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RBDM Legislative Review Team
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Dear RBDM Legislative Review Team

Thank you for providing the Anti-Discrimination Commission Queensland with the opportunity to provide its initial views on issues we would like considered as part of the *Births, Deaths and Marriages Registration Act 2003*. We note that the aim of the review is to modernise the Act, simplify its operation and ensure it is adequately meeting the community's requirements for the registration of life events.

The issues that the Commission considers should be examined as part of the review follow.

1. Do the current provisions in the *Births, Deaths and Marriages Registration Act* adequately meet the community's requirements for recognising the reassignment of a person's sex?

In 2003 the Queensland Parliament passed the *Births Deaths and Marriages Act* which contained a number of provisions of significant importance to persons who are transgender or intersex. These sections (ss22 to 24) allowed for the reassignment of a person's sex after sexual reassignment surgery to be noted on a person's entry in the register of births in certain circumstances. These provisions have had a significant legal consequence in assisting a number of individuals born in Queensland to achieve formal recognition of their gender status. This in turn has had an important impact in reducing the number of occasions where stigma and discrimination can occur due to the lack of formal recognition of an individual's gender identity.

Sex and /or gender identity is an important part of a person's personal identity. Sex and/or gender identity defines a person's sense of self and positions them in a social context. Every person has the right for their sex and/or gender identity to be recognised and respected. A decade has elapsed since the passing of the current BDM Act, and society's attitudes and understandings of sex and/or gender have evolved in that time.

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In 2009 the Australian Human Rights Commission (the AHRC) concluded its sex and gender diversity project which focused on the legal recognition of sex in documents and government records. In conducting this project the AHRC consulted extensively with the community through calling for responses to an issues paper; holding consultations and public meetings; and facilitating responses and comments via an online mechanism. People who are sex and gender diverse from Queensland contributed to the consultations. In this submission, the Anti-Discrimination Commission has drawn on and extensively reproduced in verbatim the text and findings from the Sex Files concluding paper, as it is the most contemporary and well researched body of work available on the identification system and its impacts on sex and gender diverse people.¹

The Sex files project report highlights several problems with the identification system and the existing process for the recognition of sex under relevant legislation across Australia, including the current Queensland *Births Deaths and Marriages Act*. In particular, the existing process for the recognition of persons who have reassigned their sex excludes:

- married people
- people who have not undergone genital surgery or other sex affirmation surgery.

The existing process is also generally more difficult for:

- people who cannot provide medical evidence
- children and young people under 18
- people who wish to be identified as something other than male or female.

The exclusion of married people

Married people who are sex and gender diverse face difficulties in having their sex recognised and having their marriage recognised.

Under the existing Queensland and other state and territory legislation a married person cannot apply to have their sex changed on their birth certificate even if that person meets all other criteria. This means that a married person will not be able to have a birth certificate that represents their true sex identity, unless they first cease to be married, such as by obtaining a divorce.

It appears that the rationale for the discriminatory treatment under the Queensland and other relevant state and territory legislation is to avoid a potential conflict with the requirement under the *Marriage Act 1961* (Cth) (Marriage Act) that a marriage must be between a man and a woman.

¹ Australian Human Rights Commission, Sex Files: the legal recognition: Concluding paper of the sex and gender diversity project (2009) <https://www.humanrights.gov.au/sex-files-legal-recognition-concluding-paper-sex-and-gender-2009#Heading162>

According to the apparent logic of this position, if a married person surgically changed their sex and then amended the sex on their birth certificate, it would result in a form of same-sex marriage 'on paper'. The AHRC, in the Sex Files report, did not express a view on whether this interpretation of the *Marriage Act* is correct, and noted that the issue has not been squarely considered by the Australian courts.

Assuming this interpretation of the *Marriage Act* is correct, the current state of the law has a significant discriminatory impact on the lives of those people it affects. They have difficulties in having their sex recognised in documentation and/or accessing government benefits.

It may be that legislative reform is required at the Commonwealth level to address this problem.

The exclusion of people who have not undergone the required sex affirmation surgery or genital surgery

Under the existing Queensland legislation, a person who has not undergone sex affirmation surgery, including genital surgery, cannot apply to have their birth certificate changed to note their sex identity.

The Sex Files Report states that the genital surgery that is usually required for a person to be legally recognised as female is removal of penis and testes, usually by medical procedures known as a penectomy and orchidectomy. Some women also choose to have vagina and clitoris surgically created through procedures known as vaginoplasty and clitoroplasty.

The genital surgery that is usually required for a person to be legally recognised as male is removal of the female reproductive organs through a hysterectomy procedure. Some men may choose to have a penis created through a procedure known as a phalloplasty.

The Sex File Report observes the focus on genital surgery for the legal recognition of sex results in a range of problems:

- genital surgery is not covered by Medicare and some people cannot afford to undergo surgery
- the shape and functionality of genitals are only one aspect of how people identify and present as a particular sex
- genital surgery is only one aspect of sex affirmation treatment and opinion varies in relation to how, when and if this treatment should be provided to a particular individual
- any surgery involves risks
- the citizenship and identity process is inappropriately medicalised as these processes are about confirming a person's place in the community not their medical history

- the general community makes an assessment about a person's sex based on how that person presents not by questioning a person's genital makeup
- where a person who presents as one sex is treated or classified as a person of another sex because of their genitals, this can place that person at risk of discrimination and violence.

There is a good argument that surgery should be regarded as a matter of individual choice for the person concerned and not a prerequisite for the legal recognition of a person's sex identity. Consideration could be given to broadening the *Births Deaths and Marriages Act 2003* so that surgery is not the only criterion for a change in legal sex.

For example the legislation could be amended to allow for a change in legal sex to be sought by a person who:

- has undergone or is undergoing 'sex affirmation treatment', and
- seeks to be permanently recognised as another sex.

'Sex affirmation treatment' under such reforms would mean a surgical procedure or medical treatment to confirm the sexual identity of a person. Psychological counselling concerning sex or gender identity should satisfy the criteria of sex affirmation. Sex affirmation surgery or hormonal therapy should also satisfy the criteria.

It is noted that in the United Kingdom and Spain a person who is undergoing or has undergone medical treatment, such as gender related counselling, may apply for a change in legal sex.

The exclusion of people who cannot provide medical evidence

The evidence usually required to change a birth certificate is a statutory declaration from each of two doctors or medical practitioners registered under Australian law, verifying the person has undergone sex affirmation surgery.

People who have undergone surgery in the past or overseas usually incur additional medical expenses in order to verify their surgical status. People may be precluded from obtaining the medical evidence because of the cost involved.

The AHRC in the Sex Files Report came to a view that the medical evidence currently required to support a person's change in legal sex is unnecessarily demanding. Consideration could be given to whether the relevant evidentiary requirements could be relaxed to make the system more accessible and make greater allowance for a person to self-identify their sex.

An option is the legislation could be reformed to outline what documents are needed to support the request for a change in legal sex. The following documents may be sufficient to support an application for a change in legal sex:

- one statutory declaration by a doctor or medical practitioner outlining the sex affirmation treatment the person has received or is receiving or confirming the person's sex identity, and
- one statutory declaration from the person requesting the recognition of sex declaring that they identify as a particular sex and intend to do so permanently. In the case of a child (although possibly depending on the age of the child), the legislation could stipulate that the parent(s) or guardian must make a statutory declaration in relation to the child's desire to identify as a particular sex.

If a person is unable to present medical evidence there could be discretion for the decision-maker to consider any other relevant information concerning the sex identity of a person. For example, a statutory declaration from a community leader confirming the sex identity of the person could be submitted as relevant information.

Problems faced by children and young people under 18

The most important identity documents for children and young people are birth certificates, passports, driver's licences and proof of age cards. Under current practices, children and young people only rarely undergo sex affirmation surgery before they are 18. However, greater frequency of diagnosis and awareness of sex and gender diversity means that more children and young people are expressing a sexual identity that is different to that noted on their birth certificate. It is not uncommon for children and young people who are sex and gender diverse to undergo counselling or begin hormonal treatment before they are 18. Children and young people may also outwardly present as a particular sex despite the lack of surgery.

Under the current law, people wishing to amend the sex on their birth certificate must establish that they have undergone sex affirmation or genital surgery. Given that children and young people rarely undergo such procedures until they become adults, they are typically precluded from amending the sex on their documents and records.

Many of the difficulties faced by children and young people in gaining appropriate documentation are because they have not had surgery. Whilst some of those children and young people may have surgery in the future, some will not. The special needs of children and young people who wish to amend their documents and records should be considered.

The effect of any reforms to the law on children and young people must be taken into account from their particular perspective and situation. The AHRC in the Sex Files report suggested if the definition of a 'sex affirmation treatment' is broadened as discussed above, it will ensure that children and young people are adequately covered. In addition, requiring a statutory declaration of support from the child or young person's parent or guardian would provide an additional safeguard.

The exclusion of people who wish to be identified as something other than male or female

Australia's identification system largely operates on a binary system where the only options available for sex identity are male or female. Some people who cannot or do not identify as either male or female may wish to have identity documentation that does not note their identity as either male or female.

There is a case that persons over the age of 18 years should be able to choose to be noted as something other than male or female. This would require that the definition of sex in relevant legislation, policies, guidelines and forms to include male, female or unspecified.

Operational and administrative problems with the current system

Despite legal recognition of a person's sex identity, sometimes information can be revealed about the past identity and that the person had 'changed' sex. Revealing information about a person's past identity in relation to sex can put that person at risk of discrimination and violence.

If a person's sex identity has been legally recognised, then this should be the only identity that is available to individuals and agencies that seek information. To reveal past information about a previous identity undermines the point of legal recognition. While there may be limited instances when a person's previous sex identity is relevant to the purpose of the inquiry or document, in most cases there is no reason to reveal a person's previous sex identity.

Further problems may be caused when a government agency lacks any coherent policies and practices concerning sex and gender diversity. If there is no centralised system or agency to assist people who are sex and gender diverse to change their sex, gender or name in documents and records, different agencies have different processes and criteria for changing records and there is a lack of publicly available information about these processes and criteria. Information on the process and criteria for the legal recognition of sex should be easily accessible and user-friendly.

The AHRC in the Sex files report recommended that Government agencies ought to have clear information on websites allowing an individual to be aware of all the requirements to obtain legal recognition of their sex. A reduction in the complexities and inconsistencies of the system is highly desirable.

2. Should the Births, Deaths and Marriages Registration Act contain provisions to allow for the recognition of the reassignment of a person's sex for individuals who reside in Queensland but were born elsewhere?

Particular advocates from Queensland's transgender community have for many years been requesting assistance for individuals who reside in Queensland, but who were born elsewhere, to also achieve a degree of legal recognition of their gender status in Queensland via the *Births Deaths and Marriages Act*. In particular,

they have requested consideration of the insertion of a new provision in the BDM Act to allow for a person who has changed their sex to apply to the Registrar for a document that acknowledges the person's name and sex.

Such a provision was inserted in 2004 into the Victorian Births Deaths and Marriages Registration Act 1996.² The Victoria Births Registrar can issue a recognised details certificate for a person not born in Australia who seeks to have their sex identity recognised. During this process, the Victorian Births Registrar considers the sex identity of a person and, based on relevant evidence confirming a person's sex, enables the cardinal record by the Victorian Births Registry to reflect that sex. Similar powers have also recently come into force in New South Wales for people who have undergone a sex affirmation procedure³.

The ADCQ supports similar provisions being inserted into the Queensland legislation. While the provisions will be of use to a very small proportion of the Queensland population, for that small group it will assist them to gain some degree of recognition of their status in Australia, and also in some instances when they are travelling internationally. From a human rights perspective, such recognition can have the benefit of reducing stigma and discrimination for the individuals concerned.

I am available to discuss or clarify any matters discussed above.

Thank you again for the opportunity to provide input into this legislative review.

Yours sincerely



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Anti-Discrimination Commissioner
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² sections 30E and 30F

³ *Births Deaths and Marriages Registration Act 1995* sections 32DA- 32DD.