



LEGISLATIVE ASSEMBLY OF THE NORTHERN TERRITORY

Social Policy Scrutiny Committee

**Inquiry into the Births, Deaths
and Marriages Registration and
Other Legislation Amendment
Bill 2018**

November 2018

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Chair's Preface

This report details the Committee's findings regarding its examination of the Births, Deaths and Marriages Registration and Other Legislation Amendment Bill 2018.

The primary purpose of this Bill is to amend the *Births, Deaths and Marriages Registration Act* and provisions in various other Northern Territory laws to ensure that the Territory's legislation reflects the new definition of marriage in the *Marriage Act 1961* (Cwlth), and increase the Territory's compliance with the Sex Discrimination Act 1984 (Cwlth) as amended by the *Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Act 2013* (Cwlth).

Of the 10 submissions received, four raised objections with the underlying policy intent of the Bill and did not support the proposed legislation. While the remaining submissions were generally supportive of the Bill, they raised some important policy questions. Most notably in relation to the requirement that applicants receive 'appropriate clinical treatment'; provisions allowing the Registrar to place a limit on the number of applications that can be made; and inclusion of intersex as a category of sex or gender identity. A number of issues were also raised regarding the extent to which the Bill has due regard to fundamental legislative principles.

Following consideration of the issues raised and the evidence provided, the Committee has recommended the Assembly pass this significant update to the Territory's Births, Deaths and Marriages Registration legislation with the proposed amendments as set out in the Recommendations. However, I note that there was a dissenting view on the Committee's recommendation regarding proposed section 28DA.

Given that the Statement of Compatibility with Human Rights accompanying the Bill highlights the fact that the Bill primarily affects members of the LGBTIQ community, the Committee was concerned and disappointed to learn that they were not consulted during the development of the Bill. Furthermore, the Committee notes that a number of the issues dealt with in this report could have been resolved prior to the Bill's introduction through an appropriate public consultation process.

On behalf of the Committee, I would like to thank all those who made submissions or appeared before the Committee. Their input has been extremely informative and very helpful. The Committee also thanks Ms Sally Gearin and the Department of the Attorney-General and Justice for their advice. I also thank my fellow Committee members for their bipartisan commitment to the legislative review process.



Ms Ngaree Ah Kit MLA

Chair

Committee Members

	Ms Ngaree Ah Kit MLA Member for Karama	
	Party:	Territory Labor
	Parliamentary Position:	Acting Deputy Speaker
	Committee Membership	
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	Sessional:	Social Policy Scrutiny
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	Parliamentary Position:	Acting Deputy Speaker
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	Parliamentary Position:	Deputy Leader of the Opposition, Opposition Whip
	Committee Membership	
	Standing:	Public Accounts, Privileges
	Sessional:	Social Policy Scrutiny
	Ms Sandra Nelson MLA Member for Katherine	
	Party:	Territory Labor
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	Standing:	House
	Sessional:	Social Policy Scrutiny
	Select:	Northern Territory Harm Reduction Strategies for Addictive Behaviours
	Mr Chansey Paech MLA Member for Namatjira	
	Party:	Territory Labor
	Parliamentary Position:	Deputy Speaker
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Acknowledgements

The Committee acknowledges the individuals and organisations that provided written submissions or oral evidence at public hearings.

Terms of Reference

Sessional Order 13

Establishment of Scrutiny Committees

- (1) Standing Order 178 is suspended.
- (2) The Assembly appoints the following scrutiny committees:
 - (a) The Social Policy Scrutiny Committee
 - (b) The Economic Policy Scrutiny Committee
- (3) The Membership of the scrutiny committees will be three Government Members and one Opposition Member nominated to the Speaker in writing by the respective Whip and one non-party aligned Member to be appointed by motion.
- (4) The functions of the scrutiny committees shall be to inquire and report on:
 - (a) any matter within its subject area referred to it:
 - (i) by the Assembly;
 - (ii) by a Minister; or
 - (iii) on its own motion.
 - (b) any bill referred to it by the Assembly;
 - (c) in relation to any bill referred by the Assembly:
 - (i) whether the Assembly should pass the bill;
 - (ii) whether the Assembly should amend the bill;
 - (iii) whether the bill has sufficient regard to the rights and liberties of individuals, including whether the bill:
 - (A) makes rights and liberties, or obligations, dependent on administrative power only if the power is sufficiently defined and subject to appropriate review; and
 - (B) is consistent with principles of natural justice; and
 - (C) allows the delegation of administrative power only in appropriate cases and to appropriate persons; and
 - (D) does not reverse the onus of proof in criminal proceedings without adequate justification; and
 - (E) confers powers to enter premises, and search for or seize documents or other property, only with a warrant issued by a judge or other judicial officer; and
 - (F) provides appropriate protection against self-incrimination; and
 - (G) does not adversely affect rights and liberties, or impose obligations, retrospectively; and

- (H) does not confer immunity from proceeding or prosecution without adequate justification; and
 - (I) provides for the compulsory acquisition of property only with fair compensation; and
 - (J) has sufficient regard to Aboriginal tradition; and
 - (K) is unambiguous and drafted in a sufficiently clear and precise way.
- (iv) whether the bill has sufficient regard to the institution of Parliament, including whether the bill:
- (A) allows the delegation of legislative power only in appropriate cases and to appropriate persons; and
 - (B) sufficiently subjects the exercise of a delegated legislative power to the scrutiny of the Legislative Assembly; and
 - (C) authorises the amendment of an Act only by another Act.
- (5) The Committee will elect a Government Member as Chair.
- (6) Each Committee will provide an annual report on its activities to the Assembly.

Adopted 24 August 2017

Recommendations

Recommendation 1

The Committee recommends that the Legislative Assembly pass the Births, Deaths and Marriages Registration and Other Legislation Amendment Bill 2018 with the proposed amendments set out in recommendations 2, 3, 4, 7 and 8.

Recommendation 2

The Committee recommends that the Government give consideration to deleting the word 'identity' from references to 'sex or gender identity'.

Recommendation 3

The Committee recommends that proposed section 28A be amended to incorporate a definition of the term 'gender' or 'gender identity' as appropriate.

Recommendation 4

The Committee recommends that proposed Regulations 2, 3, and 4A be amended by deleting 'intersex' as a category of sex or gender identity.

Recommendation 5

The Committee recommends that the Government, in consultation with the trans, gender diverse and intersex community, consider making additional categories of sex and gender identity available and amend the Regulations accordingly.

Recommendation 6

The Committee recommends that the Government ensures there is adequate public consultation before the introduction of the second tranche of amendments foreshadowed for the Act.

Recommendation 7

The Committee recommends that the Bill be amended to require that written notification of the reasons for adverse decisions made by the Registrar must be provided to the person concerned at the time of notification of the decision.

Recommendation 8

The Committee recommends that the Bill be amended by deleting proposed section 28DA.

1 Introduction

Introduction of the Bill

1.1 The Births, Deaths and Marriages Registration and Other Legislation Amendment Bill 2018 (the Bill) was introduced into the Legislative Assembly by the Attorney-General and Minister for Justice, the Hon Natasha Fyles MLA, on 30 October 2018. The Assembly subsequently referred the Bill to the Social Policy Scrutiny Committee for inquiry and report by 27 November 2018.¹

Conduct of the Inquiry

1.2 On 2 November 2018 the Committee called for submissions by 14 November 2018. The call for submissions was advertised via the Legislative Assembly website, Facebook, Twitter feed and email subscription service. In addition, the Committee directly contacted a number of individuals and organisations.

1.3 The Bill, associated *Explanatory Statement*, and *Statement of Compatibility with Human Rights* was also forwarded to Ms Sally Gearin for review of fundamental legislative principles under Sessional Order 13(4)(c).

1.4 As noted in Appendix 2, the Committee received 10 submissions to its inquiry. The Committee held a public briefing with the Department of the Attorney-General and Justice on 19 November 2018 and public hearings with six witnesses in Darwin on Wednesday, 21 November 2018.

Outcome of Committee's Consideration

1.5 Sessional order 13(4)(c) requires that the Committee after examining the Bill determine:

- (i) whether the Assembly should pass the bill;
- (ii) whether the Assembly should amend the bill;
- (iii) whether the bill has sufficient regard to the rights and liberties of individuals; and
- (iv) whether the bill has sufficient regard to the institution of Parliament.

1.6 Following examination of the Bill, and consideration of the evidence received, the Committee is of the view that the Legislative Assembly should pass the Bill with proposed amendments as set out in recommendations 2, 3, 4, 7 and 8.

¹ Hon Natasha Fyles MLA, Attorney-General and Minister for Justice, Parliamentary Record, *Debates Day 4 – 30 October 2018*, <http://www.territorystories.nt.gov.au/jspui/handle/10070/304283>, pp. 3-7

Recommendation 1

The Committee recommends that the Legislative Assembly pass the Births, Deaths and Marriages Registration and Other Legislation Amendment Bill 2018 with the proposed amendments set out in recommendations 2, 3, 4, 7 and 8.

Report Structure

- 1.7 Chapter 2 provides an overview of the policy objectives of the Bill and the purpose of the Bill as contained in the Explanatory Statement.
- 1.8 Chapter 3 considers the main issues raised in evidence received.

2 Provisions of the Bill

Background to the Bill

2.1 On 9 December 2017, the *Marriage Amendment (Definition and Religious Freedoms Act) 2017* (Cwlth) commenced to allow two people to marry regardless of their sex or gender. In presenting the Births, Deaths and Marriages Registration and Other Legislation Amendment Bill, the Attorney-General and Minister for Justice advised the Assembly that the Bill represents a first tranche of amendments to ensure that Northern Territory legislation reflects the new definition of 'marriage' in the *Marriage Act 1961* (Cwlth) and to increase the Territory's compliance with the *Sex Discrimination Act 1984* (Cwlth), noting that:

a second tranche of more complex amendments, which will likely relate to matters such as presumptions of parentage, are still under consideration by the Department of the Attorney-General and Justice.²

2.2 The Attorney-General further noted that the proposed amendment to the current requirement in the *Births, Deaths and Marriages Registration Act* that a person must be 'unmarried' in order to register a change of sex, is subject to a deadline imposed by the Commonwealth whereby:

on 9 December 2018, the Commonwealth *Marriage Amendment (Definition and Religious Freedoms) Act 2017* will repeal a current exemption in the *Commonwealth Sex Discrimination Act*. This exemption provides that it is not unlawful to refuse to make, issue or alter an official record of a person's sex if a law of a state or territory requires the refusal because the person is married.³

2.3 As a consequence of this deadline, the Attorney-General moved, and the Assembly agreed, that so much of Standing and Sessional Orders be suspended that would prevent referral to the Social Policy Scrutiny Committee for inquiry with a report date of 27 November 2018, rather than 6 February 2019 as provided for under Sessional Order 12.5(2).⁴

Purpose and Overview of the Bill

2.4 The Explanatory Statement notes that the primary purpose of the Bill is to amend the *Births, Deaths and Marriages Registration Act* (NT) and associated Regulations to:

- Remove the requirement to be 'unmarried' in order to register a change of sex.
- Allow for the registration of a change of sex or gender identity, rather than a change of sex only.
- Allow a person to register their sex or gender identity as something other than 'male' or 'female' and include recognition of intersex persons.

² Hon Natasha Fyles MLA, Attorney-General and Minister for Justice, Parliamentary Record, *Debates Day 4 – 30 October 2018*, <http://www.territorystories.nt.gov.au/jspui/handle/10070/304283>, p.6

³ Hon Natasha Fyles MLA, Attorney-General and Minister for Justice, Parliamentary Record, *Debates Day 4 – 30 October 2018*, <http://www.territorystories.nt.gov.au/jspui/handle/10070/304283>, p.4

⁴ Hon Natasha Fyles MLA, Attorney-General and Minister for Justice, Parliamentary Record, *Debates Day 4 – 30 October 2018*, <http://www.territorystories.nt.gov.au/jspui/handle/10070/304283>, pp.2-3

- 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.
- Provide additional safeguards in relation to applications for registering a change of sex/gender for a child to ensure that such applications are only made where it is in the best interests of the child and appropriate provisions are in place relating to the child's consent.⁵

2.5 As noted in the Statement of Compatibility with Human Rights, the Bill also provides for consequential amendments to various other Northern Territory laws:

Mostly the amendments are necessary to ensure that existing NT provisions that relate to marriage or married persons also encompass same-sex and gender diverse marriages, through the use of gender-neutral language such as 'spouse' and 'surviving spouse'.⁶

⁵ Explanatory Statement, *Births, Deaths and Marriages Registration and Other Legislation Amendment Bill 2018 (Serial 70)*, <https://parliament.nt.gov.au/committees/spsc/70-2018>, p. 1

⁶ Statement of Compatibility with Human Rights, *Births, Deaths and Marriages Registration and Other Legislation Amendment Bill 2018 (Serial 70)*, <https://parliament.nt.gov.au/committees/spsc/70-2018>, p.14

3 Examination of the Bill

Introduction

- 3.1 In its examination of the Bill and consideration of the evidence received, the Committee was mindful that the Bill has a very narrow focus and is specifically designed to address the Territory's compliance with recent amendments to the *Marriage Act 1961* (Cwlth) and the *Sex Discrimination Act 1984* (Cwlth). Given that both of these Acts are applicable to all States and Territories, and take precedence over jurisdictional legislation, the Committee also acknowledged the importance of ensuring that legislation on the Territory's statute book is compliant and lawful.
- 3.2 Nevertheless, of the submissions received four raised objections to the underlying policy intent of the Bill and were of the view that the legislation should not be passed.⁷ The remaining submissions were generally supportive of the Bill and commended the Government for bringing the legislation forward. While some submitters sought clarification on the anticipated operation of the Bill, others provided suggestions as to how the Bill might be improved. In addition, a range of issues were raised that went beyond the scope of the Bill.
- 3.3 Given the truncated timeframe for this inquiry, this report is limited to a consideration of the key issues of concern raised in submissions that are directly related to the provisions within the Bill. In addition to the submissions received, the following discussion considers the legal advice provided by Ms Sally Gearin regarding the Bill's compliance with Sessional Order 13(4)(c), and responses to the Committee's questions as provided by the Department of the Attorney-General and Justice (the Department) during the public briefing on this Bill.

Definition of 'Gender Identity'

- 3.4 Consistent with the *Sex Discrimination Act 1984* (Cwlth), the Bill introduces the term 'gender identity' and amends subsection 3(b) of the Objects of the Act to reflect that the proposed legislation allows for the registration of changes of name and 'sex or gender identity'. However, while the Bill introduces and defines other terms such as 'intersex person', 'recognition certificate' and 'psychologist', it does not include a definition of 'gender identity'.
- 3.5 The Committee notes that the term 'gender identity' was incorporated into the Commonwealth *Sex Discrimination Act* by the *Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Act 2013*, and is defined as follows:

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.⁸

⁷ Women Speak Tasmania, Submission No. 3; Feminist Legal Clinic Inc., Submission No. 4; Australian Christian Lobby, Submission No. 5; Mr Gerry Wood MLA, Submission No. 7

⁸ Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Act 2013 (Cwlth), s6; Sex Discrimination Act 1984 (Cwlth), s4(1)

- 3.6 Given that ‘gender identity’ is not currently defined elsewhere in the Territory’s legislation, the Committee sought clarification from the Department as to why the term is not defined in the Bill. The Department advised the Committee that:

During drafting, consideration was given to whether the term ‘gender identity’ needed to be included in this Bill. It was not considered necessary to define the term and this is because the Bill proposes to include an express and limited list of recognised sex and gender identities for the purposes of registering a change of sex under the Act. For that reason, a definition of the term ‘gender identity’ was not considered necessary. ... The proposed Regulation 4A which is contained at Clause 35 of the Bill provides a limited list of recognised sex or gender identities ... female, male, non-binary, intersex and unspecified.⁹

- 3.7 The Human Rights Law Centre recommended that the Bill be amended to remove the word ‘identity’ from references to ‘sex or gender identity’ noting that:

use of the term ‘identity’ in the legislation is confusing and unhelpful. The change that is to be achieved is one of legally recognised ‘gender’. Identity can exist outside legal recognition. For example, someone who has not changed their legal gender may experience discrimination on the basis of their gender identity and should be protected from such unfair treatment, regardless of whether such identity is recognised legally. While ‘gender’ is a more accurate description of the information recorded on the Register and birth certificates.¹⁰

- 3.8 The *Australian Government Guidelines on the Recognition of Sex and Gender* provide guidance to Australian Government Departments and agencies “on the collection, use and amendment of sex and gender information in individual personal records”¹¹ In collecting sex or gender information Departments are required to ensure that “they use the correct terminology for the information they are seeking”.¹²

- 3.9 In accordance with Australian Standard *AS4590 – Interchange of Client Information*,¹³ the Guidelines use the term ‘gender’ rather than ‘gender identity’. Acknowledging that “there may be multiple or different definitions”¹⁴ for these types of terms, gender is defined as follows:

Gender is a part of person’s social and personal identity. It refers to each person’s deeply felt internal and individual identity and the way a person presents and is recognised within the community. A person’s gender refers to outward social markers, including their name, outward appearance, mannerisms and dress. A person’s sex and gender may not necessarily be the same. An individual’s gender may or may not correspond with their sex assigned at birth, and some people may identify as neither exclusively male nor female.¹⁵

- 3.10 Noting that it was of the view that “the two terms can be used interchangeably”, the Department advised the Committee that the term ‘gender identity’ was preferred

⁹ Alexandra Lillis (Legal Policy Lawyer: Department of the Attorney-General and Justice) Committee Transcript, Public Briefing, Monday 19 November 2018, p.3

¹⁰ Human Rights Law Centre, Submission No. 6, p.13

¹¹ Australian Government, *Australian Government Guidelines on the Recognition of Sex and Gender*, Australian Government, Canberra ACT, November 2015, p.3

¹² Australian Government, *Australian Government Guidelines on the Recognition of Sex and Gender*, Australian Government, Canberra ACT, November 2015, p.4

¹³ Australian Government, *Australian Government Guidelines on the Recognition of Sex and Gender*, Australian Government, Canberra ACT, November 2015, p.5

¹⁴ Australian Government, *Australian Government Guidelines on the Recognition of Sex and Gender*, Australian Government, Canberra ACT, November 2015, p.9

¹⁵ Australian Government, *Australian Government Guidelines on the Recognition of Sex and Gender*, Australian Government, Canberra ACT, November 2015, p.9

since it was consistent with the Commonwealth *Sex Discrimination Act* and equivalent legislation in South Australia.¹⁶

Committee's Comments

- 3.11 The Committee does not agree with the Department's rationale for not including a definition of 'gender identity' in the Bill. While the 'express and limited list' provided under Regulation 4A includes examples of different categories of sex and gender identity, it does not constitute a definition of 'gender identity'. Moreover, the Committee notes that any definition of what is arguably a key concept of the proposed legislation ought to be in the Act and not in the Regulations which are subject to change by the Administrator.
- 3.12 The Committee also questions the extent to which the terms gender and gender identity are, in fact, interchangeable. While the definitions presented above are certainly similar, they are not the same. Moreover, as noted in the 2015 Australian Human Rights Commission report *Resilient Individuals: Sexual Orientation, Gender Identity & Intersex Rights*:
- The Australian Human Rights Commission recognises that respect for individuality impacts on a person's self-worth and inherent dignity. The use of inclusive terminology respects individuality and enables visibility of important issues. ... The Commission also recognises that terminology is strongly contested, particularly terminology to describe gender identity.¹⁷
- 3.13 In light of the available evidence, the Committee is of the view that, consistent with the *Australian Guidelines on the Recognition of Sex and Gender*, it may be more appropriate for the Bill to use the term 'gender' rather than 'gender identity'. Irrespective of which term is used, the Committee further considers that to avoid any ambiguity it should be defined within the Act.

Recommendation 2

The Committee recommends that the Government give consideration to deleting the word 'identity' from references to 'sex or gender identity'.

Recommendation 3

The Committee recommends that proposed section 28A be amended to incorporate a definition of the term 'gender' or 'gender identity' as appropriate.

Sex and Gender Identity Categories

- 3.14 The Bill amends Regulations 2 and 3 to clarify that the sex of a child may be notified/registered as: 'male', 'female', 'intersex' or 'unspecified'. Proposed Regulation 4A then sets out the different categories of sex or gender identity that may be used when applying to change the sex or gender identity on a birth certificate as: 'female', 'male', 'non-binary', 'intersex', and 'unspecified'.

¹⁶ Alexandra Lillis, Committee Transcript, Public Briefing, Monday 19 November 2018, p.4

¹⁷ Australian Human Rights Commission, *Resilient Individuals: Sexual Orientation, Gender Identity & Intersex Rights*, Australian Human Rights Commission, Sydney, 2015, p.5

- 3.15 While supporting the proposed reforms to the legislation in this area, the submissions from Intersex Human Rights Australia and the Human Rights Law Centre registered their strong opposition to the inclusion of ‘intersex’ as a category of sex or gender on the grounds that:

attempts to classify intersex people as a third sex/gender do not respect our diversity or right to self-determination. These can inflict wide-ranging harm regardless of whether an intersex person identifies with binary legal sex assigned at birth or not.¹⁸

- 3.16 Given that the Statement of Compatibility with Human Rights acknowledges that “this Bill will primarily affect the Lesbian, Gay, Bisexual, Transgender, Intersex and Queer (LGBTIQ) community”, the Committee was concerned to learn that they were not consulted in relation to determining the most appropriate categories of sex or gender identity to be included in the legislation:

There was no public consultation process in relation to this Bill. However, the department looked to model legislation in other jurisdictions, in particular the Australian Capital Territory and South Australia have made similar amendments their laws in the past, also the Commonwealth Guidelines. Those examples were drawn on to develop this bill.¹⁹

The inclusion of intersex as a recognised sex or gender category was included as just one of a number of recognised sex or gender identities in the Act. The legislation will not prevent an intersex man or woman from being registered as male or female or non-binary if that is preferred. A multitude of sex or gender markers were included with the aim of creating flexibility and providing choice so that the legislation is as inclusive as possible and not discriminatory which is the intent of the Bill.²⁰

- 3.17 However, as Mr Morgan Carpenter (Co-Executive Director, Intersex Human Rights Australia) explained to the Committee, the Department’s premise for including ‘intersex’ as a category of sex or gender identity is fundamentally flawed and illustrates a lack of understanding of what the term intersex refers to:

Intersex people are born with sex characteristics that do not fit medical or social norms for female or male bodies. There are at least 40 different intersex variations known to science. There are many different diagnoses and many of the genetic in origin.

People can be identified as having intersex traits at a wide range of ages including early in life at birth or early childhood; at puberty, because bodies change then; and prenatally, through the use of genetic screening.

Intersex people are diverse. We have different sex assignments at birth, we have different gender identities. We may be heterosexual or non-heterosexual. An Australian study in 2015 revealed that around half of intersex people are heterosexual. Most intersex people identify with the sex assigned at birth, but some of us do not.

A 2015 study of Australians born with atypical sex characteristics found 75% were female or male, while around 19% have other ways of understanding their sex or gender identity.²¹

¹⁸ Australian and Aotearoa/New Zealand Intersex Organisations and Independent Advocates, *Darlington Statement*, March 2017, <https://ihra.org.au/darlington-statement/>, p.3

¹⁹ Alexandra Lillis, Committee Transcript, Public Briefing, Monday 19 November 2018, p.6

²⁰ Alexandra Lillis, Committee Transcript, Public Briefing, Monday 19 November 2018, p.11

²¹ Morgan Carpenter, Committee Transcript, Public Hearing, Wednesday 21 November 2018, p.2

The Bill makes reference to the 2013 amendment Bill to the federal *Sex Discrimination Act*. However, the explanatory memorandum to that Act, on page 12, makes it clear that the inclusion of intersex data is an attribute in that Act, and I quote: *The definition is not intended to create a third sex in any sense*. Yet that is what the Regulations before you do.²²

I ask you, please do not create a category called 'intersex'. Do not make things even more complicated for us in prescribing who we are and what our needs are as a population by creating and deepening misconceptions about who we are as a population. Instead, consider ways of tackling those core issues we face.²³

- 3.18 Similar sentiments were expressed by Ms Sally Sievers (Northern Territory Anti-Discrimination Commissioner)²⁴, Dr Belinda Chaplin (Nurse Researcher: Transgender Health and Wellbeing)²⁵, and the Human Rights Law Centre which subsequently noted that:

We support the Bill's amendment to the regulations to allow a person to be registered as 'female', 'male', 'non-binary' or 'unspecified', and oppose the use of 'intersex' as a 'sex or gender identity' category in recognition of the position of intersex community organisations. In addition, we recommend that the Territory Government make additional categories available in consultation with trans, gender diverse and intersex community organisations.²⁶

- 3.19 It is further noted that in late 2017 the Australian Standard on data collection (*AS4590 – Interchange of Client Information*), which informs the terminology used in the Australian Government Guidelines, was updated to remove references to intersex as a category of sex or gender.²⁷ It is understood that the Commonwealth Attorney-General's Department is currently reviewing the Guidelines with a view to releasing an updated version by the end of this year.²⁸

Committee's Comments

- 3.20 On the basis of the evidence received, the Committee is of the view that inclusion of intersex as a category of sex or gender identity as currently proposed in the Bill is inappropriate and potentially discriminatory.
- 3.21 In the absence of public consultation in the development of this Bill, the Committee supports the recommendation from the Human Rights Law Centre that: the Government should consider making additional categories of sex and gender identity available in consultation with trans, gender diverse and intersex community organisations and amend the Regulations accordingly.

²² Morgan Carpenter, Committee Transcript, Public Hearing, Wednesday 21 November 2018, p.3

²³ Morgan Carpenter, Committee Transcript, Public Hearing, Wednesday 21 November 2018, p.5

²⁴ Sally Sievers, Committee Transcript, Public Hearing, Wednesday 21 November 2018, p.12

²⁵ Dr Belinda Chaplin, Committee Transcript, Public Hearing, Wednesday 21 November 2018, p.17

²⁶ Human Rights Law Centre, Submission 6, p.

²⁷ Attorney-General's Department (Commonwealth), Email communication from Civil Law Unit to Morgan Carpenter (Intersex Human Rights Australia) regarding updates to *AS4590 – Interchange of Client Information 1:2017*, unpublished, 12 December 2017, p.1

²⁸ Law Reform Commission of Western Australia, *Project 108, Discussion Paper: Review of Western Australian legislation in relation to the recognition of a person's sex, change of sex or intersex status*, Government of Western Australia, Perth, August 2018, p.42

Recommendation 4

The Committee recommends that proposed Regulations 2, 3, and 4A be amended by deleting ‘intersex’ as a category of sex or gender identity.

Recommendation 5

The Committee recommends that the Government, in consultation with the trans, gender diverse and intersex community, consider making additional categories of sex and gender identity available and amend the Regulations accordingly.

Recommendation 6

The Committee recommends that the Government ensures there is adequate public consultation before the introduction of the second tranche of amendments foreshadowed for the Act.

Information that must accompany application

3.22 Proposed sections 28C(1)(a) and (2)(b) provide that applications for a change of sex or gender identity must be accompanied by a statement from a medical practitioner or a psychologist certifying that the applicant has received appropriate clinical treatment in relation to their sex or gender identity; or is an intersex person.

3.23 Concern was raised that the Bill medicalises what is a social issue and imposes a discriminatory burden on trans and gender diverse people. For example, the Northern Territory Anti-Discrimination Commission expressed the view that:

Whilst the move away from requiring proof of surgery for gender re-assignment is commended, the ADC [Anti-Discrimination Commission] believe the approach taken still medicalises what is a societal issue, by requiring proof of “appropriate clinical treatment” to enable change of gender identity or sex. We know from research the limited access to medical services by Sister Girls and Brother Boys, and gender diverse people in remote communities across the NT. From the contacts and stories we hear, many gender diverse Aboriginal people have been living in their community as that gender identity since childhood or teen years.

The preferred approach is self-identification of sex or gender identity as the most empowering and accessible. However if third party verification or involvement is required, that a person’s family or community confirm their gender identity. This should not be at the discretion of the Registrar but an alternative under the legislation.²⁹

3.24 Similarly, the Human Rights Law Centre noted that they considered that:

the clinical treatment and medical evidence requirements impose a discriminatory burden on trans and gender diverse people. These requirements impose administrative and financial burden, and send a damaging message to these cohorts that there is something “wrong” with them that requires medical intervention and diagnosis. The idea that a medical practitioner can or should also “verify” an individual’s own sense of their gender identity is damaging to a person’s sense of self. This harm is compounded by the generally negative experiences of trans and gender diverse people have with the medical profession.

²⁹ Northern Territory Anti-Discrimination Commission, Submission No. 1, p.2

Internationally, it is now recognised that individuals should be able to self-declare their gender with supporting documentation that does not include medical certificates. As outlined in Appendix 2 of this submission, countries such as Ireland, Argentina, Belgium, Ecuador, France, Greece, Iceland, Denmark and Malta have reformed their laws to allow individuals to change the sex or gender on their birth certificates through simple administrative processes, similar to a change of name. These changes have been in effect for a number of years without any ill effects.

Requirements for medical evidence should be replaced with the approach of self-affirmation by way of a simple administrative process, to reflect International best practice.³⁰

The Committee understands that adoption of a self-identification model is currently under consideration in Tasmania and Western Australia.³¹

- 3.25 Dr Belinda Chaplin (Nurse Researcher: Transgender Health and Wellbeing, Charles Darwin University College of Nursing and Midwifery) advised the Committee that she had some concerns with the proposal of self-identification noting that:

I am a woman of trans experience and I had my sex reassignment surgery back in 1983 when things were a lot different. I have always found through my decades of experience that having some type of formal recognition from a professional, in some states that is actually two professionals need to provide written documentation that you have had appropriate clinical treatment, I think is very important that we at least have one type of written documentation.

In the case of the brother boys and sister girls, knowing that gender identity for those people has been in their community lifestyle for thousands of years, I do not see a problem with elders of the community providing some type of written documentation that the proponent is actually a brother boy, sister girl, transgender or whatever they choose to call themselves. ...

I am a member of many groups on Facebook and all those types of social media platforms and I see people who self-identify as transgender talking in language that makes me feel like they are doing this because it is a bit of a trend. I am not saying that is how they are but that is how their language comes across when they are talking online. That is one of the main reasons why I think it is really important that we have some type of documentation showing that you have had some type of clinical treatment, or in the case of brother boys and sister girls that is your identity.³²

- 3.26 The Darwin Community Legal Service also registered its support for the requirement that applicants must provide proof that they have received appropriate clinical treatment.³³ The Committee notes that the submission received from Rainbow Territory, a Darwin based community group that advocates for the human rights of the Northern Territory's LGBTQI community, did not raise any concerns regarding the requirement for appropriate clinical treatment.³⁴

³⁰ Human Rights Law Centre, Submission No. 6, p.18

³¹ See for example, Tasmanian Anti-Discrimination Commissioner, *Legal recognition of sex and gender diversity in Tasmania: Options for amendments to the Births, Deaths and Marriages Registration Act 1999*, Equal Opportunity Tasmania, Hobart, February 2016, pp.9-11; Law Reform Commission of Western Australia, *Project 108, Discussion Paper: Review of Western Australian legislation in relation to the recognition of a person's sex, change of sex or intersex status*, Government of Western Australia, Perth, August 2018, pp.68-9

³² Dr Belinda Chaplin, Committee Transcript, Public Hearing, Wednesday 21 November 2018, p.17

³³ Darwin Community Legal Service, Submission No.9, p.3

³⁴ Rainbow Territory, Submission No. 10

3.27 The Department advised the Committee that:

Consideration was given to a self-identification model during the development of this Bill. Ultimately though, the requirement for appropriate clinical treatment as an alternative to sexual reassignment surgery was a policy decision. The test of appropriate clinical treatment was determined to be the best fit for our legislation. It is consistent with models in the Australian Capital Territory and South Australia. It is also consistent with requirements at the federal level, so where the Australian Passport Office requires evidence from a registered medical practitioner or a psychologist to register a person's affirmed gender on their passport.³⁵

Committee's Comments

3.28 While the Committee acknowledges the concerns raised by the Northern Territory Anti-Discrimination Commission and the Human Rights Law Centre, as pointed out by the Department, the Government's policy position on this matter is consistent with equivalent legislation elsewhere in Australia and the *Australian Guidelines on the Recognition of Sex and Gender*.³⁶ The Committee also acknowledges the concerns raised by Dr Belinda Chaplin regarding the self-identification approach.

3.29 As noted in the Statement of Compatibility with Human Rights accompanying the Bill:

The Bill improves the legal recognition of sex and gender diverse Territorians, facilitates greater and fairer access to the mechanism for registering a change of sex or gender in the NT, and in doing so promotes the right to be protected from discrimination on the basis of a person's sex or gender identity.

To the extent that the Bill limits these human rights, namely by:

- requiring applicants to have received 'appropriate clinical treatment' in order to register a change of sex or gender;
- requiring a statement from a doctor or psychologist certifying that the person has received 'appropriate clinical treatment' or is an intersex person; ...

those limitations are considered to be reasonable, necessary and proportionate for the following reasons:

- The requirements for having received 'appropriate clinical treatment' and to provide medical evidence in support of an application aim to strike a balance between recognising that the registration of a change of sex/gender is a matter of individual choice, while maintaining some level of regulation to ensure that people access some level of care and support during the process.³⁷

3.30 On the basis of the evidence received, and in light of the fact that no other jurisdiction in Australia has, as yet, adopted a self-identification model, the Committee is satisfied that the provisions in the Bill facilitate the registration of a change of sex or gender identity while ensuring that potential applicants access an appropriate level of care and support given the life changing nature of such a decision.

³⁵ Alexandra Lillis, Committee Transcript, Public Briefing, Monday 19 November 2018, p.6

³⁶ *Births, Deaths and Marriages Registration Act 1996* (SA), s 29K; *Births, Deaths and Marriages Registration Act 1997* (ACT), s25; Australian Government, *Australian Government Guidelines on the Recognition of Sex and Gender*, Australian Government, Canberra ACT, November 2015, p.5

³⁷ Statement of Compatibility with Human Rights, *Births, Deaths and Marriages Registration and Other Legislation Amendment Bill 2018 (Serial 70)*, <https://parliament.nt.gov.au/committees/spsc/70-2018>, p.16

Reviewable Decisions

- 3.31 Section 48 of the *Births, Deaths and Marriages Registration Act* provides that persons aggrieved by a decision of the Registrar can apply to the Northern Territory Civil and Administrative Tribunal (NTCAT) for a Review of the decision. However, in relation to proposed sections 28D and 28DA, there is no requirement for the Registrar to provide an applicant with written notification of the reasons for decisions made in respect of refusing to make requested changes to the register, or rejecting an application to register a change of sex or gender identity.
- 3.32 In the absence of such a requirement, Ms Sally Gearin advised the Committee that:
- there is no basis for an aggrieved person to determine if the decision was appropriately made or not. A Review in these circumstances would be otiose when there are no reasons published for the refusal by the Registrar. In these circumstances it is likely the matter would be referred back to the Registrar to provide reasons before any Review could take place.³⁸
- 3.33 In response to the Committee's questions on this issue, the Department advised that it did not consider that an express provision requiring the Registrar to provide reasons for an adverse decision made under the Act was necessary given that the provisions set out in sections 34 and 35 of the *Northern Territory Civil and Administrative Tribunal Act* (NTCAT Act) apply to decisions made under the *Births, Deaths and Marriages Registration Act*.³⁹
- 3.34 The Committee notes that section 34(2) provides that 'on making a reviewable decision, the decision maker must give each person who has a right under the relevant Act to have the decision reviewed by the Tribunal written notice of:
- (a) the decision; and
 - (b) the fact that the person has a right to have the decision reviewed by the Tribunal; and
 - (c) the fact that the person has a right to request a statement of reasons for the decision.'
- 3.35 Section 35(3) then provides that a request for a written statement of reasons for the decision 'must be made in writing'. Where the person was given notice of the decision under section 34(2), the request 'must be made within 28 days after notice of the decision was given; or otherwise – within 28 days after the decision.'

Committee's Comments

- 3.36 While acknowledging that section 35 of the NTCAT Act gives a person a right to request reasons for a decision made by the Registrar, the Committee remains concerned that there are a range of barriers to a person accessing that right, such as the need to make the request in writing and the need to make the request within 28 days.

³⁸ Sally Gearin, *Advice on proposed Births, Deaths and Marriages Registration and Other Legislation Amendment Bill 2018*, unpublished, 15 November 2018, p.2

³⁹ Alexandra Lillis, Committee Transcript, Public Briefing, Monday 19 November 2018, p.8

- 3.37 Given the nature of the decisions that will be made by the Registrar as a consequence of the proposed amendments, the Committee is of the view that, as contemplated by section 35(6), notifications of adverse decisions should also include the reasons for the decision. This would both simplify and streamline the process and facilitate fairer access to a review of decisions where necessary.

Recommendation 7

The Committee recommends that the Bill be amended to require that written notification of the reasons for adverse decisions made by the Registrar must be provided to the person concerned at the time of notification of the decision.

Registrar may limit number of applications

- 3.38 Proposed section 28DA provides that:

- (1) The Registrar may determine a limit on the number of applications that may be made under this Part in respect of a person.
- (2) The Registrar must publish the limit in the manner the Registrar considers appropriate.
- (3) The Registrar may reject an application in relation to a person under this Part if the number of applications in respect of the person concerned exceeds the limit.

Modelled on section 29S of the South Australian *Births, Deaths and Marriages Registration Act 1996*, the Explanatory Statement notes that this section “aims to deter frivolous applications.”⁴⁰

- 3.39 A number of concerns were raised regarding this provision. The Northern Territory Anti-Discrimination Commission expressed the view that:

The proposal to limit the number of times a person can apply for a change in sex or gender identity trivialises the life changing nature of making such a decision and the importance and significance of having documents that properly reflect a person’s identity. We understand it is in response to one or two incidences in SA, however the broader message it sends to the wider community far outweighs minor inconvenience to registry staff of processing a person’s claim on numerous occasions.⁴¹

- 3.40 Apart from the fact that applications must be accompanied by proof of ‘appropriate clinical treatment’, Ms Sally Sievers (Northern Territory Anti-Discrimination Commissioner), pointed out that the potential for frivolous applications would also be limited by the fact that:

it will come with a fee, so the fee will be self-limiting because the groups of people who might want to do this are not affluent. Lots of trans people, with the prejudice and discrimination, do not work and so the fee itself may be a limitation on how frequently people apply. Maybe formalising a process when the registrar thinks it is too much but I think it will be a really tiny percentage for the message that it

⁴⁰ Explanatory Statement, *Births, Deaths and Marriages Registration and Other Legislation Amendment Bill 2018 (Serial 70)*, <https://parliament.nt.gov.au/committees/spsc/70-2018>, p.5

⁴¹ Northern Territory Anti-Discrimination Commission, Submission No. 1, p.2

sends that we have to limit people—that people are going to go back and forward—when really it is some really significant change.⁴²

- 3.41 The Darwin Community Legal Centre queried what criteria or guidelines would inform the Registrars decision as to what the limit should be and suggested that:

It would appear more appropriate that the Registrar has the discretion to assess and limit an individual's sex change applications on a case by case basis.⁴³

- 3.42 As drafted, the Committee notes that it is unclear whether it is intended the provision is aimed at limiting the number of times a person can make an invalid application, or limiting the number of times a person can have the Register changed, or both. Similarly, it is unclear whether the limit would apply to the number of applications that may be made per year for example, or whether a limit may also be determined regarding the number of applications that can be made in a lifetime. Moreover, Ms Sally Gearin notes that, as drafted, “there is no impediment to the Registrar imposing different limits on different individuals.”⁴⁴

- 3.43 In the absence of any criteria that the Registrar must take into account when determining a limit on the number of applications, it may be argued that this section provides for an inappropriate delegation of legislative power as it effectively gives the Registrar the job of making the law. It may also be argued that this section fails to ensure that rights and liberties are only dependent on administrative power if the power is sufficiently defined and subject to appropriate review. As Ms Gearin points out:

The Registrar is empowered to reject an application exceeding the limit imposed, or to accept and approve the application. No reasons are required to be provided for the exercise of this power, so the individual would have no understanding as to why the limit was imposed or why it was not enforced.⁴⁵

- 3.44 In response to the Committee's queries regarding this matter, the Department advised that:

The limit would be discretionary, so if the Registrar does set a limit, then the Registrar would still be able to accept an application that exceeds the limit. ... The provision is worded such that the Registrar would determine a limit and publish that limit so that limit would apply to all people.⁴⁶

It comes down more to the administrative operation of the Act. The Registrar is responsible for administering the Register and ensuring that is done in – so that the Objects of the Births, Deaths and Marriages Registration Act provide that the Registrar is to maintain the register in the most economical and efficient way.⁴⁷

There is no express criteria in the Bill, however the Registrar's functions give the Registrar the power to administer the registration system established by the Act and ensure that it operates efficiently, effectively and economically and to ensure that the Act is administered in the best way calculated to achieve its objectives.

⁴² Sally Sievers, Committee Transcript, Public Hearing, Wednesday 21 November 2018, p.13

⁴³ Darwin Community Legal Centre, Submission No. 9, p.3

⁴⁴ Sally Gearin, *Advice on proposed Births, Deaths and Marriages Registration and Other Legislation Amendment Bill 2018*, unpublished, 15 November 2018, p.2

⁴⁵ Sally Gearin, *Advice on proposed Births, Deaths and Marriages Registration and Other Legislation Amendment Bill 2018*, unpublished, 15 November 2018, p.3

⁴⁶ Alexandra Lillis, Committee Transcript, Public Briefing, 19 November 2018, p.9

⁴⁷ Hannah Clee, (Senior Policy Lawyer, Legal Policy, Department of the Attorney-General and Justice), Committee Transcript, Public Briefing, 19 November 2018, p.8

Any limit that was to be determined by the Registrar would be determined in accordance with those functions and objects.⁴⁸

- 3.45 While the equivalent legislation in the ACT neither incorporates a limit nor provides the Registrar the discretion to set a limit, the Committee notes that South Australia has set a limit of “once in a 12 month period and three times in your lifetime – exceptions may apply.”⁴⁹ The Committee also understands that Western Australia and Tasmania are currently considering options whereby change of sex or gender would be subject to the same limitations as that applying to a change of name. As such, the Law Reform Commission of Western Australia’s 2018 *Discussion Paper: Review of Western Australian legislation in relation to the recognition of a person’s sex, change of sex or intersex status* proposes a limit on applications of “Once every 12 months, lifetime limit of 3 times.”⁵⁰ In Tasmania, however, it has been proposed that:

the requirements for an application to the Registrar to record a change of sex be consistent with the approach taken to registering a change of name, including limiting the option of registering a change of sex to once in a 12 month period.⁵¹

- 3.46 The Committee notes that while limits on applications to change a name are not expressly provided for under the *Births, Deaths and Marriages Registration Act* (NT) or associated Regulations, the ‘Adult Change of Name Form’ provides that:

If you have registered a change of name with any Registry in Australia within a period of **twelve (12) months** any further applications for a change of name at any Registry in Australian within that twelve (12) month period will be refused, except with the consent of the Registrar upon consideration of the applicant’s reasons for the change.⁵²

Committee’s Comments

- 3.47 The Committee does not agree with the Department’s claim that proposed section 28DA is simply a mechanism to facilitate the administrative operation of the Act. While it may be aimed at addressing administrative problems, it does so by giving the Registrar a statutory power to set a limit on the number of applications allowed, and to choose whether to apply that limit.
- 3.48 As there is no criteria for either of these powers, they could be used to both limit the number of unsuccessful applications, and to limit the number of changes that may be made to the Register. The Committee considers that the office of Registrar does not require the qualifications necessary to determine the frequency at which such

⁴⁸ Alexandra Lillis, Committee Transcript, Public Briefing, 19 November 2018, p.10

⁴⁹ Consumer and Business Services, *Record a change of sex or gender identity 0 application*, https://www.sa.gov.au/_data/assets/pdf_file/0010/301213/Change-of-Gender-form-170825-1644-.pdf, p.1

⁵⁰ Law Reform Commission of Western Australia, *Project 108, Discussion Paper: Review of Western Australian legislation in relation to the recognition of a person’s sex, change of sex or intersex status*, Government of Western Australia, Perth, August 2018, p.58

⁵¹ Tasmanian Anti-Discrimination Commissioner, *Legal recognition of sex and gender diversity in Tasmania: Options for amendments to the Births, Deaths and Marriages Registration Act 1999*, Equal Opportunity Tasmania, Hobart, February 2016, p.11

⁵² Department of the Attorney-General and Justice, *Adult Change of Name – Birth Registered in the Northern Territory*, <https://nt.gov.au/law/bdm/legal-change-of-name/legally-change-your-name>, p.1

changes to the Register should be made, or whether the personal circumstances of an individual warrant an exemption from such a limit.

- 3.49 Given the seriousness and life changing nature of a person's decision to apply to change their sex or gender identity, the fact that applications must be accompanied by proof of 'appropriate clinical treatment', the fees attached to the application process, and the size of the Territory's population, the Committee considers that the limited potential for frivolous applications does not justify the discretionary powers contemplated by proposed section 28DA.
- 3.50 While the Committee agreed that proposed section 28DA was problematic, some members considered that there may be some merit in setting an annual limit on applications as proposed in Western Australia and Tasmania, and would have appreciated more time to fully explore this option. Although the Committee notes that South Australia has introduced a limit of once in a 12 month period and three times in a lifetime, the majority view of the Committee is that, for the reasons outlined above, proposed section 28DA ought to be removed from the Bill.

Recommendation 8

The Committee recommends that the Bill be amended by deleting proposed section 28DA.

Privacy Protections

- 3.51 The Human Rights Law Council queried whether additional privacy protections might be necessary in light of the proposed amendments, and noted that the *Births, Deaths and Marriages Registration Act 1997* (ACT) includes the following range of provisions:
- the requirement that a new birth certificate only shows the altered record of sex, and does not include any word or statement to the effect that the person to whom the certificate relates has changed their sex;
 - a general prohibition on accessing a birth certificate showing a person's sex before the alteration of the record to anyone other than the person, a child of the person or a prescribed person; and
 - provisions that prohibit the use of old birth certificates that shows a person's sex before the record was altered with the intent to deceive.⁵³

Committee's Comments

- 3.52 Acknowledging the importance of ensuring that the proposed amendments are subject to appropriate privacy protections, the Committee notes that sections 28E, 28F and 28G of the Territory's *Births, Deaths and Marriages Registration Act* are equivalent to those referred to above in the ACT legislation. In addition, sections 41 and 42 provide that in determining whether an applicant has an adequate reason for wanting to access or search the Register, the Registrar must have regard to:

⁵³ The Human Rights Law Centre, Submission No. 6, p.22; see also *Births, Deaths and Marriages Registration Act 1997* (ACT), ss27 & 28

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- the nature of the applicant's interest;
 - the sensitivity of the information;
 - the use to be made of the information;
 - the age and contents of the entry; and
 - other relevant factors.

- 3.53 Sections 42(2) and 43 further provide that ‘the Registrar must, as far as practicable, protect the persons to whom the entries in the Register relate from unjustified intrusion on their privacy.’ In accordance with the *Northern Territory Births, Deaths and Marriages Access Policy*, while there is no restriction on access to the Birth Register by the registered person or a parent of a child under the age of 18 years of age, access by other persons or organisations is generally restricted and requires written authority from the registered person.⁵⁴
- 3.54 Given the above, the Committee is satisfied that existing provisions are appropriate and does not consider that additional privacy protections are required to accommodate the proposed amendments in the Bill.

⁵⁴ Department of the Attorney-General and Justice, *Northern Territory Births, Deaths and Marriages Access Policy*, Northern Territory Government, Darwin NT, August 2018, pp.5-6

Appendix 1: Submissions Received

Submissions Received

1. Northern Territory Anti-Discrimination Commissioner
2. Intersex Human Rights Australia
3. Women Speak Tasmania
4. Feminist Legal Clinic Inc.
5. Australian Christian Lobby
6. Human Rights Law Centre
7. Mr Gerry Wood MLA
8. Mr Joshua Kuswadi
9. Darwin Community Legal Service Inc.
10. Rainbow Territory

Note

Copies of submissions are available at: <https://parliament.nt.gov.au/committees/spsc/70-2018>

Appendix 2: Public Briefing and Public Hearing

Public Briefing – 19 November 2018

Department of the Attorney-General and Justice

- Hannah Clee: Senior Policy Lawyer, Legal Policy
- Alexandra Lillis: Legal Policy Lawyer

Public Hearing – 21 November 2018

- Morgan Carpenter: Co-Executive Director, Intersex Human Rights Australia
- Anna Brown: Director of Legal Advocacy, Human Rights Law Centre
- Lee Carnie: Senior Lawyer, Human Rights Law Centre
- Rosalina Curtis, Private Citizen

- Sally Sievers: Northern Territory Anti-Discrimination Commissioner

- Dr Belinda Chaplin: Nurse Researcher, Transgender Health and Wellbeing, Charles Darwin University: College of Nursing and Midwifery

Note

Copies of hearing transcripts and tabled papers are available at:

<https://parliament.nt.gov.au/committees/spsc/70-2018>

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Sex Discrimination Act 1984 (Cwlth)

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Statement of Compatibility with Human Rights, *Births, Deaths and Marriages Registration and Other Legislation Amendment Bill 2018 (Serial 70)*, <https://parliament.nt.gov.au/committees/spsc/70-2018>

Tasmanian Anti-Discrimination Commissioner, *Legal recognition of sex and gender diversity in Tasmania: Options for amendments to the Births, Deaths and Marriages Registration Act 1999*, Equal Opportunity Tasmania, Hobart, February 2016

Yogyakarta Principles plus 10: *Additional Principles and State Obligations on the Application of International Human rights Law in relation to Sexual Orientation, Gender Identity, Gender Expression and Sex Characteristics to Complement the Yogyakarta Principles* (Geneva, 10 November 2017), <http://yogyakartaprinciples.org/principles-en/yp10/>

Dissenting Report by Mrs Lambley

The NT Legislative Assembly Social Policy Scrutiny Committee

Inquiry into the Births, Deaths and Marriages Registration and Other Legislation Amendment Bill 2018

Dissenting Report

From Robyn Lambley, Member for Araluen

26th November 2018

The Social Policy Scrutiny Committee was forwarded the Births, Deaths and Marriages Registration and Other Legislation Bill 2018 by the NT Attorney General in Parliament on 30th October 2018 to be scrutinized by the Social Policy Scrutiny Committee on Monday 26th November. This gave the Committee less than 30 days to complete the whole process.

The Bill requires consequential amendments to the NT Births, Deaths and Marriages Act in order to comply with the Federal Marriage Act and the Federal Sex Discrimination Act by the 9th December 2018. Thus the Bill will be debated during the last week of Parliamentary sittings for 2018, concluding on Thursday 29th November 2018.

Points of Dissent

The following is a list of points on which I dissent from the position taken by the Social Policy Scrutiny Committee in regards to the analysis and recommendations of the Committee.

1. No community consultation was done in the preparation of the Bill

The Bill was written and developed with no consultation at all with any stakeholder or interest groups, despite aspects of the Bill being of an extremely sensitive and contentious nature.

The Bill includes significant changes to laws around birth registration and gender identity including:

- Providing children the option and process by which they can change their gender on their birth certificate
- the definition of gender identity on birth certificates
- the process for adults changing their gender on a birth certificate
- the replacement of terminology on birth certificates such as wife, husband, he, she, brother, sister, widow and widower to “gender neutral” terms such as spouse and de facto partner

Curiously, most of the proposed consequential amendments to the NT Births, Deaths and Marriages Act are not necessary in order to meet the requirements of the Federal Marriage Act and the Federal Sex Discrimination Act, due by 9th December 2018.

Therefore, most of the proposed amendments to the Act could have been debated in the community and in the Parliament over a much longer timeframe.

The Social Policy Scrutiny Committee found it difficult to properly scrutinise this Bill because of the lack of insight and information from special interest groups and the broader public. A limited public hearing was hastily organised and held by the Social Policy Scrutiny Committee in the space of 2 days on Wednesday 21st November 2018. This was insufficient and raised more questions than what were answered.

It is my view that, in its current form, the Bill should not be debated in Parliament until a full community consultation is undertaken.

2. The definition and purpose of a Birth Certificate

This Bill raises questions around the meaning and purpose of a Birth Certificate in the NT. It proposes that changes (specifically gender) can be made to a birth certificate.

A birth certificate should be a record of a person's details at birth. Changing any details on a birth certificate, means it is not a true and accurate record of a birth, and by literal definition is not a birth certificate.

The Government should consider the use of an alternative "identity" or "recognition" certificate to allow people to change their details, including gender, if they choose.

The Social Policy Scrutiny Committee should have recommended that the Bill include clarification of what is a Birth Certificate, and recommended an alternative certificate be provided by NT Birth, Deaths and Marriages to include changes, such as gender identity.

3. Replacing traditional gender terms to "gender neutral" terms

The Bill makes many changes to gender specific terms (such as he and she, husband and wife, a man or a woman, widow or widower, brother and sister) to "gender neutral terms (such as spouse, de facto partner, two people, person, and sibling).

The Bill proposes the replacement of gender specific terms in favour of gender neutral terms.

With the intent of this Bill to supposedly introduce contemporary and socially progressive changes, it should aim to be inclusive, not exclusive.

The Social Policy Scrutiny Committee should have recommended that the traditional terms should remain, with the alternative "gender neutral" terms being added, rather than replacing the old.

4. Limit on the number of times a person can change their gender on their birth certificate

The Social Policy Scrutiny Committee has recommended that there be no limit on the number of times a person can change their gender on their birth certificate.

Recommendation 8 of the Inquiry Report of the Social Policy Scrutiny Committee recommends that section 28DA be deleted, thus removing this restriction and allowing people to change their gender as often as they like.

Other Australian jurisdictions have considered placing a limit of one gender change per year, in line with the option of changing your name once per year. I believe this limit is reasonable and sensible and should have been a recommendation of the Committee.

A handwritten signature in black ink, appearing to read 'Robyn Lambley', with a small dot at the end.

Robyn Lambley

Member for Araluen