

COMMUNITY LEGAL CENTRES TASMANIA

3 September 2019

Tasmania Law Reform Institute
Private Bag 89
HOBART TAS 7001
attn: Dylan Richards

via email: law.reform@utas.edu.au

Dear Dylan,

Re: *Legal Recognition of Sex and Gender Issues Paper*

Community Legal Centres Tasmania (CLC Tas) welcomes the opportunity to provide comment on the Tasmania Law Reform Institute's *Legal Recognition of Sex and Gender Issues Paper* ('the Issues Paper').¹

CLC Tas is the peak body representing the interests of nine community legal centres (CLCs) located throughout Tasmania. We are a member-based, independent, not-for-profit and incorporated organisation that advocates for law reform on a range of public interest matters aimed at improving access to justice, reducing discrimination and protecting and promoting human rights.

We strongly support the recent passing of the *Justice and Related Legislation (Marriage and Gender Amendments) Act 2019* (Tas) ('JRL Act'), which sought to broaden the rights of transgender and gender diverse persons by making a number of amendments to the *Births, Deaths and Marriages Registration Act 1999* (Tas) and other Acts. We strongly support the JRL Act's intention of recognizing sex and gender diversity in law and reducing discrimination against members of the community who identify as other than male and female (non-binary). We believe that the stigma, discrimination and trauma experienced by transgender and gender diverse Tasmanians will be reduced by the amendments passed, which importantly, are consistent with international human rights obligations.²

¹ CLC Tas would like to acknowledge Katherine Sproule 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). As found at http://yogyakartaprinciples.org/wp-content/uploads/2016/08/principles_en.pdf (Accessed 28 August 2019).

Births, Deaths and Marriages Registration Act 1999 (Tas)

The amendments to the *Births, Deaths and Marriages Registration Act 1999* (Tas) ('the BDM Act') are strongly supported. These amendments include removing requirements for transgender persons to not be married and undergo surgery in order to have their legal gender recognized. The passing of these amendments has meant that there is now significantly less pressure on intersex individuals to make life-changing decisions such as divorcing their spouse and undergoing expensive and invasive medical procedures. As well, we believe that the former requirement is outdated and does not align with the recent changes to the *Marriage Act 1961* (Cth) that permits the marriage between members of the same gender.

The amendment also reflects *Yogyakarta* principles and aligns with other Australian jurisdictions including the Australian Capital Territory, South Australia, Northern Territory and Victoria³ that have also removed the requirement of surgery in order to register a change of gender. In our opinion, the removal of the requirement of surgery as a condition to registering a change of gender is a significant leap forward in promoting bodily autonomy, freedom and physical integrity for intersex and gender diverse persons. The amendment ensures that the link between a legal procedure and a medical procedure that reinforces outdated gender binary terms no longer exist.⁴ Importantly, individuals still have the freedom and personal choice to undergo reassignment surgery if they choose to do so, with nothing in the Act removing this right.

- Consent to change of gender for minors

We support the amendment lowering the age of minors who may apply to register a change of gender from 18 to 16. This permits minors over the age of 16 to register a change of gender without the consent of their parents. As we have previously noted,⁵ parental consent could be challenging when parents were unsupportive of their child's decision, and unwilling to consent to registering the change. This could prove traumatic to the minor, as it limits their bodily autonomy and freedom to be registered as the gender they identify as.

We believe sufficient safeguards are in place to ensure that the minor has appropriate understanding of what registering a change of gender will mean for them. Under section 28C of the amended BDM Act, a registrar can require evidence that a minor has received counseling regarding the consequences of registering a change of gender. This is similar to the South Australia amendment where a minor aged at least 16 years may make an application to the court for approval to apply for

³ *Births, Deaths and Marriages Registration Amendment Bill 2013* (ACT); *Births, Deaths and Marriages Registration (Gender Identity) Amendment Act 2016* (SA); *Births, Deaths and Marriages Registration and Other Legislation Amendment Act 2018* (NT); *Births, Deaths and Marriages Registration Amendment Bill 2019* (Vic).

⁴ Ulrika Westerlund and Richard Köhler, *Human Rights and Gender Identity: Best Practice Catalogue* (2nd version, December 2016) at para. 3.4. As found at https://tgeu.org/wp-content/uploads/2017/02/2.11-TGEU_BestPracticeCatalogue.pdf (Accessed 28 August 2019).

⁵ Community Legal Centres Tasmania, Letter to Legislative Council members in support of the *Justice and Related Legislation (Marriage Amendments) Bill 2018*. As found at <http://www.clctas.org.au/what/reform/> (Accessed 28 August 2019).

a change of sex or gender.⁶ Before granting approval, the court must be satisfied that approval would be in the best interests of the child, having regard to:⁷

- whether the child understands the meaning and implications of the making of an application to the Registrar; and
- whether the child has the capacity to consent to the application and, if so, the child's position in relation to the making of the application; and
- whether the child has undertaken a sufficient amount of appropriate clinical treatment in relation to the child's sex or gender identity.

It is arguable that the South Australian considerations are already encapsulated in the 'will and preference' requirement set out in Tasmania's BDM Act. Nevertheless, we would not oppose a set of criteria being introduced into section 28C of the BDM Act to clarify what is meant by 'will and preference'. This would have the advantage of assisting both the decision-maker and the applicant in clearly setting out what must be established in order for the application to be granted.

- Sex and gender information on official documentation

Amendments to the BDM Act mean that a birth certificate will include details of the sex and gender only if the individual requests that it be included.⁸ This aligns with *Yogyakarta principles plus 10*, which explicitly includes the removal of gender from identity documents.⁹ It is acknowledged that some concerns have been raised around obtaining an Australian passport for individuals whose birth certificate does not record their preferred gender.¹⁰ However, according to information made available by the Department of Foreign Affairs and Trade, in cases where the birth certificate has no recorded gender, DFAT simply requires a written statement completed by a medical practitioner or registered psychologist certifying that the person is intersex, of indeterminate or unspecified sex.¹¹ We do not believe that this imposes an additional administrative burden upon applicants whose birth certificates do not record their gender.

Further, in our opinion the amendments to the BDM Act permitting the removal of gender from a birth certificate will have no impact upon the collation of Australian Bureau of Statistics (ABS) data, police records or genealogy records. Individuals who have changed gender and/or have chosen to not record their gender are ensured privacy. Although historical records are retained in the Registry database, they will not be released nor recorded unless requested¹² when there are valid reasons to

⁶ Section 29J(1) of the *Births Deaths and Marriages Registration Act 1996* (SA).

⁷ Section 29J(4)-(5) of the *Births Deaths and Marriages Registration Act 1996* (SA).

⁸ Section 46(3) of the *Births, Deaths and Marriages Registration Act 1999* (Tas).

⁹ Principle 31 of the *Yogyakarta principles plus 10*.

¹⁰ Tasmanian Law Reform Institute, *Legal Recognition of Sex and Gender Issues Paper* at 24.

¹¹ Section 25 of the *Births, Deaths and Marriages Registration Act 1999* (Tas). This can be made through DFAT's standardised pro form (B-14 statement).

¹² Tasmanian Law Reform Institute, *Legal Recognition of Sex and Gender Issues Paper* at 28.

grant access to the information. This ensures a balance between restoring records for the benefits of the community whilst promoting privacy.

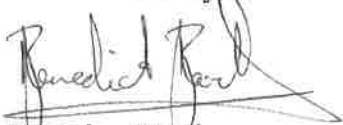
- Concerns about possible fraudulent behaviour

We believe that the concerns about the risk of fraudulent activity are overstated. Measures are in place to ensure that a person's gender is only changed for legitimate purposes. As the Issues Paper observed, it is a crime to use a birth certificate highlighting a past sex and gender to deceive,¹³ to make a false statement in the required gender statutory declaration,¹⁴ and to make a false or misleading representation in an application to change gender.¹⁵ These statutory provisions will assist in deterring individuals from changing their gender for illegitimate and deceitful purposes; for example, registering a change of gender to secure gender specific enrolment or employment.

In summary, we strongly believe that the amendments to the BDM Act and implementation of the JLR Act will assist in reducing the discrimination, stigma and trauma that is experienced by intersex and gender diverse Tasmanians. Importantly, the reforms promote body autonomy and are consistent with international human rights obligations. We believe that most of the concerns raised are misguided and that the amendments passed will have no negative or unintended impacts upon other Tasmanians or Tasmanian statutory provisions.

If we can be of any further assistance, please do not hesitate to contact us.

Yours faithfully,



Benedict Bartl

Policy Officer

Community Legal Centres Tasmania

¹³ Section 54(2) of the *Births, Deaths and Marriages Registration Act 1999* (Tas).

¹⁴ Section 113 of the *Criminal Code Act 1924* (Tas).

¹⁵ Section 54 of the *Births, Deaths and Marriages Registration Act 1999* (Tas).