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**THE LEGISLATIVE ASSEMBLY FOR THE
AUSTRALIAN CAPITAL TERRITORY**

BIRTHS, DEATHS AND MARRIAGES REGISTRATION AMENDMENT BILL 2020

**EXPLANATORY STATEMENT
and
HUMAN RIGHTS COMPATIBILITY STATEMENT
(*Human Rights Act 2004, s 37*)**

**Presented by
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Minister for Justice, Consumer Affairs and Road Safety**

BIRTHS, DEATHS AND MARRIAGES REGISTRATION AMENDMENT BILL 2020

This Explanatory Statement relates to the Births, Deaths and Marriages Registration Amendment Bill 2020 (the Bill) as presented to the ACT Legislative Assembly. It has been prepared in order to assist the reader of the Bill and to help inform debate on it. It does not form part of the Bill and has not been endorsed by the Assembly.

The Explanatory Statement must be read in conjunction with the Bill. It is not, and is not meant to be, a comprehensive description of the amendments. What is said about a provision is not to be taken as an authoritative guide to the meaning of a provision, this being a task for the courts.

The Bill **is** a Significant Bill. Significant Bills are bills that have been assessed as likely to have significant engagement of human rights and require more detailed reasoning in relation to compatibility with the *Human Rights Act 2004*.

OVERVIEW OF THE BILL

The Bill fulfils, in part, a commitment of the Government to ‘improve processes for changing birth registration and birth certificates for trans and gender diverse people, particularly young people as stated in the *Capital of Equality First Action Plan 2019 & 2020*. It is also introduced to give effect to the Government Response to recommendation 6 in the *Review of the Domestic Adoption Process in the ACT*.

The Bill removes certain barriers that trans, intersex or gender diverse young people are facing in changing their given name or particulars about sex (the gender identity particulars) to better reflect their gender identities. Upon having gender identity particulars changed, they may obtain an updated birth certificates or a recognised details certificate.

The additional pathways introduced by the Bill will be administered in the manner that is accessible to trans, intersex or gender diverse young people in terms of financial costs, expediency and user-friendliness.

The Bill is also introduced to support the adoption community in the ACT by allowing the Registrar-General to issue integrated birth certificates. Upon commencement of the amendments, individuals who were born in the ACT and adopted may apply for a birth certificate which includes the details of both birth parents and adoptive parents. Integrated birth certificates may also be issued in some situations where a person born overseas is adopted in the ACT.

Removing barriers for the LGBTIQ community

The amendments create additional pathways for the change of gender identity particulars (sex and/or given name) for a young person under 18 years old.

The changes that can be made through the additional pathways relate only to written information recorded on a register maintained by the Registrar-General (the Register) and on birth certificates. They do not authorise a young person to make independent decisions about medical or other treatments for gender dysphoria.

The eligibility criteria for a transgender, intersex or gender diverse young person to apply for a change of registered details under the new pathways varies depending on the age of the young person and whether they have support of a person with parental responsibility.

Significantly, the amendments recognise that transgender, intersex or gender diverse young people who have attained the age of 16 years have capacity to apply for a change of gender identity particulars independently, as if they were adults.

Where a young person under 16 wishes to change their registered gender identity particulars they can do this with the consent of both parents, or one parent (or person with parental responsibility) in certain limited circumstances. Where the young person does not have parental consent they may now apply to the ACT Civil and Administrative Tribunal (the ACAT) for leave to make an application to the Registrar-General. After leave is granted by ACAT, the young person may apply directly to the Registrar-General for a change of registered sex and/or given name to better reflect the person's gender identity.

However, a young person who under 12 years old may apply to ACAT for leave only if at least one person with parental responsibility has given consent, and exceptional circumstances apply.

Supporting the adoption community

The Bill also allows an adopted person to apply for an integrated birth certificate which includes details of the person's birth parents and adoptive parents. A person may apply for the certificate if the person—

- a) was born in the ACT, and
- b) adopted in the ACT or in another Australian State or Territory, and
- c) is entitled to access identifying information under Part 5 of the *Adoption Act 1993*.

The Registrar-General may also, upon application, issue an integrated certificate to a person who was born in a foreign country, and adopted in Australia, if the Registrar-General has all the relevant information to produce the certificate.

Delay in commencement

The Bill will commence on a date fixed by the Minister by written notice, or 12 months after its notification day, whichever occurs earlier. This is to allow Access Canberra and the ACAT sufficient time to take all necessary steps in implementing the legislative changes introduced by the Bill.

CONSULTATION ON THE PROPOSED APPROACH

The additional pathways are modelled on the recommendations made by Equality Australia in its report entitled *ACT LGBTIQ+ Legal Audit: Reforms for an Inclusive ACT*. Equality Australia conducted an independent and comprehensive legal audit of ACT legislation and regulations for laws which could discriminate against or cause harm to LGBTIQ+ people. The report has identified areas for law reform to remove discrimination and help to make the ACT a safe, respectful and inclusive jurisdiction for all. In refining the policies for the change of gender identity particulars, the Government consulted:

- A Gender Agenda Inc;
- ACT Civil and Administrative Tribunal (ACAT);
- ACT Human Rights Commission;
- Births, Deaths and Marriages Registration, Access Canberra;
- ACT Office for LGBTIQ+ Affairs; and
- Youth Law Centre, a division of Legal Aid ACT.

In developing the amendments relating to the issue of integrated birth certificates, the Government consulted the following entities:

- ACT Together, Barnados Australia;
- Birth Family Advocacy Support Service, Australian Red Cross;
- Registrar, South Australian Births, Deaths and Marriages;
- Adoption Act Review Office, South Australian Department of Child Protection;
- NSW Department of Communities and Justice;
- Therapeutic, Assessment and Support, Community Services Directorate; and
- Births, Deaths and Marriages Registration, Access Canberra.

CONSISTENCY WITH HUMAN RIGHTS

Rights engaged

- The right of a child to protection without distinction or discrimination of any kind
- The right to privacy
- The right to equality and non-discrimination
- The right to life
- The right of family to protection by society

Rights Promoted

- The right of a child to protection without distinction or discrimination of any kind
- The right to privacy of transgender, intersex or gender diverse people
- The right to privacy of adopted people
- The right of transgender, intersex or gender diverse people to the equal protection of the law without discrimination
- The right to life of transgender, intersex or gender diverse people
- The right of adopted people's family to protection by society

Rights Limited

Allowing transgender, intersex or gender diverse young people to independently change their birth certificate details, whether or not by obtaining ACAT leave, engages the right of families to be protected because it affects the discharge of parental responsibility by a parent or guardian of the young person.

The Bill also allows young people to use the additional pathways to change their given names or registered sex only to better reflect their gender identity. Thus, it potentially limits equality rights for young people who wish to change their given names or registered sex for other reasons.

In addition, the eligibility requirements for accessing the additional pathways are different for young people in different age groups. This may be argued as limiting the right to equality and non-discrimination.

All hearings relating to the application for the granting of leave by ACAT are to be held in private. This engages the right to a fair hearing.

1. Nature of the right and the limitation (s28(a) and (c))

Section 11(1) of the *Human Rights Act 2004* (the HRA) provides that the family is the natural and basic group unit of society and is entitled to be protected by society. Section 12(a) of the HRA provides that a family must not be interfered with unlawfully or arbitrarily. These two rights are closely related to each other and are engaged when a policy affects parenting arrangements for children.

The Bill has flow-on effects on the domain of parental responsibility as generally understood by the community. The concept of parental responsibility is a recognition that ordinarily a parent is in the best position to act in the best interests of the child. The Bill allows a child, under certain circumstances, to make independent decisions with minimal or no parental involvement, thereby limiting the discharge of parental responsibility.

Section 8(3) of the HRA provides that every individual is equal before the law and is entitled to the equal protection of the law without discrimination. It prohibits any distinction, exclusion, restriction or preference based on personal attributes like race, colour, sex, language, religion, national or social origin, property of birth.

However, the principle of equality sometimes requires the Government to take positive action in order to diminish or eliminate conditions which cause or help to perpetuate discrimination.¹ Further, a differentiation of treatment will not 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 International Covenant on Civil and Political Rights (ICCPR).²

The Bill only allows changes to gender identity particulars to be made to better reflect the applicant's gender identity and not for other purposes. This means that young people who would like to change their given names for other purposes cannot access the additional pathways. Further, eligibility criteria for accessing the additional pathways vary across different age groups, with stricter requirements applying to younger age groups.

The right to a fair hearing includes the requirement for hearing to be fair and public, which ensures the transparency that contributes to the appearance of impartiality and fairness of a tribunal. However, the ICCPR provides that 'the press and the public may be excluded from all or part of a trial...when the interest of the private lives of the parties so requires'.³

2. Legitimate purpose (s28(b))

The current *Births, Deaths and Marriages Registration Act 1997* presents significant barriers for young people who have the understanding and maturity to make their own decisions about their gender identity in obtaining legal recognition and identification documents that accurately reflect their gender in situations where they do not have the support of both parents.

Currently, it is not possible for a young person under 18 to have their gender identity particulars changed in the Register, and a birth certificate issued with changed details, unless they have the consent of both parents.

Not being able to obtain identification documents that accurately reflect their gender identity can create a range of difficulties and increases the chance of the young people being subjected to discrimination, prejudice or bullying. This is of particular concern as transgender, intersex or gender diverse young people face higher risks of depression, anxiety and other mental health issues than other young people.⁴ These young people also face a greater risk of self-harm and suicide.⁵

However, studies have shown that this risk can be reduced and that transgender, intersex or gender diverse young people who are able to socially transition or live

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

² *Ibid* [13].

³ *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 14(1).

⁴ 'Risk factors for suicide', *Beyond Blue* (Web Page) <<https://healthyfamilies.beyondblue.org.au/age-13/mental-health-conditions-in-young-people/suicide/risk-factors-for-suicide>>.

⁵ *Ibid*.

according to their preferred gender have mental health outcomes comparable to other young people.⁶

The United Nations Human Rights Committee commented that a signatory of the ICCPR should take adequate measures, without violating their other Covenant obligations, to prevent suicides, especially among individuals in particularly vulnerable situations.⁷ This Bill is one measure that can be taken to support these vulnerable young people and address the heightened risks that they face.

The additional pathways embody the principle of evolving capacities stated in Articles 5 and 12 of the United Nations Convention on the Rights of the Child.⁸ This principle is established on the premise that children acquire maturity at different rates, and apart from biological age, there is a range of other factors which influence children's maturity. Even though parents are responsible for protecting their children, such responsibility does not give parents absolute rights over their children. Once a young person is sufficiently competent to make a decision about a matter, the parental responsibility to make the decision on their behalf is commensurately reduced.

3. Rational connection between the limitation and the purpose (s28(d))

To protect the rights of transgender, intersex and gender diverse children, where there are conflicting views between the parents and the children, the Bill allows young people who have sufficient maturity to make their own decisions about their registered gender identity.

The Bill provides that young people who are 16 years or older may apply directly to the Registrar-General to change their registered sex and/or given name to better reflect their gender identity

For young people under 16, in situations where no parental consent has been obtained, the maturity of the young person may be assessed by the ACAT, which will grant leave if sufficient maturity is demonstrated. Having obtained ACAT's leave, the young person can independently apply to the Registrar-General to change their gender identity particulars.

In this instance, upholding the right to life and children's evolving capacities to make their own decisions engages the right of family.

Eligibility criteria for accessing the additional pathways are different for young people of different age groups. There are stricter criteria for younger children, compared to those for older children. This is to recognise that some younger children are unlikely to have the sufficient level of maturity to make this decision

⁶ Kristina R Olson et al, 'Mental Health of Trans Children Who Are Supported in Their Identities' (2016) 137(3) *Pediatrics* 2015-3223:1–8.

⁷ Human Rights Committee, *General comment No. 36 (2018) on article 6 of the International Covenant on Civil and Political Rights, on the right to life*, 124th sess, UN Doc CCPR/C/GC/36 (31 October 2018) [9].

⁸ Committee on the Rights of the Child, *General Comment No. 12 (2009) The right of the child to be heard*, 51st sess, UN Doc CRC/C/GC/12 (1 July 2009) [84]–[85].

independently, while it is more likely for older children to be able to understand the nature and effects of changing gender identity particulars.

The additional pathways to change gender identity particulars are special measures taken to alleviate the vulnerabilities of transgender, intersex or gender diverse young people. As discussed above, transgender, intersex or gender diverse young people face significant risks and experience many barriers to fully participating in the community, which have direct impacts on mental well-being.⁹

Hence, while these additional pathways are not available to all young people, this is not a limitation of the right to equality and non-discrimination.

The right to a fair hearing is engaged because the hearing at the ACAT about an application for grant of leave must be held in private. However, it is important that hearings are not open to the public because the information that is produced in the hearing is likely to be highly sensitive and personal and relates to a young person. Proceedings involving young people under 18 are usually held in private to respect the particular vulnerability of this group. In the absence of such an arrangement, young people might be reluctant to access the additional pathways, which would undermine the purpose of the amendments.

4. Proportionality (s28 (e))

Any limitation of the right of family has been kept to a minimum by allowing parents or guardians to participate in the decision-making process as far as possible, without jeopardising the health and well-being of transgender, intersex or gender diverse young people.

For a young person who has attained the age of 12 years but not yet 16, the consent of both parents is necessary for the young person to apply directly to the Registrar of Births, Deaths and Marriages for a change of gender identity particulars. In limited special circumstances, an application may be made with the consent of one person with parental responsibility.

Where a young person is between 12 years old and 16 years old and does not have parental consent, the person may apply to the ACAT for leave to make application to the Registrar-General. The grant of leave by the ACAT allows the young person to apply for a change of gender identity particulars independently.

Before dealing with an application for leave, the ACAT is required to take reasonable steps to notify each parent or guardian.¹⁰ However, the ACAT must not notify the persons if it would pose a risk to the young person or another person's health or safety, and that the risk cannot be mitigated by taking appropriate actions. This is to protect the young person, and other parties from

⁹ Carlo Moleiro and Nuno Pinto, 'Sexual Orientation and Gender Identity: Review of Concepts, Controversies and Their Relation to Psychopathology Classification Systems' (2015) 6 *Frontiers in Psychology* 1511.

¹⁰ Parental consent to make an application for leave by the ACAT is necessary only for a young person who is less than 12 years old. Parental consent is not necessary for a young person who is at least 12 years old to apply to the ACAT for leave.

being treated with violence, aggression or being harassed during or after the process at the ACAT.

Each parent or person with parental responsibility for an applicant is entitled to make submissions to the ACAT concerning the ability of the applicant to understand the nature and effect of the change sought. The Public Advocate, who is an independent statutory office-holder with the function of advocating for the rights of children and young people, may also make submissions to the ACAT.

If not satisfied with the decision of the ACAT, the applicant may appeal internally to the Appeal Tribunal, or to the Supreme Court. Instead of appealing against the original decision, the applicant may re-apply to the ACAT for leave at a later date as the applicant's capacity will continue to evolve and mature.

The right to appeal is given to only the applicant to address any attempt by a parent or guardian to delay the change of gender identity particulars by instituting appeals. It is important that the process is not overly drawn out to minimise the adverse impact on the applicant's mental well-being. Allowing a parent or guardian to appeal may also lead to an increase in litigation costs as the matter escalates to the Supreme Court or the High Court. Increased litigation costs would reduce the accessibility of this pathway for young people.

As the ACAT is to hear from all relevant parties before making a decision to grant leave, and that a young person may unilaterally apply for a change of gender identity particulars only after demonstrating sufficient maturity, it is considered that the limitation of the right of family here is reasonable and proportionate.

The limitation on the right to equality of young people in the differing treatment at different ages is reasonable and proportionate as it reflects the practical realities and likely level of maturity and understanding of young people at those ages.

The threshold of 16 years old for transgender, intersex or gender diverse young people to independently change their gender identity particulars, without ACAT proceedings reflects the level of independence and maturity generally attained at that age which is sufficient for other significant decisions. The age of 16 years is the age that young people are deemed competent to give consent to sexual intercourse and consent to medical treatment. In South Australia, New Zealand and the United Kingdom, legislation was enacted to specifically recognise the right of a person of or over 16 years old to make decisions about the person's medical treatment and provide consent as validly and effectively as an adult.

As discussed above, a young person between 12 and 16 may apply to ACAT for leave if they do not have the necessary support of parents or people with parental responsibility. This additional procedural step ensures that there is an independent assessment of their ability to make this decision independently.

For children under 12, greater restrictions apply, recognising the greater responsibility that parents have for guiding and supporting younger children. A child under 12 is dependent on parents (or those with parental responsibility) for support and conflict with those responsible for them will affect a child's wellbeing.

It is already possible for registered details to be changed with the consent of both parents. These amendments provide an additional pathway for young people who are not yet 12 to apply to ACAT for leave to change their gender identity particulars, but only if they have the consent of at least one parent or person with parental responsibility, and they can demonstrate exceptional circumstances such as having socially transitioned and lived in their preferred gender identity for a reasonable period.

On this basis any limitation of the right of equality and non-discrimination caused by the different eligibility criteria applying to the young people of different age groups is reasonable and proportionate.

A hearing in relation to an application for leave at ACAT must be held in private. Section 29G represents the right balance struck between the right to a fair hearing, and the applicant's and the family's right to privacy and reputation. As the restriction is for the benefit of the applicant, this does not unreasonably limit their right to a fair hearing.

Births, Death and Marriages Registration Amendment Bill 2020

Compatibility Statement

Human Rights Act 2004

In accordance with section 37 of the *Human Rights Act 2004* I have examined the **Births, Deaths and Marriages Registration Amendment Bill 2020**. In my opinion, having regard to the Bill and the outline of the policy considerations and justification of any limitations on rights outlined in this explanatory statement, the Bill as presented to the Legislative Assembly **is** consistent with the *Human Rights Act 2004*.

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Gordon Ramsay MLA
Attorney-General

CLAUSE NOTES

Clause 1 Name of Act

This clause provides that the name of the Act is the Births, Deaths and Marriages Registration Amendment Act 2020.

Clause 2 Commencement

This clause provides that the Bill has a delayed commencement to allow implementation work to occur. If the Bill has not commenced within 12 months beginning on the notification day, it automatically commences on the first day after that period.

Clause 3 Legislation amended

This clause provides that the Bill amends the *Births, Deaths and Marriages Registration Act 1997* (the Act). The Bill also amends the *Adoption Act 1993* in schedule 1 to the Bill.

Clause 4 Section 19 heading

This clause changes the heading of section 19 of the Act to align with the introduction of new sections 19A, 24, 29A, and the new part 4A.

Clause 5 New section 19A

This clause introduces the additional pathways for young people to change any of their given names to better reflect their gender identity.

The new section 19A provides that to access the additional pathways, a young person must be domiciled or resident in the ACT, or has the person's birth registered in the ACT.

For a young person who is at least 16 years old, but not yet 18 years old, the young person may apply directly to the Registrar-General for a change of any of that young person's given names to better reflect that young person's gender identity.

For a young person who is at least 12 years old, but not yet 16 years old, the young person may apply to the Registrar-General for a change of any of that young person's given names if—

- a) both parents of that young person have given consent to the application; or
- b) it is not practicable or reasonable to obtain the consent of both parents, one parent has given consent to the application; or

- c) a circumstance prescribed by regulation applies, one stated person with parental responsibility consents to the application; or
- d) the ACT Civil and Administrative Tribunal (the ACAT) has granted leave allowing the young person to make an application to the Registrar-General.

Due to the varying nature of parental responsibility for a child that could be given by a court to a person, not all people with parental responsibility for a child should be able to give consent for the purposes of the new sections 19A, 24(1)(a), and 29A. As such, it is expedient for the Minister to prescribe by regulation people with specific types of parental responsibility that can consent to an application. It is likely that people with long-term care responsibility, or with the responsibility to make major long-term decisions would be able to give consent.

**Clause 6 Application to alter register to record change of sex
section 24 (1) (a)**

This clause substitutes the existing subsection 24 (1) (a) of the Act.

This clause provides that a person may apply to the Registrar-General for alteration of the record of the person's sex in the registration of the person's birth if the conditions similar to those set out under the new section 19A are satisfied.

Clause 7 New section 24 (2) (d)

This clause inserts an additional condition for the application to alter the record of a child's sex in the registration of the child's birth by the parents of, or a person with parental responsibility for the child.

This clause provides that if a child has applied for the alteration of the child's sex record under the new subsection 24 (1) (a), the parents of, or a person with parental responsibility for the child cannot apply for a change of record of the child's sex.

**Clause 8 Evidence in support of application
section 25 (1)**

This clause deletes the words 'who is at least 18 years old' from subsection 25 (1) of the Act. This is an amendment consequential to the amendments being made to section 24 (1) (a) of the Act.

Section 25 sets out the evidentiary requirements for a person who is applying to the Registrar-General under section 24 for alteration of the record of the sex of the person. Subsection 25 (1) (a) provides that that person must present 'a statement by a doctor, or a psychologist, certifying that the person...has received appropriate clinical treatment for alteration of the person's sex'.

The phrase 'has received appropriate clinical treatment for alteration of the person's sex' was inserted into the Act in 2014 through the passage of the *Births, Deaths and*

Marriages Registration Amendment Act 2014 (the 2014 Amending Act). The 2014 Amending Act also removed the requirement for sexual reassignment surgery before a person can alter the person's sex in the registration of the person's birth.

The explanatory statement for the 2014 Amending Act states that the words 'appropriate clinical treatment' was deliberately left undefined so to ensure that the exercise of professional medical judgement is neither expanded nor impeded by the 2014 Amending Act.

Without limiting the meaning of 'appropriate clinical treatment', it is the Bill's intent that a person satisfies the requirement of section 25 (1) (a) (i) of the Act if the person has, for example, consulted a doctor or psychologist in respect of the person's gender identity, regardless of the form in which the consultation takes place. To avoid doubt, it is not necessary for a person to have undergone hormone therapy or surgery to satisfy the requirement in section 25 (1) (a).

Clause 9 New section 25 (1) (aa)

This clause relocates the existing subsection 25 (2) (a) of the Act to subsection 25 (1).

Clause 10 Section 25 (2)

This clause deletes the existing subsection 25 (2), having relocated 25 (2) (a) as subsection 25 (1) (aa). Subsection 25 (2) is rendered redundant by the amendments being made to subsection 25 (1).

**Clause 11 Application for recognised details certificate
 Section 29A (1) (a)**

This clause substitutes the existing subsection 29A (1) (a) of the Act.

This clause provides that a person may apply to the Registrar-General for a document that acknowledges the person's name and sex, known as a recognised details certificate, if the conditions similar to those set out under the new section 19A are satisfied.

To qualify for a recognised details certificate, a person must be domiciled or resident in the ACT but the person's birth is registered in a place other than the ACT.

**Clause 12 Evidence in support of application for recognised details
 certificate
 Section 29B (1)**

This is an amendment consequential to the amendment being made to subsection 29A(1)(a).

Clause 13 Section 29B (2)

This clause redrafted subsection 29B (2) to state that the evidentiary requirements set out in the existing section 29B (2) are applicable to only an application made under section 29A (2), instead of every application made under section 29A.

Clause 14 New part 4A

The clause inserts the new part 4A into the Act which sets out the process of applying for, and the granting of leave by the ACT Civil and Administrative Tribunal (the ACAT) to apply to the Registrar-General for a change of gender identity particulars.

Section 29E

The new section 29E provides that a young person who is not yet 16 years old may apply to the ACAT for leave to apply to the Registrar-General for a change of gender identity particulars.

Subsection 29E (2) provides that a young person may apply to the ACAT for leave only if the person also satisfied the requirement in section 19A (a) of the Bill, section 24 (1) (b) or section 29A (1) (b) of the Act. Those provisions relate to residency or birth registration requirements.

Subsection 29E (3) provides that a young person who is less than 12 years old may apply to the ACAT for leave only if—

- (a) at least one parent, or a person with parental responsibility for the young person consents to the application being made; and
- (b) exceptional circumstances apply to the young person, for example, the young person has socially transitioned their gender identity by showing a definite and consistent gender identity over a reasonable period.

Subsection (3) (b) provides one example of many circumstances that may be considered exceptional by the ACAT. The example serves as a benchmark for the ACAT against which other situations may be compared to determine whether or not those other situations are considered exceptional circumstances.

In relation to the example provided, assessing a reasonable time will depend on the age of the child and other circumstances.

The Bill also envisages that, in practice, a question of whether a young person has satisfied the requirements in subsection 29E (3) (b) would be dealt with by the ACAT together with the determination of a question under section 29H.

When making an application to the ACAT, it will be made clear to the young person that the ACAT must give notice about the application to each parent or person with parental responsibility for the young person.

If the young person does not want the ACAT to notify any of the parents or people with parental responsibility, the young person is expected to make submissions to the ACAT about this matter when making the application.

Subsection 29E (5) expressly provides that a young person is legally competent to make an application, and to represent themselves at a proceeding of the ACAT instituted under Part 4A. However, a young person may be found to be not being legally competent for reasons other than the young person's age.

Section 29F

Subsection 29F (1) requires the ACAT to take reasonable steps to notify the Public Advocate, and each parent or person with parental responsibility for the young person.

The ACAT must not notify a parent, or person with parental responsibility for the young person if the notification could reasonably be expected to adversely affect the young person. This is to minimise the potential emotional and physical harm to the young person from the involvement of an unsupportive parent or person with parental responsibility in the proceedings.

In deciding if notifying a parent of, or a person with parental responsibility for a young person could reasonably be expected to adversely affect the young person, the ACAT would need to take into consideration the risks to the young person's health and safety, or to the health and safety of another person related to the young person, and if the risks can be mitigated by taking any appropriate actions.

Where, having considered a young person's submissions and all information available to the ACAT, the ACAT is satisfied that notifying a parent or a person with parental responsibility is likely to cause psychological or physical harm to the young person, then notification must not happen. However, if the disagreement by parents or people with parental responsibility for the young person is not violent or emotionally abusive, and is not likely to cause psychological harm to the young person, it is not likely that the young person would be adversely affected.

If a young person makes a submission under section 29E (4) (b), the ACAT must decide if notifying a parent or a person with parental responsibility for the person could reasonably be expected to adversely affect the young person, after considering the person's submission.

If a decision is made contrary to the young person's submission, the ACAT must tell the young person the reasons for the decision, and allow the young person a period, being of at least 14 days, to withdraw the application. If the application is not withdrawn after the stated period, the ACAT will proceed to notify each parent or person with parental responsibility.

Section 29G

Section 29G provides that an application for leave must not be heard until the end of the period stated in the notice given to a young person under subsection 29F (2) (b) (ii). This is to align with the requirement to give the young person at least 14 days to withdraw an application.

However, if, after receiving a notice under subsection 29F (2) (b) a young person confirms that they want the application to proceed, the application may be heard before the end of the period stated in the notice. The necessary implication is that the ACAT may proceed to notify the parent or person with parental responsibility before the end of the stated period.

Due to the sensitivity of information that may be presented at a hearing with respect to an application made under the new part 4A, the hearing must be held in private.

Subsection 29G (3) deems a hearing under part 4A as a hearing to which section 39 of the ACAT Act applies. Section 39 (2) of the ACAT Act gives the ACAT power to make orders specifying the prohibitions or restrictions as to the publication or disclosure of matters relating to a hearing.

Subsection 29G (4) permits a parent or a person with parental responsibility for the young person, and the Public Advocate to make submissions to the ACAT about and only about the young person's decision-making ability to understand the meaning and legal implications of the change sought. Subsection 29G (5) clarifies that a parent or person with parental responsibility, and the Public Advocate are not parties to the application.

Section 29H

Section 29H says that the ACAT must grant an application for leave if it is satisfied that on reasonable grounds that the young person—

- a) has sufficient decision-making ability to understand the meaning and legal implications of the change; and
- b) believes that the change would better reflect their gender identity.

Subsection 29H (2) provides that the ACAT must not consider if the change is in the best interests of the young person. Further, it must not consider if any other requirements under the Act in relation to the change is satisfied.

The language in subsection 29H (1) is drawn from the *Gillick* competence doctrine which originated in a United Kingdom House of Lords' decision.¹¹ This doctrine has been subsequently adopted and refined in Australia by the High Court and the Family Court of Australia. Essentially, a minor is Gillick competent if the minor

¹¹ *Gillick v West Norfolk & Wisbech Area Health Authority* [1968] AC 122 ('*Gillick*').

'possesses sufficient intellectual capacity and emotional maturity to understand the nature and consequences of the' proposal.¹²

While subsection 29H (1) draws on the concept of Gillick competence, it is not intended that a young person would necessarily need to obtain a medical assessment of their competence in order to be found as having satisfied the requirements in subsection 29H (1). Undergoing medical assessment not only increase the associated costs for a young person to apply to the ACAT, it also prolongs the process of determining an application, which is contrary to the objectives of the Bill.

A change of gender identity particulars relates only to registered details recorded in the Register and on identity documents and is fully reversible. Therefore, the level of understanding a young person would need to demonstrate in order to be found competent to make a decision about their gender identity particulars would not need to be of the same level as that required to consent to medical treatment, particularly where that treatment may have irreversible effects.

Section 29I

Subsection 29I (1) authorises the Registrar-General to ask from the ACAT for a copy of an order made under section 29H in relation to a young person.

Subsection 29I (2) requires the ACAT to provide a copy of the order, if the Registrar-General has asked for it under subsection (1).

Clause 15 Issue of certificates New section 45 (3) and (4)

This clause inserts the new subsection 45 (3) and (4) into the Act.

Subsection 45 (3) provides that the Registrar-General, upon application by an adopted person, has a discretion to issue the integrated birth certificate to an adopted person if the Registrar-General is satisfied that—

- a) the person's birth was registered in the ACT and was adopted in the ACT or another State or Territory; or
- b) the person was born outside of Australia and was adopted in the ACT.

To be eligible for an integrated birth certificate, the adopted person must also satisfy the existing requirements set out in part 5 of the *Adoption Act 1993*.

¹² *Secretary, Department of Health & Community Services v J.W.B & S.M.B* (1992) 175 CLR 218, 311 ('*Marion's Case*').

The Registrar-General may exercise discretion not to issue an integrated birth certificate if, for example, the Registrar-General does not have all the information that the Registrar-General deems relevant to an integrated birth certificate.

Subsection 45 (4) provides for the definition of an integrated birth certificate.

Clause 16 Dictionary, new definition of young person

This clause inserts the definition of ‘young person’ into the Dictionary at the end of the Act.

Schedule 1 Adoption Act 1993

Clause 1.1 Section 62 (3) (c)

This clause replaces the existing subsection 62 (3) (c) of the *Adoption Act 1993*.

The new subsection 62 (3) (c) allows the Registrar-General to issue an integrated birth certificate if the requirements in subsections 62 (3) (a) and (b) have been satisfied.

Clause 1.2 New section 62 (4)

This clause inserts the subsection 62 (4) into section 62 of the *Adoption Act 1993*.

The new subsection 62 (4) refers the reader to the definition of ‘integrated birth certificate’ now found in section 45 of the Act.