

Legal Recognition of Sex and Gender

FINAL REPORT No. 31

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Information about the Tasmania Law Reform Institute

The Tasmania Law Reform Institute ('TLRI') was established on 23 July 2001 by agreement between the Government of the State of Tasmania, the University of Tasmania and the Law Society of Tasmania. The creation of the TLRI was part of a Partnership Agreement between the University and the State government signed in 2000. The TLRI is based at the Sandy Bay campus of the University of Tasmania within the Faculty of Law. The TLRI undertakes law reform work and research on topics proposed by the government, the community, the University and the TLRI itself.

The work of the TLRI involves the review of laws with a view to:

- the modernisation of the law
- the elimination of defects in the law
- the simplification of the law
- the consolidation of any laws
- the repeal of laws that are obsolete or unnecessary
- uniformity between laws of other states and the Commonwealth.

The TLRI's Acting Director is Dr Brendan Gogarty. The members of the Board of the TLRI are Dr Brendan Gogarty (Chair), Professor Tim McCormack (Dean of the Faculty of Law at the University of Tasmania), the Honourable Justice Helen Wood (appointed by the Honourable Chief Justice of Tasmania), Ms Kristy Bourne (appointed by the Attorney-General), Associate Professor Jeremy Prichard (appointed by the Council of the University), Mr Craig Mackie (nominated by the Tasmanian Bar Association), Ms Ann Hughes (appointed at the invitation of the TLRI Board), Mr Rohan Foon (appointed by the Law Society of Tasmania), Ms Kim Baumeler (appointed at the invitation of the TLRI Board) and Ms Rosie Smith (appointed at the invitation of the TLRI Board as a member of the Tasmanian Aboriginal community).

The Board oversees the TLRI's research, considering each reference before it is accepted, and approving publications before their release.

This study has been approved by the Tasmanian Social Sciences Human Research Ethics Committee. If you have concerns or complaints about the conduct of this study, please contact the Executive Officer of the HREC (Tasmania) Network on +61 3 6226 6254 or email human.ethics@utas.edu.au. The Executive Officer is the person nominated to receive complaints from research participants. Please quote ethics reference number H0016752.

Acknowledgments

This Final Report was prepared for the Board by Dylan Richards and Jess Feehely and edited by Bruce Newey. The Issues Paper that preceded this Report was also prepared by Jess Feehely and Dylan Richards and edited by Bruce Newey. Assistance and oversight of the preparation of the Report was provided by the previous TLRI Director, Associate Professor Terese Henning and Acting Director Dr Brendan Gogarty. Valuable advice was also provided by the Board of the TLRI.

The TLRI wishes to thank all those who made submissions in response to the questions asked in the Issues Paper. All submissions greatly assisted the TLRI in determining the recommendations in this Report. All those submissions have been taken into account in formulating those recommendations. The project was funded by a grant from the Solicitors' Guarantee Fund.

Special thanks goes to Jon Kudelka (art); Oliver Cassidy (voice) and Nick Storr (sound) for their dedicated, voluntary work on the Explainer Video to the Final Report. The Explainer Video can be found at <<http://utas.edu.au/gender-reforms>>.

Explainer Video and Electronic Copy of Report

An Explainer Video for the Final Report can be found at: <http://utas.edu.au/gender-reforms>

An electronic copy of the Final Report is available at the TLRI website via the permalink <http://utas.edu.au/gender-reforms>

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List of Acronyms & Abbreviations

The following is a complete list of acronyms used in this Final Report:

ABS – Australian Bureau of Statistics

ACL – Australian Christian Lobby

ADA – Anti-Discrimination Act 1998 (Tas)

AGA – A Gender Agenda

AHRC – Australian Human Rights Commission

AIA – Acts Interpretation Act 1931 (Tas)

AISSGA – Androgen Insensitivity Syndrome Support Group Australia

AMA – Australian Medical Association

APS – Australian Psychological Society

BDM Act – Births, Deaths and Marriages Registration Act 1999 (Tas)

CFP – Chief Forensic Psychiatrist

CLC Tasmania – Community Legal Centres Tasmania

Criminal Code – *Criminal Code Act 1924* (Tas), Schedule 1

Darlington Statement – Intersex Human Rights Australia, Joint consensus statement by Australian and Aotearoa/New Zealand intersex organisations and independent advocates (2017), see footnote 22 on p 10 of this Report.

FLC – Feminist Legal Centre

Gender Declaration – a statutory declaration made under the Births, Deaths and Marriages Registration Act 1999, s 28A, described at [2.4.62] on p 59 of this Report.

Gillick Competence – the common law test for the capacity of children to give valid consent, described at [3.5.6] on p 115 of this Report.

Human Cloning Act – Human Cloning for Reproduction and Other Prohibited Practices Act 2003 (Tas)

JRL Act – Justice and Related Legislation (Marriage and Gender Amendments) Act 2019 (Tas)

Malta Declaration – Organisation Intersex International Europe, Public Statement of the Third International Intersex Forum (2013), see footnote 22 on p 10 of this Report.

LGBTIQ – Lesbian, Gay, Bisexual, Transgender, Intersex and Queer/Questioning. Please note that this is the acronym used by this Final Report, however other variants of this acronym are in general use. Where another document uses one of these variants, the Final Report reproduces that variant

The Registrar – The Tasmanian Registrar of Births, Deaths and Marriages

Reproductive Health Act – Reproductive Health (Access to Terminations) Act 2013 (Tas)

SALRI – South Australian Law Reform Institute

Surrogacy Act – Surrogacy Act 2012 (Tas)

TC4K – Tasmanian Coalition for Kids

TLRI – Tasmania Law Reform Institute

WALRC – Law Reform Commission of Western Australia

WHO – World Health Organisation

WPAT – World Professional Association for Transgender Health

Yogyakarta Principles – The Yogyakarta Principles: Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity (2007), described at [1.1.10] on p 2 of this Report.

Executive Summary

This Report discusses amendments to the *Births, Deaths and Marriages Registration Act 1999* (Tas) and other matters relating to the legal recognition of sex and gender in Tasmania. The distinction between sex and gender is explained on pages 8-10 of this Report.

The reference pre-dated the introduction and passage of the *Justice and Related Legislation (Marriage and Gender Amendments) Act 2019* (Tas) and sought advice more generally regarding the legal recognition of sex and gender. However, the TLRI has necessarily taken account of the recent passage of this legislation and framed its review on the basis of:

- whether the recent changes are functional and achieve their stated objectives; and
- what, if any, further reforms are needed to improve consistency with existing laws and human rights obligations.

The Final Report concludes that the changes made by the *Justice and Related Legislation (Marriage and Gender Amendments) Act 2019* (Tas) achieve the objective of reducing discrimination and trauma experienced by intersex and gender diverse Tasmanians by making it easier to obtain identification documents that accords with their gender identity. The terms ‘transgender’, ‘intersex’ and ‘gender diverse’ are explained on pages 10-12 of this Report. The Final Report further concludes that the new laws are generally consistent with best practice international human rights approaches and approaches being considered in other Australian jurisdictions.

The TLRI was also asked to consider questions surrounding medical treatment on children, particularly as it relates to intersex children.

An unresolved issue in Tasmanian law is the way intersex people are treated. This Report addresses surgical interventions on intersex children and the need to respect the right of children to have input into their own medical treatment. The issue of consent is especially important given the permanent impact, physical, mental and emotional, that can be caused by surgical interventions.

This Report makes a number of recommendations intended to eliminate the practice of non-consensual surgical interventions and to enshrine existing legal principles regarding the capacity of children to consent, or not consent, to medical treatment. Please see the list of recommendations on page xi. By implementing these reforms, the TLRI believes that greater clarity in the law will be achieved, and that the rights of a frequently marginalised group will be better protected. This Report makes use of specific terminology relating to sex and gender, including the terms ‘sex’ and ‘gender’, in ways that may not be immediately familiar to all readers. A list of terminology used in the Report and definitions of that terminology can be found on page 8.

Terms of Reference

In late 2018, the Attorney General, the Hon Elise Archer MHA, wrote to the Tasmania Law Reform Institute seeking its advice on several aspects of the law relevant to sex and gender. Accordingly, the Attorney General asked that the TLRI provide advice consistent with the following terms of reference:

1. Consider, with reference to laws in other Australian jurisdictions:
 - a. what steps should be required in Tasmania to register a change of a person's sex or a person's intersex status on official documents; and
 - b. what categories of sex and/or gender should be displayed on birth certificates and other documents.
2. Review the law and make recommendations for any reforms in relation to consent to medical treatment to alter a person's sex or gender.
3. Review definitions and the use of terms relating to sex and gender in Tasmanian legislation and make recommendations for reform.

List of Recommendations

<p>Recommendation 1 (Page 5)</p>	<p>The Tasmanian Government publish information resources and fund community awareness and education activities regarding amendments to the <i>Births, Deaths and Marriages Registration Act 1999</i> (Tas).</p>
<p>Recommendation 2 (Page 14)</p>	<p>The Long Title of the <i>Births, Deaths and Marriages Registration Act 1999</i> (Tas) be replaced by the following:</p> <p>An Act to provide for the registration of births, deaths and marriages and to provide legal recognition for trans and gender diverse Tasmanians and those with intersex variations of sex characteristics.</p>
<p>Recommendation 3 (Page 25)</p>	<p>An additional birth registration option, ‘Unspecified’, be made available to accommodate the needs of parents who, after 120 days, are not in a position to nominate the sex of their child as either male or female.</p>
<p>Recommendation 4 (Page 65)</p>	<p>The Registrar of Births, Deaths and Marriages develop and publish guidelines addressing:</p> <ul style="list-style-type: none"> • what the Registrar should, and should not, consider in assessing and exercising their discretion to refuse applications; • what additional information can and cannot be requested; • guidance as to relevant factors to be considered in satisfying themselves regarding a child’s ‘will and preference’, including the child’s capacity to understand; • the circumstances in which counselling should be requested, and the circumstances in which counselling is considered unnecessary; • a regularly updated list of gender descriptors, with a notation that the list is a guide rather than an exhaustive list; and • information and referral details that should be provided to applicants when the Registrar requests further information or evidence or rejects an application. <p>The TLRI recommends that these guidelines be developed in consultation with the trans, gender diverse and intersex communities, the Commissioner for Children and Young People and registries in comparable jurisdictions.</p>

	<p>The TLRI recommends that these guidelines be subject to regular review to ensure they are responsive to developments in the law, society and needs of the relevant communities.</p>
<p>Recommendation 5 (Page 75)</p>	<p>The Tasmanian Government conduct an audit of:</p> <ul style="list-style-type: none"> • all government and statutory board composition requirements; and • eligibility criteria for grant programs <p>to clarify whether selection is intended to be on the basis of sex or gender.</p>
<p>Recommendation 6 (Page 76)</p>	<p>The Tasmanian Government enact all recommended reforms identified in Column 3 of Appendix 3 to ensure that the terms ‘sex’ and ‘gender’ are used consistently and accurately and in accordance with the definitions introduced or amended by the <i>Justice and Related Legislation (Marriage and Gender Amendments) Act 2019</i> (Tas).</p>
<p>Recommendation 7 (Page 112)</p>	<p>The <i>Criminal Code</i> should be reformed to criminalise non-consensual medical interventions in the following terms:</p> <p>178F Unnecessary medical intervention to change the sex characteristics of children.</p> <p>(1) Any person who performs a surgical, hormonal, or other medical intervention to alter or modify the sex characteristics of a child is guilty of a crime, unless:</p> <p>(a) it is performed to address a clear danger to the life or health of the child and it cannot be deferred until the child is able to give informed consent; or</p> <p>(b) it takes place with the informed consent of the child.</p> <p>(2) Nothing in this Section is intended to apply to interventions involving a consenting transgender child seeking treatment to delay puberty or secondary sexual differentiation.</p> <p>Charge: Performing unnecessary medical intervention to change the sex characteristics of a non-consenting child.</p>

<p>Recommendation 8 (Page 114)</p>	<p>That intersex people should be able to pursue claims for compensation for personal trespass and breach of professional duty against doctors where medical interventions to alter intersex variations of sex characteristics have resulted in physical or mental harm, irrespective of any parental consent to the intervention at the time it was performed. Provision to this effect should be made in the <i>Civil Liability Act 2002</i> (Tas).</p> <p>The informed consent of the child on whom the intervention is performed should provide a defence in such cases. However, consent itself should not be a defence if the intervention was performed negligently and the child did not voluntarily assume the risk of such negligence.</p> <p>The primary remedy should be compensatory damages for harm caused by any medical intervention to alter sex characteristics that did not satisfy the relevant factors.</p>
<p>Recommendation 9 (Page 125)</p>	<p>The Tasmanian Government enact a <i>Consent to Medical Treatment Act</i> that covers the field with respect to children's consent to medical care. The TLRI recommends that this Act should enable a child of 16 years or older to obtain medical treatment and undergo surgical procedures when they consent to treatment and surgical procedures.</p> <p>For children under 16, the TLRI recommends that <i>Gillick</i> competence be enshrined in this Act. The South Australian <i>Consent to Medical Treatment and Palliative Care Act 1995</i> may provide useful guidance in this regard.</p> <p>The TLRI does not recommend that counselling be a mandatory precondition to children receiving medical treatment or undergoing surgical procedures.</p>
<p>Recommendation 10 (Page 127)</p>	<p>The Government give consideration to including in the <i>Consent to Medical Treatment Act</i> proposed in Recommendation 9 all the reforms recommended in Part 3 of this Report. The Act would be comprehensive in providing the entire legal framework for surgical intervention to alter the sex characteristics of children.</p>

Part 1

Introduction

1.1 Why has the TLRI looked into this issue?

1.1.1 In September 2019, amendments to the *Births, Deaths and Marriages Registration Act 1999* (Tas) (*'BDM Act'*) took effect. The amendments changed the way that sex and gender are recorded on official documents and the process for a person to change the way those details about them are recorded. The changes follow similar recent amendments in South Australia and the ACT, and consideration of comparable amendments in several other Australian jurisdictions. Legislation with similar objectives to the *BDM Act* took effect in Victoria on 1 May 2020.

1.1.2 Most Tasmanians never need to think about the way their sex or gender is described on their birth certificates. For people whose sex characteristics conform to a traditional understanding of 'male' or 'female', and accord with their understanding of their own gender, what official documents say about their sex or gender is rarely a cause for concern.

1.1.3 Similarly, most Tasmanian children and their parents will not face decisions about whether surgery should be performed on a child born with variations of common sex characteristics. This is not, however, the case for all Tasmanians.

1.1.4 Intersex, transgender and gender diverse people may have an understanding of their own gender that conflicts with the sex they were assigned at birth. Some do not identify with any particular gender at all. For these Tasmanians, producing identification documents in everyday situations, such as enrolling in school or university, opening a bank account or applying for a job, can be distressing if those documents record a sex which differs from their gender identity.

1.1.5 This was reflected in a number of submissions received by the TLRI in response to the earlier Issues Paper. For example, Equality Australia stated:

For most people, updating their birth certificate is really simple. But for trans or gender diverse people, updating your birth certificate so it correctly reflects who you are, can be almost impossible. A birth certificate is the first document a person has — it says who you are, and where you belong. Being forced to use ID that doesn't match your identity creates daily problems when applying for a job, going to Centrelink or enrolling to study.¹

1.1.6 There is increasing acceptance that sex and gender are different concepts, and that neither concept is confined to binary classifications.² However, there is often a lack of understanding of the breadth of variation of sex characteristics and gender identity. This can result in poorly

¹ Equality Australia, Submission to Tasmania Law Reform Institute ('TLRI'), *Legal Recognition of Sex and Gender* (Issues Paper 29, 2019) 2.

² Several submissions to the TLRI maintain that biological sex is binary, though acknowledge allowances for intersex variations (see, for example, submissions from the Feminist Legal Centre Inc ('FLC') and the Australian Christian Lobby ('ACL') to TLRI, *Legal Recognition of Sex and Gender* (Issues Paper 29, 2019)).

implemented policy and treatment of intersex variations as ‘disorders’ which require surgical intervention.

1.1.7 Several submissions to the TLRI described personal experience of such treatment in Tasmania, including the ongoing physical and mental health harms experienced by people with intersex variations of sex characteristics and their families as a result of pressure to undergo ‘normalisation’ procedures.³

1.1.8 The TLRI recognises the diverse experiences of trans and gender diverse people and people with intersex variations of sex characteristics and the many and different challenges they face. Discrimination can put gender diverse people and those with intersex variations of sex characteristics at risk of suffering physical and mental health conditions and prevent them from fully participating in and contributing to public life.

1.1.9 At the same time, trans and gender diverse people report that having access to a birth certificate that reflects the gender identity they live can be profoundly affirming. An updated birth certificate can provide them with legal documentation to use in their daily lives that reduces discrimination against them:

The reality of the *JRL Act [Justice and Related Legislation (Marriage and Gender Amendments) Act 2019 (Tas)]* is that all it does is provide an opportunity for trans people to have their legal identity reflect their lived identity. This helps ... We don’t want to end anyone’s gender. We want to be able to express our own. The impact on young people is particularly important.⁴

1.1.10 The *Yogyakarta Principles*, developed and endorsed by an international panel of experts, create a universal guide to the application of human rights principles and legal standards on sexuality and gender identity. Significantly, the *Yogyakarta Principles* recognise that a person’s gender identity is integral to their personality and that people of diverse sexuality and gender identities should be able to enjoy legal capacity in all aspects of life.⁵

1.1.11 A 2018 UN report by the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity, Victor Madrigal-Borloz, noted: ‘Trans persons are particularly vulnerable to human rights violations when their name and sex details in official documents do not match their gender identity or expression.’⁶

1.1.12 Poor policies and practices can have profound and lasting effects on intersex and gender diverse people. Despite some advances, legal recognition of sex and gender diversity continues to present challenges for these vulnerable communities.

³ The people who made these submissions asked to remain anonymous. Medical details cannot be released for privacy reasons.

⁴ Dede River, Submission to TLRI, *Legal Recognition of Sex and Gender* (Issues Paper 29, 2019) 2.

⁵ International Panel of Experts in International Human Rights Law and on Sexual Orientation and Gender Identity, *The Yogyakarta Principles: Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity* (March 2007) <<http://yogyakartaprinciples.org/>> (‘*Yogyakarta Principles*’). Australian representatives are signatories to the *Yogyakarta Principles*. See [2.2.95] for more discussion about this document.

⁶ Victor Madrigal-Borloz, *Report of the Independent Expert on Protection Against Violence and Discrimination Based on Sexual Orientation and Gender Identity*, UN Doc A/HRC/38/43 (11 May 2018) 10.

1.1.13 In this context, this Final Report looks at two key issues that, if resolved, could significantly improve the lives of intersex, trans and gender diverse Tasmanians:

- legal recognition of gender identity on official documentation; and
- consent to medical procedures to alter sex characteristics.

1.1.14 This Report examines the current legal framework for each of these issues and whether reforms are needed to bring Tasmanian laws into conformity with relevant human rights obligations.

1.1.15 Tasmania has a community of trans and gender diverse people. It has a community of people with intersex variations of sex characteristics. In preparing this Final Report, the TLRI is keenly aware that it is these communities that will be most affected by any legislative changes. Their rights to equality before the law and dignified treatment have been given the highest priority in the approach taken in this Report.

1.1.16 This Report also acknowledges that the changes are not universally supported. Concerns were raised in some submissions⁷ regarding the potential for changes in registration practices to undermine historical and demographic data collection and criminal investigations. Some submissions⁸ also outlined concerns that greater recognition and respect for gender diversity may have adverse impacts on women's rights, particularly with regard to access to women-only spaces and affirmative action policies designed to redress historic discrimination. These concerns are discussed in Part 2.

1.2 Background to the reference

1.2.1 In late 2018, the Attorney-General requested that the TLRI provide advice, with reference to laws of other Australian jurisdictions, consistent with the following terms of reference:

- Review the definitions and use of terms relating to sex and gender in Tasmanian legislation and make any recommendations for reform;
- What steps should be required in Tasmania to register a change of a person's sex or intersex status on official documents;
- What categories of sex/gender should be displayed on birth certificates and other documents; and
- Review the law and make recommendations for any reforms in relation to consent to medical treatment to alter a person's sex or gender.

1.2.2 The request was made in the context of proposed amendments to the *BDM Act* seeking to address those issues.

⁷ See submissions from the FLC, Women Speak Tasmania, ACL and one anonymous submission to TLRI, *Legal Recognition of Sex and Gender* (Issues Paper 29, 2019).

⁸ For example, Women Speak Tasmania, Submission to TLRI, *Legal Recognition of Sex and Gender* (Issues Paper 29, 2019).

1.2.3 On 10 April 2019, the Tasmanian Parliament passed the *Justice and Related Legislation (Marriage and Gender Amendments) Act 2019* (Tas) (the ‘*JRL Act*’), which made a number of amendments to the *BDM Act* and other legislation. Key amendments include:

- new definitions around concepts of sex and gender;
- confirming that a child’s sex will be recorded at birth as male or female;
- giving parents of children born with intersex variations of sex characteristics longer to register the birth (and, therefore, the sex) of their child;
- allowing parents to choose whether to include information about a child’s sex on the birth certificate;
- removing reassignment surgery as a prerequisite to registering a change of sex, and introducing a new procedure to register a change of gender;
- allowing any person over 16 to apply to change their registered gender or name, and allowing parents and guardians to apply to change their child’s registered gender or name if that accords with the ‘will and preference’ of the child;
- confirming that the law will apply to any person on the basis of their sex (where no change of gender has been registered) or their registered gender; and
- clarifying that inciting hatred of a person or group on the basis of their gender identity or intersex variations of sex characteristics is an offence under the *Anti-Discrimination Act 1998* (Tas) (‘*ADA*’).

1.2.4 These changes are explained in greater detail in Part 2 of this Report.

1.2.5 The amendments made by the *JRL Act* were intended to make it easier for Tasmanians to gain official documentation that reflects their gender identity. The stated aim of those changes was to reduce the discrimination and trauma experienced by intersex and gender diverse Tasmanians whose identification documents do not correctly record their gender identity.⁹

1.2.6 As outlined in [1.3.5] and Part 2, the passage of the legislation was subject to some criticism regarding a lack of community consultation and concerns regarding the broader social implications of the changes. This Final Report considers and seeks to address those concerns.

1.3 Scope of review

Legal recognition of sex and gender

1.3.1 This Report has been informed by the passage of the *JRL Act* and its implementation through the *BDM Act* and other legislation (see [2.3.1]–[2.3.43]).¹⁰

⁹ See, for example, Tasmania, *Parliamentary Debates*, Legislative Council, 21 March 2019 (Ruth Forrest); Tasmania, *Parliamentary Debates*, House of Assembly, 10 April 2019 (Ella Haddad); Tasmania, *Parliamentary Debates*, House of Assembly, 10 April 2019 (Cassy O’Connor).

¹⁰ Despite the implementation of the *JRL Act* through other legislation, this Final Report continues to refer to the *JRL Act* as a source for the changes. This is to maintain consistency with the Issues Paper and to collate all the changes effected by the *JRL Act*. In some instances, the Final Report uses ‘the revised *BDM Act*’ to refer to the *BDM Act* as in force since the changes made by the *JRL Act* took effect.

1.3.2 As outlined above, the amendments effected by the *JRL Act* clarify definitions of sex and gender, set out the categories of sex or gender to be displayed on official documentation and the steps required to register or alter sex or gender status on official documents. These matters go directly to the Terms of Reference underpinning this review.

1.3.3 A combination of a relatively short period of parliamentary consideration, the significant volume of amendments proposed, and a level of confusion about the nature of the reforms meant that the amendments, and their rationale and implications, were not always clearly communicated to the Tasmanian community. Part 2 of this Report builds on the Issues Paper prepared by the TLRI to provide a detailed explanation of the changes, their purpose, how they have come about and how they will be implemented. The TLRI recommends that the Tasmanian Government also develop a suite of information resources to assist the community to understand the new laws.

Recommendation 1

The TLRI recommends that the Tasmanian Government publish information resources and fund community awareness and education activities regarding amendments to the *Births, Deaths and Marriages Registration Act 1999* (Tas).

1.3.4 The TLRI recognises that legislation passed by the Tasmanian Parliament reflects the views of that Parliament (whether held unanimously or by majority). The TLRI can investigate options to modernise or simplify the law, to eliminate defects in the law or to bring laws into greater conformity with other states and the Commonwealth. In some instances, this means that the TLRI will make recommendations that relate to policy questions, particularly in relation to laws that no longer reflect contemporary approaches. However, where legislation has been passed recently, the TLRI generally does not seek to revisit the underlying policy position for that legislation.

1.3.5 Instead, Part 2 of the Final Report is confined to examining how the changes made by the *JRL Act* will operate and any consequential issues that may arise. During debate on the *JRL Act*, a number of concerns were raised regarding potential implications of the reforms for the operation of other existing laws. Those concerns included:

- possible difficulties for Tasmanians applying for passports;
- potential effects on the rigour of demographic datasets;
- potential implications for criminal or historic investigations;
- possible limitations on police search powers;
- application of laws relating to embryo development and termination of pregnancies; and
- implications for gender-specific institutions, sports, organisations or employment practices.

Part 2 will consider these concerns and any further reforms required to address them. Part 2 also considers other concerns raised in submissions received by the TLRI.

1.3.6 The TLRI acknowledges that some in the community do not support the underlying policy position given effect by the *JRL Act*. For example, in its submission on the Issues Paper, Women Speak Tasmania noted:

Some women's groups have significant issues with a legislative regime that allows male persons to self-identify as female and become legally female via a simple administrative

procedure. These issues have been the subject of much debate, many of the elements of which were raised during parliamentary deliberations on the [*JRL Act*].

It is sufficient in this regard to note that the opposition of the aforementioned women's groups will continue despite the passage of the [*JRL Act*].¹¹

1.3.7 This and other submissions are addressed in Part 2.

1.3.8 Part 2 also looks at the current situation in other jurisdictions and whether any further reforms are needed to improve consistency between jurisdictions and compliance with human rights obligations.

Consent to medical treatment

1.3.9 The key reform issue identified in the Terms of Reference that was not addressed by the *JRL Act* relates to consent to medical treatment to alter a person's sex or gender. The TLRI has taken a broad view of this inquiry and included alteration of sex characteristics, consistent with the broader terms used in the *JRL Act* and the intent of the reference.

1.3.10 Part 3 examines the operation of current laws relating to medical treatment, including interventions on children with intersex variations of sex characteristics, having regard to relevant human rights obligations.

1.3.11 Part 3 also discusses opportunities for reform to protect the dignity, bodily integrity and autonomy of transgender, gender diverse and people with variations of sex characteristics, and the broader potential consequences of such reforms.

1.4 Conduct of the reference

1.4.1 In June 2019, the TLRI released Issues Paper no. 29: *Legal Recognition of Sex and Gender* for public consultation. The TLRI invited responses to the Issues Paper in a number of ways:

- by completing the Submissions Template available on the TLRI's website;
- by answering one, a select number or all of the questions set out in the Issues Paper;
- by providing a more detailed response to the Issues Paper; or
- by meeting with members of the TLRI.

1.4.2 The TLRI received 34 written submissions to the Issues Paper from:

- Intersex Human Rights Australia
- Ron Bains (individual)
- Androgen Insensitivity Syndrome Support Group Australia Inc. ('AISSGA')
- Jemima Willis (individual)

¹¹ Women Speak Tasmania, Submission to TLRI, *Legal Recognition of Sex and Gender* (Issues Paper 29, 2019) 5.

- Human Rights Watch – Australia
- Director of Public Prosecutions (Tas) ('DPP')
- Dr Geoff Holloway (individual)
- Alastair Lawrie (individual)
- Joanna Pinkiewicz (individual)
- Australian Psychological Society Ltd ('APS')
- Transforming Tasmania
- A Gender Agenda ('AGA')
- Feminist Legal Centre Inc ('FLC')
- Women Speak Tasmania
- Anne Elston (individual)
- Dede River (individual)
- Tasmanian Coalition for Kids ('TC4K')
- Australian Christian Lobby ('ACL')
- Equality Australia
- Equality Tasmania
- Tasmanian Council of Social Services ('TasCOSS')
- Community Legal Centres Tasmania ('CLC Tasmania')
- Women's Health Tasmania
- Office of the Commissioner for Children and Young People
- Women's Legal Service Tasmania
- Six submissions from individuals who asked to remain anonymous
- Three submissions made confidentially

1.4.3 The TLRI also met or spoke with the following bodies regarding the Issues Paper:

- Department of Health, Sexual and Reproductive Health Collaborative Group
- Tasmanian Families for Transgender Kids

1.4.4 The changes to the *BDM Act* took effect on 5 September 2019. The TLRI spoke with the Registrar of Births, Deaths and Marriages (the 'Registrar') regarding the new provisions and how they have been operating since their commencement.

1.4.5 This Report has benefitted significantly from the submissions received and the consultations undertaken. The TLRI thanks all those people who took the time to respond to the public consultation and to meet with the TLRI to discuss the matters raised in the Issues Paper. All the submissions provided valuable advice and assistance to the TLRI in the determinations of the

recommendations made in the Report and they were all taken into account when determining those recommendations.

1.4.6 The TLRI notes that the Australian Human Rights Commission ('AHRC') is currently conducting an investigation into protecting the human rights of people born with variations in sex characteristics in relation to non-consensual medical interventions (see AHRC, *Protecting the human rights of people born with variations in sex characteristics in the context of medical interventions* ('AHRC Inquiry')). Many people who made submissions to the TLRI in response to the Issues Paper shared their submissions to the AHRC Inquiry in relation to this issue and urged the TLRI to consider the outcomes of that investigation.

1.4.7 Given the TLRI's reporting timeframe, this Final Report has not been able to address directly the AHRC's recommendations. However, the TLRI notes that many of the issues raised in submissions received by the TLRI will be given similar consideration by the AHRC Inquiry.

1.5 Terminology

Definitions of sex and gender

1.5.1 Colloquially, sex and gender are often conflated. The terms are often used interchangeably by people and in legislation. Even the Australian Bureau of Statistics ('ABS') acknowledges that data collection relating to sex often records information that, more accurately, relates to gender (see [2.4.17]).¹²

1.5.2 A number of submissions strongly opposed any conflation of 'sex' and 'gender' in legislation.¹³

1.5.3 The Australian Government Guidelines on the Recognition of Sex and Gender¹⁴ acknowledge a distinction between sex and gender. Australian legislation and case law¹⁵ generally reflect that while sex is informed by biology, gender is a social identity — a combination of an individual's deeply held feelings and the way in which they are perceived by society.

Sex

1.5.4 There is a common view that 'sex' is binary, that a person is either a man or a woman, usually defined by someone having either XX or XY chromosomes. A person with XX chromosomes is thus commonly considered to be 'biologically female' and someone with XY chromosomes is in turn considered to be 'biologically male'.

¹² ABS, *Sex and Gender Diversity in the 2016 Census* (Cat. No. 2071.0, 27 June 2017) <<https://www.abs.gov.au/ausstats/abs@.nsf/Lookup/by20Subject/2071.0~2016~Main20Features~Sex20and20Gender20Diversity20in20the20201620Census~100>>.

¹³ For example, see submissions from Geoff Holloway, FLC, ACL, Tasmanian Coalition for Kids ('TC4K'), and two anonymous submissions to TLRI, *Legal Recognition of Sex and Gender* (Issues Paper 29, 2019).

¹⁴ Attorney-General's Department (Cth), *Australian Government Guidelines on the Recognition of Sex and Gender* (2013) <<https://www.ag.gov.au/RightsAndProtections/HumanRights/Pages/Australian-Government-Guidelines-on-the-Recognition-of-Sex-and-Gender.aspx>>.

¹⁵ See Appendix 1 of this Final Report for summaries of relevant case law.

1.5.5 In some ways, this idea of the male-female binary is intuitive. A number of submissions maintained that this binary is scientifically correct, and variations were ‘very rare’.¹⁶

1.5.6 However, the World Health Organisation (‘WHO’) presents a more complicated picture of the genetic components of sex, noting the variety of configurations of sex chromosomes, or allosomes, that can occur. These include people born with only a single sex chromosome (45X or 45Y), rare cases of people born with three sex chromosomes (such as 47XXX, 47XXY or 47XYY), and people born with 46XX chromosomes who have the appearance, including the external genitalia, of the average person with 46XY chromosomes, and vice versa.

1.5.7 People with intersex variations are born with biological sex characteristics that do not necessarily fit with the typical categorisations of male or female. For some people, these characteristics are apparent at birth, while for others they emerge later in life, such as at puberty.

1.5.8 When accounting for the full range of factors that determine sex, including chromosomal patterns, genital anatomy, internal reproductive organs and hormone patterns, accurate differentiation is incredibly complex.

1.5.9 This complexity was recognised by the High Court in *Re Norrie*, which upheld a person’s right to register their sex as ‘not specified’.¹⁷

Gender

1.5.10 As with sex, there has been a traditional view that gender is a binary — male and female. However, there is increasing social and legal recognition of gender diversity as existing across a broad spectrum, rather than in distinct, discrete categories.

1.5.11 This view of gender is reflected in the *JRL Act*. It has also been recognised previously in Tasmanian law, both in specific legislation such as the *Anti-Discrimination Act 1998* (Tas) and in s 24A of the *Acts Interpretation Act 1931* (Tas), which provides that any legislative reference to a particular gender is taken to include ‘every other gender’. However, many Tasmanian laws continue to refer to gender in binary terms.

Approach adopted in this Report

1.5.12 The TLRI acknowledges that challenges affecting trans and gender diverse people and people with intersex variations of sex characteristics are highly personal. There is no universal experience upon which we can draw, and we understand that the knowledge of and language describing sex and gender evolves over time. For this reason, the submissions made by individuals or organisations representing the experiences of trans and gender diverse persons and persons with intersex variations of sex characteristics have been invaluable in informing this Final Report.

1.5.13 The TLRI also acknowledges that different people may ascribe different meanings to the terminology used in this Final Report. Further, the TLRI acknowledges that much of the terminology surrounding sex and gender is used colloquially.

¹⁶ For example, submissions from Women Speak Tasmania, TC4K, ACL and one anonymous submission to TLRI, *Legal Recognition of Sex and Gender* (Issues Paper 29, 2019).

¹⁷ *NSW Registrar of Births, Deaths and Marriages v Norrie* (2013) NSWCA 145, see summary in Appendix 1.

1.5.14 The TLRI has had regard to submissions concerned that the language used in legislation and policy must maintain a clear distinction between sex and gender, and that sex should remain a critical criterion for identification.¹⁸

1.5.15 The TLRI also notes a submission describing the creation of separate legal categories of ‘sex’ and ‘gender’ as ‘highly problematic’ and stating that it ‘opens the door’ to ‘division and discrimination’.¹⁹

1.5.16 To this end, the TLRI acknowledges the distinction between the terms ‘sex’ and ‘gender’ while noting that there is a need to consider the situations in which sex or gender data are relevant.

1.5.17 The TLRI seeks to be inclusive and intentional in the language used in this Final Report. Our use of the relevant terms is intended to be specific and consistent. The TLRI’s adopted terminology is informed by a variety of sources: the Australian Government Guidelines on the Recognition of Sex and Gender,²⁰ the AHRC report, *Resilient Individuals*,²¹ the *Yogyakarta Principles*, the *Darlington Statement*, and the *Malta Declaration*.²²

1.5.18 The TLRI also recognises that the matters explored in this Final Report may affect the intersex, trans and gender diverse communities in different ways, given that there is no universal experience for individuals in these communities. Many issues relating to sex characteristics and gender identity will not affect intersex people in the same way that they affect transgender people, and vice versa. The TLRI’s use of language is intended to reflect that.

1.5.19 Some key terminology is set out below:

Gender

Gender refers to the way in which a person identifies or expresses their masculine or feminine traits and the way they are recognised within a community. A person’s gender identity may not always be exclusively male or female and does not always correspond with the sex assigned at birth.

Gender expression

The way in which a person externally expresses their gender or how they are perceived by others.

¹⁸ For example, submissions from Women Speak Tasmania, the ACL, FLC and two anonymous submissions to TLRI, *Legal Recognition of Sex and Gender* (Issues Paper 29, 2019).

¹⁹ Dede River, Submission to TLRI, *Legal Recognition of Sex and Gender* (Issues Paper 29, 2019) 4.

²⁰ Attorney-General’s Department (Cth) (n 14).
<<https://www.ag.gov.au/RightsAndProtections/HumanRights/Pages/Australian-Government-Guidelines-on-the-Recognition-of-Sex-and-Gender.aspx>>.

²¹ Australian Human Rights Commission, *Resilient Individuals: Sexual Orientation, Gender Identity & Intersex Rights: National Consultation Report* (2015) <<https://www.humanrights.gov.au/our-work/lgbti/publications/resilient-individuals-sexual-orientation-gender-identity-intersex>>.

²² *Yogyakarta Principles* (n 5); Intersex Human Rights Australia, *Joint consensus statement by Australian and Aotearoa/New Zealand intersex organisations and independent advocates* (March 2017) <<https://ihra.org.au/darlington-statement/>> (‘*Darlington Statement*’); Organisation Intersex International Europe, *Public Statement of the Third International Intersex Forum* (December 2013) <<https://oiieurope.org/public-statement-by-the-third-international-intersex-forum/>> (‘*Malta Declaration*’).

This is consistent with the definition adopted by the *JRL Act*:

gender expression means any personal physical expression, appearance (whether by way of medical intervention or not), speech, mannerisms, behavioural patterns, names and personal references that manifest or express gender or gender identity.

Gender identity

A person's deeply felt sense of being a man, a woman, both, in between, or something other. It is recognised that the sex assigned at birth may not be the same as a person's gender identity or gender expression. Further, a person may not identify exclusively as a man or woman.

Intersex person²³

A person born with genetic, hormonal or physical sex characteristics that do not fit typical binary notions of male or female bodies. Intersex people have a diversity of bodies and identities. While some intersex characteristics are apparent at birth, not every person is the same. For some, their intersex variations of sex characteristics will only become apparent later in life, such as at puberty.

Misgendering

Misgendering is a term for describing or addressing someone using language that does not match a person's gender identity.

Sex or sex characteristics

Sex refers to each person's physical features relating to sex. It arises from a variety of factors, including gonads, internal reproductive anatomy, external genitalia, allosomes, hormones, endocrinology, secondary physical features emerging from puberty, and so on.

This definition is consistent with that adopted by the *JRL Act*:

sex characteristics means a person's physical, hormonal or genetic features relating to sex, including genitalia and other sexual and reproductive anatomy, chromosomes, genes, hormones, and secondary sex characteristics

Sex reassignment procedure

A surgical procedure involving the alteration of a person's sex characteristics, whether for the purpose of assisting a person to match their gender identity or to alter intersex variations of sex characteristics. These procedures are also known as sexual reassignment surgery (for example, under the former *BDM Act*), sex affirmation surgery, gender affirmation procedures, or genital confirmation surgery.

This Final Report uses the terms 'sexual reassignment surgery' and 'sexual reassignment procedures' when discussing provisions of the former *BDM Act* or the *Criminal Code Act 1924*

²³ The TLRI acknowledges the submission of the Intersex Human Rights Association recommending against the use of this term, preferring persons with intersex variations of sex characteristics. The TLRI has sought to use the preferred term in the Final Report but has retained the definition as the term 'intersex person' is used in numerous cases, documents and legislation in other jurisdictions.

(Tas). In situations where procedures are discussed without reference to particular legislative provisions, the Final Report will use ‘gender affirmation procedures’.

Trans and gender diverse

This is an umbrella term used to describe all people whose gender identity is different to the sex they were assigned at birth. Within this broad categorisation there are more specific terms that trans and gender diverse people may use to describe their own experience.

The TLRI is not aware of a definitive list of terms describing the spectrum of experiences that comprise ‘trans and gender diverse’²⁴ and understands that terms evolve as the complexity and diversity of experience is recognised.

Children and Young People

1.5.20 This Report uses the term ‘children’ to refer to anyone under the age of 18 years, including those children who are considered to have sufficient autonomy to consent to medical procedures. This approach reflects that of the *BDM Act* but may be inconsistent with other legislation in Tasmania and other jurisdictions. That is because the terms ‘child’, ‘young person’ and related terms are used differently across differing legislation relevant to Tasmania (specifically Tasmanian and Commonwealth Acts).

1.5.21 The Institute notes that, from a social perspective, adolescents are often thought of differently to younger children. This distinction is incorporated into some legislative and policy regimes by adopting different terminology reflective of differing levels of childhood development. The most common distinction is between ‘children’ and ‘young person’. However, the meaning of these terms also varies. For example, the *Children, Young Persons and Their Families Act 1997* (Tas) defines a young person as a child who is 16 or 17, while the *Commissioner for Children and Young People Act 2016* (Tas) definition includes any child whom the Commissioner considers to be a young person.

1.5.22 As noted above, the *BDM Act* refers only to children; without reference to ‘young people’. For consistency, this Report uses the term ‘child’ or ‘children’ to refer to any person under 18, regardless of their stage of physical, intellectual or emotional development. However, particularly in terms of consent issues discussed in Parts 2 and 3, the Institute recognises that many children prefer to be referred to as ‘young people’ and that their capacity and autonomy are not determined by their age alone.

²⁴ See A Waling et al, *Understanding LGBTI+ Lives in Crisis* (Australian Research Centre in Sex, Health, and Society and Lifeline Research Foundation, 2019) which includes a helpful glossary of terms <www.lifeline.org.au/static/uploads/files/understanding-lgbti-lives-in-crisis-01-02-2019-wfvrtijhbwmm.pdf>.

Part 2

Legal Recognition of Sex and Gender

2.1 Introduction

2.1.1 Part 2 examines the recent changes effected by the *JRL Act* and the direct and indirect consequences of the operation of these new laws.

2.1.2 Section 2.2 provides an explanation of the recent changes to the *BDM Act*, including a comparison with the legislative approach that was in place before the changes took effect. This section also outlines the justifications provided to Parliament for the changes.

2.1.3 Section 2.3 briefly outlines recent changes to other legislation, including the *Adoption Act 1988* (Tas) and the *ADA*.

2.1.4 Sections 2.4 and 2.5 examine issues raised in submissions received by the TLRI regarding the potential consequences of recent changes in respect of identification documents, data collection, criminal and historical investigations, and access to gender-specific spaces, services and programs. These sections discuss whether further reforms are required to ensure security, the rigour of statistical records and that gender equity initiatives are not undermined.

2.1.5 These sections conclude that, in large part, the recent changes are functional, implementation has been well-managed, and the changes can achieve their stated objectives.

2.1.6 Section 2.6 analyses the consequential implications of the changes effected by the *JRL Act* on existing laws and policies in Tasmania. It discusses concerns raised in submissions regarding these potential consequences and the experiences in other jurisdictions that have adopted contemporary sex and gender recognition laws. This section also considers further reforms to resolve any conflicts that could arise.

2.1.7 Finally, section 2.7 sets out the TLRI's views regarding the operation of the recent changes and any consequential amendments or policy reforms required to ensure the changes are effective. It is the TLRI's view that the *JRL Act* is functional, consistent with international best practice, and able to operate alongside existing Tasmanian laws with few amendments. Nevertheless, a suite of minor consequential reforms is recommended to improve the operation of the laws.

2.2 Tasmania's current legal framework: explaining the recent changes

2.2.1 The complicated history of the *JRL Act* resulted in a degree of uncertainty in the Tasmanian community regarding what changes had been introduced by the Act. To clarify these changes, this section both outlines provisions under the *BDM Act* prior to the changes and the amended *BDM Act* in relation to:

- definitions of sex and gender;
- registering sex, or a change of sex or gender; and
- sex and gender information on official documentation.

2.2.2 Table 1 summarises the changes made by the *JRL Act* in relation to these issues. These changes took effect on 5 September 2019 and have been incorporated into the amended *BDM Act*. For ease of reference, this Report still refers to the *JRL Act*.

2.2.3 At the outset, the TLRI notes that the Long Title of the amended *BDM Act* remains:

An Act to provide for uniform legislation in relation to the registration of births, deaths and marriages *and to provide for the rights of persons who have undergone sexual reassignment surgery* [emphasis added].

2.2.4 As the *BDM Act* no longer requires sexual reassignment surgery as a precondition to registering a change of gender (see [2.2.91]–[2.2.119]), the TLRI recommends that the Long Title be amended to reflect the objectives of the revised Act.

Recommendation 2

The TLRI recommends that the Long Title of the *Births, Deaths and Marriages Registration Act 1999* (Tas) be replaced by the following:

An Act to provide for the registration of births, deaths and marriages and to provide legal recognition for trans and gender diverse Tasmanians and those with intersex variations of sex characteristics.

Table 1: Amendments to *Births, Deaths and Marriages Registration Act 1999* (Tas)

	<i>BDM Act</i> prior to recent changes	<i>BDM Act</i> following recent changes
Time for notification of birth	21 days	21 days
Time for registration of birth	60 days	60 days 120 days if ‘variations of sex characteristics do not allow for an easy assignment of sex’.
Sex recorded in birth registration	Male or Female (in practice – the Act did not mandate this, but the birth registration form offered only M and F options).	Male or Female
Sex or gender recorded on birth certificate (no change)	Registered sex at birth included.	Registered sex only included if requested by applicant.
Change of sex or gender (adult)	Any person over 18 can apply to register a change of sex if: <ul style="list-style-type: none"> • unmarried; and • has undergone sexual reassignment surgery (evidence from two doctors). 	Any person over 16 can apply to register a change of gender. The application must include: <ul style="list-style-type: none"> • a gender declaration confirming the applicant ‘identifies as being of the gender specified in the declaration

	<i>BDM Act prior to recent changes</i>	<i>BDM Act following recent changes</i>
	Must register as Male or Female	<p>and lives, or seeks to live, as a person of that gender'; and</p> <ul style="list-style-type: none"> any other document or information that the Registrar reasonably requires. <p>It is not necessary for an applicant to have undergone reassignment surgery. Gender may be recorded as Male, Female, Indeterminate, Non-binary, or as neither entirely male nor entirely female.</p> <p>No more than one change of gender can occur within a 12-month period.</p>
Change of sex or gender (child)	<p>Parents can apply to change their child's sex if the child has undergone sexual reassignment surgery (evidence from two doctors).</p> <p>Unless there is only one parent named in the child's birth registration, or only one surviving parent, both parents must consent to the application.</p>	<p>Parents or guardians of a child under 16 can apply to register a change in their child's gender. The application is to include:</p> <ul style="list-style-type: none"> a gender declaration or statutory declaration that the application reflects the 'will and preference' of the child; any other document or information that the Registrar reasonably requires. <p>It is not necessary for an applicant to have undergone reassignment surgery. Any application relating to a person under 18 should be accompanied by evidence that the child has received appropriate counselling. Consent of both parents is required unless there is only one parent named in the child's birth registration, a sole surviving parent or sole guardian, or where a magistrate has approved the making of the application.</p>
Change of name	<p>Any person over 18 can apply to change their name.</p> <p>Parents may apply to change a child's name. Consent of the child is required for children over 12.</p> <p>A magistrate may approve the name change if satisfied that the change is in the 'best interests of the child'.</p>	<p>Any person over 16 can apply to change their name.</p> <p>Parents may apply to change the name of a child under 16. Consent of the child is required for children over 12.</p> <p>A magistrate may approve the name change if satisfied that the change 'is consistent with the child's will and preferences'.</p>
Sex or gender recorded on birth certificate (post change)	Any birth certificate issued following change of sex must record the changed sex but also include a notation that the person was previously 'registered as of the other sex'.	<p>Registered sex or gender only included if requested by applicant.</p> <p>History of changes to sex or gender only included if requested by applicant.</p> <p>A child may request a copy of their parent's birth certificate. Unless the</p>

	<i>BDM Act</i> prior to recent changes	<i>BDM Act</i> following recent changes
	Applicant can request an extract that does not include that notation. A child may request a copy of their parent's birth certificate. Unless otherwise requested by the child, the birth certificate will include details of any changes of sex or name.	parent has consented, details of changes of sex will only be included if the Registrar is satisfied that the child has a valid reason for requesting the information and disclosing those details will not have negative consequences for their parents.
Fraudulent behaviour	It is an offence for any person to show a copy of their former birth certificate (or an extract) with the intention of misleading someone about their registered sex. Punishable by up to 2 years in prison.	It is an offence for a person to use a birth certificate (or extract) showing a previous sex, gender or name, with the intention to deceive. Punishable by up to 2 years in prison.

2.2.5 The *BDM Act*, as originally enacted, was based on national model legislation endorsed by the Standing Committee of Attorneys-General and was designed to create legislative consistency across Australia. A number of states and territories, including Tasmania, have reviewed their laws in light of changing contemporary community values and expectations.

2.2.6 Appendix 2 provides an overview of the outcomes of reviews in other Australian jurisdictions. Relevant outcomes are also discussed throughout the various sections of Part 2.

Definitions of sex and gender

2.2.7 The TLRI was asked to consider ‘what, if any, reforms should be made in relation to the definitions or use of terms relating to sex and/or gender in Tasmanian legislation.’

2.2.8 This section considers new and amended terms in the *BDM Act* and other legislation, and any issues that arise from the use of those terms.

2.2.9 Prior to the passage of the *JRL Act*, the *BDM Act* did not include a definition of ‘sex’ or ‘gender’. Part 4A of the *BDM Act* purported to regulate changes of sex, rather than changes of gender. In particular, the definition of ‘sexual reassignment surgery’ referred to alteration of reproductive organs to allow a person to be considered a ‘member of the opposite sex’ or to remove or ‘correct’ ambiguities relating to the sex of the person.

2.2.10 In contrast, the *JRL Act* introduced new definitions to clarify the distinction between sex and gender. Changes to the *BDM Act* introduced by the *JRL Act* explicitly require a child's sex to be registered at birth as either male or female (see [2.2.38]–[2.2.52] below). Additional time is allowed for registration of a child where ‘variations of sex characteristics do not allow for an easy assignment of sex’.

2.2.11 ‘Sex’ is not defined in the *BDM Act*, but amendments enacted by the *JRL Act* define ‘**sex characteristics**’ as ‘a person's physical, hormonal or genetic features relating to sex, including genitalia and other sexual and reproductive anatomy, chromosomes, genes, hormones, and secondary sexual characteristics.’

2.2.12 A person's '**registered sex**' means the sex that is registered at birth, or the sex registered under the *BDM Act* before the *JRL Act* took effect.²⁵ If a change of gender is later registered, any previously registered sex ceases to apply to that person (s 28C(7) – see Figure 1 for examples of how these distinctions will operate in practice).

2.2.13 The definition of '**gender identity**' (see [2.2.14]) explicitly states that gender identity is expressed 'with or without regard to an individual's designated sex at birth'. There is no definition of 'designated sex at birth'. The term could be replaced with 'registered sex', however this would also include any person who had registered a change of sex prior to the commencement of the *JRL Act*.

2.2.14 The *BDM Act* as amended by the *JRL Act* provides that '**gender**' includes:

- male; or
- female;
- indeterminate gender; or
- non-binary; or
- a word, or a phrase, that is used to indicate a person's perception of the person's self as being neither entirely male nor entirely female and that is prescribed; or
- a word, or a phrase, that is used to indicate a person's perception of the person's self as being neither entirely male nor entirely female.

2.2.15 '**[R]egistered gender**' means the gender registered for a person. The process for a person to register their gender, or change their registered gender, is discussed below (see [2.2.81]–[2.2.90]).

2.2.16 If a person applies to register a gender using a word or phrase that is not prescribed in Regulations, the Registrar may refuse the application if the Registrar considers the word or phrase does not properly indicate a person's perception of themselves as neither male nor female (s 3A(3)).

2.2.17 The *JRL Act* inserted several new definitions into the *BDM Act*:

'[G]ender expression' means any personal physical expression, appearance (whether by way of medical intervention or not), speech, mannerisms, behavioural patterns, names and personal references that manifest or express gender or gender identity.

'[G]ender identity' means the gender-related identity, appearance or mannerisms or other gender-related characteristics of an individual including gender expression (whether by way of medical intervention or not), with or without regard to the individual's designated sex at birth, and may include being transgender or transsexual.

2.2.18 Variations of sex characteristics have been recognised in the *ADA*. '**Intersex**' was previously defined as:

²⁵ This refers to a change of sex registered prior to amendments to the *BDM Act* (following sexual reassignment surgery). From 5 September 2019, any change of gender will be recorded by a change in registered gender, rather than a change of sex.

the status of having physical, hormonal or genetic features that are –

- (a) neither wholly female nor wholly male; or
- (b) a combination of female and male; or
- (c) neither female nor male.

2.2.19 The *JRL Act* removed this definition, and inserted the following definition:

‘[S]ex characteristics’ means a person’s physical, hormonal or genetic features relating to sex, including genitalia and other sexual and reproductive anatomy, chromosomes, genes, hormones, and secondary sex characteristics.

2.2.20 Offences relating to discrimination and inciting hatred will apply to actions directed at people on the basis of their gender identity or having intersex variations of sex characteristics. The impact of these amendments is discussed in more detail at [2.3.7]–[2.3.14] below.

Views expressed in submissions

2.2.21 A variety of views were expressed in submissions regarding the revised definitions within the *BDM Act* and the *ADA*.

2.2.22 The submission from the Australian Christian Lobby (‘ACL’) emphasised the importance of recording sex for identification purposes and urged that a ‘change of sex’ be recorded as a ‘change of sex characteristics’, stating ‘[it] is not possible to change the biological sex of a person’.²⁶ The TLRI notes that the amended *BDM Act* no longer refers to a change of sex, but a change of gender.

2.2.23 The submission from Women Speak Tasmania recommended a definition of ‘sex’ be introduced into the *BDM Act*:

In the absence of a clear definition of ‘sex’ in the BDMRA, the differentiation between sex and gender at law will continue to be problematic.²⁷

2.2.24 In contrast, the submission from Dede River noted that maintaining the distinction in law between sex and gender is ‘highly problematic’ as it allows people to ‘discriminate against trans and gender diverse people by using “sex” or “biological sex” or “phenotypic sex” as a protected class in order to exclude trans people.’²⁸

2.2.25 Dede River also objected to the term ‘gender identity’:

Use of ‘identity’ can imply a level of choice, such as adoption of an identity as a ‘punk rocker’. Identity in the sense of gender identity is not a matter of choice, but is identity in the sense of ‘indissolubly one with’ or ‘intrinsic’. This has led trans people to move away from ‘gender identity’ and assert they are their gender, they do not ‘identify as’ that gender.

²⁶ ACL, Submission to TLRI, *Legal Recognition of Sex and Gender* (Issues Paper 29, 2019) 7.

²⁷ Women Speak Tasmania, Submission to TLRI, *Legal Recognition of Sex and Gender* (Issues Paper 29, 2019) 2.

²⁸ Dede River, Submission to TLRI, *Legal Recognition of Sex and Gender* (Issues Paper 29, 2019) 4.

Likewise, most trans people would see gender as ‘who they are’ rather than as a ‘deeply held feeling’.²⁹

2.2.26 The submission from Women Speak Tasmania also claimed it is ‘unhelpful to remove a well-understood definition of “intersex” from the [*Anti-Discrimination Act*] and then re-introduce the term as part of a supposedly alternative definition.’³⁰

The TLRI’s view

‘Sex’ and ‘gender’

2.2.27 The TLRI notes the conflicting views in submissions regarding the value of maintaining a distinction between ‘sex’ and ‘gender’. The TLRI acknowledges this issue, but follows international practice in recognising a distinction between ‘sex’ and ‘gender’ while working to eliminate discriminatory application of laws by careful and deliberate use of the appropriate terms.

2.2.28 On balance, the TLRI recommends that the distinction be maintained, consistent with the Australian Government Guidelines on the Recognition of Sex and Gender.

2.2.29 Advice from the Office of Parliamentary Counsel during the debate on the *JRL Bill* was that ‘sex’ was a term with a clear meaning and it is unnecessary and inappropriate to define it beyond its usual meaning.³¹

2.2.30 Notably, ‘sex’ is also undefined in the *Sex Discrimination Act 1984* (Cth) and definitions of ‘woman’ and ‘man’ were removed from that Act by the *Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Act 2013* (Cth). It is not clear whether protections against discrimination on the basis of ‘sex’ under that Act extend to sex recorded on official documents, regardless of apparent sex at birth. This is discussed below at [2.3.17] and [2.3.31].

2.2.31 It is the view of the TLRI that it is not necessary to include a definition of ‘sex’ in the *BDM Act* as the use of that term in the Act is consistent with its usual meaning.

‘Intersex’

2.2.32 The TLRI considers that the removal of the explicit definition of ‘intersex’ is consistent with international statements, such as the *Malta Declaration*,³² which seek a more holistic approach that recognises intersex variations to sex characteristics along a non-binary spectrum. This approach reflects both the preference of those with intersex variations and evidence regarding the diversity of recorded variations in sex characteristics.

²⁹ Ibid 2.

³⁰ See n 27

³¹ Tasmania, *Parliamentary Debates*, Legislative Council, 3 April 2019 (Ruth Forrest): ‘This is something I discussed at length with OPC. It was very clear. Robyn Webb said that you do not define ‘sex’, it is clearly defined. You do not do that. It is unnecessary, it is inappropriate to do so... The form clearly identifies the sex. That is what is being registered; that is what is being lodged by the parents or the person notifying the birth – same thing on the forms. My advice from OPC was that it is not necessary and we do not need to do it.’

³² *Malta Declaration* (n 22).

‘Gender’ and ‘Gender identity’

2.2.33 The TLRI considers the broad classification of ‘gender’ included in the *BDM Act* is consistent with contemporary understandings of gender diversity.

2.2.34 The TLRI acknowledges the concern raised regarding ‘gender identity’.³³ ‘Gender identity’ is an inclusive term used in the *Yogyakarta Principles* and the United Nations and by the AHRC.³⁴ Therefore, the TLRI supports its use as consistent with national and international approaches where it is used in an intrinsic sense.

2.2.35 However, the TLRI notes that the concern raised in Dede River’s submission demonstrates the importance of consulting trans and gender diverse communities in legislative and policy development and of considering how their points of view might be addressed.

Conclusion

2.2.36 The TLRI considers that recent reforms to the definitions and use of sex, gender and related terms in Tasmanian laws are consistent with the approach adopted internationally and in other jurisdictions. It is the view of the TLRI that no further reform is needed regarding these definitions.

2.2.37 As part of the audit of legislation recommended at Recommendation 6, the TLRI recommends that the Tasmanian Government review any use of the terms ‘sex’ and ‘gender’ in Tasmanian legislation to ensure that the terms are used consistently and accurately and in accordance with the definitions introduced or amended by the *JRL Act*.

Registering sex and gender

2.2.38 As discussed in Part 1,³⁵ a contradiction between a person’s gender identity and the sex or gender that is recorded on their official identification documents can be distressing for the person affected.

2.2.39 In that context, the TLRI was asked to consider what categories of sex or gender should be displayed on birth certificates and other documents, and what steps should be required to alter this information.

2.2.40 The *JRL Act* has made changes to the *BDM Act* in relation to the requirements relating to registration of sex at birth and the process for any subsequent changes of registered gender. This section outlines the new registration procedures, the categories of gender that can be recorded and the process and eligibility to register a change of gender.

2.2.41 This section also considers some of the issues that the new laws give rise to and whether further reforms should be enacted to address those issues.

2.2.42 Significantly, the amended *BDM Act* confirms the distinction between a birth registration and a birth certificate. While the *BDM Act* has always provided for both a birth registration notice

³³ Dede River, Submission to TLRI, *Legal Recognition of Sex and Gender* (Issues Paper 29, 2019) 4.

³⁴ *Yogyakarta Principles* (n 5) and the *Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Act* 2013 (Cth).

³⁵ See [1.1.2]–[1.1.5].

and a birth certificate, prior to the recent changes similar information was recorded in both documents.

2.2.43 Under the amended *BDM Act*, when registering births, parents must identify the sex of their child and are limited to ‘male’ and ‘female’ when doing so (see [2.2.46]–[2.2.56]). The birth registration statement is maintained by the Registrar of Births, Deaths and Marriages (the ‘Registrar’), but is not publicly searchable and the notice has no formal identification role.

2.2.44 In contrast, a person’s birth certificate is a cardinal identification document (see [2.2.146]–[2.2.151]). Under the amended *BDM Act*, a person can elect for their birth certificate to record one of a range of sex or gender descriptors or no descriptor at all.

2.2.45 A person may seek to change the gender recorded on their birth certificate (see [2.2.81]–[2.2.90]). This will not alter the birth registration statement.

Notification and registration of birth

2.2.46 Under s 11 of the *BDM Act*, a responsible person³⁶ must provide notice of any live birth in Tasmania to the Registrar within 21 days of the birth. This requirement was not changed by the *JRL Act*.

2.2.47 Section 15 of the *BDM Act* requires a child’s parents³⁷ to lodge a birth registration statement³⁸ with the Registrar within 60 days of the birth, or 120 days where a child’s variations of sex characteristics make it difficult to assign a sex.

2.2.48 Previously, the *BDM Act* did not explicitly restrict the categories of sex that could be registered at birth, requiring only that the Registrar ‘[make] an entry about the birth in the Register’ (s 16(1) *BDM Act*).

2.2.49 In practice, however, births were recorded as male or female only as the approved birth registration statement only included ‘Male’ and ‘Female’ options for parents to select.

2.2.50 The amended *BDM Act* now explicitly restricts the registration options to ‘Male’ and ‘Female’.

³⁶ *BDM Act* s 11(6): ‘Responsible person’ means –

- (a) in the case of a child born in a hospital or brought to a hospital within 24 hours after birth, the chief executive officer of the hospital; or
- (b) in any other case–
 - (i) the medical practitioner or midwife responsible for the professional care of the mother at the birth; or
 - (ii) if no medical practitioner or midwife was in attendance at the birth, any other person in attendance at the birth.

Note comments at [2.6.80] regarding amending references to the ‘mother at the birth’

³⁷ Section 14 of the *BDM Act* provides that the parents are jointly responsible for having the child’s birth registered and must both sign the birth registration statement. However, the Registrar may accept a birth registration statement from one of the parents, or from a person other than a parent, if satisfied that it is not practicable to obtain the signatures of both parents on the birth registration statement.

³⁸ Information about the registration process is available at <https://www.justice.tas.gov.au/bdm/howtoregister>. The birth registration notice is done online in all but exceptional circumstances.

2.2.51 During parliamentary debate, this was described as simply formalising the existing practice. The member for Murchison said of the registration process, based on her experience as a midwife:

The notice of birth form has not changed for a number of years. It is exactly the same form I used to fill out as midwife. This form will stay exactly the same: the top of the form has the sex of the child, female or male, and that is simply with us having a look between the legs and saying that looks like boy, looks like a girl, and ticking the appropriate box.³⁹

2.2.52 The *JRL Act* does not make provision for registration of intersex variations at birth. As discussed in Part 1, some children born with intersex variations of sex characteristics may not be readily able to be characterised within binary sex options. While the *JRL Act* allows additional time for registering intersex children, ultimately parents of intersex children must determine whether to register their children as male or female (s 16(3)).

2.2.53 No change of the sex data recorded in the registration notice can be made other than to ‘correct an error’ made at the time of registering the birth (s 16(4)).

2.2.54 In contrast to the binary options offered in Tasmania, some jurisdictions allow parents to select from a broader range of categories when registering the birth of a child or nominating the sex to be displayed on a birth certificate. Ireland, New Zealand and Norway currently provide for births to be registered as male, female or undetermined/uncertain.

2.2.55 For example, in the ACT the approved Birth Registration Statement under the *Births, Deaths and Marriages Registration Act 1997* (ACT)⁴⁰ allows parents to select from:

- Male
- Female
- Unspecified
- Indeterminate
- Intersex

2.2.56 The South Australian Law Reform Institute (‘SALRI’) has recommended that an ‘Unspecified’ classification be added to the Birth Registration Form in South Australia,⁴¹ however, that recommendation is yet to be implemented. Several other Australian jurisdictions have adopted, or recommended, a practice of allowing sex to be recorded at birth in a non-binary category, such as Intersex, Indeterminate,⁴² or Unspecified.⁴³

³⁹ Tasmania, *Parliamentary Debates*, Legislative Council, 3 April 2019 (Ruth Forrest).

⁴⁰ Regulation 5(1)(b) of the *Births, Deaths and Marriages Registration Regulations 1998* (ACT) requires registration of a child’s sex ‘if determinable’.

⁴¹ SALRI, *Legal Recognition of Sex and Gender* (Report, February 2016) 9 (‘SALRI Report’).

⁴² The *NSW Birth Registration Statement* (Registry of Births Deaths and Marriages, NSW) allows sex to be registered as male, female, intersex or indeterminate. The Law Reform Commission of Western Australia (‘WALRC’) has recommended inclusion of ‘Indeterminate’ as a category on the Birth Registration Statement.

⁴³ South Australia and the Northern Territory allow sex to be recorded as ‘Unspecified’.

Views expressed in submissions

2.2.57 Dede River was critical of changes to the *BDM Act* to explicitly require birth registration statements to record a child's sex as 'Male' or 'Female', noting that change was not part of the original amendments to the *JRL Bill* introduced in the House of Assembly.⁴⁴

2.2.58 A number of submissions⁴⁵ supported the extension of time for registration of the birth of a child with intersex variations of sex characteristics. For example, TasCOSS said:

Parents of intersex infants will have much longer to decide how they register their child's sex so they can access expert advice and support. Before the law change many parents were pressured or felt forced to 'choose' a sex for their newborn, often resulting in invasive and permanently damaging surgery to assign the child a sex.⁴⁶

2.2.59 However, an anonymous submission from a medical association noted that the extension of time alone did not address a key issue:

[T]here are instances in which one of two binary sexes cannot easily be allocated, due to complex genetic and/or physical clinical presentations of sexual ambiguity. No amount of analysis of genital structures, genomic analysis of allosomes, tests such as hormonal assays, or combinations of these (and other) investigations will result in certainty in all cases by a given point in time. ...

[L]engthening the period of registration for parents to choose the sex of their child to 120 days may be helpful in some cases. We note that it may also be unhelpful in others: parents must still make a binary decision where a binary choice does not, in reality, exist. It may also unintentionally impose a gender identity or expression that can be very challenging for the child if they grow up expressing a gender that does not fit with the sex imposed upon them.

2.2.60 The TLRI received several strong personal submissions detailing the pressure that parents experience when making decisions regarding the assignment of a sex to a child with intersex variations of sex characteristics, and the implications for children and families where the child does not identify with the sex that is registered for them at birth.⁴⁷

2.2.61 A number of submissions to the TLRI supported the introduction of a further 'intersex' or 'indeterminate' category on the birth registration statement.⁴⁸

2.2.62 The availability of additional categories can relieve pressure on parents of intersex children to determine their child's sex within the registration timeframe. It also reflects the reality that a wide variety of sex characteristics exist that can defy binary categorisation.

⁴⁴ Dede River, Submission to TLRI, *Legal Recognition of Sex and Gender* (Issues Paper 29, 2019) 4. The original amendments referred to were proposed by Transforming Tasmania.

⁴⁵ For example, the Australian Psychological Society ('APS'), TasCOSS, and two anonymous submissions to TLRI, *Legal Recognition of Sex and Gender* (Issues Paper 29, 2019).

⁴⁶ TasCOSS, Submission to TLRI, *Legal Recognition of Sex and Gender* (Issues Paper 29, 2019) 5.

⁴⁷ Anonymous submissions to TLRI, *Legal Recognition of Sex and Gender* (Issues Paper 29, 2019).

⁴⁸ For example, submissions from the ACL, Women Speak Tasmania, and an anonymous submission to TLRI, *Legal Recognition of Sex and Gender* (Issues Paper 29, 2019).

2.2.63 However, some commentators and submissions to the TLRI argued that the emphasis on a third category of sex further alienates intersex people as ‘other’.⁴⁹

2.2.64 In *R v Harris and McGuinness*, Justice Mathews also questioned the value of a third category:

I can see no place in the law for a third sex. Such a concept is a novel one, which could cause insuperable difficulties in the application of existing legal principles. It would also relegate transsexuals to a legal ‘no man’s land’. This I think, could only operate to their considerable detriment.⁵⁰

2.2.65 Submissions to the TLRI from Intersex Human Rights Australia and Human Rights Watch support the view that a third category would be alienating and unhelpful. Their solution, however, is to remove any requirement to register birth sex.⁵¹

The TLRI’s view

2.2.66 The TLRI supports the extended period for registering the birth of children with intersex variations of sex characteristics but, nevertheless, notes the difficulty many parents will experience in registering the birth sex as either male or female despite the additional time.

2.2.67 The *BDM Act* does not include options other than male or female to register a birth, but does remove any requirement for that information to be included in a person’s birth certificate ([2.2.43]–[2.2.53]). This will also relieve some pressure on parents and children with intersex variations of sex characteristics to identify the sex of their children as either male or female.

2.2.68 The TLRI acknowledges that, by introducing a requirement to record the sex of children born in Tasmania as either male or female, the amendments to s 16(3) and (4) of the *BDM Act* formalise the practice previously implemented through the birth registration statement forms.

2.2.69 It also accords with the United Nation’s Statistical Division’s *Principles and Recommendations for a Vital Statistics System* (Revision 3, 2014), which provides that ‘sex’ is a vital statistic and is,

needed to describe a newborn child, a decedent or a foetal death. Data should be categorized into ‘male’ and ‘female’.

2.2.70 The TLRI recognises that data relating to sex could be maintained separately from the Register under s 50 of the *BDM Act*, rather than as registrable information. Registering birth sex is consistent with majority national and international practice, although this practice is increasingly

⁴⁹ For example, the *Darlington Statement* discusses the impact of ‘undue emphasis’ on classification of intersex people (whether as ‘X’ or a third/unspecified gender), noting: ‘The larger goal is not to seek new classifications but to end legal classification systems and the hierarchies that lie behind them’: *Darlington Statement* (n 22) 3. This view was also expressed in submissions from Intersex Human Rights Australia and Human Rights Watch – Australia.

⁵⁰ *R v Harris and McGuinness* (1988) 17 NSWLR 158, 194.

⁵¹ Intersex Human Rights Australia, Submission to TLRI, *Legal Recognition of Sex and Gender* (Issues Paper 29, 2019) (appending Intersex Human Rights Australia submission to the AHRC Inquiry); Human Rights Watch, Submission to TLRI, *Legal Recognition of Sex and Gender* (Issues Paper 29, 2019).

contested. Given that sex information is no longer required to be recorded on a birth certificate, the TLRI does not oppose sex information being collected in a birth registration statement.

2.2.71 Nevertheless, the TLRI is not convinced that the registration of sex should be limited to male or female. In fact, this is problematic in that it requires the recording of inaccurate information where a baby's sex cannot be assigned or is most accurately described as intersex or as having intersex variations of sex characteristics.

2.2.72 Accordingly, the TLRI considers that there is merit in providing additional registration options for parents of the kind permitted under the ACT registration regime (see [2.2.55]) to allow parents who, after 120 days, are not in a position to nominate the sex of their child as either male or female to select 'Unspecified'. Parents would retain the option not to record any gender information on the birth certificate, or to select a gender descriptor that they felt better represented their child.

2.2.73 In situations where the 'Unspecified' option is chosen, the Registrar could request information from the parents regarding the basis for the registration that could be maintained separately under s 50 of the *BDM Act* for the benefit of statistical records.⁵²

Recommendation 3

The TLRI recommends that an additional birth registration option, 'Unspecified', be available to allow parents who, after 120 days, are not in a position to nominate the sex of their child as either male or female.

Change of gender

2.2.74 Prior to the *JRL Act*, Part 4A of the *BDM Act* dealt with applications to register a change of sex.

2.2.75 An application from an adult could only be accepted where the person was unmarried⁵³ and had undergone sexual reassignment surgery (as verified by two medical practitioners: former *BDM Act* s 28B).⁵⁴

2.2.76 The requirement to be unmarried reflected that marriage between persons of the same sex was not lawful until 2017. The *JRL Act* removed this requirement, consistent with changes introduced federally by the *Marriage Amendment (Definitions and Religious Freedom) Act 2017* (Cth) following the outcome of the marriage equality plebiscite.

⁵² See discussion at [2.4.17]–[2.4.41] below.

⁵³ This requirement reflected that marriage between persons of the same sex was not lawful until 2017. Section 28C(3) also prohibits the Registrar from recording a change of sex where a person is married.

⁵⁴ 'Sexual reassignment surgery' is defined in s 3 of the *BDM Act* as a surgical procedure involving the alteration of a person's reproductive organs, whether for the purpose of assisting a person to match their gender identity or to correct or eliminate ambiguities relating to a person's sex. The Registrar may also request further information or undertake further inquiries to be satisfied that the applicant has undergone the necessary surgery (ss 28B(b), 28C(2)).

2.2.77 The parents⁵⁵ of a child born in Tasmania could also apply to register a change in their child's sex (former *BDM Act* s 28A(2)). Applications in relation to children were also subject to the requirement to provide statutory declarations confirming that sexual reassignment surgery had been performed (s 28B).

2.2.78 The *JRL Act* replaced Part 4A of the former *BDM Act* with a new Part 4A dealing with gender identity. This aims to make clear that gender differs from sex, and that a person's identity is represented by their gender rather than their sex. The new Part 4A sets out the process by which a person whose gender identity does not conform with their registered sex can attain legal recognition as a person of their gender.

2.2.79 Significantly, the changes made by the *JRL Act* mean that it is no longer necessary for an applicant to have undergone, or provide any evidence of having undergone, sexual reassignment surgery.⁵⁶

2.2.80 Key aspects of the revised procedure for registering a change of gender are discussed below.

Procedure for registering gender

2.2.81 Any person born in Tasmania who is at least 16 years old may now apply to the Registrar to register their gender identity. The application is to be in an approved form and accompanied by:

- a gender declaration⁵⁷ made by the applicant; and
- any other document or information that the Registrar reasonably requires. However, the Registrar cannot require a medical certificate or other medical document in relation to the sex, sex characteristics or gender of the applicant (*BDM Act* s 28A(2)).

2.2.82 As outlined in [2.2.14], an applicant can nominate their registered gender as male, female, indeterminate, non-binary, or a 'word, or a phrase, that is used to indicate a person's perception of the person's self as being neither entirely male nor entirely female.'⁵⁸

2.2.83 The parents or guardians of a child born in Tasmania may also apply to register a change in their child's gender (*BDM Act* s 28A(3)). An application in relation to a child is to be accompanied by:

⁵⁵ Unless there is only one parent named in the birth registration for the child, or only one surviving parent, both parents must consent to the application (*BDM Act* s 28A(3)).

⁵⁶ *BDM Act* (as amended) s 28A. The definition of 'sexual reassignment surgery' is removed from the *BDM Act* (*JRL Act* s 13).

⁵⁷ A gender declaration is defined as 'a statutory declaration in which the declarant declares that the declarant identifies as being of the gender specified in the declaration and lives, or seeks to live, as a person of that gender' (*amended BDM Act* s 3). Gender declarations are made on an application form to register a change of gender (see Appendix 4).

⁵⁸ The Minister may prescribe a list of words or phrases that can be used. However, this will not be exhaustive, and applicants can nominate a different word or phrase that better reflects their gender identity (s 3A(f)).

- if the child can make a declaration,⁵⁹ a gender declaration; or
- if the child cannot make a declaration but is able to express their ‘will and preference’,⁶⁰ a statement from the parent/s or guardian that they believe on reasonable grounds that the proposed registration of gender is consistent with the child’s will and preference;
- any other document or information that the Registrar reasonably requires. However, the Registrar cannot require a medical certificate or other medical document in relation to the sex, sex characteristics or gender of the child (*BDM Act* s 28A(2)).

2.2.84 In general, consent is required from both the child’s parents. However, an application can be accepted from only one parent or guardian if there is only one parent named in the child’s birth registration or only one surviving parent, where the guardian is a sole guardian, or where a magistrate⁶¹ has approved the making of the application (*BDM Act* s 28A(4)).

2.2.85 If the Registrar refuses an application for registration of gender, the Registrar must provide the applicant with reasons for the refusal. Applicants can seek a review of the refusal from the Magistrates Court.

2.2.86 If the Registrar accepts an application for registration of gender, an entry will be made in the Register of Births, Deaths and Marriages, along with any other changes ‘necessary to indicate that each previous registered sex, and each previous registered gender, of the person is no longer the registered sex or registered gender in relation to the person’ (*BDM Act* s 28C(1)).

2.2.87 Where a person’s change of gender is registered, any previously registered sex or gender ceases to apply.⁶² The person is a person of the newly registered gender for the purposes of law (*BDM Act* s 28D(1)).

2.2.88 While the birth certificate will no longer include any record of previously registered sex or gender for a person (unless requested), historical records are retained by the Registrar, subject to privacy restrictions guided by the Birth Deaths and Marriages Data Access Policy.⁶³ This policy has been updated to reflect the changes to the *BDM Act*.

2.2.89 Section 28E of the *BDM Act* also provides for the recognition of interstate certificates confirming a change of ‘sex or gender’. For the purposes of the *BDM Act*, the certificate confirms a change of gender. However, the reference to both ‘sex’ and ‘gender’ in this section ensures that a recognition certificate from another state or territory can be recognised within Tasmania whatever term is used in the laws applying in the certifying jurisdiction.⁶⁴

⁵⁹ Neither the *BDM Act* nor the *Oaths Act 2001* (Tas) is explicit about when a minor can make a declaration. The *Gillick* competence test may apply (see Appendix 1).

⁶⁰ ‘Will and preference’ is discussed further at [2.2.126]–[2.2.132].

⁶¹ A magistrate may only approve the registration of a gender if satisfied that the registration is consistent with the child’s will and preference, or that the child is unable to understand the meaning and implications of the registration (s 28B).

⁶² The record of any previously registered sex or gender will not be expunged from BDM records, but access to that information will be restricted — see below.

⁶³ See [2.4.43]–[2.4.49] for information about record maintenance and access to historical data.

⁶⁴ For example, recent changes to the *Births, Deaths and Marriages Registration Act 1996* (Vic) will allow a person to change the sex registered on their birth statement without surgery or clinical procedures — see Appendix 2.

2.2.90 Any reference to a person’s sex in any Tasmanian law is taken to be a reference to their registered sex (if any) or their registered gender (if any) (*BDM Act* s 28D(1)). Some examples of how this will operate in practice are set out below:

Figure 1: Examples of registered sex and gender in Tasmanian legislation

- J was registered female at birth. She has lived as a female and has made no application to register her gender. J has a registered sex of female and no registered gender. For the purposes of any laws relating to sex or gender, J will be female.
- D was registered male at birth but identified as female from adolescence. Before the changes to the *BDM Act* commenced, D undertook sexual reassignment surgery and registered a change of sex to female. After the new laws commenced, she did not make any application to register her gender. D has a registered sex of female and no registered gender. For the purposes of any laws relating to sex or gender, D will be female.
- T is a person with intersex variations of sex characteristics who was registered female at birth. T undertook sexual reassignment surgery as an adolescent and registered a change of sex to male. After the new laws commenced, T applied for registration as neither male nor female. Upon registration, T has no registered sex⁶⁵ and a registered gender of neither male nor female. For the purposes of any laws relating to sex or gender, T will be neither male nor female.
- K was registered female at birth. K took puberty suppressants as a teenager but did not have any surgery. After the new laws commenced, K successfully applied to register their gender as non-binary. Over the following years, K comes to identify more predominantly as male and applies to change their gender to male. Upon registration, K has no registered sex⁶⁶ and a registered gender of male. For the purposes of any laws relating to sex or gender, K will be male.

Removal of requirement for surgery

2.2.91 Evidence that the applicant has undergone sexual reassignment surgery is no longer a prerequisite for registering a change of gender. Instead, the amended *BDM Act* provides for a self-identification model for gender recognition.

2.2.92 In 2016, Transgender Europe published *Human Rights and Gender Identity: Best Practice Catalogue*.⁶⁷ One of the key recommendations for best practice was to ‘[a]bolish sterilisation and other compulsory medical treatment as a necessary legal requirement for recognition of a person’s gender identity in laws regulating the process for name and sex change.’⁶⁸ The authors state that provisions for compulsory reassignment surgery:

unjustifiably link a legal procedure (gender recognition) with medical procedures (sterilisation and gender reassignment surgery). Such a link clearly violates trans people’s right to physical integrity and their right to form and found a family. Compulsory medical procedures run counter to trans people’s right to self-determination with regard to medical interventions, and often leave them with the dreadful choice between their continued ability

⁶⁵ As outlined at [2.4.46], T’s original birth registration information will be retained as a historical record.

⁶⁶ As outlined at [2.4.46], K’s original birth registration information will be retained as a historical record.

⁶⁷ Ulrika Westerlund and Richard Köhler, *Human Rights and Gender Identity: Best Practice Catalogue* (2nd rev version, December 2016) <https://tgeu.org/wp-content/uploads/2017/02/2.11-TGEU_BestPracticeCatalogue.pdf>.

⁶⁸ Ibid 33 Recommendation 4.

to procreate on the one hand, and their rectified official papers reflecting their identity on the other.⁶⁹

2.2.93 Some gender-diverse people are unwilling to undertake complex and invasive surgery. Some people are unable to undertake the procedures due to health issues. For others, the cost is prohibitive, compounded by the fact that it is often necessary to travel interstate or overseas to undergo surgical procedures, recovery time can be significant, and procedures are not routinely covered by Medicare or private health insurance.⁷⁰

2.2.94 The World Professional Association for Transgender Health ('WPATH') *2017 Identity Recognition Statement* asserts that medical evidence should not be necessary for trans people to gain legal gender recognition:

no particular medical, surgical, or mental health treatment or diagnosis is an adequate marker for anyone's gender identity, so these should not be requirements for legal gender change.⁷¹

2.2.95 The *Yogyakarta Principles*,⁷² and the supplementary *Yogyakarta Principles Plus 10*,⁷³ reflect international best practice in relation to human rights and gender identity. The Principles stress the discriminatory impact of requiring surgery and recommend excluding any requirement that a person undergo medical procedures, including sexual reassignment procedures, sterilisation or hormonal therapy, as a requirement for legal recognition of their gender identity.

2.2.96 Until *AB v Western Australia; AH v Western Australia*,⁷⁴ Australian case law regarding recognition of sex and gender (see Appendix 1) had maintained that some degree of medical or surgical intervention was required before a person could register a change of the sex assigned to them at birth. In large part, these decisions reflected the restrictive language of the legislation that they were considering.

2.2.97 For example, in *Secretary, Department of Defence v SRA*, the Court was asked to determine whether a pre-operative transsexual who lived in a de facto relationship with a man and was accepted socially as his female partner would be a 'wife' for the purposes of the *Social Security Act*.

2.2.98 Justice Lockhart recognised that a person's sex was not merely a matter of chromosomes but was also a psychological and social question.⁷⁵ Black CJ recognised that maintaining surgery

⁶⁹ Ibid.

⁷⁰ See, for example, Australian Human Rights Commission, *Sex Files: The legal recognition of sex in documents and government records* (2009) 31 <<https://www.humanrights.gov.au/our-work/lgbti/publications/sex-files-legal-recognition-sex-documents-and-government-records>>.

⁷¹ WPATH, *Identity Recognition Statement* (2017) <<https://tgeu.org/wpath-2017-identity-recognition-statement/>>.

⁷² See *Yogyakarta Principles* (n 5).

⁷³ International Service for Human Rights and ARC International, 'The Yogyakarta Principles Plus 10: Additional Principles and State Obligations on the Application of International Human Rights Law in Relation to Sexual Orientation, Gender Identity, Gender Expression and Sex Characteristics to Complement the Yogyakarta Principles' (November 2017) <<http://yogyakartaprinciples.org/>> ('*Yogyakarta Principles Plus 10*'). Australian representatives are signatories to the *Yogyakarta Principles Plus 10*.

⁷⁴ *AB v Western Australia; AH v Western Australia* (2011) 244 CLR 390 ('*AB v Western Australia*').

⁷⁵ *Secretary, Department of Social Security v SRA* (1993) 43 FCR 299, 325 ('*SRA*').

as a prerequisite for change of sex would effectively prevent those for whom the financial cost or health risks associated with surgery were too great from achieving legal recognition of their deeply-held gender identity.⁷⁶ However, both Black CJ and Lockhart J ultimately held that the Court could not extend the ordinary meaning of ‘woman’ to include someone who has not undergone reassignment surgery.⁷⁷ Lockhart J noted that such a result could only be achieved by Parliament through legislative amendments.

2.2.99 There has been growing judicial acceptance that reassignment surgery can be problematic. In *Re Alex*, Nicholson J said:

The requirement of surgery seems to me to be a cruel and unnecessary restriction upon a person’s right to be legally recognised in a sex which reflects the chosen gender identity and would appear to have little justification on grounds of principle.⁷⁸

2.2.100 The High Court in *AB v Western Australia* held:

The question whether a person is identified as male or female, by reference to the person’s physical characteristics, is intended by the Act to be largely one of social recognition.⁷⁹

2.2.101 The Court was satisfied that hormone therapy could alter gender characteristics sufficiently to allow a person to be identified as the opposite sex. Once that degree of alteration has occurred, no further consideration of the ‘extent of the person’s bodily state’ is required and the Board must consider the person’s self-identity and social perceptions about them.⁸⁰

2.2.102 The High Court decision reflected the terms of the *Gender Reassignment Act 2000* (WA) which required ‘medical or surgical procedures’. Based on that legislative requirement, self-identification alone was not enough to support the issuing of a gender recognition certificate.

2.2.103 Most other Australian jurisdictions currently require evidence of some clinical, medical or surgical treatment before a change of sex or gender can be registered. South Australia, the Northern Territory and the ACT require ‘appropriate clinical treatment’ only,⁸¹ while other jurisdictions require evidence that the applicant has undertaken sex reassignment surgery.⁸²

2.2.104 However, the *Birth, Deaths and Marriages Registration Amendment Act 2019* (Vic) recently commenced in Victoria, allowing any person over 18 to apply to change their sex to a nominated sex descriptor without any sex reassignment procedures or other medical intervention. Appendix 2 provides more details regarding these changes.

⁷⁶ Ibid 305 (Black CJ).

⁷⁷ Ibid 303 (Black CJ), 326–327 (Lockhart J).

⁷⁸ *Re Alex* (2004) 180 FLR 89, 131 (Nicholson CJ).

⁷⁹ *AB v Western Australia* (n 74) 405 (French CJ, Gummow, Hayne, Kiefel and Bell JJ).

⁸⁰ Ibid 406.

⁸¹ *Births, Deaths and Marriages Registration Act 1997* (SA) s 29L; *Births, Deaths and Marriages Registration Act 1997* (ACT) s 25; *Birth, Deaths and Marriages Registration Act 1996* (NT) s 28C.

⁸² *Births, Deaths and Marriages Registration Act 1995* (NSW) s 32C; *Births, Deaths and Marriages Registration Act 2003* (Qld) s 24; *Birth, Deaths and Marriages Registration Act 1996* (Vic) s 30B; *Gender Reassignment Act 2000* (WA).

2.2.105 The Western Australian Law Reform Commission ('WALRC') also recently concluded a review of the State's legislation in relation to change of sex and gender (the laws which were the subject of consideration in *AB v Western Australia*).⁸³ The Commission stated:

While the Commission accepts that some changes in sex characteristics (such as external physical appearance) may assist society to recognise someone's gender, logically this is neither a necessary nor sufficient condition for legal recognition of that person's gender.⁸⁴

2.2.106 The Commission recommended that Western Australia adopt a self-determination model, where a statutory declaration affirming the applicant's gender identity is sufficient evidence for the Registrar to register a change of gender.⁸⁵ SALRI has previously made a similar recommendation.⁸⁶

2.2.107 The self-determination model preferred by the Commission is consistent with the approach adopted in the amended *BDM Act*. This approach is also consistent with human rights best practice outlined in the *Yogyakarta Principles*, and the approaches in a number of international jurisdictions, including Argentina, Canada, Denmark, Ireland, California, Norway and Pakistan.⁸⁷

2.2.108 In 2012, Argentina became the first country to introduce gender self-identification legislation. Analysis of the gender identity laws 12 months after they commenced showed a positive response from the LGBTIQ community:

Participants highlighted that the legal recognition of their identity is considered as the acknowledgement of their existence, and it also has increased visibility and social acceptance of their population. [One participant noted:] 'Today, I see how my mates, through the Gender Identity Law and with an ID card, stand in a different place to face society.'⁸⁸

2.2.109 The UK is also considering amendments to the *Gender Recognition Act*, which currently requires evidence that a person has been diagnosed with gender dysphoria, to adopt a self-identification approach.⁸⁹

2.2.110 In *SRA*, Justice Lockhart recognised that, while courts were confined by the legislation they apply, Parliament could provide for a broader understanding of gender. The explicit legislative provision for self-identification of gender in the *BDM Act* (as amended by the *JRL Act*) serves to overcome the limitations identified in *SRA* and *AB v Western Australia*.

⁸³ WALRC, *Review of Western Australian Legislation in Relation to the Registration or Change of a Person's Sex and/or Gender and Status Relating to Sex Characteristics* (Final Report, Project 108, 2018) ('WALRC Report'). See Appendix 2 for an overview of the WALRC Report.

⁸⁴ Ibid 39.

⁸⁵ Ibid 66–67.

⁸⁶ SALRI Report (n 41) 42–43.

⁸⁷ The laws applying in these, and other, jurisdictions relating to self-identification of gender are discussed in Part 6.3 and Appendix 5 of the WALRC Report (n 83).

⁸⁸ Inés Aristegui et al, 'Impact of the Gender Identity Law in Argentinean Transgender Women' (2017) 18(4) *International Journal of Transgenderism* 446, 450.

⁸⁹ See *Reform of the Gender Recognition Act 2004* (Consultation, July 2018) <<https://www.gov.uk/government/consultations/reform-of-the-gender-recognition-act-2004>>.

Views expressed in submissions

2.2.111 The TLRI has learned from submissions that the requirement for surgery was a significant barrier for Tasmanians seeking to register a change of sex under the former *BDM Act*.⁹⁰

2.2.112 The TasCOSS submission commended the removal of the surgery requirement:

A trans or gender diverse person can self-determine their gender identity and have this officially recognised on their birth certificate. This is a key reform because, prior to the law change, trans people had to have genital surgery before their birth certificates could be amended. This was a cruel and unnecessary requirement for many reasons — surgery is expensive, it can be impossible to access locally, and is not an option for some people for medical or other reasons. And some people simply do not want to have surgery.

2.2.113 Spokespeople for Tasmanian Families for Trans Kids also shared their experiences and emphasised that removing prohibitive surgery requirements would have ‘life-changing’ results for trans children considering their options to express their gender identity.⁹¹

2.2.114 Many submissions to the TLRI⁹² supported the self-identification approach, acknowledging the dignity, capacity and autonomy of transgender and intersex people to express their gender identity and seek legal recognition of that gender identity. For example, the Australian Psychological Society (‘APS’) said:

The position of the APS is that an individual is the person most capable of verifying their sex or gender identity. The simplest method to achieve this is by Affidavit, and should not require that individuals have additional verification from third parties (such as mental health or medical professionals).

The TLRI’s view

2.2.115 The TLRI considers that the change of language to provide for registration of a change of gender, rather than sex, is consistent with maintaining a distinction between sex and gender.⁹³ The TLRI supports removing surgery as a prerequisite for registering a change of gender.

2.2.116 Reforms introduced by the *JRL Act* reflect a self-identification approach to gender recognition, replacing the requirement for surgery with a requirement for a person to declare their intention to live as a person of the gender with which they identify. The TLRI notes that this approach is consistent with human rights best practice outlined in the *Yogyakarta Principles*, the approaches adopted in a number of international jurisdictions and in Victoria and recommended in

⁹⁰ For example, submissions from Equality Tasmania, TasCOSS and Women’s Health Tasmania to TLRI, *Legal Recognition of Sex and Gender* (Issues Paper 29, 2019), and consultation with Tasmanian Families for Trans Kids.

⁹¹ Consultation meeting with representatives of Tasmanian Families for Trans Kids, August 2019.

⁹² See submissions from TasCOSS, Transforming Tasmania, Dede River, Equality Australia, Equality Tasmania, CLC Tasmania, and the Commissioner for Children and Young People to TLRI, *Legal Recognition of Sex and Gender* (Issues Paper 29, 2019).

⁹³ This approach can be contrasted with the approach adopted in Victoria (see Appendix 2).

other Australian jurisdictions. It is also the approach advocated in the majority of submissions addressing this issue.⁹⁴

2.2.117 Removing surgery as a prerequisite to a change of gender will relieve undue pressure on transgender and gender diverse Tasmanians to undergo costly and risky surgical intervention before achieving formal recognition of their gender identity. It also accords with fundamental human rights principles protecting people's right to be treated with dignity and humanity and their right to security of the person.

2.2.118 Removing surgery as a prerequisite to registering a gender will also relieve pressure on Tasmanians with intersex variations of sex characteristics, who can now register a gender identity that accords with their self-identification, regardless of their sex characteristics.

2.2.119 Some potential implications of the removal of the surgery requirement on the operation of other laws applying to persons of a particular sex or gender are discussed in section 2.5 below. These include search powers, reproductive health provisions and access to gender-specific spaces and programs.

Consent to change of gender for children

2.2.120 Under the amended *BDM Act*, any person born in Tasmania who is at least 16 years old may apply to the Registrar to register a change of gender. The parents or guardians of a child born in Tasmania can also apply to register a change of their child's gender,⁹⁵ and must satisfy the Registrar that the application reflects the 'will and preference' of the child.

2.2.121 Although surgery is no longer a prerequisite for registering a change of gender, some children may still elect to undergo medical procedures, ranging from puberty blocking treatment (Stage 1 treatment), hormonal treatment (Stage 2), to surgical intervention (Stage 3). Part 3 of this Report discusses consent requirements in relation to these treatments.

2.2.122 South Australia is the only other Australian jurisdiction to allow a person under 18 to make an application to register a change of sex or gender identity in their own right.⁹⁶ Section 28J of the *Births, Deaths and Marriages Act 1996* (SA) allows any child to make an application to the Court for approval to apply for a change of sex or gender.

2.2.123 Before granting approval, the Court must be satisfied that approval would be in the best interests of the child, having regard to:

- whether the child understands the meaning and implications of the making of an application to the Registrar; and

⁹⁴ See submissions from TasCOSS, Transforming Tasmania, Dede River, Equality Australia, Equality Tasmania, CLC Tasmania, Women's Health Tasmania, the Commissioner for Children and Young People, and several anonymous or confidential submissions to TLRI, *Legal Recognition of Sex and Gender* (Issues Paper 29, 2019).

⁹⁵ In general, the consent of both parents is required. However, an application can be accepted from only one parent or guardian in some circumstances (s 28A(4)).

⁹⁶ Section 6 of the *Consent to Medical Treatment and Palliative Care 1995* (SA) also provides for any person 16 or over to validly made decisions about medical treatment — see [3.6.51]–[3.6.53].

- whether the child has the capacity to consent to the application and, if so, the child's position in relation to the making of the application; and
- whether the child has undertaken a sufficient amount of appropriate clinical treatment in relation to the child's sex or gender identity.

The Court is not bound by the rules of evidence and can inform itself about any of those matters in the way the Court thinks fit (s 29J(6)).

2.2.124 In Ireland, s 12 of the *Gender Recognition Act 2015* allows an application for gender recognition to be made on behalf of a child who is 16 or 17 provided a treating medical practitioner has certified that:

- the child has attained a sufficient degree of maturity to make the decision to apply for gender recognition; and
- the child is aware of, has considered and fully understands the consequences of that decision; and
- the child's decision is freely and independently made without duress or undue influence from another person; and
- the child has transitioned or is transitioning into their preferred gender.

The medical practitioner's view must also be shared by an independent endocrinologist or psychiatrist, and the court must be satisfied that an order allowing the application to be made is in the best interests of the child (*Gender Recognition Act 2015* (Ireland) s 12(5) and (6)).

2.2.125 The initial review of the *Gender Recognition Act 2015*, undertaken after the Act had been in operation for two years, discussed the role of these third-party practitioners:

The [Review Working Group] agreed that, in what is a legal process, consideration of any third-party involvement should focus on supporting the child to ensure that their voice is heard and supporting the child and their family in the decision-making process.

Discussion among the group focused on the role a third party may have in supporting the family. It was agreed that this would not be a decision-making role with a veto over the application process. Rather, the role would be to act as a support to assist conversation within the family, and to ensure that the voice of the child has been heard and the best interest of the child has been taken into account.⁹⁷

'Best interests' vs 'will and preference'

2.2.126 Under the former *BDM Act*, the Registrar or court needed to be satisfied that a proposed change of sex for a child was in the 'best interests' of the child. This was consistent with the

⁹⁷ Department of Employment Affairs and Social Protection (Ireland), *Review of the Gender Recognition Act 2015: Report to the Minister for Employment Affairs and Social Protection* (June 2018) 82–83 <www.welfare.ie/en/pressoffice/Pages/pr180718.aspx>.

language of the *Convention on the Rights of the Child*,⁹⁸ which emphasised that the best interests of the child should be the primary consideration in decisions affecting children.

2.2.127 However, contemporary human rights approaches, such as that adopted in the *Convention on the Rights of Persons with Disability*,⁹⁹ reflect a move away from paternalistic assessments and substituted decisions about what is in the ‘best interests’ of the person affected by a decision. Instead, modern approaches favour supporting persons with sufficient capacity to make informed decisions in their own right. This approach recognises that, wherever possible, a person should be supported to make their own decisions and express their ‘will and preferences’ about matters that affect them.¹⁰⁰

2.2.128 The Registrar (or, for a contested application, a magistrate) can require or consider evidence that a child (including a person over 16) has received counselling regarding the consequences of registering a change of gender (s 28C).

2.2.129 The *BDM Act* does not define or provide examples of who would be considered suitable to provide counselling. The applicant can submit evidence of counselling from someone they consider to be qualified and experienced to advise them on the consequences of their application (s 28C).

2.2.130 If the Registrar is not satisfied that the applicant has received adequate support, the Registrar may also request that the child who is the subject of the application undertake counselling with a person that the Registrar considers has appropriate qualifications and experience. Wherever possible, the counsellor is to be agreed between the Registrar and the applicant, having regard to the circumstances of the child.

2.2.131 The application form to register a change of gender for a child under 16 years old provides for the child to make a declaration that they consent to the application, where possible, and for reasons for the application and supporting material to be provided. If the child has not provided a declaration, the Registrar will carefully consider the reasons given for the application in determining what, if any, additional information is required.

2.2.132 In practice, applications received in relation to children tend to be accompanied by considerable evidence, including medical and psychological reports, evidence of the child’s lived experience and letters of support.¹⁰¹

Views expressed in submissions

2.2.133 The ACL submission stated that 73–88% of gender dysphoria is resolved during puberty and recommended delaying any registration of a change of gender until a person is 18 years of age.

⁹⁸ *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) <www.ohchr.org/en/professionalinterest/pages/crc.aspx> (*‘Convention on the Rights of the Child’*).

⁹⁹ *Convention on the Rights of Persons with Disability*, opened for signature 30 March 2007 (entered into force 3 May 2008) <<https://www.un.org/development/desa/disabilities/convention-on-the-rights-of-persons-with-disabilities.html>>.

¹⁰⁰ The rise of ‘will and preference’ tests is discussed in detail in the TLRI’s *Review of the Guardianship and Administration Act 1995* (Final Report 26, 2018) <www.utas.edu.au/law-reform>.

¹⁰¹ Personal communication, Registrar, 12 December 2019. For more discussion about the exercise of the Registrar’s discretion to ask for evidence of counselling, see [2.4.79]–[2.4.94].

2.2.134 Evidence regarding the intensification of gender dysphoria during puberty is scarce, though some limited studies have indicated desistance following puberty. However, the *Standard of Care* from the WPATH supports the availability of puberty blockers and gender recognition strategies during adolescence to ‘relieve the psychological suffering caused by the development of secondary sex characteristics’.¹⁰² The availability of treatment to adolescents is discussed in Part 3.

2.2.135 A number of submissions supported making registration of a change of gender available from 16 years, acknowledging that many young people have strong decision-making capacity. TasCOSS also noted that many trans or gender diverse children and young people access support services for information, advice and counselling in relation to decisions about sex and gender.¹⁰³

2.2.136 The Commissioner for Children and Young People supported the removal of surgery requirements as a prerequisite for registering a change of gender for children. She said:

[In] my view, amendments to the [BDM Act] to register a change of sex or gender without the need for sex reassignment surgery contributes to the removal of discriminatory practices against ... children and young people.¹⁰⁴

2.2.137 TasCOSS and Tasmanian Families for Trans Kids also emphasised that allowing children to change their gender, and to do so without the need for surgery, will have significant mental health benefits.¹⁰⁵

2.2.138 Women Speak Tasmania recommended detailed guidance be available to assist the Registrar in undertaking,

what is essentially an inexact process — reliable determination of the ‘will and preference’ of a child, and/or their competence to express a ‘will and preference’.¹⁰⁶

2.2.139 Community Legal Centres Tasmania (‘CLC Tasmania’) considered that the phrase ‘will and preference’ is relatively well understood, but did not oppose statutory criteria being introduced to provide clarification:

This would have the advantage of assisting both the decision-maker and the applicant in clearly setting out what must be established in order for the application to be granted.¹⁰⁷

2.2.140 Several submissions emphasised that, while counselling should be available to any child considering a change of gender (particularly when accessing gender-confirming health care),

¹⁰² See, for example, Kaltiala-Heino et al, ‘Gender Dysphoria in Adolescence: Current Perspectives’ (2018) 9 *Adolescent Health, Medicine and Therapeutics* 31; E Coleman, et al, ‘Standards of care for the health of transsexual, transgender, and gender-nonconforming people, version 7’ (2011) 13(4) *International Journal of Transgenderism* 165.

¹⁰³ TasCOSS, Submission to TLRI, *Legal Recognition of Sex and Gender* (Issues Paper 29, 2019) 8.

¹⁰⁴ Commissioner for Children and Young People, Submission to TLRI, *Legal Recognition of Sex and Gender* (Issues Paper 29, 2019) 2.

¹⁰⁵ TasCOSS, Submission to TLRI, *Legal Recognition of Sex and Gender* (Issues Paper 29, 2019) and consultation with Tasmanian Families for Trans Kids.

¹⁰⁶ Women Speak, Submission to TLRI, *Legal Recognition of Sex and Gender* (Issues Paper 29, 2019) 3.

¹⁰⁷ CLC Tasmania, Submission to TLRI, *Legal Recognition of Sex and Gender* (Issues Paper 29, 2019) 2–3.

counselling should not be compulsory.¹⁰⁸ For example, TasCOSS noted that many transgender children are well supported, well informed and capable of determining whether they require counselling.¹⁰⁹

2.2.141 The TLRI understands that Working It Out has delivered training and support to Registry staff undertaking assessments of applications to register a change of gender.¹¹⁰ Service Tasmania staff who can assist with application forms have also received training.

The TLRI's view

2.2.142 The TLRI notes that trans and gender diverse youth are at much higher risk of depression and suicidal ideation prior to adulthood than their cisgender peers. The submissions from TasCOSS and the Commissioner for Children and Young People, and consultation with Tasmanian Families for Trans Kids satisfy the TLRI that allowing trans and gender diverse children to change their gender will have significant mental health benefits for them.

2.2.143 The TLRI is satisfied that decision-making principles based on the ‘will and preference’ of the child are consistent with contemporary human rights approaches and recognition of the dignity, rights and agency of children when provided with support to express their preference.¹¹¹ Despite the suggestion made by CLC Tasmania, the TLRI does not consider that it is necessary to amend the *BDM Act* to introduce criteria for determining the ‘will and preference’ of a child.¹¹²

2.2.144 Opportunities to request additional information and evidence of counselling will assist the Registrar to be satisfied that children are sufficiently capable of understanding proposed changes of gender and their consequences, and of expressing their ‘will and preference’ in relation to the application.

2.2.145 Consistent with the views expressed by TasCOSS and the APS, the TLRI supports the provisions in the amended *BDM Act* that encourage counselling but do not make it a mandatory precondition or dictate the type of counselling to be given. The TLRI considers that the amended *BDM Act* provides sufficient scope for the Registrar to determine whether an application reflects a child’s will and preference, and that the child understands the consequences of the application.

Sex and gender information on official documentation

2.2.146 The TLRI was asked to consider what categories of sex or gender should be displayed on birth certificates and other documents.

2.2.147 A birth certificate is often considered to be a ‘cardinal’ identification document that will definitively establish attributes of a person’s identity, such as age. The particulars recorded on a birth certificate can collectively assist in establishing a person’s identity. There are many examples

¹⁰⁸ See, for example, submissions from TasCOSS, Transforming Tasmania, Dede River, APS, Commissioner for Children and Young People and two anonymous submissions to TLRI, *Legal Recognition of Sex and Gender* (Issues Paper 29, 2019).

¹⁰⁹ TasCOSS, Submission to TLRI, *Legal Recognition of Sex and Gender* (Issues Paper 29, 2019) 8.

¹¹⁰ Personal communication, Registrar, 12 December 2019.

¹¹¹ For further discussion of the human rights approach to decision making, see TLRI (n 100).

¹¹² Guidelines to assist the Registrar in determining the ‘will and preference’ of children are discussed at [2.4.84]–[2.4.95].

of applications that call for proof of identity, including applications for government assistance (such as Centrelink payments), a Medicare card, a tax file number or a driver's licence.

2.2.148 Prior to the *JRL Act*, any birth certificate issued would include details of the registered sex of the person to whom it related — that is, the sex recorded in the birth registration notice or a different sex if a person had undergone sexual reassignment surgery. Where a change of sex was registered, any subsequent birth certificate was required to state the person's new registered sex but also include a notation that the person was previously 'registered as of the other sex' (s 28D).

2.2.149 Following the enactment of the *JRL Act*, birth certificates will only include details of a person's sex or gender if that person or, if under 16, their parents, requests that those details be included (s 46(3)). This 'opt-in' approach means that the default position will be that a birth certificate does not include gender details, unless the person applying for the birth certificate requests otherwise.

2.2.150 Persons applying for a birth certificate who have changed their registered sex or registered gender can request that they be issued with a birth certificate that:

- includes details of their registered sex or gender, with a notation regarding their previous registered sex or gender; or
- includes details of their registered sex or gender, without any notation regarding their previous registered sex or gender; or
- does not include any details of their registered sex or gender (*BDM Act* ss 46(4)–(7)).

2.2.151 It is an offence for any person to show a copy of their former birth certificate (or an extract) with the intention of misleading someone about their registered sex or gender (*BDM Act* s 28F).

2.2.152 A change of registered gender is often accompanied by a change of name, though each involve a separate process for registration. As with gender, any person over 16 can now apply to register a change of name, and parents of a child under 16 years old can apply to change the child's name. For a child over 12 years old, their consent to the change is required. For children under 12, the parents must satisfy the Registrar that the change reflects the will and preference of the child (s 24–27, amended *BDM Act*).

2.2.153 From the time the amendments to the *BDM Act* took effect on 5 September 2019 until 30 April 2020, 11,621 new birth certificates were issued by the Registry that include gender information.¹¹³ In contrast, only 576 birth certificates were issued in that period that did not include gender information. This figure represents approximately 5% of certificates issued.

2.2.154 In the period from commencement of the amendments to the *BDM Act* (5 September 2019) to 30 April 2020, 61 applications to register gender were made to the Registrar. The Registrar considered and accepted all 61 applications and issued the following:

¹¹³ Personal communication and email from the Registrar of Births, Deaths and Marriages, 20 May 2020. Of these, 10,078 included all gender and name details (including, where relevant, the history of changes), 96 included gender, gender history, and current name only, 137 included current gender (without gender history), current name and history of name changes and 1,237 included current gender and current name only.

- 19 birth certificates to register gender as male.
- 35 birth certificates to register gender as female.
- 7 birth certificates to register gender as non-binary.

2.2.155 Given the short timeframe, and the historic nature of the recent legislative changes, it is not possible to determine whether this number of applications or incidence of registered gender categories is representative of what could be expected in future.

2.2.156 The new Smart Forms for registering a birth and applying for a birth certificate make clear that parents can choose not to include gender information (the ‘opt-in’ method). However, recent records confirm that the vast majority of birth certificates continue to include gender information. This may change over time as the new options become better understood.

2.2.157 Two other approaches have been adopted in other jurisdictions regarding sex and gender information on birth certificates, an ‘opt-out’ approach and the complete removal of all sex and gender information from birth certificates.

Opt-out approach

2.2.158 The option for parents or individuals to request that sex or gender markers be removed from a birth certificate is referred to as an ‘opt-out’ approach. This approach allows people to avoid the default inclusion of that information but requires them to request that the information be excluded.

2.2.159 A key risk with the opt-out approach is that those who elect not to include sex will be stigmatised, with the decision not to include that information being treated as confirmation that the person is ‘other’.¹¹⁴ This risk is avoided if no sex or gender is recorded.

No sex or gender record

2.2.160 This approach simply removes any reference to sex or gender in the birth certificate. Births, changes of sex and gender continue to be registered for statistical purposes, but sex and gender information is not included in official identification documents.

2.2.161 Not including sex or gender information in birth certificates is supported by Principle 31A of the *Yogyakarta Principles Plus 10*, which recommends that states take action to:

[e]nsure that official identity documents only include personal information that is relevant, reasonable and necessary as required by the law for a legitimate purpose, and thereby end the registration of the sex and gender of the person in identity documents such as birth certificates, identification cards, passports and driver licences, and as part of their legal personality.

2.2.162 As discussed in Part 1, the United Nations Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity has queried the need for identity documents like birth certificates to include gender information.¹¹⁵ He considered that including ‘gender’ as a marker on birth certificates could stigmatise those who ‘fall outside the

¹¹⁴ WALRC Report (n 83) 74.

¹¹⁵ Victor Madrigal-Borloz, *Protection against violence and discrimination based on sexual orientation and gender identity*, UN Doc A/73/152 (12 July 2018) 12.

normative expectations of gender’. If gender was not a category in identification documents, harassment where registered sex or gender and gender identity were in conflict would not arise.

2.2.163 This position is also reflected in the *Darlington Statement*, which discussed the impact of ‘undue emphasis’ on classification of people with intersex variations of sex characteristics and concludes:

The larger goal is not to seek new classifications but to end legal classification systems and the hierarchies that lie behind them.¹¹⁶

2.2.164 Malta is one jurisdiction that does not require a child’s sex to be recorded at birth, though sex must be registered by the time the child is 18.¹¹⁷ A birth certificate issued in Malta will not include details of a person’s sex or gender. In Sweden, sex is required to be registered at birth but is not included in the categories of information to be recorded on a Population Register extract (akin to a birth certificate).

2.2.165 While birth certificates issued in Western Australian currently require sex and gender markers to be included, the WALRC has recently recommended amendments to remove sex from birth certificates. The Commission considered such a reform would avoid conflation of ‘sex’ and ‘gender’, relieve pressure on parents of intersex children and reduce stigmatisation.¹¹⁸

Views expressed in submissions

2.2.166 A number of submissions opposed the opt-in model adopted by the *JRL Act*, preferring the default position to be that sex be recorded on the birth certificate and that any subsequent change of gender be recorded separately.¹¹⁹

2.2.167 Several of these submissions took the view that it is essential for sex to be recorded on official identification documents and not to be displaced by gender identity.¹²⁰ This position was generally argued on the grounds that ‘biological sex’ is more definitive and determinative of identity and that using gender as a basis for identification would be inaccurate.

2.2.168 These submissions argued that the process for verifying sex or gender identity would need to be addressed ‘clearly and meticulously’.¹²¹ For example, the ACL argued that a record of ‘biological identity’ is necessary because:

In the event of a tragic incident, where critical disfigurement may occur, only the biological data may be able to confirm identity.¹²²

¹¹⁶ *Darlington Statement* (n 22) cl 8.

¹¹⁷ *Gender Identity, Gender Expression and Sex Characteristics Act 2015* (Malta) art 7(4); *Civil Code* (Malta) art 278(c).

¹¹⁸ WALRC Report (n 83) 59–62.

¹¹⁹ See submissions from the ACL, Women Speak Tasmania, FLC, TC4K, Joanna Pinkiewicz, Jemima Willis and two anonymous submissions to TLRI, *Legal Recognition of Sex and Gender* (Issues Paper 29, 2019).

¹²⁰ For example, the submissions from ACL, TC4K, Women Speak Tasmania and the FLC to TLRI, *Legal Recognition of Sex and Gender* (Issues Paper 29, 2019).

¹²¹ *Ibid.*

¹²² ACL, Submission to TLRI, *Legal Recognition of Sex and Gender* (Issues Paper 29, 2019) 7.

2.2.169 Jemima Willis argued that a person who was registered male at birth but presented to a doctor as female may not receive an accurate diagnosis because the doctor would not be aware of their masculine physiology:

I believe government agencies, notaries, and other officials, particularly medical professionals, are required to know the biological sex of a person. This is because without the knowledge of current biological status, medical diagnoses and procedures can be misinformed and thus cause more harm to the person.

2.2.170 The Tasmanian Coalition for Kids (‘TC4K’) objected to the notion that a birth certificate will no longer record a person’s sex.

2.2.171 This is not strictly accurate. While a person’s sex will no longer automatically appear on a birth certificate, that information will be included on request. However, as the TC4K submission notes, the birth certificate record will show ‘gender’ rather than ‘sex’, even where the record matches the person’s registered sex.

2.2.172 TC4K maintained that conflating ‘sex’ and ‘gender’ on the birth certificate means it is not possible to determine a person’s birth sex from the certificate alone (even where gender is recorded).

[A] person’s registered sex will only be verifiable on the basis on self-admission. Access to the register of Births, Deaths and Marriages to check on the original registered sex will only be available for a limited group of organisations such as law enforcement authorities. Hence most organisations who are concerned with verifying a person’s sex will have to rely on the honesty of the person involved.¹²³

2.2.173 Women Speak Tasmania called for the *JRL Act* to be repealed, stating that this is necessary to avoid inevitable administrative difficulties in verifying sex under the amended *BDM Act*.¹²⁴

2.2.174 In contrast, a number of submissions¹²⁵ argued that, consistent with the self-declaration approach adopted by the *JRL Act* and supported by the *Darlington Statement* and *Yogyakarta Principles*, verification of a person’s sex or gender should be unnecessary in most circumstances.

2.2.175 Equality Australia said:

Rarely will there be any need for a government agency, notary or other official to ask an individual their sex and/or gender, let alone have that sex and/or gender verified. The Australian Government Guidelines on the Recognition of Sex and Gender already reflect this principle.

For most purposes, members of our community are entitled to the same legal rights and protections, and subject to the same obligations, regardless of a person’s sex and/or gender. A person’s identity can be verified using other distinguishing information not related to a person’s sex and/or gender, including photo ID, a person’s name, address, birthdate, or

¹²³ TC4K, Submission to TLRI, *Legal Recognition of Sex and Gender* (Issues Paper 29, 2019) 2.

¹²⁴ Women Speak Tasmania, Submission to TLRI, *Legal Recognition of Sex and Gender* (Issues Paper 29, 2019) 1.

¹²⁵ See submissions from Equality Australia, Transforming Tasmania, Equality Tasmania, Dede River, CLC Tasmania, Women’s Health Tasmania and one anonymous submission to TLRI, *Legal Recognition of Sex and Gender* (Issues Paper 29, 2019).

contact details. Wherever possible, non-gendered personal markers should be used to verify a person's identity...

Over-emphasising the need to 'verify' a person's sex and/or gender, other than where strictly necessary, increases the risk of entrenching barriers to full participation in society and justifying discriminatory practices which are harmful to trans and gender diverse people.¹²⁶

2.2.176 Women's Legal Service also opposed 'administrative processes that would allow agencies to verify a person's sex or gender identity', preferring a self-identification approach and removal of sex and gender information from identification documents.¹²⁷

2.2.177 Dede River supported the view that gender markers should be removed from identification documents altogether:

There is no need for gender on legal identity. Aside from the major issue of discrimination, it does not help identify a person if their apparent gender is different from their legal gender.¹²⁸

2.2.178 While preferring the removal of any gender data from birth certificates, Dede River expressed a secondary preference for a strong opt-in model. She acknowledged that the amended *BDM Act* provides for an opt-in approach, but considered that administrative practice will mean that the default for most people will still be to record gender:

This [practice] creates essentially the same issues identified in the 'Opt Out' approach. Most people are expected to tick the 'show gender' box. Parents of trans children, who can now change their child's legal gender, will also tick the 'show current gender only' box to avoid otherisation.¹²⁹

2.2.179 The forms provided by the Registrar (see Appendix 4) clearly inform the applicant that they are not required to include gender information on the certificate. However, based on records since the commencement of the new laws on 5 September 2019, most people do elect to show gender on the birth certificate.¹³⁰

2.2.180 Dede River recommended that a strong opt-in approach be adopted, which would require a specific, separate application to include gender information on a birth certificate. This would avoid the 'tick a box' approach that results in people electing to include gender information without active consideration.¹³¹

2.2.181 One anonymous submission queried why it would be necessary to allow a change of gender to be recorded on a birth certificate, suggesting that where a person's gender identity conflicts with the registered sex they could simply request that the birth certificate be issued with no sex information.

¹²⁶ Equality Australia, Submission to TLRI, *Legal Recognition of Sex and Gender* (Issues Paper 29, 2019) 4.

¹²⁷ Women's Legal Service, Submission to TLRI, *Legal Recognition of Sex and Gender* (Issues Paper 29, 2019) 3.

¹²⁸ Dede River, Submission to TLRI, *Legal Recognition of Sex and Gender* (Issues Paper 29, 2019) 6.

¹²⁹ Ibid 5.

¹³⁰ Personal communication with Registrar, 12 December 2019.

¹³¹ Ibid.

The TLRI's view

2.2.182 The TLRI recognises that the *BDM Act* has adopted an 'opt-in' approach. This avoids some of the potential risks of stigma associated with an 'opt-out' approach, but in practice is unlikely to result in a significant change in the way sex and gender data are recorded. This is supported by the experience since the commencement of the changes.

2.2.183 The TLRI acknowledges that the Tasmanian Parliament chose not to exclude any sex and gender records on the birth certificate in response to a strong public response to concerns regarding 'gender erasure'. Given the contentious nature of the debate, an opt-in approach is more politically expedient than the approach advocated in Western Australia.

2.2.184 However, the TLRI recognises that this approach represents a compromise position.

2.2.185 The TLRI supports the opt-in approach as currently implemented but suggests that policies and practices be reviewed periodically to monitor how the opt-in approach is operating. Any review should involve broad consultation with affected communities, particularly those most affected by the legislation.

2.2.186 The TLRI notes TC4K's view that a person's registered sex will not be 'verifiable' under the amended *BDM Act* as it will be recorded as gender on the birth certificate. As a result, a birth certificate will have to be taken at face value as a record of a person's sex.

2.2.187 However, the TLRI considers that this is the case with most other identification documents, including passports and driver's licences. It is consistent with human rights and international practice for identification to reflect gender identity, rather than birth sex.

2.2.188 As outlined at [2.4.74]–[2.4.78], the TLRI supports the view that 'verification' of gender beyond reliance on identification documents 'at face value' is intrusive.

2.3 Recent changes to other laws

2.3.1 While the key changes effected by the *JRL Act* relate to the *BDM Act*, the *JRL Act* also amended a number of other Acts, as outlined below.

Adoption Act 1988

2.3.2 The *Adoption Act 1988* (Tas) provides for the adoption of children in Tasmania.

2.3.3 At the time the *Adoption Act* was enacted, there was a presumption that the persons making the adoption would be husband and wife. In 2004, s 20 was amended¹³² to provide that adoption orders could be made in favour of two people in a significant relationship within the meaning of the *Relationships Act 2003* (Tas). This includes couples of any gender.

2.3.4 Following those changes, any couple, regardless of the gender of the people who make up that couple, are eligible to apply for adoption of a child.

¹³² *Relationships (Consequential Amendments) Act 2003* (Tas) sch 5.

2.3.5 Under s 29, consent to an adoption is generally required from the mother and father of a child or, in the case of a child born to a woman in a significant relationship with another woman, the birth mother and her partner.

2.3.6 The *JRL Act* makes a number of amendments to replace ‘a parent or guardian’ with ‘the father, the mother, a parent or guardian.’ During parliamentary debate, the rationale for the amendment was explained as follows:

This should allay some fears in the community about a false perception that parliament was trying to do away with motherhood and fatherhood and trying to eradicate gender.¹³³

Anti-Discrimination Act 1998

2.3.7 The *Anti-Discrimination Act 1998* (Tas) aims to prohibit discrimination and provides for the investigation and resolution of complaints in relation to any such discrimination.

2.3.8 As outlined in [2.2.17]–[2.2.20], the *JRL Act* introduced new definitions of ‘gender expression,’ ‘gender identity’ and ‘sex characteristics’ into the *ADA*. The definition of transgender was also amended to include someone who ‘identifies themselves as a member of another gender and lives or seeks to live as a member of that gender.’

2.3.9 Under the *ADA*, discrimination involves:

- treating someone with any of the attributes described in s 16 of the Act less favourably than someone without that attribute (direct discrimination), or
- imposing an unreasonable condition which has the effect of burdening a person with an attribute set out in s 16 more than a person without that attribute (indirect discrimination) (ss 14, 15).

2.3.10 The attributes in s 16 include gender and gender identity.

2.3.11 ‘Intersex’ was previously included as an attribute (s 16(eb)). The *JRL Act* has refined that attribute to be ‘intersex variations of sex characteristics’. As a result, discrimination against a person on the grounds of their gender, gender identity or intersex variations of sex characteristics is actionable.

2.3.12 Since the commencement of the *ADA*, it has been an offence to incite hatred on the basis of ‘sexual orientation’ (s 19(c)). Prior to 2014, ‘sexual orientation’ was defined to include ‘transsexuality’, which included transgender and gender diversity.¹³⁴ The *Anti-Discrimination Amendment Act 2013* (Tas) sought to distinguish between sexual orientation and gender identity

¹³³ Tasmania, *Parliamentary Debates*, House of Assembly, 10 April 2019 (Cassy O’Connor).

¹³⁴ Under the *ADA*, prior to 1 January 2014, the following definition applied:

transsexual means a person of one sex who –

- (a) assumes the bodily characteristics of the other sex by medical or other means; or
- (b) identifies himself or herself as a member of the other sex; or
- (c) lives or seeks to live as a member of the other sex ...

by deleting ‘transsexuality’ from the definition of ‘sexual orientation’. The amendments also inserted new definitions of ‘intersex’, ‘transgender’ and ‘transsexual’ into the Act.

2.3.13 An unintended consequence of removing transsexuality from the definition of ‘sexual orientation’ was that transsexuality¹³⁵ was no longer covered by s 19.

2.3.14 The *JRL Act* amendments address this deficiency by inserting a new paragraph making it an offence to incite hatred towards, serious contempt for, or severe ridicule of, a person or a group on the ground of ‘gender identity or intersex variations of sex characteristics of the person or any member of the group’ (s 19, *ADA*). Rather than creating a new offence, this change is aimed at reinstating the protection against inciting hatred towards transsexuals provided prior to 2014 and updating the terminology to reflect contemporary understanding of gender diversity.

Views expressed in submissions

2.3.15 Several submissions¹³⁶ argued that this change will create a ‘legal minefield’ for offending language in relation to gender identity.

2.3.16 TC4K’s submission suggested that ‘sex’ is no longer a protected attribute, only gender. However, ‘sex’ has never been a protected attribute under the *ADA*. The term has always been conflated with gender. The amendments introduce more nuanced definitions to extend protections on the basis of self-identified gender identity.

2.3.17 TC4K also claimed that the removal of the option for a person to have a registered sex has implications for the application of the *Sex Discrimination Act 1984* (Cth), where it is unclear whether exemptions for discrimination on the basis of sex will extend to ‘registered gender’.¹³⁷

2.3.18 The principal discrimination concern of both the ACL and one anonymous submission related to ‘misgendering’, in particular, the following two issues:

- the ease with which a person could accidentally fall foul of the provisions, given the breadth of the definitions of gender identity and gender expression; and
- that deliberate use of a pronoun that contradicts a person’s gender identity should not constitute an offence where a woman refuses to acknowledge the female gender identity of a person who was registered male at birth.¹³⁸

2.3.19 The Royal Children’s Hospital guide¹³⁹ explains the benefits of using preferred pronouns:

Understanding and using a person’s preferred name and pronouns is vital to the provision of affirming and respectful care of trans children and adolescents. Providing an environment that demonstrates inclusiveness and respect for diversity is essential, with

¹³⁵ Following the 2014 amendments, ‘transsexual’ encompassed an intersex person.

¹³⁶ For example, see submissions from the ACL, TC4K, Women Speak Tasmania, the FLC and one anonymous submission to TLRI, *Legal Recognition of Sex and Gender* (Issues Paper 29, 2019).

¹³⁷ TC4K, Submission to TLRI, *Legal Recognition of Sex and Gender* (Issues Paper 29, 2019) 4–5.

¹³⁸ Anonymous submission to TLRI, *Legal Recognition of Sex and Gender* (Issues Paper 29, 2019). See also ACL Submission to TLRI, *Legal Recognition of Sex and Gender* (Issues Paper 29, 2019) 1, 4–5. Similar concerns are reflected in the FLC submission.

¹³⁹ M Telfer et al, *Australian Standards of Care and Treatment Guidelines For Trans and Gender Diverse Children and Adolescents Version 1.1* (Royal Children’s Hospital Melbourne, 2018) 5.

Australian research reporting that healthcare environments experienced as discriminatory for trans and gender diverse people are correlated with poorer mental health outcomes. Some children or adolescents may request use of a preferred name or pronoun only in certain circumstances, such as when their parents are, or are not, present in the room. This is important to respect and enact to enable optimal patient-clinician engagement, and ensure confidentiality and patient safety.

2.3.20 Anti-discrimination laws in NSW, the ACT, Queensland and the Commonwealth already prohibit vilification on the basis of gender identity. The *Racial and Religious Tolerance Amendment Bill 2019* currently being considered by the Victorian Parliament also seeks to extend protections to those discriminated against on the basis of gender identity.

2.3.21 However, the ACL was concerned that the introduction of ‘gender expression’ as a factor within gender identity has created the potential for a host of new offences. They explained their concerns as follows:

[An] offence may be caused by ‘misgendering’ through the use of an inappropriate pronoun. When the possibility of changing one’s gender is as fluid as the JRL Act allows, the possibilities for misgendering are limitless...

Who has responsibility for advising the appropriate gender in any given circumstance?

The problem with recognising subjective, fluid, imperfectly perceived, undefinable and essentially individual gender identities is obvious. Laws need to be defined, intelligible, clear and predictable.¹⁴⁰

2.3.22 The broad definition of gender identity and gender expression is consistent with international best practice. However, the suggestion in several submissions¹⁴¹ was that the *ADA* will be used vexatiously to take advantage of this breadth, citing international examples of ‘misgendering’ cases.¹⁴²

2.3.23 The Feminist Legal Centre (‘FLC’) also submitted that broad recognition of gender identity effectively discriminates against cisgender women, by denying them the rights that the Centre asserts should be exclusively available to people born with female sex characteristics. The premise of this position is that it is only ‘biological women’ who can understand the experiences of women that have led to the recognition of those rights.

2.3.24 The FLC argues that the law should not prevent women from asserting and defending their rights (and the exclusive nature of those rights) by speaking against gender identity or referring to people by their sex-based identity rather than their gender identity.

2.3.25 The FLC referenced the *Declaration of Women’s Sex-Based Rights* (the ‘Declaration’), launched in New York in 2019. In particular, the *Declaration* emphasises that states should:

¹⁴⁰ ACL submission to TLRI, *Legal Recognition of Sex and Gender* (Issues Paper 29, 2019) 1, 4, 6.

¹⁴¹ See submissions from ACL, FLC and one anonymous submission to TLRI, *Legal Recognition of Sex and Gender* (Issues Paper 29, 2019).

¹⁴² For example, a police investigation of tweets in which Caroline Farrow referred to the transgender daughter of a TV show host as her son when discussing the Girls Guides’ change of policy to accept transgender girls into the society (see ‘Surrey Police investigation over “misgendering” tweets’ *BBC News* (20 March 2019) <<https://www.bbc.com/news/uk-england-surrey-47638527>>).

- ensure that women have the right to ‘hold opinions without interference’ (*International Convention on Civil and Political Rights (ICCPR)* Article 19 (1)), and
- uphold women’s right to freedom of expression, including the ‘freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media’. (*ICCPR*, Article 19 (2)).

2.3.26 The *Declaration* asserts that these rights include the freedom to communicate ideas and opinions about ‘gender identity’ without being subject to harassment, prosecution or punishment.

2.3.27 The *Declaration* includes two further assertions that are not referenced to international conventions:

States should uphold the right of everyone to describe others on the basis of their sex rather than their ‘gender identity’, in all contexts. States should recognize that attempts by state agencies, public bodies and private organizations to compel individuals to use terms related to ‘gender identity’ rather than sex are a form of discrimination against women, and shall take measures to eliminate this form of discrimination.

States should prohibit any form of sanctioning, prosecution or punishment of persons who reject attempts to compel them to identify others on the basis of ‘gender identity’ rather than sex.

2.3.28 In response to this type of claim, Dede River’s submission states:

Trans people are not trying to prevent freedom of speech. In spite of claims by ‘free speech’ advocates, there aren’t cases of trans people having parents or others arrested for accidental misgendering...

Yet trans people daily face people preaching in the mall, and verbally attacking young trans people who walk by.¹⁴³

The TLRI’s view

2.3.29 The TLRI notes that the right to hold and express opinions is not unfettered and is balanced against the rights of groups with protected attributes.

2.3.30 ‘Sex’ has never been a protected attribute under the *ADA*. The term has always been conflated with gender. The recent amendments to the *ADA* introduce more nuanced definitions to extend protections on the basis of self-identified gender identity.

2.3.31 On concerns regarding the application of the *Sex Discrimination Act 1984* (Cth), the TLRI notes that Act relies on the ordinary meaning of ‘sex’, rather than a definition tied to a person’s ‘registered sex’ or gender. The TLRI considers it unlikely that the application of the *Sex Discrimination Act 1984* (Cth) will be affected by the amendments to the *BDM Act*.

2.3.32 An offence under s 17 of the *ADA* will only be made out where a person engages in conduct which ‘offends, humiliates, intimidates, insults or ridicules another person’ on the basis of a protected attribute (including gender identity) ‘in circumstances in which a reasonable person,

¹⁴³ Dede River Submission to TLRI, *Legal Recognition of Sex and Gender* (Issues Paper 29, 2019) 1.

having regard to all the circumstances, would have anticipated that the other person would be offended, humiliated, intimidated, insulted or ridiculed.’

2.3.33 Where misgendering is done accidentally and without a reasonable expectation or understanding that it would offend or humiliate someone, there will be no offence.

2.3.34 In contrast, an offence under s 19 of the *ADA* does not require any intent or reasonable expectation that offence will be caused. However, the threshold test in s 19 is much higher. The conduct must occur in a public place and must incite hatred, serious contempt, or severe ridicule for a person.

2.3.35 If a complaint is made to the Equal Opportunity Commissioner, the Commissioner is empowered to reject the complaint without further action if satisfied that the complaint is ‘trivial, vexatious, misconceived or lacking in substance’ or ‘does not relate to discrimination’ (s 64, *ADA*).

2.3.36 In the TLRI’s view, accidental misgendering is unlikely to satisfy the threshold for an offence against either s 17 or s 19. If a complaint is made, it is likely to be rejected under s 64.

2.3.37 Persistent or deliberate misgendering is another matter. Depending on the circumstances, such behaviour could be an offence under the *ADA* on the basis that it amounts to discrimination.

2.3.38 The TLRI has heard from people who made submissions¹⁴⁴ and those attending consultations that Tasmania’s trans and gender diverse communities continue to experience discrimination. The TLRI is satisfied that the *ADA*, as amended, reaches an appropriate balance between freedom of speech and freedom from discrimination.

Status of Children Act 1974

2.3.39 The *Status of Children Act 1974* (Tas) sets out to provide equal legal status to all children, regardless of whether they are born outside of marriage. It also sets out a number of presumptions by which the parenthood of children can be determined, unless evidence to rebut the presumption exists.

2.3.40 The court may make orders requiring testing to be undertaken to determine parentage of a child.

2.3.41 The *JRL Act* replaces references to a person’s ‘parents’ with a person’s ‘father, mother or parent’. Similar to amendments to the *Adoption Act 1988* (Tas), the amendment seeks to retain all options for parents to describe their parental roles.

Other legislation

2.3.42 The *JRL Act* also provides for minor amendments to the *Conveyancing and Law of Property Act 1884* (Tas), the *Civil Liability Act 2002* (Tas) and the *Criminal Code*.

¹⁴⁴ For example, see submissions from Equality Tasmania, TasCOSS, Commissioner for Children and Young People, Dede River, and two anonymous submissions to TLRI, *Legal Recognition of Sex and Gender* (Issues Paper 29, 2019).

2.3.43 As amendments to these Acts effected by the *JRL Act* are limited to minor changes in wording, generally replacing ‘husband’ and ‘wife’ with the gender-neutral term ‘spouse’, the operation of these laws will remain largely unchanged. For this reason, these laws are not examined in depth in this Final Report.

2.4 Consequences of changes to the *BDM Act*: identification documents

Question:

What, if any, administrative changes will be required to allow government agencies, notaries, or other officials to verify a person’s sex or gender identity if their birth certificate does not include sex or gender information?

2.4.1 The TLRI asked for feedback regarding how a person’s identity can be verified in the absence of sex or gender information on their birth certificate.

2.4.2 This section briefly addresses key concerns raised during the debate on the *JRL Act* (many of which were repeated in submissions to the TLRI) that removing sex information from birth certificates would have adverse consequences for a range of situations where identification documents are relied upon. These include:

- Applying for a passport
- Maintaining statistical records
- Historical research (including family histories)
- Probate applications, notaries and other legislative data collection.

2.4.3 The section concludes with a brief discussion about the process for verifying a person’s identification.

Applying for a passport

2.4.4 A concern repeatedly raised regarding the *JRL Act* during its passage was that Tasmanians would experience difficulty in obtaining an Australian passport if their birth certificate did not record their sex or gender.

2.4.5 In establishing the identity of a passport applicant, the Department of Foreign Affairs and Trade (‘DFAT’) ‘relies on the verified details contained in source identity documents, such as a birth certificate issued by an Australian Registry of Births, Deaths and Marriages (RBDM).’¹⁴⁵

2.4.6 In relation to the *JRL Act*, people were concerned that a birth certificate without sex recorded would not be sufficient to satisfy DFAT as to their identity.

2.4.7 The TLRI acknowledges that, without amendment to Federal policy, the *JRL Act* has imposed an additional documentary requirement on Tasmanian passport applicants whose birth

¹⁴⁵ Ibid s 43. Correspondence from DFAT to the TLRI. See also *Australian Passports Act 2005* (Cth) ss 8, 42(1).

certificate does not record gender. However, this is overcome by providing an approved statement (a ‘B-14’) or requesting a birth certificate with a gender marker.

2.4.8 DFAT has advised the TLRI that Australian passports comply with the standards set by the International Civil Aviation Organisation:¹⁴⁶

The International Civil Aviation Organization (ICAO) sets worldwide standards for passports. As specified in ICAO Document 9303: Machine Readable Travel Documents, Seventh Edition, Part 4, ‘Specifications for Machine Readable Passports’,¹⁴⁷ a sex field is mandatory in the Visual Inspection Zone (personal details page) of all machine-readable travel documents.

2.4.9 Notably, the standards do not specify that the sex field must be recorded as either female or male.

2.4.10 Consistent with the *Australian Government Guidelines on the Recognition of Sex and Gender*, DFAT uses the sex field in passports to record gender. In 2011, the Australian Passport Office within DFAT revised its policy to allow a person to obtain a passport identifying their affirmed gender as either M (male), F (female) or X (Indeterminate/ Intersex/ Unspecified).

2.4.11 The Passports Policy Office states:

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

2.4.12 To establish an applicant’s identity, DFAT considers it ‘essential that documentary evidence of a person’s sex/gender is submitted and verified for all people applying for their first Australian passport.’¹⁴⁸ For applicants seeking a passport identifying them by a gender that differs from the gender recorded in their birth certificate, DFAT currently accepts:

- a gender recognition certificate issued by the Gender Reassignment Board (WA); or
- a revised birth certificate showing the new sex issued by the Registry of Births, Deaths and Marriages; or
- a ‘recognised details certificate’, issued by a Registry of Births, Deaths and Marriages, which records new sex and current name;
- an Identity Acknowledgment Certificate issued by the South Australia Registrar; or
- a written statement completed by a medical practitioner or registered psychologist certifying that the person is
 - receiving, or has received, appropriate clinical treatment for transition to the gender identified in the passport application; or

¹⁴⁶ Correspondence from DFAT to the TLRI.

¹⁴⁷ Correspondence from DFAT to the TLRI.

¹⁴⁸ Correspondence from DFAT to the TLRI.

- unable to participate in a treatment regime, is transgender, and identifies as the gender identified in the passport application.¹⁴⁹

2.4.13 The Australian Passport Office website makes clear that ‘surgery is not a prerequisite for a passport to be issued in [the applicant’s] preferred sex’.¹⁵⁰ The Passports Policy Office also advised that DFAT does not require any details of clinical treatment to be provided.

2.4.14 The Australian Passport Office website also states:

Sex and gender diverse passport holders should be aware that while Australian travel documents are issued in accordance with international standards, those travelling on a passport showing ‘X’ in the sex field may encounter difficulties when crossing international borders due to their infrequent use. The Department of Foreign Affairs and Trade cannot guarantee that a passport showing ‘X’ in the sex field will be accepted for entry or transit by another country.¹⁵¹

2.4.15 The TLRI notes that issues in relation to difficulties experienced in overseas jurisdictions are outside the scope of this review. Further, those difficulties currently exist and are not affected by recent changes to Tasmanian laws.

The TLRI’s view

2.4.16 The TLRI is satisfied Tasmanians will still be able to apply for passports using birth certificates issued under the amended *BDM Act*.

Statistical records

2.4.17 A number of submissions¹⁵² raised questions about the effect of removing the requirement for sex to be recorded on birth certificates on the integrity of statistical records. For example, the ACL stated:

Any changes to ‘sex’ ‘gender identity’ or ‘gender expression’ recorded by Births Deaths and Marriages must be traceable to the biological sex as only the biological chromosomal data is scientifically verifiable. Sex is a vital characteristic. Gender identity and expression are not. To distort or falsify record data can have serious implications for the very reasons that such data is collected. To be of any value, data needs to be accurate.¹⁵³

2.4.18 In Australia, National Standards for the collection of population statistics rely upon information being provided to the Australian Bureau of Statistics (ABS) on a regular basis by each

¹⁴⁹ Australian Passport Office, *Sex and Gender Diverse Passport Applicants*, (Web Page) <<https://www.passports.gov.au/passports-explained/how-apply/eligibility-citizenship-and-identity/sex-and-gender-diverse-passport>>. Rule 27(c) of the *Australia Passports Declaration 2015* provides for fees to be waived for applications for a replacement passport following a change of gender. Encouraging passport holders to update details to reflect their affirmed gender was ‘intended to protect the integrity of the Australian passports system.’

¹⁵⁰ Ibid.

¹⁵¹ Ibid.

¹⁵² See submissions from the ACL, FLC and two anonymous submissions to TLRI, *Legal Recognition of Sex and Gender* (Issues Paper 29, 2019).

¹⁵³ ACL submission 3.

state and territory’s Registry of Births, Deaths, and Marriages. In its submission to SALRI’s review, *LGBTIQ Discrimination in Legislation*, the ABS stated:

This administrative data, along with the ABS’s 5-yearly Census of Population and Housing, are the basis of Australia’s population counts, including future estimates. Biological characteristics of the population are also required to accurately determine national Cause of Death statistics used to inform Australia’s death and disease prevention strategies, and funding for the health sector.¹⁵⁴

2.4.19 The ABS noted that the United Nation’s Statistical Division’s *Principles and Recommendations for a Vital Statistics System* (Revision 3, 2014) requires all births and deaths to be recorded by ‘sex’, rather than ‘gender identity’.¹⁵⁵

2.4.20 In February 2016, the ABS released a new Sex and Gender Identity Standard that provides the basis for the ABS and other organisations to collect data about sex and gender in surveys and administrative collections.

2.4.21 The Standard provides:

Determining whether to collect sex or gender information

Consistent with Australian Privacy Principles (*Privacy Act 1988*), sex and gender information should only be collected where it is necessary for, or directly related to, one or more of the agency’s functions or activities.

In general, both sex and gender should not be collected in a single collection instrument as information gained from either of these variables is sufficient for the majority of statistical purposes. The Australian Government Guidelines on the Recognition of Sex and Gender, November 2015¹⁵⁶ (Attorney-General’s Department), advocate the preferred Australian Government approach of collecting and using gender information, with sex only being collected where there is a legitimate need.

As a general rule, sex should only be collected if the study relies on knowing the biological characteristics of the target population. For example, the assessment and treatment of some medical conditions are dependent upon knowing the biological characteristics of people.

To assist data comparability, relevant international frameworks and guidelines also need to be considered when assessing whether sex or gender should be included in statistical collections. In addition, where statistics are based on multiple data sources (e.g. administrative data as well as survey data), consistency of the concept collected is preferable. ...

The production of ABS population estimates and projections are dependent on the measurement of biological sex obtained from the Census of Population and Housing and

¹⁵⁴ ABS, Additional Submission No 9, quoted in SALRI, *LGBTIQ Discrimination in Legislation: Legal Registration of Sex and Gender and Laws Relating to Sex and Gender Reassignment* (Report 5, 2016) 57.

¹⁵⁵ ABS correspondence to the TLRI.

¹⁵⁶ Attorney-General’s Department (Cth) (n 20).

the number of births and deaths, recorded by sex, regularly provided to the ABS by each State and Territory's Registrars of Births, Deaths, and Marriages.¹⁵⁷

2.4.22 Table 2 below (reproduced from the ABS Standard) sets out the classifications used by the ABS for sex and gender.

Table 2: The Sex and Gender Standard Classifications and Code Structures

Preferred Code	Alternate Code	Label	Definition
The Sex Standard Classification			
1	M	Male	Persons who have male or predominantly masculine biological characteristics, or male sex assigned at birth.
2	F	Female	Persons who have female or predominantly feminine biological characteristics, or female sex assigned at birth.
3	X	Other	Persons who have mixed or non-binary biological characteristics (if known), or a non-binary sex assigned at birth.
The Gender Standard Classification			
1	M	Male	Adults who identify themselves as men, and children who identify themselves as boys.
2	F	Female	Adults who identify themselves as women, and children who identify themselves as girls.
3	X	Other	Adults and children who identify as non-binary, gender diverse, or with descriptors other than man/boy or woman/girl.

2.4.23 The TLRI asked the ABS to confirm the process by which data on sex is acquired. Their response confirmed that information on sex recorded at birth is obtained from birth registration certificates submitted by the Registrar in a given state. The ABS does not rely on birth certificates to maintain records of sex at birth.¹⁵⁸

2.4.24 Under the amended *BDM Act*, a birth registration statement will continue to record gender as Male or Female only (ss 16(3), (5)).

2.4.25 Therefore, it was the view of the ABS that amendments to the information required or able to be recorded on birth certificates would not have a material impact on the birth statistics gathered by the ABS or the process by which those statistics are gathered.

2.4.26 The TLRI also notes that the ABS statistics recognise a non-binary option. Therefore, any future decision by the Tasmanian Government to introduce a third category of sex (for example, Unspecified) on the birth registration notice would also be consistent with ABS data collection policies.

¹⁵⁷ ABS, *Standard for Sex and Gender Variables, 2016* (Catalogue No 1200.0.55.012, 2 February 2016) <<http://www.abs.gov.au/ausstats/abs@.nsf/Lookup/1200.0.55.012main+features12016>>.

¹⁵⁸ The difference between birth registration statements and birth certificates is discussed at [2.2.42]–[2.2.45].

2.4.27 Much of the relevant demographic data is gathered through the Census. The ABS review of the 2016 census collection states:

Self-reported sex (or, in many cases, gender) is used for a range of purposes including population projections, estimates of life expectancy, family structure and gender comparisons.¹⁵⁹

2.4.28 In 2016, the ABS included for the first time in the ‘Sex’ question response options other than male or female, via a special online form with an ‘Other’ open text option. The ABS noted:

While the Census topic is Sex, the Census question does not specifically mention sex or gender. Keeping a clear distinction between the concepts of sex and gender was not possible for this Census collection. Consequently, the descriptor set includes mixed sex and gender categories.

A broad array of descriptions was provided in the written responses. Some were full of information allowing categories to be constructed. Others provided enough information to be included in a population with some characteristics in common, but not enough to clarify whether for sex or gender.

It was not possible, therefore, to assign these to a clear sex or gender category.¹⁶⁰

2.4.29 Despite the conflation of sex and gender, the ABS concluded:

The 2016 Census was an important step on a journey to collect Australian statistics on sex and gender diversity. The ABS will continue to improve future collection and processing of this information based on this experience.¹⁶¹

2.4.30 Statistics New Zealand has also allowed a ‘gender diverse’ category for demographic information since 2015.

2.4.31 There is increasing acknowledgement that gender information is more pertinent to planning, and ‘sex’ is often used as an ‘inexact proxy’ for gender.¹⁶² In many instances, gathering sex data rather than gender data may result in poor policy development as it ignores the existence of trans, gender diverse and people with intersex variations of sex characteristics.

2.4.32 Equality Tasmania emphasised the importance of consulting trans, gender diverse and intersex Tasmanians regarding data collection practices, noting,

sometimes data collection can render sex and gender diverse Tasmanians invisible and reinforce stigma and discrimination against them.

2.4.33 Consistent with the ABS *Standard for Sex and Gender Variables*,¹⁶³ a number of submissions noted that statistical information regarding sex and gender should only be collected when necessary.¹⁶⁴

¹⁵⁹ ABS (n 12).

¹⁶⁰ Ibid.

¹⁶¹ Ibid.

¹⁶² Equality Tasmania Submission to TLRI, *Legal Recognition of Sex and Gender* (Issues Paper 29, 2019) 3.

¹⁶³ ABS (n 157).

¹⁶⁴ See submissions from the APS, Equality Australia and Equality Tasmania to TLRI, *Legal Recognition of Sex and Gender* (Issues Paper 29, 2019).

2.4.34 However, some submissions expressed concern that the conflation of sex and gender undermines women's rights and threatens the monitoring (and, therefore, achievement) of progress towards gender equality.¹⁶⁵ For example, the FLC referred to this statement in the UN Women Gender Equality Glossary:

Sex-disaggregated data is data that is cross-classified by sex, presenting information separately for men and women, boys and girls. Sex-disaggregated data reflect roles, real situations, general conditions of women and men, girls and boys in every aspect of society. ... When data is not disaggregated by sex, it is more difficult to identify real and potential inequalities.

2.4.35 Equality Australia also noted:

There may be important beneficial reasons for collecting sex/gender information. For example, to measure the progress of equality for women, and for statistical purposes and research.¹⁶⁶

2.4.36 The APS supported the view that consideration should be given to whether sex or gender information is required. The Society advocated the use of a two-step process in situations where it is deemed necessary to collect statistical information about sex and gender. The 'two-step' model comprises two questions:

(1) What is your current gender identity? (A gender identity list should be provided – male, female, non-binary and a free-text 'different identity' should be an absolute minimum data set) and;

(2) What sex/gender were you assigned at birth? (Male or Female).¹⁶⁷

2.4.37 The FLC's report, *Impacts of Trans Activism on the Human Rights of Women and Girls*,¹⁶⁸ expressed concern that crime statistics will be skewed as a result of an increase in males registering their gender as female. The report argues that, statistically, men are more likely to commit violence against another person. If a violent person who was assigned male at birth but now identifies as female under the amended *BDM Act* commits a further violent act, the offence will be recoded as having been committed by a female. The FLC argued that this could skew the statistics regarding perpetrators of violence and undermine programs directed at male violence.

2.4.38 At a population level, transwomen are more likely to be victims of violence than perpetrators. The *BDM Act* may allow more transwomen to be formally recognised as women and violence against them recorded as being perpetrated against a woman.

The TLRI's view

2.4.39 The TLRI is satisfied that the changes enacted by the *JRL Act* will not undermine the collection of rigorous statistical or population data. The TLRI considers that data relating to equality indicators will continue to be available.

¹⁶⁵ See submissions from Women Speak Tasmania, FLC and two anonymous submissions to TLRI, *Legal Recognition of Sex and Gender* (Issues Paper 29, 2019).

¹⁶⁶ Equality Australia Submission to TLRI, *Legal Recognition of Sex and Gender* (Issues Paper 29, 2019) 4.

¹⁶⁷ APS Submission to TLRI, *Legal Recognition of Sex and Gender* (Issues Paper 29, 2019) 8.

¹⁶⁸ FLC Submission to TLRI, *Legal Recognition of Sex and Gender* (Issues Paper 29, 2019) Attachment 1.

2.4.40 The TLRI is satisfied that criminal records will continue to be rigorously maintained and inform crime prevention and rehabilitation programs.

2.4.41 The TLRI notes that expanding the categories of gender for which statistics are recorded could produce data that more accurately reflects the population than maintenance of binary categories.

2.4.42 Obstetric data records where a person with a gender other than female becomes pregnant are discussed in detail in [2.6.77]–[2.6.80].

Historical records

2.4.43 Some concerns were also expressed about the removal of the history of a person’s registered sex, gender or name on the basis that it may compromise police investigations by making a person whose sex has changed since a previous conviction, or information about their past convictions, more difficult to find.¹⁶⁹ Women Speak Tasmania stated:

Government agencies, notaries and other officials may also require access to historical sex or gender information for an individual.

2.4.44 There has also been concern expressed that removal of the historic record of sex may make it more difficult for adopted children seeking information about their biological parents to find a parent whose sex has been changed.

2.4.45 The basis for these concerns appears to be that removing the record of historical changes from the birth certificate effectively erases a person’s history.

2.4.46 A provision explicitly requiring historical records to be maintained separately from the Register (JRL Bill s 28K) was removed before the *JRL Act* was passed. However, the TLRI understands that it is the practice of the Registry of Births, Deaths and Marriages that changes to any recorded data do not result in the deletion of the previous record. Historical records are retained in the Registry database but will not be released or recorded unless requested.

2.4.47 Section 50 of the *BDM Act* also allows the Registrar to maintain separate records of any relevant data at the initiative of the Registrar, or at the request of the applicant. This provision could be used to maintain historical data, subject to privacy provisions limiting access to prescribed agencies (such as the police, the Australian Security Intelligence Organisation or the Department of Social Security).¹⁷⁰

¹⁶⁹ Submissions from Women Speak Tasmania, and the FLC to TLRI, *Legal Recognition of Sex and Gender* (Issues Paper 29, 2019).

¹⁷⁰ The Registrar has a responsibility to ‘as far as practicable, protect the persons to whom the entries in the Register relate from unjustified intrusion on their privacy’ (*BDM Act* ss 43(3), 45). The Registrar is required to develop written policies about access to information contained in the Register (s 47). The current policy, which was updated to reflect changes to the *BDM Act*, states: ‘The more sensitive the information on the records, the greater the restriction on access. Access to birth certificates is generally only allowed to the subject or their immediate family.’

2.4.48 Further, the *BDM Act* also allows an applicant for a birth certificate to request that the certificate include a notation of any previous registered sex, registered gender or registered name of the applicant (s 46).

2.4.49 Previously, a child of a person who had registered a change of sex could apply for an old birth certificate showing the parent's sex before the registered change of sex (s 28E).¹⁷¹ Under the amended *BDM Act*, the Registrar may provide a copy of a birth certificate including details of sex and gender or previous names to a child of the person to whom the certificate relates, or to a person who is 'a member of a class of prescribed persons'. However, the Registrar may only disclose the information if satisfied that:

- there is a valid reason to grant access to the information; and
- the person to whom the birth certificate relates is unable to consent to the disclosure of the information due to death or incapacity; and
- there are unlikely to be negative consequences to the person to whom the birth certificate relates if the information is disclosed (s 46(3)(d)).

Other records

2.4.50 The *Probate Rules 2017* (Tas) require a deceased person's birth certificate to be provided in an application for probate in some circumstances (r 44) as a form of identity confirmation. There is nothing to indicate that changes to the information recorded on birth certificates would have any impact on this requirement. That is, the rules mandate that a birth certificate be presented but do not dictate the information that must be included on the certificate.

2.4.51 Notaries may also require birth certificates to be provided in the course of verifying someone's identity. For example, a notary may be required to verify material for a Tasmanian seeking to comply with identification requirements in other jurisdictions (such as to support an application for an international job or enrolment at a foreign university). The requirements of those jurisdictions may mean that they will not accept a birth certificate without a sex or gender marker. Advice from one notary was that they may recommend to clients in that situation to apply for a birth certificate showing a gender marker or liaise with the other party about other options to verify identity.¹⁷²

2.4.52 A number of Regulations also specify that information regarding sex be gathered and maintained. These include:

- *Public Sector Superannuation Reform Regulations 2017* – requires notice of the sex of all new contributors to the superannuation fund to be given to the Commissioner;
- *State Service Regulations* – requires a record of the sex of all employees to be maintained;
- *Gas (Safety) Regulations 2014* – requires a record of the sex of any person injured in an incident.

¹⁷¹ The *BDM Act* s 28E, also allows 'prescribed persons' to apply for old birth certificates, but no other category of person has been prescribed for the purposes of that section.

¹⁷² Personal communication – confidential.

2.4.53 In each of these examples, s 28D of the *JRL Act* would amend the requirement to require details of gender to be recorded, rather than sex. While the purpose of the data collection is not explicit in the regulations listed, it appears that collecting gender records would not compromise the data or be inconsistent with the purposes for which the records are kept.

2.4.54 However, the TLRI also questions whether information regarding sex and/or gender is necessary under those regulations.

2.4.55 The TLRI understands that a whole-of-government implementation steering committee has been established to review government policies and practices to ensure consistency in approaches to the collection and use of sex or gender information. The steering committee will consider whether it is necessary to collect sex and gender information at all and, where necessary, to ensure that a person's gender can be verified solely by way of self-declaration and is not limited to identification as male or female.¹⁷³

2.4.56 A government LGBTI Reference Group is also working to assess and monitor implementation.

The TLRI's view

2.4.57 The TLRI accepts that sex and gender data remains important for a range of planning, monitoring and enforcement activities. It is not convinced that this data needs to be binary and limited to male and female sex and gender. In fact, such a limitation can lead to superficial and inaccurate data and understandings based on that data.

2.4.58 Given that sex and gender data that will continue to be collected and maintained by the Registrar, and opportunities for self-reporting of gender data, the TLRI is also satisfied that changes to the *BDM Act* will not compromise statistical data collection.

2.4.59 The TLRI acknowledges the work being done by several government committees to implement the *JRL Act* and review government policies and practices regarding information collection and use.

Verification of gender identity

2.4.60 During debate on the *JRL Act*, concerns were raised that removing the requirement for medical intervention before a change of sex can be registered could lead to fraudulent behaviour. It was argued that this could manifest in two main ways:

- A person who has not undergone reassignment surgery could be registered as one gender, while still presenting physically as a person of a different gender.
- Without the requirement for significant or irreversible medical intervention, a person could apply strategically for a number of changes of gender over time. For example, a person seeking enrolment to a gender-specific organisation could register a change of gender to

¹⁷³ Personal Communication with Department of Justice, Department of Health LGBTI Reference Group coordinator; and TasCOSS and Transforming Tasmania submissions to TLRI, *Legal Recognition of Sex and Gender* (Issues Paper 29, 2019).

secure the enrolment, and subsequently register a change of gender to revert to their previous registered gender.

2.4.61 Potential implications of the new laws for gender specific spaces, services and programs are discussed in more detail in section 2.5.

2.4.62 The amended *BDM Act* includes the following measures to protect the rigour of the process for registering a change of gender:

- A gender declaration is a statutory declaration confirming that a person identifies and lives, or intends to live, as a person of the registered gender. The declaration is sworn or affirmed by the applicant. It is a crime to knowingly make a false statement in a Statutory Declaration (*Criminal Code Act 1924* s 113).
- It is an offence to make a false or misleading representation in an application under the *BDM Act* (s 54).
- It is also an offence, punishable by up to two years in prison, for a person to use a birth certificate (or extract) showing a previous sex, gender or name, with the intention to deceive (s 54(2)).
- No application to register a change of gender can be made within 12 months of registering a change of gender (s 28A(7)).
- The Registrar can require an application made by or on behalf of a child to be supported by evidence that the child has received counselling regarding the consequences of registering a change of gender (s 28C).
- The Registrar retains a general power to refuse to accept an application to register a change of gender, and to refuse frivolous and vexatious applications.¹⁷⁴

2.4.63 The application form for a change of gender requires reasons to be given for the request to register a change of gender (see Appendix 4). In practice, a dedicated Registry officer reviews all applications and conducts an interview with applicants. The Registrar will consider any concerns identified regarding the reasons or information provided when determining the application.¹⁷⁵

2.4.64 The *Births, Deaths and Marriages Registration Amendment Act 2019* (Vic) also adopts a self-identification model, with discretion resting with the Registrar regarding refusal of any application. However, the Victorian legislation also requires an applicant for a change of sex¹⁷⁶ to submit a supporting sworn statement from an adult who has known the applicant for at least 12 months saying that they believe the application has been made in good faith.

2.4.65 In South Australia, the Registrar has discretion to limit the number of applications to register a change of gender that can be received.¹⁷⁷ The current policy notes that applications made

¹⁷⁴ A person whose application has been refused can apply to the Magistrates Court for review of the decision (*BDM Act* s 53).

¹⁷⁵ Personal communication, Registrar, 12 December 2019.

¹⁷⁶ The Victorian legislation does not distinguish between ‘sex’ and ‘gender’.

¹⁷⁷ *Births, Deaths and Marriages Registration Act 1996* (SA) s 29S.

less than 12 months since a previous application, or where an applicant has made more than three applications throughout their lifetime, may be rejected.¹⁷⁸

2.4.66 The WALRC recommended that a similar limit be adopted in Western Australia.¹⁷⁹ In contrast, the Northern Territory review recommended against setting a limit:

Given the seriousness and life changing nature of a person’s decision to apply to change their sex or gender identity, the fact that applications must be accompanied by proof of ‘appropriate clinical treatment’, the fees attached to the application process, and the size of the Territory’s population, the Committee considers that the limited potential for frivolous applications does not justify the [power to limit the number of applications].¹⁸⁰

2.4.67 Applicants in Tasmania are also limited to one change of gender in a 12-month period.¹⁸¹

Views expressed in submissions

2.4.68 The FLC and others gave a range of international examples of ‘men who claim a female “gender identity”’ asserting their rights as women in ‘law, policies and practice.’ Examples included a trans woman being transferred to a female prison and assaulting a fellow prisoner, and a man arrested for sexually assaulting several women in a women’s shelter in Canada after he gained access to the shelter and its shower facilities as a woman.¹⁸²

2.4.69 In most instances, offensive behaviour described in the submissions was also criminal. It is not clear that the crimes were facilitated by self-identification laws or that any administrative process would have prevented the behaviour.

2.4.70 One anonymous submission that raised concerns also asked:

Where are the boundaries to protect women’s safe spaces? What would stop a biological man from entering a women’s change room at the Hobart swimming pool and pretending that he is a transgender woman even if he has not completed a gender change document?

2.4.71 This highlights the issue that the opportunity for a person to fraudulently assume a gender identity to commit an assault already exists. Any assault would be a crime and will continue to be a crime following passage of the *JRL Act*.

¹⁷⁸ Consumer and Business Services, South Australian Government, *Record a change of sex or gender identity – application* <https://www.sa.gov.au/__data/assets/pdf_file/0010/301213/2019_CBS_0018_ChangeOfSexOrGenderForm_V2.pdf>. If the Registrar refuses an application, an applicant can apply to a Magistrate for approval (s 29S(3)).

¹⁷⁹ WALRC Report (n 83) 72–73.

¹⁸⁰ Social Policy Scrutiny Committee, Northern Territory Legislative Assembly, *Inquiry into the Births, Deaths and Marriages Registration and Other Legislation Amendment Bill 2018*, (November 2018) 26 <https://parliament.nt.gov.au/__data/assets/pdf_file/0018/600327/70-2018-Signed-Report-Inquiry-into-the-Births,-Deaths-and-Marriages-Registration-Amendment-Bill-2018.pdf> (‘NT Report’).

¹⁸¹ Amended *BDM Act* s 28A(7).

¹⁸² Amanda Prestigiacomo, ‘5 Times “Transgender” Men Abused Women and Children in Bathrooms’, *The Daily Wire* (online), 22 April 2016, <<https://www.dailywire.com/news/5-times-transgender-men-abused-women-and-children-amanda-prestigiacomo>>.

2.4.72 The APS stated:

The APS endorses a position whereby individuals are seen as capable of stating their own sex or gender, and does not endorse an approach that would cast undue suspicion on an individual's motives for stating a particular sex or gender. There is considerable variation in human physiology, and the presumption that a person of a particular sex or gender may gain unfair advantage in accessing a location or event that others deem not appropriate is ill-founded. Further, there is now evidence that restricting the use of facilities according to assumptions about sex or gender can have significant mental and physical health costs for sex and gender diverse people. Conversely, there is no peer-reviewed evidence to suggest that individuals claim to be a particular sex or gender in order to access locations or events from which they may otherwise be prohibited.¹⁸³

2.4.73 Equality Australia also noted that the risk of fraudulent applications is overstated:

The concerns raised about potentially fraudulent or malicious purposes are misguided and not borne out by evidence in other jurisdictions. In other Australian jurisdictions where fairer birth certificate laws have been in place for a number of years, including the Australian Capital Territory and South Australia, there is no evidence of increased risk of misuse.¹⁸⁴

The TLRI's view

2.4.74 The self-identification approach promoted by the *JRL Act* is consistent with human rights best practice outlined in the *Yogyakarta Principles*, and the approaches in a number of international jurisdictions.¹⁸⁵

2.4.75 The TLRI considers that concerns regarding 'misuse' of the gender registration procedures are misplaced. The TLRI is satisfied that applications to register a change of gender are not made lightly. This is supported by historic evidence from jurisdictions which already provide for self-identification and submissions made to the Inquiry.

2.4.76 The TLRI is not aware of evidence of higher levels of crime perpetrated by transwomen or non-binary persons, and notes that changes to the *BDM Act* do not excuse or provide mitigating circumstances for assault. Indeed, misuse of a birth certificate to gain access to a gender-specific space would be an offence and could constitute an aggravating factor for sentencing in relation to any assault committed.

2.4.77 The TLRI is satisfied that the risk of fraudulent misuse of the gender registration process is minimal and that there are sufficient safeguards in place to protect against fraudulent applications. Accordingly, taking into account the submissions received, the experience reported by the Registrar, scholarly commentary and approaches adopted elsewhere, the TLRI is of the view that there should be minimal requirements for a person to 'verify' that their gender is what they say that it is; self-identification, with the caveats regarding fraudulent behaviour, is sufficient.

¹⁸³ APS Submission to TLRI, *Legal Recognition of Sex and Gender* (Issues Paper 29, 2019) 9.

¹⁸⁴ Equality Australia Submission to TLRI, *Legal Recognition of Sex and Gender* (Issues Paper 29, 2019) 5.

¹⁸⁵ The laws applying in these, and other, jurisdictions relating to self-identification of gender are discussed in Part 6.3 and Appendix 5 of the WALRC Report (n 83).

2.4.78 The amended *BDM Act* is consistent with that approach and the Registrar, the Government’s implementation steering committee and LGBTI Reference Group are working to ensure policies and practices are consistent with that outcome.

Assessment of applications to change gender

2.4.79 The amended *BDM Act* requires the Registrar to determine applications for change of gender. The Registrar has broad discretion to make the following decisions:

- Whether to require any documents or information other than the gender declaration (s 28A, *BDM Act*).
The Registrar cannot request a medical certificate or medical document relating to sex, sexual characteristics or gender of the applicant.
- Whether the nominated gender descriptor is acceptable (s 3A, *BDM Act*).
The Registrar may refuse to register a gender if the Registrar is not satisfied that the word or phrase to be used ‘indicates the person’s perception of themselves as being neither entirely male nor entirely female.’ (s 3A(3), *BDM Act*).
- Whether the application is valid, including whether the statements made on behalf of a child confirm that the application accords with the will and preference of the child (s 28C(2)(a), *BDM Act*).
- Whether the person is able to understand the meaning and implications of the registration (s 28C(2)(b), *BDM Act*).
- Whether to require the applicant to provide evidence of counselling (s 28C(4), *BDM Act*).

2.4.80 If the Registrar refuses an application, the Registrar must provide reasons for refusal. The applicant can appeal to the Magistrates Court to challenge the Registrar’s decision.

2.4.81 For applications to register a change of gender for a child under 16 years of age, the application form provides for the child to sign a declaration confirming their intent to live as a person of the relevant gender wherever possible (see Appendix 4). Reasons for the application to change gender are also to be provided on the form.

2.4.82 The Registrar advised that applications made to April 2020 were generally supported by sufficient supporting evidence to satisfy the Registrar as to the child’s understanding of the application and their consent to the requested change.¹⁸⁶

2.4.83 The TLRI sought feedback on whether there should be any formal instrument to guide the exercise of the Registrar’s discretion.

Question:

Should guidelines be developed to guide the exercise of the Registrar’s discretion to refuse an application to register a change of gender?

¹⁸⁶ Personal communication, Registrar, 12 December 2019.

Views expressed in submissions

2.4.84 There was strong support in submissions for the development of guidelines.¹⁸⁷

2.4.85 Jemima Willis said:

Guidelines should definitely be developed. Refusing to allow an applicant to register a change of gender is refusing them their right to their identity. Of course, refusal of an application may be necessary in certain situations, such as if the applicant was suspected of fraudulent behaviour. Guidelines regarding the Registrar’s discretion to refuse applications are necessary to provide:

- safety to the general population; and
- identity expression to the individual.

2.4.86 Women Speak Tasmania recommended that guidelines be developed to guide the exercise of the Registrar’s discretion to either accept or refuse to register a change of gender. Noting the range of factors that the Registrar will consider, Women Speak Tasmania recommended detailed guidance particularly with respect to applications where the ‘will and preference’ of children is to be determined:

It seems the Registrar may require a new skill set, preferably a degree in developmental psychology, or at the very least a unit of staff with this qualification, in order to fulfil their obligations under the amendments to the [*BDM Act*]. Plus a very stringent set of guidelines to direct what is essentially an inexact process — reliable determination of the ‘will and preference’ of a child, and/or their competence to express a ‘will and preference’.

2.4.87 Other submissions supported the introduction of broad, rather than prescriptive, guidelines.¹⁸⁸ Dede River cautioned that prescriptive guidance could make the Registrar the arbiter of a person’s gender, an approach that was inconsistent with self-identification.

Much of the distrust of permission by the medical profession is based on the ‘gatekeeping’ and the imposition of requirements to meet conventional gender norms in order to have recognition. It would be unfortunate if the Registrar began to reprise that role.¹⁸⁹

2.4.88 Equality Australia also cautioned that any guidelines must ‘not depart from the Tasmanian Parliament’s intention that self-declaration underpins the process for registering a change in legal gender’:

The Registrar must not be invited to use their discretion to introduce additional barriers or ‘gate-keeping’ which the Parliament has expressly rejected (such as requirements for medical intervention, or proof of a person’s gender identity based on their choice of dress or appearance).

Any guidelines may, however, be used as an educative tool to prevent the adoption of harmful stereotypes or misconceived ideas about a person’s gender identity or expression.

¹⁸⁷ See submissions from Equality Australia, Transforming Tasmania, Dede River, Jemima Willis, CLC Tasmania and two anonymous submissions to TLRI, *Legal Recognition of Sex and Gender* (Issues Paper 29, 2019).

¹⁸⁸ For example, Equality Australia Submission to TLRI, *Legal Recognition of Sex and Gender* (Issues Paper 29, 2019) 5–6 and Dede River Submission to TLRI, *Legal Recognition of Sex and Gender* (Issues Paper 29, 2019) 6.

¹⁸⁹ Dede River Submission to TLRI, *Legal Recognition of Sex and Gender* (Issues Paper 29, 2019) 6.

These guidelines may usefully assist the Registrar to solely consider objective factors in considering whether an application may be rejected (e.g. incomplete gender declarations, applications not submitted in the approved form, or made within 12 months of previously registering a change of legal gender).

2.4.89 Women Speak Tasmania recommended that guidelines address what constitutes an acceptable gender descriptor, with the guidelines regularly reviewed and updated to reflect changing terminology.

2.4.90 Transforming Tasmania agreed in part:

We also believe that written guidelines, updated regularly, which contains a current list of gender terms, would be appropriate and useful for Registry staff.

2.4.91 Transforming Tasmania also recommended that the Registrar provide additional support to applicants:

We also recommend that, when requesting further information or evidence or rejecting an application to update gender details, the Registrar should:

- provide details for LGBTIQ support and counselling services
- offer referral to a transgender and gender diverse advocacy service
- clearly outline the next steps and/or process for appeals.

These measures will help to reduce the risk of harm and reduce barriers to access for vulnerable applicants.¹⁹⁰

2.4.92 Submissions from Transforming Tasmania and TasCOSS proposed that the Registrar could consult with Working It Out regarding complex applications, and that Working it Out could provide training to registry staff.¹⁹¹ The TLRI understands that the Registrar and Registry staff received training prior to the commencement of the *JRL Act* and that the Registry continues to liaise with the LGBTI Reference Group regarding implementation of the changes.¹⁹²

The TLRI's view

2.4.93 The TLRI commends the Registrar for engaging Working It Out to deliver staff training regarding inclusive language and trans, intersex and gender diverse experiences.

2.4.94 The TLRI recommends that the Registrar develop and publish guidelines addressing:

- (1) what the Registrar should and should not consider in assessing applications and exercising their discretion to refuse applications;
- (2) what additional information can and cannot be requested;
- (3) guidance as to relevant factors in satisfying themselves regarding a child's 'will and preference', including the child's capacity to understand;

¹⁹⁰ Transforming Tasmania Submission to TLRI, *Legal Recognition of Sex and Gender* (Issues Paper 29, 2019) 1.

¹⁹¹ Ibid 2; TasCOSS Submission to TLRI, *Legal Recognition of Sex and Gender* (Issues Paper 29, 2019) 6. Personal Communication with Department of Justice spokesperson regarding current arrangements.

¹⁹² Personal communication, Registrar, 12 December 2019.

- (4) the circumstances in which counselling should be requested, and the circumstances in which counselling is considered unnecessary;
- (5) a regularly updated list of gender descriptors, with a notation that the list is a guide rather than an exhaustive list; and
- (6) information and referral details that should be provided to applicants when the Registrar requests further information or evidence or rejects an application.

2.4.95 The TLRI recommends that these guidelines be developed and regularly reviewed in consultation with the trans, gender diverse and intersex communities, the Commissioner for Children and Young People and registries in comparable jurisdictions.

Recommendation 4

The TLRI recommends that the Registrar of Births, Deaths and Marriages develop and publish guidelines addressing:

- what the Registrar should, and should not, consider in assessing and exercising their discretion to refuse applications;
- what additional information can and cannot be requested;
- guidance as to relevant factors to be considered in satisfying themselves regarding a child's 'will and preference', including the child's capacity to understand;
- the circumstances in which counselling should be requested, and the circumstances in which counselling is considered unnecessary;
- a regularly updated list of gender descriptors, with a notation that the list is a guide rather than an exhaustive list; and
- information and referral details that should be provided to applicants when the Registrar requests further information or evidence or rejects an application.

The TLRI recommends that these guidelines be developed in consultation with the trans, gender diverse and intersex communities, the Commissioner for Children and Young People, and registries in comparable jurisdictions.

The TLRI recommends that these guidelines be subject to regular review to ensure they are responsive to developments in the law, society and needs of the relevant communities

2.5 Consequences of changes to the *BDM Act*: gender-specific programs

2.5.1 A further issue that was raised during the parliamentary debate, consultation on the Issues Paper and in submissions to the TLRI is the impact of legal recognition of gender diversity on gender-specific spaces, services and programs.

2.5.2 In each of the Australian jurisdictions that have considered issues of legal recognition of sex and gender diversity, similar concerns have been raised by stakeholders that affirmative action initiatives (such as scholarships or internships targeted at specific genders) or the security provided

by single-gender spaces such as women’s shelters, health services and women’s prisons would be compromised by allowing self-identification.¹⁹³

2.5.3 These concerns were raised during the WALRC’s Australia’s review of the *Gender Reassignment Act 2000* (WA). The Commission found:

The Commission was not presented with evidence which established that trans women impose an inherent risk to others in these spaces. The Commission also notes documented evidence of violence being perpetrated against trans and gender diverse people.¹⁹⁴

2.5.4 During debate on the JRL Bill, concerns were raised regarding the impact that recognising a change of gender without surgery would have on access to single-gender facilities and programs.¹⁹⁵

2.5.5 Several submissions to the TLRI were specifically concerned with sports clubs, while others were concerned with service provision and programs.¹⁹⁶ Principally, those concerns related to access to women’s spaces and services by people who retain some male sex characteristics.

2.5.6 The TLRI considers that balancing the interests outlined in various submissions while supporting the integration of transwomen into women’s sporting codes, women’s prisons and women’s shelters should be a key goal of policy measures operating in Tasmania.

2.5.7 The TLRI sought feedback from Tasmanian organisations who have implemented policies, or people who have been subject to any policies, identifying how access to gender-specific spaces is governed.

Question:

What policies are currently in place relating to access by sex and gender diverse people to gender-based locations or events? In your experience, what has been the outcome of implementing those policies?

Views expressed in submissions

2.5.8 While many respondents stated that policies were needed to manage access to single-gender facilities and programs,¹⁹⁷ few examples were provided.

2.5.9 Jemima Willis noted:

¹⁹³ See, for example, Part 7.7 of the WALRC Report (n 83) 74–75.

¹⁹⁴ Ibid 75.

¹⁹⁵ See submissions from TasCOSS, Equality Australia, Transforming Tasmania, Jemima Willis, Women Speak Tasmania, Dede River and one anonymous submission to TLRI, *Legal Recognition of Sex and Gender* (Issues Paper 29, 2019).

¹⁹⁶ See submissions from ACL, TC4K, Jemima Willis, Women Speak Tasmania and two anonymous submissions to TLRI, *Legal Recognition of Sex and Gender* (Issues Paper 29, 2019).

¹⁹⁷ Submissions from TasCOSS, Equality Australia, Transforming Tasmania, Jemima Willis, Women Speak Tasmania and Dede River to TLRI, *Legal Recognition of Sex and Gender* (Issues Paper 29, 2019).

Few agencies or companies have policies regarding sex and gender diverse people. In my experience, only a small minority are knowledgeable enough on the topic to consider the effects of these policies.¹⁹⁸

2.5.10 Several respondents noted that ‘transgender inclusive policies’ introduced at single sex organisations have been problematic, with one submission arguing that such policies created ‘a lot of confusion and fear and disharmony.’¹⁹⁹ However, the TLRI was not provided with any local examples of this occurring.

2.5.11 In contrast, Equality Australia stated that supportive access policies have ‘resulted in more inclusive and welcoming services for trans and gender diverse people, without any negative consequences.’²⁰⁰

Women’s services

2.5.12 The ACL²⁰¹ claimed the changes to the *BDM Act* ‘effectively abolish “women only” spaces’:

There is a problem when non-surgically transitioned persons wish to be recognised as their chosen gender which differs from their biological sex. This is a problem for women and endangers the physical and emotional safety of biological women to access safe spaces: change rooms; bathrooms; women’s refuges; even prisons. Women escaping domestic violence in a women’s refuge may be further traumatised and placed at risk when accommodated with non-surgically transitioned persons identifying as women.

2.5.13 The FLC and one anonymous submission provided a number of international examples of assault allegations in gender neutral and women-only environments (discussed at [2.4.68]–[2.4.74]). The FLC asserted that the changes to the *BDM Act* gave licence to

voyeurs, exhibitionists, rapists and pedophiles that actively use these changes in the law as an opportunity to engage in sexual misconduct targeting women and children.

2.5.14 The TLRI acknowledges that these concerns have been raised. However, there is no evidence that these fears are warranted in the Tasmanian context.

2.5.15 The APS warned against any approach that would ‘cast undue suspicion on an individual’s motives for stating a particular sex or gender’:

[T]he presumption that a person of a particular sex or gender may gain unfair advantage in accessing a location or event that others deem not appropriate is ill-founded. Further, there is now evidence that restricting the use of facilities according to assumptions about sex or

¹⁹⁸ Jemima Willis Submission to TLRI, *Legal Recognition of Sex and Gender* (Issues Paper 29, 2019) response to Question 4.

¹⁹⁹ Submissions from Joanna Pinkiewicz, Women Speak Tasmania and one anonymous submission to TLRI, *Legal Recognition of Sex and Gender* (Issues Paper 29, 2019).

²⁰⁰ Equality Australia, Submission to TLRI, *Legal Recognition of Sex and Gender* (Issues Paper 29, 2019) 9.

²⁰¹ ACL, Submission to TLRI, *Legal Recognition of Sex and Gender* (Issues Paper 29, 2019) 9. Similar sentiments were expressed in submissions from Women Speak Tasmania, TC4K, FLC, Joanna Pinkiewicz, and one anonymous submission to TLRI, *Legal Recognition of Sex and Gender* (Issues Paper 29, 2019).

gender can have significant mental and physical health costs for sex and gender diverse people.

Conversely, there is no peer-reviewed evidence to suggest that individuals claim to be a particular sex or gender in order to access locations or events from which they may otherwise be prohibited.²⁰²

2.5.16 Transforming Tasmania noted that sex or gender-specific services and venues, including Hobart Women’s Shelter and Women’s Health Tasmania, have had policies in place and these organisations and their clients are comfortable with their approaches.²⁰³

2.5.17 TasCOSS also reported that TasCOSS member organisations offering sex- and gender-specific services have had access policies in place for some time that are working well.²⁰⁴

2.5.18 Women’s Health Tasmania did not outline their specific policies but noted:

At WHT we understand that gender is a lived experience and intensely personal. Gender is not determined by biology. We recognise the diversity of women and the way they experience gender. We work with cisgender women, transgender women and women who have intersex variations.²⁰⁵

2.5.19 Women’s Legal Service confirmed that it has had a simple policy in place to offer legal services to anyone self-identifying as a woman, subject to the standard safety and conflict checks conducted for any client:

This policy has not proven problematic, and there has not arisen any actual or perceived need to inquire beyond a woman’s positive response as to whether they identify as female.²⁰⁶

2.5.20 Equality Australia presented a Victorian example of how inclusive policies are operating in family violence services (see Figure 2).

Figure 2: Inclusive Family Violence Services

The Victorian Royal Commission into Family Violence identified challenges facing LGBTI people seeking to access specialist family violence services. In its final report, the Royal Commission stated:

The family violence system has historically focused on women and their children, and people outside of heterosexual intimate partnerships have been inadequately supported by service providers. This is particularly the case with accommodation services. Transgender women and gender diverse young people can face specific barriers in gaining access to

²⁰² APS, Submission to TLRI, *Legal Recognition of Sex and Gender* (Issues Paper 29, 2019) 9.

²⁰³ Transforming Tasmania, Submission to TLRI, *Legal Recognition of Sex and Gender* (Issues Paper 29, 2019) 2.

²⁰⁴ TasCOSS, Submission to TLRI, *Legal Recognition of Sex and Gender* (Issues Paper 29, 2019) 6.

²⁰⁵ Women’s Health Tasmania, Submission to TLRI, *Legal Recognition of Sex and Gender* (Issues Paper 29, 2019) 3.

²⁰⁶ Women’s Legal Service, Submission to TLRI, *Legal Recognition of Sex and Gender* (Issues Paper 29, 2019) 4.

accommodation. This places people at risk and goes against the human rights principles that should lie at the heart of our society's response to family violence.

The Royal Commission made four recommendations to address this issue, all of which have been accepted by the Victorian Government, and have been or are in the process of being implemented. Among the recommendations, the Royal Commission recommended that the Victorian Government require all funded family violence services to achieve Rainbow Tick accreditation.

Rainbow Tick accreditation is assessed against 6 standards developed by Gay and Lesbian Health Victoria relating to organisational capability, workforce development, consumer participation, a welcoming and accessible organisation, disclosure and documentation, and culturally safe and acceptable services. The Victorian Government has taken a staged approach to the implementation of the recommendation, requiring all funded family violence services providers to under the HOW2 'Rainbow Tick' Ready training program prior to encouraging all funded family violence services to undertake full accreditation over time. The 2016-17 Victorian Budget included funding to support eleven specialist family violence services to undergo Rainbow Tick accreditation, beginning in early 2018. Among the services which have achieved Rainbow Tick accreditation are The Salvation Army Crisis Services in St Kilda, Victoria and VincentCare Victoria.

The Royal Commission also recommended that the Victorian Government remove any capacity for family violence accommodation and service providers to discriminate against LGBTI Victorians. When legislative change was not passed by the Victorian Parliament, the Victorian Government embarked on implementing the intent of the recommendation through practical measures. The Victorian Gender and Sexuality Commissioner consulted with family violence services providers, establishing a network of faith-based service providers in 2017. On 30 August 2018, a network of 10 faith-based service providers announced their commitment to refrain from using the exceptions / exemptions available to them under the *Equal Opportunity Act 2010* (Vic) to discriminate against LGBTI clients, in line with the Victorian Equal Opportunity and Human Rights Commission's Guidelines on family violence services and accommodation.

The TLRI's view

2.5.21 The TLRI recognises the importance of ensuring that measures designed to protect and advance women continue to achieve those goals, as well as ensuring that people are not discriminated against on the basis of their gender identity. Access policies should seek to protect the safety and dignity of all people.

2.5.22 The TLRI notes that concerns regarding access are often premised on the view that the former *BDM Act* restrictions on registering a change of sex provided protection against men behaving badly in women's spaces or public facilities, and that those protections were removed by the *JRL Act*, creating a dangerous environment for women.

2.5.23 The TLRI does not support this view. Trans and gender diverse people have lived in Tasmanian communities for many years. Trans and gender diverse people continue to live, work, socialise and play sport in Tasmania.

2.5.24 No evidence was provided that supports the view that jurisdictions that have adopted self-identification gender laws have experienced any increase in assaults against women by trans and/or gender diverse people.

2.5.25 Women’s sexual assault, domestic violence and crisis services have an obligation to ensure that their clients are protected, and that people accepted into refuges are not perpetrators. However, as noted in submissions, these services already have policies that provide this security.

2.5.26 The submissions the TLRI received from women’s safety organisations noted that their policies regarding access to their services pre-dated the *JRL Act*. Those services did not share the concerns raised and, in fact, supported the changes made by the *JRL Act*.

2.5.27 Importantly, registered gender will not provide a defence nor mitigating circumstances in relation to illegal behaviour, such as sexual assault. As outlined at [2.4.76] above, in some circumstances misuse of a birth certificate to gain access to a gender-specific space would be an offence and could constitute an aggravating factor for sentencing in relation to any assault committed.

Prison services

2.5.28 Several submissions referred to allegations in 2018 that a transgender woman, Marjorie Harwood, was assaulted while in the men’s prison. While the Tasmanian Prison Service has not confirmed Ms Harwood’s gender status recognised by the prison, it has stated that it had a comprehensive policy for transgender, transsexual and intersex prisoners which ‘prioritised safety, and treated prisoners with dignity and respect.’²⁰⁷

2.5.29 The Director of the Tasmania Prison Service has issued a Standing Order on Transgender, Transsexual and Intersex Prisoners confirming that prisoners will be managed according to the gender with which they identify, subject to consideration of the safety, security and good order of the prison and the prisoners.²⁰⁸

2.5.30 A number of submissions referred the TLRI to a UK example of a transgender women who assaulted two female inmates while on remand in a women’s prison.²⁰⁹ The judge in that case identified the perpetrator as a ‘predator’ who presented a danger to women and children and confined her to a separate facility.

2.5.31 Following this incident, the UK Prison Service has introduced a range of policies to balance any attempts by prisoners to ‘abuse the system’, prisoner safety, and treating trans and gender diverse prisoners with dignity. In some prisons, this has included an option for transgender prisoners to be detained in separate wings or to have their application for detention in a men’s or women’s facility assessed by a specialist panel.²¹⁰

²⁰⁷ See R Shine, ‘Transgender prison rape claim prompts push for reform in Tasmania’, *ABC News* (online, 4 August 2018) <<http://www.abc.net.au/news/2018-08-04/push-for-law-change-after-transgender-prison-rape-claim/10073500>>.

²⁰⁸ Tasmania Prison Service Director Standing Orders DSO-2.15.

²⁰⁹ One example given is that of Karen White, see Charles Hymas, ‘One in 50 prisoners identifies as transgender amid concerns inmates are attempting to secure prison perks’, *The Telegraph* (online, 9 July 2019) <<https://www.telegraph.co.uk/news/2019/07/09/one-50-prisoners-identify-transsexual-first-figures-show-amid/>>.

²¹⁰ *Ibid*.

2.5.32 US based organisation, the Alliance Defending Freedom, has recently abandoned its litigation proceedings seeking to expel all transgender women from female prisons in the United States.²¹¹

The TLRI's view

2.5.33 The TLRI notes the reports of assaults committed in prisons in other jurisdictions, and the assault on Marjorie Harwood in Tasmania.

2.5.34 The TLRI is satisfied that the Tasmania Prison Service standing orders seek to ensure the safety and dignity of all prisoners and encourages the service to review and revise these Standing Orders and their implementation regularly to ensure that these aims are being achieved.

Public toilets

2.5.35 Access to public toilets and shower facilities has also been controversial in relation to inclusion of trans and gender diverse persons.

2.5.36 Several submissions raised this issue, variously recommending exclusion, provision of separate single-sex and unisex facilities, providing special rooms for people with intersex variations of sex characteristics and maintaining single-gender toilets provided access rights are determined by gender identity.²¹²

2.5.37 Equality Australia provided an example of inclusive bathroom policies adopted at University of Technology Sydney:

Figure 3: Inclusive Bathroom Facilities

The Centre for Social Justice & Inclusion at the University of Technology Sydney (UTS) has developed a Trans & Gender Diverse Services Guide to help trans and gender diverse members of the staff and student community to navigate UTS systems and processes.

As part of the inclusion strategy, UTS has introduced a policy of designating certain bathrooms as 'all gender' bathrooms. Ten bathrooms in various university buildings, previously designated as unisex accessible bathrooms, have been designated as all gender bathrooms. Male and female bathrooms have been retained and trans and gender diverse persons on campus have the right to use whatever bathroom they feel is most suitable for them.

2.5.38 In November 2019, Hobart City Council commenced displaying trans and gender-diverse posters in public toilets around the city that state:

We all need somewhere to go. If we accept that our bodies come in all different shapes and sizes and respect each other's privacy, then everyone can feel safe in here.

²¹¹ L McGaughy, 'Christian group ends effort to force Trump admin to move transgender women to men's prisons – for now', *Dallas News* (online edition, 9 November 2019) <<https://www.dallasnews.com/news/politics/2019/11/08/christian-group-drops-effort-to-force-trump-admin-to-move-transgender-women-inmates-to-mens-prisons/>>.

²¹² See submissions from Dede River, Equality Australia, FLC and three anonymous submissions to TLRI, *Legal Recognition of Sex and Gender* (Issues Paper 29, 2019).

2.5.39 The posters will be installed on a temporary basis to avoid ‘unintended social consequences’. A Council report stated:

The installation of trans and gender-diverse posters may have unintended social consequences and as such, a temporary poster installation is seen preferable at this stage ...

As an issue that sparks debate and strong opinion, posters may create a backlash of discriminatory comment in the public sphere.²¹³

2.5.40 Dede River expressed reservations regarding policies designed to ‘accommodate’ trans people:

Policies to address trans issues by ‘allowing’ trans people to use disability toilets or some designated toilet often serve to otherise and isolate trans people, while interfering with use by people with disabilities. In offices, this has led to trans people having to go much further to get to a toilet, and in schools, to trans children being isolated.²¹⁴

The TLRI’s view

2.5.41 Local and state governments have obligations under the *ADA* not to discriminate on the basis of gender identity. Where access to facilities is dictated on the basis of binary gender, trans and gender diverse persons are vulnerable to harassment when using those facilities. The Hobart City Council’s reluctance to display permanent, gender-inclusive posters for fear of increasing harassment demonstrates the problem.

2.5.42 Trans and gender diverse Tasmanians should not be penalised for using a facility that aligns with their gender identity.

2.5.43 The TLRI notes that the promotion of gender inclusive toilet facilities is a key action of the Gender Reform Implementation Steering Committee (see [2.4.55]).

2.5.44 The TLRI also encourages all local governments to audit their public facilities and implement inclusive policies in consultation with trans and gender diverse communities and women’s safety organisations. This would include reviewing any by-laws that create offences for persons using change rooms designated for ‘the opposite sex’ (see Appendix 3).

Participation in Sports

2.5.45 Concerns have also been raised regarding the advantages that a person born with male physiology who identifies as female will enjoy in sporting pursuits over a person born with female physiology. For example, the Feminist Legal Centre stated:

There are certainly increasing reports that transgender athletes are having an adverse impact on women’s sport by dominating female events as a consequence of their physiological advantage. However, enabling transgender athletes to compete in women’s sports is not

²¹³ Hobart City Council Parks and Recreation Committee, *Report on Trans and Gender Diverse Posters in Public Convenience Facilities* (7 November 2019) <http://hobart.infocouncil.biz/Open/2019/11/PR_07112019_AGN_1100_AT.htm>.

²¹⁴ Dede River, Submission to TLRI, *Legal Recognition of Sex and Gender* (Issues Paper 29, 2019) 9.

only potentially very unfair in terms of competition to women, but it also exposes them to increased risks.

2.5.46 The FLC cites Article 10(g) of the *Convention for the Elimination of Discrimination Against Women* ('CEDAW'),²¹⁵ which requires states to provide the same opportunities for men and women to 'participate actively in sports and physical education'. This provision of the *Convention* relates specifically to access as part of education, rather than recreational or competitive sports.

2.5.47 The TLRI notes that the participation of transgender athletes, and the extent to which they enjoy an advantage, continues to be debated amongst sporting associations, including the International Olympic Committee.²¹⁶

2.5.48 Section 42 of the *Sex Discrimination Act 1984* (Cth) provides an exemption from discrimination on grounds of sex, gender identity or intersex status where a person is excluded from 'participation in any competitive sporting activity in which the strength, stamina or physique of competitors is relevant.' No similar provision exists in the *ADA*.

2.5.49 In June 2019, Sports Australia and the AHRC released *Guidelines for the inclusion of transgender and gender diverse people in sport*.²¹⁷ The guidelines, which provide guidance around implementation of discrimination laws and the use of the exemption described above, note:

Sporting organisations have identified the need for national guidance on how they can be inclusive of transgender and gender diverse people, and the operation of relevant anti-discrimination laws, while also protecting the health and safety of all players.

2.5.50 A number of sporting codes have developed policies for transgender inclusion in professional competition.²¹⁸ For example, Cricket Australia has adopted the *Inclusion of Transgender and Gender Diverse Players in Elite Cricket Policy*, aligning with the International Cricket Council's *Eligibility on the Basis of Gender Recognition* statement.

2.5.51 The Policy seeks to balance inclusion and fair competition by allowing players to participate in the competition on the basis of gender identity,²¹⁹ subject to demonstrating (for those

²¹⁵ *Convention on the Elimination of All Forms of Discrimination against Women* opened for signature 18 December 1979 (entered into force on 3 September 1981) <<https://www.ohchr.org/en/professionalinterest/pages/cedaw.aspx>>.

²¹⁶ See, for example, Richard Ewart, 'Transgender athletes controversy swirls after Laurel Hubbard wins gold at Pacific Games', *ABC News* (online, 30 July 2019) <<https://www.abc.net.au/news/2019-07-30/transgender-athletes-in-the-pacific-under-fire/11360854>>.

²¹⁷ Australian Human Rights Commission, *Guidelines for the inclusion of transgender and gender diverse people in sport* (2019) <www.humanrights.gov.au/sites/default/files/document/publication/ahrc_transgender_and_gender_diverse_guidelines_2019.pdf>.

²¹⁸ See, for example, Cricket Australia, *Inclusion of Transgender and Gender Diverse players in Elite Cricket policy* (9 August 2019) <<https://www.cricketact.com.au/news/gender-diverse-policy-and-guidelines/2019-08-09>>; Australian Football League, *Gender Diversity Policy – AFLW and AFL* (31 August 2018) <<https://s.afl.com.au/staticfile/AFL%20Tenant/AFL/Files/Gender%20Diversity%20Policy.pdf>>; National Rugby League, *Inclusion in Rugby League Framework* (2014) <<https://www.nrl.com/siteassets/community/nrl---inclusion-framework-summary.pdf>>; Pride in Sport (2019) initiatives described at <<http://www.prideinsport.com.au/psi/>>.

²¹⁹ Players are required to nominate a gender identity and commit to living as a person of that gender identity in other aspects of their lives.

competing in the women’s league) testosterone levels below a particular threshold. Decisions regarding selection of players within competitions will continue to have regard to relevant disparity of players, safety of players, and provision of fair and meaningful competitions.

2.5.52 In August 2019, Cricket Australia also released guidelines for Community Cricket to ‘assist clubs, schools, players, administrators, coaches and other volunteers deliver a safe, welcoming and inclusive environment, free of harassment and discrimination.’ The guidelines cover a range of practical issues, including respectful and inclusive language, appropriate uniforms, inclusive facilities, and collection and use of personal information.

The TLRI’s view

2.5.53 Inclusive participation in sports is a complex issue that pre-dates the changes to the *BDM Act*. The TLRI does not consider that a legislative response is appropriate, beyond reliance on existing anti-discrimination laws.

2.5.54 The TLRI considers that inclusion of trans and gender diverse people and compliance with the *ADA* is a matter to be dealt with by individual clubs and sporting codes, having regard to the AHRC guidelines.

Quotas and affirmative action

2.5.55 The FLC, Women Speak Tasmania and an anonymous submission raised concern that changes to the *BDM Act* would compromise affirmative action efforts to increase women’s participation in education and the workforce.

When men claiming female ‘gender identities’ are admitted to women’s participation quotas and other special measures designed to increase women’s participation in political and public life, the purpose of such special measures in achieving equality for women is undermined.²²⁰

2.5.56 The FLC references the commitment under *CEDAW*, Article 10(d) to provide women with ‘the same opportunities to benefit from scholarships and other study grants’ as men.

2.5.57 Equality Australia also recognised that:

In certain areas of operations and functions agencies will need to give separate consideration to relevant obligations and exemptions under anti-discrimination law.²²¹

2.5.58 Sections 25–26 of the *ADA* provide for exemptions to be granted permitting discrimination if the conduct is for the benefit of a disadvantaged group or to promote equal opportunity. Many women’s safety organisations in Tasmania currently operate under an exemption allowing them to exclude men from their services on that basis.

2.5.59 This option is available for any organisation able to demonstrate that discrimination against a person or group on the basis of any of the protected attributes is required to redress disadvantage.

²²⁰ *Declaration on Women’s Sex-Based Rights*, referred to in the FLC Submission to TLRI, *Legal Recognition of Sex and Gender* (Issues Paper 29, 2019). See <www.womensdeclaration.com/declaration-womens-sex-based-rights-full-text/>.

²²¹ Equality Australia, Submission to TLRI, *Legal Recognition of Sex and Gender* (Issues Paper 29, 2019) 4.

The onus will be on the organisation seeking the exemption to demonstrate any disadvantage that justifies the application of the exemption.

2.5.60 There are a range of provisions in Tasmanian laws requiring bodies or groups to include representatives of a particular sex or gender. For example:

- Section 13A of the *Environmental Management and Pollution Control Act 1994* requires the Board of the Environment Protection Agency to ‘include at least one person of each sex’.
- Section 60(4)(c) of the *Training and Workforce Development Act 2013* provides that the Board will ‘take into account the desirability of having as directors both men and women.’
- Section 9 of the *Macquarie Point Development Corporation Act 2012* also provides for consideration of ‘the desirability of having as directors both men and women.’

2.5.61 Additionally, the Tasmanian Government is subject to the *ADA* in board selection and cannot discriminate on the basis of gender identity unless an exemption has been granted.

The TLRI’s view

2.5.62 The TLRI recommends the Tasmanian Government audit all government and statutory board composition requirements and eligibility criteria for grant programs and review whether selection is intended to be on the basis of sex or gender.

2.5.63 Where the intention is to create decision-making bodies that reflect gender diversity, rather than merely representation on the basis of sex, statutory provisions for composition of boards could be amended to require membership of the board ‘to seek to achieve gender diversity.’

2.5.64 The TLRI notes that, as part of the Framework and Action Plan for LGBTI Tasmanians, a whole of government LGBTI Reference Group has been established to support LGBTIQ Tasmanians to enjoy access and opportunities to participate equally in social, economic, political and cultural life.

Recommendation 5

The TLRI recommends the Tasmanian Government conduct an audit of:

- all government and statutory board composition requirements; and
- eligibility criteria for grant programs

to clarify whether selection is intended to be on the basis of sex or gender.

2.6 Recent changes and consequential reforms

2.6.1 During parliamentary debate over the *JRL Act*, concerns were expressed regarding potential implications of the changes for the operation of existing laws. Those concerns included:

- Difficulties for police officers or others conducting searches where the search is required to be conducted by a person of the same sex as the person being searched.

- Difficulties in the application of offence provisions relating to human embryos being removed where the person from whom the embryo is removed identifies as a gender other than female.
- Whether medical practitioners involved in termination of pregnancies will be subject to the legal protections offered under existing reproductive health laws where procedures are performed on a person who has their gender registered as something other than female.
- Women’s safety being compromised by granting access to women-only spaces to people whose registered gender is female but who retain typically ‘male’ sex characteristics.
- Eligibility for women’s sporting events or female-only programs being granted to any person whose registered gender is female.

2.6.2 This section discusses each of these issues and identifies potential consequential reforms to ensure the effective and efficient operation of the *JRL Act* and other Tasmanian laws.

2.6.3 The Issues Paper identified a range of legislation potentially affected by the *JRL Act* and made preliminary recommendations regarding reform options. The TLRI sought feedback regarding these matters.

Question:

Are there potential implications for the interaction of the *JRL Act* with existing legislation that are not discussed in section 2.2 of the Issues Paper?

2.6.4 Having regard to views expressed in submissions and discussed below, Appendix 3 provides an overview of existing Tasmanian legislation potentially affected by the *JRL Act* and indicates what reforms are recommended.

2.6.5 As outlined below, the *JRL Act* itself provided a number of legislative provisions to direct the application of other laws referring to sex and gender. The TLRI considers that these provisions are largely functional but recommends that the consequential amendments outlined in Appendix 3 be enacted to confirm the application of other laws more explicitly.

2.6.6 The TLRI further notes that the Tasmanian Government has adopted a practice of gender-neutral drafting for all legislation. Implementation of this practice will assist in ensuring that all future Act and regulations are consistent with the amended *BDM Act*.

Recommendation 6

The TLRI recommends that the Tasmanian Government enact all recommended reforms identified in Column 3 of Appendix 3 to ensure that the terms ‘sex’ and ‘gender’ are used consistently and accurately and in accordance with the definitions introduced or amended by the *Justice and Related Legislation (Marriage and Gender Amendments) Act 2019* (Tas).

Search powers

2.6.7 A number of Tasmanian statutes provide police officers and other authorised persons with the power to execute searches in a range of circumstances.²²² In many circumstances, a frisk or a strip search is required to be carried out by an officer of the same sex or gender as the person being searched. Appendix 3 sets out the various search powers and the variety of ways in which this requirement is expressed.

2.6.8 It is important to ensure that changes effected by the *JRL Act* do not compromise the capacity for police and other authorised officers to conduct searches. A number of potential issues arise from the recent changes to the *BDM Act* effected by the *JRL Act*:

- (1) That allowing gender diversity to be recognised in identity documents will make it difficult for Tasmania Police to make available officers who identify with the diverse range of potential gender identities. If, for example, an intersex person is arrested, will a search conducted by a police officer who is not intersex be lawful?
- (2) If a person does not identify as either male or female, will restrictions on search powers make it unlawful for any officer to search that person?
- (3) If a person identifies as female, but retains the physiological characteristics of a male, is it appropriate to require that they be searched by a female officer?

2.6.9 The Tasmania Police Manual was updated in December 2018 to provide some guidance to officers regarding the searching of sex and gender diverse people. The Manual now includes the following provisions:

- (5) Transgender and intersex people:-
 - (a) should be treated according to their preferred gender;
 - (b) if an officer is unsure of how a person identifies they should respectfully ask the person;
 - (c) should be searched by a person of the same sex as the person in custody's identifying gender wherever possible;
 - (d) members should be mindful that a person's identity documents and police records may not accurately identify their identifying gender; and
 - (e) may be considered at risk of harm from other prisoners while in custody and should be placed in a single cell when being held in custody.²²³

2.6.10 The Manual recognises that restrictions on search powers are intended to implement respectful approaches to the conduct of intrusive searches. While often expressed by reference to 'sex', the restrictions are directed to gender, rather than sex.

2.6.11 This practice does not address the situation where a person does not identify as either male or female. The *Court Security Act 2017* (Tas) adopts a broader approach, explicitly providing for a

²²² *Police Powers (Public Safety) Act 2005* (Tas) s 22; *Misuse of Drugs Act 2001* (Tas) s 30; *Poisons Act 1971* (Tas) s 90C; *Terrorism (Preventative Detention) Act 2005* (Tas) s 22.

²²³ Tasmania Police, *Tasmania Police Manual* (2018) [7.3.4].

person who is ‘transsexual, transgender or intersex’ to request that a personal search be conducted by a security guard of a particular gender.

2.6.12 Section 28D(2) of the amended *BDM Act* provides that any reference to a person’s sex is taken to be a reference either to their registered sex or their registered gender.

2.6.13 Providing that a reference to ‘sex’ is a reference to ‘gender’ does not explicitly overcome the difficulty that may be presented for lawful searches where a person’s registered gender is something other than male or female. To address this, s 28D(4) provides that:

- if a person who has a registered gender²²⁴ requests that a search be conducted by a male or female; or
- if a police officer asks a person who is about to be searched whether the person wants the search to be conducted by a male or female,

the search will not be invalid, unauthorised or unlawful on the basis that the search was then conducted by a male or female as requested.

2.6.14 This approach is consistent with the Tasmania Police Manual and the *Court Security Act 2017* (Tas) and will enable lawful searches to be conducted that respect the dignity and gender diversity of those being searched.

2.6.15 For clarity, the TLRI considers that, rather than relying simply on s 28D of the *BDM Act* to extend search powers, it would be preferable also to make consequential amendments to the various Acts listed in Appendix 3. The amendments could replicate the provisions in the *Court Security Act 2017* (Tas), as appropriate. This ensures that laws relating to search are most accessible to those to whom they apply and those applying them.

2.6.16 The Director of Public Prosecutions (‘DPP’) agreed that it is:

undesirable to rely on s 28D of the *Births Deaths and Marriages Act* to extend or clarify procedures relating to search powers in other Acts.²²⁵ It is likely to cause unnecessary and avoidable confusion. A police officer should not have to refer to multiple Acts and the Police Manual to determine the lawfulness of a search or the procedures that ought to be followed.

Where an Act provides a power to search, any procedures or processes that are required to be followed, or should be followed, ought to be contained in that Act. The provisions contained in s 13(5) of the *Court Security Act 2017* are a reasonable guide for model provisions, but would benefit from some amendment so as to be consistent with the definitions in the amended *Births Deaths and Marriages Act*.²²⁶

2.6.17 Dede River’s submission supported the approach in the *Court Security Act 2017* but emphasised the ‘principle of dialogue’ between police and the trans and gender diverse community

²²⁴ For these purposes, a person who has not made any application to register a gender different to the sex that was registered at birth is not entitled to make a request as to the gender of the officer conducting the search.

²²⁵ For example, *Police Powers (Public Safety) Act 2005* s 22; *Misuse of Drugs Act 2001* s 30; *Poisons Act 1971* s 90C; and *Terrorism (Preventative Detention) Act 2005* s 22.

²²⁶ DPP, Submission to TLRI, *Legal Recognition of Sex and Gender* (Issues Paper 29, 2019) 1.

and the need to ensure that the law is ‘flexible enough that situations may be overcome by police in practice.’²²⁷

2.6.18 The Commissioner for Children and Young People identified an additional interaction between the *JRL Act* and s 131 of the *Youth Justice Act 1997* (Tas). She recommended that the government progress efforts to ‘determine the best approach for a more consistent legal framework that applies to searches of children and young people in custody.’ The TLRI supports this recommendation but notes that it is an issue beyond the scope of this inquiry.

Other searches and examinations

2.6.19 A number of other Acts provide powers to conduct searches and examinations and set out the circumstances in which searches can be undertaken.

Patient searches

2.6.20 The *Mental Health Act 2013* (Tas) (*‘Mental Health Act’*) allows custodians and escorts within mental health facilities to conduct frisk searches of patients. A frisk search is, if practicable, to be conducted by a person of the same sex as the person being searched (s 2(3)).

2.6.21 The Chief Forensic Psychiatrist (‘CFP’) also has power to authorise a range of searches of patients in secure mental health units. Unless otherwise directed by the CFP, where the search involves any touching or undressing of a person, or any touching of a person’s clothing or personal belongings, the search must be carried out in private by ‘an authorised person of the same gender as that person and only in the presence of persons of that gender’ (*Mental Health Act* s 111(11)).

2.6.22 Significantly, the *Mental Health Act* refers to a person of the same gender, rather than of the same sex. Where a patient is registered as a gender other than male or female, this arguably requires the search to be conducted by a person of the same registered gender. Such a requirement could be unduly restrictive, if not qualified by ‘if practicable’.

2.6.23 The TLRI considers that the *Mental Health Act* should be amended to provide that where a person has a registered gender other than male or female, and no authorised officer of that gender is available to conduct the search, the patient should be asked whether they would prefer to be searched by a male or female. A search that complied with that request would be taken to be lawful for those purposes.

Intimate photographs and examinations

2.6.24 Under s 21 of the *Community Protection (Offender Reporting) Act 2005* (Tas), the Registrar, or an authorised person, may take, or may cause to be taken, a photograph of a ‘reportable offender’ and may require the reportable offender to expose any part of their body.

2.6.25 However, s 21(4) prevents the Registrar/authorised person from requiring a reportable offender to expose ‘his or her genitals, the anal area of his or her buttocks or, in the case of a female, her breasts.’

²²⁷ Dedé River, Submission to TLRI, *Legal Recognition of Sex and Gender* (Issues Paper 29, 2019) 7.

2.6.26 The *Forensic Procedures Act 2000* (Tas) and the *Guardianship and Administration Act 1997* (Tas) both define ‘intimate forensic procedure’ to include examinations, photographs and taking of samples from intimate areas, specifically ‘in the case of a female, the breasts.’

2.6.27 Under the *Forensic Procedures Act 2000* (Tas), intimate forensic procedures must be conducted by a person of the same sex. Non-intimate forensic procedures requiring the removal of clothing must also be conducted by a person of the same sex.

2.6.28 The *Guardianship and Administration Act 1995* (Tas) does not require a person of the same gender to conduct intimate forensic procedures. However, the Act sets out a number of rules for how such procedures are to be conducted.

2.6.29 There is a risk that photography or examination of the breasts of a person who has female physical characteristics, but a registered gender other than female would not be considered an ‘intimate forensic procedure’. Such a procedure could be uncomfortable or humiliating for the person and should be treated with the same sensitivity as an intimate forensic procedure.²²⁸

2.6.30 Deleting ‘in the case of a female’, would extend the definition of intimate forensic procedures to any exposure of the breasts of any person.

Pregnancy, birth and related issues

2.6.31 Sexual reassignment procedures require alteration of reproductive organs, resulting in sterility for the person undergoing the procedure. Removing the requirement for sexual reassignment surgery prior to registering a change of gender means that a person whose registered sex was female, but whose registered gender is other than female, may be able to give birth. In those circumstances, a person whose registered gender is male, intersex or non-binary could become pregnant.

2.6.32 The potential implications of this change for the operation of laws relating to pregnancy and birth are set out below.

2.6.33 As a general comment, several submissions addressed the issue of gender-neutral language regarding parenthood. Women Speak Tasmania, the FLC and ACL oppose amendments that remove references to ‘mother’ and ‘father’. For example, the FLC said:

The inclusion of men who claim a female ‘gender identity’ within the legal category of mother erodes the social significance of maternity, and undermines the maternal rights for which the [*Convention on Elimination of Discrimination Against Women*] provides.

2.6.34 Women Speak Tasmania commented that amendments recommended in the Issues Paper to achieve consistency with the *JRL Act*:

²²⁸ Under the *Forensic Procedures Act 2000* (Tas), examination of a person’s breasts would require removal of clothing. Under s 41(2), the procedure must be carried out by a person of the same sex, even if characterised as a ‘non-intimate forensic procedure’.

involve erasure of the terms ‘female’ and ‘woman’ and their replacement with the generic term ‘person’. In many cases this amounts to the effective neutering of functions like childbirth that are exclusively the province of biological females.²²⁹

2.6.35 As outlined at [2.3.6], the *JRL Act* made a number of amendments to certain Acts to replace ‘a parent or guardian’ with ‘the father, the mother, a parent or guardian’ on the grounds that the amendments would ‘allay some fears in the community about a false perception that parliament was trying to do away with motherhood and fatherhood and trying to eradicate gender’.²³⁰

2.6.36 In contrast, Transforming Tasmania’s submission recommends that all gendered language be removed from Tasmanian legislation.

Some laws use binary language to refer to sex and gender, and gender roles (for example ‘mother’ and ‘father’ rather than ‘parent’, ‘parent 1’ and ‘parent 2’). We believe that these should be reviewed to ensure that language is as inclusive as possible.²³¹

Embryos and cloning

2.6.37 The *Human Cloning for Reproduction and Other Prohibited Practices Act 2003* (Tas) (*‘Human Cloning Act’*) was adopted as part of national uniform laws introduced to prevent unethical development and transplant of human embryos. The *Human Cloning Act* creates a number of offences, including:

- intentionally creating a human embryo outside the body of a woman, unless done in an attempt to achieve pregnancy in a particular woman (s 10);
- intentionally creating or developing a human embryo outside the body of a woman containing genetic material provided by more than two persons (s 11);
- intentionally developing a human embryo outside the body of a woman for a period of more than 14 days (s 12);
- removing a human embryo from the body of a woman, intending to collect a viable human embryo (s 15);
- intentionally placing a human embryo in the body of a human, other than in a woman’s reproductive tract (s 17(2)).

Each of these offences carries a maximum penalty of imprisonment for up to 15 years.

2.6.38 The Act defines ‘woman’ as ‘a female human’. The concern raised during parliamentary debate was that the purpose of the *Human Cloning Act* would be defeated if these offences ceased to apply in circumstances where someone who retains the physical reproductive characteristics of a woman is recognised by a different gender identity.

2.6.39 Arguably, the offences relating to embryos created or developed ‘outside the body of a woman’ (ss 10–12) would be unaffected by the recent changes to the law. Under s 28D of the *BDM*

²²⁹ Women Speak Tasmania, Submission to TLRI, *Legal Recognition of Sex and Gender* (Issues Paper 29, 2019) 4.

²³⁰ Tasmania, *Parliamentary Debates*, House of Assembly, 10 April 2019 (Cassy O’Connor).

²³¹ Transforming Tasmania, Submission to TLRI, *Legal Recognition of Sex and Gender* (Issues Paper 29, 2019) 2.

Act, references to ‘sex’ are taken to be references to ‘gender’. Once a person has registered their gender as other than female, that will supersede any earlier registered sex. Therefore, a person whose registered gender was other than female would not be a ‘woman’ within the definition of the *Human Cloning Act*.

2.6.40 As a result, an embryo created within the body of a person with a female reproductive system whose registered gender is other than female would continue to be characterised as having been created ‘outside the body of a woman’. An embryo could not be created or developed within the body of a person identifying as a woman who did not have a female reproductive system.

2.6.41 Even if this were not the case, s 28D(3)(c) of the *BDM Act* explicitly provides:

- (c) a reference to the fertilisation of a human egg outside of the body of a woman does not include the fertilisation of a human egg inside of the body of a person of another gender who has a female reproductive tract ...

2.6.42 Similarly, the offence of placing an embryo in a human, other than in a woman’s reproductive tract (s 17(2)), would not be affected by the recent changes to law. An embryo placed in the reproductive tract of a person with a female reproductive system whose registered gender is other than female would continue to be characterised as being placed ‘other than in a woman’s reproductive tract.’ An embryo placed in the reproductive tract of a person whose registered gender was female but who did not have a female reproductive system would not be viable.

2.6.43 In contrast, the offence of removing a human embryo from the body of a woman could be affected by the recent changes. In circumstances where an embryo developed in the body of a person with a female reproductive system whose registered gender is other than female, the embryo could be removed without making out the offence in s 15.

2.6.44 Section 28D(3)(a) of the *BDM Act* provides that any reference to pregnancy of a female or a woman includes a reference to pregnancy of a person of another gender. Arguably, this could extend to provisions relating to human embryos within the body of a woman. However, the TLRI considers that it is preferable to amend s 15 of the *Human Cloning Act* to replace ‘from the body of a woman’ with ‘from the body of a human’. This language is consistent with the language currently used in s 17(2) of the *Human Cloning Act*.

Surrogacy

2.6.45 The *Surrogacy Act 2012* (Tas) (*‘Surrogacy Act’*) provides for surrogacy arrangements to be made for a ‘birth mother’ to seek to become pregnant and give birth to a child, and for that child to be treated as the child of another person or persons (the ‘intended parent’ or ‘intended parents’) (s 5).

2.6.46 There is no legitimate risk that a person whose registered gender is male could be a ‘birth mother’ for the purposes of the *Surrogacy Act*. A valid surrogacy arrangement cannot be made after the birth mother becomes pregnant (s 5(5)(a)), so a person whose registered gender is other than female who has fallen pregnant could not subsequently enter into a surrogacy arrangement. A person whose registered gender is male or other than female could arguably be acting inconsistently with a gender declaration that the person intends to live as a male if the person enters into a surrogacy arrangement that commits him to ‘seeking to become pregnant’.

2.6.47 From a policy perspective however, the intent of the *Surrogacy Act* is to provide parents who are unable to conceive or carry a child to term with the opportunity to become parents. Allowing any consenting adults capable of becoming pregnant to enter into surrogacy arrangements, regardless of their registered gender, would be consistent with this policy objective.

2.6.48 For the purposes of a surrogacy arrangement, ‘intended parents’ may include a single man or ‘eligible woman’, a man and a woman, two men, or two ‘eligible women’ (*Surrogacy Act* s 7(1)). Section 7(2) of the *Surrogacy Act* defines ‘eligible woman’ as including a woman who:

- (a) is unable, on medical grounds, to conceive a child; or
- (b) is likely to be unable, on medical grounds, to carry a pregnancy or give birth; or
- (c) is unlikely to survive a pregnancy or birth or is likely to have her health significantly affected by a pregnancy or birth; or
- (d) if she were to conceive a child, is likely to conceive –
 - (i) a child who is likely to be affected by a genetic condition or genetic disorder, the cause of which is attributable to the woman; or
 - (ii) a child who is unlikely to survive the pregnancy or birth or whose health is likely to be significantly affected by the pregnancy or birth.

The intended parent or parents may apply to the court for a parentage order in relation to the child (s 13).

2.6.49 An intended parent whose registered gender is female, but who retains a male reproductive system, may not satisfy the first limb of the definition of ‘eligible woman’ (s 7(2)(a)), as she would theoretically still be able to conceive a child with another person with a female reproductive system. However, she would satisfy the second limb (s 7(2)(b)). Therefore, she could be considered an ‘eligible woman’ and entitled to enter into a surrogacy agreement.

2.6.50 However, the description of intended parents in s 7(1) excludes a situation in which two intended parents are seeking parentage orders and one or both of those parents has a registered gender other than male or female. The purpose of the qualifications set out in s 7 for a valid surrogacy agreement (and related parentage orders) are to ensure that the intended parent or parents are not otherwise able to have a child. This qualification can be maintained without reference to gender.

2.6.51 The *Acts Interpretation Act 1931* (Tas) (‘*AIA*’) s 24A provides that, where a statute contains a word or expression that indicates one or more particular genders, it should be taken to include every other gender. Arguably, this would overcome restrictions on ‘birth mother’ and ‘intended parents’.

2.6.52 However, for clarity and certainty, the TLRI recommends that the *Surrogacy Act* itself also be amended to ensure that characterisation as a birth parent or intended parent is not restricted by registered gender, but by capacity to conceive. This is consistent with provisions of the *Adoption Act 1988* (Tas) allowing couples of the same gender to adopt (see [2.3.4]).

2.6.53 The definition of intended parents could be amended to refer to one or two ‘eligible persons’, with ‘eligible persons’ defined in similar terms to the current s 7(2), amended as follows:

- amending s 5(1)(a) by deleting ‘female’;
- replacing all references to ‘birth mother’ with ‘birth parent’;
- replacing s 7(2)(b) with ‘is unable, or likely to be unable, on medical or other grounds, to carry a pregnancy or give birth’;
- amend s 7(2)(c) and (d) to replace ‘her’, ‘she’ and ‘woman’ with gender-neutral terms.

2.6.54 The ACL submission expressed a number of concerns regarding access to information for children of surrogates. However, these issues are not affected by the *JRL Act* and are beyond the scope of this inquiry.

Adoption

2.6.55 As outlined in [2.3.2]–[2.3.6], s 20 of the *Adoption Act 1988* (Tas) provides for the adoption of children in Tasmania by couples of any gender.

2.6.56 Sections 29(2)–(5) set out the people whose consent is required to authorise an adoption. These people relevantly include:

- the mother and father of the child, if married (s 29(2));
- the mother of the child and a man who is registered as the father of the child (s 29(3)(a));
- the mother of the child and a man who is assumed to be the parent by operation of the *Status of Children Act 1974* (ss 29(3)(b), (d) or (e));
- the mother of the child and a man with whom the mother was in a significant relationship at the time of the birth (s 29(3)(da));
- the mother of the child and a woman to whom she was married or in a significant relationship with at the time of the birth (s 29(4A)), where the child was conceived through a fertilisation procedure;
- where a child has previously been adopted, the adoptive parents of a child (s 29(5)).

2.6.57 Section 28D(3)(d) of the *BDM Act* as amended provides that a reference to ‘the mother of a child’ includes ‘a reference to a person of another gender who carried the child in the person’s female reproductive tract, or who gave birth to a child.’²³²

2.6.58 The references to ‘man’ and ‘woman’ in the other provisions of s 29 of the *Adoption Act 1988* (Tas) have the potential to unduly restrict the rights of interested parties to consent, or refuse to consent, to proposed adoption orders.

2.6.59 Section 24A of the *AIA* would operate to extend the application of the consent provisions to parents of any gender. For clarity and certainty, the provisions of s 29 should also be amended to replace any references to ‘man’ or ‘woman’ with ‘person’. This would not be inconsistent with amendments to the *Adoption Act* effected by the *JRL Act* to extend parental references to ‘the father, the mother, a parent or guardian.’ Instead, the proposed amendments would recognise that the

²³² Other than where the mother has ceased to be the mother for the purposes of the *Surrogacy Act* (*BDM Act* ss 28D(3)(d)(i)–(ii)).

mother or father of a child may, at the time of adoption, have a gender that does not conform to male or female.

Terminations

2.6.60 Prior to 2013, the *Criminal Code* included a number of criminal offences relating to performing, causing or assisting in abortions.²³³ With the introduction of the *Reproductive Health (Access to Terminations) Act 2013* (Tas) (*‘Reproductive Health Act’*), these offences were removed.

2.6.61 Terminations by medical practitioners are now principally regulated by the *Reproductive Health Act*. The Act allows medical practitioners to terminate the pregnancy of a woman in the following circumstances:

- For terminations performed not more than 16 weeks into a pregnancy, with the woman’s consent (s 4).
- For terminations performed after 16 weeks, where two medical practitioners reasonably believe continuing the pregnancy would involve greater risk of injury to the physical or mental health of the pregnant woman than if the pregnancy were terminated (s 5).

2.6.62 A failure to comply with the framework established by the *Reproductive Health Act* is generally subject to professional sanctions, rather than criminal ones.

2.6.63 Section 51(1A) of the *Criminal Code* supports this new framework, allowing a termination to be lawfully performed ‘on a woman by a medical practitioner if it is performed in good faith, with reasonable care and skill and with the woman’s consent.’

Criminal provisions

2.6.64 Section 178D of the *Criminal Code* makes it a crime to perform a termination on a woman unless the person performing the termination is a medical practitioner or the pregnant woman. A woman who consents to, assists in, or performs a termination on herself is not guilty of a crime (*Reproductive Health Act* s 8).

2.6.65 It is also a crime to perform a termination on a woman without the woman’s consent (*Criminal Code* s 178E). No prosecution will be instituted against a medical practitioner who reasonably and in good faith performs a termination on a woman who is unable to give consent, provided the termination is for the woman’s benefit.

2.6.66 In relation to each of these provisions, ‘woman’ is defined as ‘a female person of any age’ (*Criminal Code* ss 51(1B), 178D(3), 178E(3); *Reproductive Health Act* s 3). These provisions would not necessarily extend to a pregnant person with a registered gender other than female.

2.6.67 Arguably, this would mean that offence provisions relating to terminations (and related exemptions) would not apply either to terminations performed on a pregnant person who has a registered gender other than female.

²³³ Sections 134, 135, 165 (previous version of the *Criminal Code*).

2.6.68 Though a medical practitioner who performs a termination in these circumstances could potentially be charged with assault or related offences.

2.6.69 However, s 28D(3)(b) of the amended *BDM Act* provides:

A reference to the termination, or attempted termination, of a pregnancy of a female, female person or woman includes a reference to the termination, or attempted termination, of a pregnancy of a person of another gender.

2.6.70 The TLRI considers that this provision would extend the protections afforded by the *Reproductive Health Act* and the *Criminal Code* to cover terminations performed on persons with a registered gender other than female. It should also extend the offence provisions to the performance of a termination on a person of any gender.

2.6.71 Nevertheless, for clarity and certainty, the provisions of the *Reproductive Health Act* and *Criminal Code* should also be amended to replace any references to ‘woman’ with ‘person’ and removing the definitions of ‘woman’. This will make the law more accessible because this is the most logical Act in which to provide this clarification.

Obligations in relation to terminations

2.6.72 Section 6(3) of the *Reproductive Health Act* requires a medical practitioner to perform a termination in an emergency ‘if a termination is necessary to save the life of a pregnant woman or to prevent her serious physical injury.’ Nurses and midwives may be required to assist in the procedure (s 6(4)).

2.6.73 This obligation may not extend to situations where the person whose life or health is in danger has a registered gender other than female.²³⁴

2.6.74 The *Reproductive Health Act* recognises that a medical practitioner can refuse to perform a termination where they have a conscientious objection to the procedure. However, the Act obliges the medical practitioner to refer a woman seeking termination to a list of health services (s 7). In the second reading speech introducing the Act, the then Minister for Health stated:

This obligation to refer balances the right of doctors to operate within their own personal values, with the equally important ethical obligation to act in the best interests of the patient and to not deny or impede access to medical care and treatments that are legal.²³⁵

2.6.75 Subject to s 28D(3)(b) of the *BDM Act*, this obligation may not extend to a person seeking a termination where that person’s registered gender is other than female. As a result, a transgender, intersex or non-binary person who is struggling with an unwanted pregnancy may not be given appropriate support to inform the medical decisions that they make.

2.6.76 As for authorisation of terminations (see [2.6.69]–[2.6.70]), s 28D(3)(b) of the *BDM Act* will extend the obligations relating to pregnant women to any pregnant person seeking a termination. Again, the TLRI considers it desirable to amend ss 6 and 7 of the *Reproductive Health*

²³⁴ Medical practitioners remain bound by professional obligations to act to protect persons whose health and safety is at risk.

²³⁵ Tasmania, *Parliamentary Debates*, House of Assembly, 16 April 2013 (Michelle O’Byrne, Minister for Health) <http://www.parliament.tas.gov.au/bills/Bills2013/pdf/notes/24_of_2013-SRS.pdf>.

Act to replace ‘woman’ with ‘person’. This will make the law more accessible to those to whom it applies because this is the most logical *Act* in which to provide this clarification.

Data records

2.6.77 The *Obstetric and Paediatric Mortality and Morbidity Act 1994* (Tas) establishes the Council of Obstetric and Paediatric Mortality and Morbidity (the ‘OPMM Council’) to investigate and keep records of maternal deaths resulting from pregnancy or obstetrics. Statistics are to be gathered in relation to the deaths of women up to one year from birth.

2.6.78 There is no obligation to record the death of any person identifying as male who becomes pregnant. This may compromise long-term statistical data regarding maternal and infant morbidity.

2.6.79 The OPMM Council is also required to report to police any offence in relation to a woman or child (including unlawful medical practices). This obligation to report potentially unlawful practices will not extend to offences against persons who identify as male, despite retaining a female reproductive system.

2.6.80 Section 11 of the *BDM Act* requires a ‘responsible person’ to give notice of a birth to the Registrar, including stillbirths. Responsible person is defined to include a medical practitioner or midwife responsible for ‘the professional care of the mother at the birth’. For stillborn children, a certificate is to be ‘completed by the medical practitioner responsible for the professional care of the mother at the birth’.

2.6.81 Section 28D(3)(a) of the *BDM Act* provides that, in relation to any laws:

(a) a reference to the pregnancy of a female, female person or woman includes a reference to the pregnancy of a person of another gender; and

2.6.82 This provision would extend the reference to mother in this instance to a person who has given birth but has a registered gender other than female.

2.6.83 However, for clarity, the TLRI recommends that s 11 be amended to refer to a medical practitioner responsible for the ‘professional care of the birth parent at the time of the birth.’

Pregnancy health care

2.6.84 The ACL submission cites a recent study by Rutgers University identifying mental health and wellbeing concerns for pregnant transgender men noting that: ‘Surveys used to screen pregnant and postpartum females for depression are not designed to assess the impact of pregnancy on gender dysphoria in transgender men.’ The ACL concludes:

These issues need to be addressed for the wellbeing of the transgender person involved and for the wellbeing of any children.²³⁶

2.6.85 The Department of Health has established the cross-sector Sexual and Reproductive Health Collaborative Group and the LGBTI Issues in Health and Human Services Working Group. Both groups are tasked with ‘working collaboratively to improve health outcomes and access to services for LGBTI Tasmanians.’

²³⁶ ACL, Submission to TLRI, *Legal Recognition of Sex and Gender* (Issues Paper 29, 2019) 9.

2.6.86 The TLRI supports these efforts to ensure that the needs of gender diverse people who fall pregnant are catered for in Tasmania’s health services.

Crimes relating to pregnancy and birth

Infanticide

2.6.87 A woman who, within 12 months of giving birth to a child and being still disturbed from the effects of the birth, wilfully causes the death of that child, will be guilty of infanticide (*Criminal Code* s 165A). This crime carries a lower maximum penalty than murder, akin to manslaughter.

2.6.88 Where a person who identified as a woman at the time of giving birth subsequently registers a change of gender and, at the time of the child’s death has a registered gender other than female they may not be eligible for a charge of infanticide. The policy position behind the infanticide provisions reflects an acknowledgement that the influence of post-partum depression or other mental health issues arising from a traumatic birth may justify a less severe charge being imposed.

Concealment of birth

2.6.89 A person who disposes of the dead body of a child delivered by a woman (whether the child died before, at, or after, its birth) and endeavours to conceal the birth is guilty of a crime (*Criminal Code* s 166).

2.6.90 This crime will not be made out if a person who identifies as a gender other than female gives birth (or self-terminates the pregnancy) and subsequently disposes of the body of a child or enlists someone else to assist in disposing of the body of a child.

Assault on a pregnant woman

2.6.91 It is a separate crime to assault a pregnant woman where the assailant knew that the woman was pregnant (*Criminal Code* s 184A). Subject to s 28D(3)(a) of the *BDM Act* and s 24A of the *AIA*, where a person who does not identify as female is pregnant and is assaulted, this crime would not be made out.

Effect of recent changes

2.6.92 Section 28D(3)(a) of the *BDM Act* extends any reference to pregnancy of a female, female person or woman to a reference to pregnancy of any person. This would arguably extend the reach of the crimes discussed above. Section 24A of the *AIA* could also apply to extend the operation of these provisions to any person.

2.6.93 For clarity and certainty, each of the relevant offence provisions themselves could be amended by replacing ‘woman’ with ‘person’.

Sex reassignment procedures

2.6.94 The definition of ‘sexual reassignment surgery’ has been removed from the amended *BDM Act*, as surgery is no longer a prerequisite to register a change of gender.

2.6.95 Under the *Criminal Code*, the following actions are crimes:

- performing female genital mutilation on another person (s 178A); and

- taking a child out of Tasmania for the purpose of having female genital mutilation performed on the child (s 178B).

2.6.96 ‘Female genital mutilation’ (‘FGM’) includes

- (a) a clitoridectomy; or
- (b) an excision of any other part of the female genital organs; or
- (c) an infibulation or similar procedure; or
- (d) any other mutilation of the female genital organs.

2.6.97 It is a defence to a charge under ss 178A or 178B of the *Criminal Code* if the operation in question was for genuine therapeutic purposes or for a ‘sexual reassignment procedure’ (s 178C(1)(b)).

2.6.98 ‘Sexual reassignment procedure’ is defined in the *Criminal Code* as ‘a surgical procedure to give a female, or a person whose sex is ambivalent, the genital appearance of a particular sex.’²³⁷

2.6.99 Under recent changes to the law, a person may formally change their registered gender without undertaking sexual reassignment procedures. This presents a risk for a person who registers their gender as male, without any surgical intervention, and later elects to undertake a sexual reassignment procedure to remove their female genitalia.

2.6.100 The crime outlined in s 178A would be made out where FGM is performed on *any other person*. Despite its gendered name, FGM is defined by the nature of the procedure performed, rather than the gender of the person on whom it is performed. Therefore, a clitoridectomy performed on a person whose registered gender is male may constitute FGM.

2.6.101 In contrast, a ‘sexual reassignment procedure’, for the purposes of the defence under s 178C, is defined as a procedure on a female or ‘person whose sex is ambivalent’. Where the procedure is sought by a person whose registered gender is male, this defence may not apply because, at the time of surgery, the male patient would be neither a female nor a person whose sex is ambivalent for the purposes of the *Criminal Code*.²³⁸

2.6.102 This arguably exposes a medical practitioner who performs the procedure. Unless the procedure could be characterised as being for ‘genuine therapeutic purposes’, performing a clitoridectomy or similar procedure on a male patient would put the medical practitioner at risk of being charged with the crime of performing female genital mutilation.

2.6.103 Given the explicit context of the provisions relating to female genital mutilation, s 24A of the *AIA* would arguably not apply to extend the operation of the provisions to cover a procedure performed on a person identifying as male.

2.6.104 To remove any uncertainty, the definition of sexual reassignment procedure could be amended to ‘a surgical procedure to give a person the genital appearance of a particular sex’. This would overcome the limited operation of the current protection.

²³⁷ The legislation uses the term ‘sexual reassignment surgery’, however it is more accurate to refer to ‘sex reassignment surgery’.

²³⁸ This view assumes that inconsistency between a person’s sex and registered gender would be insufficient to constitute ‘ambivalence’.

The TLRI's view

2.6.105 The TLRI considers that the suite of amendments enacted by the *JRL Act* are functional. However, the TLRI is of the view that consequential amendments to other legislation should be implemented through that legislation itself. These changes would make the effect of recent changes more readily accessible to those to whom they apply and give the law greater certainty and clarity.

2.6.106 The TLRI has conducted a comprehensive search of Tasmanian legislation to determine where consequential amendments might be needed as a result of the enactment of the *JRL Act*. These are discussed above and outlined in Appendix 3

2.6.107 . Nevertheless, the TLRI still recommends that the Tasmanian Government undertake an audit of all relevant legislation to identify amendments to improve the operation of the amended *BDM Act* and the use of gender inclusive language.

2.6.108 The TLRI recommends that, as part of the audit, all desirable reforms identified in Appendix 3 be enacted.

2.6.109 The TLRI notes that consistent implementation of the Tasmanian Government's gender-neutral legislative drafting policies will be important in ensuring that all future legislation remains consistent with the amended *BDM Act* and recognition of gender diversity.

2.7 Conclusion

2.7.1 Part 2 of the Final Report has examined the recent changes to the *BDM Act* and other legislation enacted by the *JRL Act* to determine whether those changes:

- achieve the legislative aim of facilitating recognition of gender diversity in Tasmanian law and reducing discrimination against trans, gender diverse and intersex Tasmanians;
- can operate consistently with existing laws;
- necessitate any further amendments to the amended Acts or other existing laws.

2.7.2 The TLRI is of the view that the changes achieve their objective and are largely consistent with best practice international human rights approaches and approaches being considered in other Australian jurisdictions.

2.7.3 As noted in Part 1, the scope of the TLRI's review does not examine underlying policy of legislation that has been so recently enacted. However, the TLRI notes that some aspects of the *JRL Act* represented a compromise position, particularly the decision to mandate registration of sex at birth. This position may be reconsidered in future as international and national legislative practice evolves.

2.7.4 It is the TLRI's view that the new laws do not require further amendment in order to operate effectively.²³⁹

²³⁹ Subject to consequential amendments recommended in section 2.6 and Appendix 3.

Part 3

Consent to Medical Treatment to Alter a Person's Sex or Gender

3.1 Introduction

3.1.1 Part 3 of the Final Report addresses the following term of reference:

What, if any, reforms should be made in relation to consent to medical treatment to alter a person's sex or gender.

3.1.2 At common law, consent is required before medical procedures can be performed, other than in exceptional circumstances. Performing a medical procedure without consent may constitute an offence.

3.1.3 For children (persons under 18) or those unable to give consent, consent is generally required from a parent or guardian. Where the procedure is invasive, irreversible or non-therapeutic, approval from the court may also be required.²⁴⁰

3.1.4 This Part is primarily concerned with consent to medical procedures on intersex and transgender children. These issues generally arise in two divergent contexts.

3.1.5 Where intersex children are concerned, the principal issue is the extent to which invasive and irreversible surgeries should be permitted to be performed on them without their consent. Section 3.2 provides some context regarding the difficulties experienced by people with intersex variations of sex characteristics on whom 'normalising surgeries' were performed when they were children. Section 3.3 examines the current regulatory framework for medical intervention on intersex children, and Section 3.4 examines a range of potential reforms to address deficiencies.

3.1.6 The most common concerns for transgender children arise where their desire for surgery can be overridden by the refusal of a parent or a court to grant consent and comply with their wishes. This issue is addressed in sections 3.5 and 3.6.

3.1.7 While issues of medical consent, autonomy and dignity are concerns for both the intersex and transgender communities, the needs of these communities are different. They will require different responses as a result.

3.1.8 The TLRI notes that public discourse around transgender topics has a tendency to focus on surgical issues. This is especially the case where transgender youth are concerned. This form of public dialogue creates adverse risks for the mental health and wellbeing of transgender people, and in particular children.

²⁴⁰ See *Department of Health & Community Services v JWB & SMB* (1992) 175 CLR 218 ('*Marion's Case*').

3.1.9 The TLRI prefers human rights approaches to decision-making in all cases. It considers that the human rights of children and young people must include an acceptance that they are capable of being, and often are, informed on medical matters relevant to their experience. Young people are capable of making, and often do make, informed decisions in their own interest.

3.1.10 The law invests parents with the responsibility for the care and protection of children. However, a child's bodily autonomy takes precedence, especially as they mature and are able to make informed decisions about their own bodies. This applies equally to transgender and intersex youth, who the TLRI considers will be most affected by any legislative changes in this area.

3.1.11 Several submissions to the Issues Paper note that intersex people have historically not had their voices heard or acted upon, including with regard to their treatment in law or by health services, and the consequences of this disregard have been far reaching for many individuals and the intersex community as a whole.²⁴¹ These submissions urged the TLRI to have regard to the *Malta Declaration* and the *Darlington Statement* as a clear expression of the intersex community's desire for bodily autonomy.

3.1.12 The TLRI's recommendations are informed by research and the stories shared by transgender people and people with intersex variations of sex characteristics about their lives and experiences. Nevertheless, the TLRI recognises its limitations as an organisation without relevant lived experience. Any reforms undertaken in response to this Final Report should be considered in conjunction with publications produced by intersex and transgender support organisations and be guided by direct input from trans, gender diverse and intersex people.

3.2 Consent to medical treatment for intersex children: understanding the issue

3.2.1 In circumstances where children are born with intersex variations of sex characteristics (that is, ambiguous genitalia), medical practitioners will sometimes perform a 'genital normalisation' procedure. This is a surgical intervention intended to make the external genital appearance and internal gonads more closely match the typical characteristics of an assigned gender.

3.2.2 As outlined at [2.2.10], the *BDM Act* now allows a longer time for parents of children for whom 'variations of sex characteristics do not allow for an easy assignment of sex' to register the birth (and the sex) of the child (s 15(2)). This will relieve some initial pressure on parents to make medical decisions. However, for many intersex people their sex characteristics become more or less pronounced throughout their childhood. Even after 120 days, assigning a sex for the purposes of registering the birth of an intersex child can be difficult.²⁴² In general, medical practitioners and parents considered 'normalisation' interventions to be in the best interests of the child, believing the variations to be abnormal and seeking to 'correct' a perceived disorder.

²⁴¹ See TasCOSS, Submission to TLRI, *Legal Recognition of Sex and Gender* (Issues Paper 29, 2019) 7; Transforming Tasmania, Submission to TLRI, *Legal Recognition of Sex and Gender* (Issues Paper 29, 2019) 3.

²⁴² See discussion of this issue at [2.2.59].

3.2.3 However, a number of submissions to the TLRI²⁴³ emphasised that there are generations of adults who have lived and must live with the consequences of government policies and medical practices that authorised interventions to ‘normalise’ a child’s physiology. Submissions to the TLRI from community organisations and members of the community highlight the pain and suffering caused by past practices (some of which continue to be used today).

3.2.4 These submissions are consistent with the experiences of the many intersex adults who underwent these procedures as infants and children and have subsequently shared that they consider these interventions to have been extremely harmful.²⁴⁴

3.2.5 A 2013 Senate inquiry (see [3.2.8]–[3.2.10]) examining involuntary or coerced sterilisation of intersex people, received evidence regarding the social and psychological ramifications of such surgeries. It told of the social stigma, ‘legacy of shame’, erosion of trust within the child’s family unit, personal and psychological distress, adult sexual anxieties, and uncertainty about personal and gender identity experienced by those on whom surgery was performed.²⁴⁵

Human rights issues

3.2.6 Article 24.3 of the United Nations *Convention on the Rights of the Child*²⁴⁶ provides that States Parties shall take all effective and appropriate measures to abolish traditional practices prejudicial to the health of children. This is relevant to medical practices based on convention and social considerations rather than established physiological need, such as deferrable surgeries on intersex children.

3.2.7 In its 2009 report on the human rights implications of surgery on intersex infants, the AHRC said:

Under the [*Convention on the Rights of the Child*], a child who is capable of forming their own views has the right to express those views in all matters affecting them — including decisions about their health — and for those views to be given due weight. However, this right is to be exercised in accordance with the age and maturity of the child. In situations where surgery is not a medical necessity, it might be more appropriate to delay gender-related surgery until the child is at an age where their views concerning their gender identity and surgery can be taken into account.²⁴⁷

²⁴³ For example, submissions from Human Rights Watch Australia, Androgen Insensitivity Syndrome Support Group Australia (‘AISSGA’), A Gender Agenda (‘AGA’), and Intersex Human Rights Australia to TLRI, *Legal Recognition of Sex and Gender* (Issues Paper 29, 2019).

²⁴⁴ See Intersex Human Rights Australia Submission to AHRC Inquiry; Human Rights Watch, Submission to TLRI, *Legal Recognition of Sex and Gender* (Issues Paper 29, 2019) 2–3.

²⁴⁵ Senate Community Affairs References Committee, Parliament of Australia, *Involuntary or Coerced Sterilisation of Intersex People in Australia* (Second Report, 25 October 2013) <https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Community_Affairs/Involuntary_Sterilisation/Sec_Report/index>.

²⁴⁶ *Convention on the Rights of the Child* (n 98).

²⁴⁷ AHRC, *Surgery on Intersex Infants and Human Rights* (2009) <https://www.humanrights.gov.au/sites/default/files/content/genderdiversity/surgery_intersex_infants2009.pdf>.

3.2.8 The 2013 Senate report, *Involuntary or Coerced Sterilisation of Intersex People in Australia*, emphasised that ‘normalising’ surgery on infants and children has implications for a range of interrelated human rights, including:

- the right to privacy, which extends to the right to personal autonomy in relation to medical treatment;
- the right to equality and non-discrimination;
- the prohibition against torture and other cruel, inhuman and degrading treatment, including the prohibition against non-consensual scientific or medical experimentation.²⁴⁸

3.2.9 The Senate Community Affairs References Committee concluded:

Irreversible medical treatment, particularly surgery, should only be performed on people who are unable to give consent if there is a health-related need to undertake that surgery, and that need cannot be as effectively met later, when that person can consent to surgery.

Medical practice has moved, and appears to be continuing to move, in the right direction, by applying increasing caution to normalising treatment of children.²⁴⁹

3.2.10 The inquiry recommended that all medical treatment of intersex people be subject to guidelines which ‘favour deferral of normalising treatment until the person can give fully informed consent and seek to minimise surgical intervention on infants undertaken for primarily psychosocial reasons.’²⁵⁰ These recommendations have not been implemented anywhere in Australia.

3.2.11 In 2017, the *Yogyakarta Principles* (see [2.2.95]) were supplemented by the *Yogyakarta Principles Plus 10*. The *Yogyakarta Principles Plus 10* discussed the right to bodily and mental integrity and stated that no one should be subjected to invasive or irreversible medical procedures that modify sex characteristics without their free, prior and informed consent, unless medically necessary.²⁵¹ The *Yogyakarta Principles Plus 10* also emphasised that the best interests of the child should be the key consideration and that the wishes and consent of the child in question be considered and respected.²⁵²

3.2.12 The principle of free and prior informed consent is consistent with calls in international intersex human rights statements, including the *Malta Declaration* and the *Darlington Statement*,²⁵³ to respect the bodily integrity and autonomy of intersex people, including children. These documents affirm that the medicalisation and stigmatisation of intersex variations has resulted in significant physical trauma and mental health concerns.

3.2.13 The *Malta Declaration* focuses on the need to ‘de-pathologise’ intersex variations (for example, by not referring to such variations as ‘disorders’), and not to adopt a strictly medical approach to variations in sex characteristics. The *Declaration* calls on countries to introduce legal

²⁴⁸ Senate Community Affairs References Committee (n 245) 58–59.

²⁴⁹ Ibid.

²⁵⁰ Ibid 74.

²⁵¹ *Yogyakarta Principles Plus 10* (n 73) Principle 32.

²⁵² Ibid.

²⁵³ See *Darlington Statement* (n 22).

mechanisms to end ‘normalising’ practices such as genital surgeries, psychological and other medical treatments, and the non-consensual sterilisation of intersex people.

3.2.14 The *Darlington Statement* goes further, calling for the ‘immediate prohibition as a criminal act of deferrable medical interventions, including surgical and hormonal interventions, that alter the sex characteristics of infants and children without personal consent.’²⁵⁴

3.2.15 Currently, Malta is the only country to have banned the practice of performing these surgeries without the consent of the person on whom the surgery is being performed.²⁵⁵

Effectiveness of surgery

3.2.16 Evidence presented to the Senate Community Affairs References Committee into involuntary surgeries (see [3.2.8] above) suggested that the approach to surgical intervention on intersex children had become more judicious. However, the changes in this area are uneven, with surgery still regularly taking place in infancy and childhood.²⁵⁶

3.2.17 The Senate Community Affairs References Committee noted that cosmetic genital surgery continues to be performed on children who are intersex, with 78% of practitioners preferring to perform normalising surgery before the child is two years old.²⁵⁷ For example, the Disorder of Sex Development multidisciplinary team at Melbourne’s Royal Children’s Hospital explained that, while no decision is rushed into, it was preferable to perform surgery at a young age.²⁵⁸

3.2.18 The Senate Community Affairs References Committee also noted known risks of some genital normalisation procedures, including irreversible sterilisation and the likelihood that surgery would not be an isolated intervention. In fact, normalisation surgery can lead to an ongoing dependency on medical intervention, with some intersex teenagers needing to undergo continuing reconstructive surgeries throughout adolescence.²⁵⁹

3.2.19 Overall, the Senate Community Affairs References Committee noted the ‘distinct lack’ of studies on the long-term outcomes of normalisation surgery and lack of standardised practice and expressed serious concerns regarding known negative outcomes resulting from these surgeries.²⁶⁰

²⁵⁴ Ibid 7.

²⁵⁵ *Gender Identity, Gender Expression and Sex Characteristics Act 2015* (Malta).

²⁵⁶ Senate Community Affairs References Committee (n 245) 49.

²⁵⁷ Ibid.

²⁵⁸ Ibid 50.

²⁵⁹ Ibid 58.

²⁶⁰ Ibid 51. The Committee noted that few studies have analysed the outcomes of these surgeries and that many of the studies that had been undertaken had significant methodology problems which undermined their findings.

Relevant cases

3.2.20 Most cases involving medical procedures for intersex children (for example, *In Re A*,²⁶¹ *Re Lesley*²⁶² and *Re Carla*²⁶³ — see Appendix 5) have arisen when parents or guardians seek court approval for a medical procedure for their child before that child is able to give informed consent. This remains a significant issue for the intersex community.

3.2.21 In the 1992 High Court decision in *Department of Health & Community Services v JWB & SMB* (*‘Marion’s Case’*),²⁶⁴ the parents of a 14-year-old girl with severe intellectual disabilities requested that doctors perform a hysterectomy and oophorectomy, removing Marion’s uterus and ovaries. In considering whether Marion’s parents could consent to such an invasive procedure, the High Court held that the proposed operations went beyond ‘therapeutic’ procedures to treat a ‘malfunction or disease’. The Court had regard to the grave consequences of the procedure, effectively sterilising Marion, and the risk that her parents’ decision underestimated Marion’s interests and her future capacity to consent to the procedure.²⁶⁵ The Court was satisfied that the procedures were outside the scope of what parents and guardians were authorised to consent to on behalf of a child.

3.2.22 Subsequent cases have used *Marion’s Case* as the basis to discuss questions of consent to medical treatment, the limitations of parental consent, and the extent to which a young person should be involved in decisions regarding invasive surgical procedures. A summary of relevant cases is provided in Appendix 5.

3.2.23 Courts have generally held that court orders are required to authorise any significant procedures on intersex children.²⁶⁶ This has been considered a ‘procedural safeguard’ to ensure that the best interests of the child are taken into account.

3.2.24 While courts have generally been willing to provide approval for invasive surgeries, there appears to be a judicial trend towards a more strongly child-focused decision-making process. However, there is an argument that the courts have largely taken a narrow view of what is in the ‘best interests’ of the child, favouring medical intervention to ‘normalise’ intersex children.²⁶⁷ For example, in *Re Lesley*, the Family Court dismissed an argument that, given the irreversible nature of the procedures proposed, an Independent Children’s Lawyer should be appointed.²⁶⁸

3.2.25 Further, the decision in *Re Carla*²⁶⁹ that surgical intervention could be considered therapeutic (and, therefore, not require court approval) raises concerns that intersex characteristics

²⁶¹ (1993) 16 Fam LR 715.

²⁶² [2008] Fam CA 1226.

²⁶³ (2016) 324 FLR 1.

²⁶⁴ *Marion’s Case* (n 240).

²⁶⁵ Ibid 250 (Mason CJ, Dawson, Toohey and Gaudron JJ). Their Honours cited *Gillick* (at 237) in support of the view that regard must be had to a child’s competence to consent to medical procedures.

²⁶⁶ See, for example, *Re Lesley* (n 262); *Re Carla* (n 263).

²⁶⁷ Equal Opportunity Tasmania, *Legal recognition of sex and gender diversity in Tasmania: Options for amendments to the Births, Deaths and Marriages Registration Act 1999* (2016) 22.

²⁶⁸ *Re Lesley* (n 262) [43]–[46].

²⁶⁹ *Re Carla* (n 263).

continue to be seen as a disorder so that ‘normalisation’ surgery on intersex children will remain common practice.

The TLRI’s view

3.2.26 Lack of evidence or studies regarding the long term physical and mental health effects of interventions, and the invasive and irreversible nature of most surgeries, raises questions as to the circumstances in which such interventions will be in the ‘best interests’ of a child.

3.2.27 The reported experiences of people with intersex variations of sex characteristics, and the inconsistent approach taken by the courts, demonstrate the need for explicit statutory guidance as to when medical intervention on intersex children will be appropriate.

3.2.28 The following section examines the current regulatory framework.

3.3 Current approaches to medical consent for intersex children

3.3.1 Currently, Tasmania does not have a regulatory framework that explicitly addresses surgical intervention on intersex children.

3.3.2 No legislation purports to manage the exercise of discretion on the part of doctors in cases where genital normalisation is considered. In the absence of legislative provisions, guidance documents have attempted to describe best practice in this area. These documents focus on the means by which decisions are made, the reasons for that approach to decision-making and the risks of current approaches. Two examples are discussed below.

Consensus Statement on Management of ‘Intersex Disorders’

3.3.3 The 2006 *Consensus Statement on Management of Intersex Disorders*²⁷⁰ (‘2006 Consensus Statement’) represents an international medical approach to intersex issues. This statement centres on medical attention and management, framing variations in sex characteristics as a kind of disorder.

3.3.4 One of the 2006 *Consensus Statement*’s main recommendations is that all individuals should receive a gender assignment at birth, and that assignment of gender is part of effective treatment of variations in sex characteristics. However, the 2006 *Consensus Statement* stresses that assignment of gender should not occur before expert evaluation in newborns. It also does not recommend surgical intervention for cosmetic reasons but does list the likelihood of achieving a standardised physical appearance as a factor for consideration by medical practitioners.²⁷¹ Accordingly, it pathologises and problematises variations in sex characteristics.

The Senate inquiry into involuntary surgeries found that few studies on the outcomes of these surgeries have been performed since the release of the 2006 *Consensus Statement*.²⁷² The Senate Community Affairs References Committee observed that many of the studies that had been

²⁷⁰ Peter Lee et al, ‘Consensus Statement on Management of Intersex Disorders’ (2006) 118(2) *Paediatrics* 490.

²⁷¹ Ibid.

²⁷² Senate Community Affairs References Committee (n 245) 51.

completed had significant methodology problems which undermined their findings, making it difficult to analyse the benefits or otherwise of surgeries performed on children.²⁷³

Decision-making principles for the care of infants, children and adolescents with intersex conditions

3.3.5 In 2013, the Victorian Department of Health issued good practice guidelines in the form of the *Decision-making Principles for the Care of Infants, Children and Adolescents with Intersex Conditions* ('*Victorian Decision-making Principles*').²⁷⁴ The *Victorian Decision-making Principles*, based on the principles endorsed in the 2006 *Darlington Statement*, are intended to guide health professionals to achieve the 'best possible outcomes' for children with intersex conditions.

3.3.6 While the Victorian Government intends that the decision-making framework will be applied in all intersex cases in Victorian hospitals, it is not intended to provide directives or clinical protocols about individual cases. Instead, the Department of Health has endorsed five medical principles to be applied robustly, transparently and consistently in all cases:²⁷⁵

- gender assignment must be avoided before expert evaluation in newborns;
- evaluation and long-term management must be carried out in a centre with an experienced multidisciplinary team;
- all individuals should receive gender assignment;
- open communication with patients and families is essential, and participation in decision-making is encouraged;
- patient and family concerns should be respected and addressed in strict confidence.²⁷⁶

3.3.7 The *Victorian Decision-making Principles* stress that surgical intervention is not a necessary component of gender assignment and caution against allowing a sense of urgency to outweigh the need to gather information to make robust, transparent and consistent decisions.

3.3.8 The *Victorian Decision-making Principles* also acknowledge that normalising surgery is a controversial approach:

Most of the international debate about the healthcare of intersex conditions has been concerned with the ethics of performing genital surgery on infants and children. Generally, the focus of concern is not on medically necessary treatment done to avoid physical harm that is proportionate to the level of physical risk that the condition poses to the patient (for example, ensuring a functioning urinary system). The focus of concern is in cases where treatments for cosmetic effect are carried out for conditions that pose little or no physical

²⁷³ Ibid 53–56.

²⁷⁴ Victorian Department of Health, *Decision-making Principles* (February 2013) 3.

²⁷⁵ Ibid 7.

²⁷⁶ Ibid 4.

risk to the patient (for example, to ‘normalise’ the person’s body to make it look more typically male or female).²⁷⁷

3.3.9 While not explicitly recommending against normalisation surgery during childhood, the *Victorian Decision-making Principles* do emphasise the need for caution. However, the document also takes the position that gender assignment is the best practice in most cases.²⁷⁸

Views expressed in submissions

3.3.10 A number of submissions shared personal experiences and supported greater regulatory guidance in relation to medical interventions. For example, the Androgen Insensitivity Syndrome Support Group Australia (‘AISSGA’) submission provided numerous personal accounts of forced surgeries and their consequences. These accounts noted that often there was little discussion of options, and the option of not having surgery was rarely raised. The AISSGA considered that, rather than rushing to medical intervention, the clinical situation must be de-escalated, and information and support provided to individuals and families regarding options, including information relating to risk factors, successful and unsuccessful outcomes, and complication ratios. They called for more community-based participation research into the efficacy of clinical interventions.

3.3.11 The AISSGA did not support the *2006 Consensus Statement’s* references to intersex variations as ‘disorders’. It also did not support the *Victorian Decision-making Principles*, in part because those principles allow for a psychosocial²⁷⁹ rationale to be used to justify medical intervention.

3.3.12 A Gender Agenda (‘AGA’) submitted that, unless required by ‘medical necessity’, medical interventions should be deferred until the child can consent.²⁸⁰ This view was shared by the Commissioner for Children and Young People, Human Rights Watch, Intersex Human Rights Australia, the APS, and the majority of individual submissions.²⁸¹ The APS emphasised that ‘medical necessity’ is not established merely by confusion regarding binary sex, possible stigma that a child may face or other social difficulties. Instead, a determination as to ‘necessity’ should focus on function, such as circumstances where procedures are essential to assist bladder or bowel function.²⁸² Human Rights Watch emphasised the need for a restrictive interpretation of ‘medical necessity’, noting that the majority of intersex infants are perfectly healthy and atypical genitalia often does not lead to distress in itself.²⁸³ AGA suggested that ‘medical necessity’ be confined to

²⁷⁷ Ibid 21.

²⁷⁸ Ibid 15.

²⁷⁹ ‘Psychosocial’ is defined as: ‘of or relating to the interrelation of social factors and individual thought and behaviour.’ Also: ‘of or relating to human cultural evolution.’ *Oxford English Dictionary* (online at 5 March 2020) ‘Psychosocial’ (def 153937) <www.oed.com/view/Entry/153197>.

²⁸⁰ AGA considered that a child’s capacity to consent should be determined on the basis of *Gillick* competence.

²⁸¹ See submissions from Alistair Lawrie, Dede River, Jemima Willis and three anonymous submissions to TLRI, *Legal Recognition of Sex and Gender* (Issues Paper 29, 2019). Two confidential submissions also supported restricting non-consensual medical interventions and for the wishes of children to be respected. TasCOSS and Transforming Tasmania expressly deferred to the views of the intersex community, as expressed in the *Malta Declaration* and *Darlington Statement*.

²⁸² APS, Submission to TLRI, *Legal Recognition of Sex and Gender* (Issues Paper 29, 2019) 10.

²⁸³ Human Rights Watch, Submission to TLRI, *Legal Recognition of Sex and Gender* (Issues Paper 29, 2019) 2.

situations where a child's life was in danger, or when a procedure would be considered necessary for a child without intersex variations of sex characteristics.²⁸⁴

3.3.13 Where surgery is deemed necessary, AGA submitted that children and parents should be provided with mandatory information and counselling sessions before consent can be given. Jemima Willis also considered that counselling should be mandatory for affected parents and children.

3.3.14 An anonymous submission also endorsed the view that surgery should not be performed on children unless necessary. It further recommended that intersex advocates have input into whether a particular intervention is medically necessary and provide support to families being asked to consent to procedures.

3.3.15 The ACL opposed any medical intervention to alter the sex characteristics of a child, particularly in relation to children experiencing gender dysphoria.

In relation to children with 'indeterminate biological sexual characteristics', the ACL submitted that surgery should be deferred until the child begins to develop 'male' or 'female' sexual characteristics or identifies with either male or female. The ACL recognised that surgical intervention will affect a person for their entire life and must only be done with 'the fullest possible consent of the child', supported by the assistance of psychological and medical advice. Again, the ACL stressed that they did not think that this should apply to children experiencing gender dysphoria.

Anne Elston took a broader view, stating that any surgical intervention should not occur without the consent of the child, and that parents could only give consent to an intervention if motivated by the child's wishes.²⁸⁵

3.3.16 A number of submissions emphasised the limitations of the court system in addressing issues of consent for children with intersex variations of sex characteristics.²⁸⁶ AGA and the AISSGA noted that the decision in *Re Carla* indicated a willingness to justify surgical interventions as 'therapeutic'. Equality Australia noted that the decisions in *Re: Kelvin* and *Re: Matthew* removed the need for court approval for some parental decisions regarding surgery. The submission expressed concern that, without judicial or regulatory oversight, parents would continue to opt for 'normalising' procedures on intersex children despite limited evidence as to their benefits. Equality Australia supported reforms that give primacy to the wishes of the child and enshrine Principle 32 of the *Yogyakarta Principles Plus 10*.

3.3.17 Equality Australia pointed to the ongoing AHRC Inquiry on non-consensual surgeries on children with intersex variations of sex characteristics and encouraged the adoption of a national approach to the issue to prevent jurisdiction shopping. Intersex Human Rights Australia and Alistair Lawrie also urged the TLRI to consider the outcomes of the AHRC Inquiry.

²⁸⁴ AGA, Submission to TLRI, *Legal Recognition of Sex and Gender* (Issues Paper 29, 2019) 3.

²⁸⁵ The submission clarified that this would apply only where the child is *Gillick* competent to express their wishes. Anne Elston, Submission to TLRI, *Legal Recognition of Sex and Gender* (Issues Paper 29, 2019) 1.

²⁸⁶ See submissions from AISSGA, AGA, Intersex Human Rights Australia, and Equality Australia to TLRI, *Legal Recognition of Sex and Gender* (Issues Paper 29, 2019).

3.3.18 Anonymous submissions apprised the TLRI of the significant harms that can result from interventions performed on children. They told the TLRI of the often-harrowing consequences that frequently necessitated further and repeated surgeries during the lifetime of people who had been operated on either during infancy or shortly after birth, when there was no possibility of informed consent being given.

3.3.19 Only Women Speak Tasmania differed from the overall tenor of submissions regarding the need for guidance in relation to consent to medical interventions on children with intersex variations of sex characteristics. Women Speak Tasmania defined ‘intersex’ as being generally limited to people with congenital adrenal hyperplasia and stated that surgery to address this condition is very rare and done only when necessary.²⁸⁷

3.3.20 Women Speak Tasmania considered that decisions regarding medical interventions on children ‘to ensure optimum development and facilitate optimum function’ will sometimes need to be made by parents or guardians, who should have the right to do so.²⁸⁸

The TLRI’s view

3.3.21 The TLRI received 23 submissions addressing the issue of non-consensual medical interventions. The vast majority of those submissions acknowledged the persistence of ‘normalising’ surgeries on children with intersex variations of sex characteristics, and the adverse physical and psychological effects of non-consensual interventions on children (often extending into adulthood). These submissions supported a variety of reform options, but all agreed that a regulatory response is appropriate.

3.3.22 Women Speak Tasmania took a different view to the majority of submissions made to the TLRI about the extent and impact of non-consensual medical interventions. They stated:

Truly ambiguous genitalia in an infant is extremely rare, and is almost always seen in females with significant genital masculinisation as a result of Congenital Adrenal Hyperplasia. Modern medical tests, including genetic testing, allow such infants to be quickly confirmed as biologically female and appropriate non-surgical treatment can commence immediately.

Currently, surgical procedures on these rarely presenting infants are only undertaken for necessary functional reasons.

The definition of ‘intersex’ has been expanded by some to include slightly more common conditions such as hypospadias in male infants, but in virtually 100 per cent of cases of Differences of Sex Development the sex karyotype of the individual concerned is unambiguously either male or female.

3.3.23 The TLRI notes that the definition of ‘intersex’ used by Women Speak Tasmania is far narrower than definitions used by the AHRC or the United Nations, and the use of the term in the *BDM Act* and the *ADA*. The view that medical intervention on intersex children is very rare and only performed beneficially is not consistent with the findings of the 2013 *Senate Inquiry into Involuntary or Coerced Sterilisation of Intersex Persons* (see [3.2.9]).

²⁸⁷ Women Speak Tasmania, Submission to TLRI, *Legal Recognition of Sex and Gender* (Issues Paper 29, 2019) 6.

²⁸⁸ Ibid.

3.3.24 Consistent with the majority of submissions, the *Malta Declaration* and the *Darlington Statement* the TLRI considers that existing laws are inadequate to regulate non-consensual medical interventions on intersex children, and that further reform is warranted.

3.3.25 Section 3.4 discusses options for regulatory reform.

3.4 Options for reform

3.4.1 The TLRI invited submissions about whether regulatory reform in respect of surgical interventions to alter sex characteristics in children is desirable and, if so, what form such reforms should take.

Question 5

What, if any, reforms should be made in relation to consent to medical treatment to alter the sex characteristics of an intersex minor? In particular:

- In what, if any, situations should court approval be required for medical intervention on minors to alter sex characteristics?
- Should sex reassignment surgery on a minor be excluded from offences relating to female genital mutilation?
- Should Tasmanian laws prevent medical intervention to address sex characteristics in minors without their consent to the procedures (other than in emergency situations)? Should ‘emergency situations’ be defined by legislation for the purpose of this exception?
- What form should that prohibition take? Should it be a criminal offence to perform such surgery or should some alternative approach be adopted and, if so, what approach would best address this issue?
- Should there be any additional exceptions to that prohibition apart from emergency situations and, if so, what should those exceptions be?
- In what, if any, situations should an independent advocate be appointed to act on behalf of a minor where approval is sought for medical intervention to address sex characteristics?
- If parents are able to consent to medical procedures, should they be required to show that they have received counselling or advice (other than from the treating physician) about the implications of the proposed procedures?
- Should a specialist tribunal be established to consider applications for medical procedures to alter the sex characteristics of minors and, if so, who should be members of the tribunal?

3.4.2 As noted at [3.3.21], the submissions overwhelmingly endorsed the view that regulatory reform is desirable.

3.4.3 This section examines potential approaches to reform. Broadly, these include:

- extension of education and support services to assist affected parents to make informed decisions;
- introduction of medical codes of practice for practitioners performing surgery on children;
- criminalisation of surgery on children;
- establishing a specialist tribunal to make decisions regarding surgery on children
- specific health legislation to regulate surgery on children; and
- civil liability provisions.

3.4.4 Each of these options is discussed below.

Education and support services

3.4.5 A persistent problem in regulating decision-making about medical interventions on intersex children is a lack of understanding, in the general community, and by consequence, by some about intersex people and variations in sex characteristics. As detailed in Part 1 of this Final Report, there are a number of misconceptions about ‘binary sex’, the biological features that make up a person’s sex, and intersex variations of those features. In practice, this lack of understanding has often meant that the needs and desires of the intersex community are poorly addressed, or not addressed at all.

3.4.6 Personal stories shared in submissions demonstrate the difficulty that many parents face obtaining objective information when making decisions in relation to surgery on their intersex child.²⁸⁹

3.4.7 The *Darlington Statement* calls for more supported counselling services to assist intersex people and their families to make informed decisions.²⁹⁰ Funding for intersex support organisations would allow those organisations to produce helpful information about intersex matters, including surgical interventions such as genital normalisation. Financial support is also critical to the provision of counselling to parents and children and the education of medical practitioners about the potential consequences of surgery.

3.4.8 As discussed in Part 2, the *JRL Act* has introduced a range of explicit provisions in relation to counselling for children seeking to register a change of gender (see [2.2.128]). Similar emphasis should be placed on the importance of counselling prior to making any decisions regarding medical procedures on intersex children.

Views expressed in submissions

3.4.9 A number of submissions recommended that children and parents should be provided with information and counselling sessions where ‘necessary’ surgery was required.²⁹¹ AGA stressed that

²⁸⁹ See the AISSGA submission, and several anonymous and confidential submissions to TLRI, *Legal Recognition of Sex and Gender* (Issues Paper 29, 2019).

²⁹⁰ *Darlington Statement* (n 22) cl 7.

²⁹¹ For example, submissions from AGA, the AISSGA, and Equality Australia to TLRI, *Legal Recognition of Sex and Gender* (Issues Paper 29, 2019).

such counselling must not be a purely administrative exercise but should involve genuine efforts to empower parents to make informed decisions about surgery.²⁹²

3.4.10 The AISSGA also emphasised that clear information and support should be provided to individuals and families regarding their options, including information relating to risk factors, the consequences of not undertaking surgery, successful and unsuccessful outcomes from surgeries, and complication ratios. Importantly, this information must be provided with sufficient time for parents to properly consider the information and to seek further advice or support.

3.4.11 Several submissions also recommended that members of the intersex community be invited to speak with any family considering surgery to discuss their own experience. Alistair Lawrie and Women’s Health Tasmania recommended that intersex-led community organisations be funded to provide peer support and advocacy. Equality Tasmania also recommended that funding be provided for intersex organisations to deliver effective education and support.

3.4.12 Equality Tasmania also noted that there is a widespread lack of understanding regarding both intersex and transgender health needs in the medical profession. They recommended that medical students and health practitioners and allied health professionals receive training in the health issues of sex and gender diverse Tasmanians.

The TLRI’s view

3.4.13 The TLRI acknowledges that there are misconceptions within the broader community regarding intersex variations, and that these misconceptions have had an impact on policy development, medical practices, and parental decision-making.

3.4.14 Regardless of any substantive law reform discussed below, the TLRI recommends that resources be developed to promote awareness in the Tasmanian community regarding the issues and realities facing intersex people, including the potential mental health effects of normalisation procedures.

3.4.15 As noted by Equality Tasmania (see [3.4.12]), medical and allied health students and practitioners would also benefit from more training and support regarding health issues affecting the intersex and transgender communities.

3.4.16 Intersex organisations should be funded to provide peer support and participate in policy development frameworks (such as the Tasmanian Government’s LGBTI Reference Group).

3.4.17 Education and support are not ends in themselves. However, improved awareness and understanding will go some way towards more inclusive policies and practices, better informed decision-making, and more accessible support networks for children and families faced with decisions regarding medical interventions.

3.4.18 Education and support services will also complement the reform options discussed below.

²⁹² A Gender Agenda, Submission to TLRI, *Legal Recognition of Sex and Gender* (Issues Paper 29, 2019) 4.

Professional code of conduct or practice standard

3.4.19 Of the potential reform options discussed in the Issues Paper, the development of a professional code of practice was raised. A code of practice would guide decisions in the medical profession regarding interventions to address intersex variations of sex characteristics. These practice standards could address issues including:

- obtaining informed consent (including whose consent is required, standard or minimum information requirements, and referral to counselling or support services);
- assessing the best interests of the child;
- guidance on when interventions are deferrable and when they are urgent or ‘medically necessary’;
- best practice in relation to obtaining professional consensus regarding whether an intervention is necessary; and
- monitoring long term outcomes of interventions.

3.4.20 Where a code of practice is developed, practitioners who act inconsistently with the code may face disciplinary procedures or place themselves at risk of negligence claims.

3.4.21 This approach would be consistent with the recommendation of the Senate inquiry into *Involuntary or Coerced Sterilisation of Intersex People* (see [3.2.16]–[3.2.19]) to develop and implement guidelines which minimise normalisation surgeries.²⁹³ This inquiry noted the lack of medical consensus regarding the practice, prevalence and necessity for normalisation procedures, and observed that it is unclear how, if at all, medical practitioners factor diversity in the appearance of genitals into their clinical practice.

3.4.22 There is currently no national professional code of practice or practice standard which purports to advise or direct practitioners on intersex issues specifically. The Australian Medical Association (‘AMA’) 2002 position statement on *Sexual Diversity and Gender Identity* and the 2014 position statement on *Sexual and Reproductive Health* acknowledge some issues facing intersex people but do not address normalisation surgeries in great detail.

3.4.23 However, the AMA’s 2014 position statement on *Sexual and Reproductive Health* advises against cosmetic genital surgeries for children under the age of 18, and states that normalising cosmetic genital surgery on intersex infants should be avoided until a child can fully participate in decision-making.²⁹⁴ This is the extent of the AMA’s position on this specific issue.

3.4.24 The *Victorian Decision-making Principles* (see [3.3.5]–[3.3.9]) provide an example of guidelines aimed at achieving consistency of practice. However, these principles continue to endorse gender normalisation as a therapeutic procedure in many circumstances. A number of submissions to the TLRI rejected them on that basis.²⁹⁵

²⁹³ Senate Community Affairs References Committee (n 245) 74.

²⁹⁴ AMA, *Sexual and Reproductive Health* (2014) 12.

²⁹⁵ For example, see the AISSGA submission to the AHRC Inquiry (submitted to the TLRI) 19.

Views expressed in submissions

3.4.25 As outlined in [3.4.9]–[3.4.12], a significant number of submissions argued that non-consensual medical interventions should only occur in circumstances of ‘medical necessity’.²⁹⁶

3.4.26 Women’s Legal Service Tasmania recognised that some interventions may be medically necessary in an emergency but recommended that a narrow definition of emergency be developed to ensure that any such interventions are limited to procedures to address genuine health issues. The AISSGA also recognised that any regulatory framework should include a clear definition of what constitutes ‘medical necessity’.

3.4.27 The APS emphasised that medical necessity does not mean confusion in sex, possible stigma, or other difficulties but should instead focus on function, such as circumstances where procedures to assist bladder or bowel function are needed. Alistair Lawrie also submitted that social or cultural rationales should not be considered when determining whether a medical procedure is ‘necessary’.

3.4.28 The APS also submitted that any surgery should only be performed after multiple assessments.²⁹⁷ Similarly, AGA submitted any intervention should not be considered ‘necessary’ unless certified as such by a practitioner other than the practitioner performing the surgery.

3.4.29 The AISSGA suggested that a medical practitioner who performs a non-consensual intervention in a manner that is not authorised by a code of practice should be deregistered.²⁹⁸ Human Rights Watch recommended that healthcare funds should not reimburse the cost of non-essential interventions where no consent has been given by the child and a code of practice has not been complied with.

3.4.30 Women’s Health Tasmania supported the development of practice standards to guide medical assessments and decision-making. They considered practice standards alone to be insufficient to regulate non-consensual medical intervention, but noted such standards would provide valuable support for criminalisation and a more comprehensive legislative framework (see [3.4.45]).

3.4.31 As discussed at [3.4.12], Equality Tasmania also advocated for better training for medical students and practitioners in relation to intersex health needs.

The TLRI’s view

3.4.32 The TLRI agrees with submissions regarding the need for clarity in respect of what constitutes ‘medical necessity’, and for any guidelines in that regard to focus exclusively on physical function and to be developed in consultation with the intersex community.

²⁹⁶ Submissions from APS, Intersex Human Rights Australia, Human Rights Watch – Australia, A Gender Agenda, Equality Australia, TasCOSS, Women’s Health Tasmania, Women’s Legal Service, and several anonymous and confidential submissions to TLRI, *Legal Recognition of Sex and Gender* (Issues Paper 29, 2019).

²⁹⁷ APS, Submission to TLRI, *Legal Recognition of Sex and Gender* (Issues Paper 29, 2019) 10.

²⁹⁸ The AISSGA, Submission to TLRI, *Legal Recognition of Sex and Gender* (Issues Paper 29, 2019) 18.

3.4.33 Given the complexity and diversity of medical, health and social perspectives on this issue, the TLRI is unsure how practicable it would be for the Tasmanian Department of Health to develop standard decision-making principles.

3.4.34 However, in light of the significant consequences for intersex people, the TLRI considers that it would be worthwhile for discussions to be held with the intersex community in this regard.

3.4.35 The TLRI also agrees with submissions noting that practice standards should complement more regulatory approaches, allowing the practice standards to evolve with medical practice but be enforced through legislation.

Criminalisation under the Criminal Code

3.4.36 The *Darlington Statement* calls for the criminalisation of ‘deferrable medical interventions, including surgical and hormonal interventions, that alter the sex characteristics of infants and children without personal consent.’²⁹⁹

3.4.37 A potential model for criminalisation of particular medical procedures is the ban on female genital mutilation procedures under the *Criminal Code* (Tas).

3.4.38 Following condemnation of FGM both nationally and internationally, s 178A was introduced into the Tasmanian *Criminal Code*. Section 178A makes it a crime for any person to perform FGM on another person. Consent, whether given by the person being operated on or their parent or guardian will not serve as a defence to the charge.

3.4.39 ‘Female genital mutilation’ is defined to include a clitoridectomy, an excision of any other part of the female genitals, an infibulation or similar procedure, and any other mutilations of the female genital organs.³⁰⁰

3.4.40 However, the prohibition on FGM does not apply to the following procedures:

- a surgical procedure for a ‘genuine therapeutic purpose’; or
- a sexual reassignment procedure, defined as a surgical procedure to ‘give a female, or a person whose sex is ambivalent, the genital appearance of a particular sex’.³⁰¹

3.4.41 Recent court decisions, such as that in *Re Carla* (see Appendix 5), suggest that normalisation procedures might be considered therapeutic. Such procedures might arguably also be characterised as sexual reassignment procedures and fall outside the prohibition in s 178A of the *Criminal Code*.

3.4.42 One possible reform approach would be to prohibit genital normalisation procedures in a similar manner to the prohibition on female genital mutilation. However, a prohibition that does not allow for the consent of the person being operated on may not be desirable, as it does not adequately recognise the autonomy of intersex adults and capable children. Further, while courts and the medical profession continue to consider reassignment and normalisation procedures to

²⁹⁹ *Darlington Statement* (n 22) [7].

³⁰⁰ *Criminal Code* sch 1 s 1 ‘female genital mutilation’.

³⁰¹ *Ibid* s 178C.

serve a genuinely therapeutic purpose, many non-consensual normalising surgeries would fall within the exemption for therapeutic procedures.

3.4.43 A useful model may be found in the Maltese *Gender Identity, Gender Expression and Sex Characteristics Act 2015*. Section 14 of that Act provides:

14 (1) It shall be unlawful for medical practitioners or other professionals to conduct any sex assignment treatment and, or surgical intervention on the sex characteristics of a minor which treatment and, or intervention can be deferred until the person to be treated can provide informed consent:

Provided that such sex assignment treatment and, or surgical intervention on the sex characteristics of the minor shall be conducted if the minor gives informed consent through the person exercising parental authority or the tutor of the minor.

(2) Medical practitioners or other professionals in breach of this article shall, on conviction, be liable to the punishment of imprisonment not exceeding five years, or to a fine (multa) of not less than five thousand euro (€5,000) and not more than twenty thousand euro (€20,000).

(3) In exceptional circumstances treatment may be effected once agreement is reached between the interdisciplinary team and the persons exercising parental authority or tutor of the minor who is still unable to provide consent:

Provided that medical intervention which is driven by social factors without the consent of the minor, will be in violation of this Act.

(4) The interdisciplinary team shall be appointed by the Minister for a period of three years which period may be renewed for another period of three years.

(5) The interdisciplinary team shall be composed of those professionals whom the Minister considers as appropriate.

(6) When the decision for treatment is being expressed by a minor with the consent of the persons exercising parental authority or the tutor of the minor, the medical professionals shall:

(a) ensure that the best interests of the child as expressed in the Convention on the Rights of the Child be the paramount consideration; and

(b) give weight to the views of the minor having regard to the minor's age and maturity.

Views expressed in submissions

3.4.44 A number of submissions supported the view that surgery performed without consent should be subject to criminal prosecution.³⁰² Women's Health Tasmania advocated criminalisation based on the Maltese legislation, and preferred criminalisation over a civil liabilities approach:

³⁰² For example, see submissions from AGA, Equality Australia, Intersex Human Rights Australia, Transforming Tasmania, Alistair Lawrie, Dede River, Women's Health Tasmania, and an anonymous submission to TLRI, *Legal Recognition of Sex and Gender* (Issues Paper 29, 2019).

We believe criminalisation is preferable to a civil liabilities approach because it is a preventative measure, rather than reactive to errors. Criminalisation is forceful and reflects the seriousness of decision making and the potential for life time impacts.³⁰³

3.4.45 Women’s Health Tasmania also supported the introduction of a complementary legal framework for medical interventions to codify the situations in which surgery is permissible and formalise the principles that must inform decision making. This proposal is discussed at [3.6.48]–[3.6.61] below.

3.4.46 The DPP did not support criminalisation. While acknowledging that medical treatment of intersex children is complicated, the DPP opposed reforms to the *Criminal Code* that would criminalise surgery on children to alter sex characteristics where that surgery would not otherwise be unlawful.

3.4.47 In the DPP’s view, the Maltese *Gender Identity, Gender Expression and Sex Characteristics Act* was not a suitable guide for reform of the Tasmanian *Criminal Code*. This position was in part due to the use of language that is inconsistent with that of the *Code*, and in part due to the Maltese Act’s presupposition of the existence of a multidisciplinary team formed to address surgery on intersex people. No such team is mandated under Tasmanian legislation.

3.4.48 AGA strongly supported criminalisation of non-consensual medical procedures performed in Tasmania. AGA also submitted that complementary provisions should be introduced to prevent jurisdiction shopping, making it an offence to take a child interstate for the purpose of seeking a medical intervention that would be unlawful in Tasmania. Section 178B of the *Criminal Code* currently makes such a provision in relation to female genital mutilation:

178B. Removal of child from State

- (1) Any person who takes a child under the age of 18 years, or arranges for such a child to be taken, out of the State with the intention of having female genital mutilation performed on that child is guilty of a crime.

Charge: Removal of child for performance of female genital mutilation.

- (2) If it is proved that a person took the child, or arranged for the child to be taken, out of the State and that female genital mutilation was performed on the child outside the State, it is a presumption, in absence of proof to the contrary, that the person took the child, or arranged for the child to be taken, out of the State with the intention of having female genital mutilation performed on the child.

3.4.49 Women’s Legal Service Tasmania supported criminalisation of non-consensual deferrable medical intervention, including surgery and hormone treatment. However, they stressed the importance of maintaining the distinction between unlawful surgery to alter sex characteristics in intersex children and female genital mutilation.³⁰⁴

³⁰³ Women’s Health Tasmania, Submission to TLRI, *Legal Recognition of Sex and Gender* (Issues Paper 29, 2019) 6.

³⁰⁴ Women’s Legal Service, Submission to TLRI, *Legal Recognition of Sex and Gender* (Issues Paper 29, 2019) 5.

Specialist tribunal

3.4.50 Another approach to reform may be to incorporate into the criminal process oversight by a statutory board or tribunal. That review body could be tasked with overseeing all medical interventions on intersex children to ensure that they are justified either on the grounds of medical emergency or necessity or that they are performed with the child's informed consent. The review body would deploy decision-making principles based on a human rights framework that considers the best interests of the child, including their personal autonomy.

3.4.51 This approach was considered and recommended in the 2016 Options Paper released by Equal Opportunity Tasmania:

Recommendation 11: That treatment or any intervention primarily undertaken to modify or 'normalise' the visible or apparent sex characteristics of children for psychosocial reasons be classified as 'special medical procedures' and require consent of a Tasmanian board or tribunal such as the Guardianship and Administration Board informed by experts on gender and sex diversity.³⁰⁵

3.4.52 The TLRI notes that the AHRC is currently reassessing the principles which have guided decision-making about medical interventions for intersex children and the human rights implications of these practices in light of domestic and international developments.³⁰⁶

3.4.53 To ensure that applications for medical interventions are rigorously assessed to determine whether there is a genuine medical need for the procedure, membership of the statutory body would need to include allied health professionals, such as psychologists and social workers, with knowledge of the potential mental health impact of such surgery.

3.4.54 In its report on non-therapeutic male circumcision, the TLRI noted concerns that mandating court approval or authorisation of a statutory body would be costly, 'time consuming, stressful and burdensome on parents' and doctors, and potentially difficult to enforce.³⁰⁷ Similar concerns may arise in relation to provisions requiring authorisation by a specialist tribunal in respect of surgical interventions to alter sex characteristics of intersex children.

Views expressed in submissions

3.4.55 Both the AISSGA and AGA submitted that they had little confidence in the court process following *Re Carla* and preferred that decisions regarding non-deferrable surgeries be made by a specialist tribunal. This view was shared by Equality Australia, Intersex Human Rights Australia, Women's Health Tasmania and a number of individual submissions.³⁰⁸

³⁰⁵ Equal Opportunity Tasmania (n 267) 23.

³⁰⁶ For information about this review see, AHRC (n 247).

³⁰⁷ TLRI, *Non-Therapeutic Male Circumcision* (Final Report 17, 2012) 77–78
<http://www.utas.edu.au/__data/assets/pdf_file/0006/302829/Non-Therapeutic-Circ_Final-Report-August-2012.pdf>.

³⁰⁸ Submissions from Equality Australia, Intersex Human Rights Australia, Women's Health Tasmania, Dede River, Alistair Lawrie, and two anonymous submissions to TLRI, *Legal Recognition of Sex and Gender* (Issues Paper 29, 2019).

3.4.56 Women’s Health Tasmania suggested that the tribunal assess applications for surgeries in circumstances where consent cannot be given (for example, where a child lacks *Gillick* competence),³⁰⁹ and noted that any assessment must consider the importance of bodily autonomy.

3.4.57 Intersex Human Rights Australia also noted that non-consensual medical interventions may also be performed on intersex adults with disability and urged that any tribunal responsible for assessing interventions should ensure children and adults with disability be supported to make decisions wherever possible.³¹⁰

3.4.58 Each of the organisations and individuals that expressed support for the establishment of a specialist tribunal offered suggestions regarding the composition of that tribunal. Submissions generally called for a multi-disciplinary tribunal with expertise including clinicians, psychologists, human rights/legal, child and disability advocates, and members of the intersex community.

3.4.59 The submission of Anne Elston did not support the development of a specialist tribunal. She considered that a tribunal would add an unnecessary layer of bureaucracy and instead preferred simply preventing any intervention without the consent of the child.³¹¹

The TLRI’s view

3.4.60 It is the TLRI’s view that if a person is to be subject to a medical intervention, they must be involved in the making of the decision for that intervention. The law should recognise and accord respect to the right of intersex people to bodily autonomy.

3.4.61 Many of the submissions received by the TLRI recommended criminalisation of non-consensual, deferrable medical interventions on children. The TLRI agrees that this is the best course for reform and will most effectively combat ongoing and unnecessary medical interventions.

3.4.62 Consistent with a number of submissions, the TLRI considers that criminalisation is the most direct means of addressing the ongoing issue of non-consensual medical interventions. Submissions to the TLRI, including anonymous submissions, stressed that the critical consideration in surgical interventions is whether or not there is genuine and informed consent to the intervention. Cultural and social considerations, or a desire to achieve conformity with notions of what constitutes normal, usually binary, physical sex characteristics should not form the basis of a decision to perform or undergo medical and surgical intervention. The criminal law can play an important declaratory and educative role in that regard.³¹²

3.4.63 In order to differentiate the needs of intersex and trans communities, the TLRI considers it important to specify that the criminal provisions do not apply to consensual interventions that reflect the will and preference of transgender children. A suggested model is set out in Recommendation 7.

³⁰⁹ See [3.5.6].

³¹⁰ This is consistent with recommendations made by the TLRI in its review of the *Guardianship Act*: see TLRI (n 100) Part 3. See also [2.2.126]–[2.2.130].

³¹¹ Anne Elston, Submission to TLRI, *Legal Recognition of Sex and Gender* (Issues Paper 29, 2019) 1.

³¹² For example, the *Reproductive Health (Access to Terminations) Act 2013* (Tas) provides a detailed framework for regulation of terminations, to support the related criminalisation and defence provisions in the *Criminal Code Act 1924*.

Recommendation 7

The *Criminal Code* should be reformed to criminalise non-consensual medical interventions in the following terms:

178F Unnecessary medical intervention to change the sex characteristics of children.

- (1) Any person who performs a surgical, hormonal or other medical intervention to alter or modify the sex characteristics of a child is guilty of a crime, unless:
 - (a) it is performed to address a clear danger to the life or health of the child and it cannot be deferred until the child is able to give informed consent; or
 - (b) it takes place with the informed consent of the child.
- (2) Nothing in this Section is intended to apply to interventions involving a consenting transgender child seeking treatment to delay puberty or secondary sexual differentiation.

Charge: Performing unnecessary medical intervention to change the sex characteristics of a non-consenting child.

3.4.64 The TLRI does not recommend provision for oversight by a specialist review board of medical interventions permitted by the model proposed in Recommendation 7. The TLRI is of the view that the focus of unlawful interventions should be on whether the child gives informed consent. Where the child has not consented, the offence will be made out if the medical evidence demonstrates that the intervention was not life threatening or unable to be deferred.

3.4.65 Where intervention is medically necessary and/or where the intervention is performed with the informed consent of the child, no further review is warranted. The TLRI agrees with the view that additional oversight by a review board or tribunal would add an unnecessary administrative and bureaucratic layer to the process. It is unclear how such oversight could be operationalised, particularly in emergency situations, and what the effect would be of adverse findings by such a board.

3.4.66 A requirement for review would also involve an element of discrimination in that the *Criminal Code* does not impose such oversight on other, otherwise lawful, emergency or consensual medical procedures. It is consistent with the human rights approach to bodily autonomy that we respect the informed decision of a capable child.

A civil liability approach

3.4.67 The options discussed above rely on a criminal law approach to reducing harmful and unnecessary medical interventions on children. As part of that approach, failure to comply with mandatory compliance standards result in punishment (a fine, professional sanction, or term of imprisonment, depending on severity). Beyond this criminal approach remains the question of how to provide remedies and compensation to those harmed by such acts.

3.4.68 Currently, it is not generally open to intersex people to pursue civil claims against doctors who have performed surgical or hormonal interventions to alter sex characteristics with the consent of their parents, unless the interventions were performed negligently. Even where the surgery or treatment has led to psychological harm or health issues, informed parental authorisation will generally be sufficient for the doctor to avoid liability.

3.4.69 If Recommendation 7 is enacted, then compensation may be able to be awarded under the *Criminal Injuries Compensation Act 1976* (Tas).

3.4.70 One significant advantage of a civil liability approach to compensating for injuries from non-consensual surgical interventions is the opportunity to obtain damages for harm suffered as a result of unlawful medical intervention. While criminal penalties can be effective in changing the overall behaviour of medical practitioners, these remedies focus on the offender and the broader public interest in regulating medical practices. In contrast, civil remedies are able to focus on the victim and compensate them for the harm that they have suffered.

3.4.71 A disadvantage of a civil liability approach to compensating for injuries from non-consensual surgical interventions is that it operates retrospectively. That is, compensation is available only where harm has already been suffered, rather than preventing it from occurring (other than the overall deterrent value of civil penalties). There is also a risk of uncertainty for medical practitioners, who may not be willing to perform even genuinely necessary procedures for fear of future liability.

Views expressed in submissions

3.4.72 Two submissions directly addressed the civil liability option.

3.4.73 Women’s Health Tasmania preferred criminalisation over a civil liabilities approach, stating that criminalisation serves as a preventative measure, while civil liability is merely reactive to errors.³¹³

3.4.74 Women’s Legal Service also supported criminalisation but submitted that civil claims should be available to compensate those affected by non-consensual interventions.³¹⁴

The TLRI’s view

3.4.75 The TLRI is of the view that intersex people should also be able to pursue claims for compensation for personal trespass and breach of professional duty against doctors where medical interventions have resulted in physical or mental harm. This legal right should exist regardless of the fact that there was parental consent to the intervention at the time it was performed. Provision should be made in the *Civil Liability Act 2002* (Tas) for redress in circumstances where a person has suffered as a result of a non-consensual medical intervention to alter intersex variations of sex characteristics.

3.4.76 The TLRI is of the view that informed consent of the child on whom the intervention is performed should be a defence to claims for personal trespass and breach of professional duty arising from surgical interventions on children. However, consent itself should not be a defence if the intervention was performed negligently and the child did not voluntarily assume the risk of such negligence. The primary remedy should be compensatory damages for harm caused by any medical intervention not satisfying the relevant factors.

³¹³ Women’s Health Tasmania, Submission to TLRI, *Legal Recognition of Sex and Gender* (Issues Paper 29, 2019) 6.

³¹⁴ Women’s Legal Service, Submission to TLRI, *Legal Recognition of Sex and Gender* (Issues Paper 29, 2019) 6.

3.4.77 While criminal penalties are considered to be the most effective means of deterring unnecessary and non-consensual medical interventions to change the sex characteristics of intersex children, the capacity for civil remedies to focus on the victim is valuable. Submissions that described the experience of intersex people highlighted the pain and suffering that can result from these medical interventions. The opportunity must, accordingly, be provided for them to obtain damages in such cases.

Recommendation 8

The TLRI recommends that intersex people should be able to pursue claims for compensation for personal trespass and breach of professional duty against doctors where medical interventions to alter intersex variations of sex characteristics have resulted in physical or mental harm, irrespective of any parental consent to the intervention at the time it was performed. Provision to this effect should be made in the *Civil Liability Act 2002* (Tas).

The informed consent of the child on whom the intervention is performed should provide a defence in such cases. However, consent itself should not be a defence if the intervention was performed negligently and the child did not voluntarily assume the risk of such negligence.

The primary remedy should be compensatory damages for harm caused by any medical intervention to alter sex characteristics that did not satisfy the relevant factors.

3.5 Consent to medical procedures for transgender children

3.5.1 As described in [2.2.91], changes made by the *JRL Act* removed reassignment surgery as a pre-condition to registering a change of gender. This change may relieve some of the pressure for surgical intervention experienced by children and their parents or guardians. However, there are still likely to be situations in which adolescents wish to undergo surgery to align their physiological appearance with their gender identity, potentially against the wishes of their parents or guardians.

3.5.2 Medical procedures to achieve gender affirmation range from puberty blocking treatment (Stage 1 treatment), to hormonal treatment (Stage 2 treatment), to surgical intervention (Stage 3 treatment).

3.5.3 The courts have generally taken a different view regarding the consent required to authorise Stage 1 and Stage 2 treatment, and consent to Stage 3 treatment.

3.5.4 This section provides an overview of legislation and case law regarding consent to various medical interventions, and whether reform is required.

Human rights issues

3.5.5 As outlined above [3.2.7], the AHRC has recognised that the *Convention on the Rights of the Child* provides that, where a child is competent to form a view about matters affecting their health or identity, those views should be given due weight.³¹⁵

³¹⁵ *Convention on the Rights of the Child* (n 98).

3.5.6 The case of *Gillick v West Norfolk and Wisbech Area Health Authority*, approved by the High Court in *Marion’s Case* (see Appendix 5), recognises that children become increasingly competent to make decisions as they mature. ‘*Gillick* competence’ refers to the requisite intelligence and understanding of proposed procedures to give valid consent.³¹⁶ In situations where an adolescent can demonstrate ‘*Gillick* competence’, they are generally entitled to consent to their own medical treatment.

3.5.7 However, the courts retain a guardianship jurisdiction and may override consent given by a child if the court believes that the medical treatment would not be in the best interests of the child. Successive Commissioners for Children and Young People in Tasmania have emphasised that determining what is in the best interests of a child or young person is best achieved by affording children the right to be heard on matters affecting their interests.³¹⁷

Relevant legislation

3.5.8 There are currently no legislative provisions in Tasmania that explicitly address the issue of consent of children to surgical intervention to alter sex characteristics.

3.5.9 The *Family Law Act 1975* requires court approval for a special medical procedure to be performed on a child, including invasive and irreversible procedures such as Stage 3 treatments. For treatments that are not ‘special medical procedures’, the capacity of children to consent is generally determined on the basis of *Gillick* competence (see [3.5.6]). Where there is a dispute as to whether a child is *Gillick* competent, or where one or both parents object to the procedure, the Family Court may intervene. This is the case even with respect to non-special procedures.

3.5.10 The amended *BDM Act* made three significant changes in relation to consent to register a change of gender for children:

- removing the requirement to undergo sexual reassignment surgery before registering a change of gender;
- allowing 16-year-olds and 17-year-olds to apply to the Registrar to register a change of gender without parental consent; and
- allowing parents to apply to the Registrar to register a change of gender for a child younger than 16 years of age if the change reflects the child’s ‘will and preference’. It is no longer necessary to satisfy the Registrar or a court that the change is in the child’s ‘bests interests’.

3.5.11 These changes, and their impacts, are discussed in detail in [2.2.120]–[2.2.145].

3.5.12 While reforms removing reassignment surgery as a prerequisite reduce pressure on transgender children and their parents to consent to medical intervention, some transgender adolescents will still seek these treatments. The *BDM Act* does not regulate consent to medical treatment.

³¹⁶ *Gillick v West Norfolk and Wisbech Area Health Authority* [1986] AC 112, 189 (Lord Scarman).

³¹⁷ Letter from Leanne McLean, Commissioner for Children and Young People, Tasmania, to Legislative Council members, 19 March 2019; Paul Mason, Commissioner for Children, Tasmania, ‘Pink or blue – A rights-based framework for medical intervention with intersex infants’ (Conference Paper, World Congress on Family Law and Children’s Rights, August 2009).

3.5.13 In the absence of legislation, medical and healthcare professionals are guided by the *Australian Standards of Care and Treatment Guidelines for Trans and Gender Diverse Children and Adolescents* in dealing with issues of informed consent and recommendations regarding interventions.

Relevant cases

3.5.14 Cases involving medical procedures for trans children have tended to involve children who are supportive of the proposed medical procedure (see *Re Alex*,³¹⁸ *Re Jamie*,³¹⁹ *Re Kelvin*³²⁰ and *Re Matthew*³²¹ — Appendix 5). These cases focus on the capacity of the children to give informed consent to medical treatment. The case law demonstrates a trend towards respecting the agency of competent children to make decisions about their treatment.

3.5.15 Some commentators have seen the requirement for court approval of reassignment surgery where a child has demonstrated ‘*Gillick* competence’ as problematic:

The practical effect is to place a time-consuming, expensive and stressful hurdle in the path of young people who are seeking treatment, and their families. It is ironic that, given the discursive focus on ‘hearing’ children and upholding children’s rights in the family law jurisdiction, the requirement to seek court authorisation adds an additional layer of anxiety and uncertainty for individual children already caught up in a very confusing time in their lives.³²²

3.5.16 The courts have also begun to liberalise approval requirements. For example, in *Re Kelvin* the Court found that a child who is *Gillick* competent, stable, able to express a clear will and preference and is supported by parents and a doctor, can legally access hormone treatment without court approval. In *Re Matthew*, similar conditions were considered sufficient for consent to a double mastectomy. However, there is less judicial support for children’s capacity to consent to medical treatment where their wishes are not supported by a parent or guardian.

Views expressed in submissions

3.5.17 A number of submissions argued that medical intervention to alter sex characteristics should not be undertaken on children.³²³

3.5.18 In contrast, the APS supported mechanisms to allow children to access medical support, assessment and treatment. The APS noted that transgender children who are not supported by their parents or guardians face a significant barrier to accessing gender affirmation treatment.

3.5.19 The Commissioner for Children and Young People considered that existing laws already provide *Gillick* competent children with the right to consent to medical treatment unless one or

³¹⁸ *Re Alex* (n 78).

³¹⁹ (2013) 278 FLR 155.

³²⁰ (2017) 327 FLR 15.

³²¹ [2018] FamCA 161.

³²² Felicity Bell, ‘Children with Gender Dysphoria and the Jurisdiction of the Family Court’ (2015) 38(2) *University of New South Wales Law Journal* 426 (footnotes omitted).

³²³ Submissions from Dr Geoff Holloway, ACL, Women Speak Tasmania, FLC, Joanna Pinkeiwicz, and an anonymous submission to TLRI, *Legal Recognition of Sex and Gender* (Issues Paper 29, 2019).

both parents object, but noted that difficulties emerge where a parent or guardian does not support the wishes of the child or challenges their competence to give consent. A number of other submissions also recognised the barriers to gender affirmation treatment for trans young people who do not have the support of parents or a guardian.³²⁴ Ultimately, the Commissioner for Children and Young People was supportive of standalone legislation to regulate questions of consent to medical procedures on children.

3.5.20 The APS submitted that medical practitioners should be able to act on the consent of children under 16 years of age, provided the relevant practitioners are competent in assessing decision-making capacity and understanding the nuances of treatment requests from children. They noted that there are medical centres across Australia with considerable expertise in working with children seeking to affirm sex and gender.

3.5.21 Equality Australia submitted that lack of access to appropriate expert healthcare is a key issue for trans youth in Tasmania. They noted that appropriate care involves psychological support, fertility preservation, counselling, and treatment from a range of specialists including speech pathologists, endocrinologists, and paediatricians.

3.5.22 Dede River and Transforming Tasmania confirmed the challenges faced by trans people in accessing appropriate support. Ms River submitted that most doctors in Tasmania will not agree to medical interventions to alter sex characteristics unless someone they see as an expert will attest that the child is genuinely trans, regardless of the opinion of the trans person in question.

3.5.23 Given the difficulty in accessing medical care and support in Tasmania, Equality Australia supported law reform to provide young people and families with a positive right to gender affirming health care, and to recognise that young people with the appropriate age or level of maturity can consent to medical treatment, even without the support of the child’s parents.

3.5.24 TasCOSS submitted that their consultations with the trans and gender diverse community suggested law reform is necessary to create transparency and consistency around access to sex and gender affirming treatment. Transforming Tasmania and Women’s Legal Service also submitted that legislation consistent with *Re Kelvin* and *Re Matthew* and that introduces a less adversarial approach than the Family Court could be beneficial.

3.5.25 However, Tasmanian Families for Trans Kids were satisfied that *Gillick* competence was a sufficiently rigorous test and their children were currently happy, healthy and ably supported by their schools and medical practitioners. They preferred retaining the workable *Gillick* competence test given the potential for public debate on an alternative test to expose their children to harm.

3.5.26 Several submissions referred to an upcoming national inquiry into the medical treatment of trans children. However, reports that the Federal Health Minister, the Hon Greg Hunt MP, had commissioned the Royal Australasian College of Physicians (‘RACP’) to conduct an inquiry were subsequently refuted by the RACP.³²⁵ To the TLRI’s knowledge, there is no other national inquiry being considered at the time of publication.

³²⁴ Submissions from Equality Australia, CLC Tasmania, and the Commissioner for Children and Young People to TLRI, *Legal Recognition of Sex and Gender* (Issues Paper 29, 2019).

³²⁵ See J Taylor, ‘College of Physicians rejects News Corp claim it will run inquiry into treatment of trans children’, *The Guardian*, (online, 21 August 2019) <<https://www.theguardian.com/australia-news/2019/aug/21/racp-rejects-news-corp-claim-it-will-run-inquiry-into-treatment-of-trans-children>>.

The TLRI's view

3.5.27 The courts are taking an increasingly liberal view of the rights of adolescents to give valid consent to their own medical treatment (see Appendix 5). Nevertheless, in the absence of legislation dealing explicitly with the matter, uncertainty about the status of children's decisions with respect to medical treatment will remain.

3.5.28 It is the TLRI's view that, where children possess *Gillick* competence, their wishes should be respected. This approach accords with Article 12 of the United Nations *Convention on the Rights of the Child*.³²⁶

3.5.29 The TLRI acknowledges the views of some respondents that *Gillick* competence is a sufficient test and no further reform is required. However, on balance, the TLRI considers that legislative reform would provide greater certainty to trans children and their families and medical practitioners.

3.5.30 Section 3.6 examines some options to achieve this reform.

3.6 Options for reform

3.6.1 One potential legislative model to provide certainty regarding consent to gender affirmation treatment is the *Consent to Medical Treatment and Palliative Care 1995* (SA).

3.6.2 Section 12 allows a medical practitioner to conduct medical procedures on a child if:

- the child's parent or guardian consents; or
- the child consents, and at least two medical practitioners are satisfied that:
 - the child is capable of understanding the nature, consequences and risks of the treatment; and
 - the treatment is in the best interest of the child's health and well-being.

3.6.3 Section 12 of the *Consent to Medical Treatment and Palliative Care 1995* (SA) has been relied on to support transgender children who consent to gender affirmation or reassignment procedures, potentially against the wishes of their parents.

3.6.4 A similar provision to section 12 of the *Consent to Medical Treatment and Palliative Care 1995* (SA) could be enacted in Tasmania so as to explicitly allow medical procedures to be conducted with the consent of a child of at least 16 years of age. This would be consistent with the rights afforded to 16-year-olds to register a change of gender under the amended *BDM Act* (see Table 1).

3.6.5 For children under 16, the medical practitioner could act on the consent of children if two medical professionals (defined to include clinical psychologists) are satisfied that:

³²⁶ The trend away from preferencing an allegedly objective 'best interests' approach to one favouring compliance with a person's will and preferences is seen, as well, in other areas of assisted or contested decision-making like those involving people who are, or may be, subject to guardianship orders (see TLRI (n 100) Part 3. See also [2.2.126]–[2.2.130]).

- the child is capable of understanding the nature, consequences and risks of the treatment; and
- the treatment is consistent with the ‘will and preference’ of the child; and
- the treatment is consistent with the child’s health and well-being.

3.6.6 The provisions could also require evidence that a child has received counselling regarding the consequences of the surgery (similar to provisions in s 28C of the *BDM Act*). The provisions could be supported by regulations or guidelines.

3.6.7 The TLRI sought feedback on this proposal and on the following questions:

Question 6

What, if any, reforms should be enacted to enable children to consent to medical treatment to alter their sex characteristics and to enable medical practitioners to act on their consent?

Question 7

Should there be an age requirement for valid consent to medical treatment to alter sex characteristics?

Question 8

Should there be additional conditions attached to the consent to enable medical practitioners to act on it, such as a requirement that minors receive expert counselling regarding the consequences of the surgery?

Question 9

Should medical practitioners be able to act on the consent of minors under 16 years of age to medical treatment to alter their sex characteristics and, if so, in what circumstances? For example, should there be a requirement that two medical professionals (defined to include clinical psychologists) are satisfied that:

- the child is capable of understanding the nature, consequences and risks of the treatment; and
- the treatment is consistent with the ‘will and preference’ of the child; and
- the treatment is consistent with the child’s health and well-being.

3.6.8 Overall, the TLRI received 18 submissions addressing this issue.

Views expressed in submissions

Age requirements

3.6.9 The ACL did not support medical treatment to alter sex characteristics on any person under 18, irrespective of the child’s consent to the treatment, asserting that the majority of cases of gender dysphoria ‘resolve’ during puberty. Dr Holloway also cited a lack of research regarding people

who regret their gender transition in support of his view that children should not be able to consent to irreversible surgery.³²⁷

3.6.10 An anonymous submission also considered that interventions that alter sex characteristics should not be available to children, on the basis that their cognitive development is incomplete. This submission proposed that no one be able to consent to medical intervention to alter sex characteristics under two years after puberty has begun, or a minimum of 21 years old.

3.6.11 Women Speak Tasmania also submitted that a 16-year-old would not have the cognitive function to make a rational decision. They noted research suggesting that the brain does not reach maturity until 25 years old, but ultimately recommended that consent to medical treatment be limited to people over 18 years of age.

3.6.12 The ACL noted that body modifications such as tattoos and genital piercing are restricted to people over 18 and submitted that medical intervention should be similarly restricted. However, Transforming Tasmania noted that children seeking medical treatment such as contraceptives or anti-depressants were assessed against a *Gillick* competence test and it was inappropriate to treat young people seeking gender affirming treatment differently.

3.6.13 CLC Tasmania was supportive of a legal framework that respected the decision-making capacity of 16-year-olds. Anne Elston submitted that a person should be able to consent to medical treatment if they have obtained the age of consent,³²⁸ while Jemima Willis recommended that a child over 14 years of age should be able to consent if they can be shown to understand the consequences of medical treatment.

3.6.14 A number of submissions considered that there should be no strict age requirement, given the different maturity of children during adolescence. These submissions generally affirmed *Gillick* competence as the most appropriate test as to whether a child can provide informed consent to medical treatment.³²⁹

3.6.15 Dede River submitted that competence to consent will vary depending on the scope and reversibility of the procedure, with Stage 1 treatment requiring a lower level of competence than Stage 3 treatment. It was Ms River's view that genital surgery should wait until a person is sufficiently physically mature, having regard to possible complications arising from surgery. However, maturity should be determined on a case-by-case basis on the advice of medical practitioners.

3.6.16 Equality Australia recommended that legislation confirm that a child is presumed to have the capacity to make medical decisions on their own behalf at 16, but children under 16 years of age should still be able to provide informed consent where they have the capacity and maturity to

³²⁷ Dr Geoff Holloway, Submission to TLRI, *Legal Recognition of Sex and Gender* (Issues Paper 29, 2019) 1–2, 6; Submissions from the ACL and Joanna Pinkiewicz also refer to the prevalence of people who regret their gender affirmation surgery and/or seek to 'de-transition'.

³²⁸ In Tasmania, the age of consent is 17 years old.

³²⁹ Submissions from Dede River, Equality Australia, Transforming Tasmanian and TasCOSS to TLRI, *Legal Recognition of Sex and Gender* (Issues Paper 29, 2019), and consultation with Tasmanian Families of Trans Kids.

make decisions about their own medical treatment. They recommended that capacity be assessed by the child’s medical practitioner.

The TLRI’s view

3.6.17 It is the TLRI’s view that where children demonstrate ‘*Gillick* competence’ their wishes should be respected regardless of what others or a court may consider to be in their best interests. This approach accords with Article 12 of the United Nations *Convention on the Rights of the Child*.³³⁰

3.6.18 The TLRI recommends legislation be enacted that provides that any person over 16 years old can consent to medical intervention without further assessment, and a person under 16 years old can consent if a medical practitioner is satisfied that they demonstrate *Gillick* competence in relation to the relevant treatment. This is consistent with the *BDM Act* and the approach adopted in South Australia.

Conditions for consent

Parental support

3.6.19 Equality Australia outlined a range of reasons why a parent may not consent to their child’s treatment. These include where the parent rejects the child’s gender identity, is estranged from or has no meaningful relationship with the child, or where a parent has been a perpetrator of family violence. In these circumstances, Equality Australia supported the authorisation of treatment by one parent or guardian without the consent of a second parent.

3.6.20 Equality Australia noted that there is legal precedent for allowing single parent authorisation in some cases, citing the *Australian Passports Act 2005* (Cth) and the *Australian Passports Determination 2015* (Cth), where in specified circumstances, a parent may request that an application be considered without the input of another parent, or the intervention of the court.

Counselling

3.6.21 Joanna Pinkiewicz and Jemima Willis supported making counselling a mandatory prerequisite to medical consent. Ms Willis recommended that counsellors be required to clearly explain the physical and legal implications of any proposed procedure and satisfy themselves that the child understands.

3.6.22 The ACL cited research regarding the prevalence of people who regret gender affirmation procedures. It recommended that young people and their families receive compulsory counselling on loss of fertility as a result of treatment and the options to revert to birth gender if desired later in life.

3.6.23 TasCOSS stated that their consultations revealed differing views on counselling. Some sex and gender diverse people and parents of trans children believe that not all children require counselling, as they are clear and certain about who they are and what kind of care they require.

³³⁰ See also [2.2.126]–[2.2.130].

However, counselling had proven invaluable to some children and parents seeking advice about the care and support required to help a child live consistently with their gender identity.

3.6.24 Recognising this diversity of views, the majority of submissions addressing this issue opposed making counselling compulsory.³³¹

3.6.25 Transforming Tasmania recommended that a model of ‘informed consent’ in which bodily autonomy is paramount and transgender and gender diverse people are able to decide what is best for them. Under this approach no one would have to go to therapy to prove their true gender, or to get permission to change their bodies. Counselling would be provided as an option, but should not be a mandatory prerequisite for accessing gender affirming healthcare.

3.6.26 The APS also submitted that compulsory counselling assumes that everyone in these circumstances is uninformed and has not given adequate consideration to the proposed procedure. They noted that gender diverse children were very unlikely to request any kind of medical treatment pathway without already having been exposed to considerable medical oversight and support. Therefore, while counselling should always be available, the APS considered that compulsory counselling imposes an additional and sometimes unnecessary burden on a person. This position was echoed by Equality Australia, Women’s Legal Service and Tasmanian Families of Trans Kids.

3.6.27 Dede River noted that, for trans people, the issue of psychological counselling and medical permission to transition is difficult and resulting in a medicalised approach to gender. She said that, historically, there have been psychological professionals who have effectively acted as gatekeepers and demanded unreasonable adherence to binary gender norms. The requirement for these practitioners to support a procedure has sometimes prevented access to treatment. Ms River noted that concern was particularly stark for non-binary people, who often struggled to find appropriate counselling services.

3.6.28 Ms River acknowledged that advice and support can be invaluable but, in many cases, young trans people have found sympathetic and knowledgeable practitioners, counsellors or other support workers who serve as better advisors than assigned psychologists. Tasmanian Families for Trans Kids also noted that their children had trusted practitioners and they would be reluctant to switch to an assigned counsellor.

3.6.29 Several submissions also recommended more resources and services be provided to trans children considering gender affirmation procedures. This could include development of toolkits around patient rights and human rights, hospitals petitioning courts for approval and working to gain parental support for treatment and increasing the availability of legal services to children to prove their *Gillick* competence to authorise their own treatment.³³²

3.6.30 Equality Australia also recommended that best practice clinical guidance be developed to ensure that children are provided with appropriate information to make decisions about their medical treatment. They noted that flexible clinical guidelines developed by medical practitioners in consultation with trans and gender diverse people can evolve more rapidly than legislation.

³³¹ Submissions from APS, Transforming Tasmania, Women’s Health Tasmania, Women’s Legal Service, Equality Australia, Dede River to TLRI, *Legal Recognition of Sex and Gender* (Issues Paper 29, 2019), and consultation with Tasmanian Families of Trans Kids.

³³² Transforming Tasmania, Submission to TLRI, *Legal Recognition of Sex and Gender* (Issues Paper 29, 2019) 4; APS, Submission to TLRI, *Legal Recognition of Sex and Gender* (Issues Paper 29, 2019) 12, 14.

3.6.31 TasCOSS recommended that the *Australian Standards of Care and Treatment Guidelines for Trans and Gender Diverse Children and Adolescents* might serve as a useful model for Tasmania, noting that there is no one size fits all approach to counselling for trans and gender diverse young people. However, it was Dr Holloway’s view that the Treatment Guidelines were flawed and failed to require that doctors exercise caution in cases where young patients exhibited signs of depression.

Independent assessments

3.6.32 The South Australian legislation requires two independent medical professionals to confirm that a child understands and is capable of consenting to a medical procedure. Jemima Willis recommended that children aged between 14 and 18 years should be required to consult two medical professionals before they were able to consent to medical procedures.

3.6.33 However, the APS submitted that a similar requirement in Tasmania could create an unreasonable bottleneck, particularly given the lack of experienced specialists in the State. The APS was satisfied that an assessment by one qualified specialist would be sufficient in most situations.

3.6.34 In particular, the APS submitted that medical practitioners should be able to act on the consent of children under 16 years of age, so long as the practitioners in question are competent in conducting decision-making capacity assessments as well as understanding the nuances of such a request. They noted that there are medical centres across Australia with considerable expertise in working with children considering sex and gender issues and recommended that these centres be funded to help upskill other practitioners.

3.6.35 The Commissioner for Children and Young People recommended a specialist interdisciplinary body with a child-centred focus could be a suitable mechanism to resolve questions around consent.

3.6.36 In contrast, Ms Elston submitted that there is no need for the bureaucratic oversight of a tribunal for simple treatments such as Stage 1 and Stage 2 interventions.

Other issues

3.6.37 Submissions raised a number of related issues.

3.6.38 The ACL, Dr Holloway and several other submissions expressed concern that medications used as puberty blockers (Stage 1 treatment) are being prescribed off-label, amounting to ‘an experimental trial on children’.³³³ The FLC went as far as saying that the use of puberty blockers without more comprehensive clinical evidence ‘may constitute a form of child abuse’. Women Speak Tasmania warned that hormone replacement therapy, off-label drugs and surgeries could lead to a spate of future medical malpractice and negligence suits.

3.6.39 The ACL recommended that it should be criminal offence to perform a medical procedure to alter the sex characteristics of a child or someone with reduced decision-making capacity.

³³³ Submissions from ACL, Dr Holloway, FLC and an anonymous submission to TLRI, *Legal Recognition of Sex and Gender* (Issues Paper 29, 2019).

The TLRI's view

3.6.40 The TLRI acknowledges the diverse range of views regarding medical treatment for transgender youth. It also reiterates that its approach necessarily references human rights principles, which requires that all Tasmanians are treated equally and no one part of the community is subject to unnecessary legal burdens not shared by the rest.

3.6.41 The TLRI is also mindful that law reform in this area will most significantly affect the lives of trans and gender diverse youth, and concomitantly, the wider trans and gender diverse community. Parents of transgender youth universally and clearly stated that restrictions are felt most acutely by their children. The TLRI acknowledges harms that have suffered as a result of historic attitudes and practices.

3.6.42 Courts have adopted an increasingly liberal view of the rights of adolescents to give valid consent to their own medical treatment. The test of *Gillick* competence makes it possible for children to consent to medical treatment. Logically, that test should also apply where the medical treatment is to alter their sex characteristics. Yet there appears to be a lack of clarity and certainty in this area.

3.6.43 The amended *BDM Act* allows a person who is at least 16 years of age to apply to the Registrar to register a change of gender. While it is no longer necessary to undergo reassignment surgery before a change of gender can be registered, some trans adolescents will still seek medical intervention to affirm their gender. These adolescents should be given similar capacity to consent to those seeking a change of gender without medical intervention.

3.6.44 Consistent with the rights afforded to 16-year-olds to register a change of gender under the amended *BDM Act*, the TLRI recommends that any such provision should allow for medical treatment and procedures to be conducted with the consent of a child of at least 16 years of age, unless there is clear evidence of lack of *Gillick* competence.

3.6.45 For children under 16, the TLRI recommends that *Gillick* competence be enshrined in legislation. Such a provision would allow a person under the age of 16 to consent to medical treatment where the child is capable of understanding the nature, consequences and risks of the treatment, where the treatment is consistent with the 'will and preference' of the child and the treatment is consistent with the child's health and well-being.

3.6.46 The TLRI does not recommend that counselling be a mandatory precondition to receiving treatment. Compulsory counselling from an assigned counsellor is an unnecessary imposition on the individual, particularly given the likelihood that an individual will already have the support of medical professionals.

3.6.47 To achieve positive outcomes in this area, the TLRI recommends that a new law be enacted in the terms recommended above. The South Australian *Consent to Medical Treatment and Palliative Care Act 1995* may provide useful guidance in this regard.

Recommendation 9

The TLRI recommends that the Tasmanian Government enact a *Consent to Medical Treatment Act* that covers the field with respect to children’s consent to medical care. The TLRI recommends that this Act should enable a child of 16 years or older to obtain medical treatment and undergo surgical procedures when they consent to treatment and surgical procedures.

For children under 16, the TLRI recommends that *Gillick* competence be enshrined in this Act. The South Australian *Consent to Medical Treatment and Palliative Care Act 1995* may provide useful guidance in this regard.

The TLRI does not recommend that counselling be a mandatory precondition to children receiving medical treatment or undergoing surgical procedures.

Specialised legislation

3.6.48 Recommendation 9 raises the question whether the proposed *Consent to Medical Treatment Act* should deal with all matters relating to consent in this context for both intersex and transgender children. As outlined in section 3.1, issues arising in relation to medical consent differ significantly for gender affirmation surgery on transgender children and normalisation surgeries performed on children with intersex variations. To the extent that both issues warrant regulatory intervention, comprehensive stand-alone health legislation could be introduced to outline the legal framework for surgical intervention to alter the sex characteristics of infants and children. The *Reproductive Health (Access to Terminations) Act 2013* (Tas) is an example of legislation addressing a specific health issue, setting conditions under which medical procedures can occur, and providing defences to criminal offences where those conditions have been satisfied.

3.6.49 The focus of legislation addressing normalisation or reassignment surgery for children would be the codification of the circumstances in which medical interventions are acceptable, and the decision-making principles which inform decisions. Such principles should specify the criteria for making determinations and include:

- where the child is capable of giving consent,³³⁴ that the child understands the implications of the surgery and has consented to the procedure;
- where the child is not capable of giving consent, that there is a genuine medical need for the procedure and the procedure cannot be deferred until the child is capable of giving consent;
- that the child has been supported to express their will and preference in relation to the procedure to the greatest extent possible;
- that the child and the parents or guardian of the child have received adequate information and access to counselling services prior to consenting to the procedure.

3.6.50 The *Children and Young Persons (Care and Protection) Act 1998* (NSW) provides some guidance on how matters of consent can be addressed. Section 175 prohibits ‘special medical treatment’ on a child, including procedures likely to render the child permanently infertile, unless

³³⁴ See the discussion of ‘*Gillick* competence’ in Appendix 5.

consent is given in accordance with the regulations,³³⁵ or a medical practitioner believes the treatment is urgent and necessary to save the child's life or prevent serious damage to health.

3.6.51 Section 12 of the *Consent to Medical Treatment and Palliative Care 1995* (SA) allows a medical practitioner to administer treatment to a child if:

- the child's parent or guardian consents; or
- the child consents, and at least two medical practitioners are satisfied that:
 - the child is capable of understanding the nature, consequences and risks of the treatment; and
 - the treatment is in the best interest of the child's health and well-being.

3.6.52 This provision has been useful in supporting transgender children who consent to gender affirmation or reassignment procedures, potentially against the wishes of their parents. However, s 12 does not seek to prevent non-consensual medical procedures on intersex children where their parent or guardian has consented to the procedure.

3.6.53 In its review of laws which could have a discriminatory impact on members of the LGBTIQ community, SALRI recommended that s 12 be amended to clarify that medical treatment for gender affirmation or reassignment purposes must only occur with the consent of the child or adult and in accordance with Guidelines developed by the Minister.³³⁶ This recommendation has yet to be adopted, but provides another potential legislative model to regulate medical procedures on transgender and intersex children in Tasmania.

3.6.54 The TLRI has previously recommended the enactment of a specialist law regarding circumcision of minors requiring medical practitioners to provide accurate information regarding the nature of the procedure, associated risks and consequences (including risks of deferring the procedure), and the 'potential for children to grow up into adults who resent their circumcision'.³³⁷

3.6.55 There are advantages to the adoption of a specific regulatory framework for medical procedures to alter sex characteristics in children. A dedicated Act would provide for a comprehensive regulatory regime, with sufficient detail to provide certainty for parents, affected children and medical practitioners. Consolidating the rules regarding surgical intervention on intersex children could improve consistency in treatment for intersex people and serve to create understanding of the specific issues facing intersex people.

3.6.56 The legislation could include a range of penalties and enforcement provisions to ensure compliance among medical practitioners, and to clarify the interaction with any provisions of the *Criminal Code* (such as provisions relating to assault or female genital mutilation). Such legislation would also serve an educative function.

³³⁵ The *Children and Young Persons (Care and Protection) Regulation 2012* does not currently make any provision for when 'consent' will be given.

³³⁶ SALRI Report (n 41) 50.

³³⁷ TLRI (n 307) 82 (Recommendation 7).

Views expressed in submissions

3.6.57 Equality Australia supported a standalone Act for regulating medical procedures for altering sex characteristics in children which should include, among other provisions, a range of penalties and enforcement provisions to ensure compliance among medical practitioners. They stressed that it is critical that trans, intersex and gender diverse people be consulted in the development of such legislation. They noted also that these groups often have differing needs.

3.6.58 Alistair Lawrie also submitted that separate legislation must be enacted to ban deferrable medical interventions on children without consent, and that any such legislation should include penalties for non-compliance.³³⁸

3.6.59 Women’s Health Tasmania recommended standalone legislation that defines the legal framework surrounding medical interventions, codifying where surgery is permissible and the principles that must inform decision-making. Women’s Health Tasmania suggested that a human rights approach centred on the best interests of the child and the rights of people with variations in sex characteristic to bodily integrity should be enshrined in this legislation, giving practical effect to human rights obligations.³³⁹

3.6.60 Women’s Health Tasmania submitted that the legislation should provide for a specialist, multidisciplinary tribunal (see [3.4.56]–[3.4.58]). They further submitted that such legislation should refer to any medical practice standards once developed.

3.6.61 Women’s Legal Service submitted that the legislation could also provide for the appointment of an independent advocate to assist a child where court intervention is required, such as in the case of a dispute over the child’s wishes.³⁴⁰

The TLRI’s view

3.6.62 The TLRI considers that there is merit in enacting dedicated legislation to bring together all provisions relating to medical interventions performed on transgender and intersex children. It therefore recommends that the Government consider enacting the reforms recommended in this Part of this Report in dedicated legislation. That legislation should be comprehensive and provide the entire legal framework for surgical intervention to alter the sex characteristics of children.

Recommendation 10

The TLRI recommends that the Government give consideration to including in the *Consent to Medical Treatment Act* proposed in Recommendation 9 all the reforms recommended in Part 3 of this Report. The legislation Act would be comprehensive in providing the entire legal framework for surgical intervention to alter the sex characteristics of children.

³³⁸ Alistair Lawrie, Submission to TLRI, *Legal Recognition of Sex and Gender* (Issues Paper 29, 2019) 2.

³³⁹ Women’s Health Tasmania, Submission to TLRI, *Legal Recognition of Sex and Gender* (Issues Paper 29, 2019) 6.

³⁴⁰ Women’s Legal Service, Submission to TLRI, *Legal Recognition of Sex and Gender* (Issues Paper 29, 2019) 6.

Appendix 1 –

Summary of cases regarding sex and gender

Issues regarding recognition of sex and gender have been the subject of judicial consideration for many years. Each of the cases discussed in this Appendix involved interpretation of terms that relied on the meaning of sex and gender as understood at the time they were decided. These cases demonstrate the progression of understanding of sex and gender diversity and the adoption of more contemporary approaches over time.

Significantly, the cases rely heavily on the terms of the legislation under consideration and articulation of some of the international principles discussed in Parts 2 and 3.

***Corbett v Corbett* [1971] P 83**

One of the earliest decisions concerning sex and gender was *Corbett v Corbett*.³⁴¹ The case was adopted and relied upon in numerous subsequent Australian cases.

The case concerned April Ashley, a woman born male but who had lived for some time as a woman and undergone surgery to remove male genitals and to construct an artificial vagina. She subsequently married Arthur Corbett. When they later sought to divorce, the court declared their marriage to have been void, as Ashley was a male at the time of the marriage ceremony.

Ormrod J acknowledged that Ashley was transsexual in a psychological sense and living as a woman ‘more or less successfully’ in a social sense.³⁴² However, his Honour held that male physical characteristics present at birth, together with ‘immutable male chromosomal characteristics’ were decisive determiners of sex. Once fixed by these criteria, biological sex could not be changed:

In other words, the law should adopt in the first place, the first three of the doctors’ criteria, that is, the chromosomal, gonadal and genital tests, and if all three are congruent, determine the sex for the purpose of marriage accordingly, and ignore any operative intervention.³⁴³

As Ashley remained biologically a person of the male sex at the time of her marriage to Corbett, the marriage was invalid.

***R v Harris & McGuinness* (1988) 17 NSWLR 158**

Harris was registered male at birth, though with ‘strong female instincts and attributes’. After many years living as a female, Harris underwent sex reassignment surgery to remove male genitalia and construct female genitalia. Harris was working as a prostitute when arrested for soliciting an undercover police officer.

McGuinness was also registered male at birth and was living as a female but was yet to undergo sex reassignment surgery. McGuinness was also arrested for soliciting a police officer.

³⁴¹ *Corbett v Corbett* [1971] P 83.

³⁴² *Ibid* 106 (Ormrod J).

³⁴³ *Ibid* 106.

Harris and McGuinness were both charged and found guilty under s 81A of the *Crimes Act 1900* (NSW), which made it an offence for a male person to commit, or offer to commit, ‘any act of indecency with another male person.’ Both appealed against the charge.

In his dissenting judgment, Carruthers J followed *Corbett*, stating:

[S]uch surgery combined with ‘her’ hormone therapy and her psychological attitude to ‘her’ gender cannot possibly, to my mind, override the congruence of the chromosomal, gonadal and genital factors which are all male. ...

The fact that a biological male divests himself of his external genitalia cannot mean that he thereby becomes a female or vice versa.³⁴⁴

However, Street CJ, with whom Mathews J agreed, preferred a more contemporary approach:

[A]s a more compassionate, tolerant attitude to the problem of human sexuality emerges amongst the civilised nations of the world, the founding of [the decision in *Corbett v Corbett*] on clinical factors present at birth has come under increasing criticism.³⁴⁵

Their Honours held that a person’s sex was to be determined by a combination of psychological sex identification and physical attributes existing at the time of the commission of the alleged offence and not by classification based on chromosomal features. Having regard to the reassignment surgery which had altered her genitalia, and her social presentation as a woman, they were satisfied Harris was not male for the purposes of s 81A.

In contrast, the Court agreed that McGuinness was male. Carruthers J stated broadly that ‘[t]he law could never countenance a definition of male or female which depends on how a particular person views his or her own gender.’³⁴⁶ Street CJ and Mathews J considered that self-identification was a factor, but psychological sex identification alone is not sufficient to determine sex. Therefore, without any surgical intervention to alter physical sex characteristics, McGuinness could not be recognised as female.

A secondary consideration in this case arose when Harris asked that, if she was not recognised as female, she be classified as falling within a further category of ‘no sex’. Given the Court’s conclusion that Harris was female for the purposes of the law, no decision was made on this question. However, Mathews J commented:

I can see no place in the law for a third sex. Such a concept is a novel one, which could cause insuperable difficulties in the application of existing legal principles. It would also relegate transsexuals to a legal ‘no man’s land’. This I think, could only operate to their considerable detriment.³⁴⁷

Secretary, Department of Social Security v SRA [1993] 43 FCR 299

SRA was a male-to-female transsexual who lived as a woman but had not undergone sex reassignment surgery due to the cost. She was living with a male de facto partner, who was an invalid pensioner, and accepted socially as his female partner. Under s 37 of the *Social Security*

³⁴⁴ *R v Harris and McGuinness* (1988) 17 NSWLR 158, 170 (Carruthers J).

³⁴⁵ *Ibid* 160 (Street CJ).

³⁴⁶ *Ibid* 170 (Carruthers J).

³⁴⁷ *Ibid* 194 (Mathews J).

Act, a woman who is the wife (including de facto) of an invalid pensioner is eligible for a wife's pension. SRA applied for a wife's pension.

The Social Security Tribunal approved the application. The Tribunal considered that the *Act* was beneficial legislation designed to deliver social policies regarding supportive domestic relationships. In that context, the Tribunal held that requiring a person to undergo expensive surgery before being eligible to receive benefits was unduly onerous, given the range of reasons why a person may be unable to undergo such surgery, including cost and medical contra-indications. The Tribunal was satisfied that SRA had the 'psychological sex and social and cultural identity of a woman' for the purposes of the *Act* and as eligible for a wife's pension.

When that decision was upheld by the Administrative Appeals Tribunal, the Department of Social Security appealed to the Federal Court.

Black CJ (with whom Heerey J agreed) observed:

Whatever may once have been the case, the English language does not now condemn post-operative male-to-female transsexuals to being described as being of the sex they profoundly believe they do not belong to and the external genitalia of which, as a result of irreversible surgery, they no longer have. Where through medical intervention a person born with the external genital features of a male has lost those features and has assumed, speaking generally, the external genital features of a woman and has the psychological sex of a woman, so that the genital features and the psychological sex are in harmony, that person may be said, according to ordinary English usage today, to have undergone a sex change.³⁴⁸

However, Black CJ was not prepared to abandon the relevance of surgical intervention relied upon in *R v Harris and McGuinness*, holding that it would be 'going well beyond the ordinary meaning of the words' to conclude that a pre-operative transsexual, having male external genitalia, is a 'woman' for the purposes of the *Social Security Act*.

In reaching that conclusion, his Honour said:

It seems very hard in an individual case to draw a distinction based upon the fact that a person has not had an operation that she cannot afford, particularly when the person is seeking legal recognition of an identity in which she has a deep belief. ... Nevertheless, a line has to be drawn somewhere.³⁴⁹

Similarly, Lockhart J recognised that sex was not merely a matter of chromosomes but also a psychological and social question,³⁵⁰ and urged that 'post-operative transsexuals should not be denied by society the inner peace of life which is their right.' However, his Honour was also reluctant to recognise as a woman someone who had not undergone reassignment surgery:

I realise that there are cases (this is such a case) where a person has not undergone such surgery for legitimate reasons, including its cost or medical or psychological reasons which render them unfit for the operation. Nevertheless, the interests of society and the individual

³⁴⁸ *Secretary, Department of Social Security v SRA* [1993] 43 FCR 299, 304 (Black CJ).

³⁴⁹ *Ibid* 306 (Black CJ).

³⁵⁰ *Ibid* 325 (Lockhart J).

must be balanced in the determination of the ordinary meaning of the words with which this case is concerned and the application of the facts to those meanings ...

Where the anatomical sex and the psychological sex have not harmonised I cannot accept that such a person falls within the ordinary meaning of the words ‘woman’ or ‘female’.³⁵¹

Lockhart J concluded that the Court could not extend the meaning of ‘woman’ to include a pre-operative transsexual, noting that ‘a change to the law of so fundamental nature as this can only be achieved by Parliament.’³⁵²

***Re Kevin* [2001] FamCA 1074**

Kevin was registered female at birth but had undergone sexual reassignment surgery and was living as a male. Kevin was issued with a new birth certificate by the NSW Registrar of Births, Deaths and Marriages on which his sex is shown as male. Kevin held an Australian passport stating his sex as male and was recognised as male on documentation from Medicare, the Australian Tax Office, and various other public authorities.

Kevin married Jennifer, a female person, in 1999 and applied to have the certificate of marriage declared valid. The Commonwealth Attorney-General opposed the declaration on the basis that, following *Corbett*, Kevin was a female for the purposes of the *Marriage Act 1961* (Cth) and, therefore, could not lawfully marry a female.

Chislm J questioned the ‘essentialism’ assumption made by Ormrod J in *Corbett* that biological factors at birth exclusively determine whether a person is a man or a woman:

What is remarkable about this proposition is that nothing has been said to support it. No relevant principle or policy is advanced. No authorities are cited to show, for example, that it is consistent with other legal principles ... [T]he assertion that the legal criteria for determining whether a person is a man or a woman for the purpose of marriage is the person’s ‘biological sexual constitution’ is quite unsupported.³⁵³

[The essentialist view is] unable to accept the sex reassignment because they take the view that there is some essential and unalterable quality that is maleness or femaleness. This view is characterised by absolute and unsupported assertions that a person’s sex is fixed unalterably at birth, that no amount of surgery or other medical intervention can make any difference, and that the person’s self-perception and role in society are equally irrelevant. In my view however this is not a helpful approach.³⁵⁴

His Honour was not persuaded that he was required to follow the approach in *Corbett*:

I see no basis in legal principle or policy why Australian law should follow the decision in *Corbett*. To do so would, I think, create indefensible inconsistencies between Australian marriage law and other Australian laws. It would take the law in a direction that is generally contrary to developments in other countries. It would perpetuate a view that flies in the face of current medical understanding and practice. Most of all, it would impose indefensible

³⁵¹ Ibid 327.

³⁵² Ibid 326.

³⁵³ *Re Kevin* [2001] FamCA 1074, [83]–[84].

³⁵⁴ Ibid [315].

suffering on people who have already had more than their share of difficulty, with no benefit to society.³⁵⁵

His Honour went on to outline matters that would be relevant in determining a person's sex, including biological and physical characteristics at birth, the person's life experiences and self-perception, the extent to which the person has functioned in society as a man or a woman, any hormonal, surgical or other medical sex reassignment treatments the person has undergone, and the person's biological, psychological and physical characteristics at the time.

Chisolm J considered that the ordinary contemporary meaning of 'man' would include a post-operative female to male transsexual.³⁵⁶ Having regard to the factors outlined above, he was satisfied that Kevin was a man for the purposes of the *Marriage Act 1961* and his marriage to Jennifer was valid.

On appeal, the Full Court of the Family Court affirmed Chisolm J's decision.³⁵⁷

***AB v Western Australia; AH v Western Australia* [2011] HCA 42**

Both AB and AH were registered female at birth. They had undergone gender reassignment procedures — including a double mastectomy and testosterone therapy — but had not had, and did not intend to have, a hysterectomy or penis construction. They were each infertile due to hormone therapy. Both had the outward appearance of a male person, were living their lives as males and had applied to the Gender Reassignment Board for a recognition certificate.

The *Gender Reassignment Act 2000* (WA) requires the Gender Reassignment Board, in determining an application for a recognition certificate, to be satisfied of a number of factors, including that the applicant: 'has adopted the lifestyle and the gender characteristics of a person of the gender to which the person has been reassigned.'³⁵⁸

The term 'gender characteristics' was defined to mean the physical characteristics by virtue of which a person is identified as male or female.

³⁵⁵ Ibid [326].

³⁵⁶ Chisolm J, *ibid* [13]–[14], recognised that the term 'transsexual' was problematic:

'The word poses some problems. The word "transsexual" may suggest a sexual transition, a passing from one sex to the other. While that may reflect the physical changes associated with surgery or hormone treatment, it does not convey the fact that transsexuals say that they have always experienced themselves as belonging to the other sex, before as well as after the hormone or surgical procedures. The word suggests a particular answer to some of the issues that I need to address in this case, and I mention this mainly to explain that I do not intend to pre-judge any of the issues by the use of this term.

Further, I am conscious that using the word "transsexual" as a noun may tend to have a dehumanising effect. In recent years we attempt to remove such effects by a more careful use of language, for example by referring to "people with handicaps" rather than "the handicapped". Such usages are sometimes mocked as "political correctness", but I think they represent an honourable and civilised attempt to use language that reflects the essential humanity of the people being described. However no suitable alternative is evident, and the word is used in the applicants' submissions, so I will adopt it, although I will attempt to minimise its use.'

³⁵⁷ *Attorney-General v "Kevin and Jennifer" and Human Rights and Equal Opportunity Commission* [2003] FamCA 94.

³⁵⁸ *Gender Reassignment Act 2000* (WA) s 15(1)(b).

The Board was satisfied that AB and AH identified themselves as male and had adopted the lifestyle of a male person but concluded that, in the absence of a hysterectomy, they retained some gender characteristics of a female. The Board refused to issue a recognition certificate, saying:

The fact of having a female reproductive system is inconsistent with being male. Because it is inconsistent with being male, it is inconsistent with being identified as male.³⁵⁹

AB and AH appealed against the Board's decision and the matter ultimately came before the High Court.

The High Court considered that the Act explicitly recognises that a person's gender characteristics 'are not, in every case unequivocally male or female'³⁶⁰ and may be ambiguous. In reaching this conclusion, the Court adopted the approach of the dissenting judge in the Court of Appeal, Buss JA, emphasising that the Act did not refer to characteristics by which a person *is* a male, but to characteristics by which a person *is identified* as a male.³⁶¹ The Court also noted that reassignment procedures referred to 'medical or surgical procedures', rather than requiring surgical procedures 'to remove every vestige of the gender which the person denies, including all sexual organs'.³⁶²

The Court concluded:

The question whether a person is identified as male or female, by reference to the person's physical characteristics, is intended by the Act to be largely one of social recognition.³⁶³

The Court was satisfied that hormone therapy could alter gender characteristics sufficiently to allow a person to be identified as the opposite sex. Once that degree of alteration has occurred, no further consideration of the 'extent of the person's bodily state' is required and the Board must consider the person's self-identity and social perceptions about them.³⁶⁴

NSW Registrar of Births, Deaths and Marriages v Norrie (2013) NSWCA 145

The most recent Australian case addressing questions of sex and gender identity concerned 'Norrie'. Norrie was registered as male at birth. After undergoing a 'sex affirmation procedure', Norrie applied to the Registrar under the *Births, Deaths and Marriages Registration Act 1995* (NSW) to register both a change of sex to 'non-specific' and a change of name.

The Registrar issued Norrie a Change of Sex certificate and a Change of Name certificate, both of which recorded Norrie's sex as 'not specified'. Later, the Registrar advised Norrie that the Change of Sex certificate was invalid and re-issued a Change of Name certificate which recorded Norrie's sex as 'not stated'.

Norrie applied to the Administrative Decisions Tribunal for review of the Registrar's decision. The Tribunal rejected Norrie's application, holding that the Registrar had no power to record Norrie's sex as 'non-specific'. The appeal panel of the Tribunal dismissed an appeal against that decision.

³⁵⁹ Quoted in *AB v Western Australia* (n 74) 399.

³⁶⁰ *AB v Western Australia* (n 74), 402 (French CJ, Gummow, Hayne, Kiefel, Bell JJ).

³⁶¹ Ibid citing *The State of Western Australia v AH* (2010) AMLC 30-025, [205] (Buss JA).

³⁶² Ibid 404.

³⁶³ Ibid 405.

³⁶⁴ Ibid 406.

Norrie then appealed, successfully, to the Court of Appeal. By special leave, the Registrar then appealed to the High Court.

The High Court unanimously held that not all humans can be classified as either male or female. Amendments to the *Births, Deaths and Marriages Registration Act 1995* (NSW) to introduce sex affirmation procedures, and related amendments to the *Anti-Discrimination Act 1977* (NSW), were designed to ‘correct or eliminate the ambiguities relating to the sex of the person’ and recognised that a person could be of indeterminate sex. On the basis of that recognition, the High Court held that the *Births, Deaths and Marriages Registration Act 1995* allowed for the registration of a person’s sex as ‘not specified’, despite there being no explicit provision in the Act.

Appendix 2 –

Reviews of law relating to sex and gender in Australian states and territories

Recent High Court determinations, and changing political commitment to diversity and equality, have caused many Australian jurisdictions to review their approach to sex and gender recognition.

This Appendix provides an overview of reviews undertaken recently in the ACT, South Australia, the Northern Territory and Western Australia. Key outcomes of these reviews are represented in Table A2.1 below.

Australian Capital Territory

In 2011, the ACT Attorney-General, Simon Corbell, asked the ACT Law Reform Advisory Council ('LRAC') to inquire into legal recognition of transgender and intersex people in the Territory, with particular regard to compliance with the *Human Rights Act 2004* (ACT).

The LRAC's report, *Beyond the Binary: legal recognition of sex and gender diversity in the ACT*, made a number of recommendations to modernise ACT legislation and provide for recognition of sex and gender diversity. The government's response accepted many of the recommendations in the report, including implementation of two key legislative reforms: extending the registration options for children with intersex variations of sex characteristics and removing the requirement for sexual reassignment surgery before being allowed to change their sex on their birth certificate.

South Australia

In 2015, the South Australian Law Reform Institute ('SALRI') published an audit of discrimination on the grounds of sexual orientation, gender, gender identity and intersex variations of sex characteristics in South Australian legislation.³⁶⁵ The Audit Report identified discrimination arising from laws regarding registration and legal recognition of gender identity under the *Births Deaths and Marriages Registration Act 1996* (SA) and the *Sexual Reassignment Act 1988* (SA).

A subsequent report, *Legal Registration of Sex and Gender and Laws Relating to Sex and Gender Reassignment*,³⁶⁶ explored those issues in more detail and made specific recommendations for legislative change. SALRI concluded that careful implementation of their recommended changes would 'preserve the integrity of the Births Deaths and Marriages Register in South Australia, while moving it forward to reflect the modern realities of our community'.³⁶⁷

³⁶⁵ South Australian Law Reform Institute ('SALRI'), *Audit Report: Discrimination on the Grounds of Sexual Orientation, Gender, Gender Identity and Intersex Status in South Australian Legislation* (Report, 2015). <http://law.adelaide.edu.au/system/files/media/documents/2019-01/audit_report_lgbtiq_sept_2015.pdf>.

³⁶⁶ SALRI, *Legal Registration of Sex and Gender and Laws Relating to Sex and Gender Reassignment* (Report, 2016) <http://law.adelaide.edu.au/system/files/media/documents/2019-01/bdm_sra_report.pdf>.

³⁶⁷ Ibid 8.

A number of the recommendations were subsequently adopted by the South Australian Government.³⁶⁸

Northern Territory

The Births, Deaths and Marriages Registration and Other Legislation Amendment Bill 2018 was introduced into the NT Legislative Assembly by the Attorney-General and Minister for Justice, Natasha Fyles in October 2018. The Bill, designed to reflect Commonwealth marriage equality laws and to ‘increase the Territory’s compliance with the *Sex Discrimination Act 1984* (Cwlth)’, sought to:

- Remove the requirement to be ‘unmarried’ in order to register a change of sex;
- Allow a person to register a change of sex or gender identity, rather than a change of sex only;
- Allow a person to register their sex or gender identity as something other than ‘male’ or ‘female’ and include recognition of intersex persons;
- Replace the requirement to have undergone sexual reassignment surgery to register a change of sex with a requirement to have received appropriate clinical treatment;
- Provide safeguards to ensure applications for registering a change of sex or gender for a child have regard to the will and the best interests of the child.

The Bill was referred to the Social Policy Scrutiny Committee for inquiry. The Committee undertook public consultation before reporting back to the Legislative Assembly in November 2018, recommending adoption of the Bill subject to minor amendments.³⁶⁹

Victoria

In August 2019, the Victorian Parliament passed the *Births, Deaths and Marriages Registration Amendment Act 2019*. An earlier version of the legislation had been defeated in 2016. The Act took effect on 1 May 2020.

The Act removes the need for sex affirmation surgery, which the government argued ‘inappropriately medicalises the recognition of a person’s affirmed gender, sending a harmful message to trans and gender diverse people that there is something wrong with them that needs to be “fixed”.’ Instead, the amendments allow a person to apply for an ‘acknowledgement of sex’ and have their recorded sex altered to reflect a ‘description of their sex that is appropriate and meaningful to them.’

The Act does not distinguish sex and gender and provides for alteration of the actual registration of birth rather than just the birth certificate.

³⁶⁸ *Births, Deaths and Marriages Registration (Gender Identity) Amendment Act 2016* (SA).

³⁶⁹ Social Policy Scrutiny Committee, Northern Territory Legislative Assembly, *Inquiry into the Births, Deaths and Marriages Registration and Other Legislation Amendment Bill 2018* (November 2018) <https://parliament.nt.gov.au/__data/assets/pdf_file/0018/600327/70-2018-Signed-Report-Inquiry-into-the-Births,-Deaths-and-Marriages-Registration-Amendment-Bill-2018.pdf>.

Applications must be supported by a statutory declaration and a supporting statement from someone who has known the applicant for at least 12 months stating that the application is made in good faith.

Applications can be made on behalf of consenting children but must be supported by a statement from a doctor or psychologist confirming that the acknowledgement of sex is in the best interests of the child and that the child has capacity to consent.

Western Australia

In 2018, the Attorney-General of Western Australia, John Quigley, asked the Law Reform Commission of Western Australia ('WALRC') to report on issues and inconsistencies in Western Australia's current legal framework relating to the legal recognition of sex and gender. In particular, the WALRC was invited to review the operation of the *Gender Assignment Act 2000* (WA) and the *Births, Deaths and Marriages Registration Act 1998* (WA), having regard to the Commonwealth marriage equality changes and the High Court's decision in *AB and AH v Western Australia*³⁷⁰ (see Appendix 1).

The WALRC's Final Report,³⁷¹ released in December 2018, recommended a suite of reforms designed to 'substantially ease the pressure that intersex, trans and gender diverse people and their loved ones, face on a daily basis and ... improve their respective lived experiences.'³⁷²

Key recommendations include introducing an 'indeterminate' sex classification as a birth registration option and a 'non-binary' gender classification, removing any sex or gender record from birth certificates, repealing the *Gender Reassignment Act 2000* (WA), and introducing an administrative process to register a change of gender under the *Births Deaths and Marriages Registration Act 1998* (WA).

³⁷⁰ *AB v Western Australia* (n 74) – see Appendix 1 of this Final Report for a summary of this decision.

³⁷¹ WALRC Report (n 83).

³⁷² Ibid 6.

Table A2.1: Reviews of Legislation Relating to Sex and Gender Recognition in Australian Jurisdictions: Recommendations

	ACT	South Australia	Northern Territory	Victoria	Western Australia
Registration of birth	60 days or 180 days where a child's sex is initially notified as 'intersex' or 'to be advised'	60 days – required to register sex 'if determinable'	60 days	60 days	60 days – the register may be changed at any point if the sex of a child registered as 'indeterminate' develops to be more clearly M or F
Sex records at birth	Male (M) or Female (F) or 'Indeterminate/Intersex/Unspecified'	M or F or 'Unspecified'	M or F or 'Unspecified'	'In a form and manner determined by the Registrar'. In practice, M or F	M or F or 'Indeterminate'
Sex or gender records on birth certificate	M or F or 'Indeterminate/Intersex/Unspecified' Details of previous sex or gender not included unless requested	M or F or 'Other'	M or F or 'Non-Binary' or 'Unspecified' Further categories may be included in consultation with the trans, gender diverse and intersex community	M or F	None
Change of sex or gender (adult)	No surgical intervention required Gender declaration and evidence of 'appropriate clinical treatment for alteration of sex' (statutory declaration by a doctor or registered psychologist) or that the person is intersex	No medical, surgical or clinical procedures required Gender affirmation declaration Classifications include M, F, or 'Other, please specify' – Registrar can refuse to register a self-describing information if it is offensive, obscene or otherwise contrary to the public interest	No surgical intervention required Must provide a statement from a medical practitioner or a psychologist certifying that the applicant has received appropriate clinical treatment in relation to their sex or gender identity, or is an intersex person	No medical, surgical or clinical procedures required Statutory declaration and supporting statement from an adult who has known the applicant for at least 12 months saying they believe the application is in good faith M, F, or any gender diverse or non-binary 'sex descriptor' that is not prohibited (obscene or offensive, too long, symbols etc)	No medical, surgical or clinical procedures required Gender Affirmation declaration only Classifications include M, F or 'non-binary'

	ACT	South Australia	Northern Territory	Victoria	Western Australia
Change of sex or gender (children)	<p>No surgical intervention required</p> <p>Parents/guardians of a person under 18 can apply for a change of gender if believe it is in the best interests of the child</p> <p>Must provide evidence child has received ‘appropriate clinical treatment for alteration of sex’ or is intersex</p>	<p>No medical, surgical or clinical procedures required</p> <p>A parent or guardian can apply to the Magistrates Court, with approval granted only if it is ‘in the best interests of the child’ and the child consents</p> <p>A child can also apply directly to the Magistrates Court, with approval granted only if it is ‘in the best interests of the child’ and the Court is satisfied that the child understands the change</p>	<p>No surgical intervention required</p> <p>Must provide a statement from a medical practitioner or a psychologist certifying that the applicant has received appropriate clinical treatment in relation to their sex or gender identity, or is an intersex person</p> <p>Registrar must be satisfied child is aware of the meaning and implications of the change and consents to the application</p> <p>A child over 14 is presumed to be aware of the meaning of the change</p>	<p>No medical, surgical or clinical procedures required</p> <p>Parents/guardians of a person under 18 can apply for a change of gender if believe it is in the best interests of the child and child consents</p> <p>Must provide supporting statement from doctor, psychologist or a person who is a member of a prescribed class of persons. Statement confirms change is in best interests of the child and, if under 16, that child has capacity to consent</p> <p>One parent can apply if single parent or with Court consent</p>	<p>No medical, surgical or clinical procedures required</p> <p>For children aged 12–18, statutory declaration from the child, with consent of at least one parent/guardian</p> <p>For children under 12, statutory declaration from at least one parent/guardian declaring genuine belief in child’s affirmed gender, with consent of all other parents/ guardians</p> <p>Disputes in relation to children to be resolved through Family Court mediation process</p>
Limits on changes	–	<p>1 per year, total of 3</p> <p>Registrar must be satisfied application for change of gender not sought for fraudulent or improper purposes</p>	<p>Limitations proposed in original Bill, but deleted following recommendation of the Committee</p>	Once in 12 months	1 per year, total of 3

Appendix 3 –

Implications of *JRL Act* for existing legislation

Table A3.1: Implications of *JRL Act* for existing legislation

Legislation	Provision	Potential implications and reform recommendations
Gendered language		
<i>Acts Interpretation Act 1931</i>	24A. Genders (1) A word or expression that indicates one or more particular genders is taken to include every other gender. (2) A word in either the masculine or feminine gender includes a body corporate or unincorporate.	Sections 28D(1) and (2) of the <i>JRL Act</i> provide that: <ul style="list-style-type: none"> • If a person has a registered gender, that person will be treated as a person of their registered gender for the purposes of the law. • A reference to a person's sex is taken to be a reference to their registered sex (if any), or their registered gender (if any).
<i>Public Trustees Act</i>	3. Definitions (2) In this Act, words importing the masculine gender include references to the female gender and neuter gender.	Other sub-sections within s 28D address specific legislative provisions regarding sex or gender (discussed below). Collectively, s 28D complements s 24A of the <i>Acts Interpretation Act 1931</i> (Tas).
Search powers		
<i>Community Protection (Offender Reporting) Act 2005</i>	Under s 21, the Registrar or an authorised person may take, or may cause to be taken a photograph of a 'reportable offender' and may require the reportable offender to expose any part of their body. However, s 21(4) prevents the Registrar/authorised person from requiring a reportable offender to expose 'his or her genitals, the anal area of his or her buttocks or, in the case of a female, her breasts.'	Concern that person whose registered gender is other than female, but who still has female physical characteristics, could be asked to expose their breasts. Recommend amending s 21(4) by deleting 'in the case of a female'.
<i>Corrections Act 1997</i>	The Director of Corrective Services may, for the security or good order of the prison or the prisoners or detainees, order a correctional officer to search or examine a prisoner or detainee, a visitor to the prison, a correctional officer or any person appointed or employed under the Act (s 22).	This restriction is limited to female visitors (which would include any visitor identifying as female). All other visitors may be inspected by an officer of any gender. Section 28D(4) of the amended <i>BDM Act</i> provides for a person of any registered gender to request that their search be conducted by

Legislation	Provision	Potential implications and reform recommendations
	<p>Section 22(4) provides:</p> <p>(4) A search or examination, or search and examination, of a female visitor under this section is to be made by a female officer and in the presence of females only.</p>	<p>a male or female officer, and for a search conducted in accordance with that request to be lawful.³⁷³</p> <p>Recommend replacing s 22(4) with a provision similar to s 13(5) of the <i>Court Security Act 2017</i>.</p>
<i>Court Security Act 2017</i>	<p>Security officers may direct a person entering or on court premises to submit to a search, including a search of any personal effects reasonably capable of concealing a prohibited object (s 12(1)(c)).</p> <p>Section 13(5) provides that, where a search of a person over 10 years old will involve the removal of any clothing, the search is to be conducted:</p> <p>(a) if practicable, by a security officer of the same gender as the person searched or, if the person is transsexual, transgender or intersex, who is of the gender that the person requests; and</p> <p>(b) if practicable, in the presence of only persons of the same gender as the person searched or, if the person is transsexual, transgender or intersex, who is of the gender that the person requests.</p>	<p>This provision maintains the primacy of attempting to find a person of the same gender to conduct the search but recognises that this may not be possible in all situations ('if practical').</p> <p>Section 13(5) provides a model for giving a transgender, gender diverse or intersex person agency to request the preferred gender of the officer conducting the search. This provision also maintains the 'if practicable' qualification to ensure that search powers are not unduly compromised.</p> <p>This provision is consistent with the approach adopted in the Tasmania Police Manual, 7.3.4 (see below).</p>
<i>Criminal Code Act 1924</i>	<p>A person in command of an aircraft or other authorised person who reasonably believes an offence relating to the safety of the aircraft has been committed can search any person on board or about to board (s 39B(1)).</p> <p>Section 39B(3) provides:</p> <p>(3) Nothing in this section authorises the search of a female otherwise than by a female.</p>	<p>This provision would not prevent the search of any person identifying as anything other than female from being searched.</p> <p>Section 28D(4) of the amended <i>BDM Act</i> provides for a person of any registered gender to request that their search be conducted by a male or female officer, and for a search conducted in accordance with that request to be lawful.</p> <p>Recommend replacing s 39B(3) with a provision similar to s 13(5) of the <i>Court Security Act 2017</i>.</p> <p>This approach is consistent with the Tasmania Police Manual, 7.3.4(5).</p>

³⁷³ Section 28D(4) protects the validity of searches on the basis of gender only. Any search may be unlawful for reasons other than the gender of the searching officer.

<p><i>Forensic Procedures Act 2000</i></p>	<p>The Act allows for a range of forensic procedures to be carried out by an authorised person with the consent of the person on whom the procedure will be carried out, or subject to a court order. The Act also gives an authorised person power to ask any other person to help carry out the procedure (s 42).</p> <p>‘<i>intimate forensic procedure</i>’ is defined to include examinations, photographs and taking of samples from intimate areas, specifically ‘in the case of a female, the breasts.’</p> <p>Section 41 provides:</p> <p>41. Certain forensic procedures generally to be carried out by person of same sex</p> <p>(1) If practicable, an intimate forensic procedure (other than the taking of a dental impression or an X-ray) is to be carried out by a person of the same sex as the person undergoing the procedure.</p> <p>(2) If practicable, a non-intimate forensic procedure for which the person undergoing the procedure is required to remove clothing other than his or her overcoat, coat, jacket, gloves, socks, shoes and hat is to be carried out by a person of the same sex as the person undergoing the procedure.</p> <p>(3) If practicable, a person asked under section 42 to help carry out a forensic procedure covered by subsection (1) or (2) is to be a person of the same sex as the person undergoing the procedure.</p> <p>Section 45 relevantly provides:</p> <p>45. Presence of police officers during forensic procedure</p> <p>(1) Police officers may be present during the carrying out of a forensic procedure for the purposes of safety, security, continuity of evidence, investigation and the effective carrying out of the procedure in accordance with this Act. ...</p> <p>(3) A police officer who is of the opposite sex to that of the person undergoing the forensic procedure may only be present during the carrying out of the procedure if –</p>	<p>Concern that examination of the breasts of a transgender person, identifying as male but still having female physical characteristics, would not be considered ‘intimate forensic procedure’. However, exposure of the breasts would require removal of clothing so, even if ‘non-intimate’ would still require a person of the same sex to undertake the examination.</p> <p>Section 28D(4) of the amended <i>BDM Act</i> will authorise as lawful any search conducted in accordance with the request of the person being searched regarding the gender of the person conducting the search.</p> <p>Recommend amending ss 41 and 45 to:</p> <ul style="list-style-type: none"> • use gender, rather than sex • remove binary references to ‘Opposite sex’ • introduce a provision similar to s 13(5) of the <i>Court Security Act 2017</i> to allow a transgender, intersex or gender diverse person to request that the search be conducted by a person of a particular gender • retain the ‘if practicable’ qualification to ensure search powers are not unduly compromised.
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	<p>(a) it would not be reasonably practicable to carry out the procedure without the presence of the police officer; and</p> <p>(b) at the time the forensic procedure must be carried out, there is no police officer of the same sex as the person available to be present instead of the police officer of the opposite sex.³⁷⁴</p>	
<i>Guardianship and Administration Act 1997</i>	‘intimate forensic procedure’ is defined to include examinations, photographs and taking of samples from intimate areas, specifically ‘in the case of a female, the breasts.’	<p>The Act does not require people of the same gender to conduct intimate procedures but sets out some rules for how such procedures are conducted.</p> <p>Recommend deleting ‘in the case of a female’ from the definition of ‘intimate forensic procedures’, requiring examination of the breasts of any person to comply with the intimate procedures policy.</p>
<i>Mental Health Act 2013</i>	<p>Custodians and escorts may conduct frisk searches of patients. A frisk search is, if practicable, to be conducted by a person of the same sex as the person being searched (sch 2, s 2(3)).</p> <p>The Chief Forensic Psychiatrist may authorise a range of searches of patients in secure mental health units. Unless otherwise directed by the CFP, where the search involves any touching or undressing of a person, or any touching of a person’s clothing or personal belongings, the search must be carried out in privacy by ‘an authorised person of the same gender as that person and only in the presence of persons of that gender’ (s 111(11)).</p>	<p>Section 28D(4)(a) would authorise a search of a person with a registered gender in accordance with a request from that person that the search be conducted by a male or female.</p> <p>Recommend amending sch 2, s 2(3):</p> <p>(a) <u>Subject to paragraph (b)</u>, a frisk search is, if practicable, to be conducted by a person of the same sex <u>gender</u> as the person being searched.</p> <p>(b) if a person with a registered gender other than male or female requests that a search be conducted by a male or female, a frisk search is, if practicable, to be conducted in accordance with the request.</p> <p>Section 111(11) allows the CFP to direct who undertakes the search. Recommend that the CFP adopt a policy similar to the Tasmania Police Manual provisions regarding searching transgender, intersex and gender diverse patients.</p>

³⁷⁴ This requirement does not apply to a non-intimate forensic procedure that can be carried out without requiring the removal of exterior items of clothing (s 45(4)).

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<i>Misuse of Drugs Act 2001</i>	<p>The Act authorises a police officer to conduct strip searches, subject to s 30(2):</p> <p>30. Power to conduct personal searches</p> <p>(2) Where a police officer detains a person for the purpose of search under section 29 or 33, the following provisions apply:</p> <p>(a) if the person is female and it is proposed to conduct a strip search, a female police officer is to conduct it;</p> <p>(b) if the person is male and it is proposed to conduct a strip search, a male police officer is to conduct it;</p> <p>The Act also allows a magistrate to order a cavity search to be conducted by a medical practitioner.</p> <p>(4) Notwithstanding subsection (3) –</p> <p>(a) the person is first to be told that he or she may ask for the search to be conducted by a medical practitioner of the same sex as that person; and</p> <p>(b) if the person does so ask, the search is not to be conducted except by a medical practitioner of that sex unless it is not reasonably practicable in the circumstances for such a medical practitioner to be present.</p> <p>(5) The magistrate's order also authorises –</p> <p>(a) a medical practitioner who is to conduct the search to ask another person to help with the search; and</p> <p>(b) the other person to give that help.</p> <p>(6) Unless it is not reasonably practicable in the circumstances, the person asked to help is to be of the same sex as the person to be searched.</p>	<p>Recommend amending s 30(2) to add:</p> <p>(c) <u>if the person is transgender, intersex or otherwise has a registered gender other than male or female and it is proposed to conduct a strip search, an officer of the gender that the person requests is to conduct it, if practicable.</u></p> <p>This would complement the overarching provision in s 28D(4) of the amended <i>BDM Act</i>, and is consistent with the Tasmania Police Manual, 7.3.4(5).</p>
<i>Poisons Act 1971</i>	<p>The Act allows a police officer or inspector executing a warrant to search any person found on the premises listed in the warrant and</p>	<p>Recommend amending s 90C(1) to add:</p>

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	<p>detain any such person for the purpose of carrying out the search (s 90A).</p> <p>Section 90C describes the restrictions on conducting a search.</p> <p>90C. Personal searches</p> <p>(1) Where... an inspector or a police officer detains a person for the purpose of search, the following provisions apply:</p> <p>(a) if a strip search is to be carried out on a female, that search shall be carried out by a female police officer;</p> <p>(b) if a strip search is to be carried out on a male, that search shall be carried out by a male police officer;</p> <p>The Act also allows a magistrate to order a cavity search to be conducted by a medical practitioner.</p> <p>(4) If a person in respect of whom an order has been made ... requests that the search authorized by that order be not carried out unless another medical practitioner, of the same sex as that person, is present, the search shall not be carried out unless another medical practitioner of the same sex as that person is present unless the circumstances are such that it is not reasonably practicable to arrange for the presence of another medical practitioner of the same sex as that person at the search.</p>	<p>(c) <u>if a strip search is to be carried out on a person who is transgender, intersex or has a registered gender other than male or female, that search shall be carried out by a police officer of the gender that the person requests, if practicable.</u></p> <p>This would complement the operation of s 28D(4) of the amended <i>BDM Act</i>, and is consistent with the Tasmania Police Manual, 7.3.4(5).</p> <p>Recommend also replacing s 90C(4) with a provision similar to s 28D(4).</p>
<i>Police Offences Act 1935</i>	<p>Section 4A allows a police officer to take an intoxicated person into custody. While in custody the police may search the person (s 4A(7)).</p> <p>Section 4A(8) provides:</p> <p>(8) A search of a person under subsection (7) is, if practical, to be conducted by a police officer of the same sex as the person being searched.</p>	<p>Section 28D(4) of the amended <i>BDM Act</i> will apply, but recommend also amending s 4A:</p> <p>(8) <u>Subject to subsection (8A), a search of a person under subsection (7) is, if practical, to be conducted by a police officer of the same sex gender as the person being searched.</u></p> <p><u>(8A) if any person with a registered gender other than male or female requests that a search be conducted by a male or female police officer, the search is, if practical, to be conducted in accordance with the request.</u></p>

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<p><i>Police Powers (Public Safety) Act 2005</i></p>	<p>Under s 22, police may undertake strip searches in some circumstances and may detain a person for as long as is reasonably necessary to conduct the search.</p> <p>Section 22(4) provides:</p> <p>Where a police officer detains a person for the purpose of a search under this section, the following provisions apply:</p> <p>(a) if it is proposed to conduct a strip search, the search is to be conducted by an officer of the same sex as the person searched or by a person of the same sex under the direction of a police officer ...</p> <p>Note:</p> <p>Section 18 of the <i>Police Powers (Public Safety) Act 2005</i> provides police with powers to conduct an ‘ordinary search’:</p> <p>ordinary search means –</p> <p>(a) a search of a person conducted by–</p> <p>(i) running hands over the person’s outer clothing; or</p> <p>(ii) passing an electronic metal detection device over or in close proximity to the person's outer clothing; or</p> <p>(iii) requiring the person to pass through such a device; or</p> <p>(iv) requiring the person to turn out his or her pockets; and</p> <p>(b) the examination of any thing worn or carried by, or in the control or possession of, the person that is conveniently removed including –</p> <p>(i) an examination conducted by passing an electronic metal detection device over or in close proximity to that thing; or</p> <p>(ii) passing the thing through such a device; or</p> <p>(iii) searching through any bag, basket or other receptacle; or</p>	<p>This approach is consistent with the Tasmania Police Manual, 7.3.4(5).</p> <p>Section 28D(4) of the amended <i>BDM Act</i> will apply, but recommend also amending s 22(4):</p> <p>(a) <u>Subject to paragraph (aa), if it is proposed to conduct a strip search, the search is to be conducted by an officer of the same sex gender as the person searched or by a person of the same sex gender under the direction of a police officer;</u></p> <p><u>(aa) if any person with a registered gender other than male or female requests that a search be conducted by a male or female, the search is, if practical, to be conducted by an officer of that gender or by a person of that gender under the direction of a police officer.</u></p> <p>This approach is consistent with the Tasmania Police Manual, 7.3.4(5).</p>

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	<p>(iv) moving, and if it is considered necessary, removing and searching through the contents of any pocket, bag, basket or other receptacle.</p> <p>These powers are not confined by a requirement that the search be conducted by an officer of the same sex or gender as the person being searched. The powers are unaffected by the recent changes to the law.</p>	
<i>Search Warrants Act 1997</i>	<p>An executing officer for a warrant, or a police officer assisting, is authorised to conduct ordinary and frisk searches in the execution of the warrant.</p> <p>Section 18 provides:</p> <p>18. Conduct of frisk searches</p> <p>A frisk search of a person under this Act is, if practicable, to be conducted by a person of the same sex as the person being searched.</p>	<p>Section 28D(4) of the amended <i>BDM Act</i> will apply, but recommend also amending s 18:</p> <p>(a) Subject to subsection (2), a frisk search of a person under this Act is, if practicable, to be conducted by a person of the same sex <u>gender</u> as the person being searched.</p> <p>(b) if a person with a registered gender other than male or female requests that a search be conducted by a male or female, a frisk search is, if practicable, to be conducted in accordance with the request.</p>
<i>Terrorism (Preventative Detention) Act 2005</i>	<p>The Act allows a police officer to search a person who has been taken into custody under a preventative detention order, and to detain a person for as long as reasonably necessary to conduct a search (s 22).</p> <p>Searches must be conducted in accordance with s 22(5)(a):</p> <p>(a) if it is proposed to conduct a strip search, the search is to be conducted by an officer of the same sex as the person searched or by a person of the same sex under the direction of a police officer.</p>	<p>Section 28D(4) of the amended <i>BDM Act</i> will apply, but recommend also amending s 22(5):</p> <p>(a) <u>Subject to paragraph (aa),</u> if it is proposed to conduct a strip search, the search is to be conducted by an officer of the same sex <u>gender</u> as the person searched or by a person of the same sex <u>gender</u> under the direction of a police officer;</p> <p><u>(aa) if any person with a registered gender other than male or female requests that a search be conducted by a male or female, the search is, if practical, to be conducted by an officer of that gender or by a person of that gender under the direction of a police officer.</u></p>

Legislation	Provision	Potential implications and reform recommendations
<p><i>NOTE:</i></p> <p>Tasmania Police Manual (updated December 2018)</p> <p>7.3.4 SEARCHING OF PERSONS (INCLUDING TRANSGENDER AND INTERSEX PEOPLE) TO BE DETAINED IN CUSTODY</p> <p>(1) A police officer who conducts a search of a person must not use more force or subject the person to greater indignity than is reasonable and necessary in order to conduct the search.</p> <p>(2) Unless special circumstances exist to the contrary, a member should search a person in the presence of another member.</p> <p>(3) When searching persons in custody, the following procedures are to be followed:</p> <ul style="list-style-type: none"> (a) disposable gloves are to be worn by all members; (b) the search is to comply with the provisions of s 58B <i>Police Offences Act 1935</i>; (c) where practicable, a person is to be searched by a member of the same sex; and (d) where a sworn member of the same sex is not available, a person of the same sex who is not a sworn member, may be authorised by the custody officer to conduct the search. <p>Definitions: transgender and intersex people:</p> <p>(a) ‘Transgender’ is an umbrella term for people whose gender identity, history, or expression does not match dominant cultural expectations about what it means to be a woman or a man. This includes people whose gender identity is not typically associated with their assigned sex at birth as well as people who have previously lived as another gender. Many transgender people identify simply as women or men and do not consider ‘transgender’ their identity.</p> <p>(b) ‘Intersex’ refers to people born with chromosomal and/or physiological difference, sometimes including ambiguous genitalia and secondary sex characteristics such as breasts, facial hair or build. Most kind of intersex differences are not readily apparent.</p> <p>(5) Transgender and intersex people:-</p> <ul style="list-style-type: none"> (a) should be treated according to their preferred gender; (b) if an officer is unsure of how a person identifies they should respectfully ask the person; (c) should be searched by a person of the same sex as the person in custody’s identifying gender wherever possible; (d) members should be mindful that a person’s identity documents and police records may not accurately identify their identifying gender; and (e) may be considered at risk of harm from other prisoners while in custody and should be placed in a single cell when being held in custody. 		

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Criminal issues		
<i>Criminal Code Act 1924</i>	Accessories after the fact Section 6(2) provides: <p>A married woman does not become an accessory after the fact to a crime of which her husband is guilty, by receiving or assisting him in order to enable him to escape punishment; nor by receiving or assisting, in her husband's presence and by his authority, another person who is guilty of a crime in the commission of which her husband has taken part, in order to enable that other person to escape punishment; nor does a husband become accessory after the fact to a crime of which his wife is guilty by receiving or assisting her in order to enable her to escape punishment.</p>	<p>Need to clarify operation of s 6(2) and s 20 where a person in a marriage identifies as a gender other than their registered sex or gender at the time of the marriage.</p> <p>These provisions require updating to reflect the passage of the <i>Marriage Amendment (Definitions and Religious Freedom) Act 2017</i> (Cth), and equal application to all spouses.</p>
	Compulsion by a spouse Section 20(2) provides, with respect to the application of a defence of compulsion: <p>(2) A married woman shall be in the same position as regards compulsion by her husband as if she were unmarried</p>	
	165A. Infanticide The <i>Code</i> provides that a woman who, within 12 months of giving birth to a child and being still disturbed from the effects of the birth, wilfully causes the death of that child, she will be guilty of infanticide (rather than murder, which carries a higher maximum penalty).	<p>If a person with a registered gender other than female gives birth or self-terminates and conceals the birth, or gives birth and subsequently causes the death of the child, these crimes may not be made out.</p> <p>Section 28D(3)(a) of the amended <i>BDM Act</i> extends any reference to pregnancy of a female, female person or woman to a reference to pregnancy of any person. This would arguably extend the reach of these crimes. Section 24A of the <i>AIA</i> could also apply to extend the operation of these provisions to any person.</p>

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	166. Concealment of birth A person who disposes of the dead body of a child delivered by a woman (whether the child died before, at, or after, its birth) and endeavours to conceal the birth is guilty of a crime.	For clarity, the TLRI recommends: <ul style="list-style-type: none">• amending s 165A to replace ‘woman’ with ‘person’ and ‘she’ with ‘the person’• amending s 166 to remove ‘delivered by a woman’.• Amending s 184A to read: “Any person who unlawfully assaults another person, knowing that person to be pregnant, is guilty of a crime” And replace ‘pregnant woman’ with ‘pregnant person’ in the section heading and charge name.
	184A. Assault on pregnant woman Any person who unlawfully assaults a woman, knowing that woman to be pregnant is guilty of a crime.	
Medical Procedures		
<i>Criminal Code Act 1924</i>	Terminations Section 178D makes it a crime to perform a termination ‘on a woman’ unless the person performing the termination is a medical practitioner or the pregnant woman. It is also a crime to perform a termination on a woman without the woman’s consent (s 178E), however no prosecution will be instituted against a medical practitioner who reasonably and in good faith	These provisions – both the offence and defence provisions – would not extend to a pregnant person with a registered gender other than female. Section 28D(3)(b) of the amended <i>BDM Act</i> provides that a reference to the termination of the pregnancy of a female, female person or woman includes a reference to the termination of a

Legislation	Provision	Potential implications and reform recommendations
	<p>performs a termination on a woman who is unable to give consent, provided the termination is for the woman’s benefit.</p> <p>Section 51(1A) allows a termination to be lawfully performed ‘on a woman by a medical practitioner if it is performed in good faith, with reasonable care and skill and with the woman’s consent.’</p> <p>In relation to each of these sections, ‘woman’ is defined as ‘a female person of any age’ (ss 51(1B), 178D(3), 178E(3)).</p> <p>Female genital mutilation</p> <p>Female genital mutilation includes any excision or mutilation of female genitalia.</p> <p>It is a crime to:</p> <ul style="list-style-type: none"> • perform female genital mutilation on another person (s 178A), or • take a child out of Tasmania for the purpose of having female genital mutilation performed on the child (s 178B). <p>It is a defence to a charge under ss 178A or 178B if the operation in question was for genuine therapeutic purposes or for a ‘sexual reassignment procedure’ (s.178C(1)(b)).</p> <p>Sexual reassignment procedure is defined as ‘a surgical procedure to give a female, or a person whose sex is ambivalent, the genital appearance of a particular sex.’</p>	<p>pregnancy of a person of another gender. This would extend the protections afforded by the <i>Criminal Code</i>.</p> <p>For clarity, recommend also amending the provisions of the <i>Criminal Code</i> to replace references to ‘woman’ with ‘person’ and removing the definitions of ‘woman’.</p> <p>‘Sexual reassignment procedures’ are no longer a prerequisite to register a change of gender under the <i>BDM Act</i>.</p> <p>There is a risk for a person who registers their gender as male, without any surgical intervention, and later elects to undertake a sexual reassignment procedure to remove their female genitalia.</p> <p>In particular, a ‘sexual reassignment procedure’ is defined as a procedure on a female or ‘person whose sex is ambivalent’. Where the procedure is sought by a person whose registered gender is male, a medical practitioner who performs the procedure may not be protected under s 178C(1)(b). This is because at the time of surgery, the male patient would be neither a female or a person whose sex is ambivalent for the purposes of the <i>Criminal Code</i>.³⁷⁵</p> <p>Unless the procedure could be characterised as being for ‘genuine therapeutic purposes’, this would put the medical practitioner at risk of being charged with the crime of performing female genital mutilation.</p> <p>Arguably, s 24A of the <i>AlA</i> could extend the protections to persons other females. However, to remove any uncertainty, the definition of sexual reassignment procedure could be amended to ‘a surgical procedure to alter a person’s sex characteristics’.</p>
<p><i>Reproductive Health (Access to Terminations) Act 2013</i></p>	<p>Terminations</p> <p>Section 4 allows medical practitioners to terminate the pregnancy of a woman who is not more than 16 weeks pregnant with the woman’s consent.</p>	<p>Concerns that the Act will not authorise terminations on a person with a female reproductive system whose registered gender is other than female, or allow such a person to consent to a procedure. Also concern that medical practitioners are not obliged</p>

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	<p>Section 5 allows terminations after 16 weeks if two medical practitioners reasonably believe the continuation of the pregnancy would involve greater risk of injury to the physical or mental health of the pregnant woman than if the pregnancy were terminated.</p> <p>A woman who consents to, assists in, or performs a termination on herself is not guilty of a crime (s 8).</p> <p>Section 6(3) requires a medical practitioner to perform a termination in an emergency ‘if a termination is necessary to save the life of a pregnant woman or to prevent her serious physical injury.’ Section 6(4) requires a nurse or midwife to assist in the procedure.</p> <p>Section 7 obliges a medical practitioner with a conscientious objection to performing terminations to refer a woman seeking termination to a list of health services.</p>	<p>to perform a termination in emergency circumstances where the pregnant person identifies as male, or to provide such a person with a referral to appropriate health services.</p> <p>As above, s 28D(3)(b) of the amended <i>BDM Act</i> provides that a reference to the termination of a female, female person or woman’s pregnancy includes a reference to the termination of a pregnancy of a person of another gender. This would extend the protections afforded by the <i>Reproductive Health Act</i>.</p> <p>For clarity, recommend also amending the provisions of the <i>Reproductive Health Act</i> to replace references to ‘woman’ with ‘person’.</p>
<p><i>Human Cloning for Reproduction and Other Prohibited Practices Act 2003</i></p>	<p>The Act creates a number of offences, including:</p> <ul style="list-style-type: none"> removing a human embryo from the ‘body of a woman’, intending to collect a viable human embryo (s 15); intentionally placing a human embryo in the body of a human, other than in a woman’s reproductive tract (s 17(2)); intentionally placing an embryo in the body of a woman knowing that, or reckless as to whether, the embryo is a prohibited embryo (s 18(3)). <p>These are serious offences, punishable by up to 15 years in prison.</p> <p>The Act defines ‘woman’ as ‘a female human’.</p>	<p>This provision is based on uniform national legislation.</p> <p>Concern that the following activities would not be offences:</p> <ul style="list-style-type: none"> removal of viable human embryos from the body of a person with a female reproductive system whose registered gender is other than female; placing a prohibited embryo in the body of a person with a female reproductive system whose registered gender is other than female. <p>Section 28D(3)(c) of the <i>BDM Act</i> provides:</p> <p>(c) a reference to the fertilisation of a human egg outside of the body of a woman does not include the fertilisation of a human egg inside of the body of a person of another gender who has a female reproductive tract;</p> <p>An embryo placed in the reproductive tract of a person with a female reproductive system whose registered gender is other than</p>

³⁷⁵ This view assumes that inconsistency between a person’s sex and registered gender would be insufficient to constitute ‘ambivalence’.

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		<p>female would continue to be characterised as being placed ‘other than in a woman’s reproductive tract.’</p> <p>The offence under s 15 (removing a human embryo from the body of a woman) could be affected by the amended <i>BDM Act</i>. In circumstances where an embryo developed in the body of a person with a female reproductive system whose registered gender is other than female, the embryo could be removed without making out the offence in s 15.</p> <p>Section 28D(3)(a) of the amended <i>BDM Act</i> provides that any reference to pregnancy of a female or a woman include a reference to pregnancy of a person of another gender. Arguably, this could extend to provisions relating to human embryos within the body of a woman. However, the TLRI considers that it is preferable to amend s 15 of the <i>Cloning Act</i> to replace ‘from the body of a woman’ with ‘from the body of a human’. This language is consistent with the language currently used in s 17(2) of the <i>Cloning Act</i>.</p>		
<i>Poisons Regulations 2018</i>	It is an offence under reg 88 to prescribe or supply acitretin, bexarotene, bosentan, etretinate, sitaxentan, isotretinoin, tretinoin, or thalidomide to a female patient unless satisfied that the patient is not pregnant, is incapable of becoming pregnant, or has been warned about the risks of becoming pregnant.	<p>There is a risk that doctors may not be required to warn patients with a registered gender other than female who retain a female reproductive system of risks associated with these medicines.</p> <p>Section 24A of the <i>AIA</i> and s 28D(3)(a) of the amended <i>BDM Act</i> will extend the operation of reg 88 to all persons.</p> <p>For clarity (and procedural reminder to doctors), recommend that reg 88 be amended to delete ‘female’.</p>		
Workplace Health and Safety				
<i>Workers Rehabilitation and Compensation (Deemed Diseases) Notice 2017</i>	<div>Schedule 1, Rule 4 sets out presumption as to cause of disease for the purposes of compensation. This includes:</div> <table><tr><td>Breast cancer (female)</td><td>Exposure to ionizing radiation.</td></tr></table>	Breast cancer (female)	Exposure to ionizing radiation.	There is a risk that a pre-operative person with a registered gender other than female who has not had a mastectomy, could develop breast cancer as a result of workplace exposure and not be entitled to the causative presumption. This would put the person at a
Breast cancer (female)	Exposure to ionizing radiation.			

Legislation	Provision	Potential implications and reform recommendations
		<p>disadvantage in terms of evidence to establish a compensation claim.</p> <p>Recommend amending Schedule 1, Rule 4 to delete ‘female’.</p>
<i>Work Health and Safety Regulations 2012</i>	<p>These Regulations identify workplace lead risks and prescribe standards for the management of those risks.</p> <p>Under regs 394, 407, 415 and 417, ‘females of reproductive capacity’ are recognised as particularly susceptible to lead risks and afforded additional protections.</p>	<p>Section 28D(3)(e) of the amended <i>BDM Act</i> states that an assumption as to the ability of a person to procreate as a female or male is to be determined irrespective of the registered gender of the person. This provision may extend the reference to a ‘female of reproductive capacity’ to a person whose registered sex at birth was female, but whose registered gender is now different.</p> <p>Consistent with the TLRI’s approach on clarifying the application of gender-specific legislation, we recommend amending the <i>Work Health and Safety Regulations 2012</i> to replace ‘female of reproductive capacity’ with gender inclusive language such as ‘a person who may be capable of becoming pregnant’.</p>
Record collection		
<i>Obstetric and Paediatric Mortality and Morbidity Act 1994</i>	<p>This Act establishes a OPMM Council to investigate and keep records of maternal deaths resulting from pregnancy or obstetrics. Statistics are to be gathered in relation to the deaths of women up to one year from birth.</p> <p>The OPMM Council is also required to report to police any offence in relation to a woman or child (including unlawful medical practices).</p>	<p>The death of any person identifying as male who becomes pregnant will not be required to be recorded and may compromise the long-term statistical data regarding maternal and infant morbidity.</p> <p>Obligation to report potentially unlawful practices will not extend to offences against persons with a registered gender other than female who retain a female reproductive system.</p> <p>Section 24A of the <i>AIA</i> and s 28D(3)(a) of the amended <i>BDM Act</i> would extend the operation of the reporting requirements in relation to maternal deaths to any deaths during pregnancy, regardless of gender.</p> <p>Recommend also amending the Act to replace references to ‘maternal’ with ‘relating to pregnancy or birth’ and replace ‘woman’ with ‘person’.</p>

Legislation	Provision	Potential implications and reform recommendations
<i>Gas (Safety) Regulations 2014</i>	The report made by a gas entity in relation to any incident is required to record: (m) particulars of any deceased or injured person including his or her name, date of birth, sex , residential address and telephone number, and occupation or job title (reg 4(m)).	Section 28D of the amended <i>BDM Act</i> provides that legislative references to ‘sex’ will be read as references to ‘gender’. This will allow appropriate records to continue to be kept. However, query whether it is necessary to maintain these gender records?
<i>Public Sector Superannuation Reform Regulations 2017</i>	Where an employee becomes a contributor to the Fund, the responsible person is to notify the Commission of details of the employee, including ‘his or her sex’ (reg 111(2)).	
<i>State Service Regulations 2011</i>	Section 18(4) of the Act, and reg 8 require State Service employers to keep records for each employee, including sex.	
<i>Workplace issues</i>		
<i>Public Sector Superannuation Reform Regulations 2017</i>	A ‘married female’ permanent employee who has been continuously employed by the State Government since 1982 may be exempted from continuing to contribute to the superannuation Fund (reg 15(2)).	Concern that a person who meets this criterion, but now has a registered gender other than female would lose the opportunity for exemptions from contribution to the Fund. The policy is intended to apply differently to female and male employees, so the application of s 24A of the <i>AIA</i> may not deliver the intended policy outcome. Recommend the State government consider what, if any, reforms should be made to ensure that eligible long-term employees remain eligible for the exemption.
<i>Industrial Relations Act 1984</i>	A female employee who has given notice of her intention to take parental leave is to start leave 6 weeks before the due date, unless a medical practitioner certifies that she is fit to work longer (s 3). Parental leave is available to an employee for ‘the birth of a child to the employee or the employee’s partner.’	Parental leave is available both to the person giving birth and to their partner, making s 3 difficult to apply. For example, a female employee whose female partner is giving birth would be entitled to parental leave but required to seek a medical certification to work within 6 weeks of the birth. Equally, the section may not apply to a pregnant employee whose registered gender is non-binary. Recommend that s 3 be amended to replace ‘female’ with ‘pregnant’.

Legislation	Provision	Potential implications and reform recommendations
<i>Long Service Leave Act 1976</i>	Where the age for retirement is not otherwise specified in an industrial award or contract, it is defined as 65 years for a male, or 60 years for a female (s 3).	Given the distinction drawn between male and female employees, s 24A of the <i>AIA</i> may not apply to these provisions. Recommend the State government consider what, if any, reforms should be made to clarify the default retirement age for gender diverse Tasmanians.
<i>Payroll Tax Act 2008</i>	Section 53(1)(a) provides an exemption for wages paid to a ‘female employee in connection with her pregnancy.’	Section 28D(3)(a) of the amended <i>BDM Act</i> extends references to pregnancies by females to persons with any registered gender. However, for clarity, the TLRI recommends that s 53(1)(a) be amended to apply to wages paid to ‘an employee in connection with their pregnancy’.
Other legislation		
<i>Adoption Act 1988</i>	<p>Sections 29(2)–(5) set out the people whose consent is required to authorise an adoption. These people relevantly include:</p> <ul style="list-style-type: none"> • The mother and father of the child, if married (s 29(2)); • The mother of the child and a man who is registered as the father of the child (s 29(3)(a)); • The mother of the child and a man who is assumed to be the parent by operation of the <i>Status of Children Act 1974</i> (ss 29(3)(b), (d) or (e)); • The mother of the child and a man with whom the mother was in a significant relationship at the time of the birth (s 29(3)(da)); • The mother of the child and a woman to whom she was married or in a significant relationship with at the time of the birth (s 29(4A)), where the child was conceived through a fertilisation procedure; • Where a child has previously been adopted, the adoptive parents of a child (s 29(5)). 	<p>Section 28D(3)(d) of the amended <i>BDM Act</i> provides that a reference to ‘the mother of a child’ includes ‘a reference to a person of another gender who carried the child in the person’s female reproductive tract, or who gave birth to a child.’</p> <p>The references to ‘man’ and ‘woman’ in the other provisions of s 29 of the <i>Adoption Act 1988</i> (Tas) could unduly restrict the rights of interested parties to consent, or refuse to consent, to proposed adoption orders.</p> <p>Section 24A of the <i>AIA</i> would operate to extend the application of the consent provisions to parents of any gender.</p> <p>Recommend also amending s 29 to replace references to ‘man’ or ‘woman’ with ‘person’.</p>

Legislation	Provision	Potential implications and reform recommendations
<i>Children, Young Persons and their Families Act 1997</i>	<p>Section 13(1A) provides:</p> <p>(1A) If, while a woman is pregnant, an adult knows, or believes or suspects on reasonable grounds, that the child of that pregnancy once born –</p> <p>(a) is reasonably likely to suffer abuse or neglect; or</p> <p>(b) is reasonably likely to require medical treatment or other intervention as a result of the behaviour of the woman, or another person with whom the woman resides or is likely to reside, before the birth of the child –</p> <p>that adult has a responsibility to take steps to prevent the occurrence of that abuse or neglect or that behaviour.</p>	<p>The responsibility to prevent neglect and abuse should not be dependent on the birth parent being a woman. This responsibility should equally apply in situations where a trans man or a gender diverse person is pregnant with a child.</p> <p>The TLRI recommends that the Act be amended to require any adult who suspects that a child is likely to suffer abuse or neglect or to require medical treatment in utero or once born to take action.</p>
<i>Surrogacy Act 2012</i>	<p>The <i>Surrogacy Act</i> provides for surrogacy arrangements to be made for a ‘birth mother’ to seek to have a child, and for that child to be treated as the child of another person or persons (the ‘intended parent’ or ‘intended parents’) (s 5).</p> <p>Surrogacy arrangements cannot be made <u>after</u> a person becomes pregnant (s 5(5)(a)).</p> <p>For the purposes of a surrogacy arrangement, ‘intended parents’ may include a single man or ‘eligible woman’, a man and a woman, two men, or two ‘eligible women’ (s 7(1)). ‘Eligible woman’ includes a woman who:</p> <p>(a) is unable, on medical grounds, to conceive a child; or</p> <p>(b) is likely to be unable, on medical grounds, to carry a pregnancy or give birth; or</p> <p>(c) is unlikely to survive a pregnancy or birth or is likely to have her health significantly affected by a pregnancy or birth; or</p> <p>(d) if she were to conceive a child, is likely to conceive –</p>	<p>A person whose registered gender is male would not be likely to be a ‘birth mother’. A surrogacy arrangement could not be made <u>after</u> a person inadvertently becomes pregnant and a commitment to ‘seek to become pregnant’ could be acting inconsistently with a gender declaration that the person intends to live as a male.</p> <p>However, there may be situations where a person with a registered gender other than female is capable of giving birth and wants to assist a relative or others to have a family. Allowing any consenting adults capable of becoming pregnant to enter into surrogacy arrangements, regardless of their registered gender, would be consistent with the policy objective of providing opportunities for people otherwise unable to have a family to do so.</p> <p>‘Intended parents’ excludes a situation in one or both parents has a registered gender other than male or female.</p> <p>Section 7 is designed to ensure that intended parents are not otherwise able to have a child. This qualification can be maintained without reference to gender.</p>


Legislation	Provision	Potential implications and reform recommendations
	<p>(i) a child who is likely to be affected by a genetic condition or genetic disorder, the cause of which is attributable to the woman; or</p> <p>(ii) a child who is unlikely to survive the pregnancy or birth or whose health is likely to be significantly affected by the pregnancy or birth (s 7(2)).</p>	<p>Section 24A of the <i>AIA</i> and s 28D(3) of the amended <i>BDM Act</i> could extend the meaning of ‘birth mother’ and ‘intended parents’ to include people of any gender.</p> <p>Recommend also amending the <i>Surrogacy Act</i>:</p> <ul style="list-style-type: none"> • amending s 5(1)(a) by deleting ‘female’; • replacing all references to ‘birth mother’ with ‘birth parent’; • replace s 7(2)(b) with ‘is unable, or likely to be unable, on medical or other grounds, to carry a pregnancy or give birth’; • amend s 7(2)(c) and (d) to replace ‘her’ and ‘she’ and ‘woman’ with gender-neutral terms.
<p><i>Status of Children Act 1974</i></p>	<p>The Act sets out a number of rebuttable presumptions regarding paternity for a child. For example, s 8 provides:</p> <p>8. Presumption of paternity arising from cohabitation</p> <p>If –</p> <p>(a) a child was born to a woman; and</p> <p>(b) at any time during the period beginning not earlier than 44 weeks and ending not less than 20 weeks before the birth, the woman cohabited with a man to whom she was not married –</p> <p>the child is presumed to be the child of that man.</p> <p>A person can apply to a judge in chambers for a declaration of parentage and present evidence rebutting the presumptions in the Act.</p> <p>Section 10C sets out the presumptions of parenthood where a child is conceived through fertilisation procedures. The section recognises same sex couples but uses binary language that would exclude couples where one or both partners do not identify as male or female.</p>	<p>Sections 28D(3)(a) and (d) of the amended <i>BDM Act</i> provide that references to pregnancy of a woman extend to the pregnancy of any person, and references to a child of a woman includes the child of a person who gave birth to that child.</p> <p>Section 28D(5) also provides that a person’s relationship to another person through blood relations or operation of the law (for example, a father), is unaffected by the registration of a change of gender.</p> <p>Section 24A of the <i>AIA</i> could extend the presumption of parentage to a person of any gender. It remains open for any person to apply for a declaration as to parentage where the presumptions do not apply.</p> <p>However, the TLRI recommends that all presumptive provisions within the Act be amended to use gender inclusive language.</p> <p>In its submission on the Issues Paper, Equality Australia also noted that this presumption is antiquated, introduced at a time when social expectations, living arrangements and the availability of accurate paternity testing were significantly different. Equality Australia recommends that the presumptions themselves (rather than just the language) be reviewed to reflect modern relationships</p>

Legislation	Provision	Potential implications and reform recommendations
		and living arrangements. This is beyond the scope of the TLRI's inquiry.
<i>Perpetuities and Accumulations Act 1992</i>	10. Presumptions and evidence as to future parenthood (1) Where there arises, in the application of the rule against perpetuities to a disposition or in determining the right of a person to put an end to a trust or an accumulation, a question that depends on the capacity of a person to procreate a child at a future time – (a) it is presumed, subject to paragraph (b), that – (i) a male person can procreate a child at the age of 12 years or over but not under that age; and (ii) a female person can procreate a child at the age of 12 years or over but not under that age or over the age of 55 years; but (b) in the case of a living person, evidence may be given in any proceedings to show that he or she will, or will not, be capable of procreating a child at the time in question.	Section 28D(3)(e) of the amended <i>BDM Act</i> provides an assumption of a person's ability to procreate is to 'be determined irrespective of the registered gender of the person'. Section 10(1)(b) allows evidence to be presented to rebut any presumption regarding procreative capacity.
<i>Environmental Management and Pollution Control Act 1994</i>	Section 13A. Membership of Board (2) The Board is to include at least one person of each sex.	Recommend amending s 13A to provide that 'In determining the composition of the Board, regard must be had to the objective of achieving gender diversity'.
<i>Macquarie Point Development Corporation Act 2012</i>	Section 9 provides for consideration of 'the desirability of having as directors both men and women' on the Board of the Corporation.	Recommend amending s 9 to reflect the aim of gender diversity (see Recommendation 4)
<i>Training and Workforce Development Act 2013</i>	Section 60(4)(c) provides that the Board will 'take into account the desirability of having as directors both men and women.'	Recommend amending s 9 to reflect the aim of gender diversity (see Recommendation 4)
<i>Local Government Act 1993 – by-laws</i>	A number of by-laws made under the <i>Local Government Act 1993</i> address gender-specific public facilities. <ul style="list-style-type: none"> <i>Glenorchy Recreation Reserve and Natural Area Reserve By-Law – r 31</i> makes it an offence to enter the change room or public toilet intended for the opposite sex. 	Local governments should consider amending by-laws and implementing inclusive approaches to public facilities.

Legislation	Provision	Potential implications and reform recommendations
	<ul style="list-style-type: none"> • <i>Northern Midlands Swimming Pool By-Law</i> – r 12 makes it an offence to enter change room or public toilets reserved for persons of the opposite sex (if over 6yo). • <i>Waratah-Wynyard Public Reserves By-Law</i> – r 19(1) makes it an offence to enter a toilet or change room reserved for use by people of the opposite sex, except where necessary to render assistance. 	
<i>Miscellaneous property and succession legislation</i>	<p>A number of historic Acts in Tasmania address issues regarding powers to divest or inherit property. These include:</p> <p><i>Conveyancing and Law of Property Act 1884:</i></p> <ul style="list-style-type: none"> • s 43 – Power of Court to bind interest of married woman. • s 44 – Power of attorney of married woman. • s 45 – Restraint on anticipation abolished. • Schedule 3 – includes a series of provisions regarding inheritance through male and female lineage. <p><i>Landlord and Tenants Act 1935</i></p> <ul style="list-style-type: none"> • s 32 - Exemptions from distress (provides that the sewing-machine, knitting-machine, type-writing machine, or mangle of a female tenant will be exempt from the property able to be claimed for unpaid rent. <p><i>Married Women's Property Act 1935</i></p> <p><i>Settled Lands Act 1834</i></p> <p><i>Trustees Act 1884</i></p> <p><i>Pensioners (Heating Allowances) Act 1971</i></p>	<p>These provisions are antiquated, however any repeal or amendment is beyond the scope of this review.</p> <p>Section 24A of the <i>AIA</i> could apply to extend the operation of these provisions to any person, regardless of gender.</p>

Appendix 4 – Approved forms

Application for a birth certificate



Registry of Births, Deaths & Marriages

Birth certificate application Tasmania

Receipt number _____

SECTION 1 - Birth details

Family name

Given name/s

Date of birth / /

Day Month Year

If you do not know the year of birth please enter the years to be searched below

From To

This office searches a five year period for the standard fee. For searches of six years or more additional fees apply. For more information about fees visit www.justice.tas.gov.au/bdm/fees.

Town/City of birth in Tasmania

Mother/Parent's full name (birth name)

Father/Parent's full name

Please select if you have provided natural or adoptive parents details:
☐ natural parents ☐ adoptive parents

Reason for application

SECTION 2 - Applicant details

Applicant name

Relationship to registered person

If you are not the registered person please check if you can apply. Visit www.justice.tas.gov.au/bdm/who-can-apply-for-a-certificate (or call 1300 135 513)

Contact name

Street address

Town/City

State

Postcode

Country (if not Australia)

Contact number or email address

SECTION 3 - Type of certificate

You can request gender and/or change of name details to show on the certificate. This is recommended if you need the certificate for identification purposes.

Please note: If you request gender and/or change of name details to show and you are not the registered person or the parents of the registered person (who is under 16 years old), you must attach the following to this application form:

- evidence that the registered person consents to the inclusion of gender and/or change of name details on the certificate; or
- evidence that the registered person is unable to give their consent due to death or incapacity (e.g. a death certificate or doctor's certificate).

What type of certificate would you like to order?

☐ Birth certificate including all registered gender and name change details (if any)

Office use only
BSC/BSP

Recommended for evidence of identity

OR

☐ Birth certificate with current gender only (no previous gender or details of registered name changes)

Office use only
BSC1/P

☐ Birth certificate with current gender and details of registered name changes (no gender history)

BSC2/P

☐ Birth certificate with all registered gender details but no details of registered name changes

BSC3/P

☐ Birth certificate without gender and no details of registered name changes

BSCNG1/P


☐ Birth certificate without gender, with details of registered name changes

BSCNG2/P


BDM offer a same day priority processing service for an extra fee

☐ **PRIORITY SERVICE - please tick if you require the priority service**


If you would like to purchase a decorative please select one of the designs. NG - No gender shown on decorative.



☐ FLORA
☐ FLORA/NG



☐ TEDDY
☐ TEDDY/NG



☐ HANDS
☐ HANDS/NG

For security reasons your certificate will be sent by registered post (within Australia) and you will be charged a fee for this service.*

Would you also like the certificate sent express and registered post? ☐

Department of Justice

Last updated September 2019 - v6

SECTION 5 - Identification requirements

You will need to submit three, current evidence of identity documents when applying for a certificate from BDM.

Please provide

- one document from each list (at least one showing a signature and one showing your current residential address);

OR

- two documents from list 2 and one from list 3 (at least one showing a signature and one showing your current residential address);

OR

- two documents from list 2 and one from list 1 (at least one showing a signature and one showing your current residential address).

- If you have changed your name please provide evidence such as a marriage or change of name certificate.

If you apply at Service Tasmania you will need to take your original identification documents with you.

If you post your application please send copies of your identification that have been certified as true copies of the original documents by a [Justice of the Peace or Commissioner for Declarations](#).

Identification list 1

- ☐ Australian drivers licence
- ☐ Australian/Overseas passport
- ☐ Australian firearms licence
- ☐ Australian Government issued imnicard
- ☐ Australian citizenship certificate
- ☐ Tasmanian Government personal information card
- ☐ Department of Immigration & Border Protection certificate of evidence of resident status

Identification list 2

- ☐ Medicare card
- ☐ Bank card or ATM card with signature
- ☐ Australian security guard licence
- ☐ Department of Veteran Affairs or Centrelink pensioner concession card or other entitlement card issued by Australian Government
- ☐ Government issued working with vulnerable people card
- ☐ Birth certificate issued in Australia
- ☐ Student identity card issued by Education Department

Identification list 3

- ☐ Utility account (electricity, water, sewerage, phone, gas)
- ☐ Lease or rent agreement
- ☐ Council rates notice
- ☐ Australian Tax Office assessment
- ☐ Current school report or letter of enrolment
- ☐ Financial statement (credit, savings or cheque accounts)

SECTION 6: Personal information protection statement - Confirmation of consent

In line with the *Personal Information Protection Act 2004*, the Registry of Births, Deaths and Marriages is collecting this information so that we can determine your eligibility to obtain the requested certificate and to prevent fraud. If you do not provide all of the information requested, particularly that relating to the reason you need the document and your relationship to the registered person, then you may not be provided with a copy of the certificate. Your personal information may be disclosed to law enforcement agencies, courts and other organisations authorised to collect it.

Signature of applicant

Date signed

Payment (only complete if mailing application)

- ☐ Visa ☐ Mastercard ☐ Money order ☐ Cheque

Amount \$

Processing times and current fees visit - www.justice.tas.gov.au/bdm/fees

Card number

Expiry date

Name on card

Cardholder signature

Submit your form and payment

By mail
Births Deaths and Marriages
30 Gordons Hill Road
ROSNY PARK TAS 7018

In person
Visit any Service Tasmania shop, for locations go to
<http://www.service.tas.gov.au/about/shops>

*If you would like your certificate sent standard mail, by courier or overseas please contact BDM 1300 135 513.

Registration of gender – over 16 years old



Registry of Births, Deaths & Marriages

Application to register your gender

16 years and over

OFFICE USE

Certificate Code

--	--	--	--	--	--	--

Receipt

--	--	--	--	--	--	--

BDM Code - CG

General information

Who can apply

You can apply to register your gender if your birth is registered in Tasmania.

You can only apply to register a gender once in a 12 month period.

What you need to give us

1. A completed and signed copy of this form.
2. The reason for making the application.
3. In some cases the Registrar may request additional information, such as evidence you have received counselling about the implications of registering the chosen gender.
4. Evidence of identity documents, including details of any registered change of names.
5. The fee - refer to www.justice.tas.gov.au/bdm/fees or call 1300 135 513.

Certificates

You can apply for a new certificate as part of this application. Fees apply.

Change of name

Change of name is a separate process. You can get the application to register a change of name from the BDM website www.justice.tas.gov.au/bdm/forms.

Before you apply

Privacy

The information required on this form is collected under the *Births Deaths and Marriages Registration Act 1999*.

Information held by the Registrar may be used for statistical purposes and by law enforcement agencies, as well as other uses provided for by law. Such access for approved purposes may be granted to other Registries and certain government and authorised non-government agencies.

The Registrar requires proof of your identity to protect your privacy. We collect this information to make sure you have the right to register your chosen gender, to give you the new certificate, and to prevent fraud.

Disclosure of information

When you complete this application form, you are consenting to the release of information provided by you, to those agencies which may be able to validate that information in support of your application. It is extremely important that all your identity documents are accurate and reflect your correct identity information.

Documents provided as proof of identity may have their authenticity verified through the National Document Verification Service (DVS). www.dvs.gov.au

Documents issued by this office may also be verified by other organisations using DVS.

Enquiries

For fees and processing times see our website www.justice.tas.gov.au/bdm. Alternatively you can send an email to bdm@justice.tas.gov.au or phone 1300 135 513.

Lodging your application

In person

If you want to bring the form to Births, Deaths and Marriages, you will need to make an appointment by phoning 1300 135 513.

By post

Send the form with your cheque, money order or credit card details to:

Births, Deaths and Marriages
30 Gordons Hill Road
Rosny Park Tasmania 7018

Department of Justice

Last updated October 2019 - Version 1.1

J



Registry of Births, Deaths & Marriages

Application to register your gender 16 years and over

SECTION I - Your details

Name at birth

Family name

Given name/s

Current name

Family name

Given name/s

Date of birth

--	--	--	--	--	--	--	--	--	--

Day

Month

Year

Place of birth

Suburb/Town

State

Tasmania

Parent/s or Guardian/s details

First Parent's or Guardian's family name (as at time of your birth)

First Parent's or Guardian's given names

If there is no second parent/guardian please write not applicable.

Second Parent's or Guardian's family name (as at time of your birth)

Second Parent's or Guardian's given names



Registry of Births, Deaths & Marriages

Application to register your gender 16 years and over

SECTION 2 - Gender declaration statement

The form must be signed in front of a Justice of the Peace (JP) or Commissioner for Declarations. For help please visit Justice of the Peace - www.justice.tas.gov.au/justice-of-the-peace/find, Commissioner for Declarations - https://www.justice.tas.gov.au/commissionersfordeclarations/list_of_groups or ring 1300 135 513

I declare that I identify as being (please tick one option below):

☐ Male

☐ Female

☐ Non-binary

☐ Indeterminate Gender

OR

Other (for example, Transgender, Transsexual, Bigender, Agender) please specify*

and that I live or seek to live as a person of that gender.

I understand that it is a punishable offence to:

- give false or misleading information in this application.
- produce a birth certificate issued showing a previous gender with the intent to deceive.

Signature of applicant

Date signed

Before me

Name of Justice of the Peace (JP) or Commissioner for Declarations

Signature of JP or Commissioner for Declarations

Date signed

* The terms provided are only examples. The Registrar of Births, Deaths and Marriages, will determine if the gender term you choose fits within the definition of gender in the *Births, Deaths and Marriages Registration Act 1999*.



Registry of Births, Deaths & Marriages

Application to register your gender 16 years and over

SECTION 3 - Supporting information

Please provide the reason you are making this application and attach any supporting documents.

In some cases, the Registrar may request additional information, such as evidence that you have received counselling about the implications of registering the chosen gender.

Reason for making this application

Support services

If you would like advice or counselling about registering your gender the organisations below may be able to help.

Working It Out
info@workingitout.org.au
 (03) 6231 1200

Legal Aid
 1300 366 611
www.legalaid.tas.gov.au

Advocacy Tasmania
 (03) 6224 2240
www.advocacytasmania.org.au

Relationships Australia
 1300 364 277
www.tas.relationships.org.au

The Link
 57 Liverpool Street
 Hobart 7000
 (03) 6231 2927
www.thelink.org.au



Registry of Births, Deaths & Marriages

Application to register your gender 16 years and over

SECTION 4 - Proof of identity

Identification requirements

You need to submit three, current evidence of identity documents when applying to register your gender with BDM.

Please provide:

- one document from each list (at least one showing a signature and one showing your current residential address);

or

- two documents from list 2 and one from list 3 (at least one showing a signature and one showing your current residential address);

or

- two documents from list 2 and one from list 1 (at least one showing a signature and one showing your current residential address).

- If you have changed your name/s please provide evidence such as a marriage or change of name certificate.

Certify your documents

If you mail this application the copy of each identity document must be certified.

How to get a certified copy of your identity documents in Australia

1. Make a photocopy of each identity document
2. Take your photocopies and original documents to a Justice of the Peace (JP) or Commissioner for Declarations

How to get a certified copy of your identity documents if you are currently overseas

1. Make a photocopy of each identity document.
2. Take your photocopies and original documents to an Australian Consular Officer or Australian Diplomatic Officer. For more information refer to the Department of Foreign Affairs and Trade website, www.dfat.gov.au

or

Take your photocopies and original documents to a Notary Public. Refer to your local government for a list of licensed Notaries.

3. Identity documents issued by overseas authorities must be translated into English by an accredited translator, i.e. National Accreditation Authority for Translators and Interpreters (NAATI).

Apply in person

If you are applying in person you must bring your original identity documents to your appointment.

Identification list 1

- ☐ Australian drivers licence
- ☐ Australian/Overseas passport
- ☐ Australian firearms licence
- ☐ Tasmanian Government personal information card

Identification list 2

- ☐ Medicare card
- ☐ Bank card or ATM card with signature
- ☐ Australian security guard licence
- ☐ Department of Veteran Affairs or Centrelink pensioner concession card or other entitlement card issued by Australian Government
- ☐ Government issued working with vulnerable people card
- ☐ Tasmanian birth certificate
- ☐ Student identity card with photo issued by education organisation

Identification list 3

- ☐ Utility account (electricity, water, sewerage, telephone, gas)
- ☐ Lease or rent agreement
- ☐ Council rates notice
- ☐ Australian Tax Office assessment
- ☐ Current school report or letter of enrolment
- ☐ Financial statement (including passbook, credit, savings or cheque accounts)

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Registry of Births, Deaths & Marriages

Application to register your gender 16 years and over

SECTION 5 - Type of certificate

What type of certificate would you like to order?

- ☐ Birth certificate without gender and no details of registered name changes
- ☐ Birth certificate without gender, with details of registered name changes
- ☐ Birth certificate with current gender only (no previous gender or details of registered name changes)
- ☐ Birth certificate with current gender and details of registered name changes
- ☐ Birth certificate with all registered gender details but no details of registered name changes

Office use only
BSCNG1

BSCNG2

BSC1

BSC2

BSC3

OR

- ☐ Birth certificate including all registered gender and name change details (if any)

Office use only
BSC**Recommended for evidence of identity**

Decorative certificates

If you would like to purchase a decorative please select one of the designs.

☐ FLORA☐ TEDDY☐ HANDS☐ FLORA
No gender☐ TEDDY
No gender☐ HANDS
No gender

SECTION 6 - Delivery details

Contact name

Street address

Town/City

State

Postcode

Country (if not Australia)

Contact number

Email address

For security reasons your certificate will be sent by registered post (within Australia) and you will be charged a fee for this service.*

Would you also like the certificate sent express and registered post? ☐

Payment (only complete if mailing application)

☐ Visa☐ Mastercard☐ Money order☐ Cheque

Amount \$

Processing times and current fees visit - www.justice.tas.gov.au/bdm/fees

Card number

Expiry date

Name on card


Cardholder signature

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Registration of gender – minor



Registry of Births, Deaths & Marriages

Application to register your child's gender

Under 16 years

OFFICE USE

Certificate Code

--	--	--	--	--	--

Receipt

--	--	--	--	--	--

BDM Code - CG

General information

Who can apply

The parents or guardians of a child can apply to register their child's gender if the child's birth is registered in Tasmania.

One parent or guardian can apply if:

- the applicant is the only parent on the birth record; or
- the other parent has died; or
- the guardian is the only guardian of the child; or
- the registration of gender is approved by a magistrate.

What you need to give us

- A completed and signed copy of this form.
- Evidence that the registered child supports the registration of the chosen gender or the parents believe it is the will and preference of their child (see Section 2 of this form).
- The reason for making this application.
- In some cases the Registrar may request additional information, such as evidence your child has received counselling about the implications of registering the chosen gender.
- Evidence of identity documents of applicant/s, including details of any registered change of names.
- The fee - refer to www.justice.tas.gov.au/bdm/fees or call 1300 135 513

Certificates

You can apply for a new birth certificate as part of this application. Fees apply.

Change of name

Change of name is a separate process. You can get the application to register a change of name from the BDM website www.justice.tas.gov.au/bdm/forms.

Before you apply

Privacy

The information required on this form is collected under the *Births Deaths and Marriages Registration Act 1999*.

Information held by the Registrar may be used for statistical purposes and by law enforcement agencies, as well as other uses provided for by law. Such access for approved purposes may be granted to other Registries and certain government and authorised non-government agencies.

The Registrar requires proof of your identity to protect your privacy. We collect this information to make sure you have the right to register the chosen gender, to give you the new certificate, and to prevent fraud.

Disclosure of information

When you complete this form, you are consenting to the release of information provided by you, to those agencies which may be able to validate that information in support of your application. It is extremely important that all your identity documents are accurate and reflect your correct identity information.

Documents provided as proof of identity may have their authenticity verified through the National Document Verification Service (DVS). www.dvs.gov.au

Documents issued by this office may also be verified by other organisations using DVS.

Enquiries

For fees and processing times see our website www.justice.tas.gov.au/bdm. Or you can send an email to bdm@justice.tas.gov.au or phone 1300 135 513.

Lodging your application

In person

If you want to bring the form to Births, Deaths and Marriages, you will need to make an appointment by phoning 1300 135 513.

By post

Send the form with your cheque, money order or credit card details to:

Births, Deaths and Marriages
30 Gordons Hill Road
Rosny Park Tasmania 7018

Department of Justice

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Registry of Births, Deaths & Marriages

Application to register your child's gender Under 16 years

SECTION 1 - Child's details

Name at birth

Family name

Given name/s

Current name

Family name

Given name/s

Date of birth

			/				/				
--	--	--	---	--	--	--	---	--	--	--	--

Day

Month

Year

Place of birth

Suburb/Town

State

Tasmania

Parent/s or Guardian/s details

First Parent's or Guardian's family name (as at time of the child's birth)

First Parent's or Guardian's given names

If there is no second parent/guardian please write not applicable.

Second Parent's or Guardians's family name (as at time of the child's birth)

Second Parent's or Guardian's given names



Registry of Births, Deaths & Marriages

Application to register your child's gender Under 16 years

SECTION 2 - Gender declaration statement

If possible, the child should complete the gender declaration statement below. The parent/s or guardian/s of the child should also complete the declaration at Part B on the following page.

The form must be signed in front of a Justice of the Peace (JP) or Commissioner for Declarations. For help please visit Justice of the Peace - www.justice.tas.gov.au/justice-of-the-peace/find, Commissioner for Declarations - https://www.justice.tas.gov.au/commissionersfordeclarations/list_of_groups or ring 1300 135 513.

Part A - Child's gender declaration statement

I declare that I identify as being (please tick one option below):

- ☐ Male
- ☐ Female
- ☐ Non-binary
- ☐ Indeterminate Gender

OR

Other (for example, Transgender, Transsexual, Bigender, Agender) please specify*

and that I live or seek to live as a person of that gender.

Signature of child

Date signed

Before me

Name of Justice of the Peace (JP) or Commissioner for Declarations (CD)

Signature of JP or Commissioner for Declarations

Date signed

OR

Reason declaration has not been provided

* The terms provided are only examples. The Registrar of Births, Deaths and Marriages, will determine if the gender term you choose fits within the definition of gender in the *Births, Deaths and Marriages Registration Act 1999*.



Registry of Births, Deaths & Marriages

Application to register your child's gender Under 16 years

Part B - Parents/guardians declaration statement

The form must be signed in front of a Justice of the Peace (JP) or Commissioner for Declarations. For help please visit www.justice.tas.gov.au/justice-of-the-peace/find or ring 1300 135 513.

We/I declare that we/I believe that:

Child's name

identifies as being of the gender (please tick one option below):

☐ Male

☐ Female

☐ Non-binary

☐ Indeterminate Gender

OR

Other (for example, Transgender, Transsexual, Bigender, Agender) please specify*

and that the registration of gender is consistent with the will and preference of my child:

Signature of mother/parent/guardian

Date signed

Before me:

Name of Justice of the Peace (JP) or Commissioner for Declarations

Signature of JP or Commissioner for Declarations

Date signed

Signature of father/parent/guardian

Date signed

Before me:

Name of Justice of the Peace (JP) or Commissioner for Declarations

Signature of JP or Commissioner for Declarations

Date signed

* The terms provided are examples only. The Registrar of Births, Deaths and Marriages, will determine if a specified gender term fits within the definition of gender in the *Births, Deaths and Marriages Registration Act 1999*.



Registry of Births, Deaths & Marriages

Application to register your child's gender Under 16 years

SECTION 3 - Supporting information

Please provide the reason you are making this application and attach any supporting documents.

In some cases, the Registrar may request additional information, such as evidence that your child has received counselling about the implications of registering the chosen gender.

Reason for making this application

Support services

If you would like advice or counselling about registering your gender the organisations below may be able to help.

Working It Out
info@workingitout.org.au
(03) 6231 1200

Legal Aid
1300 366 611
www.legalaid.tas.gov.au

Advocacy Tasmania
(03) 6224 2240
www.advocacytasmania.org.au

Relationships Australia
1300 364 277
www.tas.relationships.org.au

The Link
57 Liverpool Street
Hobart 7000
(03) 6231 2927
www.thelink.org.au



Registry of Births, Deaths & Marriages

Application to register your child's gender Under 16 years

SECTION 4 - Proof of identity for parent/s or guardian/s

Identification requirements

Applicant/s need to submit three, current evidence of identity documents when applying to register your gender with BDM.

Please provide:

- one document from each list (at least one showing a signature and one showing your current residential address);

or

- two documents from list 2 and one from list 3 (at least one showing a signature and one showing your current residential address);

or

- two documents from list 2 and one from list 1 (at least one showing a signature and one showing your current residential address).

- If you have changed your name/s please provide evidence such as a marriage or change of name certificate.

Certify your documents

If you mail this application the copy of each identity document must be certified.

How to get a certified copy your identity documents in Australia

1. Make a photocopy of each identity document
2. Take your photocopies and original documents to a Justice of the Peace (JP) or Commissioner for Declarations

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If you are applying in person you must bring your original identity documents to your appointment.

Identification list 1

- ☐ Australian drivers licence
- ☐ Australian/Overseas passport
- ☐ Australian firearms licence
- ☐ Australian Government issued immicard
- ☐ Australian citizenship certificate
- ☐ Tasmanian Government personal information card
- ☐ Department of Immigration & Border Protection certificate of evidence of resident status

Identification list 2

- ☐ Medicare card
- ☐ Bank card or ATM card with signature
- ☐ Australian security guard licence
- ☐ Department of Veteran Affairs or Centrelink pensioner concession card or other entitlement card issued by Australian Government
- ☐ Government issued working with vulnerable people card
- ☐ Birth certificate issued in Australia
- ☐ Student identity card with photo issued by education organisation

Identification list 3

- ☐ Utility account (electricity, water, sewerage, telephone, gas)
- ☐ Lease or rent agreement
- ☐ Council rates notice
- ☐ Australian Tax Office assessment
- ☐ Current school report or letter of enrolment
- ☐ Financial statement (including passbook, credit, savings or cheque accounts)



Registry of Births, Deaths & Marriages

Application to register your child's gender Under 16 years

SECTION 5 - Type of certificate

What type of certificate would you like to order?

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Office use only

BSCNG1

BSCNG2

BSC1

BSC2

BSC3

OR

- ☐ Birth certificate including all registered gender and name change details (if any)

Office use only

BSC

Recommended for evidence of identity

Decorative certificates

If you would like to purchase a decorative please select one of the designs.

☐ FLORA☐ TEDDY☐ HANDS☐ FLORA
No gender☐ TEDDY
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No gender

SECTION 6 - Delivery details

Contact name

Street address

Town/City

State

Postcode

Country (if not Australia)

Contact number

Email address

For security reasons your certificate will be sent by registered post (within Australia) and you will be charged a fee for this service.*

Would you also like the certificate sent express and registered post? ☐

Payment (only complete if mailing application)

☐ Visa☐ Mastercard☐ Money order☐ Cheque

Amount \$

Processing times and current fees visit - www.justice.tas.gov.au/bdm/fees

Card number

Expiry date

Name on card

Cardholder signature

Department of Justice

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Appendix 5 –

Cases regarding medical procedures for children

Department of Health & Community Services v JWB & SMB (1992) 175 CLR 218 ('Marion's Case')

Marion was a 14-year-old girl with severe intellectual disabilities. Her parents applied to the Family Court for an order authorising a hysterectomy and an ovariectomy on Marion, or a declaration that it was lawful for them to consent to those procedures without the need for a court order. The procedures were proposed due to the psychological and behavioural impacts Marion suffered as a result of hormonal fluxes and menstruation.

The matter came to the High Court for determination of whether Marion's parents could consent to the proposed procedures. The Northern Territory government argued that court approval was required for invasive procedures. The Human Rights and Equal Opportunity Commission ('HREOC') also argued that an invasive surgical procedure which results in the removal of the healthy reproductive organs of a young woman, incapable of giving her own consent, cannot be carried out without a court order.

The High Court held that the proposed operations went beyond 'therapeutic' procedures to treat a 'malfunction or disease'. The Court had regard to the grave consequences of the procedure, effectively sterilising Marion, and the risk that her parents' decision underestimated Marion's interests and her future capacity to consent to the procedure.³⁷⁶ The Court was satisfied that the procedures were outside the scope of what parents and guardians were authorised to consent to on behalf of a child.

The High Court held that the Family Court has jurisdiction to authorise the procedures, having regard to the best interests of the child.

In Re A (1993) 16 Fam LR 715

A was diagnosed at birth as a female suffering from a condition known as congenital adrenal hyperplasia, causing 'extreme masculinisation of genitalia'. In early childhood A underwent genital reconstruction to give them a feminine appearance and hormone treatment. However, the hormone replacement treatment was not adequately pursued and did not prevent production of masculine hormones and 'recurrent masculinization of the external genitalia.' As an adolescent, A expressed a desire to be treated as male.

At 14, A's mother applied for approval of procedures to remove A's ovaries, tubes and uterus. She argued that court approval was not required as the medical procedure was therapeutic, designed to treat a malfunction, and the resulting sterilisation was a by-product of that legitimate aim.

The Family Court was critical of A's mother for failing to properly pursue the treatment recommended by doctors at the time of A's birth and was not satisfied that the treatment now

³⁷⁶ *Marion's Case* (n 240) 250 (Mason CJ, Dawson, Toohey and Gaudron JJ). Their Honours cited *Gillick* (at 237) in support of the view that regard must be had to a child's competence to consent to medical procedures.

proposed was therapeutic. The Court held that parental consent was not sufficient and court approval was required as a ‘procedural safeguard.’

Despite reservations, Mushin J had regard to A’s ‘very strong wishes’ and his expectation that the procedure would achieve a ‘sense of social and biological identity and self-esteem’. His Honour also considered the evidence of A’s psychologist that deferring the procedure until A was able to give consent himself would not be in his best interests. Ultimately, the Court made orders approving the procedure.

***Re Lesley* [2008] Fam CA 1226**

Lesley was born with karyotype 46XY, ‘genetically male, but she has been reared as a female since birth.’ She developed gonads primarily in her labial area. When Lesley was four, her parents applied for consent for her to undergo a gonadectomy to prevent her virilising upon puberty.

Following *Marion’s Case*, the Family Court held that the procedure was not ‘therapeutic’ and required approval from the court.

Arguments were made that an Independent Children’s Lawyer should be appointed on behalf of Lesley, given the ‘lifelong and irreversible nature of the procedure and [that] there [was] no immediate urgency.’ However, the Court was satisfied that alternatives to the proposed surgery had been appropriately canvassed and dismissed, and the gonadectomy was in Lesley’s best interests.

***Re Carla* (2016) 324 FLR 1**

C was born with a sexual development condition, genetically male but identified as female. When C was three, surgery was performed to feminise C’s external genitalia. Two years later, C’s parents applied for consent to remove the child’s gonads and related procedures. The result would be that C was infertile. There was also evidence presented that, without the procedure, there was a risk C would develop cancer or male features during puberty.

In contrast to the approach in *Re Lesley*, the Family Court accepted that the proposed procedure was therapeutic because it was necessary to ‘appropriately and proportionately treat a genetic bodily malfunction that, untreated, poses real and not insubstantial risks to the child’s physical and emotional health’.³⁷⁷

***Re Alex* (2004) 180 FLR 89**

Alex, a 13-year-old, sought to affirm his male gender by receiving puberty blocking treatment (Stage 1 treatment) until he was 16, followed by hormonal treatment (Stage 2 treatment).

The Family Court was satisfied that the puberty-blocking and hormonal treatments were not therapeutic and could not be undertaken without court approval. However, the Court was also satisfied that the treatment was in Alex’s best interests and approved the treatment.

While the application did not seek consent to surgery (Stage 3 treatment), Nicholson J raised concerns regarding surgery as a prerequisite to registering a change of sex or gender:

³⁷⁷ (2016) 324 FLR 1, 9 (Forrest J).

The requirement of surgery seems to me to be a cruel and unnecessary restriction upon a person's right to be legally recognised in a sex which reflects the chosen gender identity and would appear to have little justification on grounds of principle.³⁷⁸

***Re Jamie* (2013) 278 FLR 155**

Jamie, 10 years old at the time of the hearing, was born male but identified as female. Jamie's parents, on Jamie's behalf and following the advice of doctors, applied for consent to commence puberty blocking treatment and hormonal treatments.

The Full Court of the Family Court held that the puberty blocking treatment was entirely reversible and properly characterised as therapeutic. Therefore, the court's approval was not required to commence Stage 1 treatment.

In contrast, the hormonal treatment was not reversible without surgery. Following *Marion's Case*, the Full Court held that this meant it was non-therapeutic and court approval was required for Stage 2 treatment where a child was not capable of giving consent.

However, the Full Court recognised that if a child could demonstrate '*Gillick* competence' the child could consent to Stage 2 treatment and no court approval would be required.³⁷⁹ A determination as to whether a child is '*Gillick* competent' must be made by a court.

***Re Kelvin* (2017) 327 FLR 15**

Kelvin's case also dealt with an application for Stage 1 and Stage 2 treatment. In this case, the Full Court was asked to reconsider the position in *Re Jamie* that it was necessary to apply to the court for confirmation that a child was '*Gillick* competent'.

The Full Court held that no application to the court was required for Stage 2 treatment for gender dysphoria if:

1. the child consents to the treatment;
2. the child's treating medical practitioners agree that the child is '*Gillick* competent'; and
3. the child's parents do not object to the treatment.³⁸⁰

***Re Matthew* [2018] FamCA 161**

M was born genetically female but identifies as male. At 16, his parents applied to the Court for a finding that he was competent to consent to a double mastectomy (Stage 3 treatment).

The Family Court held that the proposed mastectomy was therapeutic, being treatment for 'a psychiatric "bodily malfunction" (gender dysphoria)'.³⁸¹ Where the treating medical practitioners agreed that M was '*Gillick* competent' and where there was no controversy between M, his parents

³⁷⁸ (2004) 180 FLR 89, [234]–[237] (Nicholson J).

³⁷⁹ (2013) 278 FLR 155, 182–183 (Bryant J), 192–193 (Strickland J).

³⁸⁰ (2017) 327 FLR 15, 44–45 (Thackray, Strickland and Murphy JJ).

³⁸¹ [2018] FamCA 161, [138] (Rees J).

or his doctors regarding the appropriateness of treatment, no application to the Family Court was necessary to approve the Stage 3 treatment.

Similar assessments as to competence and the role of court in approving Stage 3 have been made in subsequent cases.³⁸²

³⁸² For example, *Re Lincoln (No. 2)* [2016] FamCA 1071; *Re LG* [2017] FCWA 179.