

Beyond the Binary: legal recognition of sex and gender diversity in the ACT

ACT Law Reform Advisory Council

Report 2




March 2012

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TERMS OF REFERENCE

The terms of reference given to LRAC by the Attorney-General for the inquiry were:

TERMS OF REFERENCE

Law Reform Advisory Council

The legal recognition of transgender and intersex people in the Territory
January 2011

I, Simon Corbell, ask the Law Reform Advisory Council to inquire into and report on steps necessary to provide for legal recognition of transgender and intersex people in the Territory, and to ensure that any such provision is compliant with the Human Rights Act 2004, with particular regard to:

- a. the existing provisions of the Births, Deaths and Marriages Registration Act 1997
- b. the potential implications of legal recognition of transgender and intersex people in the Territory for public functions or documentation under Territory and Commonwealth law, and
- c. the potential implications of legal recognition of transgender and intersex people in the Territory for mutual recognition of a persons' sex by and among the States, Territories, and Commonwealth.

ACKNOWLEDGEMENTS

ACT Law Reform Advisory Council

The ACT Law Reform Advisory Council (LRAC) was established by the ACT Attorney-General the Hon Simon Corbell MLA to provide expert advice and recommendations to the Attorney-General.

LRAC operates as a collaborative undertaking between the ACT Government and the ANU College of Law at the Australian National University. Together they provide the funds, resources, infrastructure and staff necessary for LRAC's operation. Academic staff of the ANU College of Law contribute their expertise to inquiries conducted by LRAC.

LRAC members

Members of LRAC are appointed by the Attorney-General for a period of up to three years, on the basis of their relevant experience and expertise. Members contribute to the work of LRAC on a voluntary basis.

Members of LRAC during the period of this inquiry (January 2011 – February 2012) were:

Mr Andrew Crockett (to February 2012)	Professor Murray Raff
Magistrate Karen Fryar (to October 2011)	Mr Simon Rice, OAM (Chair)
Ms Robyn Holder	Mr Peter Sutherland
Ms Kate McMullan	Chief Magistrate Lorraine Walker (from October 2011)
Mr Athol Opas	Ms Karen Wandmaker (to April 2011)
Mr Stuart Pilkinton	Ms Helen Watchirs, OAM
Assistant Commissioner Roman Quaadvlieg	Ms Veronica Wensing
Justice Richard Refshauge	Mr Jon White
Ms Agata Pukiewicz	Ms Heidi Yates (from April 2011)

Conduct of the inquiry

The inquiry was conducted by the ACT Law Reform Advisory Council. John Croker, Arjuna Dibley and officers of the ACT Justice and Community Safety Directorate provided administrative support.

The inquiry was overseen by a sub-committee of LRAC comprising Simon Rice, Heidi Yates, Roman Quadvlieg, Kate McMullan and Veronica Wensing, reporting to LRAC as a whole. As well, LRAC was advised by an *ad hoc* subcommittee of experts comprising Peta Bourne (ANU College of Law), Wayne Morgan (ANU College of Law), Elizabeth Keogh (ANU College of Law), and Zoe Brain.

The Australian National University approved an ethical framework for the conduct of the inquiry.

The inquiry was promoted on the LRAC website <www.lawreform.act.gov.au>, and advertised in the *Canberra Times* (20 March 2011) in City News Publications in the ACT (March 2011), and in the ANU student newspaper *Woroni* (June 2011). It was discussed on two occasions on ABC Radio 666, and on Radio National's 'The Law Report' (8 November 2011).¹

¹ www.abc.net.au/radionational/programs/lawreport/better-recognition-for-transgender-people-under/3650714

In May 2011 an Issues Paper was published and distributed for comment. The public was invited to participate by making submissions to the inquiry, by post, email or telephone. The inquiry consulted with ACT public authorities. As well it consulted confidentially with medical practitioners and people in the sex and gender diverse community in the ACT.

The report of the inquiry was written by Simon Rice from material edited and compiled by Lynne Spender with research assistance from John Croker, Arjuna Dibley and Farah Ibrahim, and Portugese translation by Rodrigo Sales. The report was designed by Claire Atteia at the ANU College of Law.

SUMMARY OF RECOMMENDATIONS FOR ACTION

This summary does not strictly follow the order in which the recommendations are discussed in the report, but has grouped the recommendations according to areas of activity and responsibility.

In ACT legislation generally:

1. reference should consistently be made to 'sex and gender diversity', 'sex and gender diverse people', and 'people in sex and gender diverse communities'. [p32]
2. when necessary, specific reference should be made to 'transgender', a 'transgender person', and 'transgender people' to refer to people who, having been born as physiologically either male or female, have changed or are changing their identity from one sex and gender to another. [p32]
3. when necessary, specific reference should be made to 'intersex', an 'intersex person', and 'intersex people' to refer to people who, because of their physiological characteristics at birth, do not identify only as female or only as male. The term intersex should not be used to refer to or include people who have changed or are changing their identity from one sex and gender to another. [p32]
4. it is not necessary or appropriate to define 'female' or 'male'. Those terms do have an ordinary binary meaning and legislation is not necessary to confirm that. It is, however, appropriate to define terms of sex and gender diversity that are outside these binary terms, so that diverse sex and gender identity is given recognition as a part of a process of its being normalised. [p32]
5. the 2003 ACT Report audit of ACT laws which require a person to identify their sex and gender should be updated and extended to laws and practices, and that the need for those requirements should be reviewed with the intention of removing whenever possible a requirement that a person identify their sex and gender. [p43]

In the *Legislation Act 2001*:

6. the definition of 'transgender' is appropriate and sufficient. [p33]
7. in the definition of 'intersex', reference to a 'a genetic condition' as the reason for a person's intersex status is inappropriate, and it is sufficient to refer to the fact that an intersex person's reproductive organs or sex chromosomes that are not exclusively male or female. [p33]

In the *Births, Deaths and Marriages Registration Act 1997* and *Births, Deaths and Marriages Registration Regulation 1998*:

8. the sex of a child born in the ACT should continue to be recorded by the Registrar-General, subject to recommendations for changes to the timing for notification and registration, and to the available categories of sex. [p34]
9. to give legal recognition to sex and gender diverse people who are not defined by the female/male binary, wherever the *BDMR Act* and *BDMR Regulation* refer to two sexes, male and female, they should be amended to recognise three sex and gender identities: female, male and intersex. [p33]
10. having regard to 1-3 above, the *BDMR Act* should be amended to replace the term 'transsexual' with reference to sex and gender diverse people, and to sex and gender diversity, unless it is necessary to refer specifically to transgender people. [p33]
11. the sex of a child when it is *notified* (s5 *BDMR Act*; s4(1) *BDMR Regulation*) should be any of female, male, intersex, to be advised, or indeterminate. [p35]

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 when a child is or could be intersex, in which case one of the other four categories should be used. [p36]
13. at the time that the sex of a child is notified as 'intersex' or 'to be advised', the parents and any health practitioners involved in caring for the child should be provided with printed information, advice and resources, developed in consultation with representatives of the intersex community and expert health practitioners, which explain intersex and set out considerations for decisions that can be made about the child's sex and gender identity. [p36]
14. the current 60 days allowed for the *registration* of the sex of any child (ss9 and 11 *BDMR Act*; s5 *BDMR Regulation*) should be extended to 180 days. [p36]
15. to give legal recognition to intersex people, the available categories for the registration of a person's sex should be any of female, male, intersex and indeterminate. [p36]
16. the Registrar-General should be empowered to issue a birth certificate which shows a person's sex as 'unspecified', in circumstances where a person is in the process of changing their identity from one sex and gender to another ('transitioning'), or does not identify as having a sex. [p38]
17. the requirement in the ACT for a person to undergo sexual reassignment surgery to change the record of their sex should be abolished. [p38]
18. the requirement for a person to register a change in their sex and gender identity should not be more onerous than it is in the policy of the Passport Office. [p40]
19. when an intersex person seeks a change to the record of the sex on register, whether to female, male or intersex, the person need only rely on medical confirmation of their intersex status. [p40]
20. the requirement for a person to register a change in their sex and gender identity is a matter of policy for the government to decide, from among suitable and available options which range from self-identification to self-identification accompanied by corroboration by various classes of people. [p33 and p43]
21. it is not appropriate at this stage to prohibit, more broadly than the *Discrimination Act* already does, requests for disclosure of gender identity without a demonstrated legitimate need. [p43]
22. in light of the practice of the Registrar-General to issue a change of name certificate which does not show the person's sex or former name, no changes to current law and practice under the *Births, Deaths and Marriages Registration Act* need to be made to ensure protection of the privacy of a person who has changed their sex and gender identity. [p46]
23. the current restrictions – in the *BDMR Regulation* and Office of Regulatory Services Policy – on access to a record of a person's sex in the register are adequate, but information provided by the Territory from its register to another State or Territory, and access to the register provided by the Territory to another State or Territory, should be subject to the same restrictions on access as are set out in the *BDMR Regulation* and Office of Regulatory Services Policy. [p46]
24. s29 *BDMR Act* should accept an Australian passport or Document of Identity, in addition to an 'interstate recognition certificate', as evidence that the person mentioned is of the sex as stated in it. Further, reference in s29(3) to an 'interstate recognition certificate' should not be limited to a certificate 'in relation to a person who has undergone sexual reassignment surgery'. [p47]
25. a Certificate of Particulars is a desirable mechanism to ensure equal access for ACT residents to reforms that are designed to guarantee legal recognition of sex and gender diverse people without reliance on inhumane eligibility requirements. [p48]

In the *Discrimination Act 1991*:

26. having regard to 1-3 above, where the *Discrimination Act* refers to the attribute of 'gender identity', it should be amended to refer instead to sex and gender diversity. [p33]
27. protected attributes should include:
 - i. a person's identifying as intersex, as a sex other than their registered sex, as having no sex, and as being in transition for one sex to another
 - ii. the record of a person's sex having been altered under the *BDMR Act* or equivalent law or practice, and
 - iii. a person's physical presentation (including physical features, manner of speech, and dress) when it is not consistent with the person's recorded birth sex or with the conventional physical presentation of a person of a particular sex. [p49]

In the ACT public sector:

28. when an ACT public authority identifies and/or records a person's sex:
 - i. the person is entitled to inspect the record, and to have their sex identified and/or recorded (and if necessary amended) in accordance with their sex as registered under the *BDMR Act*
 - ii. no liability should attach to a person who, on behalf of an ACT public authority, incorrectly records a person's sex in good faith. [p44]
29. if, as recommended, the available categories for the registration of a person's sex under the *BDMR Act* are to be any of female, male, or intersex, then at least those three categories should be used in all ACT government activity. [p44]
30. when it is relevant for an ACT public authority to require a person to identify their sex – other than for notifying and registering a birth and for changing the birth record of their sex – the person should be asked their 'sex and gender identity', and should be given the option of identifying as any of:
 - a) female
 - b) male
 - c) intersex
 - d) none of the above. [p44]
31. the proposed changes to law and practice to give legal recognition to sex and gender diverse people will need to be accompanied by investment in public authorities for:
 - i. programs of education and training about sex and gender diversity
 - ii. the conversion of systems and documents to reflect the formal recognition of sex and gender diversity
 - iii. funding to ensure that the legislative changes are part of a broader program of social inclusion. [p50]

In the ACT:

32. to monitor and report on progress towards legal recognition for sex and gender diverse people in the ACT, the ACT Human Rights Commission must be sufficiently resourced to address the underreporting of discrimination against transgender and intersex people, and to support employers and service providers with information about their legal obligations under the *Discrimination Act 1991* and the *Human Rights Act 2004*. [p50]

33. to address issues of unemployment, discrimination, poor physical and mental health outcomes, and low rates of social inclusion and participation among sex and gender diverse people:
 - i. support and advisory services should be provided to sex and gender diverse people and their families
 - ii. recurrent education and training programs should be provided to service providers, employers, workplaces and educational institutions. [p50]

Nationally:

34. while the ACT is acting to remove legal obstacles for sex and gender diverse people across all its legislation, cooperation with the Commonwealth and with other State and Territory governments will be important in developing a national approach that addresses both the legal and social recognition difficulties faced by the gender diverse community. [p50]
35. it is desirable for the governments of the States, Territories and Commonwealth to audit their laws and practices for provisions which require a person to identify their sex and gender, and to review the need for those requirements with the intention of removing whenever possible a requirement that a person identify their sex and gender. [p48]

PART I – BACKGROUND

1.1 Aim of the inquiry

LRAC's terms of reference for this inquiry required it to:

- 1) identify the legal difficulties facing the gender and sex diverse community in the ACT; and
- 2) recommend legal steps which can be taken to achieve legal recognition of the gender and sex diverse community in the ACT.

The ACT Government has made the policy decision that the equal rights of all transgender and intersex people will be recognised. The question for the inquiry is how best to do that.

The idea of 'legal recognition' goes beyond defining transgender, intersex and gender identity in the *Legislation Act 2001* and the *Discrimination Act 1991*. The import of legal recognition is that a person's stated sex and gender identity is formally recognised by the Territory, and can be relied on by the person as a definitive statement of their sex and gender identity in all circumstances, entitling the person to access to services, benefits and treatment in accordance with that sex and gender identity.

1.2 Terms used in this report

Cardinal document is intended to identify documents which are widely accepted in Australia as being a definitive statement of a person's identity (eg, a passport or a birth certificate).

Gender, when it is not used in conjunction with 'sex' (eg 'sex and gender'), is intended to refer to a person's self-identification with the presentation and lifestyle of a particular sex.

Intersex is intended to identify the sex and gender identity of people who, because of their physiological characteristics at birth, do not identify as only female or only male. It does not refer to people who have changed or are changing their identity from one sex to another. Other terms commonly used, although not necessarily accepted as accurate by intersex people, are 'androgynous' and 'hermaphrodite'. Another common term is 'intersex condition', which is objected to by some intersex people as suggesting that intersex is an abnormal departure from the female/male norm requiring remedial treatment. The term 'intersex' is defined in the *Legislation Act 2001* ACT, discussed below.

Reassignment surgery is intended to refer to any surgical procedure to effect a change to a person's reproductive organs that is undertaken voluntarily by a person who wishes to change their sex and gender identity. Another term that is commonly used is 'sex affirmation surgery'.

Sex, when it is not used in conjunction with 'gender' (eg 'sex and gender'), is intended to refer to a person's biological sex, which can be any of female, male and intersex.

Sex and gender diverse is intended to be an inclusive term to encompass people whose sex and gender identity is something other than simply 'male' or female', such as intersex, transgender, transsexual, transitioning, and not identifying as having a gender.

Transgender, is intended to identify the sex and gender identity of people who, having been born as physiologically either male or female, have changed or are changing their identity from one sex and gender to another. A transgender person is not intersex. The term 'transgender' is defined in the *Legislation Act 2001* ACT, discussed below.

1.3 Current position in the ACT

Sex and gender diverse people currently have limited legal recognition in the ACT, and what recognition there is uses inconsistent terminology.

Provisions that recognise transgender and intersex people

The terms 'transgender' and 'intersex' are defined under sections 169A and 169B of the *Legislation Act 2001* (ACT) (as amended by the *Legislation (Gay, Lesbian and Transgender) Amendment Act 2003* (ACT)):

Section 169A

- 1) A **transgender person** is a person who
 - a) identifies as a member of a different sex by living, or seeking to live, as a member of that sex; or
 - b) has identified as a member of a different sex by living as a member of that sex;whether or not the person is a recognised transgender person.
- 2) A **transgender person** includes a person who is thought of as a transgender person, whether or not the person is a recognised transgender person.
- 3) A **recognised transgender person** is a person the record of whose sex is altered under the Births, Deaths and Marriages Registration Act 1997, part 4 or the corresponding provisions of a law of a State or another Territory.

Section 169B

An **intersex person** is a person who, because of a genetic condition, was born with reproductive organs or sex chromosomes that are not exclusively male or female.

The definitions support recognition that is given to sex and gender diverse people in some circumstances in the ACT, most commonly relating to

- > a choice the person can make as to the sex of a person who will conduct a body search, eg s120 *Casino Control Act 2006*, ss250 and 592 *Children and Young People Act 2008*, s211 *Confiscation of Criminal Assets Act 2003*, and s109 *Corrections Management Act 2007*
- > considerations when registering and managing detainees, eg ss185 and 189 *Children And Young People Act 2008* and s76 *Corrections Management Act 2007*), and
- > engaging in forensic procedures under the *Crimes (Forensic Procedures) Act 2000*.

Two things are noteworthy about the definitions in sections 169A and 169B of the *Legislation Act 2001* (ACT). First, the definition of a transgender person does not limit a person's identity to circumstances where the person has had the record of their sex altered; self-identity is sufficient. Secondly, the definition of an intersex person characterises their sex as a medical 'condition' which departs from the binary sexual identity of female and male.

Provisions that protect against discrimination

Under the *Discrimination ACT 1991* (ACT), discrimination because of 'gender identity' is unlawful in the areas of work, education, access to premises, provision of goods, services, facilities and accommodation, and club membership and benefits. 'Gender identity' is defined in the Dictionary of the *Discrimination Act* as

- (a) the identification on a genuine basis by a person of one sex as a member of the other sex (whether or not the person is recognised as such)
 - (i) by assuming characteristics of the other sex, whether by way of medical intervention, style of dressing or otherwise; or
 - (ii) by living, or seeking to live, as a member of the other sex; or
- (b) the identification on a genuine basis by a person of indeterminate sex as a member of a particular sex (whether or not the person is recognised as such)—
 - (i) by assuming characteristics of that sex, whether by way of medical intervention, style of dressing or otherwise; or
 - (ii) by living, or seeking to live, as a member of that sex.

Under SS 66 and 67 of the *Discrimination Act 1991*, vilification because of ‘gender identity’ is unlawful, and serious vilification because of ‘gender identity’ is an offence.

It is noteworthy that ‘gender identity’ is defined differently from ‘transgender’ and ‘intersex’ in the *Legislation Act 2001*, but that the definition fails to recognise sex and gender diversity by limiting reference to the binary sexual identity of female and male.

1.4 Human rights context

International human rights treaties

Human rights in the *International Covenant on Civil and Political Rights* (ICCPR) that are specifically relevant to people in the sex and gender diverse communities include:

- > the right to non-discrimination (articles 2(1) and 26)
- > the right to protection from torture, cruel, inhuman or degrading treatment or punishment (article 7)
- > the right of persons deprived of their liberty to be treated with humanity and dignity (article 10(1))
- > freedom of movement and travel (article 12)
- > the right to recognition before the law (article 16)
- > freedom from arbitrary interference with privacy and/or family life (article 17)
- > freedom of expression (article 19)
- > the right to marry and found a family (article 23).

The *Convention on the Rights of the Child* (CRC) is broader than the ICCPR and includes economic, social and cultural rights as well as civil and political rights. Several human rights in the CRC are specifically relevant to people under the age of 18 in the sex and gender diverse communities, including:

- > the right to non-discrimination (article 2)
- > a child’s right to have their best interests as a primary consideration in all actions concerning them (article 3)
- > the right to survival and development (article 6(2))
- > the preservation of identity (article 8)
- > the right to express views and have those views respected (article 12)
- > the right to freedom of expression (article 13)
- > the right of freedom of thought (article 14)
- > the right to privacy (article 16)

- > the right to protection from physical or mental violence, injury, abuse or exploitation (article 19)
- > the right to health (article 24)
- > the right to an adequate standard of living (article 27).

In an issues paper on human rights and gender identity, the Council of Europe Commissioner for Human Rights, Thomas Hammarberg, said:

In principle, international human rights instruments protect everybody without discrimination. Despite the fact that gender identity as a discrimination ground, along with sexual orientation, is often not explicitly mentioned in international human rights treaties, these treaties do apply to all persons through their open-ended discrimination clauses. As for the UN Covenant on Economic, Social and Cultural Rights, this was recently confirmed by the UN Committee on Economic, Social and Cultural Rights which stated that “gender identity is recognized as among the prohibited grounds of discrimination; for example, persons who are transgender, transsexual or intersex often face serious human rights violations, such as harassment in schools or in the work place.”²

The Yogyakarta Principles

The Yogyakarta Principles on the application of international human rights law in relation to sexual orientation and gender identity were adopted by a group of human rights experts in March 2007.³ The principles provide guidance on how international human rights treaties should be interpreted having regard to gender diversity. They are not legally binding, but are an interpretation of existing human rights treaties from the view point of sexual orientation and gender identity.

Yogyakarta Principle 3 outlines the right to recognition before the law for all people regardless of gender identity:

Everyone has the right to recognition everywhere as a person before the law.

Persons of diverse sexual orientations and gender identities shall enjoy legal capacity in all aspects of life.

Each person’s self-defined sexual orientation and gender identity is integral to their personality and is one of the most basic aspects of self-determination, dignity and freedom.

No one shall be forced to undergo medical procedures, including sex reassignment surgery, sterilization or hormonal therapy, as a requirement for legal recognition of their gender identity.

No status, such as marriage or parenthood, may be invoked as such to prevent the legal recognition of a person’s gender identity.

No one shall be subjected to pressure to conceal, suppress or deny their sexual orientation or gender identity.⁴

Yogyakarta Principle 3 details actions that countries should undertake to ensure they are not in breach of their human rights obligations. Some actions that are directly relevant to the legal recognition of sex include:

- > taking all necessary legislative, administrative and other measures to fully respect and legally recognise each person’s self-defined gender identity

² Thomas Hammarberg, Council of Europe Commissioner for Human Rights, Human Rights and Gender Identity. July 2009. Available at: <http://wcd.coe.int/ViewDoc.jsp?id=1476365>

³ More information on the Yogyakarta Principles can be found at: www.yogyakartaprinciples.org/

⁴ Yogyakarta Principles on the Application of International Human Rights Law in relation to Sexual Orientation and Gender Identity, p11-12.

- > taking all necessary legislative, administrative and other measures to ensure that procedures exist whereby all government-issued identity papers which indicate a person's gender/sex — including birth certificates, passports, electoral records and other documents — reflect the person's profound self-defined gender identity
- > ensuring that such procedures are efficient, fair and non-discriminatory, and respect the dignity and privacy of the person concerned
- > ensuring that changes to identity documents will be recognised in all contexts where the identification or disaggregation of people by gender is required by law or policy.

The United Nations

In December 2008, 66 nations at the United National General Assembly, including Australia, voted to adopt a *Statement on Human Rights, Sexual Orientation and Gender Identity*. The Statement reaffirmed that everyone is entitled to the enjoyment of human rights without distinction of any kind, reaffirmed the principle of non-discrimination which requires that human rights apply equally to every human being regardless of sexual orientation or gender identity, and called on states to commit to promote and protect the human rights of all persons, regardless of sexual orientation and gender identity.

On 17 June 2011 the United Nations Human Rights Council adopted a resolution on the human rights of lesbian, gay, bisexual and transgender persons,⁵ and requested the UN High Commissioner for Human Rights to report on 'discriminatory laws and practices and acts of violence against individuals based on their sexual orientation and gender identity'. In November 2011 the UN High Commissioner reported,⁶ and the UN Human Rights Council convened an expert panel to discuss the report at its 19th session on 7 March 2012.

European Union Agency for Fundamental Human Rights

In June 2007 the European Union Agency for Fundamental Human Rights (FRA) launched a two part project in response to a request from the European Parliament to develop a comparative report on homophobia and sexual orientation discrimination in the European Union (EU) Member States.

The first part is a legal analysis of homophobia and discrimination on grounds of sexual orientation in the EU member states. The resulting report, *Homophobia and Discrimination on Grounds of Sexual Orientation in the EU Member States Part I – Legal Analysis*⁷ contains a comparative legal analysis of the situation in the EU Member States. The FRA found that there has been a moderate expansion of legal protection. There has been an extension of non-discrimination legislation covering sexual orientation beyond employment in the Czech Republic and the UK, and in relation to the recognition of gender identity as autonomous grounds or as 'sex' discrimination, positive changes took place in the Czech Republic, Sweden and the UK. Equality bodies in Denmark and Estonia extended their mandate to cover sexual orientation discrimination.

The second part of the project is a comparative social analysis, *Homophobia and Discrimination on Grounds of Sexual Orientation and Gender Identity in the EU Member States: Part II - The Social Situation*⁸, based on data available throughout the EU. The report covers lesbian, gay, bisexual and transgender (LGBT) people in various areas of social and economic life such as access to employment, education and health care. It found that discrimination, harassment and violence against LGBT persons are widespread throughout the EU. The FRA

⁵ A/HRC/17/L.9/Rev.1

⁶ A/HRC/19/41

⁷ FRA, *Homophobia and Discrimination on Grounds of Sexual Orientation in the EU Member States Part I–Legal Analysis*, June 2008. Available at: http://fra.europa.eu/fraWebsite/lgbt-rights/pub_cr_homophobia_0608_en.htm. See also the 2011 update report at: http://fra.europa.eu/fraWebsite/attachments/FRA-2011-Homophobia-Update-Report_EN.pdf

⁸ FRA, *Homophobia and Discrimination on Grounds of Sexual Orientation and Gender Identity in the EU Member States: Part II - The Social Situation*, updated June 2009. Available at: http://fra.europa.eu/fraWebsite/research/publications/publications_per_year/2009/pub_cr_homophobia_p2_0309_en.htm

called on political decision-makers to further improve equality legislation and ensure accurate reporting, in order to improve the situation.

In November 2010 the FRA presented its report on homophobia, transphobia and discrimination on grounds of sexual orientation and gender identity⁹ to Members of the European Parliament, discussed below.

The European Court of Human Rights

The European Court of Human Rights (ECtHR), applying the *European Convention on Human Rights*, has ruled that states should provide transgender persons with the possibility of undergoing surgery leading to full gender reassignment, and that this surgery should be covered by insurance plans as 'medically necessary' treatment.¹⁰ The Court has also ruled that states should recognise the change of sex in identity documents.

In *Christine Goodwin v The United Kingdom* in 2002,¹¹ the Court accepted that there had been a breach of the applicant's rights to privacy and marriage due to her inability to gain legal recognition of her post-operative sex. The Court emphasised the significant impact on the life of the applicant (and others in a similar position) arising from the failure of the domestic legal system to properly recognise a change in sex following gender reassignment surgery. The Court said (at para 77):

It must also be recognised that serious interference with private life can arise when the state of domestic law conflicts with an important aspect of personal identity. The stress and alienation arising from a discordance between the position in society assumed by a post-operative transsexual and the status imposed by law which refuses to recognise the change in gender cannot, in the Court's view, be regarded as a minor inconvenience arising from a formality. A conflict between social reality and law arises which places the transsexual in an anomalous position, in which he or she may experience feelings of vulnerability, humiliation and anxiety.

Council of Europe

In July 2009 the Council of Europe Commissioner for Human Rights published an Issues Paper entitled *Human Rights and Gender Identity*. The Issue Paper reviewed existing practices on gender reassignment, and emphasised how transgender people suffer from violations of their human rights as a result of the combination of cumbersome and sometimes vague legal and medical requirements, and lengthy processes of psychological, psychiatric and physical tests such as genital examinations. It states that 'It is clear that many transgender persons do not fully enjoy their fundamental rights both at the level of legal guarantees and that of everyday life', and concludes that:

often transgender people choose not to enter the official procedures at all due to discriminatory medical processes and inappropriate treatment, or due to the fact that only one course of treatment is available. They are then, in turn, denied legal recognition of their preferred gender and name, or gender reassignment treatment that fits their own wishes and personal health needs.¹²

The paper recommends the enactment of hate crime legislation, expeditious and transparent procedures for changing name and sex, and the abolishment of sterilisation and other compulsory medical treatment as a legal requirement to recognise a person's gender identity.

9 FRA, Homophobia, transphobia and discrimination on grounds of sexual orientation and gender identity. Available at: http://fra.europa.eu/fraWebsite/research/publications/publications_per_year/pub-lgbt-2010-update_en.htm

10 Van Kuck v. Germany - 35968/97 [2003] ECHR 285 Available at: www.bailii.org/eu/cases/ECHR/2003/285.html

11 *Christine Goodwin v. The United Kingdom*, (Application no. 28957/95) 11 July 2002. Available at: www.worldlii.org/eu/cases/ECHR/2002/588.html

12 Thomas Hammarberg, Council of Europe Commissioner for Human Rights, Human Rights and Gender Identity. July 2009. Available at: <http://wcd.coe.int/ViewDoc.jsp?id=1476365>

Australian Capital Territory

The *Human Rights Act 2004* (ACT) ('ACT HR Act') guarantees recognition of certain civil and political rights in the Territory. Those relevant to people in the sex and gender diverse communities include:

Section 8 – the right to enjoy human rights without distinction or discrimination of any kind, and to equal and effective protection against discrimination on any ground.

Section 10 – the right not to be treated or punished in a cruel, inhuman or degrading way.

Section 12 – right not to have privacy, family, home or correspondence interfered with unlawfully or arbitrarily, nor to have reputation unlawfully attacked.

Section 16 – the right to freedom of expression.

Section 16 – the right when deprived of liberty to be treated with humanity and with respect for the inherent dignity of the human person.

Under s40B of the HR Act, a public authority must act in a way that is compatible with a human right, and when making a decision must give proper consideration to a relevant human right, unless required by law to do otherwise.

The *Discrimination Act* 1991, described above, is the extent to which there is provision for the right of sex and gender diverse people in the ACT to receive 'equal and effective protection against discrimination'.

Other Australian jurisdictions

Apart from the ACT, only Victoria guarantees recognition of certain civil and political rights, and the relevant provisions of the *Charter of Rights and Responsibilities Act 2006* (Vic) are substantially similar to those of the ACT HR Act.

In different terms, all jurisdictions make discrimination because of a person's sex and gender diversity unlawful, although the different terminology that is used may limit the scope of the protection.

1.5 International recognition of sex and gender diversity

The commitment to protecting the human rights of people in the sex and gender diverse communities is gathering momentum. Several countries have introduced schemes allowing individuals to change their legal sex without requiring reassignment surgery. The following overview deals with the some of those countries, alphabetically.

Argentina

On 30 November 2011 Argentina's new Gender Identity law defined 'gender identity' as 'the internal and individual way in which gender is perceived by persons, that can correspond or not to the gender assigned at birth, including the personal experience of the body. This can involve modifying bodily appearance or functions through pharmacological, surgical or other means, provided it is freely chosen. It also includes other expressions of gender such as dress, ways of speaking and gestures'.¹³

The law recognises a person's rights to recognition of their gender identity, to the free development of their person according to their gender identity, to be treated according to their gender identity, and to be identified in that way in the documents proving their identity in terms of the first name/s, image and sex recorded there. To change the record of their sex, a person must be 18 or, if under 18, must consent to have the application made by their legal representative. They must make a formal request for amendment of their birth certificate in

¹³ Translation source: Global Action for Trans*Equality at www.transactivists.org

the records and a new national identity card (with the same number as previously). The law is explicit in saying that 'in no case will it be needed to prove that a surgical procedure for total or partial genital reassignment, hormonal therapies or any other psychological or medical treatment has taken place'.

European Union

In November 2010 the FRA presented its report on homophobia, transphobia and discrimination on grounds of sexual orientation and gender identity¹⁴ to Members of the European Parliament.

The report revealed that in some EU countries, legislation and practice is increasing the protection of lesbian, gay, bisexual and transgender (LGBT) persons, while in others the rights of LGBT persons are being restricted or neglected. It found that some countries have amended their legislation and practice concerning access to gender reassignment treatment, and alteration of the recorded name or sex on official documents for those who have undergone or intend to undergo gender reassignment.

In an updated Fact Sheet 'Key legal trends in the protection of LGBT rights in the European Union 2008-2010', the FRA noted 'In relation to the recognition of gender identity as autonomous ground or as 'sex' discrimination, positive changes have been observed in the Czech Republic, Sweden and the UK.'¹⁵

Germany

In 2008 German Federal Constitutional Court struck down the provisions of the German 'transsexuellengesetz' or 'Transsexuals Law' which required proof of sex reassignment surgery and permanent infertility before a person could legally change their sex. The Court found that requiring reassignment surgery was a breach of the German Constitution specifically in relation to an individual's right to sexual self-determination and physical integrity.

The finding of the German Federal Constitutional Court reflects the March 2010 statement of the Committee of Ministers of the Council of Europe, which recommends that member states:

...take appropriate measures to guarantee the full legal recognition of a person's gender reassignment in all areas of life, in particular by making possible the change of name and gender in official documents in a quick, transparent and accessible way...¹⁶

The Committee also emphasises that '[p]rior requirements, including changes of a physical nature, for legal recognition of a gender reassignment, should be regularly reviewed in order to remove abusive requirements'.

Portugal

On 16 March 2011, law No.7/2011 established procedures for change of name and sex in the civil register in Portugal. The law does not require divorce, sterilisation, hormonal treatment or surgery as a condition for a person to officially change their gender. A report from a multidisciplinary team of experts, and subscribed by at least a physician and a psychologist, is required and can be presented to the civil registry with a request for an amended birth certificate. The civil registry officers have 8 days in which to grant the request, ask for amendments or deny the request if it does not meet requirements. The new law conforms to the Yogyakarta Principles (see above).

14 FRA, Homophobia, transphobia and discrimination on grounds of sexual orientation and gender identity. Available at: http://fra.europa.eu/fraWebsite/research/publications/publications_per_year/pub-lgbt-2010-update_en.htm

15 Key legal trends in the protection of LGBT rights in the European Union 2008-2010. Available at: http://fra.europa.eu/fraWebsite/attachments/FRA-Factsheet-Homophobia-Study-2010-FS2_EN.pdf

16 Recommendation CM/Rec (2010)5 of the Committee of Ministers to member states on measures to combat discrimination on grounds of sexual orientation or gender identity No IV(21). (Adopted by the Committee of Ministers on 31 March 2010 at the 1081st meeting of the Ministers' Deputies)

South Asia

Many cultures in South Asia have understandings of a ‘third’ gender. This has led to both legal recognition in some jurisdictions and to an increased level of discrimination.¹⁷ Legal recognition extends, for example, to passport recognition (it is possible to have ‘O’ registered for ‘other’ on Pakistani passports if applicants choose not to identify in the binary).¹⁸

Spain

Since March 15, 2007, the law in Spain allows transsexual people to modify their name and legal gender in all public documents and records on the basis of a personal request, regardless of whether they had genital reassignment surgery or not. However, medical (hormonal) treatment for at least two years and a gender dysphoria diagnosis are a prerequisite. The hormonal treatment is not a prerequisite if there are health or age reasons not to follow it.

United Kingdom

The UK *Gender Recognition Act 2004* was drafted in response to court rulings from the European Court of Human Rights. The UK Act gives sex and gender diverse people legal recognition as members of the sex appropriate to their gender (male or female) allowing them to acquire a new birth certificate, affording them full recognition of their acquired sex in law for all purposes, including marriage. The gender recognition process does not require applicants to undergo reassignment surgery. They do, however, need to demonstrate that they have suffered the medical condition of ‘gender dysphoria’, that they have lived in the ‘acquired gender’ for two years, and that they intend to continue doing so until death.¹⁹ People who have obtained legal recognition in recognised overseas jurisdictions may obtain recognition under the UK Act with reduced evidentiary requirements.

Applicants present evidence to a Gender Recognition Panel, which considers their case and issues a Gender Recognition Certificate. Successful applicants are entered onto a Gender Recognition Register, held by the Registrar General, similar in operation to the Adoptions Register for those who have been adopted.

If the person involved is in a legally-recognised marriage they will be issued an ‘Interim Gender Recognition Certificate’, which can then be used as grounds for annulment of the marriage, but otherwise has no status. After annulment, a full Certificate is issued.

A Birth Certificate drawn from the Gender Recognition Register is indistinguishable from any other birth certificate, and indicates the new legal sex and name. It can be used whenever a birth certificate is used, such as for issue of a passport. The record of birth that shows the previous legal gender continues to exist, and will carry no indication that there is an associated Gender Recognition Certificate or alternative birth certificate. Certain authorised agencies, with court permission, may have access to the Gender Recognition Register showing the links between these certificates, but the link is not accessible to the general public. This is the same approach as is taken under the UK Adoption Register.

17 For an overview of transgender and intersex people in South Asia see <http://thaiis.co.th/inis/References/Asia%20Pacific/Sanders%20D.%20%282008%29%20Third%20Sex%20Identi%20and.pdf>. For an overview of ‘hijra’ treatment in Pakistan and proposed changes to recognise them beyond the gender binary see www.guardian.co.uk/world/interactive/2010/jan/28/pakistan-transgender-hijra-wedding-dancers.

18 http://news.bbc.co.uk/2/hi/south_asia/8428819.stm

19 The two main exceptions are a right of conscience for Church of England clergy (who are normally obliged to marry any two eligible people by law), and that the descent of peerages will remain unchanged. Additionally, sports organisations are allowed to exclude transsexual people if it is necessary for ‘fair competition or the safety of the competitors’.

United States of America

States have jurisdiction over registration of births and gender/sex in the United States. This has led to a wide variety of provisions and approaches to the treatment of transgender and intersex people.²⁰ The United States has some leading approaches in some jurisdictions to transgender and intersex rights, but also has some 'retrograde' legislative frameworks.²¹

In June 2010 the US State Department announced new policy guidelines regarding gender change in passports. A person who presents medical certification that they have undergone 'appropriate clinical treatment for gender transition' may have a passport issued which shows their new gender. Sexual reassignment surgery is no longer required. Guidelines provide details about information the certification must include. A 'limited-validity passport' is available if the certification shows the person is in the process of gender transition.

Uruguay

In October 2009, Uruguay legislated to permit sex and gender diverse people to register a change of name and gender identity, and to obtain official documents such as a birth certificate and passport in that name and gender.

1.6 Australian context

There are no nationally consistent procedures to assist transgender, transsexual or intersex people who wish to change the record of their sex in official documents such as birth certificates, medical records, bank statements or employment records.

The Australian Human Rights Commission's 2009 *Sex Files Report* recommended that States and Territories adopt a consistent approach to legal recognition through a national approach to law reform. A consistent approach across Australia that enables sex and gender diverse people confirm their identity a cardinal document will make it simpler to amend the record of their sex on secondary documents and records.

Birth certificates and sexual reassignment

All Australian State and Territory jurisdictions require some form of sexual reassignment surgery to alter birth certificates. The High Court decision in *AB v Western Australia*, discussed below, has raised questions about the relevance of a surgery requirement to recognition of a person's gender identity.

The following table of Australian provisions for changing the record of sex is based on a table in the Australian Human Rights Commission's *Sex Files* report:

²⁰ See eg <http://www.transgenderlaw.org/ndlaws/>

²¹ For an overview of 'breaches' of international human rights instruments relating to LGBTI rights see eg Lesbian, Gay, Bisexual, Transgender and Intersex Human Rights in the United States A Shadow Report Violations Under the International Covenant on Civil and Political Rights www.globalrights.org/site/DocServer/LGBTI_SHADOW_REPORT_FIN.pdf?docID=5483

Criteria for requesting a change in sex noted on birth certificate²²

State/ Territory	Adults (18 or over) can apply?	Guardian of children (under 18) can apply?	Birth must be registered in the jurisdiction?	Must have undergone surgery to alter reproductive organs?	Must first obtain a gender recognition certificate	Authority must be satisfied as to other factors	Must be unmarried?
ACT	Yes	Yes	Yes	Yes	No	No	No
NSW							Yes
NT							
Qld							
SA			Yes, or the relevant surgery was carried out in SA		Yes	Yes	
Tas		Yes					
Vic		No	Yes, or the person must be a resident of Vic who lives in Vic and has done so for 12 months		No		
WA		Yes	Yes, or the person must be a resident of WA who lives in WA and has done so for 12 months, or the relevant surgery was carried out in WA		Yes	Yes	

1.7 Previous reports on sex and gender diversity in Australia

The issue of legal recognition of sex and gender diversity has been the subject of a number of reports and inquiries in the ACT and nationally.

2003 ACT Government Discrimination report

In 2003 the ACT Government tabled a report in the Legislative Assembly titled *Discrimination and Gay, Lesbian, Bisexual, Transgender and Intersex People in the ACT* ('2003 ACT report'). This report followed community consultations in the ACT and, among other issues, reported on the community's views on legal recognition.

²² Australian Human Rights Commission, *Sex Files: The Legal Recognition of Sex in Documents and Government Records*, Concluding Paper (March 2009), 16.

2007 Human Rights and Equal Opportunity Commission report Same-Sex: Same Entitlements

In 2006-7, the then Human Rights and Equal Opportunity Commission (now the Australian Human Rights Commission (AHRC)) undertook a *National Inquiry into Discrimination against People in Same-Sex Relationships: Financial and Work-Related Entitlements and Benefits* ('Same-Sex: Same Entitlements Inquiry'). The final report of the Same-Sex: Same Entitlements Inquiry was tabled in Parliament on 21 June 2007.

During the inquiry the AHRC received submissions from members of the sex and gender diverse communities about the discrimination they experienced. One of the principal concerns was that many people in the sex and gender diverse communities are not able to change the record of their sex in official documents or government records.

2008 Human Rights and Equal Opportunity Commission Issues Paper

On 9 May 2008, the then Human Rights and Equal Opportunity Commission (now AHRC) released an issues paper on sex and gender diversity²³. The paper sought the views of the sex and gender diverse communities about the most pressing human rights issues faced by people who are transgender, transsexual or intersex.

The Issues Paper outlined four broad areas of concern:

- > the ability to change or correct official and identity documents
- > health policy and services
- > protection from discrimination, and
- > education and awareness.

Responses to the Issues Paper noted that the issues are interrelated. For example, a discussion on the need for legal recognition and the ability to change documents also requires discussion about current health policy and a requirement for sexual re-assignment surgery. A majority of responses reported that having their sex or gender appropriately recorded (including the ability to not conform solely to a particular sex or gender) on official documents and records is a principal concern.

2008 Australian Human Rights Commission Consultation Report

In July 2008, the then Human Rights and Equal Opportunity Commission (now AHRC) released a report titled *Sex and gender diversity - Report of initial consultation*.²⁴ The report followed a series of public meetings held in Melbourne, Brisbane, Sydney, Perth and Canberra by the Human Rights Commissioner, Graeme Innes. These meetings were an opportunity for the Commissioner to report on the material gathered during the initial consultation and for members of the sex and gender diverse communities to raise specific issues. AHRC received 51 written responses from a range of individuals and organisations.

The responses relating to official and identity documents revealed that there are many situations when people in the sex and gender diverse communities need to present documents that contain information about their sex or gender. While Australia does have systems that enable the record on official documents to be changed, not all people in the sex and gender diverse communities can make use of those systems. For example the systems may:

- > not allow people who are married to change some or all of their documents.
- > not allow a change without having undergone reassignment surgery.
- > not offer legal recognition for people who do not identify as strictly male or female.

²³ *Sex and gender diversity: Issues paper*. May 2008. Available at: www.hreoc.gov.au/human_rights/lgbti/gender_diversity_paper.html

²⁴ AHRC, *Sex and gender diversity: Report of initial consultation*. July 2008. Available at: www.hreoc.gov.au/genderdiversity/consultation_report2008.html

Respondents suggested that the process for changing documents needs to be streamlined through a central agency, that the laws should be changed to follow the UK or Spanish system, and that documents should provide multiple options for sex or gender.

2008 Sex Files blog and discussion board

In August 2008, the AHRC launched an online blog and discussion board known as the *Sex Files*.²⁵ The blog provided an innovative online consultation with people in the sex and gender diverse communities and specifically sought discussion and debate on contentious issues concerning sex and gender diversity. Participants were able to post anonymously as a guest to the blog or to register as a participant and receive updates about the discussions. Over 9,000 unique visitors visited the Sex Files site, 389 comments were posted and 94 participants were listed as registered to the site.

2009 Australian Human Rights Commission Sex Files Report

In March 2009, the AHRC published the Sex Files report,²⁶ saying at 4.1: 'Sex and/or gender identity defines a person's sense of self and positions them in a social and political context. Every person has the right for their sex and/or gender identity to be recognised and respected'.

The report made 15 recommendations:

1. Marital status should not be a relevant consideration as to whether or not a person can request a change in legal sex.
2. The definition of sex affirmation treatment should be broadened so that surgery is not the only criteria for a change in legal sex.
3. The evidentiary requirements for the legal recognition of sex should be relaxed by reducing the quantity of medical evidence required and making greater allowance for people to self-identify their sex.
4. The special needs of children and young people who wish to amend their documents and records should be considered.
5. A person over the age of 18 years should be able to choose to have an unspecified sex noted on documents and records.
6. Information on the process and criteria for the legal recognition of sex should be easily accessible and user-friendly.
7. Documents of identity and processes required for the legal recognition of sex should not reveal personal information about a person's past identity in relation to sex.
8. Laws and processes for the legal recognition of sex should use empowering terminology.
9. Where possible, sex or gender should be removed from government forms and documents.
10. The federal government should consider the development of national guidelines concerning the collection of sex and gender information from individuals.
11. The federal government should take a leadership role in ensuring that there is a nationally consistent approach to the legal recognition of sex in accordance with the recommendations of this paper, by either:

²⁵ The Sex Files blog closed on 5 December 2008. Past posts are available at: www.hreocblog.com/genderdiversity/viewforum.php?f=2

²⁶ HREOC, *Sex Files: the legal recognition of sex in documents and government records. Concluding paper of the sex and gender diversity project*. March 2009. Available at www.hreoc.gov.au/genderdiversity/sex_files2009.html

- i. working cooperatively with state and territory governments through the Council of Australian Governments (COAG) process to amend their respective legislation and policies in line with the recommendations in this paper, particularly in relation to birth certificates, or
 - ii. establishing a national board with responsibility for receiving and determining applications for official recognition of a change in sex.....as well as securing agreement from states and territories to recognise certificates of recognition issued by such a board.
12. The federal government should consider establishing a national office to advise and assist the public and federal government in relation to changing legal recognition of sex, as an alternative or precursor to the national board put forward in Recommendation 11.
13. In the event that Recommendation 11 fails to result in sufficient support from state and territory governments, the federal government should consider legislation to:
 - i. amend the *Sex Discrimination Act* 1984 (Cth) to ensure that the protection against marital status discrimination applies in the context of married persons seeking to amend their birth certificates, to effectively override the existing discrimination under state and territory births registration legislation
 - ii. establish a minimum national standard in respect of legal recognition of sex in documents and government records in line with the recommendations in this paper.
14. The federal government should harmonise policies, procedures and legislation relevant to the legal recognition of sex in federal documents and records.
15. The federal government should take immediate steps to ensure that all federal government departments and agencies provide clear and accessible information relevant to legal recognition of sex in documents and records and how those documents and records can be amended, such as by including a page on the department or agency's website dedicated to this topic.

2010 ACT Human Rights Commissioner's advice

In 2009, the ACT Attorney-General asked the ACT Human Rights Commissioner, Dr Helen Watchirs, inquire into human rights and discrimination issues faced by people in the ACT sex and gender diverse communities, and on 16 March 2010 the Commissioner advised about issues relevant to the operation of the *Human Rights Act 2004* ('HR Act').²⁷ The advice focussed on a particular aspect of the official recognition of change of sex under the *Births, Deaths and Marriages Registration Act 1997* ('BDMR Act'), and options for law reform to ensure consistency with international human rights standards.

2011 A Gender Agenda report Gender Diversity in the ACT: A Survey of Trans Experiences

In May 2011, the organisation A Gender Agenda ('AGA') released a survey and report *Gender Diversity in the ACT: A Survey of Trans Experiences*.²⁸ The report was based on a community-based survey of the issues facing people in the sex and gender diverse communities in the ACT, including access to health care services and legal recognition of sex and/or gender and identity documents. There were 83 respondents to the survey, all of whom self-identified as sex and gender diverse. Respondents ranged from 16 to 61 years of age, with most respondents aged between 19 and 44 years; six respondents were under 18 years of age. Issues that emerged concern:

- > access to informed and respectfully-delivered medical and psychological services

²⁷ *Gender Diversity and the Births, Deaths and Marriages Registration Act 1997 (ACT)*. March 2010. Available at: www.hrc.act.gov.au/res/Advice%20on%20births%20deaths%20and%20marriages%20provisions%20Public%20Copy.pdf

²⁸ A Gender Agenda, *Gender Diversity in the ACT: A survey of Trans Experiences*. May 2011. Available at: www.genderrights.org.au/Downloads/Gender_Diversity_in_the_ACT.pdf

- > inadequate access to appropriate identity documentation
- > the need for protection from discrimination
- > lack of social connection with family and the broader community, and
- > over-representation in low income categories despite above average levels of education.

1.8 Recent developments in Australia

High Court

In October 2011, the High Court decided that under the *Gender Reassignment Act 2000 (WA)* legislation, transgender people have the right to have their gender recognised after undergoing medical or surgical procedures, even if not all of their reproductive organs have been altered.²⁹ The Court decided that the test for receiving a gender recognition certificate is not whether a person has undertaken every surgical procedure available, but whether they have altered their gender characteristics sufficiently to be identified as the opposite sex; this requires consideration of their physical characteristics (including appearance, behaviour and lifestyle) both in private and public, but does not require knowledge of their bodily state or ‘remnant sexual organs’.³⁰

Passports

In 2011, the Australian Passport Office issued a policy which enables people to obtain a passport that records their chosen sex and gender identity. The policy is of considerable relevance to this inquiry, and is discussed in detail below.

²⁹ *AB v Western Australia* [2011] HCA 42

³⁰ See a summary at www.hrlc.org.au/jurisdiction/australia/b-v-western-australia-2011-hca-42-6-october-2011/

PART 2 – THE CURRENT INQUIRY

2.1 Issues for sex and gender diverse people in the ACT

Reports and inquiries since 2003 – noted in Part 1.7 above – make it clear that people in the sex and gender diverse communities, and in the ACT no less than elsewhere in Australia, are adversely affected by a number of statutory provisions, such as those relating to identity, to recognition, and to access to government services.

On 16 May 2011, as part of its inquiry, the ACT Law Reform Advisory Council (LRAC) published an issues paper, *Legal Recognition of the Sex and Gender Diverse Community in the ACT*.³¹ Based on the reports and inquiries noted above, the Issues Paper identified the following matters that relate to the terms of reference of the inquiry, that is, to ‘steps necessary to provide for legal recognition of transgender and intersex people’ in the ACT.

Terminology

Whether the term ‘sex and gender diversity’ adequately captures the diversity of ways in which people may wish to identify themselves, and whether there are other terms which capture this diversity.

Definitions in ACT laws

Whether the current definitions in ACT law exclude any sex and gender diverse people and, if so, whether the definitions be more inclusive and whether the other terms which could be defined

Whether it is necessary to define different genders and sexes in ACT legislation.

Self-identification

Whether self-identification – such as the measures introduced through the *Legislation (Gay, Lesbian and Transgender) Amendment Act* – is an effective way to recognise sex and gender identity.

Notification and registration of births generally

Whether it is necessary, when notifying the Registrar-General of a birth or registering that birth, to specify the sex of a child.

Whether it is necessary, when notifying or registering a birth, to specify the child’s sex within the same time limits.

Notification and registration of intersex births

Whether, when notifying the Registrar-General of a birth or registering that birth, there should be the option of recording the child’s sex as something other than ‘male’ or female’ and if so, what other category is appropriate.

Intersex decisions at birth

When, how and by whom a decision about surgery for an intersex child should be made.

Correcting the register

Whether the provisions of the *BDMR Act* which allow for change of sex, and for correcting the register, provide sufficient opportunities for intersex people to correct the birth registry in the event their sex is incorrectly identified at birth.

31 LRAC, *Issues Paper: Legal Recognition of the Sex and Gender Diverse Community in the ACT*. May 2011. Available at: <http://justice.act.gov.au/page/view/2188>

Changing the record of sex and gender identity

Whether it should be possible for a person to change the record of their sex on the register to another category other than 'male' or 'female', or to remove the record of their sex and, if another category, what that other category should be.

Whether the Registrar-General should be able to issue a certificate of change of sexual identity only for people whose births are registered in the ACT and if so, how an alternative system could work.

Sexual reassignment surgery

Whether the current requirement of 'sexual reassignment surgery' for a person to change their sex on the birth register should continue and, if not, what evidence a person should be required to provide in order to change the record of their sex on the birth register.

Relevance of sex and gender identity

Whether sex- or gender-specific services are appropriate in some circumstances (eg. housing, sports, health services) and, if so, what evidence of a person's sex or gender identity should be required to access such services.

Sex identity in ACT records

Whether, it is necessary for ACT government documents other than a birth certificate to record a person's sex.

Change of name

Whether there is a risk that a person's sex or gender status will be revealed as a consequence of their having a change of name.

Access to the record of sex identity

Whether anyone should have access to the record of a person's sex as it was recorded in the register before the record was changed and, if so, who.

Reciprocal recognition

Whether a person who has changed of the registration of their sex in one State or Territory has difficulty having that change recognised in another.

Sex and gender recognition certificates

Whether the ACT should introduce a sex and gender recognition certificate for people born in the ACT which can be used as a conclusive proof of a person's sex identity among other State and Territory governments.

Whether a person who wants to apply for such a certificate should have some specified status in the ACT (eg born in the ACT, resident for a period, visitor, etc.).

What evidence a person applying for such a certificate should be required to prove of their change of sex and gender.

Whether this sex and gender recognition certificate should be instead of, or in addition to, reforms to allow change of sex to ACT birth certificates.

Commonwealth government functions, services and records

Which Commonwealth government functions and services take notice of the ACT's record of a person's sex and gender identity.

For which Commonwealth government records might a person who was born in the ACT want to change their sex and gender identification.

Practical recognition and acceptance

What steps other than reforms to the law will promote recognition and acceptance of people's sex and gender identity.

2.2 Consultations

Public submissions

In the period 16 May– 22 June 2011, 24 submissions were received by post and by email; no submissions were received on the telephone submission line. A public meeting was convened on 11 May 2011 at the Griffin Centre, Canberra City, and was attended by 27 members of the public.

Many submissions were made in confidence, on condition that the submitter is not identified. Nevertheless, some of those submitters agreed to their submissions being published online, and they are available at <www.lawreform.act.gov.au>. As well as confidential submissions, submissions were made by:

- > ACT Human Rights and Discrimination Commissioner
- > Australian Christian Lobby
- > AIDS Action Council ACT
- > AIS Support Group Australia
- > ACT Greens
- > A Gender Agenda, jointly with the Women's Legal Centre

The majority of submissions received object to the male/female binary in government documents and requirements; these submissions generally relied on a distinction between 'sex', referring to physical and biological indicators elements, and 'gender', referring to social construct that need not be limited to the male/female binary.

Submissions consistently emphasise the important distinction between intersex people and people with transgender identities. Some submissions that oppose broadening gender identity beyond the male/female binary nevertheless support recognition of the identity of intersex people.

Some submissions note the discrimination faced by people who identify as intersex or as transgender. Submissions complain that requests for gender identity occur frequently, and often unnecessarily, leading to discrimination. The unfairness of being asked about gender identity is exacerbated by the onerous legal requirements that exist to allow for a formal change of gender identity.

'For a long time our governments and society have viewed sex/gender as a binary system which is fixed for life. There has been some recognition that intersex states exist and that individuals may change gender expression/presentation over time. The reality is very complex and viewing a complex reality through a binary M/F lens results in ambiguities, absurdities and injustices.' *Individual Submission*

A number of submissions address issues around the recording of sex at birth, arising especially when it is apparent at birth that a child is intersex. Some submissions called for a relaxation of the time period required to register a new-born child's sex, and some called for allowing the decision to register a child's sex to be made by child perhaps as late as when they reach adolescence. A minority of submissions received called for the current system of registration of sex at birth to be maintained.

A significant majority of submissions call for the abolition of the current condition of reassignment surgery for the registration of a change of sex. Submissions were received from individuals who have had the 'expensive,

unnecessary and dangerous' surgery, and from those who have not had the surgery because of cost and health concerns. A number of submissions refer to the 'socially constructed' nature of gender, and point out that surgery makes no difference to actual gender presentation or to a person's own gender identity. This foreshadowed the view taken by the High Court, described above.

'It's cruel, inhumane and totally unjust to make people have surgery to be recognized, when surgery isn't an option for so many people for medical or monetary reasons or whatever their self-belief. Not being able to have the correct gender on certain documentation makes me feel uncomfortable and apprehensive about entering certain services. Which services? Anything I'd have to show my drivers license for!' *Individual submission*

A few submissions oppose any change to the existing legislative provisions for registration of a change of sex. This objection is based on the 'clinical' classification of transgender identity as a psychological 'disorder', and an argument that such a disorder should not be entrenched in legal provisions.

'[A]ny departure from a traditional understanding [of gender] is to be avoided where possible and approached with extreme caution where not'. *Submission from Australian Christian Lobby*

A number of submissions raise issues that were beyond the ambit of the reference for this inquiry. People identifying as being transgender noted the importance that local groups such as *A Gender Agenda* play in providing support services, education to the broader ACT community, and social opportunities for transgender people in Canberra. Some submissions call for financial support to be provided by the ACT government to allow this work to continue.

Some submissions raise experiences of discrimination and hardship experienced in other jurisdictions. One submission provides lengthy documentation of discrimination experienced when applying for access to services and a change in name and gender in Victoria.

Another submission records what was required when the person changed their gender in the United Kingdom, and how this change was then treated by the Australian government.

Some submissions did not address the issues raised in the paper but instead noted either their broad support for, or broad opposition to, changes being implemented by the ACT.

Experts and stakeholders

LRAC consulted confidentially with medical practitioners, and with ACT public authorities including the Office of Regulatory Services, and the Directorates of Health, Justice and Community Safety, Education and Training, Community Services, and Territory and Municipal Services.

These consultations were an important step towards understanding the practical considerations that arise when giving effect to a principled commitment to legal recognition.

2.3 Discussion of the issues

Terminology

In general discussion and in legislation, it is desirable that consistent terms are used to adequately and appropriately refer to people who identify as other than simply 'male' and 'female'.

The terms of reference for the current inquiry refer to ‘transgender and intersex people’, which are terms currently used in ACT law. The term ‘gender and sex diverse community’ was used in the 2009 Australian Human Rights Commission *Sex Files* report.

‘Gender diversity’ is the term used by the community group A Gender Agenda, and the term ‘gender diverse’ is used by the ACT Human Rights Commissioner in her submission to this inquiry.³² Current United Nations human rights terminology is limited to ‘transgender’.

The constitution of the National LGBTI [lesbian, gay, bisexual, transgender and intersex] Health Alliance uses the term ‘sex and gender diversity’, and a majority of submissions to the inquiry agreed that the term ‘sex and gender diverse’ is appropriate terminology.

It is the view of the Council that reference should consistently be made to ‘sex and gender diversity’, ‘sex and gender diverse people’, and ‘people in sex and gender diverse communities’. [Rec 1]

When necessary, specific reference should be made to ‘transgender’, a ‘transgender person’, and ‘transgender people’ to refer to people who, having been born as physiologically either male or female, have changed or are changing their identity from one sex and gender to another. [Rec 2]

When necessary, specific reference should be made to ‘intersex’, an ‘intersex person’, and ‘intersex people’ to refer to people who, because of their physiological characteristics at birth, do not identify as only female or only male. The term intersex should not be used to refer to or include people who have changed or are changing their identity from one sex and gender to another. [Rec 3]

Definitions in ACT laws

The terms ‘transgender’ and ‘intersex’ are defined under sections 169A and 169B of the *Legislation Act 2001* set out above. As already noted, the definition of an intersex person characterises their sex as a medical ‘condition’ which departs from the binary sexual identity of female and male.

Submissions to this inquiry are consistent with previous reports, which note the limitations of the binary approach to defining sexual identity. The binary fails to recognise people who are intersex and whose identity is beyond the binary.

There are currently no definitions of ‘male’ or ‘female’ in ACT legislation. In her submission to the inquiry, the ACT Human Rights Commissioner noted that this exclusion normalises these two genders, which are then given their ordinary binary meaning. As noted above, the *Discrimination Act 1991* similarly relies on the female/male binary when defining ‘gender identity’. In the Commissioner’s view, ‘[i]t would improve the integrity of demographic measurements to expand the definitions of gender and sex in ACT legislation’.³³

Despite extensive calls in submissions to this inquiry to ‘break the binary’, there is also a significant desire on the part of people who have changed their sex and gender identity to have their chosen sexual identity recognised within the binary. A person who has transitioned from one sex to another usually wants their ‘new’ sexual identity to be respected. As well, submissions show that some people who are in the process of transitioning from one sex to another also want their transitioning sexual identity to be respected, as do those who are not intersex but who choose to live with no sexual identity or officially as ‘no sex’.

It is the view of the Council that it is not necessary or appropriate to define ‘female’ or ‘male’ in ACT legislation. Those terms do have an ordinary binary meaning and legislation is not necessary to confirm that. It is, however, appropriate to define terms of sex and gender diversity that are outside

32 ACT Human Rights and Discrimination Commissioner, *Submission to LRAC 2 IP: Legal Recognition of the Sex and Gender Diverse Community in the ACT*. July 2011. p1

33 ACT Human Rights and Discrimination Commissioner, *Submission to LRAC 2 IP: Legal Recognition of the Sex and Gender Diverse Community in the ACT*. July 2011. p13

these binary terms, so that diverse sex and gender identity is given recognition as a part of a process of its being normalised. [Rec 4]

It is the view of the Council that the definition of ‘transgender’ in the *Legislation Act 2001* is appropriate and sufficient. [Rec 6]

It is the view of the Council that in the definition of ‘intersex’ in the *Legislation Act 2001*, reference to a ‘genetic condition’ as the reason for a person’s intersex status is inappropriate, and that it is sufficient to refer to the fact that an intersex person’s reproductive organs or sex chromosomes that are not exclusively male or female. [Rec 7]

It is the view of the Council that, to give legal recognition to sex and gender diverse people who are not defined by the female/male binary, wherever the *BDMR Act* and *BDMR Regulation* refer to two sexes, male and female, they should be amended to recognise three sex and gender identities: female, male and intersex. [Rec 9]

It is the view of the Council that the *BDMR Act*, which refers throughout to ‘transsexual’ people, and the *Discrimination Act* which refers in section 7, 66 and 67 to the attribute of ‘gender identity’, should be amended to replace those terms with reference to sex and gender diverse people, and to sex and gender diversity, unless it is necessary to refer specifically to transgender people and intersex people. [Recs 10 and 26]

Self-identification

Self-identification alone is not accepted under any Australian law as sufficient evidence to enable a change of sex in the register.

Research conducted by A Gender Agenda, in their 2011 study of experiences of the sex and gender diverse communities in the ACT, reveals that most respondents (64 per cent) believe that the record of a person’s sex should be changed on the basis of making a statutory declaration stating their self-identification as a particular gender; 27 per cent of respondents felt that, in addition, the production of some form of ‘letter of support’ from a medical or psychological professional should be required; and 6 per cent of respondents believed that some non-surgical medical intervention should also be required.

As noted above, self-identification is sufficient in the ACT for purposes of meeting the definitions of transgender in the *Legislation Act 2001* and of gender identity in the *Discrimination Act 1991*.

The question of self-identification as a basis for recording a change in a person’s sex and gender identity is discussed further below under ‘Proposed criteria for changing sex and gender identity in the ACT’.

It is the view of the Council that self-identification is an available option as a sufficient threshold for legally recognising a person’s change of sex and gender identity, discussed further below. [Rec 20]

Notification and registration of births generally

Under s5 of the *BDMR Act*, the birth of a child in the ACT must be notified to the Registrar-General within seven days, and within 48 hours for stillbirths. It is an offence not to notify the Registrar-General of a birth with the specified information. The notification must provide specified information which includes the child’s sex (s4(1)(b) *BDMR Regulation*).

Under ss7-14 of the *BDMR Act*, the birth of a child in the ACT must be registered (as well, the birth of a child born during a flight to an ACT airport, and of a child born outside Australia whose birth has not been registered in another country and who becomes a resident of the ACT, may be registered in the ACT). It is an offence to not register the birth of a child born in the ACT within 60 days. The entry in the register must record the child’s sex (s4(1)(b) *BDMR Regulation*).

Under s69 of the *BDMR Act*, the forms for notification and registration of a birth – ‘Notification of Birth not Occurring in a Hospital’ (Form 218) and ‘Birth Registration Statement’ (Form 201) – are legislative instruments that must be complied with. The forms currently require that the sex of a child be marked as either ‘male’ or ‘female’. Similarly, hospitals must electronically notify the Registrar-General of a birth. The electronic notification protocol requires a hospital to enter the sex of the newborn child as ‘male’ or ‘female’.

Except for the birth of an intersex child, discussed below, these notification and registration requirements are unremarkable. However, because of considerations that arise on the birth of an intersex child, the Council recommends extending the time periods for notification and registration. This is addressed in the following section.

It is the view of the Council that for reasons relating to the birth of an intersex child (discussed below), the time periods for notification and registration of a birth of child under the *BDMR Act* should be extended. [Recs 8 and 14]

It was submitted to this inquiry that the sex of a child should not be recorded at all. The Council is aware, however, of the requirements of the national framework for registry documentation, under which all Australian jurisdictions mutually recognise each other’s cardinal documents, and is aware of the use made by governments of data relating to the distribution of sex and gender identities in planning public services. For example, under the Parliamentary Agreement for the 7th Legislative Assembly ACT, at Appendix 2, 11.6, the ACT Government has agreed to ‘[p]hase in the publication of gender impact statements and gender disaggregated data associated with ACT Government legislation, policies, budget and annual reports’. This is not possible without the collection of data relating to sex and gender identity.

It is the view of the Council that the sex of a child born in the ACT should continue to be recorded by the Registrar-General, subject to recommendations for changes to the timing for notification and registration, and to the available categories of sex. [Rec 8]

It is clear that any provisions for registering a child’s sex at or soon after their birth must be complemented by the opportunity to later amend that record. That is in fact the case in the ACT, but the options at this stage are limited to the female/male binary. As a result, an intersex person who does not identify with the sex recorded for them at birth is able to change the record of their sex to the other sex in the binary, but not to ‘intersex’. That issue is addressed in the following section.

Notification and registration of intersex births, and decisions at birth

As noted above, there is currently no option under the *BDMR Act* to notify or register an intersex birth. The birth notification and registration requirements limit the recording of a child’s sex to the female/male binary, precluding the opportunity for parents to register a child’s sex as ‘intersex’. The binary in the register persists during a person’s life so that a person who later learns that they are intersex, and wants their intersex status to be recognised, cannot later change their sex to ‘intersex’.

It is not always apparent from physical observation that a child is intersex, and a child’s being intersex may not be known until the results of tests are known. Intersex status can be a question of degree, and many intersex people comfortably identify as either female or male; some people living as female or male are unaware of their being intersex.

There are occasions when a child’s intersex status is known at or soon after their birth. Immediate surgery may be required for any intersex child to address a health- or life-threatening physiological phenomenon, such as not having a functioning urinary tract. But leaving aside that necessary medical intervention, for a child who is known to be intersex at or soon after their birth, the legislation requires a decision must to be made, within short time limits, to record the child’s sex within the female/male binary.

Parents may choose not to register their child as intersex, and it is common for parents, in consultation with medical practitioners, to assign a gender identity to an intersex child; this often involves surgery and medical treatment to 'confirm' the chosen gender identity.³⁴ The chosen gender identity is the 'sex' that is recorded when formally notifying and registering the child's birth. It will not be known until the child matures whether the assigned sex which was assigned at birth and implemented through surgery and medical treatment, does in fact accord with the child's gender identity.

There are no specific laws or policies in ACT law or in the ACT public health system about procedures in relation to intersex surgery for children. Decisions on this issue are made by the person with long-term care responsibilities for the child, usually the parents (s.20 *Children and Young People Act 2008*) in consultation with a medical practitioner. As the Australian Human Rights Commission discussion paper points out, there is some uncertainty over the respective roles of parents and medical practitioners when deciding what if any surgery should be carried out on an intersex child, and over the question of consent. Anecdotes suggest that some decisions are made without a high level of information to, and consultation with, the parents of an intersex child, and that an intersex child might be assigned the physical attributes of a sex through surgery and treatment without fully considering what the child's gender identity could be.

Submissions to this inquiry, previous reports, and research suggest that parents and medical practitioners need to be given the opportunity to inform themselves about intersex status, to give substantial consideration to what if any steps they should take to confirm a particular sex and gender identity for their child, and to decide at what stage, if at all, those steps should be taken. The current time limits add considerably to the pressure on parents in having to make unexpected decisions about their child's sex and gender identity. As well, the time limits suggest to medical practitioners that they must see that steps are quickly taken to 'resolve' a child's sex.

Under s9 (2)(b) *BDMR Act*, the Registrar-General may accept a birth registration statement which does not record the child's sex when it is 'not practicable to obtain the missing particulars'. In those circumstances, the child's sex can be recorded as 'Indeterminate' in the birth register, and a birth certificate can also be issued to that effect. However, in practice, this provision is used only to register the birth of a stillborn child who dies so prematurely that their sex cannot readily be determined.

It may be that a child who is intersex will not be aware of their actual sex and gender identity at least until they are in adolescence. From time to time the Family Court is asked to make decisions relating to medical treatment that will help a child change their sex and gender identity.³⁵ In the ACT a person is able to amend the record made at birth of their sex, but the options are limited to the female/male binary. An intersex person who does not identify with the sex recorded for them at birth, or its binary opposite, but identifies as intersex, is not able to change the record of their sex to reflect their true gender identity.

It is the view of the Council that the sex of a child when it is *notified* (s5 *BDMR Act*; S 4(1) *BDMR Regulation*) should be any of female, male, intersex, to be advised, or indeterminate. These options allow time for parents and guardians to understand more fully their child's sex and gender in cases when it is apparent that the child is intersex. The option 'to be advised' allows parents and guardians to consult with medical practitioners and decide on a child's sex at some time after the birth. [Rec 11]

34 See the Australian Human Rights Commission discussion paper 'Surgery on intersex infants and human rights', July 2009 at www.hreoc.gov.au/genderdiversity/surgery_intersex_infants2009.html

35 eg, *Re: Jamie (Special medical procedure)* [2011] FamCA 248, and see www.smh.com.au/national/health/turning-point-for-sexchange-teens-20120210-1sic4.html; www.smh.com.au/national/parents-fight-for-right-to-manage-childs-gender-20120206-1r1wp.html; *Re: Bernadette* [2010] FamCA 94, and see www.smh.com.au/nsw/court-gave-teen-the-right-to-change-gender-from-boy-to-girl-20100305-popg.html; *Re: Alex* [2009] FamCA 1292, and see www.smh.com.au/national/court-supports-girls-wish-to-be-a-boy-20090503-arga.html.

It is the view of the Council that 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 when a child is or could be intersex, in which case one of the other four categories should be used. [Rec 12]

It is the view of the Council that at the time that the sex of a child is notified as ‘intersex’ or ‘to be advised’, the parents and any health practitioners involved in caring for the child should be provided with printed information, advice and resources, developed in consultation with representatives of the intersex community and expert health practitioners, which explain intersex and set out considerations for decisions that can be made about the child’s sex and gender identity. [Rec 13]

It is the view of the Council that the current 60 days allowed for the *registration* of the sex of any child (ss9 and 11 *BDMR Act*; S 5 *BDMR Regulation*) should be extended to 180 days. [Rec 14]

This allows parents the opportunity to inform themselves about intersex status, and to obtain advice about what if any steps they should take to confirm a particular sex and gender identity for their child, and at what stage if at all those steps should be taken. At any stage thereafter, the parents or child will be able to amend the recorded sex by correcting the register (see below).

It is the view of the Council that to give legal recognition to intersex people, the available categories for the registration of a person’s sex should be any of female, male, intersex and indeterminate. [Rec 15]

The category of intersex will ensure that if a decision was made to assign the sex ‘female’ or ‘male’ to an intersex child at or after their birth, and it later becomes apparent that the assigned sex does not align with the child’s sex and gender identity, it is possible for the child, at a later stage of their life, to alter the record of their sex not only to male or female as the case may be, but also to intersex. As noted above, the category of ‘indeterminate’ should be used only when it is not possible to determine the sex of a premature still-born child.

Correcting the register

Under Section 24 of the *BDMR Act* a person is able to change the record of their birth sex only if they were born in the ACT and have undergone ‘sexual reassignment surgery’; similarly, a parent or guardian of a child may apply to change the record of a child’s sex when the child’s birth is registered in the ACT and the child has undergone sexual reassignment surgery.

An application can be made to change the record of sex from male to female or from female to male. The Registrar-General must decide to refuse or agree to an application, and a decision to refuse can be reviewed by the ACT Civil and Administrative Tribunal (Schedule 1 *BDMR Act*).

Under s40 of the *BDMR Act* the birth register can be corrected by the Registrar-General to bring an entry ‘into conformity with the most reliable information available’. Although this allows an intersex person whose birth is registered in the ACT to change the record of their sex which was made at birth, if they provide reliable information as to their intersex status at birth it is not possible for an intersex person to identify their sex as ‘intersex’.

If effect is given to the Council’s view, above, that the available categories for the registration of a person’s sex should be any of female, male, or intersex, an intersex person will be able to change the record of their birth sex appropriately. Alternatively, an intersex person will be able to rely on the procedures for changing the record of their sex, discussed below.

Changing the record of sex

Section 24 of the *BDMR Act* allows a person to apply to change the record of their birth sex under certain conditions. The conditions under which a person may apply to change the record of their birth sex are that they were born in the ACT, they are at least 18 years old or are represented by their parent or guardian, and they have undergone 'sexual reassignment surgery'. A previous requirement that the person be 'unmarried' was removed in 2009.

The requirement that the person was born in the ACT is necessary, as the Registrar-General has the power to change the records only of people born in the ACT. The position of people in the ACT who were born outside the ACT is discussed below, where the Council suggests a certification procedure. The requirement that a person undergo sexual reassignment surgery is highly controversial, and is discussed below, where the Council states its view that the requirement should be abolished.

Under s27, if the Registrar-General agrees to change the record of sex, a new birth certificate is issued which records that changed sex, but which does not include words which indicate that the person has changed sex. This revised birth certificate can be used as conclusive evidence of a person's sex for any law in the ACT (s.29(1) *BDMR Act*).

Because of the currently high threshold for establishing a new sex and gender identity (reassignment surgery), the Office of Regulatory Services is comfortable that there is a low risk of fraud when it issues a birth certificate that does not track the history of changed gender identity, that is, a low risk of someone obtaining a new certificate with a new identity while still able to present as a person of the birth sex. The original certificate showing their birth sex is invalidated for purposes of the national Certification Validation Service (CVS) which the Commonwealth Attorney-General's Department operates on behalf of the Council of Australasian Registrars of Births, Deaths and Marriages. That invalidation will, however, be known only to agencies with access to the CVS; agencies which accept a birth certificate on its face are always vulnerable to fraud.

If effect is given to the Council's view, above, that the available categories for the registration of a person's sex should be any of female, male, or intersex, a person will be able to apply to change the record of their birth sex to any of those categories. The current Application Form (Form 204 – approved form AF 2011-118 under the *BDMR Act* (s69)), for example, will require re-drafting as it currently recognises only two sexes, male and female.

The Council notes the scope of s29(1) *BDMR Act*, which states that a certificate is conclusive evidence of the person's sex 'for the purposes of any territory law'.

It was submitted to this inquiry that as well as being able to issue a certificate which shows a person's changed sex, the Registrar-General should be able to issue a certificate which does not show a person's sex, that is, which shows a person's sex as 'unspecified', or as a blank. This would give some recognition to people who are in the process of changing their identity from one sex and gender to another ('transitioning'), and to those who do not identify as having a sex. It would not be available to people who simply do not wish to have their sex recorded.

In consultations, ACT public authorities advised that they would not be comfortable relying on such certificates as proof of identity. The Office of Regulatory Services expressed concern that a new birth certificate which shows a person's sex as 'unspecified', or as a blank, may not comply with the CVS. Research for this inquiry shows, however, that the validation fields for CVS do not include sex and/or gender, and so the absence of a record of sex – or a statement that sex is unspecified – does not appear to be a barrier to CVS compliance.

As discussed below, the Passport Office will now issue a passport which shows a person's sex as X, indicating that a person's sex is 'indeterminate, unspecified or intersex'. Although it is possible that a passport will show a person's sex as X, a passport is a valid document for purposes of the national Document Verification Service, operated by the Commonwealth Attorney-General's Department as part of the National Identity Security Strategy.

It is the view of the Council that the Registrar-General should be empowered to issue a birth certificate which shows a person's sex as 'unspecified', in circumstances where a person is in the process of changing their identity from one sex and gender to another ('transitioning'), or does not identify as having a sex. [Rec 16]

Sexual reassignment surgery

The current requirement

Under Section 24 of the *BDMR Act* a person must undergo 'sexual reassignment surgery' to apply to alter the record of their sex.

'Sexual reassignment surgery' is defined to mean:

a surgical procedure involving the alteration of a person's reproductive organs that is carried out (a) for the purpose of assisting a person to be considered to be a member of the opposite sex; or (b) to correct or eliminate an ambiguity relating to the sex of the person.

This requirement is more onerous than, for example, the Western Australian requirement that was considered by the High Court in the case of *AB* (above), because it requires 'a surgical procedure' rather than allowing 'a medical or surgical procedure'.

A person must provide the Registrar-General with a statutory declaration from each of two doctors verifying that the person has had 'sexual reassignment surgery', and some additional information (s6 of the *BDMR Regulation*).

Previous reports, international developments, human rights considerations, the recent High Court case of *AB*, and submissions to and consultations by this inquiry leave the Council in no doubt that the requirement for sexual reassignment surgery as a prerequisite for legal recognition of a change of sex should be abolished.

The surgery is expensive, invasive and discriminates against people who choose not to – or are unable to – have surgery. As well, the surgery is irrelevant to an intersex person who wants to correct the mis-assignment of sex. In any event, as evidence canvassed in the High Court case of *AB* makes clear, the surgery cannot fully re-assign sexual organs. The requirement that a person must undergo 'sexual reassignment surgery' to apply to alter the record of their sex can rightly be said to be 'inhuman';³⁶ it violates a person's human rights to privacy and to bodily integrity, the right to freedom from torture, and the right to equal legal status unless they submit to invasive medical procedures.

As noted above, self-identification is sufficient in the ACT for purposes of meeting the definitions of transgender in the *Legislation Act 2001* and of gender identity in the *Discrimination Act 1991*. The question of self-identification as a basis for recording a change in a person's sex and gender identity is discussed further below under 'Proposed criteria for changing sex and gender identity in the ACT'.

It is the view of the Council that the requirement in the ACT for a person to undergo sexual reassignment surgery to change the record of their sex be abolished. Alternative requirements for changing the record of sex are discussed below. [Rec 17]

Policy of the Passport Office

While this inquiry was underway, the Australian Passport Office announced significant and relevant policy changes.

A passport is a cardinal document in Australia. Australia issues passports in accordance with International Civil Aviation Organisation (ICAO) requirements, and current policy is to issue passports with a sex shown in

36 Focus group, 2003 ACT Government Report on Discrimination and Gay, Lesbian, Bisexual, Transgender and Intersex People in the ACT.

accordance with the sex shown on the applicant's birth certificate. The Passport Office and the ICAO are both currently operating within a non-binary framework which allows passport holders to identify as male/female/X.

It is now possible for an eligible person to obtain an Australian passport (or Document of Identity³⁷) which shows their sex and gender identity when it is different from the sex recorded on their birth certificate, without requiring reassignment surgery, and which shows an X for the sex of an intersex person.

Australian Passport Office
Sex and Gender Diverse Passport Applicants
Revised Policy

<https://www.passports.gov.au/web/sexgenderapplicants.aspx>

Sex reassignment surgery is not a prerequisite to issue a passport in a new gender. Birth or citizenship certificates do not need to be amended for sex and gender diverse applicants to be issued a passport in their preferred gender.

A letter from a medical practitioner certifying that the 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, is acceptable.

The letter will only be accepted from practitioners registered with the Medical Board of Australia (or equivalent overseas authority). 'Appropriate clinical treatment' does not have to be specified.

A full validity passport in a new sex may also be issued to applicants who have undergone sex reassignment surgery and have registered their change of sex with Registrars of Births, Deaths and Marriages (RBDM) or the Department of Immigration and Citizenship (DIAC).

A passport may be issued to sex and gender diverse applicants in M (male), F (female) or X (indeterminate/unspecified/intersex).

Applicants must meet all other normal passport requirements, such as providing proof of identity documents to support their identity in the wider community.

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

This initiative is in line with the Australian Government's commitment to remove discrimination on the grounds of sexual orientation or sex and gender identity.³⁸

In practical terms, the policy of the Passport Office is a benchmark for all Australian jurisdictions on the burden to be met by a person applying to change the record of their sex. To the considerable extent to which a passport is accepted as a cardinal document, it can operate instead of a birth certificate as a statement of a person's sex and gender identity. As well, it is available to Australian citizens regardless of their place of birth.

As a result, many people now have access to a cardinal document – a passport – which recognises their sex and gender identity. The continuing relevance of a birth certificate as a statement of a person's sex and gender

37 A Document of Identity (DOI) is issued under s9 *Australian Passports Act 2005*, when the issue of an Australian passport is unnecessary or undesirable, and in compassionate circumstances, to nationals of a Commonwealth country with an urgent need to travel.

38 Australian Passport Office at: www.passports.gov.au/web/sexgenderapplicants.aspx

identity will be limited to those occasions when an agency chooses to rely on it and not on a passport, and when a person has not obtained or is not eligible for a passport. It can be assumed that an eligible person who wants a cardinal document that states their changed sex and gender identity will apply for a passport.

It seems likely that the policy of the Passport Office will be accepted as a standard for at least all Commonwealth agencies, and possibly nationally, for whenever a person wishes to change their sex and gender identity.

It is the view of the Council that the requirement for a person to register a change in their sex and gender identity should not be more onerous than it is in the policy of the Passport Office. [Rec 18]

There are, however, reasons why the policy of the Passport Office should not be accepted as the only available standard for a person who wishes to change their sex and gender identity. These considerations are discussed further below.

Proposed criteria for changing sex and gender identity in the ACT

Intersex change of sex and gender identity

The Council has expressed the view above that ‘intersex’ be recognised in the ACT as a sex and gender identity along with ‘female’ and ‘male’. An intersex person is one who, because of their physiological characteristics at birth, is neither only female nor only male; an intersex person is not one who has changed or is changing their identity between male and female.

An intersex person may, despite being intersex, identify as male or female. They will not seek a change to the register if they identify with the sex (female or male) assigned to them at birth. They may, however, seek a change to the register if they identify with a different sex (female or male) from the one assigned to them at birth, or if they identify as intersex and not with the sex (female or male) assigned to them at birth.

If intersex status is to be given legal recognition, then an intersex person who seeks a change to the register – whether to change their sex between female or male or to change their sex to intersex – they ought to be able to rely on medical confirmation of their intersex status. The policy of the Passport Office is that medical confirmation of intersex status is acceptable.

It is the view of the Council that when an intersex person seeks a change to the record of the sex on register, whether to female, male or intersex, the person need only rely on medical confirmation of their intersex status. [Rec 19]

Non-intersex change of sex and gender identity

In the time available for the conduct of this inquiry, members of the Council are unable to reach a concluded view on what precisely should be done to establish a change of sex and gender identity. Members of the Council agree what the available options are, and that setting the precise requirements is a matter of policy for the Government within the options canvassed by the Council.

At the heart of the issue is the extent to which the person applying to change the record of their sex and gender identity has to offer some guarantee or level of comfort that their change of sex and gender identity is genuine and is being recorded in good faith. The current standard for this reassurance is the requirement that a person has undergone reassignment surgery; for the reasons set out above, the Council rejects this requirement. The alternatives can be placed on a scale according to the extent to which the standard is burdensome to the applicant while still offering the required guarantee or level of comfort.

It is noted above that the high threshold of reassignment surgery to establish a new sex and gender identity gives the Office of Regulatory Services comfort that there is a low risk of fraud through a person’s obtaining a new certificate with a new sex while still able to present physically as a person of their birth sex. If the threshold for establishing a new gender identity is not as high as requiring surgery, it nevertheless needs to

be high enough to maintain a level of comfort as to risk of fraud, to be accepted within the national network of registries, and to be relied on generally. In consultations, the Office of Regulatory Services advised that there is a low risk of fraud under the policy of the Passport Office, and ACT public authorities agreed that they would be comfortable relying on certificates issued by the Office of Regulatory Services according to a policy such as that of the Passport Office.

Self-identification for non-intersex change of sex and gender identity

At the least burdensome end of a scale of criteria for recording a change of sex and gender identity is a threshold which relies, essentially, on self-identification. In its consultations the Council received submissions calling for self-identification as the only criterion for a person to recording a change of sex and gender identity.

A perceived risk of self-identification is that it is open to fraud or abuse, because a person may change their sex and gender identity on a whim, or repeatedly, or with fraudulent intent. Submissions noted that self-identification is sufficient for a person to change to their name, and that there are well-accepted legal mechanisms (eg warnings, penalties, cross-checks) to address the risk of fraud. It should be noted that the process of 'self-identification' when applying to change the record, would require the provision of information to the Registrar-General, and the making of at least a statement if not a statutory declaration. This would invoke the safeguard of the penalties associated with making false statements on oath or in statutory declarations, making false or misleading statements, giving false or misleading information, and producing false or misleading documents (*Criminal Code 2002*, ss 336A-339).

Corroboration for non-intersex change of sex and gender identity

Further along the scale is a threshold which relies on self-identification *accompanied by corroboration*. On a scale between self-identification and reassignment surgery there are different ways in which to corroborate the fact that a person's change of sex and gender identity is genuine and is being recorded in good faith.

Corroboration could come from different classes of people. One possible class is identified in s11 *Oaths and Affirmations Act 1984* (ACT): a justice of the peace, a notary public, and a legal practitioner. People in this class are able to confirm no more than the person has made a statement before them to the effect that they had changed their sex and gender identity. This does not seem to differ from the rigor of the self-identification process where the person would be making a statement to the Registrar-General. As well, it unfairly assumes that the person has ready access to a justice of the peace, notary public, or legal practitioner.

Another possible class is people who are in specified family relationships with the person, and/or people who have known the person personally for a prescribed period. People in this class could be asked to confirm their knowledge that the person has changed their sex and gender identity (eg change in lifestyle and presentation). But this unfairly assumes that the person has changed their sex and gender identity in ways that are apparent to family and friends, that the person is not estranged from families and friends, and that families and friends are willing to assist the person. Many people in this class would be able to do little more than confirm what the person themselves can say: that they have changed their sex and gender identity. Although some people in the class may be able to report their own observations of a change over time in the person's appearance or lifestyle consistent with the a change in sex and gender identity, it cannot be assumed that for every person who wants to change their sex and gender identity there is someone who has made such observations, or that there have been such observable changes.

The High Court decision in *AB* (above) focused on social acceptance and recognition by others as a means of recognising a person's change of sex and gender identity. Although this suggests some support for corroboration of the type which might come from those who know the person, the Court's discussion was limited to a critique of the particular Western Australian provisions and was not an analysis of the merits of all available options, such as self-identification.

Corroboration by health practitioners

A further class is ‘medical practitioners’ registered as such with National Health Practitioner Board under the National Registration and Accreditation Scheme. This is the approach taken in the policy of the Passport Office. Relying on medical practitioners gives access to an objective criterion for assessing that the change of sex and gender identity is genuine and is being recorded in good faith: medical practitioners can not only confirm what the person has told them, but can confirm the person has had or is receiving clinical treatment to facilitate transition to a new sex and gender identity.

But relying only on medical practitioners unfairly assumes – as the policy of the Passport Office does – that clinical treatment is necessary for changing sex and gender identity. This establishes clinical treatment as a requirement, and characterises the changing of sex and gender identity as a necessarily medical exercise, contrary to the ‘social acceptance’ model identified by the High Court. Nevertheless, this objective verification of a change of sex is at a relatively low level of ‘medicalisation’, and the policy of the Passport Office in these terms has been accepted as appropriate by some representatives of the sex and gender diverse community.

A broader approach to this class of is other types of ‘health practitioners’ registered as such with National Health Practitioner Board under the National Registration and Accreditation Scheme, such as nurses and psychologists. This recognises that the nature of what is being certified is not uniquely known by a medical practitioner, that some people will not have ready access to a medical practitioner, that some people may find those other health professionals more accessible or sympathetic, and that clinical treatment may include counselling and psychological support.

This broader approach to certification would effectively avoid medicalisation of gender identity because it would rely not on certification of ‘clinical treatment’, but on certification of an assessment – by interview and not by any form of physical examination – that the person is making a considered and informed decision as to their sex and gender identity. This approach does not ‘verify’ a person’s changed sex and gender identity, but confirms that their stated sex and gender identity is one that can be relied on. It does not characterise sex and gender identity as needing ‘treatment’, it respects the person’s autonomy in identifying their sex and gender identity, and it safeguards against decisions made in times of stress or mischievously.

Conclusion on non-intersex change of sex and gender identity

As noted above, members of the Council agree that what should be done is a matter of policy for the Government, within the options canvassed by the Council.

Of the available options, some members of the Council support for self-identification, because it is the preferred option of the sex and gender diverse community, there are safeguards in the *Criminal Code 2002*, corroboration is little or no more than hearsay confirmation of self-identification, and the person is the only person who can attest to their own sense of identity. At the same time, other members of the Council support some form of corroboration because the appearance, if not the process, of corroboration offers greater comfort that a person’s change of sex and gender identity is genuine and is being recorded in good faith.

But some members of the Council have reservations about corroboration if it is to be only by medical practitioners, because of the expectation that there will be clinical treatment; they are of the view that if there is to be professional corroboration it should not be limited to medical practitioners but should extend to nurses and psychologists who can certify their assessment that the person is making a considered and informed decision as to their sex and gender identity. The Council is, however, unanimously of the view that the requirement for a person to register a change in the sex and gender identity should not be more onerous than is in the policy of the Passport Office.

It is the view of the Council that the requirement for a person to register a change in their sex and gender identity is a matter of policy for the government to decide within the options canvassed by the Council, ranging from self-identification to self-identification accompanied by corroboration by various classes of people. [Rec 20]

Relevance of sex and gender identity in ACT records

Requesting sex and gender identity

There are occasions when a person's sex and gender identification is taken into consideration, on forms and documents, for access to services and benefits, and when being dealt with by the criminal legal system. Some of these requirements for sex identification appear to be irrelevant. The Human Rights Commissioner notes, for example, the requirement that the sex of electors must be included on the electoral role (*Electoral Act 1992* (ACT)). The Human Rights Commissioner has suggested that requests for disclosure of sex and gender identity be prohibited except where the requestor can demonstrate a legitimate purpose for the information.

The Council notes that the *Discrimination Act* currently prohibits requesting or requiring information from a person in connection with discriminatory conduct because of a person's gender identity.

It is the view of the Council that it is not appropriate at this stage to prohibit, more broadly than the *Discrimination Act* already does, requests for disclosure of gender identity without a demonstrated legitimate need. [Rec 21]

To do so would hamper the necessary collection and use of such information for purposes of efficient service provision, effective planning, and accurate monitoring of different sexes' participation in public activity. Further, it would require a very extensive and continuing monitoring and enforcement capacity, even if limited to public authorities and not extending to private conduct.

The desired end of ensuring that a person's sex and gender identity is requested only when relevant can be achieved by other means, such as the educational value of adopting the recommendations in this report, and the conduct of the recommended audit.

The need to know sex and gender identity

Consultations with public authorities for this inquiry illustrated occasions when it is necessary to know a person's sex and gender identity, such in the provision of certain emergency, health and education services. On some such occasions, particularly in emergency situations when a person is unconscious or otherwise unable to communicate, an officer of a public authority may have to make their own judgement in recording a person's sex and gender identity.

When a person is required to disclose their sex and gender identity by a public authority, it is appropriate that the person knows what has been recorded, that it is accurate, and that it can be amended. This is recognised by, for example, the Information Privacy Principles under the *Privacy Act 1988* (Cth), and the *Health Records (Privacy and Access) Act 1997* (ACT).

At the same time, officers of public authorities need to be confident that they can request a person to disclose their sex and gender identity, and that they can, if circumstances dictate, make their own judgement in recording a person's sex and gender identity.

It is the view of the Council that the 2003 ACT Report audit of ACT laws which require a person to identify their sex and gender should be updated and extended to laws and practices, and that the need for those requirements should be reviewed with the intention of removing whenever possible a requirement that a person identify their sex and gender. [Rec 5]

It is the view of the Council that when an ACT public authority identifies and/or records a person's sex:

- > the person is entitled to inspect the record, and to have their sex identified and/or recorded (and if necessary amended) in accordance with their sex as registered under the *Births, Deaths and Marriages Registration Act*)
- > no liability should attach to a person who, on behalf of an ACT public authority, incorrectly records a person's sex in good faith. [Rec 28]

Statistical categories of sex and gender identity

Currently, the *BDMR Act* allows the recording of a person's sex only in binary terms: male or female. Domestic partnerships, however, are defined under s169 *Legislation Act 2001* without any presumption as to the sex and gender identities of the people in the partnership, and ACT drivers' licences make no reference to the holder's sex and gender identity. It has been suggested that all ACT laws should be amended to remove any presumption of sexual identity.³⁹

Whether and how to record a person's sex and gender identity in government records is a difficult issue. Sex and gender is recorded for both statistical and operational reasons, and those two reasons give rise to different considerations which are difficult to accommodate in a short and straightforward 'form-filling' exercise. The former requires simple and useful categorisation to enable the recording of social profile and activity; the latter requires more detail to enable the respectful and appropriate provision of a service.

As well, whether for statistical and or operational reasons, information about sex and gender is sometimes provided by the person, and is sometimes 'allocated' or described by a third party. Further, when the information is provided by the person, they sometimes do so remotely by form, and sometimes directly in a conversation. These different circumstances and means of collection complicate attempts at simple categorisation.

It is the view of the Council that if, as recommended, the available categories for the registration of a person's sex under the *BDMR Act* are to be any of female, male, or intersex, then at least those three categories should be used in all ACT government activity. [Rec 29]

The categories of female, male, or intersex are, however, definitive categories which are appropriate for registration and certification, but are not comprehensive when describing the various stages of sex and gender identity that people may be in at a particular time. For example, a person who is transitioning from a male to a female identity (or conversely) may not be intersex, and may not at the time identify as either male or female – they are transitioning. A person who has transitioned and, for example, now identifies as male, may nevertheless want to identify at the time as a transgender person.

It is the view of the Council that when it is relevant for an ACT public authority to require a person to identify their sex – other than under the *BDMR Act* for notifying and registering a birth and for changing the birth record of their sex – the person should be asked their 'sex and gender identity', and should be given the option of identifying as any of:

- a) female
- b) male
- c) intersex
- d) none of the above. [Rec 30]

³⁹ Peta Bourne and Tracie O'Keefe, *Sex and Gender Education (SAGE) Response Document to Gay, Lesbian, Bisexual, Transgender and Intersex People in the ACT: An Issues Paper*, January 2003. Available at: www.sageaustralia.org/linked/actsubmission%20feb%2003.pdf

The category 'none of the above' will prompt further inquiry, enabling person to identify themselves as, for example, transgender if they choose, and precipitating a discussion about how their needs can best be met. Through government 'best practice', the private sector will be encouraged to adopt these categories voluntarily.

The Council considered and rejected an alternative proposal to give the option of 'other' or an open field, concerned about trivialising diverse forms of gender identity, and both the uncertainty and the administrative burden of a plethora of options that might result.

Implications of changed sex and gender identity for ACT records

A person's change of sex and gender identity may have implications for status, entitlements and benefits that a person holds because of their previous sex, which is most likely to be their birth sex. For example, the 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'.

The current and growing practice of referring to a 'parent' rather than to a 'mother or 'father' will largely avoid this anomaly. That practice reflects issues around the meaning of 'mother and 'father' which already arise because of other change in law and practice, relating, for example, to adoption, surrogacy, artificial insemination, and same-sex parents.

It is the view of the Council that such consequences, should they arise, can be managed at the time within the existing law and policy framework, and are not impediments to giving legal recognition to sex and gender diverse people.

Change of name

Under s18 of the *BDMR Act* a person can apply to the Registrar-General to register a change of their name if they are an adult whose birth is registered in the ACT, a parent on behalf of a child born or resident in the ACT, or an adult who is 'domiciled or resident in the ACT'.

If the person's birth was registered outside the ACT, the Registrar-General must inform the relevant birth registration office of the change of name. If the person's birth was registered in the ACT, the Registrar-General must alter the birth register with certain information (s5A *BDMR Regulation*), including:

- > the name of the person immediately prior to their registering their changed name
- > the name shown on the person's original birth certificate, and
- > the person's sex.

The Registrar General may issue the person who changes their name with a revised birth certificate showing their changed name (s.21(3) *BDMR Act*). When the Registrar-General does so, the only requirement is that the certificate must show the person's name as changed. It does not have to show the person's sex or former name, and it is the practice of the Registrar-General to issue a change of name certificate which does not show the person's sex or former name.

In this inquiry's consultations with the sex and gender diverse communities, privacy and fear of being 'outed' as a transgender person were an important concerns, which are addressed by the current practice of the Registrar-General.

It is the view of the Council that in light of the practice of the Registrar-General to issue a change of name certificate which does not show the person's sex or former name, no changes to current law and practice under the *BDMR Act* and need to be made to ensure protection of the privacy of a person who has changed their sex and gender identity. [Rec 22]

Access to the record of sex identity

After a person has changed the record of their sex, the Registrar-General will retain a record of the person's sex as it was recorded in the register before the alteration. That information is available only to certain specified people (s7, *BDMR Regulation*, and ACT Office of Regulatory Services, *Births, Deaths and Marriages Certificate Access Policy*, Version 2.0, 17 April 2008) including to the person who changed their sex if they are over 18 years old.

As noted above, the sex and gender diverse communities are concerned with risks to their privacy, and with being 'outed'. The Human Rights Commissioner has suggested that only circumstances of medical necessity should justify access to the record on the register of a person's sex.

The Information Privacy Principles (IPP) under the *Privacy Act 1988* (Cth) prohibit unauthorised disclosure of personal information. This means that the Registrar has a duty not to disclose the information unless one of the limited exceptions applies (such as consent by the person concerned, serious or imminent threat to life or health, or that it is essential to a criminal investigation). However, s6A(4) of the *Privacy Act* provides a general exemption if an action is authorised by an enactment, and s66 of the *BDMR Act* allows States and Territories to make arrangements to exchange information. As a result, the Registrar-General can disclose information about a change of sex or name to another Registry without breaching the IPP.

It is the view of the Council that the current restrictions – in the *BDMR Regulation* and Office of Regulatory Services Policy – on access to a record of a person's sex in the register are adequate, but that information provided by the Territory from its register to another State or Territory, and access to the register provided by the Territory to another State or Territory, should be subject to the same restrictions on access as are set out in the *BDMR Regulation* and Office of Regulatory Services Policy. [Rec 23]

Reciprocal recognition

International recognition

A birth certificate is a cardinal document. The ACT will accept a birth certificate as conclusive evidence of a person's sex (s29(1) *BDMR Act*). As well, it will accept as conclusive evidence of a person's sex a 'certificate in relation to a person who has undergone sexual reassignment surgery', issued in NSW, NT, SA, Tasmania and WA, (s29(2) *BDMR Act* and s8 *BDMR Regulation*); the *BDMR Act* refers to these certificates as 'interstate recognition certificates'.

Submissions to this inquiry point out an anomaly.⁴⁰ Recognition of a birth certificate is not limited, but recognition of another form of certificate is limited to certificates from Australian jurisdictions. For example, people born in the UK who change their sex are issued with both a Gender Recognition Certificate and an amended birth certificate, while people not born in the UK who change their sex are issued only with a Gender Recognition Certificate. The former will have their sex and gender identity recognised in the ACT on the basis of their amended birth certificate, while the latter will not have their sex and gender identity recognised in the ACT on the basis of their Gender Recognition Certificate, even though holders of a similar certificate from an Australian jurisdiction will have their sex and gender identity recognised in the ACT.

40 A Gender Agenda & Women's Legal Centre, *Legal Recognition of the Sex and Gender Diverse Community in the ACT*. June 2011

Submissions to this inquiry recommend that people who have had their legal sex recognised in an overseas jurisdiction should be recognised as that sex for all purposes under ACT law.

Interstate recognition

As noted above, the ACT accepts an 'interstate recognition certificate' issued in NSW, NT, SA, Tasmania and WA as conclusive evidence of a person's sex. Currently, such certificates are issued only if the person undergoes medical or surgical procedures for sex and gender reassignment. In Queensland and Victoria a change to a birth certificate is currently subject to the same condition (see table above). If the Council's view is accepted, the ACT will abolish the requirement for reassignment surgery.

For some people, the policy of the Passport Office (above) provides an alternative and acceptable means by which a person can establish their sex and gender identity. It may be that in future some or all of the interstate recognition certificates, and amended birth certificates, will be available without a requirement for reassignment surgery, in which case the ACT will be less concerned about relying on them.

It is the view of the Council that s29 *BDMR Act* should accept an Australian passport or Document of Identity, in addition to an 'interstate recognition certificate', as evidence that the person mentioned is of the sex as stated in it. Further, reference in s29(3) to an 'interstate recognition certificate' should not be limited to a certificate 'in relation to a person who has undergone sexual reassignment surgery'. [Rec 24]

This arrangement will assist the legal recognition in the ACT of people who, through resident in the ACT were not born in the ACT, and who are not eligible for an Australian passport or Document of Identity or whose need to establish their sexual identity is not met by a such a document. Unless another arrangement is made, people in that situation will have to rely on whatever access they have to mechanisms for changing their sex in the jurisdiction of their birth (probably involving reassignment surgery) to have their sex and gender identity recognised in the ACT. Another arrangement is discussed below.

Sex and gender recognition certificates

As discussed above, a person in the ACT whose birth is not registered in the ACT will not benefit from changes in the ACT to the criteria for changing the record of their sex. They may have access to an Australian passport, but otherwise they are dependent on the ACT's recognition of certification from another jurisdiction, access to which is likely to require reassignment surgery.

An option is to provide a person who is resident in the ACT with certification which recognises their change of sex. To certify this fact – even if the certification stated only the person's sex and no history – would, however, carry a strong implication to anyone reading the certificate that the person had transitioned their sex. Such certification may be of limited use.

An alternative option is to state the person's sex as part of a general statement about the person, by way of a Certificate of Particulars issued on application under the *BDMR Act*. Such a certificate would, for the purposes of any Territory law and in all areas of activity described in Part 3 of the *Discrimination Act*, be conclusive evidence of a person's identifying particulars for example: name, date of birth, place of birth, sex, and place of residence as at the date of the certificate. A person would be eligible to apply if they meet the requirements for change of sex, and are 'domiciled or resident in the ACT' (see s18 *BDMR Act* for entitlement to apply for a change of name). A certificate of this type is available in Victoria, for example (a 'document acknowledging identity' – s30E *Births, Deaths and Marriages Registration Act 1996* (Vic)) although the change of sex recorded on that document is possible only after reassignment surgery.

While such a Certificate of Particulars would be recognised under ACT law for the purposes outlined above, it is not clear whether or on what terms it would accepted in other jurisdictions.

It is the view of the Council that a Certificate of Particulars, as described, is a desirable mechanism to ensure equal access for ACT residents to reforms that are designed to guarantee legal recognition of sex and gender diverse people without reliance on inhumane eligibility requirements. [Rec 25]

Commonwealth government functions, services and documents

There are several ways that the ACT's legal recognition of sex and gender status interacts with Commonwealth government functions and agencies. The Council has, for example, been advised that in the view of the Commonwealth, a marriage remains valid despite one party to the marriage changing their sex and gender identity. There are practical daily issues in dealings with, for example, Medicare benefits, Centrelink payments, migration sponsorship, corporations law and taxation.

ACT resident Peter Hyndal, who was born female but who now identifies as a man, has publicly drawn attention to the confusion and frustration that he encounters. Medicare recognises him as a man for some claims and as a woman for others. Centrelink insists on using his female identity. He explained that [before the 2011 policy] it took 57 phone calls, 4 letters, three interviews, two Freedom of Information requests and a formal appeal for him to retain the word male on his passport because it did not match the sex on his birth certificate.⁴¹

Submissions from members of the sex and gender diverse communities have complained of difficulties in changing gender identity on documents including Medicare and other health records, Centrelink records and taxation records. The proposed reforms to ACT law will give people conclusive evidence of their sex and gender identity which should be accepted by Commonwealth government agencies.

The Australian government has a commitment to the removal of discrimination on the grounds of sex and gender identity, and the new policy of Passport Office is indicative of that. Although the policy of the Passport Office may be promoted as the preferred approach to sex and gender identity across the Commonwealth public sector, ACT measures for changing sex will continue to be relevant until and unless such a policy is widely adopted.

Even if the policy of the Passport Office is widely adopted, it will remain necessary for people to show that they meet the required threshold. The proposed reforms to ACT law will give people conclusive evidence of their sex and gender identity to the required threshold.

There are occasions when a person is required to state their sex and gender identification, but the requirement appears to be irrelevant. No federal discrimination law prohibits requesting or requiring information from a person in connection with conduct that is discriminatory because of a person's gender identity.

It is the view of the Council that it is desirable for the governments of the States, Territories and Commonwealth audit to their laws and practices for provisions which require a person to identify their sex and gender, and to review the need for those requirements with the intention of removing whenever possible a requirement that a person identify their sex and gender. [Rec 35]

Practical recognition and acceptance

Legal reforms alone will not achieve practical recognition and acceptance of people's sex and gender identity in the ACT. Whatever the law says about equality, some people will maintain their own biases and prejudices. Law reform is a significant part of achieving attitudinal change, giving a signal to the community about the general

41 Henrietta Cook, 'Govt gender muddle blurring my identity', *Sunday Canberra Times*. 24 April 2011. P 4.

policy direction. Real change requires leadership and education to promote public acceptance the intention behind the law.

As well as access to legal recognition and appropriate identity documentation, respondents to the *A Gender Agenda* survey in 2011 reported a range of difficulties they face in society: being protected from discrimination, getting access to informed, respectfully delivered medical and psychological services, suffering lack of social connection with family and the broader community, and being over-represented in low income categories despite their above-average levels of education.⁴²

The 2003 ACT report included proposals for greater education and training for government employees about being respectful of gender diverse people. Education and training across ACT public authorities, particularly with a human rights perspective, are essential to any law reforms being successful.

The Human Rights Commissioner submits that a public education campaign will also be a vital to raise awareness of the issues and to build support for any changes. Increased resources will be needed for services which offer information and community support for people in the sex and gender diverse communities and their partners/families.⁴³

Anti-discrimination law serves an important educative function, quite apart from providing individual remedies for unlawful treatment. The existence of a protected attribute is a public statement that people with that attribute are vulnerable, and are deserving of protection. The current protected attribute in the *Discrimination Act* is 'gender identity'. This term does not adequately express the attributes which are the reasons for discriminatory treatment, one of the most persistent of which is a sex and gender diverse person's physical appearance. Even if a person's sex and gender is legally recognised, they may continue to be discriminated against and vilified because of their physical appearance.

It is the view of the Council that for purposes of anti-discrimination law in the ACT, protected attributes should include

- > a person's identifying as intersex, as a sex other than their registered sex, as having no sex, and as being in transition for one sex to another
- > the record of a person's sex having been altered under the *BDMR Act* or equivalent law or practice, and
- > a person's physical presentation (including physical features, manner of speech, and dress) when it is not consistent with the person's recorded birth sex or with the conventional physical presentation of a person of a particular sex. [Rec 27]

2.4 Implementation

These concluding comments from the *A Gender Agenda* report highlight the importance of the timing of the proposed changes to the law in the ACT:

At this time in history, the Government lists social inclusion as one of its highest priorities. As part of its social inclusion agenda the Government is looking at ways to build strong, diverse communities, free from discrimination, violence and abuse, by confronting intolerance and promoting respect and a sense of belonging for everyone. The timing is right to walk the talk for a better life for SGD people at both local and national levels.⁴⁴

42 A Gender Agenda, *Gender Diversity in the ACT: A survey of Trans Experiences*. May 2011. Available at www.genderrights.org.au/Downloads/Gender_Diversity_in_the_ACT.pdf

43 ACT Human Rights and Discrimination Commissioner, *Submission to LRAC 2 IP: Legal Recognition of the Sex and Gender Diverse Community in the ACT*. July 2011. p13

44 A Gender Agenda, *Gender Diversity in the ACT: A Survey of Trans Experiences*, May 2011, p 31. Available at:

The Council's proposed reforms to the *BDMR Act* and *BDMR Regulation* and to the *Discrimination Act* will be a first and important step in 'promoting respect and a sense of belonging for everyone'. However other essential steps are also involved.

It is the view of the Council that while the ACT is acting to remove legal obstacles for sex and gender diverse people across all its legislation, cooperation with the Commonwealth and with other State and Territory governments will be important in developing a national approach that addresses both the legal and social recognition difficulties faced by the gender diverse community. [Rec 34]

The Council's consultations and submissions indicate that the proposed changes will need to be accompanied by a number of initiatives that go beyond mere legislative change. To ensure both legal and practical recognition for sex and gender diverse people, there will need to be investment in the capacity of public authorities, monitoring and oversight, and enhanced social services.

It is the view of the Council that the proposed changes to law and practice to give legal recognition to sex and gender diverse people will need to be accompanied by investment in public authorities for:

- > programs of education and training about sex and gender diversity
- > the conversion of systems and documents to reflect the formal recognition of sex and gender diversity
- > funding to ensure that the legislative changes are part of a broader program of social inclusion. [Rec 31]

It is the view of the Council that to monitor and report on progress towards legal recognition for sex and gender diverse people in the ACT, the ACT Human Rights Commission must be sufficiently resourced to address the underreporting of discrimination against transgender and intersex people, and to support employers and service providers with information about their legal obligations under the *Discrimination Act 1991* and the *Human Rights Act 2004*. [Rec 32]

It is the view of the Council to address issues of unemployment, discrimination, poor physical and mental health outcomes, and low rates of social inclusion and participation for sex and gender diverse people:

- > support and advisory services should be provided to sex and gender diverse people and their families
- > recurrent education and training programs should be provided to service providers, employers, workplaces and educational institutions. [Rec 33]

---End---