

2013

**THE LEGISLATIVE ASSEMBLY FOR THE  
AUSTRALIAN CAPITAL TERRITORY**

***BEYOND THE BINARY: LEGAL RECOGNITION OF SEX AND GENDER DIVERSITY  
IN THE ACT***

**LAW REFORM ADVISORY COUNCIL**

**GOVERNMENT RESPONSE**

**Presented by  
Simon Corbell MLA  
Attorney-General**

## Abbreviations List

ACAT	ACT Civil and Administrative Tribunal
BDMR Act	<i>Births, Deaths and Marriages Registration Act 1997</i>
HCA	High Court of Australia
HRA	<i>Human Rights Act 2004</i>
HRC	ACT Human Rights Commission
JACS	ACT Justice and Community Safety Directorate (formerly ACT Department of Justice and Community Safety).
Report	<i>Beyond the Binary: legal recognition of sex and gender diversity in the ACT</i>

## Foreword

I am pleased to present the Government's response to the ACT Law Reform Advisory Council's report, *Beyond the Binary: legal recognition of sex and gender diversity in the ACT*.

In 2011 I requested an inquiry into the steps necessary to provide for legal recognition of transgender and intersex people in the Territory, ensuring that any such measures are compliant with the *Human Rights Act 2004*. The Council presented their report to me in June 2012.

*Beyond the Binary* considers the best ways to improve legal recognition of sex and gender diverse people and the practical options available to the ACT Government to implement these improvements. The recommendations provided in the report give the Government a valuable framework for the development of a well-informed and considered approach to strengthening the rights of sex and gender diverse people in the ACT.



The Government response provides a course of action for the Government to improve the legal recognition of sex and gender diverse people. Significantly, agreed actions include abolition of sex reassignment surgery as a requirement for a person to be eligible to change their sex on a birth certificate, expanding categories available for notification and registration of a child's sex and extending the time within which a child's sex must be registered to allow sufficient time for parents of intersex children to make complex decisions about the sex of their child.

While some measures will be able to be implemented in the short term by legislative amendment, others will be implemented incrementally. The Government will progressively consider current practices of data collection about sex and gender identity in records kept by public authorities to ensure that any data collected is necessary for the purpose of collection and that the information accurately reflects an individual's identity.

The ACT Government acknowledges that legal recognition of sex and gender diversity is a complex matter and is committed to ensuring that improvements continue in the future.

This response is evidence of the ACT Government's ongoing commitment to promoting respect for the human rights of all individuals and ensuring recognition and equality before the law for all people in the ACT.

In tabling this Government response, I wish to acknowledge the work of the Law Reform Advisory Council and other people who contributed to this project.

A handwritten signature in black ink, appearing to read 'S. Corbell'. The signature is stylized and fluid.

**Simon Corbell MLA**  
Attorney-General

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## Executive Summary

In 2011, the ACT Attorney-General referred the issue of legal recognition of sex and gender diverse people to the ACT Law Reform Advisory Council (LRAC) for consideration. The LRAC presented its report, *'Beyond the Binary: legal recognition of sex and gender diverse people in the ACT'*, to the Attorney-General in June 2012.

The Report made thirty-five recommendations to improve legal recognition of the sex and gender diverse community in the ACT. The recommendations included that:

- a) the existing legal framework for the recognition of sex and gender diverse people be updated through amending the *Births, Deaths and Marriages Registration Act 1997*, *Legislation Act 2001* and *Discrimination Act 1991*;
- b) the requirement for sexual reassignment surgery before allowing a change of sex on a birth certificate be removed;
- c) data collection systems be reviewed to reflect intersex people; and
- d) information and support services for sex and gender diverse people and their families be improved.

The Report acknowledged the Government's commitment to recognise equal rights for all transgender and intersex people. It also identified that currently there is limited legal recognition of sex and gender diverse people in the ACT and, where recognition is given, terminology is inconsistent.

The Government has considered the Report in detail and prepared a whole of Government response. The Government:

- supports 14 recommendations (4, 6-8, 10-12, 14-15, 17, 20-22, 35);
- supports in-principle 9 recommendations (1-3, 9, 13, 19, 29-30, 34);
- supports in part recommendation 24 and 28;
- notes 8 recommendations (18, 23, 25-27, 31-33)
- notes in part recommendation 24;
- does not support in part recommendation 28; and
- does not support 2 recommendations (5, 16)

The response addresses each of the Report's recommendations below.

Major reforms to be implemented in response to this report include:

- changes to the BDMR Act on birth of an intersex child; and
- abolition of the requirement that a person undergo sexual reassignment surgery before being allowed to change their sex on their birth certificate. This requirement will be replaced with criteria that are consistent with the recent High Court decision in *AB v State of WA*<sup>1</sup>.

## Background

In March 2011 the ACT Attorney-General referred the issue of legal recognition of the sex and gender diverse community to the ACT Law Reform Advisory Council (LRAC). The terms of reference were 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* (ACT). In particular, the LRAC was asked to assess:

- a) the existing provisions of the *Births, Deaths and Marriages Registration Act 1997*;

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<sup>1</sup> *AB v. State of Western Australia & Anor; AH v. State of Western Australia & Anor* [2011] HCAASP 30 (16 June 2011).

- 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 person's sex by and among the States, Territories, and Commonwealth.

To inform its inquiry, LRAC undertook public consultation to identify issues in the community in relation to sex and gender diverse people. The inquiry also included a comparative overview of legislation and policies in place in countries such as Germany, Spain and the United Kingdom which identified international trends in addressing the human rights of sex and gender diverse people.

LRAC's final report, *'Beyond the Binary: legal recognition of sex and gender diverse people in the ACT'*, was presented to the Attorney-General in June 2012.

### Legal recognition of sex and gender diverse people

People in sex and gender diverse communities regularly face barriers in all aspects of their lives, including access to services. Barriers may occur as a result of statutory provisions and procedures relating to legal recognition of sex and gender. Improving the formal legal recognition of a person's sex and gender identity will facilitate access to appropriate services and support as well as promote respect for sex and gender diverse people in the community. The report underlines the significance of legal recognition, stating "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 in all circumstances ..."

(at p 13).

There have been a number of reports and inquiries in the ACT and nationally looking at the issue of legal recognition of sex and gender diversity. These reports, such as the Australian Human Rights Commission 'Sex Files Report'<sup>2</sup>, the HREOC consultation report, 'Addressing sexual orientation and sex and/or gender identity discrimination'<sup>3</sup>, and the 2003 report on the audit of ACT laws, *Discrimination and Gay, Lesbian, Bisexual, Transgender and Intersex People in the ACT*<sup>4</sup>, have identified key issues and concerns from the sex and gender diverse community, providing a foundation for the terms of reference for the current report.

The Report considers the question of recognition of sex and gender diversity within a human rights framework, including the *International Covenant on Civil and Political Rights (ICCPR)*<sup>5</sup>, *Convention on the Rights of the Child*<sup>6</sup> and *Yogyakarta Principles on the application of human rights in relation to sexual orientation and gender identity*<sup>7</sup>. The Yogyakarta Principles outline the right to equality and non-discrimination in relation to sex and gender diverse people as follows:

'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

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<sup>2</sup> Australian Human Rights Commission, *Sex files: the legal recognition of sex in documents and government records, Concluding paper of the sex and gender diversity project*, March 2009.

<sup>3</sup> Australian Human Rights and Equal Opportunity Commission, *Addressing sexual orientation and sex and/or gender identity discrimination: Consultation Report*, 2011.

<sup>4</sup> ACT Government, Report to the Legislative Assembly: *Discrimination and Gay, Lesbian, Bisexual, Transgender and Intersex People in the ACT*, 2003.

<sup>5</sup> December 1966, <http://www2.ohchr.org/english/law/ccpr.htm>

<sup>6</sup> November 1989, <http://www2.ohchr.org/english/law/crc.htm>

<sup>7</sup>, March 2007, [http://www.yogyakartaprinciples.org/principles\\_en.htm](http://www.yogyakartaprinciples.org/principles_en.htm)

freedom. No one shall be forced to undergo medical procedures, including sex reassignment surgery, sterilisation or hormonal therapy, as a requirement for legal recognition of their gender identity.’<sup>8</sup>

The *Human Rights Act 2004* (ACT) (‘HRA’), largely based on the ICCPR, underpins the human rights framework in the ACT. One of the rights protected in the HRA is the right to recognition and equality before the law, without discrimination of any kind.<sup>9</sup>

### Sex and gender defined

The reference to ‘sex and gender diverse’ people encompasses a community of people with varying identities and physiological states. In this response, the meaning of the terms ‘gender’, ‘sex’ and ‘sex and gender diverse’ is consistent with the definitions set out on page 13 of the report. That is, ‘sex’, when not used in conjunction with ‘gender’, refers to the biological sex of a person. ‘Gender’, when not used in conjunction with ‘sex’, refers to a person’s ‘deeply felt internal and individual experience of gender, which may or may not correspond with the sex assigned at birth, including the personal sense of the body...and other expressions of gender, including dress, speech and mannerisms.’<sup>10</sup> ‘Sex and gender diverse’ encompasses people whose sex and gender is something other than just ‘male’ or ‘female’.

## **Responses to each recommendation**

### **Recommendation 1**

In ACT legislation generally, reference should consistently be made to ‘sex and gender diversity’, ‘sex and gender diverse people’, and ‘people in sex and gender diverse communities’.

The Government supports this recommendation in-principle. See discussion under recommendation 3 below.

### **Recommendation 2**

In ACT legislation, 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.

The Government supports this recommendation in-principle. See discussion under recommendation 3 below.

### **Recommendation 3**

In ACT legislation, 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.

The Government supports this recommendation in-principle.

The Report recommends the use of consistent terminology to refer to sex and gender diverse people, transgender people and intersex people to ensure that people are referred to in an appropriate and

<sup>8</sup> *Yogyakarta Principles*, p 11-12.

<sup>9</sup> *Human Rights Act 2004*, s 8.

<sup>10</sup> *Yogyakarta Principles*, p 8.

accurate way. The term ‘sex and gender diversity’ is consistent with accepted terminology, recommended and used by, for example, the Australian Human Rights Commission<sup>11</sup>, A Gender Agenda<sup>12</sup> and the Australian Passport Office.<sup>13</sup>

‘Transgender’ and ‘intersex’ have well-established and unambiguous definitions. Recommendation 10 recommends the removal of ‘transsexual’ as a term in the BDMR Act to promote consistency with this terminology.

The Government acknowledges that referring to sex and gender diverse people in an appropriate and respectful way is a necessary step in remedying other gaps in legal recognition. The terminology proposed in these recommendations is broad enough to recognise the diversity of people who identify as other than just ‘male’ or ‘female’ while still respecting the individual’s self-identity.

#### **Recommendation 4**

In ACT legislation, 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.

The Government supports this recommendation.

The Government agrees that the terms ‘female’ and ‘male’ are taken to have an ordinary and understood meaning.

Legislation and legal interpretation rarely recognise the sex of an individual as outside the binary of male-female.<sup>14</sup> As acknowledged in relation to recommendations 1-3 above, it is important to recognise sex and gender diversity outside the male-female binary.

Where required, this will be achieved incrementally through legislative amendment and promotion of the use of consistent and clearly defined terminology across government.

#### **Recommendation 5**

In ACT legislation, 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 removed with the intention of removing whenever possible a requirement that a person identify their sex and gender.

The Government does not support this recommendation.

The Government understands that this recommendation relates to the 2003 report on the audit of ACT laws, the Government Report to the Legislative Assembly, *Discrimination and Gay, Lesbian, Bisexual, Transgender and Intersex People in the ACT*.<sup>15</sup>

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<sup>11</sup> Australian Human Rights Commission, *Sex files: the legal recognition of sex in documents and government records, Concluding paper of the sex and gender diversity project*, March 2009, p 8.

<sup>12</sup> A Gender Agenda and the Women’s Legal Centre, Joint Submission to ACT Law Reform Advisory Council report: ‘*Legal Recognition of the Sex and Gender Diverse Community in the ACT*’, 22 June 2011, p 30.

<sup>13</sup> Australian Passport Office, Sex and Gender Diverse Passport Applicants Policy, see: <https://www.passports.gov.au/Web/SexGenderApplicants.aspx>.

<sup>14</sup> For example, *Secretary, Department of Social Security v SRA* (1992) 118 ALR 467 per Black CJ at 469-470 and Lockhart J at 481; *R v Harris* (1988) 17 NSWLR 159 per Matthews J at 194; *In Re Kevin (Validity of Marriage of Transsexual)* [2001] FamCA 1074 at [119] and [135].

<sup>15</sup> ACT Government, Report to the Legislative Assembly: *Discrimination and Gay, Lesbian, Bisexual, Transgender and Intersex People in the ACT*, 2003.

An extensive review of laws and practices that require a person to identify their sex and gender would be a time-consuming and expensive undertaking. The Government believes that this issue would be addressed more effectively and with more cost-benefit through an incremental approach, as proposed in response to recommendations 28-30 of the Report.

### **Recommendation 6**

In the *Legislation Act 2001* the definition of ‘transgender’ is appropriate and sufficient.

The Government supports this recommendation.

The Government agrees with the LRAC that the current definition requires no amendment.

### **Recommendation 7**

In the *Legislation Act 2001* in the definition of ‘intersex’, reference to ‘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.

The Government supports this recommendation.

Amending the *Legislation Act 2001* to reflect the accepted definition<sup>16</sup> of an intersex person will ensure that intersex people are accurately represented and defined. Support for this recommendation is consistent with the definition of intersex adopted by the Australian Medical Association in their ‘Sexual Diversity and Gender Identity’ policy.<sup>17</sup>

### **Recommendation 8**

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

The Government supports this recommendation.

The Government agrees that the role of the Registrar-General is appropriate for the purposes of recording the sex of a child born in the ACT.

### **Recommendation 9**

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

The Government supports this recommendation in-principle.

The Report recommends that the binary of ‘male’ and ‘female’ should be extended to include ‘intersex’, as a recognised physical sex. People who are physically characterised as intersex are not included in the existing binary of male/female. The Government agrees that recognition of a third category of ‘intersex’ will contribute to equal legal recognition of intersex people. Recommendation 7 provides for the amendment of the *Legislation Act 2001* to ensure that ‘intersex’ is accurately defined and represented. This will provide clarity for people who have the relevant physical characteristics, and chose to be recognised as intersex.

<sup>16</sup> Australian Human Rights Commission, *Sex files: the legal recognition of sex in documents and government records, Concluding paper of the sex and gender diversity project*, March 2009, p.7.

<sup>17</sup> Published 30/10/2002, <https://ama.com.au/position-statement/sexual-diversity-and-gender-identity-2002>.

As the Act and Regulation do not specify available categories of sex, amending the BDMR Act and BDMR Regulation may not be the most appropriate way of addressing this recommendation. It may be more appropriate to amend approved forms as provided for under the BDMR Act. Supporting this recommendation in principle will allow accurate characterisation of a person's sex through the most appropriate mechanism.

### **Recommendation 10**

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

The Government supports this recommendation.

The Report recommends that the sex and gender identity of a person can be recognised by the following categories: 'transgender', 'intersex' and 'sex and gender diverse'. The Government agrees that the inclusion of the term 'transsexual' in legislation introduces an additional definition that is not necessary under the proposed framework for terminology.

Support for this is consistent with the Government's response to recommendations 1-3 above. The Government supports the reform of definitions in legislation to ensure the use of consistent and accurate terminology.

### **Recommendation 11**

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

The Government supports this recommendation.

Further to recommendation 9, the Government supports the additional category of 'intersex' as an available sex for the purposes of notification under section 5 of the BDMR Act.

The Report notes that in circumstances where the sex of a child is not distinctly male or female, parents and medical practitioners may benefit from an opportunity to consider steps necessary to confirm the sex and gender identity of a child. In these cases, a child may be notified as 'to be advised', with the sex of child recorded at registration.

Use of the term 'indeterminate' is consistent with Section 9(2)(b) of the BDMR Act which provides that where it is not practicable to obtain particulars, such as sex, these may be omitted. This anticipates circumstances arising from the birth of premature still-born children, where sex is not discernible.

### **Recommendation 12**

In the *Births, Deaths and Marriages Registration Act 1997* and *Births, Deaths and Marriages Registration Regulation 1998* the option 'indeterminate' should be used only in circumstances anticipated by s 9(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.

The Government supports this recommendation.

As addressed in the response to recommendation 11, the Government supports the existing practice for notification of births, with the use of 'indeterminate' as a category only to be used in the specific circumstances of a premature still-born child.

### **Recommendation 13**

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

The Government supports this recommendation in-principle.

The Report notes that parents and health practitioners may be faced with situations that require complex decision making, where children are born with a gender that falls outside the binary male-female.

The Government will review current policies and practices in this area to ensure that parents and health practitioners are provided with relevant information, advice and resources to provide adequate assistance in caring for the child.

### **Recommendation 14**

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

The Government supports this recommendation.

The Report indicates that where a child is born and cannot be assigned a sex in the existing binary male-female, decisions must be made by parents as to any steps they should take to confirm a particular sex and gender identity for their child. This is a task of considerable complexity and requires time to gain information and come to a decision.

The Government accepts that time pressures can make this process increasingly stressful for parents and supports extending the period of time allowed for parents to register the sex of their child in circumstances where a child’s sex is notified as ‘intersex’ or ‘to be advised’.

### **Recommendation 15**

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

The Government supports this recommendation.

As outlined in the response to recommendation 11, the Government supports the use of ‘indeterminate’ as a category for stillbirths. The Government also supports the addition of ‘intersex’ to the existing binary definitions, as has been outlined above in recommendations 9 and 12.

## Recommendation 16

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

The Government does not support this recommendation.

The Government acknowledges that people who are transitioning from one sex to another, or people who do not identify as having a sex, may benefit from a certificate that shows a person's sex as 'unspecified'. The Report notes that people in this category have access to a passport that shows a person's sex as 'X', signifying unspecified, indeterminate or intersex.

The Report acknowledges that during the consultation process, concerns were raised about the validity of a birth certificate that showed a person's sex as unspecified. Lack of clarity associated with birth certificates that do not disclose a person's sex has logistical implications for the Registrar-General and raises questions around legitimacy, especially where a 'transitioning' person seeks recognition of their birth certificate in another jurisdiction. A birth certificate is a record of biological sex, rather than gender identity, while an Australian Passport, as a travel document, does not require the inclusion of sex as an identifying particular.

In addition, there is a risk that an absence of a record of a sex on a birth certificate may not comply with the Certification Validation Service, which would potentially create further barriers for sex and gender diverse people seeking formal legal recognition. Although the Report notes that this risk is low, the consequences are likely to be significant.

The Government's view is that, rather than improving equality of recognition for sex and gender diverse people, agreeing to this recommendation may import uncertainty. Sex and gender diverse people wishing to access a cardinal document that records an unspecified sex may request a passport, noting 'X' as their sex.

## Recommendation 17

In the *Births, Deaths and Marriages Registration Act 1997* and *Births, Deaths and Marriages Registration Regulation 1998* the requirement in the ACT for a person to undergo sexual reassignment surgery to change the record of their sex should be abolished.

The Government supports this recommendation.

A recent judgment of the High Court has established the legal principle pertaining to the relevant requirement for a person to change their sex on a Births, Deaths and Marriages Register<sup>18</sup>. This recommendation is consistent with the position taken by the High Court.

In *AB v State of Western Australia*, the High Court of Australia considered the issue of recognition of the sex and gender identity of individuals where they have not undergone sexual reassignment surgery. The court considered the meaning of 'gender characteristics' in the *Gender Reassignment Act 2000* (WA) and found that the physical characteristics by which a person is identified as male or female are confined to external physical characteristics that are socially recognisable. This removes the need for precise knowledge of a person's remnant sexual organs, and indicates that legal recognition of a change in sex may no longer require sexual reassignment surgery.

<sup>18</sup> *AB v. State of Western Australia & Anor; AH v. State of Western Australia & Anor* [2011] HCAASP 30 (16 June 2011).

The Government proposes that the ACT legislation providing for sexual reassignment surgery should be reconsidered in light of this judgment, and amended to include eligibility criteria which are consistent with the High Court decision (see recommendation 20 below).

### **Recommendation 18**

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

The Government notes this recommendation.

The Report identifies the policy reform undertaken by the Passport Office which moves away from the binary recognition of sex on a passport to include an category 'X' - indeterminate, unspecified or intersex - as well as the male and female categories. A person does not have to show evidence of sexual reassignment surgery or a changed birth certificate to elect to have their sex shown as 'X'. To qualify for an 'X' passport a person must provide either 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, or produce a certificate of recognition, such as a birth certificate.

The Government will consider the policy of the Passport Office when reviewing and amending the policy in the ACT for recognition of sex and gender diverse people under recommendation 20 below.

### **Recommendation 19**

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

The Government supports this recommendation in-principle.

There is an accepted medical definition of 'intersex' that enables a medical practitioner to clearly identify a person as intersex. This has been address in recommendation 7.

This recommendation will be considered further in developing the mechanism and criteria for change of sex, as discussed under the response to recommendation 20.

### **Recommendation 20**

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

The Government supports this recommendation.

The Government will develop a policy that removes the requirement for sexual reassignment surgery and which is consistent with the High Court decision discussed in recommendation 17 above.

The Government will develop clear criteria and definitions on which to base a decision, as well as possible mechanisms for implementation.

## Recommendation 21

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

The Government supports this recommendation.

The Government supports this recommendation on the basis that such a prohibition 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. ... it would [also] require a very extensive and continuing monitoring and enforcement capacity ...” (the Report, p 43).

The Government agrees that this existing practice is sufficient and requires no further review.

## Recommendation 22

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

The Government supports this recommendation.

The Government agrees that there are adequate measures in place to protect the privacy of a person changing their sex on their birth certificate.

## Recommendation 23

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

The Government notes this recommendation.

The Government notes the concerns in the Report surrounding access to the ACT Register by another State or Territory.

Under the ACT Certificate Access Policy<sup>19</sup> law enforcement agencies or government bodies acting under the authority of state or federal legislation may request access to the register without authorisation from the person to whom the record relates.

In addition, approved form 204 under the BDMR Act provides information to the applicant on the privacy policy in relation to access to birth certificates:

### PRIVACY INFORMATION

The *Births, Deaths and Marriages Registration Act 1997* authorises the Registrar-General to collect the information required by this form. The Registrar-General

<sup>19</sup> <http://www.ors.act.gov.au/resources/attachments/20080417 - Births, Deaths and Marriages - Certificate Access Policy.pdf>

prevents any unreasonable intrusion into a person's privacy in accordance with the *Privacy Act 1988* (C'wlth). The Registrar-General may provide identifiable information to law enforcement organisations and authorised organisations that have legal authority to request information under prescribed circumstances. Documents provided as proof of identity may have their authenticity verified through Certificate Validation System (CVS) and the National Document Verification System (DVS). Documents issued by this office may also be verified by external agencies using CVS and/or DVS.<sup>20</sup>

The existing privacy mechanisms in place under the BDMR Act and policies of the ORS will continue to apply to information about a person's change of sex. Information exchange between jurisdictions is not automatic upon a change to the ACT register. Where applications from interstate are made, procedures in the ACT are regulated by the ORS policy, appropriate legal authority and the *Privacy Act 1988* (Cth).

#### **Recommendation 24**

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

The Government supports this recommendation in part, in relation to altering the definition of 'interstate recognition certificate'.

The Government notes this recommendation in part, in relation to the recommendation that an Australian Passport or Document of Identity be accepted as evidence of a change of sex.

Legislation in a number of Australian jurisdictions provides for reciprocal recognition of registration certificates as evidence of a person's identity, including sex. Under ACT legislation, an interstate recognition certificate is, for the purposes of any Territory law, evidence of the person's sex as stated in the certificate. Section 29 of the BDMR Act provides for recognition of certificates that serve as evidence of a person's sex. The BDMR Regulations provide the jurisdictions prescribed for the purpose of recognising an interstate recognition certificate in the ACT under s 29 of the BDMR Act.<sup>21</sup>

LRAC recommends an amendment to the definition of an 'interstate recognition certificate' to remove the requirement of sexual reassignment surgery. This aspect of recommendation 24 is consistent with recommendation 17 to abolish the requirement for sexual reassignment surgery.

In response to recommendation 17 and 20, the Government will be establishing revised criteria and a mechanism for change of sex in the ACT. Acceptance of an Australia Passport, in addition to an interstate recognition certificate will be subject to criteria established.

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<sup>20</sup> Form 204 – approved form under the BDMR Act

<sup>21</sup> *Births, Deaths and Marriages Registration Regulation 1998*, s 8. Specifically, ACT will recognise certificates from NSW, SA, WA, NT and Tasmania.

## Recommendation 25

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

The Government notes this recommendation.

This instrument does not currently exist in other jurisdictions, and it is unclear how a Certificate of Particulars would operate in this area. It would be problematic for Government to assume a policy role for people born outside the ACT who have their birth certificates recorded on an interstate register. Recognising that people born outside the ACT will not have access to less burdensome requirements for changing their sex on a Births, Deaths and Marriages Register, the Government will consider possible ways to ensure that residents of the ACT who were born interstate are not discriminated against in the ACT on the ground of sex and gender diversity.

## Recommendation 26

In the *Discrimination Act 1991* 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.

The Government notes this recommendation.

See discussion under recommendation 27 below.

## Recommendation 27

In the *Discrimination Act 1991* 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.

The Government notes this recommendation.

The LRAC is currently undertaking a broad review of the *Discrimination Act*, and the Government proposes to consider these recommendations in light of that report.

Under the *Discrimination Act*, **gender identity** is defined 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.

While acknowledging that amending the Discrimination Act as recommended by LRAC would result in a more detailed listing of attributes, the current Discrimination Act provides broad protection and recognition for most sex and gender diverse people.

### **Recommendation 28**

In the ACT public sector 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.

The Government supports this recommendation in part, in relation to 28(i).

The Government does not support this recommendation in part, in relation to 28(ii).

In relation to recommendation 28(i), an individual is already entitled to access, correct and amend personal information held about them, in accordance with existing provisions under the *Privacy Act 1988* (Cth), the *Freedom of Information Act 1989* and the *Health Records (Privacy and Access) Act 1997*.

In relation to recommendation 28(ii), the Government notes that there is no general immunity of government agencies and employees in the ACT and it would not be appropriate to impose one generally in relation to this matter. Generally, the risk of incorrectly recording a person's sex and gender identity would be largely mitigated through robust data collection and maintenance systems and procedures.

It is difficult to contemplate a situation where incorrectly recorded sex would lead to an actionable loss. However, if circumstances were to arise where immunity was required, this could be provided in relation to a specific situation.

### **Recommendation 29**

In the ACT public sector 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.

The Government supports this recommendation in-principle.

This is consistent with the Government's response to recommendation 9. The task of reviewing and implementing changes to data collection and record management across the ACT Government is a complex process which will require targeted consultation across agencies, and incremental implementation.

### **Recommendation 30**

In the ACT public sector 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.

The Government supports this recommendation in-principle.

As noted in the report, “whether and how to record a person’s sex and gender identity in government records is a difficult issue. ... 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” (p 44).

This recommendation appears to relate to ‘the respectful and appropriate provision of a service’ (the Report, p 44). In such situations, a person’s gender identity may be different to the person’s sex.

The applicability and value of including the category of ‘none of the above’ will depend on the context in which the information is being collected (and if it needs to be collected at all). It is proposed that this recommendation be supported in principle, acknowledging that its application will require further consideration to identify the scope of its use and avoid any inconsistency with recommendation 29.

### **Recommendation 31**

In the ACT public sector 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.

The Government notes this recommendation.

Implementation of this recommendation would require further assessment of existing systems and resource allocation to determine the extent of any significant changes required, the resource implications and benefit that would flow to the sex and gender diverse community. In addition, part (ii) of the recommendation may be addressed to a substantial degree by the proposed actions in response to recommendation 29 above.

In relation to part (iii) of this recommendation, since the LRAC report was delivered, one of the peak groups in this area, A Gender Agenda, has received recurrent funding from the Community Services and Health Directorates to support community work in the areas of counselling, mental health and focused project grants.

The Government suggests that these recommendations are best realised by supporting other recommendations in the Report, such as recommendation 29, and working towards cultural change in the public sector and community as a result.

### **Recommendation 32**

In the ACT, 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*.

The Government notes this recommendation.

See discussion under recommendation 33 below.

### **Recommendation 33**

In the ACT, 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.

The Government notes this recommendation.

The ACT Human Rights Commission and the ACT Government are currently working to improve the knowledge of service providers about their legal obligations under the Human Rights Act and Discrimination Act. The Government is committed to improving the legal recognition of sex and gender diverse people and, through that, to address assumptions or misunderstandings that may lead to discriminatory treatment.

Recommendations 32 and 33 would require further consideration, in consultation with stakeholders about the extent of any unmet need, the most appropriate form of meeting that need and, as for recommendation 31 (ii), any budgetary impact.

As noted in response to recommendation 31, since the report was delivered, the ACT Government has provided recurrent funds to A Gender Agenda to provide support, counselling and assistance to sex and gender diverse people in the ACT.

### **Recommendation 34**

Nationally, 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.

The Government supports this recommendation in-principle.

See the comment recommendation at recommendation 35 below.

### **Recommendation 35**

Nationally, 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.

The Government supports this recommendation.

As suitable opportunities arise, the ACT will work with other jurisdictions to achieve a national approach to legal and social recognition. In addition, it is proposed that the Attorney-General write to Attorneys-General in other Australian jurisdictions informing them about the report and the government's response.