

# Final Report of the Working Group for reducing barriers to changing registered sex

**Recommendations to the  
Minister of Internal Affairs**

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# Reducing barriers to changing registered sex

## Foreword by Chair Kate Scarlet

Enrolling your child at school, opening a new bank account or handing over paperwork to Human Resources at your new workplace shouldn't be a fraught experience, but for many New Zealanders these represent circumstances in which they may be outed as transgender or belonging to another gender minority. The *Counting Ourselves* survey found 83 per cent of transgender people had the incorrect marker on their birth certificate. For at least 40 per cent of those surveyed a correct marker on their birth certificate is impossible as the Births, Deaths, Marriages and Relationships Registration Act 1995 ("the BDMRR Act") does not recognise gender identities outside of the binary.

Our recommendations aim to improve the current process for updating your birth certificate and reduce the negative impact of not being able to correct this foundational document, particularly for young people who are the most likely to rely on a birth certificate as a form of ID. Many of these recommendations are far reaching because the requirements of the BDMRR Act are far reaching. For example, the BDMRR Act requires that people changing their gender marker receive medical treatment. In order to facilitate both fulfilling this requirement and proving it in a court, there needs to be better access to medical treatment and funding for medical experts to provide legal evidence.

I believe that if all these recommendations are implemented, the experience of correcting gender markers on birth certificates will be improved. Where correction is not possible, some of the hardships associated with an incorrect birth certificate will be reduced. There will be significantly less anxiety and fear associated with the mundane administrative tasks of life and all New Zealanders will experience paperwork as it is meant to be experienced – with slight frustration that everything can't autofill.

I'd like to thank Hon Tracey Martin, Minister of Internal Affairs for putting this group together. I'd also like to thank everyone who dedicated their time, skill and experience to the Working Group. Thanks to Donna Boniface-Webb and Victoria Croucher for all their wonderful work providing secretariat support, to Michael Parfitt and his team for the in-person interviews with the transgender community and a big thanks to all those who wrote to or spoke to the group about their areas of expertise, Principal Family Court Judge, Her Honour Judge Moran, Registrar-General Jeff Montgomery, family lawyer Cathie Sheat, Service Manager for District Courts in the Northern Region, Esitamaki Teisi, the Parents of Transgender and Gender Diverse children and everyone who submitted to the Select Committee or wrote in to the Working Group.

## The Working Group for reducing barriers to changing registered sex

1. In February 2019 Hon Tracey Martin, Minister of Internal Affairs (the Minister) announced that the Births, Deaths, Marriages, and Relationships Registration Bill (the Bill) would be deferred. The Minister had decided to defer the Bill because of changes made at Select Committee. The changes would have replaced the current Family Court-based process of changing sex on a birth certificate with a statutory declaration-based on a self-identification process. In her press release in February, the Minister stated:

“I acknowledge that the current process presents barriers to individuals changing sex information on birth certificates. These include financial barriers associated with Births, Deaths and Marriages fees, and the costs of obtaining medical evidence or legal representation.

The Family Court process can also be time consuming and present dignity barriers for some applicants. Many individuals find the court process adversarial and intimidating and the medical evidence requirement invasive.

I intend to initiate work to mitigate some of these barriers in the short-term, this may involve engaging with stakeholders to test mitigation proposals and how the process can be improved.”

### The Minister appointed the Working Group to improve the process

2. In August 2019 the Minister announced the appointment of the Working Group for reducing barriers to changing registered sex (the Working Group). The Working Group’s Terms of Reference set out the following purpose, scope and approach:
  - The Working Group has been established to provide advice to the Minister of Internal Affairs on operational improvements to the current process to change registered sex on birth certificates. The Working Group will advise on barriers to individuals changing their registered sex under the current process, and on potential solutions to these barriers.
  - The Working Group will advise on barriers that may exist and recommend potential solutions to these barriers. Solutions are expected to be operational and able to be implemented under the current legislation.
  - The Working Group should also test the immediate mitigations implemented or proposed by the Department: the operational policy of waiving fees and clarification of information provided on the current process.
3. Minister Martin met with the Working Group in August 2019. At this meeting, the Minister invited the Working Group to undertake some ‘blue sky thinking’ within the current legislation, and to think more broadly about ways to address related issues facing the transgender community.

## The Working Group identified barriers throughout the process

4. The Working Group found barriers in every step of the process. There were barriers when a transgender or intersex person first sought information about how to change or correct the sex on their birth certificate. There were barriers right at the final stage for those who successfully negotiated the process of receiving a new document. Many of these barriers can be mitigated through government agencies providing clear, consistent, and accessible information about the requirements of each step of the process. Other barriers will require a commitment from government agencies, the judiciary, and the health system to work with transgender and intersex communities and to provide consistent and transparent services.

## Themes of the Working Group's recommendations

5. The potential solutions identified by the Working Group have formed the basis of their recommendations. The recommendations can be found throughout the report.

The Working Group has developed a detailed set of recommendations to improve the process of changing the sex recorded on a birth certificate. These recommendations focus on ensuring that:

- The Government takes responsibility for ensuring that information about changing sex on a birth certificate is provided in a clear, consistent, and accessible way.
- The Government ensures that cost is not a barrier for people going through the process by funding the required legal, health and support services for transgender and intersex people.
- The Family Court works with peer-led community organisations to increase the judiciary's understanding of transgender and intersex communities and gender-affirming health care.

The Minister of Internal Affairs invited the Working Group to think beyond their Terms of Reference and consider the impact of identity documents on transgender people's lives. In response, the Working Group has made recommendations to mitigate the harm to the transgender and intersex communities caused by incorrect details on identity documents. These recommendations focus on:

- Government agencies providing ways to share information which do not disclose someone's transgender status in situations where the sex recorded on their birth certificate is irrelevant.
- Protecting the privacy of individuals and ensuring information about sex or gender is not collected if it is not needed.
- Guidelines for education providers so that transgender and intersex children and young people can reach their full potential, including through participating in sport and recreation activities.

The Working Group also has recommendations to ensure this work is carried out in a timely manner and transgender communities are informed of any new developments.

- The Minister of Internal Affairs takes a leadership role with her Ministerial colleagues and reports on progress at the cross-party Rainbow Parliamentary network's community consultation scheduled for May 2020, and that the Working Group is invited to attend.

## The process can be made a LOT better, but the law needs to change

6. The Working Group has been asked to report on how to improve the process under the current law. If the Government makes all the changes in this report, it will be easier for some transgender and intersex New Zealanders to change the sex recorded on their birth certificate, or to provide evidence of their personal information in a way which respects their right to privacy. But the process will still exclude those who have not taken medical steps to transition or who have a non-binary gender. The Working Group agrees with the widespread community concerns that the current law medicalises gender diversity and forces transgender people to go to court to have their gender identity recognised on their birth certificate.

## Report structure

7. This report provides information about the importance of birth certificates and the legal requirements to change them, and then discusses the processes people need to follow to work through. Each section is briefly described below.

### I. Background

8. This section puts the task of the Working Group in an international context, introduces the terminology used in this report, outlines the resources used in writing this report, and includes information about Working Group members.

### II. Recommendations in this report

9. The section brings together all the recommendations in the report for reference.

### III. Why do you need a birth certificate?

10. This section discusses the importance of a birth certificate for people living in New Zealand. It includes examples of situations in which a birth certificate is useful, and the problems incorrect details can cause.

### IV. What does the law require?

11. This section outlines the law that governs the process to change the sex recorded on a birth certificate. It explains problems with the law and areas where recommendations in this report can make improvements.



## V. The process to change a birth certificate

12. This section forms the bulk of the report. It works through the process to change the recorded sex on a birth certificate and makes recommendations under each of the steps.

<b>The work before submitting an application to the Family Court</b>	Step 1: Finding the information about who can apply and what you need to do Step 2: Understanding and filling in the forms to apply to the Family Court Step 3: Preparing medical evidence Step 4: Submitting an application to the Family Court
<b>An application goes through the Family Court process</b>	Step 5: The Family Court accepts and processes the application Step 6: The Registrar-General and affected persons are informed Step 7: The Family Court assesses the application
<b>Applying to DIA for a new birth certificate</b>	Step 8: Receiving the declaration from the Family Court and an application form from the Department of Internal Affairs (DIA) Step 9: Finally applying for a new birth certificate!

## VI. Mitigating the harm caused by incorrect details on identity documents

13. This section has recommendations responding to the additional mandate given by the Minister when she met with the Working Group, to think about ways to address related issues facing the transgender and intersex communities.

## VII. Conclusions and next steps

14. This section has recommendations to ensure this work is carried out in a timely manner, and that transgender and intersex communities are informed of any new developments.

## VIII. Appendices



# I. Background

## International context

15. The Working Group notes the significant developments internationally since the Family Court provisions for changing registered sex were enacted in 1995, almost a quarter of a century ago. Significant revisions to New Zealand's laws are outside the scope of the Working Group's deliberations. At the same time, it would be inappropriate for the Working Group to propose options to the Minister that are outdated and do not meet international human rights standards. Relevant international human rights standards are summarised in Appendix 1.
16. The Working Group has considered that background context and been guided by the following objectives in its discussions and assessment of potential recommendations:
  - simplify current administrative processes and make them more accessible
  - remove financial barriers
  - ensure universal access to legal gender recognition
  - ensure processes respect people's privacy and confidentiality
  - identify and reduce constraints on people's ability to give free and informed consent
  - ensure fair and consistent treatment without discrimination
  - identify opportunities to ensure greater respect for people's self-determination, including recognising non-binary identities and
  - identify opportunities to ensure greater respect for people's bodily autonomy, including clarifying medical evidence requirements, and supporting identity verification and gender recognition processes that do not medicalise or pathologise gender diversity.

## Terminology used in this report

17. The sex initially recorded on birth certificates is based on information in the Register of Births, but a person's *gender* can be recorded in the 'sex' field through the Family Court process.
18. The terms *sex* and *gender identity* are both mentioned in the Births, Deaths, Marriages, and Relationships Registration Act 1995 (the BDMRR Act), but are not defined in the BDMRR Act.
19. This report refers to **sex** as the marker recorded on birth certificate for several reasons:
  - The BDMRR Act 1995 primarily refers to sex as that is the term used in the Register of Births.
  - When a baby is born, the health professional records the baby's sex based on an assessment of primary sex characteristics, namely the appearance of the external genitalia. Sex can be recorded male or female, or, if the child has a variation of sex characteristics, there is the option of indeterminate. Department of Internal Affairs records indicate that all babies registered as 'indeterminate' were either stillborn or died soon after birth. As far as they know, there haven't been any children with a variation of sex characteristics registered as indeterminate by their family with the intention of maintaining this as an identity.
20. The report refers to **gender identity/gender** as a person's concept of their self as male, female, a blend of both or neither. This is based on the definition in the NZ Guidelines for Gender Affirming Healthcare. The full glossary of terms based on the *2018 Guidelines for gender-affirming healthcare* is attached in Appendix 2.
21. The term **transgender** is used in this report as an umbrella term to describe a wide range of people whose gender identity and/or gender expression differ from their assigned sex at birth, and/or the societal and cultural expectations of their assigned sex. This term encompasses transgender people who identify as male or female, those who are non-binary and don't identify exclusively as either male or female, and those who use culturally specific terms for gender diverse people.<sup>1</sup>
22. This report uses the term **intersex** to describe people born with a **variation of sex characteristics** (such as sexual anatomy, reproductive organs, hormonal and/or chromosome patterns). Intersex people are born with sex characteristics that do not fit typical binary notions of male or female bodies. In some cases, intersex traits are visible at birth while in others, they are not apparent until puberty. Some chromosomal intersex variations may not be physically apparent at all. Being intersex relates to biological sex characteristics and is distinct from a person's sexual orientation or gender identity.

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1 Often the umbrella term transgender is abbreviated to trans. The longer version, transgender, was adopted for this report partly because it was used in the Working Group's Terms of Reference. The Working Group acknowledges that there is no universally agreed umbrella term and respects individuals' right to self-identify using terms that best describe their gender.

## The law regarding changing the sex on a birth certificate

23. The process of changing the sex recorded on a birth certificate is described in the Births, Deaths, Marriages, and Relationships Registration Act 1995 (the BDMRR Act). Three sections of the BDMRR Act allow for the sex recorded on a birth certificate to be changed:

- under **Section 28** an adult (a person over 18) can apply to change their recorded sex to male or female
- under **Section 29** a guardian can apply for their child (a person under 18) to change their recorded sex to male or female and
- under **Section 84** an intersex person who was born with a variation of sex characteristics can apply to correct their birth certificate to male, female, or 'indeterminate'. This may also require using **Section 85** where the Family Court can consider proposed corrections in cases of difficulty or dispute.

These sections are referred to throughout this report. They are further explained in part IV – *What does the law require?* and the full text of the legislation is in Appendix 3.

## The evidence and resources used by the Working Group

24. In forming their recommendations, the Working Group drew on their own expertise and experience, works they have published with other experts in their field, academic and community resources, and information provided by government departments. Below is a non-exhaustive list of resources used by the Working Group. The term used to refer to each specific resource in the body of this report is underlined and italicised below.

### Research undertaken by the Department of Internal Affairs' Customer Design and Uptake team

25. Work by the Customer Design and Uptake team included in-person interviews with people who have engaged in or considered the current process to change a birth certificate. **The speech bubbles throughout the report are mostly quotes from these interviews.** In total 30 people participated in research interviews in six different locations. Of these 30 people:

- nine had been through the process (one did not complete it)
- one person was going through the process at the time of the interview
- 20 people had considered, or were considering, the process.

In addition, 14 parents of transgender and gender diverse children answered questions online.

26. Research questions focused on:

- how and where people access information about the process
- knowledge of, and experiences with, the process
- interactions with organisations and services and
- identification documents and reasons for applying to change a birth certificate.

27. Findings from this research were reported to the Working Group. The Working Group would like to thank the people and organisations involved in these interviews.

**Counting Ourselves: The health and wellbeing of trans and non-binary people in Aotearoa New Zealand**

28. *Counting Ourselves* was the first comprehensive national survey of the health and wellbeing of trans and non-binary people in Aotearoa New Zealand. It was conducted between 21 June and 30 September 2018 and completed by 1,178 trans and non-binary people aged between 14 and 83 from all regions in the country. One of the principal authors of *Counting Ourselves*, Jack Byrne, was a member of the Working Group.

Veale J, Byrne J, Tan K, Guy S, Yee A, Nopera T & Bentham R (2019) *Counting Ourselves: The health and wellbeing of trans and non-binary people in Aotearoa New Zealand*. Transgender Health Research Lab, University of Waikato: Hamilton NZ.

**Guidelines for gender-affirming healthcare for gender diverse and transgender children, young people and adults in Aotearoa, New Zealand**

29. *The 2018 Guidelines for gender-affirming healthcare* were developed by health professionals and transgender advocates from around the country. The guidelines provide an approach to healthcare delivery which is uniquely Aotearoa/New Zealand, by using Māori models of health that recognise the importance of holistic care, while also referencing international standards. The new guidelines promote healthcare based on informed consent. The principal author of *The Guidelines for gender-affirming healthcare*, Jeannie Oliphant, was a member of the Working Group.

Oliphant J, Veale J, Macdonald J, Carroll R, Johnson R, Harte M, Stephenson C, Bullock J. *Guidelines for gender-affirming healthcare for gender diverse and transgender children, young people and adults in Aotearoa, New Zealand*. Transgender Health Research Lab, University of Waikato, 2018.

**“Michael” v Registrar-General of Births, Deaths, and Marriages (2008) 27 FRNZ 5 (Re Michael)**

30. In June 2008 the Family Court issued a comprehensive judgment regarding the case of an applicant named “Michael” (Family Court *judgments* are always anonymised). At the time there was a lack of clarity about what medical treatment was required under Section 28. The Human Rights Commission had noted that some transgender people believed they were required to undergo full reassignment surgery and that the Family Court didn’t take a consistent approach.
31. “Michael” was a trans man who had a bilateral mastectomy and had been receiving testosterone for several years. He did not intend to have more surgery. His doctors provided evidence that he had permanently transitioned to the male gender. The judge concluded that: “Whilst there needs to be some degree of permanent physical change, that does not mean that full gender reassignment surgery will be required in all cases — and it has not been in this case.”
32. *Re Michael* is not binding but is has proved highly persuasive. It has been cited with approval in subsequent cases, including those where an applicant has not had any surgical interventions.

*“Michael” v Registrar-General of Births, Deaths and Marriages, (2008) 27 FRNZ 58*

**The Registrar-General, Principal Family Court Judge, a Ministry of Justice official and a Family Court lawyer**

33. The Working Group would like to thank:
  - The Registrar-General Births, Deaths and Marriages, Jeff Montgomery (the Registrar-General) for the time he spent with the Working Group, and the advice he provided both in person at several meetings, and in writing.
  - the Principal Family Court Judge, Her Honour Judge Moran for meeting with the Working Group, and talking through their questions and concerns regarding the Family Court process.
  - Ministry of Justice official Esitamaki Teisi, Service Manager for District Courts in the Northern Region, who shared her expertise about Family Court operating practices.
  - Cathie Sheat, a Wellington Lawyer with experience representing transgender people seeking to change the sex recorded on their birth certificate at the Family Court, for sharing her time and expertise.

### **Research using the Registrar-General's records of applications to the Family Court**

34. The Department of Internal Affairs (DIA) undertook research using the Registrar-General's records of applications under Section 28 and 29 of the BDMRR Act. DIA researched using files received since the beginning of 2018. In cases where a declaration had been granted by the Family Court, information was recorded regarding:

- the time from lodgement to declaration and the location of the court
- the person's age, transition and time living in their 'nominated sex'
- medical treatments the person had undergone
- engagement with the court, such as whether the applicant had a lawyer and whether they attended court.

35. No identifying information was recorded in the course of this research. However, due to the risk that reporting all the above variables could lead to the identification of an individual, the raw data is stored securely and will not be released. Aggregate information from this survey is included in this report. This research has not been peer reviewed and results should be considered indicative only.

### **Submissions to the Select Committee**

36. The Terms of Reference state that the Working Group should consider previous feedback provided on barriers associated with the current process that were provided through submissions on the Births, Deaths, Marriages, and Relationships Registration Bill (the Bill). DIA staff identified relevant submissions on the Bill and collated comments on the current process. This information was presented to the Working Group. Some quotes from submissions on the Bill are included in speech bubbles in the text marked with <sup>(SC)</sup>.

### **The Parents of Transgender and Gender Diverse Children**

37. The Parents of Transgender and Gender Diverse Children are a group who made a detailed submission on the Bill. This submission formed the basis of a letter they wrote to the Minister of Internal Affairs in February 2019. The Minister met with representatives of the Parents of Transgender and Gender Diverse Children in September 2019 and Fleur Fitzsimmons and the Working Group Secretariat attended this meeting. Key points made by parents attending this meeting have been reflected in this report.

### **Correspondence to the Working Group**

38. The Working Group received letters from individuals from a variety of perspectives. These were considered in Working Group meetings.

## Working Group membership

39. The Working Group has six members:

<b>Kate Scarlet (Chair)</b>	Senior Community Lawyer and co-founder of Naming New Zealand
<b>Jack Byrne</b>	Senior health and human rights researcher with expertise in legal gender recognition for trans and non-binary people.
<b>Jeannie Oliphant</b>	Sexual Health Physician (FACHSHM) based at Auckland Sexual Health Service and vice president of The Professional Association for Transgender Health Aotearoa (PATHA).
<b>Mani Mitchell</b>	Executive Director and founder of the Intersex Trust Aotearoa New Zealand, Counsellor/Clinical Supervisor MNZAC
<b>Fleur Fitzsimons</b>	Parent to a transgender child and a Wellington City Councillor with portfolio responsibility for community wellbeing
<b>Ahi Wi-Hongi</b>	National Coordinator for Gender Minorities Aotearoa, and a Māori, transgender, human rights advocate who works to improve public health access for gender minorities.

40. Georgina Beyer was a member until 29 October 2019 when she resigned for personal reasons.





## II.

## II. Recommendations in this report

41. Below is a summary of all the recommendations in this report.

### **The work before submitting an application to the Family Court**

42. To make the process of changing the sex recorded on a birth certificate accessible to all transgender and intersex people, the Working Group recommends:

- A. Government agencies develop guidance which clearly lays out the process for changing the sex recorded on a birth certificate in easy to understand language, and guides a person who wants to apply through each step of the process. This should include:
  - templates for medical evidence
  - examples of the sort of information needed in the affidavit and
  - a booklet that explains the process end to end and
  - guidance about filling in all the documents the Family Court requires.
- B. Specific guidance be developed for intersex people to access the provisions of Section 84 to change the sex recorded on their birth certificate to ‘indeterminate’, male or female.
- C. The requirements for District Health Boards to retain paediatric care records be extended so children’s records are kept indefinitely to enable intersex people to access their full medical history.
- D. The Ministry of Justice or the Department of Internal Affairs should provide a free face-to-face or call centre service to guide people through each step of the process. This is needed in combination with written guidance to make the process accessible to more people, including those who don’t have English as a first language or those with disabilities which impair access.

43. To ensure all transgender and intersex people seeking advice on how to submit an application to the Family Court are able to access legal advice, the Working Group recommends:
  - E. Free legal representation is made available for people seeking to change the sex recorded on their birth certificate.
  - F. A lawyer for the child is funded for applications under Section 29, independent of the legal advice to a guardian or any counsel to assist the court.
  - G. Peer-led community organisations that are providing paralegal or rights-based support, including helping transgender and intersex people fill out affidavits to change or correct their registered sex, are resourced to do this work.
44. To guide applicants, medical professionals and members of the judiciary towards a consistent understanding of the evidentiary requirements which recognises the expertise of those delivering gender-affirming care in New Zealand, the Working Group recommends:
  - H. The Ministry of Justice creates a simple template for health professionals to provide expert medical evidence that reflects the evidential requirements in recent successful applications, acknowledging that judges may request additional evidence as they consider necessary.
  - I. When a GP has oversight of the medical steps an applicant has undertaken, judges consider recognising that GP's evidence is as sufficient expert medical evidence, and funding is available so an applicant can obtain this evidence at no cost.
45. To ensure lack of access to gender-affirming health care does not prevent transgender people from meeting the medical requirements of the law, the Working Group recommends:
  - J. Gender-affirming healthcare required to meet the medical treatment requirements of the BDMRR Act is provided free.
  - K. The Minister of Health requires District Health Boards to provide a minimum set of gender-affirming healthcare services, based on the New Zealand Guidelines for gender-affirming healthcare.

### **An application goes through the Family Court process**

46. To improve the privacy and safety of transgender people and families with transgender children submitting an application to a Family Court, the Working Group recommends:
  - L. The Ministry of Justice develop a template cover letter for people to submit with their application if they are not submitting to their closest Family Court because they are concerned about privacy or safety.
47. To make the Family Court a less intimidating place and to help applicants understand correspondence from the court, the Working Group recommends:
  - M. The Ministry of Justice draft guidance about trans-inclusive and affirming language and behaviour for the court's internal resources for staff.
  - N. The Ministry of Justice should provide a plain-English guide alongside a form or a letter that explains what it means for the applicant.

48. To ensure that the Registrar-General's office provides only the information the Family Court requires, and the process is nationally consistent, the Working Group recommends:
- O. A process is put in place to make sure the Registrar-General's office only provides information the court needs to assess the application, no information about marriages or civil unions is sent.
  - P. A fixed time frame in which the Registrar-General's office responds that is nationally consistent.
  - Q. The Family Court provides guidance about how an "interested" or "affected" person is defined and tells the applicant if anyone other than the Registrar-General has been sent their application.
49. To improve the judiciary's understanding of access to justice issues for transgender and intersex people and the delivery of gender-affirming care in New Zealand and to encourage consistency, the Working Group recommends:
- R. The development of a judicial education and training programme, with input from transgender and intersex groups and the Professional Association for Transgender Health Aotearoa (PATHA,) covering:
    - international standards of care and human rights
    - recent New Zealand case law
    - the 2018 New Zealand Guidelines for gender-affirming healthcare and
    - the reasons an applicant may not be comfortable appearing in court.
  - S. Information on interacting with transgender and intersex communities be included in the relevant general judicial education and training development programme, when judges are first appointed.
  - T. Judges do not require any more evidence than the minimum required to determine if a person meets the current, and evolving, interpretation of the medical requirements of Sections 28 and 29 of the BDMRR Act.
  - U. Whenever a judge makes a decision based on a lower level of medical treatment or there is another new development in relevant case law, the judge considers dictating a judgment for publication to enhance both judges and lawyers understanding of modern social thought.
  - V. Judges consider deciding applications under Sections 28 and 29 on the papers unless there are special circumstances that require an appearance.

### **Applying to DIA for a new birth certificate**

50. To reduce barriers for transgender and intersex people when applying for a new birth certificate to be issued, the Working Group recommends:
- W. DIA work to simplify the process of applying for a new birth certificate after a Family Court declaration has been granted.

51. To ensure there are no further financial or administrative barriers to applying for a new birth certificate after a declaration is granted, the Working Group recommends:
- X. Permanently removing the fees for the first birth certificate issued after a declaration is granted by the Family Court under Sections 28 or 29 of the BDMRR Act, or an error regarding the recording of sex is corrected by the Registrar-General under Section 84.
  - Y. Once a person's name or registered sex are changed, DIA immediately update those details within their administrative systems so that all future correspondence uses the correct details.
  - Z. DIA include an opportunity to apply for a letter from the Registrar-General which links a person's previous name and recorded sex to the name and sex recorded on their new birth certificate.

### **Mitigating the harm caused by incorrect details on an identity document**

52. To provide ways of sharing information which do not disclose someone's transgender status in situations where the sex recorded on their birth certificate is irrelevant, the Working Group recommends that:
- AA. The Registrar-General reverts to allowing people to have a short-form birth certificate issued which does not include details about their sex.
  - BB. The Registrar-General provides people with access to information from the Register of Births in a way that meets the requirements of the Privacy Act. This means only the information needed for a certain purpose will be displayed on the extract from the Register.
  - CC. A birth certificate should never be stipulated as a compulsory document required for showing proof of identity in New Zealand and, where such policies or administrative practices currently exist, an alternative statutory declaration option should be available.
  - DD. The Registrar-General explores the option of people choosing to not have any details recorded in the field for 'sex' on their birth certificate, leaving this field blank. This would also enable non-binary people to obtain a birth certificate that does not contain inaccurate data.
53. To better support the wellbeing, inclusion, safety and social transition of young transgender and gender diverse people the Working Group recommends:
- EE. The Ministry of Education continues to provide guidance to schools and other education providers which confirms that records can be changed to reflect a student's gender without a change to that student's birth certificate.
  - FF. Schools recognise a student's gender for all purposes, and ensure that this data is only collected in administrative records when it is needed for a specific purpose.
  - GG. Schools are supported to be inclusive of transgender and gender diverse students, including through the development of further guidance by the Ministry of Education working with community organisations, and financial support for the roll-out of this guidance.

HH. Government agencies work with sporting and peer-led organisations to develop guidance for schools, community groups and sporting bodies about how to ensure transgender, gender diverse and intersex students are included in sports.

54. To protect the dignity, equality and security of transgender and intersex refugees and asylum seekers the Working Group recommends:

II. Government agencies explore options for enabling transgender and intersex refugees and asylum seekers to obtain official documentation reflecting their self-defined gender and name, until they are able to change these details using processes available to permanent residents.

## Conclusions and next steps

55. To ensure this work is carried out in a timely manner, the Working Group recommends that:

JJ. The Minister of Internal Affairs and her ministerial colleagues direct their respective departments to develop a cross-departmental work programme to address the issues raised in this report, and seek advice from the Human Rights Commission about that work programme, to ensure compliance with human rights standards.

KK. The Minister of Internal Affairs takes a leadership role working with other Ministers (including Justice, Health, Education, and Sport and Recreation) on implementing the Working Group's recommendations.

LL. The Minister of Internal Affairs reports on progress in implementing these recommendations at the cross-party Rainbow Parliamentary network's next six-monthly community consultation scheduled for May 2020, and that the Working Group is invited to attend.



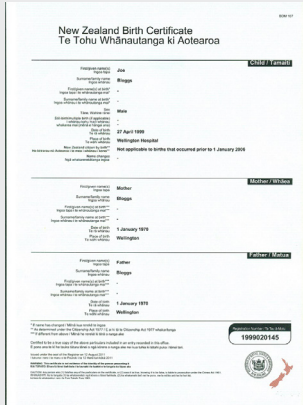


# III.

## III. Why do you need a birth certificate?

### III. A birth certificate is easy to get, and you can never lose your right to have one

56. A birth certificate is the only document that every person born in New Zealand has the right to have, and unlike a passport or a driver's license, you cannot lose your right to a birth certificate.
57. New Zealand doesn't have an official national identity document, so people use different documents to prove their identity in different circumstances. Birth certificates are not officially identity documents, but they contain a lot of important information. The Department of Internal Affairs (DIA) website says:

The birth certificate states the fact of birth, the place and date of that birth, the name or names registered for the child, and establishes a link between a child and its parents. Birth certificates contain a warning to the effect that "this certificate is not evidence of the identity of the person presenting it".
58. The best evidence of identity has a photo linking a person to the document – the government-issued documents which meet these requirements are passports and driver licences. But the age, ability and training requirements for a driver licence make them inaccessible for many people and getting a passport requires both money and the ability to manage a bureaucratic process.

Birth certificate	Driver licence	Passport
		
<p><b>Requirements:</b> Be born in New Zealand.</p>	<p><b>Requirements:</b> Aged at least 16 with acceptable eyesight and medical fitness, and the ability to pass a series of theoretical and practical tests.</p>	<p><b>Requirements:</b> Citizenship of New Zealand by birth, grant or descent. Those under 16 years old must show that their parent or guardian consents.</p>
<p><b>Validity:</b> Indefinite.</p>	<p><b>Validity:</b> Five years for a learner or restricted licence, ten years for a full licence (until the age of 75).</p>	<p><b>Validity:</b> Five years for a person under the age of 16. Ten years for a person aged over 16.</p>
<p><b>Cost:</b> \$33 (or \$35 for a decorative birth certificate).</p>	<p><b>Cost:</b> minimum of \$338 for the tests, extra for lessons and vehicle costs.</p>	<p><b>Cost:</b> \$111 for a person under 16, \$191 for a person over 16.</p>
<p><b>Who can't get one?</b> People born outside New Zealand.</p>	<p><b>Who can't get one?</b> Anyone under the age of 16. People with some conditions which affect their vision, health or learning. People without access to a car or the funds for tests and lessons.</p>	<p><b>Who can't get one?</b> People under 16 without a parent's permission. People who are not New Zealand citizens. People without the money to keep their passport up to date.</p>
<p><b>What does it show?</b> It links the name on the certificate to a date of birth, sex, place of birth and their parent's names. It shows if the person named is a citizen by birth.</p>	<p><b>What does it show?</b> The name and date of birth of the person pictured. That the person pictured can drive a car.</p>	<p><b>What does it show?</b> The name, date of birth, gender, and citizenship status of the person pictured.</p>

Had I applied for a passport rather than a birth certificate, I could have got an updated doc much quicker – but a passport expires

## A birth certificates is necessary or expected in many situations

59. In a few situations, a birth certificate is the **only** document you can use. These situations include:

- applying for citizenship of another country
- applying for some visas and study grants
- applying for an overseas passport and
- establishing the relationship between a child and their parent when someone dies.

For young people, the birth certificate is their ID.

60. The information on the births register is also used by DIA staff:

- when you apply for a New Zealand passport
- to determine whether you can be registered as “mother” or “father” on your child’s birth certificate.

61. There are also situations where using another document is possible, but a birth certificate is the most practical option. Being unable to produce a birth certificate in these circumstances can add to stress and uncertainty, or make the process harder. These situations include:

- registering a child for school, and
- as evidence of your relationship to a child when travelling.

62. There are a lot of other places in which a birth certificate can be used as part of forming an overall picture of someone’s identity. A birth certificate shows whether someone is a New Zealand citizen by birth with the right to work and study in New Zealand. Situations where a birth certificate is often requested are:

- setting up a new bank account
- starting a new job (as one form of evidence of the right to live and work in New Zealand, especially for those who do not have a passport)
- accessing housing
- accessing education services
- applying for university
- setting up utility services
- picking up medication and courier packages and
- as evidence of a child’s age for activities like school sports or camp.

What does having ID mean for me? Without it my world would be very small, extreme stress, unemployed.

I went for job interview. Everything was fine until I had to provide the birth certificate. Went from nice to cold and standoffish. Did not hear back.



## Some situations where having the wrong gender identity recorded in the 'sex' field on a birth certificate causes stress and distress

### Education

#### Enrolling a child in school

63. Many schools require a child's birth certificate for enrolment. This is often the simplest document for schools to request, as it is easily accessible for most people born in New Zealand, and most new New Zealanders will have needed to provide something similar to be granted a resident visa. While there are some other documents that can be accepted instead, including passports, most of the other alternative documents would only belong to families who have moved to New Zealand from overseas. A passport is not a realistic option for some children, as it costs \$111 and is valid for only five years (and is only available if the child holds New Zealand citizenship).
64. Education providers often record information about a child's sex based on the documents provided at enrolment. This information can follow a child when they move between education providers, including Early Childhood Education services and schools. Some schools are unaware that they are able to record a child's gender in their records and insist on retaining sex information which does not match a child's gender. This can create a lot of stress and anxiety for transgender children if they are 'outed' or misgendered in school, or in the course of school-related activities which use school records.

I handed the birth certificate to the school admin and suddenly whole admin team knew

When we moved school the principal already had the old name and gender record when we showed up.

#### Enrolling in further education

65. Young people applying for courses/tertiary studies or employment are often required to submit a birth certificate as part of verifying their identity. They are the group least likely to have an alternative form of identification that matches their gender and appearance. Often young people who have socially and/or medically transitioned, but do not have identification that aligns with their gender, are opting out or deferring studying or avoiding applying for jobs due to the distress caused by negotiating these situations. This stress on young people at such an important time in their lives needs to be urgently addressed so they can fulfil their potential through study or work.

## Family relationships

### When a parent is misgendered on their child's birth certificate...

66. A parent's gender on their child's birth certificate is based on the information held in the register of births at the time the child's birth or adoption was registered and cannot be changed. This means a trans man can only be recorded as a child's father if he changed his own birth certificate to record his sex as male before his baby's birth or adoption was registered and a trans woman can only be listed as a child's mother if her birth certificate records her sex as female before her baby's birth or adoption was registered.
67. Transgender people who haven't updated their birth certificate will be recorded as mother or father in accordance with their sex assigned at birth. Having incorrect information on their child's birth certificate can be hard for the family, for example when a trans man is listed on the child's birth certificate as their mother. An alternative option for either parent is to apply to the Registrar-General asking for the gender-neutral title 'parent' to be used.

### ...it can be distressing for both parent and child when it comes to school...

68. A child's birth certificate contains information about both the child and their parents. If a transgender parent is incorrectly gendered on their child's birth certificate, this can lead to difficulties for the child in school if the wrong parent titles are used by school staff.

### ...and when travelling internationally

69. When travelling internationally with their child, parents often carry a birth certificate to link them to the child. This is especially important if the child does not have the same surname as the parent. If either the parent or the child is incorrectly gendered on the birth certificate, this can lead to significant stress and delays while travelling.

### Misgendering on birth certificates can also add to the distress of losing a family member

70. When a parent dies, all their children are listed on their death certificate. The information for the death certificate is provided to DIA by the person registering the death – usually a funeral director. While there is no requirement for the children's details to match their birth records, some funeral directors may ask for birth certificates, and the Working Group has heard that some transgender people have assumed they had to use the name and sex on their birth certificate.

# IV.

## IV. What does the law require?

### The law that governs changing sex on a birth certificate

71. As discussed in paragraph 23, the process of changing the sex recorded on a birth certificate is described in the BDMRR Act across three sections:

- under **Section 28** an adult (a person over 18) can apply to change their recorded sex to male or female
- under **Section 29** a guardian can apply for their child (a person under 18) to change their recorded sex to male or female and
- under **Section 84** an intersex person who was born with a variation of sex characteristics can apply to correct their birth certificate to male, female, or 'indeterminate'. This may also require using **Section 85** where the Family Court can consider proposed corrections in cases of difficulty or dispute.

72. Note that 'indeterminate' is the term used in the BDMRR Act. Is it not an appropriate term to describe people with a variation of sex characteristics, and will only be used in this report when directly referencing the legislation.<sup>2</sup>

73. Sections 28, 29 and 84 have different requirements. These are described briefly below, and in full in Appendix 3. A lot of transgender and intersex people are excluded by these requirements, and do not have a pathway to changing the sex recorded on their birth certificate.

74. The tables on the next pages show the legal requirements, the problems that people experience with these requirements, and whether there is anything that can be done to improve the process without changing the law.

#### Section 28: "Declarations of Family Court as to sex to be shown on birth certificates issued for adults"

75. Section 28 (3) (a), (b) and (c) set out the requirements for an adult to change the sex recorded on their birth certificate to male or female. Requirements without quotation marks have been paraphrased.

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2 More recently, the term 'indeterminate' has been used to denote a third gender marker option on driver licence records (it does not appear on the licence itself) and on passports where indeterminate / unspecified is marked with an X. Transgender and intersex community organisations have proposed non-binary, rather than indeterminate, as the preferred term for this gender marker option.

	Section 28(3) Requires	Problems this presents	Can we improve things?
(a)	A person to nominate the sex they want to be recorded on their birth certificate, which must be different to the sex recorded at birth.	The only options for 'nominated sex' are male and female. There is no option for a non-binary identity to be reflected on a birth certificate.	<b>Only through law change.</b> It would take significant change to recognise a non-binary identity. Clauses (B) and (C) below require someone to fit a male or female 'gender identity'.
(b)	A person to satisfy the court that they are living as a person of the 'nominated sex' (male or female) and that they will maintain this gender identity.	Someone who is non-binary, or early in their transition may not be able to satisfy the court they intend to maintain the court's expectations of a male or female identity.	<b>Partly.</b> Most judges see very few applications to change the sex recorded on a birth certificate, and may not have had the opportunity to learn about transgender and intersex people and gender identity. There is an opportunity for transgender-led education and discussion to improve awareness.
(c)	(i) A person to provide medical evidence which satisfies the court that they:	There is no guidance about who can provide expert medical evidence, or the minimum evidence required.	<b>Partly.</b> Publishing information about the delivery of gender affirming care and more court judgements would give judges and applicants clarity about access to treatment.
	(B) are living as a person of the 'nominated sex' (male or female) and that they will maintain this gender identity.	The applicant has already satisfied the judge on this point at 28(3)(b) and shouldn't need a doctor to provide evidence of their identity. This is out of step with current medical best practice. Modern clinical guidelines regarding gender identity do not pathologise gender in this way.	<b>Partly.</b> The Working Group spoke to the Principal Family Court Judge about the evolving understandings of gender identity and gender-affirming health care. The opportunity to provide this material to the wider Family Court judiciary may inform the interpretation of these requirements.
	(C) "have undergone such medical treatment as is usually regarded by medical experts as desirable to enable persons of the genetic and physical conformation of the applicant at birth to acquire a physical conformation that accords with the gender identity of a person of the nominated sex"; and	There is no option for people whose transition doesn't include medical steps, or those who have medical treatment that they cannot provide full records for or doesn't fit with the court's expectations. This requirement implies that medical experts always think medical treatment is desirable. There is no guidance about the minimum level of physical change the court currently considers necessary, or what evidence the court will accept. Many people who apply spend significant time and money seeking medical evidence which may or may not be needed.	<b>Partly.</b> Providing both applicants and judges information about the standards that have been applied in recent cases will guide applicants about how this requirement is interpreted. The Working Group has developed a medical evidence template based on recent successful applications.
	(D) "will, as a result of the medical treatment undertaken, maintain a gender identity of a person of the nominated sex";	Case law shows this is currently interpreted as a requirement for permanent physical change. As above, there is no clarity about the minimum changes required.	

You are constantly told that your word is not enough on anything. You need multiple doctors and specialists in order to undergo hormone therapy or surgery should you choose those options. <sup>(SC)</sup>

These requirements are extremely hard to meet and simply unobtainable for those from low-income backgrounds. <sup>(SC)</sup>

76. In summary, Section 28 requires an adult to:

- have a birth certificate where the sex recorded (the sex they were assigned at birth) does not match the sex they want on their birth certificate (the ‘nominated sex’).
- satisfy the court that they live as a person with the gender identity which matches their nominated sex and they will maintain this gender identity, (so a transgender woman, for example, would need to show that she is, and always intends to be, a woman).
- provide the court with expert medical advice which shows that:
  - they have assumed or have always had this gender identity.
  - they have undergone medical treatment which has enabled them “to acquire a physical conformation that accords with the gender identity of a person of the nominated sex”.  
The court currently interprets this as medical treatment that has resulted in permanent physical changes which accord with their gender identity.
  - as a result of this medical treatment, they will maintain their gender identity.

### Section 29: “Declarations of Family Court as to appropriate gender identity for children”

77. Children and young people under the age of 18 cannot apply directly to the court for a declaration about the sex that is recorded on their birth certificate. For a person under 18 their guardians (usually their parents) must apply on their behalf. The court is asked to make a declaration about the sex that should be recorded on the child’s birth certificate, and also whether it is in the best interest of the child or young person to be raised “as a person of the sex specified in the application.” The following table uses the term ‘child’ throughout as this is the wording in the law. This refers to people up to the age of 18 and includes young people legally capable of making their own medical decisions from at least the age of 16. Requirements without quotation marks have been paraphrased.

	Section 29 Requires	Problems this presents	Can we improve things?
3(a)	A guardian to nominate the sex they want to be recorded on their child's birth certificate, which must be different to the sex recorded at birth.	The only options for 'nominated sex' on a birth certificate are male and female. There is no option for the guardians of a non-binary child to have their child's gender reflected on the birth certificate.	<b>Only through law change.</b> It would take significant change to recognise a non-binary identity. Clauses (b) and (c) below require someone to fit a male or female 'gender identity'.
3(b)	The guardian to satisfy the court that they intend to bring the child up as a person of the nominated sex.	There is no guidance around what evidence a guardian must show to satisfy a judge they intend to raise a child as a boy or a girl. This risks reinforcing sex-based stereotypes. It leaves guardians no flexibility to say they will support a gender diverse child's gender journey.	<b>Partly.</b> Information for judges and applicants may clarify how this requirement applies for transgender boys or girls.
3(c)	The court to be satisfied, "on the basis of expert medical evidence, that the child (i) has already undergone or (ii) if the court grants the declaration will undergo medical treatment reasonably necessary to enable the child to assume and maintain the gender identity of a person of the nominated sex."	The law doesn't require a child to have had medical treatment before applying. But in all cases to date, the child has had some treatment (psychological assessment and either hormone blockers or gender-affirming hormone treatment). Expecting a child to have a psychological assessment before they are of an age to be assessed for hormone therapy is out of step with current medical guidance for transgender children. Psychological assessment may not be funded.	<b>Partly.</b> Providing both applicants and judges information about the standards that have been applied in recent cases will guide applicants about how this requirement is interpreted. Publishing information about the availability and delivery of gender affirming care for children across New Zealand will aid judges' understanding of the appropriate evidence for the age of the child concerned.
3(d)	The court be satisfied, "on the basis of expert medical evidence, that the child's physical conformation and gonadal and genital development are such that it is more likely that the child will be able (after undergoing any of the medical treatment not yet undergone) to assume the gender identity of a person of the nominated sex than it is that the child will be able to assume the gender identity of a person of the opposite sex (with or without medical intervention)."	This outdated provision does not accord with recent interpretations of the law. In a 2015 decision about a 14 or 15-year-old child, the judge found this requirement does not mean that surgical treatment is necessary. This is the only place in Sections 28 and 29 which mentions gonads and genitals. Since the 2008 decision ' <i>Re Michael</i> ', the court has understood that genitals and gonads are not indicative of gender identity.	<b>Partly.</b> A guide for applicants could reference relevant decisions, such as the case described in the column to the left. Understanding how this requirement has been interpreted and found to be irrelevant in the modern context may reassure some families considering applying.
4	The declaration shall specify (with as much particularity as is possible in all the circumstances) all medical treatment (if any) that the child has not yet undergone that in the court's opinion (reached in the light of the expert medical evidence) is reasonably necessary to enable the child's successful assumption and maintenance of the gender identity of a person of the nominated sex.	The court is required to specify what future medical treatment the child should undergo. Guardians don't know what sort of treatment the judge might say is necessary for their child in the future, so this is a huge barrier. This is out of step with modern clinical guidelines, under which medical interventions follow a patient's changing needs. A third party pre-determining these needs is inappropriate.	<b>Partly.</b> So far, no declaration issued by the court has ever included details of future treatment, but there is no guarantee this will always be the case. A discussion between judges and medical experts about standards and pathways of gender-affirming care could generate advice to feed in to a guide for applicants.

78. It is difficult to summarise Family Court judges' interpretations of the requirements for a child to be granted a declaration, because there have been so few cases come before the court. It is likely guardians don't want to start this process if they don't know if they have a chance of success. The risk of having to tell a child that the court has decided they aren't 'enough of a boy' or 'enough of a girl' is not worth the reward of *maybe* getting a declaration granted. It is possible for the law to allow a child's birth certificate to be changed without that child receiving medical treatment, but this would need to be tested in court.
79. Rather than a summary of what a guardian must do, below is a summary recent of cases where a declaration has been granted.
80. The court has granted a declaration which states that it is in best interest of a child to be raised as a person of the nominated sex and allows them to change the sex recorded on their birth certificate under Section 29 where the guardian has:
- provided a birth certificate which shows their child's sex differs from the sex the guardian is now nominating to be recorded there (the 'nominated sex')
  - satisfied the court that they intend to raise their child as a person of the 'nominated sex'; and they want to change the sex recorded on their child's birth certificate
  - provided the court with expert medical advice which shows that:
    - their child has been assessed by a psychologist and clearly and consistently expressed their gender identity and
    - their child has received medical treatment such as puberty blockers or hormone treatment.

The current process acts contrary to the interests of families and children who are already disadvantaged either financially or through ability to take the time to work through a complex legal process.<sup>(SC)</sup>

Requiring transgender and gender diverse individuals to go through medical conformity and Family Court proceedings in order to update their birth certificates is a discriminatory practice. These requirements place an unnecessary burden on these communities, and further entrenches the difficulties they face to simply live as themselves.<sup>(SC)</sup>



## Section 84: "Correction of errors" and Section 85: "Family Court may consider proposed corrections in cases of difficulty or dispute"

81. The law acknowledges that people are born intersex, with variations of sex characteristics, and that their sex may have been recorded as 'indeterminate' at birth. It does not recognise 'indeterminate' as an identity. At the time the law was drafted (from 1989 to 1995) it was assumed that a person's sex would only be recorded as indeterminate short-term, and the person would then be assigned male or female.

### **A small number of births are registered with the sex recorded as 'indeterminate'**

82. Every year, a small number of births are registered with the sex recorded as indeterminate. However, DIA records indicate that these registrations are for babies who were either stillborn or died soon after birth. As far as we know, there haven't been any children with a variation of sex characteristics registered as indeterminate by their family with the intention of maintaining this registration.
83. With the exception of babies who are stillborn and those who die shortly after birth, babies born with a variation of sex characteristics have thus far been registered by their parents as male or female. Many children grow up unaware that they were born intersex.
84. When the BDMRR Act was drafted, it recognised the sex characteristics of intersex children might change as they grew up and no longer match the sex recorded on their birth certificate. This is reflected through the correction powers of section 84 and the terminology in section 29(3)(d) regarding a child's "gonadal and genital development". Section 29 allows guardians of intersex children to apply to change the sex recorded on their child's birth certificate from one side of the binary to the other if, at puberty or earlier, it becomes apparent that their child's body now means they are more likely to "be able to assume the [opposite] gender identity". The Working Group received no evidence of guardians having used this provision to amend an intersex child's birth certificate.



85. There are many problems underpinning this provision, including the assumption that an intersex child's bodily diversity should dictate their gender identity. Future discussions about changes to this part of the law should recognise that many intersex children have been subjected to 'normalising' surgery or hormone treatment at an early age to make their body conform with expectations of a male or female anatomy. Such medically unnecessary procedures, performed before a child is old enough to give informed consent, are unethical and violate an intersex person's human right

Section 84 Requires	Problems this presents	Can we improve things?
That the person applying provide evidence that the information recorded on their birth certificate is incorrect and could have been recorded correctly at the time their birth was registered.	<p>Surgical procedures were typically performed on intersex children without their understanding or consent. People who have tried to find records of procedures performed on them as infants, have found it difficult or impossible to obtain documents.</p> <p>Approaching health professionals and hospitals to ask for this evidence can be traumatising or retraumatising for intersex people.</p>	<p><b>Partly.</b> There is very little information about this process. Providing guidance on this process would be a step in the direction of giving the intersex community respect and recognition.</p> <p>I am being asked to prove my intersex history in order to change my birth cert.</p>

86. DIA have only been able to give the Working Group one example of a person who, as an adult, applied to change their birth certificate to record that they were born with a variation of sex characteristics. This person's birth certificate now records their sex as 'indeterminate'; a situation which does not appear to have been anticipated by the drafters of the current law.
87. The Registrar-General indicated to the Working Group that he would consider an application from a person seeking to have their birth recorded as 'indeterminate' if:
- they are able to provide medical evidence that their sex could have been recorded as indeterminate at the time of their birth.



## V. The process to change the sex recorded on a birth certificate

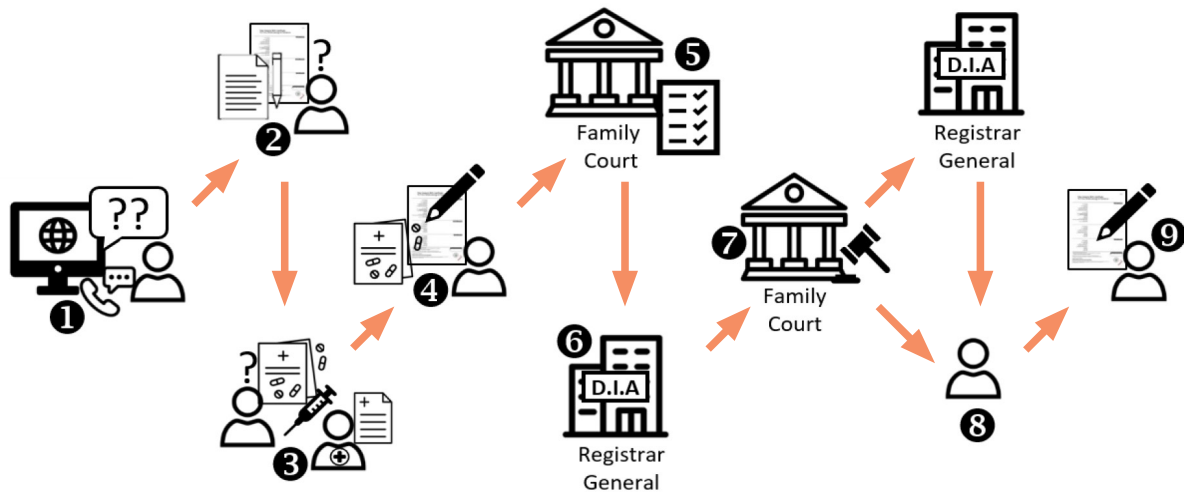
88. The process to change a birth certificate centres around the Family Court, but for transgender people the work starts long before they apply to the Family Court.

89. Before someone can submit an application to the Family Court, they need:

- information and support to understand whether they can apply
- medical evidence and
- specialist knowledge of the law.

90. We can't know how many people give up on changing the sex on their birth certificate or are put off starting the process because of what they hear about how difficult it is. What we do know, is that more than 80 per cent of those surveyed in Counting Ourselves didn't have the correct gender recorded on their New Zealand birth certificate. Family Court data in the table to the right shows that fewer than 40 people a year change the sex recorded on their birth certificate, less than half the number who changed the sex recorded on their passport.

91. At the moment the process looks something like this:



### The work before submitting an application to the Family Court

- Step 1: Finding the information about who can apply and what you need to do
- Step 2: Understanding and filling in the forms to apply to the Family Court
- Step 3: Preparing medical evidence
- Step 4: Submitting an application to the Family Court

### An application goes through the Family Court process

- Step 5: The Family Court accepts and processes the application
- Step 6: The Registrar-General and affected persons are informed
- Step 7: The Family Court assesses the application

### Applying to DIA for a new birth certificate

- Step 8: Receiving the declaration from the Family Court and an application form from the Department of Internal Affairs (DIA)
- Step 9: Finally applying for a new birth certificate!

The current process is costly, drawn out over many months/years, requires access to legal support and is often very humiliating for the individuals involved. <sup>(SC)</sup>

## The work before submitting an application to the Family Court

### Step 1: Finding the information about who can apply and what you need to do

92. The information provided on government websites is inconsistent, confusing and uses outdated terminology. Below is one example of confusing information provided by two government departments:

- the Ministry of Justice website says, “you can apply to the Family Court if you were born overseas”, but
- the Department of Internal Affairs website says, “you must have been born in New Zealand to change sex on your birth certificate”.

93. Both these statements are technically correct as they are referring to different parts of the process. But this won't be clear to anyone who hasn't sat down and read the legislation.

The image shows two side-by-side screenshots of New Zealand government websites. The left screenshot is from justice.govt.nz, titled 'CHANGE SEX ON YOUR BIRTH CERTIFICATE'. It lists criteria for applying to the Family Court, including being born overseas or a New Zealand citizen/permanent resident. The right screenshot is from the New Zealand Government website, titled 'Change the gender on your birth certificate'. It states that you must have been born in New Zealand to change your sex on your NZ birth certificate. Three speech bubbles provide commentary: a dark blue bubble on the right says 'DIA information online is all law speak. It's written for courts not for customers'; an orange bubble below it says 'I got information from talking to people who know what they're doing rather than the website'; and a dark blue bubble at the bottom says 'Even if the system has to stay the same – website changes could make it easier'.

**justice.govt.nz**

### CHANGE SEX ON YOUR BIRTH CERTIFICATE

Home > Family > Change sex on your birth certificate

If you've changed gender or the sex is wrong on your birth certificate, the Family Court can make a declaration that the sex on your birth certificate be changed to what you say it should be. It's free to apply to change the sex recorded on your birth certificate.

You can apply to the Family Court if:

- your birth must be registered, or can be registered, in New Zealand
- you were born overseas - you must be a New Zealand citizen or permanent resident
- you're 18 or older
- you're aged 16 or 17 years and are, or have been, in a marriage, civil union or de facto relationship.

**New Zealand Government**

### Change the gender on your birth certificate

You need to apply to the Family Court for a declaration before you can change the gender on your NZ birth certificate. If your application is successful, the Family Court will notify Births, Deaths and Marriages.

**Who can do it**

The Family Court can make a declaration if you're living with a different gender identity than the one on your birth certificate and you've had medical treatment (not necessarily full reconstructive surgery) to change your gender.

You must have been born in New Zealand to change your sex on your NZ birth certificate.

You can only change the sex on your birth certificate to 'indeterminate' if your sex was indeterminate when you were born, but was wrongly recorded as male or female. You should contact Births, Deaths and Marriages to make this change.

DIA information online is all law speak. It's written for courts not for customers

I got information from talking to people who know what they're doing rather than the website

Even if the system has to stay the same – website changes could make it easier

**It is the Government's job to make sure that people can access government services**

94. Information and guidance should be freely available in a format that people can understand. Currently, national transgender-led community organisations are providing the information people need to make an application. In some cases, organisations are also providing peer support by telephone, email, and in person, from a transgender person who has been through the process. Organisations are operating without funding and without access to resources, such as information about recent court decisions. If the Government values transgender and intersex New Zealanders, it needs to put funding into providing help to transgender-led organisations, and into improving the information available.

**There is no information about how intersex people can change the sex recorded on their birth certificate**

95. As mentioned earlier, in paragraph 83, intersex people are usually assigned male or female by their parents and/or medical professionals. The Working Group asked the Registrar-General about the current process for an intersex person to change the sex recorded on their birth certificate. The Registrar-General stated that an intersex person could apply to have the sex recorded on their birth certificate changed under Section 84 of the BDMRR Act, which allows for the Correction of Errors.
96. An intersex person can apply to have the sex on their birth certificate changed to 'Indeterminate', if they are able to provide medical evidence that their sex could have been recorded as indeterminate at the time of their birth. The process to make these changes is unclear, mostly because very few applications have ever been made to the Registrar-General. At present, there is no guidance available for an intersex person wishing to make such an application.

**Intersex people may be able to apply to the Registrar-General rather than going to the Family Court**

97. The Working Group asked the Registrar-General if it would be possible for an intersex person assigned male at birth to change their sex to female, or female at birth to change their sex to male. The Registrar-General told the Working Group that the BDMRR Act's underlying assumption is that sex can be determined one way or the other. It was probably envisaged at the time of drafting that an intersex child who was assigned male or female at birth, but at puberty their sex characteristics developed to more closely resemble the 'opposite' sex, could have their sex reassigned using the error correction process.
98. To date, no such application has been received by the Registrar-General. If such an application were to be made to the Registrar-General, it is possible that he would apply to the Family Court for a judgement, which could help guide decision making in future applications.
99. Internationally-agreed ethical principles of practice for supporting intersex children and adults confirm that open communication with patients and families is essential, and the process of disclosure should be planned with parents from the time of diagnosis. However, persistent secrecy and stigma around variations of sex characteristics mean that many intersex children don't know about their intersex diagnosis or related medical interventions until much later in life.

100. The Working Group has heard that intersex people struggle to access their historical medical records, often because the records had been destroyed or were no longer available. Retention of and access to medical records for minimum periods of time is a legal requirement - not just for intersex individuals but for everyone, no matter their medical history.
101. Under Health Regulations, patient records must be kept for at least ten years after the last contact the health provider had with the patient. For children's records the requirements are stricter. District Health Boards must keep paediatric care records until a child is 25, or for a minimum of 20 years from their last contact, whichever is greater. However, as intersex people may not search for their records until much later, intersex organisations have argued that paediatric hospital records should be kept indefinitely.

To make the process of changing the sex recorded on a birth certificate accessible to all transgender and intersex people the Working Group recommends that:

- A. Government agencies develop guidance which clearly lays out the process for changing the sex recorded on a birth certificate in easy to understand language and guides a person who wants to apply through each step of the process. This should include:
  - templates for medical evidence
  - a booklet that explains the process end to end
  - examples of the sort of information needed in the affidavit and
  - guidance about filling in all the documents the Family Court require.
- B. Specific guidance be developed for intersex people to access the provisions of Section 84 to change the sex recorded on their birth certificate to 'indeterminate', male or female.
- C. The requirements for District Health Boards to retain paediatric care records be extended so children's records are kept indefinitely to enable intersex people to access their full medical history.
- D. The Ministry of Justice or the Department of Internal Affairs should provide a free face-to-face or call centre service to guide people through each step of the process. This is needed in combination with written guidance to make the process accessible to more people including those who don't have English as a first language or those with disabilities which impair access or who cannot use modern technology.

## Step 2: Understanding and filling in the forms to apply to the Family Court

102. The forms transgender people fill out to change the sex on their birth certificate can't be easily changed, as they are prescribed in regulations. These forms are also used for things like challenging a will, appointing a guardian, and when couples separate or divorce. Unlike other Family Court processes, changing the sex on a birth certificate is about just one person and their own documents, so many of the spaces on the form don't seem relevant.

The three forms that must be submitted to the court.

I've filled the forms out a lot. They're ridiculously confusing. It's not clear what they're after.'

Why can't there be a sample application where they've removed someone's identity?'

Form G 5 r 20(1)(a)  
**Application form for order (or declaration) on notice**

In the Family Court at \_\_\_\_\_  
[place]

FAM No: \_\_\_\_\_

[full name]  
[address]  
[occupation]  
Applicant

[full name]  
[address]  
[occupation]  
Respondent(s)

[Set out full description of document (including whether it is made with or without notice), its date, the Act under which the document is filed, and, in the case of an affidavit or affirmation, the name of the deponent in whose support it is filed.]

This document is filed by  
[name and address for service, and, if filed by lawyers, the name and telephone number of the acting lawyer.]

In the Family Court at \_\_\_\_\_  
[place]

FAM No: \_\_\_\_\_

[full name]  
[address]  
[occupation]  
Applicant

[full name]  
[address]  
[occupation]  
Respondent(s)

[Set out full description of document (including whether it is made with or without notice), its date, the Act under which the document is filed, and, in the case of an affidavit or affirmation, the name of the deponent in whose support it is filed.]

This document is filed by  
[name and address for service, and, if filed by lawyers, the name and telephone number of the acting lawyer.]

Form G 7 r 20(1)(b)  
**Information sheet to accompany certain applications (including certain applications made without notice)**

In the Family Court at \_\_\_\_\_  
[place]

FAM No: \_\_\_\_\_

This information sheet accompanies for the following order(s):  
1. \_\_\_\_\_ 2. \_\_\_\_\_  
3. \_\_\_\_\_ 4. \_\_\_\_\_  
5. \_\_\_\_\_ 6. \_\_\_\_\_

Applicant's full name: \_\_\_\_\_

Occupation: \_\_\_\_\_

Date of birth: \_\_\_\_\_

Age: \_\_\_\_\_

Gender: \_\_\_\_\_

Ethnic group: [select the box or boxes which apply]  
☐ New Zealand European  
☐ Maori  
☐ Samoan  
☐ Cook Island Maori  
☐ Tongan  
☐ Niuean  
☐ Chinese  
☐ Indian  
☐ Other [Dutch, Japanese, Tokelauan, etc.]

Please state: \_\_\_\_\_

I'm a lawyer but I would get a Family Court lawyer [for my child]. It's almost designed like: how can we make these people give up?

Court form's all come blank. You have to figure it out

There needs to be a guide, or a set of forms that ask specific questions

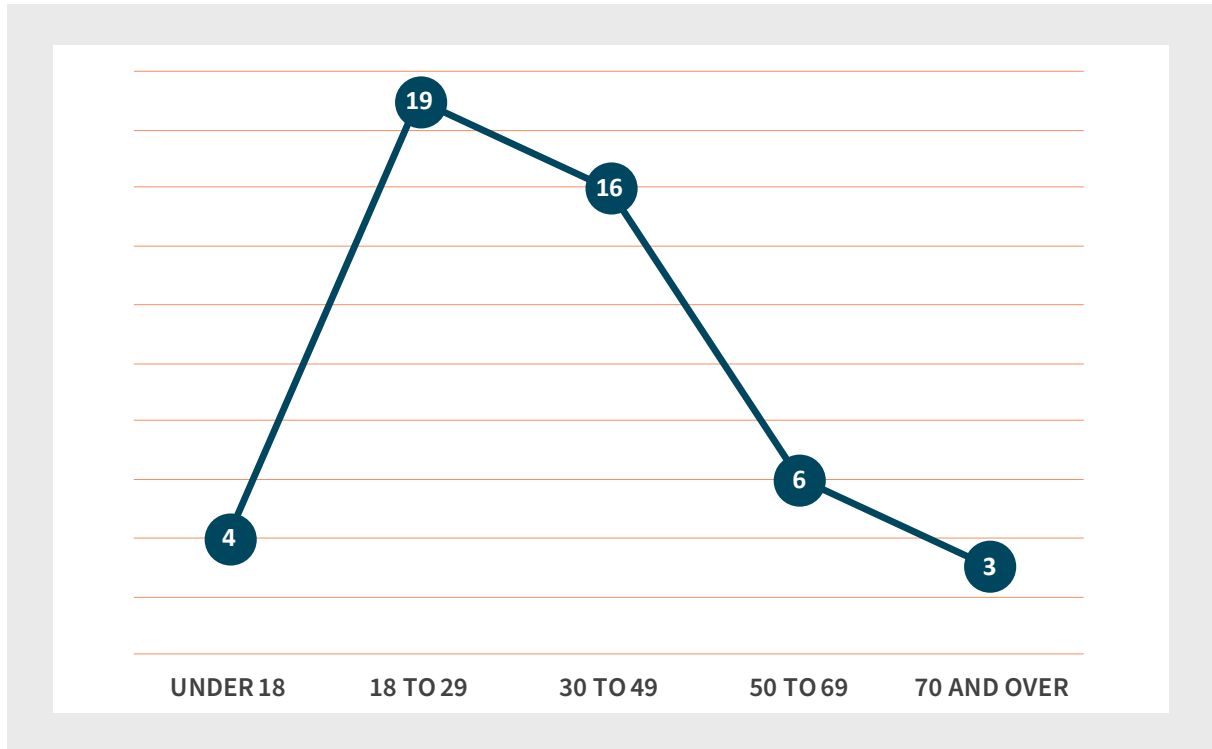
Until I had seen the form, I had no idea how much bureaucracy they wanted

103. Many people find it impossible to fill out the forms without legal advice. A Ministry of Justice court official told the Working Group that in her experience “people who are good with technology can try to do it themselves, but anyone who has English as a second language will find it inaccessible.”
104. The Working Group heard that the minimum cost of legal representation would be over \$1,000. The minimum cost represents what would be charged by a lawyer with prior experience taking cases to the Family Court, who billed only for the time to collate, submit, and follow up on an application. A lawyer who does not have experience with the process would charge significantly more, as the applicant would pay for their lawyer’s time spent researching and reviewing the application. Referrals to lawyers are usually by word of mouth as there is no list of lawyers experienced in taking such cases to the Family Court.
105. One of the forms for the Family Court is an affidavit. Judges usually rely on the applicant’s affidavit to show that the applicant is living as a person of the ‘nominated sex’ and that they will maintain this gender identity (see 28(3)(b) on page 28)<sup>2</sup>. While for some people this is a chance to tell their story, for others it can be an invasive process. Some applicants worry that their personal journey will not fit the judge’s views of what it means to be transgender. For some, their journey contains significant trauma and hardship.
106. Family and friends can also provide an affidavit, but transgender people may not have supportive family or friends who will write an affidavit for them and may not have disclosed they are trans to other people who know them. This could be because they fear discrimination, want their privacy protected, or they transitioned a long time ago and this historical information is no longer relevant in their everyday life.
107. DIA’s research using the Registrar-General’s records of applications, showed people with a wide range of ages were granted declarations; from pre-teen to those in their late 70s. No two applicants had the same story.

The work included 5 forms, 4 trips to the Family Court, 2 trips to a Justice of the Peace, and one trip to our GP. All up, the writing and lodging process took 40 hours.<sup>(SC)</sup>



**Ages of people who were granted declarations under section 28  
from January 2018 to October 2019:**



To ensure all transgender and intersex people seeking advice on how to submit an application to the Family Court are able to access legal advice, the Working Group recommends that:

- E. Free legal representation is made available for people seeking to change the sex recorded on their birth certificate.
- F. A lawyer for the child is funded for applications under Section 29, independent of the legal advice to a guardian or any counsel to assist the court.
- G. Peer-led community organisations that are providing paralegal or rights-based support, including helping transgender and intersex people fill out affidavits to change or correct their registered sex, are resourced to do this work.

### Step 3: Preparing medical evidence

108. The law requires adults to have undertaken medical treatment before they can apply for a declaration from the Family Court. There is no guidance available for medical practitioners or applicants about what medical evidence the court is likely to require.

The court process is daunting. A paediatrician who has other priorities shouldn't have to try figure it out

In my application I cited the law, and my GP copied and pasted some of that and put it into my letter

Online there's nothing that tells you – they ask for your transition history, I don't know what that is. Counsellor? IF you've seen one!

Across the board, [doctors had] no blimmin' idea. Even those who acknowledge us as trans, you have to walk them through it

#### *How can adults meet the medical requirements of the current law?*

109. To meet the medical treatment requirements under section 28 of the current law, a judge must be satisfied the person applying has:

“...undergone such medical treatment as is **usually regarded by medical experts as desirable** to ... acquire a **physical conformation** that accords with the gender identity of a person of the nominated sex; **and**

will, **as a result of the medical treatment undertaken**, maintain a gender identity of a person of the nominated sex”

110. The interpretation of this requirement has, to an extent, followed the evolution of standards of care around gender-affirming care for transgender people. This includes the importance of patient-centred care and informed consent. When the law was first applied nearly thirty years ago, medical experts usually assumed surgery was desirable treatment, often complemented by hormone therapy.
111. By the early 2000s, standards of care had changed. In the landmark 2008 decision *Re Michael* the judge accepted expert medical evidence that gender-affirming genital surgery was not necessary for a person to meet the requirements of the law. This effectively removed the legal requirement for sterilisation, and improved accessibility for people who were unable to afford such surgeries, could not have them for medical reasons, or were unwilling to undergo surgery they did not find necessary for their transition.<sup>3</sup>

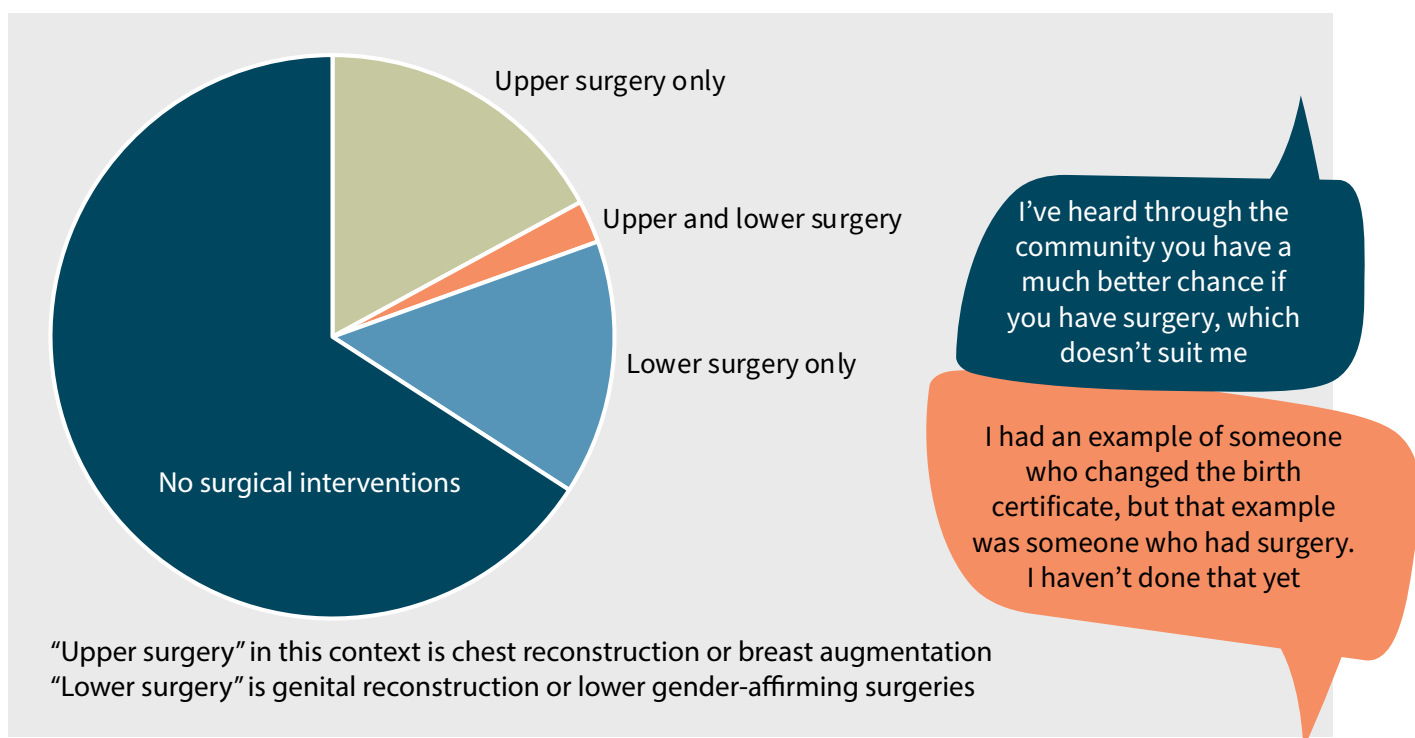
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3 Human rights bodies have also repeatedly called for the repeal of any gender recognition laws that require genital reconstruction surgery, as it amounts to coerced sterilisation.

**In recent successful applications, judges have held that surgical treatment is not necessary**

112. DIA undertook research using the Registrar-General's records of applications received since the beginning of 2018. Under section 28 there were records for 43 applications in which a declaration was granted. In 41 cases it was clear what surgical interventions were reported to the Court. This work found only one third of the 41 successful applicants had any gender-affirming surgery.

**Surgical interventions recorded for people granted a declaration under Section 28, January 2018 – October 2019:**



113. Judges have interpreted the requirement for a person to maintain a gender identity "as a result of the medical treatment undertaken" as requiring medical treatment which results in "some degree of permanent physical change". To date, each person granted a declaration has satisfied the judge that they have made "permanent change(s)" to their body. Those who had no surgical interventions had all undergone hormone treatment. Time on hormones for these adults ranged from five months to 42 years.

114. Best practice guidelines for the provision of gender-affirming healthcare have evolved significantly over the past decade. Health professionals have become increasingly aware of the rights of transgender people to be able to make informed choices for themselves regarding the care that they need. Care has moved away from pathologising assumptions that being transgender is an illness or that all transgender people wish to medically transition. The 2018 Guidelines for gender-affirming healthcare note that:

While many trans people will benefit from hormone therapies and surgical interventions, some may choose only one of these options and others may decide to have neither.

115. The medical treatment requirements in the law are currently interpreted as requiring permanent physical change. In future, the Family Court may interpret the law differently, based on expert medical evidence which aligns with the World Professional Association for Transgender Health standards of care, and New Zealand's 2018 Guidelines for gender-affirming healthcare. The court could recognise that medical experts currently regard physical change as desirable only when it is necessary for the individual treatment goal of the person concerned. The requirements for medical treatment in the current law could, arguably, be met through psychological "treatment". It is possible that the court could recognise that psychological support for social transition could also result in the maintenance of "a gender identity of a person of the nominated sex". This interpretation is yet to be tested in court.
116. At present access to gender-affirming healthcare is variable across New Zealand. A survey undertaken prior to the May 2019 Trans Health Symposium at the University of Waikato received responses from clinicians providing gender affirming healthcare in 18 of the 20 District Health Boards. The survey results highlighted the postcode lottery nature of obtaining gender affirming healthcare in New Zealand at present. Lack of access to gender affirming care significantly impedes transgender peoples' ability to meet the medical treatment requirements under the current law.

#### **What is acceptable evidence of medical treatment for adults?**

117. From the research using the Registrar-General's records of applications, it is apparent that the level of evidence individual judges accept varies greatly. The formal nature of an application to the Family Court means that people err on the side of providing as much evidence as they can with their application. Many people provide letters from a psychologist, surgeon, or endocrinologist or affidavits from these medical experts. The more evidence a person provides, the more costly, invasive and time consuming the process becomes.
118. Some applicants are successful with much less evidence. In one case in DIA's review of the Registrar-General's files, the only evidence a successful applicant provided appeared to be a letter. It stated:

I understand that X is requesting a change to her birth certificate from male to female. I can confirm that X identifies as female and has been attending the Sexual Health Service for gender-affirming care since November 2013. She has been living as a woman and taking gender-affirming hormones since February 2014.

Other applicants who provided similar letters were asked for significantly more information.

119. Each time an applicant is required to seek further medical information it can result in significant cost to the applicant and delays to the process. It may take a long time for a medical specialist at an over-subscribed and under-resourced service to write the required letter or affidavit. For example, an applicant may need to save money for fuel, borrow transportation, travel a day's drive with children and a dog from a rural or isolated area, stay in a hotel, etc. The more times this needs to be done for evidence, the more likely the applicant will go into debt or simply give up.

120. Some judges have asked applicants to provide letters from specialists, such as an endocrinologist or psychiatrist, even though the applicant has had no recent contact with specialist physicians. It is now common for a GP to provide ongoing gender-affirming care. Some judges simply request 'full medical records'. In November 2019, a medical professional wrote to the Working Group about such a request:
121. In most cases, it is unclear why additional evidence is sought so applicants cannot work with their doctor or other medical professionals to satisfy the judges specific concerns. Instead applicants and medical practitioners provide further records, assessments, and evidence in the hope that these will meet the judge's expectations.
122. The inconsistency with which applications are treated can result in stress, confusion and adverse mental health outcomes. Some applicants make their application based on advice from transgender people who have previously applied and medical experts who have supported other applications. If they are asked to provide significantly more evidence, it can make them feel unfairly scrutinised.

The Family Court lawyer contacted me. I was surprised by the level of detail she wanted to know but, with the patient's consent, I provided an updated summary letter which I believed would comply. The lawyer has only now revisited our paperwork and I have just been contacted and advised that my reports to date do not contain sufficient detail that is likely to satisfy this particular judge.

I was very concerned to have a person's full medical history disclosed unnecessarily. The lawyer argued that the person had consented to provide the court with their full medical file whereas my view is that it's not truly consensual when you feel you have no choice.  
Clinical Director | Sexual Health Service

The court contacted me saying they wanted more documents. I'd given 32 pages! They want 'a little bit more' but it's not a little bit, the effort required! Stuff that. I gave up.

The court process assumes that a medical expert is best placed to determine whether the applicant "identifies as a person of the nominated sex". We submit that the applicant is best placed to determine their own identity.<sup>(SC)</sup>

Medical intervention, whether surgical or psychological, is not accessible to all for a variety of reasons, including lack of funding, lack of availability of suitably trained medical professionals or a personal desire not to physically transition in the ways recognised by the court.<sup>(SC)</sup>

### What are the medical requirements for applications made on behalf of children and young people?

123. Children and young people (under 18), do not need to have had any medical treatment before their parent or guardian can apply to change the sex registered on their birth certificate under section 29. A judge must be satisfied that a child:
- has already undergone;** or
  - if the court grants the declaration **will undergo**, medical treatment reasonably necessary to enable the child to assume and maintain the gender identity of a person of the nominated sex.
124. However, it appears that in all cases where a declaration has been granted by the court to date, the child or young person concerned has already undergone psychological assessment and was receiving either hormone blockers or gender-affirming hormone treatment. The 2018 Guidelines for gender-affirming healthcare note that:
- No medical intervention (including psychological intervention) is needed pre-puberty. Supporting trans and gender diverse children requires a developmentally appropriate and gender-affirming approach which involves assisting children to create an environment where their gender can be affirmed.
125. Based on the weight that judges have given to evidence from a psychologist and/or other medical professionals in published judgements, it is unlikely that a judge would be satisfied that a child meets, or will meet, the requirements above without evidence of some sort of medical intervention. Again, the law is out of step with current best medical practice. A child yet to reach puberty should not have their identity ‘medicalised’ in the manner the law requires.
126. This combination of factors means that families wait until their child reaches puberty to apply. Younger children, the group most likely to be using their birth certificate as part of their evidence of identity at school, are excluded from the process. Children below the age of puberty who are excluded by the current law, could also be helped in their social transition if there is less emphasis on a birth certificate as evidence of identity. The final section of this report includes some recommendations about creating more inclusive options for transgender people of all ages to verify their identity.

### It can be difficult for children and young people to access gender-affirming care

127. It can be very difficult for children and young people to access gender-affirming healthcare services. The regional health services in Auckland and some other centres provide psychological assessments or support as part of routine care within a multidisciplinary team. However, other areas of the country require children and young people to be referred to local Child and Adolescent Mental Health Services (CAMHS). High levels of psychological distress are often required to meet the threshold for CAMHS assessment. A transgender child who is not in severe distress would need a private referral to a psychologist to get the report they would need to be able to start medical interventions.

I'm a single parent beneficiary and I can't afford that so my child is penalised because of it

It's very clear that I can't make the change without considerable financial resources

128. Many families are not able to pay for private gender-affirming healthcare and support for their child. The Parents of Transgender and Gender Diverse Children have reported that it is common for children who are not able to access gender-affirming healthcare to become withdrawn at school and begin to struggle socially. Some families report that a child is only able to access gender-affirming health care after they have developed symptoms of mental health problems associated with a lack of access to gender-affirming health care.

**A transgender young person on puberty blockers was recently granted a declaration**

129. A child or young person can be started on a puberty blockers at the onset of puberty to suppress the development of secondary sex characteristics until they are considered old enough to take the decision to begin hormone therapy. Puberty blockers are considered to be fully reversible – as opposed to hormonal therapy which causes some irreversible changes to the body.
130. The process to be prescribed puberty blockers differs throughout the country. In Auckland children and young people are started on puberty blockers after a holistic psychosocial assessment by a health team, which does not usually involve formal psychological assessment. In some other areas of New Zealand, children are referred to a psychologist for assessment before starting on puberty blockers. Recently, the Family Court granted a declaration to a child who was taking puberty blockers. The judge in this case determined that there was sufficient evidence in the psychological assessment that the child underwent before starting on puberty blockers, to meet the medical requirement described above.

**The court could determine a child's future course of treatment, but this has never been included in a declaration issued under Section 29**

131. In addition to being satisfied about the treatment a child has undergone or will undergo, the law also requires that the declaration made by the court:
- shall specify (with as much particularity as is possible in all the circumstances) all medical treatment (if any) that the child has not yet undergone that in the court's opinion (reached in the light of the expert medical evidence) is reasonably necessary to enable the child's successful assumption and maintenance of the gender identity of a person of the nominated sex.
132. This requirement is concerning for guardians who are thinking about applying. Here, the court is required to specify what future medical treatment the child should undergo. Parents don't know what sort of treatment the judge might say is necessary for their child in the future.
133. However, so far, **no declaration issued by the court has ever included details of future treatment.** The Registrar-General's office has stated that there is no process in place for recording or following up on any medical treatments that a judge might specify in a declaration, because the situation has never arisen.



134. If a judge were to direct a child to have specific medical treatment, it is difficult to see how this would meet good practice clinical guidelines for supporting transgender and gender diverse children. For example, an informed consent process to start hormonal therapy should involve several conversations with the child/family or young person before they start treatments that have an irreversible component. Additionally, health teams have a duty to provide holistic care that includes assessing and supporting the child's psychological health. A judicial decision forming the basis of a child's current or future gender-affirming healthcare needs is at odds with such an approach.

To guide applicants, medical professionals and members of the judiciary towards a consistent understanding of the evidentiary requirements which recognises the expertise of those delivering gender-affirming care in New Zealand, the Working Group recommends:

- H. The Ministry of Justice creates a simple template for health professionals to provide expert medical evidence, that reflects the evidential requirements in recent successful applications, acknowledging that judges may request additional evidence as they consider necessary.
- I. When a GP has oversight of the medical steps an applicant has undertaken, judges consider recognising that GP's evidence as sufficient expert medical evidence, and funding is available so an applicant can obtain this evidence is at no cost.

To ensure lack of access to gender-affirming health care does not prevent transgender people from meeting the medical requirements of the law, the Working Group recommend:

- J. Gender-affirming healthcare required to meet the medical treatment requirements of the BDMRR Act is provided free.
- K. The Minister of Health requires District Health Boards to provide a minimum set of gender-affirming healthcare services based on the New Zealand Guidelines for gender-affirming healthcare.

#### **Step 4: Submitting an application to the Family Court**

135. An application to the Family Court needs to be submitted to the court nearest to where the applicant lives. For transgender people living in smaller centres, submitting an application in their town can raise concerns about their privacy, and therefore the potential for discrimination or violence. Regardless of how professional the court staff are in their handling of the information, if a transgender person knows that other people in a close-knit community have read through their medical records this can be disconcerting or humiliating.
136. Some transgender people travel outside their region to find a lawyer or to submit an application to a court where they won't be recognised. It is up to the registrar of that court to decide whether they accept an application from someone living in another area.

To improve the privacy and safety of transgender people and families with transgender children submitting an application to a Family Court, the Working Group recommends:

- L. The Ministry of Justice develop a template cover letter for people to submit with their application if they are not submitting to their closest Family Court because they are concerned about privacy or safety.

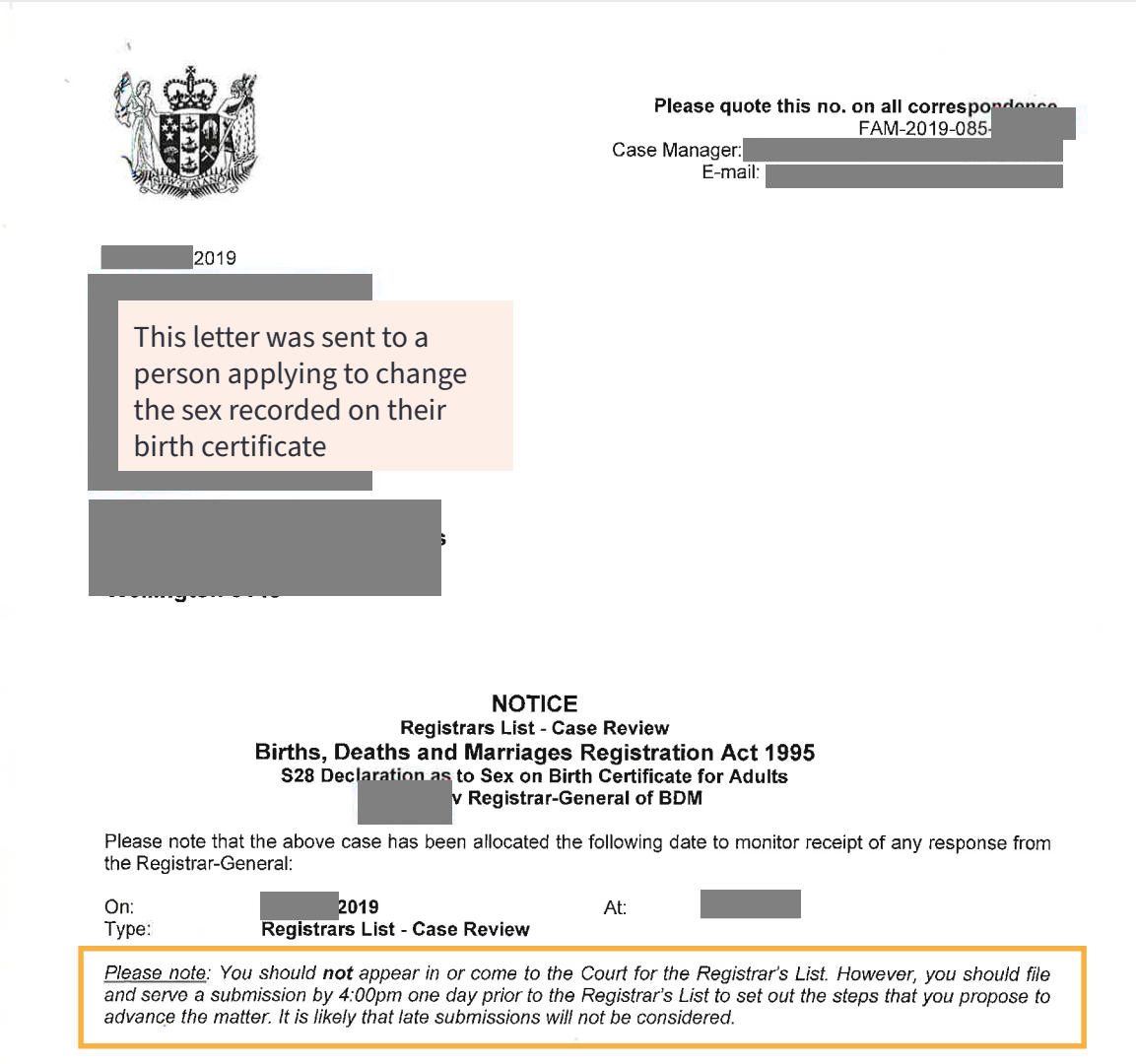



I was misgendered throughout the process by the court


## An application goes through the Family Court process



### Step 5: The Family Court accepts and processes the application


137. Formal correspondence from the Family Court is confusing. A Ministry of Justice official told the Working Group that the letters and notices that the Family Court send out are generic and automatically generated by the court systems. These templates can't be changed because they have to be generic enough to fit all kinds of applications. However, for some types of cases, staff provide a leaflet alongside the forms with information specific to the type of application.






Please quote this no. on all correspondence  
FAM-2019-085-

Case Manager:   
E-mail: 



 2019

This letter was sent to a person applying to change the sex recorded on their birth certificate



**NOTICE**  
**Registrars List - Case Review**  
**Births, Deaths and Marriages Registration Act 1995**  
**S28 Declaration as to Sex on Birth Certificate for Adults**  
**by Registrar-General of BDM**

Please note that the above case has been allocated the following date to monitor receipt of any response from the Registrar-General:

On:  2019 At:   
Type: **Registrars List - Case Review**

*Please note: You should **not** appear in or come to the Court for the Registrar's List. However, you should file and serve a submission by 4:00pm one day prior to the Registrar's List to set out the steps that you propose to advance the matter. It is likely that late submissions will not be considered.*

A letter from the court updating an applicant on the progress of their application

138. The Working Group heard that some applicants find receiving letters like the above is stressful and demoralising because they can't understand what is happening with their application. Some people seek legal advice after receiving such a letter to check whether they should "file and serve a submission" or to find out what this letter is asking them to do.

To make the Family Court a less intimidating place and to help applicants understand correspondence from the court, the Working Group recommends:

- M. The Ministry of Justice draft guidance about trans-inclusive and affirming language and behaviour as part of the court's internal resources for staff.
- N. The Ministry of Justice provide plain English guidance alongside each form or letter sent out by the court that explains what it means for the applicant.

### **Step 6: The Registrar-General and affected persons are informed**

The law requires the court to send a copy of the application to:

- the Registrar-General, (if the applicant was born in New Zealand) and
- any other person who, in the court's opinion, is interested in it or might be affected by the granting of the declaration.

### **The Registrar-General does not usually respond, but their office provides information to the court**

139. The Registrar-General is the 'Respondent' in an application to change the sex recorded on a birth certificate. This means that the Court must 'serve the application' on the Registrar-General. In theory, this means the Registrar-General could appear in court and present arguments against someone changing the sex recorded on their birth certificate. In fact, the Registrar-General almost never responds to the application. The current Registrar-General told the Working Group he would respond to an application if it presented a new way of interpreting the law. The last time the Registrar-General responded to an application was the 2008 *Re Michael* case.
140. When the Family Court serves the application on the Registrar-General, his office check that the person who has applied is registered (if they were born in New Zealand) by checking that the details the person has provided to the court match the register. They also check if there are any name changes recorded for that person. They provide this information to the court.
141. The Registrar-General's staff still check whether someone is married or in a civil union. That step is no longer needed because a person's sex doesn't affect who they can legally marry. The privacy of the person who has applied should be the most important factor here; they can choose whether or not to share information about their marital or partnership status with the judge. It should not be shared by the Registrar-General if there is no need under the law.

142. Most Family Courts give the Registrar-General a fixed time to respond. Some courts ask for a response in 21 days, some ask for a response in 28 days. The Registrar-General's staff told the Working Group they respond as quickly as they can, but if they are busy, they will use the time that the court has given them.

The courts.  
Intimidating. Law  
enforcement hasn't  
been on our side.

**Any other person who is interested in, or might be affected by, the granting of a declaration**

143. The Registrar-General registers births and holds the details of what's recorded on a birth certificate, so it makes sense that they will get a copy of the application. But the law also tells the Court to send a copy to anyone they think might be "interested in or affected by" the application. This doesn't mean that the Family Court can send a copy to the applicant's neighbours or employer. The 'interest' must be a legal relationship of some kind – such as checking if there is another parent or guardian who needs to be informed about an application.

To ensure that the Registrar-General's office provides only the information the Family Court requires, and the process is nationally consistent, the Working Group recommends:

- O. A process is put in place to make sure the Registrar-General's office only provides information the court needs to assess the application, no information about marriages or civil unions is sent.
- P. A fixed time frame in which the Registrar-General's office respond that is nationally consistent.
- Q. The Family Court provides guidance about how an "interested" or "affected" person is defined and tells the applicant if anyone other than the Registrar-General has been sent their application.

**Step 7: The Family Court assesses the application**

144. The Working Group met with the Principal Family Court Judge, Her Honour Judge Moran to discuss the manner in which the Family Court assesses applications under Sections 28 and 29 of the BDMRR Act, and how it interprets the law. The Working Group were very grateful that Judge Moran took the time to discuss their concerns in detail. The recommendations below reflect the understanding of the court process that the Working Group took from this meeting, as well as information from other sources such as the research interviews.

### **An application is assessed by a Judge before they set down time to make a decision**

145. Once an application has been accepted by the Family Court, it may be seen by a judge several times. This may be the same judge each time, or different judges, depending on the court. Usually, the first time a judge will see an application will be in 'list court'. This is when the judge goes through a list of applications and issues a 'minute' about what the case needs to progress, or set it down for a hearing. Below is an example of a minute issued in 2019 when a judge first assessed this application from a transgender adult.

<b>Date:</b>	<input type="text"/> 2019
<b>Lawyer for Applicant:</b>	<input type="text"/>
<b>Lawyer for Respondent:</b>	<input type="text"/>
<b>Lawyer for the Child/ren:</b>	<input type="text"/>
<b>Minute of Judge</b> <input type="text"/>	
<ol style="list-style-type: none"><li>1. Serve Registrar General.</li><li>2. No other person required to be served.</li><li>3. Adjourn to Registrar's List to monitor service and any response.</li><li>4. If no steps taken by Registrar General, appoint Counsel to assist with a brief to consider the papers, consider matters of jurisdiction and evidence, provide a brief memorandum on the matter for the Court.</li><li>5. Before matters can proceed, the applicant to provide full medical reports to verify the matters outlined in S28(c)(i). The only material filed is a brief letter from a Doctor. Significantly more information is required.</li></ol>	

### **Minute of a Judge from an application considered in 2019**

146. The above minute illustrates the problems regarding medical evidence discussed in Step 3. This judge requested "full medical reports" without making it clear why the material filed was not satisfactory. As noted in Step 3, in some cases a brief letter from a doctor *has* been considered satisfactory evidence.
147. The minute also directs the appointment of a Counsel to assist. A Counsel to assist is appointed for specific purposes, often to ensure that the court has the requisite evidence. Applications to change sex recorded on a birth certificate make up a tiny proportion of applications before the Family Court each year, so most judges will not regularly assess such applications.

**Judges' lack of familiarity with this law may result in more evidence being requested than is necessary**

148. In more than one of the files held by the Registrar-General which were reviewed by DIA, it appears that judges have requested more medical evidence at the same time as appointing a Counsel to assist. The Counsel to assist has then advised the Court that the evidence provided with the original application appeared to be consistent with evidence used in similar cases and therefore could be considered sufficient to make a decision. The Working Group and Judge Moran discussed the possibility of recommending that guidance be developed, both for judges and applicants, on the expected level of medical evidence to meet the requirements of the BDMRR Act. Judge Moran pointed out that the law requires that a judge be satisfied on the basis of expert medical evidence. What expert medical evidence is defined as requires interpretation and may also require an in-depth knowledge of how gender-affirming care is delivered.

**A decision on an application can be made with or without the applicant appearing before the judge**

149. In the research interviews, many people said that the idea of going to court was a major barrier to applying to change the sex recorded on their birth certificate. However, not everyone who applies to change their birth certificate is required to go to court.
150. When a judge assesses an application, they have the discretion to make a decision “on the papers”. This means they use the written evidence provided to make a decision. A lawyer experienced in taking people through the court process told the Working Group she now always requested an application be processed on the papers, and thus far, judges have used their discretion to do so each time.

When you are sitting there, and they keep questioning you and telling you that you need more documentation; ‘your application is weak’, that sort of thing. It definitely hurts you quite a lot. Even though I know that’s the text of the law...

I think going through a court process would be a very frightening and intimidating experience

To improve the judiciary's understanding of access to justice issues for transgender and intersex people and the delivery of gender-affirming care in New Zealand and to encourage consistency, the Working Group recommends:

- R. The development of a judicial education and training programme, with input from transgender and intersex groups and the Professional Association for Transgender Health Aotearoa (PATHA), covering:
  - international standards of care and human rights standards
  - recent New Zealand case law
  - the 2018 New Zealand Guidelines for gender-affirming healthcare, and
  - the reasons an applicant may not be comfortable appearing in court.
- S. Information on interacting with transgender and intersex communities be included in the relevant general judicial education and training development programme when judges are first appointed.
- T. Judges do not require any more evidence than the minimum required to determine if a person meets the current, and evolving, interpretation of the medical requirements of Sections 28 and 29 of the BDMRR Act.
- U. Judges consider dictating a judgement for publication when making a decision based on a lower level of medical treatment or there is another new development in relevant case law to enhance both judges and lawyers understanding of modern social thought.
- V. Judges consider deciding applications under Sections 28 and 29 on the papers, unless there are special circumstances that require an appearance.

## Applying to DIA for a new birth certificate

### Step 8: Receiving the declaration from the Family Court and an application form from DIA

- 151. The Department of Internal Affairs (DIA) receives a copy of the declaration from the Family Court, and posts an 'Application to Deposit a Declaration by the Family Court' (BDM65) to the transgender person who has been granted the declaration. DIA asks them to send the application form back to DIA with *another* copy of the declaration.
- 152. Prior to the fees being waived, this step used to be when DIA would ask the person to pay one fee for depositing their declaration (\$55) which updated their details in the register, and then another fee to apply for a new birth certificate (up to \$35). DIA have indicated that they will look into the need for the BDM65 and, if it is still required, whether the form could be made available online for efficiency.

To reduce barriers for transgender and intersex people when applying for a new birth certificate to be issued, the Working Group recommends:

- W. DIA work to simplify the process of applying for a new birth certificate after a Family Court declaration has been granted.

### **Step 9: Finally applying for a new birth certificate!**

153. The process of applying for a new birth certificate by posting an application form is simple, but it does present some further barriers. As mentioned in Step 8, there are application fees which are currently being waived, and there is the time and cost of posting the application.
154. One frustrating final barrier is that if someone changes their name at the same time they change the sex recorded on their birth certificate, DIA sends the new certificate, with the updated name addressed to the person's previous name.
155. When someone changes the sex on their birth certificate, the record of the old certificate is archived, in the same way that a pre-adoption birth certificate is archived. The archived certificate can only be accessed by the person named on it. Sending a new birth certificate out to an old, archived identity does not offer surety that the old record has been securely stored away.
156. The Working Group has heard that some people need evidence linking their previous name to their new name, and the letter that accompanies the new birth certificate may serve this purpose in some situations. But this letter is not formal proof linking the two identities and it would be better if applicants could choose to request formal proof if they need it, and the new birth certificate came addressed to the new name. DIA should ask all applicants if they require a letter from the Registrar-General linking their two identities as part of the application process. The Working Group understands that such letter can be issued on request.

To ensure there are no further financial or administrative barriers to applying for a new birth certificate after a declaration is granted, the Working Group recommends:

- X. Permanently removing the fees for the first birth certificate issued after a declaration is granted by the Family Court under Section 28 or 29 of the BDMRR Act, or an error regarding the recording of sex is corrected by the Registrar-General under Section 84.
- Y. Once a person's name or registered sex are changed, DIA immediately update those details within their administrative systems so that all future correspondence uses the correct details.
- Z. DIA include an opportunity to apply for a letter from the Registrar-General which links a person's previous name and recorded sex to the name and sex recorded on their new birth certificate.

## VI.

## VI. Mitigating the harm caused by incorrect details on identity documents

157. In many situations when someone uses a birth certificate as part of their identity evidence (for example to show that they are a New Zealand citizen by birth when applying for a job) the only information needed is their name, date of birth, and place of birth. Under the Privacy Act 1993, an organisation, such as a school or employer, shouldn't be requesting information it doesn't need. By asking for a birth certificate, organisations are effectively requesting information they have no need for, or right to request.
158. Additionally, a birth certificate issued under the current law has no available option that recognises a non-binary identity. In the *Counting Ourselves* survey 40 per cent of participants identified as non-binary.

### The short-form birth certificate allowed people to keep private information private

159. Under the Births and Deaths Act 1951, there were two forms of birth certificate available:

- a 'short-form' birth certificate, with a name, place and date of birth, known formally as a "Certificate of date of birth".
- A 'long-form' birth certificate, known formally as a "Certified copy of entry of birth in the Registrar-General's office".

Form No 1  
Certificate of date of birth  
I CERTIFY that, according to the record of the birth in my office, ..... was  
born at ..... on the ..... day of ..... 1.....  
.....  
Registrar of Births and Deaths  
Dated at ....., the ..... day of ..... 19.....



160. The short-form birth certificate allowed the holder to link a name and date of birth without revealing other details. This protected against social stigma about unmarried parents or a parent's occupation. The short-form certificate does not record a person's sex and was issued without details of previous names when a person changed their name. For transgender people, this certificate allowed them to provide evidence of their identity without revealing that they were transgender.

161. The short-form birth certificate was withdrawn in 1995. DIA informed the Working Group that this was because agencies had started asking for a full birth certificate, and some people who had applied for a short-form birth certificate were unhappy that they had bought a document which wasn't universally accepted.

162. However, removing the short-form birth certificate also removed choice for those who wanted to keep private the sex they were assigned at birth, their parent's or parents' details, or their former name.

163. DIA could work to develop a birth certificate that has the details needed for common situations, like banking, or enrolling in study, and none of the extraneous details an organisation has no good reason to request or hold.

164. Reinstating the short-form birth certificate would require a change to the regulations that sit under the BDMRR Act and the Births, Deaths, Marriages, and Relationships Registration (Prescribed Information) Regulations 1995. There may be ways that people can access their information from the Register of Births without changes to regulations being required. This could involve the Registrar-General developing a way to allow people to choose which information they need for a specific purpose. For example, he could provide a letter confirming certain details match those held on the Register of Births.

Form No 10  
Certified copy of entry of birth in the Registrar-General's office  
CERTIFIED COPY OF ENTRY OF BIRTH IN THE REGISTRAR-GENERAL'S OFFICE  
Place of Registration: .....

CHILD	
1. When born .....	
2. Where born (town or locality only) .....	
3. Christian or first names .....	
(If twin, state whether elder or younger) .....	
(If stillborn, state so) .....	
4. Sex .....	
FATHER	
5. Name and surname .....	
6. Profession or occupation .....	
7. Age .....	
8. Birthplace .....	
MOTHER	
9. Name and surname .....	
10. Maiden surname .....	
11. Age .....	
12. Birthplace .....	
13. Name and surname of child if there has been any addition or alteration after registration of birth .....	
Certified to be a true copy of the above particulars included in an entry of birth in the records of the Registrar-General's Office. Given under the hand (or seal) of the Registrar-General at Wellington, the ..... day of ..... 19 .....	

To provide ways of sharing information which do not disclose someone's transgender status in situations where the sex recorded on their birth certificate is irrelevant, the Working Group recommends that:

- AA. The Registrar-General reverts to allowing people to have a short-form birth certificate issued which does not have details about their sex.
- BB. The Registrar-General provide people with access to information from the Register of Births in a way that meets the requirements of the Privacy Act. This means only the information needed for a certain purpose will be displayed on the extract from the Register.
- CC. A birth certificate should never be stipulated as a compulsory document for showing proof of identity in New Zealand and, where such policies or administrative practices currently exist, an alternative statutory declaration option should be available.
- DD. The Registrar-General explores the option of people choosing to not have any details recorded in the field for 'sex' on their birth certificate, leaving this field blank. This would also enable non-binary people to obtain a birth certificate that does not contain inaccurate data.

### **There are misconceptions about what information the Ministry of Education needs**

165. The Ministry of Education does not require education providers to record a child's sex. Education providers must use a verification document when first enrolling a child or young person. This document is used to verify a student's eligibility for funding, and to establish their identity within the education system. Schools generally use the information in the document parents or guardians have provided when entering a student's name and gender in Ministry of Education systems. Most families provide a child's birth certificate. This means that, although the Ministry's system asks for a student's gender, what is usually inputted is a child's sex marker, as assigned at birth. This practice may be based on unclear guidance. Many providers' mistakenly believe that they are legally required to match the child's gender in the Ministry's system to the sex marked on their verification document, and that this cannot be changed.

### **Some schools don't know they can change the gender recorded for a student across education databases**

166. The Working Group have heard that some schools are not aware of the process to change a child's gender in the Ministry of Education's systems. Further resources and clearer guidance which clearly lays out what information the Ministry of Education need to collect and why, would reassure schools and families that there is no reason for a child's documents to reflect their sex, rather than their gender.

Some families can't afford to change their child's legal name, and rely on the school and officials to use their child's chosen name and gender.(SC)

### **Inclusive practises at schools can support a child's transition**

167. An increasing number of children and young people are socially transitioning, including within early childhood centres and schools. The World Professional Association for Transgender Health and research show that changes in name and gender marker on identity documents is a means of alleviating the stress transgender children may feel in social situations. The current law does not create an easy pathway for families to support their child's development and social transition through gender-affirming identity documents. The absence of comprehensive unisex options within many school environments also places significant pressure on individual students and their families.

To better support the wellbeing, inclusion, safety and social transition of young transgender and gender diverse people the Working Group recommends:

- EE. The Ministry of Education continues to provide guidance to schools and other education providers which confirms that records can be changed to reflect a student's gender without a change to the child's birth certificate.
- FF. Schools recognise a student's gender for all purposes and ensure that this data is only collected in administrative records when it is needed for a specific purpose.
- GG. Schools are supported to be inclusive of transgender and gender diverse students, including through the development of further guidance by the Ministry of Education working with community organisations, and financial support for the rollout of this guidance.
- HH. Government agencies work with sporting and peer led organisations to develop guidance for schools and other education providers, community groups and sporting bodies about how to ensure transgender, gender diverse and intersex students are included in sports.

### **Transgender and intersex refugees and asylum seekers face additional barriers when they have no official documents with their correct name and gender**

168. This report has summarised the barriers faced by transgender people wanting to amend the sex recorded on their birth certificate. This method of amending the recorded sex on a birth certificate is only available to people born in New Zealand. People who hold permanent residence in New Zealand are also able to apply for a Family Court declaration with regard to sex.
169. Many transgender refugees and asylum seekers in New Zealand come from countries, including most parts of Asia and Africa, where it is not possible for transgender people to amend their name, title or sex to match their gender. Some countries in Europe and North America enable transgender refugees and asylum seekers to obtain an identification

document with these details corrected. This recognises the vulnerability of refugees and asylum seekers and their heightened need to show identification documents to access health, education and other services. Intersex refugees and asylum seekers may also face related issues, particularly if their variation in sex characteristics results in bodily changes that mean they no longer resemble the photo on their identification documents.

170. In New Zealand, asylum seekers and refugees can only change their name when they become a permanent resident. Once an asylum seeker's refugee claim is accepted, they become eligible to apply for permanent residence in New Zealand, but it can take months or even years for an application to be processed. In the meantime, as a refugee they can obtain a refugee travel document in the correct gender. However, the name on that document still cannot be changed until they are a permanent resident.
171. The Working Group supports submissions by transgender refugees and asylum seekers calling for a statutory declaration process that would allow them to be issued a temporary official document that contains their self-defined name and gender marker and a current photograph.

To enable transgender and intersex refugees and asylum seekers to have an official document that protects their dignity, equality and security, the Working Group recommends:

- II. Government agencies explore options for enabling transgender and intersex refugees and asylum seekers to obtain official documentation reflecting their self-defined gender and name, until they are able to change these details using processes available to permanent residents.



## VII.

# VII. Conclusions and next steps section

172. If the government follows the process-related recommendations from the Working Group in this report, it will be easier for some transgender and intersex people to change or correct the sex recorded on their birth certificate. If these recommendations are followed, they will:

- make the process of changing sex on a birth certificate more accessible
- support transgender people in accessing the health, legal and support services they need to fulfil the requirements of the law
- improve the judiciary's understanding of transgender and intersex communities and gender-affirming care, and make the assessment of applications to the court more consistent.

173. However, the process will still exclude those who do not need medical treatment to transition or who identify as non-binary. The Working Group agrees with widespread community concerns that the current law medicalises gender diversity and forces transgender people to go to court to have their gender identity recognised.

174. The Working Group has also made recommendations to address other concerns that affect transgender and intersex communities. These recommendations, if followed, will:

- protect the privacy of individuals and ensure that agencies and organisations don't collect information they don't need
- improve the wellbeing of children and young people through support and inclusion in education, sport and recreation.

175. The privacy issues raised above don't affect only transgender communities. However, transgender people can suffer disproportionately from a breach of their privacy. Addressing these concerns and making the wider public aware of their own right to privacy will make

alternative documentation more widely acceptable. In the long run, as long as transgender people, including children and young people, do not have access to documents they can use without fear of prejudice, inequality will remain. The wider issues affecting the community also require law change to be resolved.

176. The Working Group is keen to see how the Government intends to address the issues raised in this report. They are aware that delivering this report in an election year means it may compete for attention from Ministers and government departments. With this in mind, the Working Group recommend that the Minister of Internal Affairs and her colleagues commit to addressing the recommendations in their 2020 work programmes. Additionally, the Working Group have identified an opportunity for the Minister of Internal Affairs to update representatives of New Zealand's transgender and intersex communities in May 2020.

To ensure this work is carried out in a timely manner, the Working Group recommends that:

- JJ. The Minister of Internal Affairs and her ministerial colleagues direct their respective departments to develop a cross-departmental work programme to address the issues raised in this report, and seek advice from the Human Rights Commission about that work programme to ensure compliance with human rights standards.
- KK. The Minister of Internal Affairs takes a leadership role working with other Ministers (including Justice, Health, Education, and Sport and Recreation) on implementing the Working Group's recommendations.
- LL. The Minister of Internal Affairs reports on progress implementing these recommendations at the cross-party Rainbow Parliamentary network's next six-monthly community consultation scheduled for May 2020.

# VIII.

## VIII. Appendices

### Appendix 1:

#### The right to legal gender recognition in international human rights law

The right to legal recognition is set out in Principle 31 of the United Nations *Yogyakarta Principles plus 10* which outlines the universal right to obtain identity documents, including birth certificates, and to change gendered information on them.<sup>4</sup> Specifically, Yogyakarta Principle 31 notes that where sex or gender details continue to be registered, States shall:

- i. Ensure a quick, transparent, and accessible mechanism that legally recognises and affirms each person's self-defined gender identity
- ii. Make available a multiplicity of gender marker options
- iii. Ensure that no eligibility criteria, such as medical or psychological interventions, a psycho-medical diagnosis, minimum or maximum age, economic status, health, marital or parental status, or any third-party opinion, shall be a prerequisite to change one's name, legal sex or gender;
- iv. Ensure that a person's criminal record, immigration status or other status is not used to prevent a change of name, legal sex or gender.

It also notes that States shall “Ensure that official identity documents only include information that is relevant, reasonable and necessary as required by law for a legitimate purpose, and thereby end the registration of sex and gender of the person in identity documents such as birth certificates, identification cards, passports and driver licences, and as part of their legal personality”.

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<sup>4</sup> The Yogyakarta Principles address a broad range of international human rights standards and their application to SOGI issues. On 10 Nov. 2017 a panel of experts published additional principles expanding on the original document reflecting developments in international human rights law and practice since the 2006 Principles, *The Yogyakarta Principles plus 10*. The full text of the Yogyakarta Principles and the Yogyakarta Principles plus 10 are available at: [www.yogyakartaprinciples.org](http://www.yogyakartaprinciples.org).

The relevant United Nations Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity has also examined the full scope of this duty on States. Their August 2018 report affirmed the Yogyakarta Principles and recommended that gender recognition systems “should ensure due respect for free and informed choice and bodily autonomy” and that processes should:

- i. Be based on self-determination by the applicant
- ii. Be a simple administrative process
- iii. Be confidential
- iv. Be based solely on the free and informed consent of the applicant without requirements such as medical and/or psychological or other certifications that could be unreasonable or pathologising
- v. Acknowledge and recognize non-binary identities, such as gender identities that are neither “man” nor “woman” and offer a multiplicity of gender marker options
- vi. Be accessible and, to the extent possible, cost-free.<sup>5</sup>

The Independent Expert also welcomed World Health Organisation (WHO) proposals to no longer classify gender-affirming care as a mental and behavioural disorder and recommended “eradicating the conception of gender diversity as a pathology from all aspects of everyday life”. Those WHO proposals were passed in May 2019.<sup>6</sup> The Independent Expert’s report specifically cited 10 countries around the world that had adopted gender recognition laws based on self-determination.<sup>7</sup> Since the report was written, two Australian states (Victoria and Tasmania) have joined the growing list of jurisdictions with such provisions. The Independent Expert also noted New Zealand’s passport and driver licence policies as examples of effective measures to ensure respect of gender identity.

### **Further Human Rights considerations for intersex people**

When the Yogyakarta Principles were first adopted in 2006, they included few specific references to intersex people. The expanded *Yogyakarta Principles plus 10*, adopted in 2017, note “significant developments in international human rights law and jurisprudence on issues related to . . . sex characteristics”. They specifically define ‘sex characteristics’, noting that it has evolved as an explicit ground for protection from violations of human rights and that all of the Yogyakarta Principles apply equally to this ground.

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5 General Assembly (2018). Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity: Violence and discrimination based on gender identity. 73rd session, A/73/152, paragraph 81.

6 <http://www.euro.who.int/en/health-topics/health-determinants/gender/gender-definitions/whoeurope-brief-transgender-health-in-the-context-of-icd-11>

7 A/73/152 paragraph 52.



One of the additional principles in the *Yogyakarta Principles plus 10* sets out the right to bodily and mental integrity, autonomy and self-determination. This has specific relevance to intersex people because surgical and hormonal interventions, that alter the sex characteristics of infants and children without their personal consent, violate these rights.

Principle 32 *The Right to Bodily and Mental Integrity* declares that:

... No one shall be subjected to invasive or irreversible medical procedure that modify sex characteristics without their free, prior and informed consent, unless necessary to avoid serious, urgent and irreparable harm to the concerned person.

The Darlington Statement, developed by intersex organisations and independent advocates in Aotearoa/New Zealand and Australia, calls for action to address the human rights issues faced by intersex people in this region.<sup>8</sup> This consensus statement has a major focus on ending harmful practices in medical settings coupled with supporting intersex people's right to health across their lifespan through human rights-based standards of care.

The Darlington Statement also considers the specific impact of legal classifications on intersex people. It notes the harm caused by "attempts to classify intersex people as a third sex/gender [that] do not respect [intersex people's] diversity or right to self determination" and the "undue emphasis on how to classify intersex people rather than how we are treated." It makes the following calls for action:

- "While sex/gender classifications remain legally required, sex/gender assignments must be regarded as provisional. Given existing social conditions, we do not support the imposition of a third sex classification when births are initially registered.
- Recognising that any child may grow up to identify with a different sex/gender, and that the decision about the sex of rearing of an intersex child may have been incorrect, sex/gender classifications must be legally correctable through a simple administrative procedure at the request of the individual concerned.
- Individuals able to consent should be able to choose between female (F), male (M), non-binary, alternative gender markers, or multiple options."

The Darlington Statement concludes that "the larger goal is not to seek new classifications but to end legal classification systems and the hierarchies that lie behind them". Therefore, it also recommends that "as with race or religion, sex/gender should not be a legal category on birth certificates or identification documents for anybody". As already noted, that approach was affirmed later in 2017, in the revised *Yogyakarta Principles plus 10*.

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8 See the [Darlington Statement](https://ihra.org.au/darlington-statement/), a joint consensus statement by Australian and Aotearoa/New Zealand intersex organisations and independent advocates, drafted in March 2017. <https://ihra.org.au/darlington-statement/>.

## Appendix 2: Terminology

Based on the terminology table in the [Guidelines for Gender Affirming Healthcare for Gender Diverse and Transgender Children, Young People and Adults in Aotearoa, New Zealand](#) with some further terms added.

<b>Assigned female at birth</b>	A person who was thought to be female when born and initially raised as a girl.
<b>Assigned male at birth</b>	A person who was thought to be male when born and initially raised as a boy.
<b>Cis or cisgender</b>	Someone whose gender identity aligns with their sex assigned at birth.
<b>Gender-affirming healthcare</b>	Healthcare that is respectful and affirming of a person's unique sense of gender and provides support to identify and facilitate gender healthcare goals. These goals may include supporting exploration of gender expression, support around social transition, hormone and/or surgical interventions. This may also involve providing support to whānau, caregivers or other significant supporting people.
<b>Gender diverse</b>	A term to describe people who do not conform to their society or culture's expectations for males and females. Being transgender can be one way of being gender diverse, but not all gender diverse people identify as being transgender and vice versa. Gender creative or gender expansive are other similar terms that are used when referring to children.
<b>Gender dysphoria</b>	A term that describes the distress experienced by a person due to the incongruence between their gender identity and their sex assigned at birth.
<b>Gender identity</b>	A person's concept of their self as male, female, a blend of both or neither. Gender identity can be the same as, or different to, the sex assigned at birth.
<b>Intersex/a person with a variation of sex characteristics</b>	A term for people born with sex characteristics (including genitals, gonads and chromosome patterns) that do not fit typical binary notions of male or female bodies.

<b>Non-binary</b>	A term to describe someone who doesn't identify exclusively as a man or a woman. There are many different ways that people may be non-binary, male or female.
<b>Pronoun</b>	A word used in place of a noun (or name). Pronouns include: he/him, she/her or they/them. Other gender neutral pronouns in use include ze and hir.
<b>Social transition</b>	The process by which a person changes their gender expression in social situations to better align with their gender identity.
<b>Trans boy/ male/ man</b>	A term to describe someone, assigned female at birth, who identifies as a boy/male/man.
<b>Trans girl/ female/ woman</b>	A term to describe someone, assigned male at birth, who identifies as a girl/female/woman.
<b>Trans or transgender</b>	A term for someone whose gender identity does not align with their sex assigned at birth. This term is often used as an umbrella term, recognising that people may describe themselves in many ways including the use of indigenous terms such as; whakawāhine, tangata ira tāne, tāhine (Māori), mahu (Hawai'i and Tahiti), vakasalewalewa (Fiji), palopa (Papua New Guinea), fa'afafine (Samoa), akava'ine (Rarotonga), fakaleiti or leiti (Tonga), fakafifine (Niue).

## Appendix 3:

The full text of sections of the Births, Deaths, Marriages, and Relationships Registration Act 1995 referenced in this report

### **28 Declarations of Family Court as to sex to be shown on birth certificates issued for adults**

- (1) Subject to subsection (3), the Family Court may, on the application of an eligible adult (the applicant), declare that it is appropriate that birth certificates issued in respect of the applicant should contain the information that the applicant is a person of a sex specified in the application (in subsection (3) referred to as the nominated sex).
- (2) The court must cause a copy of the application to be served on—
  - (a) the Registrar-General, if the applicant's birth is registered or is registrable under this Act but is not yet registered; and
  - (b) any other person who, in the court's opinion, is interested in it or might be affected by the granting of the declaration.
- (3) The court shall issue the declaration if, and only if,—
  - (a) it is satisfied either that the applicant's birth is registrable under this Act but is not yet registered, or that there is included in the record of the applicant's birth—
    - (i) information that the applicant is a person of the sex opposite to the nominated sex; or
    - (ii) information that the applicant is a person of indeterminate sex; or
    - (iii) no information at all as to the applicant's sex; and
  - (b) it is satisfied that the applicant is not a person of the nominated sex, but—
    - (i) has assumed and intends to maintain, or has always had and intends to maintain, the gender identity of a person of the nominated sex; and
    - (ii) wishes the nominated sex to appear on birth certificates issued in respect of the applicant; and
  - (c) either—
    - (i) it is satisfied, on the basis of expert medical evidence, that the applicant—
      - (A) has assumed (or has always had) the gender identity of a person of the nominated sex; and
      - (B) has undergone such medical treatment as is usually regarded by medical experts as desirable to enable persons of the genetic and physical conformation of the applicant at birth to acquire a physical conformation that accords with the gender identity of a person of the nominated sex; and
      - (C) will, as a result of the medical treatment undertaken, maintain a gender identity of a person of the nominated sex; or
    - (ii) it is satisfied that the applicant's sexual assignment or reassignment as a person of the nominated sex has been recorded or recognised in accordance with the laws of a State for the time being recognised for the purposes of this section by the Minister by notice in the Gazette.

## **29 Declarations of Family Court as to appropriate gender identity for children**

- (1) Subject to subsections (3) and (4), the Family Court may, on the application of the guardian of an eligible child (the child), declare—
  - (a) that it is in the child's best interests to be brought up as a person of a sex specified in the application (in subsection (3) referred to as the nominated sex); and
  - (b) that any birth certificate issued in respect of the child should contain the information that the child is a person of the sex specified in the application.
- (2) The court must cause a copy of the application to be served on—
  - (a) the Registrar-General, if the child's birth is registered or is registrable under this Act but is not yet registered; and
  - (b) any other person who, in the court's opinion, is interested in it or might be affected by the granting of the declaration.
- (3) The court shall issue the declaration if, and only if,—
  - (a) it is satisfied either that the child's birth is registrable under this Act but is not yet registered, or that there is included in the record of the child's birth—
    - (i) information that the child is a person of the sex opposite to the nominated sex; or
    - (ii) information that the child is a person of indeterminate sex; or
    - (iii) no information at all as to the child's sex; and
  - (b) it is satisfied that the child is not a person of the nominated sex, but—
    - (i) the guardian intends to bring the child up as a person of the nominated sex; and
    - (ii) wishes the nominated sex to appear on birth certificates issued in respect of the applicant; and
  - (c) it is satisfied, on the basis of expert medical evidence, that the child—
    - (i) has already undergone; or
    - (ii) if the court grants the declaration will undergo,—  
medical treatment reasonably necessary to enable the child to assume and maintain the gender identity of a person of the nominated sex; and
  - (d) it is satisfied, on the basis of expert medical evidence, that the child's physical conformation and gonadal and genital development are such that it is more likely that the child will be able (after undergoing any of the medical treatment not yet undergone) to assume the gender identity of a person of the nominated sex than it is that the child will be able to assume the gender identity of a person of the opposite sex (with or without medical intervention).
- (4) The declaration shall specify (with as much particularity as is possible in all the circumstances) all medical treatment (if any) that the child has not yet undergone that in the court's opinion (reached in the light of the expert medical evidence) is reasonably necessary to enable the child's successful assumption and maintenance of the gender identity of a person of the nominated sex.

## **84 Correction of errors**

- (1) If a Registrar is satisfied, after making any inquiries under section 82 that seem appropriate, that information recorded under this Act or a former Act contains a clerical error, he or she must correct the error and notify the Registrar-General of the error and its correction.
- (2) If the Registrar-General is satisfied, after making any inquiries under section 82 that seem appropriate, that any information—
  - (a) recorded under this Act or a former Act is incorrect, he or she must cause it to be removed and (if the Registrar-General is satisfied that relevant information in the Registrar-General's possession is correct) cause the correct information to be substituted; or
  - (b) in the Registrar-General's possession and not recorded under this Act or a former Act is correct and should have been recorded, he or she must cause the information to be recorded.

## **85 Family Court may consider proposed corrections in cases of difficulty or dispute**

- (1) The Registrar-General, if uncertain as to any matter in respect of which the Registrar-General is required to be satisfied for the purposes of section 84 or 84A, may apply to the office of the Family Court nearest the Registrar-General's office to have the matter determined.
- (2) Any person who wishes the Registrar-General to act under section 84 or 84A in respect of any matter may apply to the office of the Family Court nearest the Registrar-General's office to have the matter determined.
- (3) The Family Court at the office where application is made under this section shall, notwithstanding section 84 or 84A, after—
  - (a) giving every person whom the court considers to have an interest in the matter an opportunity to be heard; and
  - (b) receiving any evidence the court thinks fit,—determine whether or not the Registrar-General should act under that section.

## Appendix 4:

### Template letter for medical practitioners to submit to the court

#### **Information for medical practitioners asked to provide an expert medical opinion to assist an application to change the sex recorded on a birth sex through the Family Court.**

The formal statement below is an example of a medical letter to support a Family Court application to change the sex registered on a birth certificate sex. The relevant law is the Births, Deaths, Marriages, and Relationships Registration Act 1995, Section 28. Under Section 28:

The court must be satisfied, on the basis of expert medical evidence, that the applicant—

- (A) has assumed (or has always had) the gender identity of a person of the nominated sex; and
- (B) has undergone such medical treatment as is usually regarded by medical experts as desirable to enable persons of the genetic and physical conformation of the applicant at birth to acquire a physical conformation that accords with the gender identity of a person of the nominated sex; and
- (C) will, as a result of the medical treatment undertaken, maintain a gender identity of a person of the nominated sex.

Evidence to meet requirements (B) and (C) is currently interpreted as evidence that an adult has had treatment which has affected ‘permanent physical change’.

A letter needs to provide sufficient information to satisfy the following legal tests above. The letter must also be formatted appropriately for Court purposes. This means it must be”

- single sided,
- on letterhead and
- one to two pages long and
- an original document with an original ink (not electronic) signature.

**Below is a template for a formal statement of expert medical evidence endorsed by the Working Group**

## Formal Statement

[Name of Medical Practitioner] states:

### STATEMENT OF QUALIFICATIONS

I am a registered Medical Practitioner. I hold the qualifications Bachelor of Medicine and Surgery MBChB (University) [YEAR], Fellowship of the [YEAR], [include details of all qualifications].

I currently work at the [name of employer]. Prior to my current role I worked as a [previous role title] for [X] years and before that as a [previous role title] for [X] years. [Outline total work experience].

I have been providing gender-affirming healthcare since [YEAR]. [Outline courses/training/conferences attended]. I have been a member of PATHA (Professional Association for Transgender Health Aotearoa) since [YEAR].

### BACKGROUND

[Name of patient], aged [X] years, DOB [DD/MM/YEAR] has requested my report and opinion in relation to her/his application to the Family Court to have the nominated sex on her/his birth certificate specified as female/male.

**Provide a chronological report stepping through the significant points in the person's transition journey. It is helpful to provide corroboration from other people e.g. detail family support.**

**Example below.**

*I first met [Name of patient] on [day month year at X Service] in my capacity as a [role title]. [Name of patient] has been attending this service since [month year] for support to medically transition.*

*[Name of patient] has been able to articulate a long-standing female/male gender identity or [Name of patient] reported that they had been aware since... She/He has been supported by [Name of Service] to medically transition by taking hormonal therapies and/or undergoing another intervention that results in permanent physical change. Written informed consent was obtained prior to starting treatment. In addition, before starting the hormones [Name of patient] had a readiness for hormones meeting with [Name of medical practitioner] ([Job title and name of Service]). [Name of patient] has been supported in their transition by their partner/family....*



*The purpose of starting feminising/masculinising hormones was to enable **[Name of patient]** to acquire a physical conformation that was in alignment with her/his gender identity. Many of the physical changes in the body that occur with feminizing/masculinising hormones are permanent. **[Name of patient]** has been consistent in her/his decision to continue with the process of medical transition since starting in **[month year]**. She/He has now fully socially transitioned and is living as a woman/man.*

*[Note: If the intervention was not hormone treatment, replace references to hormone therapies with the name of the relevant intervention]*

## CONCLUSION

**Provide an expert opinion. Example below.**

*It is my opinion that **[Name of patient]** has assumed the gender identity of a person of the nominated sex, namely female/male.*

*It is my opinion as the prescribing doctor, that **[Name of patient]** having undergone medical transition, involving taking feminising/masculinising hormone therapy, **[or insert other intervention resulting in permanent physical change]**, to acquire the physical conformation of the female/male gender is very likely to continue to maintain the gender identity of her/his nominated sex, namely female/male.*

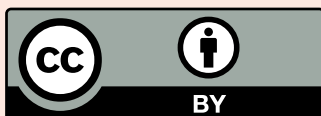
I confirm the truth and accuracy of this statement. I make this statement with the knowledge that it is to be used in court proceedings. I am aware that it is an offence to make a statement that is known by me to be false or intended by me to mislead.

**[Name of Medical Practitioner]**

MBChB, **[include all credentials]**

DATE:

Signature



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