

9 August 2019

Parliament of Victoria
Scrutiny of Acts and Regulations Committee
Parliament House, Spring Street
EAST MELBOURNE VIC 3002

Submission regarding the Births, Deaths and Marriages Registration Amendment Bill 2019

I applaud the Victorian Government's commitment to support for those with disability, its determination to address violence against women, and to bring equality for LGBTI communities. I am glad to live in a state that not only has strong anti-discrimination legislation, but also the Charter of Human Rights and Responsibilities.

I sincerely believe that that everyone should be afforded respect and treated with dignity – whether they are male, female, trans, gay, bi or straight. Equally, we need to protect the hard-won rights of women and girls, and ensure the safety of the most vulnerable in our community.

While I understand the Births, Deaths and Marriages Registration Amendment Bill 2019 (BDMRA) is coming from an admirable desire to improve the lives of trans people, it is not an appropriate legislative response. It creates serious conflicts with other rights holders, and these conflicts were not fully considered before introducing the Bill.

I am sending this submission as a constituent. I have no political or religious affiliations. I am motivated only by my concern that the BDMRA raises serious conflicts with women's rights. I do not hate trans people, I do not fear trans people. I believe there is away to protect the rights of trans people that does not diminish women's rights, and I urge Parliament to find that solution. Women must be allowed to share their concerns without being labelled transphobic, threatened and bullied into silence. That is not how a democracy works, especially not one that ostensibly values women as political citizens.

I am particularly concerned that there was no public consultation before this Bill was introduced. I'm therefore grateful that this scrutiny process is an opportunity for Parliament to more fully consider the impact of this Act. I believe it will determine that the current Bill is incompatible with the Charter and trespasses unjustifiably on rights contained in other legislation.

A note on terminology

Language and meaning is very important in this discussion. It is crucial to understand the discriminations between sex, gender and gender identity. In this submission I will be using the Macquarie dictionary definitions of these terms:

- *Sex: noun* the sum of the anatomical and physiological differences with reference to which males, females, and intersexes are distinguished.
- *Gender: noun* a socially constructed sexual identity, such as male, female, genderqueer, etc.; distinguished from physiological determination as to one's sex

- Gender identity: *noun* a human identity which is premised on a sex role distinction, usually developed as part of socialisation in childhood.
- Female: *noun* a human being of the sex which conceives and brings forth young; a woman or girl.
- Woman: *noun* 1. a female human being (distinguished from *man*); 2. an adult female person (distinguished from *girl*).
- Transgender: *adjective* of or relating to a person whose gender identity is different from their physiological gender.

The BDMRA conflicts with sex-specific rights and exceptions in the Equal Opportunity Act 2010

I am concerned about how the BDMRA will interact with the *Equal Opportunity Act 2010*, specifically the single-sex exceptions that allow for women-only spaces, jobs and sports.

Victoria was one of the first states in Australia to introduce equal opportunity legislation with the *Equal Opportunity Act 1977*. It was introduced to address the inequality women faced in employment, making it against the law to discriminate on the basis of sex or marital status. The Act has evolved and protections added for many other groups of people, across more areas of public life, and also prohibits sexual harassment. Our current Act has 19 protected attributes, including

- age
- disability
- gender identity
- race
- religion
- parental or carer status
- physical features
- political belief or activity
- pregnancy or breastfeeding
- sex.

Women are discriminated against primarily because of their biology, which the Act recognises by including sex, pregnancy and breastfeeding as protected attributes, and prohibiting sexual harassment. Women are also discriminated against because of the social gender roles that they tend to fulfil, which is why parental and carer status are attributes most often exercised by women.

In addition to prohibiting discrimination, the Act also seeks to address the historical and ongoing oppression that women face, by providing exceptions that recognise:

- **privacy and decency**, for example only employing females for a job that involves fitting women's clothing (section 26, Exception—genuine occupational requirements)
- **fairness**, for example single-sex sports (section 72, Exception—competitive sporting activities)
- **vulnerability to male violence**, for example women's shelters staffed only by females (section 28, Exception – welfare services and section 60, Exception – welfare measures)
- **cultural or religious practices**, such as women-only swimming sessions to enable Muslim women who cannot swim in mixed company to use the pool (section 12, Special measures)

My concern is that the proposed BDMRA Bill will allow anyone to change their legal sex with only a statutory declaration and supporting statement made by an adult who has known the applicant for at least 12 months. Removing the requirement for any medical intervention means male-bodied people will be able to change their legal sex to female. Therefore:

- given that 'sex' is not explicitly defined in the Act – although it has been taken to mean biological male and female by VCAT in the past¹ – what impact will that have on the protection for women in the Equal Opportunity Act?
- has an impact assessment been carried out?
- how will women's rights to privacy and decency, fairness, culture or religious practices be protected?
- how will women who have experienced male violence be protected from having male-bodied people in their safe spaces?
- will the Equal Opportunity Act need to be amended to specify *biological* sex for these exceptions, in order to maintain protections for women?

Until these questions are resolved the BDMRA as it currently stands clearly trespasses on women's rights protected in the Equal Opportunity Act.

A further note, gender identity is defined in section 4(1) of the Act as:

- (a) the identification on a bona fide basis by a person of one sex as a member of the other sex (whether or not the person is recognised as such)—
 - (i) by assuming characteristics of the other sex, whether by means of medical intervention, style of dressing or otherwise; or
 - (ii) by living, or seeking to live, as a member of the other sex...

Gender identity also includes "(b) the identification on a bona fide basis by a person of indeterminate sex as a member of a particular sex".

I believe this section of the Act could be broadened to provide greater protection in such a way that does not diminish women's rights, for example, it could include gender expression and allow for non-binary gender identities.

The BDMRA is incompatible with the Charter of Human Rights and Responsibilities Act 2006

Allowing self-identification of sex, rather than using a biological distinction, will create conflicts with the rights protected under Victoria's Charter of Human Rights and Responsibilities. I have identified at least four rights that will be limited by the BDMRA. The Committee must consider whether these limitations are justifiable and reasonable – I strongly believe that they are not.

¹ "In my view, "sex" in the EO Act has the straightforward meaning of the state of being male or the state of being female. The attribute of "sex" is included in the EO Act to prohibit discrimination on the basis of a person being a male or on the basis of the person being a female." (Dr G. P. Lyons, Senior Member). *Menzies v Waycott & Anor* [2001] VCAT 415 (31 March 2001) [198].

Section 8: Your right to recognition and equality before the law – Everyone is entitled to equal and effective protection against discrimination, and to enjoy their human rights without discrimination.

The law cannot protect against sex discrimination if it changes the legal definition of sex to mean not biology (or in some rare cases, bodies altered by surgery and medicine) but an internal sense of self that has no connection to biology or bodies.

Section 10: Your right to protection from torture and cruel, inhuman or degrading treatment – People must not be tortured. People must also not be treated or punished in a cruel, inhuman or degrading way. This includes protection from treatment that humiliates a person.

Allowing male-bodied people access to spaces created for vulnerable women, such as rape shelters and women's refuges, treats those women in a degrading way. Expecting survivors of rape, sexual assault and male violence to share their spaces with biological males, who believe themselves to be women, shows no regard for the effect or that may have on women and children dealing with significant trauma.

Section 19: Cultural rights – People can have different family, religious or cultural backgrounds. They can enjoy their culture, declare and practise their religion and use their languages.

Some cultures or religions also require women-only spaces in the practice of their religion. How will this right be upheld if male-bodied people can access such spaces?

Section 22: Your right to humane treatment when deprived of liberty – People have the right to be treated with humanity if they are accused of breaking the law and are detained.

Evidence suggests that between 70 and 90 per cent of women in prison have been physically, sexually or emotionally abused as children or adults.² The overwhelming majority of acts of domestic violence and sexual assault are perpetrated by men against women.³ Incarcerated women will be further traumatised by the presence of self-identified trans women who are still biologically male and who will be sharing facilities such as bathrooms within the closed environment of a prison. This is not humane treatment when deprived of liberty.

The Committee must consider if there is another way of achieving the desired aim of the BDMRA that will not place as great a limit on non-trans rights, for example, creating a new category on birth certificates for gender identity, rather than changing the historical record of sex.

Additional concerns related to health and statistics

In addition to the conflicts with non-trans, predominantly women's rights, outlined above, I have further concerns about the consequences of the BDMRA and self-identification of sex.

Health:

- How will male and female health services be affected, given that medical science is based upon the biological differences between male and female bodies?

² Hayley Gleeson with Julia Baird, *Why are our prisons full of domestic violence victims?* (ABC News, 20 December 2018) <<https://www.abc.net.au/news/2018-12-20/womens-prisons-full-of-domestic-violence-victims/10599232>>.

³ Dr Kristin Diemer, *ABS Personal Safety Survey: Additional analysis on relationship and sex of perpetrator*. (Documents and working papers, Research on violence against women and children, University of Melbourne 2015).

- Will patients have the right to request treatment from a practitioner of their preferred biological sex?
- What about statistics used to monitor the health and life outcomes of male and female Victorians – will that be restricted to recording birth sex?

Statistics:

- How will sex-based data be collected on crimes committed?
- Will crimes committed by trans women be regarded as crimes by females?
- Given that men commit the vast majority of sexual and violent crimes than women, how will this affect statistics on offences?
- How can effective policy responses be developed if accurate and meaningful statistics are not being collected?

Conclusion

Trans people exist and there is no question that they should be able to enjoy the rights and protections afforded to all Victorians. That is why it is important to include gender identity as a protected attribute in our Equal Opportunity Act, much as we do religious beliefs or physical appearance. No one should be discriminated against because of their beliefs or the way they look. It only becomes problematic if one's beliefs impinge upon the rights of others.

I would venture to say that most Victorians understand the principle distinction between men and women to be rational, biological and based on evidence. It is unacceptable for a free and fair society to enact legislation that allows for a person's internal sense of self to take precedence over biological reality. It is possible to protect the rights of trans people without limiting the rights of women. And it is vital to retain a distinction between *sex* and *gender identity*, as these are two distinct concepts.

This submission has demonstrated that the BDMRA will clearly place unacceptable limitations on the rights of women and girls. I look forward to reading the Committee's report to Parliament.

Yours sincerely

Claire Harris