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**LEGISLATIVE ASSEMBLY FOR THE
AUSTRALIAN CAPITAL TERRITORY**

BIRTHS, DEATHS AND MARRIAGES REGISTRATION AMENDMENT BILL 2018

EXPLANATORY STATEMENT

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BIRTHS, DEATHS AND MARRIAGES REGISTRATION AMENDMENT BILL 2018

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BIRTHS, DEATHS AND MARRIAGES REGISTRATION AMENDMENT BILL 2018

This explanatory statement relates to the Births, Deaths and Marriages Registration Amendment Bill 2018 (the “Bill”) as presented to the Legislative Assembly. It has been prepared in order to assist the reader of the Bill and to help inform debate. It does not form part of the Bill and has not been endorsed by the Assembly.

The statement is to be read in conjunction with the Bill. It is not, and is not meant to be, a comprehensive description of the Bill.

Purpose of the Bill

The Bill will amend the *Births, Deaths and Marriages Registration Act 1997* (the “Act”) to give parents greater choice about whether to register as a stillborn child a fetus who showed no sign of a heartbeat in-utero before 20 weeks’ gestation but was born during or after 20 week’s gestation. This Bill will also give parents greater choice about whether to include such a stillborn child as part of a multiple birth or on registrations of siblings who are born at the same time or later.

Under the Act as it currently stands, both parents and the registrar-general are obliged to register the birth of a child when the child was born during or after 20 weeks’ gestation but no information is given about the time at which the child’s heartbeat ceased. The ACT Maternal and Perinatal Mortality Committee (the “Committee”) has observed that such a practice and the mandatory nature of registration is often an additional source of stress and grief for some bereaved parents.

For other bereaved parents, registration provides important legal and symbolic recognition of their loss and allows the Registrar-General to issue a birth certificate for the child.

The Bill will:

- a) allow birth parents (in consultation with the other parent unless not reasonably practicable or appropriate) to choose whether to register a fetus as a stillborn child where it showed no sign of a heartbeat before reaching 20 weeks’ gestation but was born during or after 20 weeks’ gestation;
- b) remove the fall-back definition of stillborn child based on a body mass of 400g at birth, which applies where the period of gestation cannot be reliably established; and
- c) allow birth parents (in consultation with the other parent unless not reasonably practicable or appropriate), to choose whether or not to list a stillborn child who showed no sign of a heartbeat before 20 weeks’ gestation, but was born during or after 20 weeks’ gestation, as part of a multiple birth or on registrations of siblings who are born at the same time or later.

Human Rights Considerations

The Bill engages, and places limitation on, the following *Human Rights Act 2004* (ACT) right:

- Section 8 – Recognition and equality before the law

The Bill engages, and supports, the following *Human Rights Act 2004* (ACT) rights:

- Section 11 – Protection of family and children
- Section 12 – Right to privacy and reputation
- Section 14 – Freedom of thought, conscience, religion and belief
- Section 27 – Rights of minorities

Detailed human rights discussion

Rights engaged and supported

Section 11 – Protection of family and children

Section 11(1) of the HRA provides that ‘the family is the natural and basic group unit of society and is entitled to be protected by society’.

Being able to choose the most appropriate form of handling a pregnancy loss according to one’s familial values protects the role of families.

Section 12 – Right to privacy and reputation

Section 12 of the HRA provides that ‘everyone has the right...not to have his or her privacy, family, home or correspondence interfered with unlawfully or arbitrarily’.

The purpose of the right to privacy is to preserve a sphere of personal space within which individuals can develop their self-identity, their inherent dignity and their relative roles in relation to the community as a whole: *Re Kracke and Mental Health Review Board* (2009) 29 VAR 1, 131 [619—620].

In general, an individual’s right to privacy would be engaged if there is a reasonable expectation of privacy: *Halford v United Kingdom* (1997) EHRR 523, [45].

The loss of a child is a highly personal and sensitive matter to the birth parent and the birth parent would likely expect to have substantial, if not full, control over the handling of the information about the loss. Some bereaved parents may choose to register their children as stillborn children to formally recognise their loss, however, some may not be ready for this or want to do this ever. Having a choice will allow individual parents to make their own decisions about sensitive and personal matters within the sphere of private life.

Allowing the birth parent, in consultation with the other parent, to choose whether to include their loss as part of a multiple birth or on birth registrations of subsequent children further strengthens and preserves individual and family privacy.

Section 14 – Freedom of thought, conscience, religion and belief

Section 14(1)(b) says that the ‘right to freedom of thought, conscience and religion’ includes—

The freedom to demonstrate [an individual’s] religion or belief in worship, observance, practice and teaching, either individually or as part of a community and whether in public or private.

Views about the inception of personhood during gestation vary across different religions and other non-religious beliefs. Under this Bill, parents will be able to choose whether to register their losses so to conform to their individual religious or non-religious beliefs. This would promote and facilitate the freedom and practice of religions in the community.

Section 27 – Rights of minorities

‘Anyone who belongs to an ethnic, religious or linguistic minority must not be denied the right, with other members of the minority, to enjoy his or her culture, to declare and practise his or her religion, or to use his or her language’ – Section 27(1), *Human Rights Act 2004*

ACT residents who belong to ethnic minority groups may subscribe to cultural practices in relation to pregnancy losses, specifically about the manner in which pregnancy grief is addressed. Allowing choices to be made as to the registration of stillborn children provides greater flexibility for these cultural practices to be applied.

Rights engaged and limited

The amendments in the Bill primarily engage and limit the right to equality before the law because only the birth parent, after consulting the other parent, will decide whether or not to register as a stillborn child a child who showed no sign of a heartbeat before 20 weeks gestation but was born after 20 weeks.

Section 8 – Recognition and equality before the law

Section 8(3) of the *Human Rights Act 2004* (ACT) states that:

- (3) Everyone is equal before the law and is entitled to the equal protection of the law without discrimination. In particular, everyone has the right to equal and effective protection against discrimination on any ground.

The nature of the right affected (section 28(2)(a))

Section 8(3) of the *Human Rights Act 2004* (ACT)(the **HRA**) is modelled on Article 26 of the International Covenant on Civil and Political Rights (ICCPR). In interpreting a human right,

section 31(1) of the HRA provides that '[i]nternational law, and the judgments of foreign and international courts and tribunals, relevant to [the] human right may be considered'.

In its *General Comment No. 18: Non-discrimination*,¹ the United Nations Human Rights Committee (the **Committee**) stated that '[a]rticle 26...prohibits any discrimination under the law and guarantees to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

The object of article 26, ICCPR is to protect the 'recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, social, cultural or any other field of public life'.² However, the enjoyment of rights and freedoms on an equal footing does not mean identical treatment in every instance.³ In fact, the Committee remarked that 'not every differentiation of treatment will constitute discrimination, if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the [ICCPR]'.⁴

In the context of ACT law, all human rights stipulated in the HRA may be reasonably limited only if the reasonable limitation is provided by laws 'that can be demonstrably justified in a free and democratic society'.⁵

The importance of the purpose of the limitation (s 28(2)(b))

Consistent with the right to privacy and the recognition that the family is the natural and basic group unit of society and ought to be protected by the society, the Bill allows parents and families to have greater control over the way to deal with the loss of a child. The Bill achieves this by creating a choice between registering and not registering as a stillborn child a child who showed no sign of a heartbeat before 20 weeks gestation but was born only after 20 weeks gestation.

With the creation of this choice, some parents may choose to register a pregnancy loss as a stillborn child to formally recognise the life of the child, while others may not be ready to take this step, or want to do this ever. Having a choice would allow individual parents to maintain their sphere of privacy as they see fit. Being able to choose the most appropriate form of handling a pregnancy loss according to one's familial values also protects the role of families in the society.

Nature and extent of the limitation (s 28(2)(c))

¹ Human Rights Committee, General Comment No 18: Non-discrimination. 37th sess (10 November 1989) 1[1].

² Ibid 2[6].

³ Ibid 2[8].

⁴ Ibid 3[13].

⁵ *Human Rights Act 2004* (ACT) Preamble para 6, s 28.

The decision-making model enshrined in the Bill treats a birth parent and the other parent differently.

The birth parent will make the final decision of whether or not to register the pregnancy loss as a stillborn child in the limited circumstances that the Bill contemplates. The birth parent will also make the final decision of whether to include the child in a multiple birth or on birth registration of the child's subsequent siblings.

However, in making any one of the above decisions, the birth parent will have to consult the other parent, unless doing so is not reasonably practicable or appropriate in the circumstances. If the birth parent decides to register a child lost in these circumstances as a stillborn child, both the birth parent and the other parent will have to sign the birth registration statement, unless it is not practicable to obtain both signatures.⁶

Relationship between the limitation and its purpose (s 28(2)(d))

Having determined that the parents will have a choice between registering and not registering as a stillborn child a child who showed no sign of a heartbeat before 20 weeks gestation but was born only after, it is necessary for the Bill to specify the person(s) who make(s) the final decision on the birth registration.

If the Bill were to require that both parents jointly make the decision as to whether to register the child as a stillborn child under all circumstances, problems would arise as to the difficulty in contacting the non-birth parent in certain situations. For instance, the child might have been conceived with anonymous donor sperm or the birth parent could be placed at risk of family violence if they were to contact the non-birth parent. In situations where the non-birth parent is not readily available, such a requirement would impose an additional burden on a birth parent to contact the non-birth parent while suffering grief following the loss of a child.

Another alternative would be to allow either parent to make a decision to register the child. However, it is not currently possible under the Act to have a parent's particulars included on the birth register without that parent's signature. This presents a difficulty where the birth parent does not wish to participate in a registration process initiated by the non-birth parent, as the registration process currently requires the inclusion of the particulars of the birth parent. Changing this aspect of the birth registration process for this specific situation would create difficulties and inconsistencies in the register, and is not an option supported by the Registrar-General.

By virtue of having carried and given birth to a stillborn child, the birth parent is in an inherently different position to the non-birth parent. The close personal and physical connection that exists between the birth parent and the lost child gives rise to a birth parent's expectation of privacy about any matter relating the lost child, including giving formal recognition to the child. In situations where the non-birth parent has not been involved during pregnancy or birth, the birth parent's expectation of privacy entails that there be limited

⁶ *Births, Deaths and Marriages Registration Act 1997* (ACT) s 9(2).

involvement by the non-birth parent in the decision-making process regarding registration of the child.

The decision-making model that the Bill ultimately reflects a balance between competing human rights, and ensures that rights are not limited in a way that is unreasonable or disproportionate. The birth parent is given ultimate responsibility for decisions regarding the registration of the child as a stillborn child. However, a requirement has been included to consult the non-birth parent to recognise the right of the non-birth parent to equality and to ensure that this right is subject only to reasonable limitations.

Any less restrictive means reasonably available to achieve the purpose (s 28(2)(d))

These restrictions are proportionate to the aim of keeping people safe and are the least restrictive means possible in the circumstances.

Births, Deaths and Marriages Registration Amendment Bill 2018

Detail

Part 1 – Preliminary

Clause 1 — Name of Act

This is a technical clause that names the short title of the Act. The name of the Act will be the *Births, Deaths and Marriages Registration Amendment Bill 2018* (the **Bill**).

Clause 2 — Commencement

This clause provides that the Act will commence on the day after its notification day.

Clause 3 — Legislation Amended

This clause lists the legislation amended by this Bill. This Bill will amend the *Births, Deaths and Marriages Registration Act 1997* and the *Births, Deaths and Marriages Registration Regulation 1998*.

Part 2 – Births, Deaths and Marriages Registration Act 1997

Clause 4 – New section 4B

This clause moves to the front of Part 2 the definition of birth parent found in subsection 5(8) of the Act. The definition will now apply to the entire Part 2.

Clause 5 – Notification of births

This clause deletes subsection 5(8) as it will become the new section 4B.

Clause 6 – When registration of birth is required or authorised - New section 7(5) to (7)

This clause inserts new sections (5), (6) and (7) into section 7 of the Act.

Part 2 of the Act imposes an obligation to register the birth of a child on the parents of the child.

New section 7(5) provides that the birth of a child need not be registered if the child showed no sign of a heartbeat before 20 weeks gestation but was born during or after 20 weeks gestation.

New section 7(6) gives retrospective effect to subsection 7(5) for up to six months before the day section 7(6) itself commences and the birth is not registered immediately before the commencement day.

The Committee raised this issue in 2016 and has indicated that this is an ongoing issue. One of the reasons the Bill gives retrospective effect to this reform is to maximise the beneficial impacts the reform has on affected parents. The retrospective operation of this Bill captures as many affected parents as possible within the current legislative framework. The six-month retrospective operation aligns with the existing timeframe parents have to register a child's birth. Stillbirths that took place more than six months before commencement would already have been registered under the existing provisions.

The retrospective effect of the Bill does not disturb all births, including stillbirths that have been registered upon commencement. It also does not prevent parents from registering births that can be registered under the current framework.

New section 7(7) causes both subsections 7(6) and 7(7) to expire 12 months after subsection 7(6) commences. This section removes the provisions the operation of which are spent.

Clause 7 – Section 8(1)

This clause inserts '(other than a child mentioned in subsection 1A or (2))' after 'parents of a child' into the existing section 8(1) of the Act.

The existing section 8(1) provides that the parents of a child are jointly responsible for having the child's birth registered under this Act.

This clause qualifies the operation of the existing section 8(1) so it does not apply to the birth of a stillborn child who showed no sign of a heartbeat before 20 weeks gestation. This clause also qualifies section 8(1) so it does not apply if a child is a foundling.

Clause 8 – New section 8(1A) and (1B)

This clause inserts new subsections 8(1A) and (1B) after subsection 8(1).

New subsection 1A provides that the birth parent of a stillborn child who showed no sign of a heartbeat before 20 weeks gestation is solely responsible for deciding whether to register the birth of the child. The intention is that the birth parent is given the choice whether to register the birth of the child. However, the birth parent must consult the other parent of the child before making the decision.

New subsection 1B provides that the birth parent is not required to consult the other parent if it is not reasonably practicable or appropriate in the circumstances to consult the other parent. A birth parent is not required to consult the other parent if, for example—

- there is a risk of family violence or a risk to the safety and well-being of the birth parent or of another person
- the other parent is not contactable
- the other parent's identity is not known

- there is an express agreement not to contact the other parent, for instance, where the child was conceived with anonymous donor sperm.

Clause 9 – How to have the birth of a child registered, Section 9(2)(a)

This clause inserts a new subsection (ii) into subsection 9(2)(a) of the Act.

The existing subsection 9(2)(a) provides that the Registrar-General may accept a birth registration statement that is signed by only 1 of the parents, if satisfied that it is not practicable to obtain the signature of the other parent.

The new subsection (ii) adds another situation where the Registrar-General may accept a birth registration statement signed by only 1 of the parents: if only the birth parent signed the birth registration statement and the registration is carried out under the new subsection 8(1A).

Clause 10 – Dictionary, new definition of birth parent

This clause inserts a reference to ‘birth parent’ into the Dictionary located at the end of the Act to direct readers to the new section 4B of the Act for the new definition of ‘birth parent.’

Clause 11 – Dictionary, definition of stillborn child

This clause removes the outdated alternative definition of ‘stillborn child’ based on a body mass of 400g where gestation cannot be reliably established.

Part 3 – Births, Deaths and Marriages Registration Regulation 1998

Clause 12 – Dictionary Section 3, note 1

This clause makes a consequential change to section 3, note 1 of the *Births, Deaths and Marriages Registration Regulation 1998* (the **Regulation**) to direct readers to the new subsection 4B of the Act for the definition of ‘birth parent’.

Note 1 in section 3 uses the definition of ‘birth parent’ as an example of a signpost definition.

Clause 13 – Registration of births - New section 5(3) to (5)

This clause inserts subsections (3), (4) and (5) into section 5 of the Regulation.

New section 5(3) allows the birth parent, after consulting the other parent, to decide whether or not to include a stillborn child in a multiple birth if the child showed no sign of a heartbeat before 20 weeks gestation.

New section 5(4) allows the birth parent, after consulting the other parent, to decide whether or not to give the particulars of a stillborn child who showed no sign of a heartbeat before 20 weeks gestation for the registration of subsequent siblings born to the same parent.

New section 5(5) qualifies the operation of the new sections 5(3) and 5(4) so the birth parent does not need to consult the other parent if it is not reasonably practicable or appropriate in

the circumstances. Similar to the examples provided for the new subsection 8(1B), it is not reasonably practicable or appropriate if—

- there is a risk of family violence or a risk to the safety and well-being of the birth parent or of another person
- the other parent is not contactable
- the other parent's identity is not known
- there is an express agreement not to contact the other parent, for instance, where the child was conceived with anonymous donor sperms

Clause 14 – Dictionary, definition of birth parent

This clause makes a consequential change to the Dictionary of the Regulation by directing readers to the new subsection 4B of the Act for the definition of 'birth parent'.