

25 July 2022

Identity Policy Team
Department of Internal Affairs
Wellington

By email: bdmrr@dia.govt.nz

Re: *The self-identification regulations and registering gender for people born overseas – discussion document*

1 Introduction

- 1.0 The New Zealand Law Society | Te Kāhui Ture o Aotearoa (**Law Society**) welcomes the opportunity to provide feedback on the Department of Internal Affairs (**DIA's**) *The self-identification regulations and registering gender for people born overseas* discussion document (the **Discussion Document**).
- 1.1 A number of the questions in the Discussion Document are directed at individuals who identify as transgender or intersex. Given this, we have largely limited our comments to questions that do not call for a personal response.
- 1.2 This submission has been prepared with the assistance of the Law Society's Family Law Section and Human Rights and Privacy Committee.¹

Part 1 – Details of the self-identification process

2 Issue 1 – including genders outside the binary on birth certificates

- 2.0 Non-binary and other culturally specific markers are not yet available to be recorded on birth certificates. The government needs to decide the range of sex and gender markers from which people can select other than male or female. The Discussion Document identifies four options:
- (a) Option 1: do nothing (only male or female)
 - (b) Option 2: umbrella markers (1 to 5 sex or gender markers)

¹ More information on the Law Society's Family Law Section and the Human Rights and Privacy Committee is available on the Law Society's website here: <https://www.lawsociety.org.nz/branches-sections-and-groups/family-law-section/> and here: <https://www.lawsociety.org.nz/branches-sections-and-groups/law-reform-committees/human-rights-and-privacy-committee/>

- (c) Option 3: umbrella markers and other common gender terms (6 to 12 sex or gender markers)
- (d) Option 4: A more extensive list (more than 12 sex or gender markers)

Question A1: Which of these options do you prefer and why?

- 2.1 The Law Society prefers Option 4. We believe that children or young people who would utilise this process would appreciate having a diverse selection of markers to choose from. The more markers available, the more likely it is that there will be one that a person considers accurately describes them.
- 2.2 We do not see a good reason to limit the freedom of a person to describe their sex or gender in a way that is most suitable for them. We also believe that those children and young people may appreciate their gender identity being recognised by the government. Option 4 is the most inclusive option, and this should be heavily weighted.
- 2.3 From a Te Tiriti o Waitangi and wider cultural perspective, grouping all Māori gender identities under ‘takatāpui’, or all Pacific gender identities under the acronym ‘MVPFAFF+’ as proposed in Option 2 would not recognise the diversity of non-Western cultures or allow for the full expression of non-Western gender identities.
- 2.4 The Yogyakarta Principles (**Principles**) relate to human rights in the areas of sexual orientation and gender identity, published as the outcome of an international meeting of human rights groups in Yogyakarta, Indonesia, in November 2006.² This was subsequently updated and expanded in November 2017, becoming the Yogyakarta Principles plus 10. The Principles are not a treaty and are not legally binding. However, they provide sound guidance on the application of international human rights law to sexual orientation and gender identity and should be considered when making regulatory and policy decisions in this area.
- 2.5 We note the following Principles and the State’s obligations to:
 - (a) “...take all necessary legislative, administrative and other measures to fully respect and legally recognise each person’s self-defined gender identity” and “take all necessary legislative, administrative and other measures to ensure that procedures exist whereby all State-issued identity papers which indicate a person’s gender/sex – including birth certificates ... reflect the person’s profound self-defined gender identity” (Principle 3).
 - (b) “...ensure that requirements for individuals to provide information on their sex or gender Respect all persons’ right to self-determination of gender”. (Principle 6).
 - (c) “...take all necessary legislative, administrative and other measures to ensure the full enjoyment of the right to express identity or personhood, including through speech,

² <https://yogyakartaprinciples.org/>

department, dress, bodily characteristics, choice of name or any other means” and “...recognise that the needs, characteristics and human rights situations of populations of diverse ... gender identities, gender expressions ... are distinct from each other” (Principle 19).

- (d) “...while sex or gender continues to be registered [on official identity documents] ensure a quick, transparent, and accessible mechanism that legally recognises and affirms each person’s self-defined gender identity” and “make available a multiplicity of gender marker options” (Principle 31).
- (e) “...ensure the right to practice, protect, preserve and revive the diversity of cultural expressions of persons of all sexual orientations, gender identities, gender expressions and sex characteristics on the basis of the equal dignity of and respect for all” (Principle 38).

2.6 While gender is a required field on a birth certificate it would not be in line with Principles 6 or 31 to force a person to choose a gender marker that they do not identify with. Option 4 would reduce the likelihood of this occurring and would also allow for the diversity of cultural expression of gender by providing a wider range of markers.

2.7 We do not consider that the list of markers must be future-proofed, although we note that Option 4 is more likely to achieve that criterion than the earlier options. The amendments to the Birth, Death, Marriages and Relationships Registration Act 2021 (**BDMRR Act**) recognise the diversity of sex and gender markers, and with the requirement that sex/gender is recorded on a birth certificate, it follows that terms may need to be added or removed in the future as our understanding of sex/gender evolves.

2.8 It may be that in the future, the government revisits the purpose of a birth certificate and whether sex/gender needs to be recorded. In the meantime, the sex/gender markers available should be as inclusive as possible based on the information that is available today.

2.9 We note the requirement under Information Privacy Principle 1 of the Privacy Act 2020 that an agency “must not” collect personal information unless “the collection of the information is necessary” and “for a lawful purpose connected with a function or an activity of the agency”. If a service provider determines it is necessary to collect sex/gender information, they should ensure their systems can accurately record that information by supporting a wide range of markers.

Question A2: Do you see a better alternative to the options proposed?

2.10 No, none that could be implemented under the current BDMRR Act.

Question A5: Do you agree with the criteria we have used to assess the options? Please explain why, or why not.

2.11 We refer to our comments under A1 in terms of the ‘future-proofing’ and ‘practicality’ criteria.

Question A6: Are there any other considerations you think need to be factored in when assessing these options?

- 2.12 In the Law Society's view, other relevant criteria may be compliance with:
- (a) Te Tiriti o Waitangi, considered separate to the umbrella inclusivity criteria.
 - (b) New Zealand Bill of Rights Act 1990.
 - (c) Human Rights Act 1993.
 - (d) International human rights standards, for example, the Yogyakarta Principles Plus 10.

Question A7: How should the Government determine what sex markers to make available?

- 2.13 As noted above, the Law Society prefers Option 4. Of the criteria described, *inclusivity* should be given priority. In our view, if Option 4 is pursued, consultation with appropriate groups is necessary to ascertain their views as to what sex or gender markers they would want available for selection on a birth certificate.

Question A8: If you are intersex, do you think 'intersex', 'indeterminate' or another related term should be an option under the self-identification process? Please explain why, or why not.

- 2.14 The Law Society cannot comment on the perspective of people who are intersex. However, we agree that terms such as intersex or indeterminate should be included in the list of sex and gender markers under Option 4.
- 2.15 We note the separate process for people with variations of sex characteristics to amend their birth certificate to record 'indeterminate'. The Law Society would be concerned if any process under the BDMRR Act required one group of people to provide medical evidence. This has the potential to marginalise that group and impede them from selecting the sex marker they wish to have on their birth certificate. It does not fit comfortably with the self-identification process which is now being introduced.

Question A10: Do you think that providing te reo Māori markers would be supporting tino rangatiratanga? Is there another way you would describe what including these terms would mean for Māori who are transgender, intersex, or takatāpui?

- 2.16 Option 4 provides the broadest category of available sex markers that can be selected. We support the inclusion of more options than takatāpui, along with the options of whakawahine, tangata ira tāne and tāhine. These are terms which people with diverse gender identities apply to themselves, and understandably may reflect how they want their sex or gender to be recognised on their official birth record.
- 2.17 We view this as an important part of complying with Te Tiriti o Waitangi, supporting tino rangatiratanga, and recognising the mana of individual Māori. Citizens who identify outside of the male or female gender options often feel marginalised and overlooked. Providing sex or gender markers in te reo Māori is a powerful way of demonstrating broader societal recognition for those groups and acknowledging in a formal and legal way that how they wish to be described is accepted.

Question A11: Should the fact that some te reo Māori gender terms have been more recently defined be a reason to not include them in the self-identification process initially?

- 2.18 The Law Society understands the concern that including gender terms which are relatively new and are less commonly used may not have longevity. However, we do not consider this is a good reason to exclude te reo Māori gender terms in the self-identification process. To exclude those gender terms could reinforce the alienation and marginalisation of people who identify within those groups or gender markers. This reform is an opportunity to be inclusive and provide the recognition which has long been withheld. As noted in our answer to question A7, consultation with the appropriate groups is necessary to determine what te reo Māori terms should be included.
- 2.19 Regarding concern that the list might need to be regularly updated due to language evolving or terms becoming less frequently used, we do not consider that this would occur frequently. In any event, the risk of alienating groups within our society would outweigh the potential administrative burden of needing to periodically update the listed sex and gender terms.

3 Issue 2 – Who can be a suitably qualified third party to support applications for children and youth

- 3.0 Suitable qualified third parties are people who can provide a letter of support for a child or young person to amend the sex on their birth certificate. These people provide assurance a child or young person wants to make this amendment and understands what this means.
- 3.1 The Discussion Document sets out four options of the types of people who will be able to provide a letter of support:
- (a) Option 1: Do nothing (no third parties)
 - (b) Option 2: Registered professionals
 - (c) Option 3: A person who has known the child for 12 months
 - (d) Option 4: Registered professionals or a person who has known the child.

Question A13: Which of these options do you prefer and why?

- 3.2 The Law Society prefers Option 4, with the qualification that the length of time that a suitably qualified third party must have known the applicant should be set at six months or more. We consider that this option is the least restrictive.
- 3.3 Professionals such as doctors, nurses, teachers, social workers, psychologists, and counsellors are generally supportive of these children and young people, would be more independent and have the required skills to make that assessment. However, a young person may not have a good relationship with, know, or have access to any of the selected range of professionals and cost may be a barrier.
- 3.4 Including a person who has known the young person for a minimum of six months (rather than 12) ensures that most young people will be able to identify a third party who can provide a letter of support.

Question A14: Do you see a better alternative to the options proposed?

- 3.5 As above, reducing the time a child or young person has known a third party from 12 to six months will make the process more accessible for many young people.

Question A15: Under option two, if registered professionals can act as a suitably qualified third party, do you think that the professions listed are the most suitable?

- 3.6 The Law Society agrees the registered professionals listed are the most suitable but would also include teacher aides and psychotherapists as recognised third parties.

Question A16: Do you think any other people in the community could fulfil the role of a suitably qualified third party?

- 3.7 Approaching someone that you know and have a good relationship with will always be easier. This could include youth workers, lay advocates, Kaumatua and Kuia. We also consider that children or young persons may feel most comfortable approaching a person or organisation more likely to be supportive of an application, such as Rainbow Youth Aotearoa or Gender Minorities Aotearoa, as they have experience and knowledge in this area.

Question A17: Under option three, do you think there should be any additional restrictions on who can provide a letter of support?

- 3.8 The Law Society does not think there should be any additional restrictions on who can provide a letter of support. The process should be as accessible as possible to children and young persons. In our view the restrictions suggested are appropriate.

Question A18: Under option three, do you agree that they need to have known the child or young person for at least 12 months? Please explain why.

- 3.9 We refer to our answer under question A14. Shortening the amount of time a child or young person has known a third party from 12 to six months provides sufficient credibility to the role and ensures that the child or young person is supported by someone they know reasonably well. We do not consider that a requirement that the child or young person and the third party know each other for 12 months is necessary for this purpose.

Question A20: Do you agree with the criteria we have used to assess the options? Please explain why, or why not.

- 3.10 We agree that assurance, inclusivity, and accessibility are the correct criteria to assess the options regarding third party suitability, as we believe this addresses the most significant concerns and/or challenges for children and young people in this situation.

Question A21: Are there any other considerations you think need to be factored in when assessing these options?

- 3.11 The Law Society strongly recommends there is direct consultation with Rainbow Youth, Gender Minorities Aotearoa, local iwi, and other organisations in the community working with children and young people to ascertain if there are other suitably qualified third parties that should be included in the regulations.

4 Issue 3 – Additional requirements for multiple applications

- 4.0 Section 24(1)(d) of the BDMRR Act provides:

- (1) An application by an eligible person for registration of the person's nominated sex must – [...]
 - (d) if the Registrar-General has previously registered a nominated sex for the person under section 26, meet any additional requirements set out in regulations;...

4.1 This part of the Discussion Document covers the concern that the self-identification process could create an avenue for identity fraud. This is because the BDMRR Act does not limit the number of times a person can amend their registered sex. As people can change their name at the same time they register to change their sex and previous details listed on their birth certificates, they could create multiple identities with valid birth certificates.

4.2 The Discussion Document states that:

“We consider that there is likely to be a low risk people would misuse the self-identification process to obtain multiple birth certificates... We think this risk would be low because it is not common for fraud to occur with birth certificates. This could be because most service providers require photo identification alongside a birth certificate.”

4.3 We also note that Gender Minorities Aotearoa considers the risk of fraud with multiple birth certificates is low, commenting:³

“The Regulatory Impact Statement and Cabinet Paper suggest that the chief concern for the government as to why people should be restricted from changing their sex marker more than once was to prevent the likelihood of identity fraud. However, the Cabinet Paper makes it clear that a record of sex marker changes will be kept by DIA. Therefore, steps have been taken to mitigate the risk of identity fraud.”

Question A22: Do you agree with our assessment of the level of risk? Why or why not?

4.4 The Discussion Document does not contain a great deal of information as to how this level of risk has been assessed. DIA completed a regulatory impact assessment⁴ in May 2022, in which it was noted that consultation would occur with service providers to understand the risk and any measures currently in place that could mitigate it. Presumably, the outcome of this work has informed the Discussion Document's assessment. Without further information, it is not possible for the Law Society to provide a firm view on the level of risk, however we do offer the following observations.

4.5 While some service providers would require photo identification, in members' experience that is not always the case. There are circumstances where the requirement for photographic evidence can be waived. Many do not have photographic identification such as a driver's licence or passport, and alternative identification processes are used. This creates

³ Submission to the Inquiry into SOP 59 on the Births, Deaths, Marriages and Relationships Registration Bill, https://www.parliament.nz/resource/en-NZ/53SCGA_EVI_115653_GA4942/0201dff7240fead6dd9ad65e127d2d654a5ec78e

⁴ [https://www.dia.govt.nz/diawebsite.nsf/Files/Regulatory-Impact-2022/\\$file/Interim-RIS-Self-Identification-Regulations.pdf](https://www.dia.govt.nz/diawebsite.nsf/Files/Regulatory-Impact-2022/$file/Interim-RIS-Self-Identification-Regulations.pdf)

an opportunity for fraud that would be relatively simple to achieve, and the consequences of such fraud could be high.

- 4.6 Conversely, it is likely this process will be dealing with comparatively small numbers, therefore lowering the level of risk. Between 2008-2018, only 689 people changed the recorded gender on their passport.⁵ A very small number of those would have changed their recorded gender twice. We consider there is likely to be an initial surge of individuals changing their registered sex once a formalised process is available, which would then stabilise at a lower level. It seems unlikely that many of these individuals would apply for multiple changes. We also note that the risk of misuse is the same regardless of how many times an applicant has applied for a new birth certificate – the first application could in fact be for fraudulent purposes, and multiple applications in this setting may not be a reliable indicator of misuse.

Question A23: Are there any considerations you think need to be factored in when assessing the risk of identity fraud?

- 4.7 The Law Society is unaware of the internal checks available within DIA to monitor applications and cross check for identity fraud. While option 3 discusses operational processes to manage applications that could be considered high risk, we have no information about what number of applications would trigger a cross check, nor how effective a cross check might be for a person who had made multiple applications.
- 4.8 The path to finding one's gender is not always straightforward. We consider that respect for the inherent dignity of a person requires that additional checks are not the default for all individuals seeking to change their registered sex multiple times.
- 4.9 While it is important for the integrity of the system that any risk of identity fraud is mitigated, the response to this risk must be proportionate so that it does not discriminate against those who may need to change the sex marker on their birth certificate more than once. This would undermine the intended principle of inclusivity and create a barrier to self-determination.

Question A24 – Which of these options do you prefer and why?

- 4.10 The Discussion Document identifies three potential options for the government to respond to the risk of identify fraud:
- (a) Option one: Do nothing (i.e., there would be no additional requirements for subsequent applications);
 - (b) Option two: Require a referee to provide a statutory declaration stating that the application is being made in good faith;
 - (c) Option three: Develop an additional checking process managed by DIA for subsequent applications considered high risk. This would involve additional checks if an applicant applies a set number of times within a certain period.

⁵ This information was made available by DIA in response to an OIA request, and can be found here: <https://fyi.org.nz/request/9674/response/32788/attach/5/Appendix%20A%20Gender%20changes%202008%202018%20wm.pdf>

Option one – Do nothing

- 4.11 As noted above, without further information it is difficult to determine the risk of identity fraud, and we are unsure of the checking mechanisms within DIA that could be used, or whether they would be necessary to mitigate whatever risk may arise.. In the absence of information about those existing mechanisms, or an assessment of the level of risk, we are unable to assess whether this option is appropriate.
- 4.12 It is acknowledged that there are many genuine reasons why a person may want and need to change the sex marker on their birth certificate, and we stress the importance of listening to the community most affected by these changes.

Option two– Require a referee (regulatory solution)

- 4.13 Requiring a referee is unlikely to provide the high level of integrity suggested, or to pose a significant barrier to a person intent on using the process for fraudulent purposes. However, we do agree that being criminally liable for making a false declaration can be a deterrent against making false assertions about a person’s identity or the “good faith” purpose of an application to change the sex marker on a birth certificate.
- 4.14 At the same time, such a requirement may act as a barrier to some individuals. While there are organisations within the transgender and intersex communities that may be able to provide this support, this is likely to be feasible only for people in larger urban centres.
- 4.15 Any potential barrier needs to be proportionate to the risk of identify fraud and should only be pursued if such action will in fact ensure a high level of integrity. Before this option can be fully assessed , further work is needed to understand the level of risk, how significant this barrier could be, and whether there are means to address that.
- 4.16 We also note that the Discussion Document ruled out “an option to have an identity referee confirm the identity of the applicant, as this would not provide assurance that the application is genuine.” It is not clear why this option was ruled out.

Option 3 – Develop an additional checking process (non-regulatory solution).

- 4.17 This option would allow the flexibility to ensure that any additional checks are proportionate and do not introduce undue costs or barriers to application. It would also allow DIA to develop appropriate checks in response to indicators of fraud (as this knowledge develops), rather than applying such checks to every subsequent application.
- 4.18 To maintain integrity, in addition to developing additional checks as knowledge develops, we consider this process should be preventive. Accordingly, we recommend DIA have in place appropriate procedures to assess subsequent applications at the outset. What triggers those procedures, and what they will involve, should be established in accordance with (and in proportion to) the nature and the level of risk.
- 4.19 Whether this option on its own provides integrity to the self-identification process will depend on the level of risk, and the nature and application of the checking process. If the above is addressed, this option is preferred.

Question A26 Do you agree with the criteria we have used to assess the options? Please explain why or why not.

- 4.20 We agree with the principles of integrity, accessibility, and proportionality. They provide a useful framework to consider the response to potential risk of identity fraud and weigh up the options.

Question A27 Are there any other considerations you think need to be factored in when assessing these options?

- 4.21 We reiterate the importance of consulting with transgender and intersex led organisations and individuals on any regulations to be developed. The new BDMRR Act and process represent an opportunity to affirm the fundamental human right to self-identification while ensuring that sufficient safeguards are in place to prevent the abuse of the process for fraudulent means.

5 Next steps

- 5.0 We would be happy to discuss this feedback further, if that would be helpful. Please feel free to contact me via the Law Society's Law Reform & Advocacy Advisor, Dan Moore (dan.moore@lawsociety.org.nz).

Nāku noa, nā



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