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A Gender Agenda  
PO Box 5044 Lyneham ACT  
2602  
[www.genderrights.org.au](http://www.genderrights.org.au)

**A Gender Agenda** and the **Women's Legal Centre**

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## **Joint Submission**

**Legal Recognition of the Sex and Gender Diverse  
Community in the ACT**

22<sup>nd</sup> June 2011

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## Introduction

A Gender Agenda and the Women's Legal Centre welcome the opportunity to provide a joint submission in relation to the legal recognition of the sex and gender diverse community in the ACT.

A Gender Agenda is an ACT based organisation providing information, community education, support and advocacy services in relation to issues affecting transgender and intersex communities. We work collaboratively and inclusively with other organisations on a local, national and international basis.

The Women's Legal Centre is a community legal centre which assists women in Canberra and the surrounding areas. The Centre aims to improve women's access to justice by:

- Providing them with legal information, advice and representation.
- Developing and delivering community legal education resources.
- Undertaking research, law reform and lobbying activities aimed at removing barriers to justice on the basis of sex or gender, including sexual orientation or gender identity.
- Referring to sympathetic lawyers and other support services.

In preparing this submission we have consulted widely within AGA's own membership, the broader sex and gender diverse communities within the ACT, interstate and national transgender and intersex organisations, as well as a number of 'mainstream' community organisations within the ACT.

If you require any further information, we can be contacted via:

AGA: Peter Hyndal                      peter@genderrights.org.au  
0419 471 756.

WLC: Heidi Yates                      hyates@womenslegalact.org  
(02) 6257 4377

We consent to any part of this submission being made public.

## Guiding Principles behind this Submission

### 1) Human rights framework

Under the *Human Rights Act 2004* (ACT) (the 'Human Rights Act'), the ACT Government has an obligation to ensure that all individuals can enjoy their human rights regardless of their sex, gender, gender identity, sexual orientation or any other point of difference. In March last year, the Human Rights Commissioner wrote to the ACT Attorney General calling for law reform to redress the incompatibility of the *Births, Deaths and Marriages Registration Act 1997* (BDMR Act) with the rights protected under the Human Rights Act. The Commissioner stated that:

*... the current situation for gender diverse people in the ACT with respect to legal recognition of their sex under the BDMR Act is inequitable and undermines dignity, and imposes unjustifiable limitations on the human rights protected under the HR Act. In particular, the requirement that a transgender person has surgery on their reproductive organs before their change of sex can be officially recognised imposes disproportionate limitations on the right to recognition and equality before the law under s.8, and the right to privacy under s.12 of the HR Act.<sup>1</sup>*

As detailed below, AGA and the WLC join the Commissioner's call for urgent reform of provisions including those relating to registration of legal sex and surgery on intersex infants, to ensure that the rights of the sex and gender diverse (SGD) community are upheld.

### 2) Understanding sex and gender within a continuum framework

At present, ACT law relating to sex and gender uses a binary model. This is illustrated by the fact that the Registrar-General is only able to legally record a person's sex as either 'male' or 'female'. There are some legal protections available to people on the basis of their transgender or intersex status. However, such protections which exist (for example, in the area of discrimination law), do not comprehensively extend to issues of registration under the BDMR Act.

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<sup>1</sup> Letter from Human Rights Commissioner Helen Watchirs to ACT Attorney-General Simon Corbell dated 16 March 2010  
<<http://www.hrc.act.gov.au/res/Advice%20on%20births%20deaths%20and%20marriages%20provisions%20Public%20Copy.pdf?PHPSESSID=f111ca94c4f6a6a0e79c6ca61efc044c>>.

Historically, legal regulation in Australia and other western nations has operated on the premise that all people are, categorically, either male or female. This premise assumes that the attributes that make someone a 'man' are clear, definable, biological, fixed, and categorically different from the characteristics that make someone a 'woman'. This approach also tends to support the notion that someone who is a 'man' has always been a 'man' and will always happily identify as a 'man'.

Evidence proves these assumptions incorrect.

At least 4% of people are born intersex.<sup>2</sup> Intersex people can be defined as people for whom the development of chromosomal, gonadal, or anatomic sex is not aligned with the notion of a sexually binary biology. That is, there are biological differences that 'can be seen as both male and female at once, not wholly male or female, neither male or female, or other ways of being that are not captured by current sex binary'.<sup>3</sup>

For the purposes of this submission, we consider gender identity to be an individual's internal sense of being a man, a woman, or another gender. Up to 8% of the population have a gender identity which, for at least some period in their lives, is not 'in accordance with' their biological sex.<sup>4</sup> Some of these people may identify themselves as transgender, but many more would not.

AGA and the WLC recommend thinking about both biological sex and gender identity as a continuum, bridging the gap between 'man/male' and 'woman/female'. This is visually demonstrated by the following diagram produced by the Centre for Gender Sanity:<sup>5</sup>

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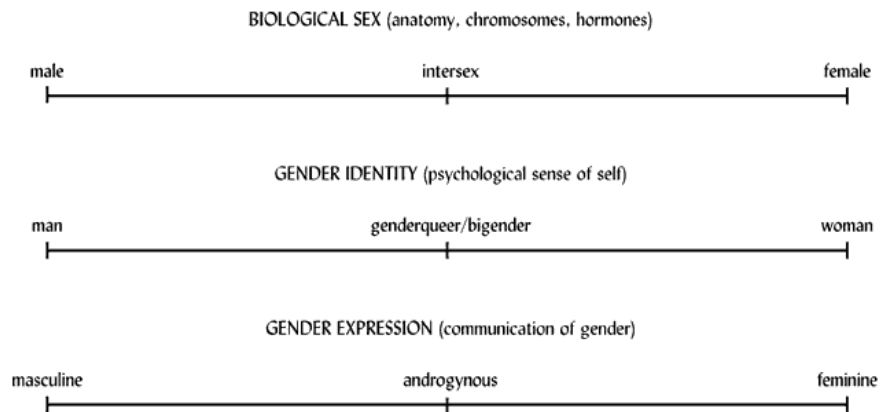
<sup>2</sup> Professor Peter Koopman, cited in *UQ News*, July 2004. Available at <<http://omc.uq.edu.au/news/536UQNEWS.pdf>>.

<sup>3</sup> Gina Wilson, Organisation Internationale des Intersexués (OII), 2009.

<sup>4</sup> Roberta Perkins (1994), *Transgender Lifestyles and HIV-AIDS Risk*, School of Sociology, University of NSW, 19.

<sup>5</sup> Available at <http://www.gendersanity.com/diagram.html>.

## Diagram of Sex and Gender



Given the reality of human biology and identities, the most productive framework for use by the ACT legislature is one that acknowledges the continuums of biological sex and of gender identity, thus accurately reflecting the reality of the human condition.

### 3) An opportunity to lead

In 2003, the ACT Government made a commitment to remove all legislative discrimination against sex and gender diverse people. This commitment remains outstanding. Yet, in the last eight years, the ACT has led the nation in a series of groundbreaking human rights reforms, including the passing of the Human Rights Act and the *Civil Partnerships Act 2008*. These reforms have become a model for other jurisdictions. We believe the ACT Government now has the opportunity, and indeed a responsibility, to lead the country in law reform to remove discrimination against sex and gender diverse people.

Whilst it would perhaps have been preferable for the Commonwealth Government to lead collaboration between the States and Territories on a consistent approach to these issues, the Australian Human Rights Commission's 2009 *Sex Files* report—along with the Human Rights Commissioner's most recent advice—provide strong impetus for action, including specific recommendations for change. As the Human Rights Commissioner has made clear:

*simply waiting for [a national] approach cannot justify an ongoing breach of the human rights of transgender people in the ACT where the Government has the ability to rectify the situation locally.*<sup>6</sup>

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<sup>6</sup> ACT Human Rights Commissioner's advice, 10.

The local SGD community are anxiously awaiting the outcome of the LRAC inquiry. Indeed, some individuals are holding off pursuit of legal avenues to protect their human rights on the 'good faith' understanding that Government *will* fulfil its promise to achieve legislative reform. AGA and the WLC both sincerely hope that these crucial reforms suffer no further delays.

#### **4) Non-disclosure of sex related information unless necessary**

People are regularly asked to state their sex in an administrative context. In most instances this is unnecessary. For people whose legally recognised sex does not correspond to their presentation or identity, it is difficult to determine the most appropriate answer to these inquiries.

It is not appropriate to request this information without good reason, as disclosure of a gender that does not align with the persons's legally recognised sex often places the individual's personal safety at risk or may be considered misleading or fraudulent.

Information regarding an individual's sex or gender identity should only be requested or disclosed where there is a demonstrated need to have access to this information.

It is interesting to note that ACT drivers' licences, which are considered to be a primary ID document, make no reference to the holder's sex or gender identity.

## **Key Recommendations**

Below are the key recommendations upon which our submission is based.

### **1) Change of legal sex should be based on self-identification**

- 1.1. Individuals should be able to change their legal sex on the basis of a self-identification model, as currently exists in relation to change of legal name.
- 1.2. All individuals born in the ACT and residing in the ACT should be able to change their legal sex on the basis of self-identification, as is currently the case in relation to change of name.
- 1.3. There should be no limit to the number of times a person can change their legal sex, other than the administrative time limits that currently exist in relation to changes of name.

### **2) Requirement for legal recognition of sex outside the binary**

- 2.1. Sex should not be compulsorily recorded on the register.
- 2.2. If sex is to be recorded, it should be an open field, which allows people to define their legal sex in their preferred terms.
- 2.3. If the legislature insists on retaining the fields of 'male' and 'female', it should introduce a third option of an open field, which allows people to define their legal sex in their preferred terms.
- 2.4. If the legislature insists on using only closed fields, it should introduce the categories of 'intersex' and 'unstated'.
- 2.5. If the legislature will only introduce a third, closed field, it should be termed as inclusively as possible, for example, 'unstated'.

### **3) No-one should be subject to medical treatment without consent**

- 3.1. Surgery should only be performed on intersex infants and children where there is a life-threatening medical imperative to do so. Otherwise, surgical interventions to an intersex child's genitals, reproductive organs or other body parts must be delayed until the intersex individual can provide their informed consent.

## **Note on Structure of this Submission**

We considered many of the issues in the issues paper to be related and overlapping. For this reason, we have structured our submission thematically, rather than numerically. Where appropriate, we have specifically noted which numerical issue is the focus of discussion.

## 1) Change of legal sex should be based on self-identification

### ISSUE 8: Sexual reassignment surgery

**Should the current requirement of ‘sexual reassignment surgery’ for a person to change their sex on the birth register continue?**

The Human Rights Commissioner’s 2010 advice to the ACT Attorney-General on the BDMR Act addresses ‘the effect of the mandatory criteria for recognition of sex change for transgender people, particularly the requirement relating to sexual re-assignment surgery, and the proportionality of limitations on rights imposed’<sup>7</sup> by reference to the Human Rights Act, including the right to recognition before the law and the right to privacy. We do not see a need here to reproduce the Commissioner’s concise summary of the reasons why the requirement for sexual reassignment surgery breaches the Human Rights Act. Suffice to say that in an international context, the ACT Commissioner is not alone in her findings that a surgical requirement such as the one in the BDMR Act breaches an individual’s human rights.<sup>8</sup>

#### ***International trends***

Given its powerful declaration of what it means for each individual to have the right to be recognised before the law, we have chosen to reproduce the 3<sup>rd</sup> *Yogyakarta Principle* (also referred to by Dr Watchirs) which states that as a signatory to the *International Covenant on Civil and Political Rights*, Australia must interpret the right to recognition before the law to mean that:

*Everyone has the right to recognition everywhere as a person before the law. Persons of diverse sexual orientations and gender identities shall enjoy legal capacity in all aspects of life. Each person’s self-defined sexual orientation and gender identity is integral to their personality and is one of the most basic aspects of self-determination, dignity and freedom. No one shall be forced to undergo medical procedures, including sex reassignment surgery, sterilisation or hormonal therapy, as a requirement for legal recognition of their gender identity.*<sup>9</sup>

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<sup>7</sup> ACT Human Rights Commissioner Helen Watchirs, Human Rights Advice on the *Births, Deaths and Marriages Registration Act 1997* (ACT) forwarded to the ACT Attorney General in 2009, 1.

<sup>8</sup> See, eg, Federal Constitutional Court (Germany) Order of 11 January 2011 (1 BvR 3295/07), the English press release for which is available at <<http://www.bundesverfassungsgericht.de/en/press/bvg11-007en.html>>.

<sup>9</sup> The 3<sup>rd</sup> Yogyakarta Principle, <[www.yogyakartaprinciples.org](http://www.yogyakartaprinciples.org)>.

This approach to protecting the human rights of the SGD community is gathering increasing momentum, including in Britain, Spain and Portugal, all of which have introduced schemes allowing individuals to change their legal sex without requiring sterilising surgery. Most recently, in January this year, the German Federal Constitutional Court struck down the provisions of the German 'transsexuellengesetz' or 'Transsexuals Law' which required proof of sex reassignment surgery and permanent infertility before a person could change their legal sex. In doing so, the court recognised that '[g]ender reassignment surgery constitutes a massive impairment of physical integrity.'<sup>10</sup> The Court found that requiring reassignment surgery was a breach of the German Constitution specifically in relation to an individual's right to sexual self-determination and physical integrity.

The finding of the German Federal Constitutional Court reflects the March 2010 statement of the Committee of Ministers of the Council of Europe, which recommends that member states:

*...take appropriate measures to guarantee the full legal recognition of a person's gender reassignment in all areas of life, in particular by making possible the change of name and gender in official documents in a quick, transparent and accessible way...<sup>11</sup>*

The Committee also emphasises that '[p]rior requirements, including changes of a physical nature, for legal recognition of a gender reassignment, should be regularly reviewed in order to remove abusive requirements'.<sup>12</sup>

### ***An Australian focus***

The most comprehensive examination of issues relating to legal recognition of sex in Australia is the Australian Human Rights Commission's report: *Sex Files: the legal recognition of sex in documents and government records*, launched in 2009. AGA had extensive input into this inquiry, and gave an address at the report launch at Parliament House. The report contains a series of recommendations relating to the rights of the SGD community, including that:

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<sup>10</sup> Federal Constitutional Court (Germany) Press Office, Press Release no 7/2011, Order of 11 January 2011 1 BvR 3295/07 available in English at <http://www.bundesverfassungsgericht.de/en/press/bvg11-007en.html>.

<sup>11</sup> Council of Europe, Committee of Ministers Recommendation CM/Rec(2010)5 of the Committee of Ministers to member states on measures to combat discrimination on grounds of sexual orientation or gender identity, para 21 <<https://wcd.coe.int/wcd/ViewDoc.jsp?id=1606669>>..

<sup>12</sup> Council of Europe, Committee of Ministers Recommendation CM/Rec(2010)5 of the Committee of Ministers to member states on measures to combat discrimination on grounds of sexual orientation or gender identity, paragraph 20. Available at: <https://wcd.coe.int/wcd/ViewDoc.jsp?id=1606669>.

*... surgery should be regarded as a matter of individual choice for the person concerned and not a prerequisite for the legal recognition of a person's sex identity.*<sup>13</sup>

In short, sexual reassignment surgery—as defined by s 23 of the BDMR Act—requires the ‘alteration of a person’s reproductive organs’ and accordingly, the unnecessary sterilisation of the person concerned. From a policy perspective, AGA and the WLC strongly oppose legislation that only recognises a person’s legal status once they have been reproductively sterilised.

As part of AGA’s submission to AHRC in 2008, a participant at our public consultation said:

*I saw a medical specialist just last week and he asked me when I was going to have a hysterectomy. When I asked him why I should have one he said “so that you can get a male passport and change your birth certificate”. When I asked him if there were any medical reasons for me to have a hysterectomy he said “no”.*

As detailed in the *Sex Files* report, society generally makes assumptions about a person’s sex based on that person’s gender presentation, not the presentation of their genitals. AGA is aware of many situations where the safety of a person who has been unable to change their legal sex—due to being unable, or unwilling to undergo the required surgery—has been put at grave risk due to the fact that their identity documents do not correspond with their gender presentation.

*In December of 2010, a trans-male AGA member who was travelling overseas for work on a female passport was detained at an overseas airport because his documentation did not match his presentation. He was separated from his partner who was travelling with him and interrogated for a number of hours by different officials. He was in-transit and was denied a re-entry visa, which meant that he was unable to continue to travel in order to meet his work commitments. Prior to this point, his workplace had not known that he was trans. The Australian consulate was unable to provide any assistance.*

Further, in terms of practicability, sexual reassignment surgery is medically unnecessary, invasive and complex surgery that is prone to unpleasant complications and often requires a number of separate surgical procedures. The surgery is not available at all in the ACT, and is not available for female to male trans people anywhere in Australia. Most surgery is performed overseas and is very expensive.

For all of these reasons, AGA and the WLC join the Human Rights Commissioner and a growing number of other international jurisdictions and

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<sup>13</sup> Australian Human Rights Commission, *Sex Files: the legal recognition of sex in documents and government records* (2009), para 10.4.

human rights experts in asserting that sexual reassignment surgery must *not* be a prerequisite for changing one's legal sex.

### **What evidence should a person be required to provide in order to change the record of their sex?**

AGA and the WLC note that in a human rights context, the key question is: why regulate change of sex any differently to other legal identifiers? For example, why not adopt the same framework for change of sex as that used by the ACT Registry for a change of name? As noted in the Human Rights Commissioner's advice, to accept a change of name application, the Registrar need only be satisfied that the applicant:

- a) was born in the ACT, or has been a resident of the ACT for at least 3 months;
- b) can satisfy the registrar of their identity and age;
- c) is not seeking to change their name for a fraudulent or other improper purpose;
- d) has completed the relevant 'change of name' statutory declaration.

Once a person has satisfied these requirements and legally changed their name, the registry maintains a record of that person's prior names, to ensure continuity of identification for that particular individual. For a person born in the ACT, their birth registration details are automatically updated to include their new name, and the new name will appear on all birth certificates issued after the change of name.<sup>14</sup> Those whose births were not registered in the ACT can obtain a Change of Name Certificate detailing the new registration.

This model of regulation is based on self-identification. Prima facie, it does not require the individual seeking the change of name to verify *why* they are seeking that change, *how long* they intend to be known by that name, or *who else* they have discussed the change of name with.

## **ISSUE 3: Self-identification**

### **Is self-identification an effective way to legally recognise sex and gender identity?**

Specific examples of legislative provisions that rely on self-identification include those introduced by the *Legislation (Gay, Lesbian and Transgender) Amendment Act 2003* (ACT). This Act ensures that in circumstances where a body search of a person is to be conducted by a 'person of the same sex', a transgender person will be searched by a member of the same sex with which they self-identify. The explanatory statement for the Act rightly states:

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<sup>14</sup> See Form 206 – CNA 'Application to Register a Change of Name for an Adult' <[www.legislation.act.gov.au](http://www.legislation.act.gov.au)>.

*Amendments that address discrimination on the basis of gender recognise that there is a need for those persons for whom gender identity is an issue to self-identify their sex.*

Section 79 of the *Corrections Management Act 2007* (ACT) also operates on a self-identification model, providing for transgender and intersex detainees to 'tell the chief executive the sex the detainee chooses to be identified with'.<sup>15</sup> Having done so, this is the sex that the detainee is taken to be.<sup>16</sup> No further evidence is required.

To our knowledge, these existing examples of regulation based on self-identification have operated—some for more than 7 years—without incident. AGA and the WLC assert that, in a human rights context, there are no persuasive reasons why change of legal sex should not be similarly regulated on a self-identifying basis.

Accordingly, in order to register a change of sex, the registrar need only be satisfied that the person:

- a) was born in the ACT, or has been a resident of the ACT for at least 3 months;
- b) can satisfy the registrar of their identity and age;
- c) is not seeking to change their sex for a fraudulent or other improper purpose; and
- d) has completed the relevant statutory declaration declaring that they identify as a particular sex.

### ***What if people seek to change their sex more than once?***

This issue was the topic of extensive discussions among the AGA community, after several individuals shared the fact that they *had* been able to change their legal sex under the *Gender Recognition Act 2004* (UK), but that Act restricts them to a single change of sex during their lifetime. We thought it was important to note our recommendations in relation to this particular issue, despite the fact that it was not expressly referred to in the issues paper.

In our free and democratic society, it is surely only appropriate to restrict the number of times a person can change their legal sex if there is a persuasive and justifiable reason to do so, and this reason is compliant with the Human Rights Act.

AGA and the WLC note that there may be practical and administrative justifications, from the registry's perspective, for limiting the time frame within which a person can change their legal sex. We understand that in the context of a change of name, although a person is not legislatively restricted from

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<sup>15</sup> *Corrections Management Act 2007* s 79(3)(a).

<sup>16</sup> *Corrections Management Act 2007* s 79(2).

changing their name as many times as they like, the Registrar may refuse to register an application if a registered change of name has been performed in the last 12 months.<sup>17</sup> We recognise that it may be appropriate to apply a similar restriction on change of sex applications.

However beyond this, we know of no persuasive reasons why a person's change of sex would be restricted to a one-off occurrence. Although some methods of legal regulation, such as marriage, require a person to declare that they intend for a particular arrangement to be permanent, they are still permitted to change their mind and their legal status if things do not go to plan.

For example, married partners sign up to the strict terms of the *Marriage Act 1961* (Cth), which defines marriage as 'the union of a *man and a woman*, to the exclusion of all others, voluntarily entered into for life' (italics ours). There is no question that hopeful intended spouses misunderstand this element of the process, as since 2006, it must be verbally pronounced in all marriage ceremonies. Despite this definition, the law does not force individuals to stay 'true to their vow'. It allows them to divorce (subject to meeting a 12-month separation requirement) and (if applicable) return to using their previous name. This is despite the fact that, historically, marriage has been attached to a set of specific legal rights which significantly change a person's legal status. It is significant that once divorced, individuals are entitled to marry as many times as they wish.

AGA and the WLC recognise that changing one's legal sex is, for an individual, a life-changing decision. It is not taken lightly and indeed, as evidenced by the anecdotal stories of AGA members, is but one step in a lifetime of changes and adaptations involved in living one's gender identity. Nonetheless, there will undoubtedly be situations where an individual, for whatever reason, may seek to change their legal sex more than once.

One example was raised by an individual at the Australian Human Rights Commissions's public consultation, where a transgender person may feel that changing their legal sex 'back' to the sex they were allocated at birth is the only option to escape the discrimination, humiliation and violent harassment which is so often the experience of transgender individuals.<sup>18</sup>

In this context, AGA and WLC strongly recommend that there be no more than a purely administrative limitation on the number of times a person can change their legal sex.

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<sup>17</sup> See Form 206 – CNA 'Application to Register a Change of Name for an Adult' <[www.legislation.act.gov.au](http://www.legislation.act.gov.au)>.

<sup>18</sup> *Protection from discrimination on the basis of sexual orientation and sex and/or gender identity in Australia: Consultation Report by Australian Human Rights Commission*, April 2011, 19.

## **ISSUE 13: Access to the record of sex identity**

### **Who should be able to access the record of a person's sex as it was recorded in the register before the record was changed?**

AGA and the WLC recognise that appropriate legislative safeguards are *essential* when protecting an individual's right to privacy in the context of access to change of sex records. We believe the current provisions of the BDMR Act relating to access to the record following change of sex would provide sufficient protection to individuals changing sex on the basis of self-identification.

### ***Challenging the argument against self-identity***

A great deal of time and energy could be spent speculating on the possible ways that a self-identification model relating to legal sex could be misused or abused by opportunistic individuals. For example, people fraudulently changing their sex solely to gain access to a single-sex service, such as a women's prison or refuge. Pages 8-9 of the Human Rights Commissioner's advice wisely and concisely addresses several such concerns. We also address the issue of sex and gender-specific services in our response to Issue 10, below.

Despite these fears, there is no available evidence that existing self-identification laws in the ACT, or elsewhere, have been misused. On the other hand, there is extensive evidence of hardship caused to individuals who cannot change their legal sex under the current legislative regime. Such hardship is particularly likely to arise where a person has inconsistent identity documents due to their self-identified sex being recognised by some departments and institutions, but not others.

*I changed my name 10 years ago, but I have some documents that I have not been able to change over (such as title deeds to property). I also avoid wherever possible showing my birth certificate or change of name certificate because both these documents show my sex incorrectly. I was with one bank when I changed my name and now I can not open a bank account with any other bank because I do not have enough points of ID to do so.*

#### ***Participant at AGA public consultation in 2008.***

*On March 10, 2009, three days after Mardi Gras, Veronica Baxter was arrested by Redfern police and held on remand at the all-male NSW Silverwater Metropolitan Reception and Remand Centre. Six days later, after a 14-hour break between checking her cell, she was found dead, hanging in her single cell. Veronica Baxter was an Aboriginal woman from the Cunnamulla country, south-west of Queensland. She dressed, appeared, and had identified as a woman for 15 years and was known by family and friends as a woman. Yet she was placed in an all-male jail. Greens MP David Shoebidge said questions remained about why Ms Baxter, a transgender Aboriginal woman,*

*was put in an all-male facility when she identified as a woman, and why she was not given hormone medication prescribed to her.*

**Read more: <http://www.smh.com.au/nsw/why-did-our-sister-die-in-a-mens-jail-20110409-1d8fe.htm#ixzz1PuimaEzP>**

As summarised by Dr Watchirs in her advice:

*A more flexible and respectful approach to recognition of gender affirmation would result in some policy re-adjustments, but is unlikely to have any major negative implications. As expressed by the European Court in the Goodwin case “society may reasonably be expected to tolerate a certain inconvenience to enable individuals to live in dignity and worth in accordance with the sexual identity chosen by them at great personal cost.”<sup>19</sup>*

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<sup>19</sup> ACT Human Rights Commissioner Helen Watchirs, Human Rights Advice on the *Births, Deaths and Marriages Registration Act 1997* (ACT) forwarded to the ACT Attorney General in 2009, 11.  
<[http://cdn.justice.act.gov.au/resources/uploads/Advice\\_Gender\\_Identity\\_and\\_BDM\\_2010.pdf](http://cdn.justice.act.gov.au/resources/uploads/Advice_Gender_Identity_and_BDM_2010.pdf)>.

## 2) Requirement for legal recognition outside the binary

### ISSUE 7A: Changing the record of sex identity

#### Should legal recognition be given to categories other than ‘male’ and ‘female’?

The majority of the AGA community believe that equity for the SGD community would be best achieved by removing the ‘sex’ field on registry records altogether. This would remove the requirement for any individual to legally identify on the basis of their sex.

However, if this option is not accepted by the legislature, the preferable alternative would be to amend the relevant legislation so that individuals could register their legal sex as something other than ‘male’ or ‘female’.

Some AGA members have highlighted their strong preference to have a legal category which specifically allows a person to identify as ‘intersex’. An important benefit of a distinct ‘intersex’ category would be the opportunity to reliably collect data, for the first time, on the number and age of intersex individuals in the community. This would have the flow-on effect of allowing government and non-government organisations to design much-needed targeted services for the intersex population and their families.

As discussed at the LRAC public consultation, there are many individuals in the community—including AGA members—who do not come within the medical definition of ‘intersex’ but nonetheless identify outside of the gender binary. Indeed, AGA has observed that growing numbers of young people are choosing to identify as neither entirely male nor female. This was evidenced in a survey conducted by AGA which was launched in May 2011:

*A high percentage of respondents (85 per cent) stated that they wanted to change their legal sex but were unable to either because they did not meet the criteria in their place of birth (45 per cent) or because the binary options currently offered were too limited (40 per cent).*

Almost half of the respondents who wanted to change their legal sex but were unable to, indicated that the reason they felt unable to was due to the limitation of the current policy of only recognising a binary model. Rather than using the terms ‘man’ or ‘woman’, ‘male’ or ‘female’, these individuals may describe themselves using terms that indicate they are ‘in between’ or ‘outside’ the binary. Such terms include ‘transgender’, ‘transsexual’, ‘genderqueer’, ‘gender questioning’, ‘gender neutral’, ‘post-gender’, ‘androgynous’, ‘me’.<sup>20</sup>

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<sup>20</sup> A Gender Agenda, *Gender Diversity in the ACT: A Survey of Trans Experiences*, May 2011, 6.

As outlined in our introduction, AGA approaches sex and gender identity using the inclusive framework of three continuums relating to biological sex, gender identity and gender expression.

### **Recommendations**

- 1) AGA and the WLC argue that the best way to protect each individual's human rights in this context would be to allow individuals to register their legal sex using whatever terms they choose. This would ensure that the register contained the most accurate information about a particular individual at any point in time. It would also ensure that the law kept up with the ever-evolving language of sex and gender identification. Such an approach would establish sex as an open field, just like a 'name' field. AGA and the WLC commend this approach to the Council as the most accurate, respectful and responsive approach to regulating sex and gender identity.
- 2) If the legislature considers this option of a single open sex field to be untenable, it should consider retaining the fixed categories of 'male' and 'female' and adding a third open category which would allow individuals who identify as neither male nor female to register their legal sex using whatever terms they choose.
- 3) If the legislature is only willing to consider the use of fixed categories regarding registration of sex, the law should at least be amended to recognise a third category of 'intersex' and a fourth category (however named) for those who do not identify as intersex, but identify outside of the gender binary. Such an approach would retain the registry's capacity to gather specific information about intersex persons, as distinct from others within the sex and gender diverse community who do not identify as male or female. It would also have the practical convenience (in terms of legislative specificity) of keeping sex a closed field, only allowing an individual to choose from one of four options.
- 4) Lastly, the AGA community has had extensive discussions around the fact that, if ACT law will only recognise *one* fixed category in addition to 'male' and 'female', it is crucial that this category be as inclusive as possible. Possible names for this category include 'unstated', 'undisclosed' or 'x'. General discussion has indicated a preference for 'unstated' over 'undisclosed', as it is a more accurate description of the fact that the law does not allow individuals to freely state their self-identified legal sex using their preferred terms. In contrast, 'undisclosed' carries the notion that a person has 'something to hide', or is 'refusing' or being 'difficult' in terms of disclosing information about their legal sex.

Regardless of the term chosen, AGA and the WLC argue that there is a dire need for the law to evolve in recognition of the social, psychological and

physiological reality of sex and gender. In reality, each individual occupies a unique place on the intersecting continuums outlined above relating to feminine and masculine identity/expression, and female and male physiology/biological sex. Any attempt to draw a legal 'line in the sand' between male and female will necessarily obscure this reality. Accordingly, at the very least, the law must provide recognition for those who do not, and cannot, fit within the misguided historical construction of a simple 'male/female' binary.

#### **ISSUE 4: Notification and registration of births generally**

##### **Is it necessary, when notifying or registering a birth, to specify the sex of the child?**

As noted above, equity for the SGD community would be best achieved by removing the 'sex' field on registry records altogether. This would remove the requirement for any individual to be legally identified on the basis of their sex when notifying or registering a birth.

If this option is not accepted, it is imperative that parents can register their child's legal sex as something other than 'male' or 'female'. It would also be preferable if sex identity information, although recorded on the register, was not included on certificates issued to individuals. At the very least, the Registrar should retain the discretion to determine whether a person's legal sex is recorded on extracts from the register.

The BDMR Act currently makes no reference to a child's sex with regard to the notification or registration of births. The Births, Deaths and Marriages Regulations currently specify that 'the sex of the child' must be recorded, but there is no legislative requirement that 'the sex of the child' could not be recorded as something other than 'male' or 'female'. Additional options could be made available when notifying or registering births without any legislative change being required.

In an environment where an individual's legal sex could be notified and/or registered as a category outside the binary, and could be changed at any point on the basis of the individual's self-identity, we see no need to amend the existing time requirements for notifying or registering births.

## **ISSUE 5: Notification and registration of intersex births**

**Is it necessary, when notifying or registering the birth of an intersex child, to specify the sex of the child?**

In our preferred model where sex is not recorded at all on the Register, the registration of intersex births becomes entirely unproblematic.

In a model where sex is recorded on the Register, but there are options available that are outside the binary of 'male' and 'female', the registration of intersex births is also unproblematic. If the child is known to be intersex when the birth is notified or registered, then their sex could be specified as 'intersex' or 'unstated'.

If the child is not known to be intersex when the birth is notified or registered, but discovers they are intersex at some later point in life (a frequent experience for intersex individuals), then a model allowing legal sex to be changed at any point on the basis of self-identification provides options for the original record to be altered to reflect this.

### **3) No-one should be subject to medical intervention without consent**

#### **ISSUE 9: Intersex decisions at birth**

##### **When, how and by whom should a decision about surgery for an intersex child be made?**

Many intersex infants with visibly atypical genitals are subjected to surgery to more clearly 'align' them to a male or female physicality. Often this occurs soon after birth – clearly without the individual's express consent – and where there is no health-related reason to perform the surgery. In some cases, surgery to 'align' the individual may continue during childhood or early adolescence. The outcomes of such surgery are most often *not* particularly effective, and often leave unjustifiable emotional and bodily scars.

As discussed above, the biological reality is that people are born somewhere along a continuum ranging from male to female. Despite this reality, we have a culturally enforced belief that all people should fit neatly into the categories of either male or female. Surgery on intersex infants and children actively perpetuates the myth that all people are unquestionably either male or female by surgically removing those body parts that prove that there *is* variation in human biology.

Similar medically unnecessary genital surgery, which is performed for different cultural reasons, is termed 'female genital mutilation' and is considered a criminal offense in the ACT.

Regardless of whether it is called 'genital mutilation' or 'corrective surgery' invasive, non-consensual and medically unnecessary genital surgery constitutes a fundamental breach of an individual's right to autonomy over their own body.

Unless there is a life-threatening medical imperative, the decision to perform such surgery should only ever be taken with the informed consent of the individual concerned (not just the consent of their parents).

To encourage compliance, hospitals should be obliged to report on all genital surgeries performed on intersex children.

## ISSUE 6: Correcting the Register

**Do the provisions of the BDMR Act which allow for change of sex, and for correcting the register, provide sufficient opportunities for intersex people to correct the birth registry in the event that their sex is incorrectly identified at birth?**

As noted above, allowing individuals to change their legal sex on the basis of self-identification would remove the need for separate legislation dealing with 'correction' of the register specifically for intersex persons. As highlighted in the Human Rights Commission's advice to the Attorney, the current wording of section 40 of the BDMR Act could, in practice, allow the Registrar to change any person's legal sex on the basis of self-identification. This is because it provides the Registrar with a broad discretion to bring an entry 'into conformity with the most reliable information available'. If 'the most reliable information' was defined to include an individual's self-identified sex, this would save the need for the drafting of new legislative criteria to introduce a self-identification model for intersex persons, and others who identify outside of the gender binary.

Regardless of whether section 40 is retained or a new legislative section drafted, intersex persons in the SGD community have expressed a strong preference for being able to change their legal sex purely on the basis of self-identification, rather than having to seek medical verification that a 'technical error' has occurred in order to 'correct' the register.

The very notion of a 'technical error' suggests that a person fits neatly into either the male or female 'box', and the register only needs to be 'corrected' because the individual was accidentally put into the 'wrong box' as an infant. In contrast, intersex persons have, by definition, both male *and* female physical features. Indeed, the definition of 'intersex' used by 'Organisation Intersex International' (OII) is:

*anyone born with a body which is not standard female or standard male according to the norms arbitrarily sanctioned by medical and legal institutions throughout the world.*<sup>21</sup>

***Please see attachment A for OII's fact sheet detailing the type and prevalence of varying intersex conditions.***

The definition used in ACT Law is narrower, referring to 'a person who, because of a genetic condition, was born with reproductive organs or sex chromosomes that are not exclusively male or female'.<sup>22</sup>

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<sup>21</sup> Organisation Internationale des Intersexués (OII) Factsheet: 'How Common is Intersex?' (2008) <[http://oii australia.com/wp-content/uploads/oii\\_how\\_common\\_is\\_intersex.pdf](http://oii australia.com/wp-content/uploads/oii_how_common_is_intersex.pdf)>.

The discovery of male and female physical features may occur at any stage of a person's life. At birth, it is usual for a child's sex to be determined by a quick glance at their genitals. However, there is a proportion of the population for whom it is impossible to tell, based purely on their genitalia, whether they are male or female. This is because their genitals are not entirely 'male' or 'female'. Elsewhere in this paper we discuss the grave implications for the individual, when parents or medical professionals decide to 'fix' a child by surgically intervening to give them the genitals of a specific sex (most often female).

For other persons, the discovery that they have both male and female physical features occurs later in life. This may be at puberty, or subsequent to medical or explorative testing, for example, tests relating to infertility.

Some individuals who fit within the medical definition of 'intersex' (i.e. having physiological attributes of both sexes) nonetheless identify strongly as either male or female. However, others—including members of the AGA community—strongly identify as intersex. These individuals anxiously seek legal recognition of their biological reality. A reality which cannot be 'corrected' into the binary categories of 'male' and 'female'.

Under the Human Rights Act, every person has the right to recognition as a person before the law.<sup>23</sup> Whilst ACT law recognises that intersex persons exist,<sup>24</sup> it effectively asks them to deny this by requiring them to sign up as 'male' or 'female' on the register. Immediately below, we recommend how ACT law could better reflect the reality of, and uphold the human rights of, intersex persons.

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<sup>22</sup> *Legislation Act 2001*, s 169B.

<sup>23</sup> *Human Rights Act 2004* (ACT) s 8.

<sup>24</sup> For example, the term 'intersex' is defined in s 169B of the *Legislation Act 2001*, and s 7(1)(c) of the *Discrimination Act 1991* provides protection from unfavourable treatment on the basis of gender identity, which—although not mentioning the term 'intersex'—includes 'the identification on a genuine basis by a person of indeterminate sex as a member of a particular sex.'

#### 4) **Equal treatment for all ACT residents: identity certificates**

##### **ISSUE 7B: Changing the record of sex identity**

##### **ISSUE 15: Sex/Gender recognition certificates**

**Should the ACT introduce a process whereby people born outside the ACT can change their legal sex and obtain a certificate which can be used as conclusive proof of that person's sex?**

We agree wholeheartedly with the Human Rights Commissioner's advice that:

*...where the ACT undertakes law reform to better protect the human rights of transgender people in the Territory it is important that the benefit of this reform is not restricted to those born in the ACT. Under the HR Act, the human rights of all residents of the ACT need to be equally protected by the government. While the ACT cannot alter the birth records of a person born inter-state, it can provide for the recognition of a change of sex for all purposes in the Territory, and could implement a scheme similar to that already provided for change of name by residents not born in the ACT. The Territory could provide an official certificate, similar to that issued in Victoria, acknowledging a person's name and sex, which could be recognised as conclusive for all purposes under Territory law.<sup>25</sup>*

There are many people living in the ACT who were not born here. This is the case in all jurisdictions, but is specifically relevant to the ACT, which is a small jurisdiction with a transient population, including a high proportion of people who move to the Territory to work in the federal public service.

To ensure that the human rights of all ACT residents are equally protected by the ACT Government, all residents should be able to change their legal sex and obtain an extract from the register specifying this change. To ensure individuals are not treated unfavourably on the basis of where they were born, the eligibility requirements for an individual *not* born in the ACT who wishes to change their legal sex *must* be the same as the requirements which apply to those born in the ACT.

If the legislature were to adopt our recommended framework for change of sex, which is almost identical to that for change of name, we assume that, for persons born in the ACT, their birth registration details would be automatically

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<sup>25</sup> ACT Human Rights Commissioner Helen Watchirs, Human Rights Advice on the *Births, Deaths and Marriages Registration Act 1997* (ACT) forwarded to the ACT Attorney General in 2009, 15.

updated to include their new sex, and that sex would appear on all birth certificates issued after the change of sex.<sup>26</sup>

However, it is possible that individuals born in the ACT would still rather use a type of 'identity certificate' or, preferably, a 'recognised details certificate', to verify their identity, rather than a new birth certificate. For example, one AGA member expressed the view that:

*If it were up to me, I would never have my birth certificate amended. It is a historical document that reflects my legal status and my 'place in the world' when I was born. It records details like my parents' names, marital status, jobs and residential addresses, as well as the names of my older siblings. My birth certificate would never be 'updated' to reflect changes to any of these details – for example, my parents having more children, my father changing profession, or my parents getting divorced. So why should the certificate be changed to reflect a change in my legal sex? What I want is a document that shows my current legal identity. Why does this have to be an amended birth certificate?*

On this basis, we recommend that all persons changing their legal sex should have the option of obtaining a new identity document regardless of whether they have an ACT birth certificate which would be automatically updated.

## **ISSUE 15: What kind of certificate should be issued?**

AGA members have expressed a strong preference that any identity document issued should not disclose, by implication, the fact that the individual has changed their legal sex. For example, from a practical perspective, providing a bank or employer with a 'Gender Recognition Certificate' such as the one issued in the UK immediately 'outs' the individual as someone who has had need to have their gender legally recognised. Such outing necessarily breaches the individual's right to privacy and leaves them vulnerable to harassment and discrimination.

In contrast, we recommend that that the certificate be titled something simple, such as an 'Identity Document'. The fields included in such a certificate could include the individual's name, sex, address and date of birth. For example, a 'document acknowledging identity' is available to residents of Victoria whose births are not registered in that State, but who meet the Victorian criteria for change of legal sex.<sup>27</sup>

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<sup>26</sup> As per the process followed in relation to a change of name – see Form 206 – CNA 'Application to Register a Change of Name for an Adult' <[www.legislation.act.gov.au](http://www.legislation.act.gov.au)>.

<sup>27</sup> *Births, Deaths and Marriages Registration Act 1996* (Vic), s 30E.

It is important to note that during the consultations leading up to the *Sex Files* report, members of the Victorian SGD community highlighted the difficulties they had had getting government agencies to accept their new identity document as proof of their sex.<sup>28</sup> To learn from this experience, we recommend (as detailed in our response to Issue 18, below) that any law reform in this area must be accompanied by comprehensive educational measures for employees of ACT Government agencies.

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<sup>28</sup> Australian Human Rights Commission, *Sex Files: the legal recognition of sex in documents and government records* (2009), para 8.1(c).

## 5) Jurisdictional issues

### ISSUE 14: Reciprocal recognition

#### **Have you had difficulties having a change of sex/gender which occurred in one State or Territory being recognised in another?**

We are not aware of any issues arising from recognition of certificates issued between states and territories.

We are aware of issues arising from a lack of recognition of certificates issued overseas. Under the UK Gender Recognition Scheme, for example, people can be recognised regardless of whether they were born in the UK:

- 1) Where a person was born in the UK and changes their sex, they are provided with a Gender Recognition Certificate and an amended birth certificate which makes no reference to former names or sex. This new birth certificate is accepted in the ACT as evidence of the person's legal sex.
- 2) Where a person was not born in the UK and changes their sex, they are only provided with a Gender Recognition Certificate. This certificate is not accepted in the ACT as evidence of the person's legal sex.

People who have already had their legal sex recognised in an overseas jurisdiction should be recognised as that sex for all purposes under ACT law. Given the speed with which international reform is occurring in this area, we recommend that the ACT's recognition of international schemes be very broadly framed, rather than specifically listing jurisdictions with existing provisions which will require constant review and updating.

### ISSUE 16: Commonwealth Government functions and services

#### **Are you aware of Commonwealth Government functions and services which take notice of the ACT's record of a person's sex/gender identity?**

For Commonwealth purposes, a person's birth certificate is considered to be the most primary form of ID, and to this extent the sex recorded on birth certificates issued by the ACT will be taken notice of by many Commonwealth agencies.

Although Commonwealth agencies do regard birth certificates as the most primary form of ID, there is no consistent approach taken by Commonwealth agencies where the identity/presentation of an individual is not in accordance with that shown on their birth certificate. In many instances, for example in the issuing of passports, Commonwealth policy already provides for recognition of a sex different to that shown on a person's birth certificate. In other instances,

Commonwealth agencies have been known to change their record of a person's sex simply on the basis of their presentation. A trans man told us that:

*I never applied to have my sex changed at Medicare at all. I just turned up there one day with my wife and child, and they asked me if we wanted to sign up for the family safety net. I knew we wouldn't be able to, because my sex was officially recorded as female. But when the person behind the counter got to the screen that said I was female, she just figured that someone in the Medicare office had made a mistake. She called her supervisor over who took one look at me, apologised for the error, and changed my sex to male!*

To the degree that the Commonwealth does not have a consistent approach to these issues, it is impossible to frame ACT provisions with regard to possible implications at a Commonwealth level.

Given that many Commonwealth agencies already have policy frameworks in place which allow for recognition of a sex different from that appearing on a person's birth certificate, any implications could be easily addressed by amendments to existing policies.

If the ACT were to introduce a recognition scheme for residents who were born outside the ACT, it is unclear to what extent Commonwealth agencies would take notice of the sex/gender recorded on a recognition certificate.

### *Passports*

Australia issues passports in accordance with the International Civil Aviation Organisation (ICAO) requirements. As stated on the Passports Office website:

*Sex is one of four mandatory personal identifiers contained in the passport and Australia, as a member of ICAO, complies with the ICAO standard that the sex data field on the travel document must be completed with the letter M for male, F for female or X for unspecified.<sup>29</sup>*

The Passports Office's current policy is to issue passports with a sex shown in accordance with the sex shown on the applicant's birth certificate. The Passports Office and the ICAO are both currently operating within a non-binary framework. Notwithstanding this framework, because the ACT does not currently allow a third option for legal sex, those individuals who are born or who live within the ACT are currently denied the opportunity of obtaining a passport showing their sex as 'X'.

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<sup>29</sup> <<https://www.passports.gov.au/web/sexgenderapplicants.aspx>>.

## Marriage

The Commonwealth specifies that marriage is between a man and a woman. There are currently many people whose sex under the *Marriage Act 1961* is entirely unclear. A trans man told us:

*I wanted to marry my partner back in 2007. We approached quite a few celebrants, but none of them would marry us because they said that it wasn't clear whether I was a man or a woman for the purposes of the Marriage Act. At the time, I'd been living as a man for 9 years. I had a male passport and a male gender recognition certificate issued in the UK, but my birth certificate still said that I was female. The celebrants basically said that the only way they could perform the marriage was if I changed my birth certificate.*

A recent ACT study found that 85% of sex and gender diverse people wanted to change their legal sex but were currently unable to.<sup>30</sup> The sex of all of these people, for the purposes of the *Marriage Act*, is currently unclear.

This lack of clarity would be resolved through the adoption of a self-identification model relating to change of legal sex.

## ISSUE 17: Commonwealth Government records

### **Are you aware of Commonwealth Government records on which a person who was born in the ACT may want to change their sex/gender identification?**

Most Commonwealth agencies would hold information about the sex of people born in the ACT. Most sex and gender diverse people would prefer that the information held was in accordance with their own identity.

The most confusing thing for Commonwealth agencies in dealing with sex and gender diverse individuals is the inconsistency of documentation.

By adopting a model whereby individuals can change the sex shown on their birth certificate on the basis of self-identification, this inconsistency will be dramatically reduced if not eliminated altogether.

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<sup>30</sup> A Gender Agenda, *Gender Identity in the ACT: A survey of trans experiences*, 2011, 18.

## 6) Other issues raised

### ISSUE 1: Terminology

#### **Does the term 'sex and gender diversity' adequately capture the diversity of ways in which people may wish to identify themselves?**

We welcome the use of the term 'sex and gender diversity' as an inclusive umbrella term for use in public policy or other non-legal contexts. However, we would like to make the following points regarding its use:

- 1) The sex and gender diverse community is itself highly diverse, and it is essential that an umbrella term such as 'sex and gender diverse community' is not used in such a way as to deny or obscure that diversity.
- 2) Many people will be unfamiliar with the term, so if it is to be used in a policy document, it would be desirable for it to be followed by a non-exhaustive list of terms such as transgender, transsexual, cross-dresser, intersex, genderqueer, etc. It is very important that this list be open in order to be as inclusive as possible.

### ISSUE 2: Definitions in ACT Laws

#### **Do current definitions in ACT law exclude any sex and gender diverse people? Is it necessary to define different genders and sexes in ACT legislation?**

We do not believe that it is necessary to define different genders and sexes in ACT legislation. The law currently operates effectively without any legal definitions of 'man' or 'woman'. It follows that the law is equally able to operate effectively without a definition of 'intersex', 'transgender' or 'sex and gender diverse'.

In a model based on self-identification, there should be no need to define any sexes or genders.

Current definitions in ACT law are contradictory and exclude a great number of sex and gender diverse people.

For example, the definition of 'gender identity' in the *Discrimination Act 1991* specifies that an individual must identify 'on a genuine basis' as a 'member of the other sex'. This definition references the binary and requires some external assessment of how genuine an individual's own identity is. This definition immediately excludes individuals who have a fluid or non-binary identity, or whose gender presentation is not in accordance with their gender identity.

If a definition is required, the existing definition of 'transgender person' in the *Legislation Act 2001* provides the best example of a non-binary definition, in that it recognises any person who 'identifies or has identified as a member of a *different sex*' (italics ours). However, the additional requirement in the *Legislation Act 2001* that a person must 'provide evidence' of their identity 'by living, or seeking to live, as a member of that sex' is highly problematic because it seeks to judge an individual's identity by virtue of an external observer's view of stereotypical gendered behaviours.

## **ISSUE 10: Relevance of sex and gender identity**

### **Are sex or gender specific services appropriate in some circumstances? What evidence of a person's sex or gender identity should be required to access such services?**

While there is nothing inherently wrong with having a sex or gender specific service, problems arise when people are excluded from accessing a service that they need because they apparently do not fit the right 'box'. The most obvious examples come from health services, such as where a transman requires a pap smear or a transwoman needs a prostate check.

The *Discrimination Act 1991* in s 38 provides that discrimination on the ground of sex is not unlawful in relation to the provision of services the nature of which is such that they can only be provided to members of one sex. Given that 'sex' is a scientifically and socially controversial category, and is not defined in the Act (or anywhere else in Australian law for that matter), it must be presumed that the relevant factor is whether the service can be provided to a person, regardless of any apparent incongruence between them and any other person who may access the service.

The only apparent reasons for restricting access on the basis of self-identification is a fear of abuse of the system or service provider by a person fraudulently posing as a member of the relevant sex for the wrong reasons. We submit that the risk of this happening is minimal, and concur with Dr Watchirs' advice that 'situations of inappropriate behaviour by any person in sex specific facilities can already be dealt with adequately under existing civil and criminal laws'.<sup>31</sup> On the other hand, the risk to members of the sex and gender diverse community who cannot access the services they need may be very serious.

With this balance in mind, we submit that it would not be a reasonable limitation (under the terms of s 28(2) of the *Discrimination Act 1992* (ACT)) on the right to protection from discrimination to prevent people from accessing services solely

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<sup>31</sup> ACT Human Rights Commissioner Helen Watchirs, Human Rights Advice on the *Births, Deaths and Marriages Registration Act 1997* (ACT) forwarded to the ACT Attorney General in 2009, 8.

because their legal sex or gender presentation does not coincide with a predetermined idea of the category of people for whom the service is normally provided.

In the model we propose, SGD individuals would be able to access sex or gender specific services on the basis of their self-identified sex/gender, with the focus being on whether the organisation is providing a service which the individual needs rather than whether they fit the socially constructed categories of 'woman' or 'man'. A Gender Agenda already has working relationships with gender specific services (including the Women's Legal Centre, a women's health service, and two men's services) which are willing to accept clients on the basis of their self-identified gender.

## **ISSUE 11: Sex identity in ACT records**

### **Are you aware of ACT government documents, other than a birth certificate, which record a person's sex? Is it necessary that they do?**

We are not aware of ACT government documents other than a birth certificate which record an individual's sex. However, we are aware that people are regularly asked to state their sex in an administrative context when completing forms. In most instances, this is unnecessary. For people whose legally recognised sex does not correspond to their presentation or identity, it is difficult to determine the most appropriate answer to such enquiries.

It is not appropriate to request this information without good reason, given that where an individual:

- a) records their legal sex that does not align with their gender presentation, or
- b) records the sex they identify with rather than the sex recorded on their birth certificate,

they place their personal safety at risk, and leave themselves open to allegations that they have been misleading or fraudulent.

Our model would require Territory departments to identify and remove requests for information about a person's sex except where there is a reasonable case as to why it is required. If a case is made out, the form should clearly specify why the information is being sought (as this may change someone's answer). As outlined in our recommendations above, the form will ideally have an open field in relation to 'sex', if not, the form should accept 'male', 'female', 'intersex' or 'unstated'.

## ISSUE 12: Change of name (breaches of privacy)

### **Are you aware of instances where a person's sex or gender status has been revealed as a consequence of a name change certificate?**

Prior to 12<sup>th</sup> March 2008, any person who changed their name in the ACT was issued with a Change of Name Certificate which showed their legal sex as recorded on their current birth record. This was a matter of policy and was not prescribed by any legislative or regulatory provision.

On 12<sup>th</sup> March 2008 the Births, Deaths and Marriages Registration Regulations were altered by the inclusion of section 5A, adding for the first time prescribed particulars for inclusion on Change of Name Certificates. Section 5A not only prescribed that 'sex' should be included on the certificate, but also that the original birth name of the individual should also appear.

For many sex and gender diverse individuals, the inclusion of these particulars reveals their status as intersex or transsexual.

*Whenever I have to provide ID – to open a bank account, to cash a cheque, or even to collect a parcel from the Post Office, the official documents that I can provide state that I am female. Sometimes my ID is not accepted at all. The bank teller looks at me, and says “but that can't be your ID – it says you are a woman!” Mostly my ID is eventually accepted – but only because I am prepared to cause a scene, to declare to the bank teller, and their supervisor, and the manager on duty, and everyone else waiting in the queue behind me, that “I am transsexual.” “Oh! so he's really a woman! I guess we should let her cash the cheque.”*

Some transsexual individuals not only change their name but also change their legal sex following sexual reassignment surgery. For these individuals, the BDMR Act at s 27(3) states that a birth certificate issued must not include any word or statement to the effect that the person to whom the certificate relates has changed sex. In other words, there is explicit legislative protection from a certificate being issued which would disclose the individual's transsexual status. This protection recognises the serious personal safety and privacy concerns that can arise from such a disclosure.

The problematic nature of existing legislation that requires individuals to undergo intrusive and unnecessary sterilisation surgery in order to change the sex on their birth certificates has been detailed in many places, including the Australian Human Rights Commission's 2009 *Sex Files* report. Given that these same personal safety and privacy concerns arise for transsexuals who have not changed their sex, but have changed their name, it is unreasonable to issue a Change of Name Certificate which discloses the individual's transsexual status.

As the result of a discrimination complaint made in 2010, the Registrar-General has acknowledged the serious consequences of issuing certificates that reveal

a person's status as transgender or intersex, and has already updated their Practice Manual to reflect this:

*A person who was registered as a particular sex at birth, but no longer identifies as that sex may seek to change their name and receive a certificate to that effect. It may be necessary for the Deputy Registrar-General to consider the rights which could be infringed if this request is refused. In particular, the inclusion of the applicant's former name and/or the inclusion of their sex as registered at birth may breach their right to privacy or reputation. As such the Human Rights Act requires the decision maker to consider alternative measures to address the request within the legal framework of the BDMA. For example: notation that former names are registered, but no detail is provided on the certificate or provision of a certificate without notation about sex at birth.<sup>32</sup>*

We note that when the Office of Regulatory Services (ORS) drafted this amendment to its practice manual, that it chose to frame its references to sex in a non-binary format. This policy would not be affected by the inclusion of additional categories of legal sex.

Currently, notwithstanding the fact that the Regulations still prescribe the inclusion of former names and sex on Change of Name Certificates, the Registrar-General is applying the provisions of the Human Rights Act to issue certificates which do not include the prescribed particulars. A trans man told us recently that:

*My Change of Name Certificate used to say "female" on it. Every time I had to produce it, it told the person I gave it to that I was trans. I recently got my Change of Name Certificate re-issued under the new policy without any reference to my legal sex. I've been looking for rental accommodation and I had to provide a copy of the certificate with my rental application. It felt so fabulous to know that I could do that and that the agent would assess my application without me "declaring" that I was trans. I've been living as a man for 13 years, and this is the first time I've not been outed as trans when I provide that certificate. It's such a weight off my mind.*

Given the serious privacy and safety concerns that have already been acknowledged by the Registrar-General, it is critical that we enshrine privacy protection within a legislative framework rather than in a reliance on an ORS policy document. There is currently a tension between the Regulations, which specify that sex and names at birth must be included on Change of Name Certificates, and the ORS Practice Manual which provides for these details to not be included on Change of Name Certificates.

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<sup>32</sup> <[http://www.ors.act.gov.au/resources/attachments/Births\\_Deaths\\_and\\_Marriages\\_Practice\\_Manual.pdf](http://www.ors.act.gov.au/resources/attachments/Births_Deaths_and_Marriages_Practice_Manual.pdf)>.

Our preferred model of non-disclosure of sex related information would resolve this tension by implementing a position where sex related information was not included on *any* Change of Name Certificate. Currently, Queensland and Tasmania issue Change of Name Certificates that make no reference to a person's sex. To ensure adequate protection, it would also be necessary to remove 'Name at Birth' from all certificates as well.

If this position is not acceptable, and sex is to appear on Change of Name Certificates, then our recommendation to recognise legal sex, including at least one additional category, on the basis of self-identity would also resolve many of the current privacy issues. Self-identification would allow individuals to legally change their sex to be in accordance with their presentation. Under these provisions, the presence of sex on a Change of Name document would not disclose a person's status as trans or intersex and would therefore not breach the privacy of the individual. In this scenario, it would also be necessary to remove 'Name at Birth' from all certificates to ensure adequate protection.

## **ISSUE 18: Practical recognition and acceptance**

**What steps, other than reforms to the law, will promote recognition and acceptance of people's sex and gender identity?**

### ***Recommendations***

***(based on evidence supporting key issues outlined on following page):***

- 1) Provide recurrent core funding to a community-run peak body which would provide much needed support services to transgender and intersex individuals, their families, other service providers and workplaces.
- 2) Provide funding to a community organisation to develop and deliver recurrent training to key service providers (for example the AFP, Community Legal Centres, Legal Aid, educational institutions, health care providers). Such training should be provided on a mandatory basis to new employees, and on a recurrent basis for existing staff.
- 3) Provide funding to a community organisation to provide training and information to employers, workplaces and educational institutions in order to address issues of unemployment, discrimination, poor physical and mental health outcomes, and low rates of social inclusion and participation for SGD people.
- 4) Provide funding to the ACT Human Rights Commission in order to employ an additional supported staff position dedicated to addressing the underreporting of discrimination against transgender and intersex people, and to support employers and service providers with information about their legal obligations under the *Discrimination Act 1991* and the Human Rights Act.

## ***Key issues affecting transgender and intersex people in the ACT***

### *High rates of unemployment*

A study undertaken in Sydney that compared the employment status of transgender people before and after their transition showed that there was a 25% to 50% reduction in people's engagement in work experiences after their transition. Anecdotal evidence suggests unemployment rates as high as 50% in the sex and gender diverse population.<sup>33</sup>

*Last Thursday I happened to mention to a co-worker that I was Intersex, as I was concerned that by participating in a work fitness program that it would become obvious. Well barely two and a half hours later I was called into the office and told that my work was not being performed to the standard that was expected, and that they would have to let me go.*

*Posted to email support list October 2010*

### *Disproportionately low income levels*

The recent *Tranznation* report on the health and wellbeing of transgender people states that although the sex and gender diverse respondents were more highly educated than the general population (35% with university degrees compared to only 18% of the general population), only 15% of respondents earned more than \$60,000 and 35% earned less than \$20,000. According to the same report, 59% of the Australian sex/gender diverse community earn less than \$40,000 per annum.<sup>34</sup>

### *High rates of homelessness*

A study of transgender people living in Sydney found that, at the time of the survey, 10% were living in a refuge, boarding house or other temporary accommodation. The same report noted that while more than 75% of the general population own (or are in the process of owning) their own home, less than 20% of transgender people fell into this category.<sup>35</sup> There are currently no services in the ACT that offer accommodation services to transgender or intersex people. The Sydney Gender Centre operates a residential program

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<sup>33</sup> Gender Centre, assorted reports and publications. Contact point: Elizabeth Riley (02) 9569 2366.

<sup>34</sup> Australian Research Centre in Sex, Health and Society (2007), *Tranznation – a report on the health and wellbeing of transgender people in Australia and New Zealand*, (Melbourne), 19 (Table 4).

<sup>35</sup> Roberta Perkins (1994) *Transgender Lifestyles and HIV-AIDS Risk*, School of Sociology, University of NSW, 23.

comprising 4026 bed days which, in 2009-2010, had occupancy rates of 95.6% (2008-09 was 93.7%).<sup>36</sup>

### *High experiences of discrimination*

Evidence shows that sex and gender diverse individuals experience extremely high rates of discrimination. Beyond Blue states that 90% of transgender people experience discrimination.<sup>37</sup> This is consistent with the findings of *Tranznation*. A Sydney-based study tells us that 37% of transgender people experience discrimination on at least a weekly basis and found that 'not only does it seem that everyone practices discrimination against transgender people, but also this discrimination occurs just about everywhere'.<sup>38</sup> In 2009 the ACT Human Rights Commission conducted a survey in relation to an unrelated topic where 80% of respondents identified transsexuality as the attribute most likely to result in unfavourable treatment.

### *High incidence of depression and suicide*

While the link between discrimination, depression and suicide is well documented in psychological literature, the invisibility of transgender and intersex members of the community means that specific data is not widely available. The *Tranznation* report showed exceptionally high levels of discrimination against transgender people, and also confirmed a direct causal link between the experience of discrimination and the incidence of depression. *Tranznation* also shows that the level of suicidal ideation among transgender populations is very high, with 20 per cent of Australia's transgender population reporting *current* feelings of suicidal ideation. A recent Suicide Prevention Australia position statement cites a range of studies conducted over last decade showing that the prevalence of attempted suicides among transgender people ranges between 16 and 47 per cent of that population. The paper concluded that it was indisputably clear that younger transgender people are at an elevated risk of suicide and self-harm. Evidence clearly links these health outcomes to experiences of discrimination and social exclusion.<sup>39</sup>

### *Poor interactions with health services*

*Tranznation* and many other studies have consistently shown health outcomes for transgender and intersex people are poorer than those for the general

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<sup>36</sup> Gender Centre Annual Report 2009-2010, <http://www.gendercentre.org.au/2010-Annual-Report.htm>, accessed December 16<sup>th</sup> 2010.

<sup>37</sup> Beyond Blue, Depression and anxiety in gay, lesbian, bisexual, transgender and intersex people (GLBTI) Fact Sheet 40, [http://www.beyondblue.org.au/index.aspx?link\\_id=4.1167&tmp=FileDownload&fid=1425](http://www.beyondblue.org.au/index.aspx?link_id=4.1167&tmp=FileDownload&fid=1425), accessed June 22<sup>nd</sup> 2011, 3.

<sup>38</sup> Roberta Perkins (1994) *Transgender Lifestyles and HIV-AIDS Risk*, School of Sociology, University of NSW, 58.

<sup>39</sup> Suicide Prevention Australia (August 2009), *Suicide and self-harm among Gay, Lesbian, Bisexual and Transgender Communities*.

population. They also indicate that transgender and intersex people in the ACT under-utilise existing health and community services for several reasons, including fear of discrimination and a lack of knowledge in the medical and community sector about the needs of transgender and intersex people. In a recent survey undertaken in the ACT,<sup>40</sup> less than 10% of transgender people sought advice about medical issues from a health professional, with the vast majority of respondents instead relying on information from the internet in order to avoid contact with health professionals. The resulting lack of contact between transgender and intersex people and GPs (in particular) means that many community health messages (physical activity, healthy eating, necessity of regular checkups such as pap smears and prostate checks, etc) are not effectively reaching the transgender and intersex community.

*A number of participants said... they were often reluctant to disclose their transgender status with practitioners when being treated for health problems. Fear of being “stereotyped and boxed”, pathologised, labelled, judged, stigmatized, met with hostility and ignorance, were some of the reasons that people gave... One woman explained her reluctance to use a health service, saying: Fear of the health system. After bad experiences I’m scared to use it because I know it’s not really there for me.<sup>41</sup>*

### *Experiences of violence*

Transgender and intersex people experience violence at far greater rates than the general population – and more often than not the violence is more extreme. We were recently advised that 46% of trans women in Queensland have been physically assaulted, and that 38% (of all trans women, not of the 46%) have been assaulted with a weapon. *Tranznation* found that 40% of all transgender people had been assaulted (including sexual assault), and that 35% of transgender people reported having received hate mail or obscene phone calls and/or having had objects thrown at them. Partner violence was reported by 16% of respondents in *Tranznation*.

### *Low rates of social inclusion and participation*

Many transgender and intersex people respond to these experiences by avoiding social interactions. *Tranznation* found that 65% of transgender people consciously modified their behaviour in certain settings due to their fear of stigma and discrimination. *Tranznation* also found ‘that the greater the number of places in which a person reported that they modified their behaviour, the

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<sup>40</sup> A Gender Agenda, *Gender Identity in the ACT: A survey of trans experiences*, 2011.

<sup>41</sup> Australian Research Centre in Sex, Health and Society (2007), *Tranznation – a report on the health and wellbeing of transgender people in Australia and New Zealand*, (Melbourne), 33.

higher the likelihood they were currently experiencing depression'.<sup>42</sup> Many trans and intersex people are ostracised by family and friends. Anecdotal evidence suggests that the vast majority of trans people are single, having often lost their partners as a result of 'coming out'. Documented high levels of discrimination exist in a whole range of areas, but are particularly notable in relation to employment. Feedback we have received indicates that transsexuals, intersex and gender diverse people often feel that they are unable to participate in sporting activities due to the difficulties involved.

*Since I joined AGA three months ago, I've had more social interactions than I've had in the last 10 years.*

*Verbal conversation with a trans woman in September 2010*

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<sup>42</sup> *Australian Research Centre in Sex, Health and Society (2007), Transnation – a report on the health and wellbeing of transgender people in Australia and New Zealand, (Melbourne), 66.*