



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

Everyone deserves to live with dignity and respect and be treated equally under 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, addressed key findings from our legal review to bring NSW closer into line with best practice in other jurisdictions. Concessions have been made in the Bill to allow some reforms to progress while leaving others for a later date.

WHAT'S IN THE REVISED BILL

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"I haven't updated my gender because the current outdated NSW laws would require me to undergo sterilisation...I don't think I (or anyone) should have to undergo an invasive operation of that nature in order to have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

"I had to out myself to change my licence and passport. Both people were shocked and uncomfortable with me upon disclosing my trans status."

– Trans woman, 35-44 years

particularly important for young people for whom a birth certificate may be the only piece of identification they have access to.

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.

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

People aged 18 years or over

Persons over 18 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.

Young people aged under 18 years

Young people under 18 years born in NSW will be able to have their record of sex altered with the consent of their parents (provided the young person has had counselling regarding the application) or approval from the District Court. The District Court can only make a decision if it is in the best interests of the child.

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;
- a prohibition on nominated gender markers that are obscene, offensive or impractical;
- the general need for a District Court order to update a child's legal gender where at least one parent has not provided consent;¹ and
- The District Court 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.² However, a child is not adversely affected merely because their parent disagrees with the application and the disagreement causes the child discomfort.

The Bill also gives the NSW Registrar power to correct records of sex when describing the parent-child relationship on a child's birth certificate. This addresses an issue that arose in a recent case in Queensland which prevented the correction of a birth certificate following an update in legal gender.³

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

¹ Bill, Schedule 2 [5], proposed ss 32D-32E.

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

³ *Coonan v Registrar of Births, Deaths and Marriages* [2020] QCAT 434.



a surrogacy parentage order being made in circumstances where the child was conceived through a commercial surrogacy arrangement,⁴ 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.⁵

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.⁶ 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.

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.

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.⁷

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.

EQUAL PROTECTION UNDER LAW

Everyone deserves to be treated equally under the law.

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

- ensuring crimes motivated by hatred or prejudice towards transgender and intersex people are treated in the same way as hate crimes motivated by hatred or prejudice towards people of a particular religion, racial or ethnic origin, language, sexual orientation, age or disability;
- ensuring a child's intersex variations can be relevantly taken into account in decisions that significantly affect them under the *Children's Guardian Act 2019*;
- removing pressure from parents by extending the timeframe for registering

⁴ *Surrogacy Act 2010* (NSW), s 23.

⁵ See *Surrogacy Act 2010* (NSW), s 18.

⁶ See *Surrogacy Act 2010* (NSW), s 39; *Family Law Act 1975* (Cth), s 60HB.

⁷ *Surrogacy Act 2010* (NSW), ss 26(2), 27(3) and 31.



a child born with variations of sex characteristics from 60 days to 180 days;

- ensuring that a person's gender identity or expression is not reason alone to consider them 'mentally ill or disordered' under the *Mental Health Act 2007*;
- removing stigmatising provisions affecting people with HIV or AIDS.

PROTECTING LGBTIQ+ 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).

WHAT'S OUT OF THE BILL

BETTER PROTECTIONS FROM DISCRIMINATION

Outdated provisions and gaps in the NSW *Anti-Discrimination Act 1977* mean many LGBTIQ+ people have no protection if they suffer discrimination.

Interim reforms address these issues have been removed from the Bill pending a review of the *Anti-Discrimination Act 1977* by the NSW Law Reform Commission, which is expected to be finalised in 2025. We call on the NSW Government to commit to strengthening discrimination protections for LGBTIQ+

people in line with reforms in other states and territories including:

- protecting all LGBTIQ+ people from discrimination;
- narrowing exemptions for faith-based schools and organisations;
- providing for accuracy in government data collection;
- providing for consistency with Commonwealth laws in sport and superannuation; and
- enabling equality in public sector employment.

CHANGES TO THE LAW OF CONSENT

The Bill initially proposed to change the law dealing with when children and young people and their parents can consent to medical or dental treatment in NSW. The intention was to overcome legal obstacles for young people accessing gender affirming care.

Since this change was proposed, major progress has been made in the regulation of gender affirming healthcare by NSW Health. The Australian Medical Association and transgender advocates say the proposed changes are unnecessary and their removal from the Bill will not impact access to gender affirming healthcare by young trans people and their families.

BODY SEARCHES

The Bill will no longer make changes to allow transgender and intersex people to choose a particular person or class of person to conduct body searches. We will continue to advocate for these important reforms.