

Births, Deaths and Marriages Registration Bill 2022

Statement of Compatibility

Prepared in accordance with Part 3 of the *Human Rights Act 2019*

In accordance with section 38 of the *Human Rights Act 2019* (HR Act), I, Shannon Fentiman MP, Attorney-General and Minister for Justice, Minister for Women and Minister for the Prevention of Domestic and Family Violence make this statement of compatibility with respect to the Births, Deaths and Marriages Registration Bill 2022 (the Bill).

In my opinion, the Bill is compatible with the human rights protected by the HR Act. I base my opinion on the reasons outlined in this statement.

Overview of the Bill

The *Births, Deaths and Marriages Registration Act 2003* (BDMR Act) establishes Queensland's life event registration system and commenced on 1 February 2004 based on a Model Law which was designed to provide nationally consistent legislation across Australian States and Territories.

The Bill represents the first comprehensive review of the BDMR Act since it commenced. Since 2004 there have been changes to the social, policy and operational environment which have affected the way the Registry of Births, Deaths and Marriages (the registry) delivers its services including:

- a number of social changes that have led to calls for the life event system to more appropriately accommodate the diversity of Queensland society (e.g. increased use of fertilisation procedures and greater awareness of trans and gender diverse community);
- significant operational changes at the registry, including online applications processes for certain services and the development of several new data products and services to support the registry's status as an entirely self-funded entity;
- an increased focus by government on appropriate data use and protection, and the prevention of identity theft and fraud, including ensuring life event registration systems are not misused for fraudulent purposes.

The Bill repeals and replaces the existing BDMR Act to ensure registration services remain relevant, responsive and contemporary.

The key objectives of the Bill are to:

- strengthen the legal recognition of trans and gender diverse people;
- better recognise contemporary family and parenting structures;
- facilitate improvements in the operations of the registry;
- support fraud prevention and minimise misuse of the life event system; and
- clarify the information collection, use and sharing powers of the registrar.

Acknowledgement of sex for persons 16 years and over

The Bill introduces a new statutory framework that enables a person aged 16 years and older, whose birth or adoption was registered in Queensland, to apply to the registrar to alter their record of sex.

The application must:

- nominate a sex descriptor;
- include a statement, verified by statutory declaration, by the person that the person identifies as the sex specified in the application and lives, or seeks to live, as a person of that sex; and
- be accompanied by a ‘supporting statement’ made by a person who is at least 18 years old and who has known the applicant for at least 12 months. The supporting statement must state that the person making the supporting statement believes that the person making the application makes the application in good faith; and supports the application (referred to as the ‘supporting statement requirement’).

The quasi ‘self-declaration’ model adopted by the Bill allows a person to declare their sex marker with no requirement for a medical statement from a doctor or psychologist. This avoids medicalising the process.

In addition, the Bill enables a person to apply at the same time to register a change of the person’s name. The registrar must refuse to register a change of name to a prohibited name or if the registrar reasonably suspects that the change is sought for fraudulent or other improper purposes.

For those born outside Queensland who have been ordinarily resident for 12 consecutive months in Queensland, the Bill creates an equivalent pathway that results in the issue of a recognised details certificate.

The application and evidentiary requirements are largely the same (for example, a person will be required to provide a statutory declaration and supporting statement).

One key difference is that, for a person who was born in another Australian State or Territory, the person cannot apply to change their name at the same time. In this situation, a change of name must be sought from the originating jurisdiction where the person’s birth or adoption was registered. This is to align with the best practice approach developed to minimise abuse of the change of name system.

Children aged 16 and 17 years old are presumed to have the capacity to consent to an application to alter their record of sex or obtain a recognised details certificate. This presumption means that the application process for children under 16 years of age is different than those for children aged 16 and 17.

Acknowledgement of sex for children under 16

For persons under 16, the Bill introduces pathways to alter a child’s record of sex that, like the pathway for persons aged 16 and above, removes the requirement for sexual reassignment surgery and allows parent(s) or person(s) with parental responsibility to apply directly to the registrar to alter the child’s record of sex or obtain a recognised details certificate.

Due to the different ways in which parental responsibility for a child may be allocated by a court, the Bill prescribes the people, other than parents, with specific types of parental responsibility that can make an application to alter a child's sex marker on behalf of a child.

This recognises that people, other than parent(s) may be allocated parental responsibility to make major long-term decisions in relation to a child and enables those persons to use the administrative pathway and apply directly to the registrar to alter a child's sex marker on their birth record.

A person with *parental responsibility* is defined in Schedule 2 of the Bill to mean—

- (a) a guardian of the child under a relevant child protection order; or
- (b) a guardian of the child under an appointment by will; or
- (c) a person who has parental responsibility to make decisions about major long-term issues for the child under a parenting order made under the *Family Law Act 1975* (Cwlth), part VII.

Schedule 1, Part 1 of the Bill sets out the prescribed circumstances where a person with parental responsibility can apply individually. For example, one person can apply if that person is the only guardian of the child under a relevant child protection order or that person is a guardian of a child under an appointment by will and the child has no surviving parent.

Schedule 1, Part 2 of the Bill sets out the circumstances where an application must be made jointly by persons who share parental responsibility. For example, this captures where two persons have guardianship of the child under a relevant child protection order or where two persons have parental responsibility to make decisions about major long-term issues for a child.

Also, the Bill provides that a parent allocated sole parental responsibility for all major long-term issues for a child under an order (or in relation to a change of name, a specific order relating to this issue) can apply directly to the registrar, without any Queensland court approval.

The Bill introduces a process for the parent(s) or person(s) with parental responsibility of a child to apply to alter the record of sex in the relevant child register (which means whichever of the birth register, adopted children register, parentage order register or cultural recognition register has an open entry for the person).

Where there is disagreement, the Bill provides that one parent or person with parental responsibility may apply to the Childrens Court on behalf of a child under 16. The Bill also introduces another pathway that enables a child, aged at least 12 years, but less than 16 years, to make an application to the Childrens Court on their own because parent(s) or person(s) with parental responsibility do not consent to altering the child's sex.

The Bill also introduces a process with similar requirements for the parent(s) or person(s) with parental responsibility of a child whose birth is not registered in Queensland, but who has lived in Queensland for at least 12 months, to apply for a recognised details certificate.

Medical requirements for gender recognition act as an exclusion mechanism, because they bar trans people that are unwilling or unable to comply with such requirements from the rights associated with legal gender recognition.

The Bill makes clear that it is incompatible with human rights to force people to choose between their right to legal gender recognition and their right to physical integrity. By doing this, the amendments acknowledge that transitioning for some individuals, including children, can be a social process or, in other cases, both a social and medical process. A key point of differentiation between the new framework for persons 16 years and over and those children under the age of 16 is the evidence which will be required to support the application.

The Bill provides that an application to the registrar or the court to alter the sex of or obtain a recognised details certificate for a child under 16 must be accompanied by evidence of an assessment undertaken by a developmentally informed practitioner who has a professional relationship with the child. As part of the assessment, the developmentally informed practitioner is required to make a statement based on their engagement with the child and their professional evaluation, that the child understands the meaning and legal implications of the alteration or the issue of a recognised details certificate and that they support the application to alter the record of the child's sex on the relevant child register or obtain a recognised details certificate.

Dispensation of consent framework

Under the *Family Law Act 1975*, parents are presumed to have equal shared parental responsibility—that is, they both have responsibilities in making decisions jointly about major long-term issues, such as where a child goes to school, any change of name or major health issues.

This principle protects the rights of children and their parents. It also reflects Australia's international obligations for children to maintain their family ties and to 'know their parents and, as far as possible, be cared for by them'.

Dispensing with parental consent is a mechanism found in Part 5, Division 4 of the Bill which allows the Childrens Court to determine that the consent of a parent or person with parental responsibility is not required to proceed with an application to alter the record of the child's sex or obtain a recognised details certificate.

The Bill introduces a framework for dispensing with parental consent with a strong 'best interests' focus that places the child at the centre of decision making. Specifically, the proposed amendments reflect best practice to uphold the best interests of the child or young person as the paramount consideration in dispensing with consent decisions.

Choice of sex descriptors

An applicant for an alteration of sex or recognised details certificate will be able to select a sex descriptor of their choice (e.g., male, female or any other descriptor of a sex). Allowing a person to choose their descriptor means a person will be able to describe their sex in a way that is the most appropriate and meaningful to them.

The registrar will be required to refuse the application if the descriptor is a prohibited sex descriptor.

A prohibited sex descriptor is defined in Schedule 2 of the Bill to mean a sex descriptor that is:

- obscene or offensive or absurd;

- impractical (e.g., a descriptor that is too long or consists of symbols without phonetic significance or for some other reason); or
- contrary to public interest.

The registrar is also required to refuse the application if the registrar reasonably suspects the alteration is sought for a fraudulent or other improper purpose or if a record of the person's sex has been altered within the 12 months preceding the application.

Recognising contemporary relationships

The Bill reflects more contemporary relationship and family structures by ensuring same sex and gender diverse parents are able to record a parenting descriptor on their child's birth certificate that correctly reflects their parenting role.

The Bill provides that, as part of registering parentage details, each of the child's parents may be registered as the child's mother, father, or parent. This amendment will facilitate the registration of multiple combinations of parental descriptors including mother/father, mother/mother, father/father, mother/parent, father/parent, or parent/parent.

The Bill omits the current definition of 'birth'. While no new definition is inserted in its place, it is proposed to rely on the ordinary meaning of birth as 'the act of bringing forth young' (refer to Macquarie Dictionary).

To provide for the most inclusive approach, whilst retaining 'mother' in the context of how a child's parent may be registered, a gender-neutral term of 'birth parent' which refers to 'the person, of any sex, who gave birth to the child' is used in all other relevant clauses of the Bill.

This acknowledges the importance of woman-centred care and makes clear that a woman who identifies as a 'mother' can continue to have this recognised on the register and child's birth certificate while also removing any legislative restriction which requires the registrar to record a person who gave birth to a child only as the child's mother (for example, a non-binary person who gives birth may register as parent).

For those persons who wish to update life event registrations which occurred prior to the proposed reforms commencing, the corrections power will facilitate these changes.

Change of name framework

The Bill introduces a requirement that a person who was born outside Australia and has not had their birth registered in another state, must be ordinarily resident in Queensland for at least 12 consecutive months before making an application to change their name.

The Bill also introduces a limit to the number of changes of name for an adult person; the registrar must not approve a change of name for an adult if aware that three or more changes of the person's name have registered in Queensland or another State.

Approval process for 'restricted persons'

The Bill amends the *Corrective Services Act 2006* (CSA) and the *Dangerous Prisoners (Sexual Offenders) Act 2003* (DPSOA) to introduce a requirement for persons in the custody of the chief executive of corrective services (QCS chief executive) (except prisoners released on parole) and prisoners released under a supervision order or interim supervision order (released

prisoners) under the DPSOA to obtain the written permission of the QCS chief executive prior to making an application to the registrar to alter their record of sex or for the issue of a recognised details certificate.

This is designed to protect the safety and welfare of the individual concerned, support community safety and ensure the good order and security of the correctional environment. It also aims to prevent applications that may harm another person, be made for secondary gain, or that may perpetuate a person's offending behaviour.

Registrar's power to waive fees

The Bill provides that a regulation made under the Act may provide the registrar with the capacity to waive payment of a fee or provide for the registrar to refund a fee paid.

Data services for law enforcement, government bodies and private companies

The Bill enables the registrar to enter into an arrangement with an entity for the provision of relevant information to the entity if the registrar is satisfied that the provision of that information is in the public interest. The provision of information includes the giving or supply of information for use and captures the data sharing services provided by the registry.

In entering these arrangements, the registrar must protect the persons to whom the information relates as far as practicable, from unjustified intrusion on their privacy.

Examples of the types of arrangements the registrar may enter with government, law enforcement and the private sector that may be in the public interest are listed in the Bill and include, for example, an arrangement between the registrar and:

- a law enforcement body about providing information to the body for the purpose of supporting the performance of the body's activities related to the enforcement of laws;
- a government agency about providing relevant information to the agency for the purpose of supporting the efficient delivery of the agency's services; and
- a non-government organisation, private sector agency or government agency about providing relevant information to the organisation or agency for the purpose of removing the names of deceased persons from a database of the organisation or agency.

Human Rights Issues

Human rights relevant to the Bill (Part 2, Division 2 and 3 *Human Rights Act 2019*)

I have considered each of the rights protected by part 2 of the HR Act. In my opinion, the human rights that are relevant to the Bill are:

- Recognition and equality before the law (section 15 of the HR Act);
- Freedom of expression (section 21 of the HR Act)
- Privacy and reputation (section 25 of the HR Act);
- Protection of families and children (section 26 of the HR Act);
- Property rights (section 24 of the HR Act); and
- Cultural rights – generally (section 27 of the HR Act).

The rights expressed under the HR Act are to be read alongside other supplementary means of interpretation, including *The Yogyakarta Principles: Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity* (Yogyakarta Principles) and *The Yogyakarta Principles plus 10: Additional Principles and State Obligations on the Application of International Human Rights Law in Relation to Sexual Orientation, Gender Identity, Gender Expression and Sex Characteristics to Complement the Yogyakarta Principles* (YP+10).

Promotion of human rights

New framework in Part 5 of Bill

Currently, under the BDMR Act, a person (or parents/guardians on behalf of their child) may apply to change their sex on the register of births or adopted children register only where the person has undergone sexual reassignment surgery. This requirement imposes a limit on human rights as compulsory reassignment surgery links a legal procedure (recognition on a person's birth registration) with medical procedures (sterilisation and reassignment surgery).¹

The Bill removes the surgery requirement and makes it easier for trans and gender diverse individuals to alter their record of sex on the relevant child register or obtain a recognised details certificate in a way that recognises their inherent dignity and autonomy.

Therefore, the new framework in Part 5 of the Bill promotes the right to equality before the law (section 15 of the HR Act); the right to privacy and reputation (section 25 of the HR Act) and the protection of families and children (section 27 of the HR Act).

Section 15 of the HR Act provides that every person has the right to enjoy their human rights without discrimination, is equal before the law and is entitled to the equal protection of the law without discrimination and has the right to equal and effective protection against discrimination. Discrimination under the HR Act includes discrimination on the basis of an attribute set out in section 7 of the *Anti-Discrimination Act 1991* (AD Act), such as gender identity and sex.

Section 15(1) is based upon Article 16 of the International Covenant on Civil and Political Rights (the ICCPR)² which is in similar terms. International human rights commentary suggests that the right to recognition before the law recognised in section 15(1) of the HR Act extends to the right to have a person's gender identity recognised without being required to undergo a medical procedure (including, but not limited to, sexual reassignment surgery, sterilisation or hormonal therapy).³

The new process which enables a person aged 16 or above to alter their record of sex in the relevant child register or obtain a recognised details certificate does not require a person to show medical evidence of a person's transition or to provide confirmation by a medical

¹ For example, in *A.P. v France* (European Court of Human Rights, Chamber, Application No 79885/12, 52471/13 and 52596/13, 6 July 2017), the European Court of Human Rights held that making recognition of sexual identity conditional upon undergoing a medical operation with a high probability of sterility infringed the applicant's right to privacy. A similar finding was reached in *S.V. v Italy* (European Court of Human Rights, Chamber, Application No 55216/08, 11 January 2019) in relation to what was described as 'gender reassignment surgery', even where no risk of sterilisation was apparently involved.

² *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976), art 18.

³ See Principle 3 of the Yogyakarta Principles; and Principle 31 of the YP+10

professional as to the person's sex. Such requirements would inappropriately medicalise the expression of the person's sex and undermine the person's own statements about their identity.

In this way, the Bill promotes the rights of trans and gender diverse individuals and people to be equal before the law and to enjoy their human rights without discrimination as well as the right to privacy (which includes a person's bodily integrity and autonomy).⁴ The rights of trans and gender diverse persons with a disability may also be promoted as some medical conditions preclude persons from undertaking sexual reassignment surgery.

The introduction of new processes to alter the record of sex of a child under 16 where previously there were limited mechanisms for this and the onerous requirement of surgery, promotes the right to equality of trans and gender diverse children and protects children's right to live a life free from discrimination by creating a pathway to update the relevant child register or obtain a recognised details certificate to better reflect the child's lived identity. The new framework also has at its heart the promotion of the child's best interests.

The scope of sex descriptors a person may nominate in their application promotes the right to equality and also promotes the right to freedom of expression of trans and gender diverse individuals because it allows a person to express their sex by electing a descriptor of their sex that is the most appropriate and meaningful to them. Allowing a diverse range of descriptors is also an acknowledgement and promotion of a person's cultural rights as it allows persons with a particular cultural background to nominate a descriptor that is reflective of their language or cultural heritage.

Recognising contemporary relationships

Discrimination under the HR Act includes discrimination on the basis of an attribute set out in section 7 of the *Anti-Discrimination Act 1991* (AD Act), such as sexual orientation and gender identity. The Bill promotes the right to equality before the law by facilitating same sex couples and trans and gender diverse parents to choose a parental descriptor that best matches their role.

Waive fees

The ability for the registrar to waive fees promotes property rights and the right to equality before the law for financially disadvantaged people as it allows people who may otherwise be unable to afford obtaining a certificate to be able to so.

Amendments to the AD Act

The Bill omits and replaces the definition of 'gender identity' in the AD Act and inserts a new attribute of discrimination based on 'sex characteristics'.

The current definition of 'gender identity' in the AD Act does not limit the rights to equality and non-discrimination under section 15(3) and (4) of the HR Act and therefore is currently compatible with those rights in the HR Act.

⁴ While the ICCPR does not include an express right to physical or bodily integrity, the UN Human Rights Committee has affirmed that the rights to privacy (Art 17) and security of the person (Art 9) in the ICCPR include bodily integrity and autonomy. See, for example, Human Rights Committee, General Comment No 35: Article 9 (Liberty and Security of Person), 112th sess, UN Doc CCPR/C/GC/35 (16 December 2014) [3]; Human Rights Committee, General Comment No 28: Article 3 (The Equality of Rights Between Men and Women), 68th sess, UN Doc CCPR/C/21/Rev.1/Add.10 para 20.

However, amending the AD Act to include a broader, more contemporary definition of gender identity, as well as introducing a separate attribute of discrimination based on sex characteristics, will better promote the rights to equality and non-discrimination (subject to the need for balance against competing human rights).

Currently, section 28(1) of the AD Act makes it lawful to discriminate on the basis of the grounds of ‘lawful sexual activity’ or ‘gender identity’ if the work involves the care or instruction of minors, and the discrimination is reasonably necessary to protect the physical, psychological or emotional wellbeing of minors having regard to all the relevant circumstances of the case, including the person’s actions.

Section 28(2) permits discrimination in the area of working with children if someone has been convicted of an offence of a sexual nature involving a child or has been precluded from working with children under a law of another State or the Commonwealth

The Bill repeals section 28 as it is redundant given the operation of Queensland’s blue card system, which regulates the area of work involving the care and instruction of minors, and is both offensive and stigmatising towards LGBTIQ+ persons and lawful sex workers.

If human rights may be subject to limitation if the Bill is enacted – consideration of whether the limitations are reasonable and demonstrably justifiable (section 13 *Human Rights Act 2019*)

Acknowledgement of sex for persons 16 years and over

(a) the nature of the right

The right to recognition and equality before the law encompasses the right to recognition as a person before the law and the right to enjoy the person’s human rights without discrimination. Section 15(4) provides a right to equal and effective protection against discrimination and entitles every person to a separate and positive right to be effectively protected against discrimination.

While the Bill removes the requirement that a person must have undergone sexual reassignment surgery in order to apply to alter the sex recorded in their birth registration, clause 39 limits the right to equal and effective protection against discrimination on the basis of gender identity by requiring a supporting statement.

The supporting statement requirement could potentially discriminate against trans and gender diverse people as it may pose a barrier to some individuals by limiting a person’s ability to initiate the application process to alter their record of sex or obtain a recognised details certificate and, as a consequence, prevent the expression of their identity.

(b) the nature of the purpose of the limitation to be imposed by the Bill if enacted, including whether it is consistent with a free and democratic society based on human dignity, equality and freedom

The purpose of the limitation on the right to recognition and equality before the law, by requiring a supporting statement, is to protect the integrity of the register. An accurate and complete register ensures a person can obtain a birth certificate with accurate information and

use that official document to interact with society at large and engage in a range of everyday circumstances.

- (c) the relationship between the limitation to be imposed by the Bill if enacted, and its purpose, including whether the limitation helps to achieve the purpose

The limitation on the right to recognition and equality before the law will achieve its purpose of providing a level of rigour to the process, by providing that the application must include the supporting statement to be accepted by the registrar. The requirement to complete a supporting statement is an essential safeguard which ensures that the person is making the application with genuine intent. The supporting statement requirement is consistent with the framework adopted in Victoria and this requirement has been in operation for over two years without any reports that it has restricted accessibility.

- (d) whether there are any less restrictive (on human rights) and reasonably available ways to achieve the purpose of the Bill

An alternative to the approach taken in the Bill is to require no supporting statement at all. However, this would not be as effective in achieving the purpose of the limitation of ensuring the integrity of the register, as the registrar would be less able to identify applications made in bad faith or for improper purposes.

Further, the supporting statement requirement is not considered overly restrictive. A supporting statement does not need to be made by a family member or a medical professional. It can be made by any adult as long as the person has known the applicant for at least 12 months (for example, a friend or neighbour or work colleague).

- (e) the balance between the importance of the purpose of the Bill, which, if enacted, would impose a limitation on human rights and the importance of preserving the human rights, taking into account the nature and extent of the limitation

On balance, the purpose of protecting the integrity of the register outweighs a relatively minor limitation on the right to equality before the law and therefore the measures are appropriately balanced.

- (f) any other relevant factors

Nil.

Framework to acknowledge sex for children under 16

- (a) the nature of the right

Recognition and equality before the law

This right is a stand-alone right that permeates all human rights. It encompasses both the right to recognition as a person before the law and the right to enjoy human rights without discrimination. Discrimination under the HR Act includes (but is not limited to) direct and indirect discrimination as defined in the AD Act and includes discrimination based on a person's age.

The requirements for allowing the alteration of a child's record of sex or issuing of a recognised details certificate are different for children under 16 years. These requirements, including the

requirement that the application is supported by an assessment undertaken by a developmentally informed practitioner, limits the right to recognition and equality before the law as it directly discriminates against children under the age of 16 on the basis of their age.

Protection of children

The right under section 26 protects the right of every child, without discrimination, to the protection that is needed by the child and is in the child's best interests. This protection of children recognises the special vulnerability of children, and the additional protections that children are owed by the State. The right requires the State to ensure the survival and development of every child to the maximum extent possible, and to take into account the best interests of the child as an important consideration in all actions affecting a child.

The rights protected in section 26 of the HR Act are based on those protected in Article 3 of the *Convention on the Rights of the Child* and Article 24(1) of the ICCPR.

Privacy and reputation

The right to privacy and reputation protects the individual from all interferences and attacks upon their privacy, family, home, correspondence (written and verbal) and reputation. The scope of the right to privacy is very broad. It protects privacy in the sense of personal information, data collection and correspondence, but also extends to an individual's private life more generally. Living a life of dignity is essential for a human being to fulfil their liberties and freedoms. Privacy is a form of dignity.

Privacy is connected to personal autonomy and human dignity and includes the way in which individuals see themselves and how they decide to project themselves towards others. In this regard, the United Nations Human Rights Committee⁵ has stated that the notion of privacy refers to the sphere of a person's life in which he or she or they can freely express his or her or their identity, with others or by themselves.

The Bill limits the right to privacy by requiring children under the age of 16 to provide evidence to the registrar and the Childrens Court that is likely to contain highly personal and sensitive information about the child's transition experience. This includes information subject of an assessment undertaken by a developmentally informed practitioner about their transition to the sex with which they currently identify.

(b) the nature of the purpose of the limitation to be imposed by the Bill if enacted, including whether it is consistent with a free and democratic society based on human dignity, equality and freedom

The purpose of the limitation on the right to recognition and equality before the law and the right to privacy, by providing more onerous requirements on children under the age of 16 and the disclosure of a child's personal information through the assessment, is to protect other competing rights, namely the best interests of the child.

Age limits necessarily involve a degree of generalisation using age as a proxy measure of maturity and capacity to act responsibly. This recognises that some younger children are

⁵ United Nations, Human Rights Committee, Case of Coeriel et al. v. The Netherlands, 9 December 1994, CCPR/C/52/D/453/1991, para. 10.2.

unlikely to have the sufficient level of maturity to make this decision independently, while it is more likely for older children to be able to understand the nature and effects of changing their registered details.

The purpose of introducing bespoke provisions in the Bill that differentiate pathways accessible to children under 16 acknowledges the evolving capacities stated in Articles 5 and 12 of the United Nations Convention on the Rights of the Child.

This principle is established on the premise that children acquire maturity at different rates, and apart from biological age, there is a range of other factors which influence children's maturity.

(c) the relationship between the limitation to be imposed by the Bill if enacted, and its purpose, including whether the limitation helps to achieve the purpose

Right to recognition and equality before the law

The limitation on the right to recognition and equality before the law by providing more onerous requirements on children under the age of 16 will achieve its purpose of protecting the best interests of children as the assessment by the developmentally informed practitioner will provide an important independent safeguard of the child's general health and wellbeing and enables the particular vulnerabilities of children to be taken into account.

Trans and gender diverse young people face significant risks and experience many barriers to fully participating in the community, which have direct impacts on mental wellbeing. Hence, while these additional pathways are not available to all young people, this is not a limitation of the right to equality and non-discrimination.

Right to privacy and reputation

The limitation on the right to privacy through the requirement to provide personal information to the registrar or the Childrens Court will achieve its purpose as it will mean the Court can make a proper assessment of what is in the child's best interests.

This amendment protects the health and safety of trans and gender diverse children. The inability of trans and gender diverse young people to obtain identification documents that accurately reflect their gender identity may create a range of difficulties and increase the chance of their subjection to discrimination, prejudice or bullying.

(d) whether there are any less restrictive (on human rights) and reasonably available ways to achieve the purpose of the Bill

Right to recognition and equality before the law and right to privacy and reputation

An alternative to the approach taken in the Bill is to require no assessment by a developmentally informed practitioner. However, this would not be as effective in achieving the purpose of the limitation, namely promoting the best interests of the child.

Access to altering a child's record of sex or obtaining a recognised details certificate is not withheld from a person under the age of 16. Rather, it is handled differently until a person turns 16. While the age limitations may be perceived as a restriction, it is recognised as having an important protective function.

In relation to contested applications, the Childrens Court is the most child appropriate forum to objectively and independently determine whether the child's desire to alter their record of sex on the register or obtain a recognised details certificate is in their best interests, whilst also having regard to the role and responsibilities of parents or persons with parental responsibility, should they be involved in the proceedings.

Proceedings in the Childrens Court related to a child are closed. Information that is of a personal nature to the child is confidential, allowing a child to give evidence to support the application to alter their record of sex in the relevant child register in a safe and child focussed environment. The rules that govern the practice and procedures of the Childrens Court operate to protect information about the child from being shared with people who are not relevant to the proceedings.

(e) the balance between the importance of the purpose of the Bill, which, if enacted, would impose a limitation on human rights and the importance of preserving the human rights, taking into account the nature and extent of the limitation

The provisions in the Bill strike a balance between limiting the right to recognition and equality before the law and the right to privacy and reputation with considerations of what is in a child's best interests.

While the pathways and requirements in the Bill for those under the age of 16 minimally impair the rights, they are considered proportionate and necessary to maintaining the best interests of a child whilst achieving the purpose.

(f) any other relevant factors

Nil.

Arrangements in the Bill which impact on the exercise of parental responsibility

(a) the nature of the right

Protection of families and children and the right to privacy of the family

Section 26(1) of the HR Act provides that the family is the fundamental group unit of society and is entitled to be protected by society and the State. Section 25(a) of the HR Act also protects the rights of an individual not to have their family unlawfully or arbitrarily interfered with.

The concept of parental responsibility is recognised both in law and in wider society as comprising part of the broader concept of a 'family' in Queensland. Accordingly, any proposed law that would diminish parental responsibility engages and limits section 26(1) and section 25(a) of the HR Act.

Parental responsibility acknowledges that ordinarily a parent is best placed to make decisions for and act in the best interests of the child.

The Bill restricts the role of the parent and the scope of parental responsibility to act in the interests of their children by:

- allowing a young person aged 16 or over to take action to alter their registered sex or obtain a recognised details certificate (as well as concurrently register a change of first name to complement their acknowledgement of sex) without parental consent;

- enabling one parent or person with parental responsibility to apply to the Childrens Court for an order directing the registrar to accept an application to alter the record of sex or obtain a recognised details certificate for a child under 16 years of age;
- providing a dispensation framework that allows a parent or person with parental responsibility to dispense with the other parent or other person with parental responsibility's consent to proceed with an application to alter the sex marker of the child or obtain a recognised details certificate;
- enabling a child who is at least 12 but less than 16 years old and unable to obtain the consent of their parents or persons with parental responsibility to apply to the Childrens Court seeking an order directing the registrar to accept an application to alter the sex marker on their birth record; and
- enabling one parent or person with parental responsibility to apply to the Magistrates Court to approve a change of name for a child.

Collectively, these arrangements in the Bill are referred to in the remainder of the Statement as 'child-related initiatives'.

The Bill will therefore limit the right to protection of families and the protection against unlawful and arbitrary interference with the family.

- (b) the nature of the purpose of the limitation to be imposed by the Bill if enacted, including whether it is consistent with a free and democratic society based on human dignity, equality and freedom

Protection of families and children and the right to privacy of the family

The purpose of the limitation on the right to the protection of families achieved by the child-related initiatives is to promote the equality rights of young people and the best interests of children who have the requisite maturity to be able to make their own decisions.

The measures are all aimed at striking a balance between limitations on section 25(a) and section 26(1) and the promotion of the child's best interest in section 26(2).

While it is presumed that parental responsibility for a child ends at the age of 18, as a matter of common law, parental authority diminishes as the capacity of a child to decide matters for themselves develops. As such, a child can be competent to decide a matter for themselves before they turn 18.

The 'best interests of the child' acknowledges the child's legal personality and that a child should, as far as practicable, be involved in decisions about their life. The child-related initiatives in the Bill recognise that section 26(2) is the ultimate purpose, and appropriately modifies the process for achieving the best interests of the child in line with their capacity.

The dispensation framework will ensure that the affirmation of a child's lived identity is not frustrated by an inability to locate a party, or in circumstances where the parent lacks capacity to consent.

- (c) the relationship between the limitation to be imposed by the Bill if enacted, and its purpose, including whether the limitation helps to achieve the purpose

Protection of families and children and the right to privacy of the family

The limitation on the right to protection of families will achieve its purpose of promoting the rights of young people and the best interests of the child by facilitating recognition of trans and gender diverse children through processes that are accessible and tailored to a child's age and capacity.

The ability for children aged 16 and 17 to make applications to the registrar is consistent with the frameworks adopted in Tasmania and the Australian Capital Territory.

(d) whether there are any less restrictive (on human rights) and reasonably available ways to achieve the purpose of the Bill

Protection of families and children and the right to privacy of the family

An alternative to the approach taken in the Bill is to require children up to the age of 18 to require parental support before applying to the registrar. However, this would not be as effective in achieving the purpose of the limitation of promoting the equality rights of young people and the best interests of the child.

The regime in the Bill only allows children aged 16 and above to apply directly to the registrar as it is presumed they have capacity to understand the decision and act in their own best interests. It is noted children aged 16 and above are able to make a range of decisions independent of their parents – for example, 16 is the age of sexual consent, and young people aged 16 and above are able to obtain their own social housing or accommodation.

The dispensation framework in the Bill is consistent with that adopted in other analogous regimes, such as the *Adoption Act 2009* and *Meriba Omaker Kaziw Kazipa (Torres Strait Islander Traditional Child Rearing Practice) Act 2020*.

The Bill includes a range of safeguards designed to limit the circumstances in which the consent of a parent or person with parental responsibility can be dispensed with. These include clauses that provide that:

- an application for dispensation can only be made to a court;
- a relevant parent or person with parental responsibility must be served a copy of the application for dispensation of consent which provides information about where and when the application is to be heard; and
- the opportunity for a person who is served with a copy of the application for dispensation of consent to challenge the application in court if they choose to do so.

(e) the balance between the importance of the purpose of the Bill, which, if enacted, would impose a limitation on human rights and the importance of preserving the human rights, taking into account the nature and extent of the limitation

The concept of parental responsibility is recognised both in law and in wider society as comprising part of the broader concept of a 'family' in Queensland. Accordingly, any proposed law that diminishes parental responsibility is likely to engage and limit s 26(1) and s 25(a).

However, it has been recognised that parental responsibility exists on a diminishing scale and is ultimately premised on the best interests of the child. That is to say, where a child is capable of making decisions in their best interests, the importance of parental consent is subsumed to that interest. The limitation to the rights to protection of families and children and the right to

privacy and reputation are outweighed by the purpose of promoting the rights of the child in section 26(2) of the HR Act.

(f) any other relevant factors

Nil.

Prohibitions in relation to name and sex descriptors

(a) the nature of the right

The right to privacy and reputation protects the individual from all interferences and attacks upon their privacy, family, home, correspondence (written and verbal) and reputation.

The scope of the right to privacy and reputation is very broad. It protects privacy in the sense of personal information, data collection and correspondence, but also extends to an individual's private life more generally. Living a life of dignity is essential for a human being to fulfil their liberties and freedoms. Privacy is a form of dignity.

Privacy is connected to personal autonomy and human dignity and includes the way in which individuals see themselves and how they decide to project themselves towards others. In this regard, the United Nations Human Rights Committee has stated that the notion of privacy refers to the sphere of a person's life in which he or she or they can freely express his or her or their identity, with others or by themselves.

The Bill limits the right to privacy and reputation by placing restrictions on the name a person may select when registering a change of name (through the prohibited name exclusion) as well as the sex descriptor a person may nominate when altering their record of sex or obtaining a recognised details certificate (through the prohibited sex descriptor exclusion).

By giving the registrar discretion to decline to register a chosen name or sex descriptor in certain circumstances, the Bill constitutes a prima facie limit on the right to privacy and reputation.

(b) the nature of the purpose of the limitation to be imposed by the Bill if enacted, including whether it is consistent with a free and democratic society based on human dignity, equality and freedom

The purpose of the limitation on the right to privacy and reputation is to maintain the integrity of the information held on the registers and mitigate against any administrative burden that an overly long name or sex descriptor may pose; and to avoid any misrepresentation or confusion caused by a name or sex descriptor that consists of, or includes, symbols without phonetic significance.

(c) the relationship between the limitation to be imposed by the Bill if enacted, and its purpose, including whether the limitation helps to achieve the purpose

The limitation on the right to privacy and reputation will achieve its purpose as the thresholds of 'prohibited name' and 'prohibited sex descriptor' ensure the registrar can refuse an application and establish a person's legal identity with information that can be recognised and reproduced across a range of legal identity documents and assist people to access a range of services.

(d) whether there are any less restrictive (on human rights) and reasonably available ways to achieve the purpose of the Bill

An alternative to the approach taken in the Bill is to not impose any limitations on the name or sex descriptor a person may register. However, this would not be as effective in achieving the purpose of the limitation of maintaining the integrity of the information held on the registers.

(e) the balance between the importance of the purpose of the Bill, which, if enacted, would impose a limitation on human rights and the importance of preserving the human rights, taking into account the nature and extent of the limitation

On balance, the purpose of protecting the integrity of the register outweighs a relatively minor limitation on the right to privacy and reputation and therefore the measures are appropriately balanced to restrict inappropriate names and sex descriptors while respecting personal autonomy and human dignity.

(f) any other relevant factors

Nil.

Limits around registration of name (adult and children)

(a) the nature of the right

Privacy and reputation

The right to privacy and reputation protects the individual from all interferences and attacks upon their privacy, family, home, correspondence (written and verbal) and reputation.

The scope of the right to privacy and reputation is very broad. It protects privacy in the sense of personal information, data collection and correspondence, but also extends to an individual's private life more generally. Living a life of dignity is essential for a human being to fulfil their liberties and freedoms. Privacy is a form of dignity.

Privacy is connected to personal autonomy and human dignity and includes the way in which individuals see themselves and how they decide to project themselves towards others. In this regard, the United Nations Human Rights Committee has stated that the notion of privacy refers to the sphere of a person's life in which he or she or they can freely express his or her or their identity, with others or by themselves. This includes the right to choose and change one's name.

The Bill limits the right to privacy and reputation by placing restrictions on the number of times a person may change their name – to once in a 12-month period and three in a lifetime for adults; and for children, once within the first year of life for a first name and once in a 12-month period for a name other than the child's first name.

Recognition and equality before the law

This right is a stand-alone right that permeates all human rights. It encompasses both the right to recognition as a person before the law and the right to enjoy human rights without discrimination. Discrimination under the HR Act includes (but is not limited to) direct and indirect discrimination as defined in the AD Act and includes discrimination based on a person's age, race or sexuality. Because the definition is inclusive, it is possible that additional attributes may also be protected.

Country of origin/nationality is not one of the attributes listed in section 7 of the AD Act as an attribute on the basis of which discrimination is prohibited, however, as noted above, the definition of discrimination in the HR Act is not exhaustive.

Jurisprudence from other human rights jurisdictions suggests that only an ‘analogous ground’ will fall within the protection against discrimination, and that the indicators for whether a particular ground will amount to an analogous ground include that the distinction is made on the basis of a personal or immutable characteristic.

The Bill prima facie limits the right to recognition and equality before the law by discriminating against certain individuals in Queensland; that is, those born outside Australia and whose birth is not registered in another State, by requiring that they have been ordinarily resident in Queensland for at least 12 consecutive months before they may make an application to change their name.

(b) the nature of the purpose of the limitation to be imposed by the Bill if enacted, including whether it is consistent with a free and democratic society based on human dignity, equality and freedom

Privacy and reputation

The purpose of the limitation on the right to privacy and reputation is to strengthen the integrity of the name change system and limit opportunities for a person to create multiple identities. Maintaining an orderly system of naming/identification, including by imposing reasonable limits, promotes public order, which is integral to a free and democratic society.

Recognition and equality before the law

Most countries maintain a civil registration system to record the births, deaths, marriages and other key life events of their citizens, who can obtain certificates or extracts of these records to use as personal legal documents. Therefore, it would usually be expected that a person would have a change of their name registered in the place that holds the record of their birth.

The purpose of the limitation on the right to recognition and equality before the law is to protect the integrity of the change of name system by limiting opportunities for a person to create multiple identities in different places by requiring evidence of an ongoing connection to Queensland, in the form of 12 months’ continuous residency, before a person may apply to register a change of name here. This is another aspect of maintaining an orderly system of naming/identification and thereby promoting public order for a free and democratic society.

(c) the relationship between the limitation to be imposed by the Bill if enacted, and its purpose, including whether the limitation helps to achieve the purpose

Privacy and reputation

The limitation on the right to privacy and reputation will achieve its purpose as it safeguards the change of name system and ensures the registrar can refuse an application where a person has already reached the maximum frequency or lifetime limit of name changes.

Recognition and equality before the law

The limitation on the right to recognition and equality before the law will achieve its purpose as it safeguards the change of name system and prohibits applications by persons who do not have the required connection to Queensland.

(d) whether there are any less restrictive (on human rights) and reasonably available ways to achieve the purpose of the Bill

Privacy and reputation

An alternative to the approach taken in the Bill is to not impose any limitation on the frequency or number of times a person can change their name. However, this would not be as effective in achieving the purpose of the limitation of strengthening the integrity of the name change system and limiting opportunities for a person to create multiple identities.

Three other Australian jurisdictions impose limits on the number of name changes (New South Wales, Western Australia and Northern Territory) and in each case the limit adopted is once in a 12-month period and three in a lifetime, demonstrating that this is a reasonably available way to achieve the purpose. The remaining jurisdictions do not impose a limit, which would not achieve the purpose.

It is acknowledged that there are other limits that could have been selected to achieve the purpose while similarly minimising the impact on this right. However, the High Court has held that once within the domain of selections which fulfil the legislative purpose with the least harm to the freedom, the decision to select the preferred means is the legislature's.⁶

Safeguards are built into the process which will enable the registrar to still register a change of name if:

- the registrar is satisfied there are exceptional circumstances for approving the application;
- the application relates to a marriage or divorce;
- the registrar is satisfied that the application is for the purposes of protecting the person or another person associated with the person (for example, from domestic violence); or
- the application is made at the same time as an application under Part 5 or the registrar is otherwise satisfied the change of name is an affirmation or expression of the person's sex.

These measures ensure there is appropriate discretion for the registrar to still process a change of name, where appropriate.

Recognition and equality before the law

An alternative to the approach taken in the Bill is to not impose any minimum residency requirement. However, this would not be as effective in achieving the purpose of the limitation of protecting the integrity of the change of name system.

Four other jurisdictions require evidence of 12 months' continuous residency before a person born outside Australia may register a change of name in the jurisdiction (Victoria, South

⁶ *Unions NSW v New South Wales* [2019] HCA 1

Australia, Western Australia and Northern Territory), demonstrating that this is a reasonably available way to achieve the purpose.

It is noted that Western Australia also requires the person to be an Australian citizen or permanent resident. While this approach was considered for Queensland, it was rejected in favour of the less restrictive 12 months' residency requirement.

Tasmania and the Australian Capital Territory do not require a minimum period of residency but instead rely on the concepts of 'domiciled' or 'resident/ordinarily resident'. This would also achieve the purpose however would similarly limit human rights. A minimum period is preferred as it offers clarity to applicants and administrative simplicity.

It is acknowledged that there are other limits that could have been selected to achieve the purpose while similarly minimising the impact on this right. However, the High Court has held that once within the domain of selections which fulfil the legislative purpose with the least harm to the freedom, the decision to select the preferred means is the legislature's.⁷

Safeguards are built into the process which will enable the registrar to still register a change of name if:

- the registrar is satisfied there are exceptional circumstances for accepting the application;
- the application relates to a marriage or divorce; or
- the registrar is satisfied that the application is for the purposes of protecting the person or another person associated with the person (for example, from domestic violence).

These measures ensure there is appropriate discretion for the registrar to still process a change of name, where appropriate.

(e) the balance between the importance of the purpose of the Bill, which, if enacted, would impose a limitation on human rights and the importance of preserving the human rights, taking into account the nature and extent of the limitation

On balance, the limitations on the rights to privacy and reputation, and to recognition and equality before the law, are appropriate to safeguard the integrity of the change of name process and are supported by appropriate safeguards and discretion for the registrar.

(f) any other relevant factors

Nil.

Approval process for 'restricted persons'

(a) the nature of the right

Recognition and equality before the law

Section 15 of the HR Act reflects the essence of human rights – that every person holds the same human rights by virtue of being human and not because of a particular characteristic.

⁷ *Unions NSW v New South Wales* [2019] HCA 1

Section 15(2) provides every person is equal before the law and is entitled to equal protection of the law without discrimination. Under the AD Act, sex and gender identity are protected attributes.

Section 15(3) protects the right to equality before the law. It is directed at ensuring legislation is applied in a way that is not ‘arbitrary’ or has no objective justification. It means that legislation should also apply to people without discrimination.

Section 15(4) provides a right to equal protection against discrimination, providing every person a separate and positive right to be effectively protected against discrimination.

These provisions of the HR Act place an obligation on the State to not discriminate when enacting legislation, and a positive obligation on the state to enact legislation that protects against discrimination.

The requirement to obtain chief executive approval prior to applying to register a change of sex or request a recognised details certificate limits a prisoner’s or released prisoner’s right to equality before the law in that it imposes a process on them that is not applied to the general community. This is considered to be indirect discrimination due to sex and gender identity being protected attributes under the AD Act, and therefore is considered to limit a prisoner or released prisoner’s human rights under the HR Act.

Privacy and reputation

The right to privacy protects the individual against interference with their individual identity, including gender. It covers privacy in the narrow sense (for example, personal information, data collection and correspondence), and also in a broader sense (interference with physical or mental integrity, freedom of thought and conscience, legal personality, individual identity, sexuality, family and home).

The right to privacy includes internal limitations. The protection against interference with privacy, family, home or correspondence is limited to *unlawful* or *arbitrary* interference. The notion of arbitrary interference extends to those interferences which may be lawful, but are unreasonable, unnecessary and disproportionate.

The requirement to obtain chief executive approval prior to registering a change of sex on the register and/or obtaining a recognised details certificate may be perceived to be regulating a person’s gender identity. It requires a prisoner or released prisoner to disclose their intent to alter their sex. However, there is nothing in this administrative decision making that prevents the individual from living as their preferred sex. It does not impact an individual’s personal autonomy to express themselves or their identity.

The additional layer of decision making does not necessarily mean the individual will not be able to apply to change their sex on the register and/or receive a recognised details certificate. It only requires an additional layer of administrative decision making while the individual is in QCS custody, not including a prisoner on parole (a prisoner) or being supervised in the community as they pose a serious risk of committing a serious sexual offence (released prisoner).

In relation to human rights, arbitrary means capricious, unpredictable, unjust or unreasonable in the sense of not being proportionate to a legitimate aim sought. Because questions of

proportionality arise when considering justification of limits on human rights under section 13 of the HR Act, it is convenient to consider these questions below (under headings (b) – (e)) before making a determination as to whether any limitation on the right to privacy will be arbitrary.

The right to privacy also applies to victims and the broader community, protecting their physical and psychological integrity.

(b) the nature of the purpose of the limitation to be imposed by the Bill if enacted, including whether it is consistent with a free and democratic society based on human dignity, equality and freedom

The amendments to the CSA and the DPSOA to require a prisoner or a released prisoner to obtain QCS chief executive approval prior to altering their record of sex on the register or requesting a recognised details certificate reflecting an altered sex, have three purposes:

- to provide an opportunity for the welfare and safety of trans and gender diverse individuals to be assessed and balanced against the safety of the community and of the environment that the person resides in;
- to prevent secondary gain or activity that could be used to further an unlawful activity or purpose; and
- to prevent the registration of a change of sex that will cause harm to a victim of crime.

Further amendments to the CSA and DPSOA support implementation of these safeguards by authorising the sharing of information with the registrar to ensure a person in custody or released prisoner cannot circumvent the approval process.

These purposes are legitimate and ultimately serve to protect and promote the human rights of individuals, victims and the broader community. Victims have a right to physical and psychological integrity as an aspect of the right to privacy in section 25(a) as well as the right to security of the person in section 29(1).

(c) the relationship between the limitation to be imposed by the Bill if enacted, and its purpose, including whether the limitation helps to achieve the purpose

Presently, all prisoners and released prisoners are required to apply for chief executive approval prior to applying for a change of name. This process enables the QCS chief executive to make a balanced judgement as to whether the name change serves a legitimate purpose, will not cause a risk to the safety and welfare of the individual, or the good order or security of a correctional centre and will not cause further harm to a victim. It allows consideration of whether the change of name may enable the prisoner or released prisoner to further perpetuate crime or be for secondary gain.

Introducing the same requirement for registering a change of sex, or requesting a recognised details certificate, will enable the QCS chief executive to consider whether the change may have consequences for the welfare or safety of the individual, the good order or security of a corrective services facility, or the safety of the community. It provides an opportunity for consideration to be given to whether the individual may be seeking secondary gain or to engage in unlawful activities as a result of the change, particularly where the prisoner has a history of violent or sexual offending. The requirement also allows for victim considerations.

The requirement that a prisoner or released prisoner obtain QCS chief executive approval prior to registering a change of sex provides an appropriate set of checks and balances to ensure that the change of sex process is legitimate, and the safety of victims, correctional centres and the community is upheld.

Obtaining the QCS chief executive's approval prior to registering a change of sex is rationally connected to the purpose of protecting victims, the community and the individual's welfare.

(d) whether there are any less restrictive (on human rights) and reasonably available ways to achieve the purpose of the Bill

Potentially less restrictive alternative options that were considered include:

- requiring a prisoner or released prisoner to notify the QCS chief executive once a change of sex has been registered. This may be considered less restrictive but would not achieve the purpose. Once the change of sex has been lawfully acknowledged it is too late to prevent any harm to a victim. It may also be too late to address any impacts on the welfare or safety of the individual or secondary gain attempts;
- framing the QCS chief executive's decision-making criteria in a way that requires the chief executive to 'approve unless certain criteria apply'. While this may be considered less restrictive, it would not achieve the purpose of safety by enabling the chief executive to take different types of risk into consideration. This enables the chief executive to consider and make a decision based on the individual circumstances of the prisoner/released prisoner, their victim/s and the environment in which they reside.

There are safeguards in place to protect the prisoner/released prisoner's right to equality before the law and privacy, including:

- the criteria that must be considered by the QCS chief executive when deciding whether to approve an application to register a change of sex is exhaustive and linked directly to the purposes of the policy;
- if the QCS chief executive is leaning towards not approving the application, the applicant will be provided with a statement of reasons and be provided with an opportunity to provide further information in writing; and
- the ability to seek a judicial review of the QCS chief executive's decision is available to the prisoner/released prisoner.

(e) the balance between the importance of the purpose of the Bill, which, if enacted, would impose a limitation on human rights and the importance of preserving the human rights, taking into account the nature and extent of the limitation

On balance, the approval process applying to prisoners and released prisoners is considered appropriate to achieve the identified purposes. On the one side of the scales, requiring prisoners and released prisoners to apply to the chief executive for approval prior to being legally recognised as the sex that the individual identifies may be perceived to be indirect discrimination against trans and gender diverse prisoners and released prisoners. This is limited to the right to equal and effective protection against discrimination, under section 15(4) of the HR Act.

It may also be perceived to limit a prisoner or released prisoner's right to privacy in that if the QCS chief executive denies the application the individual will not be able to lawfully identify as their preferred gender/sex. This may be perceived to have an impact on the individual's psychological integrity.

The extent to which the amendment potentially impacts a prisoner or released prisoner's right to privacy is limited to the potential anguish they may experience due to not being able to be lawfully recognised as their preferred sex. It does not limit the individual's autonomy to express themselves as their preferred sex, use their preferred pronouns or live as their preferred sex.

The individuals captured by this amendment are in the lawful detention of the State or under intensive supervision in the community. This is a result of a Court making a finding of guilt and their offending behaviour posing too much of a risk for them to be in the community, or to be in the community without intensive supervision.

On balance, there is an obligation to maintain community safety and safety in the correctional environment and to stop crime. This includes ensuring the safety of trans and gender diverse prisoners and released prisoners. QCS has an obligation to support the rehabilitation of a prisoner and released prisoner and to reduce recidivism. Other prisoners and people that work in the correctional environment also have the right to live and work in a safe and secure correctional environment. Victims and the wider community also have the right to psychological integrity and freedom from further harm that may be caused because of crime. It also includes a responsibility to protect victims from further harm.

The primary consideration in the decision making is safety – of the individual, other prisoners and staff, the correctional environment and the community. This is covered in essence, by the right to life (section 16 of the HR Act). Trans and gender diverse prisoners and released prisoners will continue to be managed and supervised on an individualised basis. This includes being referred to by preferred name and pronouns. However, in the closed correctional environment, the number one consideration must always be safety.

The additional obligation placed on prisoners and released prisoners is based on a court requiring the person to be lawfully detained in a closed environment as a result of a finding of guilt resulting in a sentence of imprisonment, or be under intensive supervision in the community as a result of the person posing a serious danger and unacceptable risk to the community, not their sex or gender identity. It is intended to provide an additional layer of protection for the individual, to ensure their wellbeing and safety can be maintained in custody and in the community, to enable QCS to maintain good order and safety in the correctional environment, and to ensure adequate protection of the community.

Any potential mental anguish that may be experienced by a prisoner or released prisoner is considered reasonable and not arbitrary in nature. Similarly, a prisoner or released prisoner's right to equal protection against discrimination cannot be considered in isolation and must be considered in the context of their offending history and the harm, or potential harm, inflicted on others. On this basis any limitation on a prisoner's or released prisoner's human rights is considered proportionate and to strike a fair balance between the rights of the prisoner/released prisoner and the rights of victims, staff and the broader community.

On this basis, the amendment is considered reasonable and justified in the context of a free and democratic society.

(f) any other relevant factors

The process of requiring a prisoner or released prisoner to obtain the QCS chief executive's approval prior to altering their record of sex on the register or requesting a recognised details certificate reflecting their altered sex is comparable to the following:

- safeguards applying in relation to lodging an intention to marry under the *Marriage Act 1961* (Cth) or making a declaration of civil partnership under the *Civil Partnership Act 2011*; and
- approvals process applying under the *Corrections Act 1986* (Vic), *Sex Offenders Registration Act 2004* (Vic) and *Serious Offenders Act 2018* (Vic).

Information sharing amendments

(a) the nature of the right

The right to privacy and reputation under section 25 of the HR Act protects individuals from unlawful or arbitrary interferences and attacks upon their privacy, family, home, correspondence (written and verbal) and reputation. The scope of the right to privacy is broad. It protects privacy in the sense of personal information, data collection and correspondence, but also extends to an individual's private life more generally.

The right protects the individual from all interferences and attacks upon their privacy and reputation and may also be interpreted to include interference with employment. The concept of arbitrariness in the context of the right to privacy carries a human rights meaning of 'capriciousness, unpredictability, injustice and unreasonableness – in the sense of not being proportionate to the legitimate aim sought.' Whether a measure is 'arbitrary' will therefore be considered by reference to the proportionality test in section 13 of the HR Act.

The Bill limits the right to privacy by providing that the registrar may enter an arrangement with an entity for the provision of relevant information (information in a register, including information in bulk or historical or genealogical information; or maintained by the registrar under clause 105) to the entity if the registrar is satisfied that the provision of that information is in the public interest.

The Bill clearly articulates the types of data use and sharing arrangements that would be in the public interest, in relation to sharing with law enforcement, government and the private sector, including expressly providing for the data matching services the registry provides.

(b) the nature of the purpose of the limitation to be imposed by the Bill if enacted, including whether it is consistent with a free and democratic society based on human dignity, equality and freedom

The purpose of the limitation on the right to privacy is to enable the registrar to discharge the registrar's functions of ensuring the Act is administered in the way best calculated to achieve its objects (clause 98(3)(d)). The objects of the Act include providing access, in appropriate cases, to information in a register or collected under clause 105 as well as the dissemination of statistical information (clause 3(c) and (e)).

The power to enter into arrangements with entities recognises the significant public value of the information the registry holds for statistical, research, law enforcement, policy development and planning purposes relating to population, fertility, health, mortality and other matters. The power also recognises the value of the information for other public purposes, such as improving the quality of data held by government agencies.

The purpose of legislating examples of when information in the register can be provided to an entity is to ensure data shared and used is clearly authorised by law and provides transparency around the purposes for which a person's data is being used.

The Bill provides an example of an arrangement between the registrar and a law enforcement body about providing relevant information to the body for the purpose of supporting the performance of the body's activities related to the enforcement of laws.

The significance of fraud prevention has led to a proactive and collaborative flow of relevant information between law enforcement and the registry that allows authorities to anticipate, track and prevent offending. For example, sharing information captured or created pursuant to a change of name application, including regular reports on successful name changes, and also details of withdrawn or refused change of name applications under agreed circumstances.

(c) the relationship between the limitation to be imposed by the Bill if enacted, and its purpose, including whether the limitation helps to achieve the purpose

The limitation on the right to privacy will achieve its purpose as it enables the registry to exercise appropriate discretion in the arrangements it enters into with other entities.

(d) whether there are any less restrictive (on human rights) and reasonably available ways to achieve the purpose of the Bill

An alternative to the approach taken in the Bill is to not allow the registrar to enter into any arrangements. However, this would not be as effective in achieving the purpose of the limitation.

There are appropriate safeguards in place around the sharing of information or access to and use of data or information under clause 118. When deciding whether to enter an arrangement, the registrar balances the public interest in disclosing information against any likely adverse effect of the disclosure. 'Public interest' is interpreted in a way that best achieves the purpose of the Bill, and the subject matter, scope and purpose of the Bill is relevant to determining its meaning.

Further, the registrar must, as far as practicable, protect the persons to whom the information relates from unjustified intrusion on their privacy.

In addition, the registry engages with the Office of the Information Commissioner where appropriate, and ensures that arrangements entered into with entities contain provisions to:

- protect the identity of individuals, for example by imposing restrictions on the information able to be included in any publication and limiting who can access the data;
- only release the minimal amount of data needed to meet the objective of the agreement;

- ensure clearly defined, adequate and auditable data security arrangements to address data transmission methods, data storage, and individual and organisational access controls;
 - address compliance with information security standards and privacy legislation;
 - address data disposal and retention arrangements; and
 - either restrict the provision of the data to a third party or clearly set out any third party use of the data and the conditions and arrangements for this use.
- (e) the balance between the importance of the purpose of the Bill, which, if enacted, would impose a limitation on human rights and the importance of preserving the human rights, taking into account the nature and extent of the limitation

On balance, the limitation on the right to privacy is appropriate to enable the sharing of information held by the registry as it contributes significantly to Australia's and Queensland's vital statistics, which are used for research, planning and the formulation of effective and efficient evidence-based policy across multiple sectors.

(f) any other relevant factors

Nil.

Conclusion

In my opinion, the Bill is compatible with human rights under the HR Act because it limits human rights only to the extent that is reasonable and demonstrably justifiable in a free and democratic society based on human dignity, equality and freedom.

SHANNON FENTIMAN MP
Attorney-General and Minister for Justice
Minister for Women
Minister for the Prevention of Domestic and Family Violence

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