

**EMBARGOED  
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TUESDAY  
17 MARCH 2009**



Australian  
Human Rights  
Commission

*everyone, everywhere, everyday*

2009

# The sex and gender diversity project



Concluding paper



# sex files



THE LEGAL RECOGNITION  
OF SEX IN DOCUMENTS  
AND GOVERNMENT  
RECORDS

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You can also write to:

Public Affairs  
Australian Human Rights Commission  
GPO Box 5218  
Sydney NSW 2001

### **Design and layout**

Jo Clark

### **Printing**

Citywide Print

### **Cover artwork**

Crankyfish

# 2009

## Sex Files: the legal recognition of sex in documents and government records



Concluding paper of the sex and gender  
diversity project



**Australian  
Human Rights  
Commission**

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*everyone, everywhere, everyday*



# Sex Files: the legal recognition of sex in documents and government records

## Concluding paper of the sex and gender diversity project

Welcome to the concluding paper of the Australian Human Rights Commission's sex and gender diversity project – *Sex Files: the legal recognition of sex in documents and government records (Sex Files)*.

As Australia's Human Rights Commissioner, I am responsible for monitoring, protecting and promoting human rights in Australia. People who are sex and gender diverse have the same human rights as other Australians.

In our sex and gender diversity project, I specifically wanted to hear about the issues faced by the sex and gender diverse community and to provide an opportunity for people to share ideas about how these issues could be addressed.

I want to thank the hundreds of people around Australia who contributed to this project by meeting with me and my staff, writing submissions and participating in our Sex Files blog. Your views have been crucial in shaping our project and the project's final recommendations.

I have been touched and moved by the people in the sex and gender diverse community who have made it very clear that they only want one thing: to be recognised for who they are.

As one blog participant said:

I simply wish to have the same rights as everyone else. I have a PhD and I teach at a university, I do volunteer work and participate at a number of local sports clubs. I'm a good teacher, a good son, a wonderful friend and a generally kind, loving and compassionate individual. In short, I'm an upstanding citizen. And I have, for the most part, a very normal life. Apart from my family, nobody in my social or professional networks knows that I was not born male. But like so many other people who are denied the right to have their legal documents reflect the gender that they live as, I feel quite strongly that I am still being denied the right to live a life of quiet dignity.

I hope this paper leads to action by the Australian government to create a fairer and less complicated identification system that recognises sex and gender diversity. I encourage you to use the recommendations in this paper to advocate for the protection of the human rights of people who are sex and gender diverse.



*Graeme Innes AM*

Human Rights Commissioner and  
Disability Discrimination Commissioner



**Graeme Innes AM**

Human Rights Commissioner and  
Disability Discrimination Commissioner



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# Section 1: Introduction

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The sex and gender diversity project of the Australian Human Rights Commission (the Commission) focuses on the legal recognition of sex in documents and government records.

This project has its origins in the 2006-07 National Inquiry into Discrimination against People in Same-Sex Relationships: Financial and Work-Related Entitlements and Benefits (Same-Sex: Same Entitlements Inquiry). During the Same-Sex: Same Entitlements Inquiry, the Commission received submissions from members of the sex and gender diverse community about the discrimination they experienced.

One of the key concerns was that many people who are sex and gender diverse are not able to change the sex markers in official documents or government records.

The Same-Sex: Same Entitlements Inquiry was not able to address these concerns as they were beyond the Inquiry's terms of reference. In 2008, the Commission decided to investigate further.

This Sex Files concluding paper is a result of the Commission's investigations and addresses the following questions:

- What methodology did the sex and gender diversity project use? (Section 3)
- What is sex and gender diversity? (Section 4)
- What did the Commission hear about the legal recognition of sex in official documents and government records? (Section 5)
- What are the human rights relevant to the recognition of sex identity? (Section 6)
- What is Australia's identification system? (Section 7)
- What is the existing process for changing sex or gender in official documents and government records? (Section 8)
- What are the problems with the existing system? (Section 9)
- What changes does the Commission recommend to the system for the legal recognition of sex identity? (Section 10)
- What are some options for implementing the recommendations? (Section 11)
- What are some criticisms of the Commission's proposal? (Section 12)
- What are the other major issues not dealt with by Sex Files? (Section 13)

The Commission's recommendations do not satisfy all people who are sex and gender diverse. The Commission has relied on the discussion, disagreement and detailed analysis of many issues during the sex and gender diversity project to inform its recommendations.



## Section 2: Recommendations

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**Recommendation 1:** Marital status should not be a relevant consideration as to whether or not a person can request a change in legal sex.

**Recommendation 2:** The definition of sex affirmation treatment should be broadened so that surgery is not the only criteria for a change in legal sex.

**Recommendation 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.

**Recommendation 4:** The special needs of children and young people who wish to amend their documents and records should be considered.

**Recommendation 5:** A person over the age of 18 years should be able to choose to have an unspecified sex noted on documents and records.

**Recommendation 6:** Information on the process and criteria for the legal recognition of sex should be easily accessible and user-friendly.

**Recommendation 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.

**Recommendation 8:** Laws and processes for the legal recognition of sex should use empowering terminology.

**Recommendation 9:** Where possible, sex or gender should be removed from government forms and documents.

**Recommendation 10:** The federal government should consider the development of national guidelines concerning the collection of sex and gender information from individuals.

**Recommendation 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

- 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
- establishing a national board with responsibility for receiving and determining applications for official recognition of a change in sex, based on the recommendations in this paper (see section 11.2), as well as securing agreement from states and territories to recognise certificates of recognition issued by such a board.

**Recommendation 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.

**Recommendation 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:

- 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
- 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.

**Recommendation 14:** The federal government should harmonise policies, procedures and legislation relevant to the legal recognition of sex in federal documents and records.

**Recommendation 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.

## Section 3: What methodology did the sex and gender diversity project use?

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The methodology adopted by the sex and gender diversity project aimed to give members of the sex and gender diverse community an opportunity to:

- contribute to the development of the focus and scope of the project
- participate in the project irrespective of location
- participate in the project anonymously
- share information and build networks.

This was achieved by:

- calling for responses to an issues paper
- holding consultations and public meetings
- facilitating responses and comments via an online mechanism.

In addition, the Commission engaged with relevant government stakeholders to consider the human rights implications of Australia's identification system.

### 3.1 Developing the focus and scope of the project

In May 2008, the Commission released an Issues Paper about the human rights concerns of people who are sex and gender diverse. The Commission used this paper to begin a dialogue with the sex and gender diverse community.

In the Issues Paper, the Commission sought the views of the sex and gender diverse community about their most pressing human rights issues. The Commission also sought input into how it might assist in promoting and protecting the human rights of people who are sex or gender diverse.

The initial consultation revealed diverse views as to what are the 'most pressing' human rights issues for people who are sex and gender diverse. Views were informed by whether a person identified as being sex diverse or gender diverse. Nonetheless, the majority of responses identified obtaining documentation as an important issue. Consequently, the Commission decided that the sex and gender diversity project would focus on the legal recognition of sex in official documents and government records.

Many people also identified access to health services, medical treatment and the cessation of infant surgeries as important human rights issues for sex and gender diverse people. In July 2008, the Commission released a report on the responses to the Issues Paper. See section 13 for information about some of the other issues raised during the sex and gender diversity project.

As part of the project, the Australian Human Rights Commissioner conducted public meetings in Brisbane, Canberra, Hobart, Melbourne, Perth and Sydney. These public meetings enabled the Commissioner to hear firsthand the difficulties faced by people who are sex and gender diverse in having their identity recognised. The Commissioner also heard about other areas of discrimination and was better able to understand the effect that discrimination has on the day-to-day activities of people who are sex and gender diverse.

### 3.2 Participation in the Sex Files blog

On 8 August 2008, the Commission launched an online blog and discussion board known as Sex Files. The Sex Files blog aimed to consult further with the sex and gender diverse community about the legal recognition of sex in official documents and government records. The Sex Files blog was used to gather information about the current system and seek feedback on how the system could work better.

The blog provided an innovative online consultation with the sex and gender diverse communities about the legal recognition of sex. As the project concerned identity, an online consultation in cyberspace was an opportunity for participants to self-identify their sex or gender and escape scrutiny of their bodies and appearance.

The Sex Files blog specifically sought discussion and debate on some of the contentious issues concerning sex and gender diversity. Participants were able to post anonymously as a guest to the blog or to register as a blog participant and receive updates about the blog discussions. More information about the Sex Files blog discussion topics is listed at section 5.

From the launch of Sex Files in August until mid November 2008, approximately 9,032 unique visitors visited the Sex Files site, 389 comments were posted and 94 participants were listed as registered to the site.

The blog was advertised through postcards and posters which were distributed to medical professionals and organisations, universities and support groups. Several media outlets also publicised the Sex Files blog.

#### “Suffer Not In Silence

*When your true essence weeps  
sing out loud, strong and proud,  
‘I will no longer suffer in silence  
the stinging lashes of adversity’.  
Join the chorus of the alienated.  
Let the world hear a voice of unity  
as we step forward, hand in hand  
and have a say in our destiny.”*

Written by a married couple in North Queensland in an attempt to encourage other members of the sex and gender diversity community to engage in the Sex Files project. Their marriage has survived one member of the couple’s affirmation of her true self and has gone on to thrive.

### 3.3 Seeking information from government stakeholders

In addition to consulting with the sex and gender diverse community, the Commission also consulted with state, territory and federal government agencies. See Appendix 1 for a list of agencies that provided feedback to the Commission’s sex and gender diversity project.

The Commission received information from agencies by meeting with agency staff and the exchange of correspondence during the course of the sex and gender diversity project. The Commission has used this information to analyse the deficiencies in the current system and to support its recommendations.

Where relevant, throughout this paper the Commission has referenced the source of the material relied upon to provide guidance to readers.

### 3.4 What happens next?

The publication of the Sex Files concluding paper marks the completion of the sex and gender diversity project.

However, the Commission will continue to advocate for the implementation of the recommendations made in this paper. The Commission will also consider the rights of people who are sex and gender diverse in the course of its other projects.

## Section 4: What is sex and gender diversity?

---

### 4.1 How is sex and gender diversity defined?

There are various legal, social, medical and scientific opinions and theories about what constitutes sex and what constitutes gender.<sup>1</sup> There is no consensus about the definition of sex or gender.

A commonly held view is that sex is a fixed concept that is biologically determined. Some of the biological factors that may determine sex include physical attributes, chromosomes, genitals, gonads, hormones and 'brain-sex'. However, not all of these factors are accepted as being biologically determined. There are different views about which of these specific factors actually biologically determine sex.

The biological definition of sex is based on whether a person is male or female. However, there are also people who are born not exclusively male or female and are intersex. The phrase sex diversity as a term recognises the complete spectrum of sex identity.

For people who define sex as biologically determined, gender is viewed as socially constructed. From this perspective, gender can be determined by how a person looks, dresses or acts. People can express a gender identity that is masculine, feminine or something else. Gender identity does not necessarily match with sex. For example, whilst most females will have a gender identity that is feminine, some males also have a gender identity that is feminine.

The phrase gender diversity as a term recognises that all people express a gender identity and that gender identity is not necessarily linked to a person's sex.

Other views challenge this dichotomy of sex as a biological determination and gender as a social construction. These views advocate for a definition of sex that is based on social and cultural factors. This perspective collapses the distinction between sex and gender by arguing that sex is historically and politically specific. This perspective sees sex as a variable concept and gender diversity is built into the very nature of sex.

Despite this lack of consensus over the exact meaning and definition, sex and/or gender is an important part of a person's personal identity. 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 simplest way I can put it is that I don't consider myself trans anything. I am just a female (no surgery) and it's a hefty slap in the face to say that my documentation, id and whatnot cannot be changed to reflect that until I go under the knife.”

**Blog participant**

“We need to determine why our sex is relevant to anyone except ourselves and our loved ones ... Except for private moments, more often than not, our sex is hidden from the view of all others. It is a personal private matter. It is of no concern to those people who read our birth certificates, our passports, our driver’s licenses or any other official document.”

**Blog participant**

#### 4.2 How is sex and gender diversity described?

Many terms have been used to describe people who are sex and gender diverse including transgender, transsexual, pansexual, pan-gendered, androgynous, intersex and intergender. In addition, there are culturally specific terms, such as sistergirl and brotherboy, which are used by some Aboriginal and Torres Strait Islander people.

Debate exists over what are appropriate terms to refer to people who are sex and gender diverse. Much discussion on the Sex Files blog related to the specific terms and definitions used to describe sex and gender diversity. Some definitions and words are contested and draw strong views from some members of the sex and gender diverse community. The lack of consensus is partly due to the fact that there are also no fixed legal, social or medical views about sex and gender diversity.

The Commission uses the phrase ‘sex and gender diversity’ to recognise variations in sex and gender. The Commission has received feedback from people who like the phrase sex and gender diversity. However, others thought it suggested individual people have diverse sex and gender identities when the reality is that most people identify as one sex or gender (although that may differ from the details on their birth certificate).

The Commission also received feedback that some people are comfortable with terms such as transgender or transsexual, while others are not. Some responses preferred that any discussion refer to a person’s medical condition and not seek separate terminology that defines people. For example, some people want to be defined as having Harry Benjamin Syndrome rather than as being transsexual. There was also considerable debate on the Sex Files blog and in other consultations about what is considered an intersexual condition and what is considered a transsexual condition.

The Commission acknowledges the significance of terminology and that inappropriate terminology can be disempowering. Furthermore, the terminology adopted by lawmakers or policymakers will determine whether a person has certain rights (such as the ability to correct a birth certificate) and whether a person has the protection of the law (such as in the case of discrimination laws).

As one participant in our Hobart consultation pointed out, the terminology she uses is context-specific. Most of the time she uses the term ‘woman’ to describe herself, however, when she attends meetings such as the sex and gender diversity consultation, she uses the term ‘transgender’ or ‘transsexual’ to describe herself.

Based on our consultations, the Commission decided to use definitions concerning the recognition of sex based on people’s experiences rather than defining particular groups of people. Therefore, the Sex Files project is about sex identity and the problems people face in having their sex identity legally recognised in official documents and government records.

Although this paper uses the phrase sex identity, gender identity is also relevant to a person’s legal sex identity. Therefore, the Commission also draws on the human rights discourse about gender identity.

This paper also uses language such as ‘post-operative transsexual’ or ‘gender identity’ when we are referring to legal jurisprudence where this has been the language used by courts or other bodies.

## Section 5: What did the Commission hear about the legal recognition of sex in official documents and government records?

---

Most of the information the Commission received concerning the legal recognition of sex was conducted through the Sex Files blog.

The initial questions posed by the Commissioner on the Sex Files blog were:

- What terms should be used to describe people who are sex and gender diverse in Australian laws?
- What criteria should be fulfilled before a person who is sex or gender diverse can legally change their documents?
- What documents do people who are sex and gender diverse want to change?
- When have documents 'outed' people who are sex and gender diverse?
- Share your story
- Do you have any other comments you want to make?

The Sex Files blog generated vigorous debate about different aspects of these complex issues.

The most popular discussions related to the 'criteria' that should be fulfilled before a person can legally change their documents to a particular sex. Debate touched on topics such as:

- whether a person should have undergone genital modification surgery
- whether a person should be unmarried
- what sort of evidence a person would need to prove their sex identity
- how long a person must have already committed to their sex identity by living as a person of a particular sex
- how to recognise people who are not or do not identify as being either male or female.

“One of the saddest parts of my life is that I felt punished, and that those around me suffered for me not being able to be my perceived sex. Over time, I began hating myself for being unable to change my gender identity to suit my body, no matter how hard I tried.”

**Blog participant**

“Having documents that reflect one’s sense of identity is important for employment, access to healthcare and medicines and also for self affirmation and acceptance by the government that – yes – this is who you really are.”

**Blog participant**

Many participants acknowledged the complexity of the issues surrounding sex and gender diversity and debated whether the changes concerning the legal recognition of sex identity should be incremental or as broad and as inclusive as possible.

As discussions continued on the blog, the Commissioner also responded to various issues. On 5 September 2008, the Commissioner uploaded a post on ‘the scope of the project’ outlining why the project addressed issues of documentation and was dealing with issues of sex and gender together. On 10 October 2008, the Commissioner released a post on ‘discrimination’ which outlined the ongoing work of the Commission in considering how people who are sex and gender diverse can be protected from discrimination. The Commissioner’s posts on all topics are contained at Appendix 2.

On 26 September 2008, based on the information received in the Commission’s initial consultation, public meetings and on the Sex Files blog, the Commissioner released a document outlining proposed reform for the legal recognition of sex in Australia. We received significant feedback to this document and further refined these proposals, as outlined in sections 10 and 11.

In addition to the Sex Files blog, the Commission also heard about the legal recognition of sex through its public and stakeholder meetings as well as in written submissions.

# Section 6: What are the human rights relevant to the recognition of sex identity?

.....

## 6.1 The ICCPR and the CRC

People who are sex and gender diverse have the same human rights as everyone else. Human rights are about equality and dignity for everyone. All human beings deserve recognition of and respect for their sex or gender identity.

The Commission has certain statutory functions to examine whether Australia is complying with its human rights obligations under the *International Covenant on Civil and Political Rights* (ICCPR) and the *Convention on the Rights of the Child* (CRC).

The key human rights in the ICCPR that are specifically relevant to people who are sex or gender diverse, 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).

There are also several human rights in the CRC that are specifically relevant to people under the age of 18 who are sex or gender diverse. The CRC is broader than the ICCPR and includes civil, political, economic, social and cultural rights. Some relevant rights include:

- the right to non-discrimination (article 2)
- the best interests of children should be 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 of children 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).

## 6.2 The Yogyakarta Principles

In March 2007, a group of human rights experts adopted what are known as the Yogyakarta Principles on the application of international human rights law in relation to sexual orientation and gender identity. These experts included a former United Nations High Commissioner for Human Rights, several current or former United Nations special rapporteurs or treaty body members, judges, academics and activists.<sup>2</sup>

The Yogyakarta Principles provide guidance on how international human rights treaties should be interpreted in relation to the protection of gender diversity.

The Yogyakarta Principles are not legally binding themselves, but are an interpretation of already binding agreements from the view point of sexual orientation and gender identity. Therefore, the Yogyakarta Principles are persuasive in shaping our understanding of how existing binding human rights obligations apply and relate to people who are sex and gender diverse.

In particular, 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, sterilisation 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.

In addition, Yogyakarta Principle 3 details actions that countries such as Australia 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
- 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.

In December 2008, 66 nations at the United National General Assembly supported a groundbreaking statement confirming that international human rights protections include sexual orientation and gender identity. Australia was a signatory to the statement.<sup>3</sup>

### 6.3 Human rights courts and other international bodies

In addition to these international human rights documents, human rights courts and other international bodies have looked at various human rights issues concerning recognition of a person's gender or sex identity.

For example, the European Court of Human Rights has considered several cases brought against the United Kingdom concerning issues relating to legal recognition and documentation in respect of 'post-operative transsexuals'. The initial cases failed, with the Court accepting that the laws and practices of European states in relation to such issues were varied and in transition and, accordingly, States should be afforded a wide margin of appreciation in determining the appropriate course.<sup>4</sup>

However, in the more recent cases, the Court accepted that there had been substantial social, legislative and medical developments in relation to issues of sex and gender identity and a fresh assessment was therefore required.<sup>5</sup> Unlike in the earlier cases, the Court accepted that there had been a breach of the applicants' rights to privacy and marriage due to their inability to gain legal recognition of their post-operative sex. The Court emphasised the significant impact on the lives of the applicants (and others in a similar position) arising from the failure of the domestic legal system to properly recognise their change in sex following gender reassignment surgery. For instance, the Court observed:

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.<sup>6</sup>

# Section 7: What is Australia's identification system?

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## 7.1 What are the key Australian identity documents?

Federal, state and territory jurisdictions have common systems for confirming and protecting the identity of its citizens. These systems classify types of official documentation as evidence of a person's identity. The existing identification systems provide very little scope for a person to identify as other than male or female.

Under Australia's identification systems the most important identity documents are known as cardinal documents. For people born in Australia, cardinal documents are birth certificates or change of name certificates. For people not born in Australia, cardinal documents are citizenship certificates or the information contained in the database held by the federal Department of Immigration and Citizenship (DIAC records). Cardinal documents are the most trusted evidence of identity and citizenship.

Secondary documents are documents that are not considered the source data of a person's identity but are also trusted as evidence of a person's identity. Examples of secondary documents include passports, driver's licences and photo identity cards. Secondary documents are often used to open bank accounts, travel, access goods and services and for other day-to-day functions.

## 7.2 How is information about sex and gender recorded?

Some cardinal documents, such as birth certificates and change of name certificates, contain information about a person's sex.<sup>7</sup> Similarly, some secondary documents, such as passports, the Queensland driver's licence and photo identity cards, record information about a person's sex or gender.

Information about sex or gender is not only recorded on documents. Various government departments, including DIAC, record information about a person's sex or gender in databases. However, sex or gender is necessarily always recorded on official documents that certify the information in those databases. For example, under the Births, Deaths and Marriages Registration Regulation 1996 (SA), the Registrar must record information about a person's sex when a person changes their name.<sup>8</sup> However, that law does not require that a person's sex be noted on a change of name certificate. In practice, change of name certificates record a person's sex. During our consultation with the Council of Australasian Registrars (COAR), some Registrars of Births, Deaths and Marriages indicated that a birth certificate or change of name certificate can be printed without a sex notation.<sup>9</sup>

Further, in some cases there is a lack of consistency as to whether official documents and records require information about a person's sex or gender. This can create confusion for a person who identifies their sex as being different to their gender. For example, under the Road Transport (Driver Licensing) Regulation 2008 (NSW), the register must record a person's gender,<sup>10</sup> but the licence application form requires a person to identify their sex.<sup>11</sup> The driver's licence card does not need to record sex or gender.<sup>12</sup>

One of the difficulties with the identification system is that there is a lack of consistency about what is recorded in documents and in government records. Another difficulty is that, as discussed earlier, there are not universally accepted notions of what constitutes sex and what constitutes gender and therefore, what records of sex and gender should be kept.

“Identity documents do not legitimate my gender. They only make it easier to pass through the world without being stopped, harassed or questioned, or to get everyday tasks accomplished.”

**Blog participant**

### 7.3 Security concerns related to the identification system

One of the main reasons why the government records information about sex or gender is to be able to certify a person's identity as an Australian citizen or resident. Identity security is considered central to Australia's national security.

In 2005, the Australian government announced the National Identity Security Strategy. The National Identity Security Strategy and the laws governing the identification system operate to combat the misuse of stolen or assumed identities in the provision of government services and to protect Australian citizens from the theft or misuse of their identities.

Under the National Identity Strategy, accurately verifying a person's identity relies on determining a person's sex. Therefore, sex and gender are often recorded by government departments. In addition, government departments also record sex and gender in accordance with international standards for identity. For example, the Department of Foreign Affairs and Trade (DFAT) advised the Commission in its consultations that the International Civil Aviation Organisation standards require gender as a mandatory field on a passport.

During our consultations, some people challenged these security concerns and especially recording sex on documents. As one person in our Sydney consultation remarked:

the reality is that government departments only need to identify that the person they are dealing with **is** the person they are dealing with. The only people who need to know what form my genitals take are my lover and my doctor.

Participants acknowledged that government records such as the census have a valid role in preparing statistics so that policy making is better informed. However, several people questioned why sex or gender is required on identity documents while other personal identity information such as religion or race is not required.

## Section 8: What is the existing process for changing sex or gender in official documents and government records?

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People who are sex or gender diverse may seek to change the information that is recorded on cardinal documents and records to ensure they can accurately and appropriately confirm their identity. Once those cardinal documents or records are changed, that information can be used to amend the sex or gender noted on other secondary documents and records.

There are currently some significant limitations with the existing process for changing the sex or gender in official documents and records.

### 8.1 Amending the cardinal document or record

How a person amends a cardinal document or record depends on whether that person was born in Australia or elsewhere. The capacity to change a cardinal document or record is important as the document provides an official identity and enables the alteration of other documents and records, including secondary documents.

The processes for changing the following documents or records are outlined below:

- birth certificates
- gender recognition certificates
- recognised details certificate
- change of name certificates
- citizenship certificates
- DIAC records.

#### (a) Birth certificate

Requests to change the sex noted on a birth certificate can be made in two ways, depending on a person's place of birth.

In the Australian Capital Territory, New South Wales, the Northern Territory, Queensland, Tasmania and Victoria, people who seek to change the sex noted on their birth certificate make an application to the relevant state or territory Registrar of Births, Deaths and Marriages (Birth Registrars). Applications can only be made by people who satisfy the criteria outlined in Table 1.

In South Australia and Western Australia, people who wish to change the sex on their birth certificate, must apply for a recognition certificate or a gender reassignment certificate as described in section (b) below.

Direct applications to Births Registrars to change sex on a birth certificate must be supported by documentary evidence, including medical evidence confirming the applicant has undergone the requisite surgery.

During our consultation with Births Registrars, the Commission was informed that some jurisdictions allow for a sex to be noted as something other than male or female, such as 'indeterminate'. However, a sex other than male or female was only used in rare circumstances such as in the case of stillborn children or premature births where sex could not be determined.

<b>Table 1: Criteria for requesting a change in sex noted on birth certificate</b>					
State/ Territory	Adults (aged 18 or over) can apply?	Guardian of children (under 18) can apply?	Relationship to jurisdiction?	Must be unmarried?	Must have undergone surgery to alter reproductive organs?
ACT <sup>13</sup>	Yes	Yes	Birth of person must be registered in ACT	Yes <sup>14</sup>	Yes
NSW <sup>15</sup>	Yes	Yes	Birth of person must be registered in NSW	Yes	Yes
NT <sup>16</sup>	Yes	Yes	Birth of person must be registered in NT	Yes	Yes
Qld <sup>17</sup>	Yes	Yes	Birth of person must be registered in Qld	Yes	Yes
SA	In SA, people can apply to have a gender recognition certificate. After a person has received a gender recognition certificate, the person may present that certificate to the Registrar of Births who must then amend the sex noted on the birth certificate. See section 8.1(b) below for more information about the SA gender recognition certificate.				
Tas <sup>18</sup>	Yes	Yes	Birth of person must be registered in Tas	Yes	Yes
Vic <sup>19</sup>	Yes	No	Birth of person must be registered in Vic <b>OR</b> be a resident of Vic who lives and has lived for 12 months in Vic	Yes	Yes
WA	In WA, people can apply to have a gender recognition certificate. After a person has received a gender recognition certificate, the person may present that certificate to the Registrar of Births who then must amend the sex noted on the birth certificate. See section 8.1(b) below for more information about the WA gender recognition certificate.				

### (b) Gender recognition certificate

As noted above, the system is slightly different in South Australia and Western Australia. In South Australia and Western Australia, people who wish to change the sex on their birth certificate must first apply for a gender recognition certificate. In South Australia, the application is made to the Magistrates Court of South Australia. In Western Australia, the application is made to the Gender Reassignment Board. Applications can only be made by people who satisfy the criteria outlined in Table 2.

In South Australia, applications must be supported by relevant documentary evidence including a sworn affidavit by a medical practitioner relating to the reassignment procedure that has been carried out and any associated treatment.<sup>20</sup> Applications relating to an adult must also be supported by an affidavit sworn by a psychiatrist or psychologist in relation to sexual identity counselling the person has received.<sup>21</sup>

In Western Australia, applications must be supported by relevant documentary evidence including a statement signed by a medical practitioner that the applicant, or the child the application relates to, has undergone the reassignment procedure.<sup>22</sup>

Once a person has obtained a gender recognition certificate, this is deemed to be conclusive evidence that the person has undergone reassignment surgery and is of the sex stated in the certificate.<sup>23</sup> The person may then register the certificate with the Births Registrar, who must then register the change in legal sex and request a new birth certificate.<sup>24</sup>

State/ Territory	Adults (aged 18 or over) can apply	Guardian of children (under 18) can apply	Relationship to jurisdiction	Unmarried	Undergone surgery to 'eliminate ambiguity'	Undergone a medical or surgical procedure to 'alter genitals or other sexual characteristics'
SA <sup>25</sup>	Yes	Yes	Birth of person must be registered in SA <b>OR</b> the surgery must have been conducted in SA	Yes	Yes (if a child)	Yes
WA <sup>26</sup>	Yes	Yes	Birth of person must be registered in WA <b>OR</b> the surgery must have been conducted in WA <b>OR</b> the person must be a resident of WA	Yes	Yes (if a child)	Yes

### (c) Recognised details certificate

In addition, the Victoria Births Registrar can issue a recognised details certificate for a person not born in Australia who seeks to have their sex identity recognised.<sup>27</sup> Similar powers are soon to come into force in New South Wales.<sup>28</sup>

During this process, the Victorian Births Registrar considers the sex identity of a person and, based on relevant evidence confirming a person's sex, enables the cardinal record by the Victorian Births Registry to reflect that sex.

During our consultations, members of the sex and gender diverse community expressed difficulties in having government agencies accept a recognised details certificate as proof of their sex.

### (d) Change of name certificate

Anyone living in Australia can legally change their name. Many sex and gender diverse people choose to change their name to a more gender-appropriate name.

People who seek to change their name make an application to the relevant state or territory Births Registrar. As mentioned in section 7.2, a change of name certificate does not necessarily record a person's sex. However, the Births Registrar must register a person's sex on the register when a change of name application is approved.

An applicant is required to provide a reason to support their name change but is not required to provide any medical evidence in relation to sexual anatomy or sex identity.

#### **(e) Citizenship certificate**

A citizenship certificate is issued to a person who requires proof of their Australian citizenship, regardless of whether they were born in or outside of Australia.

A citizenship certificate does not record sex. A citizenship certificate is not intended to be used as evidence of identity; it is only evidence of citizenship. A person who is sex or gender diverse may seek to change the name noted on the certificate to a more gender-appropriate name.

The process for changing personal information on a citizenship certificate is usually assessed on a case-by-case basis. The Australian Citizenship Instruction Policy outlines the process for requesting changes to personal information on a citizenship certificate. The Australian Citizenship Instruction Policy can be accessed on the website for DIAC.<sup>29</sup> According to the policy, to change the name listed on a citizenship certificate, a person must provide a change of name certificate, a re-issued birth certificate showing the new name or other relevant evidence.

#### **(f) DIAC records**

DIAC collects and records personal information about Australian citizens, permanent residents and other visa holders. This database records sex and is used by DIAC and other agencies as evidence of a person's identity.

In order to amend the personal information held in DIAC records, a person may make an application under the *Freedom of Information Act 1982* (Cth).<sup>30</sup>

The *Australian Citizenship Instruction Policy*<sup>31</sup> and Form 424C<sup>32</sup> outline the evidence that should be submitted to support an application for amending personal information in DIAC records. Evidence that could support a change of name or sex on DIAC records include:

- birth certificate
- change of name certificate
- statutory declarations from people who are in a position to support the change of name or legal sex (such as a surgeon or doctor)
- any other official documents that support the change.

The Commission has been advised by DIAC that recognised details certificates, international birth certificates and international medical evidence are also accepted in the decision-making process.

DIAC records can note a person's sex as male, female or unknown.

DIAC has advised the Commission that, although specific documents should accompany a request for a change to the sex notation, it is ultimately the decision of the DIAC officer responsible for assessing the material.

“I have been treated appallingly numerous times by people who have realised I am different to them because of various legal documents ... While I realise that, in most cases, this kind of treatment is simply the result of ignorance and/or red-tape, rather than blatant prejudice on the part of the individuals dealing with me in these places, the grief caused by constantly being outed and judged is nonetheless unspeakable.”

**Blog participant**

## 8.2 Secondary identity documents

Secondary identity documents can be used to prove identity in addition to cardinal documents. The main secondary identity document that contains information about a person's sex is a passport. Some driver's licences and photo identity cards issued by state and territory road authorities (Road Authorities) also contain information about a person's sex. All Road Authorities record a person's sex in their databases.

### (a) Passport

The name and sex that is noted on a passport is almost always the same as the name and sex that is noted on the person's birth certificate, change of name certificate, citizenship certificate or in DIAC records. DFAT issues passports according to its Manual of Australian Passport Issue policy.<sup>33</sup> Under the policy, a passport can be issued in a sex that is different from the sex noted on a person's cardinal document or in DIAC records in the case of:

- a married person who has undergone the surgery required for a change in sex noted on birth certificate but who cannot change their birth certificate because they are married
- a person who is travelling for the purpose of undergoing sex affirmation surgery (this passport has a maximum validity of 12 months).

A person applying for a passport with a sex indicator different to that noted on their cardinal document or DIAC records needs to provide supporting documentation in relation to their sex identity such as:

- a statement from a state or territory Birth Registrar that the person has met all requirements for their sex identity to be recognised except that the person is married
- medical evidence confirming their sex identity
- evidence of living in character as their sex identity.

In rare circumstances, DFAT can review individual cases where a person does not meet the requirements of its policy. For example, a person who was unable to undergo sex affirmation surgery for medical reasons might be an example of a person who might request DFAT to issue a passport in exception to its policy. Similarly, a child or young person who has not undergone sex affirmation surgery might request DFAT to issue a passport with a sex indicator different to that recorded on cardinal documents or in DIAC records.

The DFAT policy also enables people who wish to have their sex identified as X (as opposed to M for male and F for female), provided that the person can present a birth certificate that notes their sex as indeterminate. DFAT advised that travelling with an X sex passport may cause difficulties when crossing international borders even though the International Civil Aviation Organisation does allow X to be noted in the sex field.

DFAT can also issue a document of identity to any Australian citizen for the purpose of travel. A document of identity has a field for gender but this can be left blank. A document of identity is valid for 36 months and is usually issued when a passport cannot be issued, such as in an emergency situation or when the Minister for Immigration and Citizenship believes a person's travel should be restricted.<sup>34</sup>

### (b) Driver's licence and register

Licences issued by Road Authorities are often used as proof of identity for everyday transactions. Queensland is the only jurisdiction that issues driver's licences that note a person's sex.<sup>35</sup>

During our consultation the Commission was informed that all Road Authorities keep records of a person's sex or gender on a licence register. This information is collected by the authority during the application process. This database is also used by police departments.

Changes of name will usually be recognised when the Road Authority receives evidence that the person has legally changed their name. The change of name will be recorded on both the card and the register.

In relation to changes of sex or gender, Road Authorities generally use the sex that is listed on the birth certificate or other cardinal document or record to facilitate any changes to the register. Some Road Authorities enable a change in gender if a person provides evidence they are undertaking or have undertaken gender reassignment treatment.<sup>36</sup> A letter from a medical practitioner will usually suffice as evidence of gender reassignment treatment.

“Ideally I want to change anything and everything that identifies me incorrectly as female ... there is always a paper trail that I think could be fixed with a more considerate database design. If these trails aren’t eliminated, or minimised, then your medical history (and that is all transition really is) becomes public property. It would be like if a police officer pulled you over and looked up the database and saw that you once had your tonsils out.

**Blog participant**

### **(c) Photo identity cards and register**

Road Authorities also administer the issuing of photo identity cards, known as proof of age cards or photo cards. Photo identity cards do record a person’s gender. State and territory legislation outlines the age (16 or above) at which a person can apply for a photo identity card and the information that must be recorded on the card.<sup>37</sup>

A change of name will be recognised when the Roads Authority receives evidence that the person has legally changed their name.

As with driver’s licences, Road Authorities generally use the sex that is listed on the birth certificate or other cardinal document or record to facilitate any changes to the register.

Some Road Authorities enable a change in recorded gender if a person provides evidence they are undertaking or have undertaken gender reassignment treatment.<sup>38</sup> A letter from a medical practitioner will usually suffice as evidence of gender reassignment treatment.

## **8.3 Other documents and records**

There are many other categories of documentation and records where sex or gender identity is recorded. People who are sex and gender diverse may wish to change their sex or gender identity in any document or record. People who are sex and gender diverse may also wish to change the name listed in old records and documents. For example, a person may wish to change a document or record containing a person’s previous gender identifying name (such as John) to their new name (such as Joan).

The Commission has not investigated all the processes that might be required by government departments or other organisations to facilitate a change in sex, gender or name in all documents and records that contain such information. However, the Commission has investigated the types of documents and records that people who are sex or gender diverse may wish to change. In particular, the Commissioner posted a question on the Sex Files blog asking for feedback on the documents (besides birth certificates and passports) that a person might wish to change.

Some of the documents and records that people identified as wanting to change include:

- mortgage documents
- educational certificates (TAFE certificates, school certificates, tertiary academic records)
- Centrelink database
- local hospital records
- Medicare records
- police records and criminal history check certificates (which contain information about a person's previous name)
- local council rates notices.

To request changes to these documents or records, people who are sex and gender diverse need to liaise with various government agencies or other organisations including:

- banks and financial institutions
- education providers
- Centrelink
- Departments of Health and local hospitals
- Medicare
- Departments of Police
- local government councils.

The Commission notes that under federal, state and territory privacy and freedom of information legislation, people generally have a right to request an alteration to records containing their personal information where that information is not, or is no longer, accurate.<sup>39</sup>

During our consultations and in the Sex Files blog, people shared their experiences of changing their documents and records. The Commission heard that some people had a relatively easy experience whereas others faced considerable difficulties. In some cases, people were told that they were not legally able to change the document or record. Experiences varied depending on the document or record being changed, whether a person had undergone surgery, whether a person had a birth certificate in their identified sex and different approaches by public servants.

“With the banks I am with, they were very helpful in not only changing my name, but also changing my gender marker. However when it came to changing the name on my mortgage, it was not possible – it being a legal contract.”

**Blog participant**



## Section 9: What are the problems with the existing system?

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During our consultation, members of the sex and gender diverse community raised several problems with the identification system and the existing process for the recognition of sex.

Most of the problems reported were due to the limitations imposed by legislation or particular policies in relation to changing cardinal documents or records.

In particular, the existing process for the recognition of sex generally excludes:

- married people
- people who have not undergone genital surgery or other sex affirmation surgery.

The existing process is also generally more difficult for:

- people who cannot provide medical evidence
- children and young people under 18
- people who wish to be identified as something other than male or female.

In addition to these problems, members of the sex and gender diverse community have also raised concerns about how the existing process operates. Some specific operational and administrative problems include:

- gender-identifying notations on re-issued birth certificates or change of name forms
- gender-identifying information in documents or records
- inconsistent treatment by various agencies when a person attempts to change the sex, gender or name noted in documents and records
- difficulties in locating information or a lack of information distributed by various agencies in relation to the process to change the sex, gender or name noted in documents and records
- lack of a centralised process to assist in liaison with various agencies.

“Because I will not divorce my wife, I am not able to change my birth certificate to my true sex. So my birth certificate still says male. However, Medicare and Centrelink know that I have undergone sex affirmation surgery and their records say that I am female. Therefore, we have been denied the PBS married safety net because we are seen as a same-sex couple.”

Queensland forum conducted by Commission

### 9.1 The exclusion of married people

Married people who are sex and gender diverse face difficulties in having their sex recognised and having their marriage recognised.

Under state and territory legislation a married person cannot apply to have their sex changed on their birth certificate even if that person meets all other criteria.<sup>40</sup> This means that a married person will not be able to have a birth certificate that represents their true sex identity, unless they first cease to be married, such as by obtaining a divorce.

Even though a married person will not be able to change the sex noted on their birth certificate, they may be able to amend other documents and records by proving they have undergone sex affirmation surgery. For example, as noted earlier a married person can apply to have the sex on their passport changed, even without amending their birth certificate.

“Why haven’t I had surgery?  
Because surgery is dangerous.  
Any surgery. I won’t risk it on  
something that will benefit me  
because... well, only because it  
pleases the bureaucrats. The  
idea that I must have surgery  
to satisfy them is absurd. I have  
been successfully living in my  
gender role for a decade now.”

**Blog participant**

During our consultations, members of the sex and gender diverse community advised that a married person is able to change the sex noted on their Medicare records or Centrelink records but they will consequently lose recognition of their status as a married person. This affects not only the person who seeks to change the record of their sex but also that person’s spouse. In some cases losing recognition of marital status will result in a financial detriment.<sup>41</sup>

## **9.2 The exclusion of people who have not undergone the required sex affirmation surgery or genital surgery**

Under state and territory legislation, a person who has not undergone sex affirmation surgery, including genital surgery, cannot apply to have their birth certificate changed to note their sex identity.

The Commission was informed in its consultations that a similar issue arises in seeking changes to other documents also, as organisations typically require a letter from a doctor verifying that the person has undergone sex affirmation surgery.

The Commission has been told that the genital surgery that is usually required for a person to be legally recognised as female is removal of penis and testes, usually by medical procedures known as a penectomy and orchidectomy. Some women also choose to have vagina and clitoris surgically created through procedures known as vaginoplasty and clitoroplasty.

The genital surgery that is usually required for a person to be legally recognised as male is removal of the female reproductive organs through a hysterectomy procedure. Some men may choose to have a penis created through a procedure known as a phalloplasty.

The Commission heard that the focus on genital surgery for the legal recognition of sex results in a range of problems:

- genital surgery is not covered by Medicare and some people cannot afford to undergo surgery
- genital surgery impacts on a person's reproductive ability
- the shape and functionality of genitals are only one aspect of how people identify and present as a particular sex
- genital surgery is only one aspect of sex affirmation treatment and opinion varies in relation to how, when and if this treatment should be provided to a particular individual
- any surgery involves risks
- the citizenship and identity process is inappropriately medicalised as these processes are about confirming a person's place in the community not their medical history
- the general community makes an assessment about a person's sex based on how that person presents not by questioning a person's genital makeup
- where a person who presents as one sex is treated or classified as a person of another sex because of their genitals, this can place that person at risk of discrimination and violence.

### 9.3 The exclusion of people who cannot provide medical evidence

In the Australian Capital Territory, New South Wales, the Northern Territory, Queensland, Tasmania and Victoria, the evidence usually required to change a birth certificate is a statutory declaration from each of two doctors or medical practitioners registered under Australian law, verifying the person has undergone sex affirmation surgery.<sup>42</sup> However, during our consultation some Births Registrars advised that they had discretion to accept other documents confirming their sex.

People who have undergone surgery in the past or overseas usually incur additional medical expenses in order to verify their surgical status. People may be precluded from obtaining the medical evidence because of the cost involved.

“Given the attitudes of societies in the Western world in general, it would not seem unreasonable to require surgery for legal recognition of true gender... BUT... (and it is a big BUT!), if that is the case, surely it is also reasonable to expect, nay demand, that surgery be made available at no cost to the patient, either in country of domicile through the health system, or overseas if necessary?!”

**Blog participant**

In addition, during our consultation several participants lamented the focus on medical evidence to support a change in legal sex. Many participants argued that a change in legal sex should be by evidence of self-identification as a particular sex.

In addition, some participants have argued that requirements for medical evidence are interpreted too rigidly. For example, in South Australia an application must include an affidavit sworn by a psychiatrist or psychologist in relation to sexual identity counselling received by the applicant. One participant in our consultation who had undergone surgery almost 20 years previously was deemed not to have met this criterion because she did not receive appropriate counselling at that time.

#### 9.4 Problems faced by children and young people under 18

The most important identity documents for children and young people are birth certificates, passports, driver's licences and proof of age cards. The Commission was informed during its consultations that, under current practices, children and young people only rarely undergo sex affirmation surgery before they are 18. However, greater frequency of diagnosis and awareness of sex and gender diversity means that more children and young people are expressing a sexual identity that is different to that noted on their birth certificate. It is not uncommon for children and young people who are sex and gender diverse to undergo counselling or begin hormonal treatment before they are 18. Children and young people may also outwardly present as a particular sex despite the lack of surgery.

Under the current laws, people wishing to amend the sex on their birth certificate or other documents (such as passports) must establish that they have undergone sex affirmation or genital surgery.<sup>43</sup> Given that children and young people rarely undergo such procedures until they become adults, they are typically precluded from amending the sex on their documents and records. However, the Commission was advised in its consultations with the COAR that some Births Registrars might have the power to remove the notation of sex from a child's birth certificate in appropriate cases. In addition, as discussed earlier in this paper, the relevant government policy dealing with obtaining passports also allows a sex to be noted on a passport that is different to cardinal documents or records in rare circumstances.<sup>44</sup>

Except in Queensland, driver's licences do not contain information about a person's sex or gender. However, the Commission has been advised that the Queensland Road Authority will accept an application on behalf of a young person to change their gender if medical evidence concerning a person's gender is provided.<sup>45</sup>

All state and territory photo identity cards contain information about gender. In some states and territories, these cards are issued to young people under the age of 18 years.

Some jurisdictions enable the gender on a photo identity card to be changed if medical evidence concerning a person's gender is provided.

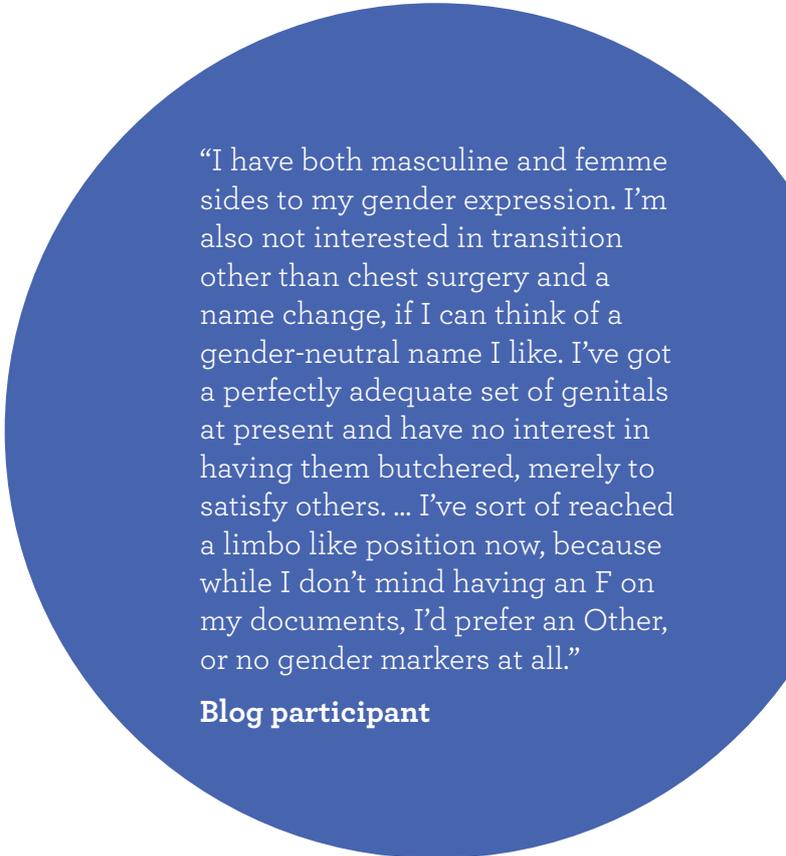
## 9.5 The exclusion of people who wish to be identified as something other than male or female

Australia's identification system largely operates on a binary system where the only options available for sex identity are male or female. Some people who cannot or do not identify as either male or female may wish to have identity documentation that does not note their identity as either male or female.

Some Births Registrars are able to note a person's sex as 'indeterminate' on their birth certificate. However, this mainly occurs in the cases involving stillborn infants where it is not possible to determine that infant's genital makeup. Some Births Registrars can remove the sex notation on a birth certificate.<sup>46</sup>

A person might be able to change their cardinal documents or DIAC records to note a sex other than male or female. However, it may be difficult to have other documents and records record this identity because many agencies are not set up to identify someone outside of a male/female binary.

As noted earlier, passport policy allows for a passport to be issued noting X as opposed to M for male or F for female. However, the Commission has been advised by DFAT that an X passport can only be issued to a person who provides a birth certificate which states the person's sex as indeterminate.



“I have both masculine and femme sides to my gender expression. I’m also not interested in transition other than chest surgery and a name change, if I can think of a gender-neutral name I like. I’ve got a perfectly adequate set of genitals at present and have no interest in having them butchered, merely to satisfy others. ... I’ve sort of reached a limbo like position now, because while I don’t mind having an F on my documents, I’d prefer an Other, or no gender markers at all.”

**Blog participant**

## 9.6 Operational and administrative problems with the current system

During the sex and gender diversity project, the Commission heard of instances when, despite legal recognition of a person's sex identity, information was revealed about the past identity and that the person had 'changed' sex. Revealing information about a person's past identity in relation to sex can put that person at risk of discrimination and violence.

For example, during our consultations with the COAR, the Commission was advised that in some jurisdictions, a change of name certificate also lists the previous name. Many names are gender specific and so this notation automatically divulges information about a person's previous legal identity. The Commission also heard that in some jurisdictions, a re-issued birth certificate may list a previous name or list a new birth registration date. Some members of the sex

and gender diverse community explained that a new registration date may arouse suspicion about the legitimacy of a birth certificate. Other people who are sex and gender diverse said it is humiliating and frustrating for an otherwise irrelevant past to be a focus of administrative processes.

Such problems are not limited to change of name certificates or birth certificates. For example, some criminal record employment checks also record information about a person's previous name.

Further problems may be caused when a government agency lacks any coherent policies and practices concerning sex and gender diversity. There is no centralised system or agency to assist people who are sex and gender diverse to change their sex, gender or name in documents and records. Different agencies have different processes and criteria for changing records and there is a lack of publicly available information about these processes and criteria.

"It seems to me that there are still way too many hoops for trans people to jump through, I don't think that either hormones or surgery should be a requirement for changing ones gender marker. Personally, I would prefer to have gender markers removed from all documents such as driver's license, for everyone regardless of them being trans or not. It would not make it any easier for someone else to use my passport whether it had 'male' or 'female' on it!"

**Blog participant**

# Section 10: What changes does the Commission recommend to the system for the legal recognition of sex identity?

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## 10.1 What reforms are needed?

The sex and gender diversity project has revealed that there are significant limitations in Australia's identification system. These limitations are mainly a result of fixed views about sex identity. In addition, there are substantial problems with how the system works even when it allows amendments to documents and records in recognition of a person's sex identity. Reform to the current system for altering documents and records would assist people to more easily legally identify as a particular sex.

The main focus of the reforms recommended by the Commission is to ensure that cardinal documents (birth certificates, citizenship certificates) and DIAC records can be altered to appropriately reflect the sex with which the person identifies.

In September 2008, the Commission prepared a document proposing reforms to the legal recognition of sex to better protect the human rights of people who are sex and gender diverse. The Commission placed the reform proposal on the Sex Files blog and sought further feedback about the proposal.

The recommendations made in this paper are based on the material the Commission received in consultations, public meetings, written submissions and the Sex Files blog. Some individuals do not agree with the approach that the Commission has taken. Some of those differing opinions are outlined at section 12.

## 10.2 What are the key reform features?

The Commission recommends that federal, state and territory laws, policies and procedures should be amended to legally recognise sex in accordance with two broad principles:

1. Access to the system for having sex legally recognised to accord with sex identity should be broadened. Specifically,
  - marital status should not be a relevant consideration as to whether or not a person can request a change in legal sex
  - the definition of sex affirmation treatment should be broadened so that surgery is not the only criteria for a change in legal sex
  - 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
  - the special needs of children and young people who wish to amend their documents and records should be considered
  - a person over the age of 18 years should be able to choose to have an unspecified sex noted on documents and records.
2. The process for amending documents and records to legally recognise sex identity should be streamlined and user-friendly. Specifically,
  - information on the process and criteria for the legal recognition of sex should be easily accessible and user-friendly
  - 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

“After studying psychology with my wife, I finally had the words to explain. I asked her to give me a chance to show her who I really was. Years of upset, confusion and change followed. At first, she felt angry, deceived and used, but eventually realised I was all the things she fell in love with, despite my gender identity.

To have the reform proposal adopted to allow me to have my cardinal documents changed, while we remain married, would be fantastic.”

### Blog participant

- laws and processes for the legal recognition of sex should use empowering terminology
- where possible, sex or gender should be removed from government forms and documents
- the federal government should consider the development of national guidelines concerning the collection of sex and gender information from individuals.

These individual recommendations are discussed in further detail below.

### 10.3 Removing marital status as a criterion

The Commission recommends that marital status should not be a relevant consideration as to whether or not a person can request a change in legal sex. It is the Commission’s view that a person should not be forced to end their marriage in order to have a change in sex legally recognised.

Under international human rights law, discrimination on the basis of a protected attribute or characteristic, including marital status, is prohibited.<sup>47</sup> As a party to the relevant international instruments, Australia is obliged to ensure that it takes all necessary steps to ensure that legislation does not impermissibly discriminate against a person based on their marital status.

As the law currently stands, there does not appear to be any legal basis upon which a person can challenge the discrimination against married persons inherent in relevant state and territory legislation dealing with amendments to birth certificates.<sup>48</sup> In the Commission’s view, this puts Australia in breach of its international obligations in relation to marital status discrimination. Legislative change is therefore required to remedy this situation.

It appears that the rationale for the discriminatory treatment under relevant state and territory legislation is to avoid a potential conflict with the requirement under the *Marriage Act 1961* (Cth) (Marriage Act) that a marriage must be between a man and a woman.<sup>49</sup>

According to the apparent logic of this position, if a married person surgically changed their sex and then amended the sex on their birth certificate, it would result in a form of same-sex marriage ‘on paper’. The Commission does not express a view on whether this interpretation of the Marriage Act is correct. The issue has not been squarely considered by the Australian courts.<sup>50</sup>

However, even assuming that this interpretation of the Marriage Act is correct, the Commission considers that this is not an adequate excuse for allowing the continued operation of discriminatory legislation which has a significant impact on the lives of those people it affects. The consequence of this discriminatory treatment includes difficulties in having their sex recognised in documentation and/or accessing government benefits.

Further, the current approach focuses too much on form at the expense of substance and does not reflect the everyday reality. Where a married person seeks to be identified as another sex, they continue to be treated and identified as married in their everyday life. From all visible appearances, they live the life of their self-identified sex and interact in the community on this basis. The sex recorded on their birth certificates or on the birth registries does not alter this reality.

Whatever views might be held in the community about same-sex marriage, it would be incorrect to believe that people would undergo sex affirmation surgery as a ‘back door’ way of achieving same-sex marriage. In addition, the numbers of people that would be affected by this change are very small. However, as noted above, the adverse consequences for those people under the current regime are significant.

As a nation, Australia has committed to eliminating discrimination from its legislation, particularly where it significantly and unfairly affects people’s rights. The current situation in relation to the exclusion of married persons from being able to change the sex recorded on their birth certificates fails to honour that commitment and must be rectified.

**Recommendation 1:** Marital status should not be a relevant consideration as to whether or not a person can request a change in legal sex.

#### 10.4 Broadening the definition of sex affirmation treatment

The Commission recommends broadening the definition of sex affirmation treatment so that surgery is not the only criterion for a change in legal sex.

Instead, the Commission proposes that a change in legal sex can be sought by a person who:

- has undergone or is undergoing ‘sex affirmation treatment’, and
- seeks to be permanently recognised as another sex.

‘Sex affirmation treatment’ under the proposed reforms would mean a surgical procedure or medical treatment to confirm the sexual identity of a person. Psychological counselling concerning sex or gender identity should satisfy the criteria of sex affirmation. Sex affirmation surgery or hormonal therapy should also satisfy the criteria.

The Commission notes, for example, that in the United Kingdom and Spain a person who is undergoing or has undergone medical treatment, such as gender related counselling, may apply for a change in legal sex.<sup>51</sup>

The Commission also notes that views and opinions vary on the necessity of surgery to request a change in legal sex. The Commission has heard from people who required psychological and anatomical harmony achieved through surgery to alleviate their condition. For others, surgery is not required for a person to live, identify and present as a particular sex. The Commission considers that surgery should be regarded as a matter of individual choice for the person concerned and not a prerequisite for the legal recognition of a person’s sex identity.

**Recommendation 2:** The definition of sex affirmation treatment should be broadened so that surgery is not the only criteria for a change in legal sex.

“Nobody should be made to wait to live in their affirmed gender nor should they be bullied into surgery if it is not medically advisable, in their hearts or financially possible.”

**Blog participant**

## 10.5 Relaxing the evidentiary requirements

Based on its consultations with the sex and gender diverse community, the Commission has formed the view that the medical evidence currently required to support a person's change in legal sex is unnecessarily demanding. The Commission therefore recommends that the relevant evidentiary requirements need to be relaxed to make the system more accessible and make greater allowance for a person to self-identify their sex.

Legislation should outline what documents are needed to support the request for a change in legal sex under the proposed reforms. The Commission recommends that the following documents should be adequate to support an application for a change in legal sex:

- One statutory declaration by a doctor or medical practitioner outlining the sex affirmation treatment the person has received or is receiving or confirming the person's sex identity, and
- One statutory declaration from the person requesting the recognition of sex declaring that they identify as a particular sex and intend to do so permanently. In the case of a child (although possibly depending on the age of the child), the legislation could stipulate that the parent(s) or guardian must make a statutory declaration in relation to the child's desire to identify as a particular sex.

If a person is unable to present medical evidence there should be discretion for the decision-maker to consider any other relevant information concerning the sex identity of a person. For example, a statutory declaration from a community leader confirming the sex identity of the person could be submitted as relevant information.

**Recommendation 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.

## 10.6 Considering the special needs of children and young people

Many of the difficulties faced by children and young people in gaining appropriate documentation are because they have not had surgery. Whilst some of those children and young people may have surgery in the future, some will not.

The Commission therefore recommends that the effect of any reform on children and young people must be taken into account from their particular perspective and situation. The Commission's recommendation in relation to broadening the definition of a 'sex affirmation treatment' will ensure that children and young people are adequately covered. In addition, requiring a statutory declaration of support from the child or young person's parent or guardian would provide an additional safeguard.

**Recommendation 4:** The special needs of children and young people who wish to amend their documents and records should be considered.

## 10.7 Inclusion of an unspecified sex identity

The Commission recommends that a person over the age of 18 years should be able to choose to be noted as something other than male or female. This would mean that the definition of sex in relevant legislation, policies, guidelines and forms would need to include male, female or unspecified.

Some people cannot or do not identify as either male or female. The removal of sex notations on all documents and records would be one way to ensure that people who do not identify as male or female are not excluded by Australia's identification system.

However, as outlined in section 7.3, there are some valid reasons for continuing to note sex or gender on some documents and records. Consequently, it is important to consider how to expand the options for sex identity to include all people who are sex and gender diverse.

There are already some documents where sex identity can be noted as something other than male or female. For example, this is the case with some birth certificates and passports as outlined in section 9. However, a notation of something other than male or female is usually only permitted in limited circumstances.<sup>52</sup>

The Commission consulted about whether there is a better term than ‘unspecified’ as an alternative to male or female; however, this was the term that received the most support on the Sex Files blog.

**Recommendation 5:** A person over the age of 18 years should be able to choose to have an unspecified sex noted on documents and records.

## 10.8 Easily accessible and user-friendly information

During the Commission’s consultations on sex and gender diversity, the Commission was told that information on the processes for amending sex identity on a variety of documents and records was not always easily accessible. While some government agencies have clear information on websites, in other cases it is difficult to access. The complexities, and inconsistencies, of the system mean that it is difficult for an individual to be aware of all the requirements.

**Recommendation 6:** Information on the process and criteria for the legal recognition of sex should be easily accessible and user-friendly.

## 10.9 Not revealing personal information about a person’s past identity

As discussed in section 9.6, the Commission heard of instances when information was revealed about a person’s past identity, putting them at risk of discrimination and violence.

If a person’s sex identity has been legally recognised, then this should be the only identity that is available to individuals and agencies that seek information. To reveal past information about a previous identity undermines the point of legal recognition.

While there may be limited instances when a person’s previous sex identity is relevant to the purpose of the inquiry or document, in most cases there is no reason to reveal a person’s previous sex identity.

**Recommendation 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.

## 10.10 Use of empowering terminology

The use of empowering, consistent and inclusive terminology is vital for any reform to the legal recognition of sex. The Commission consulted broadly with the sex and gender diverse community in relation to terminology. For more information, see section 4.2.

The Commission recommends that the terminology used in laws and processes for the legal recognition of sex should:

- recognise sex and gender diversity (and not seek to medicalise this diversity as conditions that require normalising or suppressing)

- focus on clarifying the process for amending sex identity rather than labelling certain groups of people (i.e. transgender, transsexual or intersex).

**Recommendation 8:** Laws and processes for the legal recognition of sex should use empowering terminology.

### 10.11 Reducing the requirement for sex or gender markers on forms and documents

The Commission recommends that no government agency should require a person to list their sex or gender on forms or records unless there is a particular necessity to do so.

The Commission acknowledges that there are some documents, such as cardinal documents, that require a notation about sex or gender for security reasons. There are also other cases where recording sex or gender on forms or records is necessary, such as to ensure that a person can access gender-appropriate benefits from Medicare or Centrelink. Another example may be the gathering of data in order to monitor progress in achieving gender equality. The Commission therefore acknowledges that in some circumstances it is reasonable and legitimate to include sex and gender markers on forms and documents. The Commission notes, however, that the process for amending the notation of sex and gender should still follow the recommendations outlined above.

However, in many other circumstances, the Commission believes that government agencies record sex or gender when it is not necessary for security or other legitimate reasons. The Commission therefore recommends government agencies reconsider the need for sex and gender markers on its forms and records and, where appropriate, remove or phase out such fields.

The Commission notes that there is no consistent approach to the collection of sex and gender information. The Commission believes national guidelines would assist agencies and other organisations to minimise the unnecessary collection or recording of sex or gender markers when preparing forms and keeping records.

Where it is necessary that sex or gender be provided, the Commission recommends that people be able to write their sex or gender as male, female or unspecified.

**Recommendation 9:** Where possible, sex or gender should be removed from government forms and documents.

**Recommendation 10:** The federal government should consider the development of national guidelines concerning the collection of sex and gender information from individuals.

# Section 11: What are some options for implementing the recommendations?

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## 11.1 Options for federal government leadership

The Commission acknowledges that, under Australia's federal system of government, implementing the recommendations made in this paper is complicated by the fact that responsibility in relevant areas is spread between federal, state and territory governments. For example, responsibility for the administration of passports lies with the federal government, whereas birth certificates and drivers licences are regulated by state and territory governments.

However, the Commission is convinced that the current system is unduly restrictive for people who wish to gain legal recognition of their sex, and is also complex and inconsistent. Even at the federal level, the Commission observes that there is a lack of consistency across departments and agencies in respect of processes and policies for collecting, recording and amending sex markers in official documents and records.

The Commission considers that the federal government should take a strong leadership role in ensuring that processes and criteria throughout Australia are consistent, streamlined and fair for people who wish to change their legal sex.

The Commission has identified two alternative ways by which the federal government might provide such leadership. The federal government could:

1. work with state and territory governments cooperatively through the Council of Australian Governments (COAG) process, to amend their respective legislation and policies to reflect the recommendations in this paper, particularly in respect of the criteria and process for amending birth certificates
2. establish a national board with responsibility for receiving and determining applications for official recognition of a change in sex, based on the recommendations in this paper (see section 11.2 below), as well as securing agreement from states and territories to recognise certificates of recognition issued by such a board.

The Commission's main concern is that the recommendations in this paper are adopted as consistently as possible across federal, state and territories. The Commission does not specify a view as to the most effective mechanism to achieve this consistency. However, it is convinced that national leadership is necessary, while also recognising that many problems concerning the legal recognition of sex fall largely outside the responsibility of the federal government.

In the event that either of the two options outlined above fail to result in sufficient support from state and territory governments, the federal government should consider legislation to:

- 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
- 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.

However, regardless of the option pursued, the federal government should also take steps to:

- harmonise policies, procedures and legislation relevant to the legal recognition of sex in federal documents and records
- ensure that 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.

The Commission considers that if a national board or office (discussed below in section 11.2 and 11.3) were established, its functions could include information and policy advice to direct the above harmonisation process across federal departments and agencies.

## 11.2 Establishing a national board

As outlined above, the Commission has identified the establishment of a national board as one option for furthering national consistency in line with the recommendations of this paper. The remainder of this section assumes the adoption of this option.

The national board envisaged by the Commission would have responsibility for receiving and determining applications for official recognition of a change in sex.

Once such recognition is obtained, the board would issue a certificate which would then provide conclusive proof of a person's sex for the purposes of amending other documents or records over which the federal government has responsibility.

The Commission acknowledges that, due to Australia's federal system of government, a certificate issued by such a national board would not be binding over relevant state and territory bodies, particularly birth registries. It has become clear to the Commission during its consultations that changing birth certificates is one of the most significant issues for persons seeking to change the legal recognition of their sex. Thus we acknowledge that certificates issued by the proposed national board would only be of limited assistance to members of the sex and gender diverse community unless those certificates were also recognised by the states and territories under their respective systems.

The Commission therefore considers that the key to the success of the proposed national board scheme would be for the federal government to obtain the support of state and territory governments to amend their respective legislation to recognise certificates issued by the proposed national board for relevant purposes, such as in amending a person's birth certificate. The Commission notes that the legislative framework for such recognition is already in place. The existing laws relating to birth registration in each of the states and territories already include provisions that recognise gender recognition certificates issued in other jurisdictions (currently just South Australia and Western Australia) as evidence of a person's sex.<sup>53</sup> The proposed change would simply involve expanding this recognition to include a certificate issued by the national board.

In addition to its determination function, the Commission also envisages that the new board would have the following additional functions:

- having responsibility for the implementation of the recommendations made in this paper
- providing public information and assistance in relation to policies and procedures for amending legal recognition of sex
- liaising with other federal departments and agencies to assist a person in amending their documents and records, including DIAC, DFAT, Medicare and Centrelink
- providing policy advice to government concerning issues relating to sex identity
- drafting national guidelines on the collection of sex and gender information (see Recommendation 10).

The Commission also recommends that:

- the composition of the board include at least one person who is sex and gender diverse and at least one medical specialist working in the area of sex and gender diversity

- the process adopted by the board for considering applications for recognition of a change in sex be informal, accessible, confidential and subject to merits review. In particular, the Commission intends the board to assist people with having their sex identity legally recognised in accordance with the broadened criteria recommended in this paper, rather than operating like a formal court.

### 11.3 A national office

The Commission acknowledges that, unless at least some of the states and/or territories agree to recognising certificates issued by the proposed national board, the costs associated with establishing such a board may not be justified. However, if a national board is not created, the Commission would nevertheless recommend the establishment of a national office which would exercise functions other than a determination function, such as playing an advisory and assistance role to the community and federal government.

The office could be accommodated within an existing department and may involve only a small number of staff and resources, given the small numbers of people likely to require its assistance.

The Commission also considers that the establishment of a national office may be an appropriate starting point for the federal government in implementing the recommendations in this paper. The office could provide a focal point for negotiations with state and territory governments and in driving the harmonisation of federal policies and procedures in relation to legal recognition of sex, as well as in establishing a national board with a determination function if necessary.

**Recommendation 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

- 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
- establishing a national board with responsibility for receiving and determining applications for official recognition of a change in sex, based on the recommendations in this paper (see section 11.2), as well as securing agreement from states and territories to recognise certificates of recognition issued by such a board.

**Recommendation 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.

**Recommendation 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:

- 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
- 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.

**Recommendation 14:** The federal government should harmonise policies, procedures and legislation relevant to the legal recognition of sex in federal documents and records.

**Recommendation 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.

## Section 12: What are some criticisms of the Commission’s proposal?

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The Commission’s recommendations are not supported in their entirety by the sex and gender diverse community. The main criticisms of the Commission’s proposal include:

- the retention of a requirement of medical evidence
- minimal emphasis on self-identification
- the requirement to permanently identify as a particular sex
- a national board
- dismissal of common understandings about sex.

### 12.1 The requirement for medical evidence

Some participants in the project argued that medical practitioners are not necessarily trained to assess all the aspects that make up a person’s sex or gender identity, particularly the historical or social contexts of sex or even ‘brain sex’.

Participants also raised concerns about people living in remote areas who do not have access to medical practitioners.

The Commission appreciates the concerns about medical evidence. However, the Commission believes that medical evidence is still widely considered to be an appropriate criterion for supporting sex identity.

The Commission acknowledges that some people may not be able to access medical treatment and therefore supports the decision-maker being given discretionary powers to consider a range of evidence in relation to the particular circumstances when determining sex.

### 12.2 Minimal emphasis on self-identification

Some Sex Files participants argued that there should be no surgical or medical requirements for a person to request a change in sex and that a person should be able to self-identify their sex.

These participants argued that Australia currently allows a person to change their name by deed poll with virtually no restriction which has not led to any material security issues. Participants argue that self-identification of sex identity can be achieved without disruption to security protocols.

The Commission’s recommendations support a greater ability for people who are sex and gender diverse to self-identify their sex. However, in order to verify identities for the purposes of security, it is also important that there are objective criteria and evidence for amending sex identity.

### 12.3 The requirement to permanently identify as a particular sex

Some participants have questioned why the Commission’s recommendations include a requirement for a person to ‘permanently’ intend to identify as a particular sex. They argue that medical evidence and social practice shows that a person’s conception of sex or gender identity is more fluid than has been historically or legally recognised and may change over time.

Whilst the Commission acknowledges that some people might have a shifting sex or gender identity, the Commission notes that a majority of people who are sex and gender diverse do identify as either male or female. The Commission's recommendations also allow for a person over 18 years to choose to have their sex noted as unspecified. A person over 18 years who was unable to meet the criterion of permanency would be able to request their sex be unspecified.

## 12.4 A national board

Some participants have criticised the establishment of a board to make determinations about a person's sex, suggesting that such a board 'singles out' people who are sex and gender diverse.

In the Commission's view, this criticism is based on the perception that people would be interrogated by such a board. The Commission does not recommend as one option the establishment of a board for the purpose of 'interrogating' people in relation to their sex identity. The Commission envisages a national board to be a place to facilitate changes on federal documents and records and assist people who are sex and gender diverse in documentation issues.

The Commission expects the board to operate as simply, if not more simply, than the Birth Registrars' systems in determining a change in legal sex. The broadening of criteria should mean that the process is simplified and more accessible.

In addition, under this model of a national board, persons who wish to have their sex legally recognised on birth certificates and other state and territory-issued documents can still choose to apply to state and territory Birth Registrars or other bodies, if they so wish. States and territories may amend their laws to recognise certificates issued by the national board, yet retain their functions of receiving and assessing applications.

The main purposes of such a national board would be to make things easier for people who are sex and gender diverse, make the legal recognition of sex more consistent at the federal level, and encourage consistency across state and territory determinations. The national board could also function to raise awareness more generally about sex and gender diversity issues.

## 12.5 Dismissal of common understanding about sex

Participants have told the Commission that its recommendations dismiss the common understanding about sex and sexual characteristics. For example, some participants have argued that the common understanding of sex requires a woman to not have a penis and a man to not be able to give birth. These participants argue that genital surgery should remain the only criterion for a change in legal sex.

The Commission has outlined some of the criticisms in relation to a focus on genital surgery at section 9.2 and its recommendations in relation to surgery at section 10.4.

The Commission notes that, historically, the common understandings of sex and gender have changed depending on the cultural or social views of the time. Sex and gender today remain contested concepts. See section 4 for a brief outline of some differing opinions concerning sex and gender.

Further, some people's experiences of sex and gender do not correspond to these common understandings. For example, some people are born not exclusively male or female.

Therefore, the Commission believes the common understanding of sex is an important consideration but not if those views deny the experiences of people who are sex and gender diverse.

## Section 13: What are the other major issues not dealt with by Sex Files?

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### 13.1 The focus of the sex and gender diversity project

Sex Files specifically focused on issues concerning legal identity. The focus of the Commission's sex and gender diversity project was an issue extensively debated on the blog. Some participants argued that the Commission should have investigated all issues concerning sex and gender diversity.

Some of the other issues relating to sex and gender diversity raised in our consultations include:

- appropriate protection from discrimination
- the lack of access to health services and treatment
- the practice of non-therapeutic surgeries on infants who are intersex
- greater public awareness on sex and gender diversity.

The focus of the sex and gender diversity project was the Sex Files blog and the examination of legal identity because it is the issue that has been raised most regularly with the Commission.

As a result, the Commission concentrated its limited resources in this area. However, the Commission acknowledges that other issues have a significant impact on the human rights of people who are sex and gender diverse. The following is a short summary of the additional issues raised.

### 13.2 Appropriate protection from discrimination

The Commission supports protection from discrimination for all people. During our consultations, many participants questioned when or whether the Commission is going to consider the issue of protection for people who are sex and gender diverse against discrimination and vilification.

As part of our ongoing work in promoting the human rights for all people, the Commission has considered how people who are sex and gender diverse can be protected from discrimination.

For instance, in March 2008, the Commission wrote to the federal Attorney-General encouraging him to take strong steps to change discriminatory behaviour against gay, lesbian and transgender people.<sup>54</sup>

Based on feedback from our consultations, the Commission revised its position and recognised that the term 'transgender' is not broad enough to cover all people who are sex and gender diverse.

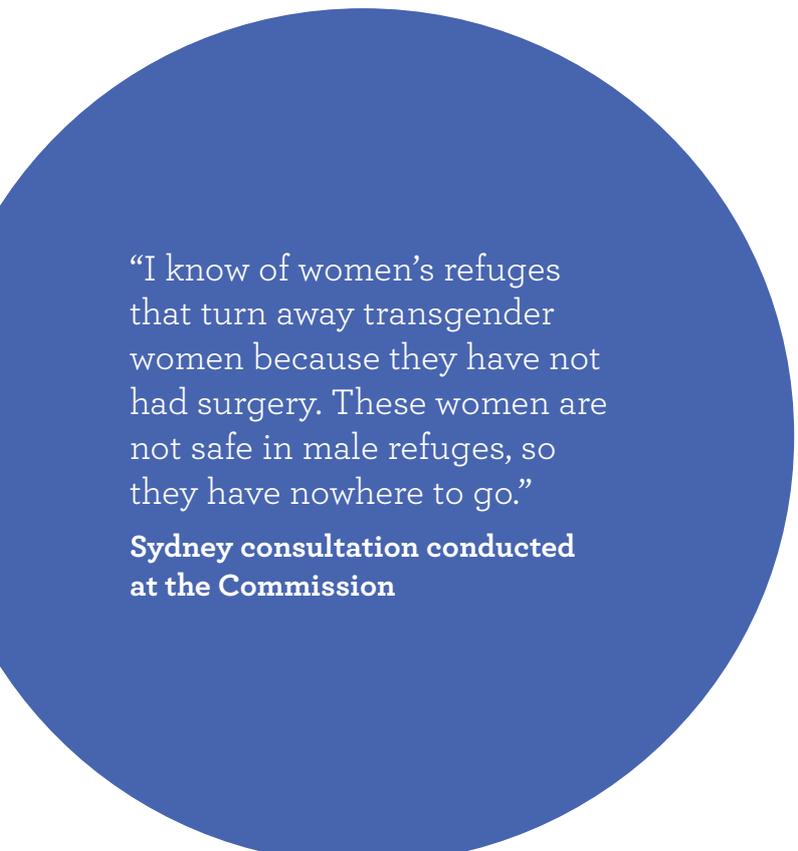
"I have been taking hormones since I was 15. I have breasts and look fully like a woman but I have never had surgery. When I was sentenced to prison they placed me in a male prison even though I asked to be transferred to a female prison. In prison, I was only provided with male clothes. It took me 6 months to get a pair of female runners. I just wanted a few female items and wanted to pay for them myself."

Telephone submission to the Commission

The Commission now advocates for protection against discrimination on the basis of sex identity or gender identity. This position covers all people who are sex and gender diverse.

Most recently, the Commission made a submission to the government on the effectiveness of the federal *Sex Discrimination Act 1984* (Cth). In that submission, the Commission recommended that the government consider implementing legal protection from discrimination on the grounds of sex identity or gender identity.<sup>55</sup>

The Commission will continue to promote the human rights of all people, including people who are sex or gender diverse. In its ongoing discussions with the federal Attorney-General and Australian government about the harmonisation and implementation of anti-discrimination laws, the Commission will recommend that people who are sex and gender diverse are adequately covered and that empowering language is used in those laws.



“I know of women’s refuges that turn away transgender women because they have not had surgery. These women are not safe in male refuges, so they have nowhere to go.”

**Sydney consultation conducted at the Commission**

### 13.3 Access to health services and treatment

Health policy and practice, and access to health services are important issues for people who are sex and gender diverse. This is because many people who are sex and gender diverse may require hormone therapy, undergo surgery and/ or counselling services.

Some of the health related issues raised with the Commission during the sex and gender diversity project, include:

- sex affirmation treatment and surgery is not covered by Medicare
- people receiving hormonal treatment (such as Androcur) must be noted as ‘sexual deviants’ in order to receive the drugs on the Pharmaceutical Benefits Scheme
- lack of choice of appropriate health services for people who are sex and gender diverse, especially children and young people
- Red Cross determines suitable blood donors according to the sex that was noted at birth.

The Commission has not had an opportunity to investigate these matters further but will raise them with the federal Minister for Health and recommend that the Australian Health Ministers’ Conference consider them.

### 13.4 Surgery on infants who are intersex

During the sex and gender diversity project, the Commission received submissions concerning the practice of genital surgery on infants who are intersex. The Commissioner also met with people who identified as being intersex or having an intersex condition.

In response to these concerns, the Commission has been seeking further information from stakeholders, medical practitioners and surgeons practising in this area. The Commission is developing an issues paper which outlines some of the human rights concerns which have been raised.

The Commission will send the issues paper to the federal Minister for Health recommending that the Australian Health Ministers' Conference consider these issues more fully.

### 13.5 Greater public awareness of sex and gender diversity issues

In our consultations, participants maintained that the Commission should be involved in educational or awareness activities aimed at increasing public awareness about sex and gender diversity issues. The Commission agrees that knowledge about sex and gender diversity issues in the broader Australian community is limited.

The Commission hopes that this paper, as well as the sex and gender diversity consultations and the Sex Files blog, will contribute to greater public awareness about sex and gender diversity issues.



# Appendix 1: List of government stakeholders involved in the sex and gender diversity project

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The Commission consulted with and sought feedback from the following government stakeholders in relation to the sex and gender diversity project:

- The Attorney General's Department
- The Council of Australasian Registrars (COAR)
- Crimtrac
- The Department of Immigration and Citizenship (DIAC)
- The New South Wales Registry for Births, Deaths and Marriages
- The New South Wales Roads and Traffic Authority
- The Passport Office, Department of Foreign Affairs and Trade (DFAT)
- The Victorian Registry for Births, Deaths and Marriages



## Appendix 2: The Commissioner's posts on the Sex Files blog

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### Welcome from the Human Rights Commissioner (posted 7 August 2008)

Welcome to the sex and gender diversity blog, where you can have your say about human rights issues that face people who are sex and gender diverse.

As you may know, the Australian Human Rights Commission has released an issues paper, and consulted with the community, aimed to determine the most pressing human rights issues for people who are sex and gender diverse. We found that the four broad areas of concern are – the ability to change or correct official and identity documents, health policy and services, protection from discrimination, and education and awareness.

The issue of legal recognition and the ability to amend documentation was by far the most commented upon. People said that Commission should focus on legislative reform, and ensure we consult widely with sex and gender diverse communities in the process.

Therefore, we've developed this blog to try to reach as many people in the sex and gender diverse communities as possible. So please encourage others to contribute to it.

Comments on the blog are public – but you can choose to post anonymously if you wish. Posts will also be moderated according to the Acceptable Use Policy which, along with our issues paper, you can also find on this site.

I look forward to hearing your comments.

*Graeme Innes*

### Acceptable Use Policy (posted 6 August 2008)

The intent of the Australian Human Rights Commission's Acceptable Use Policy is to create a positive space where people are able to publicly contribute their views to the sex and gender diversity blog, without fear of abuse, harassment or exposure to offensive or inappropriate content.

When contributing your views to this blog, please ensure that you:

- post material to the forum that is relevant to the questions currently being consulted on;
- protect your personal privacy and that of others by not including personal information about yourself or about others in your posts to the blog, (such as names, email addresses, private addresses, phone numbers or other identifying information);
- represent your own views and not impersonate or falsely represent any other person;
- do not abuse, harass or threaten others;
- do not post anything which:
  - racially or religiously vilifies others
  - incites, induces, aids, assists, promotes, causes, instructs or permits violence, discrimination, harassment, victimisation or hatred towards others, or
  - is likely to offend, insult, humiliate or intimidate others, particularly on the basis of their sex, gender identity, race, colour, descent, national origin, nationality, religion, ethnicity, gender, age, sexuality or any disability

- do not make defamatory or libellous comments
- do not use insulting, provocative, hateful, obscene or offensive language
- do not post material to the blog that infringes the intellectual property rights of others
- do not post multiple versions of the same view to the blog
- do not promote commercial interests in your posts to the blog.

Posts will generally show up on the blog within two working days. Posts that do not comply (or do not appear to comply) with the above points will not be posted on the forum or may be removed. Posts may be edited by the moderator for length or to remove unacceptable parts of contributions.

### **Your personal information and privacy**

If you choose to register to participate in the sex and gender diversity project blog, or if you email us, you will be supplying us with 'personal information' such as your email address and name.

We collect this in case we want to contact you to get permission to use your comments in a report and/or to add you to the mailing list if you request to do so.

Your personal information submitted for the sex and gender diversity blog will only be used in the context of the sex and gender diversity project and for related activities/purposes.

For further details, see the Commission's [Privacy Policy](#) (link).

### **Copyright**

By posting onto the sex and gender diversity blog, you grant the Australian Human Rights Commission permission to include your post on its website and to permit others to reproduce your post subject to the terms of the Commission's [Copyright Notice](#) (link).

## **What terms should be used to describe people who are sex and gender diverse in Australian laws? (posted 6 August 2008)**

Different laws use different terms to refer to people who are sex and gender diverse. As part of our project we have compiled a table of the different legal definitions used to describe people who are sex and gender diverse. You may like to [review](#) (link) the table we have prepared on sex and gender diversity terminology before commenting on this blog.

For example, in New South Wales, the *Births, Deaths, Marriages Registration Regulation 2006* uses the term 'transgender person' who is defined as a 'person who has undergone sexual reassignment surgery'.

The Western Australian *Gender Reassignment Act 2000* does not use a specific term like 'transgender' but instead uses the phrase, 'a person who has undergone a reassignment procedure'.

The South Australian *Equal Opportunity Act 1984* defines 'transexuality' as the 'condition of being transsexual' and as a category of sexuality.

During the Human Rights Commission's initial consultation, I heard that there is debate over whether terms like transgender or transsexual should be used. You may like to read some of the comments I made about [terminology](#) in my report of the initial consultation (link).

In the United Kingdom, the *Gender Recognition Act 2004* avoids using terms such as 'transgender' and 'transsexual' and instead allows that a 'person of either gender may make an application for a gender recognition certificate on the basis of living in the other gender or having changed gender under the law of a country or territory outside the United Kingdom'.

What terminology do you think should be used in Australian laws to refer to people who are sex and gender diverse?

I am interested to hear your comments.

*Graeme Innes*

## What criteria should be fulfilled before a person who is sex or gender diverse can legally change their documents? (posted 6 August 2008)

Under the current system not all people who are sex and gender diverse are legally recognised as their true sex or affirmed gender and have some difficulties in changing documents.

For example, in the Victorian *Births, Deaths and Marriages Registration Act 1996*, a person can only apply to alter the register if they are 'unmarried', '18 years or over', have 'undergone sex affirmation surgery' and their 'birth is registered in Victoria'.

Similar provisions exist in the South Australian *Sexual Reassignment Act 1988*, which allows people who have undergone a reassignment procedure to apply for a recognition certificate. 'Reassignment procedure' means a medical or surgical procedure (or a combination of such procedures) to alter the genitals and other sexual characteristics of a person.

During our initial consultation, people have told me that surgery or hormones should not be a requirement for changing documents. Some people told me that whether a person identifies as male or female should be the criterion that determines whether a person can change the sex or gender on their documents.

There are some international examples where genital surgery is not a requirement for changing documents.

The United Kingdom *Gender Recognition Act 2004* enables people who have been diagnosed 'gender dysphoria' and who have lived in the acquired gender for two years and who intend to do so until death to apply for a gender recognition certificate. Receiving a gender recognition certificate enables people who are sex and gender diverse to apply to change other documents and records.

In order to meet the criteria under the *Gender Recognition Act 2004* (UK), a person needs to provide two medical practitioner reports (or one medical practitioner report and one psychologist report) that state that a person has undergone treatment, is undergoing treatment, is planning treatment or has been prescribed treatment for the 'purpose of modifying sexual characteristics'.

As part of our project we have compiled a table of the different criteria used to determine whether a person who is sex and gender diverse can change their documents such as birth certificates. You may like to [review](#) (link) this table on processes for legal recognition for people who are sex and gender diverse before commenting on this blog.

I am interested to hear your comments.

*Graeme Innes*

## What documents have you wanted to change? (posted 6 August 2008)

During our consultation, people told me how important it is to obtain official identity documents such as birth certificates, passports, driver licenses and citizenship certificates in the appropriate sex or gender. Many people also told me about a number of other important documents that contain information about a person's sex or gender. I am interested to hear about other documents that you have wanted to change?

I learned that a document with an old name on it can give away incorrect information about a person's sex or gender. A few people have told me about difficulties in applying for jobs with an old name on their qualifications. I also heard from a woman that faced difficulties in changing her loan documentation and property title to reflect her new name.

Besides your main identity documents, what other documents have you needed to change and how do you think the system could be improved?

I am interested to hear your comments.

*Graeme Innes*

## **When have your documents or records ‘outed’ you? (posted 6 August 2008)**

During our consultations, people who are sex and gender diverse have told us of times when despite having appropriate documents, their sex or gender history is revealed.

I learned that criminal record checks may contain a person’s previous name. An employer might be alerted to a change in sex or gender even if the person did not have a relevant criminal record.

Do you have other examples when documents or records have ‘outed’ you?

I am interested to hear your comments.

*Graeme Innes*

## **Share your story!**

Our advocacy is the most powerful when we use personal stories to support our call for change. Politicians and the public can be made aware of sex and gender diversity issues through these stories.

We would like to collect personal stories that we may be able to publish in our final report.

The Australian Human Rights Commission seeks anecdotal stories about the difficulties in obtaining appropriate documents. These stories do not need to be formal or in the style of a submission.

You may like to include some information about your childhood or past, friendships, coming out, transitioning and aspirations.

Please let us know if you would like to remain anonymous.

We may have media interest in this project. Please also let us know if you would be willing to talk with the media about your story.

We may use some of these stories in the final report of the project. If you would like to send a photograph of yourself we may attach a photo to your story. Please take a head shot on a pale background at 300 dpi and submit to us as a jpg.

Read the Commission’s Acceptable Use Policy in this blog to read privacy and copyright information.

Alternatively, you may email your story and photo to [webfeedback@humanrights.gov.au](mailto:webfeedback@humanrights.gov.au)

*Graeme Innes*

## **Do you have any other comments you want to make? (posted 6 August 2008)**

I realise that these questions may not cover all the things that you want to say. This section of the blog is an opportunity for you to let me know other comments you may have about our sex and gender diversity project.

At the moment we are focusing on the legal recognition of sex and gender in official documents and government records. I may not be able to assist you with other matters at this time.

*Graeme Innes*

## **The scope of the sex and gender diversity project (posted 5 September 2008)**

Thank you to everyone who has contributed to our Sex Files blog.

I am pleased to see passionate discussion about the issues relating to sex and gender diversity issues. There is inevitably going to be different perspectives on these matters and I am interested in hearing a diversity of views.

Keep up the vigorous discussion!

In the meantime, let me address some concerns raised on the blog about the scope of the sex and gender diversity project.

### **Why does Sex Files only address issues of documentation?**

I understand that several issues relating to sex and gender diversity have been raised in our consultations and on Sex Files, including:

- the inability to obtain appropriate documents or change information records
- the lack of access to health services and treatment
- the practice of non-therapeutic infant genital surgeries
- greater public awareness on sex and gender diversity and
- appropriate protection from discrimination.

However, we chose to do further work specifically on issues of appropriate documentation because it is the issue that has been most regularly raised with us.

We do not have the resources to be able to thoroughly investigate all the other issues concerning sex and gender diversity. This does not mean that I am not concerned about these other issues.

I believe seeking reform in the area of appropriate documentation and government records will contribute to greater public awareness and action about sex and gender diversity issues more broadly.

### **Why does Sex Files deal with issues of sex and gender together?**

Sex Files is looking at the issue of appropriate documentation. From my consultations, I understand that this issue is important for people who wish to identify as a particular legal sex. People may wish to identify as a particular legal sex because of either sex identity or gender identity.

We understand that sex and gender are different concepts. Some participants on the blog have differentiated intersex and sexual formation issues from gender expression issues. We accept those differences and a person's right to state their identity. We also accept a person's right to feel that our project does not cover their needs and to choose not to be involved.

Our investigations are continuing and we are keen to look at both sex identity and gender identity aspects of appropriating information being recorded on documentation and in government records.

We have not yet come to firm conclusions about these issues. I will be releasing some new information shortly to seek your comments about a proposed reform scheme for Australia.

I will keep you updated.

*Graeme Innes*

### **Links to legislation (posted 5 September 2008)**

Some posts have raised concerns about the Commission's opinion on some of the laws governing a change in legal sex. The Commission has not yet come to a firm opinion about the merits of particular laws, definitions or systems.

However, the Commission is interested in looking at how the state and territory laws in Australia differ from each other and how they are used in practice. The Commission is also interested in looking at how the laws in other countries deal with changes in sex or gender.

The Commission has referred to particular legal definitions in Sex Files – not as an endorsement of those laws – but to stimulate conversation on the blog about the ideal scheme for Australia.

I encourage you to continue those discussions. You may like to refer to the legislation below by clicking on the name of the Acts. Other Acts, Regulations or policies may also be relevant to this debate and I encourage you to post up additional useful links.

### Relevant legislation in Australia

ACT: *Births, Deaths and Marriages Registration Act 1997*

NSW: *Births, Deaths and Marriages Registration Act 1995*

Please note that the Commission is aware of the amendments to the NSW *Births, Deaths and Marriages Registration Act 1995* by the *Courts and Crimes Legislation Amendment Act 2008*. Although the *Courts and Crimes Legislation Amendment Act 2008* has been enacted, the provisions relating to changes to the *Births, Deaths and Marriages Registration Act 1995* are **yet to come into force**. Therefore, the information on Sex Files refers to the current legislative position in NSW. To see the changes please refer to the *Courts and Crimes Legislation Amendment Act 2008*. The Commission will take into account the new NSW regime in its consideration of any reform.

NT: *Births, Deaths and Marriages Registration Act*

Qld: *Births, Deaths and Marriages Registration Act 2003*

Vic: *Births, Deaths and Marriages Registration Act 1996*

SA: *Births, Deaths and Marriages Registration Act 1996*;  
*Sexual Reassignment Act 1988*

Tas: *Births, Deaths and Marriages Registration Act 1999*

WA: *Births, Deaths and Marriages Registration Act 1998*;  
*Gender Reassignment Act 2000*

### Relevant international legislation

The United Kingdom: *Gender Recognition Act 2004*

Spain: *Explanatory statement for the 2006 Act regulating the rectification of the entry related to the sex of persons in the civil register.*

### Tables

The Commission has also prepared some tables which summarise the some [terminology](#) (link) and [criteria](#) (link) used in various laws as at 6 August 2008. You may find these useful in your contributions to the discussion about how Australia's system could operate.

I will be releasing some new information shortly to seek your comments about a proposed reform scheme for Australia.

I will keep you updated.

*Graeme Innes*

## Discrimination protection for people who are sex and gender diverse (posted 10 October 2008)

Thanks again to everyone who is joining the many discussions on our Sex Files blog.

Several posts have questioned when or whether the Australian Human Rights Commission is going to look at the issue of protection for people who are sex and gender diverse against discrimination and vilification.

As I mentioned in my post on the Scope of the Sex and Gender Diversity Project, the Sex Files blog was established to specifically look at the issue of documentation and the legal recognition of sex.

However, as part of our ongoing work in promoting the human rights for all people, we do consider how people who are sex and gender diverse can be protected from discrimination.

For instance, in March 2008, I wrote to the Attorney-General encouraging him to take strong steps to change discriminatory behaviour against gay, lesbian and transgender people. [Click here to view my media release on this issue.](#)

Based on feedback from our Sex Files consultations, we revised our position and recognised that the term 'transgender' is not broad enough to cover all persons who are sex and gender diverse. We now advocate for protection against discrimination on the basis of sex identity or gender identity. This position covers all people who are sex and gender diverse.

Most recently, the Commission made a submission to the government on the effectiveness of the federal *Sex Discrimination Act 1984*. In that submission, the Commission recommended that the government consider implementing legal protection from discrimination on the grounds of sex identity or gender identity. [Click here](#) to view the complete submission.

The Commission will continue to promote the human rights of all people, including, and especially, people who are sex or gender diverse.

If you have not had a chance to review my proposal on reforming the legal recognition of sex, please take a look and let me know your comments.

*Graeme Innes*

- 1 See Fausto-Sterling, A., (2000) *Sexing the Body: Gender Politics and the Construction of Sexuality*, Basic Books, New York; Gooren, L., (2006) *The Biology of Human Psychosexual Differentiation, Hormones and Behaviour* 50(4) 589-601; Grenfell, L., (2003) *Making sex: law's narratives of sex, gender and identity*, 23 *Legal Studies* 66; Hausman, B.L., (1995) *Changing Sex: Transsexualism, technology and the idea of gender in the Twentieth Century*, Duke University Press, Durham, NC; Malti-Douglas, F., (ed) (2007) *Encyclopaedia of Sex and Gender*, Macmillan Reference, USA; Stein, M., (ed) (2004) *Encyclopaedia of lesbian, gay, bisexual and transgender history in America*, Thomson Gale, USA; Vissandjee, B., et al (2007) *Integration, Clarification, Substantiation: Sex, Gender, Ethnicity and Migration as Social Determinants of Women's Health*, *Journal of International Women's Studies* vol.8, No.4; Shaw, A., & Ardener, S., (2005) *Changing Sex and Bending Gender UK*; Rubin, *The Traffic in Women: Notes on the 'Political Economy' of Sex*, in Reiter, R., ed. (1975), *Toward an Anthropology of Women*, New York, Monthly Review Press; Butler J (1990) *Gender Trouble: Feminism and the Subversion of Identity*, Routledge, New York; Haraway, D., (1996) *Modest\_Witness@Second\_Millennium.FemaleMan@\_Meets\_Oncomouse.*™ Routledge, New York; Sedgwick, E., (1990) *Epistemology of the Closet*, University of California Press, Los Angeles; Chanter, T., *Rethinking Sex and Gender*; Carver, T., and Chambers, S.A., *Judith Butler and Political Theory: Troubling Politics*, Routledge, New York; Moi, T., *What is a Woman?* (1999) Oxford University Press. For legal jurisprudence in terms of defining sex and gender see generally, Sharpe, A., *Thinking Critically in Moments of Transgender Law Reform Re Kevin and Jennifer v Attorney-General for the Commonwealth* *Griffith Law Review* (2002) Vol. 11 No. 2. Grenfell, L., *Making sex: law's narratives of sex, gender and identity*, *Legal Studies*. See also *Re Kevin (Validity of Marriage of Transsexual)* [2001] FamCA 1074, *AB v Registrar of Births, Deaths and Marriages* (2007) 162 FCR 528; [2007] FCAFC 140 and *Re Alex: Hormonal Treatment for Gender Identity Dysphoria* [2004] FamCA 297 (13 April 2004) all available at <<http://www.austlii.edu.au>>.
- 2 More information on the Yogyakarta Principles can be found at <<http://www.yogyakartaprinciples.org/>>.
- 3 The French, who initiated the statement, have created a website (<http://www.droitslgbt2008.fr/>) with an attached document (PDF format, which can be downloaded from <http://www.droitslgbt2008.fr/documents/?mode-download&id=2>) in French (pages 1-2), Spanish (pages (3-4) and English (pages 5-6).
- 4 See especially *Rees v United Kingdom* [1986] ECHR 11; *Cossey v United Kingdom* [1990] ECHR 21; *Sheffield and Horsham v United Kingdom* [1998] ECHR 69; *X, Y, and Z v UK* [1997] ECHR 20.
- 5 See especially *Goodwin v United Kingdom* [2002] ECHR 588 and *I v United Kingdom* [2002] ECHR 592.
- 6 *Ibid* (*Goodwin*) [77] (citations omitted).
- 7 During our consultation with the Council of Australasian Registrars, some Births Registrars indicated that a birth certificate or change of name certificate can be printed without a sex notation. Readers are advised to check the currency of this information with their local agency.
- 8 *Births, Deaths and Marriages Registration Regulation 1996* (SA), r 8.
- 9 Readers are advised to check the currency of this information with their local agency.
- 10 *Road Transport (Driver Licensing) Regulation 2008* (NSW), r 103(1)(c).
- 11 See NSW Government, RTA website at <<http://www.rta.nsw.gov.au/publicationsstatisticsforms/downloads/45070018.pdf>>.
- 12 *Road Transport (Driver Licensing) Regulation 2008* (NSW), r10(1).
- 13 See *Births, Deaths & Marriages Registration Act 1997* (ACT), s 24. There is also provision in this legislation that enables a person to 'correct' the register as opposed to change the register, see s 40.
- 14 Although legislation does not actually specify an applicant be unmarried, Form 204, which is used by the Australian Capital Territory Births Registrar, details that a person can only request a change in legal sex if they are unmarried. See Form 204 at <<http://www.legislation.act.gov.au/af/2008-71/current/pdf/2008-71.pdf>> for more information.
- 15 See *Births, Deaths & Marriages Registration Act 1995* (NSW), s 32B. Corrections provision, see s 45.
- 16 See *Births, Deaths & Marriages Registration Act 2005* (NT), s 28B. Corrections provision, see s 40.
- 17 See *Births, Deaths & Marriages Registration Act 2003* (Qld), ss 22-23. Corrections provision, see s 42.
- 18 See *Births, Deaths & Marriages Registration Act 1999* (Tas), ss 3, 28. Corrections provision, see s 42.
- 19 See *Births, Deaths & Marriages Registration Act 1996* (Vic), s 30A. Corrections provision, see s 43.
- 20 *Sexual Reassignment Regulation 2000* (SA), r 6 and Sch 1.
- 21 *Sexual Reassignment Regulation 2000* (SA), r 6 and Sch 1.
- 22 *Gender Reassignment Regulations 2001* (WA), r 4.
- 23 *Sexual Reassignment Act 1988* (SA), s 8; *Gender Reassignment Act 2000* (WA), s 16.
- 24 *Sexual Reassignment Act 1988* (SA), s 9; *Gender Reassignment Act 2000* (WA), s 17.
- 25 See *Sexual Reassignment Act 1988* (SA), ss 3, 7. Corrections provision, see *Births, Deaths & Marriages Registration Act 1996* (SA), s 42.
- 26 See *Gender Reassignment Act 2000* (WA), s 15. Corrections provision, see *Births, Deaths & Marriages Registration Act 1998* (WA), s 51.
- 27 See *Births, Deaths & Marriages Registration Act 1996* (Vic), ss 30E - 30F
- 28 On commencement of sch 1 of the *Courts and Crimes Legislation Amendment Act 2008* (NSW), Australian citizens and permanent residents who live and have lived in NSW for 12 months will also be able to apply for a gender recognition certificate.
- 29 See the *Australian Citizenship Instruction Policy* at <<http://www.citizenship.gov.au/law-and-policy/policy.htm>>.
- 30 See, generally, *Freedom of Information Act 1982* (Cth), Part V.
- 31 See the *Australian Citizenship Instruction Policy* at <<http://www.citizenship.gov.au/law-and-policy/policy.htm>>.
- 32 See Form 424C at <[www.immi.gov.au/allforms/pdf/424c.pdf](http://www.immi.gov.au/allforms/pdf/424c.pdf)>.
- 33 The *Manual of Australian Passport Issue policy* is not online but is available for inspection at passport offices.
- 34 Information received by the Commission from DFAT during its consultations.

- 35 Information received by the Commission from the NSW Roads and Traffic Authority during its consultation. Readers are advised to check the currency of this information with their local Road Authority.
- 36 For example, the Commission was informed that Queensland, New South Wales and Victoria have adopted this approach. Readers are advised to check the currency of this information with their local Road Authority.
- 37 See for example, *Adult Proof of Age Card Act 2008* (Qld), *Photo Card Act 2005* (NSW), *Photo Card Regulation 2005* (Vic), *Liquor Control Act 1988* (WA), *Liquor Control Regulations 1989* (WA); *Liquor Act 1975* (ACT).
- 38 For example, the Commission is aware that Queensland, New South Wales and Victoria have adopted this approach. Readers are advised to check the currency of this information with their local Road Authority.
- 39 See, eg, *Freedom of Information Act 1982* (Cth), Part V; *Privacy Act 1988* (Cth), Information Privacy Principle 7 and National Privacy Principle 6.
- 40 See table 1 in section 8.1(a) and table 2 in 8.1(b) of this paper.
- 41 In late 2008, the Australian Government passed legislation amending 84 federal laws so as to remove discrimination against same-sex couples and their families. This included amendment of laws affecting financial and work-related benefits and entitlements, such as Medicare and social security benefits. These reforms should ensure that a person who remains married after sex affirmation surgery will receive the same treatment with respect to benefits regardless of whether they are in a same-sex or opposite-sex couple relationship.
- 42 See section 8.1(a) of this paper.
- 43 See section 8.1(a) of this paper.
- 44 See section 8.2(a) of this paper.
- 45 See section 8.2(a) of this paper.
- 46 Information received by the Commission during its consultation with COAR. Readers are advised to check the currency of this information with their local Road Authority.
- 47 See, especially, ICCPR, articles 2(1) and 26; the *International Covenant on Economic Social and Cultural Rights*, article 2, the Universal Declaration of Human Rights, article 2 and the CRC, article 2.
- 48 See, especially, *AB v Registrar of Births, Deaths and Marriages* (2007) 162 FCR 528; [2007] FCAFC 140.
- 49 See, eg, *Hansard*, Legislative Assembly, Robert Hulls, 11 May 2004, p 1107, quoted in *AB v Registrar of Births, Deaths and Marriages* (2007) 162 FCR 528; [2007] FCAFC 14 at [69] (Kenny J).
- 50 See, however, *Re Kevin (Validity of Marriage of Transsexual)* [2001] FamCA 1074, where the Family Court held that the question of whether a person is a man or woman within the meaning of the Marriage Act is to be determined at the date of the marriage.
- 51 See for example, *Gender Recognition Act 2004* (UK) at <[http://www.opsi.gov.uk/acts/acts2004/ukpga\\_20040007\\_en\\_1](http://www.opsi.gov.uk/acts/acts2004/ukpga_20040007_en_1)> or the 2007 Act regulating the rectification of the entry related to the sex of persons in the civil register (Spain) at <<http://www.pfc.org.uk/files/Spain.pdf>>.
- 52 During our consultation with COAR, birth registrars mentioned that the ‘indeterminate’ sex was mostly used in cases of still born children or premature births. Information received by the Commission from DFAT advised that a notation of X on a passport is ordinarily only provided to a person who can present a birth certificate with an indeterminate sex.
- 53 *Births, Deaths and Marriages Registration Act 1995* (NSW) s 32I(2); *Births, Deaths and Marriages Registration Act* (NT) s 28J; *Births, Deaths and Marriages Registration Act 2003* (Qld) s 23(4)(b)(ii); *Births, Deaths and Marriages Registration Act 1999* (Tas) s 28H; *Births, Deaths and Marriages Registration Act 1996* (Vic) s 30G(2); *Births, Deaths and Marriages Registration Act 1997* (ACT) s 27(2); *Gender Reassignment Act 2000* (WA) s 16(2); *Sexual Reassignment Act 1998* (SA) s 8(2).
- 54 See the Commission’s press release at <[http://www.humanrights.gov.au/about/media/media\\_releases/2008/22\\_08.html](http://www.humanrights.gov.au/about/media/media_releases/2008/22_08.html)> for further information.
- 55 See the Commission’s submission at <[http://www.humanrights.gov.au/legal/submissions/2008/20080901\\_SDA.html](http://www.humanrights.gov.au/legal/submissions/2008/20080901_SDA.html)> for further information.



## Further information

### **Australian Human Rights Commission**

Level 8, Piccadilly Tower  
133 Castlereagh Street  
SYDNEY NSW 2000

GPO Box 5218  
SYDNEY NSW 2001

Telephone: (02) 9284 9600  
Complaints Infoline: 1300 656 419  
General enquiries and publications: 1300 369 711  
TTY: 1800 620 241  
Fax: (02) 9284 9611  
Website: [www.humanrights.gov.au](http://www.humanrights.gov.au)

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## *Sex Files: the legal recognition of sex in documents and government records*

*Concluding paper of the sex and gender diversity project*

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*Sex Files: the legal recognition of sex in documents and government records* is the concluding paper of the sex and gender diversity project, conducted by the Australian Human Rights Commission in 2008. The sex and gender diversity project developed out of consultations with members of sex and gender diverse communities about the discrimination they experience. One of the key human rights concerns was that many people who are sex and gender diverse are unable to change the sex markers in official documents or government records, for example birth certificates.

This paper identifies some problems with the existing systems for recognising sex identity in documents and government records. It also makes recommendations for changing the system and provides options for implementing these changes.

March 2009



**Australian  
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