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Members of the Tasmanian Legislative Council

Dear Honourable Members

Australian Lawyers for Human Rights (“**ALHR**”) refer to amendments to the *Justice and Related Legislation (Marriage Amendments) Bill 2018* (the **Bill**) currently being considered by the Tasmanian Legislative Council.

The Bill includes proposed amendments to the *Births, Deaths and Marriages Registration Act 1999* (the **Act**) which will positively impact transgender, intersex and gender diverse communities. It is ALHR’s considered position that these amendments will afford improved rights to the Tasmanian transgender, intersex and gender diverse community, including:

1. The ability to have gender (male or female) as recorded by the Registrar of Births, Deaths and Marriages (“the **Registrar**”) reflected on a birth certificate, noting that where this relates to a newly born child, that child's parent or parents can nominate whether or not to have the child’s gender recorded by the Registrar on the child’s birth certificate.
2. The ability to amend identification documents, namely birth certificates, to reflect a person’s lived gender without the need for gender reassignment surgery.
3. Allowing a parent or parents of an intersex child a further sixty (60) days before being required to register their child’s birth (which by way of direction from the

Commissioner of Births, Deaths and Marriages requires the registration of gender).

4. Amending the *Anti-Discrimination Act 1998* (Tas) to include a new definition of gender expression and to correct a former drafting error which leaves transgender Tasmanians without protection from “incitement to hatred”.
5. ALHR understands that there are other proposed amendments contained in the Bill that will address discrimination against lesbian, gay, bisexual, transgender and intersex (**LGBTI**) Tasmanians including an intention to prevent transgender Tasmanians from having to undertake a process of divorce in order to change their gender.

ALHR commends this reform, noting that the United Nations Human Rights Committee has previously found that Australia, by refusing to allow a married person to have a birth certificate consistent with their sex unless they get a divorce, was breaching the International Covenant on Civil and Political Rights (ICCPR)¹, and has called on Australia to revise its legislation to ensure compliance with the Covenant. .

ALHR urges members of the Legislative Council to support these amendments in their entirety

International human rights standards

ALHR asks members of the Legislative Council to give due and proper weight to relevant international human rights standards when considering the Bill.

In this respect, on 29 September 2015 twelve United Nations entities released an unprecedented joint statement calling for an end to violence and discrimination against lesbian, gay, bisexual, transgender and intersex people (the **Statement**).²

The Statement expressly confirms that failure to uphold the human rights of LGBTI people and protect them against abuses (such as violence and discriminatory laws and practices) constitutes serious violations of international human rights law. It calls on

¹ The United Nations Human Rights Committee “*considers that Australia’s differential treatment between married and unmarried persons who have undergone a sex affirmation procedure and who request to amend their sex on their birth certificate is not based on reasonable and objective criteria, and therefore constitutes discrimination on the basis of marital and transgender status, under article 26 of the Covenant.*” Views adopted by the Committee under article 5(4) of the Optional Protocol, concerning communication No. 2172/2012*, CCPR/C/119/D/2172/2012

² Joint UN statement on “Ending Violence and Discrimination against Lesbian, Gay, Bisexual, Transgender and Intersex People” https://www.ohchr.org/Documents/Issues/Discrimination/Joint_LGBTI_Statement_ENG.PDF

State parties to make legislative change to protect lesbian, gay, bisexual, transgender and intersex (**LGBTI**) people from violence and discrimination.

It is particularly notable that the Statement says:

States should uphold international human rights standards on non-discrimination, including by...ensuring legal recognition of the gender identity of transgender people without abusive requirements.

The Statement also notes that:

Transgender people are frequently denied legal recognition of their preferred gender or face abusive requirements such as forced sterilisation, treatment or divorce to obtain it, without which they suffer exclusion and marginalisation.

Further, we would ask you to consider the Yogyakarta Principles Plus 10 (“**YP+10**”), adopted by human rights experts, including three (3) Australian representatives, following a meeting in Geneva, Switzerland in September 2017.³ The principles seek to affirm the binding international legal standards with which all States must comply and address a broad range of human rights standards and their application to issues of sexual orientation and gender identity.

Principle 31 of the YP+10 recognises that:

Everyone has the right to legal recognition without reference to, or requiring assignment or disclosure of, sex, gender, sexual orientation, gender identity, gender expression or sex characteristics. Everyone has the right to obtain identity documents, including birth certificates, regardless of sexual orientation, gender identity, gender expression or sex characteristics. Everyone has the right to change gendered information in such documents while gendered information is included in them.⁴

Principle 31 also imposes obligations on States to:

- A) Ensure that official identity documents only include personal information that is relevant, reasonable and necessary as required by the law for a legitimate purpose, and thereby end the registration of the sex and gender of the person in identity documents such as birth certificates, identification cards, passports and driver licences, and as part of their legal personality;

- B) Ensure access to a quick, transparent and accessible mechanism to change names, including to gender-neutral names, based on the self-determination of the person;

³ Phil Lynch, *Experts Release Much Anticipated Expansion of the Yogyakarta Principles* International Service for Human Rights (Switzerland) <<http://yogyakartaprinciples.org/principles-en/press-release/>>

⁴ *Principle 31 (YP+10) The Right to Legal Recognition* <<http://yogyakartaprinciples.org/principle-31-yp10/>>

C) While sex or gender continues to be registered:

- i. Ensure a quick, transparent, and accessible mechanism that legally recognises and affirms each person's self-defined gender identity;
- ii. Make available a multiplicity of gender marker options;
- iii. Ensure that no eligibility criteria, such as medical or psychological interventions, a psycho-medical diagnosis, minimum or maximum age, economic status, health, marital or parental status, or any other third party opinion, shall be a prerequisite to change one's name, legal sex or gender;
- iv. Ensure that a person's criminal record, immigration status or other status is not used to prevent a change of name, legal sex or gender.

Inclusion of gender on birth certificates

Section 50 of the Act allows the Registrar to collect "additional information." Whilst the Act does not require the Registrar to collect information about gender at the time of registration of a child's birth, ALHR understands that gender information is nevertheless collected by the Registrar pursuant to a policy direction. That information is then stored by, and is therefore available to, the Government.

The Bill proposes that a parent or parents of a child, or a person over the age of 16 years, will be able to choose whether or not gender is recorded by the Registrar and is reflected on the child's or person's birth certificate. ALHR supports this position in the light of the Statement and Principle 31 of YP+10 and because:

1. Contrary to the views expressed by some commentators, the idea that gender is not being limited to male and female is not new. Many cultures have long-recognised third genders or other gender variances. This can include such identities as hijra, meti, lala, skesana, motsoalle, mithli, kuchu, kawein, travesty, muxé, fa'afafine, fakaleiti, hamjensgara and two-spirit, and it is important to note the impact of colonialism on the prior social, medical and legal construction of gender and the consequent erasure of nonbinary genders.
2. Since the 2013 High Court case of *NSW Registrar of Births, Deaths and Marriages v Norrie*⁵, Australians have been able to obtain identification such as passports marked with F, M or X to denote female, male or

⁵ *NSW Registrar of Births, Deaths and Marriages v Norrie* [2014] HCA 11

indeterminate/intersex/unspecified. Not every Australian has a passport, but every Australian has a birth certificate. The amendments proposed in the Bill are an appropriate extension of this recognition.

3. Intersex people, who are born with physical sex characteristics that do not fit medical norms for female or male bodies, are adversely impacted by the requirement that their birth certificate include gender. It is ALHR's view that insisting on the inclusion of gender on birth certificates perpetuates the view that intersex children ought to conform with a gender determined by parents or medical practitioners and, as a consequence, perpetuates the tendency towards the common practice of subjecting intersex children to unnecessary surgical and other procedures.
4. Parents will still be able to have gender included on their child's birth certificate if they would like to, and ALHR anticipates that many parents will still make that choice. It is ALHR's view that the proposed amendments do not take any right away from a parent. However, they seek to ameliorate potential human rights violations against transgender persons, intersex persons and other gender diverse Tasmanians.

Removing the requirement for surgical intervention

When a birth certificate does include gender markers, it is vital that the Act provides a non-intrusive means of correcting gender to reflect a person's lived experience.

The Act currently requires a person seeking to apply to the Registrar to change their sex to:

1. have undergone gender reassignment surgery; and
2. be unmarried.⁶

In order to make an application under s 28A of the Act, an applicant must also provide, amongst other things, a statutory declaration from each of two medical practitioners verifying that the applicant has undergone gender reassignment surgery.

⁶ *Births, Deaths and Marriages Registration Act 1999 (Tas)*, s 28A.

Access to birth certificates, passports and other identification documents that reflect a person's lived gender (male, female or non-binary) current is vital to avoid discrimination in many circumstances. Without these documents, it can be difficult to obtain employment, housing and access to services.

Accurate identification is also necessary for a person to participate in modern society, and timely access to updated documents is a matter of equality, non-discrimination, privacy, physical integrity and recognition as a person before the law.

The requirement that transgender Tasmanians undergo gender reassignment surgery in order to apply to change their identification documents is an abusive requirement as referred to in the Statement. The requirement also offends Principle 31 of YP+10.

ALHR calls on members of the Tasmanian Legislative Council to bring Tasmania into line with states such as the Australian Capital Territory and South Australia in allowing transgender and gender diverse people to update their legal documentation without the requirement of gender surgery.

Extended Time for Registration of Intersex Births

Intersex people are born with physical or biological sex characteristics (such as sexual anatomy, reproductive organs, hormonal patterns and/or chromosomal patterns) that are more diverse than socially understood concepts of male or female bodies. For some people these physical traits are apparent prenatally or at birth, while for others they emerge later in life.

It is estimated that a range of 1 in 1500 to 2,000 births or 4% of Australians are born with intersex characteristics.⁷ However, greater education is required as to the prevalence of intersex persons in our community and respecting their rights as both adults and children.

Where it was previously commonplace for intersex children to be subjected to surgery to "normalise" their bodies, it is now recognised by the community, including medical practitioners, that non-urgent cosmetic surgery on intersex persons can have significant mental and physical health consequences for those persons later in life.

It is ALHR's position that allowing parents of intersex children a further 60 days to register their child's birth (where gender is registered even if it does not appear on the child's birth certificate) will allow those parents greater time to educate themselves on

⁷ *Intersex population figures* Intersex Human Rights Australia <<https://ihra.org.au/16601/intersex-numbers/>>

their child's immediate and future needs as an intersex person so as to reduce the risk of unnecessary surgical intervention for that person and the potential harms that follow.

Amendments to the Anti-Discrimination Act

ALHR understands that the proposed amendment to s 19 of the *Anti-Discrimination Act 1998* (Tas) seeks to rectify a drafting error which has left transgender Tasmanians without the protection from public acts of incitement of hatred of transgender people. That protection is otherwise afforded to Tasmanians on the basis of race, disability, sexual orientation or religious belief. It is also a common provision in other Australian anti-discrimination law.

ALHR strongly supports the amendments proposed in the Bill so as to also provide protection for transgender Tasmanians against vilification. These amendments reflect States obligations pursuant to the Statement to:

“protect LGBTI persons from violence, torture and ill-treatment, including by... Investigating, prosecuting and providing remedy for acts of violence, torture and ill-treatment against LGBTI adults, adolescents and children, and those who defend their human rights.”⁸

ALHR also strongly supports the definition of “gender expression” at s 3 of the Bill as a means of affording further anti-discrimination protections to the transgender and gender diverse community.

Next Steps

ALHR urges members of the Legislative Council to introduce the amendments as soon as practicable. The consultation that has already been undertaken has allowed stakeholders to consider and provide valuable input into the amendments. Tasmania is the last state in Australia to pass legislation in relation to the requirement that a person be unmarried in order to amend their birth certificate. Delaying enactment of the amendments will only continue to violate the internationally recognised human rights of those affected. Urgent action is needed to ensure that Tasmania's laws are consistent with Australia's obligations under the ICCPR, and ALHR calls on you to lead this reform immediately.

We would welcome the opportunity to meet with you to discuss this letter to answer any questions you may have about human rights law and its relationship to the Bill.

⁸ Joint UN statement on “Ending Violence and Discrimination against Lesbian, Gay, Bisexual, Transgender and Intersex People” <https://www.ohchr.org/Documents/Issues/Discrimination/Joint_LGBTI_Statement_ENG.PDF>

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ALHR was established in 1993 and is a national association of Australian solicitors, barristers, academics, judicial officers and law students who practise and promote international human rights law in Australia. ALHR has active and engaged National, State and Territory committees and specialist thematic committees. Through advocacy, media engagement, education, networking, research and training, ALHR promotes, practices and protects universally accepted standards of human rights throughout Australia and overseas.

Any information provided in this email is not intended to constitute legal advice, to be a comprehensive review of all developments in the law and practice, or to cover all aspects of the matters referred to. You should take your own legal advice before applying any information provided in this email to specific issues or situations.

[1] Joint UN statement on “Ending Violence and Discrimination against Lesbian, Gay, Bisexual, Transgender and Intersex People” https://www.ohchr.org/Documents/Issues/Discrimination/Joint_LGBTI_Statement_ENG.PDF

[2] Births, Deaths and Marriages Registration Act 1999 (Tas), s 28A.

[3] Births, Deaths and Marriages Registration Act 1999 (Tas), s 28B.

[4] United Nations Human Rights Office of the Human Rights Commissioner, “Intersex Fact Sheet” <https://www.unfe.org/wp-content/uploads/2017/05/UNFE-Intersex.pdf>.

[5] United Nations Human Rights Office of the Human Rights Commissioner, “Intersex Fact Sheet” <https://www.unfe.org/wp-content/uploads/2017/05/UNFE-Intersex.pdf>. ALHR encourages members to contact Intersex Human Rights Australia: <https://ihra.org.au/information/contact/>