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Committee Secretary
Legal Affairs and Community Safety Committee
Parliament House
Brisbane
By email – lacsc@parliament.qld.gov.au

Dear Secretary

BIRTHS, DEATHS AND MARRIAGES REGISTRATION AMENDMENT BILL 2018

I want to thank the Committee for asking me to make a submission.

I strongly support the Bill.

About me

This submission is written in my personal capacity, not in my capacity as member of any organisation.

I am a family and fertility lawyer based in Brisbane. I was admitted as a solicitor in 1987 and have practised family law as a specialisation since 1988. I have been a Queensland Law Society Accredited Family Law Specialist since 1996. I am currently a member, amongst others of:

- ANZPATH (Australian and New Zealand Professional Association for Transgender Health Inc);
- Equity and Diversity Committee of the Queensland Law Society;
- Fellow of the International Academy of Family Lawyers;
- International Representative on the ART Committee of the American Bar Association;
- Fellow of the American Academy of Adoption and Assisted Reproduction Attorneys;
- Fertility Society of Australia;
- Family Law Section, Law Council of Australia;

- Family Law Practitioners Association of Queensland.

The problem addressed by this Bill

The problem for transgender individuals who are married with the structure of section 22 of the *Births, Deaths and Registration Act* has been quite plainly cruel:

1. A married person can choose to stay married but not be able to change the gender marker on the birth register; or

2. In order to be able to change the gender marker they have to get divorced.

For many, many years I have heard stories from transgender people who have told me of the cruel impact of this law upon their lives and that of their families. The law is not currently family friendly. The reality is that some couples who married as husband and wife may continue to live happily together (albeit through the challenging transition process). I have met a number of couples in that category who live in Brisbane.

The basis of the law, as enacted, was modelled on the New South Wales equivalent. It was based on the view of marriage that under the *Marriage Act 1961* that a heterosexual marriage could only be between someone who had been born genetically male and someone who was born genetically female. No allowance was made in the case law for the possibility of transgender individuals. It is embarrassing to reveal that that view of the law was outdated as long ago as October 2001. That is when a couple, known as Kevin and Jennifer, approached the Family Court seeking a declaration of the validity of their marriage. Kevin was a transgender individual who was born female, but identified as male. In the seminal judgment of in *Re Kevin (Validity of Marriage of Transsexual)* [2001] FamCA 1074, Justice Chisolm of the Family Court recognised the validity of the marriage.

The language used in the case was that of transsexual, a word with which the Judge struggled as he did not want to impose labels, but it was the word that was used by the parties. The word used now is either "trans" or "transgender". His Honour held:

"1. For the purpose of ascertaining the validity of a marriage under Australian law, the question whether a person is a man or a woman is to be determined as at the date of the marriage.

2. There is no rule or presumption that the question whether a person is a man or a woman for the purpose of marriage law is to be determined by reference to circumstances at the time of birth.

3. Unless the context requires a different interpretation, the words "man" and "woman" when used in legislation have their ordinary contemporary meaning according to Australian usage. That meaning includes post-operative transsexuals as men or women in accordance with their sexual reassignment.

4. The context of marriage law, and in particular the rule of the parties to a valid marriage must be a man and a woman, does not require any departure from ordinary current meaning according to Australian usage of the word "man".

5. There may be circumstances in which a person who at birth had female gonads, chromosomes and genitals, may nevertheless be a man at the date of his marriage.

6. In the present case, the husband at birth had female chromosomes, gonads and genitals,

but was a man for the purpose of the law of marriage at the time of his marriage, having regard to all of the circumstances, and in particular the following:

(a) He had always perceived himself to be a male;

(b) He was perceived by those who knew him to have had male characteristics since he was a young child;

(c) Prior to the marriage he went through a full process of transsexual reassignment, involving hormone treatment and irreversible surgery, conducted by appropriately qualified medical practitioners;

(d) At the time of the marriage, in appearance, characteristics and behaviour, he was perceived as a man, and accepted as a man by his family, friends and work colleagues;

(e) He was accepted as a man for a variety of social and legal purposes, including name, an admission to an IVF programme, and in relation to such events occurring after the marriage, there was evidence that his characteristics at the relevant times were no different from his characteristics at the time of the marriage;

(f) His marriage as a man was accepted, in full knowledge of his circumstances, by his family, friends and work colleagues."

That decision was appealed by the Commonwealth, but the appeal was dismissed. No application was made to the High Court for special leave.

That decision was made in 2001, but there has been no legislative change proposed – until now, almost 16 years later, to reflect that decision.

The experience of Jennifer

Many years ago, shortly after that decision in *Re Kevin*, I acted for a client whom I shall call Jennifer. Jennifer was born male, identified as female and had received relevant surgery. Jennifer was born in Queensland but lived in the United States. She had a husband. Jennifer had, without too much difficulty, been able to alter her name on the birth register from Mark (pseudonym) to Jennifer. The difficulty that Jennifer had was that being married at that stage and having a birth certificate that showed her gender as M, not F meant that it would be likely that she would have to leave the United States and her husband's budding career there in IT would be over.

I made representations through my then local MP to the then Attorney-General, the Hon. Rod Welford. He issued a ruling to the Registrar of Births, Deaths and Marriages that for those living overseas who married overseas that the strictures of section 22 did not apply to them. As a result of this compassionate ruling, my client was able to alter the gender marker on the birth register from M to F, was therefore able to remain living with her husband in the United States and presumably their lives were happy ever after. To get to the point of obtaining that ruling took many frustrating months for my client and I must say that I thought that her chances of success without legislative change were minimal.

Recent seminar

In February I presented to GP about legal issues to do with transgender individuals. This was part of a training seminar for approximately 50 GPs physically at the seminar in Brisbane and another 20+ who attended remotely from interstate and New Zealand.

I raised that the requirement in Queensland was that the change was not possible if the parties were married. It is fair to say that there were hails of indignation by GPs present, including those from interstate as to this requirement in the legislation, including the cruel effect that it has upon families.

Yogyakarta Principles

I have previously advised the Committee about these principles. In 2005 a distinguished group of international human rights experts met in Yogyakarta, Indonesia to outline a set of international principles relating to sexual orientation and gender identity. The result was the Yogyakarta Principles: a universal guide to human rights which affirm binding international legal standards with which all States should comply.

I draw to the attention of the Committee principle 2 – the rights to equality and non-discrimination – which provides, relevantly:

> *"Everyone is entitled to enjoy all human rights without discrimination on the basis of sexual orientation or gender identity. Everyone is entitled to equality before the law and the equal protection of the law without any such discrimination whether or not the enjoyment of another human right is also affected. The law shall prohibit any such discrimination and guarantee to all persons equal and effective protection against any such discrimination.*
>
> *Discrimination on the basis of sexual orientation or gender identity includes any distinction, exclusion, restriction or preference based on sexual orientation or gender identity which has the purpose or effect of nullifying or impairing equality before the law or the equal protection of the law, or the recognition, enjoyment or exercise, on an equal basis, of all human rights and fundamental freedoms. Discrimination based on sexual orientation or gender identity may be, and commonly is, compounded by discrimination on other grounds including gender, race, age, religion, disability, health and economic status.*
>
> *States shall: ...*
>
> *(c) adopt appropriate legislative and other measures to prohibit and eliminate discrimination in the public and private spheres on the basis of sexual orientation and gender identity;*
>
> *(d) take appropriate measures to secure adequate advancement of persons of diverse sexual orientations and gender identities as may be necessary to ensure such groups or individuals equal enjoyment or exercise of human rights. Such measures shall not be deemed to be discrimination;*
>
> *(e) in all their responses to discrimination on the basis of sexual orientation on gender identity, take account of the manner in which such discrimination may intersect with other forms of discrimination."*

Principle 6 – the right to privacy – provides relevantly:

> *"Everyone, regardless of sexual orientation or gender identity, is entitled to the enjoyment of privacy without arbitrary or unlawful interference, including with regard to their family, home or correspondence as well as to protection from unlawful attacks on their honour and reputation. The right to privacy ordinarily includes the choice to disclose or not to disclose information relating to one's sexual orientation or gender identity, as well as decisions and choices regarding both one's own body and consensual sexual and other*

relations with others. States shall:

(a) take all necessary legislative, administrative and other measures to ensure the right of each person, regardless of sexual orientation or gender identity, to enjoy the private sphere, intimate decisions, human relations...without arbitrary interference...

(f) ensure the right of all persons ordinarily to choose when, to whom and how to disclose information pertaining to their sexual orientation or gender identity, and protect all persons from arbitrary or unwanted disclosure, or thread of disclosure of such information by others."

The current provision is clearly not in accord with the Yogyakarta Principles as outlined above.

I am deeply heartened to see that there is an inquiry regarding other provisions of the *Births, Deaths and Marriages Registration Act*, but that is not a matter for this Bill.

Availability to give evidence

If sought by the Committee, I am available to give evidence, so as to assist the Committee in its deliberations.

Once again, thank you for giving me the opportunity to make this submission.

Yours faithfully

[redacted]

Stephen Page
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