

## Marrickville Legal Centre

Tim Wilson  
Australian Human Rights Commission  
GPO Box 5218  
SYDNEY NSW 2001

6 February 2015

BY EMAIL: [sogii@humanrights.gov.au](mailto:sogii@humanrights.gov.au)

Dear Mr Wilson

**RE: Sexual Orientation, Gender Identity and Intersex (SOGII) Rights  
Snapshot Report Consultation**

Thank you for the opportunity to provide input into the SOGII Rights Snapshot Report.

Marrickville Legal Centre is a community legal centre providing legal services to the residents of 12 Sydney local government areas. These areas cover the inner west, south and parts of southwest Sydney and have a combined population of over 1.1 million people. Our submission therefore focuses on examples of legislation and government policies that unduly restrict SOGII rights.

### **1. Support for LGBTIQ Network's submission**

Marrickville Legal Centre endorses the submission made by the Lesbian, Gay, Bisexual, Transgender, Intersex and Queer (LGBTIQ) Network of the National Association of Community Legal Centres (NACLC).

### **2. Marriage Equality**

In the interests of equality and non-discrimination, we strongly support marriage being legally available to all couples, regardless of sex, sexuality or gender identity. The Centre encourages the Australian Human Rights Commission (AHRC) to emphasise this issue in the final report.

### **3. Expunging homosexual sex-related convictions**

Marrickville Legal Centre supports the passage of legislation to erase the criminal records of homosexual men who were convicted for having consensual sex at a time it was illegal.

In uniformity with the LGBTIQ Network's submission, we submit that the AHRC advocate for the adoption of expungement schemes across Australia by which people convicted of consensual homosexual related offences can apply to have their criminal convictions expunged.

#### 4. Change of legal sex on birth certificates

Legislation exists in every State and Territory of Australia that provides for registration of a change to the official records of a person's sex.<sup>1</sup> In every Australian jurisdiction, except the Australian Capital Territory, a person is only eligible to apply for registration of a change of sex if evidence is available of having undergone some form of gender reassignment surgery.

The New South Wales provisions are illustrative of the barriers in order to register a change of sex. Section 32B of the *Births, Deaths and Marriages Registration Act 1995* (NSW) provides that in order to be eligible to register a change of sex an applicant must have undergone a sex affirmation procedure. An applicant must provide statutory declarations from two medical practitioners verifying that the applicant has undergone a sex affirmation procedure.<sup>2</sup> A "sex affirmation procedure" is defined as a surgical procedure involving an alteration of the person's reproductive organs.<sup>3</sup> This legislation necessitates individuals undergoing surgery before being able to register a change of sex, imposing an onerous and discriminatory burden on gender diverse and intersex people.

In contrast to the NSW legislation, ACT has recently reformed the legislative regime governing the legal change of sex. Following amendments in 2014, ACT legislation provides that a person may apply to alter the official record of their sex if the applicant has received appropriate clinical treatment for alteration of the person's sex or is an intersex person.<sup>4</sup> The 2014 amendments also had the effect of introducing a third option for recording sex on birth certificates for those who identify outside the male/female binary.<sup>5</sup> An "intersex person" is defined in section 169B of the *Legislation Act 2001* (ACT) as a person with physical, hormonal or genetic features that are either not fully female or fully male, a combination of male or female, or not female or male.

The current legal requirements relating to gender reassignment surgery are unachievable for many members of the sex and gender diverse community. For example, in *AB v State of Western Australia*,<sup>6</sup> the High Court referred to the fact

---

<sup>1</sup> *Births, Deaths and Marriages Registration Act 1997* (ACT) Part 4; *Births, Deaths and Marriages Registration Act 1995* (NSW) Part 5A; *Births, Deaths and Marriages Registration Act 1996* (NT); *Births, Deaths and Marriages Registration Act 2003* (Qld) Part 4; *Sexual Reassignment Act 1988* (SA) Part 4; *Births, Deaths and Marriages Registration Act 1999* (Tas) Part 4A; *Births, Deaths and Marriages Registration Act 1996* (Vic) Part 4A; *Gender Reassignment Act 2000* (WA) Part 3.

<sup>2</sup> *Births, Deaths and Marriages Registration Act 1995* (NSW) s 32C.

<sup>3</sup> *Ibid* s 32A.

<sup>4</sup> *Births, Deaths and Marriages Registration Act 1997* (ACT), ss 24-25. Under s 25(1)(a), the treatment may be provided by a Doctor or Psychologist.

<sup>5</sup> Birth Registration Statements in the ACT now enable a child's sex to be recorded as "Unspecified/ indeterminate/ intersex". People who wish to alter the birth register to record a change of sex may record their sex as "Male", "Female", "Unspecified", "Indeterminate", "Intersex" or "Unspecified / indeterminate / intersex".

<sup>6</sup> [2011] HCA 42, [15] (French CJ, Gummow, Hayne, Kiefel and Bell JJ).

that penis construction surgery (phalloplasty) is not performed in Australia, because of the high risks associated with this type of surgery and the low success rate. As a result, female to male transsexuals in Australia may face difficulties in satisfying the strict legal surgical requirement required in every jurisdiction except for ACT. Furthermore, many individuals wishing to have gender reassignment surgery may be unable to afford the procedure, because gender reassignment procedures are considered elective surgery under Medicare. Such individuals are therefore often forced to carry inconsistent identity documents, which causes them difficulty and mental distress when they are required to identify themselves. Consequently, these barriers create confusion and unfavourable treatment for gender and intersex diverse individuals.

Additionally, in *NSW Registrar of Births, Deaths and Marriages v Norrie*,<sup>7</sup> the High Court observed that an individual's gender might remain ambiguous, despite having had sex affirmation surgery.<sup>8</sup> This acknowledgment lends further support to the argument that having undergone reassignment surgery should not be a precondition to obtaining registration of a change of sex. These two recent decisions of the High Court also reflect a growing judicial acknowledgment of the fact that sexuality and gender identity should not be determined solely by reference to an individual's genitalia.

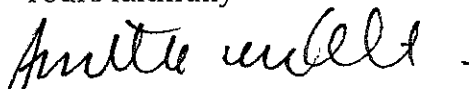
We submit that the relevant criterion for obtaining registration of a change of sex is not whether or not an individual has undergone gender reassignment surgery. We encourage the AHRC to recognise that the relevant criterion should be whether the individual genuinely identifies as intersex, or as a sex other than their registered sex, or as being in transition from one sex to another, or even – in light of the High Court's decision in *Norrie's* case – as having no sex. Furthermore, in concordance with ACT legislation, medical evidence to this effect from medical practitioners or psychologists who have supported an individual should be sufficient to enable the relevant Registrar to alter the applicant's official record of their sex.

**Recommendation:** Encourage the AHRC to highlight this crucial issue in the Report and advocate for reform across all Australian jurisdictions.

## 5. Conclusion

If you have any questions regarding this submission, please do not hesitate to contact us on 02 9559 2899.

Yours faithfully



Annette van Gent  
Principal Solicitor

<sup>7</sup> [2014] HCA 11.

<sup>8</sup> *NSW Registrar of Births, Deaths and Marriages v Norrie* [2014] HCA 11, [30] (French CJ, Hayne, Kiefel, Bell and Keane JJ).