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**To:** s 22 excluded by agreement  
**Subject:** Draft Australian Guidelines on the recognition of gender.  
**Date:** Tuesday, 20 November 2012 8:11:14 AM  
**Attachments:** [GenderRec response 20121119.doc](#)

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Dear s 22 excluded

Please find attached our comments on the draft guidelines.

We have already through the working group commented somewhat on the current definition of Intersex contained therein. This document canvasses the issues more broadly

s 47F(1)

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**From:** s 47F(1) (OII Australia)  
**To:** s 22 excluded by agreement  
**Subject:** Sex/Gender Recognition Guidelines and Swiss biomedical ethics report  
**Date:** Friday, 14 December 2012 4:34:00 PM  
**Attachments:** [NEK+Intersexualit%C3%A4t+En.pdf](#)  
[ATT00001.txt](#)

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Hi s 22 excluded

Thanks for the interesting conversation.

I mentioned a Swiss report on intersex and bioethics, and a copy is attached.

It's useful in 2 regards:

1. It shows how intersex is biological, and how we have been managed by medicine.
2. It contains a short but great analysis of the Swiss approach to sex recognition.

The Swiss context is different: they have not, in the recent past, issued non-specific passports.

Kind regards

s 47F(1)



Nationale Ethikkommission im Bereich Humanmedizin  
Commission nationale d'éthique pour la médecine humaine  
Commissione nazionale d'etica per la medicina  
Swiss National Advisory Commission on Biomedical Ethics

# On the management of differences of sex development

Ethical issues relating to "intersexuality"

Opinion No. 20/2012

Berne, November 2012

**Adopted by the Commission on 31 August 2012**

**Members of the Commission:**

Professor Otfried Höffe (Chair), Dr Ruth Baumann-Hölzle, Professor Annette Boehler, Professor Alberto Bondolfi, Dr Kurt Ebnetter-Fässler\*, Carlo Foppa, PhD, Professor Olivier Guillod, Dr Bertrand Kiefer, Dr Margrit Leuthold, PD Dr Jean Martin\*, Dr Judit Pók Lundquist\*\*, Franziska Probst, lic. iur et lic. phil.,\* Professor François-Xavier Putallaz, Maya Shaha, PhD, RN\*, Professor Brigitte Tag\*

\* Member of the working group responsible for preparation of the Opinion,

\*\* Chair of the working group responsible for preparation of the Opinion

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**Contact:** [nek-cne@bag.admin.ch](mailto:nek-cne@bag.admin.ch)

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## Summary of mandate and definition of problem

In a letter dated 15 September 2011, the Director of the Federal Office of Public Health, Pascal Strupler, requested the Swiss National Advisory Commission on Biomedical Ethics (NEK-CNE) to prepare an Opinion, for submission to the Federal Council, on ethical issues relating to “intersexuality”. This request to the Commission was issued on the basis of the Federal Council’s responses to two interpellations introduced in the National Council<sup>1</sup>, in which the Federal Council was called upon to answer various questions concerning the management of differences of sex development and associated surgical procedures.

Under the Federal Council’s mandate to the Commission, the Opinion is to focus on questions of counselling and the provision of information for parents and the medical profession. In this connection, the Commission was also asked to consider to what extent the Swiss Academy of Medical Sciences could contribute to the clarification of unresolved questions. The Commission is also to identify any relevant interfaces with social insurance and with private law.

In the Commission’s view, differences of sex development raise a number of issues in the areas of legal and medical ethics. The following points would appear to be particularly pressing.

In Switzerland, an indication of sex is required for the official registration of births, with two sexes being recognized under the Swiss legal system. Underlying this requirement, firstly, is the assumption that sex is one of the essential features of a person’s identity; at the same time, it reflects the traditional view that all humans are either male or female. Individuals whose sex is not clearly identifiable as male or female are assigned to one of these two categories. A subsequent amendment of the recorded sex requires considerable effort and sometimes – without any adequate justification – entails significant disadvantages for the person concerned.

A consequence of this legal position and the underlying social attitudes regarding the need for unequivocal categorization is the employment of medical means for sex assignment. Thus, until quite recently, sex assignment surgery was carried out on “child welfare” grounds in essentially healthy infants and children. Such procedures are irreversible and may have serious effects on the life of the person concerned – for example, if it subsequently transpires that the medically assigned sex does not match the individual’s own sense of gender identity. As the children concerned are minors, lacking the capacity to consent, it falls to their legal representatives – i.e. usually the parents – to give the required consent for medical sex assignment procedures. While this proxy consent generally legitimizes such interventions, there is a risk that, from an ex post perspective, children’s fundamental human rights to physical and psychological integrity and self-determination may be violated. It therefore needs to be carefully examined whether, and in what circumstances, irreversible sex assignment procedures can be justified by invoking the child’s welfare.

<sup>1</sup> 11.3265 Interpellation Kiener Nellen. Management of differences of sex development (questions 3 and 4) and 11.3286 Interpellation Glanzmann. Cosmetic genital surgery in children with ambiguous physical sexual characteristics (questions 2 and 3).

Hereafter, the Commission uses the term “differences of sex development” or “sex variations” in order to avoid any negative or misleading connotations associated with the term “intersexuality”.



# 1 Introduction

Until just a few years ago, questions concerning social attitudes to – and the medical management of – individuals with ambiguous sexual characteristics were not widely debated. It is largely thanks to the efforts of self-help/advocacy groups that this situation has changed, and that increasing attention is now being paid to the topic of “intersexuality” in the media and in professional circles – including the fields of medical law and ethics – both nationally and internationally. The Swiss National Advisory Commission on Biomedical Ethics (NEK-CNE, hereafter “the Commission”) welcomes this development and hopes that, by issuing this Opinion, it can help to dispel any remaining taboos surrounding the topic and to ensure that, also in the Swiss context, due attention is paid to the ethical and legal questions arising in connection with differences of sex development. In the Opinion, the Commission addresses the questions highlighted by the Federal Council, as mentioned above.

## 1.1 Definition of terms

The term “intersexuality” (or “intersex”) refers to a condition in which an individual’s sex is biologically ambiguous – i.e. the development of chromosomal, gonadal or anatomical sex is atypical and, consequently, the sex-differentiating characteristics are not concordantly and unambiguously male or female. The genotype (genetic constitution) thus does not correspond to the phenotype (physical appearance), and the phenotype itself may not be categorizable as unequivocally male or female.

A biological condition of this kind may be diagnosed prenatally, at birth, during puberty, or only later in adulthood. Clinically, such cases are known as disorders of sex development (DSD). In medicine, DSD is used as an umbrella term, covering a wide range of conditions with varying causes, manifestations and courses. **In terms of insurance law, a diagnosis of DSD indicates a congenital condition, but this does not mean that the person concerned automatically requires medical treatment.** However, some forms of DSD may involve life-threatening disorders (e.g. adrenal insufficiency, salt wasting) or are associated with an elevated risk of cancer, necessitating medical interventions. Among the best-known forms of DSD are congenital adrenal hyperplasia (CAH), disorders of androgen synthesis, androgen insensitivity syndrome (AIS), gonadal dysgenesis, ovotesticular DSD and Leydig cell hypoplasia.<sup>2</sup> Owing to differences in definitions, the reported incidence (number of new cases) and prevalence (number of existing cases in a given population) varies between 1:3000 and 1:5000.<sup>3</sup>

For the clinical context, the Commission uses the standard abbreviation DSD. **The Commission wishes to emphasize that DSD does *not* refer to transsexuality.** Transsexuality is a condition in which an individual’s gender identity does not match their biologically *unambiguous* sex. Speaking of “intersexuality” as “non-true transsexualism” – a term used in the Federal

<sup>2</sup> For statistics and an account of the main groups of DSD, cf. Schweizer/Richter-Appelt 2012, pp. 52ff.

<sup>3</sup> Bosinski 2005.

Council's reply to the above-mentioned parliamentary questions – is incorrect and should therefore be avoided.

For non-technical usage, the Commission recommends the term “sex variation”, on the following grounds: not all cases of DSD involve a (pathological) “disorder”, i.e. a functional impairment associated with suffering. Not infrequently, a case of DSD may involve a variation from a norm of sex development which does not require medical treatment. From the perspective of those affected, the term “disorder” may thus appear stigmatizing, and accordingly the term “differences of sex development”<sup>4</sup> (rendered in German as “Besonderheiten der Geschlechtsentwicklung”<sup>5</sup>) has been proposed as an alternative in the literature. The Commission endorses this proposal.

Of ethical importance, in the Commission's view, are all those cases of DSD where sex assignment represents a problem for parents, professionals, the state and ultimately also for the individual concerned. **Society's expectation that a child will be either a boy or a girl is called into question by DSD, without the child (while it lacks capacity) being able to express a view itself.** DSD poses particular challenges for ethics and law because the response to this unmet expectation may lead to crises, in which assistance will be required in many cases. The reaction to an exceptional situation of this kind needs to be acceptable from an ethical and legal viewpoint.

## 1.2 Current state of the debate

Until the end of the twentieth century, in line with the “optimal gender policy” advocated by John Money (1955), a child with a DSD was generally assigned a gender at an early age. The child's body was then surgically aligned with the assigned gender in the first months and years of its life. As it was easier for surgeons to create female than male genitalia, most of these children were surgically feminized. The child was then to be consistently reared in the surgically assigned gender role, without it (or the family) being informed about its differences or the reasons for the interventions. Secrecy was maintained even into adulthood. It was believed that this approach would enable the child to have a “normal” physical and psychosexual development. In fact, however, the treatment was often associated with severe physical complications, chronic pain, loss of fertility, psychological sequelae<sup>6</sup> and impairment of sexual quality of life.<sup>7</sup> In some cases, affected individuals also show high degrees of uncertainty of gender identity<sup>8</sup>, which may extend as far as a mismatch between assigned sex and gender identity in later life.<sup>9</sup> In particular, the persistence of taboos, feelings of shame and perceived stigmatization in clinical management were reported by patients to be distressing or even traumatic.<sup>10</sup>

Growing criticism of the “optimal gender policy”, spreading from the US, led to a change of approach in medical practice. Since the 2005 International Consensus Conference, held in Chicago, where a “consensus statement on management of intersex disorders” was prepared by over 50

<sup>4</sup> Wiesemann et al. 2010.

<sup>5</sup> Arbeitsgruppe Ethik im Netzwerk Intersexualität «Besonderheiten der Geschlechtsentwicklung» 2008 (consensus paper).

<sup>6</sup> Schützmann et al. 2009.

<sup>7</sup> Schönbucher et al. 2010

<sup>8</sup> Schweizer/Richter-Appelt 2009 und Schweizer et al. 2009.

<sup>9</sup> Bosinski 2005.

<sup>10</sup> Brinkmann et al. 2007; Kleinemeier et al. 2010; Ude-Koeller et al. 2006.

international experts from the Lawson Wilkins Pediatric Endocrine Society (LWPES) and the European Society for Paediatric Endocrinology (ESPE), new standards have been applicable for the classification, diagnosis and management of DSD.<sup>11</sup> These recommendations have been implemented at European DSD centres.<sup>12</sup> Under the new approach, decisions on irreversible genital surgery are to be guided by medical indications rather than cosmetic considerations. Interventions are to be appropriate to the individual's current needs (e.g. no vaginoplasty in childhood). All individuals are, however, still to receive a gender assignment. Acute, life-threatening conditions associated with DSD must always be treated.

In 2012, an Opinion dealing with "the situation of intersex people" was issued by the German Ethics Council. This recommends, among other things, the expansion of specialized interdisciplinary centres and of medical and psychological support services for affected individuals and their parents. It also opposes irreversible medical sex assignment measures and advocates the strengthening of the child's participatory rights. It calls for the establishment of a fund to provide recognition and assistance for individuals with DSD who have suffered as a result of earlier treatments. The Ethics Council proposes the introduction of an additional category "other" for the official registration of sex. It suggests that the individuals concerned should be able to enter into a registered civil partnership, or even to marry.

## 2 Professional counselling and support for affected parents and children

### 2.1 Background and aims of counselling and support

The birth of a child with a sex variation gives rise to uncertainties and anxieties and requires both the parents and the professionals involved to engage in processes of reflection and decision-making for which no "magic formulas" are available. In general, it is to be assumed that parents will always endeavour to promote their child's welfare.<sup>13</sup> However, it is the mark of this particular exceptional situation that it is not immediately clear, and often a matter of dispute, what will actually promote the child's welfare. This emotionally challenging situation first needs to be coped with before any decisions are taken on (non-critical) therapeutic interventions which may have far-reaching consequences. Here, professional counselling and support for parents plays an important role.

Crucial to the child's welfare from a medical/psychological viewpoint is that, after the birth, the parents should accept the child as it is, and that a normal emotional attachment should be established between them. To develop self-confidence, the child must have a sense of security. **The initial aim of counselling and support is therefore to create a protected space for parents and the newborn, so as to facilitate a close bond. In addition, the parents need to be enabled to take the necessary decisions on the child's behalf calmly and after due reflection. In this process, they should not be subjected**

<sup>11</sup> Lee et al. 2006, Hughes et al. 2006.

<sup>12</sup> Pasterski et al. 2010.

<sup>13</sup> Cf. NEK-CNE Opinion no. 16/2009 "Research involving children".

**to time or social pressures.** Parents' rapid requests for medical advice or for corrective surgery are often a result of initial feelings of helplessness, which need to be overcome so as to permit carefully considered decision-making.

The child, likewise, in accordance with its level of mental development, requires psychosocial support so that it can be involved in treatment decisions at an early stage or take such decisions, when it becomes competent to do so. The importance of psychosocial support increases with the child's age and growing self-awareness and decision-making capacity.

## **2.2 Who should provide counselling and support?**

Various stages of counselling and support for parents and individuals affected by DSD are to be distinguished, each involving different professionals.

If a sex variation is suspected in an unborn child during pregnancy, e.g. on the basis of a chromosome analysis, the expectant mother or couple should be offered psychosocial counselling.

All professionals who work with parents and the newborn before, during and after birth are to be specially trained for care provision in the initial phase, so that they can undertake early crisis intervention measures with a motivating, supportive approach.

As soon as possible, the parents and their child should be referred to a specialized centre where responsibility for counselling and care is assumed by a multidisciplinary team with the necessary medical, psychological, legal, educational, social, ethical and other expertise. As the multidisciplinary team will ideally provide care over the long term, its composition may change as required over the years.

## **2.3 Content of counselling and support**

The Commission suggests that the following items should form part of the counselling and support to be provided at least throughout the period of medical care:

- a diagnosis which is as precise as possible, based on genetic analysis, and also including the healthy aspects of the child;
- information on the need for treatment, therapeutic options and risks;
- information on possible health risks and symptoms associated with DSD;
- information on legal matters, specifically concerning the official registration of sex and the possibility of amending the recorded sex at a later date;
- assistance with insurance questions: coverage of the costs of treatment and psychosocial support by the Disability Insurance (IV) and, after the age of 20, the mandatory health insurance scheme;

- information on challenges relating to the physical and psychological development of children with DSD in puberty and adulthood, and on dealing with social expectations concerning unambiguous sex, the social environment and questions of upbringing;
- information on risks for subsequent pregnancies;
- details of self-help groups and online resources offering additional support;
- information meeting the family's specific requirements.

## 2.4 Quality characteristics of counselling and support

When providing counselling and support, it should be remembered that, depending on the particular diagnosis and family situation, the concerns and needs of the affected child – and hence also of its parents – may vary widely. Careful diagnostic investigations are therefore the essential first step. **It is important to bear in mind and also to point out to the parents that a diagnosis does not in itself entail any treatment or other medical measures, but serves initially to provide an overview of the situation and a basis for subsequent decisions, which may also take the form of watchful waiting.**

To prepare the parents for the coming challenges, they should be offered expert, sensitive and individually tailored support, possibly beginning before the birth and continuing from birth into adulthood. If requested, and if resources permit, a member of the multidisciplinary team may visit the family's home to provide personal advice. The information flow is to be coordinated by an expert within the multidisciplinary team, with the aim of avoiding contradictory information being given to the parents or the individual concerned.

The information about the complex situation communicated to the parents and later also – in an age-appropriate manner – to the individual him/herself should be comprehensive, intelligible and essentially unbiased. For this purpose, use should be made of evidence-based assessment instruments and guidelines, which can help to determine in a systematic way parents' and children's needs for information on disease/health. In the counselling process, attention is to be drawn to alternative viewpoints and conceptions. **As the nature of the counselling has a decisive influence on decision-making, a balance needs to be struck between medical information and non-medical counselling.** It should also be ensured that information has been properly understood. To avoid common misconceptions, it should be made clear that genital (sex assignment) surgery does not determine either the patient's subjective gender identity or his/her sexual orientation in later life.

### 3 Ethical considerations for decision-making

#### 3.1 Guidance for parents and the child's right to participate

In the case of DSD, a small number of decisions on medical treatment need to be taken in infancy and early childhood. In general, parents make such decisions on behalf of and in the best interests of their child.<sup>14</sup> In doing so, they have the task of supporting the child in developing its gender identity, while respecting its physical and psychological integrity. Parents should also be aware that they are intervening in a highly sensitive sphere, which concerns the core of the child's personality. Such interventions have lasting effects on the development of identity, fertility, sexual functioning and the parent-child relationship. **The parents' decisions should therefore be marked by authenticity, clarity and full awareness, and based on love for the child, so that they can subsequently be openly justified vis-à-vis the child or young adult.**

Ethically and legally, parents' responsibility and decision-making authority is constrained by the child's welfare and competence. Determination of the child's welfare is a normative process; depending on how it is interpreted, conflicts of interests may arise: the child's welfare may be defined on the basis of (a) the child's current interests or (b) the future adult's anticipated interests. Here, depending on the goal, conflicting options may present themselves. There is no guarantee that a decision which is good for the child in its current state will also be best for this person in puberty or adulthood. **The Commission recommends that the determination of the child's welfare should be based as far as possible both on the current interests of the child and on the anticipated interests of the future adult.** In cases of conflict, the multidisciplinary team – together with the parents and if possible with the involvement of the child – should seek to weight the two goals for the individual case.

As soon as the child attains capacity, it must consent to medical treatment itself, since such cases involve the exercise of highly personal rights.<sup>15</sup> Parents do not have a right to veto a decision made by a child which has already attained capacity. People have capacity if they can understand the purpose, appropriateness and effects of a given course of action and are also in a position to act of their own free will in accordance with rational judgement and to withstand pressure exerted by third parties within normal limits. In Switzerland, as regards the right to veto physical interventions, it is assumed that a child attains capacity between the ages of 10 and 14 years, although capacity is acquired by degrees and is also influenced by the severity and implications of the intervention. Empirical studies indicate that, on the basis of experience with their own body and with illnesses, children can already make rational decisions on treatment before the age of 10 years. However, it should be recalled that, with regard to sexual self-determination, the age of consent specified in Art. 187 of the Swiss Criminal Code (StGB) is 16 years.

<sup>14</sup> On parents' role as proxies cf. NEK-CNE Opinion no. 16/2009 "Research involving children".

<sup>15</sup> Art. 19, para. 2, Swiss Civil Code (ZGB). Federal Supreme Court Decision BGE 114 Ia 350, 360; BGE 134 II 235 ff.; Michel 2009, 80 ff.



**The Commission strongly supports the idea that, even before they attain capacity, children should participate in medical treatment decisions in an age-appropriate manner, and that their views should be taken into account as far as possible.** Here, the requirements to be applied for capacity in the case of *consent* to treatment are more stringent than for *refusal* of treatment. As children are susceptible to influence and frequently wish to satisfy family or parental expectations, it should also be ensured that, in order to boost their confidence, they receive independent, professional psychosocial support. It must be ensured that the wishes they express are authentic, and that they are able to cope with the demands of the decision-making situation.

### **3.2 Guidance for the multidisciplinary team**

The interdisciplinarity of the treatment and care team should lie not merely in the representation of various disciplines, but in a genuine commitment to equal status for all parties involved. While diagnosis is a matter for medical experts, proposals for treatment are to be discussed within the multidisciplinary team. The multidisciplinary team has the key task of providing parents, or the (competent) individual, with information on medically indicated and appropriate treatment options, which may vary widely in terms of the associated opportunities and risks. Decisions on the next steps are to be taken on an individual basis, in partnership with the parents and if possible the child. Here, it should be borne in mind that in most cases an intervention is not a matter of medical urgency. **Decisions on sex assignment interventions are to be guided by the questions of what genitalia a child actually requires at a given age (apart from a functional urinary system) and how these interventions will affect the physical and mental health of the child and the future adult.** Treatment needs to be carefully justified, especially since – in functional, aesthetic and psychological respects – surgically altered genitalia in DSD are not comparable to natural male or female genitalia.

Decisions are to be guided, above all, by the child's welfare. Attention needs to be paid to the child's individual circumstances, including its family, social and cultural environment; however, the team's reflections should not be influenced by prejudices vis-à-vis other cultures or religions. The limiting factor in the consideration of family/cultural circumstances will be the physical and psychological integrity of the child. An irreversible sex assignment intervention involving harmful physical and psychological consequences cannot be justified on the grounds that the family, school or social environment has difficulty in accepting the child's natural physical characteristics. The harmful consequences may include, for example, loss of fertility and sexual sensitivity, chronic pain, or pain associated with dilation (bougienage) of a surgically created vagina, with traumatizing effects for the child. **If such interventions are performed solely with a view to integration of the child into its family and social environment, then they run counter to the child's welfare.** In addition, there is no guarantee that the intended purpose (integration) will be achieved. In order to avoid parents of a child who

lacks capacity seeking sex assignment surgery abroad if they are denied this option in Switzerland, it may be pointed out that the intervention can also be performed in later life, should the individual concerned so desire.

### 3.3 Limits to freedom of choice

As part of the state's duty of care, it is obliged to protect children whose parents request interventions which clearly violate the child's welfare or participatory rights. **The following basic principle should therefore apply to the management of DSD: on ethical and legal grounds, all (non-trivial) sex assignment treatment decisions which have irreversible consequences but can be deferred should not be taken until the person to be treated can decide for him/herself.** This includes genital surgery and the removal of gonads, unless there is an urgent medical indication for these interventions (e.g. increased risk of cancer). Exceptions to the general rule would be cases where a medical intervention is urgently required to prevent severe damage to the patient's body or health.

Finally, in the interests of child protection, there should be a legal review of the liability implications of unlawful sex assignment interventions in childhood, and of the associated limitation periods. Questions of criminal law, such as the applicability of offences of assault (Art. 122 and 123, StGB) and the prohibition on genital mutilation (Art. 124, StGB), should also be investigated.

## 4 Interfaces with civil status administration

In Switzerland, an indication of sex is required for the official registration of births (Art. 8, lett. d, Civil Status Ordinance/ZStV), with only two sexes being recognized under the Swiss legal system. Underlying this requirement, firstly, is the assumption that sex is one of the essential features of a person's identity; at the same time, it reflects the traditional view that all humans are either male or female. Individuals whose sex is not clearly identifiable as male or female are thus assigned to a category which may possibly not match their subjective gender identity in later life. **A subsequent amendment of the recorded sex requires considerable effort and sometimes entails significant disadvantages for the person concerned. This procedure should be reviewed from the viewpoint of possible discrimination.** To address this situation and improve the position of the individuals concerned, the following three options were discussed by the Commission:

- The restriction to two categories of sex is based on custom; no specific legal regulations exist on this question. It would in principle be possible to introduce additional categories and adapt the federal authorities' computerized civil status register (Infostar) accordingly. Conceivably, a third category such as "other"<sup>16</sup> could be adopted. Alternatively, two fur-

<sup>16</sup> Australia was the first country to introduce a third category of this kind in passports for its citizens.



ther categories could be introduced, based on the binary classification, but indicating the uncertainty of the sex assignment (e.g. "female \*" or "male \*").

- The Civil Status Ordinance could be revised so that in the future no indication of sex would be required when births are officially registered.
- The two existing categories of sex would be maintained, but to meet the needs of people of ambiguous sex more effectively and flexibly, a facilitated system could be introduced for amending the sex recorded in the civil status register.
- The Commission's conclusions were as follows: the Commission supports the idea that sex variations should be placed on an equal footing with the traditional categories of "male" and "female", as no-one should be subjected to discrimination on the grounds of sex. **Categorization as male or female which is driven by social factors or a desire for legal certainty, rather than being based on medical considerations or the sincere wishes of the individual concerned, represents an unacceptable violation of personal liberty.** It also leads to unjustifiable discrimination.

The Commission takes the view that at present the binary classification system should be maintained, as it is deeply embedded socioculturally and people with DSD often also wish to find their place in society as a man or woman. Accordingly, the introduction of additional categories of sex, as envisaged in option 1, could lead to renewed stigmatization. **Option 3 – calling for a facilitated system for amendment of the recorded sex – appears to the Commission to be an appropriate compromise at this time.** Here, simplified amendment of the recorded sex by the cantonal supervisory authority could be considered. This would offer the advantage of sparing (already overstrained) parents, or the person of ambiguous sex, the need for court proceedings. In the assessment of sex, considerable weight should be attached to the individual's self-identified gender, supported by objective grounds, with physical sexual characteristics only being considered secondarily.<sup>17</sup> In view of the significant and unpredictable changes associated with the course of DSD in childhood and adolescence, amendments should be possible within an unbureaucratic, low-threshold framework.

## 5 Interfaces with social insurance

DSD is one of the so-called congenital conditions for which comprehensive treatment up to the age of 20 years is covered by the Disability Insurance (IV) scheme (Art. 13, para. 1, Disability Insurance Act/IVG). A congenital condition is one which is already present at the end of the birth process. A predisposition to a disease is not sufficient to qualify as a congenital condition.

<sup>17</sup> Cf. Obergericht (Court of Appeals) of Canton Zurich, Civil Chamber II, decision of 1 February 2011 – NC090012/U; FamPra. ch 04/2011, 932 ff. (comments by Andrea Büchler and Michelle Cottier).

Treatments covered by the IV encompass:

1. the congenital condition itself; and, if applicable,
2. all health impairments which medical experience has shown to be part of the symptomatology of the congenital condition; and, if applicable,
3. all health impairments which, according to medical experience, are not part of the symptomatology of the congenital condition, but which frequently occur as a consequence of, and are specifically linked to, the congenital condition (with an “established sufficient causal relationship” between the congenital condition and the secondary disorder).

Given the special nature of DSD as a congenital condition, a number of points arise which need to be taken into account in the application of the IV regulations and may also require adjustments to legal practice and legislation. These points are discussed below.

In DSD, careful diagnosis involves a genetic analysis, which however only provides diagnostic clarification in 50% of cases and which for technical reasons cannot be completed by the end of the birth process. In some individuals, DSD only becomes apparent in puberty, when secondary sexual characteristics fail to develop or characteristics of the opposite sex develop. Cases have also been reported in which DSD was only diagnosed in adulthood. But this does not alter the fact that DSD is a congenital – not an acquired – condition.

Specifying the health impairments which are part of the symptomatology of the congenital condition, or are among the established secondary disorders, is a matter for medical experts. Here, legal practice and the approval of IV reimbursement are based on medical assessments. Such assessments need to be carefully formulated, in particular with regard to possible psychosocial consequences (e.g. disorders of personality development and of behaviour in the family/school setting, psychiatric illnesses). **Especially delicate are those cases where a psychosocial indication is used to justify the medical urgency of surgical sex assignment in children who lack capacity. Here, there is a particularly great risk of insufficient respect being accorded to the child’s (future) self-determination and its physical integrity.** For the establishment of a psychosocial indication involves numerous uncertainties and imponderables.<sup>18</sup> In addition, there is a lack of representative studies with sufficient numbers of cases and control groups comprising untreated or non-invasively treated DSD subjects; also lacking are data on patient satisfaction and on the effectiveness of various surgical sex assignment procedures carried out at different times (from infancy to adulthood).<sup>19</sup> Available studies on psychological state, impairment of body experience and sexual quality of life in people with DSD paint a mixed picture.<sup>20</sup>

Since IV coverage only applies up to the age of 20, pressure could arise from a medical standpoint to carry out treatments at an early stage. **In or-**

<sup>18</sup> For example, the establishment of a psychosocial indication is based on a subjective assessment, shaped by the clinician’s own values and often involving prognostic statements about expected psychosocial development, despite the inadequate availability of data for an evidence-based approach.

<sup>19</sup> Schweizer/Richter-Appelt 2012, pp. 188ff.

<sup>20</sup> Karakazis 2006; Lee et al. 2006, pp. 493f.

**der to avoid possibly unnecessary or premature treatments, the Commission recommends that, in consultation with medical experts, the existing age limit specified in Art. 13, para. 1, IVG should be reviewed and revised upwards for somatic and psychological/psychiatric treatments of DSD.** Alternatively, the list of items reimbursable under the Health Insurance Act for DSD-related congenital conditions could be brought into line with the IV standard.

Because parents generally take decisions on behalf of their child which impinge on intimate areas of the child's life and its identity, and which can also have fundamental effects on fertility and sexual sensitivity, everything possible must be done to ensure the high quality and authenticity of such decisions. Here, professional counselling and psychosocial support for parents is crucial. From a functional viewpoint, the support provided for parents can be seen as a component of the treatment for the congenital condition, i.e. as an element in the overall therapeutic plan. However, from the perspective of the IV, parents are not currently entitled to receive reimbursable services in connection with a child's DSD-related congenital condition. **The Commission therefore recommends that a legal basis should be established which would provide for a special obligation to cover counselling and support for parents.** It would also be desirable for the costs of counselling and support provided for parents and individuals with DSD to be reimbursed by the IV beyond the age of 20, or alternatively for the list of items reimbursable under mandatory health insurance to be brought into line with the IV standard.

In the area of mandatory insurance coverage, to the Commission's knowledge, people with DSD are not subject to discrimination, although the services covered by the IV are more comprehensive than under mandatory health insurance. However, in voluntary supplementary health insurance – as is generally the case in the private insurance sector – provisos and exclusions are permissible if a medically certified condition exists, which essentially disadvantages people with congenital conditions.

Finally, the Commission notes that the terminology used in legislation (e.g. "true hermaphroditism and pseudohermaphroditism", Ordinance on Congenital Conditions/GgV, no. 359) should be revised, and the standard specialized terminology should be adopted.

## 6 Recommendations

1. The suffering experienced by some people with DSD as a result of past practice should be acknowledged by society. The medical practice of the time was guided by sociocultural values which, from today's ethical viewpoint, are not compatible with fundamental human rights, specifically respect for physical and psychological integrity and the right to self-determination.

The Commission's other recommendations come under two separate headings – *medical ethics* and *legal ethics*:

### **Medical ethical recommendations**

2. Decisions on medical treatments of a pharmacotherapeutic or surgical nature are to be taken jointly in a multidisciplinary team with the involvement of the parents and, as far as possible, the affected child. As soon as capacity is attained, the affected individual decides for him/herself. The family and cultural context may only be taken into account if the welfare of the child is not jeopardized as a result.
3. The following basic principle should apply to the management of DSD: on ethical and legal grounds, all (non-trivial) sex assignment treatment decisions which have irreversible consequences but can be deferred should not be taken until the person to be treated can decide for him/herself. This includes genital surgery and the removal of gonads, unless there is an urgent medical indication for these interventions (e.g. increased risk of cancer). Exceptions to the general rule would be cases where a medical intervention is urgently required to prevent severe damage to the patient's body or health.
4. Protection of the child's integrity is essential. Given the uncertainties and imponderables involved, a psychosocial indication cannot in itself justify irreversible genital sex assignment surgery in a child who lacks capacity.
5. Professional psychosocial counselling and support should be offered free of charge to all affected children and parents. This support should be expert, sensitive and individually tailored and should extend from the time when DSD is first suspected into adulthood.
6. To guarantee the requisite professional level of counselling, support and treatment services, this function should be concentrated at a small number of specialized centres in Switzerland.
7. Given the sensitivity and complexity of the issues, and the need for interdisciplinary decision-making, the Commission suggests that guidelines on education and training for the professionals involved should be

prepared by the Swiss Academy of Medical Sciences (SAMS) and other competent professional bodies.

8. Clinical treatment guidelines in Switzerland should be based on international standards and, if necessary, should be improved through co-operation at the international level. Accordingly, standard international terminology should be adopted.
9. There is a need for representative studies with sufficient numbers of cases and control groups comprising untreated or non-invasively treated DSD subjects. Data should also be collected on patient satisfaction and on the effectiveness of various treatment methods and surgical sex assignment procedures. To facilitate the practice of evidence-based medicine and to optimize treatment paths, research should increasingly be conducted in cooperation with international partners in these areas.
10. The long-established constitutional principle that no-one is to be subjected to discrimination on grounds of sex also applies to people whose sex cannot be unequivocally determined. Any discrimination resulting from existing regulations must be eliminated.
11. In a case of DSD, it must be possible for the sex recorded in the official registration of births to be unbureaucratically amended. It should be permissible for the cantonal supervisory authority to make such an amendment. The assessment of sex should be guided, as far as possible, by the (verifiable) self-identified gender of the individual concerned, with physical sexual characteristics playing a subordinate role. In view of the unpredictable course of DSD in childhood and adolescence, amendments should be possible without undue bureaucracy.
12. There should be a legal review of the liability implications of unlawful interventions in childhood, and of the associated limitation periods. Questions of criminal law, such as the applicability of offences of assault (Art. 122 and 123, StGB) and the prohibition on genital mutilation (Art. 124, StGB), should also be investigated.
13. The Commission recommends that the age limit ("up to the age of 20 years") specified in Art. 13 para. 1, IVG for IV coverage of somatic and psychological/psychiatric treatments for people with DSD should be raised; alternatively, the list of items reimbursable under mandatory health insurance should be brought into line with the IV standard. The aim would be to make allowance for the special nature of this congenital condition and to avoid any pressure arising for premature surgical sex assignment procedures. Any amended age limit for IV coverage in cases of DSD would be set in consultation with medical experts. If an age li-

***Legal ethical  
recommendations***

mit is specified, provision should be made for justified exceptions to the rule.

14. The Commission recommends that, in non-specialist language, DSD should only be referred to as "differences of sex development" or "sex variations", and that other terms, including "intersexuality", should be avoided. The terminology used in legislation (e.g. "true hermaphroditism and pseudohermaphroditism", Ordinance on Congenital Conditions/ GgV, no. 359) should be revised, and the standard specialized terminology should be adopted.

## **Procedure adopted by the Commission in preparing the Opinion**

In order to gain an overview of the various positions, the Commission (plenary session and working group) conducted a total of three hearings with people directly affected and experts:

- Mme A., mother of a child with DSD
- Michelle Cottier, Assistant Professor at Basel University, in cooperation with Professor Andrea Büchler, Zurich University
- Professor Christa Flück, Paediatric Endocrinology, Inselspital Bern
- Professor Ulrich Meyer, President of the Second Social Law Division of the Federal Supreme Court
- Dr Blaise-Julien Meyrat, Department of Paediatric Surgery, CHUV Lausanne
- Dr Francesca Navratil, paediatric and adolescent gynaecologist, Zurich
- Karin Plattner, self-help group “Verein SI Selbsthilfe Intersexualität” and mother of a child with DSD
- Knut Werner-Rosen, psychologist/psychotherapist, Berlin
- Dr Jürg Streuli, Institute of Biomedical Ethics, Zurich University
- Daniela Truffer & Markus Bauer, human rights advocacy group “Zwischengeschlecht.org”

The Commission also took note of written input from the following experts:

- Michael Groneberg, PD, Fribourg University
- Mirjam Werlen, lic.iur./ LL.M., Bern

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Sub No: AG-SB2013/0246

Date submitted to Office by AGD: 11 FEB 2013

File No: 12/15801

Min No:

## ATTORNEY-GENERAL AND MINISTER FOR EMERGENCY MANAGEMENT

### Draft Australian Government Guidelines on the Recognition of Sex and Gender –amendments and public consultation

**Deadline:** 22 February 2013 to allow six weeks of public consultation before the Guidelines commence on 1 July 2013.

**Key Issues:** This submission seeks your approval for amendments to the draft Australian Government Guidelines on the Recognition of Sex and Gender following feedback from other Departments, and seeks your approval to undertake public consultation on the draft Guidelines.

**AGD Analysis:** The draft Australian Government Guidelines on the Recognition of Sex and Gender (**Attachment A**) standardise the gender classification system and evidence required to change gender on personal records for Australian Government departments. Following feedback from other Departments, we seek your agreement to amend the draft Guidelines. The majority of these changes delete repetition, clarify obligations and make the Guidelines easier to use.

The updated draft does make a notable revision to the gender classification system proposed in earlier drafts. A number of Departments and other stakeholders raised concerns regarding the classification system proposed in the previous draft (Male, Female, Other [open text box]). In response, the updated draft has amended the classification system and allows people to identify as Male, Female, X (intersex/indeterminate/unspecified). This classification system is consistent with the passport policy for sex and gender diverse applicants, which has been successfully implemented. The updated draft also clarifies that people wishing to identify as a gender other than the one assigned at birth, or as X on their personal record, must provide appropriate evidence. This is likely to reduce possible misunderstanding of, or opposition to, the Guidelines.

Extension of the Guidelines to all parts of Government will change the policy for the identity document a celebrant uses when establishing the gender of a transgendered person who wishes to marry their opposite sex partner. Under current policy, a birth certificate has primacy over other identity documents when establishing a person's gender for the purposes of marriage. Under the Guidelines, marriage celebrants will accept a Gender Recognition Certificate provided by a medical practitioner, Australian Government travel document or identity document provided by a State/Territory Registrar of Births, Deaths and Marriages as evidence of gender.

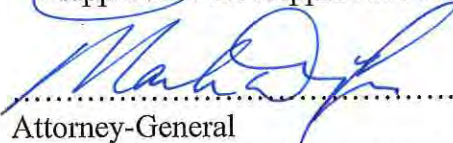
**Financial Implications:** None

**Sensitivities and Communications Plan:** Being Drafted

s 22 irrelevant to scope of request

**Recommendation:** I recommend that you

1. Approve the updated draft of the Australian Government Guidelines on the Recognition of Gender Approved / Not Approved / Discuss
2. Approve a period of six weeks public consultation on the draft Guidelines on the Recognition of Gender Approved / Not Approved / Discuss
3. Approve the attendant changes to the policy on evidence of gender for the purposes of marriage Approved / Not Approved / Discuss

  
.....

Attorney-General  
Minister for Emergency Management

2/18/3 /2013

**AGD Clearance**

Greg Manning, First Assistant Secretary, International Law and Human Rights, s 22 excluded by agreement  
Date Cleared: 07/02/2013

Action Officer: s 22 excluded by agreement Date sent for approval by AO: 06/02/2013

Branch Head: Helen Daniels, Assistant Secretary, Human Rights Policy Branch, s 22 excluded by agreement



## Background

The Guidelines standardise the gender classification system and evidence required to change gender on personal records for Australian Government departments. The Guidelines are scheduled to commence on 1 July 2013.

2. *Gender classification system:* Under the Guidelines, where gender information is collected and recorded against an individual's personal record, they will be given the option to select Male, Female or X (indeterminate/intersex/unspecified). This classification system should also be used when Australian Government agencies are collecting data.

3. *Standard of proof for change of gender:* The Guidelines will standardise what proof Australian Government departments and agencies will require to change someone's gender on their personal record. Under the Guidelines, people will have to provide evidence of their new gender identity. This evidence can include either a Gender Recognition Certificate provided by a medical practitioner, an Australian Government travel document or an identity document provided by a State/Territory Registrar of Births, Deaths and Marriages.

4. In September 2012, the previous Attorney-General approved a draft of the Guidelines to be sent to all Departments and a small advisory group of transgender and intersex stakeholders for comment (Sub No. 1914). We received feedback from all Departments and the majority made no substantial comment. A number of Departments raised concerns about the gender classification system proposed (Male, Female, Other [open text box]). These concerns were primarily in regards to the workability of an open text box, the impact on gender disaggregated data and the perception of creating a third gender. These concerns have been addressed by the new classification system outlined in the attached draft.

5. The Department has regularly consulted with the Advisory Group through the development of the Guidelines and much of their advice has been incorporated in the current draft. The Advisory Group has raised a number of additional suggestions that have not been incorporated, including accepting certificates from registered psychologists as well as medical practitioners as evidence of gender. We expect these issues to be raised through public consultation.

6. *Gender identification for the purposes of marriage:* Extension of the Guidelines to all parts of Government will change the policy for transgendered people who wish to marry their opposite sex partner. The *Marriage Act 1961* requires a birth certificate to prove a person's place and date of birth but does not require any documentation to prove gender. Currently, a birth certificate does have primacy for establishing gender for the purposes of marriage. This was confirmed in a letter from the then Attorney-General, the Hon Robert McClelland, to the former Foreign Minister when the passports policy for sex and gender diverse applicants changed in 2011 (**Attachment C**). This means, for example, if a person has transitioned from female to male and satisfied the requirements of the State Registrar of Births Deaths and Marriages to change their birth certificate to male, he is able to marry a female partner. If he was unable to satisfy these requirements (e.g. he had not had reassignment surgery) he would not be able to marry his opposite sex partner.

The Guidelines will change the current position for transgendered people wishing to marry their opposite sex partner, as the birth certificate will no longer have primacy as proof of gender. The Department will advise marriage celebrants of the standard of evidence for establishing gender as required by the Guidelines. For example if a person has transitioned from female to male and has a passport in his new gender (M), he will be able to marry a female partner. This would be the case even if his birth certificate still identifies him as female.

## Relevance to Election Commitments/Government Policy

7. The Guidelines are a commitment under the National Human Rights Action Plan and the responsibility of the Attorney-General's Department.

8. During the 2010 election, the Government reiterated their commitment to review documentation requirements to ensure transgender and intersex people are able to enjoy their human rights without discrimination and to promote broader identification options than male/female.

### **Microeconomic Implications**

9. Negligible

### **Consultation**

10. Cyber and Identity Security Policy Branch, Business and Information Law Branch, Office of Corporate Counsel Branch (Freedom of Information Section). Marriage and Intercountry Adoption Branch have approved content relating to marriage celebrants.

11. All Australian Government Departments, the Australian Human Rights Commission and a small advisory group comprising transgender and intersex stakeholders.

### **Sensitivities and Communication Plan**

Gender identity can be a sensitive issue. The Department will work with the Strategic Communications Branch to draft a Sensitivities and Communications Plan regarding the public consultation (proposed for February/March 2013) and the roll out of the Guidelines in July 2013. It should be noted that the Department has consulted widely and no Department raised serious concerns or objections about the principle that people may identify as a gender other than the one assigned at birth and/or as neither male nor female.

### **ATTACHMENTS:**

12. Attachment A – draft Australian Government Guidelines on the Recognition of Sex and Gender
13. Attachment B – Submission No. 1914
14. Attachment C – Submission No. 1387 including letter from the previous Attorney-General to the previous Foreign Minister regarding evidence of gender for the purposes of marriage



Australian Government  
Attorney-General's Department

# Australian Government Guidelines on the Recognition of Gender

*FINAL DRAFT*

*January 2013*

## Introduction

1. The Australian Government recognises that individuals may identify and be recognised within the community as a gender other than the sex they were assigned at birth or during infancy or an indeterminate sex and/or gender, and this should be recognised and reflected in their personal records held by Australian Government departments and agencies.
2. The goal of the Guidelines is to:
  - a. develop a consistent sex and gender classification system for Australian Government records,
  - b. develop a consistent standard of evidence for people to change gender or establish sex on personal records and,
  - c. maintain consistent collection of sex and gender information across Australian Government departments and agencies.
3. The Guidelines provide guidance to Australian Government departments and agencies on the collection, use, and amendment of sex and gender information in individual personal records.
4. Increased consistency in the way the Australian Government collects and records sex and gender will strengthen Australia's identity security system, the integrity of agency records and the accuracy of individual personal records, in line with the Australian Government's approach to identity security.<sup>1</sup>
5. These Guidelines support the Australian Government's commitment to introduce legal protections against discrimination on the grounds of gender identity as part of the consolidation of Commonwealth anti-discrimination laws and recent changes to the Australian Government passport policy for sex and gender diverse applicants.<sup>2</sup>
6. The collection, use, storage and disclosure of all personal information, including gender and sex information by departments and agencies are regulated by the Information Privacy Principles in the *Privacy Act 1988*.
7. Consistent with the Australian Public Service Values, all Australian Government departments and agencies will treat all people with dignity and respect, regardless of their sex and/or gender identity.

## Background

8. In 2009, the Australian Human Rights Commission released *Sex Files: the legal recognition of sex in documents and government records*. This report examined the recognition of sex in government documents and records. The Commission recommended the Australian Government consider development of national guidelines concerning the collection of sex and gender information from individuals.

<sup>1</sup> Australia's identity security framework is underpinned by the National Identity Security Strategy and associated documents. For more information please see the Attorney-General's Department website [www.ag.gov.au/identitysecurity](http://www.ag.gov.au/identitysecurity)

<sup>2</sup> In September 2011, the Minister for Foreign Affairs and the Attorney-General launched a new Australian Government passport policy for sex and gender diverse applicants. The passport policy was the first step in changing the way the Australian Government recognises sex and/or gender diversity in its records and documents. Under the passport policy, sex reassignment surgery is not a prerequisite to issue a passport in a new gender. Birth or citizenship certificates do not need to be amended for sex and gender diverse applicants to be issued a passport in their preferred gender. A letter from a medical practitioner certifying that the person has had, or is receiving, appropriate clinical treatment for gender transition to a new gender, is intersex and does not identify with the sex assigned to them at birth, is acceptable evidence of gender identity. A passport in a new sex may also be issued to applicants who have undergone sex reassignment surgery and have registered their change of sex with Registrars of Births, Deaths and Marriages or the Department of Immigration and Citizenship. A passport may be issued to sex and gender diverse applicants in M (male), F (female) or X (indeterminate/unspecified/intersex).



## Australian Government Guidelines on the Recognition of Gender

- b) valid Australian Government travel document, such as a Valid Passport, which specifies their preferred gender, or
  - c) an amended State or Territory birth certificate, which specifies their preferred gender. A State or Territory Gender Recognition Certificate or recognised details certificate showing a State or Territory Registrar of Birth Deaths and Marriages has accepted a change in sex will also be seen as sufficient evidence.
- 20. Sex reassignment surgery and/or hormone therapy are not pre-requisite for the recognition of a change of gender in Australian Government records.
- 21. Where there is conflicting gender information on the Australian Government and State or Territory documents held by a person, the Australian Government travel document or the latest dated document will take precedence in establishing a person's gender for Australian Government purposes.<sup>5</sup>
- 22. When departments and agencies are presented with conflicting information they may seek further information and supporting evidence to corroborate a person's identity or social footprint in accordance with the Australian Government's approach to identity security.

### ***Collecting Sex and Gender Information***

- 23. Consistent with Information Privacy Principle 1,<sup>6</sup> all departments and agencies currently involved in the collection of sex and/or gender information should closely examine whether such information is necessary to the performance of their specific function or for broader government statistical or administrative purposes. Where such information is not necessary, this category of information should be removed from forms or documents.
- 24. Collecting and maintaining gender disaggregated data is crucial to the ongoing monitoring of equality between men and women. These Guidelines are not designed to restrict departments or agencies from collecting gender information where this data is necessary for the performance of their specific function, is used to inform the development of policy or delivery of services or contributes to gender disaggregated data.
- 25. Consistent with Information Privacy Principle 2,<sup>7</sup> where Australian Government departments and agencies are collecting sex and/or gender information, they will ensure individuals are generally aware of the purpose for which the information is being collected.

<sup>5</sup> Conflicts in official documents may arise with respect to gender particularly for people transitioning from one gender to another. For example, a person may hold a Passport in one gender and another identity document in another. While individuals are encouraged to progressively ensure their documents reflect their preferred gender, there are legitimate reasons people may want to hold a passport in a particular gender, including to ensure their safety while travelling overseas.

<sup>6</sup> Information Privacy Principle 1 - Manner and purpose of collection of personal information

1. Personal information shall not be collected by a collector for inclusion in a record or in a generally available publication unless:

- a) the information is collected for a purpose that is a lawful purpose directly related to a function or activity of the collector; and
- b) the collection of the information is necessary for or directly related to that purpose.

2. Personal information shall not be collected by a collector by unlawful or unfair means.

<sup>7</sup> Information Privacy Principle 2 - Solicitation of personal information from individual concerned

Where:

- a) a collector collects personal information for inclusion in a record or in a generally available publication; and
- b) the information is solicited by the collector from the individual concerned; the collector shall take such steps (if any) as are, in the circumstances, reasonable to ensure that, before the information is collected or, if that is not practicable, as soon as practicable after the information is collected, the individual concerned is generally aware of:
- c) the purpose for which the information is being collected;
- d) if the collection of the information is authorised or required by or under law - the fact that the collection of the information is so authorised or required; and
- e) any person to whom, or any body or agency to which, it is the collector's usual practice to disclose personal information of the kind so collected, and (if known by the collector) any person to whom, or any body or agency to which, it is the usual practice of that first mentioned person, body or agency to pass on that information.

### ***Queries and Complaints***

32. Where information about a person's sex and/or gender is unclear, the department or agency should communicate directly with the individual to resolve the issue.
33. Departments and agencies should record and monitor complaints or queries made relating to the recording of sex and/or gender information in order to assess the success of policy changes and inform future policy in this area.
34. Departments and agencies should use the information from the monitoring of complaints to address concerns and amend relevant policies.
35. Individuals concerned about breaches of privacy may be referred to the Office of the Australian Information Commissioner (OAIC) on 1300 363 992 or directed to the Office's website - [www.oaic.gov.au](http://www.oaic.gov.au) – which has useful information on how to make a privacy complaint.

### ***Implementation***

36. Australian Government departments and agencies will progressively align their existing and future business practices with these Guidelines by 1 July 2016.
37. Implementing these Guidelines requires departments and agencies to undertake a review of legislative, regulatory or policy requirements relating to the collection of sex and/or gender information. Where there is no legislative or regulatory authority or policy or business need for the information, consideration should be given to pursuing amendments to remove the requirement within three years.
38. Implementation will also require the redesign of paper and electronic forms and the retraining of staff may be necessary. The Guidelines should also be incorporated into diversity training.
39. Departments and agencies that engage with members of the public on a regular basis should implement policies to uphold the Guidelines, including developing training for front-line staff relating to terminology, definitions and sensitivities associated with the sex and/or gender diverse community.
40. Departments and agencies that engage with members of the public on a regular basis should also provide information on the Guidelines on their website or other media as appropriate.
41. Departments and agencies that do not currently have any policies in place to assist staff in managing relationships between the organisation and members of the sex and/or gender diverse community should develop such policies, including appropriate references to the Guidelines.
42. Where departments and agencies are jointly responsible with the States and Territories for the maintenance and record of individuals' information, including sex and/or gender, those agencies will work with the States and Territories to seek their agreement to implement these Guidelines.
43. Where Departments are responsible for setting policy for other departments or agencies they should work with these departments or agencies to ensure the Guidelines are reflected in policy and practice.

b) that if it is necessary for the record to be given to a person in connection with the provision of a service to the record-keeper, everything reasonably within the power of the record-keeper is done to prevent unauthorised use or disclosure of information contained in the record.

## ***Key Terms***

*Please note there may be multiple or different definitions of the following terms. The following definitions have been provided for the purposes of these Guidelines*

### *Gender/preferred gender*

Gender is part of a person's social identity. It refers to the way a person presents and is recognised within the community. A person's gender refers to outward social markers, including their name, outward appearance, mannerisms and dress. A person's sex and gender may not necessarily be the same. An individual's preferred gender may or may not correspond with the sex or gender assigned at birth and some people may identify as neither male nor female.

### *Gender Recognition Medical Certificate*

A medical certificate signed by a Registered Medical Practitioner in the prescribed form at Appendix A.

### *Indeterminate*

A person of indeterminate sex or gender is someone whose biological sex cannot be unambiguously determined or someone who identifies as neither male nor female.

### *Information Privacy Principles*

Section 14 of the *Privacy Act 1988* (Cth) contains the Information Privacy Principles which apply to Australian government departments and agencies.

### *Intersex*

An intersex person may have the biological attributes of both sexes or lack some of the biological attributes considered necessary to be defined as one or the other sex. Intersex is always congenital and can originate from genetic, chromosomal or hormonal variations. Environmental influences such as endocrine disruptors can also play a role in some intersex differences.

### *Registered Medical Practitioner*

Registered medical practitioners may specialise in various medical fields including, but not limited to, surgeons, urologists, gynaecologists, endocrinologists, psychiatrists and general practitioners. Evidence will only be accepted from practitioners registered with the Medical Board of Australia (or equivalent overseas authority).

For the purposes of these Guidelines, certifications from persons not registered with the Medical Board of Australia (or equivalent overseas authority) such as, but not limited to, psychologists, nurse practitioners, health practitioners and natural practitioners are not acceptable evidence of sex and/or gender.

### *Sex*

For the purposes of these Guidelines, sex is understood to refer to the chromosomal, gonadal and anatomical characteristics associated with biological sex.

### *Sex and/or Gender Diverse*

The term 'sex and/or gender diverse' is used to recognise people who do not fall within the traditional binary notions of sex and gender (male and female). This includes people who identify as a different gender to their birth sex, or who are intersex and identify as male, female or neither.

## ***Appendix A – template for Gender Recognition Certificate***

**This sample text is for a letter from a registered medical practitioner certifying the sex and/or gender of a sex and gender diverse applicant.**

### **1. For people who are transitioning genders**

**This letter should be used for applicants who have had, or are receiving, appropriate medical treatment (including but not limited to hormone therapy or sex reassignment surgery) for gender transition and are seeking to update their personal record with their preferred gender of MALE or FEMALE.**

#### **Registered medical practitioner's letterhead (including full name and contact details)**

I, <medical practitioner's full name> am the doctor of <name of patient> with whom I have a doctor/patient relationship and whom I have treated (or with whom I have a doctor/patient relationship and whose history I have reviewed and evaluated).

<Name of patient> has had, or is receiving, appropriate clinical treatment for gender transition to the new gender of (specify new gender male or female).

Signature of medical practitioner

Signature block of medical practitioner

Registration number from the medical board of Australia (or equivalent overseas authority)

=====

### **2. For people who are intersex/indeterminate/unspecified**

**This sample text is for a letter from a registered medical practitioner certifying the gender of someone who is sex and gender diverse applicant. This letter should be used for applicants who are intersex or gender diverse.**

#### **Registered medical practitioner's letterhead (including full name and contact details)**

I, <medical practitioner's full name> am the doctor of <name of patient> with whom I have a doctor/patient relationship and whom I have treated (or with whom I have a doctor/patient relationship and whose history I have reviewed and evaluated).

<Name of patient> is of <indeterminate/intersex/unspecified> and lives in the gender (specify new gender male or female).

**OR**

<Name of patient> is of <indeterminate/intersex/unspecified sex> and lives in an <indeterminate/intersex/unspecified> gender.

Signature of medical practitioner

Signature block of medical practitioner

Registration number from the medical board of Australia (or equivalent overseas authority)



Sub No:

File No:

1914  
10/31126 Date submitted to Office by AGD: 2 SEP 2012**ATTORNEY-GENERAL AND MINISTER FOR EMERGENCY MANAGEMENT****Informing the Prime Minister and relevant Commonwealth Ministers on the proposed release of the draft Australian Government guidelines on the recognition of gender and consultation process****Deadline:** 26 September 2012.

**Key Issues:** This submission seeks your approval to letters to the Prime Minister and relevant Commonwealth Ministers informing them of the proposed release of an exposure draft of the *Australian Government Guidelines on the Recognition of Gender* (Guidelines) (**Attachment A**). The Guidelines are designed to provide clear rules on: the documentation required to verify or change a person's gender in government records; the collection and use of gender information in government services and entitlements and for statistical purposes; and the resolution of conflicts of gender between Commonwealth and State records). The submission also seeks your agreement to consult with targeted members of LGBTI stakeholders.

**AGD Analysis:** The draft Guidelines are designed to recognise, within Australian Government records, which people may identify as a gender other than the sex they were assigned at birth. They are designed to build upon DFAT's revised policy for sex and gender diverse passport applicants (the Passport Policy). The Passport Policy allows sex and/or gender diverse people to obtain a passport in their lived gender (male, female or intersex/indeterminate) upon furnishing a medical certificate, and without having sex reassignment surgery. Departments and agencies are supportive of the Guidelines.

Although detailed consultations have been held with Departments across the Government, advising all Cabinet Ministers is desirable because of the expected impact on their portfolios. Departments will have three years to implement the Guidelines once adopted. Generally departments and agencies will need to review legislative, regulatory or policy requirements relating to the collection of sex or gender information. It will also require the redesign of some paper and electronic forms and some retraining of staff may be necessary including incorporating the guidelines into diversity training where appropriate. The draft letters request comments on the Guidelines by Wednesday 10 October 2012 to allow time for consideration before consulting with the stakeholders.

We also propose that you agree to early consultations between the Department and targeted members of LGBTI stakeholders on the draft guidelines prior to their public release to validate the approach taken in the drafting. We will brief you on the Ministers' response if necessary prior to the release of the exposure draft of the Guidelines.

**Financial Implications:** None.

**Sensitivities and Communications Plan:** This issue could be sensitive. The Guidelines can be wrongly confused as relevant to the same-sex marriage debate. However this can be managed with clear messaging. AGD has consulted broadly within Government. The Passport Policy received wide support across the sex and/or gender diverse community but otherwise very limited media coverage. We will liaise with your Office to launch the public consultation process. Six weeks of community consultation will be undertaken.

## Background

Background information on this proposal was provided in Sub No. 0390 (**Attachment B**). An updated implementation timeline for this project is **Attachment C**.

2. *Legal Recognition of change of sex:* A nationally consistent approach to changing sex has been on the Standing Committee of Law and Justice agenda since 2009. In December 2010, the issue was referred to NJCEOs for consideration but has not been prioritised on the agenda. Once an agreed Commonwealth approach to the recognition of sex and gender is finalised, it is proposed that the Guidelines will be discussed at SCLJ with a view to seeking agreement on a national approach.

## Consultation

3. Internal: Identity Security Branch, Marriage and Inter-country Adoption Branch, Office of Corporate Counsel.

4. External: AGD has consulted broadly within Government within the following agencies: AFP, Customs, CrimTrac, AusCheck, PM&C, APSC, DFAT, Defence, DIAC, Veteran's Affairs, Human Services (Medicare, Centrelink and Child Support Agency), FaHCSIA, Health, ATO, ABS, AEC. A summary of agency comments is **Attachment D**. Other departments and agencies, particularly DFAT, are broadly supportive, but many noted the need to update administrative processes, regulations and legislation. The Guidelines provide agencies three years to comply. The Australian Electoral Commission has raised concerns with the compatibility of the Guidelines with electoral laws. We have received legal advice confirming such concerns are misplaced, and will follow this up bilaterally with the AEC.

Advice Rating	1	2	3	4	5	Comments
Timeliness						
Presentation						
Quality of Advice						
	Poor		Satisfactory		Excellent	

## ATTACHMENTS:

5. **Attachment A** - Australian Government guidelines on the recognition of gender; **Attachment B** – Sub No. 0390; **Attachment C** – Gender Identity Implementation Timeline; **Attachment D** – Summary of department and agency comments.



Australian Government  
Attorney-General's Department

Sub No:

1587

File No:

10/18084-04 Min No: AG-MC11/08983

23 AUG 2011

## ATTORNEY-GENERAL

## Change to DFAT's passport policy for sex and/or gender diverse Australians

**Deadline:** Minister Rudd's letter is a Priority B and is marked for response

**Key Issues:** Minister Rudd is seeking your endorsement to change DFAT's passport policy for sex and/or gender diverse Australians (**Attachment A**) due to your responsibility for identity security and marriage, and your role in developing a consistent Commonwealth approach to gender identity issues.

DFAT intends to introduce a policy, based on the US model, where applicants provide a medical certificate stating that appropriate clinical treatment has commenced in order to obtain a passport in their preferred gender (which is listed as sex on the passport). DFAT also intends for this policy to apply to intersex people, who identify as a different gender to that listed on their birth certificate, including no gender.

**AGD Analysis:** DFAT's current policies for sex and/or gender diverse Australians are disjointed and ambiguous. Currently, DFAT's standard practice is to require applicants to obtain a birth certificate from a Registry of Births, Deaths and Marriages (RBDM), or a citizenship certificate from DIAC, that reflects their preferred gender when applying for a passport. Ordinarily, RBDMs and DIAC will only amend a certificate if a person has undergone full sex affirmation surgery and if they are unmarried (ACT is the exception). As a consequence, some members of the sex and/or gender diverse community are unable to have their preferred gender legally recognised on their birth certificate and passport. Following several successful challenges to the Australian Human Rights Commission (AHRC) and the Administrative Appeals Tribunal (AAT), DFAT has introduced medical and marriage exceptions policies, which allow people who cannot have surgery for medical reasons, or wish to remain married, to have their passport application considered on a case-by-case basis.

DFAT's new policy will simplify and streamline the process for people wishing to obtain a passport in their preferred gender. It will reduce the administrative burden currently associated with passport applications from sex and/or gender diverse Australians and will likely result in fewer complaints to AHRC and AAT. The new policy is consistent with the Government's commitment to remove discrimination on the basis of a person's gender identity. It also supports the Department's work in developing and implementing the Commonwealth's approach to AHRC's *Sex Files* report. From a security perspective, it will better ensure that a person's passport reflects their physical appearance and is consistent with their 'social footprint'.

While this policy will only affect a very small group of people, it will dramatically improve their quality of life. It will allow them to travel freely (without safety concerns), and participate more fully in life, comparable with other Australian citizens.

**Financial Implications:** None.

**Sensitivities and Communications Plan:** Being Drafted; We recommend issuing a joint media release with Minister Rudd.

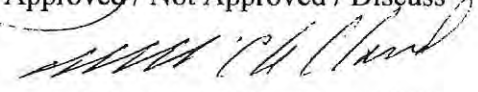
**Recommendation:** I recommend that you sign the letter to Minister Rudd (**Attachment B**) endorsing DFAT's new passport policy for sex and/or gender diverse Australians.

Approved / Not Approved / Discuss

  
Matt Hall

Assistant Secretary, Human Rights Policy Branch

s 22 excluded by agreement

  
Attorney-General

19/8/2011

21/8/2011

Action Officer: s 22 excluded by agreement



## **Background**

### *Terminology:*

2. The terms 'sex' and 'gender' are often used interchangeably, but they have different meanings. 'Sex' is generally understood to refer to a person's biological sex, whereas 'gender' refers to outward social markers of gender such as dress, mannerisms and name etc. A person's sex and gender are not always the same.
3. We use the term 'sex and/or gender diverse' to recognise people who do not fall within traditional binary notions of sex (male and female). This includes people who identify as a different gender to their birth sex. This group of people is often referred to as transgender or transsexual. There are also people who are born not exclusively male or female and are intersex. Some intersex people are assigned a sex at birth (by their doctors and parents), but later identify as another gender. There are also some intersex people who identify as neither male nor female.

### *Government approach to the issues raised in the Sex Files report:*

4. In SB10/3327, you approved the Commonwealth's overall approach to AHRC's *Sex Files* report. This includes developing national guidelines for the collection of sex and gender information, and developing a nationally consistent approach to legal change of sex. The new DFAT passport policy can be seen as the Government taking a leadership role in relation to legal change of sex.

## **Consultation**

5. The Identity Security Branch (AGD) supports the policy. Recognising gender in a passport would reduce disparity between information held in a passport and the individual legitimate passport holder when individuals physically present themselves for a passport check. This will result in an improvement in the integrity of the passport checking process.
6. The Marriage and Inter-country Adoption Branch (AGD) advise that DFAT's new policy may have unintended implications for marriage policy. Currently, when applying to get married, an Australian passport can be used as proof of identity (with other supporting documents), but it cannot be used as proof of place and date of birth. There is concern that DFAT's new passport policy may result in more people holding conflicting documents (eg. a male passport and a female birth certificate). MICAB advise that it would be difficult for a marriage celebrant to solemnise a marriage if a person presented conflicting documents.
7. To resolve this situation, the Department recommends advising marriage celebrants to disregard a person's Australian passport if the sex listed on their passport is inconsistent with the sex listed on their birth certificate. This would prevent DFAT's new policy having any impact on marriage.

## **Sensitivities and Communication Plan**

8. DFAT consulted with the sex and/or gender diverse community on this policy and they support it. The Department will work with DFAT to draft a joint media release.



ATTORNEY-GENERAL  
THE HON ROBERT McCLELLAND MP

02 SEP 2011

AG-MC11/08983

The Hon Kevin Rudd MP  
Minister for Foreign Affairs  
Parliament House  
CANBERRA ACT 2600

Dear <sup>Kevin</sup> Minister

Thank you for your letter dated 28 July 2011 seeking my endorsement to change Australia's passport policy for sex and/or gender diverse Australians.

I am pleased to support this new policy. I believe this policy will simplify and streamline the process for people wishing to obtain a passport in their preferred gender, and is consistent with the Government's commitment to removing discrimination on the basis of a person's sexual orientation and gender identity.

I note the possible implications of the new policy for marriage celebrants. As you suggest, my Department is considering providing guidance to marriage celebrants about the primacy of a person's birth certificate where there is an inconsistency with a person's passport, for the purpose of determining the sex of a person intending to marry.

I appreciate you passing on feedback from the sex and/or gender diverse community regarding the Government's approach to the issues raised in the *Sex Files* report. As you may be aware, I wrote to members of the sex and/or gender diverse community earlier this year to update them on the Government's approach to the report.

The report makes several recommendations relating to the collection and recording of sex and gender information in government records. To address these issues, my Department is coordinating a review of how and why the Australian Government collects sex and gender information. The review is currently underway and has been sent to the Australian Passport Office for input. It is likely that the review will be used to inform the development of national guidelines to ensure sex and gender information is collected consistently across government and only where there is a legitimate purpose.

The report also has a strong focus on the process for legally changing sex. While this is largely an issue for the States and Territories given their responsibility for their respective Registries of Births, Deaths and Marriages, my Department is working with State and Territory agencies to consider this issue in the interests of developing a nationally consistent approach to change of sex. The aim of this work is to create a harmonised system which addresses the needs of the sex and/or gender diverse community while ensuring the integrity

of government records. I believe the new passport policy for sex and/or gender diverse Australians demonstrates the Government's leadership role in relation to the legal change of sex.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Robt McClelland', written in a cursive style.

Robert McClelland

**From:** s 47F(1) (OII Australia)  
**To:** [Sex and Gender](#)  
**Cc:** s 22 excluded by agreement ; s 22 excluded by agreement ; s 22 excluded by agreement  
**Subject:** Re: Australian Government Guidelines on the Recognition of Sex and Gender - CONSULTATION OPEN  
[SEC=UNCLASSIFIED]  
**Date:** Saturday, 6 April 2013 10:14:16 AM  
**Attachments:** [OII-GenderRecResponse.pdf](#)  
[ATT00001.txt](#)

---

Many thanks for circulating the gender recognition guidelines. s 47G(1)(a)

Please find our submission attached.

kind regards

s 47F(1)  
Secretary, OII Australia

**From:** s 22 excluded by agree  
**To:** [Sex and Gender](#)  
**Cc:** s 22 excluded by agreement  
**Subject:** Submission by the Australian Human Rights Commission [SEC=UNCLASSIFIED]  
**Date:** Friday, 26 April 2013 2:48:21 PM  
**Attachments:** [image001.jpg](#)  
[AHRC submission to AGD re Gender Guidelines -April 2013.pdf](#)

---

Dear s 22 excluded by agreement ,

Please see the email below and attachment from s 22 excluded by agreement

Kind regards,

s 22 excluded by agreement  
Policy/Research Officer  
Scrutiny and Evaluation Team & Civil and Political Rights Team  
**Australian Human Rights Commission**

Level 5, 175 Pitt St, Sydney NSW 2000  
GPO Box 5218, Sydney NSW 2001  
**T** s 22 excluded by agreement  
**E** s 22 excluded by agreement @humanrights.gov.au **W** [www.humanrights.gov.au](http://www.humanrights.gov.au)  
**Human rights: everyone, everywhere, everyday**

---

**From:** s 22 excluded by agreement  
**Sent:** Thursday, 25 April 2013 5:41 PM  
**To:** s 22 excluded by agreement  
**Subject:** Submission by the Australian Human Rights Commission [SEC=UNCLASSIFIED]

Dear s 22 excluded by agreement

I attach the Commission's submission to the Attorney-General's Department Consultation on the Gender Guidelines. Thank you for the extension granted by s 22 excluded by agreement .

Please contact me if you have any questions.

Kind regards  
s 22 excluded by agreement  
Senior Policy Officer  
Sexual Orientation, Sex and Gender Identity Team

**Australian Human Rights Commission**  
Level 3, 175 Pitt St, Sydney NSW 2000  
GPO Box 5218, Sydney NSW 2001  
**T** s 22 excluded by agreement  
**E** s 22 excluded by agreement @humanrights.gov.au  
**W** [www.humanrights.gov.au](http://www.humanrights.gov.au)  
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## ***Twenty Years: Twenty Stories***

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Australian  
Human Rights  
Commission

# Australian Government Guidelines on the Recognition of Gender: Consultation Draft

April 2013

**AUSTRALIAN HUMAN RIGHTS COMMISSION SUBMISSION TO THE  
ATTORNEY-GENERAL'S DEPARTMENT**

ABN 47 996 232 602  
Level 3, 175 Pitt Street, Sydney NSW 2000  
GPO Box 5218, Sydney NSW 2001  
General enquiries 1300 369 711  
Complaints info line 1300 656 419  
TTY 1800 620 241

Australian Human Rights Commission  
[www.humanrights.gov.au](http://www.humanrights.gov.au)

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## 1 Introduction

1. The Australian Human Rights Commission makes this submission to the Attorney-General's Department consultation on the *Australian Government Guidelines on the Recognition of Sex and Gender Consultation Draft* (Guidelines).
2. The Guidelines are a response to the Commission's *Sex Files* concluding paper. The Commission commends the Australian Government for introducing a reform which will make it easier for individuals to have their sex and/or gender recognised by the Government. In conjunction with the introduction of the Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Bill 2013 (Cth) (SDA Bill), the Guidelines represent an important step forward for people discriminated against on the basis of their gender identity or because they are intersex.

## 2 Summary

3. In 2009 the Commission consulted on the legal recognition of sex and gender in official documents and government records. The consultation revealed that there are significant limitations in the way that official documents and government records record sex and gender. The result of the consultation was the *Sex Files* concluding paper which included 15 recommendations.
4. These recommendations included that the 'federal government should consider the development of national guidelines concerning the collection of sex and gender information from individuals'.<sup>1</sup> The Commission is encouraged to see the Government develop the Guidelines in response to this recommendation. The Commission supports the adoption of the Guidelines.
5. The Commission also considers that the federal government should take a strong leadership role in ensuring the processes and criteria throughout Australia are consistent, streamlined and fair for people who wish to change their legal sex or gender. The implementation of the Commonwealth's approach in the Guidelines will assist in this process.
6. The Commission strongly supports the Guidelines. In particular the Commission is encouraged to see that the Guidelines:
  - provide for individuals to be recognised as neither male nor female
  - do not require surgery as a criterion for being recognised as a particular gender
  - do not include marital status as a criterion for changing gender information on government records
  - provide for consistency across the Australian Government.

7. The Commission encourages the Government to consider some further options to strengthen the effectiveness and accessibility of the Guidelines.

### **3 Recommendations**

8. The Australian Human Rights Commission recommends that:
  - The Australian Government Guidelines on the Recognition of Gender be adopted and enter into force by 1 July 2013 **[Recommendation 1]**.
  - The Government use the Guidelines as a platform for developing a nationally consistent approach to the legal recognition of sex and/or gender with state and territory governments **[Recommendation 2]**.
  - Individuals not be required to select a personal title which is inconsistent with their sex or gender **[Recommendation 3]**.
  - Evidence from Registered Psychologists certifying an individual's sex or gender should satisfy the requirements of the Guidelines **[Recommendation 4]**.
  - The Guidelines be more explicit on the legitimate reasons why individuals may have conflicting records of gender **[Recommendation 5]**.
  - The Guidelines refer to the collection of sex and gender-disaggregated data in paragraph 24 and clarify that this data should continue to be collected where it is necessary for the ongoing monitoring of equality between men and women **[Recommendation 6]**.
  - The Guidelines reference the Commission as a mechanism for enquiries and complaints about gender identity and intersex discrimination, subject to the passage of the SDA Bill **[Recommendation 7]**.
  - The Guidelines include a requirement for departments and agencies to provide an implementation report after 18 months **[Recommendation 8]**.
  - The Guidelines include a requirement that departments and agencies provide clear and accessible information on their website about how sex and/or gender can be amended in government records and documents **[Recommendation 9]**.

### **4 The Sex Files Report**

9. In 2009 the Commission consulted on the legal recognition of sex and gender in official documents and government records. The consultation

revealed that there are significant limitations in the way that official documents and government records record sex and gender. The result of the consultation was the *Sex Files* concluding paper which included 15 recommendations.

10. These recommendations included that the 'federal government should consider the development of national guidelines concerning the collection of sex and gender information from individuals'.<sup>2</sup> The Commission is encouraged to see the Government develop the Guidelines in response to this recommendation. The Commission supports their adoption.
11. **The Commission recommends that the Australian Government Guidelines on the Recognition of Gender be adopted and enter into force by 1 July 2013 [Recommendation 1].**
12. The Guidelines are consistent with the Government's commitment in the *National Human Rights Action Plan 2012* (Action Plan).<sup>3</sup> In the Action Plan the Government also committed to 'work with the states and territories to develop a nationally consistent approach to legally changing sex'.<sup>4</sup> This is also in response to the *Sex Files* recommendations.<sup>5</sup> The Commission considers that the federal government should take a strong leadership role in ensuring the processes and criteria throughout Australia are consistent, streamlined and fair for people who wish to change their legal sex. A national approach is necessary given the complexities and inconsistencies across, and between, federal and state and territory governments. The implementation of the Guidelines will assist in this process.
13. **The Commission recommends that the Government use the Guidelines as a platform for developing a nationally consistent approach to the legal recognition of sex and/or gender with state and territory governments [Recommendation 2].**

## 5 Human rights and the recognition of intersex and gender identity

14. There is no separate international human rights agreement that deals specifically with gender identity and intersex, however all people have the same human rights regardless of their gender identity or because they are intersex. The Commission outlines relevant human rights standards in the *Sex Files* concluding paper.<sup>6</sup>
15. The Yogyakarta Principles provide specific guidance on how these standards should be interpreted in relation to the protection of gender identity.<sup>7</sup> While not legally binding they are persuasive in shaping our understanding of how existing binding human rights obligations apply and relate to people who are sex and gender diverse.
16. In particular, Yogyakarta Principle 3 outlines the right to recognition before the law for all people regardless of gender identity:

Everyone has the right to recognition everywhere as a person before the law. Persons of diverse sexual orientations and gender identities shall enjoy legal capacity in all aspects of life. Each person's self-defined sexual orientation and gender identity is integral to their personality and is one of the most basic aspects of self-determination, dignity and freedom. No one shall be forced to undergo medical procedures, including sex reassignment surgery, sterilisation or hormonal therapy, as a requirement for legal recognition of their gender identity. No status, such as marriage or parenthood, may be invoked as such to prevent the legal recognition of a person's gender identity. No one shall be subjected to pressure to conceal, suppress or deny their sexual orientation or gender identity.

17. In addition, Yogyakarta Principle 3 details actions that countries such as Australia should undertake to ensure they are not in breach of their human rights obligations. These include taking all necessary legislative, administrative and other measures to ensure that procedures exist whereby all government-issued identity papers which indicate a person's gender/sex – including birth certificates, passports, electoral records and other documents – reflect the person's profound self-defined gender identity. The Commission is encouraged to see the Government's steps in this regard.

## 6 The Guidelines

18. The Commission strongly supports the development of the Guidelines. The Commission is particularly encouraged to see that the Guidelines:
  - provide for individuals to be recognised as neither male nor female
  - do not require surgery as a criterion for being recognised as a particular gender
  - do not include marital status as a criterion for changing gender information on government records
  - provide for consistency across the Australian Government.
19. The Commission encourages the Government to consider some further options to strengthen the effectiveness and accessibility of the Guidelines.

### 6.1 Sex and Gender Classification

20. Most personal titles, such as Mr and Mrs, are gendered to correspond with either 'male' or 'female'. Given the option within the Guidelines to be recognised as X (Intersex/Indeterminate/Unspecified), and that the collection of sex/gender data is not always required, the Guidelines could be amended to include guidance for departments and agencies that it may not be appropriate to require individuals to select from a list of possible titles which may be inconsistent with their sex or gender. Instead, individuals could self-nominate a title or remain silent. This is

particularly important in electronic forms which often includes 'title' as a mandatory field.

21. **The Commission recommends that individuals not be required to select a personal title which is inconsistent with their sex or gender [Recommendation 3].**

## **6.2 Proof of Sex and Gender**

22. In addition to registered medical practitioners, the Government should give consideration to broadening the category of medical professionals who are able to provide evidence certifying the sex and/or gender of an applicant to include Registered Psychologists. This is because psychological counselling concerning sex or gender identity should satisfy the criteria for sex affirmation.<sup>8</sup>
23. **Evidence from Registered Psychologists certifying an individual's sex or gender should satisfy the requirements of the Guidelines [Recommendation 4].**
24. As identified in the footnote to paragraph 21 of the Guidelines, there may be legitimate reasons why people may hold a passport in a gender which is different to that on other government records. This may be because of safety reasons or because of difficulties posed with travelling across borders.<sup>9</sup> Particularly during the implementation phase of the Guidelines it may be helpful to also include this point in the body of the Guidelines as an education tool for public servants.
25. **The Commission recommends that the Guidelines be more explicit on the legitimate reasons why individuals may have conflicting records of gender [Recommendation 5].**

## **6.3 Collecting Sex and Gender Information**

26. The Commission welcomes the specific recognition in the Guidelines that collecting and maintaining gender-disaggregated data is crucial to the ongoing monitoring of equality between men and women. This is consistent with Australia's obligations under the *Convention on the Elimination of All Forms of Discrimination against Women* (CEDAW). However the Guidelines should clarify that the data to be collected for CEDAW purposes should be 'sex and gender-disaggregated data'. Further, as an educative tool for public servants the Guidelines should clarify that departments and agencies should continue to collect this data where it is necessary for the ongoing monitoring of equality between men and women.
27. **The Commission recommends that the Guidelines refer to the collection of sex and gender-disaggregated data in paragraph 24 and clarify that this data should continue to be collected where it is necessary for the ongoing monitoring of equality between men and women [Recommendation 6].**



## 6.4 Queries and complaints

28. Subject to the passage of the SDA Bill the Guidelines could be amended to refer to the Commission as a mechanism to accept enquiries or complaints about alleged discrimination on the basis of gender identity or intersex status under the SDA.
29. **The Commission recommends that the Guidelines reference the Commission as a mechanism for enquiries and complaints about gender identity and intersex discrimination under the SDA, subject to the passage of the SDA Bill [Recommendation 7].**

## 6.5 Implementation

30. The Commission acknowledges that a certain period of time is necessary for government departments and agencies to update policies and systems to reflect the Guidelines. To ensure ongoing implementation within departments and agencies, an implementation report to the Attorney-General's Department after 18 months may be beneficial.
31. **The Commission recommends the Guidelines include a requirement for departments and agencies to provide an implementation report to the Attorney-General's Department after 18 months [Recommendation 8].**
32. The Commission supports the Guidelines as a tool for standardising the collection and recognition of sex and gender across government departments and agencies, and as a tool for educating public servants. In addition to this the Commission recommends that paragraph 40 be expanded to specifically require these departments and agencies to provide clear and accessible information to the public about how individuals can amend their gender in government documents.<sup>10</sup>
33. **The Commission recommends the Guidelines include a requirement that departments and agencies provide clear and accessible information on their website about how sex and/or gender can be amended in government records and documents [Recommendation 9].**

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<sup>1</sup> Australian Human Rights Commission, *The sex and gender diversity project: Concluding paper* (2009), rec 10. At <http://www.humanrights.gov.au/sex-files-legal-recognition-concluding-paper-sex-and-gender-2009> (viewed 18 April 2013).

<sup>2</sup> Australian Human Rights Commission, above.

<sup>3</sup> Australian Government, *National Human Rights Action Plan* (2012), item 209. At <http://www.ag.gov.au/Consultations/Pages/NationalHumanRightsActionPlan.aspx> (viewed 8 April 2013).

<sup>4</sup> Australian Government, *National Human Rights Action Plan*, above, item 208.

<sup>5</sup> Australian Human Rights Commission, note 1, rec 11.

<sup>6</sup> Australian Human Rights Commission, above, pp 11-12. Also see Australian Human Rights Commission, *Protection from discrimination on the basis of sexual orientation and sex and/or gender identity* (2011), pp 7-8. At

<http://www.humanrights.gov.au/publications/consultation-protection-discrimination-basis-sexual-orientation-and-sex-and-or-gender> (viewed 18 April 2013).

<sup>7</sup> *The Yogyakarta Principles: Principles on the application of international human rights law in relation to sexual orientation and gender identity* (2007). At <http://www.ypinaction.org/> (viewed 22 April 2013).

<sup>8</sup> See Australian Government, *Australian Government Guidelines on the Recognition of Gender (Consultation Draft)* (2013), para 20. Also see Australian Human Rights Commission, note 1, p 31.

<sup>9</sup> See for example Australian Human Rights Commission, above, s 8.2.

<sup>10</sup> Also see Australian Government, *The sex and gender diversity project: Concluding paper* (2009), rec 15. At

<http://www.humanrights.gov.au/sex-files-legal-recognition-concluding-paper-sex-and-gender-2009> (viewed 18 April 2013).





**Please attach gender recognition guidelines to letter to PM and letter to MFA prior to sending. Contact Action Officer for more info if required**

Sub No: AG-SB2013/0854

Date submitted to Office by AGD: 14 MAY 2013

File No: 12/15801

Min No:

**ATTORNEY-GENERAL AND MINISTER FOR EMERGENCY MANAGEMENT****Australian Government Guidelines on the Recognition of Sex and Gender – finalisation and approval**

**Deadline:** Monday 20 May 2013 to ensure Prime Ministers approval in time for announcement on 29 May and commencement on 1 July 2013. Michael Cook in your office is aware of the short deadline.

**Key Issues:** Public consultation on the Australian Government Guidelines on the Recognition of Sex and Gender (the Guidelines) closed on 19 April 2013. With the exception of one, submissions received were supportive and welcomed the Guidelines. This submission seeks your approval of the final version of the Guidelines for transmission to the Prime Minister for her approval.

**AGD Analysis:** A number of small changes have been made to the final draft (**Attachment A**) to reflect feedback received. The majority of these changes are editorial or designed to clarify meaning.

The Guidelines attached also include text based on the introduction of the Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Bill 2013. If the Bill passes Parliament, this text will be updated before the Guidelines are publicly circulated. The Department foresees it will make similar minor routine editorial updates to the Guidelines as required in the future without seeking further approval.

A letter to the Prime Minister seeking her approval of the Guidelines is attached for your signature (**Attachment B**).

The Department does propose making one notable change to Guidelines before the commencement date which is not yet in the attached draft. The Guidelines stipulate medical certificates affirming sex or gender status can be provided only by medical practitioners registered with the Medical Board of Australia. On the basis of the submissions received, we propose to extend this group to include psychologists registered with the Psychology Board of Australia.

The purpose of the certificates is to affirm gender identity in line with a person's social footprint, rather than mandate specific clinical treatment. The Department is of the view that the registration processes psychologists are subject to and the clinical services they provide to the intersex, transgender and gender diverse community means they are adequately qualified to provide evidence of gender identity. It also addresses concerns that people may not be able to access a doctor who is aware of and sensitive to intersex, transgender and/or gender diverse issues. For the purposes of the Guidelines, the processes of registration for psychologists with the Psychology Board of Australia offer equal safeguards as the process of registration of medical practitioners with the Medical Board of Australia. Psychologists must apply for registration annually and maintain specific professional standards. Most importantly, like medical practitioners, psychologists receive a registration number which is verifiable with the Psychology Board of Australia.

This change is supported by the ID Security Branch in the Department. It is also important the Guidelines are consistent with the Australian passports policy for sex and gender diverse applicants. The Passports Office at the Department of Foreign Affairs and Trade has confirmed they are not opposed to the inclusion, subject to further policy work to ensure there are no adverse consequences. Should you support this change, we have included a letter (**Attachment C**) to the Minister for Foreign Affairs seeking his agreement to change the passports policy to also accept certificates from a registered psychologist. Should he agree, we will update the Guidelines to include psychologists before the commencement date of 1 July 2013. This proposed change is also reflected in the letter to the Prime Minister seeking her approval.



**Financial Implications:** None

**Sensitivities and Communications Plan:** Being Drafted

**Recommendation:** I recommend you

1. APPROVE the final draft of the Australian Government Guidelines on the Recognition of Sex and Gender (**Attachment A**)

Approved / Not Approved / Discuss

2. SIGN the letter transmitting the final draft of the Guidelines to the Prime Minister for approval (**Attachment B**)

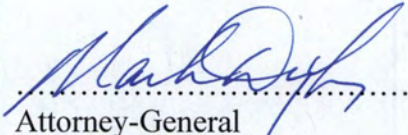
Signed / Not Signed / Discuss

3. APPROVE amendments to the Guidelines allowing registered psychologists to provide evidence of gender identity, subject to agreement with the Prime Minister and the Minister for Foreign Affairs, and

Approved / Not Approved / Discuss

4. SIGN the letter to the Minister for Foreign Affairs seeking his agreement to amend the passports policy for sex and gender diverse applicants to allow registered psychologists to provide evidence of gender identity (**Attachment C**).

Signed / Not Signed / Discuss

  
.....  
Attorney-General  
Minister for Emergency Management

15/5/2013

**AGD Clearance**

Greg Manning, First Assistant Secretary, Human Rights Policy Branch,  
Date Cleared:

s 22 excluded by agreement

Action Officer: s 22 excluded by agreement

Date sent for approval by AO: 02/05/2013

Branch Head: Daniel Abraham, Human Rights Policy Branch, Ph: s 22 excluded by agreement



## Background

2. In Submission AG-SB2013/0246 (**Attachment D**), you approved public consultation on the Australian Government Guidelines on the Recognition of Sex and Gender.
3. Public consultation on the Guidelines closed on 19 April 2013. Thirty six submissions were received. With the exception of one, all submissions welcomed and supported the adoption of the Guidelines. There is a list of organisations that provided submissions at **Attachment E**.
4. As identified above, a number of changes recommended in submissions received were made to ensure clarity. There were a number of recommended changes that the Department proposes not to make.

### Expanding people allowed to provide evidence of gender identity/self-identification of gender identity

A number of submissions recommended an expansion of the people able to provide evidence of gender identity and intersex status to include statutory declarations from community leaders, lawyers, allied health professionals and psychologists as well as individuals themselves. The Department is of the view that the registration processes psychologists are subject to and the services they provide to the intersex, transgender and gender diverse community means they are adequately qualified to provide evidence of gender identity. The other groups of people suggested may not be subject to the same rigorous registration process and public verification of qualifications and we recommend against expanding the policy to include them.

### Shortening the timeline for implementation

A number of submissions recommended reducing the timeframe for implementation from three to one or 1.5 years. The three year implementation period has been designed to allow departments and agencies to make the necessary changes to systems and process in the usual course of business. Departments would require additional resources to reduce this implementation period.

### Introducing a legislative base for the Guidelines

While a legislative base would make the Guidelines more enforceable and less subject to change, this is beyond the commitment made in the National Human Rights Action Plan and is not feasible in this term of Parliament. This issue could be revisited in future reviews of anti-discrimination legislation.

### Reporting framework

A number of submissions recommended the Guidelines include a reporting framework or the creation of a new body to monitor implementation. Introducing either of these suggestions would have resourcing impacts that are not supported by the Department in the current Budget climate. If the SDA Amendment Bill passes, the Australian Human Rights Commission will be able to investigate and resolve complaints of discrimination, harassment and bullying based on a person's gender identity and intersex status. This is reflected in the Guidelines.

5. As outlined in AG-SB2013/0246, adoption of the Guidelines will affect the guidance given to marriage celebrants regarding acceptable evidence of gender. As the Guidelines are a whole-of-government document, they do not address implementation issues specific to departments and agencies. However, the Human Rights Policy Branch will work closely with the Marriage and Intercountry Adoption Branch during the implementation period to ensure marriage celebrants receive clear guidance.

## Relevance to Election Commitments/Government Policy

6. The Guidelines are a commitment under the National Human Rights Action Plan and the responsibility of the Attorney-General's Department.
7. During the 2010 election, the Government committed to review documentation requirements to ensure transgender and intersex people are able to enjoy their human rights without discrimination and to promote broader identification options than male/female.

## Consultation

8. Internal—Identity Security Policy Branch, Marriage and Intercountry Adoption Branch
9. External—Australian Passports Office, Department of Foreign Affairs and Trade



### **Sensitivities and Communication Plan**

10. Once approved by the Prime Minister, the Department will prepare another submission attaching letters to your Ministerial colleagues to advise them of the commencement of the Guidelines.
11. The Department will work with your office to prepare a Communication Plan for public announcement of the Guidelines, once approved by the Prime Minister.
12. The Guidelines are likely to be well received by the intersex and transgender community as well as broader LGBTI representational groups. Australian Government Departments have been consulted throughout the development of the Guidelines. A number of departments have particularly welcomed guidance and whole of government approach to gender recognition and in many cases have begun to identify the changes they may need to make to ensure compliance.

### **ATTACHMENTS:**

**Attachment A** – Australian Government Guidelines on the Recognition of Sex and Gender – final draft

**Attachment B** – Letter to the Prime Minister re: Australian Government Guidelines on the Recognition of Sex and Gender

**Attachment C** – Letter the Minister for Foreign Affairs re: passports policy

**Attachment D** – Sub AG-SB2013/0246 re: public consultation and changes to policy for marriage celebrants

**Attachment E** – List of submissions received



# **Australian Government Guidelines on the Recognition of Sex and Gender**

***July 2013***

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## Introduction

1. The Australian Government recognises that individuals may identify and be recognised within the community as a gender other than the sex they were assigned at birth or during infancy or an indeterminate sex and/or gender, and this should be recognised and reflected in their personal records held by Australian Government departments and agencies.
2. The goal of the Guidelines is to:
  - a. develop a consistent sex and gender classification system for Australian Government records
  - b. develop a consistent standard of evidence for people to change gender or establish sex on personal records, and
  - c. maintain consistent collection of sex and gender information across Australian Government departments and agencies.
3. The Guidelines provide guidance to Australian Government departments and agencies on the collection, use and amendment of sex and gender information in individual personal records.
4. Increased consistency in the way the Australian Government collects and records sex and gender will strengthen Australia's identity security system, the integrity of agency records and the accuracy of individual personal records, in line with the Australian Government's approach to identity security.<sup>1</sup>
5. These Guidelines support the Australian Government's introduction of legal protections against discrimination on the grounds of gender identity and intersex status in Commonwealth anti-discrimination law<sup>2</sup> and the Australian Government passport policy for applicants who are sex and gender diverse.<sup>3</sup>
6. The collection, use, storage and disclosure of all personal information, including sex and gender information by departments and agencies are regulated by the Information Privacy Principles in the *Privacy Act 1988*.
7. Consistent with the Australian Public Service Values, all Australian Government departments and agencies will treat all people with dignity and respect, regardless of their sex and/or gender identity.
8. These Guidelines apply to all Australian Government departments and agencies.

## Background

9. In 2009, the Australian Human Rights Commission released *Sex Files: the legal recognition of sex in documents and government records*. The Commission recommended the Australian

<sup>1</sup> Australia's identity security framework is underpinned by the National Identity Security Strategy and associated documents. For more information please see the Attorney-General's Department website [www.ag.gov.au/identitysecurity](http://www.ag.gov.au/identitysecurity)

<sup>2</sup> The Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Bill 2013 is currently before Parliament. If passed, the *Sex Discrimination Act* (SDA) will provide protection from discrimination on the grounds of gender identity and intersex status.

<sup>3</sup> Under the passport policy for applicants who are sex and gender diverse, sex reassignment surgery is not a prerequisite to issue a passport in a new gender. Birth or citizenship certificates do not need to be amended for sex and gender diverse applicants to be issued a passport in their preferred gender. A letter from a medical practitioner certifying that the person has had, or is receiving, appropriate clinical treatment for gender transition to a new gender, is intersex and does not identify with the sex assigned to them at birth, is acceptable evidence of gender identity. A passport in a new sex may also be issued to applicants who have undergone sex reassignment surgery and have registered their change of sex with Registrars of Births, Deaths and Marriages or the Department of Immigration and Citizenship. A passport may be issued to intersex, transgender and/or gender diverse applicants in M (male), F (female) or X (indeterminate/unspecified/intersex). For more information please see the Australian Passports Office website [www.passports.gov.au/web/sexgenderapplicants.aspx](http://www.passports.gov.au/web/sexgenderapplicants.aspx).

Government consider development of national guidelines concerning the collection of sex and gender information from individuals.

10. These Guidelines have been prepared following a review of how and why Australian Government departments and agencies collect sex and gender information from members of the public.

## ***Sex and Gender***

11. For the purposes of these Guidelines, *sex* refers to the chromosomal, gonadal and anatomical characteristics associated with biological sex.
12. Being *intersex* is a biological condition. People who are intersex may have the biological attributes of both sexes or lack some of the biological attributes considered necessary to be defined as one or the other sex. Intersex is always congenital and can originate from genetic, chromosomal or hormonal variations.
13. *Gender* is part of a person's personal and social identity. It refers to the way a person feels, presents and is recognised within the community. A person's gender refers to outward social markers, including their name, outward appearance, mannerisms and dress.
14. A person's sex and gender may not necessarily be the same. Some people may identify as a different gender to their birth sex and some people may identify as neither male nor female. People who are intersex may identify as male or female or as neither.
15. The preferred Australian Government approach is to collect and use *gender* information. Information regarding sex would ordinarily not be required.
16. Information about people's sex should only be collected where there is a legitimate need for that information, e.g. if a service or benefit to be provided to the individual is directly related to biological sex. However, the necessity of a medical service or associated benefit should be determined by the physical need, regardless of a person's recorded sex and/or gender.
17. Departments and agencies should ensure when they collect sex and/or gender information they use the correct terminology for the information they are seeking. Please see the Key Terms section of these Guidelines for additional information.

## ***Sex and Gender Classification in Australian Government Records***

18. Where sex and/or gender information is collected and recorded in a personal record, individuals should be given the option to select M (male), F (female) or X (Indeterminate/Intersex/Unspecified).
19. This classification system is consistent with the Australian Government passports policy for applicants who are sex and gender diverse and Australian Standard AS4590 – *Interchange of client information*.<sup>4</sup>

<sup>4</sup> Standards Australia, AS4590-2006: *Australian Standard– Interchange of client information*, 2008, p 22. Available at [www.standards.org.au/](http://www.standards.org.au/)

## ***Proof of Sex and Gender/Amending Sex and Gender in Government Records***

20. Consistent with Information Privacy Principle 7,<sup>5</sup> departments and agencies must take all reasonable steps to ensure the personal information in their records is accurate. This includes a person's sex and/or gender information.
21. Where a person requests the sex and/or gender information on their personal record be amended, or where it is necessary to verify a person's sex and/or gender to confirm identity or determine eligibility for a service or entitlement, the Australian Government will recognise any one of the following as sufficient evidence of their sex and/or gender:
  - a) a medical certificate from a Registered Medical Practitioner<sup>6</sup>
  - b) valid Australian Government travel document, such as a Valid Passport, which specifies their preferred gender, or
  - c) an amended State or Territory birth certificate, which specifies their preferred gender. A State or Territory Gender Recognition Certificate or recognised details certificate showing a State or Territory Registrar of Birth Deaths and Marriages has accepted a change in sex will also be seen as sufficient evidence.
22. Sex reassignment surgery and/or hormone therapy are not pre-requisites for the recognition of a change of gender in Australian Government records.
23. Conflicts in official documents may arise for people who are intersex or transitioning from one gender to another. When departments and agencies are presented with conflicting information about a person's sex or gender, they may seek further information and supporting evidence to corroborate a person's identity or social footprint, in accordance with the Australian Government's approach to identity security.
24. Where there is conflicting gender information about a person's sex or gender on the Australian Government and State or Territory documents held by a person, the Australian Government travel document or the latest dated document will take precedence in establishing a person's gender for Australian Government purposes.
25. While individuals are encouraged to progressively ensure their documents reflect their preferred gender, there are legitimate reasons people may hold conflicting documents. For example, people who identify primarily as X may want to hold a passport in a particular gender to ensure their safety while travelling overseas.

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### **5 Information Privacy Principle 7 - Amendment of documents containing personal information**

1. An agency having control of a document containing personal information must take all reasonable steps, including by the making of an appropriate amendment, to ensure the personal information—
  - a) is accurate; and
  - b) having regard to the purpose for which it was collected or is to be used and to any purpose directly related to fulfilling the purpose, is relevant, complete, up to date and not misleading.
2. Subsection (1) applies subject to any limitation in a law of the State providing for the amendment of personal information held by the agency.
3. Subsection (4) applies if—
  - a) an agency considers it is not required to amend personal information included in a document under the agency's control in a way asked for by the individual the subject of the personal information; and
  - b) no decision or recommendation to the effect that the document should be amended wholly or partly in the way asked for has been made under a law mentioned in subsection (2).
4. The agency must, if the individual asks, take all reasonable steps to attach to the document any statement provided by the individual of the amendment asked for.

<sup>6</sup> See template at Appendix A

## ***Collecting Sex and Gender Information***

26. Consistent with Information Privacy Principle 1,<sup>7</sup> all departments and agencies that collect sex and/or gender information should closely examine whether such information is necessary to perform their specific function or for broader government statistical or administrative purposes. Where such information is not necessary, this category of information should be removed from forms or documents.
27. Collecting and maintaining sex and gender-disaggregated data is crucial to the ongoing monitoring of equality between men and women. These Guidelines are not designed to restrict departments or agencies from collecting sex and gender information where this data is necessary for the performance of their specific function, is used to inform the development of policy or delivery of services or contributes to sex and gender-disaggregated data.
28. Consistent with Information Privacy Principle 2,<sup>8</sup> where Australian Government departments and agencies are collecting sex and/or gender information, they will ensure individuals are generally aware of the purpose for which the information is being collected.
29. Where departments and agencies are collecting sex and/or gender information for a statistical or other purpose not linked with individual personal records (i.e. information is collected but not recorded in an individual record), individuals should also be given the option to select Male, Female or X (Intersex/Indeterminate/Unspecified), in line with the sex and gender classification system set out in paragraph 18.
30. Where it is necessary to verify sex or gender to confirm identity or determine eligibility for a service or entitlement, the evidence set out in paragraph 21 is sufficient proof of a person's sex or gender.
31. Departments and agencies should refrain from making assumptions about a person's sex or gender identity based on indicators such as their name, voice or appearance.

## ***Privacy and Retaining Records of Previous Sex and/or Gender***

32. The strict controls contained in Information Privacy Principles 10<sup>9</sup> and 11<sup>10</sup> relating to the use and disclosure of personal information possessed or controlled by a department or agency,

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### **7 Information Privacy Principle 1 - Manner and purpose of collection of personal information**

1. Personal information shall not be collected by a collector for inclusion in a record or in a generally available publication unless:

- a) the information is collected for a purpose that is a lawful purpose directly related to a function or activity of the collector; and
- b) the collection of the information is necessary for or directly related to that purpose.

2. Personal information shall not be collected by a collector by unlawful or unfair means.

### **8 Information Privacy Principle 2 - Solicitation of personal information from individual concerned**

Where:

- a) a collector collects personal information for inclusion in a record or in a generally available publication; and
- b) the information is solicited by the collector from the individual concerned; the collector shall take such steps (if any) as are, in the circumstances, reasonable to ensure that, before the information is collected or, if that is not practicable, as soon as practicable after the information is collected, the individual concerned is generally aware of:
  - c) the purpose for which the information is being collected;
  - d) if the collection of the information is authorised or required by or under law - the fact that the collection of the information is so authorised or required; and
  - e) any person to whom, or any body or agency to which, it is the collector's usual practice to disclose personal information of the kind so collected, and (if known by the collector) any person to whom, or any body or agency to which, it is the usual practice of that first mentioned person, body or agency to pass on that information.

### **9 Information Privacy Principle 10 - Limits on use of personal information**

1. A record-keeper who has possession or control of a record that contains personal information that was obtained for a particular purpose shall not use the information for any other purpose unless:

- a) the individual concerned has consented to use of the information for that other purpose;

apply to information relating to a person's sex and/or gender as they do to all other forms of personal information.

33. To protect identity security in line with the Australian Government's approach to identity security, departments and agencies should ensure the continuity of the record of an individual's identity. Only one record should be made or maintained for an individual, regardless of a change in gender or other change in personal identity.
34. Consistent with Information Privacy Principle 4,<sup>11</sup> to protect the privacy of an individual who has changed their sex and/or gender on Australian Government records, departments and agencies should ensure an individual's history of changes of sex, gender or name is subject to appropriate security controls and is recorded and accessed only when the person's history is relevant to a decision being made.

### *Queries and Complaints*

35. Where information about a person's sex and/or gender is unclear, the department or agency should communicate directly with the individual to resolve the issue.
36. Departments and agencies should record and monitor complaints or queries made relating to the recording of sex and/or gender information in order to assess the success of policy changes and inform future policy in this area.
37. Departments and agencies should use the information from the monitoring of complaints to address concerns and amend relevant policies.
38. The Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Bill 2013 will allow the Australian Human Rights Commission to investigate and resolve complaints of discrimination, harassment and bullying based on a person's gender identity and intersex status. This Bill is currently before Parliament. Should it pass, individuals concerned

- 
- b) the record-keeper believes on reasonable grounds that use of the information for that other purpose is necessary to prevent or lessen a serious and imminent threat to the life or health of the individual concerned or another person;
  - c) use of the information for that other purpose is required or authorised by or under law;
  - d) use of the information for that other purpose is reasonably necessary for enforcement of the criminal law or of a law imposing a pecuniary penalty, or for the protection of the public revenue; or
  - e) the purpose for which the information is used is directly related to the purpose for which the information was obtained.

#### **10 Information Privacy Principle 11 - Limits on disclosure of personal information**

1. A record-keeper who has possession or control of a record that contains personal information shall not disclose the information to a person, body or agency (other than the individual concerned) unless:
  - a) the individual concerned is reasonably likely to have been aware, or made aware under Principle 2, that information of that kind is usually passed to that person, body or agency;
  - b) the individual concerned has consented to the disclosure;
  - c) the record-keeper believes on reasonable grounds that the disclosure is necessary to prevent or lessen a serious and imminent threat to the life or health of the individual concerned or of another person;
  - d) the disclosure is required or authorised by or under law; or
  - e) the disclosure is reasonably necessary for the enforcement of the criminal law or of a law imposing a pecuniary penalty, or for the protection of the public revenue.
2. Where personal information is disclosed for the purposes of enforcement of the criminal law or of a law imposing a pecuniary penalty, or for the purpose of the protection of the public revenue, the record-keeper shall include in the record containing that information a note of the disclosure.
3. A person, body or agency to whom personal information is disclosed under clause 1 of this Principle shall not use or disclose the information for a purpose other than the purpose for which the information was given to the person, body or agency.

#### **11 Information Privacy Principle 4 - Storage and security of personal information**

A record-keeper who has possession or control of a record that contains personal information shall ensure:

- a) that the record is protected, by such security safeguards as it is reasonable in the circumstances to take, against loss, against unauthorised access, use, modification or disclosure, and against other misuse; and
- b) that if it is necessary for the record to be given to a person in connection with the provision of a service to the record-keeper, everything reasonably within the power of the record-keeper is done to prevent unauthorised use or disclosure of information contained in the record.

about discrimination may be referred to the Complaints Information Service on 1300 656 419, 02 9284 9888, 1800 620 241 (TTY toll free) or the Commission's website [www.humanrights.gov.au/complaints-information](http://www.humanrights.gov.au/complaints-information) for information on how to make a discrimination complaint.

39. Individuals concerned about breaches of privacy may be referred to the Office of the Australian Information Commissioner (OAIC) on 1300 363 992 or directed to the Office's website - [www.oaic.gov.au](http://www.oaic.gov.au) – which has useful information on how to make a privacy complaint.

## ***Commencement and Implementation***

40. These Guidelines will come into force on 1 July 2013. All Australian Government departments and agencies will progressively align their existing and future business practices with these Guidelines by 1 July 2016.
41. Implementing these Guidelines requires departments and agencies to undertake a review of legislative, regulatory or policy requirements relating to the collection of sex and/or gender information and amend these as required to ensure compliance. This includes information collected and records kept by departments and agencies as employers. Where there is no legislative or regulatory authority or policy or business need for the information, the requirement should be removed within three years.
42. Implementation will also require the redesign of paper and electronic forms. Departments and agencies should pay particular attention to the use of titles in forms and personal records. It may be necessary to retrain staff to use updated forms and systems.
43. Departments and agencies that engage with members of the public on a regular basis should implement policies to uphold the Guidelines, including developing training for front-line staff relating to terminology, definitions and sensitivities associated with the intersex, transgender and/or gender diverse community. The Guidelines should also be incorporated into diversity training.
44. Departments and agencies that engage with members of the public on a regular basis should also provide clear and accessible information on how sex and/or gender information can be changed on personal records in line with the Guidelines on their website or other media as appropriate.
45. Departments and agencies that do not currently have any policies in place to assist staff in managing relationships between the organisation and members of the intersex, transgender and/or gender diverse community should develop such policies, including appropriate references to the Guidelines.
46. Where departments and agencies are jointly responsible with the States and Territories for the maintenance and record of individuals' information, including sex and/or gender, those agencies will work with the States and Territories to seek their agreement to implement these Guidelines.
47. Where Departments are responsible for setting policy for other departments or agencies they should work with these departments or agencies to ensure the Guidelines are reflected in policy and practice.

### ***Where to go for more information***

48. Further assistance in implementing these guidelines or understanding the issues addressed can be obtained at the Attorney-General's Department website [www.ag.gov.au/genderrecognition](http://www.ag.gov.au/genderrecognition).
49. The Attorney-General's Department welcomes feedback on these Guidelines. You can provide feedback via email on [SexandGender@ag.gov.au](mailto:SexandGender@ag.gov.au).

## ***Key Terms***

*Please note there may be multiple or different definitions of the following terms. The following definitions have been provided for the purposes of these Guidelines*

### ***Gender/preferred gender***

Gender is part of a person's social and personal identity. It refers to each person's deeply felt internal and individual identity and the way a person presents and is recognised within the community. A person's gender refers to outward social markers, including their name, outward appearance, mannerisms and dress. A person's sex and gender may not necessarily be the same. An individual's preferred gender may or may not correspond with the sex or gender assigned at birth and some people may identify as neither male nor female.

### ***Gender Diverse***

The term 'gender diverse' is used to recognise people who do not fall within the traditional binary notions of sex and gender (male and female). This may include people who identify as a gender different to their birth sex or as neither male or female. Other terms commonly associated with sex and/or gender diverse people include trans, transgender, transsexual, gender queer, pan-gendered, androgynous and inter-gender. Some cultures may have their own terms for gender identities outside male and female.

### ***Indeterminate***

A person of indeterminate sex or gender is someone whose biological sex cannot be unambiguously determined or someone who identifies as neither male nor female.

### ***Information Privacy Principles***

Section 14 of the *Privacy Act 1988* (Cth) contains the Information Privacy Principles which apply to Australian government departments and agencies.

### ***Intersex***

An intersex person may have the biological attributes of both sexes or lack some of the biological attributes considered necessary to be defined as one or the other sex. Intersex is always congenital and can originate from genetic, chromosomal or hormonal variations. Environmental influences such as endocrine disruptors can also play a role in some intersex differences.

### ***Medical certificate***

A medical certificate signed by a Registered Medical Practitioner in the prescribed form at Appendix A.

### ***Registered Medical Practitioner***

Registered medical practitioners may specialise in various medical fields including, but not limited to, surgeons, urologists, gynaecologists, endocrinologists, psychiatrists and general practitioners. Evidence will only be accepted from practitioners registered with the Medical Board of Australia (or equivalent overseas authority).

For the purposes of these Guidelines, certifications from persons not registered with the Medical Board of Australia (or equivalent overseas authority) such as, but not limited to, psychologists, nurse practitioners, health practitioners and natural practitioners are not acceptable evidence of sex and/or gender.



### *Sex*

For the purposes of these Guidelines, sex refers to the chromosomal, gonadal and anatomical characteristics associated with biological sex.

### *Social footprint*

A social footprint is evidence of a person's identity operating in the community. A social footprint can be established using credentials or other information (changes of name, details of education/qualifications, electoral register entries, employment history, and interactions with organisations such as Australia Post, banks, financial institutions and State and Territory public authorities) which establish a person's use of an identity in Australia over time.

### *Transgender/trans*

A trans or transgender person is someone who identifies as a gender which is different to the sex assigned to them at birth. Unlike intersex people, transgender people are born exclusively male or female, but emotionally or psychologically identify as a different sex. This includes people who identify as a sex other than their birth sex regardless of whether they have undergone hormone therapy, sex reassignment surgery or other physical procedures.

### *Valid Passport*

A valid passport is a current Australian Passport or other travel document that was valid for at least two years on issue.

Australian Government Guidelines on the Recognition of Gender  
**Appendix A – template for medical certificate**

**This sample text is for a letter from a registered medical practitioner certifying the sex and/or gender of a person who is intersex, transgender or gender diverse.**

**1. For people who are transitioning genders:**

This letter should be used for applicants who have had, or are receiving, appropriate clinical treatment (including but not limited to hormone therapy or sex reassignment surgery) for gender transition and are seeking to update their personal record with their preferred gender of MALE or FEMALE.

**Registered medical practitioner's letterhead  
(including full name and contact details)**

I, <medical practitioner's full name> am the doctor of <name of patient> with whom I have a doctor/patient relationship and whom I have treated (or with whom I have a doctor/patient relationship and whose history I have reviewed and evaluated).

<Name of patient> has had, or is receiving, appropriate clinical treatment for gender transition to the new gender of (specify new gender male or female).

---

Signature of medical practitioner  
Signature block of medical practitioner

---

Registration number from the Medical Board of Australia  
(or equivalent overseas authority)

---

**2. For people who are intersex/indeterminate/unspecified**

This letter should be used for applicants who are intersex or gender diverse.

**Registered medical practitioner's letterhead  
(including full name and contact details)**

I, <medical practitioner's full name> am the doctor of <name of patient> with whom I have a doctor/patient relationship and whom I have treated (or with whom I have a doctor/patient relationship and whose history I have reviewed and evaluated).

<Name of patient> is of <indeterminate/intersex/unspecified> sex and lives in the gender of (specify gender male or female).

**OR**

<Name of patient> is of <indeterminate/intersex/unspecified> sex and lives in an <indeterminate/intersex/unspecified> gender.

---

Signature of medical practitioner  
Signature block of medical practitioner

---

Registration number from the Medical Board of Australia  
(or equivalent overseas authority)



**Attorney-General  
Minister For Emergency Management**

12/15801

The Hon Julia Gillard MP  
Prime Minister  
Parliament House  
CANBERRA ACT 2601

*Julia*  
Dear Prime Minister

I seek your approval of the Australian Government Guidelines on the Recognition of Sex and Gender. The Guidelines standardise the evidence required to change gender on personal Government records and provide guidance to departments and agencies on the collection, use and amendment of sex and gender information in individual personal records.

In 2009, the Australian Human Rights Commission released the Sex Files report, which highlights issues faced by sex and/or gender diverse people in Australia regarding the legal recognition of their sex status on government documents. In 2010, the Government committed to review documentation requirements to ensure transgender and intersex people are able to enjoy their human rights without discrimination and to promote broader identification options other than male/female. These Guidelines are also a commitment under the National Human Rights Action Plan.

Increased consistency in the way the Australian Government collects and records sex and gender will strengthen Australia's identity security system, the integrity of agency records and the accuracy of individual personal records, in line with the Australian Government's approach to identity security. The Guidelines also support the recent introduction of legal protections against discrimination on the grounds of gender identity and intersex status in Commonwealth anti-discrimination law.

My Department has led the development of Australian Government Guidelines on the Recognition of Sex and Gender. My Department has worked closely with both Australian Government Departments and transgender and intersex stakeholders in the development of the Guidelines. The Department released the draft Guidelines for public consultation in March 2013. Submissions were very supportive, suggesting some changes to wording and terminology which have been made.


I am proposing making one notable amendment to the Guidelines prior to the commencement date. This amendment would allow registered psychologists as well as registered medical practitioners to provide evidence of a person's gender identity. I am of the view that the registration processes psychologists are subject to and the clinical services they provide to the

intersex, transgender and gender diverse community means they are adequately qualified to provide evidence of gender identity. I have written to the Minister for Foreign Affairs to seek a corresponding change to the passports policy for sex and gender diverse applicants. This will ensure the Guidelines and this policy are consistent. Should you agree to the proposal to allow evidence from psychologists, I propose that the amendments to the Guidelines be settled by our offices ahead of their release.

It is important that there is adequate notification ahead of the 1 July 2013 start date. Your office has indicated that you would like to announce the finalisation of the Guidelines in late May 2013. Alternatively, I seek your approval of the Guidelines by Friday 15 June 2013.

Once you have approved the Guidelines, I will write to our Cabinet colleagues to draw them to their attention. While compliance is not mandatory, departments and agencies will have three years for implementation.

Yours sincerely



**MARK DREYFUS QC MP**  
15/5/13

Encl: Australian Government Guidelines on the Recognition of Sex and Gender





**Attorney-General  
Minister For Emergency Management**

12/15801

Senator the Hon Bob Carr  
Minister for Foreign Affairs and Trade  
Parliament House  
CANBERRA ACT 2600

Dear *Bob* Minister

I am seeking your agreement to amend the Australian passports policy for sex and gender diverse applicants to ensure consistency with the Australian Government Guidelines on the Recognition of Sex and Gender.

As you would be aware, the passport policy for sex and gender diverse applicants has significantly improved the lives of intersex, transgender and gender diverse people in Australia. Under the National Human Rights Action Plan, the Government committed to developing national guidelines on the recognition of gender for Australian Government departments and agencies, based on the standard set by your Department's policy.

My Department has now developed these Guidelines in close consultation with departments and stakeholders, including a period of public consultation. As a result of this process, I would like to propose a variation from the passports policy. This policy currently stipulates medical certificates affirming sex or gender status can be provided only by medical practitioners registered with the Medical Board of Australia. I propose to extend this to also accept certificates issued by psychologists registered with the Psychology Board of Australia. I am of the view this change would mark an improvement to the Guidelines without jeopardising the integrity of the Government's approach to identity security.

It is important the Guidelines are consistent with the passports policy for sex and gender diverse applicants. I therefore seek your agreement to amend the passports policy to also accept certificates from registered psychologists. If you agree I will also ask my Department to amend the Guidelines accordingly.

The Guidelines are due to commence on 1 July 2013, so your earliest attention to this matter would be welcomed.

The action officer for this matter in the Attorney-General's Department is <sup>s 22 excluded by agreement</sup>  
who can be contacted on <sup>s 22 excluded by agreement</sup>

Yours sincerely

*Mark Dreyfus*  
**MARK DREYFUS QC MP**

15/5/13

Encl: Australian Government Guidelines on the Recognition of Sex and Gender

**List of submissions received**

1. Australian Human Rights Commission

2. s 47E(d)

3.

4. Organisation Intersex International  
Australia

5. s 47E(d)

6.

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8.

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10.

11.

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13.

14.

15. s 47F(1), s 47E(d)

16.

17. s 47F(1), s 47E(d)

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*NB Submissions are not public***Advisory Group Members**

1. s 47E(d)

2. s 47E(d)

3. s 47E(d)

4. s 47F(1), Organisation Intersex International Australia

5. s 22 excluded by agreement, Sexual Orientation, Sex and Gender Identity Team, Australian Human  
Rights Commission

**From:** s 22 excluded by agreement  
**To:** s 22 excluded by agreement  
**Subject:** FW: C13/31084 - Approval of the Australian Government Guidelines on the Recognition of Sex and Gender [DLM=For-Official-Use-Only]  
**Date:** Tuesday, 28 May 2013 9:42:30 AM  
**Attachments:** [20130527153039950.pdf](#)

---

Hi s 22 excluded by agreement

Advance copy of PM's response re Guidelines on Recognition of Sex and Gender.

Thanks,

s 22 excluded by agreement

Senior Adviser  
Legal Policy Branch  
Government Division  
Department of the Prime Minister and Cabinet

s 22 excluded by agreement

s 22 excluded by agreement [@pmc.gov.au](#)

---

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PRIME MINISTER  
CANBERRA

Reference: C13/31084

The Hon Mark Dreyfus QC MP  
Attorney-General  
Parliament House  
CANBERRA ACT 2600

27 MAY 2013

*M-r L*  
Dear Attorney-General

Thank you for your letter of 15 May 2013 regarding the Australian Government Guidelines on the Recognition of Sex and Gender (the Guidelines).

I approve the Guidelines. I also approve the proposed amendment to the Guidelines, which would allow registered psychologists as well as registered medical practitioners to provide evidence of a person's gender identity, subject to agreement from the Minister for Foreign Affairs on that amendment.

I note that your Department has worked closely with other Australian Government agencies, and transgender and intersex stakeholders, in the development of the Guidelines, and that you will write to our Ministerial colleagues to draw the Guidelines to their attention.

Yours sincerely

A large, stylized handwritten signature in black ink, appearing to read 'Julia Gillard'.

Julia Gillard



**From:** [Morgan Carpenter](#)  
**To:** s 22 excluded by agreement  
**Cc:** s 22 irrelevant to scope of request s 22 excluded by agreement  
**Subject:** Re: Sex and Gender Guidelines Teleconference - Text and Agenda [DLM=For-Official-Use-Only]  
**Date:** Wednesday, 1 July 2015 11:04:35 AM

---

Dear s 22 excluded by

Many thanks for these documents, they are very much appreciated.

I am grateful that the Department has been able to take account of concern about the widespread misgendering of intersex people in this update to the guidelines. Thank you.

I haven't been able to discuss the draft with anyone and so these are personal reflections only, but I have a few thoughts and suggestions in advance of the meeting, and I wonder if the Department might be open to some of them:

1. The use of "sex/gender" throughout the document is inconsistent with the goal that agencies collect 'gender' information, and also the biological definition of sex; it instead implies that organisations will collect information on "sex/gender". Would the Department be open to replacing "sex/gender" with "gender" throughout most of the document, understanding that some reference to sex is also necessary? This might better model good practice.

2. Would the Department be open to adopting or incorporating the definition of intersex used in the recent report by Tim Wilson at the Australian Human Rights Commission? This is particularly relevant in paragraphs 12 and 14, but also "key Terms". The AHRC definition avoids framing intersex in terms of deficits:

"The term 'intersex' refers to people who are born with genetic, hormonal or physical sex characteristics that are not typically 'male' or 'female'. Intersex people have a diversity of bodies and identities."

Definitions continue to evolve somewhat, but as well as avoiding a deficit-based model, the AHRC definition also frames intersex as about "sex characteristics" rather than "sex", in the same way that the SDA differentiates between "intersex status" and "sex".

3. Paragraph 18 (definition of X) needs updating to match the definition in paragraph 30.

4. The biological definition of "indeterminate" does not sit well, in my mind, with the focus on collection of data on gender. I still support proposals to add "non-binary" to the definition of X; I also still support self-declaration.

I look forward to talking through these and other issues in the teleconference.

all the very best  
Morgan

> On 29 Jun 2015, at 5:12 pm, s 22 excluded by agreement@ag.gov.au> wrote:

>

> For Official Use Only

>

> Dear all

>

> I'm writing in regard to the Advisory Group teleconference on the update to the Australian Government Guidelines on the Recognition of Sex and Gender, to be held this Friday 3 July from 10 to 11:30am. An agenda is attached, including teleconference dial-in details – if you have any issues dialling in, please call the switchboard on (02) 6141 6666.

>

> As you're aware, we are in the process of updating the Guidelines to reflect recent amendments to the Sex

Discrimination Act 1984 and Privacy Act 1998 (including the introduction of the Australian Privacy Principles). A version of the Guidelines with these updates in tracked changes is attached for your information.

>

> As well as updating references to legislation, we intend to clarify the following issues which have arisen through the implementation of the Guidelines:

>

> • Description of 'X': We have received feedback indicating issues with the description of 'Intersex/Indeterminate/Unspecified' for the X category, including that 'intersex' is problematic for people with intersex variations as they may feel expected to tick this box in contradiction to their preferred identification; and that 'unspecified' has been misused by individuals not wanting to disclose their gender. On that basis, we are considering shortening the current description of the X category to 'Indeterminate' only, and seek your input on whether this or other terms are appropriate.

>

> • Sex and Gender: Although there is a conceptual distinction between 'sex' and 'gender,' in practice they are often referred to and used interchangeably and we intend to acknowledge this in the Guidelines. The Australian Government position is still that agencies should collect and use 'gender' information, and that there will only be very rare instances where 'sex' information can be legitimately collected. However, we also want to ensure agencies do not collect two measures but only information they are legitimately concerned with as appropriate under the Australian Privacy Principles.

>

> The relevant text we are considering updating in response to the above is highlighted in the attached version of the Guidelines. Please don't hesitate to contact me if you have any further questions, and we look forward to speaking with you on Friday.

>

> Best,

> s 22 excluded by

>

>

> s 22 excluded by agreement

> | Policy Officer

> Human Rights Policy Branch

> Attorney-General's Department

> Phone: s 22 excluded by agreement | Email: s 22 excluded by agreement@ag.gov.au

> <image001.png>

>

>

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> <Sex and Gender Recognition Guidelines - Proposed Text - June 2015.pdf><Sex and Gender Recognition  
Guidelines - Advisory Group Teleconference - 03-07-15 - Agenda(2).DOCX>

**Australian Government Guidelines on the Recognition of Sex and Gender Advisory Group:  
Teleconference**

Friday 3 July 2015

**Minutes**

Attendees:

Attorney-General's Department: s 22 excluded by agreement  
s 22 irrelevant to scope of request

Organisation Intersex International: Morgan Carpenter  
s 22 irrelevant to scope of request

Apologies:

s 22 irrelevant to scope of request

Introduction

- AGD is currently undertaking an update to the Guidelines to support implementation by Commonwealth departments and agencies by 1 July 2016. It is not a full review of the Guidelines.
- Outdated references to legislation (Privacy Principles and Sex Discrimination Act) will be updated.
- The definition of 'X' and the distinction between sex and gender will be clarified to address issues that have arisen through implementation.
- AGD is considering altering the current definition of X (Intersex/Indeterminate/Unspecified) because:
  - 'intersex' is not acceptable to community stakeholders
  - there are issues around 'unspecified' being used where respondents intend not to disclose (rather than to identify as neither male nor female), and
  - many departments and agencies would prefer a single-word descriptor for data purposes.
- AGD is considering terminology around the distinction between sex and gender in light of the fact that the Australian Government's preferred position is for gender only to be collected by government (rather than gender and sex as separate measures).
- AGD is also starting to turn its mind to what sort of evaluation process to put in place re: the Guidelines post-full implementation date of 1 July 2016.
- AGD will also be giving consideration to what role it can play to support departments who deliver frontline services.

General Points

- s 22 irrelevant to scope of request

- s 22 irrelevant to scope of request  
[REDACTED]
- Morgan and s 22(1) recommended using the definition of Intersex as given in the AHRC *Resilient Individuals* report.
- AGD clarified that the issue of documentation necessary for proof of change of sex/gender will not be addressed in this update.

#### 'X' terminology

- AGD noted the distinction between front-end and back-end implementation; front end may be able to be more flexible about descriptors, but a single word descriptor is necessary for back-end processes.
- The Advisory Group concur that using any single one of the terms currently in the 'X' definition (Indeterminate/Intersex/Unspecified) as a descriptor would be unacceptable.
- It was suggested that the status quo definition is also not helpful – s 22 irrelevant to scope of request  
[REDACTED]

- s 22 irrelevant to scope of request  
[REDACTED]

- Morgan and s 22(1) supported the use of 'non-binary.'

- s 22 irrelevant to scope of request  
[REDACTED]

- s 22 irrelevant to scope of request  
[REDACTED]

- The possibility of including statistical evidence on population numbers was discussed; however it was noted that there are problems with much of the data, and that such inclusion may also have unwanted consequences in terms of reception of the Guidelines.

#### Sex and Gender

- Morgan and s 22(1) recommended using 'gender' rather than 'sex/gender' throughout, to provide clarity about government preference, and about what is actually being collected.
- Morgan noted that 'sex' is difficult to capture, not only because people will usually give the same answer when asked about their 'sex' or 'gender,' but 'sex' is both a legal and a physical/biological entity.
  - The Guidelines should clarify ambiguity, hence the recommendation to use 'gender.'
  - Morgan recommended a sentence clarifying this lack of reliability, and the distinction between legal and biological sex.
- AGD confirmed that there is no intention to include different definitions of biological and legal sex.
  - AGD's intention is to acknowledge the definition of sex as a biological concept, while also being clear that due to the ability to legally and biologically change sex, it is not a reliable or consistent marker.

- s 22 irrelevant to scope of request  
[REDACTED]  
[REDACTED]  
[REDACTED]
- AGD noted that we propose including wording asking departments and agencies to contact AGD if they are considering collecting a measure other than gender (such as sex).
- s 22(1) and AGD noted that detailed explanation around these issues can also take place in ongoing departmental training.

#### Next Steps

- AGD will undertake internal discussion of the Advisory Group's feedback internally, and will contact the Group shortly regarding outcomes, updated proposed text and further discussions within government departments and agencies.
- Estimated timeframe: mid-late August.

**Australian Government Guidelines on the Recognition of Sex and Gender Advisory Group:  
Teleconference**

Wednesday 19 August 2015

**Minutes**

Attendees:

Attorney-General's Department: s 22 excluded by agreement

s 22 irrelevant to scope of request

Organisation Intersex International: Morgan Carpenter

s 22 irrelevant to scope of request

Apologies:

s 22 irrelevant to scope of request

Update from the Attorney-General's Department

- AGD found the feedback provided by the Advisory Group at the last teleconference to be really valuable. In particular, in relation to the descriptor of 'X' and the reshaping of the Guidelines with respect to the collection of gender information.
- While the term 'non-binary' addresses both the concerns of the sector and needs of agencies, a number of issues have been raised through consultation with key departments and agencies:
  - in the absence of a fuller consultation process, some departments are concerned about whether 'non-binary' will be sufficiently understood publicly and has the full support of the community, and
  - in light of the July 2016 implementation period deadline, a number of departments have also had to lock in approaches – consistent with the current Guidelines – for 2016-2017 system roll-outs.
- As such, AGD feels there is a need to keep the update to the Guidelines this year to the minimum necessary statutory changes and roll key policy questions into a post implementation evaluation process around July 2016.
- While not greatly satisfactory, a post implementation evaluation will have the benefit of an open and public consultation with the transgender and intersex community and stakeholders to address any other issues that have arisen through implementation.
- AGD is also planning to be part of the process around an update to the Standards Australia AS4590 (Interchange of client information), including to the sex and gender codes. This may provide an alternative means for consultation on the 'X' descriptor.
- Morgan expressed his deep disappointment that no substantive changes will be made to the Guidelines until after implementation. The key focus of this update has been on the 'X' descriptor, which will now remain unchanged. Morgan would strongly favour a change to the 'X' descriptor (i.e. removal of 'intersex'), even if it is a small change.
- s 22 irrelevant to scope of request

## s 22 irrelevant to scope of request

- As the Guidelines are setting standards for all departments and agencies, Morgan and s 22(1) both mentioned that it should not matter if there is some level of inconsistency between departments to start off with if the 'X' descriptor was amended now, as there is already inconsistency in the terms used between department and agencies at present.
- Morgan further mentioned that once the 'X' descriptor is made right, other changes can follow.
- AGD acknowledged that temporarily 'parking' the 'X' descriptor in the current update is disappointing and noted the views expressed by the Advisory Group.

### 'X' terminology

- AGD is attending an AS4590 Steering Committee in the next month where there will be an opportunity to propose a term for the new gender code. AGD intends to propose 'non-binary' for the 'X' descriptor.
- AGD sought the Advisory Group's view on the term 'gender diverse' as this has been raised with AGD by other agencies. s 22(1) view was that the term 'gender diverse' is too broad a term to serve the purpose of describing 'X'. This is because 'gender diverse' also encompasses people who identify with a binary gender. s 22(1) and Morgan agreed.
- s 22 irrelevant to scope of request
- Morgan felt that if the 'X' descriptor is not changed, it will create a perception that the Guidelines cannot or will not address this issue properly.

### Appendix A

- AGD raised the possibility of amending the template form in Appendix A to streamline and simplify the statement to be signed by a Registered Medical Practitioner or Registered Psychologist.
- Morgan mentioned that if the 'X' descriptor is not changed, Appendix A will be complicated and inappropriate for people with intersex.
- Given this issue has only just been raised in the teleconference, AGD has asked the Advisory Group to consider this issue further and provide written feedback.

### Other matters

- The Advisory Group is happy for AGD to provide contact details to the Australian Bureau of Statistics in relation to the 2016 Census.

### Next Steps



- AGD will keep the Advisory Group updated of any further progress, including on AS4590.
- AGD will circulate a draft updated version of the sample medical/psychological statement under Appendix A of the Guidelines – for feedback from the Advisory Group.