

Schedule 2 amendments to the Births, Deaths and Marriages Registration Act 1995

The Legal Effect of Changing a Birth Certificate or Other Identity Document Under the Bill will create major issues in NSW law which have not been considered or mapped by the Bill's proponents

We are opposed in general to the proposition that a person can change a historically accurate record of their sex on their birth certificate by a statutory declaration to reflect their internal perception or preference of the sex (or no sex) they wish to identify as or present as. It is a state-facilitated fiction – a rewriting of historical and current fact.

There may be a case for permitting such changes where a person has shown a serious and sustained commitment to changing their presentation as a member of one sex, through sex reassignment treatment and surgery over a period of time, provided the historical birth certificate information is retained in the Registry and is available. That is the current law in NSW and in England.

But if the Committee was minded to permit a change to the sex descriptor on birth certificates (whether or not there is a precondition of sex reassignment surgery), the law should not deem the changed sex descriptor to be effective for the purposes of any law of NSW as in the Bill's proposed new section 32H.

The law of NSW is based on a sexually dimorphic society of females and males. To deem some biological men to be women and some biological women to be men for the purposes of any law of NSW will cause confusion and havoc, including permitting the intrusion of biological men into women's only spaces at the risk of safety and privacy of, and fairness to biological women.

To go further and allow new "sex descriptors" which are not descriptors of sex at all (e.g. genderqueer, agender) to be effective in law for all purposes is mind-boggling.

Section 32I of the current BDMR Act states

(1) 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 Equality Bill would replace this with a changed s.32H(1) as follows:

(1) A person whose record of sex is altered under this part is, for the purposes of a law of this State, a person of the sex stated in the altered record.

The removal of the words "but subject to" (any law of NSW) means that all existing laws of NSW must be applied on the basis that a person has the sex stated in their altered birth record.

This will lead to a wide range of unmapped and unintended consequences. The onus is on the proponents of this Bill to explain what effect it will have on the law in NSW. They have not done so. Some examples follow.

(1) Placement of prisoners by sex

The *Crimes (Administration of Sentences) Regulation 2014* provides:

34 Separation of sexes

Female inmates must be kept separate from male inmates except in the circumstances and under the supervision that the Commissioner determines.

If the Bill is enacted, a biological male inmate who has an amended birth certificate showing a sex descriptor of female would have to be treated by the Commissioner as a female inmate and kept separate from male inmates (presumably by being housed with female inmates). If the Commissioner used the discretion to do otherwise, that would seem to amount to sex discrimination under the ADA (since the inmate is legally a female under the Bill but not being treated in the same way as other female inmates).

(2) Workplace Health and Safety

Changing the sex descriptor on a person's birth certificate does not change the person's biology. Biological women and men have different anatomies and different tolerances to exposure to workplace toxins, hazards and stresses.

A specific example is that the *Work Health and Safety Regulation 2017* makes it an offence for a person conducting a business or undertaking at a workplace to not arrange for regular biological monitoring of each worker who carries out lead risk work and to permit them to engage in such work when blood lead levels exceed a prescribed value. The permissible blood lead levels of a worker who is a "female of reproductive capacity" is a quarter of that of other workers and their blood lead levels must be monitored more frequently. In regulation 5, a "female of reproductive capacity" is defined to mean a female other than a female who provides information stating that she is not of reproductive capacity.

If a biological female worker identifies as a man and has an amended birth certificate with a sex descriptor as male, then under the Bill they are deemed to be male for the purposes of NSW law and could not legally be a female of reproductive capacity nor, because they are not female, relevantly provide information stating that they are not of reproductive capacity. It appears that a person conducting a business involving lead risk work could not be held legally responsible for treating the person as male for the purposes of monitoring and measuring blood lead levels.

More generally, under section 19 of the *Work Health and Safety Act 2011* a person conducting a business or undertaking must ensure, so far as is reasonably practicable,

the health and safety of workers engaged, or caused to be engaged by the person. Under the Bill the person conducting the business would be entitled in law to treat a biological woman (or man) with an amended birth certificate showing the opposite sex descriptor to their biology, as if they were a person of the sex in that sex descriptor and to allocate work and manage work health and safety risks as if they were a person of the sex in that sex descriptor even if that put them at greater risk of a work and safety injury.

(3) Confusion under the Anti-Discrimination Act e.g. Women's Sport and Women Only Jobs

Under the Anti-Discrimination Act, it is unlawful to discriminate against a person on the basis of their sex. Assuming that Schedule 1 of the Bill (Anti-Discrimination changes) was not enacted but Schedule 2 (Sex Self-ID) was enacted, if a biological male with an amended birth certificate with a sex descriptor of female sought access to a woman's sport team or women's refuge, would it be unlawful to refuse the person access?

Women's Sport – Section 38 of the Anti-Discrimination Act provides that it is not unlawful to exclude persons of the one sex from participation in any sporting activity not being the coaching of persons engaged in any sporting activity, the administration of any sporting activity or any prescribed sporting activity. If the biological male with the amended birth certificate applied to participate in a women's sporting competition, section 38 would not permit the exclusion of that person on the grounds that they were male. Under the Bill, in law they are female and it would not be possible to use section 38 to exclude them from a female sport.

Women only jobs. The President of AD NSW has granted many exemptions from the AD Act to enable companies to hire or promote only women for various roles e.g. BlueScope Steel can recruit 120 female only operator and trade roles and Ernst and Young can recruit and promote to achieve 50% women at Senior Manager 4 level and 30% at Partner level. A biological male with an amended birth certificate with a sex descriptor of female could be lawfully included in hiring and promotion of females under these exemptions.

An alternative approach

A much better approach to the legal effect of birth certificates than the Bill's is provide by the New Zealand Births, Deaths, Marriages, and Relationships Registration Act section 79(2) which provides as follows.

79 Certificates as evidence

(2) Any individual, private sector agency, or public sector agency authorised or required to ascertain an individual's sex or gender for a particular purpose may take into account either or both of the following:

(a) the information contained in a certificate issued under this Act:

(b) any other relevant information.

This provision allows a person to take into account the information contained in a birth certificate but not be legally bound to follow it. The person may also take account of any other relevant information. This is a much more sensible position than the deeming rule in proposed s.32H(1) under the Bill.

The NZ Department of Internal Affairs describes the effect of s.79(2) as follows (see <https://www.dia.govt.nz/bdmreview---Frequently-asked-questions>).

The new legislation clarifies how birth certificates can be used as evidence of sex or gender. Where service providers need to determine someone's sex or gender, other factors can be considered over and above the registered sex listed on a birth certificate. This reflects the fact that birth certificates are not intended to be considered evidence of a person's identity (usually birth certificates are provided with other documents such as a driver licence or passports to prove identity).

Mark Sneddon

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