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LEGISLATIVE ASSEMBLY OF THE
NORTHERN TERRITORY

ATTORNEY-GENERAL AND MINISTER FOR JUSTICE

**BIRTHS, DEATHS AND MARRIAGES REGISTRATION AND
OTHER LEGISLATION AMENDMENT BILL 2018**

SERIAL NO. 70

EXPLANATORY STATEMENT

GENERAL OUTLINE

The purpose of this Bill is to amend the *Births, Deaths and Marriages Registration Act* and other legislation in consequence of the enactment of the *Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Act 2013 (Cth)* and the *Marriage Amendment (Definition and Religious Freedoms) Act 2017 (Cth)*.

The Bill will make the following key amendments to the *Births, Deaths and Marriages Registration Act*:

- It will remove the requirement to be 'unmarried' in order to register a change of sex.
- It will allow for the registration of a change of sex or gender identity, rather than a change of sex only.
- It will allow a person to register their sex or gender identity as something other than 'male' or 'female'. It will include recognition of intersex persons.
- It will remove the requirement to have undergone sexual reassignment surgery to register a change of sex and replace this with a requirement to have received appropriate clinical treatment. There will also be a requirement that applications to register a change of sex/gender be accompanied by a statement from a registered medical practitioner or psychologist.
- There will be additional safeguards in relation to applications for registering a change of sex/gender for a child. Such applications are to be made by the parents or guardian of the child, and only where it is in the best interests of the child. There will also be provisions relating to the child's consent.

NOTES ON CLAUSES

Part 1 Preliminary matters

Clause 1. Short Title

This is a formal clause which provides for the citation of the Bill. The Bill, when passed, may be cited as the *Births, Deaths and Marriages Registration and Other Legislation Amendment Act 2018*.

Clause 2. Commencement

This is a formal clause which provides when the Act will commence. The Act will commence on the day after the day of assent by the Administrator.

Part 2 Amendment of Births, Deaths and Marriages Registration Act

Clause 3. Act amended

This is a formal clause which provides that Part 2 makes amendments to the *Births, Deaths and Marriages Registration Act*.

Clause 4. Section 3 amended (Objects of Act)

This clause amends section 3(b) by inserting 'or gender identity' after 'sex' to reflect that the Act allows for changes of 'sex or gender identity'.

Clause 5. Section 23 replaced

This clause amends the requirements for registering a change of an adult's name, by removing the requirements that a notice of the change of name be published by the applicant in a newspaper, and that the person's application be accompanied by a copy of the same notice.

A person who applies to register a change of their name will no longer be required to publish a notice of the change in a newspaper, or provide a copy of such a notice to the Registrar.

Clause 6. Sections 28A, 28B, 28C and 28D replaced

This clause repeals sections 28A, 28B, 28C and 28D and inserts new sections 28A, 28B, 28C, 28CA, 28D and 28DA.

Section 28A Definitions

The clause removes the definitions of 'recognition certificate' and 'sexual reassignment surgery', and inserts new definitions of 'intersex person', 'psychologist' and 'recognition certificate'.

'Intersex person' is defined to mean 'a person who is born with physical or biological sex characteristics that do not fit typical classifications of male or female bodies.'

'Psychologist' is defined to mean 'a person registered under the Health Practitioner Regulation National Law to practise in the psychology profession (other than as a student).'

'Recognition certificate' is defined to mean 'a certificate issued under any law certifying that a person has a sex or gender identity that is different to the sex or gender identity specified for that person in the Register'.

The amended definitions are consistent with the amended requirements for registering a change of sex or gender identity under the *Births, Deaths and Marriages Registration Act*.

Section 28B Application to register change of sex or gender identity

The clause also removes the current requirements that an adult be unmarried, and have undergone sexual reassignment surgery, in order to register a change of sex. The clause instead inserts a new section 28B(1) which allows an adult to apply to the Registrar, in a form approved by the Registrar, to register a change of the adult's sex or gender identity, in particular circumstances. The circumstances are that the adult's birth is entered in the Register, the adult believes their sex or gender identity to be that nominated in their application, and that the adult either has received appropriate clinical treatment in relation to their sex or gender identity, or is an intersex person.

The term 'appropriate clinical treatment' has not been defined, to ensure that professional medical opinions are not impeded by the Act, and to recognise that different types and levels of clinical treatment will be appropriate for different individuals.

The clause also removes the current requirement that a child have undergone sexual reassignment surgery in order to register a change of sex for the child. The new section 28B(2) relates to applications to register a change of sex or gender identity for a child and allows the

parents of the child to make such an application in particular circumstances. The particular circumstances are that the child's birth is entered in the Register, the applicants believe on reasonable grounds that the change is in the best interests of the child, and that the child either has received appropriate clinical treatment in relation to the child's sex or gender identity, or is an intersex person.

The new section 28B(3) and (4) set out the circumstances in which one parent may make an application in relation to a child, under section 28B(2). These include where the person is the only parent named in the registration of the child's birth, a person who is the only surviving parent of the child, or a person who is the child's guardian (if the parents cannot exercise their parental responsibilities).

The new section 28B(5) stipulates that for this section, the nominated sex or gender identity must be of a kind recognised in the regulations.

Section 28C Information that must accompany application

The new section 28C relates to information that must accompany an application to register a change of sex or gender identity. The new section 28C(1)(a) requires that an application by an adult to register a change of their sex or gender identity must be accompanied by a statement from a medical practitioner or psychologist certifying that the adult either has received appropriate clinical treatment in relation to their sex or gender identity, or is an intersex person. The new section 28C(1)(b) also allows for other documents or information to be prescribed in the regulations, for the purposes of accompanying such an application.

The new section 28C(2) sets out the information that must accompany an application by a person to register a change of sex or gender identity of a child. The section requires the same information as that required for an application in respect of an adult (explained above). In addition, the section requires a statement from the child consenting to the change to be provided, in circumstances where section 28CA applies.

Section 28CA Child's consent to change of sex or gender identity

The new section 28CA relates to a child's consent to the registration of a change of their sex or gender identity. The section has the effect of preventing the Registrar from registering a change of sex or gender identity for a child in circumstances where the child is aware of the meaning and implication of the child's sex or gender identity, and does

not consent to the change. Section 28CA(2) provides that, unless there is evidence to suggest otherwise, a child who has attained the age of 14 years is taken to be aware of the meaning and implication of the child's sex or gender identity.

Section 28CA(2) is consistent with existing requirements in the *Births, Deaths and Marriages Registration Act* for a child's consent to register a change of the child's name.

Section 28D Registration of change of sex or gender identity

The new section 28D is titled 'Registration of change of sex or gender identity' and stipulates that, on receipt of an application under section 28B, the Registrar must either make the requested change to the Register or refuse to make the requested change.

Section 28DA Registrar may limit number of applications

The new section 28DA(1) allows the Registrar to place a limit on the number of applications that may be made under this Part in respect of a person. Section 28DA(2) requires the Registrar to arrange for the limit to be published as the Registrar thinks fit. This would include by making it available on a website maintained by the Agency. Section 28DA(3) provides the Registrar with discretion to reject an application if the number of applications made under this Part in respect of a person exceeds the limit determined by the Registrar.

This aims to deter frivolous applications. The requirement to publish the limit also provides a measure of transparency about the Registrar's determination.

Clause 7. Act further amended

This is a formal clause which in effect provides that Schedule 1 amends the laws mentioned in it.

Part 3 Amendment of Criminal Code

Clause 8. Act amended

This is a formal clause which provides that Part 3 makes amendments to the Criminal Code.

Clause 9. Section 1 amended (Definitions)

This clause amends section 1 by omitting the definition of ‘husband’ and ‘wife’, which are adequately covered by the *Interpretation Act*.

Clause 10. Section 13 amended (Accessories after the fact)

This clause rephrases section 13(2) so that it provides that ‘the rule of law under which a wife cannot be an accessory after the fact to an offence committed by her husband is abolished’.

The new wording does not alter the intent of the repealed section 13(2), but adds clarity in light of the amended definition of ‘marriage’ brought about by the *Marriage Amendment (Definition and Religious Freedoms) Act 2017* (Cth). The new wording is also similar to that used in New South Wales. Section 347A of the *Crimes Act 1900* (NSW) refers.

Clause 11. Section 128 amended (Sexual intercourse or gross indecency involving child over 16 years under special care)

This clause amends section 128(4) by replacing the terms ‘husband’ and ‘wife’ with the gender-neutral term ‘spouse’.

This ensures that this provision extends to all married persons, regardless of their sex or gender.

Clause 12. Section 130 amended (Sexual intercourse or gross indecency by provider of services to mentally ill or handicapped person)

This clause amends section 130(3)(a) by replacing the words ‘the husband, wife, or de facto partner of’ with the gender-neutral phrase ‘spouse or de facto partner of’.

This ensures that this provision extends to all married persons, regardless of their sex or gender.

Clause 13. Section 291 replaced

This clause repeals section 291 and inserts a new section 291 titled ‘Conspiracy by husband and wife’. The new section 291 provides that ‘Any rule of law under which a husband and wife are incapable of criminally conspiring together is abolished.’

The new wording does not alter the intent of the repealed section 291, but adds clarity in light of the amended definition of 'marriage' brought about by the *Marriage Amendment (Definition and Religious Freedoms) Act 2017* (Cth). The new wording is also similar to that used in New South Wales. Section 580D of the *Crimes Act 1900* (NSW) refers.

Part 4 Amendment of Domicile Act

Clause 14. Act amended

This is a formal clause which provides that Part 4 makes amendments to the *Domicile Act*.

Clause 15. Section 5 replaced

This clause repeals section 5 and inserts a new section 5 titled 'Abolition of rule of dependent domicile of married woman'. The new section 5 provides that 'The rule of law under which a married woman has at all times the domicile of her husband is abolished.'

The new wording does not alter the intent of the repealed section 5, but adds clarity in light of the amended definition of 'marriage' brought about by the *Marriage Amendment (Definition and Religious Freedoms) Act 2017* (Cth). The new wording is similar to that used in New South Wales. Section 5 of the *Domicile Act 1979* (NSW) refers.

Clause 16. Section 8 amended (Domicile of certain children)

This clause amends section 8(3) by omitting the words 'in wedlock'. The amendment does not alter the meaning of the provision but reflects modern use of language.

Part 5 Amendment of Evidence (National Uniform Legislation) Act

Clause 17. Act amended

This is a formal clause which provides that Part 5 makes amendments to the *Evidence (National Uniform Legislation) Act*.

Clause 18. Section 73 amended (Exception – reputation as to relationships and age)

This clause amends section 73(1)(b) by replacing the words ‘a man and a woman’ with the gender-neutral phrase ‘2 people’.

This ensures that this provision extends to all married persons, regardless of their sex or gender.

Clause 19. Chapter 9 inserted

This clause inserts a new Chapter 9 after section 218 of the *Evidence (National Uniform Legislation) Act*. The new Chapter 9 is titled ‘Transitional matters for Births, Deaths and Marriages Registration and Other Legislation Amendment Act 2018’, and consists of new section 219 entitled ‘Application of section 73’.

The new section 219 provides that ‘Section 73, as amended by the *Births, Deaths and Marriages Registration and Other Legislation Amendment Act*, applies in relation to evidence adduced in proceedings on or after the day on which this Part commences, whether the proceedings are instituted before or after that commencement.’

This aims to ensure that the amendment applies to any evidence adduced immediately following the commencement of the amendment, including in proceedings that were initiated prior to the commencement of this Act.

Part 6 Amendment of Law of Property Act

Clause 20. Act amended

This is a formal clause which provides that Part 6 makes amendments to the *Law of Property Act*.

Clause 21. Section 14 amended (Rights of husband and wife)

This clause amends the heading of section 14 by replacing the words ‘husband and wife’ with the gender-neutral term ‘spouses’.

This clause also amends section 14 by replacing the words ‘A person and the person to whom he or she is legally married’, with the gender-neutral phrase ‘Two persons who are married to each other.’

These amendments ensure that this provision extends to all married persons, regardless of their sex or gender.

Clause 22. Section 188 amended (Unborn husband or wife)

This clause amends the heading of section 188 by replacing the words 'husband and wife' with the gender-neutral term, 'spouse'.

This clause also amends section 188 by replacing various references to 'widow' and 'widower' with the gender-neutral term 'surviving spouse'.

These amendments ensure that the provision extends to all married persons, regardless of their sex or gender.

Part 7 Amendment of Law Reform (Miscellaneous Provisions) Act

Clause 23. Act amended

This is a formal clause which provides that Part 7 makes amendments to the *Law Reform (Miscellaneous Provisions) Act*.

Clause 24. Section 12 amended (Proceedings against and contribution between joint and several tort-feasors)

This clause amends section 12(3) by replacing the words 'brother, sister, half-brother, half-sister', with the gender-neutral words 'sibling, half-sibling'.

Clause 25. Section 23 amended (Definitions)

This clause amends the definition of 'member of the family' in section 23 by omitting the words 'the husband, wife, de facto partner, parent, child, brother, sister, half-brother or half-sister of that person', and replacing these with the gender-neutral words 'the spouse, de facto partner, parent, child, sibling or half sibling of the person'.

Clause 26. Section 25 amended (Extension of liability in certain cases)

This clause amends section 25(1)(a) by omitting the words 'husband or wife' and inserting the gender-neutral word 'spouse' instead.

This ensures that this provision extends to all married persons, regardless of their sex or gender.

This clause also amends section 25(1)(a) by omitting the unnecessary word 'so'.

Part 8 Amendment of Married Persons (Equality of Status) Act

Clause 27. Act amended

This is a formal clause which provides that Part 8 makes amendments to the *Married Persons (Equality of Status) Act*.

Clause 28. Section 4 amended (Interspousal tort)

This clause amends section 4 by replacing the words ‘a husband and wife each have a right of action in tort against the other as if they were not married’ with the gender-neutral phrase ‘spouses each have a right of action in tort against the other as if they were not married’.

This ensures that this provision applies to all married persons, regardless of their sex or gender.

Clause 29. Section 5 amended (Spouse as agent)

This clause amends section 5 by replacing the words ‘a husband or wife does not, by reason only of his or her status as a spouse, have authority to pledge the credit of the other spouse for necessaries or to act as agent for the other spouse for the purchase of necessaries’ with the gender-neutral phrase ‘a person does not, by reason only of the person’s status as a spouse, have authority to pledge the credit of that person’s spouse for necessaries or to act as agent for that person’s spouse for the purchase of necessaries’.

This ensures that this provision applies to all married persons, regardless of their sex or gender.

Part 9 Amendment of Summary Offences Act

Clause 30. Act amended

This is a formal clause which provides that Part 9 makes amendments to the *Summary Offences Act*.

Clause 31. Section 57 amended (Offences after finding of guilt under section 56, &c.)

This clause amends the heading of section 57 by replacing the characters ‘, &c.’ with a clearer reference to ‘and other offences’.

This clause also omits section 57(1)(p), which is an outdated provision that is now adequately covered by the *Family Law Act (Cth)*.

It also makes some further minor amendments to clarify the provision and reflect modern use of language.

Part 10 **Amendment of Births, Deaths and Marriages Registration Regulations**

Clause 32. **Regulations amended**

This is a formal clause which provides that Part 10 makes amendments to the *Births, Deaths and Marriages Registration Regulations*.

Clause 33. **Regulation 2 amended**

This clause amends regulation 2 which relates to particulars for the notification of a birth. The clause inserts a new subregulation (2) to clarify that the sex of a child may be notified as male, female, intersex or unspecified.

Clause 34. **Regulation 3 amended**

This clause amends regulation 3 which relates to information for the registration of a birth. The clause inserts a new subregulation (2) to clarify that the sex of a child may be registered as male, female, intersex or unspecified.

The clause also amends regulation 3(m) by inserting the words 'or gender identity' after the word 'sex' to reflect that the Act allows for the registration of sex or gender identity information.

Clause 35. **Regulation 4A replaced**

This clause omits regulation 4A and inserts a new regulation 4A titled 'Recognised sex or gender identity'.

The new Regulation 4A sets out the different kinds of sex or gender identities that are recognised, for the purposes of Part 4A of the Act. The recognised sex or gender identities include: 'female', 'male', 'non-binary', 'intersex', and 'unspecified'.

Clause 36. **Regulations further amended**

This is a formal clause which in effect provides that Schedule 2 amends the laws mentioned in it.

Part 11 Repeal of Act**Clause 37. Repeal of Act**

This is a standard clause which provides that the *Births, Deaths and Marriages Registration and Other Legislation Amendment Act 2018* is repealed on the day after it commences.

**Schedule 1 Births, Deaths and Marriages Registration Act
further amended**

The definition of 'registrable event' in section 4 is amended by omitting 'name or sex' and inserting 'name, change of sex or gender identity' to reflect that a change of gender identity is a registrable event for the purposes of the Act.

The heading of Part 4A is amended by inserting the words 'or gender identity' after the word 'sex', to reflect that the Act allows for the registration of a change of 'sex or gender identity'.

Section 28E(1) and (2) is amended by inserting the words 'or gender identity' after all references to 'sex', to reflect that the Act allows for the registration of a change of 'sex or gender identity'.

Sections 28F and 28G are amended by replacing all references to 'sex' with references to 'sex or gender identity', to reflect that the Act allows for the registration of a change of 'sex or gender identity'. References to 'his or her' in these sections are also replaced with the gender-neutral reference to 'the person's'.

The heading of section 28H is amended by inserting the words 'or gender identity' after the word 'sex', to reflect that the Act allows for the registration of a change of 'sex or gender identity'.

Section 28H is also amended by inserting the words 'or gender identity' after all references to 'sex', to reflect that the Act allows for the registration of a change of 'sex or gender identity'.

Section 28J is amended by inserting the words 'or gender identity' after all references to 'sex', to reflect that the Act allows for the registration of a change of 'sex or gender identity'.

**Schedule 2 Births, Deaths and Marriages Registration
Regulations further amended**

The heading of regulation 4B is amended by inserting the words 'or gender identity' after the word 'sex' to reflect that the Act allows for the registration of a change of 'sex or gender identity'.

Regulation 4B is amended by replacing all references to 'sex' with references to 'sex or gender identity', to reflect that the Act allows for the registration of a change of 'sex or gender identity'. It also omits the words 'his or her sex' and replaces these with the gender-neutral words 'the person's sex or gender identity'.

Regulation 4B(e) is also amended by replacing references to 'he or she' and 'his or her' with the gender-neutral references to 'the officer or member' and 'the officer's or member's'.

Regulations 5(c), 6(h), 7(b), 7(j), 10(d), 10(m), 12(b) and 12(j) are amended by inserting the words 'or gender identity' after the word 'sex', to reflect that the Act allows for the registration of sex or gender identity information.