



Commissioner for Children and Young People
Western Australia

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Dear Law Reform Commission

Submission to the *Review of Western Australian legislation in relation to the recognition of a person's sex, change of sex or intersex status*

As Commissioner for Children and Young People in Western Australia, my role is to advocate for the best interests of all children and young people under the age of 18 in Western Australia, and to promote and monitor their wellbeing. In doing so, I must have regard for the United Nations Convention on the Rights of the Child, and prioritise the needs of Aboriginal children and young people, or children and young people who are vulnerable or disadvantaged for any reason.

Last year, my office established a portfolio area focusing on the needs and experiences of Lesbian, Gay, Bisexual, Trans, and Intersex (LGBTI) children and young people in Western Australia. All LGBTI children and young people have the right to be recognised for their gender identity, sexual orientation or intersex status, and to feel safe and respected wherever they are. Despite this, many LGBTI children and young people experience issues or challenges which impact on their health, safety, wellbeing, and other areas of their life.

Predominantly, my office's work in this space has included establishing Advisory Committees of LGBTI young people and their peers, and releasing an Issues Paper outlining a broad range of issues and considerations that are required in order to improve outcomes for LGBTI children and young people in Western Australia and across the country, which I am providing alongside this submission.

Trans and gender diverse young people involved in my Committees have raised a range of difficulties and challenges that they face in being recognised and accepted for who they are, and in particular the challenges with the current legal processes to have their gender affirmed and recognised. I am pleased that the Law Reform Commission are conducting the *Review of Western Australian legislation in relation to the recognition of a person's sex, change of sex or intersex status* ('the Review'), and the opportunities that it presents to improve recognition of trans, gender diverse and intersex people across the State.

In this submission, I will be responding to a range of questions posed by the discussion paper on the Review, drawing on feedback from young people involved in my Perth LGBTI Advisory Committee, some of which has already been provided directly to the Law Reform Commission through the meeting held with young people, as well as other issues for consideration.

Registration of sex at birth

I am supportive of the proposed model for the recording, notification and registrations of sex at birth, and removal of classifications of sex from birth certificates. As outlined in the Discussion Paper, this removes the need for parents of infants who are born with an intersex variation to register the child's sex (or gender as it currently stands) soon after the birth, providing an opportunity for families to seek further support, information, or simply wait to determine how the child may self-identify in the future. My Advisory Committee members also discussed benefits for removing the sex classification from birth certifications, in that it would support children and young people's self-identification of their gender, and remove some of the structural issues and challenges of the current processes around needing to change birth certificates and identification documents.

In the event that the proposed model is not accepted, an alternative model could be to replace the mandatory sex classification with an optional sex classification on the Birth Registration Statement that parents complete, in addition to the removal of sex classification from the birth certificate.

If classification of sex is included on birth certificates, I would encourage the Law Reform Commission to consider the views provided in the Darlington statement, a national consensus statement on behalf of people with intersex variations. The Darlington Statement does not support the imposition of a "third sex classification" when births are initially registered.¹

Application for a Gender Identity Certificate (minor)

I am supportive of the proposed model for applications for Gender Identity Certificates, and believe that it would address many of the structural barriers and challenges with the current processes, and recognises the diversity of gender identities beyond male and female. The Discussion Paper does outline that only a parent or guardian is able to apply for a Gender Identity Certificate, however consideration should also be given to whether a child or young person can apply for this also if they do not have one and require one.

Application for a change to a Gender Identity Certificate (minors)

I am supportive of a number of aspects of the proposed model to change a Gender Identity Certificate, as it supports an individual's self-identification, removes the requirements for medical interventions or treatments, and will remove some of the burden and pressure associated with current processes. However, there are a number of considerations that need to be made, to ensure that this process is not prohibitive for children and young people to be able to have their gender recognised.

¹ Darlington Statement 2017, Joint consensus statement from the intersex community retreat in Darlington. Retrieved from <https://ihra.org.au/wp-content/uploads/key/Darlington-Statement.pdf>

Requirement for parental statements to apply for a change to a Gender Identity Certificate

The *Commissioner for Children and Young People Act* recognises that "parents, families and communities have the primary role in safeguarding and promoting the wellbeing of their children and young people and should be supported in carrying out their role." Whilst both parents should be provided with an opportunity to support an application to change a Gender Identity Certificate, there may be times where a parent or guardian is not available or present in a child's life in order to provide this, or where it might not be in the child or young person's best interests to obtain this for safety or welfare reasons. The young people in my Committee were concerned that if they had one parent who was unsupportive of their gender identity, that this opinion may prevent a child or young person being able to affirm their gender, which would have negative ramifications for their life.

These issues, and additional considerations are discussed in more detail in the following section relating to dispute processes and consent requirements.

Requirements for child's statements to apply for a change to a Gender Identity Certificate

In the proposed model, the information that is required in a Statutory Declaration to support the application to change a Gender Identity Certificate differs between children and adults. The model proposes that children and young people provide statements about their gender identity, and an understanding of the meaning and implication of affirming their gender, as opposed to an adult process which requires a statement declaring their genuine belief of their affirmed gender. It is difficult to interpret the requirement for children and young people to understand the "*implication of affirming their gender*", or what a child or young person would be required to articulate to demonstrate that they understood these "implications". I would propose that the statutory declaration requirement should be the same for adults and children and young people in regards to simply declaring genuine belief of their gender identity.

Age at which a child or young person (or their guardian) can apply for a change to their Gender Identity Certificate

It is unclear from the Discussion Paper whether a Gender Identity Certificate can be changed prior to a child or young person reaching the age of 12, and what this process might look like. Many children and young people become aware of their gender identity at an early age, and just under 50% of parents of trans and gender diverse children and young people realised their child was trans before they reached 12 years of age.² Given this, no child should be precluded from having their gender formally recognised, simply because they are under the age of 12. A lack of formal recognition could impact on their ability to be recognised for their gender identity, leading to possible discrimination, or impact adversely on them in situations where a Gender Identity Certificate is required or where their gender is being questioned. I recommend that the Law Reform Commission allow children under the age of 12 to access and be permitted to change to their Gender Identity Certificate, supported either by parents or through resolution processes.

² Strauss P et al, 2017, *Trans Pathways: the mental health experiences and care pathways of trans young people*. Summary of results, Telethon Kids Institute, Perth, Australia.

Requirements to be able to apply for a change to the Gender Identity Certificate

I support the removal of all requirements for a person to undergo any surgery or medical treatment in order to apply to change the gender identity certificate. This support is provided in recognition that not all trans or gender diverse people choose to, or are able to, undergo medical transition, and that this should not prevent them from being able to receive recognition for their gender identity. This is particularly important for children and young people, who may not be able to access this due to their age or financial constraints.

The use of a Gender Identity Certificate

It is not entirely clear when or how a Gender Identity Certificate might be required or used, however my Advisory Committee members thought that this would likely be when they were accessing gender specific services (e.g. schools, health and medical services), where they are required to provide proof of identity, or in situations where their gender was in question. There should be specific restrictions on the way that a Gender Identity Certificate is used and in which circumstances it is able to be requested, to avoid it being used as an opportunity to discriminate against individuals.

Not having a current Gender Identity Certificate should not preclude people from people being recognised for their gender identity, as there may be circumstances in which a Gender Identity Certificate is not able to be obtained or where there may be specific barriers for individuals to be able to apply or obtain it, especially for children and young people, or for those who may have fluid gender identities.

Anti-discrimination legislation needs to be in place to provide protection for all people with diverse gender identities, regardless of whether they hold a Gender Identity Certificate that matches their current affirmed gender.

Dispute processes

I am concerned about the reliance on court processes to manage disputes where one or both parents are unsupportive of a child or young person being able to change their Identity Certificate. This stems from the challenges and barriers that exist for all children and young people participating in legal processes, given that legal systems are predominantly adult-oriented and not designed for children and young people.

The Australian Law Reform Commission has outlined a range of concerns relating to children and young people's participation in the legal process, including:

- Discrimination against children and young people and their marginalisation in the legal processes when decisions are being made about them.
- Failure to recognise and accommodate children and young people's evolving maturity, responsibilities and abilities.
- Failure to consult with and listen to children in matters that affect them.
- Inconsistencies in legislation dealing with legal capacities and liabilities of children.³

³ Australian Law Reform Commission 1997, *Seen and heard: priority for children in the legal process (ALRC Report 84)*, Commonwealth of Australia. Retrieved from <https://www.alrc.gov.au/sites/default/files/pdfs/publications/ALRC84.pdf>

I also have concerns about the concept of operating on the “best interests” of a child, given that legal representatives are often appointed to represent the “best interests” of a child, however these may not necessarily reflect a child or young person’s opinions or wishes. Legislation needs to clearly outline the responsibility to ensure that children and young people’s wishes and opinions are heard and represented throughout the court process.

Concerns about using a court based system to resolve disputes regarding to changing a Gender Identity Certificate

It is important to recognise that many trans and gender diverse children and young people experience family rejection, and that this is a particular stressor for young people, increasing the likelihood of mental health issues and suicide attempts amongst trans and gender diverse young people.⁴ Given the vulnerability of trans and gender diverse children and young people who do not have support from their parents to be affirmed for their gender identity, serious considerations need to be made about the appropriateness of a court model to manage the dispute processes.

My concerns about the proposed model to manage these disputes through the court include:

- The adversarial nature of court proceedings, and the potential emotional impact and trauma that could be caused by children and young people having to speak out and defend their identity in court, and be exposed in such a public way.
- Court processes being cost prohibitive for children and young people, and that without the support of one parent it is unlikely that they would be able to apply for a change, or able to navigate the process due to the costs involved.
- That children and young people may have difficulty navigating adult oriented court-processes and systems, or experience difficulty in having their voices heard against parents, lawyers and other adults.
- The potential for compounding discrimination that may occur for trans and gender diverse children and young people due to a lack of understanding about their needs.
- The level of skills and expertise amongst legal representatives and judges in the areas of gender dysphoria, childhood identity issues and intersex variations, and the potential impact of this on decision making by the court.
- The risk to the mental health and wellbeing for children and young people who are not recognised or validated for their gender identity, and the potential impact of a decision not to grant a Gender Identity Certificate to an individual child or young person.

⁴ Strauss P et al, 2017, Trans Pathways: the mental health experiences and care pathways of trans young people. Summary of results, Telethon Kids Institute, Perth, Australia

Other options to manage disputes

There may be more appropriate options to manage dispute situations, which could minimise adverse outcomes for a child or young person, and support family cohesiveness. These include:

- Mediation or other alternative dispute resolution processes as a first step
- A requirement for counselling and support for parents to help them understand gender diversity and encourage acceptance of their child's gender identity; as well as counselling and support from the children and young people given they may be experiencing parental rejection or a lack of familial support for their gender identity.

Consent requirements

There are a number of circumstances in which it may not be possible or appropriate to seek consent from both parents or guardians to apply for a change to a Gender Identity Certificate, including where there may be one parent absent, where the child or young person is living independently or is considered a "mature minor" or where it is not in the interest of safety and welfare of the child or young person to request that consent.

In these circumstances, a statutory declaration could be provided alongside the application outlining the reasons why one or both parents are unable to provide consent for the application, waiving the requirement for consent at the application stage rather than undertaking court proceedings.

As described in the Discussion paper, a number of international jurisdictions allow for young people aged 16 and over to be able to apply for a change of sex or gender through adult processes (Ontario), or where people are considered an adult for purposes relating to the care of their body from the age of 16 (Argentina). My Advisory Committee were supportive of lowering the age at which a young person could apply for a change to the Gender Identity Certificate without their parents' consent.

Considerations for court processes

If court processes are required to resolve disputes at any stage, or if mediation does not resolve the disputes, then it is vital for these systems to be set up in a way which can best support the child or young person's participation in the process, including:

- Skilled and professional independent advocates who act on the child or young person's wishes and can support children and young people to have their voices heard and considered. These advocates should be meet personally with the child or young person, be able to develop rapport sufficient to understand their views and situation and be able to present this opinion to the court. They should also have expert knowledge in the area of gender diversity and intersex variations.

- Experienced legal representatives who are skilled in representing children and young people, and who hold expert knowledge about gender diversity and intersex variations.
- Court processes which can weigh up factors such as mental health and wellbeing against other considerations in the best interest of the child, and have an appreciation of the impact on a child or young person's mental health and wellbeing should approval not be granted through the court.
- Specialist units within the court to manage issues relating to gender diversity.
- The opportunity for children and young people to be able to comment upon the outcome of a process before it is made final, and be able to access recourse or seek a review if they feel a decision is made that is not in their best interest.
- Court processes that are mindful of confidentiality and consider the safety and wellbeing of the child or young person at all interactions.
- The provision of support services (e.g. counselling or family therapy) for family and children and young people undertaking dispute processes.

Certificate for documentation for proof of sex

I am not supportive of the proposed Proof of Sex Certificate, given the intent or purpose of this certificate is not clear, and concerns that it could actually be used to further discriminate against a person, for example, where it is requested in addition to, or where it is prioritised over a person's Gender Identity Certificate. An example of this provided by young people in my Committee was that a school may request a Proof of Sex Certificate in addition to, or instead of, a Gender Identity Certificate when considering student enrolments, which may expose a young person to stigmatisation and possible discrimination.

It is not clear in what situations the Proof of Sex Certificate would be required, other than situations which relate to specific medical interventions or treatments.

If such a certificate is required, there should be clear restrictions on when and how it is used, and who is able to request it, and anti-discrimination protections enshrined in legislation.

Other issues

Prescribed fees for applying or replacing certificates

The Discussion paper did not discuss any costs of applying for or changing Gender Identity Certificates or Proof of Sex Certificates. While I appreciate that there may be some administrative costs associated with the applications and changes, these should be kept to a minimum, and in the case of children and young people, consideration given to whether these fees can be waived. Young people in my Committee have discussed that the costs of applying or changing certificates can be expensive and a prohibitive factor for some children and young people in order to obtain the documentation that they require.

Implications for recording of gender and sex if proposed model goes ahead

There are currently gaps and inconsistencies in the way that gender and sex are recorded in a number of service settings, which impact on the way that young people have their information recorded and used. Whilst I appreciate that this is not necessarily within the scope of the Law Reform Commission review, the implications of changing the legislation will be widespread, and presents an opportunity to support some system-wide changes to the way that personal information is recorded and used.

A number of young people in my Committee have discussed the current situation in hospitals and health services which do not use a young person's affirmed gender markers or names on hospital documentation. For example, a young person described an experience accessing treatment through the Gender Diversity Service, and having a hospital bracelet which had the wrong gender recorded, stating the impact of "*looking down and seeing an F or an M on your wristband can be horrible*".

Given that current Gender Reassignment Certificates or proof of documentation can trigger changes in the way that services record information, a change in the legal processes to recognise gender and sex will no doubt impact on the way that systems currently record information, or how they may do this in the future. Young people suggested that service system databases needed to be adapted to change the way that this information was recorded to reflect the young person, and that if it couldn't be recorded, that gender and sex markers should be left off things like hospital wristbands entirely.

Other considerations discussed by Committee included:

- Understanding how the certificates will be recognised and validated across State and Territory boundaries or internationally
- Whether there is a streamlined process or application for people wishing to change their name at the same time as the Gender Identity Certificate.

I thank you for the opportunity to provide a submission to the Review, and the opportunity for members of my Advisory Committee to speak directly to the Law Reform Commission, and hope that this has supported a better understanding of some of the specific considerations and needs of children and young people. I very much welcome the opportunity that the Review presents in addressing some of the systemic barriers and challenge that trans and gender diverse people, and people with intersex variations, experience across the State.

If you would like to discuss this information any further, please contact me, or alternatively you may contact Katherine Browne, Principal Policy Officer, on 6213 2210 or katherine.browne@ccyp.wa.gov.au.

Yours sincerely



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