



Tasmanian Council of Social Service Inc.

Submission to the Tasmanian Law Reform Institute on Legal Recognition of Sex and Gender Issues Paper No. 29

August 2019



INTEGRITY
COMPASSION
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About TasCOSS

TasCOSS is the peak body for the community services sector in Tasmania. Our membership includes individuals and organisations active in the provision of community services to low-income Tasmanians living in vulnerable and disadvantaged circumstances. TasCOSS represents the interests of its members and their clients to government, regulators, the media and the public. Through our advocacy and policy development, we draw attention to the causes of poverty and disadvantage, and promote the adoption of effective solutions to address these issues.

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Introduction

Thank you for the opportunity to comment on the Legal Recognition of Sex and Gender Issues Paper No. 29.

TasCOSS advocates on behalf of low-income Tasmanians who often live in vulnerable and disadvantaged circumstances. We advocate for public policy that values and respects the diversity of Tasmanians and makes a real difference to the lives of people who are experiencing vulnerability. We work to ensure that the human rights of all Tasmanians are integrated into government consultation processes, policy approaches and budget allocations.

TasCOSS submissions and advocacy are strongly informed by the expertise of our members and the lived experiences of the Tasmanians we represent. In preparing this submission, we have referred to:

- Human rights frameworks, particularly the *Yogyakarta Principles*, the *International Covenant on Civil and Political Rights* and the *Convention on the Rights of the Child*.
- The views of our members, particularly those who represent and offer services to sex and gender diverse Tasmanians.¹
- Current research on best practice for affirming models of care for sex and gender diverse people.

Context

A number of international human rights instruments relate to sex and gender diverse people. The *Yogyakarta Principles* in fact confirms that *all* international human rights laws apply to people who are sex and gender diverse.² Key rights in another instrument, the *International Covenant on Civil and Political Rights* (ICCPR), that are specifically relevant to people who are sex and gender diverse include:

- freedom of expression (article 19)
- the right to non-discrimination (article 26)
- the right to recognition before the law (article 16)
- freedom of movement and travel (article 12)
- the right to privacy (article 17) and
- the right to protection from torture, cruel, inhuman or degrading treatment or punishment (article 7).³

The *Convention on the Rights of the Child* (CRC) also contains a number of principles specifically relevant to sex and gender diverse people under the age of 18, including:

¹ 'Sex and gender diverse' is a term that recognises the variations in sex and gender. Common terms for people who are sex and gender diverse include transgender, transsexual and intersex.

² <http://yogyakartaprinciples.org/>; <http://yogyakartaprinciples.org/principles-en/yp10/>

³ <https://www.ohchr.org/EN/ProfessionalInterest/Pages/CCPR.aspx>

- the best interests of children should be a primary consideration in all actions concerning them (article 3)
- the right to survival and development (article 6)
- the preservation of identity (article 8)
- the right of children to express views and have those views respected (article 12)
- the right to freedom of expression (article 13)
- the right of freedom of thought (article 14)
- the right to privacy (article 16)
- the protection from violence, injury, abuse or exploitation (article 19)
- the right of children to health (article 24) and
- the right to an adequate standard of living (article 27).⁴

As we know in relation to other human rights issues, though, the existence of human rights protections in law does not guarantee their implementation in practice. It is well recognised that trans and gender diverse individuals are at increased risk of harm because of discrimination, social exclusion, bullying, physical assault and even homicide, and this is particularly true for trans and gender diverse young people.⁵

There is evidence to show that harms can be reduced through affirmative models of care, and through affirming practices such as using a young person's chosen name rather than their birth name.⁶ As noted by the World Professional Association for Transgender Health, the peak professional body that provides evidence-based guidelines on best practice health care for transgender people, 'Health is promoted through public policies and legal reforms that promote tolerance and equity for gender and sexual diversity and that eliminate prejudice, discrimination, and stigma.'⁷

TasCOSS supports this public health approach, which acknowledges that positive health outcomes are founded on wellbeing more broadly. We therefore see the law reforms to which the Issues Paper refer as an important step toward ensuring equality before the law and removing discrimination for sex and gender diverse people. Those reforms introduced four key changes:

1. A trans or gender diverse person can self-determine their gender identity and have this officially recognised on their birth certificate. This is a key reform because, prior to the law change, trans people had to have genital surgery before their birth certificates could be amended. This was a cruel and unnecessary requirement for many reasons - surgery is expensive, it can be impossible to access locally, and is not an option for some people for medical or other reasons. And some people simply do not want to have surgery.

⁴ <https://www.ohchr.org/en/professionalinterest/pages/crc.aspx>

⁵ Telethon Kids, *Trans Pathways*, 2017.

⁶ <https://auspath.org/wp-content/uploads/2019/05/australian-standards-of-care-and-treatment-guidelines-for-trans-and-gender-diverse-children-and-adolescents.pdf>; https://auspath.org/wp-content/uploads/2019/05/SOC_V7_English.pdf;

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⁷ https://auspath.org/wp-content/uploads/2019/05/SOC_V7_English.pdf, p. 1. We note, however, that not all of WPATH's guidelines are accepted by the trans and gender diverse community.

2. Parents of intersex infants will have much longer to decide how they register their child’s sex so they can access expert advice and support. Before the law change many parents were pressured or felt forced to ‘choose’ a sex for their newborn, often resulting in invasive and permanently damaging surgery to assign the child a sex.

3. Trans and gender diverse Tasmanians will be protected from hate speech and offensive language on the basis of gender identity, gender expression and intersex status.

4. Parents can choose whether to have gender recorded on their child’s birth certificate.

As the Issues Paper identifies, these changes have implications in law as well as in policy and practice in other spheres. TasCOSS believes that these implications are intrinsically navigable if two key principles are adhered to. They are:

- the right to health includes the right to control one’s health and body and to be free from interference⁸
- following the *Convention on the Rights of the Child*, that where a child is competent to form a view about matters affecting their health or identity, those views should be given due weight.⁹

Our responses to the questions below are based on conversations with sex and gender diverse Tasmanians and their families, intersex advocates and the LGBTIQI community more broadly.

Questions in the Issues Paper

<p>Question 1</p>	<p>What, if any, administrative changes will be required to allow government agencies, notaries, or other officials to verify a person’s sex or gender identity if their birth certificate does not include sex or gender information?</p> <p>TasCOSS understands that work in progressing across government agencies to ensure consistency in approach to the collection of sex or gender identity.</p> <p>We encourage each agency to also consult with its service users about any proposed and implemented changes.</p>
<p>Question 2</p>	<p>Should guidelines be developed to guide the exercise of the Registrar’s discretion to refuse an application to register a change of gender?</p>

⁸ World Health Organisation, ‘Human rights and health’, 29 December 2017 <https://www.who.int/news-room/fact-sheets/detail/human-rights-and-health>

⁹ *Convention on the Rights of the Child* (n 99)

<p>Question 3</p>	<p>TasCOSS understands that the Registrar is working with the Whole-of-Government LGBTI Working Group, Working it Out and with Transforming Tasmania to develop appropriate guidelines and training for registry staff.</p> <p>Are there potential implications for the interaction of the <i>JRL Act</i> with existing legislation that are not discussed in section 2.2 of this Issues Paper?</p> <p>We are not aware of other implications.</p>
<p>Question 4</p>	<p>What policies are currently in place relating to access by sex and gender diverse people to gender-based locations or events? In your experience, what has been the outcome of implementing those policies?</p> <p>Some TasCOSS member organisations offer sex- and gender-specific services. They inform us that they have had policies in place for some time around sex and gender diverse people accessing their services and report that the policies are working well.</p>
<p>Question 5</p>	<p>What, if any, reforms should be made in relation to consent to medical treatment to alter the sex characteristics of an intersex minor? In particular:</p> <ul style="list-style-type: none"> • In what, if any, situations should Court approval be required for medical intervention on minors to alter sex characteristics? • Should sex reassignment surgery on a minor be excluded from offences relating to female genital mutilation? • Should Tasmanian laws prevent medical intervention to address sex characteristics in minors without their consent to the procedures (other than in emergency situations)? Should ‘emergency situations’ be defined by legislation for the purpose of this exception? • What form should that prohibition take? Should it be a criminal offence to perform such surgery or should some alternative approach be adopted and, if so, what approach would best address this issue? • Should there be any additional exceptions to that prohibition apart from emergency situations and, if so, what should those exceptions be? • In what, if any, situations should an independent advocate be appointed to act on behalf of a minor where approval is sought for medical intervention to address sex characteristics? • If parents are able to consent to medical procedures, should they be required to show that they have received counselling or advice

	<p>(other than from the treating physician) about the implications of the proposed procedures?</p> <ul style="list-style-type: none"> • Should a specialist tribunal be established to consider applications for medical procedures to alter the sex characteristics of minors and, if so, who should be members of the Tribunal? <p>TasCOSS defers to the intersex community on these questions. In addition to consulting with the intersex community, two key documents should guide law and practice:</p> <ul style="list-style-type: none"> • <i>Malta Declaration</i> which states: intersex people must be supported to be the drivers of social, political and legislative changes that concern them; and intersex people have rights of ‘bodily integrity, physical autonomy and self-determination’.¹⁰ • <i>Darlington Statement</i> which, amongst other statements, calls for human rights and legal reform, an end to harmful and pathologising medical practices and that ‘that intersex people are the experts on our own lives and lived experience.’¹¹
<p>Question 6</p>	<p>What, if any, reforms should be enacted to enable minors to consent to medical treatment to alter their sex characteristics and to enable medical practitioners to act on their consent?</p> <p>TasCOSS’ consultations with the trans and gender diverse community, including parents of trans children, suggest that some reforms are necessary to create transparency and consistency around access to sex and gender affirming treatment.</p> <p>One parent told us that her child’s treating psychiatrist asked the child to dress as a girl inside the house and as a boy outside the house, due to disagreement between the parents about the best way to manage the child’s wish to transition. This was confusing, humiliating and distressing for the child (who is now thriving, living as her true self).</p> <p>TasCOSS therefore endorses the TLRI’s view that where minors demonstrate ‘Gillick competence’ the wishes of the child should be respected. We agree with the TLRI that this approach accords with a child’s human rights as an autonomous human being, which is provided in Article 12 of the United Nations <i>Convention on the Rights of the Child</i>.¹²</p>
<p>Question 7</p>	<p>Should there be an age requirement for valid consent to medical treatment to alter sex characteristics?</p> <p>Again, Gillick competence should guide consent to treatment for people under 18 years of age.</p>

¹⁰ <https://intersexday.org/en/malta-declaration/>

¹¹ <https://darlington.org.au/statement/>

¹² United Nations *Convention on the Rights of the Child*, Article 12.

<p>Question 8</p>	<p>Should there be additional conditions attached to the consent to enable medical practitioners to act on it, such as a requirement that minors receive expert counselling regarding the consequences of the surgery?</p> <p>While we believe the principle of Gillick competence should be adhered to, TasCOSS has heard conflicting views about whether consent to irreversible procedures such as surgery should have additional requirements such as counselling. We cannot offer a view on this.</p>
<p>Question 9</p>	<p>Should medical practitioners be able to act on the consent of minors under 16 years of age to medical treatment to alter their sex characteristics and, if so, in what circumstances? For example, should there be a requirement that two medical professionals (defined to include clinical psychologists) are satisfied that:</p> <ul style="list-style-type: none">• the child is capable of understanding the nature, consequences and risks of the treatment; and• the treatment is consistent with the ‘will and preference’ of the child; and• the treatment is consistent with the child’s health and well-being. <p>Our consultations suggest that there are differing views on this. Some sex and gender diverse people as well as parents of trans kids believe that not all children require counselling – they are clear and certain about who they are and what kind of care they require.</p> <p>We also heard, however, that while some children might be certain that their assigned sex at birth is different to their gender identity, neither the child nor the parents are certain about what care and support follows from this knowledge.</p> <p>There are guidelines in Australia that help navigate this issue, developed by the Royal Children’s Hospital Melbourne. The Australian Standards of Care and Treatment Guidelines for Trans and Gender Diverse Children and Adolescents are based on available empirical evidence, clinician consensus and trans and gender diverse people and their families. According to these guidelines:</p> <p>‘Whilst many trans and gender diverse children and their families will benefit from some form of psychological support, the level of support required will depend on the clinical and psychosocial circumstances. Trans or gender diverse children with good health and wellbeing who are supported and affirmed by their family, community, and educational environments may not require any additional psychological support beyond occasional and intermittent contact with relevant professionals in the child’s life, such as the family’s general practitioner or school supports.</p>

Others may benefit from a skilled clinician working together with family members to help develop a common understanding of the child's experience.¹³

While the guidelines acknowledge that 'further research is warranted across all domains of care for trans and gender diverse children and adolescents' TasCOSS believes the current guidelines should be used to inform practice in Tasmania. Regular reviews should be conducted to ensure care practices in Tasmania are informed by the most up to date evidence.

Conclusion

TasCOSS supports the recent legislative changes to sex and gender recognition because they:

- ensure that official documents of sex and gender diverse Tasmanians can reflect their true identities
- remove discriminatory provisions in the *Births, Deaths and Marriages Act* relating to sex and gender diverse people.

We believe that any further proposed legislative, policy or regulatory changes that might flow from the recent law reforms should be discussed with the people primarily affected by those changes, sex and gender diverse Tasmanians.

¹³ <https://www.rch.org.au/uploadedFiles/Main/Content/adolescent-medicine/australian-standards-of-care-and-treatment-guidelines-for-trans-and-gender-diverse-children-and-adolescents.pdf>, p.9.