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

BIRTHS, DEATHS AND MARRIAGES REGISTRATION AMENDMENT BILL 2023

**EXPLANATORY STATEMENT
and
HUMAN RIGHTS COMPATIBILITY STATEMENT
(*Human Rights Act 2004, s 37*)**

**Presented by
Tara Cheyne MLA
Minister for Human Rights**

BIRTHS, DEATHS AND MARRIAGES REGISTRATION AMENDMENT BILL 2023

The Bill is a Significant Bill. Significant Bills are bills that have been assessed as likely to have significant engagement of human rights and require more detailed reasoning in relation to compatibility with the *Human Rights Act 2004*.

OVERVIEW OF THE BILL

The *Births, Deaths and Marriages Registration Amendment Bill 2023* (the Bill) will amend the *Births, Deaths and Marriages Registration Amendment Act 1997* to remove administrative barriers for transgender and gender diverse people seeking to change their registered sex and/or name, and to reduce barriers for parents with sole parental responsibility to change the registered name and/or sex of their child.

Supporting young Canberrans to independently update their registered sex and name

The Bill allows a young person aged 14 years and over to make their own application directly to the registrar-general to change their registered sex and/or given name.

Currently, a young person who is aged 16 years and over may apply directly to the registrar-general, and young people aged under 16 years are required to first apply to the ACT Civil and Administrative Tribunal (ACAT) so that ACAT can assess the young person's ability to understand the decision.

The Bill updates the age for independent decision-making to 14 years for this issue, recognising that it is an age where young people are generally becoming more mature and independent and can be assumed to have understanding of the consequences of a change of registered sex or given name. It also aligns with the requirement in the BDMR Act that where a young person is 14 years or over, their parent must seek their consent before changing their name.

This amendment also acknowledges that transgender and gender diverse children and young people who are not supported in their gender identity and expression are more likely to demonstrate high levels of depression, anxiety and other mental health issues and face greater risks of self-harm and suicide.¹

Children and young people under the age of 14 years will still be able to access the pathway to ACAT, generally with the support of one parent.

Changing parents' details on a child's birth certificate

The current power under section 16 of the BDMR Act for the registrar-general to add details of parentage after the registration of a birth specifically excludes information relating to the change of sex by a parent of the child. This was a feature of the

¹ See eg Austin A, Craig SL, D'Souza S, McInroy LB. Suicidality Among Transgender Youth: Elucidating the Role of Interpersonal Risk Factors. *J Interpers Violence* 2022 Mar; 37(5-6).

original Births, Deaths and Marriages Registration Bill 1997 and was reflected in model legislation around the country.

The Bill allows a parent who subsequently changes their registered name or sex to apply to update the birth certificate of their child with the consent of the other parent and the young person (if aged 14 years and over) to reflect their change of name and any parental descriptor.

The ability for a parent to have their child's birth certificate accord with that parent's name and gender identity can be important and could avoid a parent having to explain a discrepancy or out themselves as transgender when providing the child's birth certificate, for example when enrolling a child at childcare or preschool.

The Bill also allows a parent to apply to update the birth certificate of their child to change the parental descriptor to the gender neutral term 'parent' without the consent of the other parent or young person (if aged 14 years and over). This will ensure that a minimum option is available that does not require consent of other parties as it does not have any impact on the other parent or the child.

This amendment has a delayed commencement of up to 12 months to allow implementation work and changes to database systems to ensure that original data (e.g. parents' names at the time of birth) is able to be retained when details are updated, so that the original data is available if needed at a later time for security, verification purposes or other reasons. Additional time is also needed to liaise with the national Document Verification Service, to ensure that the updated certificates will be appropriately recognised by this scheme.

Recognition of change in registered sex details

Currently, the Section 27(3) of the BDMR Act requires that "a birth certificate mentioned in this section must not include any word or statement to the effect that the person to whom the certificate relates has changed sex".

This provision was introduced by the original Births, Deaths and Marriages Registration Bill 1997 and was designed to prevent discrimination on the grounds of a record of a person's sex having been altered under the BDMR Act (or corresponding laws in other jurisdictions) and to remove a barrier to full recognition of a trans or gender diverse person's new identity. It was also an important privacy safeguard.

The Bill amends the BDMR Act to allow, on request of an applicant, a birth certificate to be issued that indicates a person's prior and current registered sex.

This will address issues that some people have been experiencing with other identification processes (e.g. applying for a passport) because their new birth certificate does not demonstrate a connection between their prior and current registered sex, and align with the existing flexibility available to people who change their names.

Allowing parents with sole parental responsibility to apply to change the registered name and/or sex of a child

Currently, the BDMR Act does not allow a parent with sole parental responsibility for a child to unilaterally apply to the registrar-general to change the child's name without the consent of the other parent, unless there are specific court orders that provide for the change in name. Instead, the parent must apply to the ACT Supreme Court who must be satisfied the change is in the child's best interests.

The Bill amends the BDMR Act to allow the registrar-general to register an application for a change in a child's name by one parent who has been granted sole parental responsibility for a child by an order of a court where:

- the duration of the order granting sole parental responsibility is until the relevant child or young person reaches 18 years of age; and
- the scope of the order granting sole parental responsibility is unlimited or, where limited by the court, explicitly provides a sole right for the parent to rename the child.

Legal proceedings can be costly, stressful and time-consuming and requiring a parent who has already finalised family law proceedings with an order granting sole parental responsibility to then commence proceedings in the ACT Supreme Court to change the name of their child is burdensome, complex and duplicative.

This amendment ensures the registrar-general will not be required to adjudicate disputes between parents.

The Bill also amends the BDMR Act to clarify that the ability of a "person with parental responsibility" of a child to apply for an alteration of a child's registered sex in section 24(2) includes a parent with sole parental responsibility.

CONSULTATION ON THE PROPOSED APPROACH

The BDMR Act was amended by the Births, Deaths and Marriages Registration Amendment Bill 2020 to remove barriers for the LGBTIQ+ community in changing the particulars of gender identity for young people and to support the adoption community.

Since then, the ACT Government has received suggestions from the community about how the BDMR Act can be further improved to remove administrative barriers for transgender and gender diverse people seeking to change their registered sex and/or name, and to reduce barriers for parents with sole parental responsibility to change the registered name and/or sex of their child.

These amendments support the Capital of Equality Strategy Second Action Plan (2022-2023) by improving the process for registering a change of sex under the BDMR Act. The Justice and Community Safety Directorate undertook targeted internal and external consultation during the development of this Bill.

CONSISTENCY WITH HUMAN RIGHTS

Rights engaged

The Bill engages the following rights under the Human Rights Act:

- Section 8 – Right to recognition and equality before the law (*promoted*)
- Section 11 – Right to protection of the family and children (*promoted and limited*)
- Section 12 – Right to privacy and reputation (*promoted*).

Rights Promoted

Section 8 – Right to recognition and equality before the law

The amendments will support the right to recognition and equality before the law by removing barriers for transgender and gender diverse people to have their name and sex reflected in identity documents.

Transgender and gender diverse young people of the age of 14 years will be able to apply directly to the registrar-general to update their name and/or sex. This will align with other provisions that acknowledge a presumption of a young person's capacity to make their own decisions at the age of 14 years. While it is a significant decision, it is also a reversible decision, and if a young person later decides that they wish to revert to their original registered birth name or sex, this can be sought through a further application to the registrar-general.

Parents will be able to apply to update their details on their child's birth certificate to better reflect their registered name and preferred parental designation. As noted above, this will avoid the parent having to explain a discrepancy and out themselves as transgender, and will more clearly establish the relationship between the child and the parent with the parent's new name.

Transgender people will also be able to apply for a copy of a birth certificate that shows both their former registered sex and current registered sex, if they wish, better facilitating proof of identity for other identification processes by showing a clear connection between the two.

Section 11 – Right to protection of the family and children

The amendments will support the right to protection of children by allowing young people aged 14 and over to apply to the registrar-general directly to change their registered name and/or sex. In light of increasing evidence that supportive, gender-affirming approaches that allow young people to express their identity socially during childhood adolescence, harms can be reduced and mental health and well-being outcomes for children and young people can be significantly improved.²

² Olson K et al, 'Mental Health of Trans Children Who Are Supported in Their Identities' (2016) 137(3) *Pediatrics* 2015-3223:1–8.

The amendments will also support the right to protection of family by allowing a child's birth certificate to be updated to reflect the current registered name of a parent, better facilitating proof of identity and the relationship between parent and child.

Section 12 – Right to privacy and reputation

The amendments will support the right to privacy and reputation by allowing transgender people to decide for themselves whether their birth certificate refers to a prior registered sex. This will allow transgender people more control over when and how they provide this information.

Rights Limited

Section 11 – Right to protection of the family and children

1. Nature of the right and the limitation (s28(a) and (c))

Article 23 of the *International Covenant on Civil and Political Rights* recognises that the family is the natural and fundamental group unit of society and is entitled to protection by society and the State.

The amendment to allow a parent who has been granted sole parental responsibility for a child to apply to change the child's name and/or registered sex will limit the right to protection of the family because it removes the requirement of the other parent's consent to make the change. This further limits the other parent's right to make a decision affecting the long-term care of their child.

2. Legitimate purpose (s28(b))

The right to protection of the family may be subject to reasonable and justifiable limitations.

This amendment will ensure that where a parent has obtained sole parental responsibility for a child following court proceedings, they will not then be required to commence fresh proceedings in the ACT Supreme Court to effect a change in name.

Under section 64B(2) of the the *Family Law Act 1975* (Cth), a parenting order may deal with the allocation of responsibility for making decisions about major long-term issues in relation to the child (section 64B(2)). Section 4 of the Family Law Act includes a child's name as an example of a major long-term issue about the care, welfare and development of the child.

When making decisions about allocating sole parental responsibility to one parent, the best interests of the child is the paramount consideration of the Federal Circuit and Family Court of Australia. Sole parental responsibility may be granted where the other parent is unable to be found, is unwilling to take responsibility for the child or where there may be a risk to the safety and wellbeing of the child due to family violence or other forms of abuse or neglect. Sole parental responsibility may also be granted following care and protection proceedings in the Childrens Court jurisdiction of the ACT Magistrates Court.

In these circumstances, removing barriers to a change of name will help promote the right to protection of children.

Changing a child's name may help to ensure the child and the applicant sole parent, and potentially other siblings, share the same surname, promoting a sense of family identity.

3. Rational connection between the limitation and the purpose (s28(d))

Allowing an applicant parent with sole parental responsibility to apply directly to the registrar-general to change a child's name is likely to achieve the objective of removing barriers and avoiding ongoing unnecessary litigation.

This amendment will better align with the Family Law Act by acknowledging that sole parental responsibility for a child includes responsibility for the child's name, and acknowledging that best interests have already been considered for all long-term issues for the applicant's child.

This approach is consistent with new legislation recently adopted in Queensland. The new *Births, Deaths and Marriages Registration Act 2023* (Qld) enables a person who holds a Family Court order which grants sole parental responsibility for all long-term issues for a child (which encompasses the child's name) to apply directly to the registrar to register a change of name for the child without further court approval.

4. Proportionality (s28 (e))

In developing these amendments, an alternative of amending the BDMR Act to change the pathway for application from the ACT Supreme Court to the ACAT was also considered.

While this would represent a less expensive and more accessible pathway than the Supreme Court, it would nevertheless result in re-litigating questions of what is in the best interests of the child which have already been finalised by the Federal Circuit and Family Law Court of Australia in granting a parent sole parental responsibility. Subjecting a person to participation in ongoing litigation in multiple systems and jurisdictions can increase the risk of systems abuse and coercive control.

The amendments do not affect the existing pathway to apply to the ACT Supreme Court for a change in a child's name under section 19 of the BDMR Act.

Furthermore, the Bill does not affect an adult's ability to change their name under section 18 of the BDMR Act, providing a child or young person with a pathway to choose their own given name and surname once they reach the age of 18 years.

For these reasons the limitations on rights are considered to be reasonable and proportionate in accordance with section 28 of the Human Rights Act.

Births, Deaths and Marriages Registration Amendment Bill 2023

Human Rights Act 2004 - Compatibility Statement

In accordance with section 37 of the *Human Rights Act 2004* I have examined the **Births, Deaths and Marriages Registration Amendment Bill 2023**. In my opinion, having regard to the Bill and the outline of the policy considerations and justification of any limitations on rights outlined in this explanatory statement, the Bill as presented to the Legislative Assembly is consistent with the *Human Rights Act 2004*.

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Shane Rattenbury MLA
Attorney-General

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 2023*.

Clause 2 Commencement

This clause provides for the Act to commence on the day after its notification day, except for sections 4 to 7 and 20. These sections will automatically commence 12 months after the Act's notification day unless the Minister by written notice fixes an earlier date.

Clause 3 Legislation amended

This clause identifies that the Act will amend the *Births, Deaths and Marriages Registration Act 1997* and the *Births, Deaths and Marriages Registration Regulation 1998*.

Clause 4 Section 16 heading

This clause substitutes a new heading to reflect that section 16 now allows both addition and alteration of details of parentage after registration of birth.

Clause 5 New section 16 (1A) to (1C)

This clause allows a parent to apply to the registrar-general to update their child's birth registration to reflect that parent's registered change in name and words used to describe the relationship with the child, such as mother, father or parent.

The clause makes it clear that consent is required by both parents to make the change, as well as the consent of a young person aged 14 years and over, unless the other parent is not able to provide their consent. The consent requirements do not apply where the only alteration is to use the word 'parent' to describe the parent's relationship with the child.

Clause 6 Section 16 (2)

This clause inserts the words "or alteration" after the word "addition" to reflect that section 16 now allows both addition and alteration of details of parentage after registration of birth.

Clause 7 Section 16 (5)

This clause removes section 16(5) which precludes the addition of any information that relates to a change of sex by a parent of the child.

**Clause 8 Application by parent to register change of child's name
New section 19 (2) (aa)**

This clause inserts a new circumstance where an application may be made by one parent to register a change in a child's name where the applicant is the only person with parental responsibility for decisions about the child's name until the child is 18 years old.

Clause 9 Section 19 (2), new examples

This clause inserts examples of where new section 19(2)(aa) may apply, such as where parental responsibility has been allocated to the applicant by the *Family Law Act 1975* (Cwlth) or long term care responsibility has been transferred under the *Children and Young People Act 2008*.

**Clause 10 Application by young person to register change of given name
Section 19A (b)**

This clause changes the age at which a young person may make an application to the registrar-general for registration of a change in their given name from at least 16 years old to at least 14 years old.

Clause 11 Section 19A (b) (i)

This clause removes the requirement that an application by a young person to register a change of given name be for the purpose of better reflecting their gender identity.

**Clause 12 Application to alter register to record change of sex
Section 24 (1) (a)**

This clause changes the age at which a young person may make an application to the registrar-general for an alteration of the record of their sex from at least 16 years old to at least 14 years old.

Clause 13 New section 24 (3) (aa)

This clause inserts a new circumstance where an application may be made by one parent to register a change in a child's sex, namely where the applicant is the only person with parental responsibility for decisions about the child's sex until the child is 18 years old.

Clause 14 Section 24 (3), new examples

This clause inserts examples of where new section 24(3)(aa) may apply, such as where parental responsibility has been allocated to the applicant by the *Family Law*

Act 1975 (Cwlth) or long term care responsibility has been transferred under the *Children and Young People Act 2008*.

Clause 15 Issue of birth certificates
Section 27 (2)

This clause substitutes the wording “before, or both before and after, the alteration” for “before the alteration”, allowing a certificate to be issued that shows a person’s sex both before and after the alteration of the record of registered sex.

Clause 16 Section 27 (2) (c)

The clause substitutes the word “prescribed” for “specified” to align with current drafting practice.

Clause 17 Section 27 (3)

The clause inserts the words “unless requested by the applicant under subsection (2)” to make it clear that the decision about whether or not a certificate indicates a person has changed their sex is the decision of the applicant.

Clause 18 Application for recognised details certificate
Section 29A (1) (a)

This clause changes the age at which a young person may make an application to the registrar-general for a recognised details certificate acknowledging their name and sex from at least 16 years old to at least 14 years old.

Clause 19 Application by young person for leave to apply for change of given name or sex etc
Section 29E (1)

This clause changes the age at which a young person may apply to the ACAT for leave to apply to the registrar-general for registration of a change in given name(s) (section 19A), alteration of a record of their registered sex (section 24) or a recognised details certificate (section 29A) from not yet 16 years old to not yet 14 years old to align with clauses 10, 12 and 16 above.

Clause 20 Registration of births
Section 5 (2)

This clause amends the *Births, Deaths and Marriages Registration Regulation 1998* to substitute “parent’s relationship with” for “of the parents of”.

Clause 21 Issue of birth certificates – Act, s 27 (2) (c)
Section 7

The clause substitutes the word “prescribed” for “specified” to align with current drafting practice.