

SUBMISSION

Births, Deaths, Marriages Registrations (Gender Identity) Amendment Bill 2016



**Joint submission from organisations from trans, gender
diverse and intersex communities**

March 2017

Summary of recommendations

Terms of reference recommendations

Recommendation 1

We recommend that the preferred new gender registration should be 'Other; please specify' with a free text field.

In the alternative, applicants should be able to change their registered sex and/or gender to a *minimum* of 8 categories, being male, female, male and female, X, non-binary, unspecified, brotherboy and sistergirl.

Recommendation 2

We recommend that the sufficient amount of clinical treatment including only counselling in the Regulations should be determined on a case by case basis by the medical practitioner or psychologist and the trans or gender diverse person.

In the alternative, we recommend that the minimum amount of counselling should not exceed 6 months or the completion of three 45 minutes of counselling, whichever comes first.

Additional recommendations

Recommendation 3

We recommend that guidelines be prepared by the Registry of Births, Deaths and Marriages for applications by people born with variations of sex characteristics to correct a sex marker on a birth certificate in South Australia.

Recommendation 4

We recommend that if a maximum limit on total applications for change of sex or gender is set out in policy, that the limit should be no fewer than four applications, with an option for further applications if 'special circumstances' are present.

Recommendation 5

We recommend that the Regulations be drafted to ensure they are reviewed after 5 years in operation.

Recommendation 6

We recommend that the application fees set in the regulations should be the same as the current application fee for a change of sex application, with a waiver of the application fee available in 'special circumstances'.

In addition, we recommend that one application process for change of sex or gender and name should be available at the current application fee for a change of sex application, with a waiver of the fee available in 'special circumstances'.

1 Introduction

We commend the South Australian Government on passing the *Births, Deaths, and Marriages Registrations (Gender Identity) Amendment Bill 2016 (Bill)*.

This reform is a promising step forward for the LGBTIQ community and an opportunity to ensure people in South Australia can change the sex or gender marker on our birth certificates to access official government identification that accurately describes who we are and how we live our lives.

Properly drafted regulations are crucial to ensuring these reforms can be used in practice.

Trans and gender diverse people are born with a gender identity or expression different from that which was assigned at birth or that which is expected of them by society. Trans people generally identify as male or female and gender diverse people generally as a non-binary gender (i.e. outside categories of male and female). The *Sex Discrimination Act 1984* (SDA) defines 'gender identity' as the 'gender-related identity, appearance or mannerisms or other gender-related characteristics of a person (whether by way of medical intervention or not), with or without regard to the person's designated sex at birth'.¹

Intersex is not about sexual orientation, transitioning sex/gender or gender identity. It is about biology, about being born with sex characteristics that differ from social and medical norms for female or male bodies. Some intersex people are assigned the wrong sex when their birth is initially registered, and as with the general population, people with intersex variations have a broad range of gender identities and sexual orientations. A higher proportion of people with intersex variations use sex markers outside the male/female binary (19% X or another option and 6% unsure), the majority of intersex people in the Intersex Survey identified as female (52%) or male (23%).² The SDA defines 'intersex status' as the 'status of having physical, hormonal or genetic features that are neither wholly female nor wholly male, a combination of female and male; or neither female nor male'.³

This joint submission has been prepared by 8 advocacy and support organisations representing or working with trans, gender diverse and intersex communities in South Australia to address queries regarding the drafting of regulations required by the Bill in response to the letter from the Department of the Premier and Cabinet dated 24 February 2017.

2. Terms of reference questions

2.1 Question One – sex marker categories

What sex or gender identities should be recognised by the regulations for persons who apply to have their registered sex and/or gender changed?

- ***Male, Female, Unspecified.***
- ***Male, Female, Non-Binary.***
- ***Male, Female, Other.***
- ***Male, Female, Unspecified, Non-Binary.***
- ***None of the above – please provide feedback as to your preferred approach.***

¹ *Sex Discrimination Act 1984* (Cth) s 4.

² OII Australia, *Intersex: Stories and Statistics from Australia* (2016) <https://oii.org.au/30313/intersex-stories-statistics-australia/>.

³ *Sex Discrimination Act 1984* (Cth) s 4.

This question addresses the requirement to set Regulations pursuant to s 29I(2)(a) of the Bill.

Legal requirements in Commonwealth legislation

The Australian Bureau of Statistics' submission to SALRI's review of legislative or regulatory discrimination against individuals and families on the grounds of sexual orientation, gender, gender identity or intersex status (**SALRI Review**) argued that the collection of data on a person's 'sex' is:

- a requirement under the *Census and Statistics Act 1909* (Cth); and
- necessary for compliance with United Nations guidelines on the collection of national vital statistics.

This submission suggests that removing sex or gender data from birth registration data collection would be incompatible with current Commonwealth law and policy.

The recognition of sex or gender outside the male and female categories is now a matter of Commonwealth Government policy (for example, passports can be issued with an "X" category) and has been recognised by the High Court of Australia.⁴ The ACT also allows birth certificates to be issued with classifications other than male and female.

Increasingly, countries around the world are also recognising gender diversity but we note that law reform in foreign jurisdictions can often reflect culturally specific ideas about gender that are not necessarily appropriate to directly translate to the Australian context.⁵

SALRI and Legislative Review Committee reports

The South Australian Parliament Legislative Review Committee (**Committee**) recommended that a third 'non-specific' sex should be available for registration⁶.

More usefully, SALRI established two principles to be applied for the registration of sex and gender based on its community consultations:⁷

- registering sex and gender based on the principle of self-identification (e.g. 'Other [with option to self-describe]' or 'Please specify [with option to self-describe]'); and
- registering sex and gender based on the principle of non-specification (e.g. 'Unspecified', 'Non-specified' or 'Undeclared').

SALRI also made the following relevant recommendations:

For adults and children who apply to have their registered sex and/or gender changed, this category should be described as 'Other, please specify' with the option to provide an additional description of gender identity. This category would align with the principle of self-identification supported by the Roundtable and would also be consistent with the proposed new ABS Sex and Gender Identity Standard...

If, contrary to this primary recommendation, these options are not considered administratively feasible, then SALRI notes that the terms 'unspecified' and 'non-binary' have received support, particularly in the context of adult applications for change of sex and/or gender, and could be used a single third option for the registration of sex and/or gender.

⁴ *NSW Registrar of Births, Deaths and Marriages v Norrie* [2014] HCA 11 (2 April 2014).

⁵ For example, the "third gender" in India and Nepal.

⁶ Report of the Legislative Review Committee into the Sexual Reassignment Repeal Bill 2014, Parliament of South Australia.

⁷ South Australian Law Reform Institute, *LGBTIQ Discrimination in legislation*, Report 5, February 2016

Findings of the Trans Survey on Gender Identity Regulations

The Trans Survey found strong support for the adoption of additional gender markers. 72% supported additions to male or female markers, being either one or several new non-binary markers or personal self-identification of gender. Of the remaining respondents the largest group, 25% supported the removal of sex or gender entirely from birth certificates as being unnecessary.

The most supported new markers were “X” (25%), Non-binary (19%), Unspecified (11%) and Other or None 10%. Some 4% also supported administratively appropriate non-binary markers without specifying a particular personal preference.

The terms ‘brotherboy’ and ‘sistergirl’ are unique to Indigenous communities as distinct cultural identities that are preferred by some Aboriginal and Torres Strait Islander sistergirls and brotherboys to reflect the roles they play in the community.

Findings in the Intersex Survey summary

Intersex people are born with a combination of male and female sex characteristics and while the majority identify as either male or female, a small but significant number wish to access categories that more accurately reflect their status and should be permitted to do so. Others prefer not to specify.

In a survey of 272 intersex people in Australia in 2015, 52% identified as female, 23% as male, 7% as X, 6% unsure and 12% as another option.

Intersex advocates have provided feedback that the category of “non-binary” is not a suitable category for all intersex people, and that some intersex people want to be recognised as both female and male and not othered to another category that does not explicitly state who someone is and their identity. Sex classifications should allow people to have their biological sex/gender identity legally recognised if they identify as both female and male, in recognition that categories such as “non-binary” are not suitable for everyone.

Conclusion

The Regulations should recognise the reality of gender diverse and intersex people who identify as neither or both male and female. This would require the inclusion of an additional category or categories of gender marker as well as “M” and “F”. We suggest the categories of “M”, “F” and “Other (please specify)” to allow individuals to nominate terms appropriate to themselves.

We acknowledge that a significant portion of the trans and gender diverse community surveyed in the Trans Survey believe that the removal of gender from birth registration is not at the current time practical due to Commonwealth legislation and international data collection guidelines.

We endorse the principles identified by SALRI as providing appropriate guidance for determining policy given the provisions of the Bill passed by the Parliament.

The first SALRI principle of self-identification is consistent with human rights principles outlined by the Yogyakarta Principles.

The second principle that an option for an ‘unspecified’ sex or gender marker be made available was strongly supported in the Trans Survey with 51.7% of the respondents supporting both ‘non-binary’ and ‘unspecified’ as options.

Recommendation 1

We recommend that the preferred new gender registration should be 'Other; please specify' with a free text field.

In the alternative, applicants should be able to change their registered sex and/or gender to a *minimum* of 8 categories, being male, female, male and female, X, non-binary, unspecified, brotherboy and sistergirl.

2.2 Question Two – prescribed period of counselling

What period of counselling should be prescribed in the regulations as a sufficient amount of appropriate treatment *by counselling only*? This may include a specific number of hours over a year or a minimum time period (e.g. 6 months).

This question addresses the requirement to set Regulations pursuant to section 29H(3) of the Bill. Section 29H(1) of the Bill requires that a person undergo 'clinical treatment' which 'need not involve invasive of medical treatment (and may include or be constituted by counselling)'.

Section 29H(3) requires the Regulations to specify a minimum period of counselling where it is relied on as evidence of clinical treatment. Counselling by itself is acceptable as evidence of clinical treatment for an application provided it is equal or greater than a prescribed period.

Prescribed period required for counselling only

Section 29H(3) and the terms of reference require that a prescribed period be set in the Regulations for clinical treatment constituted by counselling only, not situations in which other clinical treatment has been undertaken (e.g. hormones, surgery).

As a period of counselling is not required for intersex people whose sex characteristics do not fit medical norms of male and female, this section of the submission deals exclusively with issues affecting the trans and gender diverse communities.

Statement required from a medical practitioner or psychologist

The Bill requires that an application for a change of sex or gender be accompanied by a statement by a 'medical practitioner or psychologist certifying that the person has undertaken a sufficient amount of appropriate clinical treatment in relation to the person's sex or gender identity (including in the case of a person whose sex or gender identity has now become determinate)'.⁸

The Trans Survey and feedback from trans advocates has highlighted that self-affirmation without requiring confirmation from a medical practitioner or psychologist is a preferred option for some trans and gender diverse advocates.

Some trans advocates also have serious concerns that it is not appropriate for the Regulations to interfere with counselling standards set by WPATH and ANZPATH or otherwise create or enforce a 'de facto medical protocol'. The WPATH Standards of Care specifically do not set required guidelines for counselling in recognition that different people require different types of treatment, and that the number or types of sessions depend on the individual person and their treatment goals.⁹

⁸ *Births, Deaths and Marriages Registration (Gender Identity) Bill 2016 (SA) s 29K(a).*

⁹ *Ibid.*

In addition, some trans advocates have raised concerns that this would exclude accredited social workers who provide counselling specifically for trans and gender diverse people, and that very few medical practitioners in South Australia have received appropriate training on gender identity because of strict provisions under the *Sexual Reassignment Act* which has now been repealed. There are some concerns within the trans and gender diverse community that medical practitioners and psychologists in South Australia who are likely to treat trans and gender diverse people should be required to meet the competency of mental health professionals working with trans and gender diverse children and adults.¹⁰

However, as these issues are outside the terms of reference of this inquiry, we will now focus on the question raised as part of this consultation.

Experience of the trans and gender diverse community

It is the experience of the trans and gender diverse community that each individual is different with regard to their requirement for counselling, and that specification of a 'one size fits all' regulation will run the danger of holding back a significant number of trans and gender diverse people from achieving legal recognition of their gender. The Trans Survey discusses this matter extensively.

For the reasons outlined in the Trans Survey, this matter is seen as critical for the success of the Bill in allowing an easier path to gender recognition for those previously been denied that option due to financial or health grounds.

We submit that the prescribed period of a sufficient amount of counselling should be determined individually by consultation between the medical practitioner or psychologist and the client.

In the alternative, the Trans Survey found strong community support for a short assessment (51%) as the prescribed period (perhaps no more than 6 months or a limited number of sessions).

The Trans Survey also found a strong view that a minimum number of sessions (with 3 sessions most often specified) should be adequate to assess clinical support for an application for a birth certificate application.¹¹ This time period is consistent with the DSM-5 minimum time period of 6 months for a diagnosis or gender dysphoria.

Conclusion

As section 29H(3) of the Bill places a strong onus for the specification of a 'prescribed period', we make both a broad recommendation that a sufficient 'prescribed' period should be defined on a case by case basis by the client and practitioner/counsellor and a specific recommendation for a reasonable minimum assessment period.

Recommendation 2

We recommend that the prescribed period for counselling only in the Regulations should be determined on a case by case basis by the counsellor and the trans or gender diverse person.

In the alternative, we recommend that the minimum prescribed period for clinical treatment should not exceed 6 months or the completion of three 45 minutes of counselling, whichever comes first.

¹⁰ The World Professional Association for Transgender Health, *Standards of Care for the Health of Transsexual, Transgender, and Gender Nonconforming People*, [https://s3.amazonaws.com/amo_hub_content/Association140/files/Standards%20of%20Care%20V7%20-%202011%20WPATH%20\(2\)\(1\).pdf](https://s3.amazonaws.com/amo_hub_content/Association140/files/Standards%20of%20Care%20V7%20-%202011%20WPATH%20(2)(1).pdf) 22.

¹¹ Trans Survey, s 3.3, 3.4.

3 Additional issues

3.1 Guidelines on correction applications

Section 42 of the Act allows a Registrar to correct the Register 'to bring the particulars contained in an entry about a registrable event into conformity with the most reliable information available to the Registrar of the registrable event'. The Registrar has an obligation to ensure the registrable event is accurate and must correct the register (and subsequent birth certificate) if information later comes to light that shows the recording of the registrable event at birth was incorrect.

This already empowers a Registrar to correct a sex marker for an intersex person where there is an error in how an intersex person's sex was recorded at birth. Some intersex people who are born as male and female will apply for their birth certificate to be *corrected* to reflect this fact, which is different from a change of sex application. This is important for intersex people where a decision was made at birth about the sex of rearing and what sex would be registered on their birth certificate, and the decision made about their sex was wrong.

Recommendation 3

We recommend that guidelines be prepared by the Registry of Births, Deaths and Marriages for applications by people born with variations of sex characteristics to correct a sex marker on a birth certificate in South Australia.

3.2 Maximum number of applications

We note with general approval the Registrar's desire to maintain administrative consistency in the Act and policies between changes to name and sex or gender.

The proposal to limit change of sex or gender applications to one application per year is consistent with the policy for name changes and was also supported in the findings reported by the Trans Survey.¹²

However, the Trans Survey found very little community support for setting a maximum limit on the total number of applications an applicant can make.

For many trans and gender diverse people our acceptance of our gender identity evolves over time in response to social stigma, discrimination, family pressure, lack of knowledge, minority stress, confusion and inaccurate natal gender assignment. This is a significantly different life experience to the issues most people might address by changing their name.

As a group of organisations dedicated to advocating for the rights of trans and gender diverse people, we request that both the South Australian Government and Registrar recognise these realities of our lives. We do not support a maximum limit of three change of sex or gender applications as sufficient and this legal barrier may be detrimental to some members of our community.

We also note that regardless of SALRI's recommendation that the administrative processes for name and gender amendment should be consistent, the Bill does not implement this approach. The requirement for evidence of clinical treatment to support a change of sex or gender application already means that administrative procedures are inconsistent.¹³

¹² Trans Survey, s 3.5.

¹³ Ibid.

We also consider that the Registrar should have discretion to approve further applications for change of sex or gender in 'special circumstances' where there are compelling reasons for a further application to be made (e.g. significant adverse mental health impacts if an application is barred by the Regulations).

Recommendation 4

We recommend that if a maximum limit on total applications for change of sex is set out in policy, that the limit should be no fewer than four applications, with an option for further applications if 'special circumstances' are present.

3.3 Registrations at birth

The Bill addresses changes of sex for existing registrations but does not address natal registration in South Australia. Therefore, concerns regarding registration at birth are not relevant to the current consultation but remain a priority for the intersex community in South Australia. These priorities include concerns that initial sex registration may be surgically or hormonally reinforced, as described in the 2016 Family Court case of *Re Carla (Medical procedure)*.¹⁴ Options other than female or male should not be used when initially registering a birth.

3.4 Review of the Regulations

The Trans Survey also sought community opinion on how long the Regulations should operate before being reviewed. The Trans Survey found clear support for an early review of the effectiveness of the new Regulations.

43% of respondents favoured a review after five years and nearly as many 38% supported a review after two years in operation.

The Regulations determine several matters of critical importance to whether the Bill meets its objective of supporting the trans and gender diverse community to change the sex or gender on our birth certificates. If the Regulations generate unintended consequences or barriers it is important that this be addressed early to prevent further harm to our community.

As understanding of sex, gender, gender diversity and identity is expanding in Australia and most parts of the world, we believe that regular review of this area of law is clearly required.¹⁵

Recommendation 5

We recommend that the Regulations be drafted to ensure they are reviewed after 5 years in operation.

3.5 Application fees

We are concerned that a high application cost will act as a financial barrier to some trans, gender diverse and intersex people being able to change the sex or gender on their birth certificate.

¹⁴ See, OII Australia, *The Family Court case Re: Carla (Medical procedure) [2016] FamCA 77* December 2016) <https://oii.org.au/31036/re-carla-family-court/> Family Court of Australia.

¹⁵ Trans Survey, s 3.6.

As discussed above, trans and gender diverse people experience higher rates of unemployment than the general population.

Approximately 12% of intersex people surveyed in 2015 were unemployed and looking for work (a higher proportion than the general population) and 63% of participants earned an income under \$41,000 per year, with 41% earning less than \$20,000 per year, well below the Australian minimum wage of approximately \$34,158 in Australia during the survey period.¹⁶

We have been informed that the current cost for a change of sex application is approximately \$80, with a re-issue fee of approximately \$40. We consider that these fees should be retained under the new system.

We also consider that a process should be available for people who simultaneously change their name and their sex to make this a streamlined process which avoids requiring a person to pay 'double' the fees.

Accordingly, we recommend that any application fee should be low (e.g. comparable to the change of name application fee cost) and that a waiver of the application fee be available in 'special circumstances' (e.g. Low Income Healthcare Card holders, people experiencing serious mental health issues or homelessness, etc).

Recommendation 6

We recommend that the application fees set in the regulations should be the same as the current application fee for a change of sex application, with a waiver of the application fee available in 'special circumstances'.

In addition, we recommend that one application process for change of sex or gender and name should be available at the current application fee for a change of sex application, with a waiver of the fee available in 'special circumstances'.

¹⁶ Intersex Survey, 146.

Appendix A: Glossary and list of abbreviations

Act	<i>Births, Deaths and Marriages Registration Act 1996 (SA)</i>
Bill	<i>Births, Deaths, and Marriages Registration (Gender Identity) Amendment Bill 2016</i>
Intersex	An umbrella term to describe people born with variations in physical sex characteristics (such as chromosomes, gonads or hormones) that our do not fit typical medical definitions of female or male
Intersex Survey	Summary of survey of 272 intersex people in Australia conducted in 2015 – OII Australia, <i>New publication “Intersex: Stories and Statistics from Australia”</i> (February 2016)
Committee	South Australian Parliament Legislative Review Committee
Non-binary	An umbrella term to describe gender identities that are not exclusively male or female or those that identify outside of the gender binary
Registrar	South Australian Registrar of Births, Deaths and Marriages
SALRI	South Australian Law Reform Institute
Trans Survey	Survey of 121 trans and gender diverse people in South Australia conducted in 2017 - Trans Legal Reform Group South Australia, <i>Trans Community Survey: Gender Identity Regulations - Gender Identity Regulations</i> (January 2017)
Trans and gender diverse	An umbrella term to describe people whose gender identity or expression is different from that which was assigned at birth, or that which is expected of them by society
Yogyakarta Principles	Principles drafted in 2006 by a pre-eminent group of human rights experts in Yogyakarta to provide a guide to binding international human rights and legal standards