

REGISTRATION OF BIRTHS, DEATHS AND MARRIAGES (AMENDMENT) BILL 2014

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EXPLANATORY MEMORANDUM

The amendments proposed by this Bill originated as part of a draft model law developed by State and Territory registrars of births, deaths and marriages and adopted, with local amendments, in all Australian jurisdictions except Norfolk Island (the last was Queensland in 2003).

A recent High Court decision (*NSW Registrar of Births, Deaths and Marriages v Norrie*) resulted in a registrar being required to accept and note the reassignment of a person's gender to one of "non-specific" rather than of male or female. The court said that if the applicant for the change establishes that the applicant has undergone a sex affirmation procedure and that procedure has not resolved the ambiguity of the applicant's sex, the applicant should be permitted to apply for their sex to be registered as "non-specific" and the High Court commented that the Act provides the "Registrar with the role of establishing and maintaining the registers by recording information provided by members of the community" and does not require any determination other than that the Act has been complied with. This Bill seeks also to give effect to that principle in Norfolk Island and in doing so to follow and clarify the model law.

The existing principal Act is unusual in that it has no regulation-making power and contains various forms and similar provisions such as those for fees, in the body of the Act. This means that it is time-consuming to make changes from time to time that may be considered necessary or desirable. The Bill therefore removes all of the references to matters that are thought to be best provided for by regulation and inserts a regulation-making power. It is anticipated that if the Bill is passed and assent given, new Regulations will be made to give effect to the new provisions of the Bill and to bring the forms and fees taken from the Act back into force by way of regulation.

The Bill is in 4 clauses as follows —

Clause 1 through 3 are the usual provisions for the short title, the commencement and the referral of the principal Act being amended.

Clause 4 is the amending section and inserts a Schedule of the amendments to be made—

Item 1 inserts a new division "Division 2A – Reassignment of sex" that introduces four new sections —

Proposed section 23A provides that the reassignment of a person's sex after sexual reassignment surgery may be noted in the person's entry in the register of births or adopted children register, only if the person is not married. The reassignment of sex may be from male to female, female to male or male or female to non-specific. The section makes it clear that noting in the Register means only that the sex as reassignment is to be entered not the fact that there has been a change.

Proposed section 23B provides that an application to note reassignment of sex may be made by an adult on their own behalf or by the parents or guardian of a child. The application must be accompanied by the statutory declarations of two doctors verifying that the person has undergone sexual reassignment surgery or a recognition certificate.

The definition of “doctor” includes a person who is registered as a medical practitioner in another country corresponding to the *Medical Practitioners Registration Act 1983*. A statutory declaration may also be taken by a notary public in another country. The application must also comply with the provisions of the section and other matters as prescribed

Proposed section 23C provides that a person who has had a reassignment of the person’s sex entered into a register maintained under a corresponding law (of a State or Territory), is a person of the sex as reassigned – that is male, female or non-specific. A person who is the subject of a recognition certificate is a person of the sex as stated in the recognition certificate, however, the person must comply with clause 23 for the reassignment of sex to be noted under the Act. If the reassignment of a person’s sex is noted under this Act, the person is a person of the sex as reassigned. It is noted that the Bill only affects registers of Norfolk Island maintained under the principal Act.

Proposed section 23D seeks to ensure confidentiality of any amendment of a register under the changes and provides penalties for breach. It is noted that drawing inference from a refusal to inspect a particular register may be an unlawful disclosure. However the person whose details are changed may publicly reveal the changes in which case it ceases to be an offence to reveal that fact. It is the intent of the Act to preserve the confidentiality of persons whose sex is reassigned and that while there may be some disclosures made, the records of the Registrar concerning the reassignment remain confidential. The section provides that a certificate of any entry in the register of births must not show that there has been a reassignment of sex but a person who has had their sex reassigned may apply for a certificate stating that there has been a change and when it was recorded. The intent of this is to provide for circumstances where persons are required to establish that their identity has been changed and recorded.

Items 2 to 22 all remove from the principal Act references to forms, particulars and fees in the Act and substitutes references to such matters to be prescribed by regulation.

Item 23 repeals subsection 51(7) referring to fees and the Schedules to the Act (other than Schedule 1 which repeals earlier enactments).

Item 24 inserts a new section 63 to empower the Administrator to make regulations for the Act.

18 August 2014