



MONASH University
Castan Centre for Human Rights Law

**Castan Centre for Human Rights Law
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**Submission to Queensland Department of Justice and
Attorney-General**

**Registering life events: Recognising sex and gender
diversity and same-sex families: Review of the *Births,
Deaths and Marriages Registration Act 2003* (Qld)**

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1. Introduction

The Castan Centre for Human Rights Law welcomes the Queensland Government's commitment to review legislation regulating the registration of births deaths and marriages, in light of contemporary social norms concerning family formation and gender identity. This submission responds to the first in an anticipated series of discussion papers issued by the Queensland Department of Justice and Attorney General.

This submission endorses legislative reform that permits a child's parents to decide how they describe themselves on their child's birth or adoption registration. It addresses Part 10 of the Discussion Paper, concerning recording same-sex families on the register.

While a majority of children are still likely to be born to parents who identify as a traditional heterosexual couple, an increasing number of children are born into, or live in, diverse family arrangements including those involving same-sex parents.¹ Additionally, Queensland law now permits individuals to record a change in sex following sex reassignment,² and the 2017 amendments to the *Marriage Act* now recognise same-sex marriages at law.

These social and legal changes are not yet reflected in the Act, as recognised by the Discussion Paper.³ Instead, s10A of the Act limits parental information in three ways:

- a) There can be only two parents recorded;⁴
- b) One parent must be designated as either father or mother; and
- c) There can be only one father and only one mother.

None of the terms 'mother', 'father', or 'parent' are defined in the Act. The limitations on parental designation therefore seem arbitrary, serving no particular purpose.

This submission contends that these limitations have four inter-related adverse effects. They:

1. breach the child's human rights;
2. breach the parents' human rights;
3. reflect an outdated construction of social institutions; and
4. fail to uphold the multiple roles of birth registration and birth certificates.

For these reasons, we strongly recommend that the legislation be amended, as set out in Section 6 below, to better protect the human rights of children and parents in same-sex families.

2. Child's Human Rights

Compared with previous regimes for birth registration, provision in the Act for registration of same-sex parents meets many human rights principles found in the *Convention on the Rights of the Child* (CRC),⁵ recognising the rights of the child to:

¹ For a discussion of modern family structures, see: Family Law Council, Report on Parentage and the Family Law Act (2013)1-4.

² Under Part 4 of the *Births Deaths and Marriages Registration Act 2003* (Qld) ('Act').

³ Department of Justice and Attorney-General, Registry of Births Deaths and Marriages, 'Registering life events: Recognising sex and gender diversity and same-sex families Review of the Births, Deaths and Marriages Registration Act 2003 (Qld)' Discussion Paper 1 (March 2018) ('Discussion Paper').

⁴ This aspect of the legislation will be the topic of a later discussion paper – see Discussion Paper, 14. For the record, this submission supports recording of more than two parents. When the relevant discussion paper is issued, we intend to make a submission accordingly.

⁵ *Convention on the Rights of the Child*, 20 Nov 1989, 1577 UNTS 3 ('CRC'). There are currently 140 signatories and 194 parties to the treaty.

- a) Know and be cared for by their parents;⁶
- b) Have their rights respected without discrimination, including as to their parents' birth or other status⁷—which includes the sexual orientation of their parents;⁸
- c) preserve their identity, including family relations as recognised by law;⁹ and
- d) both parents share common responsibility.¹⁰

The overarching measure for establishing whether decisions conform to the CRC, is that they are made in the best interests of the child.¹¹ This measure is relevant to the Act — namely that any amendments must reflect what is in the best interests of the child.

While permitting two same-sex parents to appear in a child's birth registration goes some way to satisfying a child's human rights, the current limitations fail to give them full expression. In particular where a same-sex couple self-identifies as mother and mother, or father and father — or even as parent and parent:

- a) denying the self-identified expression of filial relationship marks out that child as different from the default heterosexual coupling. This is discriminatory in breach of Article 2 as it privileges those statuses that conform to traditional (heterosexual) gender norms.
- b) The designation on birth registration fails to reflect that child's, and their family's, own identity. The child is denied recognition of their family on their birth registration in breach of Article 8 of the CRC.

3. Parents' Right to Non-discrimination

The limitations in s10A of the Act on parents' self-identification nonetheless permit registration of same-sex parents.

Additionally, Part 4 of the Act accommodates sex reassignment, providing for entry into the birth register of a person's reassigned sex. Despite current problems with these provisions¹² their existence further evidences the law's recognition of the limitations of traditional conceptions of sex and gender. To this extent, mandating self-identification as 'mother' or 'father', and prohibiting two mothers or two fathers, runs contrary to the logic of the Act's own schema.

As illustrated by the Explanatory Notes for the Births Deaths and Marriages Registration Bill (Qld) 2003,¹³ the Act was intended to introduce reform that permitted recognition of a child's father in circumstances where the mother had omitted him from the registration record. Such a provision accords recognition of an explicit filial relationship, implicitly reflecting one of the Act's purposes. To

⁶ Article 7(2), CRC.

⁷ Article 2, CRC.

⁸ Comm on the Rights of the Child, General Comment No 4: Adolescent Health and Development in the Context of the Convention of the Rights of the Child, para 6, UN Doc CRC/GC/2003/4 (1 July, 2003); Comm on the Rights of the Child, General Comment No 3: HIV/AIDS and the Rights of the Child, para 8, UN Doc CRC/GC/2003/3 (17 March, 2003).

⁹ Article 8, CRC.

¹⁰ Article 18, CRC. This would be met by government measures that '[support] and [promote] the viability of joint parenting'—see Rachel Hodgkin and Peter Newell, *Implementation Handbook for the Convention on the Rights of the Child* (3rd ed, United Nations Children's Fund, 2007), 236.

¹¹ Article 3, CRC. For a full discussion on these rights, see Paula Gerber and Phoebe Lindner, 'Birth Certificates for Children with Same-Sex Parents: A Reflection of Biology or Something More?' (2015) 18(2) *New York University Journal of Legislation and Public Policy* 225.

¹² The Discussion Paper deals with aspects of this including the hurdle to satisfying the requirements to be recognised as 'reassigned', and the current limitation on recording reassignment to those who are not married. This latter provision must now change consequent on the *Marriage Act*.

¹³ Explanatory Notes, Births Deaths and Marriages Registration Bill (Qld) 2003 ('Bill'), 3.

deny same-sex parents the opportunity to record an equivalent explicit filial relationship discriminates on the basis of sexual orientation.

Despite already catering for same-sex parents, and providing for sex reassignment, the Act nonetheless forces same-sex parents to choose an ascribed parental designation that may differ from their own identified relationship with the child. To do so discriminates against same-sex parents on the basis of their sexual orientation with no justifiable rationale.

4. Contemporary Social Institutions

In limiting birth registration to only one mother and one father, the Act fails to accord with contemporary family structures. Doing so leaves the statistical purposes of the Act out of step with contemporary social institutions.

The Explanatory Notes for the Bill observed the restrictive nature of the superseded legislation in terms of supporting 'medical and other research in the public interest'.¹⁴ Collection and dissemination of statistical information is an express object of the Act.¹⁵ In prohibiting the accurate recording of filial relationships, the Act provides for the collection of incorrect information. This runs counter to its express object. It is in the public interest that government and researchers have access to accurate statistics concerning contemporary family structures. Permitting parents to record their self-determined designation promotes accurate record-keeping and aids in public interest research.

5. Roles of Birth Registration

State-run birth registration serves a number of purposes including psycho-social identity formation.¹⁶ Information from the register presented in a birth certificate provides a person with 'all-important proof of their name and their relationship with their parents and the state'.¹⁷ So important is birth registration, that Kertzer and Arel suggest that 'the practice of inscribing cultural categories on personal identification documents can clearly affect an individual's own sense of identity'.¹⁸

Beyond purely legal questions of parentage, where a birth certificate fails to reflect accurately the make-up of a family according to members' own conception of that family and its relationships, there are likely to be consequences to the individual child's sense of personal identity. It is not only legal recognition of parentage (despite its limited form in the Act), but the recording of express filial descriptors — mother and father — where they are appropriate, that represent 'a public validation of the social realities of their families ... attract[ing] not only legal rights and obligations, but also the corroboration of a particular social status.'¹⁹

¹⁴ Ibid 3.

¹⁵ Section 3(d).

¹⁶ See, eg, discussion in Paula Gerber and Phoebe Lindner, 'Birth Certificates for Children with Same-Sex Parents: A Reflection of Biology or Something More?' (2015) 18(2) *New York University Journal of Legislation and Public Policy* 225.

¹⁷ Liz Brooker and Martin Woodhead (eds), *Developing Positive Identities: Diversity and Young Children* (The Open University, 2008), 2.

¹⁸ David I Kertzer and Dominique Arel, 'Censuses, Identity Formation and the Struggle for Political Power' in David I Kertzer and Dominique Arel (eds), *Census and Identity: The Politics of Race, Ethnicity and Language in National Censuses* (Cambridge University Press, 2002) 1, 5.

¹⁹ Adiva Sifris, 'The Legal Recognition of Lesbian-Led Families: Justifications for Change' (2009) 21 *Child and Family Law Quarterly* 197, 199.

The birth certificate, through birth registration, declares the holder's identity and permits the holder to identify themselves in a particular way.²⁰ Providing only partial acknowledgement of parental relationships without scope for tailoring the parents' own parental designations, fails to accord with the best interests of the child in identity formation.

6. Recommendations

1. The Act be amended to permit same-sex parents to choose how they are recorded on a birth or adoption registration.
2. Parents should be entitled to self-select the descriptors that accord with their own identification of their relationship with the child. Any combination of mother, father, and parent should be permitted.

²⁰ See, eg, Paula Gerber and Phoebe Lindner, 'Modern Families: Should Children Be Able to Have More than Two Parents Recorded on Their Birth Certificates?' (2015) 5(1) *Victoria University Law and Justice Journal* 34; Gerber and Lindner, above n 11.