



LAW REFORM COMMISSION
of
WESTERN AUSTRALIA

PROJECT 108

FINAL REPORT

Review of Western Australian legislation
in relation to the registration or change
of a person's sex and/or gender and status
relating to sex characteristics

THE LAW REFORM COMMISSION OF WESTERN AUSTRALIA

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FOREWORD

On 15 January 1968, the Law Reform Committee (the precursor to the Law Reform Commission of Western Australia) met for the first time. In 1968, the social and legal landscapes in Western Australia were dramatically different from today. Less than 12 months earlier the Australian public had overwhelmingly supported amending the Australian Constitution to remove provisions that discriminated against Aboriginal people. In 1968, babies were issued birth certificates that contained far more information than they do today. Sexuality was largely a taboo topic that was rarely, if ever, discussed. The Stonewall riots in the United States (considered to have been pivotal to the modern fight for LGBTIQ rights) would not occur for another 18 months and the LGBTIQ acronym had not even been coined. In Western Australia, there may have been some public discourse around sexual orientation (including reference to the lesbian, gay and bisexual communities), but it would take many years before the public discussion included sex and gender diversity (including reference to the 'intersex' and 'trans' communities).

Stepping forward 50 years and the world has changed dramatically. We live in a time when the Western Australian public is far more familiar with sex, gender and sexuality than ever before. These topics are now widely discussed. Less than 12 months ago, the Western Australian public evidenced their understanding of issues relating to sexual orientation during the Commonwealth government survey on same sex marriage. In this milieu, on 16 January 2018, exactly 50 years and one day after the first meeting in Western Australia of the newly established Law Reform Committee, the Attorney-General of Western Australia, the Hon. John Quigley MLA announced that he would be asking the Law Reform Commission of Western Australia to report on issues and inconsistencies in Western Australia's current legal framework relating to the legal recognition of sex and gender.

In substance, the Terms of Reference for this project sought a review of the existing practices under the *Gender Reassignment Act 2000*

(WA) and the *Births, Deaths and Marriages Registration Act 1998* (WA), as well as practices in other Australian jurisdictions and abroad. This reference was made in circumstances where the *Gender Reassignment Act 2000* (WA), which had once been seen as progressive, was no longer considered in this way having been soundly criticised by the High Court of Australia in *AB and AH v Western Australia*.¹

The reference from the Attorney-General required a substantial amount of research, document drafting and community engagement. In order to do justice to the topic of the reference, to complete the reference in just under 11 months and to complete it to the high standard expected of Commission reports, the Commission sought and was very ably assisted by a talented team of lawyers from the firm, Corrs Chambers Westgarth. Partners Kirsty Sutherland and Jared Heath led a team including Tegan Harrington and Giles Kenny. The team provided the Commission with an extraordinarily high standard of support and for this the Commission is very grateful.

It was apparent from an early stage that the Commission's work on this reference would be substantially advanced by the assistance of someone with expertise and a deep understanding of the specific matters that had been raised. Fortunately, at that time, Mr Steven Penglis SC approached the Commission with an offer of pro bono assistance. Steven is a widely respected Senior Counsel. Importantly, Steven was the lead counsel acting for the appellants in the *AB and AH v Western Australia* cases before the Western Australian Court of Appeal and the High Court of Australia. Recognising the value that he could bring to its work, the Commission, having first consulted the Attorney-General, appointed Steven as a Special Commissioner of the Law Reform Commission of Western Australia for the purposes of assisting the Commission in its work on this reference.

The value that Steven has provided to the Commission has been immeasurable. Steven, your generosity, wisdom and willingness to assist the Commission in the ways that you have,

¹ *AB v Western Australia; AH v Western Australia* (2011) 244 CLR 390.

cannot be underestimated. Your assistance has been outstanding, and words cannot express how grateful the Commission is for your assistance.

With the team engaged, this project commenced with the Commission identifying and consulting a substantial number of relevant individuals, organisations and government departments.

A Discussion Paper was published on 20 August 2018. It contained measures that the Commission was proposing be implemented and it raised specific questions for public comment. The Commission requested the public provide their submissions by 19 October 2018. Despite the period for the making of submissions being short, the Commission received over 500 submissions. The Commission also engaged in additional consultations where the Commission sought to investigate or clarify matters raised in submissions.

It is likely that many of the people who took the time to provide submissions to the Commission have never taken the bold step of responding to a public inquiry before. To those people, the Commission is especially grateful. When preparing reform proposals it is critical to ensure that reforms are aligned to the needs and desires of the community. The submissions that were provided to the Commission allowed it to gauge the public sentiment. Without those submissions, it would have been impossible for the Commission to carry out its work. Thank you for assisting the Commission in this way.

While many submissions supported the model of reform that the Commission had proposed, others did not support it and a larger number supported some parts but not others. Irrespective of the positions that were taken, the Commission acknowledges and thanks all those who participated in this project and shared their experiences, knowledge and perspectives. The information has been extremely valuable and it has enabled the Commission to propose a model for reform that aims to best meet the wishes of the Western Australian public.

The Commission especially thanks those individuals who generously shared their own experiences, or those of their family and gave deeply personal insight into the lived experience of intersex, trans and gender diverse people in Western Australia.

The intersex, trans and gender diverse people who the Commission met deserve special thanks. The Commission heard directly from a number of trans people that they regularly experience bigotry, discrimination and physical violence. The Commission heard that one of the greatest fears of a trans person was the fear that they might be 'outed' and that others would then treat them differently, possibly violently. No person should have to live with such threats hanging over them and perpetrators of such behaviors should forever hang their heads in shame. Surprisingly, the trans people who the Commission met, did not harbor bitterness, rather, they had positive outlooks and wanted nothing other than to be allowed to get on with their lives without fear or threat.

Many submissions raised the need for reform of the *Equal Opportunity Act 1984* (WA). While this Act is beyond the Terms of Reference of this report, the Commission understands that the Attorney-General will be making a reference to review that Act shortly. The proposals in this Final Report should not need to be delayed pending the outcome of any review of that Act, although as the Commission details in this report, implementation of the reforms in this report may require some transitional amendments to that Act.

This report comes at a time when reform in this area is happening in other Australian jurisdictions and abroad at a rapid rate. The Commission is aware that there has been substantial public debate on the proposal to remove sex classifications from birth certificates outlined in the Discussion Paper. In many cases those opposed to this reform may not have understood the proposal in detail (for example, why it was being proposed and how it would be likely to impact on their daily lives) and in order to assist the public to gain a greater understanding, this Final Report provides further explanation of this proposed reform. Importantly, removal of the sex classification field from birth certificates will not make anyone less male or less female, rather it should reduce the likelihood of trans people being accidentally 'outed' and it should reduce the pressure on the parents of intersex children to assign a sex to their child at a time when there can be no medical certainty that the assignment is correct.

After 50 years of there being an independent body in Western Australia that is charged with reviewing the laws of Western Australia and providing impartial and independent proposals for reform of those laws, it is fitting that the Commission has been asked to undertake this review. As evidenced by the survey undertaken by the Commonwealth government in 2017, Western Australian society has matured over the last 50 years. The Western Australian public is becoming more progressive and accepting, and the importance of the rights of the individual seem to be on the ascendency.

When this reference was made in January this year, the Commission was ambitiously requested to provide its Final Report before end of November. With the unwavering support of the Attorney-General, the Department of Justice, particularly Dominic Fernandes and Emily Priest, and the many other officials who have assisted the Commission throughout this project, the Commission now submits this Final Report. Hopefully, the reforms that the Commission has proposed will have a positive impact on the lives of ordinary people who have for too long lived their lives facing violence, bigotry and discrimination simply because they can no longer continue to lie about their identity.

It is with great pride and determination that the Commission makes the carefully considered recommendations set out in this Report. If adopted, these recommendations are intended to substantially ease the pressures that intersex, trans and gender diverse people, and their loved ones, face on a daily basis and hopefully in turn they will improve their respective lived experiences.

Dr David Cox
Chairman
Law Reform Commission of Western Australia
November 2018

LIST OF RECOMMENDATIONS

Recommendation 1

The *Equal Opportunity Act 1984* (WA) be amended to include protections against discrimination based on gender identity and intersex status.

Recommendation 2

The reports prepared by the Department of Health within 48 hours and by the hospital within one month of birth be amended to refer to sex and not gender.

Recommendation 3

The Birth Registration Form be amended to include an 'indeterminate' sex classification option.

Recommendation 4

The Birth Registration Form include a statement notifying parents:

- (a) if a child's sex is not able to be determined at the time the form is submitted, then the sex field should be marked 'indeterminate'; and
- (b) the sex classification may be updated later once the child's sex has been determined with medical certainty.

Recommendation 5

Sex classification be removed from birth certificates.

Recommendation 6

The *Births, Deaths and Marriages Registration Act 1998* (WA) and the *Births, Deaths and Marriages Registration Regulations 1999* (WA) be amended to expressly prohibit the recording of sex or gender on birth certificates.

Recommendation 7

The *Births, Deaths and Marriages Registration Act 1998* (WA) be amended to provide an application process for a person born in Western Australia to apply for a Gender Identity Certificate.

Recommendation 8

The *Births, Deaths and Marriages Registration Act 1998* (WA) be amended to provide an application process for a person born outside of Western Australia to apply for a Gender Identity Certificate.

Recommendation 9

The *Births, Deaths and Marriages Registration Act 1998* (WA) be amended to provide for the gender classifications of 'male', 'female' and 'non-binary'.

Recommendation 10

The *Gender Reassignment Act 2000* (WA) and *Gender Reassignment Regulations 2001* (WA) be repealed.

Recommendation 11

The *Births, Deaths and Marriages Registration Act 1998* (WA) be amended to provide an administrative process to change the gender classification on a Gender Identity Certificate.

Recommendation 12

The *Births, Deaths and Marriages Registration Act 1998* (WA) be amended to provide an administrative process to change the gender classification on a Gender Identity Certificate for a minor under 12 years of age.

Recommendation 13

The *Births, Deaths and Marriages Registration Act 1998* (WA) be amended to provide an administrative process to change the gender classification on a Gender Identity Certificate for a legally incompetent adult.

Recommendation 14

The *Births, Deaths and Marriages Registration Act 1998* (WA) be amended to provide an administrative process to change the gender classification on a Gender Identity Certificate for a minor 12 years of age or older.

Recommendation 15

The *Births, Deaths and Marriages Registration Act 1998* (WA) be amended to provide a dispute resolution process for minors if one or more parent(s)/guardian(s) do not provide statutory declarations or signatures for a minor's application to change gender.

Recommendation 16

The *Births, Deaths and Marriages Registration Act 1998* (WA) be amended to include restrictions on access to superseded versions of sex/gender information held by the Registrar of Births, Deaths and Marriages.

Recommendation 17

The *Births, Deaths and Marriages Registration Act 1998* (WA) be amended to provide protections for entitlement under a will trust or other instrument for a person who has changed their gender.

CHAPTER 1. 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**) requiring the Commission to review and report on the *Gender Reassignment Act 2000 (WA) (GR Act)* and *Births, Deaths and Marriages Registration Act 1998 (WA) (BDMR Act)* in accordance with Terms of Reference, which on 19 February 2018, were amended 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 considered 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 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.

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.²

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 jurisdictions have amended their legislation to accord with changing community values and expectations.³ 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.⁴

² Further detail regarding medical and psychosocial developments is provided in Chapter 3.

³ The reforms across different Australian jurisdictions are explored in Chapter 5 and are summarised in table form in Appendix 4.

⁴ The Gender Reassignment Amendment Bill 2015 (WA) proposed to abolish the Board and confer its function of issuing recognition certificates on the State Administrative Tribunal, but this Bill was not enacted.

In 2017, the Commonwealth 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.⁵ While issues relating to sexuality and sexual orientation do not form part of this report, the results of the survey 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,⁶ as well as relevant international human rights principles and law.⁷

1.3 Scope of Reference

The Commission was required to review the 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 included giving consideration to issues relating to both sex and gender, including those issues that affect intersex, trans and gender diverse people.

The Commission 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 report has been on the legal recognition, registration or change of a person's sex and/or gender status, and status relating to sex characteristics.

The Commission did not consider issues relating to sexuality and sexual orientation.

In developing this report, the Commission considered relevant Australian and international legal developments, both in legislation and case law.

While the Commission considered 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 was outside the scope of this report (and the capacity of the Commission) to make recommendations regarding reform to Commonwealth legislation.

1.4 Methodology

This project has involved a number of stages which have led to this Final Report, as outlined below. Throughout the project the Commission sought to engage stakeholders and interested members of the public. The Commission's consultations, the submissions and its own research has informed the completion of the Final Report.

(a) Preliminary consultations

In order to prepare the Discussion Paper, the Commission engaged with several stakeholders on a preliminary basis in an effort to identify potential issues, inconsistencies and recommendations. The Commission met with a number of interested individuals and organisations in order to assess the issues which were raised by the Terms of Reference. In addition, some parties chose to provide the Commission with written materials.⁸

(b) Discussion Paper

After the preliminary consultations, the Commission published its Discussion Paper on 20 August 2018. It contained a proposed model and express questions for public consideration and comment. The Commission requested submissions by 19 October 2018. The Commission received over 500 submissions. The Commission carefully reviewed all submissions. The Commission also engaged in additional consultations to clarify matters that were raised by individuals and organisations in their submissions.

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

6 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).

7 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.

8 A list of the stakeholders who the Commission contacted or consulted with prior to the release of the Final Report is set out in Appendix 1.

(c) Final Report

The Commission used the information gathered from the consultations and submissions and its own further research to develop this Final Report. As a result, some proposals in the Discussion Paper have been altered or developed for the Final Report.

The Commission is grateful to all those individuals and organisations who generously shared their experiences, knowledge and perspectives. Such participation was invaluable to this Final Report and the Commission's recommendations.

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 Commonwealth Government Guidelines on the Recognition of Sex and Gender (**Government Guidelines**),⁹ the Australian Human Rights Commission,¹⁰ the Yogyakarta Principles plus 10,¹¹ the Darlington Statement,¹² 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. The Commission also recognises that the matters explored in this Final Report may affect the intersex, trans and gender diverse communities in different ways, given the varied experiences of individuals within these communities.

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 Final Report.

| Key terminology | |
|------------------------|---|
| Term | Description |
| Gender | Gender refers to how a person identifies, the ways they express their personal and social identity and the way they are recognised within a community. |
| Gender identity | A person's deeply felt sense of being a man, a woman, both, in between, neither or something other. It is recognised that a person's sex as registered at their birth may not necessarily be the same as that person's gender identity. |
| Intersex person | A person born with genetic, hormonal or other sex characteristics that are not typically male or female. Intersex people have a diversity of bodies and identities. ¹³ 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 | For the purposes of this Final Report, a person's sex characteristics associated with their biological sex. |

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

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

11 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).

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

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

| Key terminology | |
|-----------------------------------|--|
| Term | Description |
| Sex characteristics | Sex characteristics are a person's physical features relating to sex, including genitalia and other sexual and reproductive anatomy, chromosomes, hormones, and secondary physical features emerging from puberty. ¹⁴ |
| Trans or Trans and gender diverse | <p>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.</p> <p>Under the broad trans and gender diverse umbrella are more specific terms that some trans and gender diverse people may use.</p> |

2.2 Key considerations for reform

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

In this Final Report, the Commission explored sex and gender classifications and whether they 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 most Western Australians, these two options are sufficient. For others, such as some intersex people or those who feel that their birth sex and gender identity do not align, current laws create certain difficulties in having their sex and/or gender identity recognised or changed.

The Commission considered 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 the appropriate alternative options for classification of sex and/or gender that should be introduced into 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 include:

- a person's birth sex or status relating to sex characteristics, where 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 reviewed 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.¹⁵ 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'.¹⁶

The Commission considered 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 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.

¹⁵ GR Act s 5.

¹⁶ GR Act Long title.

(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'.¹⁷ A reassignment procedure means a medical (including hormonal therapy)¹⁸ and/or surgical procedure to alter the sex characteristics of a person.¹⁹ 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.²⁰

The Commission reviewed:

- possible models for reform with respect to the process of changing a person's sex and/or gender classification;
- the criteria that should be satisfied in order for an individual to change their legal sex and/or gender classification; and
- how many times a person should 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'.²¹ 'Child' is defined in the GR Act as 'a person under the age of 18 years'.²² In the case of a minor, an application must be made by the minor's guardian.²³ 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 considered 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.

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 adopted in its 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 report is informed by a number of key principles. None of these principles are absolute, each must be balanced and tested. This has been the approach taken by the Commission in the development of this report.

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

17 GR Act ss 14(1), 15(1)–(2), 17(1).

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

19 GR Act s 3.

20 GR Act s 15(1)(a).

21 GR Act s 15(2)(b).

22 GR Act s 3.

23 GR Act s 14(2)(b).

- 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 included that the Commission ensures 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.²⁴ 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 the submissions phase.

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.
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 supports 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.

24

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

Almost all the stakeholders with whom the Commission engaged (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 heard diverse perspectives on the relevant issues. Some of the key issues, and the different perspectives on them, included:

(a) Sex on birth certificates:

- Sex markers should remain with the only options being male and female;
- sex markers should remain with the options of male, female and 'indeterminate';
- sex markers should remain with the option of male, female and other alternatives;
- sex markers should be optional (eg, parents have the choice); and
- sex markers should be removed.

(b) Proof of sex and gender:

- Proof of Sex Certificates should be created;
- Proof of Sex Certificates should not be created given the potential for discrimination;
- the Registry should not record gender identity;
- Gender Identity Certificates should be created; and
- Gender Identity Certificates should not be created.

(c) Change of gender:

- It should be possible to change gender identity;
- it should not be possible to change gender identity;
- the Board's current processes should be amended;
- the Board should be abolished;

- applications for a change of gender identity should be made to the Registrar;
- gender identity options should only be male and female;
- gender identity options should be male, female and 'non-binary';
- gender identity options should be male, female, 'non-binary' and other alternatives;
- a change of gender identity should be based on self-determination;
- any change of gender should require the satisfaction of certain criteria (eg, medical intervention or counselling);
- there should be limitations on the number of changes of gender identity; and
- there should be no limitations on the number of changes of gender identity.

(d) Change of gender for minors:

- There should be no change of gender identity for minors;
- there should be a process for change of gender identity for minors;
- a minor's informed consent should be required to change their gender identity;
- the consent of all parents (or guardians) should be required to change a minor's gender identity;
- the consent of only one parent (or guardian) should be required to change a minor's gender identity;
- there should be a dispute resolution process for minors who wish to change their gender identity where they do not have parental (or guardian) consent;
- there should be no dispute resolution process for minors who wish to change their gender identity if they do not have parental or guardian consent; and
- the minor's best interests should determine whether they are allowed to change their gender identity.

(e) Medical interventions on intersex minors:

- There should be no normalisation medical interventions on intersex minors; and

- normalisation medical interventions should only be performed on intersex minors once they can, and do, give their consent.

(f) Amending the *Equal Opportunity Act 1984* (WA):

- The EO Act should be amended to better protect intersex, trans and gender diverse people.

In light of the consultations, the submissions which have been received and the research set out in this Final Report, the Commission has developed a series of recommended reforms. The recommended reforms are set out in detail in Chapter 7 with discussion of the intended outcomes that are expected to flow from them.

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 addressed by this Final Report. Many of these issues are complex.

In this context, the Commission was 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 presented, the Commission hoped to be able to build greater understanding of the issues and hence facilitate wider community support for the foundations which informed the 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. Contrary to popular belief, XX and XY chromosomes are not definitive of a person being of the female and male sexes, respectively.
- (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.²⁵

(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.²⁶

(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.²⁷
- (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 been identified by 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.²⁸
- (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.²⁹

25 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>> .

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

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

28 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>.

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

(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.³⁰
- (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.³¹
- (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 a person to have medical treatment in order for their sex to be 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.³² It is estimated that one third of all trans people have attempted suicide.³³
- (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.

As one person stated: '[b]eing forced to use ID that doesn't match your identity creates daily problems when applying for a job, going to Centrelink, or enrolling to study'.³⁴

A non-binary person shared: 'there's no means under ... Western Australian law ... to obtain [s]tate identity documents that [reflects their] gender identity accurately. This is frustrating ... not only does this create a discrepancy in identity documentation (as [their] passport has an X marker in the [sex field]), it means that [they're] denied a form of legitimacy from the [s]tate that has always and unthinkably been granted to Western Australian men and women'.³⁵

As another person summarised: '[h]aving documents that support your identity are ... priceless'.³⁶

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

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

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>>.

33 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*.

34 Submission by Anonymous.

35 Submission by Daniel Ortlepp.

36 Submission by Anonymous.

(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.³⁷

(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'.³⁸
- (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.³⁹
- (iii) Since 2011, a written statement or a Department of Foreign Affairs and Trade (DFAT) form completed by a medical practitioner or psychologist (registered with the Medical Board of Australia, Psychology Board of Australia or equivalent overseas authority) 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.⁴⁰

(g) Other Australian jurisdictions have already changed their law

- (i) Both the ACT⁴¹ and South Australia⁴² 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,⁴³ Tasmania's Anti-Discrimination Commissioner has made recommendations⁴⁴ and NSW's Anti-Discrimination Board has made a submission⁴⁵ that there be no requirement for surgical, medical or hormonal treatment to change sex.⁴⁶

3.2 Medical and psychosocial reasons for review

The Commission considered the experiences of trans, gender diverse and intersex people to be at the heart of this report. 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 this community are unique to them. This report provided 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.

37 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.

38 GR Act ss 3 (definition of 'reassignment procedure'), 14(1). See Chapter 4 of this Final Report.

39 *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.

40 DFAT, *Application for an Australian Travel Document: Form B-14* <<https://www.passports.gov.au/file/52/download?token=9gaPS9Bn>>.

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

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

43 Victorian Bill.

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

45 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.

46 At the time of drafting this report, the *Births, Deaths and Marriages Registration and Other Legislation Amendment Bill 2018* is before the NT Parliament which may amend a number of sex or gender-related processes.

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 intersex, trans and gender diverse 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).⁴⁷ 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.⁴⁸ Similarly, the World Health Organisation classifies some intersex variations as developmental anomalies⁴⁹ or endocrine disorders.⁵⁰

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,⁵¹ 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'.⁵² The Commission heard these medical interventions, referred to as 'normalisation' procedures, are procedures (including surgery) which are not always 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.⁵³ The Committee recommended that guidelines should be developed which favour deferral of 'normalising' procedures until the person can give fully informed consent.⁵⁴

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.

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

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

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

50 World Health Organisation, *ICD-11 for Mortality and Morbidity Statistics* (2018), 5A71 <<https://icd.who.int/browse11/l-m/en>>.

51 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.

52 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.

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

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

(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.⁵⁵ The most common barrier to healthcare access faced by trans and gender diverse individuals is lack of knowledge about their particular health needs.⁵⁶ There may be a lack of cultural competency amongst healthcare providers as well as inappropriate record keeping systems and clinical facilities.⁵⁷ 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.⁵⁸

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.⁵⁹

(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.⁶⁰ 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.⁶¹

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.⁶²

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

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

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

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

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

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

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

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

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.⁶³

(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.⁶⁴

(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.⁶⁵

The mental health issues affecting trans young people were also explored in the Trans Pathways research report,⁶⁶ 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; and

(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%;

(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.⁶⁷ 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.⁶⁸

63 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).

64 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 *Journal of Clinical Endocrinology and Metabolism* 94, 3132–54.

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

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

67 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.

68 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.

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 because they identify as LGBTIQ per se, but rather because of how they are perceived and treated by society.⁶⁹

Research into the mental health experiences of intersex people has found that they often experience very high rates of depression, anxiety and post-traumatic stress disorder (PTSD), often as co-diagnoses.⁷⁰ Intersex people have directly attributed these diagnoses to how their intersex variations were treated and feeling that their bodily integrity was not respected.⁷¹

In recommending reform of the GR Act and the BDMR Act, the Commission is conscious of this wider psycho-social context and desires that the recommended reforms 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’,⁷² 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.⁷³

(c) Social footprint

As stated earlier in this Final Report,⁷⁴ 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.⁷⁵

The Government Guidelines state that the Commonwealth government is ‘primarily concerned with a person’s identity and social footprint’.⁷⁶ 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.

69 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.

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

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

72 See Chapter 5 of this Final Report.

73 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).

74 See Chapter 3.1(d)(iii) of this Final Report.

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

76 Government Guidelines 3 [2].

The Government Guidelines state that sex and/or gender information should be removed from forms or documents unless necessary.⁷⁷ Where such information is necessary, the Commonwealth 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'.⁷⁸

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.⁷⁹

(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 Marriages Registration 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 Nations Statistical Division's *Principles and Recommendations for a Vital Statistics System*⁸⁰ (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 categorised into 'male' and 'female', and in the case of a foetal death, the category 'unknown' is also appropriate.⁸¹

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.⁸²

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 Marriages⁸³ and are provided to the Australian Bureau of Statistics (ABS). The ABS in turn provides these statistics to international bodies such as the United Nations Demographic Yearbook and the United Nations World Population Prospects. Such statistics are deemed a vital component of global population statistics.⁸⁴

(e) Collecting sex data after birth

The ABS is required to collect statistical information for the Australian census.⁸⁵ 'Sex' is a prescribed matter of statistical information for collection.⁸⁶

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.

77 Government Guidelines 6 [29].

78 Government Guidelines 4 [16].

79 See Chapter 5 of this Final Report.

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

81 UN Recommendations 19–20, 32.

82 UN Recommendations 32.

83 See Chapter 5 of this Final Report for further analysis of the legal basis for the Registrars requiring such information.

84 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)>.

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

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

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

A birth certificate is an identification document.⁸⁷ 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.

Relevantly, however, the Commission understands that sex or gender is not a mandatory data input when using government identity verification tools or biometric face verification services.⁸⁸ The Commission also understands from consultation with WA Police that usual practice is to identify and process a person based on their self-identified gender rather than the sex on their birth certificate.

(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.⁸⁹ 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,⁹⁰ 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'.

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).⁹¹

(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,⁹² 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.

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

88 Consultation with the Department of Home Affairs.

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

90 See Chapter 5 of this Final Report for more information on changing the gender recorded in an Australian passport.

91 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) 1 <https://www.transport.wa.gov.au/mediaFiles/licensing/LBU_FS_YourSecureID.pdf>.

92 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(a); *School Education Regulations 2000* (WA) reg 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>>.

(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.⁹³ Gender may be relevant to criminal justice processes, such as incarceration,⁹⁴ and body searches.⁹⁵ In addition, there may be requirements for certain bodies to be constituted by representatives of a particular gender.⁹⁶

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, fitness facilities segregated according to gender). 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.⁹⁷

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.

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 parent(s)/guardian(s).

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'.⁹⁸ 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(s) or guardian(s) can provide consent on their behalf.⁹⁹ The parent(s) or guardian(s) of a minor have responsibility for that minor's long term welfare.¹⁰⁰ 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.¹⁰¹

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.

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

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

95 *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).

96 *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).

97 GR Act s 20.

98 *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).

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

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

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

(b) Court approval for certain medical procedures

Court approval is required for procedures that are invasive and irreversible,¹⁰² or 'non-therapeutic', meaning that the procedure is not for the purpose of curing a malfunction or disease.¹⁰³

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.¹⁰⁴

In *Marion's Case*, the High Court held that sterilisation, carried out for the purpose of sterilisation, as distinct from sterilisation being 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.¹⁰⁵ 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
- (ii) because of the grave consequences of making a wrong decision.¹⁰⁶

In these circumstances, the Family Court has jurisdiction to provide authorisation for such procedures under their 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.¹⁰⁷ 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),¹⁰⁸ 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',¹⁰⁹ 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.

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

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

104 *Marion's Case* (1992) 175 CLR 218, 269 (Brennan J).

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

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

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

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

109 *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).

Similarly, in *Re Lesley* (2008),¹¹⁰ 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.¹¹¹

In *Re Carla* (2016),¹¹² the child was born with a genetic sexual development condition. The child was genetically male but identified as a female, and underwent surgery to feminise her external genitalia at 3 years of age. Later, at age 5 the child's parents brought an application for consent to have the 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.

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.¹¹³ 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'.¹¹⁴ 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.¹¹⁵ 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.¹¹⁶ 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'.¹¹⁷ 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 has expressed their preference to defer non-essential medical procedures until the person can give their own fully informed consent.¹¹⁸

(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),¹¹⁹ 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.¹²⁰ This required the court to have regard to the best interests of Alex as the paramount consideration.¹²¹ The court determined to allow both stage 1 and stage 2 treatment.¹²²

110 *Re Lesley* [2008] FamCA 1226.

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

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

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

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

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

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

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

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

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

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

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

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

In *Re Jamie* (2013),¹²³ 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.¹²⁴ However, given the nature of stage 2 treatment, it was still the role of the court to determine *Gillick* competence.¹²⁵ If the child was not *Gillick* competent, court authorisation for stage 2 was still required.

In *Re Kelvin* (2017),¹²⁶ the Full Court of the Family Court found that stage 2 treatment, in certain circumstances, was a medical procedure to which parents could consent. Therefore, where the child consents to stage 2 treatment, the parents do not object, and the medical practitioners agree that the child is *Gillick* competent, it is no longer mandatory to apply to the Family Court for a determination of whether the child is *Gillick* competent.¹²⁷

In *Re Matthew* (2018),¹²⁸ 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.¹²⁹ 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 when a *Gillick* competent minor is able to consent to stage 1, 2 or 3 transitioning procedures, in both cases without court approval, is 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.

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

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

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

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

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

128 *Re Matthew* [2018] FamCA 161.

129 *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'¹³⁰ and establish a 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 beneficial, 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.¹³¹

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.¹³²

(a) Board

The GR Act establishes the Board,¹³³ with the functions to receive and determine applications for recognition certificates and to issue those certificates.¹³⁴

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),¹³⁵ 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.¹³⁶

The Board must be constituted by at least three members.¹³⁷ The President may give practice directions.¹³⁸ The Board has an executive officer and such other officers as are necessary.¹³⁹

(b) Applying for recognition certificates

A person who has undergone a 'reassignment procedure' may apply to the Board for a recognition certificate.¹⁴⁰ An application may be made by an adult or by a child's guardian.¹⁴¹ A child is anyone under the age of 18.¹⁴²

130 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 section 4.4 of this Final Report.

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

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

133 GR Act s 5(1).

134 GR Act s 5(2).

135 GR Act s 6.

136 GR Act s 7.

137 GR Act s 8(2).

138 GR Act s 10.

139 GR Act s 11.

140 GR Act s 14(1).

141 GR Act s 14(2).

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

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.¹⁴³

The application must be made in the prescribed form¹⁴⁴ and accompanied by:

- the prescribed fee,¹⁴⁵ which is currently \$40;¹⁴⁶
- a statement signed by a medical practitioner that the applicant (or the child) has undergone the reassignment procedure;¹⁴⁷
- any documents relating to where the reassignment procedure was carried out;¹⁴⁸
- the original (or certified copy) of the birth certificate of the applicant (or the child);¹⁴⁹
- the original (or certified copy) of any documents showing proof and length of residency of the applicant (or the child);¹⁵⁰
- 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;¹⁵¹ 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.¹⁵²

The Board can require an applicant to give any additional information necessary for a proper consideration of the application.¹⁵³ 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.¹⁵⁴

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.¹⁵⁵ An applicant can attend the meeting, as may those who have been served with a copy of the application.¹⁵⁶ 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.¹⁵⁷ The Board's proceedings are not bound by the rules of evidence,¹⁵⁸ and must be conducted in private.¹⁵⁹ The President has a casting vote.¹⁶⁰

143 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.

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

145 GR Act s 14(3).

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

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

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

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

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

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

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

153 GR Regulations reg 4(3).

154 GR Act s 14(4).

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

156 GR Act s 14(5).

157 GR Act s 14(8).

158 GR Act s 14(6).

159 GR Act s 14(7).

160 GR Regulations reg 8.

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

Where the applicant is an adult¹⁶¹

| At least one of the following must apply: | AND the Board must be satisfied of all of the following: |
|--|--|
| <ul style="list-style-type: none"> • 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. | <ul style="list-style-type: none"> • The applicant believes their true gender is the gender to which they have been reassigned. • The applicant has adopted the lifestyle and the gender characteristics¹⁶² 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 18¹⁶³

| At least one of the following must apply: | AND the Board must be satisfied of the following: |
|--|--|
| <ul style="list-style-type: none"> • 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. | <ul style="list-style-type: none"> • It is in the best interests of the child that the recognition certificate is issued. |

At the time of drafting, a recognition certificate cannot be issued to a person who is married,¹⁶⁴ however, on 15 August 2018, the Attorney-General introduced the Gender Reassignment Amendment Bill 2018 (WA) into Parliament to amend the GR Act in order to permit this.¹⁶⁵

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.¹⁶⁶ 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.¹⁶⁷

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.¹⁶⁸

¹⁶¹ GR Act s 15(1).

¹⁶² '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.

¹⁶³ GR Act s 15(2).

¹⁶⁴ GR Act s 15(3).

¹⁶⁵ 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.

¹⁶⁶ *AB v Western Australia; AH v Western Australia* (2011) 244 CLR 390, 404 [32] (French CJ, Gummow, Hayne, Kiefel and Bell JJ).

¹⁶⁷ *AB v Western Australia; AH v Western Australia* (2011) 244 CLR 390, 406 [39] (French CJ, Gummow, Hayne, Kiefel and Bell JJ).

¹⁶⁸ GR Act s 14(9).

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.¹⁶⁹ 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.¹⁷⁰ An equivalent certificate issued under a corresponding law has the same effect.¹⁷¹

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'¹⁷² and make any other entries and alterations on any other register or index as may be necessary.¹⁷³

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 recognition certificate.¹⁷⁴

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

- an application form approved by the Registrar;¹⁷⁵ and
- the prescribed fee,¹⁷⁶ which is currently \$30.¹⁷⁷

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.¹⁷⁸

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.¹⁷⁹ A birth certificate must not include a statement that a person has changed sex.¹⁸⁰

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.¹⁸¹

The GR Act also provides that if a gender reassigned person has a certificate of qualification¹⁸² which refers to them by a name that by common usage is not attributed to a 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.¹⁸³ 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.¹⁸⁴

169 GR Act s 21.

170 GR Act s 16(1).

171 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.

172 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 section 4.4 of this Final Report.

173 GR Act s 17(1).

174 GR Act s 17(2).

175 GR Act s 17(3).

176 GR Act s 17(3).

177 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)).

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

179 GR Act s 18(1).

180 GR Act s 18(2).

181 GR Act s 19.

182 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').

183 GR Act s 20(1).

184 GR Act s 20(3).

(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.¹⁸⁵

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 \$2,000.¹⁸⁶

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.¹⁸⁷

(a) The role of the Registrar

The BDMR Act provides for the appointment of the Registrar,¹⁸⁸ whose functions include establishing and maintaining the registers necessary for the purposes of the BDMR Act.¹⁸⁹ The Registrar must maintain a register of registrable events,¹⁹⁰ which includes (among other events) births, deaths, marriages and changes of name.¹⁹¹ 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.¹⁹²

(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.¹⁹³ The information required to be provided in the report includes recording the gender of the child as male, female or indeterminate.¹⁹⁴ 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 a bundle of materials, including the Birth Registration Form.
- (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.¹⁹⁵ The Commission understands that the information that must be provided includes recording the gender of the child as male, female or indeterminate.¹⁹⁶ The Registrar uses the notification of birth to identify where the parents of the child have not registered the child's birth within the required period of time and follow up with them.

185 GR Act s 22.

186 GR Act s 23.

187 BDMR Act ss 3(a)–(b).

188 BDMR Act s 5.

189 BDMR Act s 6(a).

190 BDMR Act s 49(1).

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

192 BDMR Act s 49(2).

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

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

195 BDMR Act s 12.

196 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.

- (iii) The parents of the child are jointly responsible¹⁹⁷—or if the child is a founding the person with responsibility for the child’s long-term care, welfare and development is responsible¹⁹⁸—for registering the child’s birth by lodging a Birth Registration Form within 60 days of the birth.¹⁹⁹ The Registrar’s Birth Registration Form requires sex (with the options ‘male’ or ‘female’) to be reported. However, the Register database allows birth sex to be recorded as ‘unknown’ or ‘not determinate’, if not ‘male’ or ‘female’.

The Registrar must accept a Birth Registration Form lodged after the 60 day period, although the person responsible for registering the birth is exposed to a penalty of \$1,000 for late lodgement.²⁰⁰ The information in the Birth Registration Form is entered into the Register and is used to create the birth certificate. The sex data on the Birth Registration Form 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.²⁰¹ If the particulars available to the Registrar are incomplete, the Registrar may register a birth on the basis of incomplete particulars.²⁰²

(c) Sex and/or gender classification

Neither the BDMR Act nor the BDMR Regulations expressly require the notification, Birth Registration Form 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.²⁰³

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 Form, or extension of time within which a Birth Registration Form must be lodged, in circumstances where the child’s birth sex is indeterminate.²⁰⁴ 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.²⁰⁵ 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.²⁰⁶ The Registrar may add additional registrable information to an entry in the Register if there is sufficient evidence of the matters to be recorded.²⁰⁷

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.

197 The Registrar may accept a Birth Registration Form 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).

198 BDMR Act s 15(2).

199 BDMR Act ss 15, 16.

200 BDMR Act s 16.

201 BDMR Act s 17(1).

202 BDMR Act s 17(2).

203 GR Act s 18(1).

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

205 BDMR Act s 19(1).

206 BDMR Act s 19(2).

207 BDMR Act s 52.

A person who is dissatisfied with a decision of the Registrar may apply to the SAT for a review of the decision.²⁰⁸ 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,²⁰⁹ and the Registrar must then correct the Register.²¹⁰

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 \$10,000.²¹¹

While a range of Western Australian legislation and regulations refer to birth certificates, aside from the GR Act itself, none require the specification of sex or gender on the birth certificate.²¹² Such legislation usually refers to birth certificates for the purposes of identification, where sex and gender would only be relevant to the extent necessary for such identification.

When someone dies in Western Australia, the death must be registered:²¹³

- (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.²¹⁴ 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.²¹⁵ 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.

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.²¹⁶ 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.²¹⁷

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

208 BDMR Act s 67.

209 BDMR Act s 20(b).

210 BDMR Act s 51(2).

211 BDMR Act s 59.

212 *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).

213 BDMR Act s 40(1).

214 BDMR Act s 44(1).

215 BDMR Act s 42.

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

217 Gender Reassignment Amendment Bill 2015 (WA).

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,²¹⁸ assists with its decision making. 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 symbolic importance to many who apply for it.

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. As one applicant described it: 'it was confronting ... it was nerve-racking. ... When we came out my Mum and I just looked at each other and we both cried. I went home emotionally exhausted'.²¹⁹ Other individuals described the requirement to prove their gender to professionals on the Board as humiliating, given they were already living as their affirmed gender. As one person put it: 'I don't need some [B]oard to tell me who I am'.²²⁰

Additionally, others found the requirement to provide evidence of counselling problematic, having already gone through the reassignment procedure without any subsequent medical treatment as 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.

In several instances, families shared the difficulties and struggles associated with their child appearing before the Board. Parents indicated that the process was 'incredibly arbitrary and oppressive'.²²¹ One parent described the Board as 'another hurdle which [their child] had to overcome'.²²² They stated that the journey for their child had already been difficult and they hoped that the process for legally establishing their gender, would be made more accessible.²²³

The Commission also recognises that whatever entity is 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 are equipped to offer sensitive support to those members of the community who seek to access it to change their legal status.

4.4 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:

218 GR Act s 7.

219 Submission from TransFolk of WA and Human Rights Law Centre.

220 Submission from TransFolk of WA and Human Rights Law Centre.

221 Submission by Anonymous.

222 Submission by Anonymous.

223 Submission by Anonymous.

- (a) As set out in this Chapter 4, 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.
- (b) 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)).
- (c) 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 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:

- (a) some jurisdictions refer to the concept of 'sexual reassignment', including 'sexual reassignment surgery',²²⁴ which arguably confuses the concepts of sex and sexuality; and
- (b) one jurisdiction refers to transsexuality as a form of sexuality,²²⁵ rather than referring to concepts relating to gender, specifically of a person being, and entitled to being recognised as, trans or transgender.

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

225 Anti-Discrimination Act 1992 (NT) s 4.

CHAPTER 5. AUSTRALIAN CONTEXT

The Terms of Reference require the Commission to consider inconsistencies between Western Australian and Commonwealth legislation. This Chapter provides an overview 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 territories 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 the recommendations 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 amended²²⁶ to provide protection under Commonwealth law against unlawful discrimination on the grounds of sexual orientation, gender identity and 'intersex status'.²²⁷ 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.²²⁸ Where discrimination takes place against a person on the ground of gender identity or 'intersex status',²²⁹ they are generally able to make a discrimination complaint to the Australian Human Rights Commission.²³⁰

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.²³¹

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.²³²

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.²³³

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

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

228 SD Act ss 14–27.

229 SD Act ss 5B–C.

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

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

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

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

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 of terminology regarding intersex status and gender identity has been described by a number of subsequent reviews of state legislation as reflecting best practice.²³⁴

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 exemption²³⁵ for conduct that would otherwise be discriminatory but which is in direct compliance with a Commonwealth, state or territory law prescribed by regulations.²³⁶ In August 2013, all Commonwealth, state and territory legislation was prescribed until 31 July 2014.²³⁷ 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 2015²³⁸ and then to 31 July 2016.²³⁹ 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 2017.²⁴⁰ 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.²⁴¹ The EO Act also appears to do this in providing protection from discrimination on gender history grounds.²⁴² 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.²⁴³ 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.²⁴⁴

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 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, and superannuation.²⁴⁵ 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.

234 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)'.

235 SD Act s 40(2B).

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

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

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

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

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

241 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.

242 EO Act pt IIAA.

243 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].

244 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.

NSW 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.

245 EO Act ss 35AC-AR.

Accordingly, the GR Act, BDMR Act and the EO Act appear 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.²⁴⁶ 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.²⁴⁷ 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.²⁴⁸ 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'.²⁴⁹

(b) Government 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 Commonwealth government records. The Government Guidelines have been influential in the shift towards recognising the distinction between gender and sex in Commonwealth government documents.²⁵⁰

As noted above, the Government Guidelines provide that, unless necessary, government departments and agencies should not request sex or gender information.²⁵¹ Where required, the 'preferred approach is for Australian government departments and agencies to collect gender information'.²⁵²

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 3.²⁵³

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.²⁵⁴ 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.²⁵⁵

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

247 SD Act s 13(1).

248 SD Act s 43A.

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

250 Equal Opportunity Tasmania, *Legal recognition of sex and gender diversity in Tasmania* (February 2016) 25.

251 Government Guidelines 6 [29].

252 Government Guidelines 3 [2].

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

254 Government Guidelines 3 [1].

255 Government Guidelines 4 [19].

From consultation with the Commonwealth Attorney-General's Department, the Commission is aware that the Department commenced an evaluation of the Government Guidelines in March 2017. The Department is currently considering the range of issues raised during the evaluation and is undertaking further targeted discussions with key stakeholders. One area of possible reform that has broad support across stakeholders includes redefining the third gender option by replacing 'indeterminate, intersex or unspecified' with the term 'non-binary'.

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 Commonwealth government and in the Australian Standards on data collection (AS4590) to 'non-binary'.²⁵⁶ 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 male or female or those whose bodily characteristics are not considered stereotypically male or female.

In order to have Commonwealth government records recognise a change in gender and/or sex, neither surgery nor hormone therapy are required.²⁵⁷ Instead, a Commonwealth 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.²⁵⁸

(c) Australian Passports approach to gender

In 2011, the Australian Passport Office within DFAT 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).²⁵⁹ It requires a written statement or a DFAT form to be completed by a medical practitioner or psychologist (registered with the Medical Board of Australia, Psychology Board of Australia or equivalent overseas authority) 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.²⁶⁰

Importantly, the nature of the treatment does not have to be specified and surgery is not required.²⁶¹ 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).²⁶²

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.²⁶³

256 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/>>.

257 Government Guidelines 5 [25].

258 Government Guidelines 5 [24].

259 DFAT, *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>>.

260 DFAT, *Form B-14*, Australian Passport Office (accessed 17 July 2018) <<https://www.passports.gov.au/file/52/download?token=9gaPS9Bn>>.

261 DFAT, *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>>.

262 DFAT, *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>>.

263 DFAT, *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>>.

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 procedure²⁶⁴ may have their current, affirmed gender (as certified by a registered medical practitioner or registered psychologist) 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.²⁶⁵

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 ACT 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, and consequently the proposed Justice and Related Legislation (Marriage Amendments) Bill 2018 (Tas) was tabled in the Tasmanian Parliament on 16 October 2018.²⁶⁶ Queensland has begun a review of its legislation with a Discussion Paper issued in early 2018.

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

In NSW, 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**).²⁶⁷ The NSW Act requires an applicant to have undergone a 'sex affirmation procedure',²⁶⁸ as opposed to the 'reassignment procedure' that is required in Western Australia.

In NSW, an applicant must be at least 18 years old²⁶⁹ and have either had their birth registered in NSW²⁷⁰ or have been a resident for one year.²⁷¹ The applicant requires statutory declarations from two doctors or medical practitioners verifying that the person has undergone a sexual affirmation procedure.²⁷² In the case of a child, parents or a guardian can apply on their behalf.²⁷³

In 2014, the High Court in *Norrie* held that not all human beings can be classified by sex as either male or female.²⁷⁴ 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',²⁷⁵ 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.²⁷⁶ 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.²⁷⁷ 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

264 As defined in the GR Act s 3.

265 See Chapter 3 of this Final Report.

266 Elise Archer, Attorney-General, 'Treating same-sex marriage equally' (Media Release, 16 October 2018) <http://www.premier.tas.gov.au/releases/treating_same-sex_marriage_equally>.

267 NSW Act s 32B.

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

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

270 NSW Act s 32B(1).

271 NSW Act s 32DA(1).

272 NSW Act ss 32C, 32DB.

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

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

275 NSW Act s 32A(b).

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

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

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.²⁷⁸

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.²⁷⁹ 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.²⁸⁰

Similar to the Western Australian position, the ACT requires that the applicant believes their sex to be the sex nominated in the application.²⁸¹ 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.²⁸² The ACT Act recognises

the sex classifications as male, female or 'unspecified/indeterminate/intersex'.²⁸³ 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 years old²⁸⁴ and have had their birth registered in the ACT.²⁸⁵ Unlike Tasmania and the NT which exclude people born outside the jurisdiction altogether, a person whose birth is registered outside the ACT can still apply if they are 'domiciled or resident in the ACT'.²⁸⁶ 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.²⁸⁷ 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.²⁸⁸

In the ACT, the ACT Registrar must include 'sex' as a specific classification in the birth register.²⁸⁹ If the sex is not determinable, it may be recorded as 'unspecified/indeterminate/intersex'.²⁹⁰ The ACT and South Australia are the only two Australian jurisdictions that require the recording of sex **except** where it is not determinable.²⁹¹

The ACT requires that a birth be notified within seven days and registered within six months.²⁹² In most other jurisdictions, birth registration is required within 60 days.²⁹³ Other states which have subsequently reviewed their legislation have not proposed to extend this registration period.²⁹⁴

278 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').

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

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

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

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

283 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>>.

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

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

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

287 ACT Act s 24(2).

288 ACT Act s 24(3).

289 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>>.

290 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>>.

291 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.

292 ACT Act ss 5, 10.

293 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).

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

(c) South Australia: new legislation

In 2016, South Australia amended its *Births, Deaths and Marriages Registration Act 1996* (SA) (**SA Act**).²⁹⁵

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, (except Western Australia) under the GR Act and the SR Act 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'²⁹⁶ in order to obtain a recognition certificate to then present to the SA Registrar. In South Australia, a person was required to apply to the Magistrates Court for a recognition certificate.²⁹⁷ 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.²⁹⁸

The applicant was required to provide a prescribed form;²⁹⁹ an affidavit from both a medical practitioner in relation to the reassignment procedure;³⁰⁰ and from a psychiatrist or psychologist in relation to counselling regarding the applicant's sexual identity;³⁰¹ their birth certificate;³⁰² and a fee of \$86.³⁰³ If granted, a recognition certificate could only be issued recording the sex as male or female.³⁰⁴

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**).³⁰⁵ 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.³⁰⁶

The SALRI Report also recommended that in relation to children, an application on behalf of a child must be in the child's best interests and the child must understand and consent to the change of sex and/or gender.³⁰⁷ The SALRI Report further recommended that a child should have the option to apply to the Magistrates Court to change their sex and/or gender³⁰⁸ and that the SA Registrar be only required to record sex on the birth register where sex is determinable.³⁰⁹

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.³¹⁰ 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'.³¹¹

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

296 SR Act s 7(2).

297 SR Act s 7.

298 SR Act s 7(8).

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

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

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

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

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

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

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

306 SALRI Report 9–10, 28, 43–4.

307 SALRI Report 10–11.

308 SALRI Report 11.

309 SALRI Report 9.

310 SA Act s 29I(2).

311 SA Regulations reg 7A.

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'.³¹² The SA Act provides that 'appropriate clinical treatment' has a broad meaning and 'need not involve invasive medical treatment' and 'may include or be constituted by counselling' alone.³¹³ An applicant must be over 18 years³¹⁴ and have had their birth registered in South Australia.³¹⁵ For a child, applications require court approval³¹⁶ and the court must be satisfied that the application is in the best interests of the child.³¹⁷

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.³¹⁸ 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.³¹⁹

The SA Act empowers the SA Registrar to limit the number of applications a person can make to change their sex or gender identity.³²⁰ 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.³²¹ This is consistent with the number of applications for a change of name.³²² Consistent with the ACT Registrar, the SA Registrar is only required to record sex in the birth register if determinable.³²³

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.³²⁴

(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.³²⁵ The application is made to the Victorian Registrar of Births, Deaths and Marriages (**Victorian Registrar**).³²⁶ The required evidence is two statutory declarations by either doctors or medical practitioners verifying that the applicant underwent sex affirmation surgery.³²⁷ These doctors or medical practitioners must be those who either performed the sex affirmation surgery or who provided other medical treatment to the applicant.³²⁸ 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.³²⁹

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.

312 SA Act s 29K.

313 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.

314 SA Act s 29I(1).

315 SA Act s 29I(1).

316 SA Act s 29J(2).

317 SA Act s 29J(4).

318 SA Act s 29M(1).

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

320 SA Act s 29S(1).

321 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>.

322 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>>.

323 SA Act s 17; SA Regulations reg 6.

324 SA Act s 29O.

325 Victorian Act s 30A(1).

326 Victorian Act s 30A(2).

327 Victorian Act s 30B(1).

328 Victorian Act s 30B(1).

329 Victorian Act s 30E(1).

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.³³⁰ 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).³³¹ This is consistent with the prohibitions that apply to a change of name.³³²

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.³³³ 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 has known the applicant for over 12 months.³³⁴ 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.³³⁵ 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.³³⁶

The Victorian 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.³³⁷

(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.³³⁸ The applicant must have had their birth registered in Tasmania³³⁹ and have two statutory declarations by doctors confirming the reassignment.³⁴⁰ Along with the NT, 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.

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.³⁴¹ As the Equal Opportunity Tasmania paper observes, this makes children born in Tasmania dependent on the permission of their parents in order to have their change of sex registered.³⁴²

330 Victorian Bill cl 5 (definition of 'sex descriptor').

331 Victorian Bill cl 5 (definition of 'prohibited sex descriptor').

332 Victorian Act s 4 (definition of 'prohibited name').

333 Victorian Bill cl 8.

334 Victorian Bill cl 8.

335 Victorian Bill cl 8.

336 Victorian Bill cl 8.

337 Victorian Bill cl 13.

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

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

340 Tasmanian Act s 28B.

341 Tasmanian Act s 28A(2).

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

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,³⁴³ with only the ACT and South Australia offering an exception where sex is not determinable.³⁴⁴

In February 2016, Equal Opportunity Tasmania issued a paper which recommended:

- removing the requirement for ‘sexual reassignment surgery’ or any surgical, medical or hormonal treatment to record a change of sex;³⁴⁵
- 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;³⁴⁶ and
- introducing a ‘non-binary’ sex classification.³⁴⁷

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.³⁴⁸ The paper identified four options, each subsequent option 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.³⁴⁹

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.³⁵⁰ From the age of 12, a child’s informed consent would be required³⁵¹ and from the age of 16 there would be no need for parental or court approval.³⁵² 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.³⁵³ The applicant must provide statutory declarations by two doctors verifying such surgery.³⁵⁴ For a child, an application may 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.³⁵⁵ 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.

343 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)(iii), 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.

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

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

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

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

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

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

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

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

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

353 Queensland Act s 22.

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

355 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).

In March 2018, the Queensland Government issued a Discussion Paper with the purpose of exploring how sex and gender diversity can be recognised.³⁵⁶ The current Queensland Act only recognises the sex classifications of male and female (and, since *Norrie*, arguably also 'non-specific').³⁵⁷ 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.³⁵⁸

(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.³⁵⁹ The required evidence includes two statutory declarations by medical practitioners.³⁶⁰ Alternatively, a recognition certificate issued in another jurisdiction can be used as supporting evidence.³⁶¹ The NT Act makes no mention of any court approval process, but it does make provision for parents to apply to the NT Registrar to register their child's change of sex.³⁶² 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.³⁶³

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.³⁶⁴

356 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>>.

357 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.

358 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>>.

359 NT Act s 288(1). However at the time of drafting this report, the *Births, Deaths and Marriages Registration and Other Legislation Amendment Bill 2018* is before the NT Parliament which may amend a number of sex or gender-related processes, including this requirement.

360 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>>.

361 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>>.

362 NT Act s 28B(2).

363 NT Act s 28B.

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

CHAPTER 6. INTERNATIONAL CONTEXT

In developing this Final Report, including the recommendations for reform in Chapter 7, the Commission considered the legal framework in a number of foreign jurisdictions in relation to the registration of sex and change of sex and/or gender classification.

6.1 Jurisdictions reviewed

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;³⁶⁵ and
- (l) United States.³⁶⁶

A table comparing the legal and practical framework for each of these jurisdictions is set out in **Appendix 5**. This table has been updated for amendments that have been made, following the release of the Discussion Paper in August 2018.

The Commission also considered specific areas of legal reform in Portugal, Sweden and Luxembourg such as around gender classifications and change of gender processes.

6.2 Registering sex at birth

Reporting the sex of child

The reporting of a newborn's sex forms part of the administrative procedure of registering the birth of a child. Generally, the process will mean that the child is examined at birth, and a determination of their sex will be made. The sex of the child, along with other birth particulars, will often be reported by the hospital or parents to a national or state body.

At present, there are very few international jurisdictions that permit the sex of the baby to be left unreported altogether. An exception is Malta, where the birth of children must be registered, however the sex of the child can be left blank until they reach the age of 18.³⁶⁷

Sex classifications

Many overseas jurisdictions require the sex of a child at birth to be registered as either male or female, with no options outside of the binary. These countries currently include:

- (a) Denmark;³⁶⁸
- (b) India;³⁶⁹
- (c) Pakistan;³⁷⁰ and
- (d) United Kingdom.³⁷¹

Although the sex of a newborn might be simply observed, this process may not always be straightforward. For example, children with intersex variations may be born with sex characteristics that are not readily identifiable as (wholly) male or female. Some jurisdictions permit the recognition of these differences, including by using the classifications of indeterminate or uncertain. These countries include:

365 The United Kingdom's review into the *Gender Recognition Act 2004* (UK) is discussed in further detail below.

366 The review of the legal and practical framework in the United States of America was confined to California and Oregon, whilst noting the recent legislative changes in New York City.

367 *Gender Identity, Gender Expression and Sex Characteristics Act 2015* (Malta) art 7(4); *Civil Code* (Malta) art 278(c).

368 Government of Denmark, Fødselsanmeldelse [Birth Notification Form], Personregistrering.dk <<https://www.personregistrering.dk/fileadmin/pdfs/print/Fodselsanmeldelse.pdf>>.

369 *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>.

370 Government of Pakistan, *Application for Registration of Birth of a Child of Citizen of Pakistan Born in a Country Outside Pakistan* <<http://pcgv.org/Registration%20of%20Child%20Born%20Outside%20Pakistan%20Form%20Updated%20September%202021%202012.pdf>>.

371 UK Government, *Register a birth* <<https://www.gov.uk/register-birth>>.

- (a) Ireland (male, female and undetermined);³⁷²
- (b) New Zealand (male, female and undetermined);³⁷³ and
- (c) Norway (male, female and uncertain).³⁷⁴

Birth certificates without sex/gender

As noted above, in Malta the sex of a child can be left blank until they reach the age of 18. In such cases, the child's birth certificate will not include a sex classification. In Sweden, a person may order an extract of the Swedish Tax Agency's Population Register (analogous to a birth certificate), which includes information about the person that is included on the Population Register.³⁷⁵ This information includes the person's name, place of birth, personal identity number and other information, but does not expressly include sex.³⁷⁶

Notably, in a United Nations independent expert report released in July 2018 (UN Expert Report), the independent expert expressed doubts over the 'real need' for gender markers on official and non-official documents.³⁷⁷ Further, the independent expert urged member states to 'refrain from gathering and exhibiting data without a legitimate, proportionate and necessary purpose and ensure that, when data must be collected, it should be done on the basis of self-determination, while respecting privacy and confidentiality'.³⁷⁸

6.3 Change of sex/gender (adults)

Application process and evidentiary requirements

With the exception of Malta, the sex of an individual will generally be recorded as part of their birth registration. Many overseas jurisdictions have however, begun to allow for an administrative process that permits applicants to change their legal gender. The ability of a person to change their sex/gender classification on the basis of their self-determined gender identity is consistent with the UN Expert Report's recommendations. Change of legal gender processes on the basis of self-determination also accords with principle 31 of the Yogyakarta Principles plus 10,³⁷⁹ and the Darlington Statement.³⁸⁰

The following countries allow for gender recognition on the basis of self-determination:

- (a) Argentina;³⁸¹
- (b) Belgium;³⁸²
- (c) Canada;³⁸³
- (d) Denmark.³⁸⁴
- (e) India;³⁸⁵
- (f) Ireland;³⁸⁶
- (g) Luxembourg;³⁸⁷
- (h) Malta;³⁸⁸
- (i) Norway;³⁸⁹

372 Ireland National Perinatal Reporting System, *Birth Notification Form BNF01*, 11 <http://www.hpo.ie/nprs/nprs_documentation/NPRS_Instruction_Manual_Mar_2015.pdf>.

373 New Zealand Government, *Notification of Birth for Registration of child born in New Zealand*, Department of Internal Affairs, 1 <<https://www.govt.nz/assets/Documents/BDM/Notification-of-Birth-for-Registration-of-a-child-born-in-New-Zealand-BDM27.pdf>>; contemplated at *Births, Deaths, Marriages, and Relationships Registration Act 1995* (NZ) ss 29(3)(a)(ii), 32(a)(ii), 77(4)(a).

374 Norwegian Government, *Notification of birth to the Medical Birth Registry of Norway – Part D*, Norwegian Institute of Public Health <<https://www.fhi.no/en/hn/health-registries/medical-birth-registry-of-norway/notification-of-birth-to-the-medical-birth-registry-of-norway/>>.

375 Swedish Tax Agency, *Population registration in Sweden* <<https://www.ohchr.org/Documents/Issues/Children/BirthRegistration/SwedenPopulationRegistration.pdf>>.

376 Ibid.

377 Victor Madrigal-Borloz, *Protection against violence and discrimination based on sexual orientation and gender identity*, 73rd sess, UN Doc A/73/152 (12 July 2018).

378 Ibid.

379 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) 9.

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

381 *Identidad de Genero (Ley 26.743)* [Gender Identity Law (Law 26.743)] (Argentina) art 3.

382 *Code Civil 1807* [Civil Code] (Belgium) art 62bis § 1.

383 Previous requirements for gender reassignment surgery in Ontario, and Alberta have been overruled by common law; *XY v Ontario* (Government and Consumer Services) [2012] HRTO 726; *C.F. v Alberta (Vital Statistics)* [2014] ABQB 237.

384 *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.

385 *National Legal Services Authority v Union of India and Ors*, (Unreported, Supreme Court of India, Writ Petition (Civil) No. 400 of 2012 and Writ Petition (Civil) No. 604 of 2013, April 15 2014), [20] <<https://supremecourtindia.nic.in/jonew/judis/41411.pdf>>.

386 *Gender Recognition Act 2015* (Ireland). This piece of legislation contains no requirements for medical or state intervention in order to achieve recognition of gender identity.

387 *Loi du 10 août 2018 relative à la modification de la mention du sexe et du ou des prénoms à l'état civil et portant modification du Code civil (Mémorial A n° 797 de 2018)* art 2.

388 *Gender Identity, Gender Expression and Sex Characteristics Act 2015* (Malta) art 3(1)(a).

389 *Lov om endring av juridisk kjønn 2016* [Legal Gender Amendment Act, Prop 74 L 2015-2016] (Norway) § 2.

- (j) California and Oregon in the United States;³⁹⁰
- (k) Pakistan;³⁹¹ and
- (l) Portugal.³⁹²

Gender classifications

The gender classifications available to applicants differ across each international jurisdiction.

The following jurisdictions include one or more legal gender classifications in addition to the binary of ‘male’ and ‘female’:

- (a) India (third gender);³⁹³
- (b) Oregon (X (non-binary));³⁹⁴
- (c) California (non-binary);³⁹⁵
- (d) Pakistan (transgender);³⁹⁶
- (e) Saskatchewan (X or no sex/gender);³⁹⁷
- (f) Nova Scotia (under new legislation expected to commence in January 2019,³⁹⁸ male, female, X or no sex/gender).³⁹⁹
- (g) Alberta, Newfoundland and Labrador, Ontario (X);⁴⁰⁰
- (h) Malta (not addressed in legislation, but X and ‘other gender’ in practice);⁴⁰¹
- (i) New York City (under new legislation commencing 1 January 2019, X (non-binary));⁴⁰² and

- (j) New Zealand (indeterminate, only if the sex was wrongly recorded as male/female at birth).⁴⁰³

Limit on number of changes

While most countries enable multiple applications without restriction, several of these jurisdictions also impose limits on the number of changes of gender that an individual can make. Examples include Argentina,⁴⁰⁴ Belgium⁴⁰⁵ and Malta,⁴⁰⁶ as well as Oregon in the United States,⁴⁰⁷ where a person may change their legal gender once. Nevertheless, in each of these jurisdictions, further applications are permitted through the court system.

390 California Department of Public Health, *Correcting the Sex Field on Birth Certificates*, 3 <[https://www.cdph.ca.gov/Programs/CHSI/CDPH%20Document%20Library/ADA_Correcting%20Sex%20Field%20\(01-18\).pdf](https://www.cdph.ca.gov/Programs/CHSI/CDPH%20Document%20Library/ADA_Correcting%20Sex%20Field%20(01-18).pdf)>; Oregon Health Authority, *Change Vital Records* <<https://www.oregon.gov/oha/PH/BIRTHDEATHCERTIFICATES/CHANGEVITALRECORDS/Pages/amendbirthinfo.aspx>>.

391 *Transgender Persons Protection of Rights Act 2018* (Pakistan) s 3(1).

392 Lei n.º 38/2018 (Portugal) art 9.

393 *National Legal Services Authority v Union of India and Ors*, (Unreported, Supreme Court of India, Writ Petition (Civil) No. 400 of 2012 and Writ Petition (Civil) No. 604 of 2013, April 15 2014), [116] <<https://supremecourtindia.nic.in/jonew/judis/41411.pdf>>.

394 Oregon Health Authority, *Application to change the name and/or sex on a record of live birth to support gender identity* <<http://www.oregon.gov/oha/PH/BIRTHDEATHCERTIFICATES/CHANGEVITALRECORDS/Documents/OHA-2673.pdf>>.

395 *Gender Recognition Act of 2017* (California) ss 10(a) and 11(a), which amends *Health and Safety Code 2017* (California) ss 103425 and 103426.

396 *Transgender Persons Protection of Rights Act 2018* (Pakistan) s 2(n)(i)–(iii).

397 *Arnot v Forsberg* [2018] SKQB 159.

398 Nova Scotia, *New Gender Identity Option for Birth Certificates* <<https://novascotia.ca/news/release/?id=20180919003>>.

399 Nova Scotia Vital Statistics Service, *Change of Sex Designation* <<https://novascotia.ca/sns/pdf/ans-change-of-sex-designation-16-years-of-age-or-older.pdf>>; note that the Nova Scotia Government has recently assented to legislative amendments to their *Vital Statistics Act* <https://nslegislature.ca/legc/bills/63rd_2nd/3rd_read/b042.htm>; these changes recognise gender “X” as an option on birth certificates, as well as making the sex field optional <<https://nslegislature.ca/sites/default/files/pdfs/proceedings/hansard/63-2/h15oct02.pdf>>.

400 *Vital Statistics Act*, SA 2007, c V-4.1, s 29.1; *Vital Statistics Information Regulation*, Alta Reg 108/2018, reg 16; Ontario Vital Statistics Agency, *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>>; Newfoundland Labrador Vital Statistics Service, *Change of Sex Designation* <http://www.serviceni.gov.nl.ca/birth/changing_your_sex_designation/pdf/cosd_16_and_over.pdf>.

401 Identity Malta, *Application for a Malta Passport* <<https://identitymalta.com/wp-content/uploads/2017/09/FORM-A.pdf>>.

402 The New York City Council, *Amending sex designation on birth records and the issuance of birth records* <<https://legistar.council.nyc.gov/LegislationDetail.aspx?ID=3521898&GUID=A052CA3B-4FB7-4DD0-8318-5112E8422BA1&Options=&Search=>>.

403 *Births, Deaths, Marriages, and Relationships Registration Act 1995* (NZ) s 28(3).

404 *Identidad de Género (Ley 26.743)* [Gender Identity Law (Law 26.743)] (Argentina) art 8.

405 *Code Civil 1807* [Civil Code] (Belgium) art 62bis, § 10.

406 *Gender Identity, Gender Expression and Sex Characteristics Act 2015* (Malta) art 8(2).

407 *Oregon Administrative Rules 333-001-0265* (Oregon) s 0272(2); Oregon Health Authority, *Vital Records and Certificates* <<https://www.oregon.gov/oha/PH/BIRTHDEATHCERTIFICATES/Pages/rules.aspx>>.

6.4 Change of sex/gender (minors)

Given the sensitivity surrounding a minor changing their legal sex and/or gender, the framework in each international jurisdiction differs. Some countries such as Ireland,⁴⁰⁸ Denmark,⁴⁰⁹ Pakistan⁴¹⁰ and the United Kingdom,⁴¹¹ do not currently permit minors under the age of 18 to have their gender identity recognised. The majority of the countries we considered do allow minors access to a process for recognising their gender identity. This allows minors access to the same degree of self-determination of gender as adults within their jurisdiction. These include:

- (a) Argentina (under the age of 18);⁴¹²
- (b) Malta (under the age of 16);⁴¹³
- (c) New Zealand (under the age of 18);⁴¹⁴
- (d) Norway (under the age of 16);⁴¹⁵ and
- (e) California and Oregon in the United States (both under the age of 16).⁴¹⁶

When a minor's application is contested in:

- (a) Argentina;⁴¹⁷
- (b) Alberta, Nova Scotia, Newfoundland and Labrador, New Brunswick and British Columbia in Canada;⁴¹⁸
- (c) Malta;⁴¹⁹
- (d) Norway;⁴²⁰ and
- (e) California in the United States,⁴²¹

the judicial decision-maker must look to the best interests of the child, and make their determination based on the minor's personal circumstances. The capacity of the child,⁴²² the views of the child,⁴²³ and the objective benefit of the process for the child,⁴²⁴ are included in this decision across each of these overseas jurisdictions.

6.5 United Kingdom's reform of the *Gender Recognition Act 2004* (UK)

On 3 July 2018, the United Kingdom Government Equalities Office publicly released a consultation paper considering reform of the *Gender Recognition Act 2004* (UK) (**UK Consultation Paper**).

The process and requirements for a change of legal 'gender' classification under the *Gender Recognition Act 2004* (UK) are very similar to the current process in Western Australia under the GR Act. Applications for a change in legal gender classification are made to the Gender Recognition Panel and require medical reports and a statutory declaration in order to prove gender dysphoria, the applicant having lived in that gender for at least two years and an intention to continue to do so until death.⁴²⁵

408 [Gender Recognition Act 2015 \(Ireland\)](#) s 12(1); note that this was the subject of a legislative review to the Minister for Employment Affairs and Social Protection, released on 18 June 2018. The report recommended that children of all ages (subject to parental consent and a proper administrative procedure) should be afforded a system of gender recognition. These changes have not been made as yet <<http://www.welfare.ie/en/downloads/GRA%20Review%20Report.pdf>>.

409 [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.

410 [Transgender Persons Protection of Rights Act 2018](#) (Pakistan) s 3(3).

411 [Gender Recognition Act 2004 \(UK\)](#) chapter 7 s 1.

412 [Codigo Civil y Comercial de la Nacion \(Ley 26.994\)](#) [Argentine Civil and Commercial Code (Law 26.994)] (Argentina) art 26.

413 [Gender Identity, Gender Expression and Sex Characteristics Act 2015](#) (Malta) arts 2, 7.

414 [Births, Deaths, Marriages, and Relationships Registration Act 1995 \(NZ\)](#) s 27A.

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

416 [Health and Safety Code 2017](#) (California) s 103430(e); [Oregon Administrative Rules 333-001-0265 \(Oregon\)](#) s 0272(1)(b)(B).

417 [Identidad de Genero \(Ley 26.743\)](#) [Gender Identity Law (Law 26.743)] (Argentina) art 5.

418 [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); [Vital Statistics Act](#), RSBC 1996, c 479, s 27(3).

419 [Gender Identity, Gender Expression and Sex Characteristics Act 2015](#) (Malta) art 7(2).

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

421 [Health and Safety Code 2017](#) (California) s 103430(2).

422 [Identidad de Genero \(Ley 26.743\)](#) [Gender Identity Law (Law 26.743)] (Argentina) art 5.

423 [Gender Identity, Gender Expression and Sex Characteristics Act 2015](#) (Malta) art 7(2).

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

425 Further detail is provided in the table at Appendix 5.

The UK Consultation Paper considered the current processes under the *Gender Recognition Act 2004* (UK) and noted the UK Government 'wants to make the legal recognition process less intrusive and bureaucratic'.⁴²⁶ The UK Consultation Paper also noted the relationship between the *Gender Recognition Act 2004* (UK) and *Equality Act 2010* (UK), and sought submissions with respect to this relationship.

Consultation (including by way of submission) on the UK Consultation Paper was conducted until 22 October 2018. At the time of drafting this report, the UK Government Equalities Office is analysing the responses received during the consultation process and it is anticipated it will release its report at a later date.

426 Minister for Women and Equalities (UK), Reform of the Gender Recognition Act – Government Consultation (July 2018) 11 <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/721725/GRA-Consultation-document.pdf>.

CHAPTER 7. RECOMMENDATIONS FOR REFORM

7.1 Introduction to the Commission's recommendations

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 recommended 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) Comparison of models

A comparison of the current processes in Western Australia and the Commission's recommended model for reform is set out in the table in **Appendix 3**.

(b) Consultation and submissions

The Commission developed its recommended model based on the research set out in this Final Report, and with the benefit of over 500 submissions and engagement with various stakeholders. The collective input of the diverse views expressed during the consultation and submissions process was invaluable in considering the relevant issues and developing the Commission's recommended model.

(c) What information is relevant (sex or gender)?

As set out in Chapter 3, the Commission recognises that government, private business and community organisations may sometimes lawfully seek to collect information on sex and/or gender.⁴²⁷

Importantly, and relevant to the Commission's Terms of Reference to consider where Western Australia's legislative framework is inconsistent with the Commonwealth's, 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). Information about sex should only be collected where the agency has a specific and legitimate need for sex information.

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 death and to provide it to the ABS. In other circumstances, information about sex is relevant to certain rights, obligations or services related to a person's physical features relating to sex (for example, medical procedures).⁴²⁸ Otherwise, the Commission considers that a person's sex should remain the private information of that person.

The Commission considers the focus should be on how a person identifies, and how a person is recognised. In other words, if there is a specific and legitimate need to collect data on sex or gender, the focus should be on collecting information about gender rather than sex.

Against this background, the Commission considers that while sex should continue to be assigned and recorded at birth and death 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').

427 Subject to the requirements of the *Privacy Act 1988* (Cth).

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).

428 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.

(d) Discrimination concerns

The Commission received a substantial number of submissions with concerns about discrimination currently faced by intersex, trans and gender diverse people. As detailed in Chapter 5, the EO Act currently 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 gender identity.

The Attorney-General recently foreshadowed his intention to refer a new project to the Commission to undertake a detailed review of the EO Act. The Commission considers a detailed review of the EO Act would be beneficial, including as a result of any abolition of or amendments to the GR Act and the role of the Board and recognition certificates.

While a detailed review of the EO Act is beyond the scope of the Terms of Reference for this report, the Commission recognises that abolishing or amending the GR Act will necessarily have significant implications for intersex, trans and gender diverse people. Accordingly, quite separate from any detailed review of the EO Act, the Commission strongly considers that, should the GR Act be abolished or amended, at a minimum, protections against discrimination based on gender identity and intersex status ought to be introduced.

Recommendation 1

The *Equal Opportunity Act 1984 (WA)* be amended to include protections against discrimination based on gender identity and intersex status.

7.2 Registration of birth sex

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

(i) The Commission's recommended model

As detailed in Chapter 4, children born in Western Australia are registered with the Department of Health and/or the Registry of Births, Deaths and Marriages as follows:

- (A) a report is made by the delivery midwife to the 'Chief Health Officer' of the Department of Health within 48 hours of the birth.⁴²⁹ The prescribed form for this report requires the reporting of 'gender' against the categories 'male', 'female' or 'indeterminate' (the **First Report**);⁴³⁰
- (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 (the **Second Report**).⁴³¹ 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'; and
- (C) a final report called the 'Birth Registration Form' is made by the parents/guardians of the child to the Registrar within 60 days of the birth.⁴³² The Birth Registration Form is a form approved by the Registrar, which currently requires the parents/guardians to state the child's sex in one of two categories: 'male' or 'female'.⁴³³

⁴²⁹ *Health (Miscellaneous Provision) Act 1911 (WA)* s 335.

⁴³⁰ *Health (Notifications by Midwives) Regulations 1994 (WA)* sch, Form 2.

⁴³¹ BDMR Act s 12.

⁴³² BDMR Act ss 15, 16.

⁴³³ BDMR Act ss 14, 15.

After reviewing the existing scheme in Western Australia, the Commission recommends reform of the recording of birth sex as follows:

- (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; and
- (C) the approved form for the Birth Registration Form should be modified to record the sex classification options 'male', 'female' or 'indeterminate' for sex. A brief statement should be included in the Birth Registration Form notifying parents that if a child's sex is not able to be determined then the sex field should be marked 'indeterminate' and that this may be updated later if the child's sex has developed.

(ii) Reporting sex at birth

Currently the Registrar enters a child's sex information onto the Register based on the disclosures made in the Birth Registration Form. Unlike the First and Second Report, the Birth Registration Form is completed by the parent(s)/guardian(s) of the child. The parent(s)/guardian(s) record either 'male' or 'female' on the Birth Registration Form sex field. The Birth Registration Form does not provide the parent(s)/guardian(s) with an 'indeterminate' option.

The Commission heard from the Australian Medical Association that classifying sex as either 'male' or 'female' is inadequate and does not reflect the spectrum of sex identities that exist.⁴³⁴ To acknowledge the reality that not every child is born 'male' or 'female', the recommended reform expressly acknowledges that circumstances may exist where a child cannot be categorised as 'male' or 'female' at a point in time and permits parents to choose an 'indeterminate' sex field on the Birth Registration Form.

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 determination of sex is primarily based on a 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, within the First and Second Reports, they may be assigned 'indeterminate'. For some children, it may be that a range of other tests can be performed in due course in order to reach a point where there is sufficient data to allow a sex assignment. For others, their sex characteristics may be less ambiguous at a future time after birth (eg, following puberty). The Commission strongly considers 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.

The Commission recognises that not all parents/guardians will feel comfortable registering an 'indeterminate' sex field on their child's Birth Registration Form (as may be recorded on the First and Second Report). This may be because of limited community understanding of intersex variations and the perceived stigma of falling outside the male/female binary. To assist the parent(s)/guardian(s), the Commission's recommended model limits any consequential effects for the child whose sex is assigned as 'indeterminate', as sex classification from the Birth Registration Form will not be exhibited on a birth certificate (see recommended reform in section 7.2(b)).

The Commission heard from the Registrar that there were access and accuracy challenges associated with relying on the Second Report for the provision of birth statistics to the ABS.⁴³⁵ Under the Commission's recommended model, the Registrar would continue to have access to birth sex statistics from the Birth Registration Form in order for these to be provided to the ABS. The birth sex statistics will now also include statistics of those children assigned as 'indeterminate', which are statistics the Commission understands are currently difficult to accurately quantify.

434 Submission from the Australian Medical Association.

435 See also the submission from the ABS.

- (iii) The impact of the Commission's recommended 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 (intended to align a child's sex characteristics with the sex assigned to them at birth). 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 to be aligned with the expected sex characteristics of someone 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 (and would likely require consideration of Commonwealth legislation, being the *Family Law Act 1975* (Cth)), the Commission's recommended reform may have the consequence of partially addressing these concerns. The recommended reform is likely to reduce, or at least delay, the practice, given that parents will no longer need to determine the child's sex for the purposes of registering the birth. Parents may later seek to amend the child's birth registration to accommodate time to receive medical advice and consider the consequences of any intervention. As the sex classification on a Birth Registration

Form will not appear on a birth certificate, choosing 'indeterminate' will have no bearing on official identification documents. 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 Form.

Recommendation 2

The reports prepared by the Department of Health within 48 hours and by the hospital within one month of birth be amended to refer to sex and not gender.

Recommendation 3

The Birth Registration Form be amended to include an 'indeterminate' sex classification option.

Recommendation 4

The Birth Registration Form include a statement notifying parents:

- (a) if a child's sex is not able to be determined at the time the form is submitted, then the sex field should be marked 'indeterminate'; and
- (b) the sex classification may be updated later once the child's sex has been determined with medical certainty.

(b) Sex classification on birth certificates

- (i) The Commission's recommended model: removal of sex classification from birth (and death) certificates

The Commission recommends the removal of sex classification from birth (and death) certificates.

- (ii) Reasons for reform

In preliminary consultations, the Commission heard from Intersex Human Rights Australia that it considers removing sex/gender from birth certificates would prevent the stigmatisation of children born with intersex variations, and it could help to reduce pressure to modify the sex characteristics of such

children. A submission endorsed by Intersex Human Rights Australia, recognised that the absence of sex/gender on birth certificates, as with race, will not abolish such concepts, nor will it end the ability to collect data on lived experience.⁴³⁶

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 view is that it is preferable to avoid conflating information about a person's sex assigned 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 their own gender identity).

In order to allow a process of gender affirmation (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 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.

Submissions to the Commission from a broad range of stakeholders were supportive of the removal of sex classification from birth certificates, including from the Commissioner for Children and Young People, GLBTI Rights in Ageing Inc., a submission endorsed by Intersex Human Rights Australia, the Hon Alison Xamon MLC, Trans Health Australia, TransFolk of WA and the Human Rights Law Centre, National Tertiary Education Union, Telethon Kids Institute, Rainbow Labor WA, Perth Inner City Youth Centre, Curtin University, Centre for Human Rights Education and members of the public. This recommendation is also consistent with the Darlington Statement⁴³⁷ and the Yogyakarta Principles plus 10.⁴³⁸

Submissions from various government departments including the Department of Health, the Department of Local Government, Sport and Cultural Industries and the Department of Justice (Corrective Services) did not object to or identify any substantive issues with the Commission's recommendation.⁴³⁹

The Commission acknowledges, however, that not everyone supports this recommendation.

The Commission received submissions from individuals and organisations with concerns about removing sex from birth certificates.⁴⁴⁰ The submitted reason for these concerns included issues relating to establishing identification,⁴⁴¹ historical and statistical records,⁴⁴² medical services,⁴⁴³ sport⁴⁴⁴ and other matters traditionally segregated by 'sex' (including prison facilities,⁴⁴⁵ education⁴⁴⁶ and religious practices⁴⁴⁷). The Commission has carefully considered each of these matters.

Before addressing each of these matters, the Commission considers it important to note that this recommended reform is not intended to propose that individuals will cease to identify as a male or female in their daily life. Nor does the Commission propose that government agencies, private entities or other individuals who are lawfully entitled to collect information about a person's sex or gender cease to be able to do so. Rather, the question is whether proof of sex in the form of a person's birth certificate is required.

For identification purposes, the Commission heard from the Commonwealth Department of Home Affairs that the removal of sex from birth certificates is unlikely to impact identity security measures in Australia.⁴⁴⁸ For identity verification, sex or gender is not a mandatory data input when using government identity verification tools or biometric face verification

436 Submission endorsed by Intersex Human Rights Australia.

437 Australian and Aotearoa/New Zealand intersex organisations and independent advocates, *The Darlington Statement* (March 2017), 3.

438 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.

439 Submissions from the Department of Health, Department of Justice (Corrective Services) and Department of Local Government, Sport and Cultural Industries.

440 Submissions from members of the public; Registrar of Births, Deaths and Marriages; Feminist Legal Clinic; Australian Christian Lobby; Association for Reformed Political Action; Hon Charles Smith MLC; and the Roman Catholic Archdiocese of Perth.

441 Submissions from Association for Reformed Political Action; and Hon Charles Smith MLC.

442 Submissions from Feminist Legal Clinic; Australian Christian Lobby and Hon Charles Smith MLC.

443 Submissions from Association for Reformed Political Action; and Hon Charles Smith MLC.

444 Submissions from Registrar of Births, Deaths and Marriages; and Association for Reformed Political Action.

445 Submission from Association for Reformed Political Action.

446 Submissions from Association for Reformed Political Action; and the Roman Catholic Archdiocese of Perth.

447 Submission from Association for Reformed Political Action.

448 Consultation with the Department of Home Affairs.

services.⁴⁴⁹ The Commission also understands from consultation with WA Police that usual practice is to identify and process a person based on their self-identified gender rather than the sex on their birth certificate.

The Commission also heard concerns from members of the public about the importance of recording sex for statistical purposes.⁴⁵⁰ The Commission agrees that keeping accurate statistics is very important. For the reasons detailed in section 7.2(a) above, the recommended reform will not impact the collection of data about sex at birth and death. Accordingly, current users of that information, such as the ABS, will remain unaffected other than the possibility that the quality of the analysis may improve as a consequence of the improvement to the quality of the data.

As stated in Chapter 6, the UN Expert Report queried the need for states to exhibit gender markers in official and non-official documentation.⁴⁵¹ The independent expert concluded that this kind of practice by states appears to be 'fulfilling the vestiges of needs that have long been superseded or adhering to a rationale that should have never been applied in the first place'.⁴⁵²

The independent expert recommended states not gather and exhibit sex or gender data without a legitimate, proportionate and necessary purpose. The Commission agrees with the conclusion of the independent expert and considers the recommended model is consistent with their approach.

In relation to maintaining historical records, the Commission understands from the Registrar that there are a number of instances where information registered at birth is later changed or updated, such as adoptive parents replacing biological parents on a child's birth certificate following adoption. The Commission also understands that changes to the information on the Register do not overwrite previous, historical information held on the Register. The birth registration of an individual will be updated with a new version where details of

the person's sex (or name) are amended due to a change of sex. The previous version is not replaced, but it will be marked as superseded by the current version of the registration.

With respect to medical services, the Commission was advised by the Australian Medical Association that it is not common practice to prove sex via a patient's birth certificate.⁴⁵³ From a health and medical perspective, sex is usually determined via a combination of medical documentation, discussions between the practitioner and the patient or parent(s)/guardian(s), and clinical assessment.⁴⁵⁴ The Commission also understands that the complexities in individual sex characteristics are not something that are reflected on a birth certificate.⁴⁵⁵ Individual sex varies greatly, and it would simplify and fail to recognise humanity's diversity if medical treatment relied on a birth certificate for appropriate treatment. The Commission considers the recommended model will not detract from medical identification nor negatively impact patient treatment.

In relation to single-sex sports, the Commission considered the submission from the Department of Local Government, Sport and Cultural Industries, which submitted that:

- the removal of sex from birth certificates would have an insignificant impact on the sport and recreation sector;
- few sports, sports clubs and associations look at birth certificates when registering participants (and when they do, emphasis is on their date of birth rather than gender);
- national sports policies support people to participate in sport based on their gender identity;
- a Gender Identity Certificate should be sufficient in proving gender, where there is a requirement for formal documentation; and

449 Consultation with the Department of Home Affairs.

450 Submissions from members of the public and the Hon Charles Smith MLC.

451 Victor Madrigal-Borloz, *Protection against violence and discrimination based on sexual orientation and gender identity*, 73rd sess, UN Doc A/73/152 (12 July 2018).

452 Victor Madrigal-Borloz, *Protection against violence and discrimination based on sexual orientation and gender identity*, 73rd sess, UN Doc A/73/152 (12 July 2018), [37].

453 Submission from the Australian Medical Association.

454 Submission from the Australian Medical Association.

455 Submission endorsed by Intersex Human Rights Australia.

- where there is a perceived unfair competitive advantage due to strength, stamina or physique, this is assessed on a case-by-case basis, and exclusions under equal opportunity and sex discrimination legislation may potentially apply.

With respect to prisons, the Commission heard from the Department of Justice (Corrective Services) that prisons take into account a prisoner's self-identified gender before determining an appropriate prison placement.⁴⁵⁶ The Department confirmed that the removal of sex from birth certificates will have little impact on their legislative responsibilities.⁴⁵⁷ As set out in their submission, an evaluation of prisoner placement will be required if the Commission's recommended model is implemented.⁴⁵⁸

Finally, in relation to children and young people, the Commission heard from the L J Goody Bioethics Centre (founded as an agency of the Roman Catholic Archdiocese of Perth) that the exclusion of sex from birth certificates will cause considerable difficulty for any organisation or institution that deals with children or young adults according to their birth sex.⁴⁵⁹ There was particular concern for the registration of children in appropriate classes and personal hygiene in both single-sex and co-educational schools.

In relation to schools, as a starting point, the Commission notes that all schools (government or private) are required to keep an enrolment register. The particulars required to be kept on that register do not include the sex or gender of each child.⁴⁶⁰ For government schools, the Commission is not aware of any legislative requirement which requires sex or gender to be provided when enrolling a child, or requires proof of sex or gender via a birth certificate.⁴⁶¹ The Commission also consulted with the Association of Independent Schools of Western Australia and understands that although gender is relevant for enrolment, this information is not required to be proven by a birth certificate.⁴⁶² The Commission acknowledges that schools may wish to collect

information on gender for the purposes of the day-day operations of the school (eg on the enrolment form). The Commission's recommended reform will not prevent this occurring,⁴⁶³ rather it effects the proof of that gender (if proof is required).

Other concerns in relation to matters traditionally segregated by sex are discussed in section 7.7 below. The Commission considers these concerns ultimately depend upon the application of anti-discrimination legislation (and any relevant exemptions) and should be considered in the context of the foreshadowed review of the EO Act.

Recommendation 5

Sex classification be removed from birth certificates.

Recommendation 6

The *Births, Deaths and Marriages Registration Act 1998* (WA) and the *Births, Deaths and Marriages Registration Regulations 1999* (WA) be amended to expressly prohibit the recording of sex or gender on birth certificates.

7.3 Documentary proof of gender

(a) Documentary proof of gender for people born in WA

- (i) The Commission's recommended model: Gender Identity Certificate

Where a person is required to prove their gender, the Commission's recommended model is for the person to order a Gender Identity Certificate from the Registrar.

A Gender Identity Certificate would be a document issued by the Registrar under the BDMR Act, which records and certifies a person's gender identity.

⁴⁵⁶ Submission from the Department of Justice (Corrective Services).

⁴⁵⁷ Submission from the Department of Justice (Corrective Services).

⁴⁵⁸ Submission from the Department of Justice (Corrective Services).

⁴⁵⁹ Submission from the Roman Catholic Archdiocese of Perth.

⁴⁶⁰ *School Education Act 1999* (WA) s 19(a); *School Education Regulations 2000* (WA) reg 6(1).

⁴⁶¹ *School Education Act 1999* (WA) s 16(1); *School Education Regulations 2000* (WA) reg 5.

⁴⁶² Consultation with the Association of Independent Schools of Western Australia.

⁴⁶³ Providing such collection is done lawfully.

The Commission recommends that the application process for a Gender Identity Certificate be a simple administrative form, as with the current process for ordering a birth certificate. Additional supporting documentation would be required where a person wishes to change their registered gender.

The Commission's recommended model regarding Gender Identity Certificates is set out in further detail below.

(ii) Reasons for reform

The Commission received broad stakeholder support for the Gender Identity Certificate, not only from the trans and gender diverse communities, but other organisations and government bodies. These included Trans Health Australia, a submission endorsed by Intersex Human Rights Australia, TransFolk WA and Human Rights Law Centre, the Commissioner for Children and Young People, GLBTI Rights in Ageing Inc., WA AIDS Council, the Hon Alison Xamon MLC, Australian Medical Association, Department of Local Government, Sport and Cultural Industries, National Tertiary Education Union, Telethon Kids Institute, Curtin University, Rainbow Labor WA, Perth Inner City Youth Centre, Centre for Human Rights Education and members of the public. The Commission considers the recommended model is accessible and provides a streamlined process for individual self-determination of legal gender.

The Commission understands from DFAT that the International Civil Aviation Organisation (ICAO) (which sets worldwide standards for passports) requires a sex field in the personal details page of all machine readable travel documents.⁴⁶⁴ To meet the ICAO standards, documentary evidence of a person's sex/gender must be submitted to and verified by DFAT during the passport application process.⁴⁶⁵ DFAT confirmed to the Commission that a Gender Identity Certificate would be sufficient evidence for the passport application process.⁴⁶⁶

Under the Commission's recommended model, all first-time passport applicants in Western Australia will be required to provide a Gender Identity Certificate (or other acceptable documentary evidence of sex/gender) to DFAT during the application process. While it would be possible for a minor's parents/guardians to apply for a Gender Identity Certificate following birth at the same time as applying for a birth certificate, the Commission recognises this is an additional administrative burden on applicants, the Registrar and DFAT. In the Commission's view, however, the administrative burden of obtaining a Gender Identity Certificate in order to apply for a passport is outweighed by the value in an individual's right to self-determination.

As international models on best practice continue to evolve, the Commission does not consider the current requirement to prove sex/gender will remain indefinitely. The Commission understands the ICAO recognised in a review in 2012 that the tangible benefits of not requiring travel documents to display the holder's sex/gender mean there is a significant opportunity for the ICAO to change the mandatory requirement in the future.⁴⁶⁷

The Commission has been unable to determine circumstances in which a birth certificate is required to be produced in order to prove sex as opposed to gender. As detailed in section 7.2(b) above, there is no legal or medical identification purpose of a document proving an individual's sex.

A large number of submissions to the Commission expressed concern about the concept in the Discussion Paper of a Proof of Sex Certificate. The Commission heard participants in a study by the Human Rights Law Centre and TransFolk of WA commented that proving sex as opposed to gender would be damaging, unnecessary and an avenue for discrimination.⁴⁶⁸ The Commission believes a Proof of Sex Certificate would only serve to introduce a new form of discrimination and does not see any utility in retaining it in the recommended model.

464 Submission from DFAT.

465 Submission from DFAT.

466 Submission from DFAT.

467 International Civil Aviation Organization, *A Review of the Requirement to Display the Holder's Gender on Travel Documents* (10-12 December 2012) <https://www.icao.int/Meetings/TAG-MRTD/Documents/Tag-Mrtd-21/Tag-Mrtd21_IP04.pdf>.

468 Submission from TransFolk of WA and Human Rights Law Centre.

A Proof of Sex Certificate would also provide little statistical value to government agencies. Under the Government Guidelines, the Commonwealth's preferred approach is for agencies to collect gender rather than sex data (where it is necessary to collect sex and/or gender information). Consistent with this, a Gender Identity Certificate would be preferred to a Proof of Sex Certificate. Although sex data is collected at birth, this information is collected via the Birth Registration Form, not from any Proof of Sex Certificate.

Submissions to the Commission also indicated that the basis for how sex is determined remains uncertain.⁴⁶⁹

Accordingly, the Commission does not recommend a Proof of Sex Certificate. The need to prove sex is rare. Generally, if sex information is requested, a Gender Identity Certificate should be sufficient. Otherwise, any need to prove sex is likely to require testing specific to the sex characteristic relevant in the given context, and it is best undertaken by medical professionals on a case-by-case basis.

Recommendation 7

The *Births, Deaths and Marriages Registration Act 1998* (WA) be amended to provide an application process for a person born in Western Australia to apply for a Gender Identity Certificate.

(b) Documentary proof of gender for WA residents born outside of WA

(i) The Commission's recommended model: Gender Identity Certificate

The Commission recommends allowing people born outside of Western Australia, or those without birth certificates, to apply for Gender Identity Certificates, provided they provide:

- (A) proof of residency in Western Australia for at least the previous 12 months;
- (B) a pro forma statutory declaration declaring genuine belief of their affirmed gender and eligibility based on residency requirements; and

- (C) proof of identification (as required under the current process for birth certificate applications).

(ii) Reasons for reform

The Commission received submissions advocating a process be available for those that either do not have birth certificates, or who are born outside of Western Australia.⁴⁷⁰ The Commission considers it is consistent with the overall reform proposed in this Final Report to extend to those born without a Western Australian birth certificate the opportunity to access legal recognition of their gender identity.

Recommendation 8

The *Births, Deaths and Marriages Registration Act 1998* (WA) be amended to provide an application process for a person born outside of Western Australia to apply for a Gender Identity Certificate.

7.4 Gender Identity Certificates

(a) Applications for Gender Identity Certificates where there is no change of gender

(i) The Commission's recommended model (adult): administrative application to the Registrar

The Commission's recommended application process for an adult with no change to their registered gender (eg. applying for their first Gender Identity Certificate, or a replacement Gender Identity Certificate when one is lost) is similar to the process to apply for a birth certificate.⁴⁷¹ The Commission recommends the applicant submit an application form (in an approved form) in which they provide their personal details (including their gender) and proof of identification.

(ii) The Commission's recommended model (minors): administrative application to the Registrar by one parent/guardian

469 Submissions from GLBTI Rights in Ageing Inc.; Sex Not Stereotypes Alliance and a submission endorsed by Intersex Human Rights Australia.

470 Submission from Trans Health Australia; consultation with Youth Pride Network.

471 See, eg, WA Government, Registry of Births, Deaths and Marriages, *Birth Certificate Application Form* <https://bdm.justice.wa.gov.au/files/BDM1_Birth_Applic_Form.pdf>.

The Commission's recommended application process for a minor⁴⁷² with no change to their registered gender (eg. applying for their first Gender Identity Certificate, or a replacement Gender Identity Certificate when one is lost) is similar to the process to apply for a minor's birth certificate.⁴⁷³ The Commission recommends the applicant parent/guardian submit an application, in an approved form, in which they provide:

- (A) the minor's personal details (including their gender); and
- (B) the applicant parent/guardian's own contact details, relationship to the minor, and proof of identification.

The Commission heard from Western Australia's Public Advocate with respect to adults who have a guardian appointed under the *Guardianship and Administration Act 1990* (WA). Under the current process, a guardian may apply for their represented person's birth certificate in much the same way as a parent/guardian of a minor. The Commission recommends that a guardian of a legally incompetent adult be able to apply for a Gender Identity Certificate in the same way as a parent/guardian of a minor.

(iii) Reasons for reform

The Commission recognises a simple administrative process is necessary for adults and minors (and their parent(s)/guardian(s) on their behalf) to access a Gender Identity Certificate. The Commission also anticipates a Gender Identity Certificate will be required when a parent is applying for a minor's first passport. To minimise the burden on adults and a minor's parent(s)/guardian(s), the Commission has modelled the application process for Gender Identity Certificate on the current application process for a birth certificate.

(b) Available classifications

- (i) The Commission's recommended model: male, female or non-binary

The Commission recommends the possible classifications on a Gender Identity Certificate be 'male', 'female' or 'non-binary'.

(ii) Reasons for reform

With the exception of passports, there is no sex or gender classification outside of the male/female binary recognised on official documentation in Western Australia. Under the Commission's recommended model, an individual will be able to express their gender outside of this binary by choosing the 'non-binary' gender classification on their Gender Identity Certificate.

The Commission was advised by different stakeholders of alternative options for gender classification, including alternatives such as 'X', 'indeterminate' and 'other'.⁴⁷⁴ 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.

In both its preliminary consultations and in response to the Discussion Paper, the Commission received broad support for 'non-binary' as the additional gender classification. These stakeholders include, but are not limited to, the Human Rights Law Centre, Amnesty International, Intersex Human Rights Australia, Youth Pride Network, TransFolk of WA, WPATH, ANZPATH and Trans Health Australia.

The Commission recognises that the Government Guidelines preference the gender classification of 'X' (or in the alternative 'indeterminate' or 'unspecified') for information collected or recorded on an individual's personal record. From consultation with the Commonwealth Attorney-General's Department, the Commission is aware that the Government Guidelines are under review. The Department has identified redefining the third gender option by replacing 'indeterminate, intersex or unspecified' with the term 'non-binary' as one area of possible reform that has broad support across stakeholders. Although the Commission notes this is still under consideration, the Commission believes the gender classification of 'non-binary' represents the best possible option with widespread support from relevant stakeholders.

472 Under 18, in line with the definition of 'minor' in the *Family Law Act 1975* (Cth).

473 See, eg, WA Government, Registry of Births, Deaths and Marriages, *Birth Certificate Application Form* <https://bdm.justice.wa.gov.au/files/BDM1_Birth_Applic_Form.pdf>.

474 Submissions from WA AIDS Council; South Australian Law Reform Institute; ABS; the Hindu Council of India, WA Chapter and Feminist Legal Clinic.

Recommendation 9

The *Births, Deaths and Marriages Registration Act 1998* (WA) be amended to provide for the gender classifications of 'male', 'female' and 'non-binary'.

7.5 Applications to change Gender Identity Certificate

(a) Application for change of gender on Gender Identity Certificate (adults)

The Commission recommends repealing the GR Act and implementing an administrative process to change gender on a Gender Identity Certificate directly through the Registrar. Consequently, the Board will be abolished.

The Commission recommends that applications by an adult to change the gender on their Gender Identity Certificate be made in an approved form to the Registrar, along with:

- (A) a pro forma statutory declaration by the applicant, in which they declare their genuine belief of their affirmed gender; and
- (B) proof of identification (as required under the current process for birth certificate applications).

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 preferred by the applicant).

(ii) Reasons for reform

The objective behind the Commission's recommended model and repeal of the GR Act is to promote a process of self-determination and remedy some of the administrative burdens on applicants seeking to have their gender identity legally recognised. 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.

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. The Commission's recommended model would remove the requirement to apply to the Board altogether. This would ensure consistency with the other Australian jurisdictions and avoid the additional procedural requirements imposed on applicants under the current process.

Similarly, the majority of stakeholder submissions suggested that the Board should be abolished, including Trans Health Australia, the Youth Pride Network, the Equal Opportunity Commission (WA), the WA AIDS Council, Amnesty International Australia, GLBTI Rights in Ageing Inc., the National Tertiary Education Union and the Australian Medical Association. These stakeholders shared the view that applications to the Board were incompatible with a self-determination approach of gender affirmation, and they were an unnecessary administrative hurdle. In a survey of trans individuals submitted to the Commission, an overwhelming number of participants were in favour of removing the Board as part of the gender affirmation process.⁴⁷⁵ According to participants, the current Board process causes confusion, stress, anxiety and unnecessary delays, and is viewed by trans and gender diverse people as 'gate-keeping' or 'policing' gender identity by the state.⁴⁷⁶ The Commission is confident the recommended model will reduce the anxiety and stress experienced by people who need to change their gender.

The Commission also received a large number of submissions which expressed a preference for a self-determination model with an administrative process, including the Australian Human Rights Commission, TransFolk of WA and the Human Rights Law Centre, Intersex Human Rights Australia, Equal Opportunity Commission (WA), SALRI, RANZCP, Federation of Australian Buddhist Councils, Buddhist Council of Western Australia, WPATH, ANZPATH, Trans Health Australia, and Youth Pride Network.

As outlined in section 6.3, a model based on self-determination is the current process in a large (and growing) number of international jurisdictions. For more information, see **Appendix 5**.

⁴⁷⁵ Submission from TransFolk of WA and Human Rights Law Centre.

⁴⁷⁶ Submission from TransFolk of WA and Human Rights Law Centre.

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 paper proposed a statutory declaration as one option for evidence in support of an application for change of sex and/or gender.⁴⁷⁷ Trans Health Australia told the Commission 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.⁴⁷⁸

The Commission heard from the Australian Christian Lobby and some members of the public that the Register of Births, Deaths and Marriages records information about historical events and should not contain the gender identity of a person. Similarly, the Commission heard concerns that a change of gender would constitute destroying historical evidence of a person's birth sex. The Commission understands from the Registrar that there are a number of instances where information registered at birth is later changed or updated, such as adoptive parents replacing biological parents on a child's birth certificate following adoption. The Commission also understands that changes to the information on the Register do not overwrite previous, historical information held on the Register. For example, the birth registration of an individual will be updated with a new version where details of the person's sex (or name) are amended due to a change of sex. The previous version is not replaced, but it will be marked as superseded by the current version of the registration.

The Commission is conscious the reallocation of responsibilities to the Registrar will likely require a diversion of resources from those devoted to the Board to the Registry, at least for the purposes of implementing any requisite changes to the WA Registration System. This was an important administrative consideration identified by the SALRI following their recommended repeal of the SR Act.⁴⁷⁹

Recommendation 10

The *Gender Reassignment Act 2000* (WA) and *Gender Reassignment Regulations 2001* (WA) be repealed.

Recommendation 11

The *Births, Deaths and Marriages Registration Act 1998* (WA) be amended to provide an administrative process to change the gender classification on a Gender Identity Certificate.

(b) Application for change of gender on Gender Identity Certificate (minors under 12)

CASE STUDY

Anonymous:

'We are a family of five that live in [regional Western Australia]. Two of our children attend Primary School. When we moved to [regional Western Australia] 6 years ago we have a clear memory of a then three-year-old [A] telling us "it would be easier if I was a girl". This has not turned out to be a passing phase. For the last 2 years [A] has been more direct and we have been told daily: "I am a girl".

As parents we simply want our children to be healthy and happy. For this reason, we have stopped quietly gatekeeping [A's] choice about 'girl' toys and clothes. We are listening to our child and in doing so we have seen [A's] confidence grow. We now know that letting [A] be who [A] wants to be is making our child simply ... happy.

After much careful consideration, time and consultation with the school and mental health professionals locally and at the Children's Hospital's Gender Diversity Service, [A] decided to start the 2018 school year as a girl.

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

478 These countries include Belgium, Canada (Alberta, Newfoundland and Labrador), Denmark (following a reflection period of six months), Ireland, Malta and the United States of America (California and Oregon).

479 Submission from the South Australian Law Reform Institute.

[A's] experience, and many of the stories we have read and heard, have shown us that gender identity is not determined by your private parts but how you think and feel. For some people, anatomy assigned at birth and their gender identity do not align.

But there are alarming statistics, which make us fearful for our child. For adults who don't feel they conform with their sex assigned at birth the rates of attempted suicide are 40%. However, when a child is able to choose their gender and is supported by their family, friends, school and community that statistic decreases by 93%.

In spite of the growing body of research that clearly highlights the importance of people, including children, being able to determine their gender the current legislation prevents [A] at her current age from changing the gender marker on her birth certificate. [A] is born in NSW where the requirements state she must have surgical reassignment before being able to change her gender marker on her birth certificate. While we can't change her birth certificate currently in NSW we are hopeful that by telling our story that WA might lead the charge with legislative changes that allow children to determine their gender rather than requiring them to undertake medical interventions such as hormones or surgical reassignment to 'prove' their gender and change their birth certificate.

As parents of transgender child and seeing how living as [a] girl our daughter can be her true self we find incredibly arbitrary and oppressive that despite the fact that [A's] mental health professionals, the school, friends and family all recognise [A] as a girl and she uses the female personal pronouns in every aspect of her life she is not allowed to change her gender markers on all relevant documents pertaining to her identity. [A] is also very upset by the gender marker on her birth certificate and asks us what are we doing about getting it changed'.⁴⁸⁰

- (i) The Commission's recommended model: administrative application to the Registrar with consent of all responsible parent(s)/guardian(s)

The Commission recommends that applications to change the gender on the Gender Identity Certificate of a minor under 12 be made by one applicant parent/guardian to the Registrar (in an approved form) which contains:

- (A) the minor's personal details (including their gender);
- (B) the applicant parent/guardian's own contact details, relationship to the minor, and proof of identification;
- (C) a pro forma statutory declaration by the applicant parent/guardian, in which they declare their genuine belief of the child's affirmed gender; and
- (D) signature(s) of all other responsible parent(s)/guardian(s).⁴⁸¹

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

The Commission also heard from the Western Australian Public Advocate about circumstances in which an adult with an appointed guardian may express a wish to change their gender. With respect to adults with appointed guardians under the *Guardianship and Administration Act 1990* (WA), the Commission again recommends that a guardian of a legally incompetent adult be able to apply for a change of gender in the same way as a parent/guardian of a minor under 12. The Commission notes that the requirement for signatures from 'all other responsible ... guardian(s)' (in (D) above) contemplates instances where a legally incompetent adult may have more than one appointed guardian.

- (ii) Reasons for reform

Submissions to the Commission emphasised that a minor should have the right to live authentically according to their own identity.⁴⁸²

480 Submission by Anonymous (parents of trans daughter).

481 Being the parent(s) or guardian(s) with parental responsibility of the minor as under the *Family Law Act 1975* (Cth).

482 Submissions from Amnesty International; the Commissioner for Children and Young People, and a submission endorsed by Intersex Human Rights Australia.

The Commission understands from the Commissioner for Children and Young People that many minors become aware of their gender identity at an early age, and just under 50% of parents of trans and gender diverse minors realise their child is trans before they reach 12 years of age.⁴⁸³ The Commission considers that minors under 12 years of age should not be overlooked, and a process should be available to them to seek formal recognition of their gender identity.

The Commission recognises, however, that it is not appropriate for the same process to apply to minors of all ages. The Commission recommends the consent of all minor's parent(s)/guardian(s) be required when applying for change of gender for a minor under 12 years of age. The Commission considers this will provide the necessary oversight to protect minors who are not yet competent to provide informed consent.

Consistent with practice in several Canadian provinces,⁴⁸⁴ and the recommendations by the Tasmanian Anti-Discrimination Commissioner,⁴⁸⁵ the Commission recommends a minor's informed consent is required from 12 years of age. The Commission's recommendations for minors 12 and over are detailed in the next section of this report.

The Commission's recommended model is one based on the principle of self-determination. Under the Commission's model, a minor's sense of their own gender is the main requirement for an application to the Registrar to, in effect, change the gender on their Gender Identity Certificate. A minor will no longer be required to meet the GR Act preconditions to legal recognition detailed in Chapter 4. The Commission considers this will reduce pressure on parent(s)/guardian(s) to have a minor undergo a reassignment procedure to access legal recognition, which was a concern of a number of individuals who made submissions.

Submissions to the Commission expressed concern that this process would permit 'sex reassignment' or other medical procedures with irreversible changes to minors. The Commission clarifies that a change of gender does not necessitate a reassignment of sex. Any such reassignment procedures are governed by the distinct legal principles set out in Chapter 3.

Recommendation 12

The *Births, Deaths and Marriages Registration Act 1998* (WA) be amended to provide an administrative process to change the gender classification on a Gender Identity Certificate for a minor under 12 years of age.

Recommendation 13

The *Births, Deaths and Marriages Registration Act 1998* (WA) be amended to provide an administrative process to change the gender classification on a Gender Identity Certificate for a legally incompetent adult.

(c) Application for change of gender on Gender Identity Certificate (minors 12 and over)

CASE STUDY

Anonymous:

'I have a 13 year old son He loves music, mostly kpop, and plays the clarinet. He is fascinated with languages. [B] currently learns Chinese after he was accepted into the gifted and talented program at [school], and is studying Japanese in his spare time through TAFE. He also loves hanging out with his friends and going ice skating. He is incredibly smart, funny and selfless.

The only thing that differentiates my son from any other child is that he is transgender.

He misses a lot of school due to appointments with [Perth Children's Hospital] (for puberty blocking medication), his speech pathologist (to help him develop a deeper voice), his physio (as he has bad posture trying to hide his chest), his psychologist (due to issues with gender distress), his GP for management of the medication, and the list goes on.

483 Submission from Commissioner for Children and Young People.

484 Consistent with practices in Alberta, Newfoundland and Labrador and New Brunswick.

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

Everyone is his life, at home and school, knows about his transition and has warmly and lovingly accepted this.

[B] has gone through the process of legally changing his name, and now wishes to proceed to apply for a gender recognition certificate through the Gender Reassignment Board.

Most parts of his transition have already been so intrusive. The volume of health workers that he has to interact with about such a private, personal matter is overwhelming. But he just sucks it up and gets on with it because he know the end goal he wants.

In applying for a gender recognition certificate, he will be judged by a group of people who don't know him as the honest, determined person that he is. This is just another hurdle for him to overcome, and I am so proud of him for wanting to do this.

If this process could be changed, it would mean a lot to [him] and our family. It means with the support of his family, he will be able to request this change in the same format as changing his name. Without feeling like he is being judged, and having to prove himself.

I don't think the current process is fair'.

- (i) The Commission's recommended model: administrative application to the Registrar with consent of one responsible parent/guardian

The Commission recommends that applications to change the gender on the Gender Identity Certificate of a minor 12 and over, be made by the minor to the Registrar (in an approved form) which contains:

- (A) the minor's personal details (including their gender);
- (B) a pro forma statutory declaration by the minor, in which they declare their genuine belief of their affirmed gender;

- (C) the contact details, relationship to the minor, and proof of identification of one responsible parent/guardian⁴⁸⁶ consenting to the application; and
- (D) signature of that responsible parent/guardian.

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

(ii) Reasons for reform

The Commission received broad stakeholder support for establishing a process for the legal recognition of a change of gender of minors over 12 years of age.⁴⁸⁷

The Commission's recommended model establishes a simple administrative process for a minor 12 years of age or over to change the gender on their Gender Identity Certificate. This process is similar to the process available to minors under 12 years of age, except the consent of the minor and only one parent/guardian is required. The requirement for a minor over 12 years of age to provide their consent is consistent with the principle of self-determination (as detailed in the Yogyakarta Principles plus 10 and Darlington Statement) and supported by the Family Court of WA, as a minor should have a say in determining their own sense of gender identity.⁴⁸⁸

In view of the materials provided to the Commission, including that trans youth will usually have formed their gender identity by the age of 12, the Commission considers that a minor over 12 years of age will usually be capable of providing their informed consent with respect to a change of gender.

Recommendation 14

The Births, Deaths and Marriages Registration Act 1998 (WA) be amended to provide an administrative process to change the gender classification on a Gender Identity Certificate for a minor 12 years of age or older.

⁴⁸⁶ Being the parent(s) or guardian(s) with parental responsibility of the minor as under the *Family Law Act 1975* (Cth).

⁴⁸⁷ Submissions from GLBTI Rights in Ageing Inc.; National Tertiary Education Union; Trans Health Australia; Telethon Kids Institute; Centre for Human Rights Education; Perth Inner City Youth Service; members of the public, and a submission endorsed by Intersex Human Rights Australia.

⁴⁸⁸ Submission by the Family Court of WA.

(d) Dispute resolution process

(i) The Commission's recommended model: Mediation and Family Court

The Commission recommends a dispute resolution process for circumstances where one or more parent(s)/guardian(s) do not provide the statutory declarations or signatures required for applications to change the gender on a minor's Gender Identity Certificate.

The Commission's recommended dispute resolution process is for a minor to apply to the Family Court, with the support of one parent/guardian or a next friend, to dispense with the requirement for the relevant statutory declaration(s) and/or signatures from the parent(s)/guardian(s).

Under the Commission's recommended model, the relevant parent(s)/guardian(s) must be served with the application to the Family Court, and they must be given an opportunity to object and be heard by the Family Court. Prior to the hearing, a court-ordered mediation process must take place, to avoid hearing the dispute in court, if appropriate.

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:

- (A) the minor's level of understanding and maturity;
- (B) the minor's wishes; and
- (C) the views of each parent/guardian.

While considering the child's best interests remains unchanged from the current process, the matters above would add clarity and transparency to the Family Court's evaluative process.

(ii) Reasons for reform

The Commission received submissions supporting a formalised dispute resolution process for minors in circumstances where one or both parent(s)/guardian(s) do not consent to a minor's application to change gender.⁴⁸⁹

A number of stakeholders 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.⁴⁹⁰ The Commission's recommended dispute resolution process provides this independent process, while still involving parents to the extent deemed necessary by the Family Court.

As detailed in the Discussion Paper, 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.⁴⁹¹ The Commission heard from the Family Court that it has the capacity and the resources to accommodate the Commission's recommended model.⁴⁹²

Submissions to the Commission recommended a mediation process be available prior to any formalised court hearing.⁴⁹³ The Commission considers that mediation is the most appropriate first step in the dispute resolution process as it will facilitate communication between the parent(s)/guardian(s) and the minor. The Commission recognises, however, that mediation may not always be possible or appropriate depending on individual family circumstances. The Commission considers the Family Court is in the best position to assess what is appropriate and in the best interests of a minor on a case-by-case basis.

489 Eg, submissions from the Commissioner for Children and Young People; a submission endorsed by Intersex Human Rights Australia; Amnesty International; TransFolk and Human Rights Law Centre; and WA AIDS Council.

490 Submissions from Trans Health Australia; Commissioner for Children and Young People; TransFolk of WA and the Human Rights Law Centre; consultation with Youth Pride Network.

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

492 Submission from the Family Court of WA.

493 Consultation with the Commissioner for Children and Young People.

An evaluation of the minor's best interests is supported by the Children's Court of WA⁴⁹⁴ and the Commission considers it is best practice when resolving a dispute involving a minor. This approach has been adopted in Argentina,⁴⁹⁵ Belgium,⁴⁹⁶ New Brunswick⁴⁹⁷ and Newfoundland and Labrador⁴⁹⁸ in Canada, Ireland,⁴⁹⁹ Norway,⁵⁰⁰ and in California in the United States.⁵⁰¹ The recommended 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.

Court oversight is consistent with recent amendments in South Australia, which requires Magistrates Court approval as part of the application process for a child.⁵⁰² Internationally, the approval of an applicable court is also required in Ireland,⁵⁰³ Malta,⁵⁰⁴ New Zealand⁵⁰⁵ and California in the United States.⁵⁰⁶

Recommendation 15

The Births, Deaths and Marriages Registration Act 1998 (WA) be amended to provide a dispute resolution process for minors if one or more parent(s)/guardian(s) do not provide statutory declarations or signatures for a minor's application to change gender.

(e) Limits on applications to change gender

- (i) The Commission's recommended model: same as change of name

The Commission heard from the Registry of Births, Deaths and Marriages that, once enacted, the Births, Deaths and Marriages Registration Amendment (Change of Name) Bill 2018 (WA) would limit the number of change of name applications to once every 12 months and a limit of three times in a lifetime.

The Commission recommends applications to change gender on a Gender Identity Certificate mirror the change of name provisions, being (once enacted) once every 12 months, with a lifetime limit of three applications. 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.

- (ii) Reasons for reform

In the Commission's preliminary consultations, Trans Health Australia told the Commission they preferred not limiting the number of applications, but that if a limit is necessary, there should be provision for further applications in special circumstances. Other stakeholders, including TransFolk of WA and the WA AIDS Council shared this view in their submissions.⁵⁰⁷

The Commission acknowledges the views of these stakeholders and the need to avoid arbitrarily or unfairly limiting the legal recognition of an individual's self-determined gender identity. The Commission recognises, however, that a system without limits may prove administratively difficult and inconsistent with other Australian jurisdictions and change of name practice.

494 Submission from the Children's Court of WA.

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

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

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

498 *Vital Statistics Act*, SNL 2009, c V-6.01, s 26.1(4).

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

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

501 *Health and Safety Code 2017* (California) s 103430(e)(A).

502 SA Act s 29J(2).

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

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

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

506 *Health and Safety Code 2017* (California) s 103430(e).

507 Submissions from TransFolk of WA and Human Rights Law Centre and the WA AIDS Council.

In South Australia, for example, the Registrar has a discretion to set a limit⁵⁰⁸ and has done so by limiting applications to one per year and a lifetime limit of three applications.⁵⁰⁹ An applicant can, however, seek approval from the Magistrates Court for further applications (if refused by the Registrar).⁵¹⁰ Both the Victorian Bill⁵¹¹ and the Equal Opportunity Tasmania paper⁵¹² also proposed a limit of one application per year.

The Commission considers that a limit on the frequency and number of times a person can change their gender will minimise this process being used for inappropriate purposes. As noted above, the model allows for further applications to be made with an order from an appropriate court or tribunal such as the Magistrates Court or the SAT. The Commission favours adopting an approach which is consistent with other Australian jurisdictions.

(f) Access to historical information

Under the current process, when a person receives a recognition certificate and requests a new birth certificate, the person's birth registration is updated to include the amended sex classification (and change of name, where applicable) as a new version of the registration. The new birth certificate will include the amended sex classification and new name without reference to the old information.⁵¹³

The historical record of the original birth registration details are retained on the Register within the old, superseded version. Access to such details on the Register are strictly limited.

In the Commission's consultations with the trans and gender diverse community, privacy and fear of being 'outed' as a trans person were important concerns.⁵¹⁴

The Commission recommends, at a minimum, access to superseded versions of birth registration information (or Gender Identity Certificate registration, if separate from the birth registration), including superseded sex/gender and name information, be strictly limited. This is consistent with the current limitations on access to historical change of sex information under the GR Act.

Recommendation 16

The *Births, Deaths and Marriages Registration Act 1998* (WA) be amended to include restrictions on access to superseded versions of sex/gender information held by the Registrar of Births, Deaths and Marriages.

7.6 Optionality Model

(a) Optional sex/gender on birth certificates

While the Commission's recommendation is for sex to be removed from birth certificates, it is conscious of concern expressed in a number of submissions regarding the removal of sex from birth certificates.

The Commission considered an alternative model during the review process in which sex could remain, but would be optional, on birth certificates (**Optionality Model**). This model was outlined during consultation with the Registry and suggested in submissions from the Australian Medical Association, the Commissioner for Children and Young People and members of the public.⁵¹⁵ The Australian Medical Association and Commissioner for Children and Young People discussed this alternative as a means to address public resistance to potential changes.

508 SA Act s 29S.

509 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>.

510 SA Act s 29S(3).

511 Victorian Bill cl 8.

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

513 A change of name only results in a new birth certificate which refers to the old information.

514 Submissions from TransFolk of WA and the Human Rights Law Centre and members of the public.

515 Consultation with Registrar of Births, Deaths and Marriages; submissions from members of the public; the Australian Medical Association; and Commissioner for Children and Young People. See also submission from Sex Not Stereotypes Alliance who support a sex/genderless birth certificate as an alternate model, but only for those born 'indeterminate'.

Under the Optionality Model, the sex field on birth certificates would be amended to 'sex/gender'. The sex/gender field would be listed only where an applicant has requested it to be included and may be removed at a later date depending on an applicant's preference. The Commission's recommendations as to the Gender Identity Certificate process would still apply in relation to the Optionality Model, for proof of gender where an individual has elected for a sex/genderless birth certificate or their birth is either not registered or is registered outside of Western Australia.

The Optionality Model is based on self-determination of identity, and it provides individuals (and their parents) with the option to exclude sex from an important personal identification document, while having the option to prove gender (by way of a Gender Identity Certificate) where required.

(b) Reasons why Optionality Model is not preferred by the Commission

Although the Commission considered the Optionality Model as a valid alternative, the Commission's preference is for the recommended model for the reasons detailed below.

The Commission understands the importance of birth certificates as a record of a historical and registrable event (namely, the individual's birth). The Optionality Model, like the current process, permits an amendment to the record of this historical event where a person changes sex/gender on their birth certificate. While the Commission acknowledges that such changes to the Register do not overwrite the information registered at birth, the Commission's preference is to avoid replacing information registered at birth, on the face of the birth certificate. As noted above, the Commission recommends that sex be removed from birth certificates, which removes the requirement to replace registered birth sex with a change of sex or gender at a point after birth.

The Commission considers that the Optionality Model would necessarily conflate sex and gender, which only continues to endorse the current confusion of these terms in the GR Act. The Commission's recommended model avoids conflation of this terminology.

The Commission also recognised the Optionality Model may create circumstances where children who are born with intersex variations may be 'outed'. The Commission anticipates that under the Optionality Model it is possible that the majority of infants and young children with their sex/gender omitted from their birth certificate will be children born with intersex variations. If this is the case, there is the possibility that those children will be 'outed' as having intersex variations when presenting their birth certificate for identification purposes. It is also possible that, in the interests of avoiding this situation, parents may feel pressure to register their children within the sex binary and consider unnecessary medical interventions before their child is able to consent. The Commission's preference is to avoid the potential for this to occur.

7.7 Other considerations

(a) Key concerns around specified sex/gender spaces

The Commission heard from some stakeholders concerned that single sex/gender related spaces and 'affirmative action' or 'positive discrimination' measures (eg, scholarships for women) may be affected by recognising self-determined gender (that is, including trans women).⁵¹⁶ These concerns include that recognition of gender by self-determination may impede special measures that have been introduced for the protection and advancement of women.⁵¹⁷ The Commission understands the importance of these spaces and measures.

⁵¹⁶ Submissions from Feminist Legal Clinic; Sex Not Stereotypes Alliance; Australian Family Association and Allcare Mother and Baby Health Service; members of the public.

⁵¹⁷ Supplementary submission from the Feminist Legal Clinic.

Some raised concern about trans women perpetrating assaults against others in female spaces, such as bathrooms, family violence refuges and prisons. The Commission was not presented with evidence which established that trans women impose an inherent risk to others in these spaces. The Commission also notes documented evidence of violence being perpetrated against trans and gender diverse people.⁵¹⁸

The Commission recognises that single sex/gender spaces should take into account, amongst other things, the personal safety of all people in those spaces. The Commission heard from the Department of Justice (Corrective Services) that the existing practice in prisons is to take into account a prisoner's self-identified gender before determining an appropriate prison placement.⁵¹⁹ The Commission's proposed model does not change this. The approach to any assaults in prisons should be the application of appropriate policies and procedures around risk assessment and laws relating to assault, rather than simply excluding trans women.

Similarly, if there are concerns about trans women being included in family violence refuges, the Commission considers there should be appropriate policies and procedures to ensure all feel safe in such places, rather than simply excluding trans women.

In the UK Government Equalities Office's review of their *Gender Recognition Act 2004 (UK)*, they outlined that addressing these concerns is, in practice, one of balance between protections against discrimination and exemptions to anti-discrimination provisions.⁵²⁰ The Commission agrees with this approach and considers that any concerns in relation to the application of single sex/gender spaces or affirmative action/positive discrimination measures should be addressed in the foreshadowed review of the EO Act, rather than mitigating against the adoption of the Commission's recommended model.

(b) Binary sex in legislation

As noted in Chapter 4, a range of Western Australian legislation and regulations are premised upon references to binary sex or gender classifications.⁵²¹ If additional sex or gender classifications were recognised (such as a 'non-binary' classification), 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.

The Commission received a submission from the Department of Justice (Corrective Services) that addressed the binary sex/gender classifications in the *Prisons Act 1981 (WA)* and the *Young Offenders Act 1994 (WA)*. The Department submitted that although the *Prisons Act 1981 (WA)* provides for the separation of male and female prisoners, the Department's existing procedures take into account a prisoner's self-identified gender before determining an appropriate prison placement.⁵²² The Department concluded that based on this practice, no consequential amendments to the *Prisons Act 1981 (WA)* would be required. The Department considered that amending the EO Act to include protection against discrimination based on gender identity and intersex status would provide sufficient legislative safeguards for prisoners.⁵²³ The Department also considered the *Young Offenders Act 1994 (WA)* and recommended the binary classification in section 152(4) be removed.⁵²⁴ The Commission understands that the *Young Offenders Act 1994 (WA)* is subject to review by the Department and section 152(4) will be reviewed as part of the overall review process.⁵²⁵

518 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).

519 Submission from the Department of Justice (Corrective Services).

520 Minister for Women and Equalities (UK), *Reform of the Gender Recognition Act – Government Consultation* (July 2018) 45 <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/721725/GRA-Consultation-document.pdf>.

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

522 Submission from the Department of Justice (Corrective Services).

523 Submission from the Department of Justice (Corrective Services).

524 Submission from the Department of Justice (Corrective Services).

525 Submission from the Department of Justice (Corrective Services).

(c) Entitlements under instruments following change of gender

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. The Commission recommends a similar provision be added to the BDMR Act with respect to a change in gender classification.

Recommendation 17

The *Births, Deaths and Marriages Registration Act 1998* (WA) be amended to provide protections for entitlement under a will trust or other instrument for a person who has changed their gender.

GLOSSARY AND DEFINED TERMS

(a) Glossary

In this Final Report, 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.

| Term | Description |
|--|---|
| 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 how a person identifies, the ways they express their personal and social identity and the way they are recognised within a community. |
| 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. ⁵²⁶ 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. ⁵²⁷ |
| Gender identity | A person’s deeply felt sense of being a man, a woman, both, in between, neither, or something other. It is recognised that a person’s sex as registered at their birth may not necessarily be the same as that person’s gender identity. |
| Intersex person | A person born with genetic, hormonal or other sex characteristics that are not typically male or female. Intersex people have a diversity of bodies and identities. ⁵²⁸ 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. ⁵²⁹ 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 report, the Commission has endeavoured to use ‘sex characteristics’ or ‘intersex people’ where possible. |
| 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 | For the purposes of this Final Report, a person’s sex characteristics associated with their biological sex. |

⁵²⁶ American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* (American Psychiatric Publishing, 5th ed, 2013) 451–459, 451.

⁵²⁷ Arlene Istar Lev, ‘Gender Dysphoria: Two Steps Forward, One Step Back’ (2013) 41(3) *Clinical Social Work Journal* 288–296.

⁵²⁸ Australian Human Rights Commission, *Resilient Individuals: Sexual Orientation, Gender Identity & Intersex Rights* (2015) 5.

⁵²⁹ SD Act s 4 (definition of ‘intersex’).

| Term | Description |
|--|--|
| Sex characteristics | Sex characteristics are a person's physical features relating to sex, including genitalia and other sexual and reproductive anatomy, chromosomes, hormones, and secondary physical features emerging from puberty. ⁵³⁰ |
| Trans and gender diverse | An umbrella term used to describe all people whose gender identity is different to their sex assigned at birth. Under the broad trans and gender diverse umbrella are more specific terms that some trans and gender diverse people may use. |
| 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. ⁵³¹ 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%. ⁵³² |
| 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. ⁵³³ |

530 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.

531 Androgen Insensitivity Syndrome Support Group Australia, *Fact Sheets* <http://www.aiisga.org.au/fact_sheets.htm>.

532 Androgen Insensitivity Syndrome Support Group Australia, *Fact Sheets* <http://www.aiisga.org.au/fact_sheets.htm>.

533 *Mosby's Dictionary of Medicine, Nursing & Health Professions* (Elsevier, 9th ed, 2016) (definition of 'congenital adrenal hyperplasia').

| Term | Description |
|-----------------------------|---|
| 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. ⁵³⁴ |
| 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. ⁵³⁵ |
| Vaginoplasty | A surgical procedure for the construction or reconstruction of the vagina. |

(b) Defined terms

The Commission has used the following defined terms in this Final Report.

| 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 |
| DFAT | Department of Foreign Affairs and Trade |
| EO Act | <i>Equal Opportunity Act 1984 (WA)</i> |
| First Report | Report made by the delivery midwife to the 'Chief Health Officer' of the Department of Health within 48 hours of the birth of a child in WA |
| Gender Identity Certificate | A proof of gender document provided by the Registrar, as recommended by the Commission in Chapter 7 of this Final Report |
| Government Guidelines | Commonwealth Government Attorney-General's Department's <i>Guidelines on the Recognition of Sex and Gender</i> (2nd ed, 2015) |
| GR Act | <i>Gender Reassignment Act 2000 (WA)</i> |

⁵³⁴ Elizabeth Martin, *Oxford Concise Medical Dictionary* (Oxford University Press, 9th ed, 2015) (definition of 'hormone replacement therapy').

⁵³⁵ Elizabeth Martin, *Oxford Concise Medical Dictionary* (Oxford University Press, 9th ed, 2015) (definition of 'Turner's syndrome').

| Defined term | Full description |
|------------------------|---|
| GR Regulations | <i>Gender Reassignment Regulations 2001 (WA)</i> |
| ICAO | International Civil Aviation Organisation |
| LGBTIQ | Lesbian, gay, bisexual, transgender, intersex and queer community |
| NLSA | <i>National Legal Services Authority v Union of India and Ors</i> |
| Norrie | <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> |
| Optionality Model | An alternative model considered by the Commission in which sex could remain, but would be optional, on birth certificates |
| 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 |
| SALRI | South Australian Law Reform Institute |
| SALRI Report | SALRI's Report on <i>Legal Registration of Sex and Gender and Laws Relating to Sex and Gender Reassignment</i> |
| 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> |
| Second Report | Report 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 |
| 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 |

| Defined term | Full description |
|------------------------------|--|
| Tasmanian Regulations | <i>Births, Deaths and Marriages Registration Regulations 2010 (Tas)</i> |
| UK Consultation Paper | Consultation paper considering reform of the Gender Recognition Act 2004 (UK) in July 2018 |
| UN Expert Report | United Nations independent expert report released in July 2018 |
| UN Recommendations | United Nations Statistical Division's <i>Principles and Recommendations for a Vital Statistics System (Revision 3, 2014)</i> |
| Victorian Act | <i>Births, Deaths and Marriages Registration Act 1996 (Vic)</i> |
| Victorian Bill | <i>Births, Deaths and Marriages Registration Amendment Bill 2016 (Vic)</i> |
| 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 1:

STAKEHOLDERS CONSULTED BY THE COMMISSION

As part of its consultation process (in addition to or separate from the submissions process), the Commission contacted, or was contacted by, the following organisations in relation to their views relating to the Terms of Reference for this report:

(a) Review specific bodies or departments

- (i) President of the Gender Reassignment Board, Magistrate Patrick Hogan;
- (ii) Registry of Births, Deaths and Marriages;
- (iii) Commonwealth Attorney-General's Department;
- (iv) Australian Passport Office / Department of Foreign Affairs and Trade;
- (v) Commissioner for Children and Young People;
- (vi) Department of Education (School Psychology Services);
- (vii) Department of Home Affairs;
- (viii) Independent Schools Council of Australia; and
- (ix) Association of Independent Schools of Western Australia;

(b) Health and medical associations:

- (i) Australian and New Zealand Professional Association for Transgender Health & World Professional Association for Transgender Health;
- (i) Australian Medical Association (Western Australia);
- (ii) Department of Health (Western Australia);
- (iii) National LGBTI Health Alliance;
- (iv) Royal Australasian College of Physicians;
- (v) Royal Australian and New Zealand College of Obstetricians and Gynaecologists;

- (vi) Royal Australian and New Zealand College of Psychiatrists; and

- (vii) 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 (as he then was) 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;
- (vi) Western Australian Bar Association; and
- (vii) Western Australia Police Force;

(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: LIST OF RESPONSES RECEIVED

| | | |
|--|---|--|
| Allcare Mother and Baby Health Service (E V Whitely, Director) | Dr Paul W Skerritt (Psychiatrist, Clinical Professor, UWA Medical School) | Office of the Public Advocate (Pauline Bagdonavicius, Public Advocate) |
| Amnesty International Australia | Dr Sam Winter (Associate Professor and Team Leader in Sexology, School of Public Health, Curtin University) | Perth Inner City Youth Service (Andrew Hall, Executive Officer) |
| Association for Reformed Political Action | Equal Opportunity Commission WA (Dr John Byrne, Acting Commissioner) | Rainbow Labor WA (Andrew Skinner and Jaime Page) |
| Australian Bureau of Statistics | Family Court of Western Australia (Chief Judge Stephen Thackray) | Registry of Births, Deaths and Marriages (Brett Burns, Registrar) |
| Australian Christian Lobby (Peter Abetz, Western Australia Director) | Federation of Australian Buddhist Councils (Cecilia Mitra, President) | Royal Australian & New Zealand College of Psychiatrists, Western Australian Branch (Dr Elizabeth Moore, Chair) |
| Australian Family Association (Warwick D'Silva) | Feminist Legal Clinic (Anna Kerr, Principal Solicitor) | Sex Not Stereotypes |
| Australian Medical Association | GLBTI Rights in Ageing (June Lowe, Chair) | South Australian Law Reform Institute (Dr David Plater, Deputy Director) |
| Centre for Human Rights Education (Professor Baden Offord, Director) | Hindu Council of India, WA Chapter (Damji Koriya, Coordinator) | Telethon Kids Institute (Dr Ashleigh Lin, Program Head of Mental Health and Youth) |
| Children's Court of Western Australia (Judge J Wager, President) | Intersex Human Rights Australia (Morgan Carpenter, Co-Executive Director) | The Royal Australasian College of Physicians |
| Commissioner for Children and Young People WA (Colin Pettit, Commissioner) | LJ Goody Bioethics Centre, Agent of Roman Catholic Archdiocese of Perth (Rev Dr Joseph Parkinson, Director) | Trans Health Australia (Melody Moore, National Chairperson) |
| Curtin University | Member for East Metropolitan Region (Hon Charles Smith MLC) | TransFolk of WA and Human Rights Law Centre |
| Department of Education (Jennifer McGrath, Acting Director General) | Member for North Metropolitan Region (Hon Alison Xamon MLC) | Wallbanks Legal (Rachael Wallbank) |
| Department of Foreign Affairs and Trade | National Tertiary Education Union (Dr Jonathan Hallett, Acting WA Division Secretary and Dr David Rhodes, WA Queer Unionist in Tertiary Education WA Steering Committee Representative) | Western Australian AIDS Council (David Kernohan, CEO) |
| Department of Health (Dr D J Russell-Weisz, Director General) | | World Professional Association for Transgender Health (Dr Gail Knudson, President) |
| Department of Justice (Corrective Services) (Dr Adam Tomison, Director General) | | Youth Pride Network |
| Department of Local Government, Sport and Cultural Industries (Duncan Ord, Director General) | | Anonymous 1 |
| Dr Nin Kirkham (UWA Discipline of Philosophy) | | Anonymous 2 |
| | | Anonymous 3 |
| | | Anonymous 4 |

| | | | | |
|---------------|---------------|----------------|--------------|--------------|
| Anonymous 5 | Kate B. | Frog D. | Margaret G. | Michelle H. |
| Anonymous 6 | Cam B. | Jessica D. | Alexis G. | Lauren H. |
| Anonymous 7 | Jo B. | Mary D. | Kathy G. | Nathaniel H. |
| Anonymous 8 | Tara C. | Layth D. | Naomi G. | Cassandra |
| Ryan A. | Karlee C. | Domenico D. | Veronica G. | (Gordon) H. |
| Nicole A. | Erin C. | Nicolai d. | Derek G. | Grace I. |
| Felice A. | Ian C. | Emily D. | Peta G. | Riley J. |
| Natalie A. | Bree C. | Sean D. | Demi G. | Brynne J. |
| Alexandra A. | Lee C. | Gail D. | Kate G. | Benjamin J. |
| Larissa A. | Kristy C. | Kate D. | Natalie G. | Leyon J. |
| Sophie A. | Andrew C. | Christine D. | Alexander G. | Clars J. |
| Terrence A. | Margaret C. | Kasey-Faith D. | Peter G. | Holly J. |
| Annie A. | Jess C. | Helen D. | Caroline H. | Alyssia J. |
| Eugene A. | Florence C. | Alex D. | Gillian H. | Alysha J. |
| Chloe A. | Sandy C. | James D. | Peter H. | Leece J. |
| Nick A. | Jamie C. | Rhiannon E. | Catherine H. | Sally J. |
| Jacqueline B. | Eloise C. | Rebecca E. | Levi H. | Shannon J. |
| Kim B. | Jessica C. | Sky E. | Logan H. | Jane J. |
| G&K B. | Laura C. | Alison E. | Rachel H. | Melanie J. |
| Mitchell B. | Deborah C. | Sam E. | Sarah H. | Tricia J. |
| Brandon B. | Isabella C. | Louise E. | Petrina H. | Deidre J. |
| Jeremy B. | Grace C. | Amelia E. | Catherine H. | Toby J. |
| Rowena B. | Catherine C. | Liam E. | Natasha H. | Vanessa K. |
| Bryden B. | Iosha C. | Gillian E. | Kimberley H. | Marion K. |
| Emily B. | Beth C. | Michelle E. | James H. | Stacey K. |
| Amber B. | Jenny C. | Alison E. | Fiona H. | Rachel K. |
| Ella B. | Neil C. | Carissa E. | Bridget H. | Jess K. |
| Brooke B. | Samantha C. | Amanda F. | Vanessa H. | Rose K. |
| H&V B. | Sara C. | John F. | Greta H. | Arrol K. |
| Tristan B. | Niamh C. | Misty F. | Mitchell H. | Rhiannon K. |
| Freddy B. | Jacqueline C. | Dylan F. | Phillip H. | Tyko K. |
| Geoff B. | Rebecca C. | Lachlan F. | William H. | Graham K. |
| Ashlyn B. | Jacob C. | Jarv F. | natasha H. | Sam K. |
| Lisa B. | Florence C. | Louise F. | Tegan H. | Will K. |
| Blank B. | Jake C. | Jasmine F. | Jessica H. | Dezire K. |
| Lucy B. | Laura C. | Claire F. | Zoey H. | Rachael K. |
| Katie B. | Darian C. | George F. | Theodore H. | Jess K. |
| Danielle B. | Brendan C. | Benjamin F. | Steve H. | Marina L. |
| Lauren B. | Jasmyne C. | Clare F. | Megan H. | Jarmo L. |
| Sami B. | Liberty C. | Katskin F. | Laura H. | Rayna L. |
| Sarah B. | Millicent C. | Gill F. | Chloe H. | Stevie L. |
| Emily B. | Sarah C. | Samantha G. | Louise H. | Joni L. |
| Sam B. | Zin D. | Priscilla G. | Amanda H. | Elizabeth L. |
| Clayton B. | Duc D. | Adam G. | Chase H. | Nick L. |
| Jack B. | Michele D. | Grace G. | Isabella H. | Alastair L. |
| Jane B. | Harper D. | John G. | Bronwyn H. | Rachel L. |
| Chloeq B. | T D. | John G. | Aleina H. | Thomas L. |
| Elise B. | Lara d. | Jessica G. | Brooke H. | Holly L. |

| | | | | |
|----------------|----------------|--------------|------------------|----------------|
| Keira L. | Skylar M. | Kat P. | Andrew S. | Tiffany v. |
| Max L. | Britt M. | Molley P. | Grace S. | Jacob V. |
| Kim L. | Kristina M. | Claire P. | Dana S. | Renae V. |
| Karen L. | Janica M. | Alana P. | Tanya S. | Carleen V. |
| Emily L. | Elise M. | Virginia R. | Julee S. | Nathan V. |
| Georgia L. | Talitha M. | Kelsey R. | Debra S. | Rosemary V. |
| Melvin L. | Dee anna M. | Chase R. | Amy S. | Linny W. |
| Tamara L. | Sylvanna M. | Riley R. | Michelle S. | Lane W. |
| Peter L. | Patrick M. | Marilyn R. | Jessica S. | Haley W. |
| Christopher L. | Katie M. | Bryanne R. | Jackie S. | Stuart W. |
| Sook Kwan L. | Tanya M. | John R. | Cairan S. | Matt W. |
| Laura L. | Alana M. | Chenelle R. | Eva S. | Elloise W. |
| Clare L. | Bridget M. | Melissa R. | Sophie S. | Angus W. |
| Dirk L. | Naomi M. | Diane R. | Chloe S. | Sadie W. |
| Sue L. | Deborah M. | Peter R. | Bruce S. | Liz W. |
| W M. | Emily M. | Tara R. | Briannah S. | Greg W. |
| Talei M. | Andrew M. | Heath R. | Alex S. | Julia W. |
| Chloe M. | Rory N. | Shantelle R. | Jennifer S. | Carrie W. |
| Renee M. | Kimberley N. | Vera R. | Erik S. | Mitchell W. |
| Rachael M. | Adrian N. | Mitchell R. | Sonya S. | Yvonne W. |
| Ewan M. | Sheree N. | Laura R. | David S. | Byron W. |
| Conor M. | Jacinta N. | Kelton R. | Finnley S. | Georgia W. |
| Luke M. | Mary N. | Charmaine R. | Phoebe S. | Dino W. |
| Fiona M. | Genevieve N. | Libby R. | Gayatrii S. | Thomas W. |
| Shannon M. | Dana N. | Megan R. | Bryce S. | Evelyn W. |
| Ben M. | R O. | Michael R. | Selena S. | Karen W. |
| Anna M. | Lavinia O. | Elleot R. | Yvonne S. | Emery W. |
| Ash M. | Graham O. | Jade R. | Ellie S. | Emily-Alice W. |
| Cheryl M. | Frank O. | Cameron R. | Kim T. | Kerensa W. |
| Richard M. | Daniel O. | Isabel R. | Gail T. | Rosemary W. |
| Morgan M. | Cara O. | Chelsie R. | Isabella T. | Matty W. |
| Elizabeth M. | Jaime P. | Kate R. | Jesse T. | Rebecca W. |
| Julie M. | Cheree P. | Eisha R. | Kristen T. | Dani W. |
| Madison M. | Michelle P. | Ali S. | Sam T. | Heather W. |
| Elias M. | Richard P. | Tym S. | Tosari T. | Lotus Y. |
| Rebecca M. | Luke P. | Ness S. | Rebecca T. | Vicky Y. |
| Hayley M. | Stuart P. | Jillian S. | Andrew T. | Rebeka Y. |
| Kylie M. | Sanna P. | Karinda S. | Crystal T. | Dianne Z. |
| Adrian M. | Robert P. | Judith S. | Leah T. | Jacqui. |
| Justin M. | Nimue Clair P. | Charlie S. | Alexandra T. | Barbara. |
| P M. | Avery P. | Katarina S. | Sylvie T. | |
| Nova M. | Melanie P. | Rachel S. | Luca T. | |
| Selina M. | Jennifer P. | Greg S. | Melissa Grace T. | |
| Darren M. | Anjolie P. | Ryan S. | Danijela T. | |
| Anke M. | Lee P. | Ryan S. | Jarryd U. | |
| Laura M. | Alex P. | Jackie S. | Hannah U. | |
| Tanya M. | Tracie P. | Allison S. | Andrew V. | |
| Daniel M. | Lesley P. | Jessie S. | Sasha V. | |

APPENDIX 3:

COMPARISON OF CURRENT PROCESS & RECOMMENDATIONS

| Issue | Current process | Recommended model |
|--|--|---|
| Registration of birth sex | | |
| Recording, notification and registration of sex at birth | Report from delivery midwife to 'Chief Health Officer' within 48 hours of birth (mandatory 'gender' classification: Male, Female or Indeterminate) (First Report). | First Report is unchanged, except mandatory sex, not 'gender', classification. |
| | Report from 'responsible person' in hospital to Registrar within one month of birth (mandatory 'gender' classification: Male, Female or Indeterminate) (Second Report). | Second Report is unchanged, except mandatory sex, not 'gender' classification. |
| | Birth Registration Form from parents to Registrar within 60 days of birth (mandatory sex classification: Male or Female) (BRF). | Same, except mandatory sex classifications: Male, Female or Indeterminate. |
| Birth statistics for ABS | From the BRF. | No change. |
| Information on the Register | Sex on Register (from BRF). | No change. |
| Birth certificate | Birth certificates detail sex of person (either Male or Female). | No sex classification on birth certificates. |
| Certificate for documentary proof of gender | | |
| Documentary proof of sex/gender | Sex (only) is classified on birth certificates. | Application to Registrar for Gender Identity Certificate as set out below. |
| Documentary proof of sex/gender for WA residents born outside of WA | Recognition Certificate available to those born outside of, but resident in, WA. | Gender Identity Certificate available to people resident in WA for at least previous 12 months, with statutory declaration declaring their affirmed gender and residency. |
| Gender Identity Certificates | | |
| Applications for Gender Identity Certificates with no change of gender (adults) | N/A. | Application to the Registrar, which specifies the applicant's affirmed gender. |

| Issue | Current process | Recommended model |
|--|---|--|
| Gender Identity Certificates | | |
| Applications for Gender Identity Certificates with no change of gender (under 18) | N/A. | Application to the Registrar, by one parent/guardian, which specifies the minor's sex/gender. |
| Available classifications | Male, Female. | Male, Female, Non-binary. |
| Application for change of gender on Gender Identity Certificate (adults) | <p>Change of sex on birth certificate following receipt of Recognition Certificate under the GR Act, which 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, along with a statutory declaration by applicant, declaring genuine belief of their affirmed gender. |
| Application for change of gender on Gender Identity Certificate (under 12) | <p>Change of sex on birth certificate following receipt of Recognition Certificate under the GR Act, which requires:</p> <ul style="list-style-type: none"> • medical 'reassignment procedure'; • application is to be supported by medical practitioner statement and other materials required under GR Regulations reg 4(b); and • Board must be satisfied it is in the best interests of the minor. | <p>Application to Registrar, by one parent/guardian, with:</p> <ul style="list-style-type: none"> • a statutory declaration by applicant parent/guardian, declaring genuine belief of the child's sex or affirmed gender; and • signature(s) of all responsible parent(s)/guardian(s).⁵³⁶ |

536 Being the parent(s) or guardian(s) with parental responsibility of the minor as under the *Family Law Act 1975* (Cth).

| Issue | Current process | Recommended model |
|--|---|---|
| Application for change of gender on Gender Identity Certificate (12 or over) | Same as above. | Application to Registrar by minor aged 12 or over, with: <ul style="list-style-type: none"> • a statutory declaration by minor, declaring genuine belief of their affirmed gender; and • signature of one parent/guardian.⁵³⁷ |
| Dispute resolution process – where one or more parent(s)/guardian(s) do not consent to application and Registrar does not waive requirement for parental/guardian consent | N/A | Application to Family Court by minor with support of one parent/guardian or next friend, and with mandatory court-facilitated mediation process before final court hearing. <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. |
| Privacy | No reference to change of sex on new birth certificate, although historical information of sex is retained by the Registrar and access is restricted. | No reference to change of sex/gender included on Gender Identity Certificate, however historical information of sex/gender is retained by the Registrar and access is restricted. |
| Limit on applications to change gender on 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. |

⁵³⁷ Ibid.

APPENDIX 4:

COMPARISON OF LEGISLATION ACROSS AUSTRALIAN JURISDICTIONS

| 1. Registration of sex at birth | | NSW | VICTORIA | VICTORIAN BILL | SA |
|--|--|--|--|--|---|
| 1.1 Birth notification | | NSW | VICTORIA | VICTORIAN BILL | SA |
| | WA | NSW | VICTORIA | VICTORIAN BILL | SA |
| Sex classification mandatory according to approved forms (male, female or indeterminate). ⁴⁷³ | Sex classification mandatory (specific sex markers are not covered by legislation/regulations). ⁴⁷⁵ | Sex classification not mandated under the legislation/regulations. | Sex classification not mandated under the legislation/regulations. | No proposed amendment to current status. | Sex classification mandatory if determined (specific markers not covered by legislation/regulations). ⁴⁷⁸ |
| Notification must be provided by hospital/doctor/midwife within one month of birth. ⁴⁷⁴ | Notification must be provided by hospital/doctor/midwife within 7 days of birth. ⁴⁷⁶ | Notification must be provided by hospital/doctor/midwife within 21 days of birth. ⁴⁷⁷ | Notification must be provided by hospital/doctor/midwife within 21 days of birth. ⁴⁷⁷ | | Notification must be provided by hospital/doctor/midwife within 7 days of birth. ⁴⁷⁹ |
| TASMANIA | | TASMANIA (options for reform) | QUEENSLAND | NT | ACT |
| Unclear if sex classification is mandatory (particulars to be collected are determined by the Registrar). ⁴⁸⁰ | No proposed recommendation to current status. | Unclear if sex classification is mandatory (no public information is provided in detail what is included in the approved form). ⁴⁸² | Unclear if sex classification is mandatory (no public information is provided in detail what is included in the approved form). ⁴⁸² | Sex classification mandatory (specific sex markers are unclear). ⁴⁸⁴ | Sex classification mandatory only if determinable (specific markers not covered by legislation/regulations). ⁴⁸⁶ |
| Notification must be provided by hospital/doctor/midwife within 21 days of birth. ⁴⁸¹ | | Notification must be provided by hospital/doctor/midwife within 2 working days of birth. ⁴⁸³ | Notification must be provided by hospital/doctor/midwife within 2 working days of birth. ⁴⁸³ | Notification must be provided by the hospital/doctor/midwife within 10 days of birth. ⁴⁸⁵ | Notification must be provided by the hospital/doctor/midwife within 7 days. ⁴⁸⁷ |

| 1. Registration of sex at birth | | VICTORIAN BILL | | SA |
|--|---|---|--|--|
| 1.2 Registration of birth | | VICTORIA | | SA |
| 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).⁴⁸⁸</p> <p>The parents/guardians must register the birth within 60 days after the date of the birth.⁴⁸⁹</p> | <p>Sex classification mandatory (specific sex markers are not covered by legislation/regulations).⁴⁹⁰</p> <p>The NSW birth registration statement specifies male or female for child's sex.⁴⁹¹</p> <p>The parents/guardians must register the birth within 60 days after the date of the birth.⁴⁹²</p> | <p>Sex classification mandatory (specific sex markers are not covered by legislation/regulations).⁴⁹³</p> <p>The Victorian birth registration statement specifies male or female for child's sex.⁴⁹⁴</p> <p>The parents/guardians must register the birth within 60 days after the date of the birth.⁴⁹⁵</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.⁴⁹⁶ <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.⁴⁹⁷ | <p>Sex classification mandatory if determined (specific sex markers are not covered by legislation/regulations).⁴⁹⁸</p> <p>The SA birth registration statement specifies male or female for child's sex.⁴⁹⁹</p> <p>The parents/guardians must register the birth within 60 days after the date of the birth.⁵⁰⁰</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).⁵⁰¹</p> <p>The Tasmanian birth registration statement specifies male or female for child's sex.⁵⁰²</p> <p>The parents/guardians must register the birth within 60 days after the date of the birth.⁵⁰³</p> | <p>No proposed recommendation to current status, except sex classifications. An additional category of X meaning 'non-binary' is recommended.⁵⁰⁴</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.⁵⁰⁵</p> <p>The parents/guardians must register the birth within 60 days after the date of the birth.⁵⁰⁶</p> | <p>Sex classification mandatory (specific sex markers are not covered by legislation/regulations).⁵⁰⁷</p> <p>The NT birth registration statement specifies male, female or other (unspecified/indeterminate/intersex) for child's sex.⁵⁰⁸</p> <p>The parents/guardians must register the birth within 60 days after the date of the birth.⁵⁰⁹</p> | <p>Sex classification mandatory only if determinable (specific markers not covered by legislation/regulations).⁵¹⁰</p> <p>The ACT birth registration statement specifies male, female, unspecified, indeterminate or intersex for child's sex.⁵¹¹</p> <p>The parents/guardians must register the birth within 6 months after the day of the birth.⁵¹²</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.⁵¹³</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.⁵¹⁴</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.⁵¹⁵</p> <p>A person may apply to the NSW Registrar for the inclusion of additional registrable information (which does not include information relating to change of sex but does include information registered at birth on the register.⁵¹⁶</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.⁵¹⁷</p> <p>A person may apply to the Victorian Registrar for the inclusion of additional registrable information.⁵¹⁸</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.⁵¹⁹</p> |

TASMANIA

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.⁵²⁰

TASMANIA

(options for reform)

No proposed amendment to current status.⁵²¹

QUEENSLAND

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.⁵²²

A person may apply to correct the register (including information registered at birth) upon application in the prescribed form.⁵²³

NT

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.⁵²⁴

ACT

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.⁵²⁵

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> ⁵²⁶ | | <i>Who determines an application to change sex?</i> NSW Registrar. ⁵³⁰ | <i>Who determines an application to change sex?</i> Victorian Registrar. ⁵³³ | <i>Who determines an application to change sex and/or gender?</i> No change: Victorian Registrar. ⁵³⁶ | <i>Who determines an application to change sex and/or gender?</i> SA Registrar. ⁵⁴⁰ |
| <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> NSW Registrar. ⁵³¹ | <i>Who issues the birth certificate or document showing the altered sex?</i> Victorian Registrar. ⁵³⁴ | <i>Who issues the birth certificate or document acknowledging identity showing the altered sex and/or gender?</i> No change: Victorian Registrar. ⁵³⁷ | <i>Who issues the birth certificate or identity acknowledgment certificate showing the altered sex and/or gender?</i> SA Registrar. ⁵⁴¹ |
| <i>Is a change of gender identity recognised?</i> | | <i>Is a change of gender identity recognised?</i> No. The NSW Act refers to change of sex and this is consistent with the requirement for a 'sex affirmation procedure'. ⁵³² | <i>Is a change of gender identity recognised?</i> No. The Victorian Act refers to change of sex and this is consistent with the requirement for 'sex affirmation surgery'. ⁵³⁵ | <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). ⁵³⁸ The requirement for sex affirmation surgery was to be removed. ⁵³⁹ | <i>Is change of gender identity recognised?</i> Yes. The SA Act refers to an application to change 'sex or gender identity'. ⁵⁴² There is a requirement for 'appropriate clinical treatment', however this treatment can be wholly constituted by counselling. ⁵⁴³ |
| <i>No. Despite the reference to 'gender', the GR Act requires a 'reassignment procedure' to change the applicant's physical sex characteristics.</i> ⁵²⁹ | | | | | |

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 |
|--|---|---|---|---|--|
| <i>Who determines an application to change sex?</i> | Tasmanian Registrar. ⁵⁴⁴ | <i>Who determines an application to change sex and/or gender?</i> No change: Tasmanian Registrar. ⁵⁴⁷ | <i>Who determines an application to change sex?</i> Queensland Registrar. ⁵⁵⁰ | <i>Who determines an application to change sex?</i> NT Registrar. ⁵⁵³ | <i>Who determines an application to change sex and/or gender?</i> ACT Registrar. ⁵⁵⁶ |
| <i>Who issues the birth certificate showing the altered sex?</i> | Tasmanian Registrar. ⁵⁴⁵ | <i>Who issues the birth certificate showing the altered sex and/or gender?</i> No change: Tasmanian Registrar. ⁵⁴⁸ | <i>Who issues the birth certificate showing the altered sex?</i> Queensland Registrar will note the reassignment in the register. ⁵⁵¹ | <i>Who issues the birth certificate showing the altered sex?</i> NT Registrar. ⁵⁵⁴ | <i>Who issues the birth certificate or recognised altered sex and/or gender?</i> ACT Registrar. ⁵⁵⁷ |
| <i>Is change of gender identity recognised?</i> | No. The Tasmanian Act refers to change of sex and this is consistent with the requirement for 'sex affirmation surgery'. ⁵⁴⁶ | <i>Is change of gender identity recognised?</i> Yes. Recommendation of an application for change of gender identity (ie, based on self-determination principles). ⁵⁴⁹ | <i>Is change of gender identity recognised?</i> No. The Queensland Act refers to reassignment of sex and this is consistent with the requirement for 'sexual reassignment surgery'. ⁵⁵² | <i>Is change of gender identity recognised?</i> No. The NT Act refers to change of sex and this is consistent with the requirement for 'sexual reassignment surgery'. ⁵⁵⁵ | <i>Is change of gender identity recognised?</i> Uncertain. The ACT Act refers to an application to change 'sex', ⁵⁵⁸ and unless the person is an intersex person, there is a requirement for 'appropriate clinical treatment'. ⁵⁵⁹ 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 |
|---|--|---|--|---|
| 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. ⁵⁶⁰ | As per the form approved by the NSW Registrar. ⁵⁶¹ Following <i>Norrie</i> , the current form specifies 'non-specific' in addition to male or female. | As per the form approved by the Victorian Registrar. ⁵⁶² The current form specifies male or female. ⁵⁶³ Query whether <i>Norrie</i> would apply to permit the Victorian Registrar to accept 'non-specific' in addition to male or female. | Male, female or applicant's nominated 'sex descriptor' (must not be a 'prohibited sex descriptor'). ⁵⁶⁴ | Male, female, non-binary or indeterminate/intersex/ unspecified. ⁵⁶⁵ |

| TASMANIA | TASMANIA (options for reform) | QUEENSLAND | NT | ACT |
|---|--|---|---|---|
| As per the form approved by the Tasmanian Registrar. ⁵⁶⁶ The form specifies male or female. ⁵⁶⁷ Query whether <i>Norrie</i> would apply to permit the Tasmanian Registrar to accept 'non-specific' in addition to male or female. | Male, female or 'non-binary' (X). ⁵⁶⁸ | As per the approved form. ⁵⁶⁹ The current form specifies male or female. ⁵⁷⁰ Query whether <i>Norrie</i> would apply to permit the Queensland Registrar to accept 'non-specific' in addition to male or female. | The legislation, regulations and form approved by the NT Registrar do not specify particular sex markers. ⁵⁷¹ Query whether <i>Norrie</i> would apply to permit the NT Registrar to accept 'non-specific' in addition to male or female. | As per the form approved by the ACT Registrar. ⁵⁷² The current form specifies male, female, unspecified, indeterminate or intersex. ⁵⁷³ |

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.⁵⁷⁴</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.'⁵⁷⁵</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.⁵⁷⁶</p> <p>An applicant must satisfy the board that they:</p> <ul style="list-style-type: none"> believe that their true gender is the gender to which the person has been reassigned,⁵⁷⁷ have adopted the lifestyle and gender characteristics of a person of the gender to which the person has been reassigned,⁵⁷⁸ and received proper counselling in relation to their gender identity.⁵⁷⁹ | <p>Applicant must have undergone a sex affirmation procedure.⁵⁸⁰</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.'⁵⁸¹</p> | <p>Applicant must have undergone sex affirmation surgery.⁵⁸²</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.'⁵⁸³</p> | <p>Application based on self-determination (the applicant must believe their sex is the nominated sex in the application).⁵⁸⁴</p> <p>No medical procedure or treatment required.⁵⁸⁶</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.⁵⁸⁷ | <p>Applicant must have undertaken a sufficient amount of appropriate clinical treatment.⁵⁸⁵</p> <p>Defined as 'clinical treatment need not involve invasive medical treatment (and may include or be constituted by counselling).'⁵⁸⁶</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.⁵⁸⁷ |

2. Registration of change of sex and/or gender (adults)

| 2.3 Required criteria | TASMANIA | TASMANIA (options for reform) | QUEENSLAND | NT | ACT |
|-----------------------|---|---|--|--|--|
| | <p>Applicant must have undergone sexual reassignment surgery.⁵⁸⁸</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 the 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.'⁵⁸⁹</p> | <p>Recommendation that there be no requirement for surgical, medical or hormonal treatment.⁵⁹⁰</p> | <p>Applicant must have undergone sexual reassignment surgery.⁵⁹¹</p> <p>Defined as 'a surgical procedure involving the alteration of a person's reproductive organs carried out:</p> <p>(a) to help the person to be considered to be a member of the opposite sex; or</p> <p>(b) to correct or eliminate ambiguities about the sex of the person.'⁵⁹²</p> | <p>Applicant must have undergone sexual reassignment surgery.⁵⁹³</p> <p>Defined as 'a surgical procedure involving the alteration of a person's reproductive organs carried out:</p> <p>(a) to assist 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.'⁵⁹⁴</p> | <p>Applicant must believe their sex to be the sex nominated in their application⁵⁹⁵ and:</p> <ul style="list-style-type: none"> • have received appropriate clinical treatment for alteration of sex;⁵⁹⁶ or • be an intersex person.⁵⁹⁷ <p>'Intersex person is a person who has physical, hormonal or genetic features that are—</p> <p>(a) not fully female or fully male; or</p> <p>(b) a combination of male or female; or</p> <p>(c) not female or male.'⁵⁹⁸</p> |

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;⁵⁹⁹ documents relating to where the reassignment procedure was carried out;⁶⁰⁰ original birth certificate;⁶⁰¹ proof of residency;⁶⁰² any information regarding adoption of the lifestyle of a person of the gender to which the applicant has been reassigned;⁶⁰³ and statement from any person that has provided counselling in relation to gender identity.⁶⁰⁴ | <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;⁶⁰⁵ 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;⁶⁰⁶ and proof of identity of the applicant.⁶⁰⁷ | <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;⁶⁰⁸ 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.⁶⁰⁹ | <p>Application form with the following documentation:</p> <ul style="list-style-type: none"> statutory declaration by the applicant;⁶¹⁰ and a supporting statement from an adult who has known the applicant for at least 12 months.⁶¹¹ | <p>Application form with a statement by medical practitioner or psychologist certifying the applicant has undertaken a sufficient amount of appropriate clinical treatment.⁶¹²</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.⁶¹³</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.⁶¹⁴ | <p>Recommendation that application be consistent with approach to register change of name.⁶¹⁵</p> | <p>Application form with the following documentation:</p> <ul style="list-style-type: none"> identification documents;⁶¹⁶ and a recognition certificate issued by another state;⁶¹⁷ or statutory declaration by 2 registered medical practitioners verifying the applicant has undergone sexual reassignment surgery.⁶¹⁸ | <p>Application form with the following documentation:</p> <ul style="list-style-type: none"> a recognition certificate;⁶¹⁹ 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.⁶²⁰ | <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;⁶²¹ and document confirming applicant was born in the ACT.⁶²² |

2. Registration of change of sex and/or gender (adults)

2.5 Limit on number of applications

| WA | NSW | VICTORIA | VICTORIAN BILL | SA |
|------------------------|------------------------|------------------------|---|--|
| No express limitation. | No express limitation. | No express limitation. | Only one application may be made in a 12 month period. ⁶²³ | SA Registrar may determine and set a limit on the number of applications that can be made. ⁶²⁴ |
| | | | | According to the current form, you can change sex or gender only once in a 12 month period, with a limit of 3 times. ⁶²⁵ 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. ⁶²⁶ |

| TASMANIA | TASMANIA (options for reform) | QUEENSLAND | NT | ACT |
|----------|-------------------------------|------------|----|-----|
|----------|-------------------------------|------------|----|-----|

| | | | | |
|------------------------|--|------------------------|------------------------|------------------------|
| No express limitation. | Recommendation to limit a change of sex to once in a 12 month period. ⁶²⁷ | No express limitation. | No express limitation. | 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 | NSW | VICTORIA | VICTORIAN BILL | SA |
|--|--|--|--|--|
| Not covered by the legislation or regulations. | Not covered by the legislation or regulations. | Victorian Registrar to notify Commissioner of Police where application is by a 'registrable offender' under the <i>Sex Offenders Registration Act 2004</i> (Vic). ⁶²⁸ | A 'restricted person' requires 'approval' to accompany their 'acknowledgement of sex application'. ⁶²⁹ The Victorian Registrar must also notify the Justice Secretary of the alteration of the record for particular offenders. ⁶³⁰ | Not covered by the legislation or regulations. |
| TASMANIA (options for reform) | | QUEENSLAND | | ACT |
| Not covered by the legislation or regulations. | No recommendations. | Not covered by the legislation or regulations. | Not covered by the legislation or regulations. | Not covered by the legislation or regulations. |
| TASMANIA | | NT | | ACT |
| Not covered by the legislation or regulations. | No recommendations. | Not covered by the legislation or regulations. | Not covered by the legislation or regulations. | 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,⁶³¹ • their birth is registered in WA,⁶³² or • they have been a resident in WA for 12 months.⁶³³ <p>An equivalent certificate issued under a 'corresponding law' has the same effect as a recognition certificate.⁶³⁴ However, as the only corresponding law is the SR Act (which has been repealed), this provision has no operative effect.⁶³⁵</p> | <p>Applicant may register change of sex if:</p> <ul style="list-style-type: none"> • their birth is registered in NSW,⁶³⁶ or • they are an Australian citizen or permanent resident who lives, and has lived for at least one year, in NSW.⁶³⁷ <p>If the applicant's birth is not registered in NSW they will be issued a recognised details certificate.⁶³⁸</p> <p>NSW recognises the sex of a person as detailed in an interstate recognition certificate or recognised details certificate.⁶³⁹</p> | <p>Applicant may register change of sex if:</p> <ul style="list-style-type: none"> • their birth is registered in Victoria,⁶⁴⁰ or • their principal place of residence is, and has been for at least 12 months, Victoria.⁶⁴¹ <p>If the applicant's birth is not registered in Victoria they will be issued a document acknowledging identity.⁶⁴²</p> <p>Victoria only recognises the sex of a person detailed in an interstate recognition certificate from WA (the SR Act has been repealed).⁶⁴³</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,⁶⁴⁴ or • they have been a resident of SA for at least 12 consecutive months before the application and they were born outside of Australia.⁶⁴⁵ <p>If the applicant's birth is not registered in SA they will be issued an identity acknowledgment certificate.⁶⁴⁶</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.⁶⁴⁷</p> |

2. Registration of change of sex and/or gender (adults)

2.7 Jurisdictional requirements

| TASMANIA | TASMANIA (options for reform) | QUEENSLAND | NT | ACT |
|---|----------------------------------|--|--|--|
| <p>Applicant may only register a change of sex if their birth is registered in Tasmania.⁶⁴⁸</p> <p>Tasmania recognises the sex of a person as detailed in an interstate recognition certificate.⁶⁴⁹</p> | <p>No recommendations.</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.⁶⁵⁰</p> | <p>Applicant may only register a change of sex if their birth is registered in the NT.⁶⁵¹</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.⁶⁵²</p> | <p>Applicant may register change of sex if:</p> <ul style="list-style-type: none"> • their birth is registered in the ACT,⁶⁵³ or • they are domiciled or a resident in the ACT.⁶⁵⁴ <p>If the applicant's birth is not registered in the ACT they will be issued a recognised details certificate.⁶⁵⁵</p> <p>ACT recognises the sex of a person as detailed in an interstate recognised details certificate.⁶⁵⁶</p> |

3. Registration of change of sex and/or gender (minors)

3.1 Application process (decision-makers)

| WA | NSW | VICTORIA | VICTORIAN BILL | SA |
|---|---|--|---|---|
| Application to the Board ⁶⁵⁷ by the child's guardian. ⁶⁵⁸ | Application to NSW Registrar by the parents of a child (or parent if the applicant is the sole parent), or the guardian. ⁶⁵⁹ | Not applicable as applicant must be over 18 years of age. ⁶⁶⁰ | 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. ⁶⁶¹ Alternatively an application may be made by a parent or guardian to the County Court for approval. ⁶⁶² | Application to SA Registrar by the child or by a parent or guardian of the child. ⁶⁶³ Before an application to the SA Registrar can be made, the Magistrates Court is required to approve the making of the application. ⁶⁶⁴ |

| TASMANIA | TASMANIA (options for reform) | QUEENSLAND | NT | ACT |
|--|--|---|--|--|
| 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. ⁶⁶⁵ | Recommendation to allow application to Tasmanian Registrar by child alone from 16 years of age. ⁶⁶⁶ | 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). ⁶⁶⁷ | Application to NT Registrar by the parents or one parent (if they are the sole parent) or guardian. ⁶⁶⁸ | Application to ACT Registrar by parents or one parent (if sole parent) ⁶⁶⁹ or a person with parental responsibility. ⁶⁷⁰ |

3. Registration of change of sex and/or gender (minors)

3.2 Application process (evidence required)

| WA | NSW | VICTORIA | VICTORIAN BILL | SA |
|--|--|-------------|---|--|
| <p>Application requires evidence as per adult process⁶⁷¹ except the Board must be satisfied that it is in the best interests of the child that the certificate be issued.⁶⁷²</p> | <p>Application requires evidence as per adult process.⁶⁷³</p> | <p>N/A.</p> | <p>Application requiring the following evidence:</p> <ul style="list-style-type: none"> 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; and⁶⁷⁴ 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.⁶⁷⁵ <p>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.⁶⁷⁶</p> | <p>Application requiring evidence as per adult process except for approval of the Magistrates Court.⁶⁷⁷</p> <p>Magistrates Court is required to take into account the following:</p> <ul style="list-style-type: none"> 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.⁶⁷⁸ <p>The Magistrates Court may grant approval if satisfied the application is in the best interests of the child.⁶⁷⁹</p> <p>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 application and they were born outside of Australia.⁶⁸⁰</p> |

| 3. Registration of change of sex and/or gender (minors) | | | | |
|--|--|--|--|---|
| 3.2 Application process (evidence required) | | | | |
| TASMANIA | TASMANIA (options for reform) | QUEENSLAND | NT | ACT |
| Application requires evidence as per adult process. ⁶⁸¹ | Recommendation to require informed consent for children over 12 years of age. ⁶⁸² | 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. ⁶⁸³ | Application requires evidence as per adult process. ⁶⁸⁴ | <p>Application requires the following evidence:</p> <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;⁶⁸⁵ statement by a doctor or psychologist certifying the child has received appropriate clinical treatment or is an intersex person;⁶⁸⁶ and documents confirming child's birth was in or registered in the ACT.⁶⁸⁷ <p>The same process for a recognised details certificate is available for a child if they are domiciled or a resident in the ACT.⁶⁸⁸</p> |

3. Registration of change of sex and/or gender (minors)

3.3 If application is contested

| WA | NSW | VICTORIA | VICTORIAN BILL | SA |
|--|--|----------|--|---|
| Not covered by the legislation or regulations. | 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. ⁶⁸⁹ | Not covered by the legislation or regulations. Application may be made by one parent alone or by the child themselves. ⁶⁹⁰ |

| 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. ⁶⁹¹ | One parent or guardian may apply to the Magistrates Court. ⁶⁹² | Not covered by the legislation or regulations. | Not covered by the legislation or regulations. |

APPENDIX 5:

COMPARISON OF LEGISLATION ACROSS INTERNATIONAL JURISDICTIONS

| 1. Registration of sex at birth | | CANADA ⁶⁹³ | |
|---|--|--|---|
| 1.1 Birth notification/registration statement | | BELGIUM | |
| ARGENTINA | BELGIUM | CANADA ⁶⁹³ | |
| Sex classification mandatory (specific sex markers are unclear). ⁶⁹⁴ | Unclear from the official and publicly available Belgian material. | Birth notification and sex classification mandatory: <ul style="list-style-type: none"> • <u>British Columbia</u>: male, female, other or ambiguous.⁶⁹⁵ • <u>Newfoundland and Labrador</u>: male, female or unknown.⁶⁹⁶ • <u>Prince Edward Island</u>: male or female (but only for non-hospital births).⁶⁹⁷ • <u>Saskatchewan</u>: specific sex marker options unclear (form is generally completed by the parents if birth occurs in hospital).⁶⁹⁸ Other: <ul style="list-style-type: none"> • <u>Nova Scotia</u>,⁶⁹⁹ <u>Ontario</u>,⁷⁰⁰ <u>New Brunswick</u>:⁷⁰¹ birth notification mandatory but unclear if sex markers are required. • <u>Alberta</u>: sex marker only required if it is determined.⁷⁰² | |
| DENMARK | INDIA | MALTA | NEW ZEALAND |
| Sex classification is mandatory (boy or girl). ⁷⁰³ | Sex classification is mandatory (male or female). ⁷⁰⁴ | Birth registration mandatory, but sex classification is optional (male, female or left blank). ⁷⁰⁷ | Sex classification mandatory ⁷⁰⁸ (male, female ⁷⁰⁹ or indeterminate ⁷¹⁰). |
| NORWAY | PAKISTAN | UNITED STATES | |
| Sex classification mandatory ⁷¹¹ (male, female or uncertain). ⁷¹² | Sex classification is mandatory (male or female). ⁷¹³ | <u>California</u> : Sex classification mandatory, however it is unclear what the available sex classifications are at birth. ⁷¹⁵ For example, the Delayed Registration of Birth form has a free-text field for sex. ⁷¹⁶ <u>Oregon</u> : Sex classification mandatory (male, female, undetermined or X). ⁷¹⁷ | |

| | | | |
|--|---|--|---|
| 1. Registration of sex at birth | | | |
| 1.2 Birth certificate | | | |
| ARGENTINA | BELGIUM | CANADA | NEW ZEALAND |
| Sex classification mandatory (specific sex markers are unclear). ⁷¹⁸ | Sex classification mandatory (specific sex markers are unclear). ⁷¹⁹ | Sex classification mandatory (specific sex markers are unclear). ⁷²⁰ Sex classification mandatory in <u>Prince Edward Island</u> and <u>New Brunswick</u> . ⁷²¹ (only male or female). ⁷²² | Sex classification mandatory (male, female ⁷³⁰ or indeterminate ⁷³¹). |
| DENMARK | INDIA | IRELAND | MALTA |
| Sex classification is not required. ⁷²³ However, gender information is required for a person's Civil Registration Number (system is binary so only male or female is available). ⁷²⁴ | Sex classification is mandatory (male or female). ⁷²⁵ | Sex classification is mandatory. ⁷²⁶ (male or female). ⁷²⁷ | Sex classification on birth certificates (extract and full certificate), but not death certificates. ⁷²⁸ |
| NORWAY | PAKISTAN | UNITED KINGDOM | UNITED STATES |
| Sex classification mandatory - birth certificate based on birth notification. ⁷³² (binary 'birth number' suggests only male or female). ⁷³³ | Unclear from the official and publicly available Pakistan material. | Sex classification mandatory (male or female). ⁷³⁴ | <u>California</u> Sex classification mandatory, however it is unclear what the available sex classifications are at birth. ⁷³⁵ <u>Oregon</u> Sex classification mandatory (male, female, undetermined or X). ⁷³⁶ |

| 1. Registration of sex at birth | | | | |
|--|---|---|---|---|
| 1.3 Deadline for birth sex registration | | | | |
| ARGENTINA | BELGIUM | | | |
| Within 40 days. ⁷³⁷ | Within 15 days (in the case of children born with ambiguous sex characteristics within 3 months with a medical certificate). ⁷³⁸ | | | |
| CANADA | | | | |
| Manitoba: within 5 days. ⁷³⁹ Alberta: within 10 days, but sex and other details not until 1 year. ⁷⁴⁰ New Brunswick: within 14 days. ⁷⁴¹ Nova Scotia, ⁷⁴² Ontario, ⁷⁴³ Newfoundland and Labrador, ⁷⁴⁴ Prince Edward Island ⁷⁴⁵ : within 30 days. Saskatchewan: within 180 days. After this date, affidavit required, and other evidence if prescribed. ⁷⁴⁶ British Columbia: within 1 year. After this date, affidavit required, and other evidence if prescribed. ⁷⁴⁷ | | | | |
| DENMARK | INDIA | IRELAND | MALTA | NEW ZEALAND |
| Unclear from the official and publicly available Danish material. | Birth registration within 21 days of birth. ⁷⁴⁸ | Birth registration must be made within 3 months of birth, ⁷⁴⁹ and cannot be entered more than 12 months from the date of birth without written consent of the Superintendent Registrar. ⁷⁵⁰ | If birth sex is entered, it must be done within 15 days. ⁷⁵¹ If birth sex is left blank, an application must be made to register the child's gender before they reach 18 years of age. ⁷⁵² | Birth notification within 5 working days after the birth. ⁷⁵³ Registration of birth 'as soon as is reasonably practicable after the birth'. ⁷⁵⁴ According to the registration form, registration is expected within two months. ⁷⁵⁵ |
| NORWAY | PAKISTAN | UNITED KINGDOM | UNITED STATES | |
| Unclear from the official and publicly available Norwegian material. | Unclear from the official and publicly available Pakistan material. | England, Wales and Northern Ireland: registration within 42 days. ⁷⁵⁶ Scotland: registration within 21 days. ⁷⁵⁷ | California Within 10 days of birth, or up to 1 year within which an application for delayed registration must be made. ⁷⁵⁸ Oregon Within 5 days of birth. ⁷⁵⁹ | |

| 1. Registration of sex at birth | |
|--|--|
| 1.4 Access to personal information | |
| ARGENTINA | CANADA |
| <p>The original birth certificate cannot be given without consent or judicial order in writing.⁷⁶⁰ Amendment of sex (and/or name change) will not be publicised.⁷⁶¹</p> | <p>Vital statistics are confidential and must not be communicated to anyone not entitled to the information under the respective Acts or Regulations.⁷⁶²</p> |
| DENMARK | NEW ZEALAND |
| <p>Unclear from the official and publicly available Danish material.</p> | <p>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.⁷⁶⁷</p> |
| INDIA | MALTA |
| <p>Unclear from the official and publicly available Indian material.</p> | <p>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.⁷⁶⁵</p> <p>A person who had official duties involving a matter in the <i>Gender Identity, Gender Expression and Sex Characteristics Act 2015</i> (Malta), must not disclose such matter in accordance with the <i>Professional Secrecy Act</i> and the <i>Data Protection Act</i>.⁷⁶⁶</p> |
| IRELAND | UNITED STATES |
| <p>If the register of births is amended in accordance with a Gender Recognition Certificate the original entry is to be retained.⁷⁶³ 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).⁷⁶⁴</p> | <p>In both states, the new birth certificate will replace the old birth certificate and the old birth certificate and applicant shall not be disclosed, without written request of the registrant (California) or an order of a court of record (both states).⁷⁷³</p> |
| PAKISTAN | UNITED KINGDOM |
| <p>The National Database and Registration Authority must ensure the protection and confidentiality of data and information contained in the registration and database systems.⁷⁷¹</p> | <p>Except in limited circumstances it is an offence to disclose information relating to an application under the <i>Gender Recognition Act 2004</i> (UK), or the person's gender before their acquired gender, must not be disclosed.⁷⁷²</p> |
| NORWAY | UNITED STATES |
| <p>The Tax Office, which manages birth certificates and is also the National Registry Authority,⁷⁶⁸ is under an obligation of confidentiality in relation to personal information acquired.⁷⁶⁹ Although gender is not included in the confidentiality obligation, the legislation suggests that historical information (such as previous gender) may be considered confidential.⁷⁷⁰</p> | <p>In both states, the new birth certificate will replace the old birth certificate and the old birth certificate and applicant shall not be disclosed, without written request of the registrant (California) or an order of a court of record (both states).⁷⁷³</p> |

| | |
|--|--|
| 1. Registration of sex at birth | |
| 1.5 Correcting birth sex | |
| ARGENTINA | CANADA |
| Corrections to birth certificate upon application to Civil Registry. ⁷⁷⁴ | Correction of errors is possible upon application to the relevant registrar / director. ⁷⁷⁵ |
| BELGIUM | |
| Unclear from the official and publicly available Belgian material. | |
| DENMARK | IRELAND |
| 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. ⁷⁸⁰ | In <u>Manitoba</u> ⁷⁷⁶ (unless the person who provided the registration information appears in person), <u>Ontario</u> ⁷⁷⁷ , <u>Newfoundland and Labrador</u> ⁷⁷⁸ and <u>New Brunswick</u> ⁷⁷⁹ the original information is required to remain, in some form, on the certificate. |
| NORWAY | MALTA |
| The Tax Office (National Registry Authority) may correct obvious errors or incorrect information where there is evidence. ⁷⁸⁵ | No. ⁷⁸³ Correction of errors with appropriate evidence (eg, statutory declaration). ⁷⁸⁴ |
| PAKISTAN | UNITED KINGDOM |
| Unclear from the official and publicly available Pakistan material. | Correction of clerical errors, and errors of fact with appropriate evidence, including a statutory declaration. ⁷⁸² |
| UNITED STATES | NEW ZEALAND |
| Correction of errors made upon application to the General Register Office with supporting documentation or proof. ⁷⁸⁶ | Correction of the sex field on birth certificates with an Affidavit to Amend a Record, VS 24 form. ⁷⁸⁷ <u>Oregon</u> Correction of sex field on birth certificates made administratively, by the birthing facility if a minor or with affidavit if an adult. ⁷⁸⁸ |

| 2. Adult change of sex/gender | |
|---|--|
| 2.1 Application process | |
| ARGENTINA | BELGIUM |
| Application to the National Registry of Persons (Registro Nacional de las Personas). ⁷⁸⁹ | Application to the Civil Registrar. ⁷⁹⁰ |
| | Ontario, <u>British Columbia</u> , <u>Newfoundland and Labrador</u> , <u>New Brunswick</u> : application to the Registrar. ⁷⁹² <u>Nova Scotia</u> , <u>Alberta</u> , <u>Saskatchewan</u> : application to the Registrar. ⁷⁹² <u>Manitoba</u> , <u>Prince Edward Island</u> : application to the Director. ⁷⁹³ |
| DENMARK | IRELAND |
| Written application to the Economy and Domestic Ministry. ⁷⁹⁴ | Application to the Minister for Social Protection for a Gender Recognition Certificate. ⁷⁹⁷ The Gender Recognition Certificate may later be used to request the particulars relating to recognition of gender are entered in the register. ⁷⁹⁸ |
| | Application to the Director of Public Registry. ⁷⁹⁹ Application to the Family Court. ⁸⁰⁰ |
| | NEW ZEALAND |
| NORWAY | UNITED KINGDOM |
| Application to the Tax Office (National Registry Authority). ⁸⁰¹ | Application to the Gender Recognition Panel. ⁸⁰³ |
| | Application to Pakistan's National Database and Registration Authority. ⁸⁰² |
| | UNITED STATES |
| | <u>California</u> Either through application to the State Registrar, or Court Petition. ⁸⁰⁴ <u>Oregon</u> Either through application to the Oregon Vital Records office, or Court application. ⁸⁰⁵ |

| 2. Adult change of sex/gender | |
|--|--|
| 2.2 Available classifications | |
| ARGENTINA | CANADA |
| Unclear from the official and publicly available Argentine material. | Saskatchewan: male, female, X or no sex. ⁸⁰⁶ Alberta, Newfoundland and Labrador, Ontario: male, female or X. ⁸⁰⁷ British Columbia, Manitoba, New Brunswick: male or female. ⁸⁰⁸ Nova Scotia: As under new legislation expected to commence in January 2019, ⁸⁰⁹ male, female, X or no sex. ⁸¹⁰ |
| DENMARK | IRELAND |
| Unclear from the official and publicly available Danish material. | Male or female. ⁸¹² |
| INDIA | NEW ZEALAND |
| Male, female or third gender (trans men, trans women and persons with intersex variations). ⁸¹¹ | While it is not addressed in the legislation, in practice the classifications are Male, Female or X/Other gender. ⁸¹³ possible if sex was indeterminate at birth and wrongly recorded as male/female). ⁸¹⁴ |
| NORWAY | UNITED STATES |
| Male or female (as only the male/female binary is used by the Tax Office (National Registry Authority)). ⁸¹⁵ | California Male, female and non-binary. ⁸¹⁹ Oregon Male, female and X (non-binary). ⁸²⁰ New York City As under new legislation commencing 1 January 2019, male, female and X (non-binary). ⁸²¹ |
| PAKISTAN | UNITED KINGDOM |
| Male, female, transgender (intersex, eunuch or transgender persons included in definition of 'transgender person'). ⁸¹⁶ | Male or female. ⁸¹⁷ A recent Administrative Court found that people have a right to non-gendered identity (eg, X). ⁸¹⁸ |

| 2. Adult change of sex/gender | |
|---|---|
| 2.3 Required criteria | |
| ARGENTINA | CANADA |
| Self-determination by applicant. ⁸²⁵ | Self-determination by applicant. |
| Self-determination by applicant. ⁸²² | Statutory requirements for gender reassignment surgery in <u>Ontario</u> ⁸²³ and <u>Alberta</u> ⁸²⁴ have been overruled by common law. |
| DENMARK | IRELAND |
| Self-determination by applicant. ⁸²⁵ | Self-determination by applicant. Applicant must not be married or have a civil partner. ⁸²⁷ |
| INDIA | MALTA |
| The decision in National Legal Services Authority v Union of India and Ors (NLSA) held that there is no requirement to undergo medical procedures. ⁸²⁶ | Application based on self-determination. |
| INDIA | NEW ZEALAND |
| Self-determination by applicant. ⁸²⁵ | Some degree of permanent physical change as a result of the treatment (including psychological treatment) received. ⁸²⁸ |
| NORWAY | UNITED STATES |
| Application based on self-determination. ⁸²⁹ | Administrative option for both states are based on self-determination. As under new legislation commencing 1 January 2019, this will also be the case in <u>New York City</u> , where the requirement for an associated affidavit from a health professional (as part of an application) will be removed. ⁸³² |
| PAKISTAN | UNITED KINGDOM |
| Application based on self-determination. ⁸³⁰ | 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. ⁸³¹ |

2. Adult change of sex/gender

2.4 Required evidence

ARGENTINA

Application with proof of age (18 or over).⁸³³

BELGIUM

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

CANADA

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 (in Nova Scotia as under new legislation expected to commence in January 2019,⁸³⁸ this is only a requirement if the applicant is under the age of 16).⁸³⁹

In British Columbia the Registrar General must believe the application is made in good faith.⁸⁴⁰ If a registration is fraudulently or improperly obtained, the Registrar General may order it be cancelled/not issued.⁸⁴¹

DENMARK

Statutory declaration by applicant, with confirmation of the application by the applicant after a reflection period of 6 months.⁸⁴²

INDIA

Common law does not require any evidence.⁸⁴³ 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.⁸⁴⁴

IRELAND

Proof of identity, birth and residency⁸⁴⁵ with a statutory declaration.⁸⁴⁶

MALTA

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.⁸⁴⁷

NEW ZEALAND

Specific evidence from a medical expert.⁸⁴⁸
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.⁸⁴⁹

NORWAY

Application form only (it is unclear from publicly available material whether this form requires a sworn/affirmed statement).⁸⁵⁰

PAKISTAN

No supporting documentation is required.⁸⁵¹

UNITED KINGDOM

Medical reports and a statutory declaration.⁸⁵²

UNITED STATES

California

Affidavit (administrative process) or Court Petition with declarations from a physician and the applicant (Court process).⁸⁵³

Oregon

Notarised application (administrative process) or relevant proof (Court process) required.⁸⁵⁴

New York City

As under new legislation commencing 1 January 2019, the applicant will only be required to file a signed and notarised statement to the New York City Department of Health and Mental Hygiene.⁸⁵⁵

| 2. Adult change of sex/gender | |
|--|---|
| 2.5 Limit on number of applications | |
| ARGENTINA | CANADA |
| Once (additional applications made by court order). ⁸⁵⁶ | Once (in exceptional circumstances the Family Court may authorise a further modification). ⁸⁵⁷ |
| DENMARK | INDIA |
| No express limitation. | No express limitation. |
| IRELAND | NEW ZEALAND |
| 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. ⁸⁵⁸ | Once (additional applications made by court order). ⁸⁵⁹ |
| MALTA | NORWAY |
| No express limitation. | No express limitation. |
| PAKISTAN | UNITED KINGDOM |
| No express limitation. | No express limitation. |
| UNITED STATES | UNITED STATES |
| California | California |
| No express limitation. | No express limitation. |
| Oregon | Oregon |
| Once and any subsequent changes must be done through a court order. ⁸⁶⁰ | Once and any subsequent changes must be done through a court order. ⁸⁶⁰ |

| 2. Adult change of sex/gender | |
|--|--|
| 2.6 Jurisdictional requirements | |
| ARGENTINA | BELGIUM |
| No express jurisdictional and publicly available Danish material. | Any citizen of Belgium or a foreigner who is on the population register. ⁸⁶¹ |
| | <u>Prince Edward Island</u> : any person, whether there birth is registered in the province or not, may apply. ⁸⁶² <u>Newfoundland and Labrador</u> , <u>British Columbia</u> , <u>Alberta</u> , <u>Ontario</u> <u>Manitoba</u> , <u>Saskatchewan</u> : birth must be registered in the province. ⁸⁶³ <u>New Brunswick and Nova Scotia</u> (as under new legislation expected to commence in January 2019): ⁸⁶⁴ birth is registered in the province or the person has been ordinarily a resident in the province for at least 3 months. ⁸⁶⁵ <u>Manitoba</u> : applicant must be a Canadian citizen who has been a resident of the province for a year. ⁸⁶⁶ |
| DENMARK | INDIA |
| 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), ⁸⁶⁷ or the person must ordinarily reside in Ireland. ⁸⁶⁸ A foreign recognition certificate may be used when applying for a Gender Recognition Certificate – but it must meet equivalent Irish standards. ⁸⁶⁹ |
| NORWAY | PAKISTAN |
| Residents of Norway ⁸⁷³ and Norwegian nationals residing abroad. ⁸⁷⁴ | Citizens of Pakistan. ⁸⁷⁵ |
| | <u>California</u> Applicant must be born in California but does not need to be a current resident. ⁸⁷⁷ <u>Oregon</u> Applicant must be born in Oregon but does not need to be a current resident. ⁸⁷⁸ |
| | UNITED KINGDOM |
| | 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. ⁸⁷⁶ |
| | UNITED STATES |
| | <u>California</u> Applicant must be born in California but does not need to be a current resident. ⁸⁷⁷ <u>Oregon</u> Applicant must be born in Oregon but does not need to be a current resident. ⁸⁷⁸ |
| | NEW ZEALAND |
| | Applicant must be citizen of Malta. ⁸⁷⁰ However this requirement is not expressed for minors. ⁸⁷¹ 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. ⁸⁷² |

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.⁸⁹⁸

BELGIUM

Application to Civil Registrar requiring 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.⁸⁹⁹

CANADA

Prince Edward Island, Saskatchewan: no specific minor process – it appears the adult process applies to minors.⁹⁰⁰

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.⁹⁰¹

British Columbia: the consent of all parents or guardians.⁹⁰²

Ontario: the consent of all persons with legal custody of the child and the express consent of the child.⁹⁰³

Newfoundland and Labrador: a statement from a medical professional and the written consent of all parents.⁹⁰⁴ If the child is over 12 years of age the consent of the child is required.⁹⁰⁵ If the child is under 12 years of age, an additional statement from a different medical professional is required.⁹⁰⁶

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.⁹⁰⁷ If the child is less than 12 years of age then a statement from a medical professional is required.⁹⁰⁸

Manitoba: statement from a medical professional required to include an opinion that the child has the capacity to make health care decisions.⁹⁰⁹

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.⁹¹⁰ If the child is over 12 years of age, the child's consent is required.⁹¹¹

| 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, ⁹¹² with parent/guardian consent to the application, ⁹¹³ a certificate from a medical practitioner ⁹¹⁴ and an endocrinologist or psychologist agreeing with the medical practitioner's opinion. ⁹¹⁵ The Court must only make an order if it is in the best interests of the child. ⁹¹⁶ | Persons exercising parental authority may file an application to the registry of the Civil Court (Voluntary Jurisdiction Section). ⁹¹⁷ The court, when hearing the application shall consider the best interest of the child and give weight to the views of the minor. ⁹¹⁸ | Application to the Family Court by 'the guardian' of the eligible child. ⁹¹⁹ 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. ⁹²⁰ |
| NORWAY | | UNITED KINGDOM | | |
| 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. ⁹²¹ | N/A. | N/A. | UNITED STATES | |
| The application for a child aged under 6 must be submitted by the person or persons who have custody of the child. ⁹²² The child must: | | | California | |
| <ul style="list-style-type: none"> • have a congenital somatic sex development 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.⁹²³ | | | It is unclear whether, in practice, the administrative process for adults also applies to minors. ⁹²⁴ With respect to the Court petition, an application can be made by at least one parent/guardian. ⁹²⁵ If only one parent/guardian makes the application, notice must be given to the other parent/guardian. ⁹²⁶ The Court shall grant the order without a hearing unless a parent/guardian objects to the application. ⁹²⁷ | |
| | | | Oregon | |
| | | | Application to the Registrar by one parent/guardian or legal representative of the applicant, which can, but need not, follow a court order. ⁹²⁸ | |

3. Child change of sex/gender

3.3 If application contested

ARGENTINA

Where contested by any of the legal representatives of the minor, judges are to determine the application, taking into account the principles of progressive capacity and best interests of the child.⁹²⁹

BELGIUM

Child can request the Family Court to authorise them to make the declaration with the assistance of an ad hoc guardian in lieu of parents.⁹³⁰

CANADA

Alberta, Nova Scotia, Newfoundland and Labrador, New Brunswick: Court may order that a person's consent be dispensed with if it is in the interests of the child to do so.⁹³¹

British Columbia: Minister may waive the consent requirement if satisfied the waiver would be in the child's best interests.⁹³²

Newfoundland and Labrador, New Brunswick: Registrar may waive parental consent if service of documentation on parent occurs and no objection is made.⁹³³

DENMARK

N/A.

INDIA

N/A.

IRELAND

Court may order that consent is not required in circumstances where obtaining such consent is not possible, or should not be obtained as it is not in the interest of the safety or welfare of the child to request consent.⁹³⁴

MALTA

Persons exercising parental authority may file an application to the registry of the Civil Court (Voluntary Jurisdiction Section).⁹³⁵

The court, when hearing the application shall consider the best interest of the child and give weight to the views of the minor.⁹³⁶

NEW ZEALAND

Application to the Family Court by 'the guardian' of the eligible child.⁹³⁷ 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.⁹³⁸

NORWAY

N/A.

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.⁹³⁹ This application must be submitted to the County Governor of Oslo and Akershus.⁹⁴⁰ There is no process available to a child without the support of at least one parent/guardian.

UNITED KINGDOM

N/A.

UNITED STATES

California

Court Petition: if only one parent/guardian makes the application, notice must be given to the other parent/guardian.⁹⁴¹ 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.⁹⁴² The Court shall grant the order without a hearing unless a parent/guardian objects to the application.⁹⁴³

Oregon

Application to the Registrar by one parent/guardian or legal representative of the applicant, which can, but need not, follow a court order.⁹⁴⁴

473 BDMR Act s 12; *Health (Notifications by Midwives) Regulations 1994* (WA), sch, Form 2.
474 BDMR Act ss 12(1)–(2).
475 NSW Act s 12(1); NSW Regulations reg 4(a).
476 NSW Act ss 12(1)–(2), (5).
477 Victorian Act ss 12(1), (3), (6).
478 SA Act s 12(1); SA Regulations reg 4(c).
479 SA Act ss 12(1), (2), (5).
480 Tasmanian Act s 11(2).
481 Tasmanian Act ss 11(1), (3), (6).
482 Queensland Act s 5(1).
483 Queensland Act ss 5(1)–(3).
484 NT Act s 12(1); NT Regulations reg 2(c).
485 NT Act ss 12(1), (2), (6).
486 ACT Act s 5(2)(a); ACT Regulations reg 4(1)(b).
487 ACT Act ss 5(1), (2)(b)(i), (3).
488 BDMR Act s 17.
489 BDMR Act ss 15–6.
490 NSW Act ss 14, 17(1); NSW Regulations reg 5(1)(a).
491 As informed by the NSW registry.
492 NSW Act ss 15–6.
493 Victorian Act s 14; Victorian Regulations reg 7(c).
494 As informed by the Victorian registry.
495 Victorian Act ss 15, 18.
496 Victorian Bill cl 5 (definition of ‘sex descriptor’).
497 Victorian Bill cl 5 (definition of ‘prohibited sex descriptor’).
498 SA Act s 14; SA Regulations reg 5(c).
499 As informed by the SA registry.
500 SA Act ss 15–6.
501 Tasmanian Act s 13.
502 As informed by the Tasmanian registry.
503 Tasmanian Act ss 14–5.
504 Equal Opportunity Tasmania, *Legal recognition of sex and gender diversity in Tasmania* (February 2016) 4, 28.
505 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>>.
506 Queensland Act ss 8–9.
507 NT Act s 14; NT Regulations reg 3(b).
508 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.
509 NT Act ss 15–6.
510 ACT Act ss 9(1), 11(1); ACT Regulations reg 5(1)(b).
511 ACT Government, *Birth Registration Statement* <<https://www.accesscanberra.act.gov.au/ci/fattach/get/106834/1475723156/redirect/1/filename/Birth+registration+statement.pdf>>.
512 ACT Act ss 8, 10.
513 BDMR Act ss 50–1.
514 BDMR Act ss 4 (definition of ‘registrable information’), 19(1).
515 NSW Act s 45.
516 NSW Act s 20.
517 Victorian Act ss 42–3.
518 Victorian Act s 43(5).
519 SA Act ss 41–2.
520 Tasmanian Act ss 41–2.
521 Equal Opportunity Tasmania, *Legal recognition of sex and gender diversity in Tasmania* (February 2016) 12.
522 Queensland Act ss 42–3.
523 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>>.
524 NT Act ss 39, 40.
525 ACT Act ss 40–1.
526 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’.
527 GR Act ss 3 (definition of ‘Board’), 14(1).
528 GR Act s 17(1).
529 GR Act ss 3 (definition of ‘recognition certificate’), 14(1).
530 NSW Act ss 32D, 32DC.
531 NSW Act ss 32DD, 32E.
532 NSW Act ss 32B, 32DA.
533 Victorian Act ss 30C(1), 30F(1).
534 Victorian Act ss 30D, 30F(1).
535 Victorian Act ss 30A(1)(c), 30E(1)(d).
536 Victorian Bill cls 8, 10.
537 Victorian Bill cls 9, 10.
538 Victorian Bill cls 1, 8, 10.
539 Victorian Bill cls 1, 8, 10.
540 SA Act ss 29(1), 29O(1).
541 SA Act ss 29M, 29Q.
542 SA Act Part 4A.
543 SA Act ss 29H(1) (definition of ‘clinical treatment’), 29K, 29O.
544 Tasmanian Act ss 28A, 28C.
545 Tasmanian Act s 28D.
546 Tasmanian Act s 28A(1)(b).
547 Equal Opportunity Tasmania, *Legal recognition of sex and gender diversity in Tasmania* (February 2016) 9–10.
548 Equal Opportunity Tasmania, *Legal recognition of sex and gender diversity in Tasmania* (February 2016) 29.
549 Equal Opportunity Tasmania, *Legal recognition of sex and gender diversity in Tasmania* (February 2016) 9–10.
550 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>>.
551 Queensland Act ss 22, 24.
552 Queensland Act s 23.

553 NT Act s 28B.
554 NT Act s 28E.
555 NT Act s 28B.
556 ACT Act ss 24, 29A.
557 ACT Act ss 27, 29C.
558 ACT Act Part 4.
559 ACT Act ss 24(1)(c)(i), 29A(1)(d)(i).
560 GR Act s 3 (definition of 'gender characteristics').
561 NSW Act ss 32B, 32DA.
562 Victorian Act ss 30A(2), 30E(3).
563 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/embriage_cache/emshare/original/public/2018/06/ad/8264e0376/Alteration%20of%20Sex%20-%20July%202018.pdf>.
564 Victorian Bill cls 5 (definition of 'sex descriptor' and 'prohibited sex descriptor'), 8, 10.
565 SA Act ss 29I(2), 29O(2); SA Regulations reg 7A.
566 Tasmanian Act s 28A.
567 Equal Opportunity Tasmania, *Legal recognition of sex and gender diversity in Tasmania* (February 2016) 4.
568 Equal Opportunity Tasmania, *Legal recognition of sex and gender diversity in Tasmania* (February 2016) 28.
569 Queensland Act s 23(4).
570 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>>.
571 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>>.
572 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/108022/1476308821/redirect/1/filename/Application+to+alter+birth+register+to+record+change+of+sex.pdf>>.
573 ACT Government, *Application to alter birth register to record change of sex* <<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>>.
574 GR Act s 14(1).
575 GR Act s 3 (definition of 'reassignment procedure').
576 *AB v Western Australia; AH v Western Australia* (2011) 244 CLR 390, 404 [32] (French CJ, Gummow, Hayne, Kiefel and Bell JJ).
577 GR Act s 15(1)(b)(i).
578 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)).
579 GR Act s 15(1)(b)(iii).
580 NSW Act ss 32B(1), 32DA(1).
581 NSW Act s 32A.
582 Victorian Act ss 30A(1)(c), 30E(1)(d).
583 Victorian Act s 4 (definition of 'sex affirmation surgery').
584 Victorian Bill cls 8, 10.
585 SA Act ss 29I, 29K, 29O.
586 SA Act s 29H(1) (definition of 'clinical treatment').
587 SA Act s 29H(3); SA Regulations reg 7C.
588 Tasmanian Act s 28A.
589 Tasmanian Act s 3 (definition of 'sexual reassignment surgery').
590 Equal Opportunity Tasmania, *Legal recognition of sex and gender diversity in Tasmania* (February 2016) 11.
591 Queensland Act s 22.
592 Queensland Act sch 2 (definition of 'sexual reassignment surgery').
593 NT Act s 28B(1)(b).
594 NT Act s 28A (definition of 'sexual reassignment surgery').
595 ACT Act ss 24(1)(c), 29A(1)(d).
596 ACT Act ss 24(1)(c)(i), 29A(1)(d)(i).
597 ACT Act ss 24(1)(c)(ii), 29A(1)(d)(ii).
598 *Legislation Act 2001* (ACT) s 169B.
599 GR Regulations reg 4(1)(b)(ii).
600 GR Regulations reg 4(1)(b)(iii).
601 GR Regulations reg 4(1)(b)(iv).
602 GR Regulations reg 4(1)(b)(v).
603 GR Regulations reg 4(1)(b)(vi).
604 GR Regulations reg 4(1)(b)(vii).
605 NSW Act ss 32C(a), 32DB(a).
606 NSW Act ss 32C(b), 32DB(b); NSW Regulations regs 10(a), 11(a).
607 NSW Act ss 32C(b), 32DB(b); NSW Regulations regs 10(b), 11(b).
608 Victorian Act ss 30B(1), 30E(2).
609 Victorian Act ss 30B(2), 30E(2).
610 Victorian Bill cls 8, 10.
611 Victorian Bill cls 8, 10.
612 SA Act ss 29K(a), 29O(2)(b).
613 SA Act s 29K(b).
614 Tasmanian Act s 28B(a).
615 Equal Opportunity Tasmania, *Legal recognition of sex and gender diversity in Tasmania* (February 2016) 11.
616 Queensland Act s 23(4)(d); Queensland Regulations reg 12(2)(a).
617 Queensland Act s 23(4)(b)(ii), sch 2 (definition of 'recognition certificate').
618 Queensland Act s 23(4)(b)(i).
619 NT Act s 28C; NT Regulations reg 4A(a).
620 NT Act s 28C; NT Regulations reg 4A(b).
621 ACT Act s 25(1)(a).
622 ACT Act s 25(1)(b).
623 Victorian Bill cls 8, 10.
624 SA Act s 29S(1).
625 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>.
626 SA Act ss 4 (definition of 'Court'), 29S(3).
627 Equal Opportunity Tasmania, *Legal recognition of sex and gender diversity in Tasmania* (February 2016) 11.
628 Victorian Act s 30I.
629 Victorian Bill cl 13.
630 Victorian Bill cl 16.
631 GR Act s 15(1)(a)(i).

- 632 GR Act s 15(1)(a)(ii).
- 633 GR Act s 15(1)(a)(iii).
- 634 GR Act s 16(2).
- 635 GR Act s 3 (definition of 'corresponding law'); GR Regulations reg 3.
- 636 NSW Act s 32B.
- 637 NSW Act s 32DA(1).
- 638 NSW Act s 32DD.
- 639 NSW Act ss 32I, 32J; NSW Regulations reg 19.
- 640 Victorian Act s 30A(1).
- 641 Victorian Act s 30E(1)(b).
- 642 Victorian Act s 30F(1).
- 643 Victorian Act ss 4 (definition of 'interstate recognition certificate'), 30G(2).
- 644 SA Act s 29I(1).
- 645 SA Act s 29O(1).
- 646 SA Act ss 29O(1), 29Q.
- 647 SA Act s 29K(b).
- 648 Tasmanian Act s 28A(1)(a).
- 649 Tasmanian Act s 28H.
- 650 Queensland Act s 24(2), sch 2 (definition of 'recognition certificate').
- 651 NT Act s 28B(1)(a).
- 652 NT Act ss 28A (definition of 'recognition certificate'), 28I.
- 653 ACT Act s 24(1)(b).
- 654 ACT Act s 29A(1)(b).
- 655 ACT Act ss 29A(1), 29C.
- 656 ACT Act s 29D(2).
- 657 GR Act s 14(1).
- 658 GR Act s 14(2)(b).
- 659 NSW Act ss 32B(2), 32DA(2).
- 660 Victorian Act ss 30A(1)(a), 30E(1)(a).
- 661 Victorian Bill cls 8, 10.
- 662 Victorian Bill cls 8, 10; Victorian Act s 4 (definition of 'Court').
- 663 SA Act s 29J(1).
- 664 SA Act ss 4 (definition of 'Court'), 29J(2).
- 665 Tasmanian Act ss 28A(2)–(4).
- 666 Equal Opportunity Tasmania, *Legal recognition of sex and gender diversity in Tasmania* (February 2016) 17.
- 667 Queensland Act ss 23(2)–(3).
- 668 NT Act s 28B(2).
- 669 ACT Act s 24(3).
- 670 ACT Act s 24(2).
- 671 See GR Regulations reg 4.
- 672 GR Act s 15(2)(b).
- 673 NSW Act ss 32C, s32DB.
- 674 Victorian Bill cl 8.
- 675 Victorian Bill cl 8.
- 676 Victorian Bill cl 10.
- 677 SA Act s 29J(2)–(3).
- 678 SA Act s 29J(5).
- 679 SA Act s 29J(4).
- 680 SA Act ss 29P, 29Q.
- 681 Tasmanian Act s 28B.
- 682 Equal Opportunity Tasmania, *Legal recognition of sex and gender diversity in Tasmania* (February 2016) 18.
- 683 Queensland Act s 23(4); Queensland Regulations reg 12(2)(b).
- 684 NT Act s 28C.
- 685 ACT Act s 25(2)(a).
- 686 ACT Act s 25(2)(b).
- 687 ACT Act s 25(2)(c).
- 688 ACT Act ss 29A(2), 29B(2).
- 689 Victorian Bill cls 8, 10; Victorian Act s 4 (definition of 'Court').
- 690 SA Act s 29J.
- 691 Equal Opportunity Tasmania, *Legal recognition of sex and gender diversity in Tasmania* (February 2016) p 18.
- 692 Queensland Act s 23(3).
- 693 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).
- 694 *Codigo Civil y Comercial de la Nacion (Ley 26.994)* [Argentine Civil and Commercial Code (Law 26.994)] (Argentina) art 96.
- 695 *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-adoption-death-marriage-and-divorce/deaths/vsa052.pdf>>.
- 696 *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>.
- 697 *Vital Statistics Act*, RSPEI 1988, c V-4.1, s 2; *Vital Statistics Act Regulations*, PEI Reg EC453-00, reg 6 and schedule A.
- 698 *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).
- 699 *Vital Statistics Act*, RSNS 1989, c 494, s 3.
- 700 *Vital Statistics Act*, RSO 1990, c V4, s 8; *Vital Statistics Regulation*, RRO Reg 1094/1990, regs 1(1)–(2).
- 701 *Vital Statistics Act*, SNB 1979, c V-3, s 12(1)–(3).
- 702 *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).
- 703 Government of Denmark, *Fødselsanmeldelse [Birth Notification Form]*, Personregistrering.dk <<https://www.personregistrering.dk/fileadmin/pdfs/print/Fodselsanmeldelse.pdf>>.
- 704 *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>.
- 705 *Civil Registration Act 2004 (Ireland)* ss 2 definition of 'the required particulars', 30(1), sch 1 pt 1.
- 706 Ireland National Perinatal Reporting System, *Birth Notification Form* BNF01, 11 <http://www.hpo.ie/nprs/nprs_documentation/NPRS_Instruction_Manual_Mar_2015.pdf>.
- 707 *Gender Identity, Gender Expression and Sex Characteristics Act 2015* (Malta) art 7(4); *Civil Code* (Malta) art 278(c).
- 708 *Births, Deaths, Marriages, and Relationships Registration Act 1995 (NZ)* ss 5, 5A; *Births, Deaths, Marriages, and Relationships Registration (Prescribed Information) Regulations 1995 (NZ)* reg 3(1)(b).
- 709 New Zealand Government, *Notification of Birth for Registration of child born in New Zealand*, Department of Internal Affairs, 1 <<https://www.govt.nz/assets/Documents/BDM/Notification-of-Birth-for-Registration-of-a-child-born-in-New-Zealand-BDM27.pdf>>.
- 710 Contemplated at *Births, Deaths, Marriages, and Relationships Registration Act 1995 (NZ)* ss 29(3)(a)(ii), 32(a)(ii), 77(4)(a).

- 711 [Lov om helsepersonell m.v. \(helsepersonelloven\) 1999](#) [Health Care Act 1999] (Norway) § 35.
- 712 Norwegian Government, *Notification of birth to the Medical Birth Registry of Norway – Part D*, Norwegian Institute of Public Health <<https://www.fhi.no/en/hn/health-registries/medical-birth-registry-of-norway/notification-of-birth-to-the-medical-birth-registry-of-norway/>>.
- 713 Government of Pakistan, *Application for Registration of Birth of a Child of Citizen of Pakistan Born in a Country Outside Pakistan* <<http://pcgv.org/Registration%20of%20Child%20Born%20Outside%20Pakistan%20Form%20Updated%20September%202021%202012.pdf>>.
- 714 UK Government, *Register a birth* <<https://www.gov.uk/register-birth>>.
- 715 [Health and Safety Code 2017 \(California\)](#) ss 102425.
- 716 State of California, *Delayed Registration of Birth Form* <<https://www.cdph.ca.gov/CDPH%20Document%20Library/ControlledForms/VS85.pdf>>.
- 717 [Oregon Revised Statute \(ORS\) s 432.088](#) (birth registration is mandatory); Oregon Health Authority, *Instructions for completing the Oregon Report of Live Birth on paper* <<http://www.oregon.gov/oha/PH/BIRTHDEATHCERTIFICATES/REGISTERVITALRECORDS/Documents/Birth/BCOutfac.pdf>>.
- 718 [Codigo Civil y Comercial de la Nacion \(Ley 26.994\)](#) [Argentine Civil and Commercial Code (Law 26.994)] (Argentina) art 96.
- 719 [Code Civil 1807](#) [Civil Code] (Belgium) art 57 § 1.
- 720 [Vital Statistics Act](#), RSBC 1996, c 479, s 36(2)(d); [Vital Statistics Act](#), CCSM 2017, c V60, s 32(3); [Vital Statistics Act](#), RSNS 1989, c 494, s 37(2A)(d); [Vital Statistics Act](#), RSO 1990, c V4, s 43(1)(d); [Vital Statistics Act](#), SNL 2009, c V-6.01, s 30(3)(d); [Vital Statistics Information Regulation](#), Alta Reg 108/2018, reg 3(1); [Vital Statistics Act](#), SS 2009, c V-7.21, s 65(1)(d).
- 721 [Vital Statistics Act](#), RSPEI 1988, c V-4.1, s 32(2)(d); [Vital Statistics Act](#), SNB 1979, c V-3, s 39(1)(g); [General Regulation](#), NB Reg 1987-30, reg 11.41.
- 722 [Vital Statistics Act Regulations](#), PEI Reg EC453-00, reg 6 and schedule A; [General Regulation](#), NB Reg 1987-30, reg 11.41.
- 723 Embassy of Pakistan, *Fødsele- Og Navneattest [Name and Birth Certificate]* <http://www.pakistanembassy.dk/nadra/birth_specimen.jpg>.
- 724 *Executive Order on the Civil Registration Act No 5 of 9 January 2013* (Denmark) s 4, annexure 1 3(4) [Global Denmark trans, English Translation of Executive Order on the Civil Registration Act (July 2013)] <https://www.cpr.dk/media/17536/lovbekendtg_relse_eng_12070213.pdf>.
- 725 [The Registration of Births and Deaths Act 1969](#) (India) ss 8–9, 30; [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>.
- 726 [Civil Registration Act 2004 \(Ireland\)](#) s 19 and sch 1 pt 1.
- 727 [Civil Registration Act 2004 \(Ireland\)](#) sch 1 pt 1 does not define sex. However, the only registrable sexes under the [Gender Recognition Act 2015](#) (Ireland) s 18(1) are male or female.
- 728 Maltese Government, *Certificate Types* <<https://secure2.gov.mt/certifikati/CertificateTypes2.aspx>>.
- 729 [Births, Deaths, Marriages, and Relationships Registration Act 1995 \(NZ\)](#) s 67(1); [Births, Deaths, Marriages, and Relationships Registration \(Prescribed Information\) Regulations 1995 \(NZ\)](#) reg 6(a)(iii).
- 730 New Zealand Government, *Notification of Birth for Registration of child born in New Zealand*, Department of Internal Affairs, 1 <<https://www.govt.nz/assets/Documents/BDM/Notification-of-Birth-for-Registration-of-a-child-born-in-New-Zealand-BDM27.pdf>>.
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- 799 *Gender Identity, Gender Expression and Sex Characteristics Act 2015* (Malta) art 4; *Notarial Profession and Notarial Archives 1927* (Malta) art 50.
- 800 *Births, Deaths, Marriages, and Relationships Registration Act 1995 (NZ)* s 28(1); note that this was the subject of a review by the New Zealand Governance and Administration Committee, released on 10 August 2018. The report recommended that individuals should be able to apply directly to the Registrar-General's office, rather than the Family Court. These changes have not been made as yet <https://www.parliament.nz/resource/en-NZ/SCR_79010/bea83bb6ba26f9fbbf543855e3bc08fa8d954b2a>.
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- 802 *Transgender Persons Protection of Rights Act 2018* (Pakistan) s 3.
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- 804 *Health and Safety Code 2017 (California)* ss 103425, 103426; *Gender Recognition Act of 2017 (California)*: California Courts, *Gender Changes* <<http://www.courts.ca.gov/genderchange.htm>>.
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- 807 *Vital Statistics Act*, SA 2007, c V-4.1, s 29.1; *Vital Statistics Information Regulation*, Alta Reg 108/2018, reg 16; Ontario Vital Statistics Agency, *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>>; Newfoundland Labrador Vital Statistics Service, *Change of Sex Designation* <http://www.servicenl.gov.nl.ca/birth/changing_your_sex_designation/pdf/cosd_16_and_over.pdf>.
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- 810 Nova Scotia Vital Statistics Service, *Change of Sex Designation* <<https://novascotia.ca/sns/pdf/ans-change-of-sex-designation-16-years-of-age-or-older.pdf>>; note that the Nova Scotia Government has recently assented to legislative amendments to their Vital Statistics Act <https://nslegislature.ca/legc/bills/63rd_2nd/3rd_read/b042.htm>; these changes recognise gender “X” as an option on birth certificates, as well as making the sex field optional <<https://nslegislature.ca/sites/default/files/pdfs/proceedings/hansard/63-2/h15oct02.pdf>>.
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- 813 Identity Malta, *Application for a Malta Passport* <<https://identitymalta.com/wp-content/uploads/2017/09/FORM-A.pdf>>.
- 814 *Births, Deaths, Marriages, and Relationships Registration Act 1995 (NZ)* s 28(3).
- 815 *Lov om endring av juridisk kjønn* [Legal Gender Amendment Act, Prop 74 L 2015-206] (Norway) § 1; *Forskrift om folkeregistrering 2007 hefte 11 s 1273* [Regulations on population registration 2007] (Norway) § 2-2.
- 816 *Transgender Persons Protection of Rights Act 2018* (Pakistan) s 2(n)(i)–(iii).
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- 823 *XY v Ontario (Government and Consumer Services)* [2012] HRTO 726.
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- 825 *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.
- 826 *National Legal Services Authority v Union of India and Ors*, (Unreported, Supreme Court of India, Writ Petition (Civil) No. 400 of 2012 and Writ Petition (Civil) No. 604 of 2013, April 15 2014), [20] <<https://supremecourtindia.nic.in/jonew/judis/41411.pdf>>.
- 827 *Gender Recognition Act 2015 (Ireland)* s 10(1)(f)(i).
- 828 *Michael v Registrar-General of Births, Deaths and Marriages (2008) 27 FRNZ 58*, [50].
- 829 *Lov om endring av juridisk kjønn 2016* [Legal Gender Amendment Act, Prop 74 L 2015-2016] (Norway) § 2.
- 830 *Transgender Persons Protection of Rights Act 2018* (Pakistan) s 3(1).

- 831 [Gender Recognition Act 2004 \(UK\)](#) s 1(1); note that these requirements are currently under review, with public submissions having closed on 19 October 2018 - UK Government, *Reform of the Gender Recognition Act 2004* <<https://www.gov.uk/government/consultations/reform-of-the-gender-recognition-act-2004>>.
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- 833 *Identidad de Genero (Ley 26.743)* [Gender Identity Law (Law 26.743)] (Argentina) art 4.
- 834 *Code Civil 1807* [Civil Code] (Belgium) art 62bis, § 3.
- 835 *Code Civil 1807* [Civil Code] (Belgium) art 62bis, § 5.
- 836 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.
- 837 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).
- 838 Nova Scotia, *New Gender Identity Option for Birth Certificates* <<https://novascotia.ca/news/release/?id=20180919003>>.
- 839 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); note that the Nova Scotia Government has recently assented to legislative amendments to their *Vital Statistics Act* <https://nslegislature.ca/legc/bills/63rd_2nd/3rd_read/b042.htm>; these changes remove the requirement for a professional statement to change the sex indicator on an individual's birth certificate <<https://nslegislature.ca/sites/default/files/pdfs/proceedings/hansard/63-2/h15oct02.pdf>>; *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).
- 840 *Vital Statistics Act*, RSBC 1996, c 479, s 27(4).
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- 842 *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.
- 843 *National Legal Services Authority v Union of India and Ors*, (Unreported, Supreme Court of India, Writ Petition (Civil) No. 400 of 2012 and Writ Petition (Civil) No. 604 of 2013, April 15 2014), [20] <<https://supremecourtindia.nic.in/jonew/judis/41411.pdf>>.
- 844 United Nations Development Program, *Legal Gender Recognition a Multi-Country Legal and Policy Review in Asia* <<http://www.weareaptn.org/wp-content/uploads/2018/02/rbap-hhd-2017-legal-gender-recognition-5.pdf>> p 39.
- 845 *Gender Recognition Act 2015 (Ireland)* s 10(1).
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- 847 *Gender Identity, Gender Expression and Sex Characteristics Act 2015* (Malta) art 4; *Notarial Profession and Notarial Archives 1927* (Malta) art 50.
- 848 *Births, Deaths, Marriages, and Relationships Registration Act 1995 (NZ)* s 28(3)(c)(i).
- 849 *Births, Deaths, Marriages, and Relationships Registration Act 1995 (NZ)* s 28(3)(c)(ii); note that this was the subject of a review by the New Zealand Governance and Administration Committee, released on 10 August 2018. The report recommended that the requirement for medical evidence should be removed. These changes have not been made as yet <https://www.parliament.nz/resource/en-NZ/SCR_79010/beat83bb6ba26f9fbbf54385e3bc08fa8d954b2a>.
- 850 Skatteetaten [Norwegian Tax Administration], *Applications for change of legal gender* <<https://www.skatteetaten.no/person/folkeregister/endre-kjonn/>>.
- 851 Government of Pakistan, *Pak-Identity*, National Database and Registration Authority <<http://fd.nadra.gov.pk/supp-documents/>>.
- 852 *Gender Recognition Act 2004 (UK)* ss 3, 3D
- 853 *Health and Safety Code 2017 (California)* s 103426; *Gender Recognition Act of 2017 (California)*; California Courts, Gender Changes <<http://www.courts.ca.gov/genderchange.htm>>.
- 854 *Oregon Administrative Rules 333-001-0265 (Oregon)* ss 0271 and 0272; *Oregon Revised Statute (ORS)* ss 33.410, 33.420, 33.460.
- 855 The New York City Council, *Amending sex designation on birth records and the issuance of birth records* <<https://legistar.council.nyc.gov/LegislationDetail.aspx?ID=3521898&GUID=A052CA3B-4FB7-4DD0-8318-5112E8422BA1&Options=&Search=>>>.
- 856 *Identidad de Genero (Ley 26.743)* [Gender Identity Law (Law 26.743)] (Argentina) art 8.
- 857 *Code Civil 1807* [Civil Code] (Belgium) art 62bis, § 10.
- 858 *Gender Recognition Act 2015 (Ireland)* s 15.
- 859 *Gender Identity, Gender Expression and Sex Characteristics Act 2015* (Malta) art 8(2).
- 860 *Oregon Administrative Rules 333-001-0265 (Oregon)* s 0272(2); Oregon Health Authority, Vital Records and Certificates <<https://www.oregon.gov/oha/PH/BIRTHDEATHCERTIFICATES/Pages/rules.aspx>>.
- 861 *Code Civil 1807* [Civil Code] (Belgium) art 62bis, § 1.
- 862 *Vital Statistics Act*, RSPEI 1988, c V-4.1, s 12(1), (2).
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- 864 Nova Scotia, *New Gender Identity Option for Birth Certificates* <<https://novascotia.ca/news/release/?id=20180919003>>.
- 865 *Vital Statistics Act*, SNB 1979, c V-3, s 34(1); note that the Nova Scotia Government has recently assented to legislative amendments to their *Vital Statistics Act* <https://nslegislature.ca/legc/bills/63rd_2nd/3rd_read/b042.htm>; these changes allow Nova Scotia residents born outside the province to access documentation that reflects their gender identity <<https://nslegislature.ca/sites/default/files/pdfs/proceedings/hansard/63-2/h15oct02.pdf>>.
- 866 *Vital Statistics Act*, CCSM 2017, c V60, s 25(3).
- 867 *Gender Recognition Act 2015 (Ireland)* s 9(1)(a).
- 868 *Gender Recognition Act 2015 (Ireland)* s 9(1)(b).
- 869 *Gender Recognition Act 2015 (Ireland)* s 11.
- 870 *Gender Identity, Gender Expression and Sex Characteristics Act 2015* (Malta) arts 3 and 4.
- 871 *Gender Identity, Gender Expression and Sex Characteristics Act 2015* (Malta) art 7.
- 872 *Births, Deaths, Marriages, and Relationships Registration Act 1995 (NZ)* s 27A(a).
- 873 *Lov om endring av juridisk kjønn 2016* [Legal Gender Amendment Act, Prop 74 L 2015-2016] (Norway) § 2.
- 874 *Forskrift om endring av juridisk kjønn for norske statsborgere bosatt i utlandet 2016 hefte 17* [Regulations concerning change of legal gender for Norwegian citizens abroad, 2016, book 17] (Norway) § 1.
- 875 *Transgender Persons Protection of Rights Act 2018* (Pakistan) s 3(3).
- 876 *Gender Recognition Act 2004 (UK)* chapter 7 s 3.
- 877 *Gender Recognition Act of 2017 (California)* s 103426.
- 878 *Oregon Administrative Rules 333-001-0265 (Oregon)* s 0273(1)(b); Oregon Health Authority, Vital Records and Certificates <<https://www.oregon.gov/oha/PH/BIRTHDEATHCERTIFICATES/Pages/rules.aspx>>.
- 879 *Codigo Civil y Comercial de la Nacion (Ley 26.994)* [Argentine Civil and Commercial Code (Law 26.994)] (Argentina) art 26.
- 880 *Code Civil 1807* [Civil Code] (Belgium) art 62bis, § 11.
- 881 *Age of Majority Act*, RSBC 1996, c 479, ss 1(1)(a), 1(2).
- 882 *Vital Statistics Information Regulation*, Alta Reg 108/2018, reg 17(1)(c); *The Interpretation Act*, CCSM 2000, c. 180, s 17, schedule of definitions.
- 883 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>>.
- 884 *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).

- 885 [Vital Statistics Act](#), RSPEI 1988, c V-4.1, s 12(1).
- 886 [Vital Statistics Act](#), SS 2009, c V-7.21, s 31(2).
- 887 [Arnot v Forsberg](#) [2018] SKQB 159.
- 888 [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.
- 889 [Gender Recognition Act 2015 \(Ireland\)](#) s 12(1); note that this was the subject of a legislative review to the Minister for Employment Affairs and Social Protection, released on 18 June 2018. The report recommended that children of all ages (subject to parental consent and a proper administrative procedure) should be afforded a system of gender recognition. At the time of drafting, these changes have not been made <<http://www.welfare.ie/en/downloads/GRA%20Review%20Report.pdf>>.
- 890 [Gender Identity, Gender Expression and Sex Characteristics Act 2015](#) (Malta) arts 2, 7.
- 891 [Births, Deaths, Marriages, and Relationships Registration Act 1995 \(NZ\)](#) s 27A.
- 892 [Lov om endring av juridisk kjønn 2016](#) [Legal Gender Amendment Act, Prop 74 L 2015-2016] (Norway) § 4.
- 893 [Transgender Persons Protection of Rights Act 2018](#) (Pakistan) s 3(3).
- 894 [Gender Recognition Act 2004 \(UK\)](#) chapter 7 s 1.
- 895 [Health and Safety Code 2017 \(California\)](#) s 103430(e).
- 896 [Oregon Administrative Rules 333-001-0265 \(Oregon\)](#) s 0272(1)(b)(B).
- 897 The New York City Council, [Amending sex designation on birth records and the issuance of birth records](#) <<https://legistar.council.nyc.gov/LegislationDetail.aspx?ID=3521898&GUID=A052CA3B-4FB7-4DD0-8318-5112E8422BA1&Options=&Search=>>>.
- 898 [Identidad de Genero \(Ley 26.743\)](#) [Gender Identity Law (Law 26.743)] (Argentina) art 5.
- 899 [Code Civil 1807](#) [Civil Code] (Belgium) art 62bis, § 11.
- 900 [Vital Statistics Act](#), RSPEI 1988, c V-4.1, s 12(1); [Arnot v Forsberg](#) [2018] SKQB 159.
- 901 [Vital Statistics Act](#), RSNS 1989, c 494, s 25(2).
- 902 [Vital Statistics Act](#), RSBC 1996, c 479 s 27(2)(d).
- 903 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>>.
- 904 [Vital Statistics Act](#), SNL 2009, c V-6.01, s 26.1(2).
- 905 [Vital Statistics Act](#), SNL 2009, c V-6.01, s 26.1(2)(d).
- 906 [Vital Statistics Act](#), SNL 2009, c V-6.01, s 26.1(2)(e).
- 907 [Vital Statistics Information Regulation](#), Alta Reg 108/2018, reg 17(4).
- 908 [Vital Statistics Information Regulation](#), Alta Reg 108/2018, reg 19.
- 909 [Vital Statistics Act](#), CCSM 2017, c V60, s 25(8)(2)(f).
- 910 [Vital Statistics Act](#), SNB 1979, c V-3, s 34.1(3).
- 911 [Vital Statistics Act](#), SNB 1979, c V-3, s 34.1(3)(a).
- 912 [Gender Recognition Act 2015 \(Ireland\)](#) s 12.
- 913 [Gender Recognition Act 2015 \(Ireland\)](#) s 12(4)(a).
- 914 [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.
- 915 [Gender Recognition Act 2015 \(Ireland\)](#) s 12(4)(b)(ii).
- 916 [Gender Recognition Act 2015 \(Ireland\)](#) s 12(6).
- 917 [Gender Identity, Gender Expression and Sex Characteristics Act 2015](#) (Malta) art 7(1).
- 918 [Gender Identity, Gender Expression and Sex Characteristics Act 2015](#) (Malta) art 7(2).
- 919 [Births, Deaths, Marriages, and Relationships Registration Act 1995 \(NZ\)](#) s 29(1).
- 920 [Births, Deaths, Marriages, and Relationships Registration Act 1995 \(NZ\)](#) s 29.
- 921 [Lov om endring av juridisk kjønn 2016](#) [Legal Gender Amendment Act, Prop 74 L 2015-2016] (Norway) § 4.
- 922 [Lov om endring av juridisk kjønn 2016](#) [Legal Gender Amendment Act, Prop 74 L 2015-2016] (Norway) § 4.
- 923 [Lov om endring av juridisk kjønn 2016](#) [Legal Gender Amendment Act, Prop 74 L 2015-2016] (Norway) § 4.
- 924 [Health and Safety Code 2017 \(California\)](#) s 103426.
- 925 [Health and Safety Code 2017 \(California\)](#) s 103430(e).
- 926 [Health and Safety Code 2017 \(California\)](#) s 103430(e)(A).
- 927 [Health and Safety Code 2017 \(California\)](#) s 103430(e)(B).
- 928 [Oregon Administrative Rules 333-001-0265 \(Oregon\)](#) s 0272(1)(b)(B); [Oregon Revised Statute \(ORS\)](#) s 432.
- 929 [Identidad de Genero \(Ley 26.743\)](#) [Gender Identity Law (Law 26.743)] (Argentina) art 5.
- 930 [Code Civil 1807](#) [Civil Code] (Belgium) art 62bis, § 11.
- 931 [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).
- 932 [Vital Statistics Act](#), RSBC 1996, c 479, s 27(3).
- 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 [Gender Recognition Act 2015 \(Ireland\)](#) s 12(5).
- 935 [Gender Identity, Gender Expression and Sex Characteristics Act 2015](#) (Malta) art 7(1).
- 936 [Gender Identity, Gender Expression and Sex Characteristics Act 2015](#) (Malta) art 7(2).
- 937 [Births, Deaths, Marriages, and Relationships Registration Act 1995 \(NZ\)](#) s 29(1).
- 938 [Births, Deaths, Marriages, and Relationships Registration Act 1995 \(NZ\)](#) s 29.
- 939 [Lov om endring av juridisk kjønn 2016](#) [Legal Gender Amendment Act, Prop 74 L 2015-2016] (Norway) § 4.
- 940 [Lov om endring av juridisk kjønn 2016](#) [Legal Gender Amendment Act, Prop 74 L 2015-2016] (Norway) § 5.
- 941 [Health and Safety Code 2017 \(California\)](#) s 103430(e)(A).
- 942 [Health and Safety Code 2017 \(California\)](#) s 103430(2).
- 943 [Health and Safety Code 2017 \(California\)](#) s 103430(e)(B).
- 944 [Oregon Administrative Rules 333-001-0265 \(Oregon\)](#) s 0272(1)(b)(B); [Oregon Revised Statute \(ORS\)](#) s 432.



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