

2023

Legislative Assembly For The Australian Capital Territory

Births, Deaths and Marriages Registration Amendment Bill 2023

**SUPPLEMENTARY EXPLANATORY STATEMENT**

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## Introduction

This supplementary explanatory statement relates to the Births, Deaths and Marriages Registration Amendment Bill 2023 as presented to the Legislative Assembly. It has been prepared in order to assist the reader of the amendments and to help inform debate on them. It does not form part of the amendments themselves and has not been endorsed by the Assembly.

The Statement must be read in conjunction with the amendments. It is not, and is not meant to be, a comprehensive description of them. What is said about a provision is not to be taken as an authoritative guide to the meaning of a provision, this being a task for the courts.

## Overview of the amendments

Birth certificates are primary identity documents that provide access to essential government services including the provision of passports and licenses, access to Medicare and Centrelink, and enrolment in schools and universities. All people deserve fair and equal access to identification documents that enable them to safely and easily access these services. Therefore, birth certificates administered by the ACT should be able to as practically as possible reflect the gender of all ACT residents including those whose sex marker requires changing as a result of gender transition/affirmation.

These amendments make three significant changes to the process of changing a sex marker on a birth certificate. First, they remove the requirement for clinical verification of a change of sex installing instead a self-declaration process similar to the current change of name process. Second, they make the change of sex marker process allow for an 'open text' sex marker description. Third, they allow applicants to, upon application in writing, have their sex removed from their birth certificate, meaning an individual can choose to have a birth certificate issued without a sex marker.

These amendments will have little direct or indirect ongoing financial effect aside from the implicit expectation that Access Canberra will have to make appropriate adjustments to their forms and birth registry to allow for these reforms. The amendments have a 12 month implementation time to allow an adequate adjustment period for Access Canberra, it is noted that they have the ability to be commenced earlier by Ministerial notice. There may be some financial benefit afforded to individual applicants who will no longer be required to go through medical and clinical processes to seek the necessary documentation to make their application.

## Background

The registration of births and the provision of birth certificates is governed by each state and territory in Australia. Each jurisdiction has slightly different rules that govern the registration and

change of sex marker. In 2014, the ACT was the first jurisdiction in Australia to reform our Births, Deaths and Marriages Registration Act to allow for more than two sex categories to be recognised as sex markers on a birth certificate. These changes also altered the medical requirements to change sex on a birth certificate from a surgical change to the more open and subjective “evidence of appropriate clinical treatment”. While forward thinking and responsive to advocacy at the time, these reforms have become outdated as other jurisdictions in Australia and around the world have made reforms to their Births, Deaths, and Marriages Registration Acts to remove all requirements for medical or clinical verification.

Since 2014, ACT has also passed further amendments to the Act designed to support gender diverse Canberrans to have access to accurate and affirmative identity documents including establishing an application process for people under 18 to change their birth certificates subject to ACAT processes, and allowing for people born outside of the ACT to apply for a recognition of details certificate.

If you are born in the ACT, you must currently provide evidence of “appropriate clinical treatment” to change the record of the sex on your birth certificate. This purposefully broad requirement has been interpreted as requiring ‘sign off’ from a medical practitioner administering hormone or surgical treatments, or a psychologist providing gender related counseling. Requiring these verifications from the limited number of practitioners providing gender affirming care in Canberra, for what is essentially an administrative process, causes barriers and delays to service access by gender diverse Canberrans. These amendments remove this process, and install a simple self-declaration process in its place.

Since 2014, language to describe non-binary gender experiences and identity has significantly changed and developed with the term ‘non-binary’ coming into common use along with a range of other terms including agender, gender diverse, and gender fluid. The language to describe non-binary gender experiences may further develop in the coming years. This makes an open text descriptor the most appropriate policy response as it also allows for a diversity of identification and flexibility for language development. This legislation puts in place an open sex descriptor so applicants can nominate the most appropriate term to describe their gender on the register and their subsequent birth certificates. This reform keeps in place the original registration process which requires parents to declare a binary sex for their child upon initial registration. Applicants who apply to change their, or their child’s, sex marker later in life will then be presented with an open category alongside the options to tick male or female.

In 2018, the ACT Government commissioned a review of ACT legislation that directly or indirectly discriminates against lesbian, gay, bisexual, transgender, intersex, and/or queer peoples (LGBTIQ+ people). The resulting report from [Equality Australia](#) made a series of recommendations on birth certificates to which this reform directly responds. Local trans and gender diverse advocacy and peer support service, A Gender Agenda, as well as the ACT

LGBTIQ+ Ministerial Advisory Council, and Equality Australia have advocated for the reforms this bill undertakes since the release of this report in 2018.

It is important to note that the proposed changes to the Act will affect the registry and resulting birth *certificates*, not birth notification statements which are collected for statistical purposes and not available for public consumption.

### Consultation

The development of these reforms has been done in consultation with impacted stakeholder advocacy groups including Equality Australia, A Gender Agenda, Meridian, the ACT Human Rights Commission, Intersex Human Rights Australia, and the ACT Council of Social Services. Most feedback from stakeholders was sought and received in writing via email except for A Gender Agenda and Equality Australia who were more closely involved in the development of these amendments. This consultation occurred through meetings in person, over video conference and through written correspondence via email.

All impacted stakeholders were strongly supportive of the reforms this legislation enables.

### Human Rights Compatibility

Note: This section has been informed by advice provided by the ACT Human Rights Commission, but is not the entirety of its advice.

The intent of the reforms in these amendments are to provide trans and gender diverse people with a simpler administrative process for the recording of self-identified sex marker descriptors on birth certificates issued by the ACT Registrar General. As such, these amendments are fundamentally affirmative of the human rights of trans and gender diverse Canberrans. The ACT Human Rights Commission has indicated their support for the intent of the amendments which better provide for the rights of trans and gender diverse people to the equal protection of the law and without interference with their privacy.

This legislation enlivens Section 8(3) of the Human Rights Act 2004 which recognises the right of trans and gender diverse people to equal protection of the law. This right requires the ACT Government to take steps to ensure the legal recognition and equality of all people and the effective protection from discrimination against people (s 8(1) – 8(3)).

Gender identity is a protected attribute under the Discrimination Act 1991. Further, gender identity comprises an element of self-defined bodily and informational autonomy that is also protected by the right to privacy in s 12 of the Human Rights Act 2004. Principle 3 of the Yogyakarta Principles on the application of international human rights obligations to issues

of gender identity states that “each person’s self-defined sexual orientation and gender identity is integral to their personality and is one of the most basic aspects of self-determination, dignity and freedom”.

This is also the case for children and young people who hold these same rights to privacy and equal protection of the law. As such, it is considered that, any decision making authority, including but not limited to the ACT Civil and Administrative Tribunal who are responsible for decision making around the capacity of a person under 14 to make an application to change the sex marker on their birth certificate, should consider medical or clinical input into this decision to be appropriate only insofar as it can be used to determine an applicants competency to understand the (administrative) decision they are making (i.e. their Gillick competency) not a determination about the level of clinical or medical treatment they may have had in affirming their gender.

### Outline of the provisions

The reforms these amendments will make to the Act are:

1. Remove the requirement for medical verification of clinical treatment to change a sex marker on an individual’s birth certificate or recognised details certificate. (Section 24, Section 25, Section 29)
  - The proposed amendment will make changes to an individual’s sex marker on their birth certificate or recognised details certificate a process that does not require authorisation or verification from a medical practitioner.
2. Allow an open text description of sex. (New Division 4.3, s29DA)
  - This change will allow those who do not identify with the descriptors male, female, or non-binary to describe their gender as accurately as possible given the diversity of terms used to express these experiences. All descriptors will be allowed providing that the description is not obscene or offensive.
  - This new division also defines a prohibited sex descriptor.
  - Decisions about the appropriate use of descriptions will be limited to the Registrar-General and will be only able to be appealed by the individual applying for the change.
3. Make sex an optional particular on a birth certificate to allow for people to choose whether to display this information on their birth certificates. (Section 27)
  - Some people do not identify with a gender and therefore may wish to display this information on their birth certificate.

- Others may consider it personal, private information, or take a political or philosophical stance against gender as an identifying piece of information and therefore not want this information to be displayed.
  - Making it sex an optional descriptor on a birth certificate will allow individuals to make their own choice about their identity document.
  - The registrar general must be satisfied that individuals over the age of 14 either consent to the request or cannot understand the implications of the request. This is to ensure that the person remains in control of the information that is enclosed on their birth certificate.
  - This provision is not intended to otherwise limit the discretion of the registrar-general regarding the information that may be included on a certificate under section 45(1)(a) having regard to the privacy protections in section 44.
4. Ensure that individuals have the option to exclude previous names from being displayed on newly issued birth certificates while allowing for people to display this information should they choose to do so. (Section 21 (3) and (4))
- This will ensure that it is a right of the applicant, rather than the registrar general, to determine what previous information is printed on one's birth certificate.
  - By limiting the list of people who can request not to include a former name on their birth certificate to only the person and those with parental responsibility, ensures that the person has control over how their information is being disclosed.
  - With the added provision, the registrar general must be satisfied that individuals over 14 years of age, consent to the request or cannot understand the implications of the request for details to be omitted from birth certificates.
  - Through 21 (4)(b), provisions are strengthened to safeguard against the risk of identity fraud and reinstates that the Registrar-General has the discretion to refuse to issue a certificate if they suspect it is under fraudulent purposes. This also works as an important measure to ensure trans, and gender diverse individuals are protected from the risk of transphobic sentiment associated with the suspicion of fraud.