

COMMUNITY LEGAL CENTRES TASMANIA

27 November 2018

The Honourable Jim Wilkinson
President of the Legislative Council
Parliament House
Hobart TAS 7000

via email: jim.wilkinson@parliament.tas.gov.au

Dear Jim,

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

Community Legal Centres Tasmania (CLC Tas) is writing to urge members of the Legislative Council to support the passing of the *Justice and Related Legislation (Marriage Amendments) Bill 2018* ('the Bill').¹

We strongly support the intent of the Bill and its aim of recognising sex and gender diversity in law and reducing discrimination against members of our community who identify as other than male or female (non-binary). The support of the Legislative Council will ensure that Tasmanian legislation is consistent with the *Anti-Discrimination Act 1998* (Tas) and the recent changes to the *Marriage Act 1961* (Cth). Importantly, the amendments are consistent with Australia's international human rights obligations including the *Yogyakarta Principles on the Application of International Human Rights Law in relation to Sexual Orientation and Gender Identity* which observed more than a decade ago:²

Many States and societies impose gender and sexual orientation norms on individuals through custom, law and violence and seek to control how they experience personal relationships and how they identify themselves. The policing of sexuality remains a major force behind continuing gender-based violence and gender inequality.

¹ CLC Tas would like to acknowledge Zoey Dwyer who assisted in the preparation of this response.

² The International Commission of Jurists and the International Service for Human Rights, *Yogyakarta Principles on the application of international human rights law in relation to sexual orientation and gender identity* (2006) at 6. As found at http://yogyakartaprinciples.org/wp-content/uploads/2016/08/principles_en.pdf (Accessed 25 November 2018).

Importantly, the Yogyakarta principles have recently been complemented with the *Yogyakarta principles plus 10* which explicitly includes the removal of gender from identity documents.³

By passing these amendments the Legislative Council has an opportunity to better protect the rights of members of our community with sex and gender diversity and thereby “promise a different future where all people born free and equal in dignity and rights can fulfil that precious birthright”.⁴

- ***Anti-Discrimination Act 1998 (Tas)***

The recognition by the House of Assembly that the strengthening of protections for persons with sex and gender diversity in the *Anti-Discrimination Act 1998 (Tas)* is welcomed. For example, the Office of the High Commissioner for Human Rights has observed that many intersex people suffer discrimination and violence due to their sex characteristics:⁵

Because their bodies are seen as different, intersex children and adults are often stigmatized and subjected to multiple human rights violations, including violations of their rights to health and physical integrity, to be free from torture and ill-treatment, and to equality and non-discrimination.

...
Intersex persons are often subjected to discrimination and abuse if it becomes known that they are intersex, or if they are perceived not to conform to gender norms. Anti-discrimination laws do not typically ban discrimination against intersex persons, leaving them vulnerable to discriminatory practices in a range of settings, including access to health services, education, public services, employment and sports.

The amendments passed by the House of Assembly modernise the definition of gender identity (by expressly including gender expression) and replace the outdated attribute of ‘intersex’ with ‘intersex variations of sex characteristics’. The insertion of the definitions ‘gender expression’ and ‘sex characteristics’ clearly demarcates between sex and gender, and is a better reflection of the sex and gender diversity of our community.

Further, we support the replacement of ‘intersex’ with ‘intersex variations of sex characteristics’⁶ as it more accurately reflects the definition used by the UN Office of the High Commissioner for Human Rights:⁷

³ Principle 31 of the *Yogyakarta principles plus 10*. As found at http://yogyakartaprinciples.org/wp-content/uploads/2017/11/A5_yogyakartaWEB-2.pdf (Accessed 26 November 2018).

⁴ The International Commission of Jurists and the International Service for Human Rights, *Yogyakarta Principles on the application of international human rights law in relation to sexual orientation and gender identity* (2006) at 7.

⁵ United Nations Office of the High Commissioner for Human Rights, ‘Fact Sheet: Intersex’. As found at <https://www.unfe.org/wp-content/uploads/2017/05/UNFE-Intersex.pdf> (Accessed 25 November 2018).

⁶ ‘Sex characteristics’ is defined in clause 3 of the Bill as meaning “a person’s physical, hormonal or genetic features relating to sex, including genitalia and other sexual and reproductive anatomy, chromosomes, genes, hormones, and secondary sex characteristics”.

Intersex people are born with physical or biological sex characteristics (such as sexual anatomy, reproductive organs, hormonal patterns and/or chromosomal patterns) that do not fit the typical definitions for male or female bodies. For some intersex people these traits are apparent at birth, while for others they emerge later in life, often at puberty.

Finally, the amendments seek to ensure that sex and gender diverse persons are protected against incitement to hatred, serious contempt or severe ridicule. It appears that this was a “drafting error”⁸ when the Act was amended in 2014 and should be rectified. In other words, the protections that were removed due to legislative oversight should be returned so that sex and gender diverse persons are better protected against incitement to hatred.

- ***Births, Deaths and Marriages Registration Act 1999 (Tas)***

The amendments passed by the House of Assembly to the *Births, Deaths and Marriages Registration Act 1998* (Tas) (‘the Act’) have previously been raised in an Options Paper published by Equal Opportunity Tasmania.⁹ The amendments also ensure consistency with the *Anti-Discrimination Act 1998* (Tas) which does not require a person to have invasive surgery or any medical procedures before their gender identity is recognised and protection from discrimination is provided.¹⁰

We also note that non-consensual deferrable surgical intervention to identify sex is not appropriate for intersex persons, who “are born with sex characteristics (including genitals, gonads and chromosome patterns) that do not fit typical binary notions of male or female bodies”.¹¹

Significantly, the amendments passed by the House of Assembly will reduce the pressure on intersex individuals to make life-changing decisions such as divorcing their spouse and undergoing invasive surgery. Importantly, these amendments will ensure that Tasmanian legislation is consistent with recent changes to the *Marriage Act 1961* (Cth).

Currently, the Act requires that an individual seeking to register a change of sex to ‘not be married’ and to have undergone gender affirmation surgery. Not only does gender affirmation surgery reinforce gender binary terms, but it is also a

⁷ United Nations Office of the High Commissioner for Human Rights, Intersex Awareness Day – Wednesday 26 October. End violence and harmful medical practices on intersex children and adults, UN and regional experts urge. As found at <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=20739&LangID=E> (Accessed 25 November 2018).

⁸ Emily Baker, ‘Gender law reform vote: What it all means’, *The Mercury*, November 21 2018.

⁹ Equal Opportunity Tasmania, *Legal recognition of sex and gender diversity in Tasmania: Options for amendments to the Births, Deaths and Marriages Registration Act 1999* (February 2016).

¹⁰ See the definition of ‘gender identity’ in section 3 of the *Anti-Discrimination Act 1998* (Tas).

¹¹ The Office of the High Commissioner for Human Rights, Factsheet: Intersex. As found at <https://www.unfe.org/wp-content/uploads/2017/05/UNFE-Intersex.pdf> (Accessed 25 November 2018). Also see the definition of ‘intersex’ in section 3 of the *Anti-Discrimination Act 1998* (Tas).

significant cost imposition both emotionally and financially.¹² Forcing spouses to divorce has consequences for the individual, the relationship and the family, particularly where children are involved. Moreover, to lawfully reinforce binary gender norms and require gender affirmation surgery places undue pressure on an individual to make a decision about their body and violates their bodily integrity.

The recommendations outlined by Equal Opportunity Tasmania acknowledge that some individuals may not want to undergo invasive surgery, but feel the choice is forced upon them in order to identify as who they are.¹³ And, for those who do wish to undergo a change to their sex characteristics through surgical means, financing it can be difficult and is medically impossible for some. As a result, without legislative reform individuals are forced to choose between identifying as who they truly are by undergoing surgery, or living their life as a person they do not identify with.

Extending the time period for parents in assigning a gender to their child in circumstances where the sex is unclear is another amendment that should be supported. Currently, the time period allowed under the Act is only 60 days.¹⁴ In many instances, this will be an insufficient period of time, given the significance of the decision for the future health of the child. Doubling the timeframe to 120 days will make little difference to the Registrar, but it may be of significant assistance to the family of the child, and for the future of the child. The additional time will allow for increased knowledge and an assurance that a more informed decision will be made.

The largest amendments passed by the House of Assembly are those that replace Part 4A of the Act. Broadly, these amendments will enable the change or deletion of gender from birth certificates, will implement changes to the record keeping of gender and sex changes and removes the section 28A requirements of 'forced divorce' and forced surgery. The objects of this part are consistent with the Equal Opportunity Tasmania recommendations, particularly the acknowledgement that gender affirmation surgery is "out of step with discrimination law", "inconsistent with legal precedent" and "inconsistent with policy changes at the federal level that provide a more flexible approach to the recognition of a change of sex".¹⁵ Support for the amendments to Part 4A of the Act will ensure that sex and gender diversity recognition is made easier when attempting to make changes to gender on birth certificates.

¹² In discussions with stakeholders we have been informed that women undergoing gender affirmation surgery have to pay more than \$20,000 because the procedure is not covered by Medicare or private health insurance. Other costs include time taken off work for the procedure and travel costs because most operations are performed overseas.

¹³ Equal Opportunity Tasmania, *Legal recognition of sex and gender diversity in Tasmania: Options for amendments to the Births, Deaths and Marriages Registration Act 1999* (February 2016).

¹⁴ Section 15 of the *Births, Deaths and Marriages Registration Act 1999* (Tas).

¹⁵ Equal Opportunity Tasmania, *Legal recognition of sex and gender diversity in Tasmania: Options for amendments to the Births, Deaths and Marriages Registration Act 1999* (February 2016) at 6.

For example, if an individual of sex or gender diversity applies for a job that requests their Birth Certificate, this may result in them having to 'out' themselves to the prospective employer before they feel comfortable doing so. In a recent opinion piece, the mother of a teenage boy who had been born a girl observed the distress caused by his having to produce identity documentation:¹⁶

He applied for various jobs, but when it came to identification requirements, which for him meant a birth certificate because he's too young to drive, he would get very anxious. He wasn't sure if or how to explain his situation because his birth certificate says he is female, but he appears to be male. He felt that if he explained his situation he wouldn't get the job. What advice does a parent give a child for this type of situation? The only thing I could do was reassure him that he is who he is and to be proud of it. I told him, we will overcome these obstacles together. He applied for more than 10 jobs and each time he explained his situation. Each time he would be visibly upset by this and it was detriment to his mental health. All he wanted was to be treated like everyone else and not have to explain his situation to prospective employers.

Finally, the House of Assembly has passed an amendment to the Act that lowers the age at which name and sex changes can be made from 18 to 16 years of age. As the law currently stands, for individuals under 18, but over 12 years of age, both parents must consent to an application to change registered details.¹⁷ The practical effect of the current situation is that one parent can effectively veto the decision of the child (irrespective of their age and maturity) and prevent the name change. As outlined in the Equal Opportunity paper, it is not uncommon for one parent to dispute the change of name, or be absent from family life.¹⁸ Thus, the requirement to obtain the consent of both parents unfairly restricts the opportunity for a child over the age of 12 to change their name.

In summary, we strongly urge you to support the important reforms to the *Anti-Discrimination Act 1998* (Tas) and the *Births, Deaths and Marriages Registration Act 1998* (Tas) which have been passed by the House of Assembly. Significantly, the amendments will not impose any obligations on people who are currently registered as male or female, or who wish to register their children as such. As well, the amendments will not result in any changes to records, which will continue to be maintained for genealogical, census and criminal data purposes. Importantly, the reforms have the support of the sex and gender diverse community.

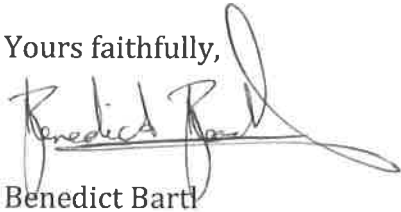
¹⁶ Candace Harrington, 'Because I only want the best for my children', *The Mercury*, 19th November 2018.

¹⁷ Sections 23 and 25 of the *Births, Deaths and Marriages Registration Act 1999* (Tas).

¹⁸ Equal Opportunity Tasmania, *Legal recognition of sex and gender diversity in Tasmania: Options for amendments to the Births, Deaths and Marriages Registration Act 1999* (February 2016) at 17.

If you have any queries, please do not hesitate to contact us.

Yours faithfully,

A handwritten signature in black ink, appearing to read 'Benedict Bartl', with a long horizontal flourish extending to the right.

Benedict Bartl
Policy Officer

Community Legal Centres Tasmania

cc: All members of the Legislative Council