
Legal recognition of sex and gender
diversity in Tasmania:
Options for amendments to the
*Births, Deaths and Marriages
Registration Act 1999*

Issued for comment by the Tasmanian Anti-Discrimination
Commissioner

February 2016

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Introduction and invitation

This options paper examines steps necessary to provide legal recognition of transgender and intersex people in Tasmania's *Births, Deaths and Marriages Registration Act 1999* (Tas) (the '*Births Deaths and Marriages Act*').

Proposed changes would ensure the *Births Deaths and Marriages Act* is consistent with the *Anti-Discrimination Act 1998* (Tas) (the '*Anti-Discrimination Act*') as amended from 1 January 2014. Those amendments extended protections to people with intersex variations and clarified the protections available on the basis of gender identity.

A consistent and fair approach to the recognition of sex and gender diversity in the Register of Births, Deaths and Marriages will enable sex- and gender-diverse people to confirm their identity in what are referred to as cardinal documents, such as birth certificates. This will make it simpler to amend the record of sex and related information in secondary documents and records (such as bank records, employment records and so on).

I urge you to give careful consideration to the recommendations contained in this paper and provide comment to my office on your views.

Robin Banks
ANTI-DISCRIMINATION COMMISSIONER

February 2016

How to contribute

The Anti-Discrimination Commissioner invites written comments by 5:00 pm on **Monday 4 April 2016**.

Your views on the recommendations in particular are sought. We also welcome your views on the other options identified, and any other suggestions and input.

Submissions, comments and views can be sent:

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If sending your comments electronically, the Commissioner would prefer to receive it as a Word or RTF document to ensure accessibility. Unless confidentiality is sought, submissions will be made public through the office's website:

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If you do not wish to have part or all of your submission made public, please indicate this. Your wish will be respected.

Equal Opportunity Tasmania is also available to meet with you to discuss this matter. Please contact the office by e-mail or telephone if you wish to arrange a meeting:

e-mail: office [@equalopportunity.tas.gov.au](mailto:office@equalopportunity.tas.gov.au)
phone: 03 6165 7515 or 1300 305 062

Summary of recommendations

1. That the requirement for sexual reassignment surgery before a person can register their change of sex under the *Births, Deaths and Marriages Registration Act 1999* (Tas) be removed.
2. That there be no requirement for surgical, medical or hormonal treatment to change sex classification.
3. That the requirements for an application to the Registrar to record a change of sex be consistent with the approach taken to registering a change of name, including limiting the option of registering a change of sex to once in a 12-month period.
4. That section 28A of the *Births, Deaths and Marriages Registration Act 1999* (Tas) be amended by omitting from subsection 1(c) the requirement to not be married.
5. That the age at which a person can apply to have a change of sex registered be aligned with the legal principles expounded by the Family Court in *Re: Lucy (Gender Dysphoria)* [2013] FamCA 518 (12 July 2013); *Re: Sam and Terry (Gender Dysphoria)* [2013] FamCA 563 (31 July 2013) and confirmed by the Family Court of Australia – Full Court in *Re: Jamie* [2013] FamCAFC 110 (31 July 2013).
6. That the age at which a person can apply to have a change of name registered be lowered to 16 years of age.
7. Provisions be introduced in the *Births, Deaths and Marriages Registration Act 1999* (Tas) to require a child's informed consent to applications by a parent(s) or legal guardian to register a change of sex of a young person over 12 years of age.
8. In situations where two parents dispute an application to have a change of name or change of sex registered relating to a child over 12 years of age, the law be amended to allow the application of one parent to be accepted as long as it is accompanied by the informed consent of the child to whom the application relates.
9. That section 15 of the *Births, Deaths and Marriages Registration Act 1999* (Tas) be amended to provide discretion to the Registrar to extend the time within which a birth must be registered.
10. That parents and health practitioners involved with the care of the child for whom it is not possible to provide an immediate sex classification be provided with information and appropriate contacts within the intersex community and others with relevant expertise.
11. That treatment or any intervention primarily undertaken to modify or 'normalise' the visible or apparent sex characteristics of children for psychosocial reasons be classified as 'special medical procedures', and require consent of a Tasmanian board or tribunal such as the Guardianship and Administration Board informed by experts on gender and sex diversity.

12. That the Tasmanian Government require all public authorities to review their requirements to collect information regarding sex and gender with the intention of removing this requirement whenever possible.
13. That the Tasmanian Government only collect information about a person's biological sex where there is a legitimate need to do so.
14. That, where it is considered necessary to know a person's sex or gender, information be collected regarding the person's gender and options be available for a person to identify their gender as other than male or female by the introduction of a 'non-binary' classification category.
15. That the classification of sex in the Register of Births, Deaths and Marriages be extended to include a new category referred to as X meaning 'non-binary'.
16. That historical data relating to a person's previous sex or gender not be included on corrected or amended birth certificates unless requested by the applicant.

Issues

Concerns about the *Births Deaths and Marriages Act* fall into the following categories:

1. The requirement to undertake gender re-assignment surgery for a change of sex to be recognised.
2. Arrangements for correcting a record of sex.
3. The requirement that a person not be married to have a change of sex legally recognised.
4. The age and approval requirements for young persons to have a change of sex or name registered.
5. The timeframes for registering a birth.
6. Unnecessary medical treatment to make intersex bodies conform to the sex assigned at birth.
7. The restrictions associated with a person being recognised as a gender other than male or female.
8. The requirement that a birth certificate issued by the Registrar include a notation that the person was previously registered as another sex unless the person requests the issue of an extract from the Registrar which does not include that notation.

Each issue is examined in turn and possible amendments canvassed.

Section 1 deals with issues 1, 2, 3 and 4 above.

Section 2 deals with issues 5 and 6 above.

Section 3 deals with issue 7 above.

Section 4 deals with issue 8 above.

Section 5 deals with the registration of parentage details.

Section 6 deals with other related issues.

The Glossary sets out the way in which terms are used in this options paper.

1. Change-of-sex provisions

Section 28A of the *Births Deaths and Marriages Act* restricts the ability to make an application to register a change of sex to an adult whose birth is entered in the Tasmanian Register and who:

- a) has undergone sexual reassignment surgery; and
- b) is not married.

Sexual reassignment surgery is defined to mean:

... a surgical procedure involving the alteration of a person's reproductive organs carried out –

- (a) For the purpose of assisting the person to be considered to be a member of the opposite sex; or
- (b) To correct or eliminate ambiguities relating to the sex of the person.

In considering whether or not to note the particulars of a change of sex, the Registrar may undertake any enquiries or require the person making the application to provide further details so the Registrar is better informed about whether the applicant has had sexual reassignment surgery.¹

The effect of the current provisions is that a transgender person who has not had sexual reassignment surgery and/or who remains married is not able to obtain official recognition from the Registry of their gender identity. It also implies that a person with an intersex variation must have their 'ambiguities' 'corrected' or 'eliminated'.

Sexual reassignment surgery

There are several reasons why the requirement to undergo sexual reassignment surgery should be removed:

- It is out of step with discrimination law.
- It is inconsistent with legal precedent.
- It is inconsistent with policy changes at the federal level that provide a more flexible approach to the recognition of a change of sex.
- In the cases of persons with intersex variations, it may encourage surgical or hormonal interventions to modify sex characteristics of children, practices that are a violation of human rights and should be outlawed.

The *Anti-Discrimination Act 1998* (Tas) (the '*Anti-Discrimination Act*') prohibits discrimination on the basis of gender identity and intersex.

¹ *Births, Deaths and Marriages Registration Act 1999* (Tas) s 28C(2).

Gender identity is defined in the *Anti-Discrimination Act* to mean²:

The gender-related identity, appearance or mannerisms or other gender-related characteristics of an individual (**whether by way of medical intervention or not**), with or without regard to the individual's designated sex at birth, and includes transsexualism and transgenderism (**emphasis added**)

Intersex is defined in the *Anti-Discrimination Act* to mean³:

The status of having physical, hormonal or genetic features that are –

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

The *Anti-Discrimination Act* does not require a person to have sexual reassignment surgery or any medical procedures before their gender identity is recognised and protection from discrimination is provided. Nor is surgical intervention in relation to those physical features that are typically used to identify sex considered appropriate for a person with an intersex variation.

This approach is consistent with human rights principles, including the *Yogyakarta Principles*, which set out the application of international human rights law in relation to sexual orientation and gender identity.⁴ It is also consistent with most recent UN statements on intersex and has the support of key stakeholders.⁵

Recent court cases are also relevant to these issues. The High Court in the case of *AB v the State of Western Australia*⁶ considered the test in the *Gender Reassignment Act 2000 (WA)* to be applied by the Gender Reassignment Board in determining whether or not to issue a 'recognition certificate'. Section 14(1) of that Act required a person applying for a recognition certificate to

² *Anti-Discrimination Act 1998* (Tas) s 3.

³ *Anti-Discrimination Act 1998* (Tas) s 3.

⁴ Principle 3 of the *Yogyakarta Principles on the application of international human rights law in relation to sexual orientation and gender identity* requires that 'no one shall be forced to undergo medical procedures, including sex reassignment surgery, sterilisation or hormonal therapy, as a requirement for legal recognition of their gender identity'. The International Commission of Jurists and the International Service for Human Rights, *Yogyakarta Principles on the application of international human rights law in relation to sexual orientation and gender identity* (2006) <http://www.yogyakartaprinciples.org/principles_en.htm>.

⁵ United Nations Office of the High Commissioner for Human Rights, *Intersex Factsheet* (2015) <<http://aisdsd.org/new-un-intersex-fact-sheet/>>.

⁶ [2011] HCA 42 (6 October 2011) <<http://www.austlii.edu.au/au/cases/cth/HCA/2011/42.html>>.

have ‘undergone a reassignment procedure’. ‘Reassignment procedure’ is defined in section 3 of that Act to mean:

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

The High Court held this did not require the person to have undertaken every surgical procedure available, but was a question of whether they have altered their gender characteristics sufficiently to be identified as a member of the opposite sex.⁷

In the view of the High Court this requires consideration of their physical characteristics (including appearance, dress, behaviour, lifestyle), but does not require knowledge of the status of their internal sexual or reproductive organs.

There is capacity within the *Births Deaths and Marriages Act* to correct the Register in situations where a sex has been wrongly recorded (see below). Unlike other jurisdictions, however, in Tasmania the requirement for registration of the change of sex of an adult is solely proof of surgical procedure.⁸ This is a stricter requirement than other jurisdictions where either a medical or surgical procedure is recognised for this purpose.

Many transgender people do not undergo surgical treatment or hormone therapy to live as their identified gender. Nor do people with intersex variations need their biological characteristics ‘corrected’.

There are several reasons why a person undertaking gender transitioning may opt not to have surgical treatment:

- surgery is invasive;
- surgery is expensive;
- some gender reassignment surgery is not approved in Australia⁹;

⁷ *AB v Western Australia* [2011] HCA 42 (6 October 2011).

⁸ In Western Australia, for example, legislation enables the recognition of a change of sex on completion of either a medical or surgical procedure.

⁹ At [15] in *AB v Western Australia* [2011] HCA 42 (6 October 2011), the High Court of Australia noted:

Neither AB nor AH contemplate any further surgical procedures. It was explained, by medical evidence to the Tribunal, that a penis construction (phalloplasty) is not performed in Australia, because of the high risks associated with it and its low rate of success. Neither of the appellants wished to have a hysterectomy. Neither considered it necessary to their sense of male identity. Each had suffered the effects of surgery in the past and wished to retain their internal organs because

- people may have health conditions that preclude them having surgery; and
- people may have had some gender reassignment surgery that was not successful.

In addition, with regard to guidelines relating to appropriate treatment protocols for a person undergoing gender transition, surgical intervention is rarely considered prior to living for at least 2 years in the gender with which they identify.¹⁰ The World Professional Association for Transgender Health in its publication, *The Standards of Care* (version 7)¹¹, states in relation to surgical interventions:

While the SOC [Standards of Care] allow for an individualized approach to best meet a patient's health care needs, a criterion for all breast/chest and genital surgeries is documentation of persistent gender dysphoria by a qualified mental health professional. For some surgeries, additional criteria include preparation and treatment consisting of feminizing/masculinizing hormone therapy and one year of continuous living in a gender role that is congruent with one's gender identity.

Options to register a change of sex

Alternative requirements for the registration of a change of sex vary in the extent to which they require third-party corroboration and the level of authority required to verify that sufficient changes have been made to a person's identity to confirm that a change of sex should be recorded.¹²

Option 1: Application to the Registrar

The least burdensome requirement for recognising a change of sex would be to rely on self-identification as the only criterion for recording a change of sex.

This approach would essentially involve the applicant making a formal statement to the Registrar that they have changed their gender identity in a similar process to the current change of name requirements. Section 23 of the *Births Deaths and Marriages Act* provides that an adult person may apply to the Registrar in a form approved by her for the registration of a change of name. Section 26(1)(b) of the *Births Deaths and Marriages Act* provides authority to the Registrar to

they believed that they might be beneficial for future phalloplasty, if advances in that procedure made it feasible.

¹⁰ Roderick Best, 'Gender identity dysphoria – legal issues: A debate about being child centred or hearing the child's voice' (Paper presented to the 6th World Congress on Family Law and Children's Rights, Sydney, March 2013) 6.

¹¹ World Professional Association for Transgender Health, *The Standards of Care for the Health of Transsexual, Transgender, and Gender-Nonconforming People* (Version 7) (2012) [58] <<http://www.wpath.org>>.

¹² Options and issues in this section are based on those examined by the ACT Law Reform Advisory Council in their report *Beyond the Binary: legal recognition of sex and gender diversity in the ACT* (ACT Law Reform Advisory Council, Report 2, March 2012).

require the applicant to provide evidence to establish to her satisfaction that the change of name is not sought for fraudulent or other improper purpose. Section 54 introduces penalty provisions for a person making a false or misleading representation in an application or document under the Act. Applications for a change of name can only be made once in a 12-month period.

Applicants seeking a change of name must provide the Registrar with evidence of their right to reside in Australia, identity, proof of Tasmanian residency and details of previous name changes. Information regarding the reason for the change of name is also required to ensure that any change is not for fraudulent or improper purposes. All identification and supporting documentation must be certified by a Justice of the Peace or by a Births, Deaths and Marriages Registry staff member.

Option 2: Requirement to complete a sworn affidavit

Under this option, the applicant could be required to supply a duly completed affidavit as provided under the *Oaths Act 2001* (Tas). The extent to which this might differ from a formal statement made to the Registrar under Option 1 is not clear.

Option 3: Corroboration by a relative or associate

A third option would be to require that, in addition to the formal application made by the person seeking registration of a change of sex, the applicant supply an affidavit or statutory declaration for one or more family members or associates who attest to the transition the applicant has made.

This option relies on the applicant having family and friends who are willing to provide the necessary statements. This may not always be available to the applicant: they may be estranged from their family, or their family members may not acknowledge their gender identity. Equally they may not wish to disclose their gender history to friends who recognise them in their current gender. In any event, it is unclear to what extent any statement would add to the requirement under Option 1.

Option 4: Corroboration by a health practitioner

A further option would be to require a statement from a health practitioner affirming a change of sex or confirming the person has an intersex variation and has rejected the sex they were assigned at birth.

While a requirement to seek confirmation of a change of sex from a medical practitioner may provide a level of independent verification, it assumes the person who wishes to alter their sex registration details has done so with the involvement of a medical practitioner. The effect of which is to continue to 'medicalise' gender transitioning and encourage further medical involvement in the life of people with intersex variations. It is important to note a person who has intersex variations may not be seeking to make or have made any physical changes to their body but rather may have determined their sex identified at birth was inaccurate.

Satisfying this criterion may also be difficult for some people because of limited access to medical practitioners with expertise in supporting people who seek to transition.

Attempts to address difficulties with this approach have involved extending the authority to confirm a change of sex or gender to other health professionals such as psychologists. This is the approach taken by the Australian Government¹³, which will accept a statement from a registered medical practitioner or a registered psychologist or a valid Australian Government passport which specifies their correct gender.¹⁴

The medical practitioner or registered psychologist is, however, required to affirm the person has received 'appropriate clinical treatment'. The term 'appropriate clinical treatment' is defined such that it is not limited to surgical or medical intervention or other forms of invasive treatment. There remains a view, however, that including a requirement that a change of sex be corroborated by a health practitioner continues to encourage unnecessary medical involvement in the lives of those who wish to register a change of sex.

To remove discrimination on the grounds of gender identity and intersex, the procedure for changing a person's registered sex should be as clear and simple as possible. On this basis, the recommendation is to replace the current arrangements with requirements that mirror those established to register a change of name. This would include the application of similar provisions to guard against fraud, and restricting the frequency with which changes can be made to once in a 12-month period.

Recommendations

1. That the requirement for sexual reassignment surgery before a person can register their change of sex under the *Births, Deaths and Marriages Registration Act 1999* (Tas) be removed.
2. That there be no requirement for surgical, medical or hormonal treatment to change sex classification.
3. That the requirements for an application to the Registrar to record a change of sex be consistent with the approach taken to registering a change of name, including limiting the option of registering a change of sex to once in a 12-month period.

¹³ Commonwealth of Australia, *Australian Government Guidelines on the recognition of sex and gender* (July 2013) available at <http://www.ag.gov.au/Publications/Pages/AustralianGovernmentGuidelinesontheRecognitionofSexandGender.aspx>.

¹⁴ The Australian Passport Office will accept a letter from a medical practitioner certifying that a person has had, or is receiving, appropriate clinical treatment for gender transition to a new gender or that they are intersex and do not identify with the sex assigned to them at birth.

Correcting a record of sex

Section 42 of the *Births Deaths and Marriages Act* makes provision for correction of the Register to 'bring the particulars contained in an entry about a registrable event into conformity with the most reliable information available to the Registrar of the registrable event'.

This provision is preferred by some intersex people who wish to have their birth certificate amended where they are of a different sex from the one assigned to them at birth.

In most circumstances an intersex person may not be aware of their intersex status until they are adolescent (or even later). A mechanism to readily correct the Register is therefore important to enabling an intersex person to ensure the Register accurately records their sex and should be retained.

Whilst not stipulated in the *Births Deaths and Marriages Act*, it is important to ensure a correction to the Register not be intrusive or involve any additional requirements, such as confirmation of medical or hormonal intervention.

Requirement not to be married

Section 28A of the *Births Deaths and Marriages Act* requires that a person wishing to register a change of sex not be married.

The practical effect of this provision is to require a married person who has undergone a gender transition to seek a divorce before being entitled to have their change of gender recognised. It also has the effect of requiring that an intersex person who wishes to change their sex classification (other than by correcting the Register) is not married.

Evidence exists to suggest this is a significant barrier for some people, who consider they are required to choose between their marriage and their need to have their correct sex or gender officially recognised. It is not uncommon for couples to wish to stay together through a gender reassignment process. Nor is it unusual for a person with intersex variations to be married, in some cases prior to knowing they have intersex traits or sex characteristics.

While legal restrictions exist that prevent same-gender couples from marrying, there are no provisions that require States to terminate marriages because one partner changes their sex or gender.

The ACT removed the requirement that a person be unmarried before changing the record of their birth sex in 2009, and is the only jurisdiction to do so in Australia thus far.¹⁵ We are not aware of any challenge to the removal of this requirement.

¹⁵ ACT Law Reform Advisory Council, *Beyond the Binary: legal recognition of sex and gender diversity in the ACT* (ACT Law Reform Advisory Council, Report 2, March 2012) 37.

Many countries, including Argentina, Uruguay, the United States, New Zealand, Austria, Belgium, Denmark, Estonia, Georgia, Germany, Iceland, Luxembourg, the Netherlands, Norway, Portugal, Romania, Spain, Sweden and Switzerland do not require a transgender person to end their marriage as a pre-condition to legal gender recognition even though some of these jurisdictions do not recognise same-sex marriage.¹⁶

The current requirement has harsh impacts on those who remain in a loving relationship and have no wish to formally end their marriage. This makes it particularly difficult for them to satisfy the Family Court that their marriage has irretrievably broken down in order to meet the conditions for divorce. Section 48 of the *Family Law Act 1975* (Cth) specifies:

- (1) An application under this Act for a divorce order in relation to a marriage shall be based on the ground that the marriage has broken down irretrievably.
- (2) Subject to subsection (3), in a proceeding instituted by such an application, the ground shall be held to have been established, and the divorce order shall be made, if, and only if, the court is satisfied that the parties separated and thereafter lived separately and apart for a continuous period of not less than 12 months immediately preceding the date of the filing of the application for the divorce order.
- (3) A divorce order shall not be made if the court is satisfied that there is a reasonable likelihood of cohabitation being resumed.

Significant concerns also exist for the impact on children in a situation where a couple is married and one spouse seeks to register a change of sex.

A change of sex is not listed as a circumstance under the *Marriage Act 1961* (Cth) that would render a marriage void.¹⁷ Nor does the *Marriage Act* prohibit a person who is married from legally changing their sex.

It is unlikely that divorce being a precondition for official recognition of a change of sex will have practical impact on the situation of a couple who wish to remain together. Regardless of the legally recognised sexes of the couple, they will present publicly as a same-sex couple who are married. It is arguable, therefore, that limitations on the rights of a married person to have their change of sex legally recognised is a disproportionate limitation on their right to privacy and family life as protected under international human rights instruments.¹⁸

¹⁶ Jack Byrne, *Licence to be yourself: Laws and advocacy for legal gender recognition of trans people* (The Open Society Foundations, May 2014) 19.

¹⁷ See Part III of the *Marriage Act 1961* (Cth).

¹⁸ For a discussion on this issue see the March 2010 advice of Dr Helen Watchirs, ACT Human Rights and Discrimination Commissioner, to the ACT Attorney-General regarding recognition of gender diversity in the ACT *Births, Deaths and Marriages Registration Act 1997* (ACT) summarised at <http://hrc.act.gov.au/content.php/content.view/id/295> and available through <http://hrc.act.gov.au/>.

Recommendation

4. That section 28A of the *Births, Deaths and Marriages Registration Act 1999* (Tas) be amended by omitting from subsection 1(c) the requirement to not be married.

Age at which change of sex application can be made

Application to register a change of sex is only available to adults. The *Births Deaths and Marriages Act* defines an **adult** to mean¹⁹:

A person who is aged 18 years or older or, although under that age, is or has been married

Section 28D(2) does, however, provide that the parents of a child may apply for registration of a change of the child's sex. The application may be made by one parent if they are a sole parent or there is no other surviving parent of the child.

The effect of these provisions is to prevent a person under 18 years of age from independently applying to be legally recognised as a sex other than the sex assigned to them at birth, unless they are or have been married or they have the permission of their parent(s). In the case of an application by a child's parent(s), it also means a child does not have to agree should the parents wish to register a change of sex.

This differs from the provisions governing an application to register a change of name. Section 25 of the *Births Deaths and Marriages Act* requires that a child over 12 years of age is to consent to a change of name unless she or he is unable to understand the meaning and implications of the change. Section 26 accords powers to the Registrar to seek evidence to satisfy her or himself that the request meets these conditions.

In effect, the current provision means applications for registration of a change of sex are treated differently from other decisions involving minors.

In December 2013, the Netherlands amended its gender-recognition laws to enable anyone who is 16 years or older to make application to have a change of sex recognised and Germany has removed minimum-age restrictions. This means applications for gender recognition in law are treated the same as other legal applications by minors.

To effectively examine options for amendment to the *Births Deaths and Marriages Act*, it is helpful to understand the legal position in Australia relating to the treatment of children undergoing gender transitioning.²⁰

¹⁹ *Births, Deaths and Marriages Registration Act 1999* (Tas) s 3.

²⁰ Information in this section is derived from Malcolm K Smith & Ben Matthews 'Treatment for gender dysphoria in children: the new legal, ethical and clinical landscape' (2015) 202(2) *Medical Journal of Australia* 102–105. See also, World Professional Association for Transgender Health, above n 11, 18–21.

A child who identifies with a gender that is not consistent with his or her biological sex is generally given treatment in two stages:

- The first stage involves the provision of puberty-blocking medication, which delays the onset of puberty in the child's sex of birth.
- The second stage involves cross-hormone treatment—usually testosterone or oestrogen—aimed at encouraging the development of physical characteristics of the child's identified gender.

The provision of hormones associated with Stage 1 of gender transitioning is reversible and has been undergone by children as young as 10 years old. The second stage commences when a child is slightly older: around 16 years old. The effects of Stage 2 treatment are considered more serious and are not fully reversible.

Until recently, the Courts have taken the view that both stages of treatment are to be considered 'special medical procedures' that can only be lawfully performed with Court approval. This approach arose from a landmark decision in 1992 referred to as *Marion's case*²¹ in which the High Court set out principles under the *Family Law Act 1975* (Cth) for determining what decisions fall outside the scope of parental control, thereby requiring court approval.

Section 67ZC of the *Family Law Act* provides the Family Court with authority to make orders relating to 'special medical procedures' being undertaken on children. In particular, it requires that decisions made about whether the procedure should be allowed are in the best interests of the child.

This approach was extended to children who are gender transitioning in 2004 following the Family Court decision *re Alex*²² in which the Family Court determined that treatment of a child for gender dysphoria was a 'special medical procedure', thereby requiring court consent. Since that time the Family Court has considered many cases involving the treatment of children with gender dysphoria and evidence suggests the Court's involvement in matters related to a child's gender identity are becoming increasingly common.

Most recently, however, the Court has changed its approach to these issues. In two decisions in 2013, the Court held that Stage 1 treatment was largely therapeutic and does not require court

²¹ *Department of Health and Human Services v JWB and SMB ("Marion's case")* [1992] HCA 15; (1992) 175 CLR 218 (6 May 1992) <<http://www.austlii.edu.au/au/cases/cth/HCA/1992/15.html>>.

²² *Re Alex* (2004) 31 Fam LR 503.

approval.²³ Stage 2 continues to require the Court's authority. This approach was confirmed by the Full Court of the Family Court in *Re: Jamie* later that year.²⁴

In *Re: Jamie*, the Full Court of the Family Court also clarified the application of the notion of **Gillick competency** as it relates to minors in relation to these matters. The Full Court determined a competent minor is able to consent to Stage 2 treatment; although the question of competency is to be determined by the Court.

The issue in relation to the *Births Deaths and Marriages Act* is whether Tasmanian law relating to change of sex registration should be consistent with the legal principles established by the Family Court. As indicated earlier, Stage 2 treatment may commence from around 16 years of age should a court find the minor is competent. Reducing the age at which an application for a change of sex can be made to 16 years of age would bring the *Births Deaths and Marriages Act* into line with these principles.

With regard to an application for change of registration for a child undergoing Stage 1 treatment—the administration of puberty blockers—the question arises as to whether the Registrar should also be required to satisfy her or himself the child consents to the application. In situations where a child's parent(s) consent to Stage 1 treatment, the way is open for them to apply for a change of registered sex. The *Births Deaths and Marriages Act* does not currently require the consent of the child to do this. As noted above, the change of name provisions of the Act require the Registrar to be satisfied the child agrees with the application for children over 12 years of age. This is consistent with the provisions of the *Convention on the Rights of the Child*, which makes clear it is important to involve children in decisions that affect them, including decisions about medical treatment.²⁵ This same principle should apply in relation to applications for a change of sex.

Parental approval of sex and name changes

Section 24 of the *Births Deaths and Marriages Act* requires that an application to register a change of child's name be made by both parents unless:

- the applicant is the sole parent named in the registration of the child's birth;
- there is no other surviving parent of the child; or
- a magistrate approves the proposed change of name.

If the parents of the child are dead, the application may be made by the child's guardian.

²³ *Re: Lucy (Gender Dysphoria)* [2013] FamCA 518 (12 July 2013) <<http://www.austlii.edu.au/au/cases/cth/FamCA/2013/518.html>> and *Re: Sam and Terry (Gender Dysphoria)* [2013] FamCA 563 (31 July 2013) <<http://www.austlii.edu.au/au/cases/cth/FamCA/2013/563.html>>.

²⁴ *Re: Jamie* [2013] FamCAFC 110 (31 July 2013) <<http://www.austlii.edu.au/au/cases/cth/FamCAFC/2013/110.html>>.

²⁵ *Convention on the Rights of the Child* (entry into force for Australia 1991, ATS 1991 No. 4) Article 12.

Section 25 of the *Births Deaths and Marriages Act* provides that if the child about whom an application is made is more than 12 years old their consent is required for the change of name unless the child is unable to understand the meaning and implication of the name change.

Similar provisions exist in section 28A of the *Births Deaths and Marriages Act* in relation to parental applications for registration of a change of sex. Although, as outlined above, there are no provisions requiring the consent of a child over 12 years of age to a parental application for the registration of a change of sex.

The practical effect of these provisions is that a parent who does not consent to an application for a change of name or registration of a change of sex of a minor can effectively veto that application, even in circumstances where the child wishes to proceed with the changes. The only option in this situation (and only then in relation to a proposed change of name) is to apply to a magistrate to resolve the dispute.

It is often the case that one or other parent refuses to accept their child's 'difference' and is therefore unsupportive of the changes even in circumstances where the child has consented.

Research clearly demonstrates that supportive parents can significantly affect the mental well-being of children. This is particularly so for transgender youth. On the other hand, practices that reject diversity of gender identity or expression can take a huge toll, and are known to contribute to higher rates of suicide and high-risk behaviours.

Lowering the age at which a person can independently seek to apply to have a change of name or sex registered to 16 years would be consistent with the views of the Family Court. It would also be consistent with the practices adopted by overseas jurisdictions, which have given significant emphasis to the views of the child in accordance with their age or maturity and weighed these against the risk of the decision and the extent to which any proposed changes are invasive, permanent or reversible.

For children over 12 years old and under 16, consideration should also be given to enabling an application to be made by one parent provided the child consents. This would help to reduce the need for costly legal procedures in the event of two parents disagreeing. Applications made by a parent (unless they meet the criteria stipulated in the Act for making an application as a sole parent) would not be allowed in situations where the child did not consent.

Recommendations

5. That the age at which a person can apply to have a change of sex registered be aligned with the legal principles expounded by the Family Court in *Re: Lucy (Gender Dysphoria)* [2013] FamCA 518 (12 July 2013); *Re: Sam and Terry (Gender Dysphoria)* [2013] FamCA 563 (31 July 2013) and confirmed by the Family Court of Australia – Full Court in *Re: Jamie* [2013] FamCAFC 110 (31 July 2013).
6. That the age at which a person can apply to have a change of name registered be lowered to 16 years of age.

7. Provisions be introduced in the *Births, Deaths and Marriages Registration Act 1999* (Tas) to require a child's informed consent to applications by a parent(s) or legal guardian to register a change of sex of a young person over 12 years of age.
8. In situations where two parents dispute an application to have a change of name or change of sex registered relating to a child over 12 years of age, the law be amended to allow the application of one parent to be accepted as long as it is accompanied by the informed consent of the child to whom the application relates.

2. Recognition of intersex

There are several sections of the *Births Deaths and Marriages Act* relevant to the recognition of a person with intersex characteristics. These are each examined in turn.

Timeframe for registering a birth

Section 11(3)(a) of the *Births Deaths and Marriages Act* requires **notification** by a responsible person of a live birth within 21 days after birth. In the case of a stillbirth, the requirement is 48 hours. A 'responsible person' in this context may be the hospital where the child was born, a medical practitioner or midwife responsible for the care of the mother at birth, or any other person in attendance at birth if no medical practitioner or midwife was present.

The **registration** of a birth is done by completing a birth registration statement. This is done by the parents or other responsible care providers. It is a requirement that the birth registration statement is lodged within 60 days after the date of birth.

The sex of the child is requested in both instances.

Parents of children who are born with apparent characteristics outside the binary gender norm may be faced with having to consider complex issues arising from the registration decisions they must make in short time frames.²⁶ They may require additional knowledge, assistance and time to fully consider these issues and implications of the decisions they are required to make.

A key concern of intersex stakeholders is to ensure the requirement to register the sex of a child not increase pressure to undertake unnecessary and physically damaging medical sex-assignment interventions.

For this reason, parents of children born with intersex variations may require additional time to register their child.

It is also important the parents of a child known to have intersex variations have access to expert information and guidance from a broad range of stakeholders (both inside and outside the medical profession) to assist in understanding issues associated with their child's situation. It is therefore also recommended that parents and any health practitioners involved with the care of any child with intersex traits be provided with information and appropriate contacts within the intersex community.

Recommendations

9. That section 15 of the *Births Deaths and Marriages Registration Act 1999* (Tas) be amended to provide discretion to the Registrar to extend the time within which a birth must be registered.

²⁶ It should be noted, however, that some intersex variations may not be apparent at birth and may not manifest until puberty or later.

10. That parents and health practitioners involved with the care of the child for whom it is not possible to provide an immediate sex classification be provided with information and appropriate contacts within the intersex community and others with relevant expertise.

Options for registering an intersex birth

Birth notification and registration provisions in most Australian jurisdictions limit the recording of a child's sex to either male or female. In Tasmania, however, the *Births Deaths and Marriages Act* is not prescriptive about the information to be collected and the Registrar has considerable flexibility about how to record a person's sex.

While there are no specific provisions to enable an intersex birth to be registered under the *Births Deaths and Marriages Act*, the lack of prescription about the information to be collected by the Registrar in this Act provides a degree of flexibility not available in other jurisdictions.

This means the parents of a child born with an intersex variation may be able to have their child registered outside of the binary categories of male and female should they so choose. This is, however, up to the discretion of the Registrar and there are reasons why the flexibility available to the Registrar should be clarified:

- The discretion of the Registrar does not provide certainty about the options where a child of indeterminate sex is born.
- It is not clear the extent to which the Registrar may recognise diverse sex classifications, for example, recognising a child as both male and female should the parent wish for this to happen.

The current preferred approach of intersex stakeholders is for the child to be registered as male or female, with capacity for the birth certificate and other documentation to be corrected easily and without delay. Such correction would be available to that person as an adult or consenting minor if the sex assigned is found to be incorrect or the person has a preference to be recognised in some other way.

Intersex stakeholders believe that once a person is able to provide consent they should be able to choose their sex classification according to that most relevant to them. Part 3 of this paper examines options for extending available categories of sex registration in more detail.

There are two major reasons intersex stakeholders consider options outside of the binary male/female classification should not be made available from birth. The first is the legal barriers that may arise from assigning an intersex infant to a third classification (for example, restrictions on their rights in terms of marriage). The second is the added pressure it may place on parents to agree to surgery in an effort to avoid having their child's sex classified as non-binary/indeterminate or unspecified from birth.

In practice, then, the current preference of intersex stakeholders is not to establish non-binary sex classification at birth, but to make broader options available if and when an alternative classification is requested by the person as an adult or as a child when competent to make this decision.

This approach is founded on the view that, while clinicians typically get sex assignment right, this should be easily changed if found not to be appropriate. It also reflects the reality that many intersex people do not wish to change their gender marker, even as adults, and are comfortable maintaining their sex assigned at birth.

Regulation of medical procedures

A primary concern is to ensure that sex assignment not result in surgical or medical treatment to reinforce the chosen sex classification.

It was estimated, in a submission to the Australian Human Rights Commissioner, that around 65–70 intersex children are born each year in Australia who may be at risk of unnecessary surgical intervention.²⁷

To provide greater assurance that parents will not inappropriately agree to surgery under pressure to assign a sex to the child, consideration should be given to regulating surgical intervention aimed at modification of the sex characteristics of infants and children (and adults without capacity) primarily for psychosocial reasons. This approach is in line with recommendations from the 2014 Senate Community Affairs References Committee report into the involuntary or coerced sterilisation of intersex people.²⁸ A key recommendation of the Committee was:

... that all medical treatment of intersex people take place under guidelines that ensure treatment is managed by multidisciplinary teams within a human rights framework. The guidelines should favour deferral of normalising treatment until the person can give fully informed consent, and seek to minimise surgical intervention on infants undertaken for primarily psychosocial reasons.²⁹

To give effect to its recommended approach, the Committee proposed all medical interventions relating to intersex children aimed at modifications of sex characteristics for psychosocial reasons be authorised by a civil and administrative tribunal in each state or territory or the Family Court (whose child welfare jurisdiction under the *Family Law Act* applies also to the application for the sterilisation of children without disabilities and exists concurrently with state and territory

²⁷ 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>>

²⁸ Senate Community Affairs References Committee, Parliament of Australia, *Involuntary or coerced sterilisation of intersex people in Australia* (2013) <http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Community_Affairs/Involuntary_Sterilisation/Sec_Report/index>.

²⁹ Ibid, Recommendation 3.

jurisdictions).³⁰ Responsibility for determining the mechanism for expanding the jurisdiction of relevant tribunals was referred to the Standing Committee on Law and Justice for consideration.³¹

In Tasmania, the Guardianship and Administration Board has responsibility for providing consent to medical treatment where there is evidence a person, by reason of disability, is unable to give informed consent or refusal to medical treatment unless the procedure is required in urgent circumstances to save a person's life or to prevent serious damage to a person's health.³² Contravention of these provisions could result in criminal prosecution and proceedings for civil remedies.

For the purposes of the *Guardianship and Administration Act 1995* (Tas), medical treatment includes any treatment intended or is reasonably likely to have the effect of rendering permanently infertile the person on whom it is carried out.

Unlike the situation of a child who identifies with a gender not aligned with their biological sex³³, approval for medical intervention in relation to an intersex child (other than that required for emergency purposes) is likely to be irreversible and risks long-term adverse consequences.

It is for this reason that consideration should be separately given to the appropriate mechanism for granting approval for any 'normalising treatment' prior to the child being sufficiently mature to make informed decisions of their own. There are strong grounds for considering whether the child will acquire the capacity to make a decision regarding surgical intervention in the future and, if so, the presumption should be against performing the procedure until that time.

Following the High Court's decision in *Marion's case*, the following principles are relevant to approaches to authorisation of a medical procedure:

- whether the procedure is irreversible;
- whether significant risk exists that a wrong decision might be made (either as to the minor's present or future capacity to consent, or about what are the best interests of a child who cannot consent, or the procedure being proposed before all relevant factors are manifest); and
- whether grave consequences flow from the decision.

Taking these considerations together, it is strongly arguable that decisions regarding 'normalising' surgical or medical procedures on intersex children should not be left to either medical practitioners or parents alone. There is a strong case to find that, in the majority of cases following

³⁰ Ibid, Recommendation 6.

³¹ Ibid, Recommendation 7.

³² *Guardianship and Administration Act 1995* (Tas) Part 6.

³³ Where treatment can be staged and denial of that treatment is likely to have significant adverse psychological and physical effects.

the birth of an intersex child, surgical decisions are being made without appropriate recourse to the courts.

In the absence of recommendations for a national approach arising from the Standing Committee on Law and Justice, it is recommended as part of a package of reforms to the *Births Deaths and Marriages Act* that consideration be given to the legal classification of any ‘normalising treatment’ or any intervention primarily undertaken for psychosocial reasons on intersex children as a ‘special medical procedure’. These procedures should, as a result, require the consent of an appropriate board or tribunal with relevant expertise in intersex matters.

The effect of such provisions would be to require medical professionals and parents to seek approval for surgery on intersex infants, thereby delinking it from any issues arising from the registration of the child’s sex at birth.

Recommendation

11. That treatment or any intervention primarily undertaken to modify or ‘normalise’ the visible or apparent sex characteristics of children for psychosocial reasons be classified as ‘special medical procedures’, and require consent of a Tasmanian board or tribunal such as the Guardianship and Administration Board informed by experts on gender and sex diversity.

3. Categories for the registration of a person's sex

Recognition of non-binary sex markers

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 registration provide sufficient flexibility to correctly record accurate information about the person's sex or gender identity.

Retention of binary sex categories provide for ease of administration, but do little to promote inclusion or recognition of the actual complexities of sexual and gender diversity. This is a significant source of concern to both intersex and transgender advocates.

The preferred approach of many intersex stakeholders is to enable a person to choose their sex classification from a range of options including male (M), female (F), X (non-binary) or M+F (both male and female). Enabling multiple choice of sex, ie, M+F, is advocated in order that a person who has both male and female biological markers can be legally identified as both male and female.

Transgender advocates have also sought legal clarification regarding the option of being recognised as a gender other than male or female. In the case of the *NSW Registrar of Births, Deaths and Marriages v Norrie*³⁴, the High Court ruled that the NSW births, deaths and marriages law does permit the registration of a third classification other than male or female. This sanctions the right of a person who medically or surgically transitions from one gender to another to be recognised as 'non-specific' in situations where they identify as being neither male nor female.³⁵

In that case, the High Court considered the submission made by the Registrar that allowing an 'uncategorised' or similar category would cause 'unacceptable confusion' in other legislation. The High Court stated:

The difficulty foreshadowed by this argument could only arise in cases where other legislation requires that a person is classified as male or female for the purpose of legal relations. For the most part, the sex of the individuals concerned is irrelevant to legal relations. In this regard, s 8(a) of the *Interpretation Act 1987* (NSW) provides that "[i]n any Act or instrument ... a word or expression that indicates one or more particular genders shall be taken to indicate every other gender". 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).³⁶

³⁴ [2014] HCA 11 (2 April 2014) <<http://www.austlii.edu.au/au/cases/cth/HCA/2014/11.html>>.

³⁵ Ibid.

³⁶ *NSW Registrar of Births, Deaths and Marriages v Norrie* [2014] HCA 11 (2 April 2014) [42].

The Australian Passport Office is able to issue passports that show a person's sex as male, female or X, with X indicating the person's gender is indeterminate, unspecified or intersex. This definition is, however, under review. This review is the result of the Sex and Gender Advisory Group³⁷ expressing its unanimous support for simplifying the description of the gender and sex category of 'X' used by Australian Government departments and the Australian Standard on data collection (AS4590) to 'non-binary'.

This proposals arises from serious concerns about the ongoing and inappropriate use of 'intersex' as a descriptor for 'X' and the view that the continued use of 'intersex' 'unspecified' and 'indeterminate' in data collection using the 'X' category is likely to perpetuate data integrity issues.

Passports are accepted as a 'cardinal document' for identification purposes and are a valid document for the purposes of the national document verification service operated by the Federal Attorney-General's Department as part of the National Identity Security Strategy. Sex-reassignment surgery is not a pre-requisite to the issuing a passport in a new gender, nor do birth or citizenship certificates need to be amended for sex- or gender-diverse applicants to be issued a passport in their preferred gender. It is, however, a requirement that a medical practitioner support the application through the provision of a letter certifying the person has had, or is receiving, appropriate clinical treatment for gender transition or they are intersex and do not agree with the sex assigned to them at birth.

The adoption of a similar standard for all Commonwealth government agencies through the introduction of the *Australian Government Guidelines on the recognition of sex and gender* in July 2013 increases the likelihood this approach will be rolled out nationally.

The following examines options for the collection and recording of sex and/or gender information in cardinal documents, such as birth certificates.

Option 1: Cease recording sex on birth certificates

Some transgender and intersex advocates have argued for the removal of the requirement to collect information regarding sex from the requirement to register a birth. It is argued, for example, that sex or gender is not recorded on other crucial forms of identification such as driver's licenses.

Whether or not to record a person's sex and when it is required is a difficult issue. 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 need for that information. Where information is required, it is recommended that **gender** (rather than sex) information is collected. This approach is reflected in advice developed by my office and it is recommended it be an approach adopted across the Tasmanian Government.

³⁷ Convened by the Commonwealth Attorney-General's Department to guide the review of the Australian Government *Guidelines on the Recognition of Sex and Gender*.

Ceasing to record the sex of a child at birth would obviate the necessity for procedures to recognise a correction of the register to amend a person's sex where this does not accord with the sex designated at birth or to reflect a changed gender identity.

As outlined in earlier discussion, in terms of general administrative datasets, it is preferable that information is collected regarding a person's gender and the categories available include the capacity to identify a sex and/or gender category beyond the binary categories of male and female.

Difficulties may arise, however, for public planning and policy development that is reliant on the collection of information regarding the gender make-up of the Tasmanian population and it is widely accepted a person's sex and gender may need to be recorded for both statistical and operational reasons.

Further, collection of sex data as well as sufficient information to establish a person's age, geographical location and Aboriginal status is required under *Census and Statistics Act 1905* (Cth) to enable the Australian Bureau of Statistics to collect, analyse and publish population details. Advice from the ABS provided to the Tasmanian Registrar 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.³⁸

Option 2: The introduction of additional sex categories for adults

This approach would introduce the option of additional sex categories available to adults or competent children who wish to have their sex or gender recorded as non-binary.

Under this option, in addition to the categories of male and female, a person could seek to be legally recognised as neither male nor female, both male and female, indeterminate, or unspecified.

The difficulty with this approach rests in part on whether it is possible to develop an exhaustive list of sex categories suited to the needs of those who are biologically diverse or have diverse gender identities.

Establishing an exclusive list of sex categories may restrict the flexibility available to the Registrar to recognise variations in the way in which sex and gender is described in the future.

Option 3: The introduction of free field sex categories for adults

An alternative approach is to enable an individual's sex or gender to be registered in whatever form they wish by offering a free-text field for this purpose. Collectively these might be grouped into an 'other' category which includes an option to self-describe.

³⁸ E-mail from Registrar Births, Deaths and Marriages (Tas), 23 October 2015.

A person may have a diverse range of biological characteristics or a gender identity that may be binary (male or female), non-binary (neither male nor female) or multiple (male and female). Introduction of multiple sex or gender markers for adults or capable children would enable this diversity to be legally recognised. This has the capacity to more accurately enable legal sex assignment to match a person's biological characteristics.

Whilst this would provide a large degree of flexibility, it may undermine the usefulness of data on sex for administrative and planning purposes. Advice received by the Registrar from the Australian Bureau of Statistics also indicates the ABS would have strong concerns if an 'other' category for sex were introduced as its consider it would risk undermining the quality of collected data.³⁹

Option 4: Introduction of an X marker

The most workable option may be to support the introduction of a new 'X' category that could be used by any applicants who wish to be legally recognised as a status outside the binary categories of male and female.

The preferred approach of the Commonwealth Government is to include an X category in the collection of information regarding gender and for X to represent 'intersex/unspecified/indeterminate'.⁴⁰

Intersex advocates have, however, since argued the implementation and interpretation of the Guidelines has not been respectful of intersex people and they regard the Guidelines as flawed.⁴¹ They are particularly concerned that the classification fails to respect the sex and gender of intersex people who are male or female.⁴² As a consequence, there is now a preference that the category of 'non-binary' be adopted.⁴³

³⁹ Ibid.

⁴⁰ Commonwealth of Australia, *Australian Government Guidelines on the recognition of sex and gender* (July 2013) available at <http://www.ag.gov.au/Publications/Pages/AustralianGovernmentGuidelinesontheRecognitionofSexandGender.aspx>.

⁴¹ Organisation Intersex International Australia, *Intersex people and identification documents* (2014) <https://oii.org.au/24378/intersex-people-and-identification-documents/>.

⁴² Ibid, 8.

⁴³ Ibid, 11.

Recommendations

12. That the Tasmanian Government require all public authorities to review their requirements to collect information regarding sex and gender with the intention of removing this requirement whenever possible.
13. That the Tasmanian Government only collect information about a person's biological sex where there is a legitimate need to do so.
14. That, where it is considered necessary to know a person's sex or gender, information be collected regarding the person's gender and options be available for a person to identify their gender as other than male or female by the introduction of a 'non-binary' classification category.
15. That the classification of sex in the Register of Births, Deaths and Marriages be extended to include a new category referred to as X meaning 'non-binary'.

4. Birth certificates

Historical data on birth certificates

Section 28D of the *Births Deaths and Marriages Act* provides:

- (1) If a change of sex is registered under this Part in respect of any person, a birth certificate issued by the Registrar for the person is to show the person's sex as registered with a notation that the person was previously registered as another sex.
- (2) If requested by the person, the Registrar may issue an extract from the Register which does not include the notation referred to in subsection (1)

The practical effect of this provision is that a full birth certificate issued to a person who has registered a change of sex will include details regarding the sex or gender under which they were previously registered.

For transgender people this can be a difficult reminder of their previous gender status and for intersex people it means details that have been amended on the Register through a change-of-sex application are included on their birth certificate. In both cases, it undermines the effectiveness and appropriateness of a birth certificate as a primary identification document for these people, and interferes with their privacy rights.

Section 45 of the *Births Deaths and Marriages Act* provides the Registrar must, as far as practicable, protect the persons to whom the entries in the Register relate from unjustified intrusion on their privacy.

The requirement to disclose a person's gender history by including a notation on the birth certificate of those who have registered a change of sex is a breach of this privacy and is discriminatory in its effect. It is my view that historical data relating to a person's previous sex should not be included on corrected or amended birth certificates unless requested by the applicant.

Recommendation

16. That historical data relating to a person's previous sex or gender not be included on corrected or amended birth certificates unless requested by the applicant.

5. Registration of parentage details

Concern has emerged about the capacity of the Registrar to issue a birth certificate listing multiple persons as parents on a birth certificate, with children of same-sex parents, for example, seeking to also have an additional biological parent added to their birth certificate.⁴⁴

Situations may arise where a child has a child-parent relationship with both individuals in a significant relationship and a biological parent. In some cases, this may mean that a child wishes to have multiple individuals legally recognised as their parents.

A parent is defined under the *Anti-Discrimination Act 1998* (Tas) to include:

... a step parent, surrogate parent, adoptive parent, guardian, within the meaning of the *Children, Young Person and Their Families Act 1997* and foster parent

Complex legal definitions exist in relation to the definition of a parent arising from provisions in a number of statutes, including:

- *Status of Children Act 1974* (Tas)
- *Adoption Act 1988* (Tas)
- *Coroner's Act 1995* (Tas)
- *Children, Young Persons and the Families Act 1997* (Tas)
- *Relationships Act 2003* (Tas)
- *Surrogacy Act 2012* (Tas)

The *Acts Interpretation Act 1931* (Tas) does not give guidance as to the prescribed meaning of the term 'parent'. Nor is it clear whether the Registrar has the capacity to list all people with a parental relationship to the child.

Whilst it is beyond the capacity of this document to examine this matter in detail, it is raised here as an emerging issue and one that may require further amendment to the *Births Deaths and Marriages Act* at a future date.

⁴⁴ See for example, Lucy Cormack, 'Hugo Atkinson's fight to have three parents recognised on his birth certificate', *Sydney Morning Herald*, 27 August 2015.

6. Other matters

Definitions and consequential amendments

It is important to ensure consistent definitions are used in legislation and to ensure references to related matters reflect current views of sex and gender diversity.

References in legislation (including the *Births Deaths and Marriages Act*) to persons of the ‘opposite sex’ for example, serve to reinforce binary sex categories. It is preferable that the reference is changed to ‘another’ sex. It is important that this not be done without reviewing the effect to ensure unintended consequences do not arise.

Similarly, references to ‘transsexuals’ may be considered to reinforce out-dated notions that a change of gender identity requires surgical intervention and are not sufficiently broad to capture all gender diversity.

To avoid these implications gender identity should be defined in a way that is consistent with the *Anti-Discrimination Act*.

The national context

In March 2009, the Australian Human Rights Commission (then the Human Rights and Equal Opportunity Commission) issued a report making recommendations consistent with those outlined in this paper.⁴⁵ A key recommendation arising from its report was the need for a single nationally consistent approach to the legal recognition of sex. This also appears to be the perspective generally adopted by Registrars around the country.

As outlined previously, there is also a need for clarification regarding the role the Family Court may have in relation to the restriction of non-therapeutic treatment of intersex children. To the extent the jurisdiction of the Family Court differs from restrictions contained in state or territory law, the authority of the Family Court will prevail. Potentially, therefore, the Family Court could overrule decisions made at the state or territory level not to authorise treatment.

It is preferable; therefore, that action is taken to clarify the position at the federal level with regard to matters raised in this report.

⁴⁵ Human Rights and Equal Opportunity Commission, *Sex Files: the legal recognition of sex in documents and government records* (AHRC, March 2009).

Glossary

Please note there may be multiple or different definitions of the following terms. The following definitions have been provided for the purposes of this paper.

Gender

Gender is part of a person's social and personal identity. It refers to each person's deeply felt internal and individual identity. A person's gender may be reinforced by their outward social markers, including their name, outward appearance, mannerisms and dress. A person's physical characteristics may not be typically associated with their gender. An individual's gender may or may not correspond with the sex or gender assigned at birth and some people may identify as neither woman nor man or both woman and man.

Gender diverse

The term '*gender diverse*' is used to recognise people who do not fall within the traditional binary notions of gender (woman and man). This may include people who identify as a gender not typically associated with their assigned sex at birth, as neither woman nor man, or as both woman and man. Other terms commonly associated with gender-diverse people include 'trans', 'transgender', and 'transsexual', 'gender queer', 'pan-gendered', 'gender questioning', 'androgynous' and 'inter-gender'. However, it is important to acknowledge that many people whose gender history might be described as trans, transgender, or transsexual identify simply as women or men and do not consider 'trans' as their identity. Some cultures have specific terms and recognised social roles for genders aside from women and men.

Gender dysphoria or Gender identity dysphoria

The term '*gender identity dysphoria*' is defined by the *Diagnostic and Statistical Manual of Mental Disorders* (DSM-IV) as a strong and persistent cross-gender identification which in children is manifested by a repeated stated desire (or insistence that she/he is) another sex; a preference for dressing in the attire of another sex; strong and persistent preference for adopting cross-sex roles in play or persistent fantasies of being another sex; intense desire to participate in stereotypical games and pastimes of another sex; and strong preference for playmates of another sex.

Intersex

The term 'intersex' refers to people who are born with genetic, hormonal or physical sex characteristics that are not typically 'male' or 'female'. Intersex people have a diversity of bodies and identities. The characteristics may not be apparent at birth and may not manifest until later in life.

Sex

Sex refers to the chromosomal, gonadal and anatomical characteristics associated with biological sex categories.

Transgender/trans

Transgender or *trans* is different from intersex. A person who is trans or transgender is someone who was born with biological characteristics associated with either females or males, and who identifies as a gender that is not typically associated with their registered sex at birth.