



**LGBTI**  
Legal Service Inc



Human Rights  
Law Centre

# Recognising LGBTI diversity in Queensland

Submission to the Queensland Department of Justice and  
Attorney-General's discussion paper:

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

**Joint submission from LGBTIQ community organisations**

**April 2018**

## SUMMARY OF RECOMMENDATIONS

1.	We recommend that the Queensland Government conduct a review of its policies in relation to collection of sex/gender with the intention of developing a uniform approach across departments and agencies, whereby sex/gender information is collected only when necessary and in an appropriate manner.
2.	Assuming the Registry continues to register a person's sex / gender, we recommend that options other than male or female be made available.
3.	<p>Assuming the Registry continues to register a person's sex / gender, we recommend that applicants have the option to self-describe their sex / gender in a free-text field.</p> <p>In the alternative, we recommend that the following categories be prescribed by regulation: male, female, male and female, non-binary, unspecified, and that the final list of descriptors be developed in close consultation with trans, gender diverse and intersex communities including sistersgirls and brotherboys.</p>
4.	We recommend that references to 'sex' in the BDMR Act and BDMR Regs be replaced with the term 'sex/gender'.
5.	We recommend that the Queensland Government introduce necessary consequential amendments to give effect to any proposed Bill, including clarification around a person's entitlement under a will or trust.
6.	We recommend that any reforms include additional privacy protections in relation to sex and gender information.
7.	We recommend that any reforms include reduced application costs for applicants experiencing financial hardship.
8.	<p>We recommend that 'parent' be added to references to 'mother' and 'father' in the BDMR Regs and that these descriptors be available for use on the Register and birth certificates without discrimination and according to individual choice.</p> <p>We recommend that following a change of sex on the register, that an application should be able to be made to change the description of a parent on a child's birth certificate (e.g. from father to parent). If a child has reached 12 years of age, we recommend that their consent be required to change their parents' details on their birth certificate.</p>
9.	We recommend investment in information, education, training, IT and systems infrastructure change and community support services as part of the implementation of future reforms.
10.	We recommend that further time be allowed for parents of intersex infants to register the child's sex at birth, including ensuring that any penalties for delaying the notification or registration of a child's sex at birth do not apply for parents of an intersex infant.
11.	We recommend that parents of intersex infants be provided with information, advice and support from medical practitioners and experts within the intersex community to explain relevant medical and human rights considerations to take into account when making decisions relating to their child's sex and gender identity.

12.	We recommend that the Queensland Government further consider legislative amendments to ensure that deferrable and irreversible medical treatments are not performed on intersex infants and children unable to provide free, full and informed consent, except in cases of absolute medical necessity.
13.	We recommend that section 42 of the BDMR Act be amended to allow an intersex person or the parents or guardian of an intersex child under 16 to apply to correct the sex recorded at birth on the Register through a simple administrative process.
14.	We recommend that the requirement that an applicant undergo sexual reassignment surgery before changing their sex /gender be removed from the BDMR Act.
15.	<p>We recommend that change of sex be achieved through a simple administrative process that does not require medical or other evidence to be produced by the applicant.</p> <p>In the alternative, if the above recommendation is not accepted, we recommend that an applicant be required to provide a supporting statement from an adult known to them for more than 12 months.</p> <p>In the alternative, if the above recommendations are not accepted, we recommend that the applicant be required to provide a supporting letter from a medical professional (including a general practitioner or counselling psychologist) confirming that the applicant has received clinical treatment in relation to the applicant's sex or gender identity.</p>
16.	We recommend that the process for registering a correction or change of sex of a child should be the same as an adult for a child aged 16 or over, and for parents or guardians to be able to make an application on behalf of a child's behalf where it is in the child's best interests.
17.	We recommend that the Queensland Government ensure that any reforms allow for sufficient flexibility for all people born or living in Queensland to have their sex and / or gender legally recognised, including consideration of residence restrictions and recognition certificates.
18.	We recommend that consideration be given to reviewing and amending the BDMR Act and BDMR Regs (together with the <i>Status of Children Act 1978</i> (Qld) and laws governing assisted reproductive technology and altruistic surrogacy, where relevant) to better recognise diverse family structures, such as allowing for more than two legal parents on a birth certificate.
19.	We recommend that the BDMR Act and BDMR Regs be amended to recognise children born to single parents through assisted reproductive technology as siblings on their birth certificates.

## Table of Contents

---

<b>Introduction</b> .....	<b>4</b>
<b>A. Collecting and registering a person’s sex</b> .....	<b>5</b>
1. How should a person’s sex be recorded on the birth, adoption and death registers? .....	5
1.1. Registration of sex in Queensland.....	5
1.2. Recommendations for reform .....	5
2. Do you have any other comments on this issue?.....	9
2.1. Sex and gender .....	9
2.2. Consequential amendments .....	10
2.3. Access to the Register.....	10
2.4. Implications of a change or correction of sex and/or gender on records .....	11
2.5. Broader reforms required to promote inclusion of sexual and gender diversity .....	12
2.6. Notification and registration of sex at birth .....	12
2.7. Regulation of special medical procedures.....	17
<b>B. Recording the reassignment of a person’s sex</b> .....	<b>18</b>
3. Should any changes be considered to the BDMR Act and BDMR Regulation to improve the legal recognition of sex and gender diverse people in Queensland? If so, what should the changes be? .	18
3.1. Correcting an intersex person’s sex at birth on the Register.....	18
3.2. Medical treatment preceding a change of registered sex / gender .....	19
3.3. Unmarried requirement.....	21
4. Should any changes be made to the BDMR Act’s provisions regarding an application to note a reassignment of sex for children/young people under the age of 18? If so, what should the changes be? .	21
5. Should the BDMR Act contain provisions to allow for the reassignment of a person’s sex for individuals who reside in Queensland but whose birth was registered elsewhere? .....	23
6. Should the BDMR Act allow for the issuing of a gender recognition certificate / identity acknowledgement certificate which can be used by a person as proof of their sex or gender? .....	24
<b>C. Recognising diverse families on the Register</b> .....	<b>24</b>
7. Should the BDMR Act be amended to permit same-sex parents to choose how they are recorded on a birth or adoption registration?.....	24
8. If so, what descriptors should be available and in what combinations? .....	24
Additional comments .....	25

## Introduction

---

We thank the Queensland Government for initiating this review of how life events are registered in the state and the Attorney-General's stated commitment to recognising and respecting sex and gender diversity. This is a welcome step forward to promoting inclusion and recognising the diversity of lesbian, gay, bisexual, trans and intersex (**LGBTI**) people living in our communities. Importantly, the review follows steps taken by the Queensland Government to progress the implementation of marriage equality as an issue of urgency.

Every person in our community should have the freedom and independence to live their own lives. All people should be free to be legally recognised as who they are – reflecting the gender they live as. All children should have access to the legal and emotional security of having their parents legally recognised. All people should be able to correct inaccurate details about who they are without facing unnecessary legal barriers.

The Registry of Births, Deaths and Marriages (**the Registry**) was established to: (a) collect information; (b) create a person's legal identity; and (c) provide evidence of key life events. As identified in the Department of Justice and Attorney-General's Discussion Paper 'Registering life events: Recognising sex and gender diversity and same-sex families. Review of the Births, Deaths and Marriages Registration Act 2003 (Qld), Discussion Paper 1' (**BDM Discussion Paper 1**), much has changed since the *Births, Deaths and Marriages Registration Act 2003* (Qld) (**BDMR Act**) and *Births, Deaths and Marriages Registration Regulation 2015* (Qld) (**BDMR Regs**) were first introduced. This review is a welcome opportunity to update the recording of sex/gender and diverse families to better align with its stated purposes. In particular:

- (a) This is an opportunity to ensure the Registry is collecting accurate statistical information. Currently, the BDMR Act does not allow the Registry to accurately record the sex/gender of many trans, gender diverse and intersex people born in the state or the actual composition of rainbow families. Current systems are out of step with national data collection practices by the Commonwealth Attorney-General's Department and Australian Bureau of Statistics.
- (b) This is an opportunity to ensure the Registry is more accurately creating and maintaining the legal identity of individuals. Current processes are not flexible enough to allow people the freedom to correct or change the sex they were assigned at birth to reflect who they are, particularly without resort to invasive and unnecessary surgeries. In addition, the Registry creates the legal identity of children without recognising all of their parents, and does not allow parents to use terms that best describe their relationship to their child.
- (c) This is an opportunity to improve the accuracy of the Registry's recording of key life events. The current BDMR Act acts as a barrier to correcting or changing a record of sex/gender to reflect the reality of a person's lived experience. This is important because birth certificates are commonly used by individuals to prove their sex, gender and family relationships.

Currently, our laws provide for a person's sex at birth to be recorded on the Register based on information received from medical practitioners. It is very difficult for the minority of intersex people who want to correct the sex they were assigned at birth to do so (even when a intersex person has been subjected to non-consensual surgery or other medical procedures as a child to align their sex characteristics with this assignment and they grow up to identify as another gender). People with intersex variations have a diversity of bodies and gender identities. While a small proportion of intersex people do not identify as male or female, the majority of intersex people do identify as male or female. Particularly given the potential for intersex people to carry experiences of trauma as a result of their early gender assignment and medical treatment, it is important that they do not experience unfair or onerous barriers when seeking to correct their legal sex/gender.

Currently in Queensland, it is extremely difficult for trans and gender diverse people to change their legal gender to reflect who they are, due to outdated legal barriers to recognition. Trans and gender diverse people are already part of our communities – in our workplaces, neighborhoods and schools. Yet 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 change your birth certificate to match the gender you live as is also a profoundly positive and affirming experience that supports the health and well-being of vulnerable trans and gender diverse people.

LGBTI parents already raise children in loving homes across the state. There have been a number of very welcome reforms to Queensland laws to support LGBTI people becoming parents and starting families through assisted reproductive technology, altruistic surrogacy or adoption. But these parents cannot always choose how they are recognised on their children's birth certificates, and not all parents involved in raising and caring for children are legally recognised. When our laws do not recognise the diversity of our modern family structures, they leave some children in rainbow families without legal certainty and security if anything were to happen to their legally recognised parent/s.

This submission provides a series of recommendations towards ensuring that Queensland birth certificate laws better meet the needs of LGBTI communities and reflect best practice legal recognition, in a way that respects the fundamental human rights of LGBTI people and their families.

## **A. Collecting and registering a person's sex**

---

### **1. How should a person's sex be recorded on the birth, adoption and death registers?**

#### **1.1. Registration of sex in Queensland**

In situations where an individual seeks to correct the Register because the sex assigned at birth is inaccurate, or amend the Register to record a gender identity different from the sex assigned at birth, it is important the available categories of sex/gender descriptors provide sufficient flexibility to correctly record accurate information about the person's sex or gender identity.<sup>1</sup>

Below we explore potential options for reform to the process of registering sex and/or gender information on the Register.

#### **1.2. Recommendations for reform**

##### **Should sex/gender information be recorded on the Register**

As noted above, it is currently a legal requirement in Queensland to indicate the sex when registering the birth of a child in Queensland.

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. However, rationales for the collection of sex/gender information in certain contexts remain. For example, to measure progress in reducing inequality between men and women. Collection of sex and gender information is also important to adequately survey and describe the Australian population and develop policies and programmes 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 discussed above, 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 sex only be collected where there is a legitimate

---

<sup>1</sup> Equal Opportunity Tasmania, *Legal recognition of sex and gender diversity in Tasmania: Options for amendments to the Birth, Deaths and Marriages Registration Act 1999* (February 2016), 24.

need for that information.<sup>2</sup> Where information is required, it is recommended that gender (rather than sex) information is collected.<sup>3</sup>

When it comes to registration at birth and the inclusion of sex/gender information on cardinal documents such as birth certificates, there is a diversity of views within trans, gender diverse and intersex communities.

Some advocates argue for the removal of the requirement to collect information regarding sex when registering a birth. 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>4</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>5</sup>

However, for many trans and gender diverse people, obtaining a birth certificate that reflects their gender identity is profoundly important to their sense of self and boosts their confidence to assert their gender when dealing with decision makers and officials in their day to day lives. In this way, legal affirmation of gender identity can support and promote improved health and well-being for cohorts that suffer alarmingly high rates of depression, attempted suicide and suicide.<sup>6</sup>

Ceasing to record the sex of a child at birth on the Register would obviously remove the need for administrative procedures to amend a person's sex/gender marker in the future where it does not accord with the sex designated at birth. It would not preclude the collection of sex and/or gender information for statistical or operational reasons.

The *Census and Statistics Act 1905* (Cth) sets out arrangements with state governments to collect any statistical or other information necessary to enable the Australian Bureau of Statistics to collect, analyse and publish population details, including sex data. Advice from the ABS indicates that approval from the Commonwealth Statistician for an exemption under the legislation would be required if there were any interest in not collecting this information and it is unlikely this permission would be granted.<sup>7</sup>

It would appear then that the Registry is legally required to continue to record sex information and it is not necessary at this stage to resolve the competing views and perspectives on this issue.

### **Introduction of categories other than male and female**

Assuming the Registry continues to record sex/gender information, provision should be made to recognise people whose gender identity is neither male or female or both male and female.

---

<sup>2</sup> Australian Government, Attorney-General's Department, *Australian Government Guidelines on the Recognition of Sex and Gender* (November 2015).

<sup>3</sup> Ibid.

<sup>4</sup> Above n 2 [8]a.

<sup>5</sup> Ibid [8].

<sup>6</sup> See e.g., National LGBTI Health Alliance, *Snapshot of Mental Health and Suicide Prevention Statistics for LGBTI People* (July 2016) <https://lgbtihealth.org.au/wp-content/uploads/2016/07/SNAPSHOT-Mental-Health-and-Suicide-Prevention-Outcomes-for-LGBTI-people-and-communities.pdf>; Australian Psychological Society, *Information Sheet: Australian Psychological Society Recommends Mental Health Practices that Affirm Transgender People's Experiences* (2017) <https://www.psychology.org.au/getmedia/00cd6bab-650a-431b-bc67-fdfb69729b83/Info-Sheet-Transgender-affirmation-extended-version.pdf> 1; The World Professional Association for Transgender Health, *Standards of Care for the Health of Transsexual, Transgender, and Gender Nonconforming People* (7<sup>th</sup> version) [https://www.wpath.org/media/cms/Documents/SOC%20v7/SOC%20V7\\_English.pdf](https://www.wpath.org/media/cms/Documents/SOC%20v7/SOC%20V7_English.pdf) 1-2.

<sup>7</sup> Above n 1, 26, citing email correspondence.

Currently, people born in Queensland can only be registered as either 'male' or 'female' under the BDMR Act and BDMR Regs.<sup>8</sup> In practice, this ignores the reality of gender diverse people in Queensland and does not promote inclusion or recognition of sexual and gender diversity in line with Australian Government Guidelines.<sup>9</sup>

Trans and gender diverse advocates advocate for legal recognition of gender identities other than male or female to support those who identify as neither or both male or female. 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>10</sup> Intersex advocates have supported the recognition of sex outside the male and female categories to accommodate the small number of intersex people who identify as a gender other than wholly male or wholly female.<sup>11</sup> A person may want their sex / gender to be recorded as male, female, or as neither or both male or female (sometimes referred to as non-binary). Introduction of additional sex/gender markers would enable this diversity to be legally recognised. This will improve the integrity of the data collected by the Registry.<sup>12</sup> Most importantly, providing 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.

The provision of non-binary options for registration of sex was recommended by the Australian Human Rights Commission in its recent *Resilient Individuals Report*,<sup>13</sup> and aligns with national and international human rights principles.<sup>14</sup> As referred to in BDM Discussion Paper 1, the High Court has also considered this issue, including most recently in *NSW Registrar of Births, Deaths and Marriages v Norrie (Norrie)*.<sup>15</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>16</sup> The equivalent provision of the *Acts Interpretation Act 1954* (Qld) is similar, providing that: "[i]n an Act, words indicating a gender include each other gender".

The High Court stated:<sup>17</sup>

The 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>8</sup> *Births, Deaths and Marriages Registration Regulation 2015* (Qld) schedule 1, part 1, item 1 and schedule 2, part 1, item 1; see also Queensland Birth Registration Form: <https://publications.qld.gov.au/dataset/birth-registration/resource/c52c1bfa-ec2d-4af3-b0a1-56242007f3cc>.

<sup>9</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>10</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>11</sup> Above n 2, [8]d.

<sup>12</sup> National LGBTI Health Alliance, *Making the Count: Addressing data integrity gaps in Australian standards for collecting sex and gender information* (March 2016) <https://lgbtihealth.org.au/wp-content/uploads/2016/03/WhitePaper-MakingTheCount-Ansara-LGBTIHealthAlliance.pdf>.

<sup>13</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>14</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>15</sup> [2014] HCA 11.

<sup>16</sup> A point raised in submissions by the intervenor A Gender Agenda represented by the Human Rights Law Centre.

<sup>17</sup> Above n 17 [42].



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.

### **Introduction of a free-text field to allow for individuals to record their sex/gender**

We recommend that a free-text field be provided to allow individuals to self-describe their sex/gender. Collectively these might be grouped into an 'other' category which includes an option to self-describe, although the use of "other" has been criticised by some advocates. This approach was considered by the Victorian Government as part of the Births, Deaths and Marriages Registration Amendment Bill 2016 (Vic). This approach allows individuals the freedom to select a sex/gender descriptor that matches their gender identity and avoids the need to determine and predict the exact categories that will be utilised by members of the community.

LGBTI community organisations could 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.

### **Specifying a limited number of new categories by legislation or regulation**

Alternatively, the available categories could be specified in legislation or regulation. The difficulty with this approach rests in part on whether it is possible to develop an exhaustive list of sex/gender descriptors suited to the current and future needs of people who do not identify as male or female.<sup>18</sup> Recent studies have shown an increase in non-binary gender identities, with trans and gender diverse young people self-describing as a range of gender identities, including – for example – genderqueer, genderfluid, no gender, agender, androgynous, bi-gender and brotherboy.<sup>19</sup>

We recommend prescribing the available categories in the BDMR Regulations over prescription in the BDMR Act. Legislation offers permanence and greater certainty but in our view the flexibility offered by regulations is of greater benefit, given that developing the list of available descriptors would require careful and continual consultation with transgender, gender diverse and intersex communities. This has been the approach adopted in the Australian Capital Territory and South Australia.

### **Additional non-binary categories**

There is a diversity of views within the intersex community, and within trans and gender diverse communities, about legal recognition of sex/gender outside of 'male' and 'female'.

In 2017, as South Australia was developing its approach to sex/gender categories following the passage of reforms to its birth certificate laws, LGBTI community organisations recommended that, if a free text field was rejected, applicants should be able to change their registered sex/gender to a *minimum* of 8 categories, being male, female, male and female, X, non-binary, unspecified, brotherboy and sistergirl.<sup>20</sup>

The Darlington Statement – a joint consensus statement from a number of intersex organisations and advocates – states that: "[i]ndividuals able to consent should be able to choose between female (F), male (M),

---

<sup>18</sup> Above n 1, 26.

<sup>19</sup> Beyond Blue, *From Blues to Rainbows: The mental health and well-being of gender diverse and transgender young people in Australia* (2014) <https://www.beyondblue.org.au/docs/default-source/research-project-files/bw0268-from-blues-to-rainbows-report-final-report.pdf?sfvrsn=2> 33.

<sup>20</sup> South Australian Rainbow Advocacy Alliance, Organisation Intersex International Australia (now Intersex Human Rights Australia), Human Rights Law Centre, National LGBTI Health Alliance, Gender Diversity Alliance South Australia, FTMen-SA, Mental Illness Fellowship South Australia, Shine SA, *Joint submission from organisations from trans, gender diverse and intersex communities* (March 2017).

non-binary, alternative gender markers, or multiple options”.<sup>21</sup> This statement was affirmed as recently as April 2018.

The approach adopted by Australian departments and agencies including the Australian Passport Office is to provide for the categories of male, female or X, with X indicating the person’s gender is indeterminate, unspecified or intersex.<sup>22</sup> However, while a positive development at the time of introduction, the categories have been critiqued for contributing to misunderstanding about intersex people, who do not wish to be seen as a “third sex”, particularly given the majority of intersex people identify as either male or female. We understand that the terminology used in the Australian Guidelines is currently under review.

We recommend close consultation with transgender, gender diverse and intersex communities to develop the final list of available sex/gender descriptors, if this approach is to be adopted. We would also be happy to provide further input in the future.

Recommendations	
1.	We recommend that the Queensland Government conduct a review of its policies in relation to collection of sex/gender with the intention of developing a uniform approach across departments and agencies, whereby sex and/or gender information is collected only when necessary and in an appropriate manner. <sup>23</sup>
2.	Assuming the Registry continues to register a person’s sex / gender, we recommend that options other than male or female be made available.
3.	Assuming the Registry continues to register a person’s sex / gender, we recommend that applicants have the option to self-describe their sex / gender in a free-text field.  In the alternative, we recommend that the following categories be prescribed by regulation: male, female, male and female, non-binary, unspecified, and that the final list of descriptors be developed in close consultation with trans, gender diverse and intersex communities including sistersgirls and brotherboys.

**2. Do you have any other comments on this issue?**

Yes.

**2.1. Sex and gender**

The terms sex and gender are often conflated in law and policy, particularly for legal recognition purposes (rather than population surveys or medical information, for example). For the purpose of birth certificate laws, we suggest that it would be appropriate to recognise that the state is, in fact, recording information about both sex and gender under the same descriptor or field in the Registry data collection system. This could be achieved by replacing references to ‘sex’ in the BDMR Act and BDMR Regs with the term ‘sex/gender’.

For example, hospitals could be said, in most cases, to be providing information to the Registry about the sex of a newborn infant. An exception would arguably be a child born with an intersex variation whose biological who would generally be assigned as male or female and recorded on their birth certificate as such, without this necessarily matching their biological sex. However, a change of sex marker on a birth certificate made

<sup>21</sup> Ibid.

<sup>22</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], 4-5.

<sup>23</sup> Above n 1, 28.

later in life by a trans person is best characterised as a change to ensure their birth certificate reflects their gender. In this way it can be said that legal sex does not (and should not) reflect biological sex.

The South Australian Births, Deaths and Marriages Registration (Gender Identity) Amendment Bill 2016 (SA) used the term 'sex or gender identity' to address this issue.

Our recommendation is to update terminology in the statute to reflect the reality that legal sex actually can signify gender by replacing references to sex with the term 'sex/gender'. Data collection by other government agencies may have reason to differentiate between the sex and gender (as reflected in the fact that the ABS has both a sex standard for data collection and a gender standard for data collection) but policy governing birth certificates should continue not to distinguish between sex and gender.

Recommendation	
4.	We recommend that references to sex in the BDMR Act and BDMR Regs be replaced with the term 'sex/gender'.

### 2.2. Consequential amendments

We recommend that the Queensland Government consider and implement any consequential amendments required to give effect to any amendment to the registration of sex.<sup>24</sup> These would include a provision that clarifies that a person who has an entitlement under a will or trust or under a state or territory law does not lose the entitlement only because the person's sex has been altered on the Register.<sup>25</sup>

Recommendation	
5.	We recommend that the Queensland Government introduce necessary consequential amendments to give effect to any proposed Bill, including clarification around a person's entitlement under a will or trust.

### 2.3. Access to the Register

Currently, s 44 of the BDMR Act sets out the conditions in which the Registrar may grant individuals or organisations access to the Registry. Section 44 provides that a person or entity may apply to the Registrar for information about life events recorded in the Register, including a copy of a source document.

It may be that further privacy protections are necessary in light of the reforms proposed above. Under the ACT 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>26</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>27</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>28</sup>

<sup>24</sup> See Annexure A for examples of legislative provisions which may require amendment (e.g. legislation which refers to 'male and female' persons only, or which refers to people of 'opposite' sexes, rather than 'different' sexes).

<sup>25</sup> *Births, Deaths and Marriages Registration Act 1997* (ACT) s 29.

<sup>26</sup> *Ibid* s 27.

<sup>27</sup> *Ibid* s 27.

<sup>28</sup> *Ibid* s 28.

In South Australia, the Registrar issues two birth certificates to an applicant following a change of sex or gender identity on the Register:

- (a) a birth certificate is issued showing previous amendments to the Register to enable the applicant to change their secondary identity documents and other records by proving a chain of identity (e.g. to a superannuation fund); and
- (b) a new birth certificate is issued without showing previous records to enable the applicant to provide this document without requiring them to reveal the sex or gender identity formerly recorded on the Register (e.g. to a new employer).

In making these recommendations, the Registrar would still retain the authority to share relevant information with law enforcement authorities, which could be readily prescribed for the purposes of these provisions.

Recommendation	
6.	We recommend that any reforms include additional privacy protections in relation to sex and gender information.

In addition, we note that trans, gender diverse and intersex people are more likely to experience unemployment and underemployment. As a result, applicants to correct or amend the Register are more likely to be experiencing financial hardship. We consider that financial means should not act as a barrier to being able to ensure that your sex and/or gender is correctly recorded on the Register, or to access identity documents which reflect the correct sex and/or gender.

Recommendation	
7.	We recommend that any reforms include reduced application costs for applicants experiencing financial hardship.

**2.4. Implications of a change or correction of sex and/or gender on records**

We are aware that a person’s correction or change of sex / gender may have implications for status, entitlements and benefits that a person holds because of their previously registered sex.<sup>29</sup> One example of these implications was outlined by the ACT Law Reform Council in its *Beyond the Binary* Report as follows:

[T]he Office of Regulatory Services has noted that registration of a birth in the ACT requires recording of the name of the child’s ‘mother’. A person whose birth sex was female, but whose changed registered sex is male may be able to give birth, because reassignment surgery – which results in sterility – is not a requirement for their having changed the registration of their sex. In those circumstances, a person whose registered sex is male could give birth and be registered as the ‘mother’.<sup>30</sup>

A similar scenario could arise in Queensland if the recommended reforms are implemented. For many parents, being legally recognised as a term which best reflects their sex / gender and their relationship to their child is important. While some parents wish to be legally recognised as a ‘mother’ or ‘father’, some parents may prefer to be recognised as a ‘parent’ instead, including parents wanting a gender neutral option.

Following a change of sex on the Register, an application should also be able to be made to change the description of a parent on a child’s birth certificate, if necessary (e.g. from father to parent). Similar to a change of name, if a child has reached the age of 12 years we recommend that their consent be required to

<sup>29</sup> [Pers. Comm.] 4/01/2018 Births, Deaths and Marriages, Department of Justice, WA., p 55.

<sup>30</sup> *Births, Deaths and Marriages Registration Act 1997* (ACT) s 45.

effect a change to the description of their parents on their birth certificate (e.g. a 'father' changes to 'parent' following a gender transition).

Recommendation	
8.	<p>We recommend that 'parent' be added to references to 'mother' and 'father' in the BDMR Regs and that these descriptors be available for use on the Register and birth certificates according to individual choice .</p> <p>We recommend that following a change of sex on the register, that an application should be able to be made to change the description of a parent on a child's birth certificate (e.g. from father to parent). If a child has reached 12 years of age, we recommend that their consent be required to change their parents' details on their birth certificate.</p>

### 2.5. Broader reforms required to promote inclusion of sexual and gender diversity

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. Whilst acknowledging that addressing the weaknesses in Queensland's anti-discrimination laws is outside the scope of this review, we wish to emphasise the importance of accompanying non-legislative measures to support and complement Queensland's LGBTIQ+ Inclusion Strategy.<sup>31</sup> Successful implementation of any future reforms will require care and investment by the Queensland 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	
9.	<p>We recommend investment in information, education, training, IT and systems infrastructure change and community support services as part of the implementation of future reforms.</p>

### 2.6. Notification and registration of sex at birth

The BDMR Act and BDMR Regs affect how people are registered at birth on their birth certificate. Currently, parents are required to register the birth of a child within 60 days. We will consider the effect of this legislation on people born with intersex variations.

The Darlington Statement provides that:

While sex/gender classifications remain legally required, sex/gender assignments must be regarded as provisional. Given existing social conditions, we do not support the imposition of a third sex classification when births are initially registered.

Recognising that any child may grow up to identify with a different sex/gender, and that the decision about the sex of rearing of an intersex child may have been incorrect, sex/gender classifications must be legally correctable through a simple administrative procedure at the request of the individual concerned.<sup>32</sup>

Accordingly, we do not recommend that infants born with intersex variations are registered as a 'third sex' at birth.

<sup>31</sup> Public Service Commission, Queensland public sector *LGBTIQ+ inclusion strategy 2017-2022* (March 2017) <https://www.forgov.qld.gov.au/sites/default/files/lgbtiq-inclusion-strategy.pdf?v=1491458841>.

<sup>32</sup> Above n 25.

### 2.6.1. Sex / gender registration options at birth in Australia

We provide further information on the notification and registration requirements of sex at birth in Australian jurisdictions to assist the review to understand the variations between different state and territory regulatory regimes. We have contacted the Registrars in other Australian jurisdictions to gauge how registration of intersex children is dealt with in practice.

#### Queensland

The BDMR Regs specify the information to be included in the forms for notification and registration of birth.<sup>33</sup> The regulations provide that these forms must include information regarding the child's sex,<sup>34</sup> and allow a child's sex to be noted as either male or female.<sup>35</sup>

#### Australian Capital Territory

Children born in the ACT can be registered as: Female, Male, Unspecified, Indeterminate and Intersex.

Access Canberra advises that the Unspecified/Indeterminate categories are only available for use if the sex of the child is yet to be determined. This means a birth can be registered within the requisite 6 months, even if the sex of the child has yet to be determined, and the registration can be changed once this determination is made. They could not advise the precise definition of either word, or under what circumstances each should be used.

The ACT Law Reform Advisory Council 2<sup>nd</sup> report (2012)<sup>36</sup> included the following recommendation:

12. the option 'indeterminate' should be used only in circumstances anticipated by s9(2)(b) *BDMR Act* when it is not possible to determine the sex of a premature still-born child; it should not be used to [sic] when a child is or could be intersex, in which case one of the other four categories should be used (p.10).

Recommendation 11 to include an option 'to be advised' was not taken up; the word 'Unspecified' was included instead. If recommendation 12 (above) was accepted, presumably 'Unspecified' is the correct term to use when registering the birth of a child whose sex has yet to be determined.

#### Northern Territory

Children born in the NT can be registered as: Female, Male, Other (Unspecified/Indeterminate/Intersex).

The NT Registrar advises:

[W]e are a very small jurisdiction and very rarely get instances where a live birth notification is sent to our office from the hospital identifying the child as Other/Unspecified/Indeterminate/Intersex. At the moment, there are a few options for parents but this all depends on the situation/scenario but two common options are

- the parents can leave the sex of the child as Other/Unspecified/Indeterminate/Intersex and wait some time to see if the child is showing either more female or male tendencies and we do a Section 40 correction to the Register or;
- the child can undergo sexual reassignment surgery and the parents apply to change the sex as per part 4A of our legislation.

The first option is currently under review as we are updating our policies and procedures so I can't really give you any further information regarding time frames and what documents need to be given to the

<sup>33</sup> *Births, Deaths and Marriages Registration Regulation 2015* (Qld) reg 14(1)(a).

<sup>34</sup> *Births, Deaths and Marriages Registration Regulation 2015* (Qld) sch 1 pt 1 reg 1(d).

<sup>35</sup> See, e.g., Queensland Government, *Register a Birth* (2018) <https://www.qld.gov.au/law/births-deaths-marriages-and-divorces/birth-registration-and-adoption-records/register-a-birth>. See Form: Birth Registration Application Form

<sup>36</sup> ACT LRAC (2012) 'Beyond the Binary: legal recognition of sex and gender diversity in the ACT'. [http://www.justice.act.gov.au/resources/attachments/LRAC\\_Report\\_7\\_June.pdf](http://www.justice.act.gov.au/resources/attachments/LRAC_Report_7_June.pdf) [Accessed 04/01/2018].

Registrar for consideration. The second option will possibly be reviewed as well due to legislation changes in the very near future.<sup>37</sup>

## Tasmania

The Tasmanian Registrar advises:

The *Births, Deaths and Marriages Registration Act 1999* does not specify how the sex of a child should be recorded.

We would handle any circumstance where the parent/s were unable to determine the sex of their child within the 60 day period on a case by case basis (please note, we have not had such a case yet). There is an option in the BDM system to register a child as indeterminate, but until now has only been used for stillbirths.<sup>38</sup>

## Victoria

The Victorian Registrar advises:

In relation to your query regarding how the birth of an intersex infant is registered, our relevant legislation, the *Births, Deaths and Marriages Registration Act 1996*, does not provide any specific guidance. Where parents do not indicate the sex of their infant in the BRS and the hospital records confirm that the infant is intersex, our procedures provide for the sex of the infant to be described in our record keeping system (LifeData) as 'unknown' or 'indeterminate'<sup>39</sup>.

The Victorian Registry has not processed a Birth Registration Statement (BRS) in these circumstances for some time, and so are currently looking into how the sex of the child would then be recorded on the birth certificate.

## Western Australia

The WA Registrar advises:

In regard to your question around registering intersex babies we have not had this issue. However you will note our registration form only allows Male or Female as we register a child's sex not gender. In the case where a child is born and the sex is unable to be determined immediately, we do have the option of registering the child with the sex recorded as either Unknown or Not Determined. Generally the process requires medical confirmation that the child's sex is still to be determined and we work with the parents to progress registration appropriately. The birth registration can be updated at a later date once the sex is determined.<sup>40</sup>

## Australia

The Australian Government Guidelines on the Recognition of Sex and Gender do not apply to birth notification or birth registration requirements, as they only apply to the departments and agencies of the Australian Government.<sup>41</sup> Ordinarily, birth notification and registration is managed by state and territory governments.<sup>42</sup>

The Australian Human Rights Commission has suggested that further options other than male or female should be made available.<sup>43</sup> However, intersex organisations and advocates do not recommend that intersex infants be registered as a third sex at birth, in recognition of the additional barriers and potential discrimination and stigma that an intersex child who is registered as a third sex may face when growing up.<sup>44</sup>

---

<sup>37</sup> [Pers. Comm.] 4/01/2018 Registrar-General's Office, NT Department of the Attorney-General and Justice.

<sup>38</sup> [Pers. Comm.] 4/01/2018 Births, Deaths and Marriages, Department of Justice, Tasmania.

<sup>39</sup> [Pers. Comm.] 4/01/2018 Registry of Births, Deaths and Marriages, Department of Justice and Regulation, Victoria.

<sup>40</sup> [Pers. Comm.] 4/01/2018 Births, Deaths and Marriages, Department of Justice, WA.

<sup>41</sup> Above n 14 [16].

<sup>42</sup> Ibid.

<sup>43</sup> Australian Human Rights Commission, *Sex Files: The Legal Recognition of Sex in Documents and Government Records* (2009) <https://www.humanrights.gov.au/our-work/sexual-orientation-sex-gender-identity/publications/sex-files-legal-recognition-sex> 3; above n 16 57-9.

<sup>44</sup> Above n 25.

## 2.6.2. Time frames for notification and registration of births

### Queensland

The BDMR Act provides that **notification** of a birth must be given to the registrar within two working days after the birth.<sup>45</sup> The notification must be made using an approved form by a responsible person as defined by the Act.<sup>46</sup>

The Act also allows for the **registration** of birth through the submission of a birth registration application which must be in the approved form.<sup>47</sup> The form may be completed by the parents of the child or a person taking care of the child if the child was abandoned.<sup>48</sup> The completed form is to be given to the registrar within 60 days after the birth.<sup>49</sup> However, the application may also be accepted outside of this time frame if the registrar is satisfied that the birth happened.<sup>50</sup>

The BDMR Act provides that the notification and registration of birth forms may only be regarded as properly completed where they contain certain prescribed information.<sup>51</sup> The BDMR Regs outline the information to be included.<sup>52</sup> This Regulation provides that the forms must include information regarding the child's sex.<sup>53</sup> Penalties may apply where a birth is not notified or registered as required.<sup>54</sup>

We recommend that any reforms consider the practical considerations involved in parents registering an intersex child's sex at birth. Parents should not be pressured to assign an intersex infant's sex within a short timeframe, as it can take some time for the parents to understand their child's intersex variation and to register a sex which is most likely to correlate with their child's sex and gender identity.

### Other jurisdictions

Legislation has been amended in both South Australia and the Australian Capital Territory to support the recognition of intersex on birth documents.<sup>55</sup> Generally, notification of birth must be made within a short period of time.<sup>56</sup> Penalties may apply where applications are not lodged within the time required.<sup>57</sup> Consequently, amendments have been made to require for the sex of the child to only be notified where the sex is determinable.<sup>58</sup>

Amendments have also been made to allow for recognition of intersex on birth registration in South Australia and the Australian Capital Territory.<sup>59</sup> Ordinarily, in South Australia, a child may be registered within 60 days of birth.<sup>60</sup> In the Australian Capital Territory, registration may be completed within six months.<sup>61</sup> This extended

<sup>45</sup> *Births, Deaths and Marriages Registration Act 2003* (Qld) s 5(1), (3).

<sup>46</sup> *Births, Deaths and Marriages Registration Act 2003* (Qld) s 5(1), (2).

<sup>47</sup> *Births, Deaths and Marriages Registration Act 2003* (Qld) s 9(1).

<sup>48</sup> *Births, Deaths and Marriages Registration Act 2003* (Qld) s 8(1)(a)-(b).

<sup>49</sup> *Births, Deaths and Marriages Registration Act 2003* (Qld) s 9(2).

<sup>50</sup> *Births, Deaths and Marriages Registration Act 2003* (Qld) s 9(3).

<sup>51</sup> *Births, Deaths and Marriages Registration Act 2003* (Qld) s 55(2)(b).

<sup>52</sup> *Births, Deaths and Marriages Registration Regulation 2015* (Qld) reg 14(1)(a).

<sup>53</sup> *Births, Deaths and Marriages Registration Regulation 2015* (Qld) sch 1 pt 1 reg 1(d).

<sup>54</sup> *Births, Deaths and Marriages Registration Act 2003* (Qld) ss 5(1), 8(1), 8(5).

<sup>55</sup> *Births, Deaths and Marriages Registration (Gender Identity) Variation Regulations 2017* (SA) pt 2, regs 4-6; *Births, Deaths and Marriages Registration Amendment Act 2014* (ACT) sch 1, pt 1.1 [1.2]-[1.3].

<sup>56</sup> *Births, Deaths and Marriages Registration Act 1996* (SA) s 12; *Births, Deaths and Marriages Registration Act 1997* (ACT) s 5.

<sup>57</sup> *Births, Deaths and Marriages Registration Act 1996* (SA) s 12(1); *Births, Deaths and Marriages Registration Act 1997* (ACT) s 5(1).

<sup>58</sup> *Births, Deaths and Marriages Registration Act 1996* (SA) reg 4(c); *Births, Deaths and Marriages Registration Act 1997* (ACT) reg 4(1)(b).

<sup>59</sup> *Births, Deaths and Marriages Registration (Gender Identity) Variation Regulations 2017* (SA); *Births, Deaths and Marriages Registration Amendment Act 2014* (ACT).

<sup>60</sup> *Births, Deaths and Marriages Registration Act 1996* (SA) s 16(1).

<sup>61</sup> *Births, Deaths and Marriages Registration Act 1997* (ACT) s 10(1).



period of time is permitted to allow time for parents to consider their options where their child is born intersex.<sup>62</sup>

The Fact Sheet about the 2014 ACT Amendment Act states:

The Amendment Act extends the time period for the registration of the birth of a child born in the ACT from 60 days to 6 months. This is expected to reduce pressure on parents of babies who are not clearly male or female by allowing additional time to make complex decisions about the registered sex of their child.

In both jurisdictions, the Registrar may accept an application for registration outside of the permitted time frames.<sup>63</sup> However, penalties may apply where applications are not lodged within the time outlined.<sup>64</sup> Consequently, both jurisdictions have also expressed that the sex of the child is only required to be registered where it is determinable.<sup>65</sup>

The ability to not note the sex of the child on birth notification and registration removes the pressure to choose a particular sex where a child is born intersex.<sup>66</sup> This may ensure parents are not forced to choose a particular sex for their child within a short period of time after birth.<sup>67</sup> This may also remove pressure for parents to consider more intrusive options such as surgery to assign a particular sex.<sup>68</sup>

The WA Registrar advises:

By way of general note we do not apply the 60 day requirement to register a child's birth at any time. Our desire is to register all children and we often register events well outside of the 60 day period.<sup>69</sup>

Equal Opportunity Tasmania has suggested that an extension of time should be permitted for registration of birth where a child is born intersex to allow parents to consult with experts before deciding whether to assign their child as either male or female.<sup>70</sup>

### 2.6.3. Recommended reforms

We recommend that the Queensland Government consider an extension of time for notification and registration of birth. The Registrar may be provided with a discretion to permit an extension of time where a child is born intersex. This approach may also ensure parents are able to take time to seek advice and support to determine what is in the best interests of their child. Parents may choose to consult with medical practitioners and intersex community and support organisations on factors to consider when making decisions concerning their child's sex and gender identity.

Recommendation	
10.	We recommend that further time be allowed for parents of intersex infants to register the child's sex at birth, including ensuring that any penalties for delaying the notification or registration of a child's sex at birth do not apply for parents of an intersex infant.
11.	We recommend that parents of intersex infants be provided with information, advice and support from medical practitioners and experts within the intersex community to explain

<sup>62</sup> *Births, Deaths and Marriages Registration Amendment Act 2014 (ACT)* s 5.

<sup>63</sup> *Births, Deaths and Marriages Registration Act 1996 (SA)* s 16(2); *Births, Deaths and Marriages Registration Act 1997 (ACT)* s 9(5).

<sup>64</sup> *Births, Deaths and Marriages Registration Act 1996 (SA)* s 16(1); *Births, Deaths and Marriages Registration Act 1997 (ACT)* s 10.

<sup>65</sup> *Births, Deaths and Marriages Registration Regulations 2011 (SA)* regs 5(c), 6(c); *Births, Deaths and Marriages Registration Regulation 1998 (ACT)* reg 5(1)(b).

<sup>66</sup> [Above](#) n 1, 19-20.

<sup>67</sup> *Ibid.*

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

<sup>69</sup> [Pers. Comm.] 4/01/2018 Births, Deaths and Marriages, Department of Justice, WA.

<sup>70</sup> [Above](#) n 1, 19-20.

	relevant medical and human rights considerations to take into account when making decisions relating to their child's sex and gender identity.
--	--

**2.7. Regulation of special medical procedures**

Intersex people are entitled to the same dignity, respect and bodily integrity that every human being is entitled to. This includes protection from forced and coercive medical procedures, despite the good intentions of clinicians responsible for carrying out such treatments. In 2013, the Australian Senate Community Affairs References Committee released its report on the involuntary or coerced sterilisation of intersex people in Australia (**2013 Intersex Report**),<sup>71</sup> but implementation of the recommendations across Australia remains limited. There have also been developments internationally about understandings of the operation of human rights law to protect intersex infants and children from medically unnecessary surgeries and treatments performed without their full, free and informed consent, except in cases of absolute medical necessity.<sup>72</sup> For example, Principle 32 of the Yogyakarta Principles Plus 10 relevantly states:

No one shall be subjected to invasive or irreversible medical procedures that modify sex characteristics without their free, prior and informed consent, unless necessary to avoid serious, urgent and irreparable harm to the concerned person.<sup>73</sup>

**Queensland**

In Queensland, the *Guardianship and Administration Act 2000* (Qld) provides for the regulation of special health care matters for persons with impaired capacity.<sup>74</sup> These matters may be heard by the Queensland Civil and Administrative Tribunal.<sup>75</sup> The Act defines special health care matters as the donation of tissue, sterilisation, termination of pregnancy, special medical research or experimental health care.<sup>76</sup> Jurisdiction exists over sterilisation for children with impaired capacity.<sup>77</sup> Jurisdiction over surgical intervention to re-assign an intersex child to a particular sex is not provided for.

Intersex advocates report that medical interventions continue to be performed on intersex infants and children without court oversight. In submissions made to the Australian Human Rights Commission it was suggested that approximately 65-70 children born intersex each year may be at risk of unnecessary surgical intervention.<sup>78</sup> The small number of special medical procedure applications that have been determined by the Family Court have proceeded without a contradictor and allowed treatment to go ahead on the advice of clinicians. The Family Court in Queensland has heard one particularly disturbing case where Justice Forrest determined that a gonadectomy should be performed on a 5 year old girl and that the application need not have been made to the Court.<sup>79</sup>

<sup>71</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>72</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). UN Human Rights Office of the High Commissioner, 'End violence and harmful medical practices on intersex children and adults, UN and regional experts urge' (2016) <http://ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=20739&LangID=E>. The Committees included The Committee against Torture, The Committee on the Rights of the Child and the Committee on the Rights of Persons with Disabilities. The statement also called for the investigation of human rights violations, and the provision of compensation and redress.

<sup>73</sup> *Ibid.*

<sup>74</sup> *Guardianship and Administration Act 2000* (Qld) ch 5 pt 3.

<sup>75</sup> *Guardianship and Administration Act 2000* (Qld) s 81.

<sup>76</sup> *Guardianship and Administration Act 2000* (Qld) ch 5 pt 3.

<sup>77</sup> *Guardianship and Administration Act 2000* (Qld) ss 11A(2), 81.

<sup>78</sup> Penny Rumble, Submission No 13 to the Australian Human Rights Commission: Sexual Orientation, Gender Identity & Intersex Rights (2014) [1] <https://www.humanrights.gov.au/our-work/sexual-orientation-sex-gender-identity/projects/sogii-rights>.

<sup>79</sup> *Re Carla* (2016) 54 Fam LR 576.

**Other jurisdictions**

Equal Opportunity Tasmania has recommended for surgery on intersex children to be included as a special medical procedure to be heard by a Tasmanian tribunal.<sup>80</sup> The separate requirement for consent from a medical board or tribunal would ensure that surgery would not be undertaken without proper oversight from medical professionals and experts on intersex matters.<sup>81</sup>

The 2013 Intersex Report suggested that medical treatments and intervention on intersex infants and children may be made by state or territory civil and administrative tribunals or the Family Court (under its welfare jurisdiction under the *Family Law Act 1975* (Cth)).<sup>82</sup> The expansion of state and territory tribunal jurisdiction for the hearing of these matters as special medical procedures was referred to the Law, Crime and Community Safety Council (formerly known as the Standing Council on Law and Justice) for consideration.<sup>83</sup> However, changes to the current framework have not been made.<sup>84</sup>

**Recommended reforms**

Queensland should consider legislating to provide for proper oversight before an intersex child undergoes any form of medical treatment which is deferrable, medically unnecessary, cosmetic or sterilising. Oversight from a specialist panel established by legislation or the Queensland Civil and Administrative Tribunal may ensure that surgery would not be undertaken without adequate consideration of the best interests of the child, consistent with international human rights law.

Reforms in this area should be considered further separately to this review. However, we draw your attention to these matters to ensure the Department is apprised of the relevant background. Care should be taken to ensure parents do not feel pressured to make decisions about gender assignment and medical treatment.

Recommendation	
12.	We recommend that the Queensland Government further consider legislative amendments to ensure that deferrable and irreversible medical treatments are not performed on intersex infants and children unable to provide free, full and informed consent, except in cases of absolute medical necessity.

**B. Recording the reassignment of a person's sex**

**3. Should any changes be considered to the BDMR Act and BDMR Regulation to improve the legal recognition of sex and gender diverse people in Queensland? If so, what should the changes be?**

Yes.

**3.1. Correcting an intersex person's sex at birth on the Register**

Section 42 of the BDMR Act allows the Registrar to correct the Register following an order of a Queensland court or QCAT or on application from a coroner or other government official empowered to correct information on the register. Other jurisdictions allow the Register to be corrected by an individual or their parent where there is an inaccurate record on the Register.

<sup>80</sup> Above n 1, 21-23.

<sup>81</sup> Ibid.

<sup>82</sup> Above n 86 rec 3, 6.

<sup>83</sup> Ibid rec 7.

<sup>84</sup> Australian Government, Attorney-General's Department, *Annual Report 2013-2014* (2014) <https://www.ag.gov.au/Publications/AnnualReports/13-14/Documents/AGDAnnualReport.pdf> 68.

Intersex advocates have advocated for the ability for intersex people to correct the sex registered at birth, and for this to be a simple administrative process that is distinct from an application to change their registered sex. This use of this word conveys an important acknowledgement that an error was made with the original assignment at birth.

Recommendation	
13.	We recommend that section 42 of the BDMR Act be amended to allow an intersex person or their parents or guardian to apply to correct the sex recorded at birth on the Register through a simple administrative process.

### 3.2. Medical treatment preceding a change of registered sex / gender

#### Queensland

In Queensland, an adult may apply to note the reassignment of the adult’s sex.<sup>85</sup> This application must be made in the approved form, and must be accompanied by evidence of sexual reassignment surgery, amongst other requirements.<sup>86</sup>

In line with the views of member of the trans and gender diverse communities, we argue that Queensland should move towards a self-affirmation model for legal recognition for a range of reasons, including:

- **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. Indeed, social research demonstrates that growing numbers of trans and gender diverse people do not require medical support for their transition – 40% of young trans and and gender diverse people surveyed in 2014 said they did not want, or were unsure about, a medical transition.<sup>87</sup>

- **Requiring medical verification is damaging and discriminatory**

Requiring medical treatment, even a letter from a clinician, as a prerequisite to change of sex/gender marker is a discriminatory burden on trans, gender diverse and intersex 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 incorrect but also damaging to a person’s sense of self. This harm is compounded by the generally negative experiences of trans, gender diverse and intersex people with the medical profession.

- **International best practice is now self-declaration**

Internationally, it is now recognised that individuals should be able to self-declare their gender with supporting documentation that does not include medical certificates. Countries such as Ireland, Argentina, Denmark and Malta have reformed their laws to allow individuals to change sex/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 in some countries without any ill effects.

<sup>85</sup> *Births, Deaths and Marriages Act 2003* (Qld) s 5(1).

<sup>86</sup> *Ibid* ss 23(1), (4), sch 2.

<sup>87</sup> Above n 25, 39.

- **Self-declaration aligns with human rights standards**

Trans, gender diverse and intersex 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 Queensland to lead by example and promote good practice that meets the needs of trans, gender diverse and intersex people.

### **Other jurisdictions**

Historically, equivalent legislation in other Australian jurisdictions has mirrored the Queensland provisions described above. Recently, however, significant reform has been progressed in some states and territories to liberalise provisions for registering a person's change of sex or gender. The primary trend in Australia is a shift towards systems that give greater effect to self-affirmation, supplemented by evidence of associated clinical (but not necessarily surgical) treatment.

For example, the proposed Victorian Bill did not require medical evidence, instead relying on self-affirmation.<sup>88</sup> The Bill proposed that the application include a statutory declaration made by the applicant that "the person believes the person's sex to be as nominated in the application". The Bill required a supporting statement from any adult who has known the applicant for at least 12 months (e.g. a parent, partner, support worker, lawyer, medical practitioner).

An application to register a person's change of sex in South Australia must be accompanied by a statement from a medical practitioner or psychologist certifying that the applicant has undergone a sufficient amount of clinical treatment in relation to their sex or gender identity. Counselling alone can constitute sufficient clinical treatment for this purpose.<sup>89</sup> In South Australia, the prescribed period for treatment by a counsellor is 135 aggregate minutes across 3 counselling sessions, or counselling sessions over a period of at least 6 months.<sup>90</sup>

The Australian Capital Territory's births, deaths and marriages laws also do not require sexual reassignment before a person can register a change of sex or gender. As in South Australia, applicants are required to provide a statutory declaration from a doctor or psychologist confirming that the applicant has received appropriate clinical treatment.<sup>91</sup>

### **Recommended reforms**

Reform to Queensland's change of sex registration laws is critical to allow trans and gender diverse Queenslanders to assert their authentic identity. We recommend that requirements for medical evidence should be replaced with the approach of self-affirmation by way of a simple administrative process, to reflect international best practice.

The process should be a simple administrative process, similar to jurisdictions such as Argentina.<sup>92</sup> We recommend that the applicant complete and sign a form seeking the change.

In the alternative, if this recommendation is not accepted, an applicant could be required to provide a supporting letter from a medical professional (general practitioner or counselling psychologist, for example) certifying that the applicant has received clinical treatment in relation to the applicant's gender identity. The

---

<sup>88</sup> *Births, Deaths and Marriages Registration Amendment Bill 2016 (Vic)* cl 8.

<sup>89</sup> *Births Deaths and Marriages Registration Act 1996 (SA)* s 29K.

<sup>90</sup> *Births, Deaths and Marriages Registration Regulation 2011 (ACT)* s 7C.

<sup>91</sup> *Births, Deaths and Marriages Registration Act 1997 (ACT)* s 24(1).

<sup>92</sup> *Gender Identity Law 2012 (Argentina)*.

amended BDMR Regs should clearly state that counselling by a psychologist and treatment by a general practitioner are both forms of clinical treatment.

Recommendation	
14.	We recommend that the requirement that an applicant undergo sexual reassignment surgery before changing their sex or gender be removed from the BDMR Act.
15.	<p>We recommend that change of sex be achieved through a simple administrative process that does not require medical or other evidence to be produced by the applicant.</p> <p>In the alternative, if the above recommendation is not accepted, we recommend that an applicant be required to provide a supporting statement from an adult known to them for more than 12 months.</p> <p>In the alternative, if the above recommendations are not accepted, we recommend that the applicant be required to provide a supporting letter from a medical professional (including a general practitioner or counselling psychologist) confirming that the applicant has received clinical treatment in relation to the applicant’s sex or gender identity.</p>

**3.3. Unmarried requirement**

Section 12(2)(d) of the BDMR Regs require any person who is or was married, and who applies to note the reassignment of their sex, to provide evidence of either the death of their last husband or wife or the dissolution of their marriage.<sup>93</sup> We note that the Births, Deaths and Marriages Registration Amendment Bill 2018 (Qld) has been tabled in Parliament. We support the proposed amendments in this Bill and make this submission without considering the amendments in this Bill.

**4. Should any changes be made to the BDMR Act’s provisions regarding an application to note a reassignment of sex for children/young people under the age of 18? If so, what should the changes be?**

Yes. Schools, sporting clubs, employers and other key service providers often require parents to provide state-based identity documents – such as a child’s birth certificate – as proof of a child’s identity and sex. Children generally do not have access to alternate forms of identity available to adults, such as proof of age documents and driver’s licences.

In 2017, Trans Pathways<sup>94</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 Queensland Government needs 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.

<sup>93</sup> *Births, Deaths and Marriages Registration Regulation 1997* (ACT) s 12(2)(d).

<sup>94</sup> Above n 22.

## Queensland

In Queensland, a child's parents or guardians may apply to note the reassignment of a child's sex.<sup>95</sup> An application made in relation to a child must also be made in the approved form and supplemented by the same statutory declarations as for adults, with the additional requirement of a document verifying the identity of and relationship between the child and the child's parents or guardians.<sup>96</sup> The registrar must accept an application if ordered to do so by a Magistrates Court on the application of a child's parent or guardian.<sup>97</sup>

## Other jurisdictions

The Victorian Births, Deaths and Marriages Registration Amendment Bill 2016 (Vic) allowed for a parent to apply to change their child's sex on their birth certificate.

In South Australia, a child is taken to have the capacity to apply to register a change of sex, although a single parent or guardian of the child may also make the application.<sup>98</sup> Whether made by child, parent or guardian, the application must be approved by the South Australian Magistrates Court as being in the being in the best interests if the child.<sup>99</sup> In making this assessment, the Court must take in to account:<sup>100</sup>

- whether the child understands the meanings and implications of the making of the application,
- whether the child has the capacity to consent to the application and, if so, the child's position in relation to the application,
- whether the child has undertaken a sufficient amount of clinical treatment in relation to the child's sex or gender identity, and
- whether a designated certificate or prescribed notification has been provided.

In making this assessment, the Court is not bound by the rules of evidence, but may inform itself as it thinks fit.<sup>101</sup> The process for applying to change the registered sex or gender of a child is otherwise the same as for adults.

In the Australian Capital Territory, a child cannot apply to change their registered sex or gender. However, a child's parents or guardians may apply and there is no need to obtain court approval. Instead, in addition to the usual statement from a medical practitioner, all that is required is a statement by the parents or guardian of the child stating that the alteration is in the child's best interests.<sup>102</sup> A single parent may apply if they are the only parent named in the Register, or if there is no other surviving parent.<sup>103</sup>

## Recommended reforms

We consider that a simple administrative process should be available to correct or change a child's registration of sex and/or gender.

We recommend that the BDMR Act be amended to allow a child aged 16 or over, or the child's parents or guardian, to apply to correct or change the child's registered sex or gender. The process for registering a change should be the same as for adults, with the exception that if a child's parents or guardians make the application, they include a statement that the correction or change is in the child's best interests.

### Recommendation

<sup>95</sup> *Births, Deaths and Marriages Registration Act 2003* (Qld) s5(2)(a),(c).

<sup>96</sup> *Births, Deaths and Marriages Registration Act 2003* (Qld) s 23(2)(b).

<sup>97</sup> *Births, Deaths and Marriages Registration Act 2003* (Qld) s 5(3).

<sup>98</sup> *Births, Deaths and Marriages Registration Act 1996* (SA) s 29J(1), (6).

<sup>99</sup> *Births, Deaths and Marriages Registration Act 1996* (SA) s 29J(2)(b).

<sup>100</sup> *Births, Deaths and Marriages Registration Act 1996* (SA) s 29J(5).

<sup>101</sup> *Births, Deaths and Marriages Act 1996* (Qld) s 29J(6).

<sup>102</sup> *Births, Deaths and Marriages Registration Regulation 1997* (ACT) ss 24, 25.

<sup>103</sup> *Births, Deaths and Marriages Registration Act 1997* (ACT) s 24(3).

16.	We recommend that the process for registering a correction or change of sex of a child should be the same as an adult for a child aged 16 or over, and for parents or guardians to be able to make an application on behalf of a child's behalf where it is in the child's best interests.
-----	--

**5. Should the BDMR Act contain provisions to allow for the reassignment of a person's sex for individuals who reside in Queensland but whose birth was registered elsewhere?**

Yes. There is a need to consider how any Queensland reform framework would interact with interstate regimes. Three existing regimes offer possible models for addressing this issue.<sup>104</sup>

1. **Victoria:** Under the *Births, Deaths and Marriages Registration Act 1996* (Vic), gender recognition certificates issued in interstate jurisdictions are recognised in Victoria. However, currently such certificates require evidence of medical intervention or surgery (ss 30H and 30G).
2. **ACT:** Under s 66 of the *Births, Deaths and Marriages Registration Act 1997* (ACT), the Minister is given the power to enter into agreements with other states and territories about how the laws are to interact with corresponding laws in other jurisdictions.<sup>105</sup>
3. **South Australia:** Under s 27 of the *Births, Deaths and Marriages Registration Act 1996* (SA), if the Registrar is satisfied that the name of a person whose birth is registered in South Australia has been changed under another law or by order of a court, the change of name may be registered under the South Australian Act.

We recommend that any reforms ensure that:

- People who were born in Queensland and live in Queensland, but received a recognition certificate interstate or overseas, can have that correction or change recognised in Queensland,
- People who were born in Queensland but currently reside interstate or overseas, can apply to correct or change their registered sex and/or gender,
- People who were born interstate or overseas but live in Queensland, and have corrected or changed their registered sex and/or gender, can have that change recognised in Queensland, and
- People who were born interstate or overseas but live in Queensland, and cannot correct or change their registered sex and/or gender, can be issued with a recognition certificate in Queensland (e.g. due to interstate residence requirements or their birth country not allowing a legal change of registered sex/gender).

Recommendation	
17.	We recommend that the Queensland Government ensure that any reforms allow for sufficient flexibility for all people born or living in Queensland to have their sex and / or gender legally recognised, including consideration of residence restrictions and recognition certificates.

<sup>104</sup> South Australian Law Reform Institute, *LGBTIQ Discrimination in legislation Legal registration of sex and gender and laws relating to sex and gender reassignment Report 5* (February 2016), 54.

<sup>105</sup> See also, ACT Law Reform Advisory Council, *Beyond the Binary: legal recognition of sex and gender diversity in the ACT* (2012), 39-40 (Beyond the Binary Report), 47.



**6. Should the BDMR Act allow for the issuing of a gender recognition certificate / identity acknowledgement certificate which can be used by a person as proof of their sex or gender?**

Yes. See above.

## **C. Recognising diverse families on the Register**

---

**7. Should the BDMR Act be amended to permit same-sex parents to choose how they are recorded on a birth or adoption registration?**

Yes.

**8. If so, what descriptors should be available and in what combinations?**

The options of mother, father and parent should all be available to legal parents without discrimination and in any combination.

We support parents having the choice to select the parent category which best reflects their sex or gender identity and their relationship to their child. In addition, we support further reform to allow for recognition of more than two parents to accommodate the diverse family structures found in LGBTI families, discussed in further detail below.

### **Recognising the diversity of rainbow families**

There has been increasing recognition of the existence of same-sex couples as parents and the law is increasingly recognising the diversity of families. In Australia, it is estimated that about 11 per cent of gay men and 33 per cent of lesbian women are parents.<sup>106</sup> Research to date shows that children of same-sex parents fare as well as children of different-sex parents on scales of emotional, social and educational development.<sup>107</sup>

The past 15 years have seen major developments in Australian family law incorporating and recognising LGBTI couples and their children. However, there remain some anomalies and gaps in recognition and Australian family law generally remains a two-parent model of legal parentage, which does not accurately reflect the diversity in same-sex and gender diverse families (as well as other forms of diverse families). For example, two mothers who want to be legally recognised as 'mother' and 'mother' on their child's birth certificate should be able to do so, rather than being recognised as 'mother' and 'parent'.

Rainbow families can be formed in a multitude of different ways and be made up of a variety of structures. Lesbian couples conceive children with assistance from known or anonymous sperm donors using assisted reproductive technology and are legally recognised as parents. Known donors will often play an active role in the children's lives, and in some cases a parenting role, but are not considered legal parents under Queensland law.<sup>108</sup> Male couples can become legal parents of children created through altruistic surrogacy arrangements or by adopting children as a couple (as can other couples). Men can also create families with female friends who are single or in lesbian relationships using assisted reproductive technology. Trans people can create families too (in relationships or as a single person) but can face challenges depending on the impact of medical treatment undertaken to support their transition. These diverse family structures mean that it is not uncommon for more than two people to be raising a child and be playing an active role in their welfare and development.

---

<sup>106</sup> Deborah Dempsey, *Same-sex Parented Families in Australia*, Australian Institute of Family Studies (December 2013) [www.aifs.gov.au/cfca/publications/same-sex-parented-families-australia](http://www.aifs.gov.au/cfca/publications/same-sex-parented-families-australia).

<sup>107</sup> Ken W Knight, Sarah EM Stephenson, Sue West et al 'The kids are OK: it is discrimination not same-sex parents that harms children' (2017) 207(9) *Medical Journal of Australia* 374.

<sup>108</sup> Note that the Family Court has previously made orders granting parental responsibility to a donor in cases where a lesbian couple is raising the child.

Currently, Queensland law does not recognise more than two legal parents for children and does not allow more than two parents to be listed on a child's birth certificate. It is important to be able to register and identify those individuals who exercise a parenting role in a child's life and wish to have this legally recognised. The law should be flexible enough to both recognise these families but also regulate and manage these relationships on breakdown.

The *Family Law Act 1975* (Cth) (**FLA**) provides the main legal framework regarding parenting and family matters. The FLA defines parents as including natural and adoptive parents. The Family Court jurisprudence is mixed when it comes to non-legal parents such as step parents, foster parents and other adults performing parenting roles outside this restrictive definition. For example, in some cases donors have been granted parenting responsibility for children being raised by lesbian parents. A 2013 review of parentage laws by the Family Law Council expressed concern about the uncertainty and inconsistency in decision making regarding parentage of children, and that this inconsistent treatment could disadvantage children raised by non-biological parents.<sup>109</sup>

Ultimately, resolution of these issues requires amendment to the FLA. The Australian Law Reform Commission is currently conducting a *Review of the Family Law System*, which includes consideration of the greater diversity of family structures in contemporary Australia and the importance of ensuring the Act meets the contemporary needs of families and individuals who interact with the family law system.<sup>110</sup>

In the meantime, we recommend that the Queensland Government should also take steps to ensure that children being raised by non-legal parents are not disadvantaged by the lack of recognition afforded to these relationships under the law. This may include allowing third or fourth parents (such as a gay male couple raising a child with a lesbian couple) to be considered legal parents under state law and including such parents on the birth certificates of children.

<b>Recommendation</b>	
18.	We recommend that consideration be given to reviewing and amending the BDMR Act and BDMR Regs (together with the Status of Children Act and laws governing assisted reproductive technology and altruistic surrogacy, where relevant) to better recognise diverse family structures such as allowing for more than two legal parents to be recognised on a birth certificate.

**Additional comments**

The LGBTI Legal Service has assisted a single parent who sought to have both of their donor conceived children listed as siblings on their birth certificates. The BDMR Regs provide in Schedule 1, Part 1, Item 8 and Schedule 2, Part 1, Item 6, that for any other 'children of the parents relationship' to be listed as siblings on the birth certificate then to include the name and age of the other child in the application. However, as the single parent gave birth to both children through assisted reproductive technology as a single, the children were not considered 'children of the parents' relationship' and therefore were not allowed by the Registrar to be listed as siblings on the birth certificates. The single parent undertook conciliation with the Registrar through the Anti-Discrimination Commission Queensland and the Registrar agreed to list the children as siblings on the birth certificates.

<sup>109</sup> Family Law Council, *Report on Parentage and the Family Law Act* (December 2013) 59.

<sup>110</sup> Australian Law Reform Commission, *Review of the Family Law System: Issues Paper* (March 2018).

<b>Recommendation</b>	
19.	We recommend that the BDMR Act and BDMR Regs be amended to recognise children born to single parents through assisted reproductive technology as siblings on their birth certificates.