

30 August 2018

Hon Tracey Martin
Minister of Internal Affairs
Parliament Buildings
Wellington 6160

By email: t.martin@ministers.govt.nz

Dear Minister Martin,

Proposed clarifications to the Births, Deaths, Marriages, and Relationships Registration Bill

1. This letter comes from a coalition of trans and non-binary people who coordinated a Joint Statement on 10 August, welcoming your proposed changes to the Births, Deaths, Marriages and Relationships Registration Act 1995. Our group includes people with extensive experience supporting people to obtain a Declaration as to Sex through the current Family Court process, and some of us are academics who have researched and published on legal gender recognition.
2. Our coalition has analysed the Government's Bill carefully and we have some suggestions about ways the Bill could be strengthened through small amendments. These suggestions would clarify the Bill's intentions and reduce the risk of unintended consequences. They fall into three categories:
 - A. Simple wording changes to improve clarity
 - B. Improving consistency with the current passports policy, and
 - C. Extending the issues to be considered in the proposed statutory review.

A. Wording changes to improve clarity

3. Clause 22B(2)(a) in the Bill refers to 4 options for registering nominated sex; "female", "male", "intersex", or "X (unspecified)". The first three terms are also listed as options in clause 22C(2)(a). Three separate aspects of these proposals are discussed in turn below.

Delete the new proposed category 'intersex'

4. We would like to reiterate the views of health professionals and intersex community advocates in New Zealand and overseas that intersex infants should be registered as either female or male at birth with the awareness that, like all other children, they may grow up to identify with a different sex or gender.¹ This means they would have the same access as trans people to a simple, administrative process, based on self-

¹ See for example the 2013 international *Malta Declaration* (<https://ihra.org.au/24241/public-statement-by-the-third-international-intersex-forum/>), the 2017 Australasia *Darlington Statement* (<https://darlington.org.au/statement/>), and Waterworth, C. (2017) 'Natural Diversity and Supporting Intersex People', *Nursing Review*, 10 May 2017 (<http://archive.nursingreview.co.nz/issue/april-2017-vol-15-2/natural-diversity-understanding-and-supporting-intersex-people/>)

determination, to subsequently amend the sex details on their birth certificate to female, male, or a third X option.

5. The Australasian *Darlington Statement* explicitly cautions that “given existing social conditions, we do not support the imposition of a third sex classification when births are initially registered”.² A separate ‘intersex’ category is a highly stigmatised category with uncertain social and legal outcomes for those assigned this sex. The Bill’s proposed ‘intersex’ classification could imply that parents of infants born with intersex variations do not have the option of classifying their child’s sex as male or female.
6. The introductory commentary on page 2 of the Government Bill states, “as part of the change to a self-identification process, we also recommend removing all references to ‘medical histories’, ‘medical evidence’, ‘physical conformation’, ‘sexual assignment’ and ‘sexual reassignment’ from the bill”. We support strongly this movement away from pathologisation. However, there is the risk that introducing an ‘intersex’ category may have the opposite effect, if an infant’s intersex variation or medical diagnosis is used as the basis for legally classifying their sex as ‘intersex’.
7. **Therefore, we recommend** that the option ‘intersex’ is deleted from clause 22B(2)(a) and clause 22C(2)(a).

Consider the merits of retaining indeterminate as a separate option in limited situations

8. To date, the category ‘indeterminate’, marked by an (I), has been used on some birth certificates when a child is born with a noticeable intersex variation.³ This option has been used predominantly when a stillborn baby’s sex cannot be easily identified.⁴
9. **We recommend** that further consultation is undertaken with the Intersex Trust Aotearoa New Zealand (ITANZ), either before or during the Bill’s proposed statutory review, about whether the term ‘indeterminate’ is retained for these limited situations.
10. We understand that this indeterminate option has also been requested by a few intersex adults, to reflect that they do not identify their sex as either male or female.⁵ The Bill proposes introducing a new third X option on birth certificates. As both intersex and trans people will have the option of choosing this category, or male or female, this may influence whether an additional indeterminate category is still required for intersex people.

² 2017 Australasia *Darlington Statement* (<https://darlington.org.au/statement/>)

³ Intersex people are defined as those born with sex characteristics (including genitals, gonads and chromosome patterns) that do not fit typical binary notions of male or female bodies.

⁴ Data provided by the Department of Internal Affairs to the Human Rights Commission’s Transgender Inquiry. Human Rights Commission (2008) *To Be Who I Am: Kia Noho Au ki Tōku Anō Ao, Report of the Inquiry into Discrimination Experienced by Transgender People*, p. 84.

⁵ Some intersex adults have also applied to correct information on their original birth certificate under section 84 of the current Act. Those provisions are carried over into clause 134 of the Bill.

Rename the proposed X option as ‘non-binary’ rather than ‘unspecified’

11. We welcome the introduction of a third X category on birth certificates. While the Bill is silent on this, we assume that the proposed term ‘unspecified’ has been adopted from the current passports policy which uses ‘indeterminate / unspecified’ to describe its X option. The Law Reform Commission of Western Australia has recently proposed that the equivalent ‘unspecified/intersex/indeterminate’ wording used in Commonwealth guidelines and some Australian laws is amended to ‘non-binary’. That recommendation is based on Australian research about the terms most commonly used by transgender people there.⁶
12. Similarly, preliminary unpublished survey data from over 850 trans and non-binary people who have completed New Zealand’s *Counting Ourselves* survey, show that when people are asked “what gender or genders do you currently identify with”, non-binary is the most frequently chosen term.⁷ Ireland’s statutorily appointed Gender Recognition Act Review Group recently recommended introducing non-binary as a third gender marker there.⁸ Non-binary is also the preferred third option recommended by intersex advocates in this region and internationally, for the minority of intersex people who do not want to be recognised as either male or female.⁹
13. In addition, the term ‘unspecified’ does not align fully with the statutory declaration process outlined in clause 22B(2)(b) of the Bill which requires a person to verify their sex, and that they intend to continue to identify as that sex. That requirement is more clearly met if a person is able to specify their sex or gender marker, rather than to say it is ‘unspecified’.
14. This Bill is an opportunity to introduce an appropriate, evidence-based term for this third, X category. We propose that the term ‘unspecified’ is replaced by the commonly used term ‘non-binary’. Non-binary is a more accurate description of a self-declared sex that is outside the two, binary options of male or female. This is an important but simple change. We note that the Bill’s commentary already describes the introduction of an ‘unspecified’ option as a way to recognise non-binary identities.
15. **We recommend** that clause 22B(2)(a) is amended to read:
 - (2) This application must–
 - (a) specify “female”, “male” or “X (non-binary)” as the eligible person’s nominated sex.

⁶ Law Reform Commission of Western Australia (2018): *Discussion Paper, Review of Western Australian legislation in relation to the recognition of a person’s sex, change of sex or intersex status*, chapter 5.

<https://www.lrc.justice.wa.gov.au/files/LRC-Project-108-Discussion-Paper.pdf>

⁷ <http://countingourselves.nz/>

⁸ Gender Recognition Review Group (June 2018) *Review of the Gender Recognition Act 2015*. Report to the Minister for Employment Affairs and Social Protection.

<http://www.welfare.ie/en/downloads/GRA%20Review%20Report.pdf>

⁹ The 2017 Australasia *Darlington Statement* (<https://darlington.org.au/statement/>)

Clarify the privacy protections in clause 84 around name details on a birth certificate

16. Clause 84 includes important privacy protections when a person's nominated sex is amended on their birth certificate. However, the wording in subclauses 84(3) is very confusing. It may be interpreted as requiring that a person's original birth name is listed on the amended birth certificate, particularly because the phrase "name first registered for the person" appears in subclause 84(3)(a).
17. **We recommend** that subclauses 84(3)(a) and 84(3)(b) are reworded to reflect the provisions under the Act and the intentions of this Bill, which are to ensure that an amended birth certificate does not include information that would disclose a person's previous name or gender marker. For example, In the current 1995 Act, this includes subsection 64(1)(c) stating that a birth certificate "shall contain no other information".

B. Improving consistency with the current passports policy

Extend the fourth, non-binary option so it is available to those under the age of 16

18. Non-binary options, including genderqueer or gender diverse, are frequently chosen by young people. For example, New Zealand's *Counting Ourselves* survey is open to trans and non-binary people aged 14 or older. Preliminary data show that, when asked to list their gender, a majority of those aged 14 or 15 year selected one of the non-binary gender identity options.
19. The current passports policy enables children and youth to choose an M, F or X on their passport. Yet, the Bill's proposals only include an X option for those aged 16 or older. This means there is no option available that enables a non-binary person under the age of 16 to have both a passport and birth certificate that reflect their gender identity.

20. **We recommend** that clause 22C(2)(a) is amended to:

- (2) This application must–
 - (a) specify "female", "male" or "X (non-binary)" as the eligible child's nominated sex."

Remove the requirement that people can only use this administrative process once

21. As the Bill's commentary notes; "New clause 22B would also specify that an eligible person can only change their nominated sex once, except where the Registrar-General is satisfied that special reasons exist. However, we recommend that all applicants should be able to apply to revert to the sex recorded at birth."
22. The Bill provides no guidance about what might amount to "special reasons making it appropriate to accept the application". This does not provide enough certainty to applicants and leaves too much discretion with administrative officials.
23. In contrast, the process for amending sex details on a passport does not include a limit on the number of applications that can be made. Instead, it includes an alert that "we would like applicants to note that multiple changes in gender identity are likely to have implications for a person at overseas border controls or may affect a person's ability to confirm their identity in the wider community. The Department recommends that prior

to applying for a change in sex / gender details in your passport, that applicants carefully consider these implications.”¹⁰ We consider that a similar alert is better suited to a statutory declaration process, rather than leaving discretionary powers with administrative officials.

24. Limits on the number of administrative applications have additional consequences in New Zealand because a third gender marker option has been available on passports for at least 16 years.¹¹ The Department of Internal Affairs has released data from 2012 – 2017 on requests to change gender markers on passports over that period.¹² This information shows that since a self-declaration model was introduced in December 2012, more people have been moving between the X category and the male and female options, *or vice versa*. The Bill’s proposal to limit the number of administrative applications to one retains an unnecessary barrier and misses the opportunity to create a simple process for people to have congruent passports and birth certificates. It is also out of step with recent changes in two Australian territories and proposals in an August 2018 discussion paper by the Law Reform Commission of Western Australia.¹³
25. Clause 22F allows anyone to use the simple administrative process a second time to revert to their sex recorded at birth. If the Bill’s provisions are predicated on self-identification, this ability to make further amendments should be available to anyone, no matter which of the nominated sex options a person is requesting.
26. Therefore, **we recommend** that clause 22B(4) is deleted, and further research is undertaken to consider, at the time of the proposed review, what, if any, limitations are placed on the number of applications.

C. Timeframe and scope of the proposed statutory review

27. Clause 147A lists what elements in clauses 22 and 23 must be reviewed 5 years after the enactment of the relevant provisions. Given the speed at which international good practice and human rights law is evolving in this area, we welcome such a review, including the required consultation with the Human Rights Commissioner. We note that other countries, including Ireland, have conducted similar reviews within a two-year period,¹⁴ involving extensive consultation with trans and non-binary people.¹⁵

¹⁰ <https://www.passports.govt.nz/what-you-need-to-renew-or-apply-for-a-passport/information/>

¹¹ This was previously marked by a (-) before changing to (X)

¹² Data provided by the Department of Internal Affairs to the authors and available on request.

¹³ ACT has no limit on the number of times a person can apply to amend their sex details, while South Australia has a limit of one change in the first year or three times within a lifetime, though exceptions may apply. Law Reform Commission of Western Australia (2018) *Discussion Paper, Review of Western Australian legislation in relation to the recognition of a person’s sex, change of sex or intersex status*, chapter 5. <https://www.lrc.justice.wa.gov.au/files/LRC-Project-108-Discussion-Paper.pdf>

¹⁴ Section 7, Gender Recognition Act 2015

(<https://data.oireachtas.ie/ie/oireachtas/act/2015/25/eng/enacted/a2515.pdf>)

¹⁵ Gender Recognition Review Group (June 2018) *Review of the Gender Recognition Act 2015*. Report to the Minister for Employment Affairs and Social Protection.

<http://www.welfare.ie/en/downloads/GRA%20Review%20Report.pdf>

28. **We recommend** that explicit reference should be made in clause 147A(2) to consultation with transgender, non-binary, and intersex people.
29. **We also recommend** that the review would be more appropriate three, rather than five, years after the commencement of the proposed new process for amending gender markers on birth certificates.
30. As the Bill's provisions were not drafted until after the Select Committee process, there are some outstanding issues that would benefit from more detailed analysis, and that **we recommend** are added to the scope of the review. These are listed below.

Consider whether it is necessary to collect sex details on a birth certificate

31. The *Yogyakarta Principles+ 10*, published in 2017, update how international human rights law applies to sexual orientation, gender identity, gender expression and sex characteristics. Principle 31, the Right to Legal Recognition, calls on States to:
“Ensure 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”.¹⁶
32. Principle 31 also sets out human rights requirements in instances where sex or gender continues to be registered. The provisions of this Government Bill largely follow this second approach. However, even within this region, the recent Law Reform Commission of Western Australia's discussion paper recommends removing sex details from birth certificates. In British Columbia, Canada, there are ongoing human rights complaints on this issue.¹⁷ It would be timely for the proposed review to consider whether it is still necessary to record sex details on a birth certificate.

Review whether there is any justifiable rationale for retaining clause 22I in the Bill

33. Clause 22I in the Bill reflects section 33 in the current Act. It states, “Despite sections 22B to 22G and section 23, the sex of every person must continue to be determined by reference to the general law of New Zealand”. There is no rationale provided in the Bill for why this provision should be retained. A generic exemption such as this undermines the effectiveness of trans and non-binary people's right to recognition before the law. The proposed review offers an opportunity for evidence-based discussion, including an in-depth assessment of what, if any, limitations on trans and non-binary people's right to equal protection and recognition before the law can be justified.

¹⁶ *The Yogyakarta Principles plus 10*, Principle 31, p. 9. Retrieved from: http://yogyakartaprinciples.org/wp-content/uploads/2017/11/A5_yogyakartaWEB-2.pdf

¹⁷ For example, the British Columbia cases: *Doty v Vital Statistics*, *Trans Alliance Society et al v Vital Statistics* (<http://gender-freeidcoalition.ca/happeningnow.html>)

Review whether there is sufficient explicit focus on the rights on the child

34. Both the Malta and Argentina gender recognition laws explicitly reference the United Nations Convention on the Rights of the Child.¹⁸ Several Australian territories are reviewing gender recognition provisions for children.¹⁹
35. **We recommend** that the review considers whether the Bill provides sufficient attention to a child or adolescent’s explicit request, and the principles of progressive autonomy and evolving capacities of the child.

Review identity verification options for refugees, asylum seekers and temporary residents

36. Principle 31 of the *Yogyakarta Principles plus 10* notes that international human rights law requires that States ensure that a person’s “immigration status or other status is not used to prevent a change of name, legal sex or gender”. The Government Bill contains no provisions that provide such legal recognition or protection to people living in New Zealand who are not permanent residents or citizens. This is a significant issue for those trans and non-binary refugees, asylum seekers or new migrants who cannot amend their name or gender marker on documents issued in their home country.
37. **We recommend** that the government investigates and implements some form of identification verification process for trans and non-binary refugees, asylum seekers and migrants in New Zealand on temporary visas; and reviews the effectiveness of those provisions as part of the scheduled statutory review.

38. In summary, we recommend:

1. rewording clauses 22(B)(2)(a) and 22(C)(2)(a) to specify “female”, “male”, or “X (non-binary)”
2. consulting further with ITANZ about retaining the option of ‘indeterminate (I)’ in limited situations
3. clarifying the privacy protections in clause 84 around changes to sex and name details on a birth certificate
4. deleting clause 22B(4) that limits the number of times a person can use this administrative process
5. bringing forward the statutory review to three years after these changes are enacted, explicitly mentioning consultation with trans, non-binary and intersex communities, and expanding the scope of the review to consider:
 - a. if it is necessary to collect sex details on birth certificates
 - b. if there is any justifiable rationale for retaining clause 22I in the Bill
 - c. whether there is sufficient explicit focus on the rights on the child and
 - d. options for providing some form of identity verification document that enables refugees, asylum seekers, and other trans and non-binary people in New Zealand on temporary visas, to amend their name and gender marker

¹⁸ Article 5 of the Argentinean Gender Identity Act No. 26.743, adopted 30 November 2011 with the English translation approved by the Senate on 8 May 2012; Article 7 of Malta’s Gender Identity, Gender Expression and Sex Characteristics Act 2015, Act No XI of 2015 as amended by Act No LVI of 2016.

¹⁹ ACT and Western Australia, as at August 2018

Thank you for your leadership in introducing these legislative reforms. We look forward to ongoing opportunities to ensure that New Zealand continues to model a human rights-based approach to legal gender recognition.

If you have any questions about the issues raised in this letter, our coalition can be contacted through either Jack Byrne (jbyrne@waikato.ac.nz / +6421 1509810) or Dr Jaimie Veale (jveale@waikato.ac.nz / +6427 4223988).

Yours sincerely,

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