

Your Ref:
Our Ref: 787

19 March 2019

To: The Honourable Members of the Legislative Council

Dear Honourable Member

Re: Proposed Amendments to the Justice and Related Legislation (Marriage Amendments) Bill 2018

Introductory Comments

I am writing to contribute to consideration of the Justice and Related Legislation (Marriage Amendments) Bill 2018 (the Bill), with particular regard to amendments proposed to the *Births, Deaths and Marriages Registration Act 1999* (the BDMR Act). The Bill also proposes amendments to the *Anti-Discrimination Act 1998*, a matter which is outside the scope of this letter of advice, and is more properly a matter for the Anti-Discrimination Commissioner.

Consistent with my functions as Commissioner for Children and Young People, my focus is on the potential impact of the Bill's provisions on the rights and wellbeing of children and young people in Tasmania.

In my letter of 29 November 2018 to Honourable Members, I indicated that I was generally supportive of the intent of amendments proposed to the BDMR Act as they seek to promote and protect the enjoyment by children and young people in Tasmania of a number of fundamental human rights and freedoms.

As well as commenting on some provisions which appeared to require further consideration to address apparent drafting issues, I also expressed my preliminary views on the proposals outlined in relation to applications to register or change gender information relating to a child or young person aged less than 18 years of age. I also noted the need for additional requirements to ensure that the best interests of a child or young person are promoted and protected.



Since I provided my preliminary advice, significant amendments have been drafted by various Honourable Members, with the support of the Office of Parliamentary Counsel. These proposed amendments have been provided to me by the Hon Ruth Forrest MLC (Ms Forrest's proposed amendments) and by the Government (other MLC's proposed amendments). This advice does not respond to each individual newly drafted amendment, but rather gives an indication of the policy positions which I recommend supporting, based on fundamental human rights principles which are applicable to children and young people and on the consultations I have undertaken to date.

Over the past weeks I have had the opportunity to consult with stakeholders who have expressed differing views on the appropriateness or otherwise of the amendments to the BDMR Act. I have also spoken with children and young people who are gender diverse and/or identify as a gender other than their biological sex, and with their parents. These conversations have informed the views I express in this letter and affirm my strong view that it is important for us as a community to ensure that we do all we can to remove the unacceptable discrimination children and young people can experience in their everyday lives because of their gender identity.

I think it is also important to acknowledge that since November 2018, when this Bill came before the Upper House, interested parties have had the time and opportunity to make their views known to me and to other stakeholders. While public discussion and debate are critical elements of our democratic processes, there is a risk that debate around the BDMR Act amendments may become highly politicised and expose children, young people and their families to harm and distress. Whilst public debate should be encouraged, we should also take care to ensure that it is respectful and conducted in a manner which does no harm to those children and young people whose lives can be impacted by the issues being discussed.

Background

The office of Commissioner for Children and Young People is established under the *Commissioner for Children and Young People Act 2016* (CCYP Act). The Commissioner's functions, which are set out in s.8 of the CCYP Act, include:

- (a) advocating for all children and young people in the State generally;
- (c) researching, investigating and influencing policy development into matters relating to children and young people generally;
- (d) promoting, monitoring and reviewing the wellbeing of children and young people generally; and
- (e) promoting and empowering the participation of children and young people in the making of decisions, or the expressing of opinions on matters, that may affect their lives.



In performing these and other functions under the CCYP Act, I am required to:

- do so according to the principle that the wellbeing and best interests of children and young people are paramount; and
- observe any relevant provisions of the United Nations *Convention on the Rights of the Child* (UNCRC).¹

Section 8(3) of the CCYP Act provides that when performing a function or exercising a power, I must act independently, impartially and in the public interest.

Further, I must give special regard to the needs of children and young people who are vulnerable or disadvantaged.

Preliminary Observations

The Bill outlines a framework for amendments to the BDMR Act in relation to registration of birth, change of name, entry of sex or gender information on the Register, and to the type of information considered to be registrable information.

The changes proposed by the Bill engage a number of rights including the right of children and young people to be registered at birth, to equality before the law, to non-discrimination, freedom of expression, and the right to survival and development. The proposed amendments also seek to acknowledge the fundamental importance of children and young people being provided with the opportunity to express a view on matters affecting them and for those views to be respected and taken into account.

In its General Comment on the implementation of the rights of the child during adolescence, the United Nations *Committee on the Rights of the Child* said:

*Adolescents who are ... transgender ... commonly face persecution, including abuse and violence, stigmatization, discrimination, bullying, exclusion from education and training, as well as a lack of family and social support, or access to sexual and reproductive health services and information. In extreme cases, they face sexual assault, rape and even death. These experiences have been linked to low self-esteem, higher rates of depression, suicide and homelessness ... The Committee emphasizes the rights of all adolescents to freedom of expression and respect for their physical and psychological integrity, gender identity and emerging autonomy. ... States should also take effective action to protect [...] transgender [...] adolescents from all forms of violence, discrimination or bullying by raising public awareness and implementing safety and support measures.*²

When considering the Bill and any amendments proposed to it, we must maintain a focus on the fundamental right of children and young people to have their best interests assessed and taken into account as a primary consideration in all actions and decisions that concern them.

¹ Section 3(1) of the *Commissioner for Children and Young People Act 2016* (Tas).

² Committee on the Rights of the Child, General Comment No. 20 (2016) on the implementation of the rights of the child during adolescence, paras. 3 and 34.



Article 3, paragraph 1, of the *Convention on the Rights of the Child* gives the child the right to have his or her best interests assessed and taken into account as a primary consideration in all actions or decisions that concern him or her, both in the public and private sphere.

As the UN Independent Expert On Protection against Violence and Discrimination based on Sexual Orientation and Gender Identity, Victor Madrigal-Borloz said in his July 2018 Report:³

... States should take the best interests of the child as a primary consideration and respect the child's right to express views in accordance with the age and maturity of the child, in line with the Convention on the Rights of the Child and, in particular, in keeping with the safeguards established pursuant to article 19 of the Convention, which must not be excessive or discriminatory in relation to other safeguards that give recognition to the autonomy and decisional power of children at a certain age in other areas.

Article 19 of the *Convention on the Rights of the Child* is set out below for reference:

Article 19

1. *States Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child.*
2. *Such protective measures should, as appropriate, include effective procedures for the establishment of social programmes to provide necessary support for the child and for those who have the care of the child, as well as for other forms of prevention and for identification, reporting, referral, investigation, treatment and follow-up of instances of child maltreatment described heretofore, and, as appropriate, for judicial involvement.*

I wish also to emphasise that there can be no real appreciation or understanding of what is in a child's or young person's best interests without according them the right to be heard and to have a say on matters that affect them.⁴

³ UN Human Rights Council, *Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity*, 19 April 2017, A/HRC/35/36, available at: http://www.un.org/en/ga/search/view_doc.asp?symbol=A/73/152

⁴ Articles 3(1) and 12 *Convention on the Rights of the Child*; and Committee on the Rights of the Child, General Comments No. 12 (2009) on the right of the child to be heard and No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration.



Therefore, and as I indicate later in this letter, for the Bill to better promote the rights, wellbeing and best interests of children and young people, I respectfully suggest that “best interests” considerations should apply in the following circumstances:

- (a) Where an application to register a change of gender is made by the child’s parent(s) or guardian(s) there should be an additional requirement that the applicant(s) believe on reasonable grounds that the change is in the child’s best interests.
- (b) Where an application is made to a Magistrate to approve registration of a gender a Magistrate must be satisfied that the registration of the gender in relation to a child or young person is in the best interests of the child.
- (c) Section 24 of the BDMR Act deals with applications by a child’s parent to register a change of the child’s name. A Magistrate may, on application by a child’s parent, approve a proposed change of name for the child if satisfied that the change is in the child’s best interests. The Bill proposes removing this “best interests” requirement, a position I do not support.

Furthermore, safeguards should be put in place to ensure that children and young people are aware of and understand the potential implications of an application to register a change of gender and of any decision they make as to what gender markers are to appear on their birth certificate.

Finally, in considering the proposed amendments to the Bill, I have also been guided by the features of recognition procedures recommended by the UN High Commissioner for Human Rights and set out in the Independent Expert’s report referred to above:⁵

...the process of recognition should:

- *Be based on self-determination by the applicant*
- *Be a simple administrative process*
- *Not require applicants to fulfil abusive requirements, such as medical certification, surgery, treatment, sterilization or divorce*
- *Acknowledge and recognize non-binary identities, such as gender identities that are neither “man” nor “woman”*
- *Ensure that minors have access to recognition of their gender identity.*

⁵ UN Human Rights Council, *Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity*, 19 April 2017, A/HRC/35/36, par 39, available at: http://www.un.org/en/ga/search/view_doc.asp?symbol=A/73/152



My comments below seek to outline my views on the various policy issues raised by the BDMR Act amendments.

1. **The requirement to undergo sexual reassignment surgery to apply to register a change of sex**

The BDMR Act currently provides as follows:

28A. Application to register change of sex

- (1) *An adult person –
 - (a) whose birth is entered in the Register; and
 - (b) who has undergone sexual reassignment surgery; and
 - (c) who is not married –may apply to the Registrar, in a form approved by the Registrar, to register a change of the person's sex.*
- (2) *The parents of a child whose birth is registered in the State may apply to the Registrar, in a form approved by the Registrar, for registration of a change of the child's sex.*
- (3) *An application for registration of a change of a child's sex may be made by one parent if –
 - (a) the applicant is the sole parent named in the registration of the child's birth under this Act or any other law; or
 - (b) there is no other surviving parent of the child.*
- (4) *If the parents of a child are dead, cannot be found or for some other reason cannot exercise their parental responsibilities in respect of the child, the child's guardian may apply for registration of a change of the child's sex.*

Section 28B provides that an application under s.28A to register a change of sex is to be accompanied by:

- (a) *a statutory declaration from each of 2 medical practitioners verifying that the person who is the subject of the application has undergone sexual reassignment surgery; and*
- (b) *any other document or information that the Registrar requires.*

The above suggests that the requirement to undergo sexual reassignment surgery applies equally to children. I reiterate the comments I made in my letter of 29 November 2018 which, for convenience sake, I repeat below:

If the Bill as amended does not receive the support of the Legislative Council, it is, in my opinion, imperative that any existing requirement in the BDMR Act for a child or young person to undergo sex reassignment surgery as a precondition to change of their registered sex be removed. Instead, safeguards of the type I propose above should be put in place to ensure that children and young people are aware of



and understand the potential implications of their decision, and to ensure that their rights and wellbeing are protected and promoted.

In the Family Court case of *In Re Alex*, Nicholson J expressed his “regret that a number of Australian jurisdictions require surgery as a prerequisite to the alteration of a transsexual person's birth certificate in order for the record to align a person's sex with his/her chosen gender identity” and stated that:⁶

The requirement of surgery seems to me to be a cruel and unnecessary restriction upon a person's right to be legally recognised in a sex which reflects the chosen gender identity and would appear to have little justification on grounds of principle.

In my respectful opinion, the very idea that a child or young person should be required to undergo sex reassignment surgery in order to be able to apply to register a change of sex (or gender) is discriminatory, inconsistent with fundamental human rights and out of touch with the lived realities of children and young people who identify as a gender that differs from their sex at birth.

2. Insert a definition of gender

The Bill would permit applications to be made to have a gender specified in the application registered in relation to the person who is the subject of the application. I am supportive of including gender classifications of:

- female;
- male; and
- classifications which are neither female or male such as “non- binary”.⁷

Further to allow for the inclusion of other or more contemporary descriptions of gender, I would also suggest that consideration be given to including an additional category of “a gender identity of a kind recognised by the Regulations that the person is seeking to have registered”.⁸

3. Registration of birth and ensuring that the sex of a baby is recorded when that birth is registered

I understand amendments are being proposed, the effect of which would be to ensure the sex of a baby is recorded when the baby's birth is registered, which I support.

⁶ *In Re Alex* [2004] FamCA 297 at paras 234-237 – cited in Advice re Gender Identity and BDM 2010, Human Rights and Discrimination Commissioner, ACT Human Rights Commission.

⁷ See for example Human Rights Law Centre submission to the Legislative Assembly of the Northern Territory's Social Policy Scrutiny Committee on the Births, Deaths and Marriages Registration and Other Legislation Amendment Bill 2018, page 17 and the Western Australian Law Reform Commission Project 108 Final Report page 65.

⁸ For example, see section 291 of the *Births, Deaths and Marriages Registration Act 1996* (SA) and Regulation 7A of the Regulations under that Act.



I would also support any proposal to extend the time within which a birth is to be registered where variations of sex characteristics do not allow any easy assignment of sex.

4. **Application may be made to register a gender for a young person who has attained the age of 16 years but has not attained the age of 18 years**

I understand that amendments proposed to the Bill would allow a young person who has attained the age of 16 years and whose birth is registered in the State, to apply to have a gender specified in the application registered in relation to that young person. My comments below should be read in this context.

In my view, it is appropriate and consistent with a child rights approach to allow a young person who has the appropriate level of understanding and maturity to apply to register a change of their gender. This is particularly so where a young person does not have supportive parents or guardians or where those parents or guardians might actively oppose any steps a young person may wish to take to apply to register a change of gender.

Currently, as far as I am aware, the only Australian state or territory which permits a person who has not attained the age of 18 years to apply **on their own behalf** to register a change of their sex or gender identity is South Australia. Such an application may only be made with prior approval by the Court.⁹ The Court may approve the making of the application if satisfied that it is in the best interests of the child that the approval be granted.

It is, in my respectful opinion, necessary to understand and appreciate how in practice application processes proposed in the Bill for young people who have attained the age of 16 years may operate given the legislative context within which they exist. In particular, we need to be clear how these application processes would operate alongside the *Family Law Act 1975* (Cth). In doing this, we are contributing to ensuring that young people seeking to utilise the application process proposed in the Bill are fully informed.

Furthermore, to ensure we take account of all potential scenarios, particularly where there may be a dispute between young people and their parents, it may be prudent to include as an option that an application by a young person who has attained the age of 16 years may also be made to a Magistrate.

What is to accompany the application?

I am generally supportive of an application process which requires the following documentation in support of that application:

- a) a form approved by the Registrar;

⁹ See section 29J of the *Births, Deaths and Marriages Registration Act 1996* (SA).



- b) a gender declaration, which means a statutory declaration in which the young person declares that they identify as being of the gender specified and lives, or seeks to live, as a person of that gender.

I am also of the opinion that a young person should have the option of including with their application evidence that the young person has undertaken counselling as to:

- (a) whether or not the application ought to be made;
- (b) the implications of the registration of the gender; and
- (c) the implications of any choice that may be made as to the information, in relation to sex or gender, that is to be included on a birth certificate in relation to that young person.

The Bill could provide that the counselling is to be provided by a person, chosen by the young person, who the young person considers has suitable qualifications, training or experience to provide such counselling.

Before the Registrar determines the application:

- (a) the Registrar should be able to require that the young person provide any other document or information that the Registrar reasonably requires, other than a medical certificate, or other medical document, in relation to the sex, sexual characteristics of gender of the young person; and
- (b) if the application is not accompanied by evidence of counselling of the sort referred to above being provided by a person *who the Registrar considers is a person with suitable qualifications, training or experience to provide such counselling*, the Registrar should be able to require the young person to provide appropriate evidence of counselling:
 - i) by a person agreed to by the Registrar and the young person; and
 - ii) who the Registrar considers is a person with suitable qualifications, training or experience to provide such counselling.

In my respectful opinion, the process outlined above recognises the autonomy and decisional power of young people in accordance with their age and maturity, while including appropriate safeguards to promote and protect their wellbeing and best interests.

I should make it clear, however, that in proposing the above discretions available to the Registrar, my intention is certainly not to impose onerous or otherwise inappropriate or excessive requirements on children and young people as a prerequisite to register a gender. In my discussions with transgender young people and their families to date, it has been the case that families seek support from appropriately trained individuals to assist and guide them in supporting their children. In particular, families have told me of the exceptional supports provided by the organisation “Working It Out” to Tasmanian children, families and the broader community. I would be supportive of an expansion of support services for children and young people who identify as gender diverse and their families.



My intention in recommending that these discretions are available to the Registrar is to ensure that all children and young people, including those who may not receive the high levels of support provided by families I have met to date, also have their best interests promoted and protected through the provision of appropriate levels of information and support to assist decision making relevant to their gender.

5. Application may be made to register a gender for a child aged less than 16 years

I am supportive of amendments which would allow the parents or guardians of a child who has not attained the age of 16 years **and** whose birth is registered in the State, to apply to register a gender in relation to the child.

I am also supportive of amendments which would allow an application to register gender to be made by one parent or guardian if:

- (a) the applicant is the sole parent named in the registration of the child's birth, or
- (b) the guardian is the sole guardian of the child, or
- (c) there is no other surviving parent of the child, or
- (d) the registration of the gender in relation to the child is approved by a magistrate.

An application to register gender for a child could, in my opinion, be accompanied by:

- (a) a gender declaration if the child is able to make a statutory declaration, or, if they are unable to make a gender declaration, a statutory declaration made by the applicant(s) to the effect that they believe the application is consistent with the expressed wishes of the child or young person who is the subject of the application; and
- (b) a statement from each of the applicants stating they believe on reasonable grounds that the application is in the best interests of the child.

An application to register gender for a child or young person might also be accompanied by evidence that the applicant(s) (and perhaps the child or young person where the child or young person is capable of making a gender declaration) has/have undertaken counselling from a person who the applicant parent(s) or guardian(s) consider(s) to have suitable qualifications, training or experience as to:

- (a) whether or not the application ought to be made;
- (b) the implications of the registration of the gender; and
- (c) the implications of any choice that may be made as to the information, in relation to sex or gender, that is to be included on a birth certificate in relation to that person;

Before determining an application, the Registrar should be able to require that the parent(s) or guardian(s) provide any other document or information that the Registrar



reasonably requires, other than a medical certificate, or other medical document, in relation to the sex, sexual characteristics of gender of the child.

Additionally, in my opinion, if the application is not accompanied by evidence of counselling of the sort referred to above being provided by a person *who the Registrar considers is a person with suitable qualifications, training or experience to provide such counselling*, the Registrar should have a discretion to require the applicant(s) provide appropriate evidence of counselling by a person agreed and who the Registrar considers is a person with suitable qualifications, training or experience to provide such counselling.

6. Information about sex or gender will only be included on birth certificates in certain circumstances

I would support amendments which would have the effect of providing choice as to whether sex or gender information appears on a birth certificate. This could be done by providing that references to sex or gender will only be included on a birth certificate if requested by:

- (a) a person who has attained the age of 16 years and they are the person to whom the certificate relates; or
- (b) the parent or guardian of a child or young person who has not attained the age of 16 years and to whom the certificate relates.

Various options should be available to applicants in relation to what, if any, reference is made to sex or gender, or previous sex or gender, on the birth certificate (for example, the person's registered sex or gender may be included with or without a notation as to previous registered sex or gender).

7. Applications to register a change of a child's name

I reiterate the concern I expressed in my letter of 29 November 2018 and earlier in this letter in relation to the proposal to remove consideration of "best interests" in applications to change a child's name (see s.24 of the BDMR Act).

Furthermore, I do not support the current practice whereby birth certificates issued after a child or young person has changed their name also show the previous name and recommend amendments to rectify this situation.

In my discussions with transgender young people and their families to date who have taken steps to change their child's name and seek a new extract of their birth certificate, it has been made clear to me that the fact that the new birth certificate includes the previous name of the child as well as the new name of the child, is distressing. Further, the fact that the new birth certificate includes a gender marker that is not consistent with the gender the child identifies with, is distressing for children and families, and can result in unnecessary discrimination when the new birth certificate is used as a form of identification.



Conclusion

I trust that the above information will assist you with your consideration of the proposed amendments to the Bill. I am of course available to clarify my comments should that be necessary.

Yours sincerely

Leanne McLean

Commissioner for Children and Young People

cc: The Hon Roger Jaensch, MP, Minister for Human Services
The Hon Elise Archer MP, Attorney-General and Minister for Justice