

# Childrens Court Amendment Rule 2024

## Human Rights Certificate

### Prepared in accordance with Part 3 of the *Human Rights Act 2019*

In accordance with section 41 of the *Human Rights Act 2019*, I, Yvette D'Ath MP, Attorney-General and Minister for Justice and Minister for the Prevention of Domestic and Family Violence, provide this human rights certificate with respect to the *Childrens Court Amendment Rule 2024* made under the *Childrens Court Act 1992*.

In my opinion, the *Childrens Court Amendment Rule 2024* is compatible with the human rights protected by the *Human Rights Act 2019* (HR Act). I base my opinion on the reasons outlined in this statement.

## Overview of the Subordinate Legislation

### Background to the Childrens Court Amendment Rule 2024

On 14 June 2023, the Legislative Assembly passed the *Births, Deaths and Marriages Registration Act 2023 Act* (new Act). The new Act will repeal and replace the existing *Births, Deaths and Marriages Registration Act 2003* to ensure registration services remain relevant, responsive and contemporary.

The most extensive change introduced by the new Act is a new framework to strengthen the legal recognition of trans and gender diverse people. Under this framework a person aged 16 years and over may apply directly to the Registry of Births, Deaths and Marriages (RBDM) to alter their record of sex by providing a declaration that the person lives, or seeks to live, as a person of that sex.

### *Acknowledgement of sex framework in the new Act that applies to persons under 16*

For children under 16, the new Act provides two alternative pathways.

The first, an administrative path, enables the parents, or one parent or person with parental responsibility for a child (in certain circumstances), to apply directly to RBDM to alter the record of the child's sex.

The second, a path through the Childrens Court, allows either:

- (a) an eligible person for the child; or
- (b) a child of at least 12 years but less than 16 years that does not have the support of their parents or person(s) with parental responsibility;

to apply to the Childrens Court for an order directing the Registrar to accept an application to alter the record of sex of the child in the relevant child register.

Both pathways (administrative and court) allow for a concurrent application to be made that seeks approval of a proposed change of first name for the child.

An alternative pathway is provided for a child born outside of Queensland through an application for a recognised details certificate. The process to obtain this certificate largely mirrors the framework for an acknowledgement of sex application. A key difference is that a child who was born in another Australian State or Territory, cannot apply to change their name at the same time. In this situation, a change of name must be sought from the originating jurisdiction where the person's birth or adoption was registered.

#### *Dispensation of consent of a stated party*

Part 5, Division 4 of the new Act provides an avenue for a relevant person to apply to the Childrens Court for an order dispensing with the need for the application to be made with the consent of a stated party (a dispensation order).

The Childrens Court may make a dispensation order if —

- the relevant person cannot locate the party after making all reasonable enquiries; or
- the conception of the child was a result of an offence committed by the party; or
- QCAT, a tribunal of another jurisdiction, or a Queensland or non-Queensland court has made an order that the other parent doesn't have capacity to give consent; or
- if the court is satisfied it is in the child's best interests to make the order.

Similar to the process described above, if a dispensation order is made, the supportive parent may then make an application to the Registrar and provide a copy of the dispensation order made by the Childrens Court to the Registrar.

#### The Childrens Court Amendment Rule 2024

The *Childrens Court Amendment Rule 2024* (Amendment Rule) amends the *Childrens Court Rules 2016* (CC Rules).

Section 7(1) of the *Childrens Court Act 1992* (the Act) provides that the procedure of the Childrens Court is governed by the CC Rules.

Section 7(2) of the Act provides that the CC Rules may be made by the Governor in Council with the agreement of the President of the Childrens Court.

Under section 7(3) of the Act, a rule may make a provision about any matter that is:

- required or permitted to be prescribed under a law giving jurisdiction to the Childrens Court; or
- necessary or convenient to be prescribed for the carrying out or giving effect to a law giving jurisdiction to the Childrens Court.

Section 69 of the new Act confers jurisdiction on the Childrens Court.

The purpose of the Amendment Rule is to facilitate the Childrens Court jurisdiction introduced in Part 5 of the new Act, by amending the CC Rules to bring acknowledgement of sex applications started under the new Act, including an appeal, into scope of the CC Rules and to provide procedural guidance to support particular aspects of the new jurisdiction.

The new BDMR Act automatically commences on 24 June 2024.

The Amendment Rule is proposed to commence at the same time as the new Act.

## **Human Rights Issues**

### **Human rights relevant to the subordinate legislation (Part 2, Division 2 and 3 *Human Rights Act 2019*)**

In my opinion, the human rights under the HR Act that are relevant to the Amendment Rule are:

- recognition and equality before the law (section 15);
- privacy and reputation (section 25);
- protection of families and children (section 26); and
- right to a fair hearing (section 31).

The nature and scope of these rights are considered below, along with considerations of how each right may be promoted or limited by the Amendment Rule.

### **Consideration of human rights promoted**

#### *Protection of families and children*

The right under section 26 of the HR Act protects the right of every child, without discrimination, to the protection that is needed by the child and is in the child's best interests. This protection of children recognises the special vulnerability of children, and the additional protections that children are owed by the State. The right requires the State to ensure the survival and development of every child to the maximum extent possible, and to take into account the best interests of the child as an important consideration in all actions affecting a child.

The rights protected in section 26 of the HR Act are based on those protected in Article 3 of the Convention on the Rights of the Child and Article 24(1) of the International Covenant on Civil and Political Rights (ICCPR).

The Amendment Rule generally promotes the right of children to protection under section 26 of the HR Act by:

- allowing a child capable of forming their own views, to express those views and participate in acknowledgement of sex proceedings; and

- requiring the court to consider how a child’s best interests are or will be affected directly or indirectly by any directions, orders or decisions made by the court.

### *Recognition and equality before the law*

This right is a stand-alone right that permeates all human rights. Section 15 of the HR Act recognises that every person has a right to recognition as a person before the law; is equal before the law and is entitled to the equal protection of the law without discrimination; has the right to equal and effective protection against discrimination; and that measures taken for the purpose of assisting or advancing persons or groups of persons disadvantaged because of discrimination do not constitute discrimination.

In 2007, the Human Rights Committee<sup>1</sup> clarified the jurisprudence on the right to equality before courts and tribunals and to a fair trial under Article 14 of the ICCPR,<sup>2</sup> stating that:

- the right to equality before courts and tribunals means that “the same procedural rights are to be provided to all the parties unless distinctions are based on law and can be justified on objective and reasonable grounds, not entailing actual disadvantage or other unfairness to the defendant”;<sup>3</sup>
- the principle of equality between parties applies in criminal and civil proceedings.<sup>4</sup>

English is the language in which proceedings in Australian courts and tribunals are conducted. However, where a person before the courts has limited proficiency in English, the provision of translation or interpreting services is necessary in order to meet the requirements of procedural fairness and ensure a fair trial in accordance with human rights.

Queensland’s increasingly linguistically diverse society means that proactive steps are essential to ensuring the availability and competency of translators and interpreters in languages other than English, particularly in the specialised environment of courts.

New rule 18A provides that a document filed in the court that is written in a language other than English, requires a certified translation of the document to be filed and signals a proactive step towards meeting the requirements of procedural fairness and a fair trial.

It may be considered that including this requirement imposes an additional obligation on someone from a non-English speaking country and could limit the right to equality before the law by resulting in the different treatment of parties to proceedings depending on their ethnicity. However, the HR Act is clear that such measures taken for the purpose of assisting or advancing persons or groups of persons disadvantaged because of discrimination do not constitute discrimination.

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<sup>1</sup> The Human Rights Committee is the treaty body attached to the ICCPR. Australia has acceded to the First Optional Protocol that confers jurisdiction on the Human Rights Committee of the United Nations to receive complaints made by Australian citizens concerning breaches of the covenant once domestic avenues of redress have been exhausted.

<sup>2</sup> Human Rights Committee, General Comment No 32: Article 14: Right to Equality Before Courts and Tribunals and to a Fair Trial, 90th session, UN Doc CCPR/C/GC/32 (23 August 2007).

<sup>3</sup> Ibid [13].

<sup>4</sup> Ibid.

The purpose of this requirement is to ensure that a party to the proceeding whose first language may not be English, is not prevented from placing evidence before the court. It also ensures that the Childrens Court receives information or evidence required in a way that allows it to decide an application having received all the evidence it requires to make a decision.

The Amendment Rule promotes the right to recognition and equality before the law under section 15 of the HR Act by ensuring that a person whose first language is not English is afforded procedural fairness by ensuring a person with limited proficiency in English is able to participate in proceedings in a meaningful way.

For the reasons above, I consider that new rule 18A does not limit the right to recognition and equality before the law. In my opinion, the rule does not constitute discrimination because it represents a positive measure taken for the purpose of assisting or advancing persons from non-English speaking backgrounds.

### *Right to a fair hearing*

Section 31(1) of the HRA provides for all individuals to have criminal charges or civil proceedings decided by a competent, independent and impartial court or tribunal following a fair, public hearing. The content of the right to a fair hearing contains many elements, including, relevantly:

- equal access to, and equality before, the courts;
- the right to legal advice and representation; and
- the right to procedural fairness.

The right to a fair hearing affirms the right of all individuals to procedural fairness and natural justice when coming before a court or tribunal.<sup>5</sup> It guarantees that proceedings must be heard and decided by a competent, impartial, and independent court or tribunal after a fair and public hearing, and that all judgments or decisions are publicly available.

Broadly, this right ensures a party has a reasonable opportunity to put their case in conditions that do not place them at a substantial disadvantage compared to the other party, and also embraces principles of unimpeded access to courts, and the open and transparent administration of justice. What constitutes a ‘fair’ hearing depends on the facts of the case and requires the weighing of a number of public interest factors including the rights of the parties.

The Amendment Rule promotes the right to a fair hearing by facilitating the conduct of fair hearings by setting out the practices and procedures to be followed in acknowledgement of sex proceedings, such as the procedures for parties to be served with court documents to ensure they receive and can respond to material the court may take into account.

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<sup>5</sup> Human Rights Committee, General Comment No 32: Article 14: Right to Equality Before Courts and Tribunals and to a Fair Trial, 90th session, UN Doc CCPR/C/GC/32 (23 August 2007).

The Amendment Rule also promotes equality of access to the court by the right of a person, including a child, who has a right to be heard in a proceeding to conduct the proceeding on their own behalf or to be represented by a lawyer.

**Consideration of reasonable limitations on human rights (section 13 *Human Rights Act 2019*)**

In my opinion, the Amendment Rule limits the right to privacy and reputation (section 25).

***Collection of personal information on court forms and required documents to be filed***

(a) the nature of the right

Section 25(a) of the HR Act provides, amongst other things, that a person has the right to not have his or her privacy, family, home, or correspondence unlawfully or arbitrarily interfered with. Section 25(b) of the HR Act provides that a person has the right to not have their reputation unlawfully attacked. The right to privacy is broad and protects the individual against all interferences with their individual identity, including gender. It covers privacy as it pertains to the collection of personal information. Only lawful and non-arbitrary intrusions may occur upon privacy and reputation.

The Amendment Rule will arguably limit the right to privacy in the following ways:

- through the collection of personal information on court forms. For example: information collected from an applicant when completing an originating application form or an affidavit. This includes information disclosed about a child's sex and proposed altered sex; and
- by imposing an obligation to file particular documents that may be perceived to be documents of a personal or private nature, together with an originating application. For example, a copy of the birth certificate or a copy of a domestic violence order, if any, including domestic violence orders from a corresponding jurisdiction and other documents relevant to the proceedings. A document 'relevant to the proceeding' includes an order or a registered or approved agreement under the *Family Law Court 1975* (Cwlth).

(b) the nature of the purpose of the limitation, including whether it is consistent with a free and democratic society based on human dignity, equality and freedom

To start an acknowledgement of sex proceeding in the Childrens Court, a person must file an acknowledgement of sex application (an originating application in the approved form). The *Childrens Court Rules 2016* set out the information an originating application must contain and where, the completed application is to be filed.

This procedure is consistent with other types of proceedings that are started in the Childrens Court of Queensland, including child protection proceedings and adoption proceedings.

(c) the relationship between the limitation and its purpose, including whether the limitation helps to achieve the purpose

The purpose of collecting personal information through court forms is to ensure that the applicant and parties to the proceedings, if relevant, provide the necessary and relevant information required for the court to carry out its role, to receive and hear the facts from the parties. This purpose ensures that the court has the necessary relevant information to help resolve and, if necessary, determine proceedings that come before it.

The collection of personal information supports the protection of the best interests of the child by ensuring that the court is presented with relevant information and evidence about the child when deciding an acknowledgment of sex application.

The limitation on the right to privacy through the requirement to provide personal information to the Childrens Court will achieve its purpose as it will mean the court can make an informed decision of what is in the child's best interests.

(d) whether there are any less restrictive and reasonably available ways to achieve the purpose

No less restrictive and reasonably available ways to achieve the purposes discussed under (b) above, have been identified.

(e) the balance between the importance of the purpose of the limitation and the importance of preserving the human right, taking into account the nature and extent of the limitation

The relevant provisions in the Amendment Rule that require disclosure of personal information on court forms and for particular documents (of a personal nature) to be filed with an originating application, strike a balance between limiting the right to privacy and reputation with considerations of what is in a child's best interests.

On balance, it is considered that the benefit of collecting personal information about or obtaining relevant documents, from the parties to an acknowledgment of sex proceeding, outweighs the potential limitations on the right to privacy and reputation.

Overall, any limitations on the right to privacy and the protection of families and children are reasonable and demonstrably justifiable under section 13 of the HR Act.

## Conclusion

In my opinion, I consider that the *Childrens Court Amendment Rule 2024* is compatible with the *Human Rights Act 2019* because it limits human rights only to the extent that is reasonable and demonstrably justified in accordance with section 13 of the Act.

**YVETTE D'ATH MP**  
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