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**THE LEGISLATIVE ASSEMBLY FOR THE
AUSTRALIAN CAPITAL TERRITORY**

BIRTHS, DEATHS AND MARRIAGES REGISTRATION AMENDMENT BILL 2013

EXPLANATORY STATEMENT

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Overview of the Bill

The Births, Deaths and Marriages Registration Amendment Bill 2013 (the Bill) amends the *Births, Deaths and Marriages Registration Act 1997*, the *Births, Deaths and Marriages Registration Regulation 1998*, and the *Legislation Act 2001* to improve legal recognition of sex and gender diverse people in the ACT community.

The Bill removes and replaces terminology that is no longer suitable with terminology that ensures that people are referred to in an appropriate, accurate and consistent way while respecting the individual's self-identity. It also modifies existing definitions and inserts new relevant definitions into the Act.

The Bill extends the time period for the registration of the birth of a child from 60 days to 6 months in order to reduce pressure on parents of babies who are not clearly male or female by allowing additional time to make complex decisions about the registered sex of their child.

The Bill changes the requirements for people who wish to change their sex on their birth certificate so that sexual reassignment surgery is no longer required and this enhances official recognition of a person's chosen gender. It also clearly identifies the evidence required in order to support the application to alter the register to record change of sex.

The Bill specifies that if a person has a change of sex, they do not lose any entitlement under a will, trust or territory law only because the person's sex has been altered on the register. It also modifies the clauses in the Act dealing with certificate evidence and interstate recognition certificates.

The Bill amends the Births, Deaths and Marriages Registration Regulation to ensure consistency with amendments made to Act. The Bill also makes a minor amendment to section 168B of the Legislation Act to amend the definition of 'intersex'.

Human Rights Implications

The Births, Deaths and Marriages Registration Amendment Bill positively engages rights protected under the *Human Rights Act 2004* (HRA). The right to recognition and equality before the law is expressed under section 8, the right protection of the family and children is expressed under section 11 and the right to privacy and reputation is expressed under section 12 of the HRA.

Section 8 provides that

- 1) *Everyone has the right to recognition as a person before the law.*
- 2) *Everyone has the right to enjoy his or her human rights without distinction or discrimination of any kind.*
- 3) *Everyone is equal before the law and is entitled to the equal protection of the law without discrimination. In particular, everyone has the right to equal and effective protection against discrimination on any ground.*

Section 8 incorporates general ‘equality rights’; the rule of non-discrimination and principles of equality before the law, and equal protection of the law as defined by articles 2, 16 and 26 of the International Covenant on Civil and Political Rights (ICCPR).

Recognition before the law means that the law must formally acknowledge people as subjects of the law, human beings with legal rights, not objects of the law. The right to equal protection of the law prohibits discrimination in law or in practice in any field regulated by public authorities. The recognition of equality before the law is not limited to the rights protected by the HRA. The right aims to protect people from discrimination of any kind in the enjoyment of rights set out in the HRA.

The *Discrimination Act 1991* provides protection from discrimination for people with certain attributes. In addition to this, Commonwealth legislation provides further protections. Section 8 of the HRA is a statement of the general principle of non-discrimination and equality of treatment that applies to everyone. The Discrimination Act does not limit section 8, nor does the HRA limit the protections of the Discrimination Act.

Section 11 provides that

- (1) *The family is the natural and basic unit of society and is entitled to be protected by society.*
- (2) *Every child has the right to protection needed by the child because of being a child, without distinction or discrimination of any kind.*

Section 11 incorporates protection of the family and children into the rule of non-discrimination and identifies them as a category of people afforded special protection in society.

Section 12 provides that

Everyone has the right –

- (a) *not to have his or her privacy, family, home or correspondence interfered with unlawfully or arbitrarily; and*
- (b) *not to have his or her reputation unlawfully attacked.*

Section 12 of the HRA gives effect to article 17 of the ICCPR and protects individuals from unlawful and arbitrary interference with privacy. Privacy is connected to personal autonomy and human dignity.

The Bill positively engages the right to equality and the right to privacy by official recognition of a person's chosen gender. The abolition of sex reassignment surgery as a requirement for a person to be eligible to change their sex on a birth certificate promotes respect for the human rights of all individuals and ensures recognition and equality before the law for all people in the ACT.

Extending the time period for the registration of the birth from sixty days to six months supports the right to protection of the family and children.

Clause Notes

Clause 1 Name of Act

This clause provides that the name of the Act is the *Births, Deaths and Marriages Registration Amendment Act 2013*.

Clause 2 Commencement

This clause provides for the commencement of the Act. The Act will commence 30 days after notification.

Clause 3 Legislation amended

This clause provides that the Act amends the *Births, Deaths and Marriages Registration Act 1997*. This Act also amends the *Births, Deaths and Marriages Registration Regulation 1998* and the *Legislation Act 2001*.

Clause 4 Dictionary Section 2, note 1

This clause removes the example of ‘sexual reassignment surgery’ in *Note 1*.

This is consistent with the removal of the requirement for reassignment surgery as criteria for a person to alter their sex in the registration of the person’s birth.

Clause 5 Sections 9 and 10

This clause extends the time period for the registration of a birth from 60 days to 6 months.

This amendment recognises that parents or a person with parental responsibility may need to take certain steps to confirm a particular sex for their child. Time pressures can make this process more stressful for parents and extending the period of time for parents to register the sex of their child will reduce pressure to make a complicated decision quickly.

This clause supports the right to protection of the family and children which states that the family is the natural and basic group unit of society and is entitled to be protected by society.

Clause 6 Application to register change of child’s name Section 19 (5)

This clause replaces the reference to ‘child’s guardian’ with ‘a person with parental responsibility for the child’. This aligns the Act with terminology used in the *Children and Young People Act 2008*.

**Clause 7 Definitions for pt 4
Section 23**

This clause removes the definitions of ‘sexual reassignment surgery’ and ‘transsexual person’ as they are no longer required for the operation of this Act.

**Clause 8 Application to alter register to record change of sex
Section 24 (1) (c)**

This clause removes the requirement for sexual reassignment surgery before a person can alter the person’s sex in the registration of the person’s birth. Instead, it requires that the person believes their sex to be the sex nominated in the application and either the person has received appropriate clinical treatment for alteration of the person’s sex or the person is an intersex person.

To ensure that the exercise of professional medical judgement is not expanded or impeded by this Act, ‘appropriate clinical treatment’ is not defined.

The requirement that a person undergo sexual reassignment surgery to apply to alter the record of their sex violates a person’s human rights to privacy, bodily integrity and the right to equal legal status unless they submit to invasive medical procedures.

The criteria replacing the requirement of reassignment surgery are based on the High Court judgement, *AB v State of Western Australia*, which established the legal principle on the relevant requirement for a person to change their sex on a Births, Deaths and Marriages Register. The High Court considered the issue of recognition of the sex and gender identity of individuals where they have not undergone sexual reassignment surgery. The Court found that the physical characteristics by which a person is identified as male or female are confined to external physical characteristics that are socially recognisable. This removes the need for precise knowledge of a person’s remnant sexual organs, and indicates that legal recognition of a change in sex no longer requires sexual reassignment surgery.

Clause 9 Section 24 (2)

This clause substitutes the requirement for a child to have undergone sexual reassignment surgery for alteration of the record of the child’s sex with the following criteria: the parent of, or a person with parental responsibility for, the child may apply if they believe on reasonable grounds that alteration of the record of the child’s sex is in the best interests of the child, and the child has received appropriate clinical treatment for the alteration of the child’s sex or the child is an intersex person.

This amendment does not create a new power to record a change of sex for a child, rather it removes the requirement for a child to undergo sexual reassignment surgery.

The protection of the family and children is entrenched in the HRA. In order to support this right, the best interests of the child must be considered.

Clause 10 Section 25

This clause removes the requirements for evidence in support of applications which related to the requirement of reassignment surgery and specifies what evidence in support of application is now necessary in terms of the new criteria in section 24 (1) (c) and section 24 (2).

An application under section 24 for alteration of the record of the sex of the person who is at least 18 years old must be accompanied by a statutory declaration by a doctor, or a psychologist, certifying that the person has received appropriate clinical treatment for alteration of the person's sex or is an intersex person. The person is also required to produce documents confirming that the person was born in the Territory or has had their birth registered in the Territory and any other documents and information that are prescribed.

An application under section 24 for alteration of the record of the sex of a child must be accompanied by a statement signed by the parents of, or a person with parental responsibility for, the child stating that the alteration of the record of the child's sex is in the best interests of the child. The parent or person with parental responsibility must also supply a statutory declaration by a doctor, or psychologist, certifying that the child either has received appropriate clinical treatment for alteration of the child's sex or is an intersex person.

The parent or person with parental responsibility must also supply documents confirming that the child was born in the Territory or has had their birth registered in the Territory and any other documents and information that are prescribed.

Clause 11 Sections 27 and 28

The term 'transsexual' is omitted from these sections. The removal of the term 'transsexual' is consistent with accepted terminology used to promote consistency. It also ensures that people are referred to in an appropriate and accurate way while still respecting the individual's self-identity.

Clause 12 Section 29

This clause states that a person who has entitlements under a will, trust or territory law does not lose the entitlement only because the person's sex has been altered on the register, unless the will, trust or territory law provides otherwise.

This is in line with the right to recognition and equality before the law which specifies that everyone has the right to enjoy his or her human rights without distinction or discrimination of any kind.

Clause 13 Section 65

This clause deals with certificate evidence and states that an interstate recognition certificate is, for the purposes of any territory law, evidence that the person mentioned in it is of the sex stated in the certificate. It also defines the meaning of ‘interstate recognition certificate’ as a certificate issued under a corresponding law.

Clause 14 Dictionary, note 2

This clause points readers to the term ‘intersex person’ in the Legislation Act. An intersex person is a person who was born with reproductive organs or sex chromosomes that are not exclusively male or female.

Clause 15 Dictionary, new definition of *parental responsibility*

This clause specifies that the definition of the term ‘parental responsibility’ is found in the dictionary of the Children and Young People Act.

Clause 16 Dictionary, definitions of *sexual reassignment surgery* and *transsexual person*

This clause removes the definitions of ‘sexual reassignment surgery’ and ‘transsexual person’ from the dictionary.

Sexual reassignment surgery is no longer a requirement to alter the register to record change of sex. The removal of the term ‘transsexual’ is consistent with accepted terminology used to promote consistency.

Schedule 1 – Other Amendments

Part 1.1 Births, Deaths and Marriages Registration Regulation 1998

These clauses make a series of amendments to the Births, Deaths and Marriages Registration Regulation.

Clause 1.1 Section 4 (1)

Section 4 of the regulation expands on what particulars must be included in a notice of birth. This clause makes a minor amendment to section 4 of the Regulation to remove reference to section 5 (3) of the Act, and replace it with a reference to section 5(2) of the Act.

Clause 1.2 Section 4 (1) (b)

This clause states that the notice of birth must state the sex of the child if it is determinable. This ensures that the relevant doctor is not pressured into identifying the sex of an intersex

child in order to avoid a penalty for not specifying the sex of the child on the notification of birth.

Inserting the specification that the notice must only state the sex of the child, if the sex of the child is determinable, supports the right to protection of the family and children.

Clause 1.3 Section 5 (b)

This clause states that the registration of births must state the sex of the child, if the sex of the child is determinable. This clause supports and acknowledges the right to protection of the family and children by ensuring that there is no pressure on the parents of an intersex child to specify the sex of the child in order to register the child's birth.

Clause 1.4 Section 7

This clause deals with the issuing of birth certificates. The registrar-general may issue a birth certificate showing a person's sex before the alteration of the record if application is made by: a parent or person with parental responsibility for the person, an executor or administrator of the estate of the person, and a lawyer authorised by the parent, executor or administrator. The clause specifies that an application can also be made by the person, by a child of the person or by a person specified by regulation.

The removal of a spouse, civil union partner or civil partner, or former spouse, civil union partner or civil partner from the list of people who may apply protects the right to privacy of an individual, especially the privacy of an individual who has changed their sex on their birth certificate.

Clause 1.5 Section 8

This clause removes the section dealing with the effect of certificates issued for 'transsexual' people. The term 'transsexual' is used in the existing section which is removed. Removing this clause ensures that a category of people is not identified by an exception. The issue of birth certificates is not an unusual practise and does not only affect a specific category of individuals.

Part 1.2 Legislation Act 2001

Clause 1.6 Section 169B

This clause amends the definition of 'intersex' to mean a person who has physical, hormonal or genetic features that are: neither wholly female nor wholly male, a combination of female and male, or neither female nor male. Amending the clause to reflect the accepted definition of an intersex person will ensure that intersex people are accurately represented and defined. The definition will now be consistent with the definition of intersex adopted in section 4 of the *Sex Discrimination Act 1984* (Cth).