

**Submission  
No 38**

## **EQUALITY LEGISLATION AMENDMENT (LGBTIQA+) BILL 2023**

**Organisation:** Women's Rights Network Australia

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**Inquiry by the Committee of NSW  
Services of the NSW Parliament into  
Equality Legislation Amendment  
(LGBTIQA+) Bill 2023**

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## INTRODUCTION

Thank you for the opportunity to provide the NSW Legislative Committee of Community Services with our submission on the Equality Legislation Amendment (LGBTIQA+) Bill 2023 (the Bill). The Women's Rights Network Australia Inc. (Women's Rights Network) is a non-partisan network of women across Australia organising to promote and protect our sex-based rights. The recognition of biological sex, factual accuracy, and evidence-based science are critical elements to consider when developing policy and law. In our work we promote the sex-based rights of females in Australia by raising awareness on current limitations of and threats to women's rights. We advocate for policies and laws that promote and safeguard sex-based equality.

**The Women's Rights Network OPPOSES the Bill in its entirety.**

The bill, if passed, will have serious consequences for women, gay and lesbian people, and children. It will have consequences for the accurate collection of data, making it impossible to track sex-based discrimination, inequality, and even crime. This closed door process for considering the bill also risks undermining its ultimate reception within the community.

## EXECUTIVE SUMMARY

The Bill seeks to modify over 20 existing NSW Acts, purportedly to enhance the lives of LGBTIQA+ people. However, we believe the overall effect of the Bill will be to significantly diminish the rights and safeguards of Australian women and girls. Below is a summary of our key concerns:

### **Terminology**

The terminology used in the Bill is prone to confusion. The Bill conflates the concepts of gender, gender identity with the material fact of biological sex.

### **Erosion of Rights**

The rights of females (women and girls) to single-sex provisions such as toilets, changing rooms, sports, prizes, prison accommodation will be undermined by the creation of 'legal sex' that does not reference material biological sex.

### **Minors**

Minors will be able to access both changed legal sex status and irreversible medical treatments without parental knowledge or consent. This is in opposition to the latest expert evidence and knowledge on the treatment of children with gender identity dysphoria.

### **Redefining Sex and Sexual Orientation**

The Bill undermines nature of same-sex attraction, introduces new definitions of sexuality, and fails to protect heterosexuals from sexual orientation discrimination.

### **Exploitation of Women**

The Bill encourages the exploitation of women's bodies in both sex work (prostitution) and commercial surrogacy.

### **Restrictions on Freedom of Expression**

The Bill will have the effect of criminalising ordinary speech such as the observation of a person's biological sex. The Bill restricts sharing information that may be vital for risk mitigation and safeguarding.

### **Infringing the rights of Government Workers**

The Bill infringes the rights of government workers to refuse intimate contact with the opposite sex.

### **Impact on Government Workplaces**

The Bill introduces diversity targets for sexual orientation, gender identity and medical conditions (intersex status), but does not deal with inequality on the basis of biological sex.

### **Closed Consultation**

The Committee's decision to undertake a closed consultation process to assess the Bill in the absence of an electoral mandate denies the right of NSW residents to transparent assessment of proposed legal changes.

### **Diminishing Pre-Existing Rights**

The Bill diminishes the existing rights of women and girls.

## **Note on Key Terms**

The Bill deals with a number of concepts and terms that have been subject to disputed definitions. The Bill uses many terms and concepts without providing a definition. These include "sex", "gender", "gender identity", "transgender person"

### **What is Sex?**

The word "sex" is derived from the Latin word "sexus" which was derived from the Proto Indo European word "séksus" (dating back to ~4500 BCE to 2500 BCE). The word expresses the distinction between males and females. Sex is the scientifically based categorisation of all animal species, including mammals.

Different sex cells in males and females give rise to two reproductive systems, with two separate roles in human sexual reproduction, and consequently, two biologically distinct forms of human bodies. Female reproductive systems evolved to develop larger gametes (eggs), as well as gestating and bearing young. Males produce the smaller gametes (sperms). The differences between the two sexes include many genetic, anatomical, physiological, hormonal and other biological factors such as bone structure, muscle mass, metabolism, strength and speed. It's not possible to change a person's sex. It is not possible to create the functional reproductive organs of the opposite sex or the genetic/chromosomal make up of a person's body, such as the size and shape of their skeleton and internal organs such as the heart and lungs.

We use the word 'sex' to mean the biological categorisation of humans and most other living things. Sex is binary, meaning there are two sexes: male and female. Males produce small, motile gametes; females produce large, stationary gametes.

We use the word 'woman' to refer to adult human females.

### **What is Gender?**

"Gender" originates from the Latin word "genus", classifying nouns based on their grammatical gender (e.g. masculine and feminine words, like le and la in French). John Money adopted the term "gender" in the 1950s to refer to the psychological and behavioural characteristics commonly but not exclusively observed in each sex.

Many feminists thereafter used the term "gender" to distinguish between the societal norms and expectations attributed to each sex from the immutable biological traits of each sex. Feminist discourse concerning the imposition of regressive gender roles, and sex based

discrimination has brought the term “gender” into common parlance. For example, in 1975 Gayle Rubin argued that while biological differences are fixed, gender differences are the result of social interventions that dictate how women and men should behave. Since, unlike sex, “gender is social, mutable and alterable” .

Used synonymously with the word “sex”, the adoption of the word “gender” more broadly can be also be attributed to avoiding confusion with sexual intercourse. For example, the United States Supreme Court Justice Ruth Bader Ginsburg used the word “gender” in *Weinberger v. Wiesenfeld*<sup>2</sup> in this way to discuss sex differences in a polite manner. We avoid this usage.

We use the word ‘gender’ to indicate the cultural expectations and typical behaviours attached to the category of sex, which can include stereotypes, which change over time.

## What is Gender Identity?

The Bill seeks to add protections for ‘gender identity’ without providing a definition of ‘gender identity’.

The Sex Discrimination Act Cth 1984 defines gender identity thusly:

*“gender identity” means the gender - related identity, appearance or mannerisms or other gender - related characteristics of a person (whether by way of medical intervention or not), with or without regard to the person’s designated sex at birth.*<sup>3</sup>

This definition echoes the definition of gender identity set out in the Yogyakarta Principles:

*Gender identity is understood to refer to each person’s deeply felt internal and individual experience of gender, which may or may not correspond with the sex assigned at birth, including the personal sense of the body (which may involve, if freely chosen, modification of bodily appearance or function by medical, surgical or other means) and other expressions of gender, including dress, speech and mannerisms.*<sup>4</sup>

These definitions posit a “deeply held” and “internal sense” of gender identity that is given expression by enacting stereotypes through choice of clothes, mannerisms, and personal affectation.

Gender identity is separate to a person’s sex, and cannot impact on personal traits that are attributable to a person’s sex. The definition conflates sex (a material fact) with gender (a cultural expectation) by allowing that “modification of the body” may be “freely chosen” to give expression to a gender that is independent of sex.

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<sup>1</sup> Stanford Encyclopedia of Philosophy

<sup>2</sup> <https://supreme.justia.com/cases/federal/us/420/636/>

<sup>3</sup> [https://www.austlii.edu.au/cgi-bin/viewdoc/au/legis/cth/consol\\_act/sda1984209/s4.html](https://www.austlii.edu.au/cgi-bin/viewdoc/au/legis/cth/consol_act/sda1984209/s4.html)

<sup>4</sup> <https://yogyakartaprinciples.org/introduction/>

In Australia in 2021-2022, 1 in 8 women are victims of sexual assault in the preceding 12 months, contrasted with 1 in 22 men<sup>5</sup>. 97% of sexual assault offenders proceeded against by police were male.<sup>6</sup> 22% of women have experienced sexual violence since the age of 15<sup>7</sup>. Mission Australia puts this figure at 1 in 6 Australian women<sup>8</sup>. The Australian Institute of Health and Welfare states “[w]hile every experience of family, domestic or sexual violence is very personal and different, it is most common for this type of violence to be perpetrated against women, by men”<sup>9</sup>. These factors are attributable to sex and persist despite the existence of a person’s gender identity.

Gender identity is a belief, not a status and not a characteristic capable of protection. It cannot be independently verified, and can change over time. Hence it cannot be protected as an immutable status. The word “sex” refers to a material, observable characteristic and should be relied upon in law.

## Who Are ‘Transgender People’?

The Anti Discrimination Act NSW 1977<sup>10</sup> defines a transgender person as

*(a) who identifies as a member of the opposite sex by living, or seeking to live, as a member of the opposite sex, or (b) who has identified as a member of the opposite sex by living as a member of the opposite sex, or (c) who, being of indeterminate sex, identifies as a member of a particular sex by living as a member of that sex,*

This definition recognises the binary and immutable nature of biological sex. The Bill seeks to abolish the binary nature of sex by replacing references to a singular “other sex” with reference to “another sex”, implying a plurality of other sexes.

We use the term ‘trans-identified person’ to describe a person who professes a gender identity that is not the same as their sex. Our usage includes both trans-identified males and trans-identified females.

The reasons for a person adopting a transgender identity are varied, but are linked to biological sex. In the late 1980s, Ray Blanchard posited the root cause of all male-to-female cross-sex identification was a matter of either homosexuality or an intense paraphilia. A survey conducted in 2015 of roughly 3,000 American “trans-identified males” revealed at least 60% were attracted to women and 55% were attracted to men (of which 15% were bisexual and 40% were exclusively homosexual). Recent studies<sup>11</sup>, coupled with empirical

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<sup>5</sup> <https://www.aihw.gov.au/family-domestic-and-sexual-violence/resources/fdsv-summary>

<sup>6</sup> <https://www.abs.gov.au/articles/sexual-assault-perpetrators>

<sup>7</sup>

<https://www.abs.gov.au/statistics/people/crime-and-justice/personal-safety-australia/latest-release>

<sup>8</sup>

<https://www.missionaustralia.com.au/publications/policy-submissions/employment-and-training/800-implementation-of-the-ndis-and-the-provision-of-disability-services-in-nsw>

<sup>9</sup> <https://www.aihw.gov.au/family-domestic-and-sexual-violence/resources/fdsv-summary>

<sup>10</sup> [https://www.austlii.edu.au/cgi-bin/viewdoc/au/legis/nsw/consol\\_act/aa1977204/s38a.html](https://www.austlii.edu.au/cgi-bin/viewdoc/au/legis/nsw/consol_act/aa1977204/s38a.html)

<sup>11</sup> <https://doi.org/10.1016/j.jadohealth.2016.10.369>



data gleaned from gender clinics<sup>12</sup> indicate that adolescent girls without a childhood history of gender dysphoria are a rapidly-expanding cohort of trans-identified people.

Careful investigation is required to understand the motivations of the varying groups of individuals within the larger category of trans-gender identification.

## LGBTIQA+

The term LGBTIQA+ is an umbrella term not defined in the Bill.

The term LGBTIQA+ groups together Lesbian, Gay and Bisexual (LGB) people who comprise a sexual minority, with Transgender (T) identified people who have an internal belief about gender, Intersex (I) people who have a medical condition causing differences of sexual development, and others (QA+) whose rights & needs may at times be in conflict. Lesbians, Gays and Bisexuals are same-sex attracted individuals. Their right to pursue same-sex relationships must be balanced by the desire of trans-identified people whose belief is that their gender identity supersedes the reality of sex.

The Bill makes many provisions regarding sex-workers, who are not typically covered by the LGBTIQA+ umbrella.

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<sup>12</sup>

<https://www.economist.com/united-states/2018/09/01/why-are-so-many-teenage-girls-appearing-in-gender-clinics>

# Objections to the Bill

## Erosion of Women's and Girls Rights: The Impact of Sex Self-ID

### **Schedule 2: Amendment of Births Deaths and Marriages Registration Act 1995 No 62.**

The proposed amendments simplify the process for individuals aged 16 and older to change their legal sex (not gender). They can submit an application to the registrar at Births, Deaths, and Marriages, accompanied by a statutory declaration from someone who has known them for at least 12 months, attesting to their intention to live in their newly affirmed sex.

This is done with the intention of supporting a 'transgender person' who is someone who holds a belief about their gender. The Bill conflates sex with gender by allowing the alteration of a legal sex marker in order to give effect to a changeable belief about gender.

As a women's rights organisation, Women's Rights Network is concerned with the protection and preservation of female-only spaces. These include but are not limited to: safe-havens from sex-based and sexual violence, sport, prison, changing rooms and amenities, female-only prizes and opportunities, female language and culture, female-specific medical care and the right to political representation as women.

We are also concerned about the collection of data and tracking information based on sex. The administrative nature of the sex-change process creates a lower threshold

### **Gender identity to be treated as a protected class but not biological sex**

A judge of the court may currently consider aggravating factors when determining an appropriate sentence for a criminal offender such as whether a form of violence was motivated by hatred for or prejudice against a group of people to which the offender believed the victim belonged (such as religion, racial or ethnic origin, sexual orientation, age or disability).

The Bill proposes extending these categories to 'gender identity' and intersex status. It is unclear on what basis these extended categories are warranted, given the absence of supporting evidence showing that these populations are more at risk of harm.

Given the high rate of violence towards women<sup>13</sup>, it is unclear why the Bill does not extend the same protection to biological sex.

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<sup>13</sup> <https://www.aihw.gov.au/family-domestic-and-sexual-violence/resources/fdsv-summary>

# Minors can access irreversible medical treatments without Parental Consent and Knowledge

**(Schedule 2: Amendment of Births Deaths and Marriages Registration Act 1995 No 62; Schedule 3: Amendment of Children and Young Persons (Care and Protection) Act 1998 No 157.)**

The Bill allows 16- and 17-year-olds, who are not considered mature enough to drink, drive, vote, get married, or even get a tattoo, to legally change their sex with a form and to access irreversible medical treatment. The Bill allows minors to obtain updated identity documentation including a modified legal sex descriptor without the knowledge or consent of parents.

The Bill creates a legal presumption that minors should be allowed to consent to irreversible medical treatments. Women's Rights Network opposes this view.

## **Age of consent for medical treatment**

The Bill proposes that a minor would have the ability to make a decision about their own medical or dental treatment as validly and effectively as an adult if in the opinion of the medical practitioner or dentist the child is capable of understanding the nature, consequences and risks of the treatment, and the treatment is considered to be in the best interests of the child's health and well-being.

Firstly, it has already been determined under law that children do not have the cognitive ability to make life changing decisions. It is assumed that the intent of the proposal is to enable children to assess "gender-affirming care" without the safeguarding of mechanism of requiring parental consent.

The Cass Review<sup>14</sup> (released 10 April 2024) was undertaken in relation to the UK's Gender Identity Service. The review found that there is a greater propensity for a person to incur serious harm by a child-led health ("affirmative care") approach (which bases its diagnoses upon the patient's own medical evaluation without challenge) rather than a "watchful waiting" approach (which allows for the careful exploration of the underlying causes of the gender distress/dysphoria). Minors who have their transgender identity "affirmed", are more likely to proceed down a pathway of irreversible medical interventions (i.e. puberty blockers, cross-sex hormones and gender affirming cosmetic surgeries) than to address the causes of their feelings of gender dysphoria).

The Cass Review includes data from many countries, including Australia, and represents the latest expert thinking on treatment of gender identity distress in minors. The Bill would make provisions that are contrary to the evidence-based recommendations made in the Cass Review.

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<sup>14</sup> <https://cass.independent-review.uk/home/publications/final-report/>

# Redefining Sex and Sexual Orientation

## **(Schedule 1: Amendment to Anti-Discrimination Act 1977 No 48; Schedule 2: Amendment of Births Deaths and Marriages Registration Act 1995 No 62.)**

Sex, by definition, is binary – either male or female, including variations of sexual development (intersex) within these categories. However, the Bill proposes significant changes that undermine legal recognition of the binary nature of sex.

Women's Rights Network is concerned about all attempts to erase and undermine the legal recognition of biological sex. Homosexuality (including lesbianism) is same-sex attraction and has a basis in the binary nature of biological sex. We believe that factually accurate, meaningful and socially accepted language in law matters.

### **Multiple Sex Descriptors**

The Bill amends various acts to legally recognise multiple sexes. It allows for any sex descriptor to be registered under the Births, Deaths and Marriages Registration Act. This has far-reaching implications for sex-segregated services and data collection.

The collection of sex data is vital for understanding and tracking population trends from the trivial (understanding purchasing patterns) to the serious (understanding sex-based violence). Introduction of new terms that do not correlate with biological sex will frustrate any endeavour that relies upon collection of accurate sex data.

### **Expanded Sex Descriptors**

The Bill permits sex descriptors to include "male," "female," or "any other descriptor of sex" (except offensive terms). This allows people to legally register made-up sex descriptions.

The Bill confuses sex descriptors and gender identity descriptors. The examples of a sex descriptor in law include "agender, genderqueer and non-binary", which are gender identities not sex descriptors.

### **Change in Terminology**

The Bill alters terminology in various acts, changing references from 'opposite sex' to 'another sex.' For instance, "living as the opposite sex" becomes "living as another sex," implying the existence of more than two distinct sexes, which is factually incorrect.

- Schedule 1 requires that public service forms incorporate non-binary language (e.g. parent 1 and parent 2 instead of mother and father).
- Schedule 5 & 17 redefines sexual orientation to be based on 'gender identity'. This effectively eliminates the category of gays and lesbians as same sex attracted people under law since a person with a penis can identify as a lesbian and a person with a vagina can identify as a gay man.
- Schedule 9 & 15 removes female anatomical biological references by replacing "breasts" to "private upper body part".

These changes undermine the legal recognition of the binary nature of sex, thus posing a safeguarding risk in situations where sex is important.

### **Redefined Discrimination**

Part 4C of the ADA, previously about "Discrimination on the basis of homosexuality" is renamed "Discrimination on the basis of sexuality". It replaces the definition of "homosexual" with a broader one encompassing homosexual, bisexual, and asexual orientations.

Notably, heterosexuality remains undefined in law and lacks protection from discrimination.

## **The Bill encourages the Exploitation of Women**

**(Schedule 18 Amendment of Summary Offences Act 1988 No 25; Schedule 1 Amendment of Anti-Discrimination Act 1977 No 48; Schedule 6 Amendment of Crimes Act 1900 No 40; Schedule 19 Amendment of Surrogacy Act 2010 No 102)**

### Prostitution/Sex Work

Women's Rights Network recognises that prostitution (referred to in the Bill as 'sex work') is commercialised violence against women and girls. Women's Rights Network supports the Nordic Model<sup>15</sup>, which criminalises the buyers of sex (and supports the vulnerable women who are engaged in the sale of sex).

Accordingly, it is our view that Part 3 of the Summary Offences Act 1988 NO 25 should remain in place. This view is aligned to Article 6 of Committee on the Elimination of Discrimination against Women (CEDAW) which states "Parties shall take all appropriate measures, including legislation, to suppress all forms of traffic in women and exploitation of prostitution of women."

In their myth busting paper<sup>16</sup>, the Wahine Toa Rising and Coalition Against Trafficking in Australia explain that in many cases, women are pushed into the sex trade via poverty and disadvantage, and around 90% report that they would leave if they could. When you can't feed your children, you make difficult choices".

Numerous studies, survivor testimonies and outreach organisations note that many buyers actively seeking to harm, dehumanise or degrade women in the sex trade, often based on racist, classist and misogynistic views. These are not mutually pleasurable and healthy sexual relationships. Those who sell sex, predominantly women, experience noticeably elevated levels of physical and sexual violence and psychological trauma. Those who buy sex, almost exclusively men, have been found to exhibit higher rates of sexual aggression and 'hostile masculinity', and to see women in the sex trade as less than human. Women are

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<sup>15</sup> <https://nordicmodelnow.org/>

<sup>16</sup>

[https://www.catwa.org.au/wp-content/uploads/2020/11/CATWAWTR-16-days\\_SexTradeMyths\\_202011\\_21\\_Final.pdf](https://www.catwa.org.au/wp-content/uploads/2020/11/CATWAWTR-16-days_SexTradeMyths_202011_21_Final.pdf)

seen as simply objects through which to gain sexual pleasure, regardless of their feelings, safety or personhood.

The most concerning proposal in the Bill in relation to sex workers is the repeal of s15A which makes it unlawful to by coercive conduct or undue influence, cause or induce another person to commit an act of prostitution or surrender any proceeds of an act of prostitution. The reason cited for the change is that the offence of sexual servitude will supply an adequate remedy, if a remedy is required. However, Section 80B requires proof of physical constraint, for example, women being locked in. Coercive control (which will become an offence in domestic relationships from July 2024) deals with a range of controlling behaviours that take away a person's freedom to act. For example, a worker may be required to service more men that she wishes to, in order to pay for the amenity and protection of the brothel. In order to keep her 'contract' she may be unable to refuse sexual practices that she finds to be particularly demeaning or harmful to her physical or psychological well-being. There is no case for removing this provision.

We agree with the statement in the second reading speech<sup>17</sup> given by Alex Greenwich MP that a person such as a sex worker's partner who becomes incapacitated, an adult child who lives at home while studying or a housemate on a low income should not be penalised or prosecuted for living of the earning of a sex-worker. There is no evidence that such prosecutions have taken place to necessitate the wholesale removal of the provision.

#### **"Sex work" as a protected class**

The Bill also proposes changes that will criminalise vilification against sex workers. The maximum penalty is three years imprisonment. It is unclear why the sex worker profession is the only occupation to be protected and how this advances the equality of LGBTIQA+ people. One may speculate that the Bill seeks to normalise and indeed encourage sex work as a viable career choice. However, sex work is a dangerous occupation for women, with long-term impacts on their mental and physical health. Many women are trafficked into the industry and suffer horrendous abuse and loss of freedom. While we acknowledge that if the Government were to outlaw sex-work it would likely go underground, resulting in much less protection for vulnerable women who work in the trade, but at the same time we don't believe it should be encouraged or promoted.

The Bill fails to explain on what basis a sex worker should be given the same protection as an innate biological characteristic such as race or sex.

## Commercial Surrogacy

The Surrogacy Act (2010) prohibits commercial surrogacy in NSW. Schedule 19 of the Bill will make it legal to engage in commercial surrogacy by removing a ban on commercial surrogacy arrangements outside of NSW and allowing courts to issue parentage orders to intending parents of children born from these arrangements. This schedule is said to acknowledge that

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<sup>17</sup>

<https://www.parliament.nsw.gov.au/Hansard/Pages/HansardResult.aspx#/docid/'HANSARD-13238793-22-134163'>

the practice of overseas surrogacy arrangements goes on and that this amendment would allow children protections under the Surrogacy Act (2010) to legal recognition of their surrogacy and therefore to inheritance rights (Alex Greenwich MP Second Reading Speech). For example, parties can apply for a parental order and take the child's wishes into account.

However poorly regulated overseas arrangements will make it difficult for an adult child or birth parents to exercise their Part 5 rights to full birth records. It also makes most unlikely for a birth parent living overseas without material resources to apply in the NSW courts for a discharge of the parenting order under Division 6 on the grounds of fraud, duress or improper means. For this same reason, the proposed amendment that provides for a birth mother's rights to manage her pregnancy is also unenforceable in an overseas country.

It should be noted that this act as it stands provides minimal protections for children and would be improved by including some of the provisions of the NSW Adoption Regulation (2016). Under Part 3, adopting parents are provided with education and training and assessed for their suitability. Part 5 requires an adoption plan that sets out arrangements for information sharing and ongoing contact between the child and his/her birth family. Though both acts are guided by the paramount principle of the best interests of the child, evidently children given to surrogate parents have fewer rights than adoptees.

Commercial surrogacy is another form of human trafficking and abuse. The Federal Criminal Code should be expanded to include this practice in its definition of the trafficking of children. The Women's Rights Network considers commercial surrogacy to be an affront to the rights of children and that it encourages the exploitation of women's bodies – most commonly low income and disadvantaged women. The United Nations has warned that children risk becoming 'commodities' due to the growth in this unethical practice.

It is our view that commercial surrogacy should not be supported, regardless of where in the world it takes place. The Bill will create a loophole that allows individuals residing within NSW the opportunity to engage in commercial surrogacy, and thereby contribute to a practice that commodifies the bodies of women and girls.

## Restrictions on Freedom of Expression

### **(Schedule 8 Amendment of Crimes (Domestic and Personal Violence) Act 2007 No 80)**

#### **Speaking the truth classed as violence**

The Bill proposes that the disclosure of a person's gender history, sexual orientation, biological sex, intersex condition, HIV status or sex work history could be treated as a form of violence which could form the basis of an apprehended violence order.

We consider that these provisions are disproportionate to the outcomes of such disclosures. These provisions have no regard for times when disclosure may be required for management of medical risks (in the case of HIV status) or personal risk (for the maintenance of single-sex spaces and safeguarding). These provisions will have the effect

of criminalising the expression of a person's ordinary perception of whether someone is a male or a female.

## Infringing the rights of Government Workers

**(Schedule 5 Amendment of Court Security Act 2005 No 1; Schedule 7 Amendment of Crimes (Administration of Sentences) Act 1999 No 93; Schedule 9 Amendment of Crimes (Forensic Procedures) Act 2000 No 59)**

The Bill proposes that if a person who identifies as being transgender requires a bodily search, including strip search and forensic procedures, that it must be conducted by a member of a particular sex requested by the criminal suspect or offender. The Bill does not contain a provision for a person whose job it is to perform the search or procedure to refuse on the basis of discomfort and thereby prioritises the comfort or preference of the self identified person with a transgender identity over other opposite sex individuals. We consider this to be an imposition on the rights of female workers to refuse intimate contact with members of the opposite sex.

The Bill will amend a number of Acts to allow any person claiming to have a transgender identity to select the sex of a person carrying out a body search while in the court or prison system or while in the custody of police. The law currently states that all searches on prisoners must be conducted by a person of the same sex. This Bill will amend that provision to allow a person who says they are transgender to select the sex of the officer who strip-searches them. This provision only relates to a self-declaration at the time of the search, and does not rely on a reference to either the material reality of sex or even a legally-obtained altered identity document.

Female officers may be placed in uncomfortable or difficult workplace situations if males elect a strip search by a female officer. The transgender person doesn't need to have altered their sex descriptor, or fulfil any other requirements. They can simply assert that they 'seek to live' as a member of the opposite sex at the time of the search and will then have the right to be treated as such.

## The Bill has an impact on Government Workplaces

**(Schedule 12 Amendment of Government Sector Employment Act 2013 No 40; Schedule 13 Amendment of Government Sector Employment (General) Rules 2014)**

The Bill proposes diversity targets and quotas for all NSW public sector agencies. There are already some targets in place in the NSW public service relating to women in leadership roles, Aboriginal and Torres Strait Islander employment, and employment of people with disability. There is no evidence provided to justify the creation of diversity targets relating to the sexual orientation, intersex status (a medical condition) or gender identity of employees.



Unlike biological sex, these statuses are invisible, and should have no bearing on hiring decisions.

We propose that in place of quotas that the public service take steps to minimise the risk of discriminatory hiring such as the use of blind application (with no personal attributes listed) when selecting candidates for interviewing and a requirement to substantiate and record the basis on which one candidate is chosen over another. Additionally, the public service should seek to create an inclusive environment for its diverse workforce.

The Bill encourages government departments to provide leave for “gender-affirming care”. This leave is not available for any other forms of cosmetic surgery, for example for women who wish to receive a breast reduction will be required to use their existing leave entitlement. No rationale is given in the Bill for this special provision.

## Closed Consultation

### **The people of NSW deserve better than a closed-door consultation process**

This bill entails a conflict of rights. Whatever else the committee concludes, we trust it will acknowledge this conflict.

It is not efficient, effective or befitting a liberal democracy to mediate a conflict of rights behind closed doors. Rather the process requires open, robust and meaningful consultations with ALL stakeholders. A closed and secretive process will not only undermine Parliament’s capacity to devise the best possible legislation, but it also violates the human rights of all citizens of NSW to freedom of expression – to “seek, receive and impart information and ideas of all kinds” (art 19, ICCPR). It also breaches women’s rights to participate in public affairs (art 25 ICCPR, art 7 CEDAW).

While Women’s Rights Network appreciates the late invitation to make a submission to this committee, we are aware of many other women, women’s groups, and experts who were eager to participate and are still waiting for the opportunity to do so.

We draw your attention to the process last year in Queensland, where the Queensland Parliament referred its bill to allow sex-self ID to the Legal Affairs and Safety Committee of the Queensland Parliament which in turn invited the public to make written submissions. ,

Even so, the development of the Queensland bill fell short of best practice, with the Queensland Law Society commenting that

It is in all our best interests to ensure proposed laws work as effectively and efficiently as possible, and this requires meaningful and robust consultations with stakeholders. Short consultations held during the Christmas and new year shutdown will not yield the best legislation.

Even allowing for a truncated consultation period, the Queensland process received 385 which it published online - a measure of public interest and concern about the bill. It also held public hearings.

By contrast, the citizens of NSW are allowed to participate only through a drop down electronic survey that will likely only demonstrate the effectiveness of advocates' social media campaigns.

Unfortunately, the NSW Parliament appears to have form in this regard having recently imposed an artificially tight deadline for the debate on its recent Conversion Ban legislation - legislation which could lock gay and autistic children into a medical pathway for gender dysphoria.

Finally, the point needs to be made that legislation that effectively diminishes rights but does not say so clearly and unambiguously risks legal challenge. This is the consequences of the "principle of legality" that holds that legislation must not be interpreted as diminishing rights, imposing new burdens, or altering the common law unless it does expressly in unmistakable and unambiguous language.

As Justice Gleeson said in *Electrolux*, "the presumption is not merely a commonsense guide to what a parliament in a liberal democracy is likely to have intended; it is a working hypothesis, the existence of which is known both to parliament and the courts, upon which statutory language will be interpreted. The hypothesis is an aspect of the rule of law."

The women of NSW deserve to know in unmistakable and unambiguous language that this Bill will diminish their rights and be given a meaningful process to register their opposition.

## Diminishing Pre-Existing Rights

The Bill will diminish the pre-existing rights of women and girls in NSW.

In this section, we set out our concerns that the framing of this bill fails to uphold the "principle of legality" and as such threatens the functioning of our liberal democracy and the rule of law.

### **The "principle of legality" and the flawed case for the Equality Bill**

The "principle of legality" holds that legislation must not be interpreted as diminishing rights, imposing new burdens, or altering the common law unless it does expressly in unmistakable and unambiguous language.

As Justice Gleeson said in [Electrolux](#), "the presumption is not merely a commonsense guide to what a parliament in a liberal democracy is likely to have intended; it is a working hypothesis, the existence of which is known both to parliament and the courts, upon which statutory language will be interpreted. The hypothesis is an aspect of the rule of law."

## **Changing the definition of sex and woman diminishes pre-existing rights.**

The Equality Bill proposes amendments to the Births, Deaths and Marriages Registration Act 1995 (No 62) to facilitate a person in NSW to change their legal record of sex. As such it will alter the ordinary meaning of "sex" in NSW, and as a consequence the ordinary meaning of "woman".

Advocates for this bill may believe such a change is justified to advance the rights of LGBTIQA+ people. (We disagree, and our reasons are outlined below.) However, regardless of one's position on that issue, Parliament cannot deny that changing these definitions will impact pre-existing rights, particularly those of women, which are based on the current definition of sex.

Regrettably however, the Bill, its Explanatory Notes, and the Hansard record of its introduction fail to acknowledge any such impact, let alone do so 'expressly and in unmistakable and unambiguous language.' This omission constitutes a clear breach of the principle of legality, and as such will place in legal jeopardy any legislation subsequently passed. Parliament's action in passing such a bill might also raise serious questions about its understanding of and commitment to the principles of legality that underpin the operation of our liberal democracy.

## **This committee's closed-door process further compounds these risks**

The actions of this committee in restricting public involvement in its inquiry to a superficial online survey and allowing submissions only on the basis of a confidential list of stakeholders risks compounding the bill's existing breach of the principle of legality. Whatever the Committee's intentions for doing so, a closed door process threatens the ultimate legitimacy of this legislation which will in turn impact the interests of *all* stakeholders.

These actions also potentially violate the human rights of all citizens of NSW to freedom of expression - to "seek, receive and impart information and ideas of all kinds" (art 19, ICCPR) and the rights of women in particular to participate in policy formation (art 7 CEDAW).

The Committee's process is also at odds with recent practice in other jurisdictions in Australia. In 2022 the Queensland Parliament introduced a bill to allow sex-self ID. Following public concern, Parliament referred the bill to a committee. The committee invited the public to make [written submissions](#), receiving 385 which it published online, from concerned citizens and subject matter experts. It also held public hearings.

Even so, the development of the Queensland bill fell short of best practice. The [Queensland Law Society](#) commented in its submission that

It is in all our best interests to ensure proposed laws work as effectively and efficiently as possible, and this requires meaningful and robust consultations with stakeholders. Short consultations held during the Christmas and new year shutdown will not yield the best legislation.

[Committee members](#) also noted the Government had begun closed consultations with LGBT groups in 2018 but engaged women's groups only in 2022 and then only in response to public pressure with one information session rather than actual consultation:

The development of this Bill could have benefited immeasurably by being conducted in a transparent, respectful and consultative manner with the whole community over an extended period of time.

## Recommendations

### **Recommendation 1: Reject the Bill**

Women's Rights Network recommends that the committee reject the bill in its entirety.

### **Recommendation 2: Frank and Fearless Public Consultation**

The Bill introduces a conflict of rights and diminish the rights of women and girls in NSW. A conflict of rights must be mediated through a robust process involving all stakeholders. Failing to recognise the conflict of rights will set the Bill on shaky legal ground, and establish the potential for future challenges.

We recommend that a broad consultation is undertaken on the issues canvassed in the Bill. There is no electoral mandate to make the significant changes proposed in the Bill. A broad public consultation would reduce the risk that viewpoints are overlooked.

### **Recommendation 3: Investigate Potential Harm to Children**

In reference to the provisions of Schedule 2 and Schedule 3 of the Bill, we recommend that the committee initiate a separate public inquiry to determine the efficacy of 'gender affirming' practices in schools, medical and psychological support settings, family law and other relevant settings, for example but not limited to:

- Whether it is appropriate to affirm a child's identity in schools without parental consent;
- whether it is ethical to administer puberty blockers to minors (to stop them from undergoing puberty) and cross-sex hormones (to give them cosmetic attributes resembling the opposite sex) in the absence of comprehensive research on the health outcomes of these medical practices (noting the catastrophic nature of some side-effects that have been observed in patients to date).
- the capacity of children and people with severe mental health comorbidities to consent to gender affirming cosmetic surgeries such as mastectomies and castration.