



LAW REFORM COMMISSION
of
WESTERN AUSTRALIA

PROJECT 108

DISCUSSION PAPER

Review of Western Australian legislation in
relation to the recognition of a person's sex,
change of sex or intersex status

THE LAW REFORM COMMISSION OF WESTERN AUSTRALIA

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PROJECT 108 DISCUSSION PAPER

TABLE OF CONTENTS

Chapter 1 Introduction.....	7
1.1 Terms of Reference.....	7
1.2 Background of Reference	8
1.3 Scope of Reference	8
1.4 Methodology.....	9
(a) Consultations.....	9
(b) Next steps.....	9
Chapter 2 The Commission’s Approach	10
2.1 Terminology.....	10
2.2 Key considerations for reform	12
(a) Are sex and/or gender classifications necessary?.....	12
(b) What sex and/or gender classifications are appropriate?.....	12
(c) When are classifications of sex and/or gender relevant?	12
(d) What should be the role of the Gender Reassignment Board?.....	12
(e) What should be the process for changing sex and/or gender classification?.....	13
(f) What process should apply in relation to minors?	13
2.3 Principles informing the Commission’s approach	14
Chapter 3 Reasons for review	16
3.1 Striving for common ground	16
(a) The sex binary is not absolute.....	16
(b) Our community includes intersex, trans and gender diverse people	16
(c) Intersex, trans and gender diverse people are recognised as having a range of health experiences	17
(d) Intersex, trans and gender diverse people face a range of challenges	17
(e) Birth certificate content has changed	17
(f) It is legally possible to change your sex or gender	18
(g) Other Australian jurisdictions have already changed their law	18

3.2	Medical and psychosocial reasons for review	18
3.3	Medical context.....	19
	(a) Pathologisation	19
	(b) Normalisation	19
	(c) Healthcare discrimination	20
	(d) Health performance indicators.....	20
3.4	Psychosocial context.....	21
	(a) Mental health	21
	(b) Discrimination and bullying	22
	(c) Social footprint.....	23
	(d) Collecting sex data at birth	23
	(e) Collecting sex data after birth.....	24
	(f) Legal or practical reasons for requiring sex classifications on legal identification documents.....	24
3.5	Court decisions on medical procedures for trans or intersex minors	26
	(a) Medical procedures on minors.....	26
	(b) Court approval for certain medical procedures.....	26
	(c) Cases involving trans and intersex minors	27
	(d) Medical procedures involving intersex minors.....	27
	(e) Medical procedures involving trans minors	28
	Chapter 4 Western Australian context.....	30
4.1	Gender Reassignment Act 2000 (WA).....	30
	(a) Board	30
	(b) Applying for recognition certificates	30
	(c) Effect of recognition certificates	33
	(d) Other provisions.....	34
4.2	Births, Deaths and Marriages Registration Act 1998 (WA)	34
	(a) The role of the Registrar	34
	(b) Birth notification and registration process	34
	(c) Sex and/or gender classification	35
4.3	Gender Reassignment Board in practice.....	37
4.4	Key issues for consideration.....	38

Chapter 5 Australian context	39
5.1 Commonwealth	39
(a) <i>Sex Discrimination Act 1984</i> (Cth).....	39
(b) Australian Guidelines on the Recognition of Sex and Gender	41
(c) Australian Passports approach to gender	43
5.2 Other States and Territories	41
(a) New South Wales: <i>Norrie’s case</i>	42
(b) Australian Capital Territory: new legislation	44
(c) South Australia: new legislation.....	45
(d) Victoria: proposed Bill.....	46
(e) Tasmania: Equal Opportunity Tasmania paper.....	48
(f) Queensland	49
(g) Northern Territory.....	50
Chapter 6 International context	51
6.1 Jurisdictions reviewed	51
6.2 Other jurisdictions of note.....	51
Chapter 7 Potential model for reform and conclusion	52
7.1 Introduction.....	52
(a) Possible model for reform.....	52
(b) Intended outcomes.....	52
(c) Consultation	52
7.2 The important distinction between sex and gender	52
(a) What is the difference between sex and gender?	52
(b) Statutory confusion.....	53
(c) What changes?.....	53
(d) What information is relevant?	54
(e) Way forward	54
7.3 Important information for preparing submissions	55
7.4 Summary of current process and proposed model.....	56
7.5 Registration of birth sex.....	62
(a) Recording, notification and registration of sex at birth	62
(b) Sex classification on birth certificates.....	65

7.6	Documentary proof of sex and gender	66
	(a) Documentary proof of gender	66
	(b) Documentary proof of sex.....	66
7.7	Application for Gender Identity Certificate (adults)	67
	(a) Application to Registrar for Gender Identity Certificate.....	67
	(b) Available gender classifications	67
	(c) Application for first Gender Identity Certificate	68
	(d) Application for subsequent Gender Identity Certificate (same gender as previous certificate)	69
	(e) Application for subsequent Gender Identity Certificate (different gender to previous certificate).....	70
	(f) Limit on the number of applications to change the gender on their Gender Identity Certificate.....	71
	(g) Process for people born outside of Western Australia.....	72
7.8	Application for Gender Identity Certificate (minors).....	73
	(a) Application process for first Gender Identity Certificate for a minor	73
	(b) Application for subsequent Gender Identity Certificate for a minor (same gender as previous certificate)	74
	(c) Application for subsequent Gender Identity Certificate for a minor (different gender to previous certificate).....	74
	(d) Available gender classifications	74
	(e) Dispute resolution process (where one or more parents do not provide statutory declarations consenting to the application)	74
7.9	Proof of Sex Certificate.....	76
7.10	Other considerations.....	77
	(a) <i>Equal Opportunity Act 1984 (WA)</i>	77
	(b) Consequential legislative amendments	77
	Glossary and defined terms	78
	(a) Glossary	78
	(b) Defined terms.....	81
	Appendix 1 – Stakeholders consulted on a preliminary basis	
	Appendix 2 – Comparison of legislation across Australian jurisdictions.....	
	Appendix 3 – Comparison of legislation across international jurisdictions	

INTRODUCTION

1.1 Terms of Reference

On 16 January 2018 the Attorney-General referred a project to the Law Reform Commission of Western Australia (**Commission**) with Terms of Reference requiring the Commission to review and report on the *Gender Reassignment Act 2000 (WA)* (**GR Act**) and the *Births, Deaths and Marriages Registration Act 1998 (WA)* (**BDMR Act**).

On 19 February 2018, the Attorney-General amended the Terms of Reference to state:

The [Commission] is to review and report on the inconsistencies between Western Australian and Commonwealth legislation in relation to the recognition of a person's sex, change of sex or intersex status.

In carrying out its review, the Commission should examine and make recommendations as to any legislative reform necessary to the Gender Reassignment Act 2000 (WA) and the Births, Deaths and Marriages Registration Act 1998 (WA) to improve the process by which a person's change of sex or a person's intersex status is recognised by law in Western Australia and any consequential amendments including:

- a. *whether another category for classification of sex should be introduced and how any new category should be designated;*
- b. *whether the role of the Gender Reassignment Board should be retained, or whether the Registrar of Births, Deaths and Marriages, or another person or body, should have responsibility for registering change of sex or intersex status;*
- c. *what criteria should be used to determine whether a change of sex or intersex status should be registered and what evidence is necessary to establish that criteria;*

- d. *any approval requirements which should apply in relation to applications by children to register change of sex or intersex status, including issues of parental consent, disputes between parents, and whether the child should be required to give informed consent; and*
- e. *any other related matter.*

Accordingly, the Commission is to consider inconsistencies between Western Australian and Commonwealth legislation in relation to the recognition of a person's 'sex', 'change of sex' or 'intersex status' (in the last case, as described in the Terms of Reference but referred to in this report as issues faced by intersex people or relating to sex characteristics).

The Commission's Terms of Reference expressly reference review of the GR Act and the BDMR Act but are otherwise broad in scope. They require the Commission to consider legislative reform to improve the process by which a person's change of sex or gender, and status relating to sex characteristics, is legally recognised in Western Australia.

INTRODUCTION

1.2 Background to Reference

Since the GR Act and the BDMR Act were introduced, there have been legal, medical and social developments relevant to understandings of sex and gender identity.¹

The BDMR Act was based on a Model Law endorsed by the Standing Committee of Attorneys-General and was designed to create legislative consistency across the different Australian States and Territories. Since the enactment of the BDMR Act in 1998, a number of Australian State and Territory jurisdictions have amended their legislation to accord with changing community values and expectations.² Both the GR Act and the BDMR Act have been subject to minor and/or technical amendments since their enactment but have not been comprehensively reviewed in relation to issues of sex and gender since their commencement.³

In 2017, the Australian Federal government undertook a nation-wide survey, called the Australian Marriage Law Postal Survey, to gauge community attitudes with respect to legalising same-sex marriage. The survey resulted in the legalisation of same-sex marriage at the Commonwealth level.⁴ While issues relating to sexuality and sexual orientation do not form part of this review, the results of this survey appear to indicate a shift in community attitudes and understanding, reflected in the challenging of traditional social customs.

It is appropriate to consider the ways in which the GR Act and the BDMR Act accord with current Commonwealth laws and policies regarding sex characteristics and gender identity,⁵ as well as relevant international human rights principles and law.⁶

1.3 Scope of Reference

The Commission is required to review and report on inconsistencies between Western Australian and Commonwealth legislation in relation to the recognition of a person's sex; changes of sex and/or gender classification; and status relating to sex characteristics. This includes giving consideration to issues relating to both sex and gender, including those issues that affect intersex, trans and gender diverse people.

The Commission recognises that sex and gender are different concepts. The Commission also acknowledges the diverse experiences of individuals within the respective intersex, trans and gender diverse communities.

While there are many challenges faced by these communities, the primary focus of this review is upon the legal recognition, registration or change of a person's sex and/or gender status, and status relating to sex characteristics.

The Commission will not be considering issues relating to sexuality and sexual orientation.

¹ Further detail regarding medical and psychosocial developments is provided in Chapter 3.

² The reforms across different Australian jurisdictions are explored in Chapter 5 and are summarised in table form in Appendix 2.

³ The Gender Reassignment Amendment Bill 2015 (WA) proposed to abolish the Gender Reassignment Board and confer its function of issuing recognition certificates on the State Administrative Tribunal, but this Bill was not enacted.

⁴ *Marriage Amendment (Definition of Religious Freedoms) Act 2017* (Cth).

⁵ The *Sex Discrimination Act 1984* (Cth) was amended in 2013 to include protections against unlawful discrimination against a person on the grounds of sexual orientation, gender identity and intersex status: *Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Act 2013* (Cth). See also Australian Government Attorney-General's Department's *Guidelines on the Recognition of Sex and Gender* (2nd ed, 2015).

⁶ See *The Yogyakarta Principles: Principles on the application of international human rights law in relation to sexual orientation and gender identity* (March 2007); Drafting Committee formed by the International Service for Human Rights and ARC International, *The Yogyakarta Principles plus 10: Additional principles and state obligations on the application of international human rights law in relation to sexual orientation, gender identity, gender expression and sex characteristics to complement the Yogyakarta Principles* (November 2017). Australian representatives are signatories to both the Yogyakarta Principles and the Yogyakarta Principles plus 10.

INTRODUCTION

In undertaking this review, the Commission will consider relevant Australian and international legal developments, both in legislation and case law.

While this Discussion Paper may consider issues which fall within the responsibilities of the Commonwealth government, such as passports, Centrelink payments and issues relating to parental responsibility for children under the *Family Law Act 1975* (Cth), it is outside the scope of this review (and the capacity of the Commission) to make recommendations regarding reform to Commonwealth legislation.

1.4 Methodology

(a) Consultation

In order to prepare this Discussion Paper, the Commission engaged with several stakeholders on a preliminary basis in an effort to identify potential issues, inconsistencies and recommendations. As a result of this engagement, the Commission met with a number of individuals and organisations, while others provided the Commission with a written response.⁷ Given the limited time available before releasing this Discussion Paper, the Commission was not able to engage with all interested parties.

The Commission is grateful to those individuals and organisations who generously shared their experiences and perspectives in the short timeframe available. Their collective input was invaluable in the drafting of this Discussion Paper.

(b) Next steps

The Commission welcomes your submission and response.

Anyone interested in this review now has the opportunity to make a submission in response to this Discussion Paper, including those who may already have been approached by the Commission. A number of issues and questions are set out in this Discussion Paper to guide those wishing to make a submission. All submissions will be carefully considered.

The Commission may also seek to directly engage with relevant stakeholders prior to the finalisation of its recommendations in the Final Report.

Please send your submission to the email address: lrcwa@justice.wa.gov.au

or alternatively to

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Law reform is a public process. The Commission assumes that any submissions on or responses to this Discussion Paper are not confidential. The Commission may quote from or refer to your comments in whole or in part and may attribute them to you, although will usually discuss comments generally and without attribution. If you would like your comments to be treated confidentially, please clearly identify which information in your submission is confidential and the Commission will endeavour to protect that confidentiality, subject to the Commission's other legal obligations.

⁷ A list of the stakeholders who the Commission contacted or consulted with prior to the release of the Discussion Paper is set out in Appendix I.

CHAPTER 2. THE COMMISSION'S APPROACH

2.1 Terminology

The Commission acknowledges that challenges affecting the intersex, trans and gender diverse communities are highly personal. It also acknowledges that as language evolves over time, terminology may mean different things to different people. For these reasons, the Commission seeks to be both intentional and inclusive in the language it uses.

As outlined in Chapter 1, the Commission has adopted an interpretation of the Terms of Reference which seeks to give relevant terms a meaning which is specific, consistent and inclusive.

The Commission's adopted terminology is informed by the Australian Government Guidelines on the Recognition of Sex and Gender (**Government Guidelines**),⁸ the Australian Human Rights Commission,⁹ the Yogyakarta Principles plus 10,¹⁰ the Darlington Statement,¹¹ and the Commission's initial discussions with stakeholders.

The Commission is cognisant of the fact that there is an important distinction between sex and gender and also recognises that the matters explored in this Discussion Paper may affect the intersex, trans and gender diverse communities in different ways, given the varied experiences of individuals within these communities.

In order to make this distinction clear:

Sex is a *biological* concept that describes, in part, a person's physical features, including genitalia, other sexual reproductive anatomy, chromosomes, hormones and secondary physical features emerging from puberty.

Gender is a *social* concept that describes the way in which a person identifies or expresses their masculine or feminine traits and the way they are recognised within a community. A person's gender identity may not always be exclusively male or female and may not always correspond with their sex assigned at birth.

The Commission further understands that issues relating to gender identity, while likely to affect trans and gender diverse people, may not affect people with intersex variations. Similarly, issues pertaining to sex characteristics may not affect the trans and gender diverse community.

Some key terminology is set out below. A more detailed Glossary can be found at the end of this Discussion Paper.

⁸ Australian Government Attorney-General's Department, *Guidelines on the Recognition of Sex and Gender* (2nd ed, 2015).

⁹ See Australian Human Rights Commission, *Resilient Individuals: Sexual Orientation, Gender Identity & Intersex Rights* (2015).

¹⁰ Drafting Committee formed by the International Service for Human Rights and ARC International, *The Yogyakarta Principles plus 10: Additional principles and state obligations on the application of international human rights law in relation to sexual orientation, gender identity, gender expression and sex characteristics to complement the Yogyakarta Principles* (November 2017).

¹¹ Australian and Aotearoa/New Zealand intersex organisations and independent advocates, *The Darlington Statement* (March 2017).

CHAPTER 2. THE COMMISSION'S APPROACH

Key terminology

Gender

Gender refers to the way in which a person identifies or expresses their masculine or feminine traits and the way they are recognised within a community.

A person's gender identity may not always be exclusively male or female and may not always correspond with their sex assigned at birth.

Gender identity

A person's deeply felt sense of being a man, a woman, both, in between, or something other. It is recognised that a person's sex as registered at their birth and their gender identity may not necessarily be the same. A person may also identify as neither a man nor a woman and/or neither male nor female (sometimes referred to as 'non-binary').

Intersex person

A person born with genetic, hormonal or physical sex characteristics that are not typically male or female. Intersex people have a diversity of bodies and identities.¹² For some intersex people these traits are apparent at birth, while for others they become apparent or emerge later in life, often at puberty.

Sex or Sex characteristics

Sex characteristics are each person's physical features relating to sex, including genitalia and other sexual and reproductive anatomy, chromosomes, hormones, and secondary physical features emerging from puberty.¹³

Trans or Trans and gender diverse

Trans and gender diverse is an umbrella term used to describe all people whose gender identity is different to the sex they were assigned at birth.

Under the broad trans and gender diverse umbrella are more specific terms that trans and gender diverse people may use.

For more detail, please refer to the Glossary section at the end of this Discussion Paper.

¹² Australian Human Rights Commission, *Resilient Individuals: Sexual Orientation, Gender Identity & Intersex Rights* (2015) 5.

¹³ Drafting Committee formed by the International Service for Human Rights and ARC International, *The Yogyakarta Principles plus 10: Additional principles and state obligations on the application of international human rights law in relation to sexual orientation, gender identity, gender expression and sex characteristics to complement the Yogyakarta Principles* (November 2017) 6.

CHAPTER 2. THE COMMISSION'S APPROACH

2.2 Key considerations for reform

(a) Are sex and/or gender classifications necessary?

In this Discussion Paper, the Commission will explore whether sex and/or gender classifications remain sufficiently relevant in contemporary Western Australian society to warrant their inclusion in important legal documentation, such as birth certificates.

(b) What sex and/or gender classifications are appropriate?

The GR Act currently provides only two options for classifying a person's sex: male or female. For many Western Australians, these two options may be sufficient. For others, such as some intersex people or those who feel that their birth sex and gender identity do not align, current laws may create certain difficulties in having their sex and/or gender identity recognised or changed.

The Commission will review whether new sex and/or gender classifications ought to be introduced to recognise the lived experiences and needs of the intersex, trans and gender diverse communities and whether an alternative option or options for classification of sex and/or gender should be introduced into the GR Act and the BDMR Act.

(c) When are classifications of sex and/or gender relevant?

The Commission recognises that sex and gender may be relevant at multiple points in time during a person's life. These may include:

- a person's birth sex or status relating to sex characteristics, as this may be relevant to registering a birth; and
- a person's sex and/or gender at a point of change, whether as a minor or an adult.

The Commission will consider the timing implications for registering sex classification or changes to such sex and/or gender classification.

(d) What should be the role of the Gender Reassignment Board?

The GR Act established the Gender Reassignment Board (**Board**) to receive and determine applications for recognition certificates by applicants seeking to have their change of sex recognised.¹⁴ In establishing the Board and the recognition certificate process, the overarching purpose of the GR Act is to 'promote equality of opportunity' and 'provide remedies in respect of discrimination'.¹⁵

The Commission will consider the role of the Board and whether it should be retained, adapted or abolished, and whether the Western Australian Registrar of Births, Deaths and Marriages (**Registrar**), or another person or body, should have responsibility for registering a change in a person's sex and/or gender classification.

¹⁴ GR Act s 5.

¹⁵ GR Act Long title.

CHAPTER 2. THE COMMISSION'S APPROACH

(e) **What should be the process for changing sex and/or gender classification?**

Currently the only way for a person to change their sex on the Register of Births, Deaths and Marriages (**Register**) is to provide evidence of having gone through a 'reassignment procedure'.¹⁶ A reassignment procedure means a medical (including hormonal therapy)¹⁷ and/or surgical procedure to alter the sex characteristics of a person.¹⁸ A person is also required to have either been born, been resident for no less than 12 months, or have had the relevant reassignment procedure performed, in Western Australia.¹⁹

The Commission will consider:

- possible models for reform with respect to the process of changing a person's sex and/or gender classification;
- what criteria ought to be required before an individual can change their legal sex and/or gender classification; and
- how many times a person will be allowed to change their sex and/or gender classification.

(f) **What process should apply in relation to minors?**

In addition to the requirement for a reassignment procedure, the GR Act requires that the Board be satisfied that an application by a child for a recognition of change of sex is 'in the best interests of the child'.²⁰ 'Child' is defined in the GR Act as 'a person under the age of 18 years'.²¹ In the case of a minor, an application must be made by the minor's guardian.²² The practical effect of the current legislation is that if a minor's guardian does not consent to the child's application, it is unlikely to be possible for the minor's application to proceed.

The Commission will consider the process which applies to minors, including:

- at what age or level of competency a minor may themselves apply to change their sex and/or gender classification (or refuse a change proposed by their parents or guardians);
- whether an application by, or with the consent of, one or more parent(s) or guardian(s) is required;
- to whom the application is to be made and whether the test should be 'in the best interests of the child'; and
- how disputes between parents or guardians, or between parents or guardians and the minor, relating to a change of sex and/or gender classification are to be resolved.

¹⁶ GR Act ss 14(1), 15(1)–(2), 17(1).

¹⁷ *AB v Western Australia; AH v Western Australia* (2011) 244 CLR 390, 404 [32] (French CJ, Gummow, Hayne, Kiefel and Bell JJ).

¹⁸ GR Act s 3.

¹⁹ GR Act s 15(1)(a).

²⁰ GR Act s 15(2)(b).

²¹ GR Act s 3.

²² GR Act s 14(2)(b).

CHAPTER 2. THE COMMISSION'S APPROACH

2.3 Principles informing the Commission's approach

In an effort to avoid further stigmatising the intersex, trans and gender diverse members of our community, the Commission has tried to adopt in its preliminary consultations and in its preferred model for reform, a philosophy of respectfulness and inclusiveness, with the aspiration that this might promote diversity and respect in the wider community, and empower individuals to express themselves comfortably.

The Commission's approach to this review is informed by a number of key principles. None of these principles are absolute. Each must be balanced and tested, which the Commission seeks to do through this Discussion Paper.

These principles include that all members of the Western Australian community should:

- have their individuality respected;
- have their autonomy and agency empowered, including children, to the maximum extent of their competency;
- enjoy equal recognition and opportunity without discrimination; and
- have access to appropriate mechanisms to address their particular needs, without undue administrative complexity.

These principles also include that the rights and needs of individuals must be considered in the context of the broader responsibilities and limited resources of government and the interests of the community as a whole. By extension, the Commission considers that the law should not restrict the actions of an individual where such actions do not impact on the broader community.

Finally, these principles include that the Commission should seek to ensure that Western Australian law is informed by, and remains consistent with, evolving best practice both in an Australian and international context.

This approach is consistent with the approach advocated by the Western Australian Branch of the Royal Australian and New Zealand College of Psychiatrists (**RANZCP**). The RANZCP (WA Branch) is a member organisation that represents over 450 members, 340 of whom are qualified psychiatrists. Many members of the WA Branch of RANZCP treat people who may wish to access the provisions of the GR Act. Accordingly, the insights of the WA Branch and its members are particularly valued. The WA Branch referred the Commission to a 2016 Position Statement released by the national RANZCP.²³ The Position Statement explains that 'LGBTI [lesbian, gay, bisexual, trans and intersex] identity has historically been criminalised, pathologised or invisibilised by the legal and medical institutions of Australia and New Zealand'. The WA Branch told the Commission that '[p]eople who identify as LGBTI are at increased risk of exposure to institutionalised and interpersonal discrimination and marginalisation which in turn increases vulnerability to mental illness and psychological distress'. Similar information was provided to the Commission during its preliminary engagement with stakeholders.

The WA Branch of RANZCP encouraged the Commission to develop proposals for reform that met the following objectives:

1. Upholds the dignity, privacy and self-determination of people who are sex and/or gender diverse.
2. Enables access to appropriate care and treatment for people who are experiencing distress related to gender or sex.

23 RANZCP, *Position Statement 83 'Recognising and addressing the mental health needs of the LGBTI population'* (March 2016).

CHAPTER 2. THE COMMISSION'S APPROACH

3. *Emphasises that the proper forum for consideration of these issues is within a health and well-being (as opposed to legal or political) framework and is a matter that should be between individuals concerned and (if required) appropriately qualified medical specialists.*
4. *Ensures for people who are sex and/or gender diverse that ethical principles, such as informed consent, confidentiality, freedom from discrimination, are applied in the same manner as for other evidence-based medical procedures or treatments.*
5. *Establishes procedures for the registration of sex and/or gender or changes to the registration of sex and/or gender that are merely administrative in nature, straightforward, timely, and which do not incur undue financial and legal burden.*
6. *Recognises that appropriate treatment and the balance of clinical risks varies according to individuals and therefore a framework that legislates particular treatment interventions is inappropriate.*
7. *Is informed by careful consideration of the use and value of information regarding sex and gender in order to balance privacy and dignity for individuals with genuinely necessary information required by the state.*
8. *Applies the above considerations and principles regarding treatment of minors, with provision for support for young people and families where family values are in conflict with the wishes of the young person. Where possible, policy support young people in deferring irreversible changes until they reach maturity/age at which they would be considered to have legal capacity for consent.*

9. *Supports the involvement of consumers who are affected by these changes in all stages of decision making about appropriate nomenclature and processes.*

Almost all the stakeholders with whom the Commission engaged on a preliminary basis (whether intersex, trans or gender diverse members of the community, medical professionals or community and religious leaders) supported a guiding principle that might be expressed as:

Where the way that a person wishes to live their life has limited or no impact on the rest of the community, their wishes should be respected and to the extent that the law does not already do so, the law should be reformed.

The Commission has sought to obtain varied perspectives on the relevant issues, engaging on a preliminary basis with a wide spectrum of stakeholders to inform the direction of proposed reform. Despite this approach, the Commission has not had the benefit of hearing from anyone who does not support at least some reform of the GR Act. The Commission considers it important to consider any opposition as this can assist in ensuring that the proposed law reform best meets the needs of the community and minimises the risk of unforeseen consequences.

In light of this preliminary engagement with stakeholders and the research set out in this Discussion Paper, the Commission has developed a series of proposed reforms. Together, these form the Commission's preferred model. The proposed reforms are set out in detail in Chapter 7 with discussion of the intended outcomes that are expected to flow from them. The Commission hopes that through further engagement with the community it will be able to test the proposed reforms to ensure that they are likely to result in the intended outcomes.

CHAPTER 3. REASONS FOR REVIEW

This Chapter provides some medical and social context around the issues of sex and gender classification.

3.1 Striving for common ground

The Commission acknowledges that a variety of views may be held on the issues explored by this Discussion Paper. Many of these issues are complex.

In this context, the Commission is keen to strive for common ground between various perspectives so as to ensure the delivery of a fair and balanced report. Despite the challenges this may present, the Commission hopes to be able to build greater understanding of the issues and hence facilitate wider community support for the foundations which inform its final recommendations.

The Commission accordingly sets out the following foundations upon which common ground might be possible:

(a) The sex binary is not absolute

- (i) Not everyone is naturally born male or female. Not everyone has either XX or XY chromosomes.
- (ii) Intersex people are born with biological sex characteristics (such as sexual anatomy, reproductive organs, hormonal patterns and/or chromosomal patterns) that do not fit the typical definitions for male or female bodies. For some intersex people, these traits are apparent at birth, while for others they emerge later in life, often at puberty.²⁴

(iii) Trans and gender diverse people are those who genuinely feel that their gender identity is different from the sex they were assigned at birth or that they sit outside the gender binary.

(iv) The High Court of Australia has recognised that not all human beings can be classified by sex as either male or female.²⁵

(b) Our community includes intersex, trans and gender diverse people

- (i) The number of intersex, trans and gender diverse people in our community is higher than might be commonly understood.²⁶
- (ii) It is difficult to obtain accurate data because of the historically different practices and social context, in which intersex, trans and gender diverse people may not have identified themselves or others in this way.
- (iii) It has been suggested that, in Australia, the number of people with intersex variations may be similar to the number of people naturally born with red hair in our community.²⁷
- (iv) It is difficult to get an accurate estimate of the trans or gender diverse population in Australia. There are no population-based studies in Australia that have asked about gender identity.²⁸

24 Defined by the Office of the High Commissioner for Human Rights, Intersex Awareness Day – Wednesday 26 October 2016, *End violence and harmful medical practices on intersex children and adults* (2016) <<https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=20739&LangID=E>>, quoted in Intersex Human Rights Australia, *Submission on the Exposure Draft of the Marriage Amendment (Same-Sex Marriage) Bill* (9 January 2016) <<http://ihra.org.au/31139/submission-marriage-amendment-2017/#d1a>>.

25 Norrie (2014) 250 CLR 490, 492 [1] (French CJ, Hayne, Kiefel, Bell and Keane JJ).

26 Department of Health, *Transgender and gender diverse health and wellbeing: background paper* (2014) 13.

27 Comparison of population data at the end of the September quarter of 2017, Australian Bureau of Statistics, *3101.0 – Australian Demographic Statistics* (September 2017) <<http://www.abs.gov.au/AUSSTATS/abs@.nsf/mf/3101.0>> with the results of the UK Red-Head Project: University College London, *BritainsDNA Announces the Results of the Red-Head Project* (August 2013) <https://www.ucl.ac.uk/mace-lab/genetic-ancestry/guff_pages/guff_documents/Red-Head_Project.pdf>.

28 Department of Health, *Transgender and gender diverse health and wellbeing: background paper* (2014) 14.

CHAPTER 3. REASONS FOR REVIEW

- (c) **Intersex, trans and gender diverse people are recognised as having a range of health experiences**
- (i) People with a range of sex characteristics are medically classified as being intersex. For example, people with Androgen Insensitivity Syndrome, Congenital Adrenal Hyperplasia or Turner Syndrome are usually medically recognised as intersex.
 - (ii) ‘Gender dysphoria’ has been recognised as a medical condition.²⁹
 - (iii) There has been a shift in international public health away from using the term ‘gender dysphoria’ or classifying it as a mental illness. The World Health Organisation prefers the term ‘gender incongruence’ and classifies it as a sexual health condition.³⁰
 - (iv) Importantly, not all intersex, trans and gender diverse people experience gender dysphoria or gender incongruence.
 - (v) Many intersex, trans or gender diverse people do not wish to be classified as having a medical condition or wish to undergo medical intervention.
 - (vi) Some people may choose to undergo a range of medical treatments to assist them to achieve a sex which feels best for them. Such treatment may include hormone therapy or surgery.
 - (vii) Not all intersex, trans or gender diverse people are able or willing to access some forms of medical treatment. This may be due to a range of factors including medical concerns, financial barriers, age or religion, to name a few. Accordingly, any requirement for medical treatment to have a person’s sex recognised risks making such recognition inaccessible for such people.
- (d) **Intersex, trans and gender diverse people face a range of challenges**
- (i) Intersex, trans and gender diverse people often have a different lived experience and may struggle to find acceptance in the community.
 - (ii) Compared to the general population, trans people aged 18 and over are nearly 11 times more likely to attempt suicide, and people with an intersex variation are nearly six times more likely to attempt suicide.³¹ It is estimated that one third of all trans people have attempted suicide.³²
 - (iii) Western Australians whose gender is not reflected on a Western Australian identity document face a range of challenges, including inconsistencies between Commonwealth and State identification documents, having to provide such conflicting identification documents to employment, educational, social and financial institutions and the impact on mental and physical health of not having their own sense of self recognised.
- (e) **Birth certificate content has changed**
- (i) The BDMR Act has been amended numerous times since its first incarnation in 1841. Historically, Western Australian birth certificates included information on the parents’ residence and profession. Since 1998, such information is no longer included.³³

29 American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders DSM-5* (American Psychiatric Publishing, 5th ed, 2013) 451–9.

30 World Health Organisation, *ICD-11 for Mortality and Morbidity Statistics* (2018), HA6Z <<https://icd.who.int/browse11/l-m/en>>.

31 National LGBTI Health Alliance, *Snapshot of Mental Health and Suicide Prevention Statistics for LGBTI People* (2016), 2 <<https://lgbtihealth.org.au/wp-content/uploads/2016/07/SNAPSHOT-Mental-Health-and-Suicide-Prevention-Outcomes-for-LGBTI-people-and-communities.pdf>>.

32 National LGBTI Health Alliance, *Snapshot of Mental Health and Suicide Prevention Statistics for LGBTI People* (2016), 2 <<https://lgbtihealth.org.au/wp-content/uploads/2016/07/SNAPSHOT-Mental-Health-and-Suicide-Prevention-Outcomes-for-LGBTI-people-and-communities.pdf>>, citing J McNeil et al, ‘Trans Mental Health Study 2012’ [2012] *Scottish Transgender Alliance*.

33 In addition to the names of the parents, the 1841 Act required the parents’ residence and general ‘description’: *Births, Deaths and Marriages Registration Act 1841* (WA). This was amended in 1847 to remove ‘description’ in place of the ‘rank and profession’ of the father: *Births, Deaths and Marriages Registration Amendment Act 1847* (WA). Today, there is no requirement for the parents’ residence or profession.

CHAPTER 3. REASONS FOR REVIEW

(f) It is legally possible to change your sex or gender

- (i) Since the introduction of the GR Act in 2000, Western Australians have been able to change the sex on their birth certificate, provided they have undergone a ‘reassignment procedure’.³⁴
- (ii) Since 2011, the High Court of Australia has held that a ‘reassignment procedure’, which means a medical or surgical procedure, may include hormone therapy (without surgery) which alters the genitals and other [sex] characteristics of a person.³⁵
- (iii) Since 2011, a statutory declaration by a medical practitioner or psychologist as to a person’s clinical treatment for transitioning, or being a transgender or intersex person, or of indeterminate sex, is sufficient to change that person’s sex and gender on an Australian passport, the Commonwealth’s foundational identification document.³⁶

(g) Other Australian jurisdictions have already changed their law

- (i) Both the Australian Capital Territory³⁷ and South Australia³⁸ have changed their laws to:
 - (A) recognise a sex other than male or female; and

(B) provide that the ‘appropriate clinical treatment’ required to change sex on a birth certificate may be satisfied with sufficient counselling (that is, without surgery or hormone therapy).

- (ii) Other jurisdictions are also exploring changes. Victoria’s Parliament has considered new legislation,³⁹ Tasmania’s Anti-Discrimination Commissioner has made recommendations⁴⁰ and New South Wales’ Anti-Discrimination Board has made a submission⁴¹ that there be no requirement for surgical, medical or hormonal treatment to change sex.

3.2 Medical and psychosocial reasons for review

The Commission considers the experiences of trans, gender diverse and intersex people are at the heart of this review. Law does not exist in a vacuum. It affects how people’s lives are lived on a daily basis, including how they and others perceive their identity and worth. The Commission recognises that many of the experiences of members of these communities are unique to them. This review provides an opportunity to reflect upon these experiences, particularly as they are relevant to any law reform. Many of these experiences arise in the medical and psychosocial context. This chapter outlines some of these experiences and forms the basis for considering the adequacy of the GR Act and BDMR Act, the reasons for and success of legislative amendments in other jurisdictions and the design of any proposed new model for Western Australia.

34 GR Act ss 3 (definition of ‘reassignment procedure’), 14(1). See Chapter 4 of this Discussion Paper.

35 *AB v Western Australia; AH v Western Australia* (2011) 244 CLR 390, 404 [32] (French CJ, Gummow, Hayne, Kiefel and Bell JJ). The Commission notes that the definition in the GR Act (s 3) is ‘gender characteristics’, however this definition more accurately describes sex characteristics.

36 Australian Government Department of Foreign Affairs and Trade, *Application for an Australian Travel Document: Form B-14* <<https://www.passports.gov.au/file/52/download?token=9gaPS9Bn>>.

37 *Births, Deaths and Marriages Registration Amendment Act 2014* (ACT). See ACT Act pt 4; ACT Regulations reg 6.

38 *Births, Deaths and Marriages Registration (Gender Identity) Amendment Act 2016* (SA). See SA Act pt 4A; SA Regulations pt 3A.

39 Victorian Bill.

40 Equal Opportunity Tasmania, *Legal recognition of sex and gender diversity in Tasmania* (February 2016) 3.

41 NSW Anti-Discrimination Board, *Anti-Discrimination Board’s submission to the Review of the Births, Deaths and Marriages Registration Act 1995* (NSW) (14 April 2015) 3–4.

CHAPTER 3. REASONS FOR REVIEW

3.3 Medical context

While a person with an intersex variation will not necessarily have a medical condition merely because of such variation, some members of these communities may have shared experiences of their gender identity or sex characteristics being characterised by some as medically, psychologically or socially ‘abnormal’. They may also face barriers to accessing healthcare and may experience discrimination by healthcare providers not otherwise faced by the general population. These barriers and experiences of discrimination have a negative effect on the health performance indicators of trans, gender diverse and intersex people.

(a) Pathologisation

Gender dysphoria is the term used to describe the distress or discomfort felt by those individuals whose sense of being a man, woman or any other gender differs from the sex they were assigned at birth. Gender dysphoria has been recognised as a medical condition in the American Psychiatric Association’s *Diagnostic and Statistical Manual of Mental Disorders* (5th edition).⁴² As mentioned above, recently there has been a shift in international public health away from using the term ‘gender dysphoria’ or classifying it as a mental illness. The World Health Organisation prefers the term ‘gender incongruence’ and classifies it as a sexual health condition.⁴³ Similarly, the World Health Organisation classifies some intersex variations as developmental anomalies⁴⁴ or endocrine disorders.⁴⁵

Conversely, many trans, gender diverse and intersex people criticise an approach which is

seen as pathologising gender variance or intersex variations, reinforcing a binary model of sex and gender and discounting the fact that some trans and gender diverse people experience no dysphoria between the sex they were assigned at birth and their gender identity,⁴⁶ while a person with an intersex variation will not necessarily have a medical condition merely because they are an intersex person.

(b) Normalisation

RANZCP has stated that ‘the birth of an intersex child continues to be treated as a “psychosocial emergency”, leading to non-essential medical interventions from infancy’.⁴⁷ The Commission heard these medical interventions, referred to as ‘normalisation’ procedures, are procedures (including surgery) which may not be medically necessary and which have the purpose of making an intersex person, particularly a child, appear as either male or female. The intersex person subjected to ‘normalisation’ procedures is then raised according to their assigned or ‘normalised’ sex.

The Commission heard concerns about the prevalence of ‘normalisation’ procedures on intersex children without their consent. In 2013, the Australian Senate Community Affairs Committee’s *Report on the Involuntary or Coerced Sterilisation of Intersex People in Australia* found that there is no medical consensus around the conduct of normalising procedures.⁴⁸ The Committee recommended that guidelines should be developed which favour deferral of ‘normalising’ procedures until the person can give fully informed consent.⁴⁹

42 American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* (American Psychiatric Publishing, 5th ed, 2013) 451–9.

43 World Health Organisation, *ICD-11 for Mortality and Morbidity Statistics* (2018), HA6Z <<https://icd.who.int/browse11/l-m/en>>.

44 World Health Organisation, *ICD-11 for Mortality and Morbidity Statistics* (2018), LD2A <<https://icd.who.int/browse11/l-m/en>>.

45 World Health Organisation, *ICD-11 for Mortality and Morbidity Statistics* (2018), 5A7I <<https://icd.who.int/browse11/l-m/en>>.

46 L Newman, ‘Sex, Gender and Culture: Issues in the Definition, Assessment and Treatment of Gender Identity Disorder’ (2002) 7(3) *Clinical Child Psychology and Psychiatry* 3, 352–9.

47 RANZCP, *Position Statement 83 ‘Recognising and addressing the mental health needs of the LGBTI population’* (March 2016) 3, citing J Latham and C Barrett, ‘Appropriate bodies and other damn lies: Intersex and ageing and aged care’ (2015) 34(S2) *Australasian Journal on Ageing* 19–20.

48 Senate Community Affairs References Committee, Parliament of Australia, *Involuntary or coerced sterilisation of intersex people in Australia* (2013) 66–9, 73–4.

49 Senate Community Affairs References Committee, Parliament of Australia, *Involuntary or coerced sterilisation of intersex people in Australia* (2013) 74.

CHAPTER 3. REASONS FOR REVIEW

In accordance with the Commission's general principle that all members of the community should have their autonomy and agency empowered, including children to the maximum extent of their competency, the Commission sees merit in the Committee's recommendation.

(c) Healthcare discrimination

The Australian Human Rights Commission noted in its *Resilient Individuals: Sexual Orientation, Gender Identity & Intersex Rights* report that trans and gender diverse people are particularly vulnerable to exclusion and discrimination when seeking healthcare.⁵⁰ The most common barrier to healthcare access faced by trans and gender diverse individuals is lack of knowledge about their particular health needs.⁵¹ There may be a lack of cultural competency amongst healthcare providers as well as inappropriate record keeping systems and clinical facilities.⁵² Crucial reproductive health screenings are 'often rigidly gendered', such that trans and gender diverse people may find it difficult to participate in these routine procedures without fear of humiliation.⁵³

Similarly, some people with intersex variations may face challenges in participating in routine procedures, particularly where these people were not previously informed of normalising procedures undertaken without their consent. At the same time, the experiences and needs of intersex people may be distinct from members of the trans and gender diverse community. Intersex Human Rights Australia noted in its submission to the Australian Law Reform Commission:

*[H]ealthcare services for 'LGBTI' populations are often designed around the sexual health needs of adult sexually-active non-heterosexual people, or around the healthcare needs of adults or children intending to transition gender. There are no specialist services for adults with intersex variations, with knowledge of our lifetime health needs including those arising from sterilisations, genital surgeries, or potential cognitive or other health issues.*⁵⁴

(d) Health performance indicators

A report by the Australian Human Rights Commission noted that trans and gender diverse people report poor outcomes across a range of health performance indicators when compared to the general Australian population.⁵⁵ The report noted that health outcomes improve with better access to hormonal and surgical treatment. In a joint submission to the Commission, the World Professional Association for Transgender Health (**WPATH**) and Australian and New Zealand Professional Association for Transgender Health (**ANZPATH**) stated that medical and other barriers to gender recognition may harm the physical and mental health of trans individuals:

*WPATH's view is that gender recognition can have an important influence on the health and wellbeing of all people, and that it is particularly important for transgender people to have their gender identity recognised on key identity documentation; regardless of what gender affirming healthcare they have accessed, or what their demographics may be.*⁵⁶

50 Australian Human Rights Commission, *Resilient Individuals: Sexual Orientation, Gender Identity & Intersex Rights* (2015) 46.

51 J D Safer et al, 'Barriers to Health Care for Transgender Individuals' (2016) 23(2) *Curr Opin Endocrinol Diabetes Obes* 2.

52 J D Safer et al, 'Barriers to Health Care for Transgender Individuals' (2016) 23(2) *Curr Opin Endocrinol Diabetes Obes* 2.

53 Australian Human Rights Commission, *Resilient Individuals: Sexual Orientation, Gender Identity & Intersex Rights* (2015) 46.

54 Intersex Human Rights Australia, *Submission to the Australian Law Reform Commission on the Review of the Family Law System – Issues Paper* (May 2018) 8.

55 Australian Human Rights Commission, *Resilient Individuals: Sexual Orientation, Gender Identity & Intersex Rights* (2015) 46.

56 WPATH and ANZPATH, *Submission on the matter of procedures for gender recognition for transgender people in Australia* (2018) 4.

CHAPTER 3. REASONS FOR REVIEW

3.4 Psychosocial context

(a) Mental health

RANZCP has identified a number of considerations for mental health policy and practice relating to people identifying as 'LGBTI'. RANZCP also highlighted the importance of educating the public as to issues affecting intersex, trans and gender diverse people, noting that:

[g]reater awareness of intersex and gender diverse identities in particular is urgently needed to begin to address the high vulnerability and low mental health outcomes of these groups.⁵⁷

Some of the key considerations addressed by RANZCP include:

(i) Negative healthcare experiences:

Health services available to the general Australian population may not seem relevant or accessible to 'LGBTI' children and adolescents and many have reported feeling uncomfortable about accessing these services and having to 'come out' to health professionals.⁵⁸

(ii) Mental health issues affecting trans children and adolescents:

Puberty can be a particularly distressing time for trans and gender diverse children and adolescents:

International consensus guidelines recommend that adolescents who fulfil eligibility and readiness criteria undergo treatment to (reversibly) suppress puberty.⁵⁹

(iii) Visibility in data and research:

We do not have clear statistics relating to 'LGBTI' populations. Reliable statistical information is required, however these statistics must be balanced with each person's right to privacy and dignity.⁶⁰

The mental health issues affecting trans young people were also explored in the Trans Pathways research report,⁶¹ which involved surveying 859 trans young people aged between 14 and 25, and 194 parents and guardians of a trans young person aged 25 or younger. Some of the key statistics reported in the Trans Pathways report are as follows:

(i) Sex assignment:

- (A) 74.4% of the participants were assigned female at birth;
- (B) 1.6% of the participants identified as intersex; and
- (C) 21% of the participants were not sure if they were intersex or not.

(ii) Gender markers: aside from 'male' or 'female', the most prevalent, preferred gender markers were 'non-binary' and 'agender'.

(iii) Parental recognition: parents realised their child was trans when the child was between the ages of:

- (A) 0 and 5 years: 26.5%;
- (B) 6 and 12 years: 21.8%;
- (C) 13 and 18: 43.9%; and
- (D) 19 and 24: 8%.

57 RANZCP, *Position Statement 83 'Recognising and addressing the mental health needs of the LGBTI population'* (March 2016) 2.

58 RANZCP, *Position Statement 83 'Recognising and addressing the mental health needs of the LGBTI population'* (March 2016) 3, citing K Robinson et al, *Growing Up Queer: Issues facing young Australians who are gender variant and sexuality diverse* (Young and Well Cooperative Research Centre, Melbourne, Australia, 2014).

59 RANZCP, *Position Statement 83 'Recognising and addressing the mental health needs of the LGBTI population'* (March 2016) 3, citing W Hembree et al, 'Endocrine treatment of transsexual persons: An Endocrine Society Clinical Practice Guideline' [2009] 94(9) *Journal of Clinical Endocrinology and Metabolism*, 3132–54.

60 RANZCP, *Position Statement 83 Recognising and addressing the mental health needs of the LGBTI population* (March 2016) 4.

61 P Strauss et al, *Trans Pathways: the mental health experiences and care pathways of trans young people. Summary of results* (Telethon Kids Institute, 2017).

CHAPTER 3. REASONS FOR REVIEW

(iv) *Mental health concerns:*

- (A) 74.6% of participants had at some time been diagnosed with depression;
- (B) 72.2% had been diagnosed with an anxiety disorder;
- (C) 79.7% had self-harmed; and
- (D) 48.1% had attempted suicide at some point in their life.

The Trans Pathways report referred to research that showed that trans people experience higher rates of anxiety, eating disorders, depression, social phobia and suicidal ideations than their non-trans peers.⁶² The research suggests trans young people are experiencing clinically significant depressive symptoms at almost 10 times the rate, and anxiety disorders at 10-13 times the frequency, of the general young Australian population.⁶³

As noted in the Trans Pathways report, research shows that the reason ‘LGBTIQ (lesbian, gay, bisexual, transgender, intersex and questioning or queer)’ people experience these mental health concerns is not due to any internal conflict with their gender identity or sexual preference, but rather because of how they are perceived and treated by society.⁶⁴

Research into the mental health experiences of intersex people has found that they often experience very high rates of depression, anxiety and PTSD, often as co-diagnoses.⁶⁵ Intersex people have directly attributed these diagnoses to how their intersex variations were treated and feeling that their bodily integrity was not respected.⁶⁶

In considering any reform of the GR Act and the BDMR Act, the Commission is conscious of this wider psycho-social context and desires that any reform should have a positive impact on the health and wellbeing of the trans, gender diverse and intersex communities.

(b) **Discrimination and bullying**

While the *Sex Discrimination Act 1984 (Cth)* (**SD Act**) prohibits discrimination on the basis of a person’s ‘gender identity’ and ‘intersex status’ in certain contexts, and the *Equal Opportunity Act 1984 (WA)* (**EO Act**) provides protection against discrimination on ‘gender history grounds’,⁶⁷ the reality is that many trans, gender diverse and intersex people experience such discrimination.

The Australian Human Rights Commission’s report noted that:

While comparatively little data is available on the experiences of trans and gender diverse people, a significant number of structural barriers exist to equality of opportunity. Trans and gender diverse people also report disproportionately high rates of violence, harassment, bullying and exclusion related to their identity... Differences in the physical presentation to a person’s gender identity (particularly during transition) led to significant unjust discrimination for the trans person for a number of participants in the consultation. These experiences of discrimination heightened and exacerbated reported feelings of shame and low self-worth.⁶⁸

62 P Strauss et al, *Trans Pathways: the mental health experiences and care pathways of trans young people. Summary of results* (Telethon Kids Institute, 2017) 24–5 citing C Moleiro and N Pinto, ‘Sexual orientation and gender identity: review of concepts, controversies and their relation to psychopathology classification systems’ (2015) 6 *Frontiers in Psychology* 1511.

63 P Strauss et al, *Trans Pathways: the mental health experiences and care pathways of trans young people. Summary of results* (Telethon Kids Institute, 2017) 24–6.

64 P Strauss et al, *Trans Pathways: the mental health experiences and care pathways of trans young people. Summary of results* (Telethon Kids Institute, 2017) 12; G Rosenstreich, *LGBTI People Mental Health & Suicide* (National LGBTI Health Alliance, 2nd revised ed, 2013); B S Mustanski, R Garofalo and E Emerson, ‘Mental Health Disorders, Psychological Distress, and Suicidality in a Diverse Sample of Lesbian, Gay, Bisexual, and Transgender Youths’ (2010) 100(12) *American Journal of Public Health* 2426, 2426–32.

65 T Jones et al, *Intersex: Stories and Statistics from Australia* (Open Book Publishers, 2016) 120.

66 T Jones et al, *Intersex: Stories and Statistics from Australia* (Open Book Publishers, 2016) 121.

67 See Chapter 5 of this Discussion Paper.

68 Australian Human Rights Commission, *Resilient Individuals: Sexual Orientation, Gender Identity & Intersex Rights* (2015) 54, citing H Mulcare et al, *Tranznation, A Report on the health and wellbeing of transgender people in Australia and New Zealand* (Australian Research Centre in Sex, Health & Society, La Trobe, 2007); Z Hyde et al, *The First Australian National Trans Mental Health Study: Summary of Results* (School of Public Health, Curtin University, 2014); E Smith et al, *From Blues to Rainbows: Mental health and wellbeing of gender diverse and transgender young people in Australia* (The Australian Research Centre in Sex, Health and Society, La Trobe University, 2014).

CHAPTER 3. REASONS FOR REVIEW

(c) Social footprint

As stated earlier in this Discussion Paper,⁶⁹ trans, gender diverse and intersex people may face administrative challenges where different identity documents record conflicting sex and/or gender classifications. This in turn can impact on the individual's health and general wellbeing.

In 2009, the Australian Human Rights Commission recommended that no government agency should require a person to list their sex or gender on forms or records unless there is a particular necessity to do so.⁷⁰

The Government Guidelines state that the Australian government is 'primarily concerned with a person's identity and social footprint'.⁷¹ The Government Guidelines describe a person's social footprint as the evidence of that person's identity within the community, which, through credentials or other information establish their identity in Australia over time.

The Government Guidelines state that sex and/or gender information should be removed from forms or documents unless necessary.⁷² Where such information is necessary, the Australian Government's preferred approach is to collect gender information. In contrast, information regarding a person's sex 'would not ordinarily be required and should only be collected where there is legitimate need for that information and it is consistent with Australian Privacy Principles'.⁷³

The Commission recognises that Commonwealth, State and Territory government departments and agencies may have reasons for collecting sex or gender information however this does not necessarily require a binary classification. Such a view is reflected in the Government Guidelines.⁷⁴

(d) Collecting sex data at birth

Chapter 4 explores the current legal framework in Western Australia, including the requirements under the BDMR Act and the *Births, Deaths and Regulations 1999 (WA) (BDMR Regulations)* for births and deaths to be registered and the recording of sex. The next few sections consider the reasons for recording such data.

The United Nation's Statistical Division's Principles and Recommendations for a Vital Statistics System 75 (**UN Recommendations**) considers sex to be part of the 'vital statistics' to be collected by member states on the occurrence of various events, which primarily relate to births, deaths and marriages, and recommends that:

- (i) all births and deaths be recorded by sex (being biological characteristics); and
- (ii) data should be categorized into 'male' and 'female', and in the case of a foetal death, the category 'unknown' is also appropriate.⁷⁶

69 See Chapter 3.1(d)(iii) of this Discussion Paper.

70 Australian Human Rights Commission, *Sex Files: the legal recognition of sex in documents and government records* (2009) 3, 34.

71 Government Guidelines 3 [2].

72 Government Guidelines 6 [29].

73 Government Guidelines 4 [16].

74 See Chapter 5 of this Discussion Paper.

75 United Nations, *Statistical Division's Principles and Recommendations for a Vital Statistics System* (Revision 3, 2014).

76 UN Recommendations 19–20, 32.

CHAPTER 3. REASONS FOR REVIEW

The UN Recommendations state that:

*Vital statistics disaggregated by sex serve various purposes. For example, data on live births by sex is used to calculate the sex ratio at birth. Unusual changes in the ratio of male to female births may indicate gender-biased registration problems and an unusually high or low sex ratio at birth may indicate some degree of gender preferences in the society. Infant deaths and deaths by sex allow analysis of mortality differences by sex.*⁷⁷

The UN Recommendations do not address the appropriate classification for sex in instances where a child's biological sex characteristics are ambiguous, or how a correction is to be made where sex has been incorrectly assigned.

Australian birth statistics, including birth sex, are collected by State and Territory Registrars of Births, Deaths and Marriages⁷⁸ and are provided to the Australian Bureau of Statistics (**ABS**). The ABS in turn provides these statistics to international bodies such as the UN Demographic Yearbook and the UN World Population Prospects. Such statistics are deemed a vital component of global population statistics.⁷⁹

(e) Collecting sex data after birth

The ABS is required to collect statistical information for the Australian census.⁸⁰ 'Sex' is a prescribed matter of statistical information for collection.⁸¹

Death statistics, including sex, are collected by State and Territory Registrars of Births, Deaths and Marriages. Such data permits the comparison of data within populations over time and between populations at the same point in time, as well as

the compilation of nationally and internationally consistent data.

(f) Legal or practical reasons for requiring sex classifications on legal identification documents

A birth certificate is an identification document.⁸² In many situations, a birth certificate can be used to establish a person's identity or to reflect an attribute of their identity, such as age. Indeed, various particulars reflected in a birth certificate, including sex, might assist in collectively establishing a person's identity.

(i) Legal necessity for birth certificate

In some cases, the relevant legislation or regulations may expressly require production of records held by the Registrar, which show a person's sex. For example, a person may be required to provide information showing their sex as shown in the records held by the Registrar, when applying for a passport.⁸³ In practice, the person will be asked for their birth certificate as proof of their sex as shown in the Registrar's records. The sex recorded on a person's birth certificate is then transferred onto an Australian passport,⁸⁴ although as explored in Chapter 5, a person does not have to change their birth certificate 'sex' in order to change their Australian passport 'gender'.

77 UN Recommendations 32.

78 See Chapter 5 of this Discussion Paper for further analysis of the legal basis for the Registrars requiring such information.

79 Australian Bureau of Statistics, *Essential Statistical Assets for Australia* (2013) 37 <[http://www.ausstats.abs.gov.au/ausstats/subscriber.nsf/0/DDA6B8011409DCB4CA257B2D000D2C9B/\\$File/Essential%20Statistical%20Assets%20for%20Australia.pdf](http://www.ausstats.abs.gov.au/ausstats/subscriber.nsf/0/DDA6B8011409DCB4CA257B2D000D2C9B/$File/Essential%20Statistical%20Assets%20for%20Australia.pdf)>.

80 *Census and Statistics Act 1905* (Cth) s 8(3).

81 *Census and Statistics Regulation 2016* (Cth) reg 9.

82 Australian Human Rights Commission, *Sex Files: the legal recognition of sex in documents and government records* (2009) 13.

83 *Australian Passports Act 2005* (Cth) s 43(1); *Australian Passports Determination 2015* (Cth) s 21.

84 See Chapter 5 of this Discussion Paper for more information on changing the gender recorded in an Australian passport.

CHAPTER 3. REASONS FOR REVIEW

There are other instances where a birth certificate is required to be produced and the sex recorded on it is transferred to other administrative records (for example, by the Western Australian Department of Transport when someone applies for a driver's licence), even though subsequently issued instruments do not refer to that sex (for example, the driver's licence itself).⁸⁵

(ii) Legal necessity for proof of identity

In other cases, the law may require proof of identity, without necessitating such proof through production of a birth certificate, although obviously this may be one way of doing so. Instances include applying for a tax file number or a Medicare card.

(iii) Practical necessity for birth certificate

There are circumstances in which government departments or agencies, or even private businesses or community organisations, may request the production of a birth certificate, without there being any express legal necessity to do so. For example, enrolling a child in school,⁸⁶ opening a bank account or becoming a member of a sporting organisation. It is not clear that in all such circumstances the requirement to produce a birth certificate is necessary to establish sex, as distinct from identity or age, although this may be relevant to segregated activities such as sport.

(iv) Practical reasons for sex or gender information

More broadly, there are various circumstances in which the sex or gender of a person may be relevant. Particular sex characteristics of a person may be relevant to certain criminal offences, such as female genital mutilation.⁸⁷ Gender may be relevant to criminal justice processes, such as incarceration,⁸⁸ and body searches.⁸⁹ In addition, there may be requirements for certain bodies to be constituted by representatives of a particular gender.⁹⁰

There are various administrative processes during which government departments or agencies, private businesses or community organisations may collect information from a person, including as to their sex or gender. This may arise during the course of enrolling for elections, enrolling for study, registering with professional bodies, undertaking employment or procuring goods or services relevant to a particular sex or gender (for example, segregated fitness facilities). Indeed, certificates of qualification from professional bodies may contain details of a person's sex or gender. As set out in Chapter 4, the GR Act provides a mechanism by which such qualification certificates can be replaced for a gender reassigned person.⁹¹

In all circumstances where sex or gender is relevant, it might ordinarily be sufficient for the relevant person to state their sex or gender. In some cases, however, additional evidence may be required. This may be achieved, for example, through the production of a birth certificate.

85 See, eg, no reference is made to sex or birth in the *Road Traffic (Authorisation to Drive) Act 2008* (WA) s 9 'Additional matters to do with identity'. See also Western Australian Department of Transport, *Your Secure Identity* (October 2017) <https://www.transport.wa.gov.au/mediaFiles/licensing/LBU_FS_YourSecureID.pdf>.

86 The Western Australian Department of Education is required to record a child's date of birth on the school's enrolment register (*School Education Act 1999* (WA) s 19(1); *School Education Regulations 2000* (WA) s 6(1)), but makes no mention of the requirement to produce a birth certificate in order to verify the date of birth. The Department of Education, however, specifies on its website that a birth certificate be produced when enrolling a child in school: <<https://www.education.wa.edu.au/how-to-enrol-a-step-by-step-guide>>.

87 *Criminal Code Act 1913* (WA) s 306.

88 *Prisons Act 1918* (WA) s 44.

89 *Court Security and Custodial Services Act 1999* (WA) s 4(6); *Prisons Act 1981* (WA) s 49(4); *Sentence Administration Regulations 2003* (WA) reg 19(1); *Young Offenders Regulations 1995* (WA) reg 92(5).

90 *Young Offenders Act 1994* (WA) s 152(4); *Human Reproductive Technology Act 1991* (WA) s 9; *Occupational Safety and Health Act 1984* (WA) s 15(5).

91 GR Act s 20.

CHAPTER 3. REASONS FOR REVIEW

3.5 Court decisions on medical procedures for trans or intersex minors

(a) Medical procedures on minors

Generally, in order for a person to undergo a medical procedure, they must provide their consent. Otherwise, the procedure may constitute an assault.

In regard to medical procedures performed on minors, there are two potential sources of such consent: the minor themselves or their parents/guardians.

Generally, minors cannot give valid consent unless they are able to demonstrate a particular level of competency. The courts have held that a child has such competency when the child ‘achieves a sufficient understanding and intelligence to enable [them] to understand fully what is proposed’.⁹² This is colloquially referred to as the ‘Gillick test’ or ‘Gillick competency’.

Alternatively, if a minor cannot consent due to their incapacity (including because they are not Gillick competent), the minor’s parent or guardian can provide consent on their behalf.⁹³ The parents or guardians of a minor have responsibility for that minor’s long term welfare.⁹⁴ In accordance with the Gillick approach, the power of parents or guardians to consent on behalf of a minor diminishes as the minor’s own capacity and maturity grows.⁹⁵

Relevantly, the courts have held that certain procedures on a minor cannot be performed with mere consent from the parents, guardians or minor themselves; prior court approval is required instead.

(b) Court approval for certain medical procedures

Court approval is required for procedures that are invasive and irreversible,⁹⁶ or ‘non-therapeutic’, meaning that the procedure is not for the purpose of curing a malfunction or disease.⁹⁷

Court approval is not required for therapeutic procedures, which have been held to be:

*administered for the chief purpose of preventing, removing or ameliorating a cosmetic deformity, a pathological condition or a psychiatric disorder, provided the treatment is appropriate for and proportionate to the purpose for which it is administered.*⁹⁸

In *Marion’s Case*, the High Court held that intentional sterilisation, as distinct from sterilisation as the by-product of medical treatment that aims to treat some malfunction or disease, should not come within the ordinary scope of the power of parents or guardians to consent to medical procedures on behalf of a minor in their care.⁹⁹ The basis for this decision was that:

- (i) there was a significant risk of making the wrong decision, either as to:
 - (A) the child’s present or future ability to consent; or
 - (B) what would be in the best interests of the child; and

92 *Gillick v West Norfolk and Wisbech Area Health Authority* [1986] AC 112, 189 (Lord Scarman). As endorsed in Australia in *J v Lieschke* (1987) 162 CLR 447, 452 (Wilson J).

93 *Department of Health and Community Services (NT) v JWB and SMB* (1992) 175 CLR 218, 235 (Mason CJ, Dawson, Toohey and Gaudron JJ).

94 *Family Law Act 1975* (Cth) ss 61B–C.

95 *Marion’s Case* (1992) 175 CLR 218, 237 (Mason CJ, Dawson, Toohey and Gaudron JJ) citing *Gillick* [1986] AC 112, 183–4 (Lord Scarman).

96 *Marion’s Case* (1992) 175 CLR 218, 250 (Mason CJ, Dawson, Toohey and Gaudron JJ), 269 (Brennan J).

97 *Marion’s Case* (1992) 175 CLR 218, 269 (Brennan J); *Re Alex* (2004) 180 FLR 89, 116 [153] (Nicholson CJ).

98 *Marion’s Case* (1992) 175 CLR 218, 269 (Brennan J).

99 *Marion’s Case* (1992) 175 CLR 218, 250 (Mason CJ, Dawson, Toohey and Gaudron JJ).

CHAPTER 3. REASONS FOR REVIEW

(ii) because of the grave consequences of making a wrong decision.¹⁰⁰

In these circumstances, the Family Court has jurisdiction to provide authorisation for such procedures under its welfare jurisdiction and makes such decisions on the basis of the best interests of the child.

(c) Cases involving trans and intersex minors

The cases involving medical procedures for intersex minors differ from those involving medical procedures for trans minors.

The former often arise when parents or guardians seek court approval for a medical procedure for their child before that child is able to give informed consent.¹⁰¹ In contrast, the latter often involve a minor who is of an age that they seek the medical procedure themselves and issues arise as to their capacity to give informed consent or whether it involves a special medical procedure which requires court approval.

There have been several recent cases relating to medical procedures involving trans minors which have reflected a trend towards empowering the autonomy and agency of the minor to the maximum extent of their competency. The Commission notes these decisions have been welcomed by the trans and gender diverse community. In contrast, it appears that there have been fewer cases involving intersex minors and that some of these decisions have been criticised by the intersex community.

(d) Medical procedures involving intersex minors

In *Re A (Welfare of a Child A)* (1993),¹⁰² the child was assigned the sex female at birth, but had a condition which caused an extreme degree of masculinisation of the genitalia. The child's mother brought an application to have the child's ovaries, tubes and uterus removed when the child was 14. The mother argued that the medical procedure was therapeutic, with the resulting sterilisation a 'bi-product of surgery appropriately carried out to treat some malfunction or disease',¹⁰³ such that court approval was not required. The Family Court rejected the argument that the treatment was therapeutic, finding that parental consent was not sufficient to authorise such a surgical procedure.

Similarly, in *Re Lesley* (2008),¹⁰⁴ an application was brought to have a child's gonads removed. The Family Court again found that this constituted a special medical procedure which required court approval.¹⁰⁵

In *Re Carla* (2016),¹⁰⁶ the child was born with a genetic sexual development condition. The child was genetically male but identified as a female. The child's parents brought an application for consent to have the 5 year old child's gonads removed and other procedures to manage the child's condition. The medical evidence was that the procedure would render the child infertile but without doing so there was a risk the child could develop cancer or male features during puberty. The parents argued the medical procedure was therapeutic and hence court approval was not required.

100 *Marion's Case* (1992) 175 CLR 218, 250 (Mason CJ, Dawson, Toohey and Gaudron JJ).

101 But see *Re Sally (Special Medical Procedure)* [2010] FamCA 237, where the intersex minor was 14 years old.

102 *Re A* (1993) 16 Fam LR 715.

103 *Re A* (1993) 16 Fam LR 715, [19] (Mushin J), quoting *Marion's Case* (1992) 175 CLR 218, 250 (Mason CJ, Dawson, Toohey and Gaudron JJ).

104 *Re Lesley* [2008] FamCA 1226.

105 *Re Lesley* [2008] FamCA 1226, [38] (Barry J).

106 *Re Carla* (2016) 324 FLR 1.

CHAPTER 3. REASONS FOR REVIEW

In contrast to *Re Lesley*, the Family Court held that the procedure was therapeutic, even if an incidental outcome was rendering the child infertile, and court approval was not required.¹⁰⁷ The Court considered the procedure was therapeutic because it was necessary to ‘appropriately and proportionately treat a genetic bodily malfunction that, untreated, poses real and not insubstantial risks to the child’s physical and emotional health’.¹⁰⁸ One relevant difference was that in *Re Lesley*, the child’s gonads were located in the labial area, whereas in *Re Carla*, the gonads were located in the intra-abdominal cavity.¹⁰⁹ Given this, it was more difficult in *Re Carla* for the gonads to be regularly monitored. In addition, the medical evidence was that relocating the gonads outside the child’s body would have adverse psychological consequences for the child.¹¹⁰ In this context, the Family Court held that the medical procedure was an appropriate and proportionate response to the risks to the child’s ‘physical and emotional health’.¹¹¹

The Commission heard concerns from some that the decision in *Re Carla* may enable parents and guardians to pursue ‘normalisation’ procedures for their intersex children without court approval and before the child is able to consent or express a view themselves. As noted above, the Australian Senate Community Affairs Committee’s expressed their preference to defer non-essential medical procedures until the person can give their own fully informed consent.¹¹² The Commission notes that each case is different and must be informed by appropriate medical evidence, which continues to evolve. The Commission understands that the current medical preference is to monitor, rather than intervene, for as long as is medically viable.

(e) Medical procedures involving trans minors

Several Family Court cases have considered whether and when court approval is required to permit a minor to undergo a sex transitioning procedure. Such procedures are considered to have the following stages:

- (i) stage 1: puberty blocking treatment (reversible);
- (ii) stage 2: hormonal treatment (non-surgical, but with certain irreversible effects); and
- (iii) stage 3: surgical treatment (including, but not limited to, chest reconstructive surgery, phalloplasty, hysterectomy, bilateral salpingectomy or creation of the neovagina and vaginoplasty).

In *Re Alex* (2004),¹¹³ a 13 year old adolescent sought to affirm his male gender by receiving stage 1 treatment until he turned 16 and then stage 2 treatment thereafter. The Family Court held that both stage 1 and stage 2 were non-therapeutic and hence required court approval.¹¹⁴ This required the court to have regard to the best interests of the child as the paramount consideration.¹¹⁵ The court determined to allow both stage 1 and stage 2 treatment.¹¹⁶

107 *Re Carla* (2016) 324 FLR 1, 3 [9], 7 [45], 9 [49], 9 [54] (Forrest J).

108 *Re Carla* (2016) 324 FLR 1, 9 [52] (Forrest J).

109 *Re Carla* (2016) 324 FLR 1, 4 [20] (Forrest J).

110 *Re Carla* (2016) 324 FLR 1, 4 [20], 9 [52] (Forrest J).

111 *Re Carla* (2016) 324 FLR 1, 9 [52] (Forrest J).

112 Senate Community Affairs References Committee, Parliament of Australia, *Involuntary or coerced sterilisation of intersex people in Australia* (2013) 74.

113 *Re Alex* (2004) 180 FLR 89.

114 *Re Alex* (2004) 180 FLR 89, 124 [196] (Nicholson CJ).

115 *Family Law Act 1975* (Cth) s 67ZC. See *Family Law Act 1975* (Cth) s 60CC for how best interests are determined.

116 *Re Alex* (2004) 180 FLR 89, 131 [242] (Nicholson CJ).

CHAPTER 3. REASONS FOR REVIEW

In *Re Jamie* (2013),¹¹⁷ the Full Court of the Family Court held, in contrast to *Re Alex*, that treatment for gender dysphoria was therapeutic. The Full Court held that court authorisation for stage 1 treatment was no longer required, provided there was no dispute between the parents and the medical practitioners. In addition, if the child was *Gillick* competent and consented to the treatment, court authorisation was not required for stage 2 treatment.¹¹⁸ However, given the nature of stage 2 treatment, it was still the role of the court to determine *Gillick* competence.¹¹⁹ If the child was not *Gillick* competent, court authorisation for stage 2 was still required.

In *Re Kelvin* (2017),¹²⁰ the Full Court of the Family Court found that stage 2 treatment was no longer a medical procedure to which parents could not consent and which therefore required court authorisation, except in certain circumstances. Therefore, where stage 2 treatment of a child with gender dysphoria is proposed, the child consents to the treatment, medical practitioners agree that the child is *Gillick* competent and the parents of the child do not object, it is not mandatory to apply to the Family Court for a determination of whether the child is *Gillick* competent.¹²¹

In *Re Matthew* (2018),¹²² the Family Court further extended this analysis to stage 3 treatment. Stage 3 treatment of a child with gender dysphoria was for the purpose of treating a psychiatric ‘bodily malfunction’ and was therefore therapeutic in nature.¹²³ Therefore, if a child consents to the treatment, the medical practitioners agree that the child is *Gillick* competent, and there is no relevant controversy, there is no need for court approval. The Family Court noted that a controversy might arise in a number of ways, including between the child, the parents and the medical practitioners. The disagreement can relate to whether the child is *Gillick* competent, whether the treatment is therapeutic, whether everybody involved consents, or about any other thing, all of which activate the necessity for court authorisation.

The Commission considers that these cases, both as to when parents can consent to therapeutic procedures for intersex children and a *Gillick* competent minor is able to consent to stage 1, 2 or 3 transitioning procedures, in both cases without court approval, are highly relevant to considering what procedures and evidence should be required for a change of sex or gender under the GR Act and the BDMR Act.

117 *Re Jamie* (2013) 278 FLR 155.

118 *Re Jamie* (2013) 278 FLR 155, 182 [129], 183 [134] (Bryant CJ), 192 [188], 193 [195] (Strickland J).

119 *Re Jamie* (2013) 278 FLR 155, 184 [137] (Bryant CJ), 186 [186] (Finn J), 193 [196] (Strickland J).

120 *Re Kelvin* (2017) 327 FLR 15.

121 *Re Kelvin* (2017) 327 FLR 15, 44 [182], 45 [184] (Thackray, Strickland and Murphy JJ), [187] (Ainslie-Wallace and Ryan JJ).

122 *Re Matthew* [2018] FamCA 161.

123 *Re Matthew* [2018] FamCA 161, [38] (Rees J).

CHAPTER 4. WESTERN AUSTRALIAN CONTEXT

4.1 Gender Reassignment Act 2000 (WA)

The long title of the GR Act states that its purposes include to allow the reassignment of 'gender'¹²⁴ and establish a Gender Reassignment Board with the power to issue recognition certificates.

In *AB and AH v Western Australia*, the High Court described the statutory objects of the GR Act as remedial and beneficiary and stated that:

*The [GR Act] acknowledges the difficulty under which certain members of society labour by reason of the disconformity between their belief about who they are, by reference to their gender, and the social-historical record of their gender at birth. It seeks to alleviate that suffering and the discrimination which such persons may face by providing legal recognition of the person's perception of their gender.*¹²⁵

When enacted, the GR Act was focussed upon trans people operating within the gender binary. It did not expressly contemplate the circumstances of intersex or gender diverse (that is, non-binary) people.¹²⁶

(a) Board

The GR Act establishes the Board,¹²⁷ with the functions to receive and determine applications for recognition certificates and to issue those certificate.¹²⁸

The Governor appoints:

- a President of the Board (who must be a judge of the Supreme Court, the District Court or the Family Court of Western Australia or an Australian legal practitioner for at least eight years);¹²⁹ and
- up to five other Board members, who must include a medical practitioner, a person who has undergone a reassignment procedure and a person with experience in equal opportunity matters.¹³⁰

The Board must be constituted by at least three members.¹³¹ The President may give practice directions.¹³² The Board has an executive officer and such other officers as are necessary.¹³³

(b) Applying for recognition certificates

A person who has undergone a 'reassignment procedure' may apply to the Board for a recognition certificate.¹³⁴ An application may be made by an adult or by a child's guardian.¹³⁵ A child is anyone under the age of 18.¹³⁶

¹²⁴ The Commission notes that whilst the GR Act refers to reassignment of 'gender', it may more accurately refer to reassignment of 'sex' given the requirement for the applicant to undergo a 'reassignment procedure'. See Chapter 7.2(b) of this Discussion Paper.

¹²⁵ *AB v Western Australia; AH v Western Australia* (2011) 244 CLR 390, 402 [25] (French CJ, Gummow, Hayne, Kiefel and Bell JJ).

¹²⁶ *Western Australia, Parliamentary Debates*, Legislative Assembly, 9 April 1997, 1360–1 (Kevin Prince, Minister for Health).

¹²⁷ GR Act s 5(1).

¹²⁸ GR Act s 5(2).

¹²⁹ GR Act s 6.

¹³⁰ GR Act s 7.

¹³¹ GR Act s 8(2).

¹³² GR Act s 10.

¹³³ GR Act s 11.

¹³⁴ GR Act s 14(1).

¹³⁵ GR Act s 14(2).

¹³⁶ GR Act s 3 (definition of 'child').

CHAPTER 4. WESTERN AUSTRALIAN CONTEXT

The GR Act defines ‘reassignment procedure’ to mean:

*a medical or surgical procedure (or a combination of such procedures) to alter the genitals and other gender characteristics of a person, identified by a birth certificate as male or female, so that the person will be identified as a person of the opposite sex and includes, in relation to a child, any such procedure (or combination of procedures) to correct or eliminate ambiguities in the child’s gender characteristics.*¹³⁷

The application must be made in the prescribed form¹³⁸ and accompanied by:

- the prescribed fee,¹³⁹ which is currently \$40;¹⁴⁰
- a statement signed by a medical practitioner that the applicant (or the child) has undergone the reassignment procedure;¹⁴¹
- any documents relating to where the reassignment procedure was carried out;¹⁴²
- the original (or certified copy) of the birth certificate of the applicant (or the child);¹⁴³
- the original (or certified copy) of any documents showing proof and length of residency of the applicant (or the child);¹⁴⁴

- if the applicant wishes, any relevant information regarding the adoption of the lifestyle of a person of the gender to which the applicant (or the child) has been reassigned;¹⁴⁵ and
- a statement from any person who has provided counselling in relation to the gender identity of the applicant (or the child), signed by that person.¹⁴⁶

The Board can require an applicant to give any additional information necessary for a proper consideration of the application.¹⁴⁷ A copy of the application must be served on the Attorney-General and on any other person who the Board considers should be served with notice.¹⁴⁸

The Board will make a determination of an application at a meeting. Normally, the Board will meet to consider any application within four weeks of it being lodged.¹⁴⁹ An applicant can attend the meeting, as may those who have been served with a copy of the application.¹⁵⁰ The Board will be made up of the President and two other members. At the meeting, the Board will consider the information in the application.

The Board must determine every application by giving a written decision with the reasons for that decision.¹⁵¹ The Board’s proceedings are not bound by the rules of evidence,¹⁵² and must be conducted in private.¹⁵³ The President has a casting vote.¹⁵⁴

137 GR Act s 3 (definition of ‘reassignment procedure’). As noted above, the Commission is cognisant that the definition in the GR Act (s 3) is ‘gender characteristics’, however this definition more accurately describes sex characteristics. The Commission also acknowledges that this language may be seen as inappropriate to the extent that it implies that sex characteristic variations require correction or elimination. The Commission also recognises that it is in tension with the Commission’s general principle that all members of the community should have their autonomy and agency empowered, including children to the maximum extent of their competency.

138 GR Act ss 14(3), 26; GR Regulations sch 1, Form 1 [for an adult], Form 2 [for a child].

139 GR Act s 14(3).

140 GR Regulations reg 4(1)(b)(i). GR Regulations reg 4(2) permits the Board to waive the fee.

141 GR Regulations reg 4(1)(b)(ii).

142 GR Regulations reg 4(1)(b)(iii).

143 GR Regulations reg 4(1)(b)(iv).

144 GR Regulations reg 4(1)(b)(v).

145 GR Regulations reg 4(b)(vi).

146 GR Regulations reg 4(b)(vii).

147 GR Regulations reg 4(3).

148 GR Act s 14(4).

149 Board, *Information for those Seeking a Gender Reassignment Certificate* <http://www.courts.dotag.wa.gov.au/_files/Gender_Reassignment_brochure.pdf>.

150 GR Act s 14(5).

151 GR Act s 14(8).

152 GR Act s 14(6).

153 GR Act s 14(7).

154 GR Regulations reg 8.

CHAPTER 4. WESTERN AUSTRALIAN CONTEXT

The Board may issue a recognition certificate in the following circumstances:

Where the applicant is an adult¹⁵⁵

At least one of the following must apply:

- The reassignment procedure was carried out in Western Australia.
- The applicant's birth was registered in Western Australia.
- The applicant is a resident of Western Australia and has been so for at least 12 months.

AND the Board must be satisfied of all of the following:

- The applicant believes their true gender is the gender to which they have been reassigned.
- The applicant has adopted the lifestyle and the gender characteristics¹⁵⁶ of a person of the gender to which the person has been reassigned.
- The applicant has received proper counselling in relation to their gender identity.

Where the applicant is under 18¹⁵⁷

At least one of the following must apply:

- The reassignment procedure was carried out in Western Australia.
- The child's birth was registered in Western Australia.
- The child is a resident of Western Australia and has been so for at least 12 months.

AND the Board must be satisfied of all of the following:

- It is in the best interests of the child that the recognition certificate is issued.

Currently, a recognition certificate cannot be issued to a person who is married,¹⁵⁸ however on 15 August 2018, the Attorney General introduced the Gender Reassignment Amendment Bill 2018 into Parliament to amend the GR Act in order to permit this.¹⁵⁹

In *AB and AH v Western Australia*, the High Court held that a 'reassignment procedure' may include hormone therapy (without surgery) which sufficiently alters the genitals and other gender characteristics of a person so that the person will be identified as a person of the opposite sex.¹⁶⁰ The High Court also held that once this

requirement, and the jurisdictional grounds (set out in the table above) are satisfied, in determining whether the applicant has the gender characteristics of a person of the gender they are seeking to be recognised as, the Board is directed to consider a person's perception of themselves and social perceptions about them, although no further consideration of the extent of the person's bodily state is required.¹⁶¹

A decision by the Board not to issue a recognition certificate does not prevent a person from re-applying based on additional or changed circumstances.¹⁶²

¹⁵⁵ GR Act s 15(1).

¹⁵⁶ 'Gender characteristics' means the physical characteristics by virtue of which a person is identified as male or female; GR Act s 3 (definition of 'gender characteristics'). As noted above, the Commission is cognisant that the definition in the GR Act (s 3) is 'gender characteristics', however this definition more accurately describes sex characteristics.

¹⁵⁷ GR Act s 15(2).

¹⁵⁸ GR Act s 15(3).

¹⁵⁹ Similar amendments are being progressed in other Australian jurisdictions. See, eg, *Justice Legislation Amendment (Access to Justice) Act 2018* (Vic) pt 3; *Births, Deaths and Marriages Registration Amendment Act 2018* (Qld) s 3.

¹⁶⁰ *AB v Western Australia; AH v Western Australia* (2011) 244 CLR 390, 404 [32] (French CJ, Gummow, Hayne, Kiefel and Bell JJ).

¹⁶¹ *AB v Western Australia; AH v Western Australia* (2011) 244 CLR 406 [39] (French CJ, Gummow, Hayne, Kiefel and Bell JJ).

¹⁶² GR Act s 14(9).

CHAPTER 4. WESTERN AUSTRALIAN CONTEXT

An aggrieved person, including the applicant or the Attorney-General, may apply to the State Administrative Tribunal (**SAT**) for a review of a Board decision.¹⁶³ A SAT decision may also be appealed to the Supreme Court of Western Australia and, as a final resort, to the High Court of Australia.

(c) Effect of recognition certificates

A recognition certificate is conclusive evidence that the person has undergone a reassignment procedure and is of the sex stated in the certificate.¹⁶⁴ An equivalent certificate issued under a corresponding law has the same effect.¹⁶⁵

If a recognition certificate (including an equivalent certificate) relating to a person whose birth is registered in Western Australia is produced to the Registrar, the Registrar must register the reassignment of 'gender'¹⁶⁶ and make any other entries and alterations on any other register or index as may be necessary.¹⁶⁷

A person must wait one month after the recognition certificate is issued to produce it to the Registrar and cannot do so if an application is made for a review of the decision to issue the certificate.¹⁶⁸

A person must produce the recognition certificate to the Registrar accompanied by:

- an application form approved by the Registrar;¹⁶⁹ and
- the prescribed fee,¹⁷⁰ which is currently \$30.¹⁷¹

The Commission notes, however, that the application form specifies the registration fee is \$49 and includes the cost of the new birth certificate and postage.¹⁷²

Once the Registrar has registered the reassignment of sex and altered the Register accordingly, a birth certificate issued by the Registrar for the person must, unless otherwise requested by the person, show the person's sex in accordance with the altered Register.¹⁷³ A birth certificate must not include a statement that a person has changed sex.¹⁷⁴

The Supreme Court may cancel a recognition certificate if it appears it was obtained by fraud or other improper means and may, on cancelling the certificate, make any consequential orders that may be necessary or desirable.¹⁷⁵

The GR Act also provides that if a gender reassigned person has a certificate of qualification¹⁷⁶ which refers to them by a name that by common usage is not attributed to a

163 GR Act s 21.

164 GR Act s 16(1).

165 GR Act s 16(2). An 'equivalent certificate' is a certificate issued under a corresponding law that corresponds to a certificate under the GR Act: GR Act s 3 (definition of 'equivalent certificate'). A 'corresponding law' is a law of another State, Territory or another country that is declared by the regulations to be a corresponding law: GR Act s 3 (definition of 'corresponding law'). The GR Regulations declared the SR Act to be a corresponding law: GR Regulations reg 3. The SR Act has since been repealed by the *Births, Deaths and Marriages (Gender Identity) Amendment Act 2016* (SA). Accordingly, there is currently no corresponding law and hence capacity to recognise any equivalent certificate.

166 As noted above, the GR Act refers to reassignment of 'gender', it may more accurately refer to reassignment of 'sex' given the requirement for the applicant to undergo a 'reassignment procedure'. See Chapter 7.2(b) of this Discussion Paper.

167 GR Act s 17(1).

168 GR Act s 17(2).

169 GR Act s 17(3).

170 GR Act s 17(3).

171 GR Regulations reg 6. The Registrar has power to remit the whole or part of a fee under the BDMR Act (s 70), but this power would not appear to apply to a fee under the GR Act and GR Regulations. The Board has no express power to remit this fee (cf GR Regulations reg 4(2)).

172 WA Government, Registry of Births, Deaths and Marriages, *Application to Register Change of Sex of Adult* <https://bdm.justice.wa.gov.au/GI/gender_reassignment.aspx?uid=7219-6282-8371-6256>.

173 GR Act s 18(1).

174 GR Act s 18(2).

175 GR Act s 19.

176 A document that shows that the person has an authorisation, qualification or experience that is needed for or facilitates the practice of a profession, the carrying on of a trade or business or the engaging in of an occupation: GR Act s 20(5) (definition of 'certificate of qualification').

CHAPTER 4. WESTERN AUSTRALIAN CONTEXT

person of the reassigned gender and the person has adopted another name, the issuing authority may issue a replacement certificate showing the new adopted name.¹⁷⁷ A replacement certificate need not show that it is issued in place of the original, but may do so if the issuing authority considers it would not otherwise be practicable to issue the certificate.¹⁷⁸

(d) Other provisions

The GR Act imposes confidentiality requirements on both those who hold or held positions involving duties related to the administration of the GR Act, as well as issuing authorities and any person acting on their behalf.¹⁷⁹

The GR Act also prohibits a person from making a statement knowing it to be false or misleading in a material respect for the purposes of, or in connection with, an application, which is subject to a penalty of \$2,000.¹⁸⁰

4.2 Births, Deaths and Marriages Registration Act 1998 (WA)

The objects of the BDMR Act are to provide for the registration of (amongst other things) births, and the keeping of registers for recording and preserving information about births in perpetuity.¹⁸¹

(a) The role of the Registrar

The BDMR Act provides for the appointment of the Registrar,¹⁸² whose functions include establishing and maintaining the registers necessary for the purposes of the BDMR Act.¹⁸³ The Registrar must maintain a register

of registrable events,¹⁸⁴ which includes (among other events) births, deaths, marriages and changes of name.¹⁸⁵ The Register must contain the particulars of each registrable event required under the BDMR Act (or any other written law) and may contain further information if its inclusion is considered appropriate by the Registrar.¹⁸⁶

(b) Birth notification and registration process

When a child is born in Western Australia:

- (i) The midwife who attends at the birth must provide a report to the Department of Health's Chief Health Officer within 48 hours.¹⁸⁷ The information required to be provided in the report includes recording the gender of the child as male, female or indeterminate.¹⁸⁸ The Commission understands that the child's sex will be determined based on a physical inspection. If the result is indeterminate, further testing is undertaken (for example, chromosome testing), which can often take a week or longer. The child's parents are given avarious materials, including the birth registration statement.
- (ii) If born in, or brought within 24 hours of the birth to, a hospital the Chief Executive of a public hospital or the Chief Executive Officer or General Manager of a private hospital, or in any other case, the doctor or midwife responsible for the care of the child's mother at birth, must give the Registrar notice of the birth within one month after the birth.¹⁸⁹ The Commission understands that the information

177 GR Act s 20(1).

178 GR Act s 20(3).

179 GR Act s 22.

180 GR Act s 23.

181 BDMR Act ss 3(a)–(b).

182 BDMR Act s 5.

183 BDMR Act s 6(a).

184 BDMR Act s 49(1).

185 BDMR Act s 4 (definition of 'registrable event').

186 BDMR Act s 49(2).

187 *Health (Miscellaneous Provisions) Act 1991 (WA)* s 335.

188 *Health (Notifications by Midwives) Regulations 1994 (WA)* sch, Form 2.

189 BDMR Act s 12.

CHAPTER 4. WESTERN AUSTRALIAN CONTEXT

that must be provided includes recording the 'gender' of the child as male, female or indeterminate.¹⁹⁰ The Registrar uses the notification of birth to monitor whether the parents of the child subsequently register the child's birth.

- (iii) The parents of the child are jointly responsible¹⁹¹—or if the child is a founding person with responsibility for the child's long-term care, welfare and development is responsible¹⁹²—for registering the child's birth by lodging a birth registration statement within 60 days of the birth.¹⁹³ The Registrar's birth registration form requires sex to be recorded, but only provides for male or female classification. The Registrar must accept a birth registration statement lodged after the 60 day period, with the person responsible for registering the birth exposed to a penalty of \$1,000 for late lodgement.¹⁹⁴ The information in the birth registration statement is entered into the Register and is used to create the birth certificate. The sex data on the birth registration statement is also provided to the ABS for birth statistics.

The Registrar is to register the birth in the Register, including such particulars as the Registrar considers appropriate.¹⁹⁵ If the particulars available to the Registrar are incomplete, the Registrar may register a birth on the basis of incomplete particulars.¹⁹⁶

(c) Sex and/or gender classification

Neither the BDMR Act nor the BDMR Regulations expressly require the notification, birth registration statement or the Register to record a child's sex or gender. Accordingly, the BDMR Act and the BDMR Regulations are silent as to the basis for determining a child's birth sex, as well as any available sex or gender classifications. Instead, it appears that the Registrar considers that inclusion of a child's sex is appropriate and hence administratively required. The GR Act appears to assume that, at least following a 'gender reassignment', a person's sex is registered on the Register and shown on that person's birth certificate.¹⁹⁷

Given neither the BDMR Act nor the BDMR Regulations expressly require the Register to record a child's sex or gender, there is no express exemption from lodging a birth registration statement, or extension of time within which a birth registration statement must be lodged, in circumstances where the child's birth sex is indeterminate.¹⁹⁸ Similarly, there is no express basis or period for amending the Register for a change in a child's birth sex, for example as a result of further testing following birth.

As a general matter, a person may apply to the Registrar for inclusion of additional registrable information about a person's birth registration in the Register.¹⁹⁹ Such application must be in writing, include the information required by the Registrar and, if required by the Registrar, be accompanied by a statutory declaration verifying the information.²⁰⁰ The Registrar may add

190 The Commission understands this is detailed in a Schedule to a Memorandum of Understanding between the Registrar and the Department of Health on behalf of maternity hospitals.

191 The Registrar may accept a birth registration statement from one parent if satisfied that it is impractical for the other parent to join in the application because of death, disappearance, ill health, unavailability or the need to avoid unwarranted distress: BDMR Act s 15(1).

192 BDMR Act s 15(2).

193 BDMR Act ss 15, 16.

194 BDMR Act s 16.

195 BDMR Act s 17(1).

196 BDMR Act s 17(2).

197 GR Act s 18(1).

198 The Registrar does retain the general power to register births on the basis of incomplete particulars: BDMR Act s 17(2).

199 BDMR Act s 19(1).

200 BDMR Act s 19(2).

CHAPTER 4. WESTERN AUSTRALIAN CONTEXT

additional registrable information to an entry in the Register if there is sufficient evidence of the matters to be recorded.²⁰¹

The Commission was advised by the Registrar that although it is very rare, a child's sex can be corrected in the Register in this way where medical evidence is provided to demonstrate that the wrong sex was recorded at birth.

A person who is dissatisfied with a decision of the Registrar may apply to the SAT for a review of the decision.²⁰² In addition, a State court may, on application by an interested person, order the Registrar to include or correct registrable information about a birth in the Register,²⁰³ and the Registrar must then correct the Register.²⁰⁴

The BDMR Act prohibits a person from making a knowingly false or misleading representation in an application or document under the BDMR Act, which is subject to a penalty of \$10,000.²⁰⁵

While a range of Western Australian legislation and regulations refer to birth certificates, aside from the GR Act itself, none requires the specification of sex or gender on the birth certificate.²⁰⁶ Such legislation usually refers to birth certificates for the purposes of identification, where sex and gender would only be relevant to the extent they are necessary for such identification.

When someone dies in Western Australia, the death must be registered:²⁰⁷

- (i) The doctor who was responsible for the person's medical care immediately before the death or who examined the deceased person's body must certify the cause of death and give a Medical Certificate of Cause of Death within 48 hours.²⁰⁸ The Registrar's approved form only provides for male or female sex classification.
- (ii) The funeral director or other person who arranges for the disposal of the deceased person's remains must notify the Registrar by lodging a death registration statement and give the Registrar the Medical Certificate Cause of Death within 14 days of the death.²⁰⁹ The Registrar's approved form provides for male, female, unknown and not determined sex classification. The information in the death registration statement is used to create the death certificate and is provided to the ABS. The Commission understands that if there are any inconsistencies between the Medical Certificate Cause of Death and the death registration form, the Registrar will contact the relevant funeral director to confirm the details.

If any changes were to be made to the sex or gender classifications available for the purposes of birth reports, notifications, registration statements and certificates, it would be prudent to consider making equivalent changes to the Medical Certificate of Cause of Death and death registration statement. If additional sex or

201 BDMR Act s 52.

202 BDMR Act s 67.

203 BDMR Act s 20(b).

204 BDMR Act s 51(2).

205 BDMR Act s 59.

206 *Adoption Rules 1995* (WA) s 12(1)(b); BDMR Act s 35(4); *Casino Control (Burswood Island) (Licensing of Employees) Regulations 1985* (WA) reg 4(2)(c); *Child Care Services (Child Care) Regulations 2006* (WA) reg 67(4); *Children and Community Services Act 2004* (WA) s 97(1); *Community Protection (Offender Reporting) Act 2004* (WA) s 38(2A); *Criminal Investigation (Covert Powers) Act 2012* (WA) s 44 (definition of 'evidence'); GR Act ss 3 (definition of 'reassignment procedure'), 18; GR Regulations reg 4(1)(b)(iv); *Pawnbrokers and Second-hand Dealers Act 1994* (WA) s 14; *Pawnbrokers and Second-hand Dealers Regulations 1996* (WA) reg 13(1); *Security and Related Activities (Control) Regulations 1997* (WA) reg 18; *Spent Convictions Regulations 1992* (WA) sch 1; *Surrogacy Act 2008* (WA) s 20(5); *Tobacco Products Control Regulations 2006* (WA) reg 17(a).

207 BDMR Act s 40(1).

208 BDMR Act s 44(1).

209 BDMR Act s 42.

CHAPTER 4. WESTERN AUSTRALIAN CONTEXT

gender classifications were recognised, it would be necessary to consider what consequential amendments to other legislation would be required, given a range of Western Australian legislation and regulations are premised upon references to binary sex or gender classifications.²¹⁰

4.3 Gender Reassignment Board in practice

The Board is an independent specialist tribunal. The Board's meetings are held at the SAT's offices and SAT staff provide administrative support to the Board despite the Board being independent of the SAT.²¹¹ In 2015, a Bill was introduced to abolish the Board and confer its function of issuing recognition certificates on the SAT, but this lapsed with the prorogation of the last Parliament.²¹²

The Board is not a court and the Commission heard that it seeks to adopt a non-adversarial approach.

The relevant expertise of its members, which include a medical practitioner, a person who has undergone a reassignment procedure and a person with experience in equal opportunity matters,²¹³ assists with its decision making. If an applicant has received appropriate medical treatment, the Board often accepts this as evidence that the applicant is living in their affirmed gender. Evidence that an applicant has received appropriate medical treatment is most often accepted by the Board as support for the assertion that the applicant is living in their affirmed gender.

The Board recognises that for some people, its processes are an important step in their journey towards legal recognition. The Board seeks to support this journey, noting that the granting

of a recognition certificate can be of particular symbolic importance to many who apply for it.

During its preliminary engagement with stakeholders, the Commission heard that different people have had different experiences with the GR Act and Board processes. Some people had a positive view of the process, expressing that the recognition certificate held even greater significance to them than their amended birth certificate. For others who were born overseas but resided in Western Australia, the process was important because they were not able to amend their birth certificate. Some appreciated that the Board is informed by members who are medical practitioners as well as those who have undergone a reassignment procedure. Others supported the non-legalistic manner in which the Board operated, and the confidentiality of its processes and records.

In contrast, some people found the GR Act process difficult. Despite the composition of the Board, they felt nervous about attending the Board meeting, feeling uncomfortable with the prospect of having to prove they were living in their affirmed gender, despite having already transitioned. Still others found the requirement to provide evidence of counselling problematic, when they had previously gone through a reassignment procedure and had not received any subsequent medical treatment because they were not unwell. The process was also said to be expensive and the required paperwork onerous and confusing. For these people, the High Court's interpretation of the GR Act as being beneficial and remedial legislation to alleviate 'suffering and discrimination' had not necessarily been their experience.

210 See, eg, *Prisons Act 1981* (WA) s 44; *Young Offenders Act 1994* (WA) s 152(4).

211 Board, *Information for those Seeking a Gender Reassignment Certificate* <http://www.courts.dotag.wa.gov.au/_files/Gender_Reassignment_brochure.pdf>.

212 Gender Reassignment Amendment Bill 2015 (WA).

213 GR Act s 7.

CHAPTER 4. WESTERN AUSTRALIAN CONTEXT

These experiences demonstrate that an entity empowered to give effect to legal changes in sex and/or gender requires adequate resourcing. It also requires personnel who have a thorough understanding of sex and gender and who are equipped to offer sensitive support to those members of the community who seek to access it in order to change their legal status.

4.4 Key issues for consideration

Against this background, in preparing a submission to the Commission in response to this Discussion Paper, you may wish to consider:

- to whom an application for a legal change of sex and/or gender should be made (and whether it is appropriate to retain a role for both the Board and the Registrar);
- what sex and/or gender classifications are recognised (including beyond the binary of man/male and woman/female);
- what criteria must be satisfied, including what requirement (if any) there is for surgical or medical treatment, to permit a change of sex and/or gender (including for a child);
- what evidence is required to achieve a change of sex and/or gender; and
- whether it is necessary for a birth certificate to record birth sex and, if so, what sex classifications are to be recognised?

CHAPTER 5. AUSTRALIAN CONTEXT

The Terms of Reference require the Commission to consider inconsistencies between Western Australia and Commonwealth legislation. This chapter provides an overview of some of the areas of inconsistency between the GR Act, BDMR Act and EO Act and Commonwealth legislation, policies and practice.

This chapter also provides an overview of legislation and relevant reforms in other Australian states and territory in relation to the recognition of a person's sex, change of sex or gender, and status relating to sex characteristics. Such an overview is useful in understanding potential options for reform, as well as seeking to facilitate, where appropriate and possible, uniformity across Australian jurisdictions.

5.1 Commonwealth

(a) *Sex Discrimination Act 1984 (Cth)*

In 2013, the SD Act was amended²¹⁴ to provide protection under Commonwealth law against unlawful discrimination on the grounds of sexual orientation, gender identity and 'intersex status'.²¹⁵ The SD Act provides that discrimination is unlawful in the areas of employment, education, the provision of goods, services and facilities, accommodation, and other areas.²¹⁶ Where discrimination takes place against a person on the ground of gender identity or 'intersex status',²¹⁷ they are generally able to make a discrimination complaint to the Australian Human Rights Commission.²¹⁸

The SD Act includes 'gender identity' as a protected attribute, which is defined broadly as meaning:

*the gender-related identity, appearance or mannerisms or other gender-related characteristics of a person (whether by way of medical intervention or not), with or without regard to the person's designated sex at birth.*²¹⁹

While this definition does not use descriptions such as 'trans' or 'gender diverse', it is clear from the second reading speech for the amending Act that trans people were intended to be covered by it.²²⁰

Accordingly, the SD Act provides anti-discrimination protection regardless of a person's sex assigned at birth or whether the person has had any medical intervention. Instead, the attribute of 'gender identity' includes the way a person self-identifies and expresses their gender. It also does not specifically require that a person's gender identity must be either male or female in order to be protected.

The SD Act also includes intersex status as a protected attribute, which is defined as meaning:

the status of having physical, hormonal or genetic features that are:

- a) *neither wholly female nor wholly male; or*
- b) *a combination of female and male; or*
- c) *neither female nor male.*²²¹

The SD Act's inclusion of 'intersex status' as a separate protected attribute distinguishes the biological variations in sex characteristics from gender identity. The SD Act's approach and use

214 *Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Act 2013 (Cth)*.

215 SD Act ss 3 (definition of 'intersex status'), 5A–C.

216 SD Act ss 14–27.

217 SD Act ss 5B–C.

218 *Australian Human Rights Commission Act 1986 (Cth) s 46P*.

219 SD Act s 4(1) (definition of 'gender identity').

220 Commonwealth, *Parliamentary Debates*, House of Representatives, 21 March 2013, 2893–4 (Mark Dreyfus, Attorney-General).

221 SD Act s 4(1) (definition of 'intersex status').

CHAPTER 5. AUSTRALIAN CONTEXT

of terminology regarding intersex status and gender identity has been described by a number of subsequent reviews of state legislation as reflecting best practice.²²²

When the SD Act was amended to provide protection against discrimination on the basis of sexual orientation, gender identity and intersex status, the amending Act created an exemption²²³ for conduct that would otherwise be discriminatory but which is in direct compliance with a Commonwealth, state or territory law prescribed by regulations.²²⁴ In August 2013, all Commonwealth, state and territory legislation was prescribed until 31 July 2014.²²⁵ This was to enable all jurisdictions to review and amend their laws to achieve compliance with the SD Act. Subsequently, this deadline was extended to 31 July 2015²²⁶ and then to 31 July 2016.²²⁷ The GR Act, BDMR Act and EO Act are now beyond the extension granted until 31 July 2016. In 2016, the deadline for the *Human Reproductive Technology Act 1991* (WA) and the *Surrogacy Act 2008* (WA) was extended to 31 July 2017.²²⁸ No other states or territories have had any further extensions. Accordingly, conduct which is in compliance

with state or territory legislation but which discriminates against people on the basis of their gender identity or intersex status (and where any other valid exemption does not apply) risks being in breach of the SD Act.

As outlined in Chapter 4, both the GR Act and the BDMR Act are premised either explicitly or in practice on a binary conception of sex and gender.²²⁹ The EO Act also appears to do this in providing protection from discrimination on gender history grounds.²³⁰ A person has a gender history if they identify as a member of the opposite sex (that is, a sex of which the person was not a member at birth) by living, or seeking to live, as a member of that opposite sex.²³¹ This does not provide express protection for those trans or gender diverse people who do not identify as either male or female. It also does not provide express protection for an intersex person.²³²

Discrimination against a gender reassigned person (that is, someone who has been issued with a recognition certificate under the GR Act) on gender history grounds is unlawful

222 See SALRI Audit Paper, *Discrimination on the grounds of sexual orientation, gender identity and intersex status in SA* (September 2015) 106. This paper's recommendations made frequent reference to the SD Act's choice of 'gender identity' and 'intersex status', noting that South Australia's legislation should be amended 'by reference to or in identical terms as the relevant terms in the *Sex Discrimination Act 1984* (Cth)'.

223 SD Act s 40(2B).

224 SD Act s 116 provides the Governor-General may make regulations.

225 *Sex Discrimination Regulations 1984* (Cth) reg 5 as amended by *Sex Discrimination Amendment (Exemptions) Regulation 2013* (Cth) reg 4 sch 1.

226 *Sex Discrimination Regulations 1984* (Cth) reg 5 as amended by *Sex Discrimination Amendment (Exemptions) Regulation 2014* (Cth) reg 4, sch 1.

227 *Sex Discrimination Regulations 1984* (Cth) reg 5 as amended by *Sex Discrimination Amendment (Exemptions) Regulation 2015* (Cth) reg 4, sch 1.

228 *Sex Discrimination Regulations 1984* (Cth) reg 5 as amended by *Sex Discrimination Amendment (Exemptions) Regulation 2016* (Cth) reg 4 sch 1.

229 The GR Act defines 'gender characteristics' as meaning 'the physical characteristics by virtue of which a person is identified as either male or female': GR Act s 3 (definition of 'gender characteristics'), but it also acknowledges that there can be 'ambiguities' in gender characteristics: GR Act s 3 (definition of 'reassignment procedure'). The BDMR Act does not itself specify any binary classifications, but to the extent that it operates in conjunction with the GR Act to facilitate a change of sex classification, it is implicitly premised on the same binary conception of sex and gender. Also, as noted above, the Commission is cognisant that the definition in the GR Act (s 3) is 'gender characteristics', however this definition more accurately describes sex characteristics.

230 EO Act pt IIAA.

231 EO Act s 35AA. The High Court has held that the phrase 'opposite sex' entails the binary categories of sex: *Norrie* (2014) 250 CLR 490, [33].

232 South Australia, Tasmania and the ACT each provide protection against discrimination on the grounds of 'gender identity' and intersex status, similar to the SD Act: *Equal Opportunity Act 1984* (SA) pt 3; *Anti-Discrimination Act 1998* (Tas) s 16; *Discrimination Act 1991* (ACT) s 7(1).

Victoria and Queensland both provide protection for discrimination on the grounds of 'gender identity', which includes someone of indeterminate sex: *Equal Opportunity Act 2010* (Vic) s 4; *Anti-Discrimination Act 1991* (Qld), s 7. However, Victoria and Queensland do not expressly refer to intersex status and their definitions of 'gender identity' may be premised on a binary conception of sex.

New South Wales provides protection against discrimination on 'transgender grounds', where the definition of transgender includes someone of indeterminate sex: *Anti-Discrimination Act 1977* (NSW), Part 3A, s 38A. NSW does not expressly refer to intersex status and its definition of transgender may also be premised on a binary conception of sex.

The NT provides protection against discrimination on the basis of sexuality, which includes transsexuality: *Anti-Discrimination Act 1992* (NT), s 4. The NT does not define the meaning of 'transsexuality' and appears to conflate gender identity with sexuality.

CHAPTER 5. AUSTRALIAN CONTEXT

in a range of circumstances, including in the context of employment, education, access to places and vehicles, goods, services and facilities, accommodation, land, clubs, sport, requesting or requiring information, superannuation.²³³ Importantly, this means that protection is only afforded on the basis of having obtained legal recognition of gender identity, rather than purely on the basis of a person's self-affirmed gender.

Accordingly, the GR Act, BDMR Act and the EO Act each appear to be at least partially inconsistent with the SD Act. Both the SD Act and the EO Act apply to the provision of goods, services and facilities. On this basis, even if the EO Act protections are not adequate, the SD Act protections may still apply. It is worthy to note that it has generally been held that the regulatory functions and powers of state instrumentalities are not services under these Acts.²³⁴ It is therefore possible that a Western Australian government agency would not be subject to these anti-discrimination provisions if it fails or refuses to recognise a person's sex or gender in the context of exercising a regulatory function. Arguably, managing the birth and death registers, driving licence records and school enrolments might be considered to be regulatory functions, rather than a provision of services. The SD Act also does not apply in the context of employment by a state instrumentality.²³⁵ Accordingly, it is possible that a Western Australian government employee who experiences discrimination on the basis of an attribute which is protected under the SD Act but not the EO Act may not have the ability to make a complaint under the SD Act.

The amended SD Act also provides for another exemption in relation to requests for information and the keeping of records, stating that it is not unlawful to request information, or make or keep records, in a way that does not allow for a person to identify as being neither male nor female.²³⁶ The Explanatory Memorandum to the amending Act justified the exemption as achieving 'the legitimate objective of minimising regulatory impact on organisations':

Mandating that all forms must be amended to offer an alternative category could have a significant regulatory impact for a wide range of organisations. This impact would be disproportionate to the small number of people who do identify as neither male [n]or female. The limited nature of the exception is a proportionate means of achieving this objective'.²³⁷

In the context of considering potential amendments to the GR Act and BDMR Act, the Commission considers it appropriate to consider whether the EO Act should be amended to align with the SD Act to protect against discrimination based on gender identity or intersex status.²³⁸

(b) Australian Guidelines on the Recognition of Sex and Gender

The Government Guidelines seek to create a uniform system of classification of sex and gender in the collection, use and amendment of Australian government records. The Government Guidelines have been influential in the shift towards recognising the distinction between gender and sex in Commonwealth Government documents.²³⁹

233 EO Act ss 35AC–AR.

234 Equal Opportunity Commission, *Letter to the Commission* (29 May 2018) 2.

235 SD Act s 13(1).

236 SD Act s 43A.

237 Explanatory Memorandum, Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Bill 2013 (Cth) 6–7.

238 See also Equal Opportunity Commission, *Review of the Equal Opportunity Act 1984* (May 2007), which recommended amendments to the EO Act to provide, among other things, protection against gender identity discrimination.

239 Equal Opportunity Tasmania Report, *Legal recognition of sex and gender diversity in Tasmania*, 25.

CHAPTER 5. AUSTRALIAN CONTEXT

As noted above, the Government Guidelines provide that, unless necessary, Government departments and agencies should not request sex or gender information.²⁴⁰ Where required, the ‘preferred approach is for Australian Government departments and agencies to collect gender information’.²⁴¹

Irrespective of whether sex or gender are to be collected, any collection should only be done where there is a legitimate need for the information and it is consistent with Australian Privacy Principle 3.²⁴²

The Government Guidelines recognise that a person’s gender may be different to their sex at birth and may be neither exclusively male nor female.²⁴³ The Government Guidelines encourage Commonwealth Government departments and agencies to facilitate the collection of sex and gender information in accordance with the individual’s preference on how their sex or gender is to be recorded. The Government Guidelines give the options of ‘M (male), F (female) or X (indeterminate/intersex/ unspecified)’, where X refers to any person who does not exclusively identify as either male or female.²⁴⁴

A joint submission by the National LGBTI Health Alliance to the Commonwealth Attorney General’s Department expressed a consensus for simplifying the descriptor ‘X’ used by the Australian government and in the Australian Standards on data collection (AS4590) to ‘non-binary’.²⁴⁵ These stakeholders expressed serious concerns about the inappropriate use of ‘intersex’ as a descriptor for ‘X’ and that the use of ‘intersex’, ‘unspecified’ and ‘indeterminate’ in data

collection was likely to perpetuate data integrity issues. In addition, the term ‘indeterminate’ did not appropriately describe those who do not identify as men or women or those whose bodily characteristics are not considered stereotypically male or female. The Commission understands that the Commonwealth Attorney-General’s Department is currently reviewing the Government Guidelines and intends to release an updated version later in 2018.²⁴⁶

In order to have Australian government records recognise a change in gender and/or sex, neither surgery nor hormone therapy are required.²⁴⁷ Instead, an Australian government department or agency will recognise a change within a timely manner based on any one of:

- a) *a statement from a Registered Medical Practitioner or a Registered Psychologist;*
- b) *a valid Australian Government travel document, such as a valid passport, which specifies their gender; or*
- c) *a state or territory birth certificate, which specifies their gender. A document from a state or territory Registrar of Births, Deaths and Marriages recognising a change of sex and/or gender will also be seen as sufficient evidence.*²⁴⁸

240 Government Guidelines 6 [29].

241 Government Guidelines 6 [29].

242 *Privacy Act 1988* (Cth) Schedule 1.

243 Government Guidelines 3 [1].

244 Government Guidelines 4 [19].

245 National LGBTI Health Alliance, *Letter to the Commonwealth Attorney-General’s Department RE: Commonwealth Attorney-General’s Department Review of the Australian Government Guidelines on the Recognition of Sex and Gender* (24 September 2015) <<https://lgbtihealth.org.au/resources/submission-review-agd-guidelines/>>.

246 Australian Government Attorney-General’s Department.

247 Government Guidelines 5 [25].

248 Government Guidelines 5 [24].

CHAPTER 5. AUSTRALIAN CONTEXT

(c) Australian Passports approach to gender

In 2011, the Australian Passport Office, situated within the Commonwealth Department of Foreign Affairs and Trade, revised its guidelines to allow a person to obtain a passport identifying their affirmed gender as either M (male), F (female) or X (Indeterminate/Intersex/Unspecified).²⁴⁹ It requires a simple form to be completed by a registered medical practitioner or psychologist certifying that the person is:

- (i) *receiving/received appropriate clinical treatment for transition to (specify gender), or*
- (ii) *is unable to participate in a treatment regime, is transgender and identifies as (specify gender), or*
- (iii) *is intersex or of indeterminate sex.*²⁵⁰

Importantly, the nature of the treatment does not have to be specified and surgery is not required.²⁵¹ Similarly, a person's birth or citizenship certificates do not have to be amended in order for a person's passport to be issued in their affirmed gender (although an amended birth certificate or a recognition certificate is sufficient evidence for a change of gender on a passport).²⁵²

The Passport Office states that:

*The policy removes unnecessary obstacles to recording a person's preferred gender in their passport and was developed in close consultation with sex and gender diverse community organisations in Australia.*²⁵³

As a result, there is the possibility that a person might have inconsistent recognition of their sex and gender between their Commonwealth and Western Australian identification documents. For example, a trans person born in Western Australia who has not undergone a reassignment procedure²⁵⁴ may have their current, self-affirmed gender recorded in their Passport, but will continue to have their birth sex recorded on their birth certificate.

If trans, gender diverse and intersex people have inconsistent identification documents, this is likely to create a range of administrative challenges (for example, enrolling for school, accessing government benefits, opening bank accounts), as well as feeling their identity is not fully recognised.²⁵⁵

5.2 Other States and Territories

There have been a variety of developments to improve the legal recognition of trans, gender diverse and intersex people across the states and territories. The Australian Capital Territory in 2014 and South Australia in 2016 amended their respective Births, Deaths and Marriages Registration Acts, while Victoria unsuccessfully attempted to do so in 2016. Tasmania's Anti-Discrimination Commissioner undertook a review in 2016 of possible options for amending the Tasmanian legislation, but to date no legislation has been introduced. Queensland has begun a review of its legislation with a Discussion Paper issued in early 2018.

249 Australian Government Department of Foreign Affairs and Trade, *Sex and Gender Diverse Passport Applicants: Revised Policy*, Australian Passport Office (19 October 2011) <<https://web.archive.org/web/20111019035814/https://www.passports.gov.au/web/sexgenderapplicants.aspx>>.

250 Australian Government Department of Foreign Affairs and Trade, *Form B-14*, Australian Passport Office (accessed 17 July 2018) <<https://www.passports.gov.au/file/52/download?token=9gaPS9Bn>>.

251 Australian Government Department of Foreign Affairs and Trade, *Sex and Gender Diverse Passport Applicants*, Australian Passport Office (accessed 17 July 2018) <<https://www.passports.gov.au/passports-explained/how-apply/eligibility-citizenship-and-identity/sex-and-gender-diverse-passport>>.

252 Australian Government Department of Foreign Affairs and Trade, *Sex and Gender Diverse Passport Applicants: Revised Policy*, Australian Passport Office (19 October 2011) <<https://web.archive.org/web/20111019035814/https://www.passports.gov.au/web/sexgenderapplicants.aspx>>.

253 Australian Government Department of Foreign Affairs and Trade, *Sex and Gender Diverse Passport Applicants: Revised Policy*, Australian Passport Office (19 October 2011) <<https://web.archive.org/web/20111019035814/https://www.passports.gov.au/web/sexgenderapplicants.aspx>>.

254 As defined in the GR Act s 3.

255 See Chapter 3 of this Discussion Paper.

CHAPTER 5. AUSTRALIAN CONTEXT

(a) New South Wales: *Norrie's case*

In New South Wales, a person can apply to the Registrar of Births, Deaths and Marriages (**NSW Registrar**) to have a change of sex recognised under the *Births, Deaths and Marriages Registration Act 1995* (NSW) (**NSW Act**).²⁵⁶ The NSW Act requires an applicant to have undergone a 'sex affirmation procedure',²⁵⁷ as opposed to the 'reassignment procedure' that is required in Western Australia.

In NSW, an applicant must be at least 18 years old²⁵⁸ and have either had their birth registered in NSW²⁵⁹ or have been a resident for one year.²⁶⁰ The applicant requires statutory declarations from two doctors or medical practitioners verifying that the person has undergone a sexual affirmation procedure.²⁶¹ In the case of a child, parents or a guardian can apply on their behalf.²⁶²

In 2014, the High Court in *Norrie* held that not all human beings can be classified by sex as either male or female.²⁶³ The Court reviewed the context of prior amendments to the NSW Act, which included an amendment to provide that a purpose of a 'sex affirmation procedure' was 'to correct or eliminate the ambiguities relating to the sex of the person',²⁶⁴ and included amendments to the *Anti-Discrimination Act 1977* (NSW) which in its definition of a 'recognised transgender person' cross-referred to the NSW Act and also recognised that a person might be of indeterminate sex.²⁶⁵ Accordingly, in the context of the NSW Act's reference to 'ambiguities', as well as the anti-discrimination legislation recognising people of indeterminate

sex, the High Court held that the NSW Act itself recognises that a person's sex may be neither male nor female.²⁶⁶ Therefore, despite sections of the NSW Act appearing to adopt a binary conception of sex, the NSW Act overall was found not to be confined to binary conceptions of sex. Consequently, the NSW Registrar had the power to register a person's change of sex as 'non-specific'.

While the High Court has not considered equivalent legislation in other States and Territories, it is arguable that, to the extent that other States and Territories have similar legislation and legislative history to the NSW Act, the High Court's decision might also enable the Registrars in these other jurisdictions to recognise a person's sex or gender as non-specific.²⁶⁷

The Commission understands that NSW may consider reviewing its sex and gender recognition legislation after the next State election.

(b) Australian Capital Territory: new legislation

In 2014, the *Births, Deaths and Marriages Registration Act 1997* (ACT) (**ACT Act**) was amended to remove the requirement for a person to have undergone 'sexual reassignment' surgery in order to change their sex on the Register.²⁶⁸ Instead, a person may apply to the ACT Registrar-General of Births, Deaths and Marriages (**ACT Registrar**) if they have received 'appropriate clinical treatment' (which is undefined) or if they are an intersex person.²⁶⁹

256 NSW Act s 32B.

257 NSW Act s 32A (definition of 'sex affirmation procedure').

258 NSW Act ss 32B(1), 32DA(1).

259 NSW Act s 32B(1).

260 NSW Act s 32DA(1).

261 NSW Act ss 32C, 32DB.

262 NSW Act ss 32B(2), 32DA(2).

263 *Norrie* (2014) 250 CLR 490, 492 [1] (French CJ, Hayne, Kiefel, Bell and Keane JJ).

264 NSW Act s 32A(b).

265 *Norrie* (2014) 250 CLR 490, 497 [28], 499 [33] (French CJ, Hayne, Kiefel, Bell and Keane JJ).

266 *Norrie* (2014) 250 CLR 490, 499 [33] (French CJ, Hayne, Kiefel, Bell and Keane JJ).

267 See, eg, the legislation in a number of other states and territories refers to 'ambiguities': Queensland Act sch 2 (definition of 'sexual reassignment surgery'); Tasmanian Act s 3 (definition of 'sexual reassignment surgery'); NT Act s 28A (definition of 'sexual reassignment surgery'). See also GR Act s 3 (definition of 'reassignment procedure').

268 *Births, Deaths and Marriages Registration Amendment Act 2014* (ACT).

269 ACT Act s 24(1)(c). An 'intersex person' is defined in section 169B of the *Legislation Act 2001* (ACT).

CHAPTER 5. AUSTRALIAN CONTEXT

Similar to the Western Australian position, the ACT requires that the applicant believes their sex to be the sex nominated in the application.²⁷⁰ The required evidence is a statutory declaration by a doctor or a psychologist certifying that the person has received appropriate clinical treatment or is an intersex person.²⁷¹ The ACT Act recognises the sex classifications as male, female or ‘unspecified/indeterminate/intersex’.²⁷² These sex classifications were the most expansive of all the Australian jurisdictions until South Australia’s legislative reforms in 2016.

An applicant must be over 18 years²⁷³ and have had their birth registered in the ACT.²⁷⁴ Unlike Tasmania and the Northern Territory which exclude people born outside the jurisdiction altogether, in the ACT a person whose birth is registered outside the jurisdiction can still apply if they are ‘domiciled or resident in the ACT’.²⁷⁵ The ACT Act does not limit the number of times that a person can apply to alter their sex.

The parents of, or persons with responsibility for, a child, may make an application on behalf of the child, provided it is in the best interests of the child.²⁷⁶ The application can be made by one parent if there is only one parent named in the register or there is only one surviving parent.²⁷⁷

In the ACT, the ACT Registrar must include ‘sex’ as a specific classification in the birth register.²⁷⁸ If the sex is not determinable, it may be recorded as ‘unspecified/indeterminate/intersex’.²⁷⁹ The ACT and South Australia are the only two Australian jurisdictions that require the recording of sex **except** where it is not determinable.²⁸⁰

The ACT requires that a birth be notified within seven days and registered within six months.²⁸¹ In most other jurisdictions, birth registration is required within 60 days.²⁸² Other States which have subsequently reviewed their legislation have not proposed to extend this registration period.²⁸³

(c) South Australia: new legislation

In 2016, South Australia amended its *Births, Deaths and Marriages Registration Act 1996 (SA) (SA Act)*.²⁸⁴

Prior to the amendments, South Australia’s *Sexual Reassignment Act 1988 (SA) (SR Act)* was broadly similar to the GR Act. In contrast to all other Australian jurisdictions, under these two Acts a person could not apply directly to the South Australian Registrar of Births, Deaths and Marriages (SA Registrar) in order to register a change of sex. Instead, a person was required to have undergone a ‘reassignment procedure’²⁸⁵ in order to obtain a recognition certificate to then present to the SA Registrar. In South Australia, a

270 ACT Act s 24(1)(c).

271 ACT Act s 25(1)(a).

272 ACT Government, *Births Deaths and Marriages, Form 204-ACS: Application to Alter Birth Register to Record Change of Sex*, Access Canberra (accessed 17 July 2018) <<https://www.accesscanberra.act.gov.au/ci/fattach/get/108022/1476308821/redirect/1/filename/Application+to+alter+birth+register+to+record+change+of+sex.pdf>>.

273 ACT Act s 24(1)(a).

274 ACT Act s 24(1)(b).

275 ACT Act s 29A(1)(b).

276 ACT Act s 24(2).

277 ACT Act s 24(3).

278 ACT Act s 11(1); ACT Regulations reg 5; ACT Government, *Birth Registration Statement* <<https://www.accesscanberra.act.gov.au/ci/fattach/get/106834/1475723156/redirect/1/filename/Birth+registration+statement.pdf>>.

279 ACT Regulations reg 5; ACT Government, *Birth Registration Statement* <<https://www.accesscanberra.act.gov.au/ci/fattach/get/106834/1475723156/redirect/1/filename/Birth+registration+statement.pdf>>.

280 ACT Act s 11(1); ACT Regulations reg 5; ACT Government, *Birth Registration Statement* <<https://www.accesscanberra.act.gov.au/ci/fattach/get/106834/1475723156/redirect/1/filename/Birth+registration+statement.pdf>>; SA Act s 17(1); SA Regulations reg 6.

281 ACT Act ss 5, 10.

282 BDMR Act s 16(1); NSW Act s 16(1); Victorian Act s 18(1); Queensland Act s 9(2); SA Act s 16(1); Tasmanian Act s 15(1); NT Act s 16(1).

283 See Victorian Bill; Equal Opportunity Tasmania, *Legal recognition of sex and gender diversity in Tasmania* (February 2016).

284 *Births, Deaths and Marriages (Gender Identity) Amendment Act 2016 (SA)*.

285 SR Act s 7(2).

CHAPTER 5. AUSTRALIAN CONTEXT

person was required to apply to the Magistrates Court for a recognition certificate.²⁸⁶ The Magistrate needed to be satisfied that the person:

- (i) believes that his or her true sex is the sex to which the person has been reassigned; and
- ii) has adopted the lifestyle and has the sexual characteristics of a person of the sex to which the person has been reassigned; and iii) has received proper counselling in relation to his or her sexual identity.²⁸⁷

The applicant was required to provide a prescribed form,²⁸⁸ an affidavit from both a medical practitioner in relation to the reassignment procedure;²⁸⁹ and from a psychiatrist or psychologist in relation to counselling regarding the applicant's sexual identity;²⁹⁰ their birth certificate;²⁹¹ and a fee of \$86.²⁹² If granted, a recognition certificate could only be issued recording the sex as male or female.²⁹³

In February 2016, the South Australian Law Reform Institute (**SALRI**) issued a report titled, *Legal Registration of Sex and Gender and Laws Relating to Sex and Gender Reassignment (SALRI Report)*.²⁹⁴ The SALRI Report identified a number of areas of discrimination towards trans, gender diverse and intersex people and recommended options for law reform. It recommended repealing the SR Act, inserting a new Part 4A of the SA Act to create a simpler process of direct application to the SA Registrar for changing a person's sex and/or gender, and including the option of 'Other, please specify' in

addition to the sex classifications of male and female.²⁹⁵

The SALRI Report also recommended that in relation to children, an application on behalf of a child must be in the child's best interest and the child must understand and consent to the change of sex and/or gender.²⁹⁶ The SALRI Report further recommended that a child should have the option to apply to the Magistrates Court to change their sex and/or gender²⁹⁷ and that the SA Registrar be only required to record sex on the birth register where sex is determinable.²⁹⁸

In September 2016, South Australia repealed the SR Act and amended the SA Act to empower the SA Registrar to recognise a change of 'sex or gender identity', without the requirement for a 'reassignment procedure'. South Australia is the only jurisdiction to recognise a change of 'sex or gender identity', as opposed to just a change of sex. The available classifications are those recognised by the regulations.²⁹⁹ The current regulations recognise 'male', 'female', 'non-binary' and 'indeterminate/intersex/unspecified', and have not adopted the SALRI Report's preferred option of 'Other, please specify'.³⁰⁰

An application to change sex or gender identity requires a statement by a medical practitioner or psychologist certifying that the applicant has undertaken 'a sufficient amount of appropriate clinical treatment in relation to the person's sex or gender identity'.³⁰¹ The SA Act provides that 'appropriate clinical treatment' has a broad

286 SR Act s 7.

287 SR Act s 7(8).

288 *Sexual Reassignment Regulations 2015* (SA) reg 5(1)(a).

289 *Sexual Reassignment Regulations 2015* (SA) reg 5(1)(b)(i).

290 *Sexual Reassignment Regulations 2015* (SA) reg 5(1)(b)(ii).

291 *Sexual Reassignment Regulations 2015* (SA) reg 5(1)(b)(iii).

292 *Sexual Reassignment Regulations 2015* (SA) reg 5(1)(b)(iv).

293 See SR Act s 3 ('definition of 'reassignment procedure') that is limited to the binary classifications.

294 SALRI, *Legal Recognition of Sex and Gender Report* (February 2016).

295 SALRI Report 9–10, 28, 43–4.

296 SALRI Report 10–11.

297 SALRI Report 11.

298 SALRI Report 9.

299 SA Act s 29I(2).

300 SA Regulations reg 7A.

301 SA Act s 29K.

CHAPTER 5. AUSTRALIAN CONTEXT

meaning and ‘need not involve invasive medical treatment’ and ‘may include or be constituted by counselling’ alone.³⁰² An applicant must be over 18 years³⁰³ and have had their birth registered in South Australia.³⁰⁴ For a child, applications require court approval³⁰⁵ and the court must be satisfied that the application is in the best interests of the child.³⁰⁶

Once a change of sex or gender identity has been entered on the Register, an extract or certificate issued by the SA Registrar must only disclose the new sex or gender identity.³⁰⁷ While the SA Registrar maintains a historical record of the applicant’s sex or gender identity before the registration of the change, access to this record is only available to the person who made the application, a child of the person or a person or body specified by regulation.³⁰⁸

The SA Act empowers the SA Registrar to limit the number of applications a person can make to change their sex or gender identity.³⁰⁹ Currently, a person is able to change their sex or gender identity once in a 12 month period and three times in their lifetime, however exceptions may apply.³¹⁰ This is consistent with the number of applications for a change of name.³¹¹ Consistent with the ACT Registrar, the SA Registrar is only required to record sex in the birth register if determinable.³¹²

For a person whose birth is registered outside the jurisdiction, if they have been resident in South Australia for at least 12 consecutive months, they may apply for an identity acknowledgement certificate in which their sex or gender identity is recorded.³¹³

(d) Victoria: proposed Bill

The *Births, Deaths and Marriages Registration Act 1996* (Vic) (**Victorian Act**) permits a change of sex if a person is over 18 years, had their birth registered in Victoria and has undergone sex affirmation surgery.³¹⁴ The application is made to the Victorian Registrar of Births, Deaths and Marriages (**Victorian Registrar**).³¹⁵ The required evidence is two statutory declarations by either doctors or medical practitioners verifying that the applicant underwent sex affirmation surgery.³¹⁶ These doctors or medical practitioners must be those who either performed the sex affirmation surgery or who provided other medical treatment to the applicant.³¹⁷ Currently, there is no ability at all for children to apply for a change of sex. There is no limit on the number of applications a person can make to have a change of sex recognised.

For a person whose birth is registered outside the jurisdiction, if they have been resident in Victoria for at least 12 months, they may apply for a document acknowledging their sex.³¹⁸

302 SA Act s 29H (definition of ‘clinical treatment’). If constituted by counselling alone, an applicant must have attended at least 3 counselling sessions aggregating 135 minutes or counselling sessions over a period of at least 6 months: SA Act 29H(3); SA Regulations reg 7C.

303 SA Act s 29I(1).

304 SA Act s 29I(1).

305 SA Act s 29J(2).

306 SA Act s 29J(4).

307 SA Act s 29M(1).

308 SA Act s 29M(2)(b).

309 SA Act s 29S(1).

310 South Australian Department of Premier and Cabinet, *Record a change of sex or gender identity – application* (May 2017) 1 <https://www.sa.gov.au/_data/assets/pdf_file/0010/301213/Change-of-Gender-form-170825-1644-.pdf>.

311 South Australian Department of Premier and Cabinet, *Register a change of name* (6 July 2018) <<https://www.sa.gov.au/topics/family-and-community/births,-deaths-and-marriages/changing-your-name>>.

312 SA Act s 17; SA Regulations reg 6.

313 SA Act s 29O.

314 Victorian Act s 30A(1).

315 Victorian Act s 30A(2).

316 Victorian Act s 30B(1).

317 Victorian Act s 30B(1).

318 Victorian Act s 30E(1).

CHAPTER 5. AUSTRALIAN CONTEXT

Apart from the ACT (which has the option of ‘unspecified, indeterminate, intersex’) and South Australia (which has the option of ‘non-binary’ or ‘indeterminate/intersex/unspecified’), Victoria and all other jurisdictions only recognise the binary male and female sex classification, although in NSW since *Norrie* there is also a ‘non-specific’ option.

In 2016, the Victorian government introduced the Births, Deaths and Marriages Registration Amendment Bill 2016 (Vic) (**Victorian Bill**), which would have made extensive amendments to the Victorian Act. It was defeated in the Legislative Council on 6 December 2016. The Commission has heard that in many respects the Victorian Bill represents a best practice approach.

The Victorian Bill provided that the sex descriptors on a birth certificate were male, female or ‘any other sex’ nominated by the applicant.³¹⁹ The only restriction was that the nominated sex descriptor could not be prohibited, namely because it was obscene or offensive or could not practicably be established by repute or usage (because it is too long, consists of or includes symbols without phonetic significance or for some other reason).³²⁰ This is consistent with the prohibitions that apply to a change of name.³²¹

The Victorian Bill required that the applicant be over 18 years, had their birth registered in Victoria, believe their sex to be the sex nominated in the application, and had no alteration to the record of their sex in the preceding 12 months.³²² As such, the Victorian Bill permitted only one change of sex every 12 months, but otherwise did not impose a limit.

An application required a statutory declaration by the applicant stating that they believed their sex to be as nominated in the application, as well as a statutory declaration by an adult who had known the applicant for over 12 months.³²³ No other evidence was required.

Importantly, the Victorian Bill also provided for parents to apply on behalf of their child, provided that the child consented and the parents believed that the alteration was in the best interests of the child.³²⁴ Court approval was only to be required in instances of no parental consent or where only one of the parents consented. The Court was to be satisfied that the alteration of the record was in the child’s best interests.³²⁵

The Bill established particular regimes for a change of sex by certain classes of person (prisoners, prisoners on parole, offenders, registrable offenders and detainees), requiring the applications to be accompanied by a relevant approval.³²⁶

(e) Tasmania: Equal Opportunity Tasmania paper

The *Births, Deaths and Marriages Registration Act 1999* (Tas) (**Tasmanian Act**) requires that a person has undergone ‘sexual reassignment surgery’ in order to apply to the Tasmanian Registrar of Births, Deaths and Marriages (Tasmanian Registrar) to register a change of sex.³²⁷ The applicant must have had their birth registered in Tasmania³²⁸ and have two statutory declarations by doctors confirming the reassignment.³²⁹ Along with the Northern Territory, Tasmania does not allow anyone whose birth was registered outside the local jurisdiction, to make an application. There are no limits on the number of applications that can be made.

319 Victorian Bill cl 5 (definition of ‘sex descriptor’).

320 Victorian Bill cl 5 (definition of ‘prohibited sex descriptor’).

321 Victorian Act s 4 (definition of ‘prohibited name’).

322 Victorian Bill cl 8.

323 Victorian Bill cl 8.

324 Victorian Bill cl 8.

325 Victorian Bill cl 8.

326 Victorian Bill cl 13.

327 Tasmanian Act s 28A(1)(b).

328 Tasmanian Act s 28A(1)(a).

329 Tasmanian Act s 28B.

CHAPTER 5. AUSTRALIAN CONTEXT

A child is unable to independently apply to have a change of sex recognised, but their parents are able to make an application on their behalf.³³⁰ As Equal Opportunity Tasmania observes, this makes children born in Tasmania dependent on the permission of their parents in order to have their change of sex registered.³³¹

Along with Western Australia, Tasmania is the only other jurisdiction where the applicable legislation and regulations do not expressly require the registration of birth sex. The Tasmanian Act is not prescriptive as to the information that must be collected when registering a birth. Except for Western Australia, in all other states and territories the relevant regulations prescribe the registration of birth sex,³³² with only the ACT and South Australia offering an exception where sex is not determinable.³³³

In February 2016, the Tasmanian Anti-Discrimination Commissioner issued an options paper which recommended:

- removing the requirement for ‘sexual reassignment surgery’ or any surgical, medical or hormonal treatment to record a change of sex;³³⁴
- permitting an application for a change of sex be the same as for a change of name, with a limit of one every 12 months;³³⁵ and
- introducing a ‘non-binary’ sex classification.³³⁶

As with an application for a change of name, it was recommended that the Tasmanian Registrar needs to be satisfied that the change of sex would not be sought for a fraudulent or other improper purpose.³³⁷ The paper identified four options, each being more onerous, for satisfying this requirement: a formal statement by the applicant; an affidavit sworn by the applicant; corroboration by a relative or associate; or corroboration by a health practitioner.³³⁸

The paper recommended that the age at which a person can apply to have a change of sex registered be consistent with the legal principles articulated by the Family Court.³³⁹ From the age of 12, a child’s informed consent would be required³⁴⁰ and from the age of 16 there would be no need for parental or court approval.³⁴¹ The paper also recommended granting the Tasmanian Registrar discretion to extend the time within which a birth must be registered, in order to better address the circumstances of an intersex person.

(f) Queensland

Under the *Births, Deaths and Marriages Registration Act 2003 (Qld)* (**Queensland Act**), a person must have undergone ‘sexual reassignment surgery’ in order to apply to the Queensland Registrar of Births, Deaths and Marriages (Queensland Registrar) to have their change of sex registered.³⁴² The applicant must provide statutory declarations by two doctors verifying such surgery.³⁴³ For a child, an application may

330 Tasmanian Act s 28A(2).

331 Equal Opportunity Tasmania, *Legal recognition of sex and gender diversity in Tasmania* (February 2016) 14.

332 NSW Act s 17(1); NSW Regulations reg 5; Victorian Act s 14; Victorian Regulations reg 7; Queensland Act ss 6(1), 41(1)(b)(i); Queensland Regulations reg 14(1)(a)(ii), sch 1 pt 1; SA Act s 14; SA Regulations reg 5; ACT Act s 11(1); ACT Regulations reg 5; NT Act s 14; NT Regulations reg 3.

333 ACT Act s 11(1); ACT Regulation reg 5; SA Act s 17(1); SA Regulations reg 6.

334 Equal Opportunity Tasmania, *Legal recognition of sex and gender diversity in Tasmania* (February 2016) 3.

335 Equal Opportunity Tasmania, *Legal recognition of sex and gender diversity in Tasmania* (February 2016) 3.

336 Equal Opportunity Tasmania, *Legal recognition of sex and gender diversity in Tasmania* (February 2016) 4.

337 Equal Opportunity Tasmania, *Legal recognition of sex and gender diversity in Tasmania* (February 2016) 9–10.

338 Equal Opportunity Tasmania, *Legal recognition of sex and gender diversity in Tasmania* (February 2016) 9–11.

339 Equal Opportunity Tasmania, *Legal recognition of sex and gender diversity in Tasmania* (February 2016) 16–7. See also Chapter 3 of this Discussion Paper.

340 Equal Opportunity Tasmania, *Legal recognition of sex and gender diversity in Tasmania* (February 2016) 17–8.

341 Equal Opportunity Tasmania, *Legal recognition of sex and gender diversity in Tasmania* (February 2016) 17.

342 Queensland Act s 22.

343 Queensland Act s 23(4)(b)(i).

CHAPTER 5. AUSTRALIAN CONTEXT

be made on their behalf by the parent(s) or guardian(s), in the same process as an adult to either the Magistrates Court or the Queensland Registrar.³⁴⁴ The Queensland Act does not require the child's consent, as is contemplated by the Victorian Bill and the Equal Opportunity Tasmania paper. The Queensland Act does not limit the number of applications that can be made, nor is it limited to applicants born in Queensland.

In March 2018, the Queensland Government issued a Discussion Paper with the purpose of exploring how sex and gender diversity can be recognised.³⁴⁵ The current Queensland Act only recognises the sex classifications of male and female (and, since *Norrie*, arguably also 'non-specific').³⁴⁶ The Discussion Paper called for submissions on how a person's sex should be recorded on the birth, adoption and death registers, as well as submissions on whether any changes should be considered to the Queensland Act to improve the legal recognition of sex and gender diverse people in Queensland.³⁴⁷

(g) Northern Territory

Under the *Births, Deaths and Marriages Registration Act 1996 (NT) (NT Act)*, an adult must have undergone 'sexual reassignment surgery' and have had their birth registered in the NT in order to apply to the NT Registrar of Births, Deaths and Marriages (NT Registrar) to have their change of sex registered.³⁴⁸ The required evidence includes two statutory declarations by medical practitioners.³⁴⁹ Alternatively, a recognition certificate issued in another jurisdiction can be used as supporting evidence.³⁵⁰ The NT Act makes no mention of any court approval process but does make provision for parents to apply to the NT Registrar to register their child's change of sex.³⁵¹ Along with Tasmania, the NT Act excludes a person whose birth is registered outside the jurisdiction from applying for a registration of change of sex.³⁵²

In September 2017, the Department of Attorney-General and Justice released a Discussion Paper considering how to modernise the *Anti-Discrimination Act 1992 (NT)*, suggesting that 'gender identity' and 'intersex status' be included as protected attributes as under the *SD Act*.³⁵³

344 Queensland Act ss 23(2)–(3). Note that a document verifying the identity of, and the relationship between, the child and the child's parents is also required: Queensland Act s 23(4); Queensland Regulations reg 12(2)(b).

345 Queensland Government, Department of Justice and Attorney-General, *Registering life events: Recognising sex and gender diversity and same-sex families* (7 March 2018) <<https://publications.qld.gov.au/dataset/review-of-the-births-deaths-and-marriages-registration-act-2003-qld/resource/1e272ba5-396a-4a19-a992-25697393fae2>>.

346 Queensland Government, *Form 6 (Version 3) Application to note a reassignment of sex in the birth register or the adopted children register* <<https://publications.qld.gov.au/storage/f/2014-04-17T02%3A42%3A12.485Z/bdm-form-6-reassignment-sex.pdf>>; see also *Norrie* (2014) 250 CLR 490.

347 Queensland Government, Department of Justice and Attorney-General, *Registering life events: Recognising sex and gender diversity and same-sex families* (7 March 2018) 12 <<https://publications.qld.gov.au/dataset/review-of-the-births-deaths-and-marriages-registration-act-2003-qld/resource/1e272ba5-396a-4a19-a992-25697393fae2>>.

348 NT Act s 28B(1).

349 NT Act s 28C(a); NT Regulations reg 4A(b); Northern Territory Registry of Births, Deaths and Marriages, *Register a change of sex on a birth certificate* <<https://nt.gov.au/law/bdm/register-a-change-of-sex-on-a-birth-certificate>>.

350 NT Act s 28C(a); NT Regulations reg 4A(a); Northern Territory Registry of Births, Deaths and Marriages, *Register a change of sex on a birth certificate* <<https://nt.gov.au/law/bdm/register-a-change-of-sex-on-a-birth-certificate>>.

351 NT Act s 28B(2).

352 NT Act s 28B.

353 Department of the Attorney-General and Justice, *Modernisation of the Anti-Discrimination Act* (September 2017).

CHAPTER 6. INTERNATIONAL CONTEXT

During its preliminary engagement with stakeholders, the Commission was referred to the legal framework in various foreign jurisdictions in relation to registration of sex and change of sex and/or gender classification, including recent developments in a number of these jurisdictions.

6.1 Jurisdictions reviewed

In developing this Discussion Paper, including the overview of possible options for reform in Chapter 7, the Commission reviewed the relevant legislation, regulations and guidelines in the following jurisdictions:

- (a) Argentina;
- (b) Belgium;
- (c) Canada;
- (d) Denmark;
- (e) India;
- (f) Ireland;
- (g) Malta;
- (h) New Zealand;
- (i) Norway;
- (j) Pakistan;
- (k) United Kingdom; and
- (l) United States.³⁵⁴

A table comparing the legal and practical framework for each of these jurisdictions is set out in **Appendix 3**.

6.2 Other jurisdictions of note

It is reported by the media that Portugal's parliament approved change of gender legislative principles of self-determination.³⁵⁵ The law, however, was vetoed by President Rebelo de Sousa and he requested the parliament consider adding a medical report requirement for minors.³⁵⁶

The Commission has also been informed by Transgender Europe, as well as media reports,³⁵⁷ that Sweden's government is currently considering reform of its gender recognition legislation with new legislation expected later this year.³⁵⁸

The Commission will continue to monitor relevant international legal developments following the release of this Discussion Paper.

354 The review of the legal and practical framework in the United States of America was confined to California and Oregon.

355 'Portugal's parliament approves new legal gender law', *BBC News* (online), 13 April 2018 <<https://www.bbc.com/news/world-europe-43740417>>; Kieran Guilbert, 'Portugal approves law to boost transgender rights, protect intersex infants', *Reuters* (online), 13 April 2018 <<https://www.reuters.com/article/portugal-lgbt-lawmaking/portugal-approves-law-to-boost-transgender-rights-protect-intersex-infants-idUSL1N1RQ0ZP>>.

356 Presidência da República Portuguesa, 'Noticias 9 de maio de 2018' (9 May 2018) <<http://www.presidencia.pt/?idc=10&idi=147430>> [Portuguese]; 'Portugal's president vetoes new gender-change law', *BBC News* (online), 10 May 2018 <<https://www.bbc.com/news/world-europe-44063016>>.

357 'Time for Change: Sweden to Fast Track Gender Realignment Amid High Demand', *Sputnik News* (online), 18 March 2017 <https://sputniknews.com/art_living/201703181051718540-sweden-sex-change/>; 'Sweden to modernize law on changing gender', *The Local Sweden* (online), 16 March 2017 <<https://www.thelocal.se/20170316/sweden-to-modernize-law-on-changing-gender>>.

358 The two proposed pieces of legislation are at: Vissa kirurgiska ingrepp i konsorganen (2018), 7 <https://www.regeringen.se/4990f8/contentassets/313687fc78b643e7be24a8ab994477e5/vissa-kirurgiska-ingrepp-ds-2018_11.pdf> [Swedish]; Andring av det kon som framgar av folkbokforingen (2018), 11 <<https://www.regeringen.se/49b48e/contentassets/7a67fe76fe0a44c1b2f3c8d5ed8fa6d1/andring-av-det-kon-som-framgar-av-folkbokforingen-ds-2018-17.pdf>> [Swedish].

CHAPTER 7. POSSIBLE MODEL FOR REFORM

7.1 Introduction

After reviewing the current legal framework in Western Australia (Chapter 4) and the legislative schemes that are currently operating in other Australian and foreign jurisdictions (Chapters 5 and 6), the Commission has developed a possible model for law reform that seeks to improve the administrative processes for recording sex at birth and any subsequent gender affirmation in Western Australia.

(a) Possible model for reform

A summary of the current processes in Western Australia and the Commission's proposed model is set out in the table in section 7.4 below. The sections which follow in this Chapter then explain the different components of this proposed model, as well as other options for components of the model (either in addition, or in the alternative to, the Commission's proposed model).

(b) Intended outcomes

The Commission has developed its proposed model having regard to Commonwealth law, the revised schemes in other Australian jurisdictions and relevant international obligations that Australia has accepted. The Commission's proposed model seeks to enact a scheme which is administratively simple and minimally bureaucratic. The Commission intends that the scheme is clear and easy to follow, with flexibility to respond to different circumstances and which respects the privacy of those people seeking to use it. The scheme is also intended to be as minimally disruptive to existing government services and programs as possible.

(c) Consultation

The Commission developed its proposed model based on the research set out in this Discussion Paper, as well as with the benefit of the preliminary engagement with various stakeholders who held a diversity of views. Their collective input was invaluable in considering the relevant issues.

The Commission hopes that through further engagement with the community it will be able to test the proposed reform to ensure that it is likely to result in the intended outcomes and to identify any issues requiring further consideration.

7.2 The important distinction between sex and gender

(a) What is the difference between sex and gender?

As set out in Chapter 2, the Commission recognises that there is an important distinction between sex and gender:

- Sex is a biological concept that describes, in part, a person's physical features, including genitalia, other sexual reproductive anatomy, chromosomes, hormones and secondary physical features emerging from puberty.
- Gender is a social concept that describes the way in which a person identifies or expresses their masculine or feminine traits and the way they are recognised within a community. A person's gender identity may not always be exclusively male or female and may not always correspond with their sex assigned at birth.

In many cultures it has been thought that, just as there is a binary in sex between man and woman, there is also a binary in gender between male and female.³⁵⁹ Just because a binary has traditionally existed within those cultures for both sex and gender, this does not entail that sex and gender align. Indeed, for some people, their gender identity does not correspond with their sex assigned at birth.

³⁵⁹ Conversely, some cultures have historically recognised non-binary identities.

CHAPTER 7. POSSIBLE MODEL FOR REFORM

(b) Statutory confusion

In many circumstances, the terms ‘sex’ and ‘gender’ have been conflated, which causes confusion. It is arguable that such confusion is also reflected in the GR Act:

- As set out in Chapter 4 of this Discussion Paper, the GR Act defines the concept of a ‘reassignment procedure’ to mean medical or surgical procedures to alter the genitals and other gender characteristics of a person (s 3), while ‘gender characteristics’ is defined to mean the physical characteristics by which a person is identified as male or female (s 3). Given that both of these concepts are concerned with physical biology, the Commission considers they should instead refer to sex characteristics and the procedures to alter these.
- The GR Act proceeds on the basis that if a person has undergone such a reassignment procedure, that person can apply for a recognition certificate, which is conclusive evidence that the person is of the sex stated in the certificate (s 16(1)).
- The GR Act provides that once the reassignment certificate is produced to the Registrar, the Registrar must register the reassignment of gender (s 17(1)). Again, this should instead be a reference to the reassignment of sex. Once the reassignment of gender is registered, the birth certificate that is issued must show the person’s sex in accordance with the register as altered (s 18(1)). It is noted that here, the GR Act again reverts back to the concept of sex.

In summary, the GR Act contemplates a person can undergo a procedure to change their biological sex characteristics, with the consequence that their sex changes. On the basis of this change (and provided the other statutory criteria are satisfied) the GR Act then purports to recognise and certify a change in their gender. For these reasons, it is the view of the Commission that the GR Act and the Gender Reassignment Board might more accurately be

referred to as the Sex Reassignment Act and Sex Reassignment Board respectively.

While the Commission accepts that some changes in sex characteristics (such as, external physical appearance) may assist society to recognise someone’s gender, logically this is neither a necessary nor sufficient condition for legal recognition of that person’s gender.

During the course of this review, the Commission has identified confusing terminology in other statutory contexts:

- some jurisdictions refer to the concept of ‘sexual reassignment’, including ‘sexual reassignment surgery’,³⁶⁰ which arguably confuses the concepts of sex and sexuality; and
- one jurisdiction refers to transsexuality as a form of sexuality,³⁶¹ rather than referring to concepts relating to gender, specifically of a person being, and entitled to being recognised as, trans or transgender.

(c) What changes?

The Commission acknowledges that it is possible for a person to undergo a procedure to change their biological sex characteristics. For some trans and gender diverse people, this can be an important step in their transitioning process. This does not mean, however, that medical procedures should be a legal precondition for all trans and gender diverse people to have their gender identity recognised.

The Commission heard from stakeholders that as people develop, their understanding of their gender also develops. Many people have always had a deeply felt sense of being a particular gender identity. This may not change throughout their lifetime. What may change is the language available to describe it, the person’s comfort and confidence to express it and society’s recognition and respect for it.

As part of its engagement with all parts of the community, the Commission is interested in

³⁶⁰ See Queensland Act s 22; Tasmanian Act s 28A(1)(b); NT Act s 28B(1). See also former SR Act.

³⁶¹ *Anti-Discrimination Act 1992* (NT) s 4.

CHAPTER 7. POSSIBLE MODEL FOR REFORM

hearing from anyone who feels that their innate sense of gender has changed over their lifetime.

In this context, and in accordance with the Commission's preferred principle of empowering a person to express who they are, the Commission considers that rather than referring to concepts of gender being 'reassigned', it is preferable to refer to gender being 'affirmed'.

(d) What information is relevant?

As set out in Chapter 3, the Commission recognises that government, private business and community organisations may seek to collect information on sex and/or gender.

Importantly, the Government Guidelines state that the Commonwealth's preferred approach is for Commonwealth agencies to collect gender information (where necessary to collect sex and/or gender information), with information about sex only collected where the agency has a legitimate need for sex information, specifically.

The Commission accepts that in some limited cases, there will be a need to collect information about a person's sex. For example, the Registrar has a need to collect such information at birth and to provide it to the ABS. In other circumstances, information about sex is relevant to rights, obligations or services related to a person's physical biology (for example, medical procedures).³⁶² Otherwise, the Commission considers that a person's sex (that is, their physical biology) should remain the private information of that person.

The Commission considers the focus should be on how a person identifies, and is recognised, within a social context. In other words, the focus should be on collecting information about gender. In most cases, it is information about a person's gender which government, private business and community organisations will require to identify a person and determine what rights, obligations and services should apply (for example electoral enrolment or criminal justice procedures).³⁶³

(e) Way forward

Against this background, the Commission considers that while sex should continue to be assigned and recorded at birth for certain limited purposes, the focus for reform should be on the ways in which a person's gender is legally recognised, recorded and empowered (that is, 'affirmed').

³⁶² For example, provisions in relation to female genital mutilation: *Criminal Code Act Compilation Act 1913* (WA) s 306.

For example, provisions relating to cervical cancer: see generally *Health (Cervical Screening Register) Regulations 1991* (WA).

It is also arguable that sex remains relevant to law relating to pregnancy and abortion: see generally *Human Reproductive Technology Act 1991* (WA); *Surrogacy Act 2008* (WA) ss 3, 19(2); *Family Court Act 1997* (WA) ss 188, 189; *Artificial Conception Act 1985* (WA) ss 5, 6(1), 6A(1); *Criminal Code Act Compilation Act 1913* (WA) ss 1(4A), 199(5), 290, 291; *Health (Miscellaneous Provisions) Act 1911* (WA) s 334. It is noted that a trans person whose gender identity is male may still be capable of giving birth.

³⁶³ For example, law requiring a body to be constituted by representatives of a particular gender: *Young Offenders Act 1994* (WA) s 152(4); *Human Reproductive Technology Act 1991* (WA) s 9; *Occupational Safety and Health Act 1984* (WA) s 15(5).

For example, law requiring the gender of a person to be ascertained: *Criminal Investigation Act 2006* (WA) s 22; *Terrorism (Preventative Detention) Act 2006* (WA) s 4; *Terrorism (Extraordinary Powers) Act 2005* (WA) s 4; *Corruption, Crime and Misconduct Act 2003* (WA) s 54(3); *Criminal Investigation (Identifying People) Act 2002* (WA) s 55(7); *Prisons Act 1981* (WA) s 44; *Young Offenders Regulations 1995* (WA) reg 81(2).

For example, law requiring a body search to be done by a person of a particular gender: *Court Security and Custodial Services Act 1999* (WA) s 4(6); *Prisons Act 1981* (WA) s 49(4); *Sentence Administration Regulations 2003* (WA) reg 19(1); *Young Offenders Regulations 1995* (WA) reg 92(5).

CHAPTER 7. POSSIBLE MODEL FOR REFORM

7.3 Important information for preparing submissions

The Commission invites submissions on:

- (a) any aspect of the Commission's proposed model for reform (set out below);
- (b) any of the other options for components of the proposed model for reform (set out below);
- (c) whether any of the aspects of the proposed model will cause unexpected difficulties (including removal of sex classification from birth certificates);
- (d) any other models for reform that might be recommended, especially if they have not been identified in this Discussion Paper; and/or
- (e) any other issues within the scope of the Terms of Reference or otherwise relevant to any issues raised in this Discussion Paper.

In order to assist people to prepare submissions that are within the scope of the Terms of Reference, the Commission has inserted throughout Chapter 7, a series of boxes that raise issues and questions to provoke consideration and responses. While these boxes identify relevant issues and seek responses to these, they are not exhaustive and people are encouraged to comment on any other issues they feel are relevant, provided they fall within the Terms of Reference.

Remember the distinction between sex and gender

(Refer to section 7.2 above.)

In order to ensure submissions are clear and understandable, the Commission requests those making a submission to pay particular attention to using the terms 'sex' and 'gender' correctly.

CHAPTER 7. POSSIBLE MODEL FOR REFORM

7.4. Summary of current process and proposed model

ISSUE	CURRENT PROCESS	PROPOSED MODEL
Registration of birth sex		
Recording, notification and registration of sex at birth	<p>Report from delivery midwife to 'Chief Health Officer' within 48 hours of birth (mandatory 'gender' classification: Male, Female or Indeterminate).</p> <p>Report from 'responsible person' in hospital to Registrar within one month of birth (mandatory 'gender' classification: Male, Female or Indeterminate).</p> <p>Birth Registration Statement from parents to Registrar within 60 days of birth (mandatory sex classification: Male or Female).</p>	<p>Same report from delivery midwife to 'Chief Health Officer' within 48 hours of birth (except mandatory sex, not 'gender', classification).</p> <p>Same report from 'responsible person' in hospital to Registrar (except mandatory sex, not 'gender' classification).</p> <p>Sex classification not included on Birth Registration Statement from parents to Registrar.</p>
Information held by the Registrar	Information from the Birth Registration Statement is inputted into the Register (sex classification is included on the Birth Registration Statement and therefore on the Register).	<p>Information recording sex classification at birth to be held by the Registrar but not included on the Register.</p> <p>Information from the Birth Registration Statement is inputted into the Register (sex classification is not included on the Birth Registration Statement and therefore not on the Register).</p>
Birth certificate	Birth certificates detail sex of person (either Male or Female).	No sex classification on birth certificates.
Certificate for documentary proof of sex and gender		
Documentary proof of gender	Gender is currently conflated with sex.	Application to Registrar for Gender Identity Certificate as set out below.

CHAPTER 7. POSSIBLE MODEL FOR REFORM

ISSUE	CURRENT PROCESS	PROPOSED MODEL
Documentary proof of sex	<p>Sex is classified on birth certificates.</p> <p>Birth certificates can be ordered from the Registrar by the relevant person, or if a minor, by one parent/guardian.</p>	Application to Registrar for Proof of Sex Certificate as set out below.
Application for Gender Identity Certificate (adults)		
Application for Gender Identity Certificate	Currently sex classification on birth certificates.	Gender Identity Certificate can be ordered from Registrar.
Available classifications	Male, Female.	Male, Female, Non-binary.
Application for first Gender Identity Certificate	<p>N/A, although application for Recognition Certificate under the GR Act requires:</p> <ul style="list-style-type: none"> • medical ‘reassignment procedure’, together with the criteria under GR Act s 15(1); and • application is to be supported by medical practitioner statement and other materials required under GR Regulations reg 4(b). 	Application to the Registrar, which specifies the applicant’s affirmed gender.
Subsequent Gender Identity Certificate applications with the same gender classification as the previous Gender Identity Certificate	N/A.	Application to the Registrar, which specifies the applicant’s affirmed gender.

CHAPTER 7. POSSIBLE MODEL FOR REFORM

ISSUE	CURRENT PROCESS	PROPOSED MODEL
Subsequent Gender Identity Certificate applications with a different gender classification to the previous Gender Identity Certificate	N/A.	<p>Application to the Registrar, which specifies affirmed gender, along with:</p> <ul style="list-style-type: none"> • a statutory declaration by applicant, declaring genuine belief of their affirmed gender; and • all originals and copies of the previous Gender Identity Certificate(s) in the possession, custody or control of the applicant. <p>Registrar may also require any other evidence to prove the application is not sought for a fraudulent or improper purpose.</p>
Limit on applications for subsequent Gender Identity Certificate with a different gender classification to the previous Gender Identity Certificate	If the statutory criteria for a Recognition Certificate are satisfied, no express limit.	Once every 12 months, lifetime limit of 3 times. Further applications by approval of appropriate Court or Tribunal.
Jurisdictional requirements	Recognition Certificate available to those born outside of, but resident in, WA.	Same requirements as Recognition Certificate (available to people resident in WA for at least 12 months), along with statutory declaration proving genuine belief of affirmed gender and eligibility on basis of WA residence.
Application for Gender Identity Certificate (minors)		
Application to receive Gender Identity Certificate for minor	Currently sex classification on birth certificate.	Gender Identity Certificate can be ordered from Registrar, by parent(s)/guardian(s) as per the below process.
Available classifications	Male, Female.	Male, Female, Non-binary.

CHAPTER 7. POSSIBLE MODEL FOR REFORM

ISSUE	CURRENT PROCESS	PROPOSED MODEL
<p>Application for first Gender Identity Certificate</p>	<p>N/A, although application for Recognition Certificate under the GR Act requires:</p> <ul style="list-style-type: none"> • medical ‘reassignment procedure’; and • application is to be supported by medical practitioner statement and other materials required under GR Regulations reg 4(b). <p>Board must be satisfied it is in the best interests of the minor.</p>	<p>Application to Registrar, by one parent/guardian, with parent/guardian’s proof of identification (ie, same as current process for ordering new birth certificate for a minor), without requirement for statutory declaration.</p>
<p>Subsequent Gender Identity Certificate applications with the same gender classification as the previous Gender Identity Certificate</p>	<p>N/A.</p>	<p>Application to Registrar, by one parent/guardian, with parent/guardian’s proof of identification, without requirement for statutory declaration.</p>

CHAPTER 7. POSSIBLE MODEL FOR REFORM

ISSUE	CURRENT PROCESS	PROPOSED MODEL
<p>Subsequent Gender Identity Certificate applications with a different gender classification to the previous Gender Identity Certificate</p>	<p>N/A.</p>	<p>Application to the Registrar by at least one parent/guardian, which specifies affirmed gender of minor, and is supported by statutory declarations from:</p> <ul style="list-style-type: none"> • all parents/guardians (consenting to the application); • the minor, if the minor is 12 or over, declaring genuine belief of gender identity and ability to understand the meaning and implications of affirming their gender; and • all originals and copies of the previous Gender Identity Certificate(s) in the possession, custody or control of the parents/guardians or minor. <p>Registrar may also require any other evidence to prove the application is not sought for a fraudulent or improper purpose.</p>
<p>Dispute resolution process (where one or more parents do not consent to application)</p>	<p>N/A</p>	<p>Application to Family Court by minor with support of one parent/guardian or next friend.</p> <p>Family Court must consider application on the basis of the minor's best interests. When determining best interests, Family Court should also have regard to:</p> <ul style="list-style-type: none"> • minor's level of understanding and maturity; • minor's wishes; and • views of each parent/guardian.

CHAPTER 7. POSSIBLE MODEL FOR REFORM

ISSUE	CURRENT PROCESS	PROPOSED MODEL
Application for Proof of Sex Certificate		
Application for Proof of Sex Certificate	N/A, although application for Recognition Certificate under the GR Act requires: <ul style="list-style-type: none"> • medical ‘reassignment procedure’; and • application is to be supported by medical practitioner statement and other materials required under GR Regulations reg 4(b). 	Application to the Registrar, which specifies affirmed sex, and is supported by statutory declaration(s) from relevant medical practitioners declaring the sex of the person.

CHAPTER 7. POSSIBLE MODEL FOR REFORM

7.5 Registration of birth sex

(a) Recording, notification and registration of sex at birth

(i) Current process

As detailed in Chapter 4, there is no express legislative provision that requires registration of a child's sex by the Registrar under the BDMR Act or BDMR Regulations. However, the Registrar is required to register the birth of a child in the Register with such particulars as the Registrar considers to be appropriate.³⁶⁴ Currently the Registrar records a child's sex as part of the birth registration process.

During the birth registration process, details about the child are entered onto the Register. The information is taken from a Birth Registration Statement that the parents/guardians are required to lodge with the Registrar within 60 days of the birth.³⁶⁵ The Birth Registration Statement is made in an approved form which currently requires the parents/guardians to state the child's sex in one of two categories: 'male' or 'female'.³⁶⁶ The approved form does not allow the parents to use any other non-binary categories.

The lodgement of the Birth Registration Statement is, however, not the first time (or the only time) that the Registrar or other Government agencies are provided with information about the birth of a child, including information on a child's sex. Other reporting is required, including:

- (A) A report being made by the delivery midwife to the 'Chief Health Officer' within 48 hours of the birth.³⁶⁷ The prescribed form for this report requires the reporting of 'gender' against the categories 'male', 'female' or 'indeterminate' (**First Report**).³⁶⁸

The inclusion of 'indeterminate' means that this is a form of non-binary reporting of sex (in contrast to the binary sex classifications required by the Birth Registration Statement submitted by the parents).

Further, while the prescribed form refers to 'gender', it seems likely this is instead intended to be a reference to 'sex', which can be determined by either a physical examination or other medical testing. Accordingly, it seems likely that since the introduction of the First Report, midwives have routinely reported the child's sex.

- (B) An additional report must be made by the 'responsible person' (such as the chief executive of the public hospital, or the midwife attending the birth) to the Registrar within one month of the birth (**Second Report**).³⁶⁹ The Second Report is the first time that the Registrar becomes aware of the birth of the child.

The Second Report contains particulars required by the Registrar, and agreed between the Registrar and the Department of Health (WA). The particulars include the child's 'gender' to be listed as either 'male', 'female' or 'indeterminate'.

As noted with the First Report, the inclusion of 'indeterminate' means that this is another form of non-binary reporting of sex and it is likely that the use of the term 'gender' again should instead be a reference to 'sex'.

- (ii) The Commission's proposed model
Having reviewed the existing scheme in Western Australia, the Commission proposes reform of the recording of birth sex as follows:

364 BDMR Act s 17(1). The Commission also notes the United Nations' *Convention on the Rights of the Child* includes the right of every child to a legally registered name and nationality, as well as the responsibility of national governments to respect this (arts 7 and 8).

365 BDMR Act ss 15, 16.

366 BDMR Act ss 14, 15.

367 *Health (Miscellaneous Provision) Act 1911 (WA)* s 335.

368 *Health (Notifications by Midwives) Regulations 1994 (WA)* sch, Form 2.

369 BDMR Act s 12.

CHAPTER 7. POSSIBLE MODEL FOR REFORM

- (A) the prescribed form for the First Report should be modified to refer to sex, instead of gender, and the current classification options should remain unchanged ('male', 'female' or 'indeterminate');
- (B) the requirement to submit the Second Report and the classification options should remain unchanged ('male', 'female' or 'indeterminate'), although the reference should be to sex, instead of gender;
- (C) the approved form for the Birth Registration Statement should be amended to remove the question concerning the child's sex. Otherwise, all other obligations concerning the lodgement of and entry into the Register of the information in the Birth Registration Statement should be unchanged; and
- (D) the Registrar would not record the child's sex on the Register.

The Commission has assumed that the parents/guardians will be made aware of their child's assigned sex by the hospital (eg, delivery midwife or doctor). As such, the parents/guardians will be aware of the child's sex as listed on the Second Report.

During the preliminary consultation process, the Intersex Human Rights Association told the Commission that the intersex community would prefer that parents are not required to classify the sex of their child when registering their child's birth. The Commission's proposed model is consistent with this suggestion. As an alternative, the Intersex Human Rights Association indicated that if there was a mandatory requirement for the parents to register their child's sex, they would prefer binary sex categories only. The Commission understands the Intersex Human Rights Association's alternative preference is partly due to a desire to avoid the stigma of being classified as a third option (such as 'indeterminate' or 'other') and partly because it considers the intersex option has not been well utilised by parents in the Australian jurisdictions

with this option (that is, the ACT and SA). The Commission attempts to alleviate both of these concerns in its proposed model.

- (iii) The impact of the Commission's proposed model on the records maintained by the Registrar

Implementation of this proposed reform should result in reduced pressure on parents to determine a child's sex before the child is 60 days old. This should allow parents more time to make decisions regarding the child's sex, informed by appropriate medical advice.

Currently the Registrar enters a child's sex information onto the Register based on the disclosures made in the Birth Registration Statement. Removal of that information from the Birth Registration Statement will not necessarily have a negative impact on the information held by the Registrar.

At the time that the Registrar enters the relevant information into the Register, the Registrar can currently access at least one document (the Second Report) in which the child's sex is recorded. The proposed reform would only see sex being removed from the Birth Registration Statement. As such, under the Commission's proposed model, the Registrar would continue to have access to birth sex statistics, for provision to the ABS.

This proposed reform is minor, but it is intended to have a positive impact on the lives of children whose sex is not able to be determined at the time of birth. For the purposes of the First and Second Reports, the measure of sex is primarily based on an objective medical assessment of the child's sex characteristics. Children with sex characteristics which are perceived to be 'ambiguous' means the medical professions are unable to immediately classify their sex as 'male' or 'female'. In these circumstances, for the purposes of the First and Second Reports, they may be assigned 'Indeterminate'. For some children, it may be that a range of other tests can

CHAPTER 7. POSSIBLE MODEL FOR REFORM

be performed in due course in order to reach a point where there is sufficient evidence to allow an objective sex assignment. For others, their sex characteristics may be less ambiguous at a future time after birth (eg, following puberty). The Commission is strongly of the view that appropriate time should be allowed for any testing to be completed carefully and in full, without possible impediment due to time pressure relating to registration of sex on the Register.

Currently, the Birth Registration Statement does not provide parents/guardians with an 'Indeterminate' option and parents/guardians likely require the assistance of medical advice in coming to an informed decision about the sex of their child. It is unclear why reporting of sex is required to be undertaken by parents/guardians in addition to medical professionals.

(iv) The impact of the Commission's proposed model on the prevalence of 'normalisation' procedures on intersex children

The Commission also heard that the intersex community is concerned with the practice of medical, especially surgical, intervention being used to 'normalise' a child's sex characteristics, such that the child has sex characteristics consistent with their assigned sex. Reasons for these concerns include:

- (A) the intervention is never done with the child's informed consent (consent would be impossible to obtain given the child's age) and at times without informed parental consent;
- (B) the practice reinforces perceptions about what sex characteristics are 'ambiguous', where any differences might otherwise be celebrated as a form of diversity;
- (C) some interventions result in irreversible changes to a child's body, including sterilisation, in order to alter their appearance so as to align it with the expected sex characteristics

of a person of the sex to which the child has been assigned;

- (D) where sex has been erroneously assigned the interventions may give rise to dysmorphia and the subsequent consequences of that condition; and
- (E) the intervention may not be in the best interests of the child, when assessed objectively.

While the practice of medical intervention to 'normalise' the sex characteristics of intersex children raises issues that are beyond the Terms of Reference, the Commission's proposed reform may have the consequence of partially addressing these concerns. The proposed reform is likely to reduce, or at least delay, the practice, given that parents will no longer need to determine the child sex for the purposes of registering the birth. Parents will now have time to receive medical advice and consider the consequences of any intervention. In these circumstances, there would no longer be any artificially imposed pressure to determine sex and consent to procedures to 'normalise' the child's sex characteristics by reference to the inclusion of a sex classification in the Birth Registration Statement.

(v) Non-binary reporting under the Commission's proposed model

In most Australian States and Territories (Western Australian included) binary sex markers ('male' or 'female') are recorded during the registration of birth. The practice of using binary sex markers in this way is inconsistent with the Government Guidelines. The Government Guidelines recommend the inclusion of additional, non-binary categories when agencies seek to record the sex and/or gender of individuals. The practice of using binary sex markers is also inconsistent with recent reforms in the ACT and South Australia that require the recording of sex except where it is not determinable.³⁷⁰

370 ACT Act s 11(1); ACT Regulations reg 5; ACT Government, *Birth Registration Statement* <<https://www.accesscanberra.act.gov.au/ci/fattach/get/106834/1475723156/redirect/1/filename/Birth+registration+statement.pdf>>; SA Act s 17(1); SA Regulations reg 6.

CHAPTER 7. POSSIBLE MODEL FOR REFORM

The removal of the sex from the Birth Registration Statement will mean that in order for the Registrar to record a child's sex, the Registrar will have to rely upon the Second Report, which reports the child's sex in a non-binary fashion. This proposed reform will, to some extent, align the Western Australian birth registration process with that used in the ACT and South Australia and increase consistency with the Government Guidelines, at least as far as they recommend non-binary sex categories.

(vi) Key questions

Questions

1. Will the Commission's proposed model cause any difficulties if implemented?
2. Is the 'Indeterminate' category sufficient or should additional categories be added to the forms that are used for the First Report and the Second Report, which will then be used to record the sex of the child?

(b) Sex classification on birth certificates

(i) Current process

As detailed in Chapter 4, while not expressly required by legislation or regulation, birth certificates in Western Australia currently specify sex as a mandatory field. The Intersex Human Rights Association and the Youth Pride Network recommended to the Commission that birth certificates should not have sex and/or gender markers.

Under the GR Act, once the Registrar has registered a person's change of sex and altered the Register accordingly, the person may request a new birth certificate with the sex classification amended to reflect their reassigned sex.³⁷¹

(ii) The Commission's proposed model: removal of the sex field from birth certificates

While information on a birth certificate can be amended under the current process to include details that were not accurate as at the date of birth, such as a change of name, the Commission's preliminary view is that it is preferable to avoid conflating information about a person's biological sex (recorded at birth) with information about a person's gender identity (which cannot be known at birth and only becomes apparent at a later time when the child is able to form and articulate their own gender identity).

In order to facilitate a process of gender affirmation (which will be discussed later in this Chapter) while avoiding conflation of sex and gender, the Commission considers it preferable that sex should not be a field on the birth certificates.

Existing birth certificates that include a person's sex could be re-issued upon request in the new form which would no longer include any sex classification.

While at first glance this proposed reform might appear heretical given the assumed importance of birth certificates and their content, the content of birth certificates has changed over time. In order to understand why changing the content of a birth certificate is not as radical as may first appear, it is important to understand the history of these important documents.

The practice of documenting births has been widespread and longstanding throughout human existence. From the ancient world to the present, birth has long been celebrated by entering the name of each newborn onto an official list or register and then issuing the child (or the child's parents/guardians) with an official document, the birth certificate, setting out details that are recorded in the official register. This document serves a range of identification related functions and can be used, for example, to prove an individual's age, heritage and place of birth. Ultimately, it is the foundational document used to establish citizenship and to obtain government benefits such as a passport.

371 GR Act s 18(1).

CHAPTER 7. POSSIBLE MODEL FOR REFORM

The content of birth certificates differs between jurisdictions and also within the same jurisdiction over time. The existence of such differences belies belief that the content of a birth certificate is unchangeable. Current birth certificates contain substantially less information than past versions. A clear example of this is that the Registrar no longer includes information about the parents' residence and profession.

The proposed reform will have limited impact on the collection of data regarding the child's sex (see section 7.5(a) above). Accordingly, current users of that information, such as the ABS, will largely remain unaffected. The only potential impact may be improvements to data analysis as a consequence of improvements to the quality of data. This may occur given that the information will be based on the Second Report from the responsible person under the BDMR Act (being, in short, the hospital).

(iii) Key questions

Questions

3. Should sex classification be mandatory on birth certificates?
4. Should alternative markers be available, such as 'other/indeterminate' or 'not specified', if sex classification is required on birth certificates?

7.6 Documentary proof of sex and gender

(a) Documentary proof of gender

- (i) The Commission's proposed model: creation of a Gender Identity Certificate

Where a person is required to prove their gender, the Commission's proposed model is for the person to apply for a Gender Identity Certificate from the Registrar, which will record the person's gender, as shown in the records held by the Registrar. Under this model, the Register will have no record of the person's gender until after the person (or parent(s)/guardian(s) for minors) applies for and receives their first Gender Identity Certificate.

The Commission's proposed model regarding Gender Identity Certificate applications is set out at sections 7.7 and 7.8 below.

(b) Documentary proof of sex

- (i) The Commission's proposed model: creation of a Proof of Sex Certificate

One difficulty that could arise from the proposed reform is that, in theory, a person may be required to prove their sex, as opposed to their gender. The Commission is of the view that such a requirement is a medical issue and it would rarely (if ever) be necessary. The necessity to establish sex is made further remote by the Government Guidelines. The Government Guidelines suggest information on an individual's gender is more important for the provision of services and agencies are encouraged to consider collecting information on gender rather than sex where it is relevant for them to do so.

However, the Commission cannot rule out the possibility that an individual may need to prove sex as distinct from gender and therefore has included a process for obtaining a Proof of Sex Certificate. This is set out at section 7.9 below.

CHAPTER 7. POSSIBLE MODEL FOR REFORM

Questions

5. Are there circumstances in which it will be necessary or desirable to prove sex through a birth certificate, where proof of gender by a Gender Identity Certificate or proof of sex by medical documentation is not appropriate or sufficient?

6. If yes for the above, would certification by the Registrar alleviate this issue?

7.7 Application for Gender Identity Certificate (adults)

(a) Application to Registrar for Gender Identity Certificate

As described at section 7.6(a) above, where a person is required to prove their gender, the Commission's proposed model is for the person to apply for a Gender Identity Certificate which records the person's gender.

The application process would be a simple administrative form, as with the current process of ordering a birth certificate.

Additional supporting documentation would be required where it is an application for the person's first Gender Identity Certificate, or for subsequent applications where the gender sought on the new Gender Identity Certificate is different to the gender on the previous Gender Identity Certificate. This is discussed in further detail below.

(b) Available gender classifications

(i) Current process

There is no legislative requirement in the BDMR Act or Regulations for the currently available gender classifications of 'male' and 'female'. Under the GR Act, however, male and female are the only two gender classifications available to a person applying for a change of gender, including on the prescribed form supplied to the Board.³⁷²

(ii) The Commission's proposed model: male, female or non-binary

The Commission's proposed model would be to adopt 'non-binary' as a new, third option for gender classification (in addition to male and female).

South Australia is the only Australian jurisdiction to currently use 'non-binary' as a third option for sex or gender classification.³⁷³ The 'non-binary' classification (or another alternative marker option such as 'X') is used in countries such as India, Malta, Pakistan, the United Kingdom, and California and Oregon in the United States of America.

The Commission recognises that there are many possible gender classifications, in addition to male and female, and is not of the view that 'non-binary' is the best (or only) gender classification in addition to male or female. The Commission is aware of the broad stakeholder support for 'non-binary' as an additional gender classification. These stakeholders include, but are not limited to, the Human Rights Law Centre, Intersex Human Rights Australia, TransFolk of WA, WPATH, ANZPATH and Trans Health Australia.

The Commission also notes that the National LGBTI Health Alliance has recommended to the Commonwealth Attorney General's Department that the Government Guidelines be updated to refer to the third option being 'non-binary', given that it enjoys 'unanimous support' amongst relevant stakeholders and was described as being 'the best possible option'.³⁷⁴

³⁷² GR Act s 3 (definition of 'gender characteristics').

³⁷³ SA Regulations reg 7A(c).

³⁷⁴ Letter from the National LGBTI Health Alliance to the Commonwealth Attorney-General's Department, *RE: Commonwealth Attorney-General's Department Review of the Australian Government Guidelines on the Recognition of Sex and Gender*, 24 September 2015 <<https://lgbtihealth.org.au/resources/submission-review-agd-guidelines/>>.

CHAPTER 7. POSSIBLE MODEL FOR REFORM

(iii) Other options

Other options for gender markers in addition, or in the alternative, to ‘non-binary’, include (but are not limited to):

- (A) not specified/unspecified; and
- (B) other (please specify).

The Federation of Australian Buddhist Councils expressed its preference for a non-binary classification potentially being ‘indeterminate’ or ‘other, please specify’. Trans Health Australia also recommended ‘other (please specify)’, with ‘non-binary’ and ‘unspecified’ being alternatives to this. The Victorian Bill proposed to adopt the ‘other (please specify)’ approach as well.

‘Other (please specify)’ would empower a person to self-describe their gender classification. This option was recommended in the Government Guidelines in instances where gender information is sought on forms.

(c) Application for first Gender Identity Certificate

(i) Current process

In Western Australia, the current process for adults to change their sex on the Register requires an application to the Gender Reassignment Board for a recognition certificate.³⁷⁵ The recognition certificate must then be submitted to the Registrar.³⁷⁶

The applicant must satisfy a number of eligibility criteria in order to obtain a recognition certificate:

- (A) they must have undergone a reassignment procedure (defined in the GR Act as ‘a medical or surgical procedure’),³⁷⁷
- (B) their reassignment procedure must have been carried out,³⁷⁸ or their birth must be registered³⁷⁹ or they must have been a resident for at least 12 months,³⁸⁰ in Western Australia;
- (C) they must believe their true gender is the gender to which they have been reassigned;³⁸¹
- (D) they must have adopted the lifestyle and have the gender characteristics of a person of the gender to which they have been reassigned;³⁸² and
- (E) they must have received proper counselling in relation to their gender identity.³⁸³

As detailed in Chapter 4, the GR Act currently requires an application for a change of sex to be supported by the evidence prescribed by the GR Regulations. The application must be made in the prescribed form³⁸⁴ and supported by:

- (A) the prescribed fee,³⁸⁵ which is currently \$49;³⁸⁶
- (B) a statement signed by a medical practitioner that the applicant (or the child) has undergone the reassignment procedure;³⁸⁷

375 GR Act s 14(1).

376 GR Act s 17(1).

377 GR Act s 3 (definition of ‘reassignment procedure’)

378 GR Act s 15(a)(i).

379 GR Act s 15(a)(ii).

380 GR Act s 15(a)(iii).

381 GR Act s 15(1)(b)(i).

382 GR Act s 15(1)(b)(ii).

383 GR Act s 15(1)(b)(iii).

384 GR Act ss 14(3), 26; GR Regulations sch 1, Form 1.

385 GR Act s 14(3).

386 GR Regulations reg 4(1)(b)(i), although the Board may waive the fee: GR Regulations reg 4(2).

387 GR Regulations reg 4(1)(b)(ii).

CHAPTER 7. POSSIBLE MODEL FOR REFORM

- (C) any documents relating to where the reassignment procure was carried out;³⁸⁸
- (D) the original (or certified copy) of the birth certificate of the applicant (or the child);³⁸⁹
- (E) the original (or certified copy) of any documents showing proof and length of residency of the applicant (or the child);³⁹⁰
- (F) if the applicant wishes, any relevant information regarding the adoption of the lifestyle of a person of the gender to which the applicant (or the child) has been reassigned;³⁹¹ and
- (G) a statement from any person who has provided counselling in relation to the gender identity of the applicant (or the child), signed by that person.³⁹²

Every other Australian jurisdiction currently requires an application by an adult, for a change of sex, to be made directly to the Registrar in that jurisdiction. Internationally, the current Western Australian process is similar to the system in the United Kingdom, where the applicant must apply to the Gender Recognition Panel.³⁹³

Trans Health Australia, the Youth Pride Network and the Equal Opportunity Commission (WA) all suggested to the Commission that the Board should be abolished. These organisations shared the view that applications to the Board were incompatible with a self-determination approach of gender affirmation, and were an unnecessary administrative hurdle. The Commission heard from some that their experience of the Board process was traumatising and humiliating.

- (ii) The Commission's proposed model:
administrative application to the Registrar

The Commission's proposed model would remove the requirement to apply to the Gender Reassignment Board altogether. This would ensure consistency with other Australian States and Territories.

Where a person applies for their first Gender Identity Certificate, the Commission's proposed model would be for that person to submit an application to the Registrar for a Gender Identity Certificate, which states their gender in the application form. Under the Commission's model, and in line with the Commission's principles of inclusivity and equality, the process for a first Gender Identity Certificate process does not differ between people whose sex recorded at birth differs from their gender identity and people whose birth sex and gender are the same. As gender is not recorded on the Register, a person's first Gender Identity Certificate application will be the first time the Registrar will hold records of a person's gender (by way of the current Gender Identity Certificate recorded for the person).

- (d) **Application for subsequent Gender Identity Certificate (same gender as previous certificate)**

Under the Commission's proposed model, where a person has already successfully applied for a Gender Identity Certificate (or an application has been successfully made on their behalf) and they wish to order another Gender Identity Certificate with the same gender recorded, the process is the same as the person's first Gender Identity Certificate application.

388 GR Regulations reg 4(1)(b)(iii).

389 GR Regulations reg 4(1)(b)(iv).

390 GR Regulations reg 4(1)(b)(v).

391 GR Regulations reg 4(b)(vi).

392 GR Regulations reg 4(b)(vii).

393 *Gender Recognition Act 2004* (UK) ch 7, s 1. See also UK Government, *Apply for a Gender Recognition Certificate* <<https://www.gov.uk/apply-gender-recognition-certificate>>.

CHAPTER 7. POSSIBLE MODEL FOR REFORM

In summary, an application would be made to the Registrar for an additional copy of their Gender Identity Certificate. The Commission contemplates this process would be similar to ordering a birth certificate under the current process in Western Australia.³⁹⁴

(e) Application for subsequent Gender Identity Certificate (different gender to previous certificate)

Under the Commission's proposed model, where a person wishes to order a Gender Identity Certificate that records a different gender to the gender recorded on their current Gender Identity Certificate, the person would submit an application to the Registrar for a new Gender Identity Certificate along with:

- a statutory declaration by the applicant, in which they declare their genuine belief of their affirmed gender; and
- all originals and copies of the previous Gender Identity Certificate(s) in the possession, custody or control of the applicant.

The Registrar may also request further evidence if required to prove the application is not sought for a fraudulent or improper purpose.

Once changed, a new Gender Identity Certificate would be issued. If the application was rejected on the basis that the Registrar believed the application was made for a fraudulent or improper purpose (or any other reason), the initial Gender Identity Certificate(s) would be returned, along with notification of rejection from the Registrar.

In line with the Commission's preference for a simple and efficient administrative process, it contemplates that the application and statutory declaration will be part of an approved form and may be witnessed by an authorised witness at the Registry itself (if requested by the applicant).

The Commission's proposed model is one based on the principle of self-determination. Under this model, an applicant's sense of their own gender is the only requirement for an application to the Registrar to, in effect, change the gender on their Gender Identity Certificate.

A model based on self-determination is the current process in a large (and growing) number of jurisdictions, including:

- Argentina;
- Belgium;
- the majority of Canada's Provinces and Territories;
- Denmark;
- India;
- Ireland;
- Malta;
- Norway;
- Pakistan; and
- California and Oregon in the United States of America.

For more information, see **Appendix 3**.

A large number of stakeholders have expressed their preference for a self-determination model with an administrative process, including the Australian Human Rights Commission, Intersex Human Rights Association, Equal Opportunity Commission (WA), RANZCP, Federation of Australia Buddhist Councils, Buddhist Council of Western Australia, WPATH, ANZPATH, Trans Health Australia and Youth Pride Network.

The Commission notes that the requirement to make a statutory declaration (and the legal consequences of doing so falsely) may assist in ensuring an applicant takes the process seriously, whilst not being unnecessarily onerous. Equal Opportunity Tasmania's options paper proposed a statutory declaration by the applicant as one

³⁹⁴ See, eg, WA Government, Registry of Births, Deaths and Marriages, *Birth Certificate Application Form* <https://bdm.justice.wa.gov.au/_files/BDMI_Birth_Applic_Form.pdf>.

CHAPTER 7. POSSIBLE MODEL FOR REFORM

option for evidence in support of an application for change of sex and/or gender. Trans Health Australia submitted to the Commission that it supported the requirement for a statutory declaration.

An application to change gender based on self-determination principles, and supported by a statutory declaration, affidavit or similar document sworn or affirmed by the applicant, is the current process in a number of foreign jurisdictions, including:

- Belgium;
- Alberta, Newfoundland and Labrador in Canada;
- Denmark (following a reflection period of 6 months);
- Ireland;
- Malta; and
- California and Oregon in the United States of America.

(i) Other options

Another (alternative) option for eligibility before an applicant can apply to change their gender classification is ‘appropriate clinical treatment’ and/or evidence that the applicant is an intersex person.

As noted in Chapter 5, the requirement for appropriate clinical treatment is currently required by the Australian Passport Office, as well as in the ACT and South Australia. In the ACT, appropriate clinical treatment is not required where the person can provide evidence that they are an intersex person. In South Australia it is expressly provided that appropriate clinical treatment ‘need not involve invasive medical treatment’ and ‘may include or be constituted by counselling’ alone.³⁹⁵

(f) Limit on the number of applications to change the gender on their Gender Identity Certificate

(i) Current process

Currently, there is no express limit on the number of applications that a person can make to the Gender Reassignment Board to have a change of sex recognised. In theory, if the criteria in the GR Act are satisfied, a person is able to seek more than one recognition certificate. In practice, however, it may be difficult to satisfy the statutory criteria more than once.

(ii) The Commission’s proposed model: once per year with a lifetime limit of three applications (absent court or tribunal approval)

The Commission’s proposed model would be to limit a person to one application per year, with a lifetime limit of 3 applications under the process at 7.7(e) above (ie, to change the gender on the applicant’s Gender Identity Certificate). Beyond this lifetime limit, a person would be able to seek an order from an appropriate court or tribunal, such as the Magistrates Court or the SAT, permitting further applications.

Although the current process does not impose an express limit, this process is far more burdensome in its criteria and the evidence required than the model’s administrative process. In considering its model, the Commission has reviewed the approaches proposed and enacted in the Australian States and Territories where the criteria and evidence required is less burdensome. In South Australia, for example, the Registrar has a discretion to set a limit³⁹⁶ and has done so by limiting applications to one per year and a lifetime limit of three applications.³⁹⁷ An applicant can, however, seek approval from the Magistrate’s Court for further applications (if refused by the Registrar).³⁹⁸ Both the Victorian Bill³⁹⁹ and the

³⁹⁵ SA Act s 29H.

³⁹⁶ SA Act s 29S.

³⁹⁷ South Australian Department of Premier and Cabinet, *Record a change of sex or gender identity – application* (May 2017), <https://www.sa.gov.au/_data/assets/pdf_file/0010/301213/Change-of-Gender-form-170825-1644.pdf>

³⁹⁸ SA Act s 29S(3).

³⁹⁹ Victorian Bill cl 8.

CHAPTER 7. POSSIBLE MODEL FOR REFORM

Equal Opportunity Tasmania options paper⁴⁰⁰ proposed a limit of one application per year.

Trans Health Australia advised the Commission it preferred not limiting the number of applications but that if a limit was necessary, there should be provision for further applications in special circumstances. As noted above, the model allows for further applications to be made via an order from an appropriate court of tribunal such as the Magistrates Court or the SAT. The Commission sees merit in adopting an approach which is consistent with other Australian jurisdictions.

(iii) Other options

Other options for limiting the number of applications to change gender include:

- (A) a maximum of one application per year (without any lifetime limit), as is the current process for a change of name in Western Australia; or
- (B) permitting only one application, with any subsequent change requiring an order from the appropriate court or tribunal.

(g) Process for people born outside of Western Australia

(i) Current process

Recognition certificates are currently available to those born outside of Western Australia, provided they have undergone a reassignment procedure,⁴⁰¹ or have been resident for at least 12 months, in Western Australia.⁴⁰² As part of the application process to the Board, evidence of this must be provided.

(ii) The Commission's proposed model

The Commission's proposed model is that applications for a Gender Identity Certificate follow the same jurisdictional requirements as are currently in place for recognition certificates. That is, the applicant's birth must either be registered, or they must have been resident for at least 12 months, in Western Australia. While under the GR Act a person who is not a resident but who has had a reassignment procedure in Western Australia can apply for a recognition certificate, the same option would not be available to applicants for a Gender Identity Certificate, as they would not require a reassignment procedure.

Where the applicant is a resident, but was not born, in Western Australia, their birth records will not be held by the Registrar. In these circumstances, an application for a Gender Identity Certificate would require an additional declaration, and proof, that the applicant has been a resident for 12 months. Any Gender Identity Certificate may then be recognised in some other jurisdictions for the purposes of amending the person's birth certificate from those jurisdictions. This process would be similar to the process in the current Victorian legislation.⁴⁰³

(iii) Other options

Another possible option would be to not accept any applications for Gender Identity Certificates from those resident, but not born, in Western Australia.

400 Equal Opportunity Tasmania, *Legal recognition of sex and gender diversity in Tasmania* (February 2016) 3.

401 GR Act s 15(1)(a)(i).

402 GR Act s 15(1)(a)(iii).

403 Victorian Act ss 30E–F.

CHAPTER 7. POSSIBLE MODEL FOR REFORM

7.8 Application for Gender Identity Certificate (minors)

(a) Application process for first Gender Identity Certificate for a minor

(i) Current process

As discussed in Chapter 4, the current application process for a recognition certificate for a child is the same process as for an adult. Ordinarily, the application is not made independently by the child, but rather by the child's guardian on their behalf.⁴⁰⁴ The GR Act defines a child as any person under the age of 18.⁴⁰⁵ This is consistent with other statutory definitions.⁴⁰⁶

Other Australian jurisdictions similarly provide a separate application process for children under the age of 18, with Victoria the only jurisdiction without any process for those under the age of 18.⁴⁰⁷ Internationally, the age of 18 is consistent with the application processes for children in Argentina,⁴⁰⁸ New Zealand,⁴⁰⁹ Alberta⁴¹⁰ and Manitoba⁴¹¹ in Canada, and California⁴¹² and Oregon⁴¹³ in the United States.

The major difference between the child and adult processes under the GR Act is that the Board must be satisfied in the case of a child that it is in the best interests of that child that a recognition certificate be issued. This is consistent with the approach in the ACT,⁴¹⁴ South Australia⁴¹⁵ and in the Victorian Bill.⁴¹⁶ However, as discussed in Chapter 5 and section 7.7(c) above, the application in those jurisdictions is directly to

the Registrar and not to a Gender Reassignment Board.

Internationally a consideration of the best interests of the child is consistent with the process in Ireland,⁴¹⁷ Malta⁴¹⁸ and New Zealand.⁴¹⁹ In these jurisdictions, however, this is a determination made by a court and not a Registrar or similar administrative body.

(ii) The Commission's proposed model: administrative application to the Registrar

Similar to the application process for a Gender Identity Certificate for an adult, under the Commission's proposed model, the application process for a minor's first Gender Identity Certificate would be a simple administrative form submitted by one of the minor's parents/guardians, along with the parent/guardian's proof of identification, and supported by the following:

- (A) statutory declarations by all parents/guardians,⁴²⁰ in which they declare their consent to the application; and
- (B) if the minor is 12 or over, a statutory declaration from the minor, in which they declare their genuine belief of their affirmed gender identity, and declare that they understand the meaning and implications of affirming their gender.

404 GR Act s 14(2).

405 GR Act s 3.

406 See the definition of 'child' under the *Family Law Act 1975* (Cth), s 4, and *Criminal Code Act Compilation Act 1913* (WA) s 1; the definition of a 'juvenile offender' (cf 'adult offender') under the *Criminal Code Act Compilation Act 1913* (WA) s 1; and the definition of 'minor' under the *Marriage Act 1961* (Cth) s 5.

407 Victorian Act ss 30A(1)(a) 30E(1)(a)

408 *Código Civil y Comercial de la Nación (Ley 26.994)* [Argentine Civil and Commercial Code (Law 26.994)] (Argentina) art 26.

409 *Births, Deaths, Marriages, and Relationships Registration Act 1995* (NZ) s 27A.

410 *Vital Statistics Information Regulation*, Alta Reg 108/2018, reg 17(1)(c).

411 *The Interpretation Act*, CCSM 2000, c. 180, s 17, schedule of definitions.

412 *Health and Safety Code 2017* (California) s 103430(e) (operative commencing 1 September 2018).

413 *Oregon Administrative Rules 333-001-0265 (Oregon)* s 0272(1)(b)(B).

414 ACT Act s 24(2).

415 SA Act s 29(4).

416 Victorian Bill cl 8.

417 *Gender Recognition Act 2015* (Ireland) s 12(6).

418 *Gender Identity, Gender Expression and Sex Characteristics Act 2015* (Malta) art 7(2).

419 *Births, Deaths, Marriages, and Relationships Registration Act 1995* (NZ) s 29.

420 All parents/guardians who have (parental) responsibility for the child under the *Family Law Act 1975* (Cth).

CHAPTER 7. POSSIBLE MODEL FOR REFORM

(b) Application for subsequent Gender Identity Certificate for minor (same gender as previous certificate)

Under the Commission's proposed model, where parents (or the minor themselves) wish to order another Gender Identity Certificate with the same gender recorded, the process is the same as the minor's first Gender Identity Certificate application. The Commission contemplates this process would be similar to ordering a birth certificate under the current process in Western Australia.⁴²¹

(c) Application for subsequent Gender Identity Certificate for minor (different gender to previous certificate)

Under the Commission's proposed model, an application to change the gender recorded on a minor's Gender Identity Certificate would require an application form submitted by one of the minor's parents/guardians, including the parent/guardian's proof of identification, and supported by the following:

- (i) statutory declarations by all parents/guardians,⁴²² in which they declare their consent to the application;
- (ii) if the minor is 12 or over, a statutory declaration from the minor, in which they declare their genuine belief of their affirmed gender identity, and declare that they understand the meaning and implications of affirming their gender; and
- (iii) all originals and copies of the minor's previous Gender Identity Certificate(s) in the possession, custody or control of the parents/guardians or minor.

The Registrar may also request further evidence if required to prove the application is not sought for a fraudulent or improper purpose.

Once changed, a new Gender Identity Certificate would be issued. If the application was rejected on the basis that the Registrar believed the application was made for a fraudulent or improper purpose (or any other reason), the initial Gender Identity Certificate(s) would be returned, along with notification of rejection from the Registrar.

The Commission's proposed model is one based on the principle of self-determination. Under this model, a minor's sense of their own gender is the only requirement for an application to the Registrar to, in effect, change the gender on their Gender Identity Certificate.

(d) Available gender classifications

Same as the gender classifications for adults. See section 7.7(b) above.

(e) Dispute resolution process (where one or more parents do not provide statutory declarations consenting to the application)

Where one or more parent(s)/guardian(s) do not provide the statutory declarations required under the model at section 7.8(c) above, the Commission's proposed model is that the minor may apply to the Family Court, with the support of one parent/guardian or next friend, to dispense with the requirement to submit a statutory declaration from the relevant parent(s)/guardian(s).

Under the Commission's proposed model, the relevant parent(s)/guardian(s) must be served with the application to the Family Court, and given an opportunity to object and be heard by the Family Court. A similar approach has been adopted in New Brunswick⁴²³ and Newfoundland

421 WA Registry of Births, Deaths and Marriages, *Birth Certificate Application Form* <https://bdm.justice.wa.gov.au/_files/BDMI_Birth_Applic_Form.pdf>.

422 All parents/guardians who have (parental) responsibility for the child under the *Family Law Act 1975* (Cth).

423 *Vital Statistics Act*, SNB 1979, c V-3, s 34.1(4).

CHAPTER 7. POSSIBLE MODEL FOR REFORM

and Labrador⁴²⁴ in Canada, Argentina,⁴²⁵ Belgium,⁴²⁶ Ireland,⁴²⁷ Norway,⁴²⁸ and in California in the United States.⁴²⁹ This model seeks to provide for independent oversight of the best interests of the child, informed by the views of all parents or guardians, while minimising any impediment to an application if one parent or guardian is unavailable or disinterested.

The Commission considers the Family Court to be an appropriate decision-maker where the application is contested by one or more parent(s)/guardian(s), given the Family Court's jurisdiction for approving medical procedures for intersex and trans and gender diverse minors in circumstances where a child is unable to give informed consent or where there is a disagreement between the parents or guardians about the medical procedure.⁴³⁰

When evaluating the application of a child under this model, the Family Court would be required to consider whether the application is in the child's best interests. In determining the child's best interests, the Family Court should have regard to the following matters:

- the minor's level of understanding and maturity;
- the minor's wishes; and
- the views of each parent/guardian.

While consideration of the child's best interests remains unchanged from the current process, the Commission considers that the additional matters identified above would add clarity and transparency to the Family Court's evaluative process.

Given the additional matters to be considered when evaluating an application to change the gender of an incompetent minor, the Commission sees merit in this decision being made by a body with appropriate dispute resolution experience and an existing literacy and sensitivity to the subject matter, rather than an administrative body.

This approach is consistent with the recent amendments in South Australia, which requires Magistrates Court approval as part of the application process for a child.⁴³¹ Internationally, the approval of an applicable court is also required in Ireland,⁴³² Malta,⁴³³ New Zealand⁴³⁴ and California in the United States.⁴³⁵

Trans Health Australia recommended including a process for an application made by parents and guardians on behalf of minors, and an independent process for an application by minors.⁴³⁶

(i) Other options

Other possible decision-makers for the dispute resolution process include the:

(A) Magistrates Court; and

(B) State Administrative Tribunal.

424 *Vital Statistics Act*, SNL 2009, cV-6.01, s 26.1(4).

425 *Identidad de Genero (Ley 26.743)* [Gender Identity Law (Law 26.743)] (Argentina) art 5.

426 *Code Civil 1807* [Civil Code] (Belgium) art 62bis, § 11.

427 *Gender Recognition Act 2015* (Ireland) s 12(5).

428 *Lov om endring av juridisk kjønn 2016* [Legal Gender Amendment Act, Prop 74 L 2015-2016] (Norway) § 4.

429 *Health and Safety Code 2017* (California) s 103430(e)(A) (operative commencing 1 September 2018).

430 See, eg, *Re Carla* (2016) 324 FLR 1; *Re Kelvin* (2017) 327 FLR 15; *Re Matthew* [2018] FamCA 161.

431 SA Act s 29(2).

432 *Gender Recognition Act 2015* (Ireland) s 12.

433 *Gender Identity, Gender Expression and Sex Characteristics Act 2015* (Malta) art 7(1).

434 *Births, Deaths, Marriages, and Relationships Registration Act 1995* (NZ) s 29(1).

435 *Health and Safety Code 2017* (California) s 103430(e) (operative commencing 1 September 2018).

436 Trans Health Australia, *Submission to the Commission* (April 2018) 3, 10.

CHAPTER 7. POSSIBLE MODEL FOR REFORM

As noted above, in South Australia, the Magistrates Court must approve an application to change a child's sex or gender identity, before the change will be recorded by the Registrar. In determining whether or not to grant approval, the Magistrates Court must take into account whether:⁴³⁷

- (A) the child understands the meaning and implications of the application to the Registrar;
- (B) the child has the capacity to consent to the application and, if so, the child's position in relation to the making of the application;
- (C) the child has undertaken a sufficient amount of appropriate clinical treatment in relation to the child's sex or gender identity; and
- (D) the Registrar has recognised a 'designated certificate' or 'prescribed notification' from another jurisdiction or registering authority.

7.9 Proof of Sex Certificate

Though instances may be rare, a person may, at times, be required to prove their sex, as opposed to their gender.

As noted above, sex is a biological concept that describes, in part, a person's physical features, including genitalia, other sexual reproductive anatomy, chromosomes, hormones and secondary physical features emerging from puberty. The evidence required to prove sex would depend on the specific sex characteristic(s) that must be proven on a case by case basis. For example, if proof of sex is required to prove particular levels of hormones, specific hormonal testing and test results will be required. If the proof of sex is sought to prove a person has specific reproductive anatomy, hormonal testing may not be required.

As such, the Commission considers proof of sex characteristics to be a medical issue that is to be determined on a case by case basis, with evidence to be provided by relevant medical professionals

depending on the specific sex characteristics required to be proven.

Under the Commission's proposed model above at 7.5(a), some sex data is still held by the Registrar but is not recorded on the Register itself. Where a person either wishes to have their affirmed sex recorded or is required to prove their sex (as distinct from their gender), the person can order a Proof of Sex Certificate from the Registrar, which will replace the earlier sex data with the person's affirmed sex.

As proposed above, the Birth Registration Statement would no longer record a child's sex and the Registrar would not record a child's sex on the Register. However, the Registrar would still hold a person's sex data through its access to the Second Report from birth, made by the 'responsible person' (such as the Chief Executive of the public hospital, or the midwife attending the birth). A Proof of Sex Certificate would replace the Second Report's data concerning the child's sex at birth.

Under the Commission's proposed model, a person (or a parent/guardian on behalf of their child) would submit an application for a Proof of Sex Certificate to the Registrar, along with a statutory declaration from one or more relevant medical practitioner(s) (based on the practitioner's own assessment of the person) declaring the person's biological sex. The options for sex classification would be the same as for the Gender Identity Certificates, being: male, female or non-binary.

The Registrar may also require additional evidence to prove that the application for a Proof of Sex Certificate is not sought for a fraudulent or improper purpose.

The Commission notes that this option of a Proof of Sex Certificate in no way diminishes the main focus of the proposed reforms, which is to prefer a self-determination model of gender recognition. The Commission acknowledges that there may be some confusion between the option of a

⁴³⁷ SA Act s 29J(5).

CHAPTER 7. POSSIBLE MODEL FOR REFORM

Proof of Sex Certificate and a Gender Identity Certificate. As noted above at 7.2, however, the distinction between sex and gender is an important one, and the focus for reform should be on the ways in which a person's gender is legally recognised, recorded and affirmed. It is also expected that this confusion will diminish with a wider administrative shift towards collecting gender data over sex.

7.10 Other considerations

(a) *Equal Opportunity Act 1984 (WA)*

As detailed in Chapter 5, the EO Act provides protection for people who have obtained a recognition certificate under the GR Act. The EO Act does not provide protections for intersex people, on the basis of their sex characteristics or intersex status, nor does it provide protections for people on the basis of their gender identity.

The Commission considers a detailed review of the EO Act would be beneficial, including as a result of any amendments to the GR Act and the existence or role of the Gender Recognition Board and recognition certificates. While a detailed review of the EO Act is beyond the scope of the Terms of Reference for this review, the Commission recognises that abolishing or amending the GR Act will necessarily have implications for the EO Act. The Commission considers it appropriate for any detailed review of the EO Act to consider whether it should be amended to align with the SD Act in protecting against discrimination based on gender identity and intersex status.

(b) **Consequential legislative amendments**

The Commission welcomes submissions on any consequential legislative amendments that may be required as a result of enacting its proposed model and other options referred to above.

For example, and as noted in Chapter 4, a range of Western Australian legislation and regulations are premised upon references to binary sex or gender classifications.⁴³⁸ If additional sex or gender classifications were recognised, it would be necessary to consider what consequential amendments to such legislation would be required to appropriately address the circumstances of other sex or gender classifications.

Section 56 of the BDMR Act provides that, '[i]n providing information extracted from the Register, the Registrar must, as far as practicable, protect the persons to whom the entries in the Register relate from unjustified intrusion on their privacy'. The Commission understands that some data on applications forms submitted to the Registrar are not recorded on the Register. The Commission also understands that all forms used to create a registration in the Register are scanned and attached to the Registry's IT system. If the gender identity certificate application forms (under the Commission's proposed model above) are not technically held in the Register, it may be necessary to consider amending the BDMR Act to ensure that information on application forms provided to the Registrar are covered by the protections in section 56 of the BDMR Act.

The current ACT, South Australian, Tasmanian and Queensland legislation each contain a provision that a person with an entitlement under a will trust or other instrument will not lose their entitlement because of a change of their sex or gender identity. A similar provision might be considered for the BDMR Act with respect to a change in gender classification.

438 See, eg, *Prisons Act 1981 (WA)* s 44; *Young Offenders Act 1994 (WA)* s 152(4).

GLOSSARY AND DEFINED TERMS

GLOSSARY AND DEFINED TERMS

(a) Glossary

In this Discussion Paper, the Commission has referred to various terms relevant to gender identity, biological sex characteristics, people with intersex variations, and trans and gender diverse people.

Set out below is a glossary for some of these terms.

The Commission recognises that many of these terms have various definitions. The Commission has sought to use the relevant legal definitions or definitions which appeared to be accepted by relevant stakeholders.

Agender

A person who does not identify as a particular gender. Agender is a term under the trans and gender diverse umbrella (see 'Trans and gender diverse').

Gender

Gender refers to the way in which a person identifies or expresses their masculine or feminine traits and the way they are recognised within a community. A person's gender identity may not always be exclusively male or female and may not always correspond with their sex assigned at birth.⁴³⁹

Gender dysphoria

The distress or discomfort that may be felt by a person whose sense of being a man or woman or any other gender differs from their sex assigned at birth.⁴⁴⁰ The use of this term as a diagnostic category originates with the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders (5th edition) and is criticised by some as pathologising gender variance, reinforcing a binary model of gender and discounting the fact that many trans and gender diverse people experience no dysphoria between their sex assigned at birth and their gender identity.⁴⁴¹

Gender identity

A person's deeply felt sense of being a man, a woman, both, in between, or something other. It is recognised that a person's sex assigned at their birth and gender identity may not necessarily be the same. A person may identify as neither a man nor a woman and/or neither male nor female (sometimes referred to as non-binary).

Intersex person

A person born with genetic, hormonal or physical sex characteristics that are not typically male or female. Intersex people have a diversity of bodies and identities.⁴⁴² For some intersex people these traits are apparent at birth, while for others they become apparent or emerge later in life, often at puberty.

Intersex status

Intersex status means the status of having physical, hormonal or genetic features that are neither wholly female nor wholly male; or a combination of female and male; or neither female nor male.⁴⁴³

During the Commission's consultation process, the IHRA expressed a preference for the term 'sex characteristics' (see 'Sex characteristics'). While 'intersex status' appears in the Terms of Reference for this review, the Commission has endeavoured to use 'sex characteristics' or 'intersex people' where possible.

439 Australian Human Rights Commission, *Resilient Individuals: Sexual Orientation, Gender Identity & Intersex Rights* (2015) 5.

440 American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* (American Psychiatric Publishing, 5th ed, 2013) 451–459, 451.

441 Arlene Istar Lev, 'Gender Dysphoria: Two Steps Forward, One Step Back' (2013) 41(3) *Clinical Social Work Journal* 288–296.

442 Australian Human Rights Commission, *Resilient Individuals: Sexual Orientation, Gender Identity & Intersex Rights* (2015) 5.

443 SD Act s 4 (definition of 'intersex').

GLOSSARY AND DEFINED TERMS

Normalisation or Normalising procedures

Medical procedures (including surgery) which are not medically necessary and have the purpose of making an intersex person, often a child, appear as either male or female.

Pathologisation

To view or characterise something as medically or psychologically abnormal.

Sex or sex characteristics

The chromosomal, gonadal and anatomical characteristics associated with a person's biological sex.

Sex characteristics are each person's physical features relating to sex, including genitalia and other sexual and reproductive anatomy, chromosomes, hormones, and secondary physical features emerging from puberty.⁴⁴⁴

Trans and gender diverse

An umbrella term used to describe all people whose gender identity is different to their sex assigned at birth. Trans and gender diverse are preferred terms for people who identify as a member of one or more groups under this umbrella.

Transgender

A person whose gender identity is different to their sex assigned at birth. The terms male-to-female (preferred term trans woman) and female-to-male (preferred term trans man) may be used to refer to people who are undergoing, or have undergone, a process of gender affirmation (see 'Transition'). 'Transgender' is a term under the trans and gender diverse umbrella (see 'Trans and gender diverse').

Transition

The process by which a trans or gender diverse person affirms their gender, whether through name change, change in style of presentation or medical support or procedures. Transitioning may have three components: social, physical and legal. Trans and gender diverse people may do all, some or none of these things, for a range of reasons.

Transsexual

A person who is in the process of undergoing, or has undergone, hormonal or surgical treatment to affirm their biological sex characteristics in line with their gender identity (see 'Transition'). 'Transsexual' is a term under the trans and gender diverse umbrella (see 'Trans and gender diverse').

The term 'transsexual' is generally to be avoided because the reference to 'sexual' may imply it is concerned with sexuality, when it is actually descriptive of gender identity.

MEDICAL TERMINOLOGY

Androgen Insensitivity Syndrome (AIS)

Androgen Insensitivity Syndrome (formerly known as Testicular Feminising Syndrome) is a genetic condition whereby, due to a variation in the development of the reproductive system, there is a complete or partial inability to utilise testosterone. People with AIS are born with testes and 46XY (male) chromosomes.⁴⁴⁵

One of the main risk factors for people with AIS is the risk of the testes becoming cancerous. This risk increases with age. Some studies suggest that the expectancy of tumours is 3.6% of the population with AIS at age 25 and 33% at age 50. Others estimate that the overall incidence of malignancy is somewhere between 5% and 22%.⁴⁴⁶

444 Drafting Committee formed by the International Service for Human Rights and ARC International, *The Yogyakarta Principles plus 10: Additional principles and state obligations on the application of international human rights law in relation to sexual orientation, gender identity, gender expression and sex characteristics to complement the Yogyakarta Principles* (November 2017) 6.

445 Androgen Insensitivity Syndrome Support Group Australia, *Fact Sheets* <http://www.aissga.org.au/fact_sheets.htm>.

446 Androgen Insensitivity Syndrome Support Group Australia, *Fact Sheets* <http://www.aissga.org.au/fact_sheets.htm>.

GLOSSARY AND DEFINED TERMS

Congenital Adrenal Hyperplasia (CAH)

A group of disorders that affect the adrenal glands. They have in common an enzyme defect resulting in low levels of cortisol and increased secretion of other hormones. This results in adrenal gland overgrowth and an increased production of cortisol precursors and androgens. Females with the classic form of CAH have ambiguous external genitalia that do not look clearly male or female. Treatment may involve hormone therapy and reconstructive surgery.⁴⁴⁷

Hormone therapy

Hormone therapy involves the administration of sex hormones to stimulate sexual development and/or maintain secondary sexual characteristics, to optimize bone health and to promote physical wellbeing. Oestrogens are usually given to people raised as female and androgens to those raised as male. Hormone therapy may be necessary for survival in people lacking adequate hormone production.⁴⁴⁸

Hysterectomy

Surgical removal of the uterus, with or without removal of the cervix.

Neovagina

A vagina constructed (or reconstructed) by surgical means (see 'Vaginoplasty').

Phalloplasty

Surgical construction of a penis (or other cosmetic surgery performed on a phallus).

Salpingectomy

Surgical removal of one (unilateral) or both (bilateral) fallopian tubes.

Turner Syndrome (TS)

A chromosomal variation in which females have one X chromosome, rather than two. Affected people are often infertile. While they have external female genitalia, their ovaries do not develop normally, resulting in an absence of menstrual periods.⁴⁴⁹

Vaginoplasty

A surgical procedure for the construction or reconstruction of the vagina.

447 *Mosby's Dictionary of Medicine, Nursing & Health Professions* (Elsevier, 9th ed, 2016) (definition of 'congenital adrenal hyperplasia').

448 Elizabeth Martin, *Oxford Concise Medical Dictionary* (Oxford University Press, 9th ed, 2015) (definition of 'hormone replacement therapy').

449 Elizabeth Martin, *Oxford Concise Medical Dictionary* (Oxford University Press, 9th ed, 2015) (definition of 'Turner's syndrome').

GLOSSARY AND DEFINED TERMS

(b) Defined terms

The Commission has used the following defined terms in this Discussion Paper.

Defined term	Full description
ABS	Australian Bureau of Statistics
ACT Act	<i>Births, Deaths and Marriages Registration Act 1997 (ACT)</i>
ACT Registrar	ACT Registrar-General of Births, Deaths and Marriages
ACT Regulations	<i>Births, Deaths and Marriages Registration Regulation 1998 (ACT)</i>
ANZPATH	Australian and New Zealand Professional Association for Transgender Health
BDMR Act	<i>Births, Deaths and Marriages Registration Act 1998 (WA)</i>
BDMR Regulations	<i>Births, Deaths and Marriages Registration Regulations 1999 (WA)</i>
Board	Gender Reassignment Board
Commission	Law Reform Commission of Western Australia
EO Act	<i>Equal Opportunity Act 1984 (WA)</i>
Government Guidelines	Australian Government Attorney-General's Department's Guidelines on the Recognition of Sex and Gender (2 nd ed, 2015)
GR Act	<i>Gender Reassignment Act 2000 (WA)</i>
GR Regulations	<i>Gender Reassignment Regulations 2001 (WA)</i>
LGBTIQ	Lesbian, gay, bisexual, transgender, intersex and queer community
Norrie's	<i>Registrar of Births, Deaths and Marriages (NSW) v Norrie (2014) 250 CLR 490.</i>
NSW Act	<i>Births, Deaths and Marriages Registration Act 1995 (NSW)</i>
NSW Registrar	NSW Registrar of Births, Deaths and Marriages
NSW Regulations	<i>Births, Deaths and Marriages Registration Regulation 2017 (NSW)</i>
NT Act	<i>Births, Deaths and Marriages Registration Act 1996 (NT)</i>
NT Registrar	NT Registrar of Births, Deaths and Marriages
NT Regulations	<i>Births, Deaths and Marriages Registration Regulations 2014 (NT)</i>

GLOSSARY AND DEFINED TERMS

Defined term	Full description
Queensland Act	<i>Births, Deaths and Marriages Registration Act 2003 (Qld)</i>
Queensland Registrar	Queensland Registrar of Births, Deaths and Marriages
Queensland Regulations	<i>Births, Deaths and Marriages Registration Regulation 2015 (Qld)</i>
RANZCP	Royal Australian and New Zealand College of Psychiatrists
Register	The register of registrable events containing particulars required by legislation or regulation, wholly or partly in the form of a computer database maintained by the Registrar of the Births, Deaths and Marriages Registry of each Australian jurisdiction.
Registrar	WA Registrar of Births, Deaths and Marriages
Registry	WA Births, Deaths and Marriages Registry
SALRI	South Australian Law Reform Institute
SAT	State Administrative Tribunal
SA Act	<i>Births, Deaths and Marriages Registration Act 1996 (SA)</i>
SA Registrar	SA Registrar of Births, Deaths and Marriages
SA Regulations	<i>Births, Deaths and Marriages Registration Regulations 2011 (SA)</i>
SD Act	<i>Sex Discrimination Act 1984 (Cth)</i>
SR Act	<i>Sexual Reassignment Act 1988 (SA)</i>
Tasmanian Act	<i>Births, Deaths and Marriages Registration Act 1999 (Tas)</i>
Tasmanian Registrar	Tasmanian Registrar of Births, Deaths and Marriages
Tasmanian Regulations	<i>Births, Deaths and Marriages Registration Regulations 2010 (Tas)</i>
UN Recommendations	United Nation's Statistical Division's Principles and Recommendations for a Vital Statistics System (Revision 3, 2014)
Victorian Act	<i>Births, Deaths and Marriages Registration Act 1996 (Vic)</i>
Victorian Bill	Births, Deaths and Marriages Registration Amendment Bill 2016 (Vic)
Victorian Registrar	Victorian Registrar of Births, Deaths and Marriages
Victorian Regulations	<i>Births, Deaths and Marriages Registration Regulations 2008 (Vic)</i>
WPATH	World Professional Association for Transgender Health

APPENDIX I:

STAKEHOLDERS CONSULTED ON A PRELIMINARY BASIS

Stakeholders contacted by the Commission

As part of its consultation process, the Commission contacted, or was contacted by, the following organisations in relation to preliminary views that related to the Terms of Reference for this review. While the Commission did not receive responses from all of these entities, the discussions it had with those it did engage with have been taken into account in this Discussion Paper.

(a) Review specific bodies or departments

- (i) President of the Gender Reassignment Board; and
- (ii) Registrar of Births, Deaths and Marriages;

(b) Health and medical associations:

- (i) Australian and New Zealand Professional Association for Transgender Health & World Professional Association for Transgender Health;
- (ii) Australian Medical Association (Western Australia);
- (iii) Department of Health (Western Australia);
- (iv) National LGBTI Health Alliance;
- (v) Royal Australasian College of Physicians;
- (vi) Royal Australian and New Zealand College of Obstetricians and Gynaecologists;
- (vii) Royal Australian and New Zealand College of Psychiatrists; and
- (viii) Trans Health Australia;

(c) Human rights and advocacy associations:

- (i) Australian Human Rights Commission;
- (ii) Equal Opportunity Commission (Western Australia);
- (iii) Human Rights Law Centre;
- (iv) Intersex Human Rights Australia (formerly OII Australia);
- (v) TransFolk of WA; and
- (vi) Youth Pride Network;

(d) Legal associations or courts:

- (i) Chief Justice of Western Australia, the Hon Chief Justice Wayne Martin AC and the Supreme Court of Western Australia;
- (ii) Children's Court of Western Australia;
- (iii) Family Court of Western Australia;
- (iv) State Administrative Tribunal;
- (v) Law Society of Western Australia; and
- (vi) Western Australian Bar Association;

(e) Religious groups or representatives:

- (i) Anglican Diocese of Perth;
- (ii) Buddhist Council of Western Australia;
- (iii) Catholic Archdiocese of Perth;
- (iv) Federation of Australian Buddhist Councils;
- (v) Hindu Council of Australia, WA Chapter;
- (vi) Islamic Council of Western Australia;
- (vii) Sikh Association of Western Australia; and
- (viii) Uniting Church in Australia, Synod of Western Australia.

Appendix 2: Comparison of legislation across Australian jurisdictions

1. Registration of sex at birth	NSW	VICTORIA	VICTORIAN BILL	SA
1.1. Birth notification				

WA	NSW	VICTORIA	VICTORIAN BILL	SA
Sex classification mandatory according to approved forms (male, female or indeterminate). ⁴⁵⁰	Sex classification mandatory (specific sex markers are not covered by legislation/regulations). ⁴⁵²	Sex classification not mandated under the legislation/regulations. Notification must be provided by hospital/doctor/midwife within 21 days of birth. ⁴⁵⁴	No proposed amendment to current status.	Sex classification mandatory if determined (specific markers not covered by legislation/regulations). ⁴⁵⁵
Notification must be provided by hospital/doctor/midwife within one month of birth. ⁴⁵¹	Notification must be provided by hospital/doctor/midwife within 7 days of birth. ⁴⁵³			Notification must be provided by hospital/doctor/midwife within 7 days of birth. ⁴⁵⁶

TASMANIA	TASMANIA (OPTIONS FOR REFORM)	QUEENSLAND	NT	ACT
Unclear if sex classification is mandatory (particulars to be collected are determined by the Registrar). ⁴⁵⁷	No proposed recommendation to current status.	Unclear if sex classification is mandatory (no public information is provided to detail what is included in the approved form). ⁴⁵⁹	Sex classification mandatory (specific sex markers are unclear). ⁴⁶¹	Sex classification mandatory only if determinable (specific markers not covered by legislation/regulations). ⁴⁶³
Notification must be provided by hospital/doctor/midwife within 21 days of birth. ⁴⁵⁸		Notification must be provided by hospital/doctor/midwife within 2 working days of birth. ⁴⁶⁰	Notification must be provided by the hospital/doctor/midwife within 10 days of birth. ⁴⁶²	Notification must be provided by the hospital/doctor/midwife within 7 days. ⁴⁶⁴

1. Registration of sex at birth

1.2. Registration of birth

WA	NSW	VICTORIA	VICTORIAN BILL	SA
<p>Although sex classification is not mandatory under the legislation or regulations, the birth registration form requires sex classification (male or female).⁴⁶⁵ The parents/guardians must register the birth within 60 days after the date of the birth.⁴⁶⁶</p>	<p>Sex classification mandatory (specific sex markers are not covered by legislation/regulations).⁴⁶⁷ The NSW birth registration statement specifies male or female for child's sex.⁴⁶⁸</p> <p>The parents/guardians must register the birth within 60 days after the date of the birth.⁴⁶⁹</p>	<p>Sex classification mandatory (specific sex markers are not covered by legislation/regulations).⁴⁷⁰ The Victorian birth registration statement specifies male or female for child's sex.⁴⁷¹</p> <p>The parents/guardians must register the birth within 60 days after the date of the birth.⁴⁷²</p>	<p>No proposed amendment to current status, except as to sex markers. The Victorian Bill defined the term 'sex descriptor' as:</p> <ul style="list-style-type: none"> • male; • female; or • any other sex.⁴⁷³ <p>The Victorian Bill also defined 'prohibited sex descriptor' as one which is:</p> <ul style="list-style-type: none"> • obscene or offensive; • too long; • has symbols without phonetic significance; or • for some other reason.⁴⁷⁴ 	<p>Sex classification mandatory if determined (specific sex markers are not covered by legislation/regulations).⁴⁷⁵ The SA birth registration statement specifies male or female for child's sex.⁴⁷⁶</p> <p>The parents/guardians must register the birth within 60 days after the date of the birth.⁴⁷⁷</p>

TASMANIA	TASMANIA (OPTIONS FOR REFORM)	QUEENSLAND	NT	ACT
<p>Unclear if sex classification is mandatory (no public information is provided to detail what is included in the birth registration statement).⁴⁷⁸ The Tasmanian birth registration statement specifies male or female for child's sex.⁴⁷⁹</p> <p>The parents/guardians must register the birth within 60 days after the date of the birth.⁴⁸⁰</p>	<p>No proposed recommendation to current status, except sex classifications. An additional category of X meaning 'non-binary' is recommended.⁴⁸¹</p>	<p>Sex is required on the child's birth extract and the Queensland birth registration statement specifies male or female for a child's sex.⁴⁸²</p> <p>The parents/guardians must register the birth within 60 days after the date of the birth.⁴⁸³</p>	<p>Sex classification mandatory (specific sex markers are not covered by legislation/regulations).⁴⁸⁴ The NT birth registration statement specifies male, female or other (unspecified/indeterminate/intersex) for child's sex.⁴⁸⁵</p> <p>The parents/guardians must register the birth within 60 days after the date of the birth.⁴⁸⁶</p>	<p>Sex classification mandatory only if determinable (specific markers not covered by legislation/regulations).⁴⁸⁷ The ACT birth registration statement specifies male, female, unspecified, indeterminate or intersex for child's sex.⁴⁸⁸</p> <p>The parents/guardians must register the birth within 6 months after the day of the birth.⁴⁸⁹</p>

1. Registration of sex at birth

1.3. Correction of birth sex

WA	NSW	VICTORIA	VICTORIAN BILL	SA
<p>The Registrar may correct errors to reflect their own inquiry or to bring particulars, such as sex, into conformity with the most reliable information available to the Registrar.⁴⁹⁰</p> <p>A person may apply to the Registrar for the inclusion of additional 'registrable information' (as that term is defined under the BDMR Act, and which may include particulars of sex) on the Register.⁴⁹¹</p>	<p>The NSW Registrar may correct errors to reflect their own inquiry or to bring particulars, such as sex, into conformity with the most reliable information available to the NSW Registrar.⁴⁹²</p> <p>A person may apply to the NSW Registrar for the inclusion of additional registrable information (which does <i>not</i> include information relating to change of sex but does include information registered at birth on the register.⁴⁹³</p>	<p>The Victorian Registrar may correct errors to reflect their own inquiry or to bring particulars, such as sex, into conformity with the most reliable information available to the Victorian Registrar.⁴⁹⁴</p> <p>A person may apply to the Victorian Registrar for the inclusion of additional registrable information.⁴⁹⁵</p>	<p>No proposed amendment to current status.</p>	<p>The SA Registrar may correct errors to reflect their own inquiry or to bring particulars, such as sex, into conformity with the most reliable information available to the SA Registrar.⁴⁹⁶</p>

TASMANIA	TASMANIA (OPTIONS FOR REFORM)	QUEENSLAND	NT	ACT
<p>The Tasmanian Registrar may correct errors to reflect their own inquiry or to bring particulars, such as sex, into conformity with the most reliable information available to the Tasmanian Registrar.⁴⁹⁷</p>	<p>No proposed amendment to current status.⁴⁹⁸</p>	<p>The Queensland Registrar may correct errors to reflect their own inquiry or to bring particulars, such as sex, into conformity with the most reliable information available to the Queensland Registrar.⁴⁹⁹</p> <p>A person may apply to correct the register (including information registered at birth) upon application in the prescribed form.⁵⁰⁰</p>	<p>The NT Registrar may correct errors to reflect their own inquiry or to bring particulars, such as sex, into conformity with the most reliable information available to the NT Registrar.⁵⁰¹</p>	<p>The ACT Registrar may correct errors to reflect their own inquiry or to bring particulars, such as sex, into conformity with the most reliable information available to the ACT Registrar.⁵⁰²</p>

2. Registration of change of sex and/or gender (adults)

2.1 Applications to change sex and/or gender (adults)

	WA	NSW	VICTORIA	VICTORIAN BILL	SA
<i>Who determines an application to change sex and/or gender?</i> ⁵⁰³		<i>Who determines an application to change sex?</i>	<i>Who determines an application to change sex?</i>	<i>Who determines an application to change sex and/or gender?</i>	<i>Who determines an application to change sex and/or gender?</i>
Board. ⁵⁰⁴	NSW Registrar. ⁵⁰⁷	Victorian Registrar. ⁵¹⁰	No change: Victorian Registrar. ⁵¹³	SA Registrar. ⁵¹⁷	
<i>Who issues the birth certificate showing the altered sex and/or gender?</i>	<i>Who issues the birth certificate or recognised details certificate showing the altered sex?</i>	<i>Who issues the birth certificate or document acknowledging identity showing the altered sex?</i>	<i>Who issues the birth certificate or document acknowledging identity showing the altered sex and/or gender?</i>	<i>Who issues the birth certificate or identity acknowledging certificate showing the altered sex and/or gender?</i>	<i>Who issues the birth certificate or identity acknowledging certificate showing the altered sex and/or gender?</i>
Registrar. ⁵⁰⁵	NSW Registrar. ⁵⁰⁸	Victorian Registrar. ⁵¹¹	No change: Victorian Registrar. ⁵¹⁴	SA Registrar. ⁵¹⁸	
<i>Is a change of gender identity recognised?</i>	<i>Is a change of gender identity recognised?</i>	<i>Is a change of gender identity recognised?</i>	<i>Is a change of gender identity recognised?</i>	<i>Is change of gender identity recognised?</i>	<i>Is change of gender identity recognised?</i>
No. Despite the reference to 'gender', the GR Act requires a 'reassignment procedure' to change the applicant's physical sex characteristics. ⁵⁰⁶	No. The NSW Act refers to change of sex and this is consistent with the requirement for a 'sex affirmation procedure'. ⁵⁰⁹	No. The Victorian Act refers to change of sex and this is consistent with the requirement for 'sex affirmation surgery'. ⁵¹²	<i>Is change of gender identity recognised?</i> Yes. The Victorian Bill proposed to allow a change of 'sex' based on the person's belief of their sex (ie, their gender identity). ⁵¹⁵ The requirement for sex affirmation surgery was to be removed. ⁵¹⁶	Yes. The SA Act refers to an application to change 'sex or gender identity'. ⁵¹⁹ There is a requirement for 'appropriate clinical treatment', however this treatment can be wholly constituted by counselling. ⁵²⁰	

2. Registration of change of sex and/or gender (adults)

2.1 Applications to change sex and/or gender (adults)

TASMANIA	TASMANIA (OPTIONS FOR REFORM)	QUEENSLAND	NT	ACT
Who determines an application to change sex?	Who determines an application to change sex and/or gender?	Who determines an application to change sex?	Who determines an application to change sex?	Who determines an application to change sex and/or gender?
Tasmanian Registrar. ⁵²¹	No change: Tasmanian Registrar. ⁵²⁴	Queensland Registrar. ⁵²⁷	NT Registrar. ⁵³⁰	ACT Registrar. ⁵³³
Who issues the birth certificate showing the altered sex?	Who issues the birth certificate showing the altered sex and/or gender?	Who issues the birth certificate showing the altered sex?	Who issues the birth certificate showing the altered sex?	Who issues the birth certificate or recognised details certificate showing the altered sex and/or gender?
Tasmanian Registrar. ⁵²²	No change: Tasmanian Registrar. ⁵²⁵	Queensland Registrar will note the reassignment in the register. ⁵²⁸	NT Registrar. ⁵³¹	ACT Registrar. ⁵³⁴
Is change of gender identity recognised?	Is change of gender identity recognised?	Is change of gender identity recognised?	Is change of gender identity recognised?	Is change of gender identity recognised?
No. The Tasmanian Act refers to change of sex and this is consistent with the requirement for 'sex affirmation surgery'. ⁵²³	Yes. Recommendation of an application for change of gender identity (ie, based on self-determination principles). ⁵²⁶	No. The Queensland Act refers to reassignment of sex and this is consistent with the requirement for 'sexual reassignment surgery'. ⁵²⁹	No. The NT Act refers to change of sex and this is consistent with the requirement for 'sexual reassignment surgery'. ⁵³²	Uncertain. The ACT Act refers to an application to change 'sex', ⁵³⁵ and unless the person is an intersex person, there is a requirement for 'appropriate clinical treatment'. ⁵³⁶ Unlike with the SA Act, 'appropriate clinical treatment' is not defined and it is unclear whether it may be wholly constituted by counselling.

2. Registration of change of sex and/or gender (adults)

2.2 Available sex and/or gender classifications

WA	NSW	VICTORIA	VICTORIAN BILL	SA
<p>Male and female are the only two gender classifications available to an applicant applying for a change of gender, including on the prescribed form supplied to the Board.⁵³⁷</p>	<p>As per the form approved by the NSW Registrar.⁵³⁸ Following <i>Norrie</i>, the current form specifies 'non-specific' in addition to male or female.</p>	<p>As per the form approved by the Victorian Registrar.⁵³⁹ The current form specifies male or female.⁵⁴⁰ Query whether <i>Norrie</i> would apply to permit the Victorian Registrar to accept 'non-specific' in addition to male or female.</p>	<p>Male, female or applicant's nominated 'sex descriptor' (must not be a 'prohibited sex descriptor').⁵⁴¹</p>	<p>Male, female, non-binary or indeterminate/intersex/unspecified.⁵⁴²</p>

TASMANIA

As per the form approved by the Tasmanian Registrar.⁵⁴³ The form specifies male or female.⁵⁴⁴ Query whether *Norrie* would apply to permit the Tasmanian Registrar to accept 'non-specific' in addition to male or female.

TASMANIA (OPTIONS FOR REFORM)

Male, female or 'non-binary' (X).⁵⁴⁵
 As per the approved form.⁵⁴⁶
 The current form specifies male or female.⁵⁴⁷ Query whether *Norrie* would apply to permit the Queensland Registrar to accept 'non-specific' in addition to male or female.

QUEENSLAND

The legislation, regulations and form approved by the NT Registrar do not specify particular sex markers.⁵⁴⁸ Query whether *Norrie* would apply to permit the NT Registrar to accept 'non-specific' in addition to male or female.

NT

As per the form approved by the ACT Registrar.⁵⁴⁹ The current form specifies male, female, unspecified, indeterminate or intersex.⁵⁵⁰

ACT

2. Registration of change of sex and/or gender (adults)

2.3 Required criteria

WA	NSW	VICTORIA	VICTORIAN BILL	SA
<p>Applicant must have undergone reassignment procedure.⁵⁵¹</p> <p>Defined as 'a medical or surgical procedure (or a combination of such procedures) to alter the genitals and other 'gender characteristics' of a person, identified by a birth certificate as male or female, so that the person will be identified as a person of the opposite sex.'⁵⁵²</p> <p>Reassignment procedure may include hormone therapy (without surgery) which sufficiently alters the genitals and other gender characteristics of a person so that the person will be identified as a person of the opposite sex.⁵⁵³</p>	<p>Applicant must have undergone a sex affirmation procedure.⁵⁵⁷</p> <p>Defined as 'a surgical procedure involving the alteration of a person's reproductive organs carried out:</p> <p>(a) for the purpose of assisting a person to be considered to be a member of the opposite sex; or</p> <p>(b) to correct or eliminate ambiguities relating to the sex of the person.'⁵⁵⁸</p>	<p>Applicant must have undergone sex affirmation surgery.⁵⁵⁹</p> <p>Defined as 'a surgical procedure involving the alteration of a person's reproductive organs carried out for the purpose of assisting the person to be considered to be a member of the opposite sex.'⁵⁶⁰</p>	<p>Application based on self-determination (the applicant must believe their sex is the nominated sex in the application).⁵⁶¹</p> <p>No medical procedure or treatment required.</p>	<p>Applicant must have undertaken a sufficient amount of appropriate clinical treatment.⁵⁶²</p> <p>Defined as 'clinical treatment need not involve invasive medical treatment (and may include or be constituted by counselling).'⁵⁶³</p> <p>If constituted by counselling, must be comprised of:</p> <ul style="list-style-type: none"> • at least 3 separate counselling sessions aggregating 135 minutes; or • counselling sessions over a period of at least 6 months.⁵⁶⁴

An applicant must satisfy the board that they:

- believe that their true gender is the gender to which the person has been reassigned;⁵⁵⁴
- have adopted the lifestyle and gender characteristics of a person of the gender to

2. Registration of change of sex and/or gender (adults)

2.3 Required criteria

- which the person has been reassigned;⁵⁵⁵ and
- received proper counselling in relation to their gender identity.⁵⁵⁶

TASMANIA	TASMANIA (OPTIONS FOR REFORM)	QUEENSLAND	NT	ACT
Applicant must have undergone sexual reassignment surgery. ⁵⁶⁵	Recommendation that there be no requirement for surgical, medical or hormonal treatment. ⁵⁶⁷	Applicant must have undergone sexual reassignment surgery. ⁵⁶⁸	Applicant must have undergone sexual reassignment surgery. ⁵⁷⁰	Applicant must believe their sex to be the sex nominated in their application ⁵⁷² and:
Defined as 'a surgical procedure involving the alteration of a person's reproductive organs carried out:	Defined as 'a surgical procedure involving the alteration of a person's reproductive organs carried out:	Defined as 'a surgical procedure involving the alteration of a person's reproductive organs carried out:	Defined as 'a surgical procedure involving the alteration of a person's reproductive organs carried out:	• have received appropriate clinical treatment for alteration of sex; ⁵⁷³ or
(a) for the purpose of assisting the person to be considered to be a member of the opposite sex; or	(a) to help the person to be considered to be a member of the opposite sex; or	(a) to assist a person to be considered to be a member of the opposite sex; or	(a) to assist a person to be considered to be a member of the opposite sex; or	• be an intersex person. ⁵⁷⁴
(b) to correct or eliminate ambiguities relating to the sex of the person. ⁵⁶⁶	(b) to correct or eliminate ambiguities about the sex of the person. ⁵⁶⁹	(b) to correct or eliminate ambiguities relating to the sex of the person. ⁵⁷¹	(b) to correct or eliminate ambiguities relating to the sex of the person. ⁵⁷¹	'Intersex person is a person who has physical, hormonal or genetic features that are—
				(a) not fully female or fully male; or
				(b) a combination of male or female; or
				(c) not female or male. ⁵⁷⁵

2. Registration of change of sex and/or gender (adults)

2.4 Evidence required

WA	NSW	VICTORIA	VICTORIAN BILL	SA
<p>Application form with the following documentation:</p> <ul style="list-style-type: none"> statement by medical practitioner that applicant has undergone reassignment procedure;⁵⁷⁶ documents relating to where the reassignment procedure was carried out;⁵⁷⁷ original birth certificate;⁵⁷⁸ proof of residency;⁵⁷⁹ any information regarding adoption of the lifestyle of a person of the gender to which the applicant has been reassigned;⁵⁸⁰ and statement from any person that has provided counselling in relation to gender identity.⁵⁸¹ 	<p>Application form with the following documentation:</p> <ul style="list-style-type: none"> statutory declaration by 2 doctors (or registered medical practitioners) verifying the applicant has undergone a sex affirmation procedure;⁵⁸² a signed statement by the same 2 doctors (or registered medical practitioners) declaring the doctor sighted proof of identity of the applicant when making the statutory declaration;⁵⁸³ and proof of identity of the applicant.⁵⁸⁴ 	<p>Application form with the following documentation:</p> <ul style="list-style-type: none"> statutory declaration by 2 doctors (or registered medical practitioners) who performed the surgery or provided other related medical treatment to the applicant, verifying the applicant has undergone sex affirmation surgery;⁵⁸⁵ or if the sex affirmation surgery was performed outside Australia, and it is not practicable to receive the statutory declarations above, then statutory declaration by 2 medical practitioners either qualified in that jurisdiction or in Australia.⁵⁸⁶ 	<p>Application form with the following documentation:</p> <ul style="list-style-type: none"> statutory declaration by the applicant,⁵⁸⁷ and a supporting statement from an adult who has known the applicant for at least 12 months.⁵⁸⁸ 	<p>Application form with a statement by medical practitioner or psychologist certifying the applicant has undertaken a sufficient amount of appropriate clinical treatment.⁵⁸⁹</p> <p>If the applicant has been issued a certificate from another jurisdiction, then must provide the certificate with a similar statement from medical practitioner or psychologist.⁵⁹⁰</p>

2. Registration of change of sex and/or gender (adults)

2.4 Evidence required

TASMANIA	TASMANIA (OPTIONS FOR REFORM)	QUEENSLAND	NT	ACT
<p>Application form with the following documentation:</p> <ul style="list-style-type: none">• statutory declaration by 2 medical practitioners verifying that the applicant has undergone sexual reassignment surgery.⁵⁹¹	<p>Recommendation that application be consistent with approach to register change of name.⁵⁹²</p>	<p>Application form with the following documentation:</p> <ul style="list-style-type: none">• identification documents,⁵⁹³ and• a recognition certificate issued by another State,⁵⁹⁴ or statutory declaration by 2 registered medical practitioners verifying the applicant has undergone sexual reassignment surgery.⁵⁹⁵	<p>Application form with the following documentation:</p> <ul style="list-style-type: none">• a recognition certificate,⁵⁹⁶ or• statutory declaration by 2 medical practitioners certifying the applicant has undergone sexual reassignment surgery and has changed sex and confirmation that they have sighted proof of identity of the applicant.⁵⁹⁷	<p>Application form with the following documentation:</p> <ul style="list-style-type: none">• statement by a doctor or psychologist certifying the person has received appropriate clinical treatment or the applicant is an intersex person,⁵⁹⁸ and• document confirming applicant was born in the ACT.⁵⁹⁹

2. Registration of change of sex and/or gender (adults)

2.5 Limit on number of applications

WA

No express limitation.

NSW

No express limitation.

VICTORIA

No express limitation.

VICTORIAN BILL

Only one application may be made in a 12 month period.⁶⁰⁰

SA

SA Registrar may determine and set a limit on the number of applications that can be made.⁶⁰¹

According to the current form, you can change sex or gender only once in a 12 month period, with a limit of 3 times.⁶⁰² However, an applicant may apply to Magistrates Court if the number of applications is greater than the limit and their application to the SA Registrar is rejected.⁶⁰³

TASMANIA

No express limitation.

TASMANIA
(OPTIONS FOR REFORM)

Recommendation to limit a change of sex to once in a 12 month period.⁶⁰⁴

QUEENSLAND

No express limitation.

NT

No express limitation.

ACT

No express limitation.

2. Registration of change of sex and/or gender (adults)

2.6 Provisions dealing with applications by 'restricted persons'? (eg, prisoners, parolees?)

WA

Not covered by the legislation or regulations.

NSW

Not covered by the legislation or regulations.

VICTORIA

Victorian Registrar to notify Commissioner of Police where application is by a 'registrable offender' under the Sex Offenders Registration Act 2004 (Vic).⁶⁰⁵

VICTORIAN BILL

A 'restricted person' requires 'approval' to accompany their 'acknowledgement of sex application'.⁶⁰⁶

SA

Not covered by the legislation or regulations.

The Victorian Registrar must also notify the Justice Secretary of the alteration of the record for particular offenders.⁶⁰⁷

TASMANIA

Not covered by the legislation or regulations.

TASMANIA
(OPTIONS FOR REFORM)

No recommendations.

QUEENSLAND

Not covered by the legislation or regulations.

NT

Not covered by the legislation or regulations.

ACT

Not covered by the legislation or regulations.

2. Registration of change of sex and/or gender (adults)

2.7 Jurisdictional requirements

WA	NSW	VICTORIA	VICTORIAN BILL	SA
<p>Applicant may apply if:</p> <ul style="list-style-type: none"> reassignment procedure was carried out in WA,⁶⁰⁸ their birth is registered in WA,⁶⁰⁹ or they have been a resident in WA for 12 months.⁶¹⁰ <p>An equivalent certificate issued under a 'corresponding law' has the same effect as a recognition certificate.⁶¹¹ However, as the only corresponding law is the SR Act (which has been repealed), this provision has no operative effect.⁶¹²</p>	<p>Applicant may register change of sex if:</p> <ul style="list-style-type: none"> their birth is registered in NSW,⁶¹³ or they are an Australian citizen or permanent resident who lives, and has lived for at least one year, in NSW.⁶¹⁴ <p>If the applicant's birth is not registered in NSW they will be issued a recognised details certificate.⁶¹⁵</p> <p>NSW recognises the sex of a person as detailed in an interstate recognition certificate or recognised details certificate.⁶¹⁶</p>	<p>Applicant may register change of sex if:</p> <ul style="list-style-type: none"> their birth is registered in Victoria,⁶¹⁷ or their principal place of residence is, and has been for at least 12 months, Victoria.⁶¹⁸ <p>If the applicant's birth is not registered in Victoria they will be issued a document acknowledging identity.⁶¹⁹</p> <p>Victoria only recognises the sex of a person detailed in an interstate recognition certificate from WA (the SR Act has been repealed).⁶²⁰</p>	<p>No proposed amendment to current status.</p>	<p>Applicant may apply to change sex or gender identity if:</p> <ul style="list-style-type: none"> their birth is registered in SA,⁶²¹ or they have been a resident of SA for at least 12 consecutive months before the application and they were born outside of Australia.⁶²² <p>If the applicant's birth is not registered in SA they will be issued an identity acknowledgment certificate.⁶²³</p> <p>SA recognises certificates of identity issued in other jurisdictions which may be used when applying for a change to sex or gender identity.⁶²⁴</p>

2. Registration of change of sex and/or gender (adults)

2.7 Jurisdictional requirements

TASMANIA (OPTIONS FOR REFORM)	QUEENSLAND	NT	ACT
<p>Applicant may only register a change of sex if their birth is registered in Tasmania.⁶²⁵</p> <p>Tasmania recognises the sex of a person as detailed in an interstate recognition certificate.⁶²⁶</p>	<p>No jurisdictional requirements specified in the legislation or regulations.</p> <p>Queensland recognises the sex of a person as detailed in a recognition certificate issued in an Australian jurisdiction as long as the person has undergone sexual reassignment surgery.⁶²⁷</p>	<p>Applicant may only register a change of sex if their birth is registered in the NT.⁶²⁸</p> <p>NT recognises the sex of a person as detailed in a recognition certificate issued in a different jurisdiction as long as the person has undergone sexual reassignment surgery.⁶²⁹</p>	<p>Applicant may register change of sex if:</p> <ul style="list-style-type: none"> their birth is registered in the ACT,⁶³⁰ or they are domiciled or a resident in the ACT.⁶³¹ <p>If the applicant's birth is not registered in the ACT they will be issued a recognised details certificate.⁶³²</p> <p>ACT recognises the sex of a person as detailed in an interstate recognised details certificate.⁶³³</p>

3. Registration of change of sex and/or gender (minors)

3.1 Application process (decision-makers)

WA	NSW	VICTORIA	VICTORIAN BILL	SA
<p>Application to the Board⁶³⁴ by the child's guardian.⁶³⁵</p>	<p>Application to NSW Registrar by the parents of a child (or parent if the applicant is the sole parent), or the guardian.⁶³⁶</p>	<p>Not applicable as applicant must be over 18 years of age.⁶³⁷</p>	<p>Application to Victorian Registrar by the parents of a child (or parent if they are the sole parent), or the guardian depending on the circumstances.⁶³⁸</p> <p>Alternatively an application may be made by a parent or guardian to the County Court for approval.⁶³⁹</p>	<p>Application to SA Registrar by the child or by a parent or guardian of the child.⁶⁴⁰</p> <p>Before an application to the SA Registrar can be made, the Magistrates Court is required to approve the making of the application.⁶⁴¹</p>

TASMANIA

TASMANIA (OPTIONS FOR REFORM)

QUEENSLAND

NT

ACT

<p>Application to Tasmanian Registrar by the parents of a child (or parent if the applicant is the sole parent), or the guardian depending on the circumstances.⁶⁴²</p>	<p>Recommendation to allow application to Tasmanian Registrar by child alone from 16 years of age.⁶⁴³</p>	<p>Application to Queensland Registrar or Magistrates Court by the parents or guardians of a child (or one parent if there is a justifiable reason in the circumstances).⁶⁴⁴</p>	<p>Application to NT Registrar by the parents or one parent (if they are the sole parent) or guardian.⁶⁴⁵</p>	<p>Application to ACT Registrar by parents or one parent (if sole parent)⁶⁴⁶ or a person with parental responsibility.⁶⁴⁷</p>
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3. Registration of change of sex and/or gender (minors)

3.2 Application process (evidence required)

WA	NSW	VICTORIA	VICTORIAN BILL	SA
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Application requires evidence as per adult process⁶⁴⁸ except the Board must be satisfied that it is in the best interests of the child that the certificate be issued.⁶⁴⁹

Application requires evidence as per adult process.⁶⁵⁰

Application requiring the following evidence:

- a statutory declaration by the applicants confirming the child's birth is registered in Victoria, the child consents to the alteration of the record, the parents believe on reasonable grounds that the alteration is in the best interests of the child and the record of the child's sex has not been altered within the 12 months preceding; and⁶⁵¹
- a statutory declaration by a doctor (or registered medical practitioner) confirming the alteration is in the best interests of the child and if the child is under 16 years, that the child has capacity to consent.⁶⁵²

Application requiring evidence as per adult process except for approval of the Magistrates Court.⁶⁵⁴

Magistrates Court is required to take into account the following:

- whether the child understands the meaning and implication of making an application;
- whether the child has capacity to consent;
- whether the child has undertaken sufficient amount of appropriate clinical treatment; and
- whether a certificate from another jurisdiction has been provided.⁶⁵⁵

The Magistrates Court may grant approval if satisfied the application is in the best interests of the child.⁶⁵⁶

The same process for an identity acknowledgment certificate is available for a child if they have been a resident of SA for at least 12 consecutive months before

The same process for a document acknowledging name and sex is available for a child if their principal place of residence is, and has been for at least 12 months, Victoria.⁶⁵³

3. Registration of change of sex and/or gender (minors)

3.2 Application process (evidence required)

the application and they were born outside of Australia.⁶⁵⁷

TASMANIA	TASMANIA (OPTIONS FOR REFORM)	QUEENSLAND	NT	ACT
Application requires evidence as per adult process. ⁶⁵⁸	Recommendation to require informed consent for children over 12 years of age. ⁶⁵⁹	Application requires evidence as per adult process except requires a document verifying the identity of, and the relationship between, the child and the child's parents. ⁶⁶⁰	Application requires evidence as per adult process. ⁶⁶¹	Application requires the following evidence: <ul style="list-style-type: none">• statement signed by the applicant (parents or person with parental responsibility) stating that alteration of the record of the child's sex is in the best interests of the child;⁶⁶²• statement by a doctor or psychologist certifying the child has received appropriate clinical treatment or is an intersex person;⁶⁶³ and• documents confirming child's birth was in or registered in the ACT.⁶⁶⁴
				The same process for a recognised details certificate is available for a child if they are domiciled or a resident in the ACT. ⁶⁶⁵

3. Registration of change of sex and/or gender (minors)

3.3 If application is contested

WA	NSW	VICTORIA	VICTORIAN BILL	SA
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Not covered by the legislation or regulations.

N/A.

One parent or guardian may apply to the County Court for an order to approve the alteration of the child's sex. The County Court may make an order approving the alteration if satisfied the alteration is in the child's best interests.⁶⁶⁶

Not covered by the legislation or regulations. Application may be made by one parent alone or by the child themselves.⁶⁶⁷

TASMANIA

TASMANIA (OPTIONS FOR REFORM)

QUEENSLAND

NT

ACT

Not covered by the legislation or regulations.

Recommendation that one parent may apply on behalf of a child over 12 years of age as long as the child provides informed consent.⁶⁶⁸

One parent or guardian may apply to the Magistrates Court.⁶⁶⁹

Not covered by the legislation or regulations.

Not covered by the legislation or regulations.

Appendix 3:

Comparison of legislation across international jurisdictions

1.	Registration of sex at birth	
1.1.	Birth notification/registration statement	
	ARGENTINA	BELGIUM

Sex classification mandatory (specific sex markers are unclear).⁶⁹⁸

Unclear from the official and publicly available Belgian material.

Birth notification and sex classification mandatory:

- British Columbia: male, female, other or ambiguous.⁶⁹⁹
- Newfoundland and Labrador: male, female or unknown.⁷⁰⁰
- Prince Edward Island: male or female (but only for non-hospital births).⁷⁰¹
- Saskatchewan: specific sex marker options unclear (form is generally completed by the parents if birth occurs in hospital).⁷⁰²

Other:

- Nova Scotia,⁷⁰³ Ontario,⁷⁰⁴ New Brunswick:⁷⁰⁵ birth notification mandatory but unclear if sex markers are required.
- Alberta: sex marker only required if it is determined.⁷⁰⁶

	DENMARK	INDIA	IRELAND	MALTA	NEW ZEALAND
Sex classification is mandatory (boy or girl). ⁷⁰⁷	Sex classification is mandatory (male or female). ⁷⁰⁸	Sex classification is mandatory (male, female or indeterminate). ⁷¹⁰	Sex classification is mandatory (male, female or indeterminate). ⁷¹¹	Birth registration mandatory, but sex classification is optional (male, female or left blank). ⁷¹¹	Sex classification mandatory ⁷¹² (male, female ⁷¹³ or indeterminate ⁷¹⁴).

	NORWAY	PAKISTAN	UNITED KINGDOM	UNITED STATES
Sex classification mandatory ⁷¹⁵ (male, female or uncertain). ⁷¹⁶	Sex classification is mandatory (male or female). ⁷¹⁷	Sex classification mandatory (male or female). ⁷¹⁸	Sex classification mandatory (male or female). ⁷¹⁹	<u>California</u> : Sex classification mandatory, however it is unclear what the available sex classifications are at birth. ⁷¹⁹ For example, the Delayed Registration of Birth form has a free-text field for sex. ⁷²⁰

Oregon: Sex classification mandatory (male, female, undetermined or X).⁷²¹

1. Registration of sex at birth	
1.2. Birth certificate	
ARGENTINA	CANADA
Sex classification mandatory (specific sex markers are unclear). ⁷²²	Sex classification mandatory (specific sex markers are unclear). ⁷²⁴
Sex classification mandatory (specific sex markers are unclear). ⁷²³	Sex classification mandatory in <u>Prince Edward Island</u> and <u>New Brunswick</u> . ⁷²⁵ (only male or female). ⁷²⁶
DENMARK	IRELAND
Sex classification is not required. ⁷²⁷ However, gender information is required for a person's Civil Registration Number (system is binary so only male or female is available). ⁷²⁸	Sex classification is mandatory ⁷³⁰ (male or female). ⁷³¹
INDIA	MALTA
Sex classification is mandatory (male or female). ⁷²⁹	Sex classification on birth certificates (extract and full certificate), but not death certificates. ⁷³²
NEW ZEALAND	NEW ZEALAND
Sex classification is not required. ⁷²⁷ However, gender information is required for a person's Civil Registration Number (system is binary so only male or female is available). ⁷²⁸	Sex classification mandatory ⁷³³ (male, female ⁷³⁴ or indeterminate ⁷³⁵).
NORWAY	UNITED KINGDOM
Sex classification mandatory - birth certificate based on birth notification ⁷³⁶ (binary 'birth number' suggests only male or female). ⁷³⁷	Sex classification mandatory (male or female). ⁷³⁸
PAKISTAN	UNITED STATES
Unclear from the official and publicly available Pakistan material.	<u>California</u> Sex classification mandatory, however it is unclear what the available sex classifications are at birth. ⁷³⁹
	<u>Oregon</u> Sex classification mandatory (male, female, undetermined or X). ⁷⁴⁰

1. Registration of sex at birth

1.3. Deadline for birth sex registration

ARGENTINA

BELGIUM

CANADA

Within 40 days.⁷⁴¹

Within 15 days (in the case of children born with ambiguous sex characteristics within 3 months with a medical certificate).⁷⁴²

Manitoba: within 5 days.⁷⁴³

Alberta: within 10 days, but sex and other details not until 1 year.⁷⁴⁴

New Brunswick: within 14 days.⁷⁴⁵

Nova Scotia,⁷⁴⁶ Ontario,⁷⁴⁷ Newfoundland and Labrador,⁷⁴⁸ Prince Edward Island⁷⁴⁹: within 30 days.

Saskatchewan: within 180 days. After this date, affidavit required, and other evidence if prescribed.⁷⁵⁰

British Columbia: within 1 year. After this date, affidavit required, and other evidence if prescribed.⁷⁵¹

DENMARK

INDIA

IRELAND

MALTA

NEW ZEALAND

Unclear from the official and publicly available Danish material.

Birth registration within 21 days of birth.⁷⁵²

Birth registration must be made within 3 months of birth,⁷⁵³ and cannot be entered more than 12 months from the date of birth without written consent of the Superintendent Registrar.⁷⁵⁴

If birth sex is entered, it must be done within 15 days.⁷⁵⁵

Birth notification within 5 working days after the birth.⁷⁵⁷

If birth sex is left blank, an application must be made to register the child's gender before they reach 18 years of age.⁷⁵⁶

Registration of birth 'as soon as is reasonably practicable after the birth'.⁷⁵⁸ According to the registration form, registration is expected within two months.⁷⁵⁹

NORWAY

Unclear from the official and publicly available Norwegian material.

Unclear from the official and publicly available Pakistan material.

UNITED KINGDOM

England, Wales and Northern Ireland: registration within 42 days.⁷⁶⁰

Scotland: registration within 21 days.⁷⁶¹

UNITED STATES

California

Within 10 days of birth, or up to 1 year within which an application for delayed registration must be made.⁷⁶²

Oregon

Within 5 days of birth.⁷⁶³

1. Registration of sex at birth

1.4. Access to personal information

ARGENTINA

The original birth certificate cannot be given without consent or judicial order in writing.⁷⁶⁴ Amendment of sex (and/or name change) will not be publicised.⁷⁶⁵

BELGIUM

Unclear from the official and publicly available Belgian material.

CANADA

Vital statistics are confidential and must not be communicated to anyone not entitled to the information under the respective Acts or Regulations.⁷⁶⁶

DENMARK

Unclear from the official and publicly available Danish material.

INDIA

Unclear from the official and publicly available Indian material.

IRELAND

If the register of births is amended in accordance with a Gender Recognition Certificate the original entry is to be retained.⁷⁶⁷ A copy of an entry will only be given to a person to whom the entry relates or a civil partner (or if no civil partner a child, parent or surviving sibling depending on availability).⁷⁶⁸

MALTA

Information in or a copy of the original 'act of birth' certificate may only be given with the consent of the person or, without such consent, upon an order of the Court (Voluntary Jurisdiction Section) or of another relevant Court.⁷⁶⁹

NEW ZEALAND

Except in limited circumstances, the Registrar-General shall not provide access to a person's birth certificate or application (and other related documents), where the person has changed their sex assignment.⁷⁷¹

A person who had official duties involving a matter in the *Gender Identity, Gender Expression and Sex Characteristics Act 2015* (Malta), must not disclose such matter in accordance with the *Professional Secrecy Act* and the *Data Protection Act*.⁷⁷⁰

1. Registration of sex at birth

1.4. Access to personal information

NORWAY

The Tax Office, which manages birth certificates and is also the National Registry Authority,⁷⁷² is under an obligation of confidentiality in relation to personal information acquired.⁷⁷³ Although gender is not included in the confidentiality obligation, the legislation suggests that historical information (such as previous gender) may be considered confidential.⁷⁷⁴

PAKISTAN

The National Database and Registration Authority must ensure the protection and confidentiality of data and information contained in the registration and database systems.⁷⁷⁵

UNITED KINGDOM

Except in limited circumstances it is an offence to disclose information relating to an application under the *Gender Recognition Act 2004* (UK), or the person's gender before their acquired gender, must not be disclosed.⁷⁷⁶

UNITED STATES

In both states, the new birth certificate will replace the old birth certificate and the old birth certificate and application shall not be disclosed, without written request of the registrant (California) or an order of a court of record (both states).⁷⁷⁷

1. Registration of sex at birth

1.5. Correcting birth sex

ARGENTINA

Corrections to birth certificate upon application to Civil Registry.⁷⁷⁸

BELGIUM

Unclear from the official and publicly available Belgian material.

CANADA

Correction of errors is possible upon application to the relevant registrar / director.⁷⁷⁹

In Manitoba⁷⁸⁰ (unless the person who provided the registration information appears in person), Ontario⁷⁸¹, Newfoundland and Labrador⁷⁸² and New Brunswick⁷⁸³ the original information is required to remain, in some form, on the certificate.

DENMARK

A new Civil Registration Number (containing birth sex information) may be issued by the Ministry of Economic Affairs and the Interior if there is an error.⁷⁸⁴

INDIA

Corrections of clerical or fraudulent errors.⁷⁸⁵

IRELAND

Corrections of clerical errors, and errors of fact with appropriate evidence, including a statutory declaration.⁷⁸⁶

MALTA

No.⁷⁸⁷

Correction of errors with appropriate evidence (eg, statutory declaration).⁷⁸⁸

NEW ZEALAND

NORWAY

The Tax Office (National Registry Authority) may correct obvious errors or incorrect information where there is evidence.⁷⁸⁹

PAKISTAN

Unclear from the official and publicly available Pakistan material.

UNITED KINGDOM

Correction of errors made upon application to the General Register Office with supporting documentation or proof.⁷⁹⁰

UNITED STATES

California

Correction of the sex field on birth certificates with an Affidavit to Amend a Record, VS 24 form.⁷⁹¹

Oregon

Correction of sex field on birth certificates made administratively, by the birthing facility if a minor or with affidavit if an adult.⁷⁹²

2. Adult change of sex/gender

2.1 Application process

ARGENTINA

Application to the National Registry of Persons (Registro Nacional de las Personas).⁷⁹³

BELGIUM

Application to the Civil Registrar.⁷⁹⁴

CANADA

Ontario, British Columbia, Newfoundland and Labrador, New Brunswick: application to the Registrar General.⁷⁹⁵

Nova Scotia, Alberta, Saskatchewan: application to the Registrar.⁷⁹⁶

Manitoba, Prince Edward Island: application to the Director.⁷⁹⁷

DENMARK

Written application to the Economy and Domestic Ministry.⁷⁹⁸

No established process, merely a common law right to identify with self-perceived gender identity.⁷⁹⁹

Secondary sources state an affidavit with a 'Change of Sex Proforma' must be sent to the Department of Publications in Delhi to register a change in sex or gender.⁸⁰⁰

INDIA

Application to the Minister for Social Protection for a Gender Recognition Certificate.⁸⁰¹ The Gender

Recognition Certificate may later be used to request the particulars relating to recognition of gender are entered in the register.⁸⁰²

IRELAND

Application to the Director of Public Registry.⁸⁰³ Application to the Family Court.⁸⁰⁴

NEW ZEALAND

NORWAY

Application to the Tax Office (National Registry Authority).⁸⁰⁵

Application to Pakistan's National Database and Registration Authority.⁸⁰⁶

UNITED KINGDOM

Application to the Gender Recognition Panel.⁸⁰⁷

California

Either through application to the State Registrar, or Court Petition.⁸⁰⁸

Oregon

Either through application to the Oregon Vital Records office, or Court application.⁸⁰⁹

UNITED STATES

2. Adult change of sex/gender	
2.2 Available classifications	
ARGENTINA	CANADA
Unclear from the official and publicly available Argentine material.	Unclear from the official and publicly available Belgian material.
Unclear from the official and publicly available Argentine material.	<u>Saskatchewan</u> : male, female, X or no sex. ⁸¹⁰ <u>Alberta, Newfoundland and Labrador, Ontario</u> : male, female or X. ⁸¹¹ <u>British Columbia, Manitoba, Nova Scotia, New Brunswick</u> : male or female. ⁸¹²
DENMARK	IRELAND
Unclear from the official and publicly available Danish material.	Male or female. ⁸¹⁴
Male, female or third gender (trans men, trans women and persons with intersex variations). ⁸¹³	Male or female. ⁸¹⁴
INDIA	MALTA
Male, female or third gender (trans men, trans women and persons with intersex variations). ⁸¹³	While it is not addressed in the legislation, in practice the classifications are Male, Female or X/Other gender. ⁸¹⁵
Male, female or third gender (trans men, trans women and persons with intersex variations). ⁸¹³	Male, female, indeterminate (a change of sex to indeterminate is only possible if sex was indeterminate at birth and wrongly recorded as male/female). ⁸¹⁶
NEW ZEALAND	UNITED STATES
Male, female, indeterminate (a change of sex to indeterminate is only possible if sex was indeterminate at birth and wrongly recorded as male/female). ⁸¹⁶	<u>California</u> Male, female and non-binary. ⁸²¹
NORWAY	UNITED KINGDOM
Male or female (as only the male/female binary is used by the Tax Office (National Registry Authority)). ⁸¹⁷	Male or female. ⁸¹⁹ A recent Administrative Court found that people have a right to non-gendered identity (eg, X). ⁸²⁰
Male or female (as only the male/female binary is used by the Tax Office (National Registry Authority)). ⁸¹⁷	<u>Oregon</u> Male, female and X (non-binary). ⁸²²
Male or female (as only the male/female binary is used by the Tax Office (National Registry Authority)). ⁸¹⁷	<u>Oregon</u> Male, female and X (non-binary). ⁸²²

2. Adult change of sex/gender

2.3 Required criteria

ARGENTINA BELGIUM CANADA

Self-determination by applicant. Self-determination by applicant. Self-determination by applicant.

Statutory requirements for gender reassignment surgery in Ontario⁸²⁴ and Alberta⁸²⁵ have been overruled by common law.

DENMARK INDIA IRELAND MALTA NEW ZEALAND

Self-determination by applicant.⁸²⁶ The decision in *National Legal Services Authority v Union of India and Ors (NLSA)* held that there is no requirement to undergo medical procedures.⁸²⁷ Self-determination by applicant. Applicant based on self-determination. Some degree of permanent physical change as a result of the treatment (including psychological treatment) received.⁸²⁹

NORWAY PAKISTAN UNITED KINGDOM UNITED STATES

Application based on self-determination.⁸³⁰ Application based on self-determination.⁸³¹ Living in the 'other gender' (diagnosis of gender dysphoria, lived in that gender for 2 years and intend to continue to do so until death) or have changed gender under the law of a country or territory outside the UK.⁸³² Administrative option for both states are based on self-determination.

2. Adult change of sex/gender

2.4 Required evidence

ARGENTINA

BELGIUM

CANADA

Application with proof of age (18 or over).⁸³³

Statutory declaration that sex does not correspond with gender identity.⁸³⁴ No earlier than three months, but no later than six months, after the first declaration, the same declaration must be made to the Civil Registrar.⁸³⁵

Newfoundland and Labrador, Alberta: application needs to be accompanied by a statutory declaration.⁸³⁶
British Columbia, Ontario, Nova Scotia, Manitoba, New Brunswick, Prince Edward Island, Saskatchewan: application needs to be accompanied by a declaration,⁸³⁷ and a medical professional's statement.⁸³⁸
In British Columbia the Registrar General must believe the application is made in good faith.⁸³⁹ If a registration is fraudulently or improperly obtained, the Registrar General may order it be cancelled/not issued.⁸⁴⁰

DENMARK

INDIA

IRELAND

MALTA

NEW ZEALAND

Statutory declaration by applicant, with confirmation of the application by the applicant after a reflection period of 6 months.⁸⁴¹

Common law does not require any evidence.⁸⁴² In practice, however, a standard form requiring transgender people to declare they have had 'sex reassignment surgery' is required. In some cities, a newspaper notification, affidavit and a copy of the NLSA judgement may be sufficient.⁸⁴³

Proof of identity, birth and residency⁸⁴⁴ with a statutory declaration.⁸⁴⁵

A (notarised) public deed is required to be submitted, in which the applicant declares their gender identity does not correspond to the assigned sex in the act of birth.⁸⁴⁶

Specific evidence from a medical expert.⁸⁴⁷
No expert medical evidence is required if the applicant's reassignment has been recorded or recognised in accordance with the laws of a State recognised by New Zealand.⁸⁴⁸

NORWAY

Application form only (it is unclear from publicly available material whether this form requires a sworn/affirmed statement).⁸⁴⁹

No supporting documentation is required.⁸⁵⁰

Medical reports and a statutory declaration.⁸⁵¹

UNITED KINGDOM

UNITED STATES

California
Affidavit (administrative process) or Court Petition with declarations from a physician and the applicant (Court process).⁸⁵²

Oregon
Notarised application (administrative process) or relevant proof (Court process) required.⁸⁵³

2. Adult change of sex/gender

2.5 Limit on number of applications

ARGENTINA

Once (additional applications made by court order).⁸⁵⁴

BELGIUM

Once (in exceptional circumstances the Family Court may authorise a further modification).⁸⁵⁵

CANADA

No express limitation.

DENMARK

No express limitation.

INDIA

No express limitation.

IRELAND

No express limitation, however an application must be made to the Minister for Social Protection to revoke a Gender Recognition Certificate that has been previously granted.⁸⁵⁶

MALTA

Once (additional applications made by court order).⁸⁵⁷

NEW ZEALAND

No express limitation.

NORWAY

No express limitation

PAKISTAN

No express limitation.

UNITED KINGDOM

No express limitation.

UNITED STATES

California
No express limitation.

Oregon

Once and any subsequent changes must be done through a court order.⁸⁵⁸

2. Adult change of sex/gender

2.6 Jurisdictional requirements

ARGENTINA

BELGIUM

CANADA

No express jurisdictional limits.

Any citizen of Belgium or a foreigner who is on the population register.⁸⁵⁹

Prince Edward Island: any person, whether there birth is registered in the province or not, may apply.⁸⁶⁰
Newfoundland and Labrador, British Columbia, Nova Scotia, Alberta, Ontario, Manitoba, Saskatchewan: birth must be registered in the province.⁸⁶¹

New Brunswick: birth is registered in the province or the person has been ordinarily a resident in the province for at least 3 months.⁸⁶²

Manitoba: applicant must be a Canadian citizen who has been a resident of the province for a year.⁸⁶³

DENMARK

INDIA

IRELAND

MALTA

NEW ZEALAND

Unclear from the official and publicly available Danish material.

No express jurisdictional limits.

A person's birth must be registered in Ireland (either through the register of births, the foreign births register or an adoption register),⁸⁶⁴ or the person must ordinarily reside in Ireland.⁸⁶⁵

A foreign recognition certificate may be used when applying for a Gender Recognition Certificate – but it must meet equivalent Irish standards.⁸⁶⁶

Applicant must be citizen of Malta.⁸⁶⁷

A person's birth must be registered, or registrable, in New Zealand or a person must be a New Zealand citizen or entitled to be a New Zealand citizen.⁸⁶⁹

However this requirement is not expressed for minors.⁸⁶⁸

NORWAY

Residents of Norway⁸⁷⁰ and Norwegian nationals residing abroad.⁸⁷¹

Citizens of Pakistan.⁸⁷²

If the applicant's change of gender has been recognised in a country on the Gender Recognition Panel's approved list, the legislation does not require the applicant to undergo medical assessment in the UK.⁸⁷³

UNITED KINGDOM

UNITED STATES

California

Applicant must be born in California but does not need to be a current resident.⁸⁷⁴

Oregon

Applicant must be born in Oregon but does not need to be a current resident.⁸⁷⁵

3. Child change of sex/gender	
3.1 Relevant age	
ARGENTINA	CANADA
<p>Under 18 years of age. Note:</p> <ul style="list-style-type: none"> between 13 and 16 a minor is assumed competent to decide on non-invasive treatment; and from 16 a minor is considered an adult for decisions relating to care of their body.⁸⁷⁶ 	<p><u>British Columbia</u>: under 19 years of age.⁸⁷⁸</p> <p><u>Alberta and Manitoba</u>: under 18 years of age.⁸⁷⁹</p> <p><u>Ontario</u>: under 17 years of age – although from 16 years of age you are able to apply through adult process.⁸⁸⁰</p> <p><u>Nova Scotia, Newfoundland and Labrador, New Brunswick</u>: under 16 years of age.⁸⁸¹</p> <p><u>Prince Edward Island</u>: no specific minor process – it appears the adult process applies to minors.⁸⁸²</p> <p><u>Saskatchewan</u>: no statutory application under 18.⁸⁸³ Recent Queens Bench decision overruled this restriction and it appears the adult process applies to minors.⁸⁸⁴</p>
BELGIUM	
<p>Must be at least 16 years of age (emancipated minor's follow adult process).⁸⁷⁷</p>	
DENMARK	INDIA
<p>N/A – applicants must be 18 years of age.⁸⁸⁵</p>	<p>The application process for the change of sex or gender for a child post NLSA is unclear.</p>
NORWAY	IRELAND
<p>Under 16 years of age.⁸⁸⁹</p>	<p>N/A – must be at least 16 years of age.⁸⁸⁶</p>
	MALTA
	<p>Under 16 years of age.⁸⁸⁷</p>
	NEW ZEALAND
	<p>Under 18 years of age.⁸⁸⁸</p>
	UNITED STATES
<p>N/A – applicants must be 18 years of age.⁸⁹⁰</p>	<p><u>California</u> Under 18 years of age.⁸⁹²</p> <p><u>Oregon</u> Under 18 years of age.⁸⁹³</p>
	UNITED KINGDOM
<p>N/A – applicants must be 18 years of age.⁸⁹¹</p>	<p>N/A – applicants for a gender recognition certificate must be 18 years of age.⁸⁹¹</p>

3. Child change of sex/gender

3.2 Application process (uncontested application)

ARGENTINA

Application as per adult process by all legal representatives and with express consent of the minor.⁸⁹⁴

Application to Civil Registrar requiring declaration from the child, the support of the parents and a statement from a child psychiatrist confirming that the child has a sufficient understanding and affirms that their sex does not match their gender identity.⁸⁹⁵

BELGIUM

Application to Civil Registrar requiring declaration from the child, the support of the parents and a statement from a child psychiatrist confirming that the child has a sufficient understanding and affirms that their sex does not match their gender identity.⁸⁹⁵

CANADA

Prince Edward Island, Saskatchewan: no specific minor process – it appears the adult process applies to minors.⁸⁹⁶

All other applications as per the adult process with the following additional requirements:

- Nova Scotia: medical professional's statement confirming child has the capacity to make an informed decision as well as the written consent of every person who has care and custody of the child.⁸⁹⁷
- British Columbia: the consent of all parents or guardians.⁸⁹⁸
- Ontario: the consent of all persons with legal custody of the child and the express consent of the child.⁸⁹⁹
- Newfoundland and Labrador: a statement from a medical professional and the written consent of all parents.⁹⁰⁰ If the child is over 12 years of age the consent of the child is required.⁹⁰¹ If the child is under 12 years of age, an additional statement from a different medical professional is required.⁹⁰²
- Alberta: application must be by a parent on child's behalf, with the consent of both parents. If the child is over 12 years of age, the child's consent is required unless there is a court order dispensing with consent.⁹⁰³ If the child is less than 12 years of age then a statement from a medical professional is required.⁹⁰⁴
- Manitoba: statement from a medical professional required to include an opinion that the child has the capacity to make health care decisions.⁹⁰⁵
- New Brunswick: application must be by a parent on child's behalf, with the written consent of parents and a statement from a medical professional required to include an opinion that the child has the capacity to make health care decisions.⁹⁰⁶ If the child is over 12 years of age, the child's consent is required.⁹⁰⁷

3. Child change of sex/gender

3.2 Application process (uncontested application)

DENMARK	INDIA	IRELAND	MALTA	NEW ZEALAND
N/A.	N/A.	Application made on behalf of a child to the Circuit Family Court, ⁹⁰⁸ with parent/guardian consent to the application, ⁹⁰⁹ a certificate from a medical practitioner ⁹¹⁰ and an endocrinologist or psychologist agreeing with the medical practitioner's opinion. ⁹¹¹ The Court must only make an order if it is in the best interests of the child. ⁹¹²	Persons exercising parental authority may file an application to the registry of the Civil Court (Voluntary Jurisdiction Section). ⁹¹³ The court, when hearing the application shall consider the best interest of the child and give weight to the views of the minor. ⁹¹⁴	Application to the Family Court by 'the guardian' of the eligible child. ⁹¹⁵ Relevant issues are whether it is in the child's best interest, whether the guardian intends to raise the child as their nominated sex, that the child is not a person of the nominated sex and expert medical evidence that the child has undergone or will undergo necessary medical treatment. ⁹¹⁶

NORWAY

Application as per adult process, with an application for a child aged between 6 and 16 to be submitted in concert with the person or persons who have custody of the child.⁹¹⁷

The application for a child aged under 6 must be submitted by the person or persons who have custody of the child.⁹¹⁸ The child must:

- have a congenital somatic sex development

UNITED KINGDOM

N/A.

UNITED STATES

California

It is unclear whether, in practice, the administrative process for adults also applies to minors.⁹²⁰ With respect to the Court petition, an application can be made by at least one parent/guardian.⁹²¹ If only one parent/guardian makes the application, notice must be given to the other parent/guardian.⁹²² The Court shall grant the order without a hearing unless a parent/guardian objects to the application.⁹²³

Oregon

Application to the Registrar by one parent/guardian or legal representative of the applicant, which can, but need not, follow a court order.⁹²⁴

3. Child change of sex/gender

3.2 Application process (uncontested application)

uncertainty and submit documentation of this condition from a health professional; and

- be informed and given an opportunity to express their views before the application is submitted.⁹¹⁹

NORWAY

PAKISTAN

UNITED KINGDOM

UNITED STATES

If an application is submitted with the support of only one parent, and there is joint custody, the gender may still be changed if this is what is best for the child.⁹³⁵ This application must be submitted to the County Governor of Oslo and Akershus.⁹³⁶ There is no process available to a child without the support of at least one parent/guardian.

N/A.

N/A.

California

Court Petition: if only one parent/guardian makes the application, notice must be given to the other parent/guardian.⁹³⁷ The other parent/guardian may file a written objection and appear at the court hearing. The Court may deny the application, where the change of gender is not in the best interest of the child.⁹³⁸ The Court shall grant the order without a hearing unless a parent/guardian objects to the application.⁹³⁹

Oregon

Application to the Registrar by one parent/guardian or legal representative of the applicant, which can, but need not, follow a court order.⁹⁴⁰

450 BDMR Act s 12; *Health (Notifications by Midwives) Regulations 1994* (WA), sch, Form 2.

451 BDMR Act ss 12(1)–(2).

452 NSW Act s 12(1); NSW Regulations reg 4(a).

453 NSW Act ss 12(1)–(2), (5).

454 Victorian Act ss 12(1), (3), (6).

455 SA Act s 12(1); SA Regulations reg 4(c).

456 SA Act ss 12(1), (2), (5).

457 Tasmanian Act s 11(2).

458 Tasmanian Act ss 11(1), (3), (6).

459 Queensland Act s 5(1).

460 Queensland Act ss 5(1)–(3).

461 NT Act s 12(1); NT Regulations reg 2(c).

462 NT Act ss 12(1), (2), (6).

463 ACT Act s 5(2)(a); ACT Regulations reg 4(1)(b).

464 ACT Act ss 5(1), (2)(b)(i), (3).

465 BDMR Act s 17.

466 BDMR Act ss 15–6.

467 NSW Act ss 14, 17(1); NSW Regulations reg 5(1)(a).

468 As informed by the NSW registry.

469 NSW Act ss 15–6.

470 Victorian Act s 14; Victorian Regulations reg 7(c).

471 As informed by the Victorian registry.

472 Victorian Act ss 15, 18.

473 Victorian Bill cl 5 (definition of ‘sex descriptor’).

474 Victorian Bill cl 5 (definition of ‘prohibited sex descriptor’).

475 SA Act s 14; SA Regulations reg 5(c).

476 As informed by the SA registry.

477 SA Act ss 15–6.

478 Tasmanian Act s 13.

479 As informed by the Tasmanian registry.

480 Tasmanian Act ss 14–5.

481 Equal Opportunity Tasmania, *Legal recognition of sex and gender diversity in Tasmania* (February 2016) 4, 28.

482 Queensland Act; Queensland Regulations reg 20(c); Queensland Government, *Birth Registration Statement* <<https://publications.qld.gov.au/dataset/birth-registration/resource/c52c1bfa-ec2d-4af3-b0a1-56242007f3cc>>.

483 Queensland Act ss 8–9.

484 NT Act s 14; NT Regulations reg 3(b).

485 NT Government, *Birth Registration Statement for Same-Sex Parents* <https://nt.gov.au/data/assets/pdf_file/0006/471768/Birth-registration-statement-for-same-sex-parents.pdf>. We have been unable to locate a public copy of the Birth Registration Statement for Different-Sex Parents.

486 NT Act ss 15–6.

487 ACT Act ss 9(1), 11(1); ACT Regulations reg 5(1)(b).

488 ACT Government, *Birth Registration Statement* <<https://www.accessscanberra.act.gov.au/cif/attach/get/106834/1475723156/redirect/1/filename/Birth+registration+statement.pdf>>.

489 ACT Act ss 8, 10.

490 BDMR Act ss 50–1.

491 BDMR Act ss 4 (definition of ‘registrable information’), 19(1).

492 NSW Act s 45.

493 NSW Act s 20.

494 Victorian Act ss 42–3.

495 Victorian Act s 43(5).

496 SA Act ss 41–2.

497 Tasmanian Act ss 41–2.

498 Equal Opportunity Tasmania, *Legal recognition of sex and gender diversity in Tasmania* (February 2016) 12.

499 Queensland Act ss 42–3.

500 Queensland Act ss 42-3; Queensland Government, *Correct a certificate* <<https://www.qld.gov.au/law/births-deaths-marriages-and-divorces/birth-death-and-marriage-certificates/correct-a-certificate>>.

501 NT Act ss 39, 40.

502 ACT Act ss 40-1.

503 The GR Act conflates the terms sex and gender, although it appears that the Act intends to effect a change of sex given the requirement to change physical sex characteristics through the use of a 'reassignment procedure'.

504 GR Act ss 3 (definition of 'Board'), 14(1).

505 GR Act s 17(1).

506 GR Act ss 3 (definition of 'recognition certificate'), 14(1).

507 NSW Act ss 32D, 32DC.

508 NSW Act ss 32DD, 32E.

509 NSW Act ss 32B, 32DA.

510 Victorian Act ss 30C(1), 30F(1).

511 Victorian Act ss 30D, 30F(1).

512 Victorian Act ss 30A(1)(c), 30E(1)(d).

513 Victorian Bill cls 8, 10.

514 Victorian Bill cls 9, 10.

515 Victorian Bill cls 1, 8, 10.

516 Victorian Bill cls 1, 8, 10.

517 SA Act ss 29(1), 29O(1).

518 SA Act ss 29M, 29Q.

519 SA Act Part 4A.

520 SA Act ss 29H(1) (definition of 'clinical treatment'), 29K, 29O.

521 Tasmanian Act ss 28A, 28C.

522 Tasmanian Act s 28D.

523 Tasmanian Act s 28A(1)(b).

524 Equal Opportunity Tasmania, *Legal recognition of sex and gender diversity in Tasmania* (February 2016) 9-10.

525 Equal Opportunity Tasmania, *Legal recognition of sex and gender diversity in Tasmania* (February 2016) 29.

526 Equal Opportunity Tasmania, *Legal recognition of sex and gender diversity in Tasmania* (February 2016) 9-10.

527 Queensland Act s 23(4); Queensland Government, Note a change of sex in a birth or adoption register (accessed 12 July 2018) <<https://www.qld.gov.au/law/births-deaths-marriages-and-divorces/birth-registration-and-adoption-records/note-a-change-of-sex-in-a-birth-or-adoption-register>>.

528 Queensland Act ss 22, 24.

529 Queensland Act s 23.

530 NT Act s 28B.

531 NT Act s 28E.

532 NT Act s 28B.

533 ACT Act ss 24, 29A.

534 ACT Act ss 27, 29C.

535 ACT Act Part 4.

536 ACT Act ss 24(1)(c)(i), 29A(1)(d)(i).

537 GR Act s 3 (definition of 'gender characteristics').

538 NSW Act ss 32B, 32DA.

539 Victorian Act ss 30A(2), 30E(3).

540 Births, Deaths and Marriages Victoria, *Application for Alternation of Sex in Birth Register or a Recognised Details Certificate* <https://www.bdm.vic.gov.au/sites/default/files/embridge_cache/emshare/original/public/2018/06/ad8264e0376/Alteration%20of%20Sex%20-%20July%20202018.pdf>.

541 Victorian Bill cls 5 (definition of 'sex descriptor' and 'prohibited sex descriptor'), 8, 10.

542 SA Act ss 29(2), 29O(2); SA Regulations reg 7A.

543 Tasmanian Act s 28A.

544 Equal Opportunity Tasmania, *Legal recognition of sex and gender diversity in Tasmania* (February 2016) 4.

545 Equal Opportunity Tasmania, *Legal recognition of sex and gender diversity in Tasmania* (February 2016) 28.

546 Queensland Act s 23(4).

547 Queensland Government, *Application to note a reassignment of sex in the birth register or the adopted child register* <<https://publications.qld.gov.au/dataset/application-to-note-a-reassignment-of-sex-in-the-birth-register-or-the-adopted-children-register/resource/01fc8f9a-bd30-4f5d-8c0c-a3acf9bc39a2>>.

548 NT Act s 28B; NT Government, *Register a change of sex on a birth certificate* <<https://nt.gov.au/law/bdm/register-a-change-of-sex-on-a-birth-certificate>>.

549 ACT Act ss 24, 29A, 69; ACT Government, *Application to alter birth register to record change of sex*
<<https://www.accesscanberra.act.gov.au/ci/fattach/get/108022/147630882/redirect/1/filename/Application+to+alter+birth+register+to+record+change+of+sex.pdf>>.

550 ACT Government, *Application to alter birth register to record change of sex*
<<https://www.accesscanberra.act.gov.au/ci/fattach/get/108022/147630882/redirect/1/filename/Application+to+alter+birth+register+to+record+change+of+sex.pdf>>.

551 GR Act s 14(1).

552 GR Act s 3 (definition of 'reassignment procedure').

553 *AB v Western Australia; AH v Western Australia* (2011) 244 CLR 390, 404 [32] (French CJ, Gummow, Hayne, Kiefel and Bell JJ).

554 GR Act s 15(1)(b)(i).

555 GR Act s 15(1)(b)(ii); We note that in the GR Act, 'gender characteristics' means 'the physical characteristics by virtue of which a person is identified as male or female'; GR Act s 3 (definition of 'gender characteristics'); the Commission is conscious that this definition is confusing as it refers to biological sex characteristics but uses the word 'gender'. As held by the High Court, this is largely a question of social recognition rather than how much of a person's body remains male or female (*AB v Western Australia; AH v Western Australia* (2011) 244 CLR 390, 405 [35] (French CJ, Gummow, Hayne, Kiefel and Bell JJ)).

556 GR Act s 15(1)(b)(iii).

557 NSW Act ss 32B(1), 32DA(1).

558 NSW Act s 32A.

559 Victorian Act ss 30A(1)(c), 30E(1)(d).

560 Victorian Act s 4 (definition of 'sex affirmation surgery').

561 Victorian Bill cls 8, 10.

562 SA Act ss 29I, 29K, 29O.

563 SA Act s 29H(1) (definition of 'clinical treatment').

564 SA Act s 29H(3); SA Regulations reg 7C.

565 Tasmanian Act s 28A.

566 Tasmanian Act s 3 (definition of 'sexual reassignment surgery').

567 Equal Opportunity Tasmania, *Legal recognition of sex and gender diversity in Tasmania* (February 2016) 11.

568 Queensland Act s 22.

569 Queensland Act sch 2 (definition of 'sexual reassignment surgery').

570 NT Act s 28B(1)(b).

571 NT Act s 28A (definition of 'sexual reassignment surgery').

572 ACT Act ss 24(1)(c), 29A(1)(d).

573 ACT Act ss 24(1)(c)(i), 29A(1)(d)(i).

574 ACT Act ss 24(1)(c)(ii), 29A(1)(d)(ii).

575 *Legislation Act 2001* (ACT) s 169B.

576 GR Regulations reg 4(1)(b)(ii).

577 GR Regulations reg 4(1)(b)(iii).

578 GR Regulations reg 4(1)(b)(iv).

579 GR Regulations reg 4(1)(b)(v).

580 GR Regulations reg 4(1)(b)(vi).

581 GR Regulations reg 4(1)(b)(vii).

582 NSW Act ss 32C(a), 32DB(a).

583 NSW Act ss 32C(b), 32DB(b); NSW Regulations regs 10(a), 11(a).

584 NSW Act ss 32C(b), 32DB(b); NSW Regulations regs 10(b), 11(b).

585 Victorian Act ss 30B(1), 30E(2).

586 Victorian Act ss 30B(2), 30E(2).

587 Victorian Bill cls 8, 10.

588 Victorian Bill cls 8, 10.

589 SA Act ss 29K(a), 29O(2)(b).

590 SA Act s 29K(b).

591 Tasmanian Act s 28B(a).

592 Equal Opportunity Tasmania, *Legal recognition of sex and gender diversity in Tasmania* (February 2016) 11.

593 Queensland Act s 23(4)(d); Queensland Regulations reg 12(2)(a).

594 Queensland Act s 23(4)(b)(ii), sch 2 (definition of 'recognition certificate').

595 Queensland Act s 23(4)(b)(i).

596 NT Act s 28C; NT Regulations reg 4A(a).

597 NT Act s 28C; NT Regulations reg 4A(b).

598 ACT Act s 25(1)(a).
599 ACT Act s 25(1)(b).
600 Victorian Bill cls 8, 10.
601 SA Act s 29S(1).
602 Government of South Australia, *Record a change of sex or gender identity – application, Consumer and Business Services* <https://www.sa.gov.au/data/assets/pdf_file/0010/301213/Change-of-Gender-form-170825-1644-.pdf>
603 SA Act ss 4 (definition of 'Court'), 29S(3).
604 Equal Opportunity Tasmania, *Legal recognition of sex and gender diversity in Tasmania* (February 2016) 11.
605 Victorian Act s 30I.
606 Victorian Bill cl 13.
607 Victorian Bill cl 16.
608 GR Act s 15(1)(a)(i).
609 GR Act s 15(1)(a)(ii).
610 GR Act s 15(1)(a)(iii).
611 GR Act s 16(2).
612 GR Act s 3 (definition of 'corresponding law'); GR Regulations reg 3.
613 NSW Act s 32B.
614 NSW Act s 32DA(1).
615 NSW Act s 32DD.
616 NSW Act ss 32I, 32J; NSW Regulations reg 19.
617 Victorian Act s 30A(1).
618 Victorian Act s 30E(1)(b).
619 Victorian Act s 30F(1).
620 Victorian Act ss 4 (definition of 'interstate recognition certificate'), 30G(2).
621 SA Act s 29I(1).
622 SA Act s 29Q(1).
623 SA Act ss 29O(1), 29Q.
624 SA Act s 29K(b).
625 Tasmanian Act s 28A(1)(a).
626 Tasmanian Act s 28H.
627 Queensland Act s 24(2), sch 2 (definition of 'recognition certificate').
628 NT Act s 28B(1)(a).
629 NT Act ss 28A (definition of 'recognition certificate'), 28J.
630 ACT Act s 24(1)(b).
631 ACT Act s 29A(1)(b).
632 ACT Act ss 29A(1), 29C.
633 ACT Act s 29D(2).
634 GR Act s 14(1).
635 NSW Act s 14(2)(b).
636 NSW Act ss 32B(2), 32DA(2).
637 Victorian Act ss 30A(1)(a), 30E(1)(a).
638 Victorian Bill cls 8, 10.
639 Victorian Bill cls 8, 10; Victorian Act s 4 (definition of 'Court').
640 SA Act s 29J(1).
641 SA Act ss 4 (definition of 'Court'), 29J(2).
642 Tasmanian Act ss 28A(2)–(4).
643 Equal Opportunity Tasmania, *Legal recognition of sex and gender diversity in Tasmania* (February 2016) 17.
644 Queensland Act ss 23(2)–(3).
645 NT Act s 28B(2).
646 ACT Act s 24(3).
647 ACT Act s 24(2).
648 See GR Regulations reg 4.
649 GR Act s 15(2)(b).
650 NSW Act ss 32C, s32DB.

651 Victorian Bill cl 8.
652 Victorian Bill cl 8.
653 Victorian Bill cl 10.
654 SA Act s 29J(2)–(3).
655 SA Act s 29J(5).
656 SA Act s 29J(4).
657 SA Act ss 29P, 29Q.
658 Tasmanian Act s 28B.
659 Equal Opportunity Tasmania, *Legal recognition of sex and gender diversity in Tasmania* (February 2016) 18.
660 Queensland Act s 23(4); Queensland Regulations reg 12(2)(b).
661 NT Act s 28C.
662 ACT Act s 25(2)(a).
663 ACT Act s 25(2)(b).
664 ACT Act s 25(2)(c).
665 ACT Act ss 29A(2), 29B(2).
666 Victorian Bill cls 8, 10; Victorian Act s 4 (definition of 'Court').
667 SA Act s 29J.
668 Equal Opportunity Tasmania, *Legal recognition of sex and gender diversity in Tasmania* (February 2016) p 18.
669 Queensland Act s 23(3).
697 Review has been confined to British Columbia, Newfoundland and Labrador, Nova Scotia, Ontario, New Brunswick, Alberta, Prince Edward Island, Saskatchewan, Manitoba (we have not considered the Canadian Territories or Quebec).
698 *Código Civil y Comercial de la Nación (Ley 26.994)* [Argentine Civil and Commercial Code (Law 26.994)] (Argentina) art 96.
699 *Vital Statistics Act*, RSBC 1996, c 479, s 2; British Columbia Vital Statistics Agency, *Handbook for Physicians, Nurse Practitioners and Registered Midwives*, 7 <[https://www2.gov.bc.ca/assets/gov/birth-](https://www2.gov.bc.ca/assets/gov/birth-adoption-death-marriage-and-divorce/deaths/vsa052.pdf)
700 *Vital Statistics Act*, SNL 2009, c V-6.01, s 4 (1); Newfoundland & Labrador Centre for Health Information, *Live Birth Notification Form Reference Manual*, 40 <https://www.nlchi.nl.ca/images/LBN_Reference_Manual_2018_-_FINAL_2017-12-28.pdf>.
701 *Vital Statistics Act*, RSPEI 1988, c V-4.1, s 2; *Vital Statistics Act Regulations*; PEI Reg EC453-00, reg 6 and schedule A.
702 *Vital Statistics Act*, SS 2009, c V-7.21, ss 20–22; *Vital Statistics Regulations*, RRS, c V-7.21, Reg 1, regs 7(1)(a)(ii), 10(1)(a)(iv).
703 *Vital Statistics Act*, RSNS 1989, c 494, s 3.
704 *Vital Statistics Act*, RSO 1990, c V4, s 8; *Vital Statistics Regulation*, RRO Reg 1094/1990, regs 1(1)–(2).
705 *Vital Statistics Act*, SNB 1979, c V-3, s 12(1)–(3).
706 *Vital Statistics Act*, SA 2007, c V-4.1, ss 4(1)–(4); *Vital Statistics Information Regulation*, Alta Reg 108/2018, reg 6(1)(f).
707 Government of Denmark, *Fødselsanmeldelse [Birth Notification Form]*, Personregistrering.dk <<https://www.personregistrering.dk/fileadmin/pdfs/print/Fodselsanmeldelse.pdf>>.
708 *The Registration of Births and Deaths Act 1969* (India) ss 8–9; *Model Registration of Births and Deaths Rules 1999* (India) r 5; Office of the Registrar General India, *Form No. 1 Birth Report* <http://crsorgi.gov.in/web/uploads/download/All_forms_with_UID_No.pdf>.
709 *Civil Registration Act 2004* (Ireland) ss 2 definition of 'the required particulars', 30(1), sch 1 pt 1.
710 Ireland National Perinatal Reporting System, *Birth Notification Form BNFO1*, 11 <http://www.hpo.ie/nprs/nprs_documentation/NPRS_Instruction_Manual_Mar_2015.pdf>.
711 *Gender Identity, Gender Expression and Sex Characteristics Act 2015* (Malta) art 7(4); *Civil Code* (Malta) art 278(c).
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835 Birth certificate needs to be accompanied by a statutory declaration that the applicant has assumed and intends to maintain their desired gender identity; *Vital Statistics Act*, SNL 2009, c V-6.01, s 26(2)(a); *Vital Statistics Act*, SA 2007, c V-4.1, s 30(1); *Vital Statistics Information Regulation*, Alta Reg 108/2018, regs 17, 18.

836 A declaration by the applicant that they have assumed, identify with and intend to maintain the gender identity that corresponds with the desired sex designation: *Vital Statistics Act*, RSNS 1989, c 494, s 25(1)(b); *Vital Statistics Act*, RSBC 1996, c 479, s 27(2)(b); Ontario Government, Changing your sex designation on your birth registration and birth certificate <<https://www.ontario.ca/page/changing-your-sex-designation-your-birth-registration-and-birth-certificate>>; *Vital Statistics Act*, CCSM 2017, c V60, s 25(5); *Vital Statistics Act*, SNB 1979, c V-3, s 34(2)(a); *Vital Statistics Act*, RSPEI 1988, c V-4.1, s 12(1)(a); *Vital Statistics Act*, SS 2009, c V-7.21, s 31(2)(b).

837 A statement confirming the sex designation on the applicant's birth certificate does not correspond with the applicants gender identity provided by a medical or health professional as the case may be: *Vital Statistics Act*, RSNS 1989, c 494, s 25(1)(c); *Vital Statistics Act*, RSBC 1996, c 479, s 27(2)(c); Ontario Government, Changing your sex designation on your birth registration and birth certificate <<https://www.ontario.ca/page/changing-your-sex-designation-your-birth-registration-and-birth-certificate>>; *Vital Statistics Act*, CCSM 2017, c V60, s 25(5); *Vital Statistics Act*, SNB 1979, c V-3, s 34(2)(b); *Vital Statistics Act*, RSPEI 1988, c V-4.1, s 12(1)(b); *Vital Statistics Act*, SS 2009, c V-7.21, s 31(2)(c).

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879 *Vital Statistics Information Regulation*, Alta Reg 108/2018, reg 17(1)(c); *The Interpretation Act*, CCSM 2000, c 180, s 17, schedule of definitions.

880 Ontario Government, Changing your sex designation on your birth registration and birth certificate <<https://www.ontario.ca/page/changing-your-sex-designation-your-birth-registration-and-birth-certificate>>.

881 *Vital Statistics Act*, RSNS 1989, c 494, s 25(2); *Vital Statistics Act*, SNL 2009, c V-6.01, ss 26.1(1), (11); *Vital Statistics Act*, SNB 1979, c V-3, ss 34(1), 34.1(1).

882 *Vital Statistics Act*, RSPEI 1988, c V-4.1, s 12(1).

883 *Vital Statistics Act*, SS 2009, c V-7.21, s 31(2).

884 *Arnot v Forsberg* [2018] SKQB 159.

885 *Lov 752/2014 Lov om ændring af lov om Det Centrale Personregister* [Motion to Amend the Act on the (Danish) Civil Registration System, 752/2014] (Denmark) art 1.

886 *Gender Recognition Act 2015* (Ireland) s 12(1).

887 *Gender Identity, Gender Expression and Sex Characteristics Act 2015* (Malta) arts 2, 7.

888 *Births, Deaths, Marriages, and Relationships Registration Act 1995* (NZ) s 27A.

889 *Lov om ending av juridisk kjønn 2016* [Legal Gender Amendment Act, Prop 74 L 2015-2016] (Norway) § 4.

890 *Transgender Persons Protection of Rights Act 2018* (Pakistan) s 3(3).

891 *Gender Recognition Act 2004* (UK) chapter 7 s 1.

892 *Health and Safety Code 2017* (California), s 103430(e) (operative commencing 1 September 2018).

893 *Oregon Administrative Rules 333-001-0265 (Oregon)*, s 0272(1)(b)(B).

894 *Identidad de Genero (Ley 26.743)* [Gender Identity Law (Law 26.743)] (Argentina) art 5.

895 *Code Civil 1807* [Civil Code] (Belgium) art 62bis, § 11.

896 *Vital Statistics Act*, RSPEI 1988, c V-4.1, s 12(1); *Arnot v Forsberg* [2018] SKQB 159.

897 *Vital Statistics Act*, RSNS 1989, c 494, s 25(2).

898 *Vital Statistics Act*, RSBC 1996, c 479, s 27(2)(d).

Ontario Government, Changing your sex designation on your birth registration and birth certificate <<https://www.ontario.ca/page/changing-your-sex-designation-your-birth-registration-and-birth-certificate>>.

900 [Vital Statistics Act](#), SNL 2009, c V-6.01, s 26.1(2).

901 [Vital Statistics Act](#), SNL 2009, c V-6.01, s 26.1(2)(d).

902 [Vital Statistics Act](#), SNL 2009, c V-6.01, s 26.1(2)(e).

903 [Vital Statistics Information Regulation](#), Alta Reg 108/2018, reg 17(4).

904 [Vital Statistics Information Regulation](#), Alta Reg 108/2018, reg 19.

905 [Vital Statistics Act](#), CCSM 2017, c V60, s 25(8)(2)(f).

906 [Vital Statistics Act](#), SNB 1979, c V-3, s 34.1(3).

907 [Vital Statistics Act](#), SNB 1979, c V-3, s 34.1(3)(a).

908 [Gender Recognition Act 2015](#) (Ireland) s 12.

909 [Gender Recognition Act 2015](#) (Ireland) s 12(4)(a).

910 [Gender Recognition Act 2015](#) (Ireland) s 12(4)(b)(i)(A)–(D); the certificate must certify that the child has attained a sufficient degree of maturity to make the decision to apply for gender recognition, understands the consequence of the decision, makes the decision independently and is transitioning into his or her preferred gender.

911 [Gender Recognition Act 2015](#) (Ireland) s 12(4)(b)(ii).

912 [Gender Recognition Act 2015](#) (Ireland) s 12(6).

913 [Gender Identity, Gender Expression and Sex Characteristics Act 2015](#) (Malta) art 7(1).

914 [Gender Identity, Gender Expression and Sex Characteristics Act 2015](#) (Malta) art 7(2).

915 [Births, Deaths, Marriages, and Relationships Registration Act 1995](#) (NZ) s 29(1).

916 [Births, Deaths, Marriages, and Relationships Registration Act 1995](#) (NZ) s 29.

917 [Lov om ending av juridisk kjønn 2016](#) [Legal Gender Amendment Act, Prop 74 L 2015-2016] (Norway) § 4.

918 [Lov om ending av juridisk kjønn 2016](#) [Legal Gender Amendment Act, Prop 74 L 2015-2016] (Norway) § 4.

919 [Lov om ending av juridisk kjønn 2016](#) [Legal Gender Amendment Act, Prop 74 L 2015-2016] (Norway) § 4.

920 [Health and Safety Code 2017](#) (California) s 103426.

921 [Health and Safety Code 2017](#) (California) s 103430(e) (operative commencing 1 September 2018).

922 [Health and Safety Code 2017](#) (California) s 103430(e)(A) (operative commencing 1 September 2018).

923 [Health and Safety Code 2017](#) (California) s 103430(e)(B) (operative commencing 1 September 2018).

924 [Oregon Administrative Rules 333-001-0265](#) (Oregon) s 0272(1)(b)(B); [Oregon Revised Statute \(ORS\)](#) s 432.

925 [Identidad de Género \(Ley 26.743\)](#) [Gender Identity Law (Law 26.743)] (Argentina) art 5.

926 [Code Civil 1807](#) [Civil Code] (Belgium) art 62bis, § 11.

927 [Vital Statistics Act](#), SA 2007, c V-4.1, s 69; [Vital Statistics Information Regulation](#), Alta Reg 108/2018, regs 17(2), (3); [Vital Statistics Act](#), RSNS 1989, c 494, s 25(7); [Vital Statistics Act](#), SNL 2009, c V-6.01, s 26.1(8)–(9); [Vital Statistics Act](#), SNB 1979, c V-3, ss 34.1(7), (8).

928 [Vital Statistics Act](#), RSBC 1996, c 479, s 27(3).

929 [Vital Statistics Act](#), SNL 2009, c V-6.01, s 26.1(4); [Vital Statistics Act](#), SNB 1979, c V-3, s 34.1(4).

930 [Vital Statistics Act](#), SNL 2009, c V-6.01, s 26.1(4); [Vital Statistics Act](#), SNB 1979, c V-3, s 34.1(4).

931 [Vital Statistics Act](#), SNL 2009, c V-6.01, s 26.1(4); [Vital Statistics Act](#), SNB 1979, c V-3, s 34.1(4).

932 [Vital Statistics Act](#), SNL 2009, c V-6.01, s 26.1(4); [Vital Statistics Act](#), SNB 1979, c V-3, s 34.1(4).

933 [Vital Statistics Act](#), SNL 2009, c V-6.01, s 26.1(4); [Vital Statistics Act](#), SNB 1979, c V-3, s 34.1(4).

934 [Vital Statistics Act](#), SNL 2009, c V-6.01, s 26.1(4); [Vital Statistics Act](#), SNB 1979, c V-3, s 34.1(4).

935 [Vital Statistics Act](#), SNL 2009, c V-6.01, s 26.1(4); [Vital Statistics Act](#), SNB 1979, c V-3, s 34.1(4).

936 [Vital Statistics Act](#), SNL 2009, c V-6.01, s 26.1(4); [Vital Statistics Act](#), SNB 1979, c V-3, s 34.1(4).

937 [Vital Statistics Act](#), SNL 2009, c V-6.01, s 26.1(4); [Vital Statistics Act](#), SNB 1979, c V-3, s 34.1(4).

938 [Vital Statistics Act](#), SNL 2009, c V-6.01, s 26.1(4); [Vital Statistics Act](#), SNB 1979, c V-3, s 34.1(4).

939 [Vital Statistics Act](#), SNL 2009, c V-6.01, s 26.1(4); [Vital Statistics Act](#), SNB 1979, c V-3, s 34.1(4).

940 [Vital Statistics Act](#), SNL 2009, c V-6.01, s 26.1(4); [Vital Statistics Act](#), SNB 1979, c V-3, s 34.1(4).

