EXPLAINER: THE EQUALITY LEGISLATION AMENDMENT (LGBTIQA+) BILL 2023 (NSW)

Everyone deserves to live with dignity and respect and be treated equally under the law.

After an extensive legal audit and community consultation, Equality Australia identified over 500 NSW laws that disadvantage or discriminate against LGBTIQA+ people.

The Equality Legislation Amendment (LGBTIQA+) Bill 2023 (the Bill), introduced by the Independent Member for Sydney Alex Greenwich MP, addresses key findings from our legal review and brings NSW closer into line with best practice in other jurisdictions.

ACCESS TO ID THAT MATCHES IDENTITY

Everyone deserves to be recognised for who they are.

Yet NSW has the most cruel and unnecessary requirements for updating legal gender anywhere in Australia.

The Bill amends the *Births, Deaths and Marriages Registration Act 1995* (NSW) to bring NSW into line with other states and territories, removing cruel and unnecessary barriers faced by trans and gender diverse people from NSW who wish to update their legal gender.

> *"I haven't updated my gender because the current outdated NSW laws would require me to undergo sterilisation…I don't think I (or anyone) should have to undergo an invasive operation of that nature in order to have my gender marker corrected. My reproductive organs have nothing to do with my gender identity."*
>
> – Non-binary person, age 25-34 years

THE NEED FOR REFORM

Having mismatched ID or a birth certificate that does not align with a person's gender risks outing trans people and puts them at risk of harassment and violence when they have to provide their ID or prove their identity. This is particularly important for young people for whom a birth certificate may be the only piece of identification they have access to.

> *"I had to out myself to change my license and passport. Both people were shocked and uncomfortable with me upon disclosing my trans status."*
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> *– Trans woman, 35-44 years*

A 2021 survey of 153 trans and gender diverse people born in NSW by Equality Australia found that only 14.9% had been able to update their gender under existing laws. Yet more than 80% of these people indicated that they would do so if reforms like those in this Bill were passed.

Surgery requirements are a significant barrier for trans and gender diverse people in updating their gender in NSW, with more than one third of NSW-born transgender people who have been unable to update their gender indicating that surgery on their genitals or reproductive organs was not an option for them because of cost or medical reasons. In

our survey, a clear majority of NSW-born transgender people were either unwilling or unable to meet the surgery requirement.

REMOVING CRUEL AND UNNECESSARY BARRIERS TO GENDER RECOGNITION

The Bill amends the *Births, Deaths and Marriages Registration Act 1995* to remove the requirement for surgery on a person's reproductive organs in order to change a record of sex on identity documentation in NSW.[1]

NSW is the only jurisdiction in Australia where surgery is still required.

People aged 16 years or over

Persons over 16 years of age born in NSW will be able to alter their record of sex with a statutory declaration and the support of a person who has known them for 12 months.[2]

Young people aged under 16 years

Young people under 16 years born in NSW will be able to have their record of sex altered with the consent of their parents, approval from NCAT or with the consent of a parent where it is not practicable or reasonable to obtain the consent of the other parent (such as where the identity of the other parent is not known).[3] In all cases, proof that the young person has had counselling regarding the application will be required.[4] NCAT can only make a decision if it is in the best interests of the child.[5]

Further safeguards

The Bill retains or introduces several safeguards to ensure the new process is not used for unintended purposes or misused. These include:

- existing penalties for knowingly providing false or misleading information;[6]
- a prohibition on nominated gender markers that are obscene, offensive or impractical;[7]
- the general need for an NCAT order to update a child's legal gender where at least one parent has not provided consent;[8] and
- NCAT must give notice about any application to alter a person's sex to each parent of the child unless the child would be adversely affected.[9] However, a child is not adversely affected merely because their parent disagrees with the application and the disagreement causes the child discomfort.[10]

The Bill also gives the NSW Registrar power to correct records of sex on marriage certificates or when describing the parent-child relationship on a child's birth certificate. This addresses issues arising in recent cases in NSW and Queensland which prevented the correction of other records following an update in legal gender.[11] For example, the NSW Court of Appeal decision of *FJG* found that the Registrar was unable to reissue a marriage

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[1] Bill, Schedule 2 [5].

[2] Bill, Schedule 2 [5], proposed s 32B.

[3] Bill, Schedule 2 [5], proposed ss 32C, 32D and 32E.

[4] Bill, Schedule 2 [5], proposed ss 32C(2), 32D(2), 32E(3).

[5] Bill, Schedule 2 [5], proposed s 32G(2).

[6] *Births, Deaths and Marriages Registration Act 1995* (NSW), s 57.

[7] Bill, Schedule 2 [5], proposed ss 32A and 32F(4).

[8] Bill, Schedule 2 [5], proposed ss 32D-32E.

[9] Bill, Schedule 2 [5], proposed s 32CA.

[10] Bill, Schedule 2 [5], proposed s 32CA(3).

[11] *Attorney General for New South Wales v FJG* [2023] NSWCA 34; *Coonan v Registrar of Births, Deaths and Marriages* [2020] QCAT 434.

certificate sought by a married female couple (where one of the spouses was a transgender woman) recognising them as each other's wives instead of husband and wife.[12]

BETTER RECOGNITION OF FAMILIES

Every child deserves the economic and emotional security that comes with legal recognition of their parents.

THE CURRENT LAW ON LEGAL PARENTAGE

Children who are born through surrogacy arrangements may not have the same economic and emotional security that comes with having their intended parents legally recognised. This is because NSW law prohibits a surrogacy parentage order being made in circumstances where the child was conceived through a commercial surrogacy arrangement,[13] and where, other than in exceptional circumstances, several formal requirements of the parentage scheme have not been fully complied with or complied with in the time required by the scheme.[14]

The effect of these provisions is to prevent the transfer of parentage to the intended parents from the surrogate and their partner (if any) for the whole of the child's life. It means a child may not be legally recognised as the child of the intended parents under a range of laws, such as inheritance or superannuation laws.[15] It also means that intended parents who seek the (more limited) parenting orders available through the federal family courts do so in the shadow of the criminal law and may be fearful of being frank with the court regarding the circumstances of the conception of their child.

PROTECTING THE BEST INTERESTS OF THE CHILD

The Bill maintains the requirement for a surrogacy arrangement to be altruistic but makes a minimal change to the *Surrogacy Act 2010* by enlarging the Supreme Court's residual discretion to depart from this requirement and still make a parentage order if it would be in the best interests of the child.[16]

This newly framed residual discretion requires the Supreme Court to have regard to the circumstances of the surrogate and her partner (if any), the intended parents and the surrogacy arrangement itself. The Bill also clarifies that the surrogate has the same right to manage her own pregnancy and birth as any mother.[17]

Other mandatory requirements of the scheme will remain (and the Supreme Court will not have the power to depart from them), including the requirements:

- concerning consent from all affected parties (including the surrogate and her partner, if any);
- that the surrogate and intended parents are all adults; and
- that the wishes of the child are considered when making the order, if the child is of sufficient maturity to express their wishes.[18]

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[12] *Attorney General for New South Wales v FJG* [2023] NSWCA 34.

[13] *Surrogacy Act 2010* (NSW), s 23.

[14] See *Surrogacy Act 2010* (NSW), s 18.

[15] See *Surrogacy Act 2010* (NSW), s 39; *Family Law Act 1975* (Cth), s 60HB.

[16] Bill, Schedule 19 [3], [5].

[17] Bill, Schedule 19 [1].

[18] *Surrogacy Act 2010* (NSW), ss 26(2), 27(3) and 31.

These minimal changes prevent a child being punished for the circumstances in which they were conceived where a Court is convinced that it would be in their best interests to recognise the reality of their family.

ACCESS TO HEALTHCARE WITHOUT DISCRIMINATION

Everyone should be able to access the healthcare they need.

CURRENT LAW

Under long-standing legal principles, health professionals can generally provide therapeutic treatment to a young person when a parent consents to the treatment[19] or the young person is themselves mature enough to understand the risks of the treatment and can thereby consent to their own treatment (known as *Gillick* competence).[20]

In the case of gender affirming healthcare, a 2020 decision of the Family Court (*Re Imogen*) has instead stated that court authorisation is required unless all parents, the treating clinician and the young person consents, even if the young person is *Gillick* competent.[21]

The practical effect of this legal approach has been to deny or delay time-critical gender affirming healthcare to transgender young people, imposing unnecessary cost, time and effort on young people and their families by requiring them to obtain court authorisation where a second parent is unavailable or unwilling to provide consent.

PROPOSED CHANGES

The Bill clarifies the law on when all children and young people and their parents can consent to medical or dental treatment in NSW. The Bill will amend the *Children and Young Persons (Care and Protection) Act 1998* as follows:

- Young people aged 16 years and over will be able to consent to their own treatment as validly and effectively as an adult.[22]
- Except in the case of *'special medical treatment'*, children aged under 16 years will be able to consent to their own treatment if, in the opinion of the doctor or dentist administering the treatment, they are capable of understanding the nature, consequences and risks of the treatment. Otherwise, they will need the consent of a parent; and
- In respect of *'special medical treatment'* – which includes non-life saving treatment which is reasonably likely to render a person under 16 years permanently infertile – the existing requirement for NCAT to approve the treatment will not apply in cases where another court has already approved the treatment.[23]

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[19] See *Re B and B: Family Law Reform Act 1995* [1997] FamCA 33 at [9.28]-[9.30].

[20] See *Gillick v West Norfolk and Wisbech Health Authority* [1986] 1 AC 112; *Secretary, Department of Health and Community Services v JWB and SMB* (*Marion's Case*) (1992) 175 CLR 218.

[21] *Re Imogen (No 6)* [2020] FamCA 761 at [35].

[22] This will be subject to and consistent with the requirements in Part 5 of the *Guardianship Act 1987* (NSW).

[23] *Children and Young Persons (Care and Protection) Act 1998* (NSW), s 175.

EQUAL PROTECTION UNDER THE LAW

Everyone deserves to be treated equally under the law.

The Bill will provide equal protection to members of the LGBTIQA+ community by:

- strengthening existing statutory interpretative principles to apply the law equally to everyone;
- ensuring crimes motivated by hatred or prejudice towards transgender and intersex people are treated in the same way as other hate crimes;
- allowing transgender and intersex people to choose a particular person or class of person to conduct body searches to the extent such a person is reasonably available;
- extending protections to intersex children; and
- removing legal stigma from people with HIV and AIDS.

PROTECTING LGBTIQA+ PEOPLE FROM VIOLENCE

Everyone deserves to live in safety, free from violence.

The Bill ensures threats to 'out' (i.e. disclose without consent) a person's sexual orientation, gender history, HIV+ status, variations of sex characteristics or sex work are a potential form of violence for the purposes of making an apprehended violence order (AVO) or apprehended personal violence order (APVO).[24]

BETTER PROTECTIONS FROM DISCRIMINATION

Everyone deserves to be treated with dignity and respect, no matter where they work, study or access goods, services or accommodation.

Yet outdated provisions and gaps in the NSW *Anti-Discrimination Act 1977* (***ADA***) mean many LGBTIQA+ people have no protection if they suffer discrimination.

The Bill would have introduced long overdue changes to bring the ADA into line with other states and territories ahead of more comprehensive reforms following a review by the NSW Law Reform Commission.

For example, the Bill would have:

- protected LGBTIQA+ people (and others) working or studying in private educational institutions;
- protected LGBTIQA+ people receiving healthcare, disability support, accommodation or other services from faith-based organisations; and
- ensured government agencies collect data about LGBTIQA+ people and their families.

The Bill would have allowed faith-based schools and service providers to continue to preference those of their own faith, impose reasonable requirements or conditions on their employees, students and service users, select people to participate in religious observance or practice as they wish, and rely on general exemptions available to others.

[24] Bill, Schedule 8 [2], [3], [4].