



Gender Recognition Reform in WA



Trans and gender diverse people born in WA just want to live our lives - go to work, enrol to study, apply for a driver's licence, or have a few drinks at the pub with our mates - but being forced to use ID that doesn't match your gender identity creates problems, and updating your birth certificate in WA so it correctly reflects your gender identity is difficult at best. A birth certificate is the first document a person has - it says who you are and where you belong. We can make it easier for trans and gender diverse people to be free to make our own choices, and to be treated with respect and dignity in everyday life.

WA's gender recognition system lags behind other states and territories in Australia. No other state or territory has a *Gender Reassignment Board* (GRB) and trans and gender diverse people have described the current process as 'difficult', 'humiliating', 'expensive', 'onerous', and 'confusing'.¹ Further, United Nations guidance has spoken out against systems of gender recognition that require any form of medical procedure.² WA's system is also out of step with other documents, such as passports³, making it hard to navigate and leading to inconsistent gender markers across ID.

The Law Reform Commission of WA recently recommended removing the need for a certificate from the GRB for protection under the Equal Opportunity Act. Beyond the discrimination law context, and to align with that recommendation, it is also necessary to modernise WA's gender recognition process – including by removing the GRB requirement for those seeking to amend their legal gender markers.

We are a coalition of LGBTIQ+ advocates calling for reform of WA's gender recognition system. We are proposing a new model for gender recognition in WA that:

- **Replaces the focus on medical evidence with a self-identification approach**
- **Brings WA in line with the Australian Government Guidelines** on the Recognition of Sex and Gender, passport approval processes, international human rights law guidance from the United Nations, and gender recognition in Victoria, Tasmania, ACT, SA, and the NT
- **Saves time and costs** with a simpler, administrative process
- **Is in line with modern understandings** of gender diversity and consent for minors
- **Is broadly supported by the trans and gender diverse community in WA**
A community survey, outlining the key principles of this proposal, was circulated in January 2023. Responses from 294 individuals indicated 89% agreement with our proposal.

¹ Law Reform Commission of Western Australia, *Review of the Equal Opportunity Act 1984 (WA) Project 111 Final Report* (2022) at 80, referring to evidence from Law Reform Commission of Western Australia, *Project 108: Review of Western Australian Legislation in Relation to the Registration or Change of a Person's Sex and/or Gender and Status Relating to Sex Characteristics* (2018).

² Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, 5 January 2016, UN Doc A/HRC/31/57, para 49.

³ See [Sex and gender diverse passport applicants](#)

Recommendations

“Human beings deserve to be recognised as themselves, and their legal identities being accurate should not be subject to financial, medical, or bureaucratic barriers. I just want my identification to reflect me rather than the facade I was forced to wear.”
~ survey respondent

A modern gender recognition system must adhere to the following principles:

- Trans and gender diverse people deserve a gender recognition system that treats them with dignity and respects their identity.
- This system must be accessible - meaning it must be administratively simple and affordable.
- This system must respect the diverse range of gender identities outside binary categories of 'male' and 'female', not only adding a third 'other' category for sex assigned at birth.
- The system must recognise the system of gender recognition at birth does not prevent medical harm done to intersex infants. Legislation protecting intersex infants from deferrable medical procedures must also be passed in addition to or following this legislation. We encourage the WA Government to consult directly with intersex advocates including *Intersex Human Rights Australia*.

Below is a comprehensive outline of changes to the current system focused on 3 processes:

- 1. Gender recognition for those over 16**
- 2. Gender recognition for those under 16**
- 3. Registration of sex at birth.**

Our recommendations adapts Australian best practice models to a WA context, creating a process that is streamlined, simple and consistent in maintaining the dignity and rights of trans and gender diverse people. This process should be implemented through amendments to the *Births, Deaths and Marriages Registration Act 1998 (WA)* and should repeal the *Gender Reassignment Act 2000 (WA)*.

1. Gender recognition process (16+)

Create a simple, administrative process that allows an individual aged sixteen or over to amend their birth certificate.

"I just want to be able to exist. Existing as a trans person should not be this difficult. Medically transitioning is not accessible. Just because I can't afford to (or even if I didn't want to) medically transition doesn't mean I shouldn't be recognised as a man."
~ survey respondent

Statutory declaration to replace medical evidence

This would involve a statutory declaration, in-line with similar state and federal documents, simply requiring a declaration signed by the applicant as well as a referee or guarantor⁴. Note that sixteen and seventeen year olds have been included as they are regularly recognised as having the maturity and capacity to make such decisions - if the Registrar requires additional information for this cohort, it should only be evidence that they have sought guidance to understand the process they are undertaking (though this should not have to be legal advice). Medical evidence should not be required.

Open text field for gender diverse applicants

Individuals should be able to select from the options of female, male, non-binary or write their own option in an open text-box. The Registrar should retain the powers to refuse applications that are obviously offensive, obscene, fraudulent or inappropriate, though the function of a statutory declaration acts as a deterrent for system misuse. These marker options are currently successfully operating in Victoria and Tasmania. All additional gender options other than female and male should be opt-in only and not recorded at birth, or in any other way without a person's informed consent.

"I am non-binary. I am unable to have my gender recognised on documents. This means I can never escape being outed. It makes me feel unsafe and makes me feel angry."
~ survey respondent

"I should be able to provide identification without being scared of being at risk because the person checking it will immediately realise I'm trans and might have a bad reaction to that."
~ survey respondent

Previous gender marker not visible on new birth certificate

This system should allow an individual to order a new birth certificate with their new gender marker and no reference to their previous marker. Additionally, individuals should be able to order a birth certificate with no recorded gender marker on it, noting that this is a popular option in Tasmania. Additionally, individuals should be able to order a new birth certificate without a gender marker on it without registering a change of gender, noting that this will not change the way they are treated under various laws.

Same time limitations for name and gender marker changes

This system should bring gender recognition in line with existing rules for name changes, allowing individuals to change a gender marker once in any 12-month period. Individuals should be able to change their gender marker unlimited times in their lifetime, rather than the current cap of three changes.

⁴ A referee or guarantor is any person over the age of 18 who has known the person applying to update their birth certificate for more than 12 months.

Standardising language of 'sex' and 'gender'

This system uses both the language of 'sex' recorded at birth and 'gender' recognition. It is important that this legislation is formulated similarly to that in Tasmania and ensures that individuals are treated as their affirmed gender for the purposes of all legislation, regardless of whether the legislation uses the language of 'sex' or 'gender'. It is imperative that an individual will not be treated as a different sex and gender for the purposes of different pieces of legislation.

Simple and cheap administrative processes

This system should be administratively simple, cheap and efficient. Individuals should be able to change their name in the same form if required, with no reference made to their previous name on their new birth certificate. If an individual is changing their name and gender at the same time, then they should only pay a single fee. Birth certificate change fee waivers should apply for low income concession card holders.

Gender recognition certificates for WA residents born interstate or overseas

People born outside WA or Australia should be able to obtain a recognised gender details certificate similar to those granted in Victoria, acknowledging that the individual will need to apply to their own state or country to change their birth certificate.

Privacy protections

Access to historical records of birth registration on the Register should be strictly limited to minimise risk of a trans or gender diverse person's identity being inappropriately disclosed.

2. Gender recognition process (under 16)

Those under sixteen years old should be able to apply with a similar statutory declaration from the child (if possible) and the consent of both parents.

This should not require any additional evidence, but if the Registrar does need more information this should be limited to evidence that the child has sought guidance to understand the process they are undertaking (though this should not have to be legal advice). Medical evidence should not be required.

The child's statutory declaration and the consent of only one parent should be sufficient when the parent is the only parent on the birth record; the other parent is dead; the guardian is the only guardian of the child; or the registration of gender is approved by a Court Order from a Magistrate, the Family Court of Western Australia or the Children's Court of Western Australia.

*"Gender is innate to people's identity, and the right to be recognised as one's gender should not be gated behind an arbitrary age restriction
~ survey respondent*

If one parent consents but another withholds their consent, an order from one of the courts noted above can be sought to approve the registration. In this situation, courts must approve the registration if it 'best reflects the will and preference of the child'.⁵ Courts should be empowered to make determinations quickly and flexibly, including 'on the papers' where appropriate (rather than full, in-person hearings). Historically, situations where one parent has withheld their consent have arisen in a family violence context. It is important that this application process is sensitive to this.

A child can obtain court approval in the absence of any parental consent if one of the courts noted above finds that the child is competent to make the decision on their own, and that it properly reflects the will and preferences of the child. A child should be regarded as competent if they are capable of understanding the general nature and effect of the registration.⁶

⁵ The 'will and preference of the child' test, as referenced in the Tasmanian *Justice and Related Legislation (Marriage Amendment) Bill*, is preferable to the 'best interests' test, which applies in the context of medical decision-making and custody arrangements. Whilst the best interests test is appropriate in those other contexts, allowing parents to make the final assessment in this instance would create an onerous evidential burden which is disproportionate to the effect of the registration decision.

⁶ See the Family Court's decision *Re: Kelvin [2017] FamCAFC 258*.

3. Changes to registration of gender at birth

Parents register the sex of their child within sixty days of birth.

Currently in WA hospital staff complete a form with the gender categories of female, male and indeterminate.⁷ Parents subsequently complete a Birth Registration Form with only male and female options.⁸ These two forms should be harmonised and only female and male options should be available on both forms. This aligns with calls from intersex advocates who do not wish to be categorised as a third sex within the legal system.

There is an opt in model for sex on birth certificates – the default is that no sex is recorded however parents are able to opt in to record sex on their child’s birth certificate.

Parents should be able to describe themselves as mother, father, or parent on their child’s birth certificate.

“At present, my deadname is on my children’s birth certificates in a position that doesn’t resemble my physical appearance or my identity. In addition, my legal identification makes it next to impossible to provide evidence that I am one of the parents of my children, this means any custody challenges will be next to impossible to counter.”
~ survey respondent

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⁷ *Health (Notifications by Midwives) Regulations 1994 (WA) sch, Form 2.*

⁸ *Births, Deaths and Marriages Registration Act 1998 (WA) ss 14, 15.*