

TASMANIA
LAW REFORM
INSTITUTE

Legal Recognition of Sex and Gender

ISSUES PAPER No. 29

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CONTENTS

Information about the Tasmania Law Reform Institute.....	iii
How to respond.....	iii
Final Report to the Attorney-General	v
Acknowledgments.....	v
List of questions	vi
Part 1: Introduction.....	1
1.1 Why are we looking into this issue?	1
1.2 Background to the reference	2
Scope of review.....	3
1.3 Terminology.....	4
Part 2: Legal Recognition of Sex and Gender	7
2.1 Tasmania's current legal framework.....	7
Definitions of sex and gender	7
Registering a change of sex or gender	11
Sex and gender information on official documentation	21
Changes to other laws	31
2.2 Recent changes and consequential reforms.....	35
Search powers	35
Other searches and examinations	37
Pregnancy, birth and related issues	38
Part 3: Consent to Medical Treatment to Alter a Person's Sex or Gender	49
3.1 Introduction.....	49
3.2 Consent to medical treatment for intersex minors	49
Human rights issues	50
3.3 Current approaches to medical consent for intersex minors	53
Consensus Statement on Management of 'Intersex Disorders'	54
Decision-making principles for the care of infants, children and adolescents with intersex conditions	54
Involuntary or coerced sterilisation of intersex people in Australia	55
3.4 Options for reform.....	56
Criminalisation under the Criminal Code	56
Specialist tribunal.....	58
Specialised legislation.....	59
A civil liability approach.....	61
Professional code of conduct or practice standard	61
Education and support.....	62

3.5 Consent to medical procedures for transgender minors	64
Human rights issues	64
Relevant cases	65
Options for reform.....	65
Appendix 1: Summary of cases regarding sex and gender	68
Appendix 2: Reviews of law relating to sex and gender in Australian states and territories.....	75
Appendix 3: Implications of <i>JRL Act</i> for existing legislation	79
Appendix 4: Cases regarding medical procedures for minors	98

Information about the Tasmania Law Reform Institute

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

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

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

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

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

How to respond

The Tasmania Law Reform Institute invites responses to the various issues discussed in this Issues Paper. There are a number of questions posed by this Issues Paper to guide your response. **Respondents can choose to address any or all of those questions in their submissions.** Respondents can also suggest alternative options for reform or raise other relevant matters in their responses.

There are a number of ways to respond:

- **By filling in the Submission Template**

The Template can be filled in electronically and sent by email or printed out and filled in manually and posted to the Institute. The Submission Template can be accessed at the Institute's webpage: <http://www.utas.edu.au/law-reform/>

- **By providing a more detailed response to the Issues Paper**

The Issues Paper poses a series of questions to guide your response — you may choose to answer all, some, or none of them. Please explain the reasons for your views as fully as possible.

- **By requesting a meeting**

Any person who does not wish to respond in writing can arrange to speak with a researcher instead. This may be undertaken by phone or in person, individually or as part of a group consultation.

The Institute uses all submissions received to inform its research. Submissions may be referred to or quoted from in a TLRI final report which will be printed, provided to the Tasmanian Government and also published on the Institute's website. Extracts may also be used in published scholarly articles and/or public media releases. However, if you do not wish your response to be referred to or identified, the Institute will respect that wish.

Therefore, when making a submission to the Institute, please identify how you would like it to be treated based on the following categories:

1. Public submission – the Institute may refer to or quote directly from the submission and name you as the source of the submission in relevant publications.
2. Anonymous submission – the Institute may refer to or quote directly from the submission in relevant publications but will not identify you as the source of the submission.
3. Confidential submission – the Institute will not refer to or quote directly from the submission but may aggregate information in your submission with other submissions for inclusion in any report or publication. Confidential submissions will only be used to inform the Institute generally in their deliberations of the particular issue under investigation, and/or provide publishable aggregated statistical data.

After considering all responses and stakeholder feedback it is intended that a final report, containing recommendations, will be published.

Providing a submission is completely voluntary. You are free to withdraw your participation at any time up to the time it is sent for publication, by contacting Kira White on (03) 6226 2069 or email Law.Reform@utas.edu.au. You can withdraw without providing an explanation. However, once the report has been sent for publication, it will not be possible to remove your comments.

All responses will be held by the Tasmania Law Reform Institute for a period of five (5) years from the date of the first publication and then destroyed. Electronic submissions will be stored on a secure, regularly backed-up University network drive. Hard copy submissions will be stored in a locked filing cabinet. At the expiry of five years, submissions will be deleted from the server, in the case of electronic submissions, or shredded and securely disposed of in the case of paper submissions.

Electronic submissions should be emailed to: Law.Reform@utas.edu.au

Submissions in paper form should be posted to:

Tasmania Law Reform Institute
Private Bag 89
Hobart, TAS 7001

Inquiries about the study should be directed to Dylan Richards at the above address, or by telephoning (03) 6226 2069, or by email to Law.Reform@utas.edu.au.

CLOSING DATE FOR RESPONSES: 20 AUGUST 2019

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

Final Report to the Attorney-General

After considering all responses and stakeholder feedback it is intended that a final report, containing recommendations for reform, will be published.

Acknowledgments

This Issues Paper was prepared for the Board by Dylan Richards and Jess Feehely and edited by Bruce Newey. The project was funded by a grant from the Solicitors' Guarantee Fund.

List of questions

The Tasmania Law Reform Institute invites responses to the various issues discussed in this Issues Paper. There are a number of questions posed by this Issues Paper to guide your response.

Respondents can choose to address any or all of the questions in their submissions. Respondents may also choose to respond to any other issue raised in this Issues Paper or raise other relevant matters in their responses.

Question 1 p 29	What, if any, administrative changes will be required to allow government agencies, notaries, or other officials to verify a person's sex or gender identity if their birth certificate does not include sex or gender information?
Question 2 p 30	Should guidelines be developed to guide the exercise of the Registrar's discretion to refuse an application to register a change of gender?
Question 3 p 47	Are there potential implications for the interaction of the <i>JRL Act</i> with existing legislation that are not discussed in section 2.2 of this Issues Paper?
Question 4 p 47	What policies are currently in place relating to access by sex and gender diverse people to gender-based locations or events? In your experience, what has been the outcome of implementing those policies?
Question 5 p 63	What, if any, reforms should be made in relation to consent to medical treatment to alter the sex characteristics of an intersex minor? In particular: • In what, if any, situations should Court approval be required for medical intervention on minors to alter sex characteristics? • Should sex reassignment surgery on a minor be excluded from offences relating to female genital mutilation? • Should Tasmanian laws prevent medical intervention to address sex characteristics in minors without their consent to the procedures (other than in emergency situations)? Should 'emergency situations' be defined by legislation for the purpose of this exception? • What form should that prohibition take? Should it be a criminal offence to perform such surgery or should some alternative approach be adopted and, if so, what approach would best address this issue? • Should there be any additional exceptions to that prohibition apart from emergency situations and, if so, what should those exceptions be? • In what, if any, situations should an independent advocate be appointed to act on behalf of a minor where approval is sought for medical intervention to address sex characteristics? • If parents are able to consent to medical procedures, should they be required to show that they have received counselling or advice (other than from the treating physician) about the implications of the proposed procedures?

	Should a specialist tribunal be established to consider applications for medical procedures to alter the sex characteristics of minors and, if so, who should be members of the Tribunal?
Question 6 p 66	What, if any, reforms should be enacted to enable minors to consent to medical treatment to alter their sex characteristics and to enable medical practitioners to act on their consent?
Question 7 p 66	Should there be an age requirement for valid consent to medical treatment to alter sex characteristics?
Question 8 p 66	Should there be additional conditions attached to the consent to enable medical practitioners to act on it, such as a requirement that minors receive expert counselling regarding the consequences of the surgery?
Question 9 p 66	Should medical practitioners be able to act on the consent of minors under 16 years of age to medical treatment to alter their sex characteristics and, if so, in what circumstances? For example, should there be a requirement that two medical professionals (defined to include clinical psychologists) are satisfied that: - the child is capable of understanding the nature, consequences and risks of the treatment; and - the treatment is consistent with the ‘will and preference’ of the child; and - the treatment is consistent with the child’s health and well-being.

Part 1

Introduction

1.1 Why are we looking into this issue?

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

1.1.2 Similarly, most Tasmanian children and their parents will not face decisions about whether to undertake surgery on a child born with sex characteristics that vary from the ‘norm’. This is not the case for all Tasmanians.

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

1.1.4 There is increasing acceptance that sex and gender are different concepts, and that neither concept is confined to binary classifications. However, there is often a lack of understanding of the breadth of variation of sex characteristics and gender identity. This can result in poorly implemented policy and treatment of intersex variations as ‘disorders’ which require surgical intervention to normalise.

1.1.5 The Institute recognises the diverse experiences of individuals within the intersex, trans and gender diverse communities and the many challenges faced by these communities. Discrimination can put gender diverse and intersex people at risk of physical and mental health conditions and prevent them from fully participating in and contributing to public life.

1.1.6 The *Yogyakarta Principles* create a universal guide to the application of human rights principles and legal standards on sexuality and gender identity. Significantly, the *Yogyakarta Principles* recognise that a person’s gender identity is integral to their personality and that persons of diverse sexuality and gender identities should be able to enjoy legal capacity in all aspects of life.¹

¹ International Panel of Experts in International Human Rights Law and on Sexual Orientation and Gender Identity, *The Yogyakarta Principles: Principles on the Application of International Human Rights Law in*

1.1.7 A 2018 UN report by Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity, Victor Madrigal-Borloz, also noted: ‘Trans persons are particularly vulnerable to human rights violations when their name and sex details in official documents do not match their gender identity or expression.’²

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

1.1.9 This Issues Paper looks at two key issues that, if resolved, could significantly improve the lives of intersex, trans and gender diverse Tasmanians:

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

1.1.10 The Issues Paper examines the current legal framework for each of these issues and what reforms are needed to ensure that Tasmanian laws comply with relevant human rights obligations.

1.1.11 Tasmania has a community of trans and gender diverse people. It has a community of intersex people. In preparing this Issues Paper the Institute is keenly aware that it is those communities who will be most affected by any legislative changes. Their rights to equality before the law and dignified treatment have been given the highest priority in the approach taken in this Issues Paper.

1.2 Background to the reference

1.2.1 In late 2018, the Attorney-General requested the advice of the Institute regarding the following issues:

- What, if any, reforms should be made in relation to the definitions or use of terms relating to sex and/or gender in Tasmanian legislation;
- What steps should be required to register a change of sex or intersex status on official documents;
- What categories of sex/gender should be displayed on birth certificates and other documents; and
- What, if any, reforms should be made in relation to consent to medical treatment to alter a person’s sex or gender.

Relation to Sexual Orientation and Gender Identity (March 2007) <<http://yogyakartaprinciples.org/>> (‘Yogyakarta Principles’). Australian representatives are signatories to the *Yogyakarta Principles*.

² Victor Madrigal-Borloz, *Report of the Independent Expert on Protection Against Violence and Discrimination Based on Sexual Orientation and Gender Identity*, UN Doc A/HRC/38/43 (11 May 2018) 10.

1.2.2 The request was made in the context of proposed amendments to the *Births, Deaths and Marriages Registration Act 1999* (Tas) (*‘BDM Act’*) seeking to address those issues.

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

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

1.2.4 These changes are explained in greater detail in Part 2 of the Issues Paper.

1.2.5 The *JRL Act* was intended to make it easier for Tasmanians to gain official documentation that reflects their lived gender identity. The stated aim of those changes was to reduce the discrimination and trauma experienced by intersex and gender diverse Tasmanians whose identification documents do not correctly record their gender.³

Scope of review

1.2.6 This Issues Paper has been informed by the passage of *JRL Act*.

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

³ See, for example, Tasmania, *Parliamentary Debates*, Legislative Council, 21 March 2019 (Ruth Forrest); Tasmania, *Parliamentary Debates*, House of Assembly, 10 April 2019 (Ella Haddad); Tasmania, *Parliamentary Debates*, House of Assembly, 10 April 2019 (Cassy O’Connor).

1.2.8 The Institute understands that these amendments, and their rationale and implications, may not have been clearly communicated to the Tasmanian community. Part 2 of this Issues Paper provides a detailed explanation of the changes and how they have come about.

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

1.2.10 Instead, Part 2 of the Issues Paper is confined to examining how the *JRL Act* will operate and any consequential issues that may arise. During debate on the *JRL Act*, a number of concerns were raised regarding potential implications for the operation of existing laws. Those concerns included:

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

Part 2 will consider these concerns and any further reforms required to address them.

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

1.2.12 The key reform issue identified in the Terms of Reference that has not been addressed by the *JRL Act* relates to consent to medical treatment to alter a person's sex or gender. Part 3 examines the operation of current laws relating to medical treatment, particularly on children with intersex variations of sex characteristics, having regard to relevant human rights obligations. Part 3 also discusses opportunities for reform to protect the dignity, bodily integrity and autonomy of transgender and intersex people.

1.3 Terminology

1.3.1 The Institute acknowledges that challenges affecting the intersex, trans and gender diverse communities are highly personal. There is no universal experience on which we can draw, and we understand that the knowledge of and language describing sex and gender evolves over time. The Institute also acknowledges that different people may ascribe different meanings to the terminology

used in this Issues Paper. Further, the Institute acknowledges that much of the terminology surrounding sex and gender is used colloquially. In particular, the terms ‘sex’ and ‘gender’ are often conflated.

1.3.2 Accordingly, the Institute seeks to be inclusive and intentional in the language used in this Issues Paper. Our use of the relevant terms is also intended to be specific and consistent. The Institute’s adopted terminology is informed by a variety of sources: the Australian Government Guidelines on the Recognition of Sex and Gender,⁴ the Australian Human Rights Commission report, *Resilient Individuals*,⁵ the *Yogyakarta Principles*, the *Darlington Statement*, and the *Malta Declaration*.⁶

1.3.3 To this end, the Institute acknowledges the distinction between the terms ‘sex’ and ‘gender’ (explained below). It also recognises that the matters explored in this Issues Paper may affect the intersex, trans and gender diverse communities in different ways, given that there is no universal experience for individuals in these communities. Many issues relating to sex characteristics and gender identity will not affect intersex people in the same way that they affect transgender people, and vice versa. The Institute’s use of language is intended to reflect that.

1.3.4 Some key terminology is set out below:

Gender

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

Gender expression

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

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

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

⁴ Attorney-General’s Department (Cth), *Australian Government Guidelines on the Recognition of Sex and Gender* (2013) <<https://www.ag.gov.au/RightsAndProtections/HumanRights/Pages/Australian-Government-Guidelines-on-the-Recognition-of-Sex-and-Gender.aspx>>.

⁵ Australian Human Rights Commission, *Resilient Individuals: Sexual Orientation, Gender Identity & Intersex Rights: National Consultation Report* (2015) <<https://www.humanrights.gov.au/our-work/lgbti/publications/resilient-individuals-sexual-orientation-gender-identity-intersex>>.

⁶ *Yogyakarta Principles* (n 1); Intersex Human Rights Australia, *Joint consensus statement by Australian and Aotearoa/New Zealand intersex organisations and independent advocates* (March 2017) <<https://ihra.org.au/darlington-statement/>> (*‘Darlington Statement’*); Organisation Intersex International Europe, *Public Statement of the Third International Intersex Forum*, (December 2013) <<https://oiieurope.org/public-statement-by-the-third-international-intersex-forum/>> (*‘Malta Declaration’*).

Gender identity

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

Intersex person

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

Sex or sex characteristics

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

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

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

Trans and gender diverse

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

Part 2

Legal Recognition of Sex and Gender

2.1 Tasmania's current legal framework

2.1.1 The complicated history of the *JRL Act* resulted in a degree of confusion in the Tasmanian community regarding what changes had been introduced by the Act. To provide a clearer understanding of these changes, this section outlines provisions under both the existing *BDM Act* and amendments to that Act in relation to:

- Definitions of sex and gender;
- Registering sex, or a change of sex or gender;
- Sex and gender information on official documentation.

2.1.2 Table 2 (see [2.1.163]) illustrates the changes made by the *JRL Act*. The changes will commence on a date to be proclaimed, but no later than 5 September 2019.⁷

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

2.1.4 Appendix 2 provides an overview of the outcomes of reviews in other Australian jurisdictions. Relevant outcomes are also discussed below.

Definitions of sex and gender

2.1.5 Colloquially, sex and gender are often conflated. The terms are often used interchangeably by people and in legislation.

2.1.6 However, the Australian Government Guidelines on the Recognition of Sex and Gender⁸ acknowledge a distinction between sex and gender. Australian legislation and case law⁹ generally

⁷ Section 2(2) of the *JRL Act* provides that Part 4 (amendments to the *BDM Act*) will commence no later than 120 days from the date on which the *JRL Act* receives Royal Assent. The *JRL Act* received Royal Assent on 8 May 2019.

⁸ Attorney-General's Department (Cth) (n 4).

⁹ See Appendix 1 of this Issues Paper for summaries of relevant case law.

accepts that while sex is informed by biology, gender is a social identity — a combination of an individual’s deeply held feelings and the way in which they are perceived by society.

Sex

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

2.1.8 In some ways, this idea of the male-female binary is intuitive.

2.1.9 However, the World Health Organisation (‘WHO’) presents a more complicated picture of the genetic components of sex. The most common markers are referred to as 46XX and 46XY, but other configurations of sex chromosomes, or allosomes, are known. They include people born with only a single sex chromosome (45X or 45Y). They also include people born with three sex chromosomes (such as 47XXX, 47XXY or 47XYY). These configurations are referred to as sex monosomies and sex polysomes respectively.

2.1.10 The WHO also notes that some people are born with 46XX chromosomes who have the appearance, including the external genitalia, of the average person with 46XY chromosomes, a condition referred to as XX male syndrome. The opposite is also known.

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

2.1.12 This information provides only a limited description of the known genetic variation in humans. When accounting for the full range of factors that determine sex, including chromosomal patterns, genital anatomy, internal reproductive organs and hormone patterns, accurate differentiation is incredibly complex.

2.1.13 This complexity was recognised by the High Court in *Re Norrie*, which upheld a person’s right to register their sex as ‘not specified’.¹⁰

Gender

2.1.14 As with sex, there has been a traditional view that gender is a binary between male and female. However, the law increasingly recognises sexuality and gender diversity as existing across a broad spectrum, rather than in distinct, discrete categories.

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

¹⁰ *NSW Registrar of Births, Deaths and Marriages v Norrie* (2013) NSWCA 145, see summary in Appendix 1.

2.1.16 Strictly binary views of gender are inconsistent with the approach to gender adopted at the Commonwealth level and in other Australian jurisdictions.

Legislative definitions

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

2.1.18 In contrast, the *JRL Act* introduced new definitions to clarify the distinction between sex and gender. Changes to the *BDM Act* introduced by the *JRL Act* explicitly require a child’s sex to be registered at birth as either male or female (see [2.1.31]–[2.1.90] below). Additional time is allowed for registration of a child where ‘variations of sex characteristics do not allow for an easy assignment of sex’.

2.1.19 The amendments to the *BDM Act* following commencement of Part 4 of the *JRL Act* will define ‘**sex characteristics**’ as ‘a person’s physical, hormonal or genetic features relating to sex, including genitalia and other sexual and reproductive anatomy, chromosomes, genes, hormones, and secondary sexual characteristics.’

2.1.20 A person’s ‘**registered sex**’ means the sex that is registered at birth, or the sex registered under the *BDM Act* before the *JRL Act* took effect.¹¹ If a change of gender is later registered, any previously registered sex ceases to apply to that person (s 28C(7) – see Figure 1 for examples of how these distinctions will operate in practice).

2.1.21 The *BDM Act* as amended by the *JRL Act* provides that ‘**gender**’ includes:

- (a) male; or
- (b) female;
- (c) indeterminate gender; or
- (d) non-binary; or
- (e) a word, or a phrase, that is used to indicate a person’s perception of the person’s self as being neither entirely male nor entirely female and that is prescribed; or
- (f) a word, or a phrase, that is used to indicate a person’s perception of the person’s self as being neither entirely male nor entirely female.

2.1.22 ‘**[R]egistered gender**’ means the gender registered for a person. The process for a person to register their gender, or change their registered gender, is discussed below (see [2.1.48]–[2.1.54]).

¹¹ This refers to a change of sex registered prior to amendments to the *BDM Act*. Following commencement of the amendments, any change of gender will be recorded by a change in registered gender, rather than a change of sex.

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

2.1.24 Intersex status has been recognised in the *Anti-Discrimination Act 1998* (Tas). ‘Intersex’ was previously defined as:

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

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

2.1.25 The *JRL Act* removed this definition, and inserted new definitions:

- ‘[G]ender expression’ means any personal physical expression, appearance (whether by way of medical intervention or not), speech, mannerisms, behavioural patterns, names and personal references that manifest or express gender or gender identity.
- ‘[G]ender identity’ means the gender-related identity, appearance or mannerisms or other gender-related characteristics of an individual including gender expression (whether by way of medical intervention or not), with or without regard to the individual’s designated sex at birth, and may include being transgender or transsexual.
- ‘[S]ex characteristics’ means a person’s physical, hormonal or genetic features relating to sex, including genitalia and other sexual and reproductive anatomy, chromosomes, genes, hormones, and secondary sex characteristics.

2.1.26 Offences relating to discrimination and inciting hatred will apply to actions directed at people on the basis of their gender identity or having intersex variations of sex characteristics. The impact of these amendments is discussed in more detail at [2.1.152]–[2.1.158] below.

2.1.27 The removal of the explicit definition of ‘intersex’ is consistent with international statements, such as the *Malta Declaration*,¹² seeking a more holistic approach that recognises intersex variations to sex characteristics along a non-binary spectrum.

Institute’s preliminary view

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

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

¹² *Malta Declaration* (n 6).

2.1.30 The Institute nevertheless welcomes feedback on this matter.

Registering a change of sex or gender

2.1.31 As discussed in Part 1, contradiction between people's gender identity and the sex or gender that is recorded on their official identification documents can be distressing for the people affected. The *JRL Act* has made changes to the *BDM Act* in relation to the requirements relating to registration of sex at birth and the process for any subsequent changes of registered gender.

Notification and registration of birth

2.1.32 Under s 11 of the *BDM Act*, a responsible person¹³ must provide notice of any live birth in Tasmania to the Registrar of Births, Deaths and Marriages (the 'Registrar') within 21 days of the birth. This requirement has not been changed by the *JRL Act*.

2.1.33 Section 15 of the *BDM Act* requires a child's parents¹⁴ to lodge a birth registration statement¹⁵ with the Registrar within 60 days of the birth, or 120 days where a child's variations of sex characteristics make it difficult to assign a sex.

2.1.34 Previously, the *BDM Act* did not explicitly restrict the categories of sex that could be registered at birth. However, the approved birth registration statement has only included 'Male' and 'Female' options. The amended *BDM Act* now explicitly restricts the registration options to male and female.

2.1.35 The *JRL Act* does not make provision for intersex status to be registered at birth. As discussed in Part 1, some children born with intersex variations of sex characteristics may not be readily able to be characterised within binary sex options. While the *JRL Act* allows additional time for registering intersex children, ultimately parents of intersex children must determine whether to register their children as male or female (s 16(3)). No change of sex can be made other than to 'correct an error' made at the time of registering the birth (s 16(4)).

¹³ *BDM Act* s 11(6): "Responsible person" means –

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

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

¹⁵ Information about the registration process is available at <<https://www.justice.tas.gov.au/bdm/howtoregister>>. From 30 April 2019, an online registration process will be available.

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

2.1.37 For example, in the ACT the approved Birth Registration Statement under the *Births, Deaths and Marriages Registration Act 1997* (ACT)¹⁶ allows parents to select from:

- Male
- Female
- Unspecified
- Indeterminate
- Intersex

2.1.38 The South Australian Law Reform Institute ('SALRI') recommended that an 'Unspecified' classification be added to the Birth Registration Form in South Australia,¹⁷ however, that recommendation is yet to be implemented. Several other Australian jurisdictions have adopted, or recommended, a practice of allowing sex to be recorded at birth in a non-binary category, such as Intersex, Indeterminate,¹⁸ or Unspecified.¹⁹

2.1.39 The availability of additional categories can relieve pressure on parents of intersex children to determine their child's sex within the registration timeframe. It also reflects the reality that a wide variety of sex characteristics exist that can defy binary categorisation. However, some intersex advocates have argued that the emphasis on a third category of sex further alienates intersex people as 'other'.²⁰ In *R v Harris and McGuinness*, Justice Mathews also questioned the value of a third category:

I can see no place in the law for a third sex. Such a concept is a novel one, which could cause insuperable difficulties in the application of existing legal principles. It would also relegate transsexuals to a legal 'no man's land'. This I think, could only operate to their considerable detriment.²¹

¹⁶ Regulation 5(1)(b) of the *Births, Deaths and Marriages Registration Regulations 1998* (ACT) requires registration of a child's sex 'if determinable'.

¹⁷ SALRI, *Legal Recognition of Sex and Gender* (Report, February 2016) 9 ('SALRI Report').

¹⁸ The *NSW Birth Registration Statement* (Registry of Births Deaths and Marriages, NSW) allows sex to be registered as male, female, intersex or indeterminate. The Law Reform Commission of Western Australia ('WALRC') has recommended inclusion of 'Indeterminate' as a category on the Birth Registration Statement.

¹⁹ South Australia and the Northern Territory allow sex to be recorded as 'Unspecified'.

²⁰ For example, the *Darlington Statement* discusses the impact of 'undue emphasis' on classification of intersex people (whether as 'X' or a third/unspecified gender), noting: 'The larger goal is not to seek new classifications but to end legal classification systems and the hierarchies that lie behind them': *Darlington Statement* (n 6) 3.

²¹ *R v Harris and McGuinness* (1988) 17 NSWLR 158, 194.

2.1.40 While the *JRL Act* does not introduce a third category of ‘sex’, it allows a broad range of options to describe a person’s ‘gender’ and removes any requirement for either sex or gender information to be included in a person’s birth certificate (see [2.1.91]–[2.1.97]).

Change of sex or gender

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

2.1.42 An application from an adult could only be accepted where the person was unmarried²² and had undergone sexual reassignment surgery (verified by two medical practitioners: *BDM Act* s 28B).²³

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

2.1.44 The parents²⁴ of a child born in Tasmania could also apply to register a change in their child’s sex (*BDM Act* s 28A(2)). Applications in relation to children were also subject to the requirement to provide statutory declarations confirming that sexual reassignment surgery had been performed (s 28B).

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

2.1.46 Significantly, the changes made by the *JRL Act* will mean that it is no longer necessary for an applicant to have undergone, or provide any evidence of having undergone, sexual reassignment surgery.²⁵

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

²² This requirement reflected that marriage between persons of the same sex was not lawful until 2017. Section 28C(3) also prohibits the Registrar from recording a change of sex where a person is married.

²³ ‘Sexual reassignment surgery’ is defined in s 3 of the *BDM Act* as a surgical procedure involving the alteration of a person’s reproductive organs, whether for the purpose of assisting a person to match their gender identity or to correct or eliminate ambiguities relating to a person’s sex. The Registrar may also request further information or undertake further inquiries to be satisfied that the applicant has undergone the necessary surgery (ss 28B(b), 28C(2)).

²⁴ Unless there is only one parent named in the birth registration for the child, or only one surviving parent, both parents must consent to the application (*BDM Act* s 28A(3)).

²⁵ *BDM Act* (as amended) s 28A. The definition of ‘sexual reassignment surgery’ is removed from the *BDM Act* (*JRL Act* s 13).

Procedure for registering a change of gender

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

- a gender declaration²⁶ made by the applicant; and
- any other document or information that the Registrar reasonably requires. However, the Registrar cannot require a medical certificate or other medical document in relation to the sex, sex characteristics or gender of the applicant (*BDM Act* s 28A(2)).

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

- if the minor can make a declaration,²⁷ a gender declaration; or
- if the minor cannot make a declaration but is able to express their 'will and preference', a statement from the parent/s or guardian that they believe on reasonable grounds that the proposed registration of gender is consistent with the child's will and preference;
- any other document or information that the Registrar reasonably requires. However, the Registrar cannot require a medical certificate or other medical document in relation to the sex, sex characteristics or gender of the child (*BDM Act* s 28A(2)).

2.1.50 In general, the consent of both the child's parents is required. However, an application can be accepted from only one parent or guardian if there is only one parent named in the child's birth registration or only one surviving parent, where the guardian is a sole guardian, or where a magistrate²⁸ has approved the making of the application (*BDM Act* s 28A(4)).

Registering gender

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

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

²⁶ A gender declaration is defined as 'a statutory declaration in which the declarant declares that the declarant identifies as being of the gender specified in the declaration and lives, or seeks to live, as a person of that gender' (*BDM Act* (as amended) s 3).

²⁷ Neither the *BDM Act* nor the *Oaths Act 2001* (Tas) is explicit about when a minor can make a declaration. The *Gillick* competence test may apply (see Appendix 1).

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

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

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

Figure 1:

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

Removal of requirement for surgery

2.1.55 In 2016, Transgender Europe published *Human Rights and Gender Identity: Best Practice Catalogue*.²⁹ One of the key recommendations for best practice was to '[a]bolish sterilisation and other compulsory medical treatment as a necessary legal requirement for recognition of a person's gender identity in laws regulating the process for name and sex change.'³⁰ The authors state that provisions for compulsory reassignment surgery:

unjustifiably link a legal procedure (gender recognition) with medical procedures (sterilisation and gender reassignment surgery). Such a link clearly violates trans people's right to physical integrity and their right to form and found a family.

²⁹ Ulrika Westerlund and Richard Köhler, *Human Rights and Gender Identity: Best Practice Catalogue* (2nd rev version, December 2016) <https://tgeu.org/wp-content/uploads/2017/02/2.11-TGEU_BestPracticeCatalogue.pdf>.

³⁰ Ibid 33 Recommendation 4.

Compulsory medical procedures run counter to trans people's right to self-determination with regard to medical interventions, and often leave them with the dreadful choice between their continued ability to procreate on the one hand, and their rectified official papers reflecting their identity on the other.³¹

2.1.56 The Institute acknowledges that the requirement for surgery has been a significant barrier for Tasmanians seeking to register a change of sex under the former *BDM Act*.

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

2.1.58 The *Yogyakarta Principles*,³² and the supplementary *Yogyakarta Principles Plus 10*,³³ reflect international best practice in relation to human rights and gender identity. The Principles highlight the discriminatory impact of requiring surgery and recommend excluding any requirement that a person undergo medical procedures, including sex reassignment surgery, sterilisation or hormonal therapy, as a requirement for legal recognition of their gender identity.

2.1.59 Until *AB v Western Australia; AH v Western Australia*,³⁴ Australian case law regarding recognition of sex and gender (see Appendix 1) had maintained that some degree of medical or surgical intervention was required before a person could register a change of the sex assigned to them at birth. In large part, these decisions reflected the restrictive language of the legislation that they were considering.

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

2.1.61 Justice Lockhart recognised that a person's sex was not merely a matter of chromosomes but was also a psychological and social question.³⁵ Black CJ recognised that maintaining surgery as a prerequisite for change of sex would effectively prevent those for whom the financial cost or health risks associated with surgery were too great from achieving legal recognition of their deeply-held gender identity.³⁶ However, both Black CJ and Lockhart J ultimately held that the Court could

³¹ Ibid.

³² See *Yogyakarta Principles* (n 1).

³³ International Service for Human Rights and ARC International, 'The Yogyakarta Principles Plus 10: Additional Principles and State Obligations on the Application of International Human Rights Law in Relation to Sexual Orientation, Gender Identity, Gender Expression and Sex Characteristics to Complement the Yogyakarta Principles' (November 2017) <<http://yogyakartaprinciples.org/>> ('*Yogyakarta Principles Plus 10*'). Australian representatives are signatories to the *Yogyakarta Principles Plus 10*.

³⁴ *AB v Western Australia; AH v Western Australia* (2011) 244 CLR 390 ('*AB v Western Australia*').

³⁵ *Secretary, Department of Social Security v SRA* (1993) 43 FCR 299, 325 ('*SRA*').

³⁶ Ibid 305 (Black CJ).

not extend the ordinary meaning of ‘woman’ to include someone who has not undergone reassignment surgery.³⁷ Lockhart J noted that such a result could only be achieved by Parliament through legislative amendments.

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

The requirement of surgery seems to me to be a cruel and unnecessary restriction upon a person’s right to be legally recognised in a sex which reflects the chosen gender identity and would appear to have little justification on grounds of principle.³⁸

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

The question whether a person is identified as male or female, by reference to the person’s physical characteristics, is intended by the Act to be largely one of social recognition.³⁹

2.1.64 The Court was satisfied that hormone therapy could alter gender characteristics sufficiently to allow a person to be identified as the opposite sex. Once that degree of alteration has occurred, no further consideration of the ‘extent of the person’s bodily state’ is required and the Board must consider the person’s self-identity and social perceptions about them.⁴⁰

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

2.1.66 All other Australian jurisdictions currently require evidence of some clinical, medical or surgical treatment before a change of sex or gender can be registered. South Australia, the Northern Territory and the ACT require ‘appropriate clinical treatment’ only,⁴¹ while other jurisdictions require evidence that the applicant has undertaken sex reassignment surgery.⁴²

2.1.67 However, the Western Australian Law Reform Commission (‘WALRC’) has recently concluded a review of the State’s legislation in relation to change of sex and gender (the laws which were the subject of consideration in *AB v Western Australia*).⁴³ The Commission stated:

³⁷ Ibid 303 (Black CJ), 326–327 (Lockhart J).

³⁸ *Re Alex* (2004) 180 FLR 89, 131 (Nicholson CJ).

³⁹ *AB v Western Australia* (n 34) 405 (French CJ, Gummow, Hayne, Kiefel and Bell JJ).

⁴⁰ Ibid 406.

⁴¹ *Births, Deaths and Marriages Registration Act 1997* (SA) s 29L; *Births, Deaths and Marriages Registration Act 1997* (ACT) s 25; *Birth, Deaths and Marriages Registration Act 1996* (NT) s 28C.

⁴² *Births, Deaths and Marriages Registration Act 1995* (NSW) s 32C; *Births, Deaths and Marriages Registration Act 2003* (Qld) s 24; *Birth, Deaths and Marriages Registration Act 1996* (Vic) s 30B; *Gender Reassignment Act 2000* (WA).

⁴³ WALRC, *Review of Western Australian Legislation in Relation to the Registration or Change of a Person’s Sex and/or Gender and Status Relating to Sex Characteristics* (Final Report, Project 108, 2018) (‘WALRC Report’). See Appendix 2 for an overview of the WALRC Report.

While the Commission accepts that some changes in sex characteristics (such as external physical appearance) may assist society to recognise someone's gender, logically this is neither a necessary nor sufficient condition for legal recognition of that person's gender.⁴⁴

2.1.68 The Commission recommended that Western Australia adopt a self-determination model, where a statutory declaration affirming the applicant's gender identity is sufficient evidence for the Registrar to register a change of gender.⁴⁵ SALRI has previously made a similar recommendation.⁴⁶

2.1.69 The self-determination model preferred by the Commission is consistent with the approach adopted by the *JRL Act*. This approach is also consistent with human rights best practice outlined in the *Yogyakarta Principles*, and the approaches in a number of international jurisdictions, including Argentina, Canada, Denmark, Ireland, California, Norway and Pakistan.⁴⁷

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

2.1.71 Some potential implications of the removal of the surgery requirement on the operation of other laws applying to persons of a particular sex or gender are discussed in section 2.2 below. These include search powers, reproductive health provisions and access to gender-specific spaces and programmes.

Registering a change of name

2.1.72 In many instances, a person will also apply to change their name when applying to register a change of gender.

2.1.73 The *JRL Act* allows any person aged at least 16 to apply to the Registrar to change their own registered name.

2.1.74 Where a child is under 16, parents may apply to the Registrar at any time to request a change of name (*BDM Act* s 24). However, a child over 12 years of age must consent to the change (s 25). Where only one parent has made the application, approval from a Magistrate is required. The magistrate must be satisfied that the change 'is consistent with the child's will and preferences'. This replaces the previous test of whether the change was 'in the best interests of the child'.⁴⁸

⁴⁴ Ibid 39.

⁴⁵ Ibid 66–67.

⁴⁶ SALRI Report (n 17) 42–43.

⁴⁷ The laws applying in these, and other, jurisdictions relating to self-identification of gender are discussed in Part 6.3 and Appendix 5 of the WALRC Report (n 43).

⁴⁸ Section 24(3) of the former *BDM Act*.

2.1.75 A person applying for a birth certificate after changing their name can request that the birth certificate include a notation detailing any previous name, or request that no such details be included. The Registrar is to comply with the request (ss 46(8)–(10)).

Consent to change of gender for minors

2.1.76 Under the amended *BDM Act*, any person born in Tasmania who is at least 16 years old may apply to the Registrar to register a change of gender. The parents or guardians of a child born in Tasmania can also apply to register a change of their child's gender,⁴⁹ and must satisfy the Registrar that the application reflects the 'will and preference' of the child.

2.1.77 Sex reassignment surgery is no longer required to register a change of gender. However, some minors may still elect to undergo medical procedures, ranging from puberty blocking treatment (Stage 1 treatment), hormonal treatment (Stage 2), to surgical intervention (Stage 3). Part 3 of the Issues Paper discusses consent requirements in relation to these treatments.

2.1.78 South Australia is the only other Australian jurisdiction to allow a person under 18 to make an application to register a change of sex or gender identity.⁵⁰ Section 28J of the *Births, Deaths and Marriages Act 1996* (SA) allows any child to make an application to the Court for approval to apply for a change of sex or gender.

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

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

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

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

- the child has attained a sufficient degree of maturity to make the decision to apply for gender recognition; and

⁴⁹ In general, the consent of both parents is required. However, an application can be accepted from only one parent or guardian in some circumstances (s 28A(4)).

⁵⁰ Section 6 of the *Consent to Medical Treatment and Palliative Care 1995* (SA) also provides for any person 16 or over to validly made decisions about medical treatment – see [3.4.20]–[3.4.22].

- the child is aware of, has considered and fully understands the consequences of that decision; and
- the child’s decision is freely and independently made without duress or undue influence from another person; and
- the child has transitioned or is transitioning into his or her preferred gender.

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

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

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

Discussion among the group focused on the role a third party may have in supporting the family. It was agreed that this would not be a decision-making role with a veto over the application process. Rather, the role would be to act as a support to assist conversation within the family, and to ensure that the voice of the child has been heard and the best interest of the child has been taken into account.⁵¹

2.1.82 Under the amended *BDM Act*, the Registrar (or, for a contested application, a Magistrate) can require evidence that a minor (including a person over 16) has received counselling regarding the consequences of registering a change of gender (s 28C). This will assist the Registrar to be satisfied that the child is sufficiently capable of understanding the proposed change of gender and its consequences, and of expressing their ‘will and preference’ in relation to the application.

2.1.83 The Act does not define or provide examples of who would be considered suitable to provide counselling. Many children, young people and their parents and guardians access support services for information, advice and counselling in relation to decisions about sex and gender. The applicant can submit evidence of counselling from someone they consider to be qualified and experienced to advise them on the consequences of their application (s 28C). If the Registrar is not satisfied that the applicant has received adequate support, the Registrar may also request that the child who is the subject of the application undertake counselling with a person that the Registrar considers has appropriate qualifications and experience. Wherever possible, the counsellor is to be agreed between the Registrar and the applicant, having regard to the circumstances of the child.

Institute’s preliminary view

2.1.84 The Institute was asked to consider ‘[w]hat steps should be required to register a change of sex or intersex status on official documents.’

⁵¹ Department of Employment Affairs and Social Protection (Ireland), *Review of the Gender Recognition Act 2015: Report to the Minister for Employment Affairs and Social Protection* (June 2018) 82–83 <<https://www.welfare.ie/en/pressoffice/Pages/pr180718.aspx>>.

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

2.1.86 Further, the broad classification of ‘gender’ included in the *BDM Act* is consistent with contemporary understandings of gender diversity.

2.1.87 Removing surgery as a pre-requisite to a change of sex or gender will relieve undue pressure on transgender and intersex Tasmanians to undergo costly and risky surgical intervention before achieving formal recognition of their gender identity.

2.1.88 The Institute considers that the practical effects of changes to the *BDM Act* will be to reduce the discrimination and trauma experienced by intersex and gender diverse Tasmanians. The incidental consequences of those changes, discussed in section 2.2, can be addressed through a series of minor amendments to affected legislation.

2.1.89 It is the preliminary view of the Institute that the *JRL Act*, as enacted, meets its legislative objectives. The consequential amendments outlined in section 2.2 below and in Appendix 3 can improve the operation of legislative changes to the *BDM Act*.

2.1.90 The Institute nevertheless welcomes feedback on this matter.

Sex and gender information on official documentation

2.1.91 A birth certificate is often considered to be a ‘cardinal’ identification document that will definitively establish attributes of a person’s identity, such as age. The particulars recorded on a birth certificate can assist in collectively establishing a person’s identity. There are many examples of applications that call for proof of identity, including applications for government assistance, a Medicare card, a tax file number or a driver’s licence.

2.1.92 One of the key concerns raised by members of the public in relation to the *JRL Act* relates to the removal of sex and gender information from birth certificates.

2.1.93 The Registrar may issue a birth certificate for any person born in Tasmania.

2.1.94 Prior to the *JRL Act*, any birth certificate issued would include details of the registered sex of the person to whom it relates. Where a change of sex was registered, any subsequent birth certificate was required to state the person’s registered sex but also include a notation that the person was previously ‘registered as of the other sex’ (s 28D).⁵²

2.1.95 Following changes to the *BDM Act*, any birth certificate issued may only include details of the sex or gender of the person to whom the certificate applies if that person or, if under 16, their

⁵² On request from the applicant, the Registrar could issue an extract from the Register that does not include that notation (s 28D(2)).

parents, requests that those details be included (s 46(3)). This ‘opt-in’ approach means that the default position will be that a birth certificate does not include sex or gender details, unless the person applying for the birth certificate requests otherwise.

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

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

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

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

Opt-out approach

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

2.1.100 A key risk with the opt-out approach is that those who elect not to include sex will be stigmatised, with the decision not to include that information being treated as confirmation that the person is ‘other’.⁵³

No sex or gender record

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

2.1.102 This approach is supported by Principle 31A of the *Yogyakarta Principles Plus 10*, which recommends that states take action to:

[e]nsure that official identity documents only include personal information that is relevant, reasonable and necessary as required by the law for a legitimate purpose, and thereby end the registration of the sex and gender of the person in identity documents

⁵³ WALRC Report (n 43) 74.

such as birth certificates, identification cards, passports and driver licences, and as part of their legal personality.

2.1.103 As discussed in Part 1, the United Nations Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity has queried the need for identity documents like birth certificates to include gender information.⁵⁴ He considered that including ‘gender’ as a marker on birth certificates could stigmatise those who ‘fall outside the normative expectations of gender’. If gender was not a category in identification documents, harassment where registered sex or gender and gender identity were in conflict would not arise.

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

The larger goal is not to seek new classifications but to end legal classification systems and the hierarchies that lie behind them.⁵⁵

2.1.105 Malta is one jurisdiction that does not require a child’s sex to be recorded at birth, though sex must be registered by the time the child is 18.⁵⁶ A birth certificate issued in Malta will not include details of a person’s sex or gender. In Sweden, sex is required to be registered at birth but is not included in the categories of information to be included on a Population Register extract (akin to a birth certificate).

2.1.106 While birth certificates issued in Western Australian currently require sex and gender markers to be included, the WALRC has recently recommended amendments to remove sex from birth certificates. The Commission considered such a reform would avoid conflation of ‘sex’ and ‘gender’, relieve pressure on parents of intersex children and reduce stigmatisation.⁵⁷

2.1.107 The Institute recognises that the *JRL Act* has adopted an ‘opt-in’ approach. This avoids some of the potential risks of stigma associated with an ‘opt-out’ approach. Given the strong public response to suggestions, albeit unfounded, that birth certificates could no longer include sex and gender information, this may be more politically expedient than the approach advocated in Western Australia.

2.1.108 The Institute welcomes feedback on this matter.

Implications for issuing of passports

⁵⁴ Victor Madrigal-Borloz, *Protection against violence and discrimination based on sexual orientation and gender identity*, UN Doc A/73/152 (12 July 2018) 12.

⁵⁵ *Darlington Statement* (n 6) clause 8.

⁵⁶ *Gender Identity, Gender Expression and Sex Characteristics Act 2015* (Malta) art 7(4); *Civil Code* (Malta) art 278(c).

⁵⁷ WALRC Report (n 43) 59–62.

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

2.1.110 Section 8 of the *Australian Passports Act 2005* provides that, before issuing an Australian passport to a person, the Minister must be satisfied of the identity of the person. For the purposes of reaching the requisite level of satisfaction, the Minister may request an applicant for a passport to disclose personal information to the Minister.⁵⁸

2.1.111 In establishing the identity of a passport applicant, the Department of Foreign Affairs and Trade (‘DFAT’) ‘relies on the verified details contained in source identity documents, such as a birth certificate issued by an Australian Registry of Births, Deaths and Marriages (RBDM).’⁵⁹

2.1.112 DFAT has advised the Institute that Australian passports comply with the standards set by the International Civil Aviation Organisation:⁶⁰

The International Civil Aviation Organization (ICAO) sets worldwide standards for passports. As specified in ICAO Document 9303: Machine Readable Travel Documents, Seventh Edition, Part 4, ‘Specifications for Machine Readable Passports’,⁶¹ a sex field is mandatory in the Visual Inspection Zone (personal details page) of all machine-readable travel documents.

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

2.1.114 The Passports Policy Office states:

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

2.1.115 To establish an applicant’s identity, DFAT considers it ‘essential that documentary evidence of a person’s sex/gender is submitted and verified for all people applying for their first Australian passport.’⁶² For applicants seeking a passport identifying them by a gender that differs from the gender recorded in their birth certificate, DFAT currently accepts:

- a gender recognition certificate issued by the Gender Reassignment Board (WA); or
- a revised birth certificate showing the new sex issued by the Registry of Births, Deaths and Marriages; or

⁵⁸ *Australian Passports Act 2005* (Cth) s 42(1).

⁵⁹ *Ibid* s 43. Correspondence from DFAT to the Institute.

⁶⁰ Correspondence from DFAT to the Institute.

⁶¹ Correspondence from DFAT to the Institute.

⁶² Correspondence from DFAT to the Institute.

- a ‘recognised details certificate’, issued by a Registry of Births, Deaths and Marriages, which records new sex and current name; or
- a written statement completed by a medical practitioner or registered psychologist certifying that the person is
 - receiving, or has received, appropriate clinical treatment for transition to the gender identified in the passport application; or
 - unable to participate in a treatment regime, is transgender, and identifies as the gender identified in the passport application.⁶³

2.1.116 The Australian Passport Office website makes clear that ‘surgery is not a prerequisite for a passport to be issued in [the applicant’s] preferred sex’.⁶⁴ The Passports Policy Office also advised that DFAT does not require any details of clinical treatment to be provided.

2.1.117 For applicants seeking a passport identifying them as X gender, DFAT requires a written statement completed by a medical practitioner or registered psychologist certifying that the person is intersex, of indeterminate or unspecified sex. This statement can be made in any format, including by completing DFAT’s standardised pro forma (B-14).

2.1.118 DFAT advice to the Institute is that amendments introduced by the *JRL Act* will impose an additional documentary requirement on Tasmanian passport applicants whose birth certificate does not record gender. However, they confirmed:

The option to present a B-14 statement would continue to be available to [sex and gender diverse] applicants whose birth certificate showed no sex/gender marker.

2.1.119 Further, any person remains entitled to request that a birth certificate be issued that does include sex or gender information (*BDM Act* s 46).

2.1.120 The Australian Passport Office website also states:

Sex and gender diverse passport holders should be aware that while Australian travel documents are issued in accordance with international standards, those travelling on a passport showing ‘X’ in the sex field may encounter difficulties when crossing international borders due to their infrequent use. The Department of Foreign Affairs and Trade cannot guarantee that a passport showing ‘X’ in the sex field will be accepted for entry or transit by another country.⁶⁵

⁶³ Australian Passport Office, *Sex and Gender Diverse Passport Applicants*, (Web Page) <<https://www.passports.gov.au/passports-explained/how-apply/eligibility-citizenship-and-identity/sex-and-gender-diverse-passport>>. Rule 27(c) of the *Australia Passports Declaration 2015* provides for fees to be waived for applications for a replacement passport following a change of gender. Encouraging passport holders to update details to reflect their affirmed gender was ‘intended to protect the integrity of the Australian passports system.’

⁶⁴ Australia Passport Office (n 63).

⁶⁵ Ibid.

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

Statistical records

2.1.122 Questions have also arisen about the effect of removing the requirement for sex to be recorded on birth certificates on the integrity of statistical records.

2.1.123 National Standards for collection of population statistics rely upon information being provided to the Australian Bureau of Statistics ('ABS') on a regular basis by each state and territory's Registry of Births, Deaths, and Marriages. In its submission to SALRI's review, *LGBTIQ Discrimination in Legislation*, the ABS stated:

This administrative data, along with the ABS's 5-yearly Census of Population and Housing, are the basis of Australia's population counts, including future estimates. Biological characteristics of the population are also required to accurately determine national Cause of Death statistics used to inform Australia's death and disease prevention strategies, and funding for the health sector.⁶⁶

2.1.124 The ABS noted that the United Nation's Statistical Division's *Principles and Recommendations for a Vital Statistics System* (Revision 3, 2014) requires all births and deaths be recorded by 'sex', rather than 'Gender Identity'.⁶⁷

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

2.1.126 The Standard provides:

Determining whether to collect sex or gender information

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

In general, both sex and gender should not be collected in a single collection instrument as information gained from either of these variables is sufficient for the majority of statistical purposes. The Australian Government Guidelines on the Recognition of Sex and Gender, November 2015⁶⁸ (Attorney-General's Department), advocate the preferred Australian Government approach of collecting and using gender information, with sex only being collected where there is a legitimate need.

As a general rule, sex should only be collected if the study relies on knowing the biological characteristics of the target population. For example, the assessment and

⁶⁶ ABS, Additional Submission No 9, quoted in SALRI, *LGBTIQ Discrimination in Legislation: Legal Registration of Sex and Gender and Laws Relating to Sex and Gender Reassignment* (Report 5, 2016) 57.

⁶⁷ ABS correspondence to the Institute.

⁶⁸ Attorney-General's Department (Cth) (n 4).

treatment of some medical conditions are dependent upon knowing the biological characteristics of people.

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

The production of ABS population estimates and projections are dependent on the measurement of biological sex obtained from the Census of Population and Housing and the number of births and deaths, recorded by sex, regularly provided to the ABS by each State and Territory's Registrars of Births, Deaths, and Marriages.⁶⁹

2.1.127 Table 1 below (reproduced from the ABS Standard) sets out the classifications used by the ABS for sex and gender.

Table 1: The Sex and Gender Standard Classifications and Code Structures

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

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

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

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

⁶⁹ ABS, *Standard for Sex and Gender Variables, 2016* (Catalogue No 1200.0.55.012, 2 February 2016) <<http://www.abs.gov.au/ausstats/abs@.nsf/Lookup/1200.0.55.012main+features12016>>.

Historical records

2.1.131 Some concerns have been raised that removal of the history of a person's registered sex, gender or name will compromise police investigations by making a person whose sex has changed since a previous conviction, or information about their past convictions, more difficult to find.

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

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

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

2.1.135 The Registrar has a responsibility to 'as far as practicable, protect the persons to whom the entries in the Register relate from unjustified intrusion on their privacy' (*BDM Act* ss 43(3), 45). The Registrar is required to develop written policies about access to information contained in the Register (s 47). The current policy states:

The more sensitive the information on the records, the greater the restriction on access. Access to birth certificates is generally only allowed to the subject or their immediate family.⁷⁰

2.1.136 Previously, a child of a person who has registered a change of sex could apply for an old birth certificate showing the parent's sex before the registered change of sex (s 28E).⁷¹ Under the amended *BDM Act*, the Registrar may provide a copy of a birth certificate including details of sex and gender or previous names to a child of the person to whom the certificate relates, or to a person who is 'a member of a class of prescribed persons'. However, the Registrar may only disclose the information if satisfied that:

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

⁷⁰ Registrar of Births, Deaths and Marriages, *Births, Deaths and Marriages Access Policy* (October 2018).

⁷¹ The *BDM Act* s 28E, also allows 'prescribed persons' to apply for old birth certificates, but no other category of person has been prescribed for the purposes of that section.

Other records

2.1.137 The *Probate Rules 2017* require a deceased person's birth certificate to be provided in an application for probate in some circumstances (r 44). There is nothing to indicate that changes to the information recorded on birth certificates would have any impact on this requirement.

2.1.138 Notaries will also often require birth certificates to be provided in the course of verifying someone's identity. Where the notary is involved in verifying material for a Tasmanian seeking to comply with identification requirements in other jurisdictions, additional administrative procedures may be needed to ensure that those requirements can be satisfied.

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

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

2.1.140 In each of these examples, s 28D of the *JRL Act* would amend the requirement to require details of gender to be recorded, rather than sex. This would not compromise the data records or be inconsistent with the purposes for which the records are kept.

Question 1

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

Opportunity for fraudulent behaviour

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

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

2.1.142 The Institute considers that concerns regarding 'misuse' of the gender registration procedures are misplaced. There is no evidence to support the view that any application to register a change of gender would be entered into lightly.

2.1.143 The *JRL Act* includes the following measures to protect the veracity of the process for registering a change of gender:

- A gender declaration is a statutory declaration confirming that a person identifies as, and lives, or intends to live, as a person of the registered gender. The declaration is sworn or affirmed by the applicant. It is a crime to knowingly make a false statement in a Statutory Declaration (*Criminal Code Act 1924* s 113 ('*Criminal Code*'));
- It is an offence to make a false or misleading representation in an application under the *BDM Act* (s 54);
- It is also an offence, punishable by up to two years in prison, for a person to use a birth certificate (or extract) showing a previous sex, gender or name, with the intention to deceive (s 54(2));
- No application to register a change of gender can be made within 12 months of registering a change of gender (s 28A(7));
- Any applications made by or on behalf of a minor must be supported by evidence that the child has received counselling regarding the consequences of registering a change of gender (s 28C);
- The Registrar retains a general power to refuse to accept an application to register a change of gender.⁷²

2.1.144 The Institute notes that in South Australia, the Registrar has discretion to limit the number of applications to register a change of gender that can be received.⁷³ The current limit set restricts applications to one per year, and no more than three applications throughout a person's lifetime.⁷⁴

2.1.145 The WALRC recommended that a similar limit be adopted in Western Australia.⁷⁵ In contrast, the Northern Territory review recommended against setting a limit:

Given the seriousness and life changing nature of a person's decision to apply to change their sex or gender identity, the fact that applications must be accompanied by proof of 'appropriate clinical treatment', the fees attached to the application process, and the size of the Territory's population, the Committee considers that the limited potential for frivolous applications does not justify the [power to limit the number of applications].⁷⁶

⁷² A person whose application has been refused can apply to the Magistrates Court for review of the decision (*BDM Act* s 53).

⁷³ *Births, Deaths and Marriages Registration Act 1996* (SA) s 29S.

⁷⁴ Consumer and Business Services, South Australian Government, *Record a change of sex or gender identity – application* <https://www.sa.gov.au/__data/assets/pdf_file/0010/301213/Change-of-Gender-form-170825-1644-.pdf>. If the Registrar refuses an application, an applicant can apply to a Magistrate for approval (s 29S(3)).

⁷⁵ WALRC Report (n 43) 72–73.

⁷⁶ Social Policy Scrutiny Committee, Northern Territory Legislative Assembly, *Inquiry into the Births, Deaths and Marriages Registration and Other Legislation Amendment Bill 2018*, (November 2018) 26 <https://parliament.nt.gov.au/__data/assets/pdf_file/0018/600327/70-2018-Signed-Report-Inquiry-into-the-Births,-Deaths-and-Marriages-Registration-Amendment-Bill-2018.pdf> ('NT Report').

Question 2

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

Changes to other laws

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

Adoption Act 1988

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

2.1.148 At the time the *Adoption Act* was enacted, there was a presumption that the persons making the adoption would be husband and wife. In 2004, s 20 was amended⁷⁷ to provide that adoption orders could be made in favour of two people in a significant relationship within the meaning of the *Relationships Act 2003* (Tas). This includes couples of any gender.

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

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

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

This should allay some fears in the community about a false perception that parliament was trying to do away with motherhood and fatherhood and trying to eradicate gender.⁷⁸

Anti-Discrimination Act 1998

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

2.1.153 As outlined in [2.1.24]–[2.1.27], the *JRL Act* introduced new definitions of gender expression, gender identity and sex characteristics in the *Anti-Discrimination Act 1998*. The definition of transgender was also amended to include someone who ‘identifies themselves as a member of another gender and lives or seeks to live as a member of that gender.’

2.1.154 Under the *Anti-Discrimination Act 1998*, discrimination involves:

⁷⁷ *Relationships (Consequential Amendments) Act 2003* (Tas) sch 5.

⁷⁸ Tasmania, *Parliamentary Debates*, House of Assembly, 10 April 2019 (Cassy O’Connor).

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

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

2.1.156 Since the commencement of the *Anti-Discrimination Act 1998*, it has been an offence to incite hatred on the basis of ‘sexual orientation’ (s 19(c)). Prior to 2014, ‘sexual orientation’ was defined to include ‘transsexuality’, which included transgender and gender diversity.⁷⁹ The *Anti-Discrimination Amendment Act 2013* (Tas) sought to distinguish between sexual orientation and gender identity by deleting ‘transsexuality’ from the definition of ‘sexual orientation’. The amendments also inserted new definitions of intersex, transgender and transsexual.

2.1.157 An unintended consequence of removing transsexuality from the definition of ‘sexual orientation’ was that transsexuality⁸⁰ was no longer covered by s 19.

2.1.158 The *JRL Act* amendments address this by inserting a new paragraph making it an offence to incite hatred towards, serious contempt for, or severe ridicule of, a person or a group on the ground of ‘gender identity or intersex variations of sex characteristics of the person or any member of the group’ (*Anti-Discrimination Act 1998* s 19). Rather than creating a new offence, this change is aimed at reinstating the protection against inciting hatred towards transsexuals provided prior to 2014 and updating the terminology to reflect contemporary understanding of gender diversity.

Status of Children Act 1974

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

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

⁷⁹ Under the *Anti-Discrimination Act 1988* (Tas), prior to 1 January 2014, the following definition applied: transsexual means a person of one sex who –

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

⁸⁰ Following the 2014 amendments, ‘transsexual’ encompassed an intersex person.

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

Other legislation

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

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

Table 2: Amendments to *Births, Deaths and Marriages Registration Act 1999* (Tas)

	<i>BDM Act</i> prior to recent changes	<i>BDM Act</i> following recent changes
Time for notification of birth	21 days	21 days
Time for registration of birth	60 days	60 days 120 days if 'variations of sex characteristics do not allow for an easy assignment of sex'
Sex recorded in birth registration	Male or Female	Male or Female
Sex or gender recorded on birth certificate (no change)	Registered sex at birth included	Registered sex only included if requested by applicant
Change of sex or gender (adult)	Any person over 18 can apply to register a change of sex if: - unmarried; and - has undergone sexual reassignment surgery (evidence from two doctors). Must register as Male or Female	Any person over 16 can apply to register a change of gender. The application must include: - a gender declaration confirming the applicant 'identifies as being of the gender specified in the declaration and lives, or seeks to live, as a person of that gender'; and - any other document or information that the Registrar reasonably requires. It is not necessary for an applicant to have undergone reassignment surgery. Gender may be recorded as Male, Female, Indeterminate, Non-binary, or as neither entirely male nor entirely female. No more than one change of gender can occur within a 12 month period.
Change of sex or gender (child)	Parents of a minor can apply to change their child's sex if the child has	Parents or guardians of a child under 16 can apply to register a change in their

	<i>BDM Act prior to recent changes</i>	<i>BDM Act following recent changes</i>
	undergone sexual reassignment surgery (evidence from two doctors). Unless there is only one parent named in the child's birth registration, or only one surviving parent, both parents must consent to the application.	child's gender. The application is to include: • a gender declaration or statutory declaration that the application reflects the 'will and preference' of the child; • any other document or information that the Registrar reasonably requires. It is not necessary for an applicant to have undergone reassignment surgery. Any application relating to a person under 18 should be accompanied by evidence that the child has received appropriate counselling. Consent of both parents is required unless there is only one parent named in the child's birth registration, a sole surviving parent or sole guardian, or where a magistrate has approved the making of the application.
Change of name	Any person over 18 can apply to change their name. Parents may apply to change a child's name. Consent of the child is required for children over 12. A magistrate may approve the name change if satisfied that the change is in the 'best interests of the child'.	Any person over 16 can apply to change their name. Parents may apply to change the name of a child under 16. Consent of the child is required for children over 12. A magistrate may approve the name change if satisfied that the change 'is consistent with the child's will and preferences'.
Sex or gender recorded on birth certificate (post change)	Any birth certificate issued following change of sex must record the changed sex but also include a notation that the person was previously 'registered as of the other sex'. Applicant can request an extract that does not include that notation. A child may request a copy of their parent's birth certificate. Unless otherwise requested by the child, the birth certificate will include details of any changes of sex or name.	Registered sex or gender only included if requested by applicant. History of changes to sex or gender only included if requested by applicant. A child may request a copy of their parent's birth certificate. Unless the parent has consented, details of changes of sex will only be included if the Registrar is satisfied that the child has a valid reason for requesting the information and disclosing those details will not have negative consequences for their parents.
Fraudulent behaviour	It is an offence for any person to show a copy of their former birth certificate (or an extract) with the intention of misleading someone about their registered sex. Punishable by up to 2 years in prison.	It is an offence for a person to use a birth certificate (or extract) showing a previous sex, gender or name, with the intention to deceive. Punishable by up to 2 years in prison.

2.2 Recent changes and consequential reforms

2.2.1 During parliamentary debate over the *JRL Act*, concerns were raised regarding potential implications of the changes for the operation of existing laws. Those concerns included:

- Difficulties presented for police officers or others conducting searches where the search is required to be conducted by a person of the same sex as the person being searched.
- Difficulties in the application of offence provisions relating to human embryos being removed where the person from whom the embryo is removed identifies as a gender other than female.
- Whether medical practitioners involved in termination of pregnancies will be subject to the legal protections offered under existing reproductive health laws where procedures are performed on a person who has their gender registered as something other than female.
- Eligibility for women's sporting events or female-only programmes being granted to any person whose registered gender is female.

2.2.2 This section discusses each of these issues and identifies potential consequential reforms to ensure the effective and efficient operation of the *JRL Act* and other Tasmanian laws.

2.2.3 Appendix 3 provides an overview of existing Tasmanian legislation potentially affected by the *JRL Act*. Key legislation is discussed in greater detail below.

Search powers

2.2.4 A number of Tasmanian statutes provide police officers and other authorised persons with the power to execute searches in a range of circumstances.⁸¹ In many circumstances, a frisk or a strip search is required to be carried out by an officer of the same sex or gender as the person being searched. Appendix 3 sets out the various search powers and the variety of ways in which this requirement is expressed.

2.2.5 It is important to ensure that changes effected by the *JRL Act* do not compromise the capacity for police and other authorised officers to conduct searches. A number of potential issues arise from the recent changes to the *BDM Act* effected by the *JRL Act*:

1. That allowing gender diversity to be recognised in identity documents will make it difficult for Tasmania Police to make available officers who identify with the diverse range of potential gender identities. If, for example, an intersex person is arrested, will a search conducted by a police officer who is not intersex be lawful?
2. If a person does not identify as either male or female, will restrictions on search powers make it unlawful for any officer to search that person?

⁸¹ *Police Powers (Public Safety) Act 2005* (Tas) s 22; *Misuse of Drugs Act 2001* (Tas) s 30; *Poisons Act 1971* (Tas) s 90C; *Terrorism (Preventative Detention) Act 2005* (Tas) s 22.

3. If a person identifies as female, but retains the physiological characteristics of a male, is it appropriate to require that they be searched by a female officer?

2.2.6 The Tasmania Police Manual was updated in December 2018 to provide some guidance to officers regarding the searching of sex and gender diverse people. The Manual now includes the following provisions:

(5) Transgender and intersex people:-

- (a) should be treated according to their preferred gender;
- (b) if an officer is unsure of how a person identifies they should respectfully ask the person;
- (c) should be searched by a person of the same sex as the person in custody's identifying gender wherever possible;
- (d) members should be mindful that a person's identity documents and police records may not accurately identify their identifying gender; and
- (e) may be considered at risk of harm from other prisoners while in custody and should be placed in a single cell when being held in custody.⁸²

2.2.7 The Manual recognises that restrictions on search powers are intended to implement respectful approaches to the conduct of intrusive searches. While often expressed by reference to 'sex', the restrictions are directed to gender, rather than sex.

2.2.8 This practice does not address the situation where a person does not identify as either male or female. The *Court Security Act 2017* (Tas) adopts a broader approach, explicitly providing for a person who is 'transsexual, transgender or intersex' to request that a personal search be conducted by a security guard of a particular gender.

2.2.9 Section 28D(2) of the *BDM Act*, as amended by the *JRL Act*, provides that any reference to a person's sex is taken to be a reference either to their registered sex or their registered gender.

2.2.10 Providing that a reference to 'sex' is a reference to 'gender' does not explicitly overcome the difficulty that may be presented for lawful searches where a person's registered gender is something other than male or female. To address this, s 28D(4) provides that:

- if a person who has a registered gender⁸³ requests that a search be conducted by a male or female; or
- if a police officer asks a person who is about to be searched whether the person wants the search to be conducted by a male or female,

the search will not be invalid, unauthorised or unlawful on the basis that the search was then conducted by a male or female as requested.

⁸² Tasmania Police, *Tasmania Police Manual* (2018) [7.3.4].

⁸³ For these purposes, a person who has not made any application to register a gender different to the sex that was registered at birth is not entitled to make a request as to the gender of the officer conducting the search.

2.2.11 This approach is consistent with the Tasmania Police Manual and the *Court Security Act 2017* (Tas) and will enable lawful searches to be conducted that respect the dignity and gender diversity of those being searched.

2.2.12 For clarity, the Institute considers that, rather than relying on s 28D of the *BDM Act* to extend search powers, it would be preferable to also make consequential amendments to the various Acts listed in Appendix 3. The amendments could replicate the provisions in the *Court Security Act 2017* (Tas), as appropriate.

Other searches and examinations

2.2.13 A number of other Acts provide powers to conduct searches and examinations and set out the circumstances in which searches can be undertaken.

Patient searches

2.2.14 The *Mental Health Act 2013* (Tas) (*'Mental Health Act'*) allows custodians and escorts within mental health facilities to conduct frisk searches of patients. A frisk search is, if practicable, to be conducted by a person of the same sex as the person being searched (s 2(3)).

2.2.15 The Chief Forensic Psychiatrist ('CFP') also has power to authorise a range of searches of patients in secure mental health units. Unless otherwise directed by the CFP, where the search involves any touching or undressing of a person, or any touching of a person's clothing or personal belongings, the search must be carried out in private by 'an authorised person of the same gender as that person and only in the presence of persons of that gender' (*Mental Health Act* s 111(11)).

2.2.16 Significantly, the *Mental Health Act* refers to a person of the same gender, rather than of the same sex. Where a patient is registered as a gender other than male or female, this would arguably require the search to be conducted by a person of the same registered gender. Such a requirement could be unduly restrictive, if not qualified by 'if practicable'.

2.2.17 The Institute considers that the *Mental Health Act* could be amended to provide that where a person has a registered gender other than male or female, and no authorised officer of that gender is available to conduct the search, the patient should be asked whether they would prefer to be searched by a male or female. A search that complied with that request would be taken to be lawful for those purposes.

Intimate photographs and examinations

2.2.18 Under s 21 of the *Community Protection (Offender Reporting) Act 2005* (Tas), the Registrar, or an authorised person, may take, or may cause to be taken, a photograph of a 'reportable offender' and may require the reportable offender to expose any part of his or her body.

2.2.19 However, s 21(4) prevents the Registrar/authorised person from requiring a reportable offender to expose 'his or her genitals, the anal area of his or her buttocks or, in the case of a female, her breasts.'

2.2.20 The *Forensic Procedures Act 2000* (Tas) and the *Guardianship and Administration Act 1997* (Tas) both define ‘intimate forensic procedure’ to include examinations, photographs and taking of samples from intimate areas, specifically ‘in the case of a female, the breasts.’

2.2.21 Under the *Forensic Procedures Act 2000* (Tas), intimate forensic procedures must be conducted by a person of the same sex. Non-intimate forensic procedures requiring the removal of clothing must also be conducted by a person of the same sex.

2.2.22 The *Guardianship and Administration Act 1997* (Tas) does not require a person of the same gender to conduct intimate forensic procedures. However, the Act sets out a number of rules for how such procedures are conducted.

2.2.23 There is a risk that photography or examination of the breasts of a person who has female physical characteristics, but a registered gender other than female would not be considered an ‘intimate forensic procedure’. Such a procedure could be uncomfortable or humiliating for the person and should be treated with the same sensitivity as an intimate forensic procedure.⁸⁴

2.2.24 Deleting ‘in the case of a female’, would extend the definition of intimate forensic procedures to any exposure of the breasts of any person.

Pregnancy, birth and related issues

2.2.25 Sexual reassignment surgery required alteration of reproductive organs, resulting in sterility for the person undergoing the procedure. Removing the requirement for sexual reassignment surgery prior to registering a change of gender will mean that a person whose registered sex was female, but whose registered gender is other than female, may be able to give birth. In those circumstances, a person whose registered gender is male, intersex or non-binary could become pregnant.

2.2.26 The potential implications of this change for the operation of laws relating to pregnancy and birth are set out below.

Embryos and cloning

2.2.27 The *Human Cloning for Reproduction and Other Prohibited Practices Act 2003* (Tas) (*‘Human Cloning Act’*) was adopted as part of national uniform laws introduced to prevent unethical development and transplant of human embryos. The *Human Cloning Act* creates a number of offences, including:

- intentionally creating a human embryo outside the body of a woman, unless done in an attempt to achieve pregnancy in a particular woman (s 10);
- intentionally creating or developing a human embryo outside the body of a woman containing genetic material provided by more than two persons (s 11);

⁸⁴ Under the *Forensic Procedures Act 2000* (Tas), examination of a person’s breasts would require removal of clothing. Under s 41(2), the procedure must be carried out by a person of the same sex, even if characterised as a ‘non-intimate forensic procedure’.

- intentionally developing a human embryo outside the body of a woman for a period of more than 14 days (s 12);
- removing a human embryo from the body of a woman, intending to collect a viable human embryo (s 15);
- intentionally placing a human embryo in the body of a human, other than in a woman's reproductive tract (s 17(2)).

Each of these offences carries a maximum penalty of imprisonment for up to 15 years.

2.2.28 The Act defines 'woman' as 'a female human'. The concern raised during parliamentary debate was that the purpose of the *Human Cloning Act* would be defeated if these offences ceased to apply in circumstances where someone who retains the physical reproductive characteristics of a woman is recognised by a different gender identity.

2.2.29 Arguably, the offences relating to embryos created or developed 'outside the body of a woman' (ss 10–12) would be unaffected by the recent changes to the law. Under s 28D of the *BDM Act*, references to 'sex' are taken to be references to 'gender'. Once a person has registered their gender as other than female, that will supersede any earlier registered sex. Therefore, a person whose registered gender was other than female would not be a 'woman' within the definition of the *Human Cloning Act*.

2.2.30 As a result, an embryo created within the body of a person with a female reproductive system whose registered gender is other than female would continue to be characterised as having been created 'outside the body of a woman'. An embryo could not be created or developed within the body of a person identifying as a woman who did not have a female reproductive system.

2.2.31 Even if this were not the case, s 28D(3)(c) of the *BDM Act* explicitly provides:

- (c) a reference to the fertilisation of a human egg outside of the body of a woman does not include the fertilisation of a human egg inside of the body of a person of another gender who has a female reproductive tract ...

2.2.32 Similarly, the offence of placing an embryo in a human, other than in a woman's reproductive tract (s 17(2)), would not be affected by the recent changes to law. An embryo placed in the reproductive tract of a person with a female reproductive system whose registered gender is other than female would continue to be characterised as being placed 'other than in a woman's reproductive tract.' An embryo placed in the reproductive tract of a person whose registered gender was female but who did not have a female reproductive system would not be viable.

2.2.33 In contrast, the offence of removing a human embryo from the body of a woman could be affected by the recent changes. In circumstances where an embryo developed in the body of a person with a female reproductive system whose registered gender is other than female, the embryo could be removed without making out the offence in s 15.

2.2.34 Section 28D(3)(a) of the *BDM Act* provides that any reference to pregnancy of a female or a woman includes a reference to pregnancy of a person of another gender. Arguably, this could extend to provisions relating to human embryos within the body of a woman. However, the Institute

considers that it is preferable to amend s 15 of the *Human Cloning Act* to replace ‘from the body of a woman’ with ‘from the body of a human’. This language is consistent with the language currently used in s 17(2) of the *Human Cloning Act*.

Surrogacy

2.2.35 The *Surrogacy Act 2012* (Tas) (*‘Surrogacy Act’*) provides for surrogacy arrangements to be made for a ‘birth mother’ to seek to become pregnant and give birth to a child, and for that child to be treated as the child of another person or persons (the ‘intended parent’ or ‘intended parents’) (s 5).

2.2.36 There is no legitimate risk that a person whose registered gender is male could be a ‘birth mother’ for the purposes of the *Surrogacy Act*. A valid surrogacy arrangement cannot be made after the birth mother becomes pregnant (s 5(5)(a)), so a person whose registered gender is other than female who has fallen pregnant could not subsequently enter into a surrogacy arrangement. A person whose registered gender is male or other than female could arguably be acting inconsistently with a gender declaration that the person intends to live as a male if the person enters into a surrogacy arrangement that commits him to ‘seeking to become pregnant’.

2.2.37 From a policy perspective, the intent of the *Surrogacy Act* is to provide parents who are unable to conceive or carry a child to term with the opportunity to become parents. Allowing any consenting adults capable of becoming pregnant to enter into surrogacy arrangements, regardless of their registered gender, would be consistent with this policy objective.

2.2.38 For the purposes of a surrogacy arrangement, ‘intended parents’ may include a single man or ‘eligible woman’, a man and a woman, two men, or two ‘eligible women’ (s 7(1)). ‘Eligible woman’ includes a woman who:

- (a) is unable, on medical grounds, to conceive a child; or
- (b) is likely to be unable, on medical grounds, to carry a pregnancy or give birth; or
- (c) is unlikely to survive a pregnancy or birth or is likely to have her health significantly affected by a pregnancy or birth; or
- (d) if she were to conceive a child, is likely to conceive –
 - (i) a child who is likely to be affected by a genetic condition or genetic disorder, the cause of which is attributable to the woman; or
 - (ii) a child who is unlikely to survive the pregnancy or birth or whose health is likely to be significantly affected by the pregnancy or birth (s 7(2)).

The intended parent or parents may apply to the court for a parentage order in relation to the child (s 13).

2.2.39 An intended parent whose registered gender is female, but who retains a male reproductive system, may not satisfy the first limb of the definition of ‘eligible woman’ (s 7(2)(a)), as she would theoretically still be able to conceive a child with another person with a female reproductive system. However, she would satisfy the second limb (s 7(2)(b)). Therefore, she would be considered an ‘eligible woman’ and entitled to enter into a surrogacy agreement.

2.2.40 However, the description of intended parents in s 7(1) excludes a situation in which two intended parents are seeking parentage orders and one or both of those parents has a registered gender other than male or female. The purpose of the qualifications set out in s 7 for a valid surrogacy agreement (and related parentage orders) are to ensure that the intended parent or parents are not otherwise able to have a child. This qualification can be maintained without reference to gender.

2.2.41 The *Acts Interpretation Act 1931* (Tas) ('AIA') s 24A provides that, where a statute contains a word or expression that indicates one or more particular genders, it should be taken to include every other gender. Arguably, this would overcome restrictions on 'birth mother' and 'intended parents'.

2.2.42 However, for clarity and certainty, the Institute recommends that the *Surrogacy Act* itself also be amended to ensure that characterisation as a birth parent or intended parent is not restricted by registered gender, but by capacity to conceive. This is consistent with provisions of the *Adoption Act 1988* (Tas) allowing couples of the same gender to adopt (see [2.1.149]).

2.2.43 The definition of intended parents could be amended to refer to one or two 'eligible persons', with 'eligible persons' defined in similar terms to the current s 7(2), amended as follows:

- amending s 5(1)(a) by deleting 'female';
- replacing all references to 'birth mother' with 'birth parent';
- replace s 7(2)(b) with 'is unable, or likely to be unable, on medical or other grounds, to carry a pregnancy or give birth';
- amend s 7(2)(c) and (d) to replace 'her' and 'she' and 'woman' with gender neutral terms.

Adoption

2.2.44 As outlined in [2.1.149], s 20 of the *Adoption Act 1988* (Tas) provides for the adoption of children in Tasmania by couples of any gender.

2.2.45 Sections 29(2)–(5) set out the people whose consent is required to authorise an adoption. These people relevantly include:

- the mother and father of the child, if married (s 29(2));
- the mother of the child and a man who is registered as the father of the child (s 29(3)(a));
- the mother of the child and a man who is assumed to be the parent by operation of the *Status of Children Act 1974* (ss 29(3)(b), (d) or (e));
- the mother of the child and a man with whom the mother was in a significant relationship at the time of the birth (s 29(3)(da));
- the mother of the child and a woman to whom she was married or in a significant relationship with at the time of the birth (s 29(4A)), where the child was conceived through a fertilisation procedure;
- where a child has previously been adopted, the adoptive parents of a child (s 29(5)).

2.2.46 Section 28D(3)(d) of the *BDM Act* as amended provides that a reference to ‘the mother of a child’ includes ‘a reference to a person of another gender who carried the child in the person’s female reproductive tract, or who gave birth to a child.’⁸⁵

2.2.47 The references to ‘man’ and ‘woman’ in the other provisions of s 29 of the *Adoption Act 1988* (Tas) has the potential to unduly restrict the rights of interested parties to consent, or refuse to consent, to proposed adoption orders.

2.2.48 Section 24A of the *AIA* would operate to extend the application of the consent provisions to parents of any gender. For clarity and certainty, the provisions of s 29 should also be amended to replace any references to ‘man’ or ‘woman’ with ‘person’. This would not be inconsistent with amendments to the *Adoption Act* effected by the *JRL Act* to extend parental references to ‘the father, the mother, a parent or guardian.’ Instead, the proposed amendments would recognise that the mother or father of a child may, at the time of adoption, have a gender that does not conform to male or female.

Terminations

2.2.49 Prior to 2013, the *Criminal Code* included a number of criminal offences relating to performing, causing or assisting in abortions.⁸⁶ With the introduction of the *Reproductive Health (Access to Terminations) Act 2013* (Tas) (*‘Reproductive Health Act’*), these offences were removed.

2.2.50 Terminations by medical practitioners are now principally regulated by the *Reproductive Health Act*. The Act allows medical practitioners to terminate the pregnancy of a woman in the following circumstances:

- For terminations performed not more than 16 weeks into a pregnancy, with the woman’s consent (s 4).
- For terminations performed after 16 weeks, where two medical practitioners reasonably believe continuing the pregnancy would involve greater risk of injury to the physical or mental health of the pregnant woman than if the pregnancy were terminated (s 5).

2.2.51 A failure to comply with the framework established by the *Reproductive Health Act* is generally subject to professional sanctions, rather than criminal ones.

2.2.52 Section 51(1A) of the *Criminal Code* supports this new framework, allowing a termination to be lawfully performed ‘on a woman by a medical practitioner if it is performed in good faith, with reasonable care and skill and with the woman’s consent.’

Criminal provisions

⁸⁵ Other than where the mother has ceased to be the mother for the purposes of the *Surrogacy Act* (*BDM Act* ss 28D(3)(d)(i)–(ii)).

⁸⁶ Sections 134, 135, 165 (previous version of the *Criminal Code*).

2.2.53 Section 178D of the *Criminal Code* makes it a crime to perform a termination on a woman unless the person performing the termination is a medical practitioner or the pregnant woman. A woman who consents to, assists in, or performs a termination on herself is not guilty of a crime (*Reproductive Health Act* s 8).

2.2.54 It is also a crime to perform a termination on a woman without the woman's consent (*Criminal Code* s 178E). No prosecution will be instituted against a medical practitioner who reasonably and in good faith performs a termination on a woman who is unable to give consent, provided the termination is for the woman's benefit.

2.2.55 In relation to each of these provisions, 'woman' is defined as 'a female person of any age' (*Criminal Code* ss 51(1B), 178D(3), 178E(3); *Reproductive Health Act* s 3). These provisions would not extend to a pregnant person with a registered gender other than female.

2.2.56 This could have the following consequences:

- A medical practitioner who performs or assists in a termination on a person whose registered gender is other than female will not be protected by the authorisations provided in s 51(1A) of *Criminal Code* or ss 4 and 5 of the *Reproductive Health Act*.

By the same reasoning, offence provisions relating to terminations would also not apply to terminations performed by someone other than a medical practitioner or without the consent of the woman on whom the termination is performed. However, a medical practitioner could potentially be charged with assault offences but for the authorising provisions in the *Reproductive Health Act* and the *Criminal Code*.

- A pregnant person who has a registered gender other than female and who performs their own termination may commit an offence against s 178D, as the termination will not be performed by a medical practitioner or a 'pregnant woman'. In that situation, the person would not be protected from criminal charges by s 8 of the *Reproductive Health Act*.
- A medical practitioner who performs a termination without the consent of the pregnant person, where that person has a registered gender other than female, will not fall within the crimes described in ss 178D and 178E of the *Criminal Code*.

2.2.57 Section 28D(3)(b) of the *BDM Act* provides:

A reference to the termination, or attempted termination, of a pregnancy of a female, female person or woman includes a reference to the termination, or attempted termination, of a pregnancy of a person of another gender.

2.2.58 The Institute considers that this provision would extend the protections afforded by the *Reproductive Health Act* and the *Criminal Code* to cover terminations performed on persons with a registered gender other than female.

2.2.59 For clarity and certainty, the provisions of the *Reproductive Health Act* and *Criminal Code* should also be amended to replace any references to 'woman' with 'person' and removing the definitions of 'woman'.

Obligations in relation to terminations

2.2.60 Section 6(3) of the *Reproductive Health Act* requires a medical practitioner to perform a termination in an emergency ‘if a termination is necessary to save the life of a pregnant woman or to prevent her serious physical injury.’ Nurses and midwives may be required to assist in the procedure (s 6(4)).

2.2.61 This obligation may not extend to situations where the person whose life or health is in danger has a registered gender other than female.⁸⁷

2.2.62 The *Reproductive Health Act* recognises that a medical practitioner can refuse to perform a termination where they have a conscientious objection to the procedure. However, the Act obliges the medical practitioner to refer a woman seeking termination to a list of health services (s 7). In the second reading speech introducing the Act, then Minister for Health stated:

This obligation to refer balances the right of doctors to operate within their own personal values, with the equally important ethical obligation to act in the best interests of the patient and to not deny or impede access to medical care and treatments that are legal.⁸⁸

2.2.63 Subject to s 28D(3)(b) of the *BDM Act*, this obligation may not extend to a person seeking a termination where that person’s registered gender is other than female. As a result, a transgender, intersex or non-binary person who is struggling with an unwanted pregnancy may not be given appropriate support to inform the medical decisions that they make.

2.2.64 As for authorisation of terminations (see [2.2.57]–[2.2.58]), s 28D(3)(b) of the *BDM Act* will extend the obligations relating to pregnant women to any pregnant person seeking a termination. Again, the Institute considers it wise to amend ss 6 and 7 of the *Reproductive Health Act* to replace ‘woman’ with ‘person’.

Data records

2.2.65 The *Obstetric and Paediatric Mortality and Morbidity Act 1994* (Tas) establishes the Council of Obstetric and Paediatric Mortality and Morbidity (the ‘Council’) to investigate and keep records of maternal deaths resulting from pregnancy or obstetrics. Statistics are to be gathered in relation to the deaths of women up to one year from birth.

2.2.66 There is no obligation to record the death of any person identifying as male who becomes pregnant. This may compromise long-term statistical data regarding maternal and infant morbidity.

2.2.67 The Council is also required to report to police any offence in relation to a woman or child (including unlawful medical practices). This obligation to report potentially unlawful practices will not extend to offences against persons who identify as male, despite retaining a female reproductive system.

⁸⁷ Medical practitioners remain bound by professional obligations to act to protect persons whose health and safety is at risk.

⁸⁸ Tasmania, *Parliamentary Debates*, House of Assembly, 16 April 2013 (Michelle O’Byrne, Minister for Health) <http://www.parliament.tas.gov.au/bills/Bills2013/pdf/notes/24_of_2013-SRS.pdf>.

Crimes relating to pregnancy and birth

Infanticide

2.2.68 A woman who, within 12 months of giving birth to a child and being still disturbed from the effects of the birth, wilfully causes the death of that child, will be guilty of infanticide (*Criminal Code* s 165A). This crime carries a lower maximum penalty than murder, akin to manslaughter.

2.2.69 Where a person who identified as a woman at the time of giving birth subsequently registers a change of gender and, at the time of the child's death has a registered gender other than female they may not be eligible for a charge of infanticide. The policy position behind the infanticide provisions reflects an acknowledgement that the influence of post-partum depression or other mental health issues arising from a traumatic birth may justify a less severe charge being imposed.

Concealment of birth

2.2.70 A person who disposes of the dead body of a child delivered by a woman (whether the child died before, at, or after, its birth) and endeavours to conceal the birth is guilty of a crime (*Criminal Code* s 166).

2.2.71 This crime will not be made out if a person who identifies as a gender other than female gives birth (or self-terminates the pregnancy) and subsequently disposes of the body or enlists someone else to assist in disposing of the body.

Assault on a pregnant woman

2.2.72 It is a separate crime to assault a pregnant woman where the assailant knew that the woman was pregnant (*Criminal Code* s 184A). Subject to s 28D(3)(a) of the *BDM Act* and s 24A of the *AIA*, where a person who does not identify as female is pregnant and is assaulted, this crime would not be made out.

Effect of recent changes

2.2.73 Section 28D(3)(a) of the *BDM Act* extends any reference to pregnancy of a female, female person or woman to a reference to pregnancy of any person. This would arguably extend the reach of the crimes discussed above. Section 24A of the *AIA* could also apply to extend the operation of these provisions to any person.

2.2.74 For clarity and certainty, each of the relevant offence provisions themselves could be amended replacing 'woman' with 'person'.

Sex reassignment procedures

2.2.75 The definition of 'sexual reassignment procedures' has been removed from the *BDM Act*, as such procedures are no longer a prerequisite to register a change of gender.

2.2.76 Under the *Criminal Code*, the following actions will be crimes:

- Performing female genital mutilation on another person (s 178A); and

- Taking a child out of Tasmania for the purpose of having female genital mutilation performed on the child (s 178B).

‘Female genital mutilation’ includes any excision or mutilation of female genitalia.

2.2.77 It is a defence to a charge under ss 178A or 178B of the *Criminal Code* if the operation in question was for genuine therapeutic purposes or for a ‘sexual reassignment procedure’ (s 178C(1)(b)).

2.2.78 ‘Sexual reassignment procedure’ is defined as ‘a surgical procedure to give a female, or a person whose sex is ambivalent, the genital appearance of a particular sex.’⁸⁹

2.2.79 Under recent changes to the law, a person may formally change their registered gender without undertaking sexual reassignment procedures. This presents a risk for a person who registers their gender as male, without any surgical intervention, and later elects to undertake a sexual reassignment procedure to remove their female genitalia.

2.2.80 In particular, a ‘sexual reassignment procedure’ is defined as a procedure on a female or ‘person whose sex is ambivalent’. Where the procedure is sought by a person whose registered gender is male, a medical practitioner who performs the procedure may not be protected under s 178C(1)(b). This is because at the time of surgery, the male patient would be neither a female or a person whose sex is ambivalent for the purposes of the *Criminal Code*.⁹⁰ Unless the procedure could be characterised as being for ‘genuine therapeutic purposes’, this would put the medical practitioner at risk of being charged with the crime of performing female genital mutilation.

2.2.81 Given the explicit context of the provisions relating to female genital mutilation, s 24A of the *ALA* would arguably not apply to extend the operation of the provisions to cover a procedure performed on a person identifying as male.

2.2.82 To remove any uncertainty, the definition of sexual reassignment procedure could be amended to ‘a surgical procedure to give a person the genital appearance of a particular sex’. This would overcome the limited operation of the current protection.

Implications for gender-specific spaces and programmes

2.2.83 In each of the Australian jurisdictions that have considered issues of legal recognition of sex and gender diversity, concerns have been raised by stakeholders that affirmative action initiatives (such as scholarships or internships targeted at specific genders) or the security provided by single-gender spaces such as women’s shelters, health services, and women’s prisons would be compromised by allowing self-identification.⁹¹

⁸⁹ The legislation uses the term ‘sexual reassignment surgery’, however it is more accurate to refer to ‘sex reassignment surgery’.

⁹⁰ This view assumes that inconsistency between a person’s sex and registered gender would be insufficient to constitute ‘ambivalence’.

⁹¹ See, for example, Part 7.7 of the WALRC Report (n 43) 74–75.

2.2.84 Concerns have also been raised regarding the advantages that a person born with male physiology who identifies as female will enjoy in sporting pursuits over a person born with female physiology.

2.2.85 Similar concerns were also raised during the WALRC's Australia's review of the *Gender Reassignment Act 2000* (WA). The Commission found:

The Commission was not presented with evidence which established that trans women impose an inherent risk to others in these spaces. The Commission also notes documented evidence of violence being perpetrated against trans and gender diverse people.⁹²

2.2.86 The Institute recognises these concerns and the importance of ensuring that measures designed to protect and advance women continue to achieve those goals. It is also critical to ensure that people are not discriminated against on the basis of their gender identity and that policies seek to protect the safety and dignity of all people.

2.2.87 Balancing these interests while supporting the integration of transwomen into women's sporting codes, women's prisons and women's shelters is already being addressed in Tasmania through a variety of policy measures.

2.2.88 For example, following allegations in 2018 that a transgender woman had been assaulted while in the men's prison, the Tasmanian Prison Service stated that it had a comprehensive policy for transgender, transsexual and intersex prisoners which 'prioritised safety, and treated prisoners with dignity and respect.' A spokesperson for the service said:

Subject to the security of the prison, transgender, transsexual and intersex prisoners are housed in a correctional facility appropriate to their gender identification.⁹³

2.2.89 The Institute is keen to receive feedback about any such policies and how well they are working, and whether more needs to be done.

2.2.90 There are also situations requiring bodies or groups to include representatives of a particular gender. For example, s 13A of the *Environmental Management and Pollution Control Act 1994* requires the Board of the Environment Protection Agency to 'include at least one person of each sex'.

2.2.91 Registered 'sex' categories under the *BDM Act* remain binary, so the requirement to include at least one person 'of each sex' would be read to require at least one person whose registered sex or registered gender is male, and one whose registered sex or gender is female.

Question 3

⁹² Ibid 75.

⁹³ See R Shine, 'Transgender prison rape claim prompts push for reform in Tasmania', *ABC News* (online, 4 August 2018) <<http://www.abc.net.au/news/2018-08-04/push-for-law-change-after-transgender-prison-rape-claim/10073500>>.

Are there potential implications for the interaction of the *JRL Act* with existing legislation that are not discussed in section 2.2 of this Issues Paper?

Question 4

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

2.2.92 The Institute considers that it is appropriate for decision-making bodies to reflect gender diversity, rather than merely representation on the basis of sex. Statutory requirements for composition of Boards could be amended to require membership of the Board ‘to seek to achieve gender diversity.’

Implications for other laws

2.2.93 A range of other laws currently use binary language in relation to sex and gender. Appendix 3 includes a comprehensive list of laws that may require minor amendment in response to the *JRL Act*.

2.2.94 The Institute welcomes feedback on any other amendments needed.

Part 3

Consent to Medical Treatment to Alter a Person's Sex or Gender

3.1 Introduction

3.1.1 Part 3 of the Issues Paper addresses the following term of reference:

What, if any, reforms should be made in relation to consent to medical treatment to alter a person's sex or gender.

3.1.2 At common law, consent is required before medical procedures can be performed, other than in exceptional circumstances. Performing a medical procedure without consent may constitute an offence.

3.1.3 For minors (persons under 18) or those unable to give consent, consent is generally required from a parent or guardian. Where the procedure is invasive, irreversible or non-therapeutic, approval from the court may also be required.⁹⁴

3.1.4 This Part is primarily concerned with consent to medical procedures on intersex and transgender children. These issues generally arise in two divergent contexts. Where intersex children are concerned, the principal issue is the extent to which invasive and irreversible surgeries should be permitted to be performed on them without their consent. Section 3.4 examines a range of potential reforms to address this issue.

3.1.5 In contrast, the most common concerns for transgender children arise where their desire for surgery can be overridden by the refusal of a parent or a court to grant consent and comply with their wishes. This issue is addressed in sections 3.5 and 3.6.

3.2 Consent to medical treatment for intersex minors

3.2.1 In circumstances where children are born with ambiguous genitalia, current medical practice is to perform a 'genital normalisation' procedure. This is a surgical intervention intended to make the external genital appearance and internal gonads more closely match an assigned gender.

⁹⁴ See *Department of Health & Community Services v JWB & SMB* (1992) 175 CLR 218 ('*Marion's Case*').

3.2.2 Intersex adults who underwent these procedures as infants and children have subsequently come forward and stated that they consider these interventions to have been extremely harmful. International intersex human rights statements, including the *Malta Declaration*⁹⁵ and the *Darlington Statement*,⁹⁶ recognise that the medicalisation and stigmatisation of intersex variations has resulted in significant physical trauma and mental health concerns.

3.2.3 Concern also exists that normalising surgery constitutes an erasure of intersex identities. The surgery effectively deconstructs intersex physiology and supplants it with a constructed identity that conforms with stereotypical male and female gender categories. The phrase ‘normalising surgery’ suggests that the child being operated on is defective in some way that requires correction. A 2013 Senate inquiry (see [3.2.6]–[3.2.8]) received evidence regarding the social and psychological ramifications of such surgeries. It told of the social stigma, ‘legacy of shame’, erosion of trust within the child’s family unit, personal and psychological distress, adult sexual anxieties, and uncertainty about personal and gender identity experienced by those on whom surgery was performed.⁹⁷

Human rights issues

3.2.4 In its 2009 report on the human rights implications of surgery on intersex infants, the Australian Human Rights Commission said:

Under the [*Convention on the Rights of the Child*], a child who is capable of forming their own views has the right to express those views in all matters affecting them — including decisions about their health — and for those views to be given due weight. However, this right is to be exercised in accordance with the age and maturity of the child. In situations where surgery is not a medical necessity, it might be more appropriate to delay gender-related surgery until the child is at an age where their views concerning their gender identity and surgery can be taken into account.⁹⁸

3.2.5 Article 24.3 of the United Nations *Convention on the Rights of the Child*⁹⁹ provides that States Parties shall take all effective and appropriate measures to abolish traditional practices prejudicial to the health of children. This is relevant to medical practices that are based on conventional medical practice and social considerations rather than established physiological need.

⁹⁵ *Malta Declaration* (n 6).

⁹⁶ *Darlington Statement* (n 6).

⁹⁷ Senate Community Affairs References Committee, Parliament of Australia, *Involuntary or Coerced Sterilisation of Intersex People in Australia* (Second Report, 25 October 2013) <https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Community_Affairs/Involuntary_Sterilisation/Sec_Report/index>.

⁹⁸ Australian Human Rights Commission, *Surgery on Intersex Infants and Human Rights* (2009) <https://www.humanrights.gov.au/sites/default/files/content/genderdiversity/surgery_intersex_infants2009.pdf>.

⁹⁹ *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990).

3.2.6 A 2013 Senate report, *Involuntary or Coerced Sterilisation of Intersex People in Australia*, emphasised that ‘normalising’ surgery on infants and children has the potential to affect a range of interrelated human rights, including:

- the right to privacy, which extends to the right to personal autonomy in relation to medical treatment;
- the right to equality and non-discrimination;
- the prohibition against torture and other cruel, inhuman and degrading treatment, including the prohibition against non-consensual scientific or medical experimentation.¹⁰⁰

3.2.7 The Senate Committee concluded:

Irreversible medical treatment, particularly surgery, should only be performed on people who are unable to give consent if there is a health-related need to undertake that surgery, and that need cannot be as effectively met later, when that person can consent to surgery.

Medical practice has moved, and appears to be continuing to move, in the right direction, by applying increasing caution to normalising treatment of children.¹⁰¹

3.2.8 The inquiry recommended that all medical treatment of intersex people be subject to guidelines which ‘favour deferral of normalising treatment until the person can give fully informed consent and seek to minimise surgical intervention on infants undertaken for primarily psychosocial reasons.’¹⁰²

3.2.9 In 2017, the *Yogyakarta Principles* (see Part 2) were supplemented by the *Yogyakarta Principles Plus 10*. The *Yogyakarta Principles Plus 10* discussed the right to bodily and mental integrity and stated that no one should be subjected to invasive or irreversible medical procedures that modify sex characteristics without their free, prior and informed consent, unless medically necessary.¹⁰³ The *Yogyakarta Principles Plus 10* also emphasised that the best interests of the child should be the key consideration and that the wishes and consent of the child in question be considered and respected.¹⁰⁴

3.2.10 This is consistent with calls in the *Darlington Statement* and the *Malta Declaration* to respect the bodily integrity and autonomy of intersex people, including children.

3.2.11 The *Malta Declaration* focused on the need to ‘de-pathologise’ intersex variations (for example, by not referring to such variations as ‘disorders’), and not to adopt a strictly medical approach to variations in sex characteristics. The *Declaration* called on countries to introduce legal

¹⁰⁰ Senate Community Affairs References Committee (n 97) 58–59.

¹⁰¹ Ibid.

¹⁰² Ibid 74.

¹⁰³ *Yogyakarta Principles Plus 10*, Principle 32.

¹⁰⁴ Ibid.

mechanisms to end ‘normalising’ practices such as genital surgeries, psychological and other medical treatments, and the non-consensual sterilisation of intersex people.

3.2.12 The *Darlington Statement* goes further, calling for the ‘immediate prohibition as a criminal act of deferrable medical interventions, including surgical and hormonal interventions, that alter the sex characteristics of infants and children without personal consent.’¹⁰⁵

3.2.13 Currently, Malta is the only country to have banned the practice of performing these surgeries without the consent of the person on whom the surgery is being performed.¹⁰⁶

Relevant cases

3.2.14 Most cases involving medical procedures for intersex minors (for example, *In Re A*,¹⁰⁷ *Re Lesley*¹⁰⁸ and *Re Carla*¹⁰⁹ – see Appendix 4) have occurred when parents or guardians seek court approval for a medical procedure for their child before that child is able to give informed consent. This remains a significant issue for the intersex community.

3.2.15 As outlined at [2.1.18], the *BDM Act* now allows a longer time for parents of children for whom ‘variations of sex characteristics do not allow for an easy assignment of sex’ to register the birth (and the sex) of the child (s 15(2)). This will relieve some initial pressure on parents to make medical decisions. However, for many intersex people their sex characteristics become more or less pronounced throughout their childhood. Even after 120 days, assigning a sex for the purposes of registering the birth of an intersex child can be difficult.

3.2.16 In the 1992 High Court decision in *Department of Health & Community Services v JWB & SMB* (*Marion’s Case*),¹¹⁰ the parents of a 14-year-old girl with severe intellectual disabilities requested that doctors perform a hysterectomy and oophorectomy, removing Marion’s uterus and ovaries. In considering whether Marion’s parents could consent to such an invasive procedure, the High Court held that the proposed operations went beyond ‘therapeutic’ procedures to treat a ‘malfunction or disease’. The Court had regard to the grave consequences of the procedure, effectively sterilising Marion, and the risk that her parents’ decision underestimated Marion’s interests and her future capacity to consent to the procedure.¹¹¹ The Court was satisfied that the procedures were outside the scope of what parents and guardians were authorised to consent to on behalf of a child.

3.2.17 Subsequent cases have used *Marion’s Case* as the basis to discuss question of consent to medical treatment, the limitations of parental consent, and the extent to which a young person

¹⁰⁵ *Darlington Statement* (n 6) 7.

¹⁰⁶ *Gender Identity, Gender Expression and Sex Characteristics Act, 2014*.

¹⁰⁷ (1993) 16 Fam LR 715.

¹⁰⁸ [2008] Fam CA 1226.

¹⁰⁹ (2016) 324 FLR 1.

¹¹⁰ *Marion’s Case* (n 94).

¹¹¹ *Ibid* 250 (Mason CJ, Dawson, Toohey and Gaudron JJ). Their Honours cited *Gillick* (at 237) in support of the view that regard must be had to a child’s competence to consent to medical procedures.

should be involved in decisions regarding invasive surgical procedures. A summary of relevant cases is provided in Appendix 4.

3.2.18 Courts have generally held that court orders are required to authorise any significant procedures on intersex children.¹¹² This has been considered a ‘procedural safeguard’ to ensure that the best interests of the child are taken into account.

3.2.19 While courts have generally been willing to provide approval for invasive surgeries, there appears to be a trend towards a more strongly child-focused decision-making process. However, there is an argument that the courts have largely taken a narrow view of what is in the best interests of the child, favouring medical intervention to ‘normalise’ intersex children.¹¹³ For example, in *Re Lesley*, the Family Court dismissed an argument that, given the irreversible nature of the procedures proposed, an Independent Children’s Lawyer should be appointed.¹¹⁴

3.2.20 Further, the decision in *Re Carla*¹¹⁵ that surgical intervention could be considered therapeutic (and, therefore, not require court approval) raises concerns that intersex characteristics continue to be seen as a disorder so that ‘normalisation’ surgery on intersex children will remain common practice.

3.3 Current approaches to medical consent for intersex minors

3.3.1 Currently, Tasmania does not have a regulatory framework which addresses surgical intervention on intersex children. Because the *JRL Act* has removed the requirement for reassignment surgery as a prerequisite to registering a change of gender, the *BDM Act* no longer plays a role in regulating consent to medical procedures in relation to minors. The *JRL Act* does not deal with the issue of non-consent to medical treatment on intersex children.

3.3.2 No legislation purports to manage the exercise of discretion on the part of doctors in cases where genital normalisation is considered. Discussion papers in other jurisdictions have attempted to describe best practice in this area, focusing on the means by which decisions are made, the reasons for that approach to decision-making and the risks of current approaches.

¹¹² See, for example, *Re Lesley* (n 108); *Re Carla* (n 109).

¹¹³ Equal Opportunity Tasmania, *Legal recognition of sex and gender diversity in Tasmania: Options for amendments to the Births, Deaths and Marriages Registration Act 1999* (2016) 22.

¹¹⁴ *Re Lesley* (n 108) [43]–[46].

¹¹⁵ *Re Carla* (n 109).

Consensus Statement on Management of ‘Intersex Disorders’

3.3.3 The 2006 *Consensus Statement on Management of Intersex Disorders*¹¹⁶ (‘*Consensus Statement*’) represents an international medical approach to intersex issues. This statement centres on medical attention and management, framing intersex status as a kind of disorder.

3.3.4 One of the *Consensus Statement*’s main recommendations is that all individuals should receive a gender assignment at birth, and that assignment of gender is part of effective treatment of intersex status. However, the *Consensus Statement* stresses that assignment of gender should not occur before expert evaluation in newborns. It also does not recommend surgical intervention for cosmetic reasons but does list the likelihood of achieving a standardised physical appearance as a factor for consideration by medical practitioners.¹¹⁷ Accordingly, it pathologises and problematises intersex status.

Decision-making principles for the care of infants, children and adolescents with intersex conditions

3.3.5 In 2013, the Victorian Department of Health issued good practice guidelines in the form of the *Decision-making principles for the care of infants, children and adolescents with intersex conditions* (‘*Decision-making Principles*’).¹¹⁸ The *Decision-making Principles*, based on the principles endorsed in the 2006 *Consensus Statement*, are intended to guide health professionals to achieve the ‘best possible outcomes’ for children with intersex conditions.

3.3.6 While the Victorian Government intends that the decision-making framework will be applied in all intersex cases in Victorian hospitals, it is not intended to provide directives or clinical protocols about individual cases. Instead, the Department of Health has endorsed five medical principles to be applied robustly, transparently and consistently in all cases.¹¹⁹ Those principles are:

- gender assignment must be avoided before expert evaluation in newborns;
- evaluation and long-term management must be carried out in a centre with an experienced multidisciplinary team;
- all individuals should receive gender assignment;
- open communication with patients and families is essential, and participation in decision-making is encouraged;
- patient and family concerns should be respected and addressed in strict confidence.¹²⁰

¹¹⁶ Peter Lee et al, ‘Consensus Statement on Management of Intersex Disorders’ (2006) 118(2) *Paediatrics* 490.

¹¹⁷ *Ibid*.

¹¹⁸ Victorian Department of Health, *Decision-making Principles for the Care of Infants, Children and Adolescents with Intersex Conditions* (February 2013) 3.

¹¹⁹ *Ibid* 7.

¹²⁰ *Ibid* 4.

3.3.7 The *Decision-making Principles* stress that surgical intervention is not a necessary component of gender assignment and caution against allowing a sense of urgency to outweigh the need to gather information to make robust, transparent and consistent decisions.

3.3.8 The *Decision-making Principles* also acknowledge that normalising surgery is a controversial approach:

Most of the international debate about the healthcare of intersex conditions has been concerned with the ethics of performing genital surgery on infants and children. Generally, the focus of concern is not on medically necessary treatment done to avoid physical harm that is proportionate to the level of physical risk that the condition poses to the patient (for example, ensuring a functioning urinary system). The focus of concern is in cases where treatments for cosmetic effect are carried out for conditions that pose little or no physical risk to the patient (for example, to ‘normalise’ the person’s body to make it look more typically male or female).¹²¹

3.3.9 While not explicitly recommending against normalisation surgery during childhood, the *Decision-making Principles* do emphasise the need for caution. However, the document also takes the position that gender assignment is the best practice in most cases.¹²²

Involuntary or coerced sterilisation of intersex people in Australia

3.3.10 The Senate Community Affairs References Committee (the ‘Senate Committee’) report, *Involuntary or Coerced Sterilisation of Intersex People in Australia*,¹²³ also discussed at length the practices surrounding normalising surgery. Evidence presented to the Senate Committee suggested that the approach to surgical intervention had become more judicious. However, the changes in this area are uneven, with surgery still taking place in infancy and childhood.¹²⁴

3.3.11 The Senate Committee noted that this type of cosmetic genital surgery continues to be performed on children who are intersex, and further noted that evidence shows that 78 per cent of practitioners prefer that normalising surgery be performed before the child is two years old.¹²⁵ For example, the Disorder of Sex Development multidisciplinary team at Melbourne’s Royal Children’s Hospital explained that no decision is rushed into but maintained a preference to perform surgery at a young age.¹²⁶

3.3.12 Despite concluding that normalisation surgery remains common in Australia, the Senate Committee was unable to find evidence that this kind of surgery is as beneficial as its proponents suggested.¹²⁷ Few studies on the outcomes of these surgeries have been performed since the release

¹²¹ Ibid 21.

¹²² Ibid 15.

¹²³ Senate Community Affairs References Committee (n 97) 49.

¹²⁴ Ibid.

¹²⁵ Ibid.

¹²⁶ Ibid 50.

¹²⁷ Ibid 51.

of the 2006 *Consensus Statement*. The Senate Committee observed that many of the studies that had been completed had significant methodology issues which undermined their findings.¹²⁸

3.3.13 The Senate Committee also noted known risks of some genital normalisation procedures, including irreversible sterilisation and the likelihood that surgery would not be an isolated intervention. In fact, normalisation surgery can lead to an ongoing dependency on medical intervention, with some intersex teenagers experiencing continuing reconstructive surgeries throughout adolescence.¹²⁹

3.3.14 Overall, the Senate Committee noted the ‘distinct lack’ of studies on the long-term outcomes of normalisation surgery and lack of standardised practice and expressed serious concerns regarding known negative outcomes resulting from these surgeries.

3.4 Options for reform

3.4.1 This section examines potential approaches to reform in relation to consent for medical treatment on minors to alter sex characteristics. Broadly, these include:

- criminalisation of surgery on minors;
- specific health legislation to regulate surgery on minors;
- introduction of medical codes of practice for practitioners performing surgery on minors; and
- improved funding for education and counselling services.

3.4.2 The Institute invites submissions about whether regulatory reform in respect of surgical interventions to alter sex characteristics in minors is desirable and, if so, what form such reforms should take.

Criminalisation under the Criminal Code

3.4.3 The *Darlington Statement* called for the criminalisation of ‘deferrable medical interventions, including surgical and hormonal interventions, that alter the sex characteristics of infants and children without personal consent.’¹³⁰

3.4.4 A potential model for criminalisation of particular medical procedures is the ban on female genital mutilation procedures under the *Criminal Code* (Tas).

3.4.5 Following condemnation of female genital mutilation both nationally and internationally, s 178A was introduced into the Tasmanian *Criminal Code*. Section 178A makes it a crime for any

¹²⁸ Ibid 53–56.

¹²⁹ Ibid 58.

¹³⁰ *Darlington Statement* (n 6) [7].

person to perform ‘female genital mutilation’ on another person. Consent, whether given by the person being operated on or their parent or guardian will not serve as a defence to the charge.

3.4.6 ‘Female genital mutilation’ covers a clitoridectomy, an excision of any other part of the female genitals, an infibulation or similar procedure, and any other mutilations of the female genital organs.¹³¹

3.4.7 However, the prohibition on female genital mutilation does not apply to the following procedures:

- a surgical procedure for a ‘genuine therapeutic purpose’; or
- a sexual reassignment procedure, defined as a surgical procedure to ‘give a female, or a person whose sex is ambivalent, the genital appearance of a particular sex’.¹³²

3.4.8 Recent court decisions, such as that in *Re Carla* (see Appendix 4), suggest that normalisation procedures may be considered therapeutic. Such procedures would arguably also be characterised as sexual reassignment procedures and fall outside the prohibition in s 178A of the *Criminal Code*.

3.4.9 One possible reform approach would be to prohibit genital normalisation procedures in a similar manner as female genital mutilation. However, a prohibition that does not allow for the consent of the person being operated on may not be desirable, as it does not adequately recognise the autonomy of intersex adults and capable minors. Further, the exclusion of ‘therapeutic’ procedures would effectively exclude any prohibition on non-consensual surgical intervention on intersex children while the medical profession continues to consider reassignment and normalisation procedures to serve a genuinely therapeutic purpose.

3.4.10 A useful model may be found in the Maltese *Gender Identity, Gender Expression and Sex Characteristics Act*, 2014. Section 15 of that Act provides:

15. (1) It shall be not be lawful for medical practitioners or other professionals to conduct any sex assignment treatment and, or surgical intervention on the sex characteristics of a minor which treatment and, or intervention can be deferred until the person to be treated can provide informed consent.

(2) In exceptional circumstances treatment may be effected once there is an agreement between the Interdisciplinary Team and the persons exercising parental authority or tutor of the minor who is still unable to provide consent:

Provided that medical intervention which is driven by social factors without the consent of the individual concerned will be in violation of this Act.

(3) The Interdisciplinary Team shall be appointed by the Minister for a period of three years, which period may be renewed for another period of three years.

¹³¹ *Criminal Code* sch 1 s 1 ‘female genital mutilation’.

¹³² *Ibid* s 178C.

(4) The Interdisciplinary Team shall be composed of those professionals which the Minister considers as appropriate.

(5) When the decision for treatment is being expressed by a minor with the consent of the persons exercising parental authority or the tutor of the minor, the medical professionals shall:

(a) ensure that the best interests of the child as expressed in the Convention on the Rights of the Child are the paramount consideration; and

(b) in so far as is practicable, give due weight to the views of the minor having regard to the minor's age and maturity.

3.4.11 The attraction of a criminalising provision in the *Criminal Code* is that enforcement of the provision would have a meaningful impact on surgical interventions. However, *Criminal Code* provisions operate most effectively where offences can be described briefly and clearly. Given the complexity around medical views and approaches to surgical intervention on intersex children, a detailed regulatory framework around consent and distinguishing therapeutic and non-therapeutic interventions would be required. This would arguably be out of place in the *Criminal Code*.

Specialist tribunal

3.4.12 Another approach to reform would be to establish a statutory board or tribunal that would determine the need for a medical procedure on a minor, using decision-making principles based on a human rights framework that considers the best interests of the child, including their personal autonomy. Other than in emergency situations, no surgical intervention on intersex minors could be lawfully performed without the authorisation of this body.

3.4.13 This approach was considered and recommended in the 2016 Options Paper released by Equal Opportunity Tasmania:

Recommendation 11: That treatment or any intervention primarily undertaken to modify or 'normalise' the visible or apparent sex characteristics of children for psychosocial reasons be classified as 'special medical procedures' and require consent of a Tasmanian board or tribunal such as the Guardianship and Administration Board informed by experts on gender and sex diversity.¹³³

3.4.14 The Institute notes that the Australian Human Rights Commission is currently reassessing the principles which have guided decision-making about medical interventions for intersex children and the human rights implications of these practices in light of domestic and international developments.¹³⁴

¹³³ Equal Opportunity Tasmania (n 113) 23.

¹³⁴ For information about this review see, Australian Human Rights Commission, *Surgery on Intersex Infants and Human Rights* (Web Page) <<https://www.humanrights.gov.au/surgery-intersex-infants-and-human-rights-2009>>.

3.4.15 As highlighted by the 2013 Senate report (see [3.3.10]–[3.3.14]), surgical intervention continues to be regularly used despite the paucity of evidence to support the level of use.¹³⁵ To ensure that applications for normalisation procedures are rigorously assessed to determine whether there is a genuine medical need for the procedure, membership of the statutory body would need to include allied health professionals, such as psychologists and social workers, with knowledge of the potential mental health impacts of such surgery.

3.4.16 In its report on non-therapeutic male circumcision, the Institute noted concerns that mandating court approval or authorisation of a statutory body would be costly, ‘time consuming, stressful and burdensome on parents’ and doctors, and potentially difficult to enforce.¹³⁶ Similar concerns may arise in relation to provisions requiring authorisation by a specialist tribunal.

Specialised legislation

3.4.17 Given the distinctive issues relating to reassignment and normalisation surgeries, specialised health legislation could be introduced to outline comprehensively the legal framework for surgical intervention to alter the sex characteristics of infants and children. The *Reproductive Health (Access to Terminations) Act 2013* (Tas) is an example of legislation addressing a specific health issue, setting conditions under which medical procedures can occur, and providing exceptions to criminal offences where those conditions have been satisfied.

3.4.18 The focus of legislation addressing normalisation or reassignment surgery for minors would be the codification of the circumstances in which surgical intervention is acceptable, and the principles which inform decisions to perform surgery. Legislation should require a doctor to demonstrate that she or he is satisfied of the following:

- where the child is capable of giving consent,¹³⁷ that the child understands the implications of the surgery and has consented to the procedure;
- where the child is not capable of giving consent, that there is a genuine medical need for the procedure and the procedure cannot be deferred until the child is capable of giving consent;
- that the procedure is in the best interests of the child on medical grounds;
- that the child and the parents or guardian of the child have received adequate information and access to counselling services prior to consenting to the procedure.

3.4.19 The *Children and Young Persons (Care and Protection) Act 1998* (NSW) provides some guidance on how matters of consent can be addressed. Section 175 prohibits ‘special medical treatment’ on a child, including procedures likely to render the child permanently infertile, unless

¹³⁵ Australian Human Rights Commission (n 98).

¹³⁶ Tasmania Law Reform Institute, *Non-Therapeutic Male Circumcision* (Final Report 17, 2012) 77–78 <http://www.utas.edu.au/__data/assets/pdf_file/0006/302829/Non-Therapeutic-Circ_Final-Report-August-2012.pdf>.

¹³⁷ See the discussion of ‘Gillick competence’ in Appendix 4.

consent is given in accordance with the regulations,¹³⁸ or a medical practitioner believes the treatment is urgent and necessary to save the child's life or prevent serious damage.

3.4.20 Section 12 of the *Consent to Medical Treatment and Palliative Care 1995* (SA) allows a medical practitioner to administer treatment to a child if:

- the child's parent or guardian consents; or
- the child consents, and at least two medical practitioners are satisfied that:
 - the child is capable of understanding the nature, consequences and risks of the treatment; and
 - the treatment is in the best interest of the child's health and well-being.

3.4.21 This provision has been useful in supporting transgender minors who consent to gender affirmation or reassignment procedures, potentially against the wishes of their parents. However, s 12 does not seek to prevent non-consensual medical procedures on intersex minors where their parent or guardian has consented to the procedure.

3.4.22 In its review of laws which could have a discriminatory impact on members of the LGBTIQ community, SALRI recommended that s 12 be amended to clarify that medical treatment for gender affirmation or reassignment purposes must only occur with the consent of the child or adult and in accordance with Guidelines developed by the Minister.¹³⁹ This recommendation has yet to be adopted, but provides another potential legislative model to regulate medical procedures on transgender and intersex minors in Tasmania.

3.4.23 The Institute has previously recommended the enactment of a specialist law regarding circumcision of minors requiring medical practitioners to provide accurate information regarding the nature of the procedure, associated risks and consequences (including risks of deferring the procedure), and the 'potential for children to grow up into adults who resent their circumcision'.¹⁴⁰

3.4.24 There are advantages to the adoption of a specific regulatory framework for medical procedures to alter sex characteristics in minors. A dedicated Act would contain a comprehensive regulatory regime, with sufficient detail to provide certainty for parents, affected children and medical practitioners. Consolidating the rules regarding surgical intervention on intersex children could improve consistency in treatment for intersex people and serve to create better understanding of the specific issues facing intersex people.

3.4.25 The legislation could include a range of penalties and enforcement provisions to ensure compliance among medical practitioners, and to clarify the interaction with any provisions of the *Criminal Code* (such as provisions relating to assault or female genital mutilation). Such legislation would also serve an educative function.

¹³⁸ The *Children and Young Persons (Care and Protection) Regulation 2012* does not currently make any provision for when 'consent' will be given.

¹³⁹ SALRI Report (n 17) 50.

¹⁴⁰ Tasmania Law Reform Institute (n 136) 82 (Recommendation 7).

A civil liability approach

3.4.26 The options discussed above rely on a criminal law approach, where failure to comply with mandatory compliance standards will result in punishment (a fine, professional sanction, or term of imprisonment, depending on severity).

3.4.27 An alternative could be found in an approach based on civil liability. Currently, it is not generally open to intersex people to pursue civil claims against doctors who have performed surgical interventions with the consent of their parents, unless the procedures were performed negligently. Even where the surgery has led to psychological harm or health issues, informed parental authorisation of the surgery will generally be sufficient for the doctor to avoid liability.

3.4.28 A civil liability approach would amend the *Civil Liability Act 2002* (Tas) to explicitly set out the factors that a doctor must be satisfied of to perform surgical interventions validly on intersex infants and children. Legislative provisions could also detail what constitutes valid consent for the purposes of authorising such surgeries. The primary remedy in this type of approach would be compensatory damages for harm caused by any surgical intervention that did not satisfy the relevant factors.

3.4.29 The opportunity to obtain damages is an advantage of the civil liability approach. Criminal penalties can be effective in changing the overall behaviour of medical practitioners, but these remedies focus on the offender and the broader public interest in regulating medical practices. In contrast, civil remedies are able to focus on the victim and compensate them for the harm that they have suffered.

3.4.30 However, there are also disadvantages to a civil liability approach. In particular, compensation is available only where harm has already been suffered, rather than preventing it from occurring (other than the overall deterrent value of civil penalties). There is also a risk of uncertainty for medical practitioners, who may not be willing to perform even genuinely necessary procedures for fear of future liability.

Professional code of conduct or practice standard

3.4.31 Rather than imposing a legal standard on medical practitioners, it may be possible to achieve a similar effect through a Code of Practice for the medical profession. These practice standards could address similar matters to the regulatory regime described in [3.4.18], including consent, best interests of the child, urgency and genuine medical necessity, and the provision of complete and accurate information. Practitioners who diverge from the Code of Practice may face disciplinary procedures or place themselves at risk of negligence claims when affected children reach majority.

3.4.32 This approach would be consistent with the recommendation of the Senate Committee to develop and implement guidelines which minimise normalisation surgeries.¹⁴¹

¹⁴¹ Ibid 74.

3.4.33 In Australia, there is currently no national professional code of practice or practice standard which purports to advise or direct practitioners on intersex issues specifically. The Australian Medical Association ('AMA') 2002 position statement on *Sexual Diversity and Gender Identity* and the 2014 statement on *Sexual and Reproductive Health* acknowledge some issues facing intersex people but do not address normalisation surgeries in great detail. The 2014 position statement advises against cosmetic genital surgeries for children under the age of 18, and states that normalising cosmetic genital surgery on intersex infants should be avoided until a child can fully participate in decision-making.¹⁴² This is the extent of the AMA's position on this specific issue.

3.4.34 The Senate report, *Involuntary or Coerced Sterilisation of Intersex People* (see [3.3.10]), raised concern regarding the lack of standardised objective measures by which 'normal' is referenced in relation to sex characteristics. The Senate Committee noted lack of medical consensus regarding the practice, prevalence and necessity for normalisation procedures. The committee also observed that it is unclear how, if at all, medical practitioners factor diversity in the appearance of genitals into their clinical practice.

3.4.35 The Victorian *Decision-making Principles* provide an example of guidelines aimed at achieving consistency of practice. However, as noted above, these principles continue to endorse gender normalisation as a therapeutic procedure in many circumstances.

3.4.36 Given the complexity and diversity of medical, health and social perspectives on this issue, it is unclear how practicable it would be for the Tasmanian Department of Health to develop decision-making principles that give effect to the Senate's recommendations for endorsement by the medical profession. However, in light of the significant consequences for intersex people, it may be worth pursuing regardless of the difficulty. To some extent, practice standards such as these could exist in conjunction with other approaches, which may alleviate some of this difficulty by reducing the burden on the drafting of the practice standards.

Education and support

3.4.37 Regardless of any substantive law reform, the Institute considers it would be desirable to produce and disseminate materials to better inform Tasmanians regarding the issues and realities facing intersex people, including the potential mental health effects of normalisation procedures.

3.4.38 A persistent problem in this area is a lack of understanding of intersex people and intersex status. As discussed in Part 1 of this Issues Paper, there are a number of misconceptions about 'binary sex', the biological features that make up a person's sex, and intersex variations of those features. The practical effect of this lack of understanding is that the needs and desires of the intersex community are often poorly addressed, or not addressed at all.

3.4.39 Education and support is not an end in itself, although improved awareness and understanding will go some way towards further action. Instead, education and support should supplement any of the other approaches adopted in this area.

¹⁴² Australian Medical Association, *Sexual and Reproductive Health* (2014) 12.

3.4.40 The *JRL Act* has introduced a range of explicit provisions in relation to counselling for minors regarding registering a change of gender. In particular, an application to register a change of gender from a person under 18 is to be accompanied by evidence that they have received counselling from someone they consider to be qualified and experienced to advise them on the consequences of their application (s 28C). Similar emphasis should be placed on the importance of counselling prior to making any decisions regarding medical procedures on intersex children.

3.4.41 The *Darlington Statement* also calls for more supported counselling services to assist intersex people and their families to make informed decisions.¹⁴³ Funding for intersex support organisations would allow those organisations to produce targeted information on intersex matters, including surgical interventions such as genital normalisation, and to provide counselling to parents and children, as well as educate medical practitioners, on the potential consequences of surgery.

Question 5

What, if any, reforms should be made in relation to consent to medical treatment to alter the sex characteristics of an intersex minor? In particular:

- In what, if any, situations should Court approval be required for medical intervention on minors to alter sex characteristics?
- Should sex reassignment surgery on a minor be excluded from offences relating to female genital mutilation?
- Should Tasmanian laws prevent medical intervention to address sex characteristics in minors without their consent to the procedures (other than in emergency situations)? Should ‘emergency situations’ be defined by legislation for the purpose of this exception?
- What form should that prohibition take? Should it be a criminal offence to perform such surgery or should some alternative approach be adopted and, if so, what approach would best address this issue?
- Should there be any additional exceptions to that prohibition apart from emergency situations and, if so, what should those exceptions be?
- In what, if any, situations should an independent advocate be appointed to act on behalf of a minor where approval is sought for medical intervention to address sex characteristics?
- If parents are able to consent to medical procedures, should they be required to show that they have received counselling or advice (other than from the treating physician) about the implications of the proposed procedures?
- Should a specialist tribunal be established to consider applications for medical procedures to alter the sex characteristics of minors and, if so, who should be members of the Tribunal?

¹⁴³ *Darlington Statement* (n 6) cl 7.

3.5 Consent to medical procedures for transgender minors

3.5.1 The issue of consent to medical procedures also arises in relation to the extent to which transgender minors can consent to reassignment surgery and whether their consent is sufficient. The changes made by the *JRL Act* to remove reassignment surgery as a pre-condition to registering a change of gender may relieve some of the pressure for surgical intervention experienced by minors and their parents or guardians. However, there are still likely to be situations in which adolescents wish to undergo surgery to align their physiological appearance with their gender identity, potentially against the wishes of their parents or guardians.

3.5.2 Medical procedures range from puberty blocking treatment (Stage 1 treatment), to hormonal treatment (Stage 2), to surgical intervention (Stage 3).

Human rights issues

3.5.3 As outlined above, the Australian Human Rights Commission has recognised that the *Convention on the Rights of the Child* provides that, where a child is competent to form a view about matters affecting their health or identity, those views should be given due weight.¹⁴⁴

3.5.4 The case of *Gillick v West Norfolk and Wisbech Area Health Authority*, approved by the High Court in *Marion's Case* (see Appendix 4), recognises that children become increasingly competent to make decisions as they mature. ‘*Gillick* competence’ refers to the requisite intelligence and understanding of proposed procedures to give valid consent.¹⁴⁵ In situations where an adolescent can demonstrate ‘*Gillick* competence’, they are generally entitled to consent to their own medical treatment.

3.5.5 However, the courts retain a guardianship jurisdiction and may override consent given by a minor if the court believes that the medical treatment would not be in the best interests of the child. Successive Commissioners for Children and Young People in Tasmania have emphasised that determining what is in the best interests of a child or young person is best achieved by affording children the right to be heard on matters affecting their interests.¹⁴⁶

3.5.6 It is the Institute’s view that where minors demonstrate ‘*Gillick* competence’ their wishes should be respected regardless of what others or a court may consider to be in their best interests.

¹⁴⁴ *Convention on the Rights of the Child* (n 99).

¹⁴⁵ *Gillick v West Norfolk and Wisbech Area Health Authority* [1986] AC 112, 189 (Lord Scarman).

¹⁴⁶ Letter from Leanne McLean, Commissioner for Children and Young People, Tasmania, to Legislative Council members, 19 March 2019; Paul Mason, Commissioner for Children, Tasmania, ‘Pink or blue – A rights-based framework for medical intervention with intersex infants’ (Conference Paper, World Congress on Family Law and Children’s Rights, August 2009).

This approach accords with their human rights as autonomous human beings articulated in art 12 of the United Nations *Convention on the Rights of the Child*.¹⁴⁷

Relevant cases

3.5.7 Cases involving medical procedures for trans minors have tended to involve children who are supportive of the proposed medical procedure (see *Re Alex*,¹⁴⁸ *Re Jamie*,¹⁴⁹ *Re Kelvin*¹⁵⁰ and *Re Matthew*¹⁵¹ – Appendix 4). These cases focus on the capacity of the minors to give informed consent. They demonstrate a trend towards respecting the agency of competent minors to make decisions about their treatment.

3.5.8 Some commentators have seen the requirement for court approval of reassignment surgery where a child has demonstrated ‘Gillick competence’ as problematic:

The practical effect is to place a time-consuming, expensive and stressful hurdle in the path of young people who are seeking treatment, and their families. It is ironic that, given the discursive focus on ‘hearing’ children and upholding children’s rights in the family law jurisdiction, the requirement to seek court authorisation adds an additional layer of anxiety and uncertainty for individual children already caught up in a very confusing time in their lives.¹⁵²

Options for reform

3.5.9 There are currently no legislative provisions in Tasmania explicitly addressing the issue of consent of minors to surgical intervention to alter sex characteristics.

3.5.10 As outlined above, the amended *BDM Act* allows a person who is at least 16 years old to apply to the Registrar to register a change of gender. The reforms removing the requirement to undergo reassignment surgery before registering a change of gender may reduce pressure on transgender children and their parents regarding medical intervention. However, some transgender adolescents will still seek these treatments.

3.5.11 The courts are increasingly taking a liberal view of the rights of adolescents to give valid consent to their own medical treatment. Nevertheless, in the absence of legislation dealing explicitly with the matter, uncertainty about the status of minors’ decisions with respect to medical treatment will remain. A statutory provision similar to s 12 of the *Consent to Medical Treatment*

¹⁴⁷ The trend away from preferencing an allegedly objective ‘best interests’ approach to one favouring compliance with a person’s will and preferences is seen, as well, in other areas of assisted or contested decision-making like those involving people who are, or may be, subject to guardianship orders (see Tasmania Law Reform Institute, *Review of the Guardianship and Administration Act 1995 (Tas)* (Final Report 26, 2018) Part 3.

¹⁴⁸ *Re Alex* (n 38).

¹⁴⁹ (2013) 278 FLR 155.

¹⁵⁰ (2017) 327 FLR 15.

¹⁵¹ [2018] FamCA 161.

¹⁵² Felicity Bell, ‘Children with Gender Dysphoria and the Jurisdiction of the Family Court’ (2015) 38(2) *University of New South Wales Law Journal* 426 (footnotes removed).

and Palliative Care 1995 (SA) could be enacted to clarify the extent to which a minor's wishes are to be taken into account in relation to medical intervention.

3.5.12 Section 12 allows a medical practitioner to conduct medical procedures on a child if:

- the child's parent or guardian consents; or
- the child consents, and at least two medical practitioners are satisfied that:
 - the child is capable of understanding the nature, consequences and risks of the treatment; and
 - the treatment is in the best interest of the child's health and well-being.

3.5.13 This provision has been relied on to support transgender minors who consent to gender affirmation or reassignment procedures, potentially against the wishes of their parents.

3.5.14 Consistent with the rights afforded to 16-year-olds to register a change of gender under the amended *BDM Act*, a similar provision in Tasmania might explicitly allow procedures to be conducted with the consent of a child of at least 16 years of age.

3.5.15 For children under 16, the medical practitioner could act on the consent of children if two medical professionals (defined to include clinical psychologists) are satisfied that:

- the child is capable of understanding the nature, consequences and risks of the treatment; and
- the treatment is consistent with the 'will and preference' of the child; and
- the treatment is consistent with the child's health and well-being.

3.5.16 The provisions could also require evidence that a minor has received counselling regarding the consequences of the surgery (similar to provisions in s 28C of the *BDM Act*). The provisions could be supported by regulations or guidelines.

Question 6

What, if any, reforms should be enacted to enable minors to consent to medical treatment to alter their sex characteristics and to enable medical practitioners to act on their consent?

Question 7

Should there be an age requirement for valid consent to medical treatment to alter sex characteristics?

Question 8

Should there be additional conditions attached to the consent to enable medical practitioners to act on it, such as a requirement that minors receive expert counselling regarding the consequences of the surgery?

Question 9

Should medical practitioners be able to act on the consent of minors under 16 years of age to medical treatment to alter their sex characteristics and, if so, in what circumstances? For example,

should there be a requirement that two medical professionals (defined to include clinical psychologists) are satisfied that:

- the child is capable of understanding the nature, consequences and risks of the treatment; and
- the treatment is consistent with the ‘will and preference’ of the child; and
- the treatment is consistent with the child’s health and well-being.

Appendix 1

Summary of cases regarding sex and gender

Issues regarding recognition of sex and gender have been the subject of judicial consideration for many years. Each of the cases discussed in this Appendix involved interpretation of terms that relied on the meaning of sex and gender, as understood at the time they were decided. These cases demonstrate the progression of understanding of sex and gender diversity and the adoption of more contemporary approaches over time.

Significantly, the cases rely heavily on the terms of the legislation under consideration and articulation of some of the international principles discussed in Parts 2 and 3.

***Corbett v Corbett* [1971] P 83**

One of the earliest decisions concerning sex and gender was *Corbett v Corbett*.¹⁵³ The case was adopted and relied upon in numerous subsequent Australian cases.

The case concerned April Ashley, a woman born male but who had lived for some time as a woman and undergone surgery to remove male genitals and to construct an artificial vagina. She subsequently married Arthur Corbett. When they later sought to divorce, the court declared their marriage to have been void, as Ashley was a male at the time of the marriage ceremony.

Ormrod J acknowledged that Ashley was transsexual in a psychological sense and living as a woman ‘more or less successfully’ in a social sense.¹⁵⁴ However, his Honour held that male physical characteristics present at birth, together with ‘immutable male chromosomal characteristics’ were decisive determiners of sex. Once fixed by these criteria, biological sex could not be changed:

In other words, the law should adopt in the first place, the first three of the doctors’ criteria, that is, the chromosomal, gonadal and genital tests, and if all three are congruent, determine the sex for the purpose of marriage accordingly, and ignore any operative intervention.¹⁵⁵

As Ashley remained biologically a person of the male sex at the time of her marriage to Corbett, the marriage was invalid.

***R v Harris & McGuinness* (1988) 17 NSWLR 158**

Harris was registered male at birth, though with ‘strong female instincts and attributes’. After many years living as a female, Harris underwent sex reassignment surgery to remove male genitalia and construct female genitalia. Harris was working as a prostitute when arrested for soliciting an undercover police officer.

¹⁵³ *Corbett v Corbett* [1971] P 83.

¹⁵⁴ *Ibid* 106 (Ormrod J).

¹⁵⁵ *Ibid* 106.

McGuinness was also registered male at birth and was living as a female but was yet to undergo sex reassignment surgery. McGuinness was also arrested for soliciting a police officer.

Harris and McGuinness were both charged and found guilty under s 81A of the *Crimes Act 1900* (NSW), which made it an offence for a male person to commit, or offer to commit, ‘any act of indecency with another male person.’ Both appealed against the charge.

In his dissenting judgment, Carruthers J followed *Corbett*, stating:

[S]uch surgery combined with ‘her’ hormone therapy and her psychological attitude to ‘her’ gender cannot possibly, to my mind, override the congruence of the chromosomal, gonadal and genital factors which are all male. ...

The fact that a biological male divests himself of his external genitalia cannot mean that he thereby becomes a female or vice versa.¹⁵⁶

However, Street CJ, with whom Mathews J agreed, preferred a more contemporary approach:

[A]s a more compassionate, tolerant attitude to the problem of human sexuality emerges amongst the civilised nations of the world, the founding of [the decision in *Corbett v Corbett*] on clinical factors present at birth has come under increasing criticism.¹⁵⁷

Their Honours held that a person’s sex was to be determined by a combination of psychological sex identification and physical attributes existing at the time of the commission of the alleged offence and not by classification based on chromosomal features. Having regard to the reassignment surgery which had altered her genitalia, and her social presentation as a woman, they were satisfied Harris was not male for the purposes of s 81A.

In contrast, the Court agreed that McGuinness was male. Carruthers J stated broadly that ‘[t]he law could never countenance a definition of male or female which depends on how a particular person views his or her own gender.’¹⁵⁸ Street CJ and Mathews J considered that self-identification was a factor, but psychological sex identification alone is not sufficient to determine sex. Therefore, without any surgical intervention to alter physical sex characteristics, McGuinness could not be recognised as female.

A secondary consideration in this case arose when Harris asked that, if she was not recognised as female, she be classified as falling within a further category of ‘no sex’. Given the Court’s conclusion that Harris was female for the purposes of the law, no decision was made on this question. However, Mathews J commented:

I can see no place in the law for a third sex. Such a concept is a novel one, which could cause insuperable difficulties in the application of existing legal principles. It would also

¹⁵⁶ *R v Harris and McGuinness* (1988) 17 NSWLR 158, 170 (Carruthers J).

¹⁵⁷ *Ibid* 160 (Street CJ).

¹⁵⁸ *Ibid* 170 (Carruthers J).

relegate transsexuals to a legal ‘no man’s land’. This I think, could only operate to their considerable detriment.¹⁵⁹

***Secretary, Department of Social Security v SRA* [1993] 43 FCR 299**

SRA was a male-to-female transsexual who lived as a woman but had not undergone sex reassignment surgery due to the cost. She was living with a male de facto partner, who was an invalid pensioner, and accepted socially as his female partner. Under s 37 of the *Social Security Act*, a woman who is the wife (including de facto) of an invalid pensioner is eligible for a wife’s pension. SRA applied for a wife’s pension.

The Social Security Tribunal approved the application. The Tribunal considered that the Act was beneficial legislation designed to deliver social policies regarding supportive domestic relationships. In that context, the Tribunal held that requiring a person to undergo expensive surgery before being eligible to receive benefits was unduly onerous, given the range of reasons why a person may be unable to undergo such surgery, including cost and medical contra-indications. The Tribunal was satisfied that SRA had the ‘psychological sex and social and cultural identity of a woman’ for the purposes of the Act and as eligible for a wife’s pension.

When that decision was upheld by the Administrative Appeals Tribunal, the Department of Social Security appealed to the Federal Court.

Black CJ (with whom Heerey J agreed) observed:

Whatever may once have been the case, the English language does not now condemn post-operative male-to-female transsexuals to being described as being of the sex they profoundly believe they do not belong to and the external genitalia of which, as a result of irreversible surgery, they no longer have. Where through medical intervention a person born with the external genital features of a male has lost those features and has assumed, speaking generally, the external genital features of a woman and has the psychological sex of a woman, so that the genital features and the psychological sex are in harmony, that person may be said, according to ordinary English usage today, to have undergone a sex change.¹⁶⁰

However, Black CJ was not prepared to abandon the relevance of surgical intervention relied upon in *R v Harris and McGuinness*, holding that it would be ‘going well beyond the ordinary meaning of the words’ to conclude that a pre-operative transsexual, having male external genitalia, is a ‘woman’ for the purposes of the *Social Security Act*.

In reaching that conclusion, his Honour said:

It seems very hard in an individual case to draw a distinction based upon the fact that a person has not had an operation that she cannot afford, particularly when the person is

¹⁵⁹ Ibid 194 (Mathews J).

¹⁶⁰ *Secretary, Department of Social Security v SRA* [1993] 43 FCR 299, 304 (Black CJ).

seeking legal recognition of an identity in which she has a deep belief. ... Nevertheless, a line has to be drawn somewhere.¹⁶¹

Similarly, Lockhart J recognised that sex was not merely a matter of chromosomes but also a psychological and social question,¹⁶² and urged that ‘post-operative transsexuals should not be denied by society the inner peace of life which is their right.’ However, his Honour was also reluctant to recognise as a woman someone who had not undergone reassignment surgery:

I realise that there are cases (this is such a case) where a person has not undergone such surgery for legitimate reasons, including its cost or medical or psychological reasons which render them unfit for the operation. Nevertheless, the interests of society and the individual must be balanced in the determination of the ordinary meaning of the words with which this case is concerned and the application of the facts to those meanings...

Where the anatomical sex and the psychological sex have not harmonised I cannot accept that such a person falls within the ordinary meaning of the words ‘woman’ or ‘female’.¹⁶³

Lockhart J concluded that the Court could not extend the meaning of ‘woman’ to include a pre-operative transsexual, noting that ‘a change to the law of so fundamental nature as this can only be achieved by Parliament.’¹⁶⁴

***Re Kevin* [2001] FamCA 1074**

Kevin was registered female at birth but had undergone sexual reassignment surgery and was living as a male. Kevin was issued with a new birth certificate by the NSW Registrar of Births, Deaths and Marriages on which his sex is shown as male. Kevin held an Australian passport stating his sex as male and was recognised as male on documentation from Medicare, the Australian Tax Office, and various other public authorities.

Kevin married Jennifer, a female person, in 1999 and applied to have the certificate of marriage declared valid. The Commonwealth Attorney-General opposed the declaration on the basis that, following *Corbett*, Kevin was a female for the purposes of the *Marriage Act 1961* (Cth) and, therefore, could not lawfully marry a female.

Chislm J questioned the ‘essentialism’ assumption made by Ormrod J in *Corbett* that biological factors at birth exclusively determine whether a person is a man or a woman:

What is remarkable about this proposition is that nothing has been said to support it. No relevant principle or policy is advanced. No authorities are cited to show, for example, that it is consistent with other legal principles ... [T]he assertion that the legal criteria

¹⁶¹ Ibid 306 (Black CJ).

¹⁶² Ibid 325 (Lockhart J).

¹⁶³ Ibid 327.

¹⁶⁴ Ibid 326.

for determining whether a person is a man or a woman for the purpose of marriage is the person's 'biological sexual constitution' is quite unsupported.¹⁶⁵

[The essentialist view is] unable to accept the sex reassignment because they take the view that there is some essential and unalterable quality that is maleness or femaleness. This view is characterised by absolute and unsupported assertions that a person's sex is fixed unalterably at birth, that no amount of surgery or other medical intervention can make any difference, and that the person's self-perception and role in society are equally irrelevant. In my view however this is not a helpful approach.¹⁶⁶

His Honour was not persuaded that he was required to follow the approach in *Corbett*:

I see no basis in legal principle or policy why Australian law should follow the decision in *Corbett*. To do so would, I think, create indefensible inconsistencies between Australian marriage law and other Australian laws. It would take the law in a direction that is generally contrary to developments in other countries. It would perpetuate a view that flies in the face of current medical understanding and practice. Most of all, it would impose indefensible suffering on people who have already had more than their share of difficulty, with no benefit to society.¹⁶⁷

His Honour went on to outline matters that would be relevant in determining a person's sex, including biological and physical characteristics at birth, the person's life experiences and self-perception, the extent to which the person has functioned in society as a man or a woman, any hormonal, surgical or other medical sex reassignment treatments the person has undergone, and the person's biological, psychological and physical characteristics at the time.

Chisolm J considered that the ordinary contemporary meaning of 'man' would include a post-operative female to male transsexual.¹⁶⁸ Having regard to the factors outlined above, he was satisfied that Kevin was a man for the purposes of the *Marriage Act 1961* and his marriage to Jennifer was valid.

¹⁶⁵ *Re Kevin* [2001] FamCA 1074, [83]–[84].

¹⁶⁶ *Ibid* [315].

¹⁶⁷ *Ibid* [326].

¹⁶⁸ Chisolm J, *ibid* [13]–[14], recognised that the term 'transsexual' was problematic:

'The word poses some problems. The word "transsexual" may suggest a sexual transition, a passing from one sex to the other. While that may reflect the physical changes associated with surgery or hormone treatment, it does not convey the fact that transsexuals say that they have always experienced themselves as belonging to the other sex, before as well as after the hormone or surgical procedures. The word suggests a particular answer to some of the issues that I need to address in this case, and I mention this mainly to explain that I do not intend to pre-judge any of the issues by the use of this term.

Further, I am conscious that using the word "transsexual" as a noun may tend to have a dehumanising effect. In recent years we attempt to remove such effects by a more careful use of language, for example by referring to "people with handicaps" rather than "the handicapped". Such usages are sometimes mocked as "political correctness", but I think they represent an honourable and civilised attempt to use language that reflects the essential humanity of the people being described. However no suitable alternative is evident, and the word is used in the applicants' submissions, so I will adopt it, although I will attempt to minimise its use.

On appeal, the Full Court of the Family Court affirmed Chisolm J's decision.¹⁶⁹

***AB v Western Australia; AH v Western Australia* [2011] HCA 42**

Both AB and AH were registered female at birth. They had undergone gender reassignment procedures — including a double mastectomy and testosterone therapy — but had not had, and did not intend to have, a hysterectomy or penis construction. They were each infertile due to hormone therapy. Both had the outward appearance of a male person, were living their lives as males and had applied to the Gender Reassignment Board for a recognition certificate.

The *Gender Reassignment Act 2000* (WA) requires the Gender Reassignment Board, in determining an application for a recognition certificate, to be satisfied of a number of factors, including that the applicant: 'has adopted the lifestyle and the gender characteristics of a person of the gender to which the person has been reassigned.'¹⁷⁰

The term 'gender characteristics' was defined to mean the physical characteristics by virtue of which a person is identified as male or female.

The Board was satisfied that AB and AH identified themselves as male and had adopted the lifestyle of a male person but concluded that, in the absence of a hysterectomy, they retained some gender characteristics of a female. The Board refused to issue a recognition certificate, saying:

The fact of having a female reproductive system is inconsistent with being male. Because it is inconsistent with being male, it is inconsistent with being identified as male.¹⁷¹

AB and AH appealed against the Board's decision and the matter ultimately came before the High Court.

The High Court considered that the Act explicitly recognises that a person's gender characteristics 'are not, in every case unequivocally male or female'¹⁷² and may be ambiguous. In reaching this conclusion, the Court adopted the approach of the dissenting judge in the Court of Appeal, Buss JA, emphasising that the Act did not refer to characteristics by which a person *is* a male, but to characteristics by which a person *is identified* as a male.¹⁷³ The Court also noted that reassignment procedures referred to 'medical or surgical procedures', rather than requiring surgical procedures 'to remove every vestige of the gender which the person denies, including all sexual organs'.¹⁷⁴

The Court concluded:

¹⁶⁹ *Attorney-General v "Kevin and Jennifer" and Human Rights and Equal Opportunity Commission* [2003] FamCA 94.

¹⁷⁰ *Gender Reassignment Act 2000* (WA) s 15(1)(b).

¹⁷¹ Quoted in *AB v Western Australia* (n 34) 399.

¹⁷² *AB v Western Australia* (n 34), 402 (French CJ, Gummow, Hayne, Kiefel, Bell JJ).

¹⁷³ *Ibid* citing *The State of Western Australia v AH* (2010) AMLC 30-025, [205] (Buss JA).

¹⁷⁴ *Ibid* 404.

The question whether a person is identified as male or female, by reference to the person's physical characteristics, is intended by the Act to be largely one of social recognition.¹⁷⁵

The Court was satisfied that hormone therapy could alter gender characteristics sufficiently to allow a person to be identified as the opposite sex. Once that degree of alteration has occurred, no further consideration of the 'extent of the person's bodily state' is required and the Board must consider the person's self-identity and social perceptions about them.¹⁷⁶

NSW Registrar of Births, Deaths and Marriages v Norrie (2013) NSWCA 145

The most recent Australian case addressing questions of sex and gender identity concerned 'Norrie'. Norrie was registered as male at birth. After undergoing a 'sex affirmation procedure', Norrie applied to the Registrar under the *Births, Deaths and Marriages Registration Act 1995* (NSW) to register both a change of sex to 'non-specific' and a change of name.

The Registrar issued Norrie a Change of Sex certificate and a Change of Name certificate, both of which recorded Norrie's sex as 'not specified'. Later, the Registrar advised Norrie that the Change of Sex certificate was invalid and re-issued a Change of Name certificate which recorded Norrie's sex as 'not stated'.

Norrie applied to the Administrative Decisions Tribunal for review of the Registrar's decision. The Tribunal rejected Norrie's application, holding that the Registrar had no power to record Norrie's sex as 'non-specific'. The appeal panel of the Tribunal dismissed an appeal against that decision. Norrie then appealed, successfully, to the Court of Appeal. By special leave, the Registrar then appealed to the High Court.

The High Court unanimously held that not all humans can be classified as either male or female. Amendments to the *Births, Deaths and Marriages Registration Act 1995* (NSW) to introduce sex affirmation procedures, and related amendments to the *Anti-Discrimination Act 1977* (NSW), were designed to 'correct or eliminate the ambiguities relating to the sex of the person' and recognised that a person could be of indeterminate sex. On the basis of that recognition, the High Court held that the *Births, Deaths and Marriages Registration Act 1995* allowed for the registration of a person's sex as 'not specified', despite there being no explicit provision in the Act.

¹⁷⁵ Ibid 405.

¹⁷⁶ Ibid 406.

Appendix 2

Reviews of law relating to sex and gender in Australian states and territories

Recent High Court determinations, and changing political commitment to diversity and equality, have caused many Australian jurisdictions to review their approach to sex and gender recognition.

This Appendix provides an overview of reviews undertaken recently in the ACT, South Australia, the Northern Territory and Western Australia. Key outcomes of these reviews are represented in Table A2.1 below.

Australian Capital Territory

In 2011, the ACT Attorney-General, Simon Corbell, asked the ACT Law Reform Advisory Council ('LRAC') to inquire into legal recognition of transgender and intersex people in the Territory, with particular regard to compliance with the *Human Rights Act 2004* (ACT).

The LRAC's report, *Beyond the Binary: legal recognition of sex and gender diversity in the ACT*, made a number of recommendations to modernise ACT legislation and provide for recognition of sex and gender diversity. The government's response accepted many of the recommendations in the report, including implementation of two key legislative reforms: extending the registration options for children with intersex variations of sex characteristics and removing the requirement for sexual reassignment surgery before being allowed to change their sex on their birth certificate.

South Australia

In 2015, the South Australian Law Reform Institute ('SALRI') published an audit of discrimination on the grounds of sexual orientation, gender, gender identity and intersex status in South Australian legislation.¹⁷⁷ The Audit report identified discrimination arising from laws regarding registration and legal recognition of gender identity under the *Births Deaths and Marriages Registration Act 1996* (SA) and the *Sexual Reassignment Act 1988* (SA).

A subsequent report, *Legal Registration of Sex and Gender and Laws Relating to Sex and Gender Reassignment*,¹⁷⁸ explored those issues in more detail and made specific recommendations for legislative change. SALRI concluded that careful implementation of their recommended changes

¹⁷⁷ South Australian Law Reform Institute ('SALRI'), *Audit Report: Discrimination on the Grounds of Sexual Orientation, Gender, Gender Identity and Intersex Status in South Australian Legislation* (Report, 2015) <http://law.adelaide.edu.au/system/files/media/documents/2019-01/audit_report_lgbtiq_sept_2015.pdf>.

¹⁷⁸ SALRI, *Legal Registration of Sex and Gender and Laws Relating to Sex and Gender Reassignment* (Report, 2016) <http://law.adelaide.edu.au/system/files/media/documents/2019-01/bdm_sra_report.pdf>.

would ‘preserve the integrity of the Births Deaths and Marriages Register in South Australia, while moving it forward to reflect the modern realities of our community’.¹⁷⁹

A number of the recommendations were subsequently adopted by the South Australian Government.¹⁸⁰

Northern Territory

The Births, Deaths and Marriages Registration and Other Legislation Amendment Bill 2018 was introduced into the NT Legislative Assembly by the Attorney-General and Minister for Justice, Natasha Fyles in October 2018. The Bill, designed to reflect Commonwealth marriage equality laws and to ‘increase the Territory’s compliance with the *Sex Discrimination Act 1984* (Cwlth)’, sought to:

- Remove the requirement to be ‘unmarried’ in order to register a change of sex;
- Allow a person to register a change of sex or gender identity, rather than a change of sex only;
- Allow a person to register their sex or gender identity as something other than ‘male’ or ‘female’ and include recognition of intersex persons;
- Replace the requirement to have undergone sexual reassignment surgery to register a change of sex with a requirement to have received appropriate clinical treatment;
- Provide safeguards to ensure applications for registering a change of sex or gender for a child have regard to the will and the best interests of the child.

The Bill was referred to the Social Policy Scrutiny Committee for inquiry. The Committee undertook public consultation before reporting back to the Legislative Assembly in November 2018, recommending adoption of the Bill subject to minor amendments.¹⁸¹

Western Australia

In 2018, the Attorney-General of Western Australia, John Quigley, asked the Law Reform Commission of Western Australia (‘WALRC’) to report on issues and inconsistencies in Western Australia’s current legal framework relating to the legal recognition of sex and gender. In particular, the WALRC was invited to review the operation of the *Gender Assignment Act 2000* (WA) and the *Births, Deaths and Marriages Registration Act 1998* (WA), having regard to the Commonwealth

¹⁷⁹ Ibid 8.

¹⁸⁰ *Births, Deaths and Marriages Registration (Gender Identity) Amendment Act 2016* (SA).

¹⁸¹ Social Policy Scrutiny Committee, Northern Territory Legislative Assembly, *Inquiry into the Births, Deaths and Marriages Registration and Other Legislation Amendment Bill 2018* (November 2018) <https://parliament.nt.gov.au/__data/assets/pdf_file/0018/600327/70-2018-Signed-Report-Inquiry-into-the-Births,-Deaths-and-Marriages-Registration-Amendment-Bill-2018.pdf>.

marriage equality changes and the High Court’s decision in *AB and AH v Western Australia*¹⁸² (see Appendix 1).

The WALRC’s Final Report,¹⁸³ released in December 2018, recommended a suite of reforms designed to ‘substantially ease the pressure that intersex, trans and gender diverse people and their loved ones, face on a daily basis and ... improve their respective lived experiences.’¹⁸⁴

Key recommendations include introducing an ‘indeterminate’ sex classification as a birth registration option and a ‘non-binary’ gender classification, removing any sex or gender record from birth certificates, repealing the *Gender Reassignment Act 2000* (WA), and introducing an administrative process to register a change of gender under the *Births Deaths and Marriages Registration Act 1998* (WA).

Table A2.1: Reviews of Legislation Relating to Sex and Gender Recognition in Australian Jurisdictions: Recommendations

	ACT	South Australia	Northern Territory	Western Australia
Registration of birth	60 days or 180 days where a child’s sex is initially notified as ‘intersex’ or ‘to be advised’	60 days – required to register sex ‘if determinable’	60 days	60 days – the register may be changed at any point if the sex of a child registered as ‘indeterminate’ develops to be more clearly M or F
Sex records at birth	Male (M) or Female (F) or ‘Indeterminate/Intersex/Unspecified’	M or F or ‘Unspecified’	M or F or ‘Unspecified’	M or F or ‘Indeterminate’
Sex or gender records on birth certificate	M or F or ‘Indeterminate/Intersex/Unspecified’ Details of previous sex or gender not included unless requested	M or F or ‘Other’	M or F or ‘Non-Binary’ or ‘Unspecified’ Further categories may be included in consultation with the trans, gender diverse and intersex community	None
Change of sex or gender (adult)	No surgical intervention required Gender declaration and evidence of ‘appropriate clinical treatment for alteration of sex’ (statutory	No medical, surgical or clinical procedures required Gender affirmation declaration Classifications include M, F, or	No surgical intervention required Must provide a statement from a medical practitioner or a psychologist	No medical, surgical or clinical procedures required Gender Affirmation declaration only

¹⁸² *AB v Western Australia* (n 34) – see Appendix 1 of this Issues Paper for a summary of this decision.

¹⁸³ WALRC Report (n 43).

¹⁸⁴ Ibid 6.

	ACT	South Australia	Northern Territory	Western Australia
	declaration by a doctor or registered psychologist) or that the person is intersex	‘Other, please specify’ – Registrar can refuse to register a self-describing information if it is offensive, obscene or otherwise contrary to the public interest	certifying that the applicant has received appropriate clinical treatment in relation to their sex or gender identity, or is an intersex person	Classifications include M, F or ‘non-binary’
Change of sex or gender (minor)	No surgical intervention required Parents/guardians of a person under 18 can apply for a change of gender if believe it is in the best interests of the child Must provide evidence child has received ‘appropriate clinical treatment for alteration of sex’ or is intersex	No medical, surgical or clinical procedures required A parent or guardian can apply to the Magistrates Court, with approval granted only if it is ‘in the best interests of the child’ and the child consents A child can also apply directly to the Magistrates Court, with approval granted only if it is ‘in the best interests of the child’ and the Court is satisfied that the child understands the change	No surgical intervention required Must provide a statement from a medical practitioner or a psychologist certifying that the applicant has received appropriate clinical treatment in relation to their sex or gender identity, or is an intersex person Registrar must be satisfied child is aware of the meaning and implications of the change and consents to the application A child over 14 is presumed to be aware of the meaning of the change	No medical, surgical or clinical procedures required For children aged 12–18, statutory declaration from the minor, with consent of at least one parent/guardian For children under 12, statutory declaration from at least one parent/guardian declaring genuine belief in child’s affirmed gender, with consent of all other parents/guardians Disputes in relation to minors to be resolved through Family Court mediation process
Limits on changes	–	1 per year, total of 3 Registrar must be satisfied application for change of gender not sought for fraudulent or improper purposes	Limitations proposed in original Bill, but deleted following recommendation of the Committee	1 per year, total of 3

Appendix 3

Implications of *JRL Act* for existing legislation

Table A3.1: Implications of *JRL Act* for existing legislation

Legislation	Provision	Potential implications and reform recommendations
Gendered language		
Acts Interpretation Act 1931	24A. Genders (1) A word or expression that indicates one or more particular genders is taken to include every other gender. (2) A word in either the masculine or feminine gender includes a body corporate or unincorporate.	Sections 28D(1) and (2) of the <i>JRL Act</i> provide that: • If a person has a registered gender, that person will be treated as a person of their registered gender for the purposes of the law. • A reference to a person’s sex is taken to be a reference to their registered sex (if any), or their registered gender (if any).
Public Trustees Act	3. Definitions (2) In this Act, words importing the masculine gender include references to the female gender and neuter gender.	Other sub-sections within s 28D address specific legislative provisions regarding sex or gender (discussed below). Collectively, s 28D complements s 24A of the <i>Acts Interpretation Act 1931</i> (Tas).
Search powers		
Community Protection (Offender Reporting) Act 2005	Under s 21, the Registrar or an authorised person may take, or may cause to be taken a photograph of a ‘reportable offender’ and may require the reportable offender to expose any part of his or her body. However, s 21(4) prevents the Registrar/authorised person from requiring a reportable offender to expose ‘his or her genitals, the anal area of his or her buttocks or, in the case of a female, her breasts.’	Concern that person whose registered gender is other than female, but who still has female physical characteristics, could be asked to expose their breasts. Recommend amending s 21(4) by deleting ‘in the case of a female’.
Corrections Act 1997	The Director of Corrective Services may, for the security or good order of the prison or the prisoners or detainees, order a correctional officer to search or examine a prisoner or detainee, a	This restriction is limited to female visitors (which would include any visitor identifying as female). All other visitors may be inspected by an officer of any gender.

Legislation	Provision	Potential implications and reform recommendations
	visitor to the prison, a correctional officer or any person appointed or employed under the Act (s 22). Section 22(4) provides: (4) A search or examination, or search and examination, of a female visitor under this section is to be made by a female officer and in the presence of females only.	Section 28D(4) of the amended <i>BDM Act</i> provides for a person of any registered gender to request that their search be conducted by a male or female officer, and for a search conducted in accordance with that request to be lawful.¹⁸⁵ Recommend replacing s 22(4) with a provision similar to s 13(5) of the <i>Court Security Act 2017</i>.
<i>Court Security Act 2017</i>	Security officers may direct a person entering or on court premises to submit to a search, including a search of any personal effects reasonably capable of concealing a prohibited object (s 12(1)(c)). Section 13(5) provides that, where a search of a person over 10 years old will involve the removal of any clothing, the search is to be conducted: (a) if practicable, by a security officer of the same gender as the person searched or, if the person is transsexual, transgender or intersex, who is of the gender that the person requests; and (b) if practicable, in the presence of only persons of the same gender as the person searched or, if the person is transsexual, transgender or intersex, who is of the gender that the person requests.	This provision maintains the primacy of attempting to find a person of the same gender to conduct the search but recognises that this may not be possible in all situations ('if practical'). Section 13(5) provides a model for giving a transgender, gender diverse or intersex person agency to request the preferred gender of the officer conducting the search. This provision also maintains the 'if practicable' qualification to ensure that search powers are not unduly compromised. This provision is consistent with the approach adopted in the Tasmania Police Manual, 7.3.4 (see below).
<i>Criminal Code Act 1924</i>	A person in command of an aircraft or other authorised person who reasonably believes an offence relating to the safety of the aircraft has been committed can search any person on board or about to board (s 39B(1)). Section 39B(3) provides: (3) Nothing in this section authorises the search of a female otherwise than by a female.	This provision would not prevent the search of any person identifying as anything other than female from being searched. Section 28D(4) of the amended <i>BDM Act</i> provides for a person of any registered gender to request that their search be conducted by a male or female officer, and for a search conducted in accordance with that request to be lawful. Recommend replacing s 39B(3) with a provision similar to s 13(5) of the <i>Court Security Act 2017</i>. This approach is consistent with the Tasmania Police Manual, 7.3.4(5)

¹⁸⁵ Section 28D(4) protects the validity of searches on the basis of gender only. Any search may be unlawful for reasons other than the gender of the searching officer.

Legislation	Provision	Potential implications and reform recommendations
<i>Forensic Procedures Act 2000</i>	The Act allows for a range of forensic procedures to be carried out by an authorised person with the consent of the person on whom the procedure will be carried out, or subject to a court order. The Act also gives an authorised person power to ask any other person to help carry out the procedure (s 42). ‘intimate forensic procedure’ is defined to include examinations, photographs and taking of samples from intimate areas, specifically ‘in the case of a female, the breasts.’ Section 41 provides: 41. Certain forensic procedures generally to be carried out by person of same sex (1) If practicable, an intimate forensic procedure (other than the taking of a dental impression or an X-ray) is to be carried out by a person of the same sex as the person undergoing the procedure. (2) If practicable, a non-intimate forensic procedure for which the person undergoing the procedure is required to remove clothing other than his or her overcoat, coat, jacket, gloves, socks, shoes and hat is to be carried out by a person of the same sex as the person undergoing the procedure. (3) If practicable, a person asked under section 42 to help carry out a forensic procedure covered by subsection (1) or (2) is to be a person of the same sex as the person undergoing the procedure. Section 45 relevantly provides: 45. Presence of police officers during forensic procedure (1) Police officers may be present during the carrying out of a forensic procedure for the purposes of safety, security, continuity of evidence, investigation and the effective carrying out of the procedure in accordance with this Act. ...	Concern that examination of the breasts of a transgender person, identifying as male but still having female physical characteristics, would not be considered ‘intimate forensic procedure’. However, exposure of the breasts would require removal of clothing so, even if ‘non-intimate’ would still require a person of the same sex to undertake the examination. Section 28D(4) of the amended <i>BDM Act</i> will authorise as lawful any search conducted in accordance with the request of the person being searched regarding the gender of the person conducting the search. Recommend amending ss 41 and 45 to: • use gender, rather than sex • remove binary references to ‘Opposite sex’ • introduce a provision similar to s 13(5) of the <i>Court Security Act 2017</i> to allow a transgender, intersex or gender diverse person to request that the search be conducted by a person of a particular gender • retain the ‘if practicable’ qualification to ensure search powers are not unduly compromised.

Legislation	Provision	Potential implications and reform recommendations
	(3) A police officer who is of the opposite sex to that of the person undergoing the forensic procedure may only be present during the carrying out of the procedure if – (a) it would not be reasonably practicable to carry out the procedure without the presence of the police officer; and (b) at the time the forensic procedure must be carried out, there is no police officer of the same sex as the person available to be present instead of the police officer of the opposite sex.¹⁸⁶	
<i>Guardianship and Administration Act 1997</i>	‘intimate forensic procedure’ is defined to include examinations, photographs and taking of samples from intimate areas, specifically ‘in the case of a female, the breasts.’	The Act does not require people of the same gender to conduct intimate procedures but sets out some rules for how such procedures are conducted. Recommend deleting ‘in the case of a female’ from the definition of ‘intimate forensic procedures’, requiring examination of the breasts of any person to comply with the intimate procedures policy.
<i>Mental Health Act 2013</i>	Custodians and escorts may conduct frisk searches of patients. A frisk search is, if practicable, to be conducted by a person of the same sex as the person being searched (sch 2, s 2(3)). The Chief Forensic Psychiatrist may authorise a range of searches of patients in secure mental health units. Unless otherwise directed by the CFP, where the search involves any touching or undressing of a person, or any touching of a person’s clothing or personal belongings, the search must be carried out in privacy by ‘an authorised person of the same gender as that person and only in the presence of persons of that gender’ (s 111(11)).	Section 28D(4)(a) would authorise a search of a person with a registered gender in accordance with a request from that person that the search be conducted by a male or female. Recommend amending sch 2, s 2(3): (a) <u>Subject to paragraph (b)</u>, a frisk search is, if practicable, to be conducted by a person of the same sex <u>gender</u> as the person being searched. (b) if a person with a registered gender other than male or female requests that a search be conducted by a male or female, a frisk search is, if practicable, to be conducted in accordance with the request. Section 111(11) allows the CFP to direct who undertakes the search. Recommend that the CFP adopt a policy similar to the

¹⁸⁶ This requirement does not apply to a non-intimate forensic procedure that can be carried out without requiring the removal of exterior items of clothing (s 45(4)).

Legislation	Provision	Potential implications and reform recommendations
		Tasmania Police Manual provisions regarding searching transgender, intersex and gender diverse patients.
<i>Misuse of Drugs Act 2001</i>	The Act authorises a police officer to conduct strip searches, subject to s 30(2): 30. Power to conduct personal searches (2) Where a police officer detains a person for the purpose of search under section 29 or 33, the following provisions apply: (a) if the person is female and it is proposed to conduct a strip search, a female police officer is to conduct it; (b) if the person is male and it is proposed to conduct a strip search, a male police officer is to conduct it; The Act also allows a magistrate to order a cavity search to be conducted by a medical practitioner. (4) Notwithstanding subsection (3) – (a) the person is first to be told that he or she may ask for the search to be conducted by a medical practitioner of the same sex as that person; and (b) if the person does so ask, the search is not to be conducted except by a medical practitioner of that sex unless it is not reasonably practicable in the circumstances for such a medical practitioner to be present. (5) The magistrate's order also authorises – (a) a medical practitioner who is to conduct the search to ask another person to help with the search; and (b) the other person to give that help. (6) Unless it is not reasonably practicable in the circumstances, the person asked to help is to be of the same sex as the person to be searched.	Recommend amending s 30(2) to add: (c) <u>if the person is transgender, intersex or otherwise has a registered gender other than male or female and it is proposed to conduct a strip search, an officer who is of the gender that the person requests is to conduct it, if practicable.</u> This would complement the overarching provision in s 28D(4) of the amended <i>BDM Act</i>, and is consistent with the Tasmania Police Manual, 7.3.4(5).
<i>Poisons Act 1971</i>	The Act allows a police officer or inspector executing a warrant to search any person found on the premises listed in the warrant and	Recommend amending s 90C(1) to add: (c) <u>if a strip search is to be carried out on a person who is transgender, intersex or has a registered gender other than</u>

Legislation	Provision	Potential implications and reform recommendations
	detain any such person for the purpose of carrying out the search (s 90A). Section 90C describes the restrictions on conducting a search. 90C. Personal searches (1) Where... an inspector or a police officer detains a person for the purpose of search, the following provisions apply: (a) if a strip search is to be carried out on a female, that search shall be carried out by a female police officer; (b) if a strip search is to be carried out on a male, that search shall be carried out by a male police officer; The Act also allows a magistrate to order a cavity search to be conducted by a medical practitioner. (4) If a person in respect of whom an order has been made ... requests that the search authorized by that order be not carried out unless another medical practitioner, of the same sex as that person, is present, the search shall not be carried out unless another medical practitioner of the same sex as that person is present unless the circumstances are such that it is not reasonably practicable to arrange for the presence of another medical practitioner of the same sex as that person at the search.	<u>male or female, that search shall be carried out by a police officer who is of the gender that the person requests, if practicable.</u> This would complement the operation of s 28D(4) of the amended <i>BDM Act</i>, and is consistent with the Tasmania Police Manual, 7.3.4(5). Recommend also replacing s 90C(4) with a provision similar to s 28D(4).
<i>Police Offences Act 1935</i>	Section 4A allows a police officer to take an intoxicated person into custody. While in custody the police may search the person (s 4A(7)). Section 4A(8) provides: (8) A search of a person under subsection (7) is, if practical, to be conducted by a police officer of the same sex as the person being searched.	Section 28D(4) of the amended <i>BDM Act</i> will apply, but recommend also amending s 4A: (8) <u>Subject to subsection (8A), a search of a person under subsection (7) is, if practical, to be conducted by a police officer of the same sex gender as the person being searched.</u> <u>(8A) if any person with a registered gender other than male or female requests that a search be conducted by a male or female police officer, the search is, if practical, to be conducted in accordance with the request.</u> This approach is consistent with the Tasmania Police Manual, 7.3.4(5).

Legislation	Provision	Potential implications and reform recommendations
<i>Police Powers (Public Safety) Act 2005</i>	Under s 22, police may undertake strip searches in some circumstances and may detain a person for as long as is reasonably necessary to conduct the search. Section 22(4) provides: Where a police officer detains a person for the purpose of a search under this section, the following provisions apply: (a) if it is proposed to conduct a strip search, the search is to be conducted by an officer of the same sex as the person searched or by a person of the same sex under the direction of a police officer ... Note: Section 18 of the <i>Police Powers (Public Safety) Act 2005</i> provides police with powers to conduct an ‘ordinary search’: ordinary search means – (a) a search of a person conducted by – (i) running hands over the person’s outer clothing; or (ii) passing an electronic metal detection device over or in close proximity to the person's outer clothing; or (iii) requiring the person to pass through such a device; or (iv) requiring the person to turn out his or her pockets; and (b) the examination of any thing worn or carried by, or in the control or possession of, the person that is conveniently removed including – (i) an examination conducted by passing an electronic metal detection device over or in close proximity to that thing; or (ii) passing the thing through such a device; or (iii) searching through any bag, basket or other receptacle; or (iv) moving, and if it is considered necessary, removing and searching through the contents of any pocket, bag, basket or other receptacle.	Section 28D(4) of the amended <i>BDM Act</i> will apply, but recommend also amending s 22(4): (a) <u>Subject to paragraph (aa), if it is proposed to conduct a strip search, the search is to be conducted by an officer of the same sex gender as the person searched or by a person of the same sex gender under the direction of a police officer;</u> <u>(aa) if any person with a registered gender other than male or female requests that a search be conducted by a male or female, the search is, if practical, to be conducted by an officer of that gender or by a person of that gender under the direction of a police officer.</u> This approach is consistent with the Tasmania Police Manual, 7.3.4(5).

Legislation	Provision	Potential implications and reform recommendations
	These powers are not confined by a requirement that the search be conducted by an officer of the same sex or gender as the person being searched. The powers are unaffected by the recent changes to the law.	
<i>Search Warrants Act 1997</i>	An executing officer for a warrant, or a police officer assisting, is authorised to conduct ordinary and frisk searches in the execution of the warrant. Section 18 provides: 18. Conduct of frisk searches A frisk search of a person under this Act is, if practicable, to be conducted by a person of the same sex as the person being searched.	Section 28D(4) of the amended <i>BDM Act</i> will apply, but recommend also amending s 18: (c) Subject to subsection (2), a frisk search of a person under this Act is, if practicable, to be conducted by a person of the same sex <u>gender</u> as the person being searched. (d) if a person with a registered gender other than male or female requests that a search be conducted by a male or female, a frisk search is, if practicable, to be conducted in accordance with the request.
<i>Terrorism (Preventative Detention) Act 2005</i>	The Act allows a police officer to search a person who has been taken into custody under a preventative detention order, and to detain a person for as long as reasonably necessary to conduct a search (s 22). Searches must be conducted in accordance with s 22(5)(a): (a) if it is proposed to conduct a strip search, the search is to be conducted by an officer of the same sex as the person searched or by a person of the same sex under the direction of a police officer.	Section 28D(4) of the amended <i>BDM Act</i> will apply, but recommend also amending s 22(5): (a) <u>Subject to paragraph (aa), if it is proposed to conduct a strip search, the search is to be conducted by an officer of the same sex <u>gender</u> as the person searched or by a person of the same sex <u>gender</u> under the direction of a police officer;</u> <u>(aa) if any person with a registered gender other than male or female requests that a search be conducted by a male or female, the search is, if practical, to be conducted by an officer of that gender or by a person of that gender under the direction of a police officer.</u>
<i>NOTE:</i> Tasmania Police Manual (updated December 2018) 7.3.4 SEARCHING OF PERSONS (INCLUDING TRANSGENDER AND INTERSEX PEOPLE) TO BE DETAINED IN CUSTODY (1) A police officer who conducts a search of a person must not use more force or subject the person to greater indignity than is reasonable and necessary in order to conduct the search. (2) Unless special circumstances exist to the contrary, a member should search a person in the presence of another member. (3) When searching persons in custody, the following procedures are to be followed: (a) disposable gloves are to be worn by all members;		

Legislation	Provision	Potential implications and reform recommendations
	(b) the search is to comply with the provisions of s 58B <i>Police Offences Act 1935</i>; (c) where practicable, a person is to be searched by a member of the same sex; and (d) where a sworn member of the same sex is not available, a person of the same sex who is not a sworn member, may be authorised by the custody officer to conduct the search. Definitions: transgender and intersex people: (a) ‘Transgender’ is an umbrella term for people whose gender identity, history, or expression does not match dominant cultural expectations about what it means to be a woman or a man. This includes people whose gender identity is not typically associated with their assigned sex at birth as well as people who have previously lived as another gender. Many transgender people identify simply as women or men and do not consider ‘transgender’ their identity. (b) ‘Intersex’ refers to people born with chromosomal and/or physiological difference, sometimes including ambiguous genitalia and secondary sex characteristics such as breasts, facial hair or build. Most kind of intersex differences are not readily apparent. (5) Transgender and intersex people:- (a) should be treated according to their preferred gender; (b) if an officer is unsure of how a person identifies they should respectfully ask the person; (c) should be searched by a person of the same sex as the person in custody’s identifying gender wherever possible; (d) members should be mindful that a person’s identity documents and police records may not accurately identify their identifying gender; and (e) may be considered at risk of harm from other prisoners while in custody and should be placed in a single cell when being held in custody.	

Legislation	Provision	Potential implications and reform recommendations
Criminal issues		
<i>Criminal Code Act 1924</i>	Accessories after the fact Section 6(2) provides: A married woman does not become an accessory after the fact to a crime of which her husband is guilty, by receiving or assisting him in order to enable him to escape punishment; nor by receiving or assisting, in her husband's presence and by his authority, another person who is guilty of a crime in the commission of which her husband has taken part, in order to enable that other person to escape punishment; nor does a husband become accessory after the fact to a crime of which his wife is guilty by receiving or assisting her in order to enable her to escape punishment. 165A. Infanticide The Code provides that a woman who, within 12 months of giving birth to a child and being still disturbed from the effects of the birth, wilfully causes the death of that child, she will be guilty of infanticide (rather than murder, which carries a higher maximum penalty). 166. Concealment of birth A person who disposes of the dead body of a child delivered by a woman (whether the child died before, at, or after, its birth) and endeavours to conceal the birth is guilty of a crime.	Need to clarify operation of s 6(2) where a person in a marriage identifies as a gender other than their registered sex or gender at the time of the marriage. This provision requires updating to reflect the passage of the <i>Marriage Amendment (Definitions and Religious Freedom) Act 2017</i> (Cth). If a person with a registered gender other than female gives birth or self-terminates and conceals the birth, or gives birth and subsequently causes the death of the child, these crimes may not be made out. Section 28D(3)(a) of the amended <i>BDM Act</i> extends any reference to pregnancy of a female, female person or woman to a reference to pregnancy of any person. This would arguably extend the reach of these crimes. Section 24A of the <i>AIA</i> could also apply to extend the operation of these provisions to any person. For clarity, recommend amending s 165A to replace 'woman' with 'person' and 'she' with 'the person'. Recommend amending s 166 to remove 'delivered by a woman'.
Medical Procedures		
<i>Criminal Code Act 1924</i>	Terminations Section 178D makes it a crime to perform a termination 'on a woman' unless the person performing the termination is a medical practitioner or the pregnant woman. It is also a crime to perform a termination on a woman without the woman's consent (s 178E), however no prosecution will be	These provisions would not extend to a pregnant person with a registered gender other than female. This could have the following consequences:

Legislation	Provision	Potential implications and reform recommendations
	instituted against a medical practitioner who reasonably and in good faith performs a termination on a woman who is unable to give consent, provided the termination is for the woman's benefit. Section 51(1A) allows a termination to be lawfully performed 'on a woman by a medical practitioner if it is performed in good faith, with reasonable care and skill and with the woman's consent.' In relation to each of these sections, 'woman' is defined as 'a female person of any age' (ss 51(1B), 178D(3), 178E(3)). Female genital mutilation Female genital mutilation includes any excision or mutilation of female genitalia. It is a crime to: - perform female genital mutilation on another person (s 178A), or - take a child out of Tasmania for the purpose of having female genital mutilation performed on the child (s 178B). It is a defence to a charge under ss 178A or 178B if the operation in question was for genuine therapeutic purposes or for a 'sexual reassignment procedure' (s.178C(1)(b)). Sexual reassignment procedure is defined as 'a surgical procedure to give a female, or a person whose sex is ambivalent, the genital appearance of a particular sex.'	- A medical practitioner who performs or assists in a termination on a person whose registered gender is other than female will not be protected. - A pregnant person who performs their own termination will not be protected from criminal charges if the person has a registered gender other than female. - A medical practitioner who performs a termination without the consent of the pregnant person, where that person has a registered gender other than female, may not be guilty of the crimes described in ss 178D and 178E. Section 28D(3)(b) of the amended <i>BDM Act</i> provides that a reference to the termination of the pregnancy of a female, female person or woman includes a reference to the termination of a pregnancy of a person of another gender. This would extend the protections afforded by the <i>Criminal Code</i>. Recommend also amending the provisions of the <i>Criminal Code</i> to replace references to 'woman' with 'person' and removing the definitions of 'woman'. 'Sexual reassignment procedures' are no longer a prerequisite to register a change of gender under the <i>BDM Act</i>. There is a risk for a person who registers their gender as male, without any surgical intervention, and later elects to undertake a sexual reassignment procedure to remove their female genitalia. In particular, a 'sexual reassignment procedure' is defined as a procedure on a female or 'person whose sex is ambivalent'. Where the procedure is sought by a person whose registered gender is male, a medical practitioner who performs the procedure may not be protected under s 178C(1)(b). This is because at the time of

Legislation	Provision	Potential implications and reform recommendations
		surgery, the male patient would be neither a female or a person whose sex is ambivalent for the purposes of the <i>Criminal Code</i>.¹⁸⁷ Unless the procedure could be characterised as being for ‘genuine therapeutic purposes’, this would put the medical practitioner at risk of being charged with the crime of performing female genital mutilation. Arguably, s 24A of the <i>AlA</i> could extend the protections to persons other females. However, to remove any uncertainty, the definition of sexual reassignment procedure could be amended to ‘a surgical procedure to give a person the genital appearance of a particular sex’.
<i>Reproductive Health (Access to Terminations) Act 2013</i>	Terminations Section 4 allows medical practitioners to terminate the pregnancy of a woman who is not more than 16 weeks pregnant with the woman’s consent. Section 5 allows terminations after 16 weeks if two medical practitioners reasonably believe the continuation of the pregnancy would involve greater risk of injury to the physical or mental health of the pregnant woman than if the pregnancy were terminated. A woman who consents to, assists in, or performs a termination on herself is not guilty of a crime (s 8). Section 6(3) requires a medical practitioner to perform a termination in an emergency ‘if a termination is necessary to save the life of a pregnant woman or to prevent her serious physical injury.’ Section 6(4) requires a nurse or midwife to assist in the procedure. Section 7 obliges a medical practitioner with a conscientious objection to performing terminations to refer a woman seeking termination to a list of health services.	Concerns that the Act will not authorise terminations on a person with a female reproductive system whose registered gender is other than female, or allow such a person to consent to a procedure. Also concern that medical practitioners are not obliged to perform a termination in emergency circumstances where the pregnant person identifies as male, or to provide such a person with a referral to appropriate health services. As above, s 28D(3)(b) of the amended <i>BDM Act</i> provides that a reference to the termination of a female, female person or woman’s pregnancy includes a reference to the termination of a pregnancy of a person of another gender. This would extend the protections afforded by the <i>Reproductive Health Act</i>. Recommend also amending the provisions of the <i>Reproductive Health Act</i> to replace references to ‘woman’ with ‘person’.

¹⁸⁷ This view assumes that inconsistency between a person’s sex and registered gender would be insufficient to constitute ‘ambivalence’.

Legislation	Provision	Potential implications and reform recommendations
<i>Human Cloning for Reproduction and Other Prohibited Practices Act 2003</i>	The Act creates a number of offences, including: - removing a human embryo from the ‘body of a woman’, intending to collect a viable human embryo (s 15); - intentionally placing a human embryo in the body of a human, other than in a woman’s reproductive tract (s 17(2)); - intentionally placing an embryo in the body of a woman knowing that, or reckless as to whether, the embryo is a prohibited embryo (s 18(3)). These are serious offences, punishable by up to 15 years in prison. The Act defines ‘woman’ as ‘a female human’.	This provision is based on uniform national legislation. Concern that the following activities would not be offences: - removal of viable human embryos from the body of a person with a female reproductive system whose registered gender is other than female; - placing a prohibited embryo in the body of a person with a female reproductive system whose registered gender is other than female Section 28D(3)(c) of the <i>BDM Act</i> provides: (c) a reference to the fertilisation of a human egg outside of the body of a woman does not include the fertilisation of a human egg inside of the body of a person of another gender who has a female reproductive tract; An embryo placed in the reproductive tract of a person with a female reproductive system whose registered gender is other than female would continue to be characterised as being placed ‘other than in a woman’s reproductive tract.’ The offence under s 15 (removing a human embryo from the body of a woman) could be affected by the amended <i>BDM Act</i>. In circumstances where an embryo developed in the body of a person with a female reproductive system whose registered gender is other than female, the embryo could be removed without making out the offence in s 15. Section 28D(3)(a) of the amended <i>BDM Act</i> provides that any reference to pregnancy of a female or a woman include a reference to pregnancy of a person of another gender. Arguably, this could extend to provisions relating to human embryos within the body of a woman. However, the Institute considers that it is preferable to amend s 15 of the <i>Cloning Act</i> to replace ‘from the body of a woman’ with ‘from the body of a human’. This language is consistent with the language currently used in s 17(2) of the <i>Cloning Act</i>.

Legislation	Provision	Potential implications and reform recommendations
<i>Poisons Regulations 2018</i>	It is an offence under r 88 to prescribe or supply acitretin, bexarotene, bosentan, etretinate, sitaxentan, isotretinoin, tretinoin, or thalidomide to a female patient unless satisfied that the patient is not pregnant, is incapable of becoming pregnant, or has been warned about the risks of becoming pregnant.	There is a risk that doctors may not be required to warn patients with a registered gender other than female who retain a female reproductive system of risks associated with these medicines. Section 24A of the <i>AIA</i> and s 28D(3)(a) of the amended <i>BDM Act</i> will extend the operation of r 88 to all persons. For clarity (and procedural reminder to doctors), recommend that r 88 be amended to delete ‘female’.
<i>Workers Rehabilitation and Compensation (Deemed Diseases) Notice 2017</i>	Schedule 1, Rule 4 sets out presumption as to cause of disease for the purposes of compensation. This includes: Breast cancer (female) Exposure to ionizing radiation.	There is a risk that a pre-operative person with a registered gender other than female who has not had a mastectomy, could develop breast cancer as a result of workplace exposure and not be entitled to the causative presumption. This would put the person at a disadvantage in terms of evidence to establish a compensation claim. Recommend amending Schedule 1, Rule 4 to delete ‘female’.
Record collection		
<i>Obstetric and Paediatric Mortality and Morbidity Act 1994</i>	This Act establishes a Council to investigate and keep records of maternal deaths resulting from pregnancy or obstetrics. Statistics are to be gathered in relation to the deaths of women up to 1 year from birth. The Council is also required to report to police any offence in relation to a woman or child (including unlawful medical practices).	The death of any person identifying as male who becomes pregnant will not be required to be recorded, and may compromise the long-term statistical data regarding maternal and infant morbidity. Obligation to report potentially unlawful practices will not extend to offences against persons with a registered gender other than female who retain a female reproductive system. Section 24A of the <i>AIA</i> and s 28D(3)(a) of the amended <i>BDM Act</i> would extend the operation of the reporting requirements in relation to maternal deaths to any deaths during pregnancy, regardless of gender. Recommend also amending the Act to delete references to ‘maternal’ and replace ‘woman’ with ‘person’.
<i>Gas (Safety) Regulations 2014</i>	The report made by a gas entity in relation to any incident is required to record:	

Legislation	Provision	Potential implications and reform recommendations
	(m) particulars of any deceased or injured person including his or her name, date of birth, sex , residential address and telephone number, and occupation or job title (r 4(m)).	Section 28D of the amended <i>BDM Act</i> provides that legislative references to ‘sex’ will be read as references to ‘gender’. This will allow appropriate records to continue to be kept.
<i>Public Sector Superannuation Reform Regulations 2017</i>	Where an employee becomes a contributor to the Fund, the responsible person is to notify the Commission of details of the employee, including ‘his or her sex’ (s 111(2)).	
<i>State Service Regulations</i>	Section 18(4) of the Act, and r 8 require State Service employers to keep records for each employee, including sex.	
Workplace issues		
<i>Public Sector Superannuation Reform Regulations 2017</i>	A ‘married female’ permanent employee who has been continuously employed by the State Government since 1982 may be exempted from continuing to contribute to the superannuation Fund (s 15(2)).	Concern that a person who meets this criterion, but now has a registered gender other than female would lose the opportunity for exemptions from contribution to the Fund. The policy is intended to apply differently to female and male employees, so the application of s 24A of the <i>AIA</i> may not deliver the intended policy outcome. Recommend the State government consider what, if any, reforms should be made to ensure that eligible long-term employees remain eligible for the exemption.
<i>Industrial Relations Act 1984</i>	A female employee who has given notice of her intention to take parental leave is to start leave 6 weeks before the due date, unless a medical practitioner certifies that she is fit to work longer (s 3). Parental leave is available to an employee for ‘the birth of a child to the employee or the employee’s partner.’	Parental leave is available both to the person giving birth and to their partner, making s 3 difficult to apply. For example, a female employee whose female partner is giving birth would be entitled to parental leave but required to seek a medical certification to work within 6 weeks of the birth. Equally, the section may not apply to a pregnant employee whose registered gender is non-binary. Recommend that s 3 be amended to replace ‘female’ with ‘pregnant’.
<i>Long Service Leave Act 1976</i>	Where the age for retirement is not otherwise specified in an industrial award or contract, it is defined as 65 years for a male, or 60 years for a female (s 3).	Given the distinction drawn between male and female employees, s 24A of the <i>AIA</i> may not apply to these provisions. Recommend the State government consider what, if any, reforms should be made to clarify the default retirement age for gender diverse Tasmanians.

Legislation	Provision	Potential implications and reform recommendations
Other legislation		
<i>Adoption Act 1988</i>	Sections 29(2)–(5) set out the people whose consent is required to authorise an adoption. These people relevantly include: • The mother and father of the child, if married (s 29(2)); • The mother of the child and a man who is registered as the father of the child (s 29(3)(a)); • The mother of the child and a man who is assumed to be the parent by operation of the <i>Status of Children Act 1974</i> (ss 29(3)(b), (d) or (e)); • The mother of the child and a man with whom the mother was in a significant relationship at the time of the birth (s 29(3)(da)); • The mother of the child and a woman to whom she was married or in a significant relationship with at the time of the birth (s 29(4A)), where the child was conceived through a fertilisation procedure; • Where a child has previously been adopted, the adoptive parents of a child (s 29(5)).	Section 28D(3)(d) of the amended <i>BDM Act</i> provides that a reference to ‘the mother of a child’ includes ‘a reference to a person of another gender who carried the child in the person’s female reproductive tract, or who gave birth to a child.’ The references to ‘man’ and ‘woman’ in the other provisions of s 29 of the <i>Adoption Act 1988</i> (Tas) could unduly restrict the rights of interested parties to consent, or refuse to consent, to proposed adoption orders. Section 24A of the <i>AIA</i> would operate to extend the application of the consent provisions to parents of any gender. Recommend also amending s 29 to replace references to ‘man’ or ‘woman’ with ‘person’.
<i>Surrogacy Act 2012</i>	The <i>Surrogacy Act</i> provides for surrogacy arrangements to be made for a ‘birth mother’ to seek to have a child, and for that child to be treated as the child of another person or persons (the ‘intended parent’ or ‘intended parents’) (s 5). Surrogacy arrangements cannot be made <u>after</u> a person becomes pregnant (s 5(5)(a)). For the purposes of a surrogacy arrangement, ‘intended parents’ may include a single man or ‘eligible woman’, a man and a	A person whose registered gender is male would not be likely to be a ‘birth mother’. A surrogacy arrangement could not be made <u>after</u> a person inadvertently becomes pregnant and a commitment to ‘seek to become pregnant’ could be acting inconsistently with a gender declaration that the person intends to live as a male. However, there may be situations where a person with a registered gender other than female is capable of giving birth and wants to assist a relative or others to have a family. Allowing any consenting adults capable of becoming pregnant to enter into surrogacy arrangements, regardless of their registered gender,

Legislation	Provision	Potential implications and reform recommendations
	woman, two men, or two ‘eligible women’ (s 7(1)). ‘Eligible woman’ includes a woman who: (e) is unable, on medical grounds, to conceive a child; or (f) is likely to be unable, on medical grounds, to carry a pregnancy or give birth; or (g) is unlikely to survive a pregnancy or birth or is likely to have her health significantly affected by a pregnancy or birth; or (h) if she were to conceive a child, is likely to conceive – (iii) a child who is likely to be affected by a genetic condition or genetic disorder, the cause of which is attributable to the woman; or (iv) a child who is unlikely to survive the pregnancy or birth or whose health is likely to be significantly affected by the pregnancy or birth (s 7(2)).	would be consistent with the policy objective of providing opportunities for people otherwise unable to have a family to do so. ‘Intended parents’ excludes a situation in one or both parents has a registered gender other than male or female. Section 7 is designed to ensure that intended parents are not otherwise able to have a child. This qualification can be maintained without reference to gender. Section 24A of the <i>AIA</i> and s 28D(3) of the amended <i>BDM Act</i> could extend the meaning of ‘birth mother’ and ‘intended parents’ to include people of any gender. Recommend also amending the <i>Surrogacy Act</i>: • Amending s 5(1)(a) by deleting ‘female’. • Replacing all references to ‘birth mother’ with ‘birth parent’. • Replace s 7(2)(b) with ‘is unable, or likely to be unable, on medical or other grounds, to carry a pregnancy or give birth’. • Amend s 7(2)(c) and (d) to replace ‘her’ and ‘she’ and ‘woman’ with gender neutral terms.
<i>Status of Children Act 1974</i>	The Act sets out a number of rebuttable presumptions regarding paternity for a child. For example, s 8 provides: 8. Presumption of paternity arising from cohabitation If – (a) a child was born to a woman; and (b) at any time during the period beginning not earlier than 44 weeks and ending not less than 20 weeks before the birth, the woman cohabited with a man to whom she was not married –	Sections 28D(3)(a) and (d) of the amended <i>BDM Act</i> provide that references to pregnancy of a woman extend to the pregnancy of any person, and references to a child of a woman includes the child of a person who gave birth to that child. Section 28D(5) also provides that a person’s relationship to another person through blood relations or operation of the law (for example, a father), is unaffected by the registration of a change of gender. Section 24A of the <i>AIA</i> could extend the presumption of parentage to a person of any gender. It remains open for any person to apply

Legislation	Provision	Potential implications and reform recommendations
	the child is presumed to be the child of that man. A person can apply to a judge in chambers for a declaration of parentage and present evidence rebutting the presumptions in the Act.	for a declaration as to parentage where the presumptions do not apply.
<i>Perpetuities and Accumulations Act 1992</i>	10. Presumptions and evidence as to future parenthood (1) Where there arises, in the application of the rule against perpetuities to a disposition or in determining the right of a person to put an end to a trust or an accumulation, a question that depends on the capacity of a person to procreate a child at a future time – (a) it is presumed, subject to paragraph (b), that – (i) a male person can procreate a child at the age of 12 years or over but not under that age; and (ii) a female person can procreate a child at the age of 12 years or over but not under that age or over the age of 55 years; but (b) in the case of a living person, evidence may be given in any proceedings to show that he or she will, or will not, be capable of procreating a child at the time in question.	Section 28D(3)(e) of the amended <i>BDM Act</i> provides an assumption of a person’s ability to procreate is to ‘be determined irrespective of the registered gender of the person’. Section 10(1)(b) allows evidence to be presented to rebut any presumption regarding procreative capacity.
<i>Environmental Management and Pollution Control Act 1994</i>	Section 13A. Membership of Board (2) The Board is to include at least one person of each sex.	Recommend amending s 13A to provide that ‘In determining the composition of the Board, regard must be had to the objective of achieving gender diversity’.
<i>Local Government Act 1993 – by laws</i>	A number of by-laws made under the <i>Local Government Act 1993</i> address gender-specific public facilities. <i>Glenorchy Recreation Reserve and Natural Area Reserve By Law</i> – r 31 makes it an offence to enter the change room or public toilet intended for the opposite sex.	Local governments should consider implementing inclusive approaches to public facilities.

Legislation	Provision	Potential implications and reform recommendations
	• <i>Northern Midlands Swimming Pool By Law</i> – r 12 makes it an offence to enter change room or public toilets reserved for persons of the opposite sex (if over 6yo). • <i>Waratah-Wynyard Public Reserves By Law</i> – r 19(1) makes it an offence to enter a toilet or change room reserved for use by people of the opposite sex, except where necessary to render assistance.	
<i>Miscellaneous property and succession legislation</i>	A number of historic Acts in Tasmania address issues regarding powers to divest or inherit property. These include: <i>Conveyancing and Law of Property Act 1884</i>: • s 43 – Power of Court to bind interest of married woman. • s 44 – Power of attorney of married woman. • s 45 – Restraint on anticipation abolished. • Schedule 3 – includes a series of provisions regarding inheritance through male and female lineage. <i>Landlord and Tenants Act 1935</i> • s 32 - Exemptions from distress (provides that the sewing-machine, knitting-machine, type-writing machine, or mangle of a female tenant will be exempt from the property able to be claimed for unpaid rent. <i>Married Women's Property Act 1935</i> <i>Settled Lands Act 1834</i> <i>Trustees Act 1884</i>	These provisions are antiquated, however any repeal or amendment is beyond the scope of this review. Section 24A of the <i>AIA</i> could apply to extend the operation of these provisions to any person, regardless of gender.

Appendix 4

Cases regarding medical procedures for minors

Department of Health & Community Services v JWB & SMB (1992) 175 CLR 218 ('Marion's Case')

Marion was a 14-year-old girl with severe intellectual disabilities. Her parents applied to the Family Court for an order authorising a hysterectomy and an ovariectomy on Marion, or a declaration that it was lawful for them to consent to those procedures without the need for a court order. The procedures were proposed due to the psychological and behavioural impacts Marion suffered as a result of hormonal fluxes and menstruation.

The matter came to the High Court for determination of whether Marion's parents could consent to the proposed procedures. The Northern Territory government argued that court approval was required for invasive procedures. The Human Rights and Equal Opportunity Commission ('HREOC') also argued that an invasive surgical procedure which results in the removal of the healthy reproductive organs of a young woman, incapable of giving her own consent, cannot be carried out without a court order.

The High Court held that the proposed operations went beyond 'therapeutic' procedures to treat a 'malfunction or disease'. The Court had regard to the grave consequences of the procedure, effectively sterilising Marion, and the risk that her parents' decision underestimated Marion's interests and her future capacity to consent to the procedure.¹⁸⁸ The Court was satisfied that the procedures were outside the scope of what parents and guardians were authorised to consent to on behalf of a child.

The High Court held that the Family Court has jurisdiction to authorise the procedures, having regard to the best interests of the child.

In Re A (1993) 16 Fam LR 715

A was diagnosed at birth as a female suffering from a condition known as congenital adrenal hyperplasia, causing 'extreme masculinisation of genitalia'. In early childhood A underwent genital reconstruction to give her a feminine appearance and hormone treatment. However, the hormone replacement treatment was not adequately pursued and did not prevent production of masculine hormones and 'recurrent masculinization of the external genitalia.' As an adolescent, A expressed a desire to be treated as male.

¹⁸⁸ *Marion's Case* (n 94) 250 (Mason CJ, Dawson, Toohey and Gaudron JJ). Their Honours cited *Gillick* (at 237) in support of the view that regard must be had to a child's competence to consent to medical procedures.

At 14, A's mother applied for approval of procedures to remove A's ovaries, tubes and uterus. She argued that court approval was not required as the medical procedure was therapeutic, designed to treat a malfunction, and the resulting sterilisation was a by-product of that legitimate aim.

The Family Court was critical of A's mother for failing to properly pursue the treatment recommended by doctors at the time of A's birth and was not satisfied that the treatment now proposed was therapeutic. The Court held that parental consent was not sufficient and court approval was required as a 'procedural safeguard.'

Despite reservations, Mushin J had regard to A's 'very strong wishes' and his expectation that the procedure would achieve a 'sense of social and biological identity and self-esteem'. His Honour also considered the evidence of A's psychologist that deferring the procedure until A was able to give consent himself would not be in his best interests. Ultimately, the Court made orders approving the procedure.

***Re Lesley* [2008] Fam CA 1226**

Lesley was born with karyotype 46XY, 'genetically male, but she has been reared as a female since birth.' She developed gonads primarily in her labial area. When Lesley was four, her parents applied for consent for her to undergo a gonadectomy to prevent her virilising upon puberty.

Following *Marion's Case*, the Family Court held that the procedure was not 'therapeutic' and required approval from the court.

Arguments were made that an Independent Children's Lawyer should be appointed on behalf of Lesley, given the 'lifelong and irreversible nature of the procedure and [that] there [was] no immediate urgency.' However, the Court was satisfied that alternatives to the proposed surgery had been appropriately canvassed and dismissed, and the gonadectomy was in Lesley's best interests.

***Re Carla* (2016) 324 FLR 1**

C was born with a sexual development condition, genetically male but identified as female. When C was three, surgery was performed to feminise C's external genitalia. Two years later, C's parents applied for consent to remove the child's gonads and related procedures. The result would be that C was infertile. There was also evidence presented that, without the procedure, there was a risk C would develop cancer or male features during puberty.

In contrast to the approach in *Re Lesley*, the Family Court accepted that the proposed procedure was therapeutic because it was necessary to 'appropriately and proportionately treat a genetic bodily malfunction that, untreated, poses real and not insubstantial risks to the child's physical and emotional health'.¹⁸⁹

***Re Alex* (2004) 180 FLR 89**

Alex, a 13-year-old, sought to affirm his male gender by receiving puberty blocking treatment (Stage 1 treatment) until he was 16, followed by hormonal treatment (Stage 2 treatment).

¹⁸⁹ (2016) 324 FLR 1, 9 (Forrest J).

The Family Court was satisfied that the puberty-blocking and hormonal treatments were not therapeutic and could not be undertaken without court approval. However, the Court was also satisfied that the treatment was in Alex's best interests and approved the treatment.

While the application did not seek consent to surgery (Stage 3 treatment), Nicholson J raised concerns regarding surgery as a prerequisite to registering a change of sex or gender:

The requirement of surgery seems to me to be a cruel and unnecessary restriction upon a person's right to be legally recognised in a sex which reflects the chosen gender identity and would appear to have little justification on grounds of principle.¹⁹⁰

***Re Jamie* (2013) 278 FLR 155**

Jamie, 10 years old at the time of the hearing, was born male but identified as female. Jamie's parents, on Jamie's behalf and following the advice of doctors, applied for consent to commence puberty blocking treatment and hormonal treatments.

The Full Court of the Family Court held that the puberty blocking treatment was entirely reversible and properly characterised as therapeutic. Therefore, the court's approval was not required to commence Stage 1 treatment.

In contrast, the hormonal treatment was not reversible without surgery. Following *Marion's Case*, the Full Court held that this meant it was non-therapeutic and court approval was required for Stage 2 treatment where a child was not capable of giving consent.

However, the Full Court recognised that if a child could demonstrate '*Gillick* competence' the child could consent to Stage 2 treatment and no court approval would be required.¹⁹¹ A determination as to whether a child is '*Gillick* competent' must be made by a court.

***Re Kelvin* (2017) 327 FLR 15**

Kelvin's case also dealt with an application for Stage 1 and Stage 2 treatment. In this case, the Full Court was asked to reconsider the position in *Re Jamie* that it was necessary to apply to the court for confirmation that a child was '*Gillick* competent'.

The Full Court held that no application to the court was required for Stage 2 treatment for gender dysphoria if:

1. the child consents to the treatment;
2. the child's treating medical practitioners agree that the child is '*Gillick* competent'; and
3. the child's parents do not object to the treatment.¹⁹²

***Re Matthew* [2018] FamCA 161**

¹⁹⁰ (2004) 180 FLR 89, [234]–[237] (Nicholson J).

¹⁹¹ (2013) 278 FLR 155, 182–183 (Bryant J), 192–193 (Strickland J).

¹⁹² (2017) 327 FLR 15, 44–45 (Thackray, Strickland and Murphy JJ).

M was born genetically female but identifies as male. At 16, his parents applied to the Court for a finding that he was competent to consent to a double mastectomy (Stage 3 treatment).

The Family Court held that the proposed mastectomy was therapeutic, being treatment for ‘a psychiatric “bodily malfunction” (gender dysphoria)’.¹⁹³ Where the treating medical practitioners agreed that M was ‘*Gillick* competent’ and where there was no controversy between M, his parents or his doctors regarding the appropriateness of treatment, no application to the Family Court was necessary to approve the Stage 3 treatment.

Similar assessments as to competence and the role of court in approving Stage 3 have been made in subsequent cases.¹⁹⁴

¹⁹³ [2018] FamCA 161, [138] (Rees J).

¹⁹⁴ For example, *Re Lincoln (No. 2)* [2016] FamCA 1071; *Re LG* [2017] FCWA 179.