

[REDACTED]

---

**From:** Victorian Women's Guild <[REDACTED]>  
**Sent:** Friday, 9 August 2019 2:46 PM  
**To:** SARC  
**Attachments:** VWG Submission to SARC re BDMRA Bill 2019.pdf

Dear SARC,

Please find attached a submission from the Victorian Women's Guild on the *Births, Deaths and Marriages Registration Amendment Bill 2019*.

Yours faithfully,

Nina Vallins,  
On behalf of the Victorian Women's Guild

--  
Victorian Women's Guild  
<https://www.victorianwomensguild.org/home>

# Submission to the Scrutiny of Acts and Regulations Committee

Attn: Martin Gepp MLC, Chair

**Re: *Births, Deaths and Marriages Registration Amendment Bill 2019***

Submitted by the Victorian Women's Guild

 [info@victorianwomensguild.com](mailto:info@victorianwomensguild.com)

08 August 2019

The Victorian Women's Guild is a collective established by women to promote women's rights and women's concerns in the State of Victoria.

Our position is that the *Births, Deaths and Marriages Registration Amendment Bill* ("BDMRA Bill") is inconsistent with existing protections for sex-based rights, that it will adversely affect women's rights and safety, and should not pass the Victorian Parliament. In the alternative, there are a number of amendments which should be made to ensure that the BDMRA Bill does not create obligations or new rights which conflict with those articulated in the *Equal Opportunity Act 2010*.

We are concerned that the BDMRA Bill:

- Offends the principle of legality;
- Is incompatible with the human rights set out in the Charter of Human Rights and Responsibilities; and trespasses unduly on the rights and freedoms of women;
- Makes rights, freedoms or obligations dependent upon non-reviewable administrative decisions;
- Inappropriately delegates legislative power to the executive and insufficiently subjects the exercise of legislative power to parliamentary scrutiny.

## **Why birth certificates matter**

Birth certificates are a person's first identity document; they are foundational. Birth certificates, proof of age, and passports are the only identity documents which record a person's sex. They therefore can form the basis of a person's access to sex-specific spaces and opportunities.

## **The Principle of Legality**

The BDMRA Bill fundamentally changes who has a right of access to sex-specific spaces and opportunities. The *Equal Opportunity Act 2010* aims to promote and facilitate the progressive

realisation of equality and it allows for discrimination on the basis of sex, order to promote equality and protect privacy and dignity.<sup>1</sup>

For example, it is currently lawful to discriminate against males in order to provide women's only competitive sporting activities; or to employ only female people in jobs where bodily privacy is a concern. An organisation could apply for an exemption from discrimination law in order to provide services to only female people. This means that those activities are lawfully available to only female-bodied and/or persons who were born male but who have undertaken serious medical intervention and made a profound commitment to living as the opposite sex.

The BDMRA Bill would, if passed, allow male-bodied but female-identified people access to those spaces and opportunities *as of right*.

Considering that this represents a fundamental change, if this is Parliament's intention, it should state so with unmistakable clarity.

At the same time, the Guild notes that the BDMRA Bill significantly conflicts with the objectives of the *Equal Opportunity Act*, to provide protections for lawful discrimination on the basis of sex (explained in more detail below). It is surely not the intention of the Government to fundamentally undermine the operation of the *Equal Opportunity Act*. In this case, the Parliament should *not* state that it intends to fundamentally change existing rights but should:

1. Withdraw the Bill and put it out for consultation;
2. In the alternative, consider amendments which would retain a common and biological understanding of sex to be recorded on birth certificate and instead allow people to apply for Gender Recognition Certificates, similar to those in the UK; and,
3. Further in the alternative, clearly state that the BDMRA Bill is not intended to conflict with the protections in the *Equal Opportunity Act* which safeguard women's sex-based rights.

## **Human Rights Concerns**

We refer to ss 8 and 13 of the Victorian Charter of Human Rights and ss 6, 26, 68, 69 and 72 of the Equal Opportunity Act.

### **Charter, Section 8: Right to recognition and equality before the law**

*s8(3) Every person 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.*

*s8(4) Measures taken for the purpose of assisting or advancing persons or groups of persons disadvantaged because of discrimination do not constitute discrimination.*

The intent of Section 8 of the Charter is to guard against sex discrimination and to ensure that affirmative actions are lawful.

---

<sup>1</sup> Equal Opportunity Act 2010, s 3; *Equal Opportunity Bill, Statement of Compatibility*, Attorney-General Rob Hills, Hansard 10 March 2010, C.1, p 770 and D.10, p 776.

The Charter presumably does this in recognition of the particular discriminations experienced by women and the long history of such discrimination: women, not men, have been denied access to education, employment, property, civil and political participation, autonomy and personal security over the course of history. Male-bodied people (of certain races and class) were never denied the right to vote in the Westminster Parliamentary system in Australia, no matter how they have identified; male-bodied people were never required to leave their jobs upon marriage or upon becoming pregnant; the action for loss of consortium was only ever available to male-bodied people, reflecting the common law understanding of wives as property of their husbands.

However, the law cannot guard against continuing sex-based discrimination, or redress such discrimination through affirmative actions, if the legal definition of sex has changed. The Bill proposes to codify an understanding of 'sex' which more properly is termed 'gender identity,' as sex is a biological reality which can never be changed.

Furthermore, if 'sex' is no longer only 'male' and 'female,' but can include almost limitless descriptors, as proposed in the Bill, then this further undermines the ability to construct single-sex spaces which guard against discrimination against women and promote affirmative action.

### **Equal Opportunity Act, ss 6, 26, 68, 69 and 72: Lawful sex-based discrimination**

We say that the Bill, in its current form, undermines the *Equal Opportunity Act* ("the EO Act"), which states that 'sex' is a protected characteristic (s 6) and, while not defining 'sex,' differentiates sex from gender identity (see s 72).

Per section 72 of the EO Act, a person may be excluded from competitive sporting activities on the basis of **sex or gender identity**, where the strength, stamina or physique of competitors is relevant. This clause is intended to allow for fair competition in sport.<sup>2</sup> At section 13 of the Act, an example is given of lawful discrimination whereby a football club could refuse to allow a 15-year-old girl to participate in a football competition restricted to boys only. Presumably, this is lawful in order to protect the girl from injury and/or harassment if she were to compete in an all-boys club, and therefore to protect the club from liability in torts. The *EO Act* thus acknowledges the material reality of biological difference.

The EO Act notes that this section does not apply to children under the age of 12; presumably, again, on the basis that prepubescent children have not yet experienced the bodily changes which create significant differences in strength, stamina and physique between male and female people.

---

<sup>2</sup> EO Act Explanatory Memorandum.

Then-Attorney-General Rob Hulls acknowledged in the Statement of Compatibility accompanying the EO Act that discrimination on the basis of gender identity was allowed in order to ensure fair competition in

competitive sporting activities by differentiating between people based on attributes which may mean they cannot compete at the same level as people without those attributes. This is an important purpose in a society that values competitive sport. Doing this may increase participation in some sports, and thereby facilitate freedom of association between members of these groups.

He noted that the limitation only applied to competitive sporting activities and in which strength, stamina or physique are relevant. He acknowledged that

The effect of this limitation may be far reaching in circumstances where no equivalent sporting competitions are provided to people in the groups excluded by the exception. However, such circumstances depend on the availability of resources, and in some instances, the history and culture of the sport, which are issues that equal opportunity law cannot adequately address.

In considering whether there was any less restrictive means reasonably available to achieve the purpose of fair competition, Minister Hulls stated

The exception allowing discrimination on the grounds of gender identity assumes that a transgender person may have a competitive advantage associated with their birth gender. This may not necessarily be the case. For example, **female to male transgender people competing in male competitive sporting activities are unlikely to have a competitive advantage**. Given this, limiting the exception to instances where people have a competitive advantage because of their gender identity may be a less restrictive means of achieving the purpose of the exception. However, framing the exception in this way may be difficult to apply, as it would involve assessing the effects of the person's gender identity on their sporting ability, an assessment that would be beyond the capability of most sporting organisations and may involve intrusive questioning and testing.

...

In light of this, and in light of the fact that the exception is limited to competitive sporting activities, the exclusion of people on the basis of gender identity is a reasonable means of achieving the purpose of the limitation.<sup>3</sup>

The *EO Act* provides for further lawful discriminations on the basis of sex, which belie an understanding of sex which is biological, rather than identity-based. At section 26, the *EO Act* allows an employer to discriminate on the basis of sex if it is a 'genuine occupational requirement of the employment that employees be people of that sex.' The Act gives a

---

<sup>3</sup> *Equal Opportunity Bill, Statement of Compatibility*, Attorney-General Rob Hills, Hansard 10 March 2010, D.12, p 777.

non-exhaustive list of examples of jobs such as fitting clothes; searching clothes or bodies; accessing lavatories; or having entry to areas where people may be in a state of undress.

Minister Hulls acknowledged the importance of sex-segregation in preserving the privacy and dignity of the people receiving the service provided by the person employed under the exception, and that this applied equally to jobs requiring men and those requiring women.<sup>4</sup>

We say that passage of the *Bill* would seriously conflict with the Equal Opportunity Act and that the Committee should return the Bill to the Attorney General for revisions to ensure that sex-specific spaces and opportunities (referring to sex as a biological category) are not undermined by the Bill.

**We note that the statement of compatibility accompanying the Bill only referred to the rights of trans and gender-diverse people and did not consider the human rights of women. This is a gross oversight which undermines the integrity of the BDMRA Bill and the EO Act.**

At a minimum, the Bill should include a provision along the lines of ‘For the avoidance of doubt, this legislation is not intended to alter the effect of sections 26, 68, 69 and 72 of the Equal Opportunity Act where those provisions protect the sex-based rights of women.’

### **Charter and EO Act Right to privacy**

*Section 13: A person has the right— (a) not to have his or her privacy, family, home or correspondence unlawfully or arbitrarily interfered with; and (b) not to have his or her reputation unlawfully attacked.*

We say that the right to privacy includes *bodily privacy*. That is, privacy protects a person’s partially or fully-unclothed body from exposure to another person; and includes the right to be free from unconsented risk exposure to the opposite sex when members of the opposite sex are partially or fully unclothed.

This matter has been particularly considered by US Courts. The Courts have declined to find that the right to privacy, as articulated in the US Constitution, extends generally to the entirety of a locker room. The Court has been satisfied that the possibility of changing in a private cubicle in a locker room is sufficient protection for a female-bodied student who is sharing the locker room with a male-bodied and female-identified student (or the inverse). Critical to the findings in the ‘locked room cases’ is that a female-bodied person still has some access to a private changing area, even if male-bodied people are allowed access to the communal changing area. See *Students v. U.S. Dep’t of Educ.*, No. 16-CV-4945, 2016 WL 6134121, at \*22 (N.D. Ill. Oct. 18, 2016).

---

<sup>4</sup> *Equal Opportunity Bill, Statement of Compatibility*, Attorney-General Rob Hulls, Hansard 10 March 2010, C.1, p 770.

We say that the *Bill* does not currently make any protections available for the bodily privacy of people on the basis of biological sex. We note that the Attorney-General did not refer to any such concerns in her Second Reading Speech. We say this is an omission and the *Bill* should be returned to the Attorney-General for amendments which will safeguard these protections currently available under the *EO Act*.

We note that Minister Hills referred to bodily privacy in considering the sections on lawful discriminations for club facilities. Section 69 of the *EO Act* allows clubs to provide equivalent but separate benefits to male and female members where it is not practicable for men and women to enjoy the same benefit together. The purpose of this exception is

to ensure men and women have reasonably equivalent access to member benefits of a club, if it is not practicable for men and women to enjoy those benefits at the same time. For example, where there is only one change room available at a sporting club, it may be reasonable to provide separate access to men and women. In such cases, the exception will operate to protect the right to bodily privacy (section 13 [of the Charter]).<sup>5</sup>

## **Makes rights, freedoms or obligations dependent upon non-reviewable administrative decisions**

The decision of the Registrar to allow or reject a person's application to change their recorded sex should be open to review by, for example, other persons in the applicant's community, victims of crime, or other affected persons. This means that the Act should explicitly allow persons in the applicant's community, victims of crime and other affected persons:

1. The opportunity to comment on a person's application to change their recorded sex
2. The right to apply for an internal review for a review of the Registrar's Decision;
3. The right to apply to the Victorian Civil and Administrative Tribunal for a review of the Decision.

For example, Evie Amati is a transgender prisoner in NSW who is male-bodied and has identified as female. Amati was convicted of injuring a number of persons with an axe. Amati is currently incarcerated in a prison for women, as per Amati's stated gender identity. Amati has since attacked women in the prison and the NSW Corrections system is now having to address the issue of the safety of female prisoners and where to keep Amati. If Amati were a prisoner in Victoria and was applying for and was granted a change to their recorded sex on their birth certificate, it is not apparent that any of the female prisoners with whom Amati would be incarcerated would be able to object to this - even though this would infringe upon their rights to security of the person (s24 of the Charter).

Similarly, if the violent ex-partner of a woman were to apply to have his legal sex changed on his birth certificate, she should have the opportunity to comment on his application and object.

---

<sup>5</sup> *Equal Opportunity Bill, Statement of Compatibility*, Attorney-General Rob Hills, Hansard 10 March 2010, D.11, p 776.

It would be unjust to make the rights of women in prison, or domestic violence shelters, or in other places where they may be in states of undress or other vulnerability, dependent on administrative decisions which they cannot appeal.

### ***Inappropriate delegation of legislative power and removal of sufficient parliamentary scrutiny***

We say that the delegation of the following powers to the Registrar represent an inappropriate delegation of legislative power and accordingly ensures that the exercise of this power is not subject to sufficient parliamentary scrutiny:

#### **1. 'Relevant person'**

The Bill states that children's application to have their recorded sex altered must be 1) done by a parent and 2) with support of a 'relevant person' (s30B(5)). A relevant person is a doctor, psychologist, or 'prescribed class of persons.' The Governor in Council has the power to determine this class. Considering the novelty of the legal change proposed by the Bill, we say that this is an inappropriate delegation of legislative power.

It should be made patently clear that power to determine additional relevant persons must be interpreted in light of the named categories - that is, persons with the qualifications to make a clinical diagnosis and/or with appropriate health qualifications.

#### **2. Fraudulent application**

At 30C(3)(b) the Bill says that the Registrar may require further information in order to establish that the alteration of the record of sex is not sought for a fraudulent or other improper purpose. There is no guidance on how to determine if an application is fraudulent or not. This is a serious matter which could require proper evidence and enliven questions of natural justice. We say that considering the significant change this Bill represents to legal understandings of sex, the Registry should have clear guidance, at least by way of Regulations, as to the grounds for determining the authenticity, including community acceptance, of an application to change recorded sex.

#### **3. Prohibited sex descriptors**

The Registrar has the power to reject certain sex descriptors: if they are obscene or offensive, too long, cannot be established by repute or usage, or a symbol. Again, there is no guidance for the Registrar on how to determine whether or not a sex descriptor can be established by repute or usage.

If a person is known generally in their community to be of the gender 'snail,' but 'snail' is not generally established in the wider community to be a sex descriptor, would this descriptor be accepted by the Registrar?

We say this is properly a matter for regulations where there can be some higher level of parliamentary scrutiny, rather than just a decision of the Registrar. We further say that the Parliament must give some kind of indication of what it expects in terms of sex descriptors in the debate in Parliament or more properly in the Bill's explanatory memorandum.

**The Guild would welcome the opportunity to provide further comment on the Bill or a more appropriate alternative Bill which would provide protections against discrimination against transgender people while maintaining safeguards for protections of women's rights.**