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## Rights, Respect & Recognition

Submission in response to the Law Reform Commission of  
Western Australia's Discussion Paper: *Review of Western  
Australian legislation in relation to the recognition of a person's  
sex, change of sex or intersex status*

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## TransFolk of WA

TransFolk of WA is a support service for all transgender people and their loved ones in Western Australia. We provide accessible safe spaces where members can access tailored peer support.

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# 1. Introduction

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TransFolk of WA and the Human Rights Law Centre welcome the opportunity to contribute to the *Review of Western Australian legislation in relation to the recognition of a person's sex, change of sex or intersex status* (**Review**) initiated by the Attorney-General on 16 January 2018. In particular, we appreciate the consultation process and the opportunity to respond to the questions outlined in the Law Reform Commission of Western Australia (**Commission**)'s *Project 108 Discussion Paper* (**Discussion Paper**).<sup>1</sup>

All people deserve to be treated with basic dignity and respect – regardless of their gender. In Western Australia, the majority of trans and gender diverse people can't access accurate identity documents that respect their gender identity. Existing laws requiring a person to make an application to the Gender Reassignment Board, divorce their spouse, undergo surgery and which only recognise people as 'male' or 'female', present unnecessary and discriminatory barriers to trans and gender diverse people.

We welcome the introduction of the *Gender Reassignment Amendment Bill 2018* (WA) in Western Australian Parliament by the Attorney-General on 15 August 2018, to remove the 'unmarried' requirement to implement marriage equality in the state, and urge its swift passage through Western Australian Parliament before 9 December 2018. Accordingly, we do not consider the issue of forced divorce in detail in this submission.

We jointly support the majority of the proposed reforms outlined in the Discussion Paper, with the exception of the recommendation to establish a "Proof of Sex Certificate" and to impose a lifetime limit on the number of applications to change the gender on a Gender Identity Certificate, which we believe may undermine the beneficial impact of the proposed reforms.

As the Discussion Paper recognises, a person's first birth certificate is the foundational document used to establish citizenship and to obtain government benefits.<sup>2</sup> Over time, race and religion classifications have been removed from identity documents in recognition that including this information is not necessary, and runs the risk of allowing discrimination against racial and religious minorities in our community.

In Western Australia, trans and gender diverse people are at risk of discrimination when applying for jobs, accessing essential services, and in a range of other situations when their birth certificate does

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<sup>1</sup> Law Reform Commission of Western Australia, *Project 108: Discussion Paper – Review of Western Australian legislation in relation to the recognition of a person's sex, change of sex or intersex status* (2018).

<sup>2</sup> *Ibid* 65.

not match their gender identity. Existing legal recognition systems do not count or recognise people with non-binary gender identities – pretending they do not exist, despite increasing research and advocacy to respect the gender identity and expression of non-binary and gender diverse people.

In addition, legal systems which only recognise binary sex classifications reinforce social and cultural stereotypes that babies are born either ‘male’ or ‘female’. For intersex infants who do not fit within medical norms of male and female bodies, this pressure for parents to assign their child a binary sex classification shortly after birth is tied closely to decision-making around parents authorising so-called ‘normalising’ medical interventions. For example, many intersex children are subjected to cosmetic surgery and sterilisation at an early age without their full, prior and informed consent. While this reform will address some issues intersex people face, there are further reforms required to prohibit non-urgent and deferrable medical interventions on intersex infants and children performed without personal consent.

We support the removal of sex classifications on birth certificates, and recommend a simple administrative process for people to obtain a Gender Identity Certificate if required.

## 2. Summary of recommendations

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### **Recommendation 1:**

We support the Commission’s recommendation that sex classification not be included on the Birth Registration Statement from parents to the Registrar, the Register or on birth certificates.

### **Recommendation 2:**

We support the Commission’s recommendation that Gender Identity Certificates be introduced for documentary proof of gender.

### **Recommendation 3:**

We recommend that the Attorney-General’s Department produce guidelines which clarify the purpose of Gender Identity Certificates and make clear that a person must not be required to produce a Gender Identity Certificate without a valid reason.

***Recommendation 4:***

We recommend that the Western Australian Government conduct an audit of relevant government policies to ensure these policies are inclusive of the needs and experiences of trans, gender diverse and intersex people (e.g. Department of Education, Department of Health and Department of Corrections policies).

***Recommendation 5:***

We oppose the Commission's recommendation that Proof of Sex Certificates be introduced in Western Australia.

***Recommendation 6:***

We support the Commission's recommendation that a Gender Identity Certificate can be ordered from the Registrar using a simple administrative process.

***Recommendation 7:***

We support the Commission's recommendation that Gender Identity Certificates make available the following classifications: Male, Female, and Non-binary. We recommend that the Registrar be empowered to regularly review and add to the available classifications in consultation with affected communities.

***Recommendation 8:***

We support the Commission's recommended process for subsequent Gender Identity Certificate applications, including additional requirements for subsequent Gender Identity Certificates issued with a different gender classification.

***Recommendation 9:***

We support the Commission's limit of one application per year for a Gender Identity Certificate, but recommend that there be no lifetime limit imposed for applications for Gender Identity Certificates.

**Recommendation 10:**

We support the Commission's recommended process for subsequent Gender Identity Certificate applications, including additional requirements for subsequent Gender Identity Certificates issued with a different gender classification.

**Recommendation 11:**

We recommend that the Western Australian Government consider additional privacy protections in relation to gender information which may be reasonable, necessary or appropriate.

**Recommendation 12:**

We recommend that the Registrar have the discretion to waive the cost of Gender Identity Certificates in situations of financial hardship.

**Recommendation 13:**

We support the Commission's proposed model for applications for a first Gender Identity Certificates for minors.

**Recommendation 14:**

We support the Commission's proposed dispute resolution process where one or more parents do not provide statutory declarations consenting to a child's application, but recommend that the Registrar be granted discretion to accept an application from one parent where special circumstances exist.

## 3. Reasons for reform

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### 3.1 Summary of reasons for fairer birth certificate laws

The Discussion Paper outlines a number of reasons why the review was undertaken. We support the reasons outlined, which provide clear and unequivocal reasons for law reform in Western Australia.

As the Discussion Paper outlines, it is extremely difficult for trans and gender diverse people born in Western Australia to change their legal gender to reflect who they are, due to outdated legal barriers

to recognition. We support the Discussion Paper's proposed model of reform which moves towards a self-affirmation model for legal recognition for a range of reasons, including:

**(a) *Being trans or gender diverse is not an "illness"***

As you would be aware, a number of trans and gender diverse people may experience symptoms like gender dysphoria that require clinical treatment and support. For many, this treatment can be life-saving. However, it is important to understand that being trans or gender diverse is not an "illness" and does not in itself require diagnosis.

**(b) *Practical impacts of having inaccurate identity documents***

Legal recognition is profoundly important to a person's sense of self and to reduce the discrimination, stigma and practical difficulties faced in day to day activities – from applying for jobs, getting a driver's licence, accessing education and accessing basic entitlements such as social security and healthcare.

**(c) *Requiring medical verification is pathologising and disrespectful***

Existing laws which require medical evidence and counselling as a prerequisite to legal recognition impose a discriminatory burden on trans and gender diverse people. Such a requirement represents an administrative and financial burden but also has much more profound consequences – it sends a damaging message to these cohorts that there is something "wrong" with them that requires medical intervention and diagnosis. The idea that a medical practitioner can or should also "verify" an individual's own sense of their gender identity is not only absurd but also damaging to a person's sense of self. This harm is compounded by the generally negative experiences trans and gender diverse people have with the medical profession.

**(d) *International best practice requires respect for self-identification***

Internationally, it is now recognised that individuals should be able to self-declare their gender with supporting documentation that does not include medical certificates. As outlined in the Discussion Paper at Appendix 3, and Appendix 1 of this submission, countries such as Ireland, Argentina, Belgium, Ecuador, France, Greece, Iceland, Denmark and Malta have reformed their laws to allow individuals to change the sex or gender on their birth certificates through simple administrative processes, similar to a change of name. These changes have been in effect for a number of years without any ill effects. We outline international best practice in Part 5 of this submission.

**(e) *Self-declaration aligns with human rights standards***

Trans and gender diverse people have the right to privacy, the right to liberty and security of person including bodily autonomy, and the right to equality before the law and freedom from discrimination. These rights are infringed by requiring a doctor or other clinician to certify a person's gender before they can change their birth certificate. In contrast, self-declaration affirms individual dignity and bodily autonomy. This is an opportunity for Western Australia to lead by example and promote good practice that meets the needs of trans and gender diverse people.

**(f) *Trans and gender diverse people are already part of our communities***

As the Discussion Paper highlights, trans and gender diverse people are already part of our communities – in our workplaces, neighbourhoods and schools. For example, recent studies show that approximately 48.6% of young trans and gender diverse people surveyed identify their gender as non-binary, including genderfluid, genderqueer and agender.<sup>3</sup> Yet our laws are not appropriately tailored to the needs and experiences of trans and gender diverse people. As a result, they experience inconvenience, embarrassment and distress because they are unable to change their birth certificate to reflect the gender they live as. Being able to access accurate identity documents is also a positive and affirming experience that supports the health and well-being of vulnerable trans and gender diverse people.

**(g) *Inclusive laws address mental health risk factors***

Most importantly, providing trans and gender diverse people with access to identity documents that reflect who they are will have a profoundly positive impact on their lives, reduce the discrimination and disadvantage they face, and support improved health and wellbeing for an already vulnerable cohort of people living in our community. In 2017, Trans Pathways – the largest ever survey into the mental health of trans young people in Australia – found that almost 80% of young trans people had self-harmed and almost half had attempted suicide.<sup>4</sup>

**(h) *Consistency of identity documents***

As outlined in the Discussion Paper, there are different federal and state approaches which can result in inconsistent identity documents. Inconsistencies between federal and state laws can lead to mismatching documents which causes practical difficulties in everyday life (e.g. being ‘outed’ as trans increases the risk of discrimination and mistreatment, difficulties providing sufficient points of ID, suspension of Centrelink payments due to data mismatches).

## 3.2 Consultation with trans and gender diverse Western Australians

On Saturday 15 September 2018 TransFolk of WA, Trans Health Australia, and The Queer Connection facilitated a community forum of approximately 20 participants to discuss the recommendations in the Discussion Paper.

While participants expressed concern about how the broader community may react and some said they would miss gender affirmation on birth certificates, there was consensus support for these progressive recommendations as the most beneficial options for the trans / gender diverse population going forward. In particular, the group supported:

- repealing the Gender Reassignment Board;
- removing sex/gender from new and replacement Birth Certificates;

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<sup>3</sup> Penelope Strauss, Angus Cook, Sam Winter, Vanessa Watson, Daniel Wright Toussaint & Ashleigh Lin, Telethon Kids Institute, *Trans Pathways: The mental health experiences and care pathways of trans young people* (2017) <https://www.telethonkids.org.au/globalassets/media/documents/brain--behaviour/trans-pathwayreport-web2.pdf> 20.

<sup>4</sup> Ibid.

- making Gender Identity Certificates available to those who need to prove their gender;
- allowing people to have their gender recognised based on self-identification, including as male, female, and non-binary; and
- making sure young people can access legal recognition from 12 years of age.

However, the group was very concerned about the recommendation to establish a “Sex Identity Certificate”. They were unclear about the purpose of such a document, and felt it would exacerbate opportunities to discriminate against trans / gender diverse individuals. They were also unclear about the practicalities, particularly as they pertain to non-binary individuals and those whose bodies do not conform to social norms.

### 3.3 Survey of trans and gender diverse Western Australians

In addition to the consultation, TransFolk of WA invited trans and gender diverse community members to participate in a survey to further gauge support for the Project recommendations.

Participants were asked whether or not they supported each of the recommendations, and stated their strong support for:

- Removing the Gender Reassignment Board (91.3% support);
- Removing sex / gender from new and replacement birth certificates (73.9% support);
- Making Gender Identity Certificates available to those who need to prove their gender (89.1% support);
- Allowing people to have their gender recognised based on self-identification, including as male, female, and non-binary (100% support); and
- Making sure young people can access legal recognition from 12 years of age (97.8% support).

Qualitative data was also collected by asking survey participants to provide comments on each of the recommendations. We have provided summaries of these responses throughout this submission.

### 3.4 Distinct issues affecting intersex people

Our submission largely focuses on access to legal recognition for trans and gender diverse people. While some intersex people may wish to correct their birth certificate, legal recognition of gender is not the primary advocacy priority for intersex human rights organisations in Australia at this time.

In March 2017, a group of intersex advocates and organisations compiled the Darlington Statement, a joint consensus statement on intersex human rights and policy issues.<sup>5</sup>

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<sup>5</sup> *Darlington Statement: Joint consensus statement from the intersex community retreat in Darlington* (March 2017) [16] <https://ihra.org.au/darlington-statement/>.

The Darlington Statement states that: “sex and gender binaries are upheld by structural violence” and “attempts to classify intersex people as a third sex/gender do not respect our diversity or right to self-determination.”<sup>6</sup> The Statement recommends “not to seek new classifications but to end legal classification systems and the hierarchies that lie behind them.”<sup>7</sup> Accordingly, the Darlington Statement recommends that “sex/gender should not be a legal category on birth certificates or identification documents for anybody.”<sup>8</sup>

We note that the current primary concern of intersex human rights organisations including Intersex Human Rights Australia and the Androgen Insensitivity Support Group of Australia is to prohibit non-urgent and deferrable medical interventions on intersex children and infants without their full, prior and informed personal consent, except in cases of absolute medical necessity. The human rights violations which continue to be experienced by intersex people in Australia in the context of medical interventions have been highlighted in the *Yogyakarta Principles plus 10*<sup>9</sup> and recent concluding observations from the United Nations Human Rights Committee<sup>10</sup> and the Committee on the Convention on the Elimination of Discrimination against Women,<sup>11</sup> as well as numerous human rights experts and bodies. The Darlington Statement sets out the call for criminal sanctions for medical procedures which violate the human rights of intersex people.<sup>12</sup>

While this issue may not fall within the Terms of Reference of this review, we urge the Commission to further consider the recommendations made by the 2013 Australian Senate Community Affairs Committee’s *Report on the Involuntary or Coerced Sterilisation of Intersex People in Australia*,<sup>13</sup> and the impact of these potential reforms on the human rights of intersex infants and children in Western Australia as a human rights priority for the state. If possible, we also recommend that the Commission take into account any reports released by the Australian Human Rights Commission’s project on *Protecting the human rights of people born with variations in sex characteristics in the context of medical interventions*.<sup>14</sup>

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<sup>6</sup> Ibid [8].

<sup>7</sup> Ibid.

<sup>8</sup> Ibid 8[a].

<sup>9</sup> *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* (10 November 2017) [http://yogyakartaprinciples.org/wp-content/uploads/2017/11/A5\\_yogyakartaWEB-2.pdf](http://yogyakartaprinciples.org/wp-content/uploads/2017/11/A5_yogyakartaWEB-2.pdf).

<sup>10</sup> UN Human Rights Committee, *Concluding observations on the sixth periodic report of Australia* (2017) at [25]-[36].

<sup>11</sup> UN Committee on the Elimination of Discrimination against Women, *Concluding Observations on Australia* (CEDAW/C/AUS/CO/8), 25 July 2016, at [26].

<sup>12</sup> Above n 5 [7].

<sup>13</sup> Australian Senate Community Affairs Reference Committee, ‘Involuntary or Coerced Sterilisation of Intersex People in Australia - Second Report’ (2013) *The Australian Senate Printing Unit Parliament House*, [https://www.aph.gov.au/Parliamentary\\_Business/Committees/Senate/Community\\_Affairs/Involuntary\\_Sterilisation/Sec\\_Report/index](https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Community_Affairs/Involuntary_Sterilisation/Sec_Report/index).

<sup>14</sup> Australian Human Rights Commission, *Protecting the human rights of people born with variations in sex characteristics in the context of medical interventions* (2018) <https://www.humanrights.gov.au/consultation-process>.

## 4. Western Australian context

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### 4.1 Overview of current process

We refer to the overview provided in the Discussion Paper of the current legislative and regulatory regime for regulating legal registration of sex and gender in Western Australia, and do not seek to duplicate this information.

However, we note that there are key features of the *Gender Reassignment Act 2000* (WA) and *Gender Reassignment Regulations 2001* (WA) which have operated to exclude many trans and gender diverse people from being legally recognised in accordance with their gender identity.

In particular, the Act:

- does not allow for legal recognition for gender diverse or non-binary people who identify outside categories of ‘man’ and ‘woman’;<sup>15</sup>
- requires applicants to pay a \$40 fee;<sup>16</sup>
- requires a number of statements and documents to be provided by medical practitioners relating to the applicant’s reassignment procedure;<sup>17</sup> and
- requires proof of counselling in relation to a person’s gender identity, including in situations where the person does not require counselling except to satisfy this requirement for legal recognition;<sup>18</sup> and
- does not allow a recognition certificate to a person who is married to be issued.<sup>19</sup>

### 4.2 Experiences of the current process

The experiences of trans and gender diverse people highlight the frustration and injustice experienced with the current regulation of changing legal gender in Western Australia.

A number of survey participants shared their experiences of the Gender Reassignment Board, in line with reflections in the Discussion Paper.<sup>20</sup> For example, one survey participant highlighted the delays

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<sup>15</sup> *Gender Reassignment Act 2000* (WA); above n 1, 30.

<sup>16</sup> *Gender Reassignment Regulations 2001* (WA) r 4(1)(b)(i), although this fee may be waived under r 4(2).

<sup>17</sup> *Gender Reassignment Act 2000* (WA) s 15(1)(b)(ii); *Gender Reassignment Regulations 2001* (WA) r 4(1)(b)(ii)-(iii).

<sup>18</sup> *Gender Reassignment Act 2000* (WA) s 15(1)(b)(iii); *Gender Reassignment Regulations 2001* (WA) r 4(1)(b)(vii).

<sup>19</sup> *Gender Reassignment Act 2000* (WA) s 15(3).

<sup>20</sup> Above n 1, 37.

in applying to the Gender Reassignment Board and the incongruence with needing 'approval' for his gender identity:

I've been living as a male for near 5 years now, HRT 2 years and top surgery in November. I applied [to the Gender Reassignment Board] last August and it took them till May this year to reject me, explaining that the endocrinologist's letter, GP letter, psychiatrist letter and psychologist letter was insufficient evidence. **I don't need some board to tell me who I am.**

### ***Case study: Experience of the Gender Reassignment Board***

I went through the Gender Reassignment Board to get my certificate updated. The process was not clearly or plainly stated, so I had originally thought that this meant I needed surgery before I could do it.

**It was 2 years into my transition before I got accurate ID.** For people who may not be able to or not want to get a medical intervention, having an ID that says you aren't who you say you are, it makes your next job application an incredibly anxiety-inducing prospect. **It feels like having a dirty secret.**

The actual process of getting correct ID was **incredibly convoluted and took months.** I had problems getting doctor's notes, couldn't get documentation from the surgeon, I had issues changing my name back and forth so that my surname looked right on my certificate, and because of these complications I decided to come to the meeting in person to answer any questions the Board might have.

It was quick, not many questions, but **it was confronting.** Even though my Mum came with me for support it was nerve-wracking. I have anxiety at the best of times in public places but this was intense. **When we came out my Mum and I just looked at each other and we both cried.** I went home emotionally exhausted.

I live over an hour from Perth. After getting through this ordeal, I had to wait for the gender recognition certificate. And then after that I had to wait another month before dealing with the Registry. Why? To give the Board time to mount an appeal. That's what the month is for.

Afterwards **I had to go through bureaucratic hell** to change my details with every institution I had myself registered with including other branches of the government. This is after living two years as my true gender with my new name and having gone through the process with those institutions already before.

If I could have done this all at the beginning, and **if it had been an easier process, it might have taken some of the pain out of it.** Being trans is not easy, and the identification situation is a big part of it.

**I know this may not affect me again in the future, but it affects lots of other trans people right now, and many more to come.**

Another survey participant called for change to the system and discussed the personal impact of being denied access to medical treatment:

I personally was denied treatment for gender dysphoria years ago. I'm now a post-op transwomen who is **lucky I didn't suicide** from that rejection. Please fix the system.

Other survey participants called for reform and spoke about the impact of having identity documents that did not match their gender identity on their lives:

I was **intentionally fired by an employer** as my birth certificate doesn't match my other papers. Make the transition process simpler and less daunting.

There was also concern about identity documents not providing respectful recognition for trans and gender diverse people:

I'm personally very new to this, as I'm just finding support within my own family to explore my gender identity. Another barrier for me has been the way the very institutions that govern my country view me. If I were to go ahead with my transition, I would want to be fully identified within my new gender, **I wouldn't want to be a "Trans woman" but a "woman"**. These processes make this a possibility, a reality. **They mean that I can be genuine and authentic in my future.**

### 4.3 Responses to key issues for consideration

We have considered the key issues for consideration highlighted in the Discussion Paper, and provide brief responses below.<sup>21</sup> We have adapted the questions slightly to reflect the proposed model for reform in Part 7 of the Discussion Paper.

**(a) To whom should an application be made (and it is appropriate to retain a role for both the Board and the Registrar)?<sup>22</sup>**

We consider that the Gender Reassignment Board should be repealed and any applications for a new birth certificate made to the Registrar through a simple administrative process.

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.

The survey participants strongly viewed the Gender Reassignment Board process as dehumanising,

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<sup>21</sup> Above n 1, 38.

<sup>22</sup> Ibid.

degrading, humiliating, intrusive, traumatic, archaic, and unnecessary. Only one person said that they needed a process like this to feel they had transitioned properly.

**(b) *What sex and/or gender classifications should be recognised (including beyond the binary of man/male and woman/female)?*<sup>23</sup>**

We consider the range of gender categories which should be recognised on gender identity certificates at Part 7.2 of this submission.

**(c) *What criteria must be satisfied, including what requirement (if any) there is for surgical or medical treatment, to permit a new birth certificate being issued (including for a child)?*<sup>24</sup>**

We support the Discussion Paper's recommendations in relation to children, and discuss further at Part 6.4 of this submission. We strongly recommend that no requirements be required for surgical or medical treatment for a new birth certificate being issued, including for children.

**(d) *What evidence is required to achieve a change of sex and/or gender?*<sup>25</sup>**

We consider that the only evidence required must be based on self-determination by the applicant. Survey participants stated that self-identification is important because personal identity cannot be determined by someone else. We do not support any third-party or medical evidence being required for legal recognition of gender.

**(e) *Is it necessary for a birth certificate to record birth sex and, if so, what sex classifications are to be recognised?*<sup>26</sup>**

We consider that it is not necessary for a birth certificate to record birth sex, for the reasons outlined in the Discussion Paper<sup>27</sup> and Part 7.1.2 of this submission.

## 5. International context

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### 5.1 Human rights principles

All human beings are born free and equal in dignity and rights.<sup>28</sup> This is the foundational principle of universality and equality which underpins international human rights law, and applies to trans, gender diverse and intersex people.<sup>29</sup>

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<sup>23</sup> Ibid.

<sup>24</sup> Ibid.

<sup>25</sup> Ibid.

<sup>26</sup> Ibid.

<sup>27</sup> Above n 1, Part 7.1.

<sup>28</sup> UN General Assembly, *Universal Declaration of Human Rights* (10 December 1948) 217 A (III).

<sup>29</sup> See e.g. Opening remarks by High Commissioner for Human Rights at the Expert meeting on ending human rights violations against intersex persons (16 September 2015) [www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=16431&LangID=E](http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=16431&LangID=E).

There is increasing international concern about reports of human rights violations experienced by trans, gender diverse and intersex people. Recent developments in comparative jurisdictions and commentary and views of United Nations human rights mechanisms, including treaty bodies and special procedures, provide guidance to governments on the importance of protecting the human rights of trans, gender diverse intersex people across all areas of public life. In particular, there is growing recognition that legal and policy frameworks that regulate medical treatment and anti-discrimination protections have a significant impact on trans, gender diverse intersex people.

Before considering the discussion questions in the Consultation Paper, this submission briefly sets out relevant human rights principles in considering potential legislative amendments and policy reform to better protect the human rights of trans, gender diverse and intersex people in relation to legal recognition.

### **UN treaties**

The human rights protections found in international human instruments apply to all people regardless of their gender identity or expression, or sex characteristics. The International Covenant on Civil and Political Rights (**ICCPR**),<sup>30</sup> the International Covenant on Economic, Social and Cultural Rights,<sup>31</sup> the Convention against Torture,<sup>32</sup> the Convention on the Rights of the Child,<sup>33</sup> the Convention on the Rights of Persons with Disabilities<sup>34</sup> and other human rights treaties are relevant for understanding human rights protections for trans, gender diverse and intersex people. These include fundamental and universal human rights to privacy, freedom from discrimination, and recognition before the law, also described in the Universal Declaration of Human Rights. In particular, the right to legal recognition before the law underpins people's access to state entitlements, including healthcare, education, housing, social security and employment.

### **UN treaty body recommendations**

Recently, a number of UN treaty bodies have made recommendations for Australia to reform its birth certificate laws.

On 15 June 2017, the United Nations Human Rights Committee handed down its decision in *G v Australia*, finding that:

the differential treatment between married and unmarried persons who have undergone a sex affirmation procedure and request to amend their sex on their birth certificate is not based on reasonable and

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<sup>30</sup> UN General Assembly, *International Covenant on Civil and Political Rights* (16 December 1966) UN Treaty Series 999, 171.

<sup>31</sup> UN General Assembly, *International Covenant on Economic, Social and Cultural Rights* (16 December 1966) UN Treaty Series 993, 3.

<sup>32</sup> UN General Assembly, *Convention against Torture and other Cruel, Inhuman, or Degrading Treatment or Punishment* (10 December 1984) UNTS 1465, 85.

<sup>33</sup> UN General Assembly, *Convention on the Rights of the Child* (20 November 1989) UNTS 1577, 3.

<sup>34</sup> UN General Assembly, *Convention on the Rights of Persons with Disabilities* (24 January 2007) A/RES/61/106.

objective criteria, and therefore constitutes discrimination on the basis of marital and transgender status, under article 26 of the Covenant.

On 1 December 2017, the Committee also recommended as part of its periodic review of Australia's compliance with the International Covenant on Civil and Political Rights that Australian governments:

Take the measures necessary to remove surgery and marital status requirements for sex change on birth, death and marriage certificates, taking into account the Committee's Views in communication No. 2172/2012, G. v. Australia.<sup>35</sup>

In addition, on 25 July 2018, the Committee on the Elimination of Discrimination against Women recommended that Australian governments:

Abolish requirements regarding medical treatment for transgender women who wish to obtain legal recognition of their gender, ensure that those requirements are abolished throughout the State party's territory and guarantee the rights of transgender women to bodily integrity, autonomy and self-determination.<sup>36</sup>

These clear directions from international human rights bodies support urgent law reform to protect the human rights of trans, gender diverse and intersex Australians.

### **UN Independent Expert on Sexual Orientation and Gender Identity**

On 12 July 2018, the United Nations' Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity delivered a report on *Protection against violence and discrimination based on sexual orientation and gender identity*.<sup>37</sup>

The report highlights "[a]busive requirements for gender recognition" that "violate human rights when a change of gender or name is sought in official records", including:

- forced, coerced or otherwise involuntary sterilisation;
- medical procedures related to transition, including surgeries and hormonal therapies;
- undergoing medical diagnosis, psychological appraisals or other medical procedures or treatment;
- third-party consent for adults; and
- forced divorce.<sup>38</sup>

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<sup>35</sup> UN Human Rights Committee, *Concluding observations on the sixth periodic report of Australia* (1 December 2017) UN Doc CCPR/C/Aus/CO/6.

<sup>36</sup> UN Committee on the Elimination of Discrimination against Women, *Concluding observations on the eighth periodic report of Australia* (25 July 2018) UN Doc CEDAW/C/AUS/CO/8.

<sup>37</sup> UN Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity, *Protection against violence and discrimination based on sexual orientation and gender identity* (12 July 2018) UN Doc A/73/152.

<sup>38</sup> *Ibid* 9.

The report also highlights a number of recommendations from the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, the European Court of Human Rights and treaty body recommendations.<sup>39</sup> For example, the World Health Organisation has recognised that “sterilization requirements run counter to respect for bodily integrity, self-determination and human dignity, and can cause and perpetuate discrimination against transgender and intersex persons”.<sup>40</sup>

The report also makes recommendations for taking into account identified best practices for legal gender recognition systems to respect the rights of trans and gender diverse people in a way which respects free and informed choice, and bodily autonomy.

Any legal recognition processes should:

- be based on self-determination by the applicant;
- be a simple administrative process;
- be confidential;
- be based solely on the free and informed consent of the applicant without requirements such as medical and/or psychological or other certifications that could be unreasonable or pathologising;
- acknowledge and recognise non-binary identities, such as gender identities that are neither “man” nor “woman” and offer a multiplicity of gender marker options;
- be accessible and, to the extent possible, cost-free; and
- examine seemingly neutral requirements that are prerequisites for change of name, legal sex or gender for potential or actual disproportionate effects in the light of the realities of the trans populations in each given context.<sup>41</sup>

### **Yogyakarta Principles**

The primary international human rights principles relating to sexual orientation and gender identity are the Yogyakarta Principles, which affirm binding international legal standards all States must comply with. In 2017, the Yogyakarta Principles were updated to reflect increased knowledge and understanding of the needs of human rights protections on the basis of sexual orientation, gender identity and sex characteristics.<sup>42</sup>

Principle 31 of the Yogyakarta Principles plus 10 relevantly states that:

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<sup>39</sup> Ibid 10.

<sup>40</sup> World Health Organisation, *Eliminating Forced, Coercive and Otherwise Involuntary Sterilisation*.

<sup>41</sup> Above n 37, 24.

<sup>42</sup> Above n 9.

Everyone has the right to legal recognition without reference to, or requiring assignment or disclosure of, sex, gender, sexual orientation, gender identity, gender expression or sex characteristics.<sup>43</sup>

## 5.2 Summary of approaches by international jurisdictions

The growing international recognition of the importance of ensuring legal recognition of gender promotes human rights principles has led to a proliferation of law reform in a number of international jurisdictions.

The requirement that a person undergo surgery has been rejected in a number of jurisdictions, including Argentina, Austria, Belgium, Denmark, Ecuador, France, Greece, Iceland, Ireland, Malta, Norway and Switzerland, most of which have also removed requirements of medical evidence for legal recognition of gender. A number of jurisdictions also allow children to change their legal gender, including Argentina, Austria, Belgium, Ecuador, Greece, Malta, Norway and Sweden. There have also been significant recent developments in relation to law reform in Portugal, Austria, Switzerland, Luxembourg, the Netherlands, New Zealand and New York City in the US.

Similar to Australia, Canadian laws vary by province and US laws vary by state. The Commission proposes a two-tiered system for the first application for a Gender Identity Certificate via a simple administrative process and a different, more onerous process for subsequent certificates in a different gender. The state of Oregon in the US has also imposed different requirements for subsequent changes of legal gender which are of note.

The notable trend across these jurisdictions is growing awareness and acknowledgement of the need to update existing laws to respect self-identification, moving away from a pathologisation model.

A table comparing the legal and practical framework for each of these jurisdictions is set out in **Appendix 1**.<sup>44</sup>

## 6. Support for the proposed model for reform

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### 6.1 Registration of birth sex

Overall, we support the Commission's suggested model for reform in relation to registration of birth sex. In particular, we support more clearly separating out collection of sex and gender information, and removing the record of sex classification on the Birth Registration Statement from the Register and from birth certificates. We outline our position on each of these stages below.

#### 6.1.1 Recording, notification and registration of sex at birth

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<sup>43</sup> Ibid, Principle 31.

<sup>44</sup> Due to resource constraints, international research in non-English speaking jurisdictions contained in Appendix 1 have been translated using online translations, not official translations.

The Discussion Paper highlights the significant benefits of not requiring a person's sex classification to be registered soon after birth, including:

- Removing pressure from parents of intersex children to assign a child's sex within 60 days;
- Potentially addressing aspects of so-called 'normalising' medical interventions on intersex infants by removing the requirement for parents to determine the child's sex for the purposes of registration at birth; and
- Aligning the Western Australian birth registration process to the system used in the Australian Capital Territory and South Australia, and increase inconsistency with the Australian Government Guidelines.<sup>45</sup>

As raised earlier in our submission, we consider that further legislative reform is required to prohibit non-urgent and deferrable medical interventions on intersex infants and children without their full, prior and informed consent.

We provide brief responses to the key questions raised in the Discussion Paper.

**(a) *Will the Commission's proposed model cause any difficulties if implemented?*** <sup>46</sup>

The threshold question of whether or not to record a person's sex/gender raises important policy considerations. Increasingly, information about sex and gender is considered personal to an individual in the same way as race, ethnicity and religion, and not data that should be routinely recorded through administrative processes.

Ceasing to record the sex classification of a child on the Birth Registration Statement and the register removes the need for administrative procedures to amend a person's sex or gender marker. It would not preclude the collection of sex or gender information for statistical or operational reasons.

However, rationales for the collection of sex/gender information in certain contexts remain. For example, data collection to measure progress in reducing inequality between men and women is justified, but this does not necessarily require gender categories to be reflected on identity documents.

Collection of sex and gender information is also important to adequately survey and describe the Australian population and develop policies and programs to respond to their needs, including the needs of LGBTI communities. Whether collection of sex or gender information is appropriate will depend on the nature and purpose of the collection.

As highlighted in the Discussion Paper, legal recognition of sex and gender is further complicated by laws that generally conflate sex and gender. Guidance developed by the Australian Government recommends that, for records other than cardinal documents, information about a person's biological

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<sup>45</sup> Above n 1, 64-65.

<sup>46</sup> Above n 1, 65.

sex only be collected where there is a legitimate need for that information.<sup>47</sup> Where information is required, it is recommended that gender (rather than sex) information is collected.<sup>48</sup>

There have been instances where trans or gender diverse people who currently have federal and state identity documents which are inconsistent are viewed as a 'data mismatch'. This has resulted in difficulties accessing services. The primary example is where social security payments have been automatically cancelled because of inconsistencies between state-based identity documents used to enroll a student at a university and the sex classification on the Centrelink database. However, there are processes in implementing legislation to ensure that any changes in state or territory laws relating to recording and registration of sex or gender do not result in administrative or bureaucratic difficulties between government agencies.

On balance, we consider that the benefits of the Commission's proposed model far outweigh any potential difficulties which may need to be dealt with during implementation of proposed reforms.

**(b) *Is the 'Indeterminate' category sufficient or should additional categories be added to the forms that are used for the First Report and the Second Report, which will then be used to record the sex of the child?***<sup>49</sup>

We support the Commission's preferred position of avoiding "conflating information about a person's biological sex (recorded at birth) with information about a person's gender identity, which cannot be known at birth and only becomes apparent at a later time when the child is able to form and articulate their own gender identity".<sup>50</sup> However, there may be situations in which an additional term, such as 'prefer not to specify', would allow parents who do not wish for their child's sex to be recorded to not to record their child's sex at birth.

### **6.1.2 Information held by the Registrar**

The Darlington Statement states that: "[a]s with race or religion, sex/gender should not be a legal category on birth certificates or identification documents for anybody."<sup>51</sup> The Darlington Statement provides the rationale that:

Undue emphasis on how to classify intersex people rather than how we are treated is also a form of structural violence. The larger goal is not to seek new classifications but to **end legal classification systems** [sic] and the hierarchies that lie behind them.<sup>52</sup>

The Independent Expert on Sexual Orientation and Gender Identity has recently made a clear recommendation about considering the reasoning for including gender markers on identity documents. The report recommends that States should:

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<sup>47</sup> Australian Government, Attorney-General's Department, *Australian Government Guidelines on the Recognition of Sex and Gender* (November 2015).

<sup>48</sup> Ibid.

<sup>49</sup> Above n 1, 65.

<sup>50</sup> Above n 1, 65.

<sup>51</sup> Above n 5, [8]a.

<sup>52</sup> Ibid [8].

Carefully review the reasoning behind the gathering and exhibition of certain data, and the rules governing data management, which must include separate considerations for the need to gather and the need to exhibit, as well as rigorous adherence to risk assessment and management considerations under the “do no harm” principle, and the participation of the affected populations and communities in the design, implementation and evaluation of the data-gathering systems. States must 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.<sup>53</sup>

Principle 31(A) of the Yogyakarta Principles plus 10 also provides that States should:

Ensure that official identity documents only include personal information that is relevant, reasonable and necessary as required by the law for a legitimate purpose, and thereby end the registration of the sex and gender of the person in identity documents such as birth certificates, identification cards, passports and driver licences, and as part of their legal personality.<sup>54</sup>

We support the Commission’s recommendation not to include sex classification on the Register and birth certificates, in a way which continues to allow the collection of necessary and appropriate statistical data which serves a legitimate purpose in order to measure social progress.

### 6.1.3 Sex classification on birth certificates

*Question 3: Should sex classification be mandatory on birth certificates?*<sup>55</sup>

The survey respondents viewed recording sex or gender on birth certificates as unnecessary. Some people thought that it should be optional, and a small number of people said that it is important for affirmation, medical reasons, and to gain support from the broader community for these changes to go ahead.

#### **Recommendation 1:**

We support the Commission’s recommendation that sex classification not be included on the Birth Registration Statement from parents to the Registrar, the Register or on birth certificates.

## 6.2 Documentary proof of gender

We welcome the Commission’s proposed model for reform which will ensure that sex and gender are not unhelpfully conflated on documentary proof of gender, and by ensuring that there is a process for people to apply to the Registrar for a Gender Identity Certificate where they wish to do so.

We would also welcome the development of guidelines by the Attorney-General’s Department which make clear that a person cannot be required to produce a Gender Identity Certificate without a valid

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<sup>53</sup> Above n 37, 23.

<sup>54</sup> Above n 9, Principle 31(A).

<sup>55</sup> Above n 1, 66.

reason, and fact sheets by the Registrar which explains in what situations a Gender Identity Certificate may – or may not – be necessary.

*Question 5: Are there circumstances in which it will be necessary or desirable to prove sex through a birth certificate, where proof of gender by a Gender Identity Certificate or proof of sex by medical documentation is not appropriate or sufficient?*<sup>56</sup>

We have carefully considered the questions outlined in the Discussion Paper, and cannot think of valid reasons where it would be necessary for a person to produce evidence of their sex which cannot be dealt with by providing a Gender Identity Certificate or proof of sex by medical documentation. The survey respondents considered that Gender Identity Certificates are important to some people and in some situations (e.g. gendered schools, prisons, etc.). However, survey respondents considered that they should not be necessary in order to prove a person's gender in an ideal world.

However, we have considered situations in which government agencies should develop policies which consider the complexities of human rights affirming treatment of trans, gender diverse and intersex people, particularly in 'single-sex' settings. For example, there are significant concerns around the safety of trans and gender diverse people in youth justice and corrections facilities (e.g. incarceration of trans men and women in men's only prisons). The Victorian Government has recently developed the Commissioner's Requirements on the *Management of Prisoners who are Trans, Gender Diverse or Intersex* sets out a number of key issues to consider in making decisions about placement of prisoners, including:

- the gender recorded on the documentation that will accompany the person into prison custody;
- the gender which aligns to the person's lived experience;
- the person's expressed views on the prison system in which they wish to be placed;
- previous custodial history and placement decisions; and
- any available medical and / or psychiatric or psychological advice.<sup>57</sup>

**Recommendation 2:**

We support the Commission's recommendation that Gender Identity Certificates be introduced for documentary proof of gender.

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<sup>56</sup> Above n 1, 67.

<sup>57</sup> Victorian Government, *Commissioner's Requirements: Management of Prisoners who are Trans, Gender Diverse or Intersex* (January 2017) 6.3.4.

**Recommendation 3:**

We recommend that the Attorney-General's Department produce guidelines which clarify the purpose of Gender Identity Certificates and make clear that a person must not be required to produce a Gender Identity Certificate without a valid reason.

**Recommendation 4:**

We recommend that the Western Australian Government conduct an audit of relevant government policies to ensure these policies are inclusive of the needs and experiences of trans, gender diverse and intersex people (e.g. Department of Education, Department of Health and Department of Corrections policies).

### 6.3 Proof of Sex Certificate

TransFolk of WA asked survey participants if they supported creating a Sex Identity Certificate for those who need to prove their sex as male, female, or non-binary. In total, 67.4 per cent of survey respondents were supportive of the creation of Sex Identity Certificates.

In the qualitative response field to the survey however, many of the comments on the Sex Identity Certificate recommendation were similar to those for the Gender Identity Certificate. Based on this, we believe that many participants did not understand the difference between these two documents, which may account for the unexpected high percentage of support for a Sex Identity Certificate.

Participants who specifically commented on having to prove sex as opposed to gender said that it would be damaging, unnecessary, and an avenue for discrimination. Any need to prove sex would be rare, and protocols such as testosterone testing already exist if required.

In addition, making Proof of Sex Certificates and Gender Identity Certificates available is unnecessary and confusing for people seeking to apply for or use these certificates. To our knowledge, government agencies generally collect information in relation to gender, rather than sex, although these categories have often been conflated under law.

Following discussion with trans and gender diverse stakeholders, we have been unable to identify a compelling reason for the practical utility of a Proof of Sex Certificate, which cannot be achieved by providing medical confirmation of sex characteristics.

We have considered the potential for professional sporting bodies to seek to enforce same-sex sporting codes in ways which do not allow a person a competitive advantage. We note that other jurisdictions in Australia already allow people to change their legal sex (which is generally conflated with gender), and this does not appear to have raised issues in relation to competitive sporting codes. Professional sporting bodies have, at times, required hormone testing to ensure that estrogen and testosterone levels are within prescribed ranges for this purpose, and have exemptions from anti-discrimination laws to conduct these tests and to enforce single sex sporting competitions.

In relation to medical treatment, patients can inform their treating medical practitioners about their gender identity and previous medical treatments where relevant. As with any other feature of health or identity, we consider that a patient should be able to maintain their privacy and confidentiality in relation to their sensitive information, and disclose on their own terms.

Unfortunately, we consider that there is also the potential for Proof of Sex Certificates to be misused by organisations seeking to discriminate against potential trans or gender diverse students or employees on the basis of their gender identity.

**Recommendation 5:**

We oppose the Commission's recommendation that Proof of Sex Certificates be introduced in Western Australia.

#### 6.4 Application for Gender Identity Certificate (adults)

Reform to Western Australian law is critical to allow trans and gender diverse people to assert their authentic identity. We support the Discussion Paper's recommendations that requirements for medical evidence be replaced with the approach of self-affirmation by way of a simple administrative process, to reflect international best practice. As outlined above, the process should be a simple administrative process, similar to jurisdictions such as Argentina and recent guidance from the Independent Expert on Sexual Orientation and Gender Identity.<sup>58</sup> We support the Commission's recommendation to remove the Gender Reassignment Board altogether and support the proposed model for reform, with the exception of the Proof of Sex Certificate, for the reasons outlined below.<sup>59</sup>

**(a) Application for Gender Identity Certificate**

The Commission proposes a simple administrative application to the Registrar for a Gender Identity Certificate. The proposed model will remove requirements for a medical 'reassignment procedure' and requirements for medical evidence to be provided as proof of medical transition, gender identity or counselling.

As described in Part 4 of this submission, the current application process to the Gender Reassignment Board is confusing, involves significant delays and imposes unnecessary and significant barriers to trans and gender diverse people being legally recognised for who they are. These barriers are directly related to poor mental health outcomes, lower employment rates and increased risks of experiencing discrimination.

We consider that a simple administrative process – similar to changing your name – is the most appropriate method of providing for legal recognition, and consistent with international best practice.

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<sup>58</sup> *Gender Identity Law 2012* (Argentina).

<sup>59</sup> Above n 1, 69.

Accordingly, we support the Commission's recommendation for a person to submit an application to the Registrar for a Gender Identity Certificate which states their gender in the application form.<sup>60</sup>

**Recommendation 6:**

We support the Commission's recommendation that a Gender Identity Certificate can be ordered from the Registrar using a simple administrative process.

**(b) Available gender classifications**

Currently, people born in Western Australia can only be registered as either 'male' or 'female'. In practice, this ignores the reality of gender diverse and non-binary people in Western Australia and does not promote inclusion or recognition of sexual and gender diversity in line with Australian Government Guidelines.<sup>61</sup> Survey participants criticised the lack of legal recognition for non-binary people.

Most importantly, providing gender diverse and non-binary people with access to identity documents that reflect who they are will have a profoundly positive impact on their lives, reduce the discrimination and disadvantage they face, and support improved health and wellbeing for an already vulnerable cohort of people living in our community.

The provision of non-binary options for registration of sex was recommend by the Australian Human Rights Commission in its recent *Resilient Individuals Report*,<sup>62</sup> and aligns with national and international human rights principles.<sup>63</sup>

As referred to in the Discussion Paper, the High Court has also considered this issue, including most recently in *NSW Registrar of Births, Deaths and Marriages v Norrie (Norrie)*.<sup>64</sup> The High Court rejected the argument by the Registrar that the gender binary sounded through the Australian legal system and that allowing this third category would cause unacceptable confusion. The Court concluded that the sex of a person was largely relevant to legal relations, drawing on s 8(a) of the *Acts Interpretation Act (NSW)*.<sup>65</sup> The equivalent provision of the *Interpretation Act 1984 (WA)* is similar,

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<sup>60</sup> Ibid.

<sup>61</sup> Australian Government, Attorney-General's Department, *Australian Government Guidelines on the Recognition of Sex and Gender* (November 2015) <https://www.ag.gov.au/Publications/Documents/AustralianGovernmentGuidelinesontheRecognitionofSexandGender/AustralianGovernmentGuidelinesontheRecognitionofSexandGender.pdf> 4[13], 9.

<sup>62</sup> Australian Human Rights Commission, *Resilient Individuals: Sexual Orientation Gender Identity & Intersex Rights* (2015) <https://www.humanrights.gov.au/our-work/sexual-orientation-sex-gender-identity/publications/resilient-individuals-sexual>.

<sup>63</sup> Office of the High Commissioner for Human Rights, *Discrimination and violence against individuals based on their sexual orientation and gender identity* (4 May 2015) [http://www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session29/Documents/A\\_HRC\\_29\\_23\\_en.doc](http://www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session29/Documents/A_HRC_29_23_en.doc).

<sup>64</sup> [2014] HCA 11.

<sup>65</sup> A point raised in submissions by the intervenor A Gender Agenda represented by the Human Rights Law Centre.

providing that: “[i]n any written law – (a) words denoting a gender or genders include each other gender”.

When *Norrie* was decided in 2014, the High Court stated that “[t]he chief, perhaps the only, case where the sex of the parties to the relationship is legally significant is marriage, as defined in the fashion found in s 5(1) of the Marriage Act 1961 (Cth).<sup>66</sup> The High Court’s comments resonate more strongly following the amendments to the definition of marriage in *Marriage Act 1961* (Cth) achieved by the passage of the *Marriage Amendment (Definition and Religious Freedoms) Act 2017* (Cth) in December 2017.

As part of the Births, Deaths and Marriages Registration Amendment Bill 2016 (Vic), the Victorian Government proposed allowing individuals the freedom to select a gender classification that matches their gender identity and avoids the need to determine and predict the exact categories that will be used. The proposal would have allowed LGBTI community organisations to supply the Registrar with a list of the most commonly used descriptors and could continue to provide advice on any additional descriptors over time. As with change of name applications, the Registrar could have the discretion to refuse any applications not made in good faith in order to ensure the integrity of the Register. We recommend close consultation with affected communities to develop the final list of available gender descriptors, if this approach is to be adopted. We would also be happy to provide further input in the future.

We propose the same gender classifications be made available to adults and minors, regardless of age.

***Recommendation 7:***

We support the Commission’s recommendation that Gender Identity Certificates make available the following classifications: Male, Female, and Non-binary. We recommend that the Registrar be empowered to regularly review and add to the available classifications in consultation with affected communities.

**(c) *Subsequent Gender Identity Certificate applications***

***Applications with the same gender classification***

The Commission proposes a simple administrative process for subsequent Gender Identity Certificates with the same gender classification as previous certificates.<sup>67</sup> We support this process, which is similar to the process of ordering a birth certificate in Western Australia.<sup>68</sup>

***Applications with a different gender classification***

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<sup>66</sup> Above n 64, [42].

<sup>67</sup> Above n 1, 69-70.

<sup>68</sup> *Ibid.*

The Commission proposes that additional requirements be introduced for subsequent Gender Identity Certificate applications with a different gender classification from previous certificate(s), including:

- A statutory declaration by the applicant;
- All originals and copies of previous Gender Identity Certificate(s); and
- Any other evidence the Registrar may require to prove that the application is not sought for a fraudulent or improper purpose.<sup>69</sup>

We confirm that a number of international jurisdictions have moved to a similar streamlined model for administrative applications for legal recognition of gender. While the additional requirement to provide a statutory declaration does provide an administrative burden on the applicant, this can be justified in the interests of ensuring that the applicant takes the process seriously and to prevent potential false statutory declarations (with current legal penalties already in place for applications lodged in bad faith or for a fraudulent purpose). The requirement to provide previous originals and copies of different Gender Identity Certificates is also designed to prevent potential fraud (e.g. people using different identity documents to avoid debt collectors) and is a justified requirement to ensuring Gender Identity Certificates are not misused.

We have some concerns about the breadth of the Registrar's discretion to request any other evidence to prove that the application is not sought for a fraudulent or improper purpose. In practice, this provision should not be used to place an unnecessary or onerous administrative burden on applicants which may cause confusion or delay. However, clear guidance on the circumstances in which further documentation is required in guidelines to accompany any reforms to ensure it simple administrative process (e.g. where the Registrar has formed a reasonable belief from the application that it is being sought for a fraudulent or improper purpose).

The Commission briefly outlines an alternative option for eligibility which requires that a person must undergo 'appropriate clinical treatment' and/or provide evidence that the applicant is an intersex person, which is required by the Australian Passport Office, the Australian Capital Territory and South Australia. We oppose this proposal on the basis that this requirement continues to rely on medical evidence of counselling, including in situations where a person may not require counselling, and where the applicant is required to incur additional expenses for unnecessary medical treatment in

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<sup>69</sup> Above n 1, 58.

order to access legal recognition. This requirement is out of step with international best practice which is based on principles of self-determination and self-identification.

**Recommendation 8:**

We support the Commission's recommended process for subsequent Gender Identity Certificate applications, including additional requirements for subsequent Gender Identity Certificates issued with a different gender classification.

***Limit on the number of applications to change the gender on a Gender Identity Certificate***

The Commission proposes placing a limit on applications for subsequent Gender Identity Certificates with a different gender classification of once every 12 months, with a lifetime limit of 3 times.<sup>70</sup> This is consistent with other jurisdictions who have reformed their birth certificate laws (e.g. South Australia). However, the Commission also proposes allowing further applications by approval with a Court or Tribunal order.<sup>71</sup>

As the Discussion Paper confirms, there is no express limit on the number of applications a person can make to the Gender Reassignment Board under the currently legal system.<sup>72</sup> In addition, there is no lifetime limit on the number of applications for a change of name in Western Australia.<sup>73</sup>

The restriction of a new Gender Identity Certificate every 12 months is reasonable, given the administrative burden of issuing new certificates for the Registrar, and the need to ensure the Register is accurate and current. However, we are unable to confirm a clear purpose for a lifetime limit, and are concerned that this may impose an unfair barrier on gender diverse people who may choose to identify as a range of different genders over their lifetime. Requiring a person to apply to a court or tribunal is stressful, costly and will likely cause delays, particularly as these applications are likely to be extremely rare and may result in confusion about how to process and manage these applications.

**Recommendation 9:**

We support the Commission's limit of one application per year for a Gender Identity Certificate, but recommend that there be no lifetime limit imposed for applications for Gender Identity Certificates.

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<sup>70</sup> Above n 1.

<sup>71</sup> Above n 1.

<sup>72</sup> Above n 1, 71.

<sup>73</sup> Above n 1, 72.

**(d) Jurisdictional requirements**

The Commission recommends making Gender Identity Certificates available to people who were not born in Western Australia but have been resident in Western Australia for at least 12 months, and requiring a statutory declaration proving genuine belief of affirmed gender and eligibility on the basis of residence in Western Australia.

Unfortunately, many people living in Western Australia were born overseas in jurisdictions which do not allow people to change their legal sex or gender, or in other states or territories which impose onerous legal barriers or residence requirements. In these situations, they may be barred from accessing a document which proves their gender. In these circumstances, the Western Australian Government should provide a Gender Identity Certificate for residents where necessary for a person to live as a full member of our community.

**Recommendation 10:**

We support the Commission's recommended process for subsequent Gender Identity Certificate applications, including additional requirements for subsequent Gender Identity Certificates issued with a different gender classification.

**(e) Other considerations**

**Rights to privacy**

It may be that further privacy protections are necessary in light of the reforms proposed above. Under the *Births, Deaths and Marriages Registration Act 1997* (ACT), a range of provisions are included to protect privacy for those who have a new sex or gender registered. These are:

- the requirement that a new birth certificate only shows the altered record of sex, and does not include any word or statement to the effect that the person to whom the certificate relates has changed sex;<sup>74</sup>
- a general prohibition on accessing a birth certificate showing a person's sex before the alteration of the record to anyone other than the person, a child of the person or a prescribed person;<sup>75</sup> and
- provisions that prohibit the use of old birth certificates that shows a person's sex before the record was altered with the intent to deceive.<sup>76</sup>

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<sup>74</sup> *Births, Deaths and Marriages Registration Act 1997* (ACT) s 27.

<sup>75</sup> *Births, Deaths and Marriages Registration Act 1997* (ACT).

<sup>76</sup> *Births, Deaths and Marriages Registration Act 1997* (ACT) s 28.

**Recommendation 11:**

We recommend that the Western Australian Government consider additional privacy protections in relation to gender information which may be reasonable, necessary or appropriate.

**Application costs**

In addition, we note that trans, gender diverse and intersex people are more likely to experience unemployment and underemployment. As a result, people applying for a Gender Identity Certificate are more likely to be experiencing financial hardship and have difficulties paying the administrative costs of a certificate. We consider that financial means should not act as a barrier to being able to access a Gender Identity Certificate. We note that the current regime does allow the Gender Reassignment Board to waive application costs.

**Recommendation 12:**

We recommend that the Registrar have the discretion to waive the cost of Gender Identity Certificates in situations of financial hardship.

## 6.5 Application for Gender Identity Certificate (minors)

### (a) **Applications for Gender Identity Certificate**

We commend the Commission on proposing an application process for Gender Identity Certificates for minors which is substantially similar for a child, with additional requirements to recognise the evolving capacity of children of different ages to provide clear instructions and consent.

Survey participants considered that legal recognition from 12 years of age will support young trans and gender diverse people to avoid issues at school. It will also likely improve the disparate poor mental health outcomes among this population.

Many young trans and gender diverse people are aware of their gender identity at a young age, (e.g. between the ages of 3 and 5).<sup>77</sup> TransFolk of WA runs support groups for trans and gender diverse people and their families, including transgender children as young as 4 years old who are aware of their gender identity and able to clearly express their preference in relation to their gender identity and expression.

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<sup>77</sup> Ruble DN et al, 'The role of gender constancy in early gender development' (2007) *Child Dev* 78(4) 1121-36.

It is critically important that children are able to access identity documents which reflect their gender in situations where this is required. This is particularly the case given the vulnerability and poor mental health outcomes associated with trans and gender diverse children who are not allowed to live their life as their true gender. In 2017, Trans Pathways<sup>78</sup> – the largest ever survey into the mental health of trans young people in Australia – found that almost 80% of young trans and gender diverse people had self-harmed and almost half of young trans and gender diverse people had attempted suicide.

The current legal regime, which requires medical treatment as a precondition of legal recognition, places pressure on parents and children to undergo medical transition in order to access legal recognition. We strongly support decisions about medical treatment being made in a medical context on the guidance of medical experts, without pressure from external legal processes for children and parents seeking to avoid the discrimination facilitated by being unable to provide accurate proof of gender when required.

In relation to children, the Independent Expert on Sexual Orientation and Gender Identity's report states that:

States should take the best interests of the child as a primary consideration and respect the child's right to express views in accordance with the age and maturity of the child, in line with the Convention on the Rights of the Child and, in particular, in keeping with the safeguards established pursuant to article 19 of the Convention, which must not be excessive or discriminatory in relation to other safeguards that give recognition to the autonomy and decisional power of children of a certain age in other areas.<sup>79</sup>

We urge the Western Australian Government to take concerted steps to address the alarmingly high rates of social exclusion and marginalisation experienced by young trans and gender diverse people, which causes high rates of poor mental health outcomes, self-harm and suicide. Allowing young people to access identity documents that reflect the gender they live as will have a profoundly positive impact on their lives.

The Commission proposes a simple administrative process for one parent or guardian to submit an application with proof of identification.<sup>80</sup> The proposed model suggests that applicants should also provide a statutory declaration confirming their consent to the application, and a statutory declaration from a child over 12 confirming their gender and that they understand the meaning and implications of affirming their gender.

***Recommendation 13:***

We support the Commission's proposed model for applications for a first Gender Identity Certificates for minors.

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<sup>78</sup> Above n 3.

<sup>79</sup> Above n 37, 11.

<sup>80</sup> Above n 1, 73.

**(b) Dispute resolution processes**

The Commission has also proposed a dispute resolution process in situations where one or more parents do not provide statutory declarations consenting to the application. Unfortunately, we are aware of a number of family situations in which parents have been unable to agree on key decisions involving the child, particularly in relation to a child's gender identity. In most of these cases, the child is raised and spends all of their time with the parent who affirms and supports their gender identity, and generally does not have any, or very minimal, contact with the other parent, who typically does not play an active role in their child's life. In some of these cases, the parent who has no contact with the child has been violent or abusive, and there may be a family violence restraining order or violence restraining order in place protecting the child from family violence.

In the majority of key legal decisions involving a child, the consent of both parents is required. However, there are generally allowances for exceptional circumstances where it is not practically possible or appropriate to obtain consent from an absent parent.

For example, the *Australian Passports Act 2005* (Cth) and section 10 of the *Australian Passports Determination 2015* (Cth) sets out 'special circumstances' in which a parent who is unable to obtain the consent of all persons with parental responsibility for a child can explain why they cannot obtain consent and request that an application be considered without requiring a court order.

These 'special circumstances' include:

- the non-consenting parent being presumed missing or dead;
- inability to contact a non-consenting parent for a reasonable period of time;
- the non-consenting parent being medically incapable of providing consent;
- the existence of a family violence order against the non-consenting parent;
- no contact between the child and the non-consenting parent for a substantial period before the application is made; or
- the child being the subject of a child welfare order.<sup>81</sup>

We recommend that the Registrar be given discretion – either in legislation or regulations – to allow an application to be received by one parent in 'special circumstances', similar to those for other legal decision-making where it is not possible or appropriate to obtain the consent of both parents.

However, where 'special circumstances' do not apply and the parent disagrees with the other parent's application, we consider that the Family Court is the appropriate decision-maker to resolve the dispute.

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<sup>81</sup> *Australian Passports Determination 2015* (Cth) s 10.

**Recommendation 14:**

We support the Commission's proposed dispute resolution process where one or more parents do not provide statutory declarations consenting to a child's application, but recommend that the Registrar be granted discretion to accept an application from one parent where special circumstances exist.

## 6.6 Public education and awareness

The reforms proposed in this submission will assist in reducing some of the ill-treatment experienced by trans, gender diverse and intersex people in their day to day lives, but they will not remove discrimination completely. While acknowledging that addressing the weaknesses in Western Australia's anti-discrimination laws is outside the scope of this review, we wish to emphasise the importance of this issue and welcome the Attorney-General's recent commitment to review existing religious exemptions which allow discrimination against LGBTI people.

Successful implementation of any future reforms will require care and investment by the Western Australian Government. Similar to the ACT Law Reform Advisory Council, we recommend investment in reviews of data collection policies and systems across government, training in sex and gender diversity and LGBTI cultural competency, and appropriate support services for trans, gender diverse and intersex people and their families.

**Recommendation 15:**

We recommend investment in information, education, training, IT and systems infrastructure change and community support services as part of the implementation of future reforms.

## 7. Conclusion

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We commend the Commission's thorough consideration of the key issues at play for ensuring that all trans and gender diverse people are treated fairly and equally in Western Australia, and that our legal recognition laws do not cause any unnecessary discrimination or disadvantage against members of our community.

We strongly support the vast majority of the Commission's recommendations, and look forward to working closely with the Commission and the Western Australian Government to make these proposed reforms a reality for Western Australia.

We believe that these reforms will deliver significant benefits to making our communities more inclusive and respecting the diversity of experiences of people already living in Western Australia.

One of the survey participants supported the proposed model for reform, and positively reflected on the change it would make to their life:

I'm excited about the prospect of having my gender legally recognised without having to go through **pathologising, anxiety-provoking, and exclusionary processes** to do so. As a non-binary person and someone who hasn't medically transitioned, **realising my rights to legal recognition had seemed impossible until now.**

We share this excitement about the possibility for a fairer and more inclusive state which respects the gender identity of all Western Australians.

## Appendix 1: Comparison of relevant international jurisdictions

Jurisdiction	Sex categories recognised	Medical requirements	Evidence of medical requirements	Marriage and the divorce requirement	Effect of age on gender recognition	Procedures for under 18 to comply to achieve gender recognition
<b>Argentina</b>	The <i>Ley de Genero (Gender Identity Law)</i> does not prohibit gender X.	Gender reassignment surgery and hormonal treatments are not required, but provided by the state as part of their public or private health care plans.	No medical evidence required.	Same sex marriage was legalised on 15 July 2010, by modifying article 2 of the Argentine Civil Code.	For minors under the age of 18, request must be made through their legal representatives with explicit agreement by the minor, taking into account the evolving capacities and best interests of the child. A minor must be assisted by a children's lawyer.	Where consent of a minor's legal representative is denied or impossible to obtain, can resort to summary proceedings where a judge will decide, taking into account the evolving capacities and best interests of the child.
<b>Austria</b>	Austria recognizes two categories of gender: male and female. It currently does not recognize a third gender. This may soon change following a recent decision by the Austrian Constitutional Court (G 77/2018), in which the Court determined that intersex individuals should be permitted to register as "X" in the civil register and other official documents.	Pursuant to an <a href="#">administrative court decision in 2009</a> , Austria does not require an individual to undergo any medical procedures to apply for a legal gender change.	Government bodies consider evidence of the individual living as the opposite gender and any "gender corrective measures" in order to meet the test that "it is very likely that the sense of opposite sex will not change".	The Constitutional Court recently directed parliament to amend its laws by the end of 2018. Same sex marriage will become legalised in Austria on 31 December 2018.  Austria's Constitutional Court overruled the divorce requirement in respect to a change of legal gender in 2006, declaring the requirement void.	Based on the drafting of the <i>Civil Status Act</i> , it appears that Austria does not impose an age restriction on gender recognition.	Accordingly, a minor is permitted to apply for a change in legal gender but it is likely that the government body will require sufficient medical opinion.  In the G 77/2018 Constitutional Court decision, it was noted by the Court that medical procedures on infants and children should be avoided and only justifiable on grounds of "sufficient medical indication".
<b>Belgium</b>	Belgium recognises two categories of gender: male and female. It currently does not recognise a third gender.  The <i>Reforming Transgender Regime Act</i> , an amendment to the <i>Civil Code</i> came into effect by Belgium	Pursuant to the amendments to the <i>Civil Code</i> , Belgium does not impose any medical requirements on individuals prior to applying for a declaration	No evidence of medical procedures is required under Belgian law.	Same sex marriage was legalised in Belgium in 2003, pursuant to the article 143 of the Belgian Civil Code.	Article 3 of the Civil Code applies to an "emancipated minor Belgian".	An individual over the age of 16 must undergo treatment by a child psychiatrist who must confirm to the registrar that the child's sex mentioned in the child's birth certificate does not

Jurisdiction	Sex categories recognised	Medical requirements	Evidence of medical requirements	Marriage and the divorce requirement	Effect of age on gender recognition	Procedures for under 18 to comply to achieve gender recognition
	Parliament on 1 January 2018, allowing for change of sex registration in birth certificates.	for change of sex registration in a birth certificate.				correspond to the child's current gender.
<b>Canada</b>	<p>Gender 'X' is recognised in Canada. Since 31 August 2017, transgender Canadians can indicate on their passports that they don't identify as either male or female. This is an ongoing effort by the federal government to eventually allow individuals to indicate their sex as 'X' on government issued identification.</p> <p>Ontario health cards no longer display a sex designation and Ontario drivers have the option to display X as a gender identifier on their driver's license.</p> <p>In July 2017, Northwest Territories began allowing X as a non-binary option on birth certificates.</p> <p>The procedure for amending an individuals' birth certificate depends on the law in the province/territory the person was born.</p>	<p>Alberta, British Columbia, Manitoba, New Brunswick, Newfoundland and Labrador, Northwest Territories, Nova Scotia, Nunavut, Ontario, Prince Edward Island, Quebec, Saskatchewan and Yukon (all 13 provinces and territories of Canada) all allow change of gender identity without surgery.</p>	<p>This differs from province to province. For example:</p> <p><b>Prince Edward Island:</b> Individuals must present a letter from doctor attesting to the applicant's gender identity.</p> <p><b>Alberta:</b> The applicant must submit a "statement confirming that the person identifies with and is maintaining the gender identity that corresponds with the requested amendment to the sex on the record of birth," as well as a letter from a physician or psychologist attesting that the amendment is appropriate.</p> <p><b>Quebec:</b> For all applicants, a change of sex designation requires an affidavit from a person who knows the applicant. For applicants under 18, application forms require a letter from a physician or psychologist.</p>	<p>Same-sex marriage and divorce was legalised in Canada via the <i>Civil Marriage Act</i> which received assent on 20 July 2005.</p> <p>Divorce between same-sex partners married in Canada but resident in other jurisdictions was added to the <i>Act</i> in 2013.</p>	<p>This differs from province to province. For example:</p> <p><b>British Columbia:</b> Legal change of gender is accessible to those under 19 as long as Proof of Parentage form completed.</p> <p><b>Nova Scotia:</b> Legal change of gender available to those who are 16 years old and above, and those younger than 16 with parental permission unless waived by court order.</p> <p><b>Quebec:</b> Legal change of sex designation is available to individuals under 18. Individuals under the age of 14 must have a parent or guardian apply on their behalf. Individuals 14-17 can apply with their own form in addition to the parent's application form.</p>	<p>This differs from province to province but must be completed in the individual's province of birth. For example:</p> <p><b>Alberta:</b> For minors aged 12-17, the parent, guardian or ward must complete the Request and Affidavit, and all parents must consent to the change.</p> <p><b>British Columbia:</b> minors (under 19) must complete Minor's Application forms including a Proof of Parentage or Legal Guardianship form and submit a physician or psychologist's confirmation form.</p> <p><b>Ontario:</b> For minors under 15, the parent must complete the Application forms. For 16-17 year olds, the individual can apply as a child or adult and complete the Application forms.</p>
<b>Denmark</b>	In June 2014, the Danish Parliament passed a gender recognition law amending the Act on the Central Personnel Register, permitting	Denmark has adopted a self-determination model. Since 2014, Denmark no longer requires	Denmark does not impose any medical requirements. There is no requirement to obtain a medical 'opinion'.	Same-sex marriage was legalised in Denmark in 2012 via the <i>Act amending the Act on Marriage</i>	Denmark's gender recognition laws impose a minimum age requirement of 18 years old, meaning	

Jurisdiction	Sex categories recognised	Medical requirements	Evidence of medical requirements	Marriage and the divorce requirement	Effect of age on gender recognition	Procedures for under 18 to comply to achieve gender recognition
	<p>individuals to amend their gender identity in official documents including birth certificates.</p> <p>Under this law, individuals are also equipped with the right to apply to amend official documents such as passports to recognise the “X” category without approval from an external committee.</p>	<p>sterilisation, or a diagnosis of gender identity disorder to change legal sex.</p> <p>In 2016 the Danish Parliament also deleted transgender as a mental disorder from its National Board of Health.</p>		<p><i>Conclusion and Resolution, Law on Marriage’s Legal and Judicial Procedure Act and the repeal of the Registered Partnership Act.</i></p>	<p>gender recognition is not available to minors.</p>	
<b>Ecuador</b>	<p>Since 2016, transgender people can change their birth name and gender identity (instead of the sex assigned at birth) on legal documents and ID cards under the <i>Gender Identity Law</i>. This is based on self-determination.</p> <p>Only male and female genders are recognised.</p>	<p>No requirement for surgery to apply for legal gender change.</p>	<p>No medical evidence required.</p>	<p>Same-sex civil unions are legal in Ecuador. Article 67 of the Ecuadorian Constitution limits marriage to be between a man and a woman.</p> <p>In January 2018, the Inter-American Court of Human Rights required recognition of same-sex marriage and ruling is binding on Ecuador (Ecuador Supreme Court has upheld that ruling is fulling binding).</p> <p>On 28 July 2018, announced that majority of judges are in favour of legalisation of same-sex marriage, and confirmed the Court will vote to legalise it.</p>	<p>Age of consent in Ecuador is 14.</p> <p>Age of majority is 18 years old, but there may be mechanisms in the act to apply with consent of legal representatives.</p>	
<b>France</b>	<p>France recognises two categories of gender: male and female. It currently does not recognize a third gender.</p> <p>In 2016 the French Parliament (via the National Assembly) amended the</p>	<p>As of October 2016, individuals are no longer required to undergo sterilisation or medical procedures in order to</p>	<p>No evidence of medical procedures is required under French law.</p>	<p>Same-sex marriage was legalised in France in May 2013 via the <i>“ouvrant le mariage aux couples de personnes de meme sexe.</i></p>	<p>French gender recognition laws only apply to individuals over the age of 18 and emancipated minors.</p>	<p>Accordingly, individuals under the age of 18 cannot achieve gender recognition currently, unless the</p>

Jurisdiction	Sex categories recognised	Medical requirements	Evidence of medical requirements	Marriage and the divorce requirement	Effect of age on gender recognition	Procedures for under 18 to comply to achieve gender recognition
	Civil Code to provide for new gender recognition laws, comprised of an application process to the court via a prosecutor to change the gender recorded in official documents.	apply to change an individual's legal sex.				individual is considered to be an emancipated minor.
<b>Germany</b>	<p>Germany permits change of legal gender for male and female under the '<i>Law about the change of first name and determination of gender identity in special cases</i>'.</p> <p>It has also been reported that German courts have directed parliament to recognise and legislate a third gender before the end of 2018 to introduce terms to the effect of "inter" and "various" (Constitutional Court, 1 BvR 2019/16, decision of 10 October 2017, <a href="#">available here</a>).</p>	<p>Germany removed the requirement for sterilisation via its Constitutional Court.</p> <p>However, Germany is not based on a self-determination model and requires an applicant to provide expert evidence from two medical professionals.</p>	<p>Applicants are required to provide two expert medical opinions which attest that the applicant:</p> <ol style="list-style-type: none"> <li>1. does permanently belong to the other sex;</li> <li>2. has lived as the corresponding gender for three years; and</li> <li>3. is unlikely to change their gender identity in the future (this must be supported by evidence).</li> </ol>	<p>Same-sex marriage was legalised in Germany on 1 October 2017 via the Law on the Introduction of the Right to Marriage for Persons of the Same Sex. Accordingly, the 'divorce' requirement is no longer a requirement in Germany.</p> <p>The Constitutional Court in Germany also ruled in 2008 that the requirement that an individual had to be unmarried was unconstitutional.</p>	There is no minimum age requirement imposed on applying for a legal change in gender in Germany.	There are no express regulations as to individuals under the age of 18. The individual is required to provide the same medical evidence as an adult.
<b>Greece</b>	<p>In October 2017, Greece's Parliament passed updated gender recognition legislation, the <i>Legal Recognition of Gender Identity – National Mechanism for the Development, Monitoring and Evaluation of Action Plans on Children's Rights</i>.</p> <p>The law imposes a requirement for an applicant to apply for a gender change via the court system (male or female only). It has been reported that in February 2018, a Greek County Court (Marousi) ruled in favour of a non-binary individual</p>	The Civil Court of Athens in case no. 418/2016 ruled that sterilisation is no longer a requirement in applying to change gender on a birth certificate. The Court declared that sterilisation constitutes a violation of Article 8 of the ECHR and the right to equality and non-discrimination enshrined in Articles 2 & 26 per the ICCPR.	Accordingly, the new laws do not impose any medical requirements on applicants.	<p>Same sex marriage is currently not legalised in Greece.</p> <p>The gender recognition law in place in Greece also requires an applicant to be single, meaning Greece still enforces the divorce requirement.</p>	Per legislation, Greek citizens over the age of 15 are permitted to apply for a change of legal gender.	Minors between the age of 15 and 17 years old are required to undergo a mental health assessment and obtain a medical certificate from a medical council at Athens Children's Hospital as part of the process of applying for a change of legal gender.

Jurisdiction	Sex categories recognised	Medical requirements	Evidence of medical requirements	Marriage and the divorce requirement	Effect of age on gender recognition	Procedures for under 18 to comply to achieve gender recognition
	amending their birth name to a neutral name.					
<b>Iceland</b>	Iceland recognises two categories of gender: male and female. It currently does not recognise a third gender.	Sex reassignment surgery is not required for official name change and gender recognition.	Anyone who has received a diagnosis and approved treatment may request confirmation from the Gender Disciplinary Expert Group that they belong to the other sex. That application must be accompanied by a statement from the team of experts, which states that the applicant has been under their supervision for at least 18 months and has been in the opposite gender role for at least one year.	Same-sex marriage has been legal in Iceland since 2010.		
<b>Ireland</b>	<p>The <i>Gender Recognition Act 2015</i> gives adult individuals the ability to apply to legally change their gender according to their gender identity. The Act only provides for male and female recognition.</p> <p>The process is progressive and adopts a self-determination approach, where an individual must apply for a 'gender application certificate', provide identity documents and complete a statutory declaration.</p>	Ireland does not impose sterilisation, medical procedures or a mental health diagnosis on individuals in accessing gender recognition.	No evidence of medical requirements is required.	<p>Ireland legalised same-sex marriage in 2015 via the <i>Marriage Act 2015</i>.</p> <p>Irish Parliament also amended the <i>Gender Recognition Act 2015</i> via the <i>Marriage Act 2015</i> to remove the requirement to be single prior to applying for a legal gender change.</p>	<p>Ireland requires an individual to be 18 years or over to apply for a Gender Recognition Certificate.</p> <p>Minors between the age of 16 – 18 may apply to the court for an exemption to apply for a Gender Recognition Certificate.</p>	A minor between the age of 16 and 18 can apply for a Gender Recognition Certificate but must obtain a court order from the Circuit Family Court exempting the minor from the Act's imposed age requirement.
<b>Italy</b>	<p>Italy recognises two categories of gender: male and female. It currently does not recognise a third gender.</p> <p>Individuals are required to obtain a court ruling permitting the legal</p>	The investigating judge has the discretion to require the individual to undergo counselling.	No medical procedure evidence is required but the individual may be required to undergo counselling and provide evidence of treatment.	<p>Same-sex marriage is not legalised in Italy.</p> <p>However, in 2014, the Constitutional Court held that forced divorce for</p>	Only individuals 18 years and older are permitted to apply for a legal gender change.	N/A

Jurisdiction	Sex categories recognised	Medical requirements	Evidence of medical requirements	Marriage and the divorce requirement	Effect of age on gender recognition	Procedures for under 18 to comply to achieve gender recognition
	gender change, pursuant to law 164, an amendment to the Italian Civil Code.	However, the Supreme Court in 2015 held that surgical procedures should not be a pre-requisite to legal gender: see judgment.  Sterilisation was removed as a requirement by the Constitutional Court in 2015: see the decision here.		transgender people was unconstitutional pursuant to Article 2 of the Italian Constitution: see <i>Italy, Corte Costituzionale, sentenza 11/06/2014 n° 170/2014</i> .		
<b>Luxembourg</b>	Luxembourg currently only recognises two genders: male and female.  A bill (Bill 7146 – Bill to amend the mention of sex and of the first names in civil status and amending the Civil Code) has very recently (27 July 2018) been approved by Luxembourg’s Parliament.  The application must be accompanied by a number of documents (e.g. birth certificate, identity card national certificate, valid passport, extract of a criminal record or proof of marriage / partnership).	Article 2 of Bill 7146 states that failure to undergo medical treatment, surgery or sterilization cannot justify the refusal by the Minister of Justice to grant a request to change one’s gender on their birth certificate.	None required under Bill 7146.	Legislation was passed in 2014 to legalise same-sex marriage, which came into effect on 1 January 2015.  Divorce is not a requirement where one party changes their gender.	Bill 7164 allows for minors to have their gender changed on their birth certificate.	The minor’s parents or guardians can make a reasoned request for the minor’s gender to be changed to the Minister of Justice.  Where the holders of parental authority disagree, the most diligent parent shall refer the matter to the guardianship judge who will rule in the interests of the child.  Article 4 states that holders of parental authority of a minor under the age of 5 need to submit the matter to the guardian judge, rather than to the Minister of Justice.
<b>Malta</b>	Section 3 of the <i>Gender Identity, Gender Expression and Sex Characteristics Act</i> states that all	There is no requirement to provide proof of a surgical procedure for total or partial genital	None are required.	A person’s rights, relationship and obligations arising out of parenthood or marriage	Individuals under 18 also have access to the right to recognition of their gender identity.	Section 7 of the Act allows the person exercising parental authority over the minor to file an application in

Jurisdiction	Sex categories recognised	Medical requirements	Evidence of medical requirements	Marriage and the divorce requirement	Effect of age on gender recognition	Procedures for under 18 to comply to achieve gender recognition
	<p>Maltese citizens have a right to the recognition of their gender identity.</p> <p>To do this, the following process must occur:</p> <ol style="list-style-type: none"> <li>the person shall make a request to the Director by means of a note of registration;</li> <li>the Director shall not require any other evidence other than the declaratory public deed.</li> </ol> <p>The Director will enter a note in the act of birth of the applicant within 15 days from the filing of the note of registration.</p>	<p>reassignment, hormonal therapies or any other psychiatric, psychological or medical treatment to make use of the right to gender identity (section 3 of the Act).</p>		<p>shall in no way be affected: section 3 of the Act)</p>		<p>the registry of the Civil Court requesting the Court to change the recorded gender and first name of the minor in order to reflect the minor's gender identity.</p> <p>After an application has been made on behalf of the Minor, the Court will consider the best interests of the child as the paramount consideration, and give due weight to the views of the minor having regard to the minor's age and maturity.</p>
<b>Netherlands</b>	<p>The Netherlands recognises two categories of gender: male and female. It currently does not recognise a third gender.</p> <p>The Dutch government is currently examining the legal consequences of a ruling delivered on 28 May 2018 by the District Court of Limberg, which ruled in favour of a Dutch citizen who wished to be recognized as a "third gender" on their birth certificate. In that case, the judge granted the request for wording "sex cannot be determined".</p>	<p>Surgery is not required.</p> <p>An expert statement is required affirming the person's conviction to belong to another gender: see <a href="#">Act of 18 December 2013 amending Code re authority to change the indication of sex in the birth certificate</a>.</p>	<p>The expert statement must affirm that the individual declared to the expert that they had a permanent conviction that they belong to another gender than stated on their birth certificate, and that they understand the repercussions of the decision to change their gender identification.</p>	<p>The Netherlands was the first country in the world to legalise gay marriage, in 2001.</p>	<p>The laws implemented in 2013 only apply to people aged 16 and over.</p> <p>In cases where a child is born and it is not immediately clear whether they are male or female, it is possible to have their gender marker remain empty.</p> <p>However, children under 16 cannot change their gender on their identity documents.</p>	N/A
<b>New York City</b>	<p>New York City has four categories for sex designation on a birth certificate issued at birth: male, female, undetermined and unknown.</p>	<p>The laws passed on 12 September 2018 which come into effect on 1 January 2019 will allow individuals to change the</p>	<p>From 1 January 2019 no medical evidence will be required.</p>	<p>Same-sex marriages have been legally recognised in the State of New York (and therefore New York City) since July 24, 2011.</p>	<p>Minors under the age of 18 may change their gender on their birth certificate in the same way as adults, However, the application</p>	<p>Both living parents named on the birth certificate, or the child's legal guardians, must make the request on the child's behalf.</p>

Jurisdiction	Sex categories recognised	Medical requirements	Evidence of medical requirements	Marriage and the divorce requirement	Effect of age on gender recognition	Procedures for under 18 to comply to achieve gender recognition
(New York City issues birth certificates separately from New York State)	On 12 September 2018 a bill was passed which will introduce the gender “x” as an option on birth certificates issued pursuant to this amendment process. Adults will be permitted to change the gender on their birth certificates to “x”, and minors under the age of 18 need their parents to make the application on their behalf. These laws will come into effect 1 January 2019.	gender on their birth certificate without an affidavit from a medical professional.			must be made on the child’s behalf by the living parents named on the original birth certificate (i.e. both parents, if two are named), or the child’s legal guardians.	
<b>New Zealand</b>	<p>The Births, Deaths, Marriages and Relationships Registration Bill (<b>Bill</b>) seeks to repeal and replace the current <a href="#">Births, Deaths, Marriages, and Relationships Registration Act 1995 (NZ) (BDMR Act)</a>.</p> <p>The Bill was sent to the NZ Governance and Administration Select Committee, which returned its report on 10 August 2018.</p> <p>The Committee recommended that the current Family Court process be replaced with an administrative process based on self-identification.</p> <p>The Committee recommended including the options of ‘intersex’ and ‘X (unspecified)’</p>	<p>Currently, the Family Court can make a declaration for change of a birth certificate if the individual is living with a different gender identity than the one on their birth certificate and they have had medical treatment to change their gender.</p> <p>The Committee recommended removing all references to ‘medical treatment’, ‘medical evidence’, ‘physical conformation’, ‘sexual assignment’ and ‘sexual reassignment’ from the proposed Bill.</p>	<p>Currently, per section 28(3)(c) of the BDMR Act, for a declaration for change of birth certificate, the Family Court must be satisfied, on the basis of expert medical evidence, that the applicant:</p> <ul style="list-style-type: none"> <li>has assumed (or has always had) the gender identity of a person of the nominated sex; and</li> <li>has undergone such medical treatment as is usually regarded by medical experts as desirable to enable persons of the genetic and physical conformation of the applicant at birth to acquire a physical conformation that accords with the gender identity of a person of the nominated sex; and</li> </ul>	<p>Same-sex marriage is legal in NZ.</p> <p>There is no requirement in the BDMR Act to be single/divorced.</p>	<p>Currently, individuals aged under 18 years old are only eligible to apply to have the sex on their birth certificate changed if they are or have been in a marriage, civil union, or de facto relationship (section 27A(a) BDMR Act). Otherwise, the legal guardian of the minor can apply on their behalf.</p> <p>The Committee recommended that the Bill be amended to enable eligible 16 or 17 year olds to apply to change the sex on their birth certificate, with different requirements depending on the age of the child.</p>	<p>Currently, if the under 18 year old is or has been in a marriage, civil union, or de facto relationship then the procedure is the same as for adults (i.e. apply to the Family Court for a declaration).</p> <p>If the guardian of the under 18 year old is applying to the Family Court for a declaration about the child’s gender identity on their behalf, the Family Court will consider different issues than it does when making a declaration about an adult.</p>

Jurisdiction	Sex categories recognised	Medical requirements	Evidence of medical requirements	Marriage and the divorce requirement	Effect of age on gender recognition	Procedures for under 18 to comply to achieve gender recognition
			<ul style="list-style-type: none"> <li>will, as a result of the medical treatment undertaken, maintain a gender identity of a person of the nominated sex.</li> </ul>			
<b>Norway</b>	<p>Norway recognises two categories of gender: male and female.</p> <p>In 2016, Norway enacted the 'Lov om endring av juridisk kjønn' (<i>Legal Gender Amendment Act</i>).</p> <p>To amend legal gender, the individual may apply to the National Registry, based on a model of self-determination.</p>	<p>Medical requirements are no longer imposed in Norway.</p>	N/A	<p>Same-sex marriage is legal in Norway and incorporates gender neutral terms, as established by the <i>Marriage Act</i>.</p>	<p>Minors 16 and over are able to apply for a change of legal gender: section 4.</p> <p>Minors between the age of 6 and 16 years old can also apply for a change of legal gender but the application must be submitted by the adult who has custody of the minor.</p> <p>If one parent does not consent, the case is to be referred to the Country Governor of Oslo who has the discretion to assess 'what is in the best interest of the child' including considering:</p> <ol style="list-style-type: none"> <li>the child's age and level of maturity;</li> <li>the gender expression the child inhibits, in what way and period of time;</li> <li>consistency regarding gender identity;</li> <li>any reasons for refusal of consent; and</li> <li>the relationship of parents to the child.</li> </ol>	<p>No procedures are required for minors.</p> <p>Children under the age of 6 may only amend their legal gender where it is proved that the child has "congenital somatic sex development uncertainty" with evidence to this effect provided by a medical expert.</p>

Jurisdiction	Sex categories recognised	Medical requirements	Evidence of medical requirements	Marriage and the divorce requirement	Effect of age on gender recognition	Procedures for under 18 to comply to achieve gender recognition
<b>Oregon</b>	<p>Oregon recognises three genders: “male”, “female” and “nonbinary”.</p> <p>In 2016 the Oregon circuit court ruled that an individual may change their government recognised sex to “nonbinary”.</p> <p>Residents have the option of amending their birth certificate and drivers licence to show their gender as: “x (Non-binary)”.</p>	<p>There are no medical requirements required to amend the gender on your birth certificate as long as you were born in Oregon.</p> <p>This ‘administrative option’ can only be exercised once by each individual.</p> <p>If an individual wishes to change their gender a second time, they will be required to obtain a court order. This will require production of a letter from a medical professional.</p>	<p>No evidence required for first change of gender via administrative means.</p> <p>If a court order is necessary, such as where an individual is changing their gender for a second time, a letter from a medical professional stating that the individual has “undergone surgical, hormonal, or other treatment for the purpose of gender transition and that sexual reassignment has been completed” will be required.</p>	<p>Same-sex marriage has been legally recognised in Oregon since 19 May 2014.</p>	<p>Minors under the age of 18 may change their gender on their birth certificate via the same mechanism as adults, however, a parent or legal guardian is required to make the request on the child’s behalf.</p>	<p>A parent or legal guardian is required to make the request on the child’s behalf.</p>
<b>Portugal</b>	<p>In April 2018, the Portuguese parliament presented new gender recognition laws, which were vetoed by the President in respect to self-determination in the context of minors.</p> <p>In July 2018, the Portuguese parliament presented an amended version of the gender recognition laws, which are subject to the President’s signature: <a href="#">Decree (XIII 3 105) ‘Right to self-determination of gender identity and expression of gender and protection of the sexual characteristics of each person’</a>.</p> <p>Portugal’s new law is considered to be progressive, based on the self-determination model where the only</p>	<p>Accordingly, with the President’s assent, individuals are no longer required to provide evidence of medical reports to apply for a legal change in gender.</p>	<p>No evidence required.</p>	<p>Same-sex marriage is legal in Portugal (<a href="#">Lei no. 9/2010 de 31 de Maio</a>) and gender recognition laws do not require an individual to be single in order to change their gender.</p>	<p>Individuals aged 16 and over have access to changing their legal gender, however certain requirements are imposed on individuals between the ages 16 to 18 which act as a restriction to ultimate self-determination.</p>	<p>Minors between 16 and 18 years old are required to provide:</p> <ol style="list-style-type: none"> <li>parental consent;</li> <li>a statement or report from a doctor or psychologist, which provides evidence that the choice in question is a free choice of the individual and confirms the absence of any obstacles.</li> </ol> <p>It has also been reported that the law introduces a moratorium on genital surgeries on intersex infants but does not constitute a full</p>

Jurisdiction	Sex categories recognised	Medical requirements	Evidence of medical requirements	Marriage and the divorce requirement	Effect of age on gender recognition	Procedures for under 18 to comply to achieve gender recognition
	<p>criteria to amend an individual's legal gender is the word of the relevant individual.</p> <p>Until the President's consent, individuals are currently bound by the current law via the Civil Code, <a href="#">available here</a>.</p>					ban on surgeries on children who cannot consent.
<b>Sweden</b>	<p>Sweden recognises two categories of gender: male and female.</p> <p>According to the <a href="#">Gender Recognition Act (1972:119)</a>, a person can, after an application of his or her own, get recognised that he or she has another gender than the one indicated in the civil registration, provided he or she:</p> <ol style="list-style-type: none"> <li>over a long period of time has perceived that he or she belongs to the other gender;</li> <li>for a while has presented in accordance with this gender identity;</li> <li>must be expected to live in accordance with this gender identity also in the future; and</li> <li>is at least eighteen years of age.</li> </ol>	<p>A person can, after an application of his or her own, get recognised that he or she has another gender than the one indicated in the civil registration, provided that:</p> <ol style="list-style-type: none"> <li>he or she has a congenital deviation in sex development; and</li> <li>a change in gender is consistent with the development of their gender identity and the most consistent with their physical condition.</li> </ol>		The application cannot be approved if the applicant is in a registered partnership: Gender Recognition Act, section 3.	<p>If the application is referring to someone who has turned eighteen then the application is made by himself or herself. The same applies for a person younger than eighteen who is not in the custody of someone else.</p>	<p>The application for gender recognition must be made by the custodian of the applicant if they are under the age of 18 years old.</p> <p>In applications where the child is over 12 years old, the child must also give his or her consent.</p>
<b>Switzerland</b>	<p>Legal gender recognition is based on Art. 1 or 42 <i>Swiss Civil Code</i>, which are general rules and not trans specific. In May 2018, the Federal Council proposed amending Swiss legislation to allow transgender individuals to change their registered gender and first names by making a declaration to civil status registry officials.</p>	<p>No surgical sterilisation or gender reassignment surgery required.</p>		No compulsory divorce required.		