
Australian Government Guidelines on the Recognition of Sex and Gender

Attorney-General's Department

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Introduction

1. The Law Council welcomes the Australian Government's development of draft Guidelines on the Recognition of Sex and Gender (the Guidelines).¹ When finalised, the Guidelines will form a practical mechanism by which the Government can help to eliminate discrimination against people who are sex and gender diverse.
2. The Guidelines have been developed as part of a range of commitments made by the Australian Government in the *National Human Rights Action Plan* in order to address discrimination against sex and/or gender diverse people. This includes the commitment to develop:

*... national guidelines across the Australian Government public sector agencies to ensure sex and gender information is collected consistently across government and only where there is a legitimate purpose, and to build consistency in the way gender may be changed in Commonwealth records.*²

3. The collection and handling of sex and gender information by governments has been identified as an issue of real concern to many people who are sex and gender diverse.³ Where such information is collected or handled in a discriminatory manner, the consequences can exacerbate the vulnerabilities already faced by this population. For example, the Law Council has been concerned by past reports by the New South Wales Gender Centre that transgendered people have decided against claiming their welfare entitlements because they have previously experienced unfair or insensitive treatment by Centrelink.⁴ This leaves people open to homelessness, poverty and violence. The Guidelines are an important step in helping to address such situations.
4. The Law Council has previously advocated on this issue. The then Secretary-General of the Law Council wrote to the Attorney-General's Department (AGD) on 13 April 2011, supporting the Australian Government's development of the Guidelines, and proposing that a number of matters be considered in its review of the Government's collection of information about sex and gender (the Review).⁵
5. The Law Council also supported measures for better legal recognition of sex and gender in documents and government records as part of its *Submission to the Australian Human Rights Commission's Consultation on the Protection from Discrimination on the Basis of Sexual Orientation and Sex and/or Gender Identity* in 2010.⁶

¹ Issued for comment by the Attorney-General's Department on 22 March 2013, available at: <http://www.ag.gov.au/Consultations/Pages/AustralianGovernmentGuidelinesontheRecognitionofSexandGender.aspx>

² *National Human Rights Action Plan*, Item 209, page 50

³ Australian Human Rights Commission, *Sex Files: The Legal Recognition of Sex in Documents and government Records* report (2009), page 5, available at: https://www.humanrights.gov.au/sites/default/files/content/genderdiversity/SFR_2009_Web.pdf

⁴ The Gender Centre, *Concerns for Clients When Accessing Government Agencies or Service Providers*, available at http://www.gendercentre.org.au/concerns_for_clients_kit.htm

⁵ Correspondence from the Secretary-General of the Law Council, Bill Grant, to Dr John Boersig PSM dated 13 April 2011

⁶ Page 32, available at:

http://www.lawcouncil.asn.au/shadomx/apps/fms/fmsdownload.cfm?file_uuid=AA4F7404-052C-0763-AA93-C57C46DADC98&siteName=lca

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6. The Law Council has called for discrimination on the basis of sexual orientation, gender identity and intersex status to be addressed in a number of other submissions on related matters.⁷
 7. The Law Council is pleased to have the opportunity to comment on the Guidelines, noting also that people who are sex and gender diverse will be in the best position to respond in detail to the issues raised.

Human Rights Context

8. The Law Council's comments on the Guidelines are informed by Australia's obligations under international treaties including the *International Covenant on Civil and Political Rights* (the ICCPR). The ICCPR contains key human rights which are specifically relevant to people who are sex or gender diverse, including:
 - The right to non-discrimination (articles 2(1) and 26);
 - The right to recognition before the law (article 16);
 - Freedom from arbitrary interference with privacy and/or family life (article 17);
 - Freedom of expression (article 19); and
 - The right to marry and found a family (article 23).
9. The *Convention on the Rights of the Child* also contains a number of human rights which are relevant to people under the age of 18 who are sex or gender diverse.⁸
10. Further to these Conventions, it is relevant to note that in December 2008, 66 nations at the United Nations General Assembly supported a statement confirming that international human rights protections extend to sexual orientation and gender identity. Australia was a signatory to the statement.⁹
11. Also important are the Yogyakarta Principles, which were developed by a group of international human rights experts in 2008 and consider the application of international human rights law in relation to sexual orientation and gender identity. While the Yogyakarta Principles are not binding, the Law Council considers that they are highly persuasive in interpreting existing international human rights obligations from this perspective.

⁷ See for example, the Law Council's *Submission to the Senate Committee on Legal and Constitutional Affairs regarding the Exposure Draft – Human Rights and Anti-Discrimination Bill 2012*; and the *Submission to the Senate Legal and Constitutional Affairs Committee regarding the Marriage Equality Amendment Bill 2010*; available at:

<http://www.lawcouncil.asn.au/programs/criminal-law-human-rights/human-rights/discrimination.cfm>

The Law Council is also currently preparing a submission to the Senate Legal and Constitutional Affairs Committee which welcomes and comments on the Government's introduction of the *Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Bill 2013*.

⁸ These include the right to discrimination (article 2), the best interests of children should be a primary consideration in all actions concerning them (article 3), the preservation of identity (article 8), the right to freedom of expression (article 13), the right to privacy (article 16) and the right to protection from physical or mental violence, injury, abuse or exploitation (article 19).

⁹ United Nations Department of Public Information, *General Assembly Adopts 52 Resolutions, 6 Decisions Recommended by Third Committee on Wide Range of Human Rights, Social and Humanitarian Issues*, (2008). Available at <http://www.un.org/News/Press/docs/2008/ga10801.doc.htm>

12. The Yogyakarta Principles contain a number of principles relevant to the legal recognition of sex and gender including the rights to:

- (i) *Recognition as a person before the law, based on each person's self-defined gender identity*¹⁰.
 - 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 one shall be subjected to pressure to conceal, suppress or deny their sexual orientation or gender identity;
 - The State shall take all necessary legislative, administrative and other measures to:
 - fully respect and legally recognise each person's self-defined gender identity; and
 - ensure that procedures exist whereby all government-issued identity papers which indicate a person's gender/sex reflect the person's profound self-defined gender identity;
 - ensure that such procedures are efficient, fair and non-discriminatory and respect the privacy of the person concerned; and
 - ensure that changes to identity documents will be recognised in all contexts where the identification or disaggregation of persons by gender is required by law or policy.
- (ii) *Privacy, including the choice to disclose or not to disclose information relating to one's gender identity.*¹¹
 - The State shall ensure the right of all persons ordinarily to choose when, to whom, and how to disclose information pertaining to their sexual orientation or gender identity, and shall protect all persons from arbitrary or unwanted disclosure, or threat of disclosure of such information by others.

13. The above obligations and principles were considered by the Australian Human Rights Commission (AHRC) as part of its *Sex Files: The Legal Recognition of Sex in Documents and Government Records* report (2009) (the AHRC Report).¹² This report, which followed consultations with the sex and gender diverse community, confirmed that a key concern of many people in this community is that they are not able to change the sex markers in official documents or government records. It provided a thorough assessment of the practical issues and discrimination faced by many such individuals in this respect.

14. The AHRC Report also provided a number of recommendations for better legal recognition of sex in documents and government records, including the development of national guidelines concerning the collection and handling of sex and gender

¹⁰ Principle 3

¹¹ Principle 6

¹² Above at n3

information from individuals.¹³ The Law Council considers that the AHRC Report provides a solid basis for analysing the Guidelines, including their likely effectiveness in responding to the practical difficulties faced by people who are sex and gender diverse, as well as in addressing Australia's international human rights obligations.

Review and consultation process

15. The Law Council is disappointed that neither the Guidelines nor their supporting material provide details about the Review which has led to the Guidelines' development. It considers that the publication of this information would provide important context for how and why Australian Government departments and agencies collect sex and gender information from members of the public, the process undertaken and its results. This would enable contributors to better assist in the Guidelines' development, by identifying relevant examples, issues and priorities.
16. Information about the current consultation process regarding the Guidelines would also be welcome. For example, the Law Council would hope that this would involve:
- the sex and gender diverse community;
 - a full range of Government agencies, including those which would be likely to encounter specific sex and gender issues in light of other concerns, such as national security or law enforcement. This would include intelligence gathering agencies and the Australian Federal Police (AFP) (see further comments below regarding the application of the Guidelines);
 - the Office of the Australian Information Commissioner;
 - the AHRC;
 - the Australian Bureau of Statistics (ABS) (see further discussion below regarding the census data commitments made under the National Human Action Plan); and
 - state and territory governments (see further discussion below regarding the Australian Government's commitment under the National Human Rights Action Plan to work with the states and territories to develop a nationally consistent approach to legally changing sex).
17. Ensuring that the consultation process about the Guidelines is broad and comprehensive will help to ensure that issues are appropriately identified and addressed. It would also boost confidence in, and take-up of, the Guidelines when finalised.

Comments regarding the Guidelines

18. The Law Council welcomes in particular the features of the Guidelines which:
- (a) allow for people to seek changes to their personal records without having to undergo sex reassignment surgery or hormone therapy;
 - (b) allow for people to identify as something other than female or male;

¹³Recommendation 10, page 9, above at n3

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- (c) recommend that no government agency should require a person to list their sex or gender on forms or records unless there is a particular necessity to do so; and
 - (d) emphasise the privacy obligations of agencies to people who are sex and gender diverse, noting that the right to privacy may be particularly important to such individuals. Personal accounts help to illustrate that proper recognition of sex and gender *and* privacy protection are both important to, and impact on, mental health and welfare outcomes in sex and gender diverse communities.¹⁴

These features were all identified as important by the sex and gender community in the AHRC Report, and formed the basis of several of its recommendations. They represent a departure from the “standard” Government approach in many respects – for example, most state and territory jurisdictions still require sex affirmation surgery or hormone therapy to be undertaken before birth certificate information can be changed.¹⁵ These important changes help to give effect to individuals’ rights to be recognised according to their own self-identity.

19. The Law Council’s further comments about the Guidelines are set out below.

20. In making these comments, it notes at the outset that the Guidelines refer throughout to agencies’ obligations set out in the Information Privacy Principles (IPPs) under the *Privacy Act 1988* (Cth). The Law Council notes that the Guidelines should clarify that from 12 March 2014, Australian Government agencies will be subject to the new Australian Privacy Principles (APPs), which will replace the IPPs.¹⁶ A version of the Guidelines which takes account of the APPs should also be made available.

Introduction/ Background Sections

- 21. Given their broad proposed application, the Law Council considers that the Guidelines will have an important educative function in helping combat instances of discrimination, harassment and/or humiliation which can be experienced by people who are sex and gender diverse.¹⁷ It is important to use the opportunity provided to provide an unambiguous message on the Government’s position in this regard.
- 22. The Law Council would therefore welcome a strengthening of the introductory paragraph which emphasises upfront the Government’s recognition of the internationally recognised human rights of people who are sex and gender diverse, including those rights and obligations identified in the Human Rights Context section above.
- 23. It also considers that the Introduction (or Background) should set out the specific commitment regarding the Guidelines under Action 209 of the National Human Rights Action Plan. This would provide context for government officials to better understand their own obligations under the Guidelines.

¹⁴See for example, AHRC report, above at n3

¹⁵ACT Law Reform Advisory Council, *Beyond the Binary: Legal Recognition of Sex and Gender Diversity in the ACT*, Report 2, March 2012, pages 22-23

¹⁶Due to the passage of the *Privacy Amendment (Enhancing Privacy Protection) Act 2012*

¹⁷AHRC, *Sexual Orientation and Sex and/or Gender Identity, Research Paper – October 2010* (the Research Paper), page 4, available at http://www.hreoc.gov.au/human_rights/lgbti/lgbticonsult/research_paper.html

24. It is also important that agencies are aware of their further obligations under action 205 of the National Human Rights Action Plan. This comprises an Australian Government commitment to:

... amend data collection to allow for, or encourage disclosure of, sexual orientation and gender identity to establish a better evidence base for service provision and policy development (see further discussion below).¹⁸

25. The Introduction (or Background) should also set out this commitment.

Application

26. The Law Council considers that the Guidelines should state clearly upfront that they apply to all Australian Government departments and agencies. While the later Commencement and Implementation section implies that this is the case, it is important that the information is made available at the outset.

27. Such a statement would better reflect the commitment in the National Human Rights Action Plan to develop guidelines “*across the Australian Government public sector agencies*”.¹⁹

28. In its earlier correspondence to the AGD, the Law Council raised its concerns that the Review omitted certain key agencies such as the AFP and intelligence gathering agencies. It noted the potential for such agencies to collect or use information on sex and gender status in a manner which could be intimidating and intrusive. The Law Council reiterates its concerns on this matter, noting that the AHRC Report specifically identified police records as key relevant documents.²⁰ The Guidelines should emphasise that these agencies are subject to their operation.

29. To assist agencies, the Guidelines could also provide practical examples of the purposes for which the Government currently collects gender and sex information such as for:

- its Centrelink and Medicare databases (the Department of Families, Housing, Community Services and Indigenous Affairs (FaHCSIA), other Centrelink purposes, the Department of Health and Ageing (DoHA) and other Medicare purposes;
- citizenship and immigration purposes, and for considerations when registering and managing the needs of asylum seekers (the Department of Immigration and Citizenship (DIAC));
- the issuing of passports (the Department of Foreign Affairs and Trade (DFAT));
- considerations when carrying out personal searches – for example, as to the choice to be made regarding who will carry out a search (for example, the Australian Customs Service);
- police searches, records and criminal history Australian Federal Police (AFP); and

¹⁸ Action 205, National Human Rights Action Plan

¹⁹ Above at n2

²⁰ Page 21, above at n3

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- intelligence gathering (the AGD, Department of Defence, the Australian Security and Intelligence Organisation (ASIO) and the Australian Secret Intelligence Service (ASIS)).

The Guidelines should, however, clarify that this list is not exhaustive and agencies should review their own collection of information.

30. As raised in its earlier correspondence,²¹ the Law Council considers that the Government should expressly adopt the Guidelines in relation to its own collection of information as an employer. Given that employment is a key area in which people typically experience discrimination, and given the Australian Public Service's broad reach as an employer of more than 160,000 people,²² it would seem highly relevant to apply the Guidelines to information collected for employment purposes, including recruitment, promotion and security clearance processes. The Law Council is concerned that not adopting this policy may send conflicting Government messages.

Sex and Gender Section

31. The policy set out in paragraphs 14 and 15 is fundamental to the operation of the Guidelines. It states that:

14. The preferred Australian Government approach is to collect and use gender information. Information regarding sex would not ordinarily be required.

15. Information about people's sex should only be collected where there is a legitimate need for that information, eg. if a service or benefit to be provided to the individual is related to biological sex.

32. The Law Council supports the Australian Government's preference for information based on gender rather than sex unless it is related to biological purposes. This is consistent with a human rights-based approach of recognising individuals according to their self-defined identity.
33. However, the Law Council is concerned that this paragraph does not fully reflect the Government's commitment under the National Human Rights Action Plan "to ensure sex *and* gender information is collected ... only where there is a legitimate purpose".
34. That is, it should be amended to emphasise that information about gender, as well as about sex, should only be collected where necessary for a legitimate purpose. While paragraph 23 does appear to confirm that this is the case, it appears to relate to government data rather than personal records. It is therefore important that the initial statement in paragraph 14 is clear in its general application to information collected for personal records, statistical or administrative purposes.
35. To help to explain the meaning of "a legitimate purpose", consideration should be given to using the wording used in paragraph 37 which refers to a "legislative or regulatory authority or policy or business need for the information".
36. In order to further emphasise this overarching policy, the Law Council suggests that the headline be amended, or the section split into two sections, with the first focusing on definitions and the second reading "Sex and Gender Information – Collection Only for Legitimate Purposes".

²¹ Above at n5

²² APS Commission, State of the Service 2011-2012: At A Glance Report, page 9, accessed at http://www.apsc.gov.au/__data/assets/pdf_file/0013/5332/ataglance.pdf

Sex and Gender Classification in Australian Government Records Section

37. The Law Council notes that paragraph 23 of the following section, which appears to be targeted at government information other than personal records (such as statistical or administrative information), puts an onus on all departments and agencies which collect sex/ gender information to:

... 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.

38. The Law Council suggests that the same obligation should be included for information collected for personal records in a new paragraph inserted in this section.

39. In line with its previous comments, it further suggests that both the new paragraph and paragraph 17 should reinforce that such information must be necessary “for legitimate purposes”. For example, paragraph 17 would be amended to state that:

Where sex and/or gender information is deemed to be necessary for a legitimate purpose and is collected or recorded in a personal record, individuals should be given the option to select M (male), F (female) or X (Indeterminate/Intersex/Unspecified).

40. The Law Council supports providing people with the ability to choose to be defined according to the categories proposed. However, it is interested in the views of the sex and gender diverse community as to whether the proposed grouping of “indeterminate, intersex and unspecified” is appropriate. It is concerned that specific, different meanings are accorded to each of these terms, and where possible, it may be more appropriate to include each as a separate term. However, the Law Council does recognise that the AHRC Report concluded that persons over the age of 18 should be able to choose to have an “unspecified sex” noted on documents and records as an alternative to “male” or “female”, notwithstanding difficulties with this approach.²³

41. Another option is provided by the view of the ACT Law Reform Advisory Council that people should be given the option of identifying as any of: “female”; “male”; “intersex” or “none of the above.” If they choose the latter category, they could also enable persons to further identify themselves, for example, as transgender.²⁴

42. One of the Law Council’s Constituent Bodies, the ACT Law Society has also recommended that the Guidelines state that personal titles should be provided on a voluntary rather than obligatory basis. Other than honorific titles such as “Doctor” or “Professor”, the titles attached to names are gendered. It would not be consistent to require a title if a person chose a gender classification that is neither male nor female.

Proof of Sex and Gender/ Amending Sex and Gender in Government Records Section

43. The general right of a person to request an alteration to records containing their personal information where it is not, or is no longer, accurate²⁵ should be outlined at the outset of this paragraph. This would include the right to seek a change in sex or gender.

²³ Page 33, AHRC Report

²⁴ Above at n15, page 37

²⁵ *Privacy Act (1988)* IPP 7

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44. The Law Council welcomes the proposed policy that sex reassignment surgery and/or hormone therapy are not prerequisites for the recognition of a change of gender. Noting the AHRC Report's finding that the medical evidence required to support a person's change in legal sex is often unnecessarily demanding,²⁶ it also welcomes the relatively straightforward approach in which a person would refer to a medical certificate of one medical practitioner to support an application under paragraph 19.
45. However, the Law Council queries why only a medical practitioner should have the ability to corroborate sex or gender identity, given that other persons in appropriate positions in the community may have a better knowledge of the individual concerned. These people might include community leaders, psychologists, pharmacists or lawyers. The Law Council is concerned that the sole emphasis on a medical practitioner tends to "medicalise" diversity as a condition that requires treatment. It also notes that such concerns were raised in the AHRC Report, as well as concerns about the cost of obtaining medical evidence. The AHRC Report recommended that the discretion should be available to consider relevant information from individuals other than medical practitioners.²⁷
46. The Law Council recommends that paragraph 19 be amended to include the ability to accept Gender Recognition Certificates from persons in appropriate positions in the community, as well as medical practitioners, to confirm a person's sex or gender identity.
47. Similarly, template 1 at Appendix A currently proposes that a person transitioning genders must "have had, or be receiving, appropriate clinical treatment for gender transition". For the reasons set out above, the Law Council queries why the template could not require simple confirmation that the person has transitioned, or is transitioning genders, rather than receiving clinical treatment. It recommends that changes be made to this effect.
48. It also suggests that paragraph 19 clarify that the Australian Government will recognise "any one of the following [documents] as sufficient evidence of their sex and/or gender". These documents are: a gender recognition medical certificate (noting the Law Council's recommendations above that this category be broadened), a valid Australian Government travel document or an amended State or Territory birth certificate.

Collecting Sex and Gender Information Section

49. Consistent with the terminology set out in the National Human Rights Action Plan, paragraphs 23 and 24 should be amended to emphasise that such information should only be collected where necessary "for a legitimate purpose", eg:

23. Consistent with IPP 1, all departments and agencies that collect sex and/or gender information should closely examine whether such information is necessary for a legitimate purpose, for example for the performance of their specific function or for broader government statistical or administrative purposes.

50. The Law Council agrees with paragraph 24, which states that collecting and maintaining gender-disaggregated data is crucial to the ongoing monitoring of equality between men and women. The paragraph clarifies that such data can be collected where necessary by departments or agencies for the performance of their specific

²⁶Page 39, above at n3

²⁷Page 32 and 33, above at n3

function, or where it is used to inform the development of policy of delivery of services, or where it contributes to gender-disaggregated data.

51. The Law Council supports the inclusion of paragraph 26, which provides for individuals to identify as something other than “male” or “female” This helps to give effect to the principle of recognising individuals based on their self-defined gender identity. Importantly, it should also assist agencies to develop policies and deliver services which are more appropriate for the needs of people who are sex and gender diverse. However, the Law Council does reiterate its concerns about grouping individuals as “intersex, indeterminate or unspecified”, and suggests that allowing for separate categorisation of individuals as “intersex”, “indeterminate” or “unspecified” could help to better adapt policies and services in this way.

Privacy and Retaining Records of Previous Sex and/or Gender Section

52. The Law Council appreciates the emphasis given to respecting individual privacy regarding the history of changes of sex, gender or name in this section.
53. It is also mindful of the instances described in the AHRC Report, in which information was revealed about a person’s past identity, putting them at risk of discrimination and violence.²⁸
54. It considers that paragraph 31 should be augmented to emphasise that:

While there may be limited instances when an individual’s history of changes of sex, gender or name is relevant to a decision being made, in most cases there is no reason to record, access or reveal this information.

Queries and Complaints Section

55. The Law Council considers that this section should be strengthened so that complaints or queries across Australian Government agencies are monitored by a central oversight body, for example, within the AGD. This will help to assess the effectiveness of the Guidelines over time, and ensure that improvements to the Guidelines and their implementation can be made.
56. The Guidelines state that individuals with concerns about breaches of their privacy may be referred to the Office of the Australian Information Commissioner. The Law Council considers that an alternative complaint mechanism for individuals should also be available, noting that the content of the complaint may raise issues beyond the matters covered by the IPPs (or APPs), such as discriminatory treatment.
57. A central oversight body could also act as a contact point for agencies seeking advice on how to respond to complaints. It could provide ongoing public reports to the Attorney-General about the numbers and types of complaints made (with individual information de-identified in accordance with IPPs, or APPs), and actions to address any issues raised. It could also recommend changes which would help to boost the effectiveness of the Guidelines.
58. The Law Council is concerned that without such improvements, the Guidelines’ value may be compromised.

²⁸ Page 34, above at n3

Commencement and Implementation Sections

59. The Law Council considers that this Section must be strengthened significantly if the Guidelines are to realise their objectives. It is concerned that the Guidelines are not sufficiently clear regarding: the responsibilities of Australian Government agencies; applicable timeframes; or reporting on progress. It also considers that a central body must have overall responsibility for the implementation of the Guidelines and be required to report on progress made.

60. For example, paragraph 36 should be amended to clearly state that:

All Australian Government departments and agencies must align their existing and future business practices with these Guidelines by 1 July 2016.

61. Paragraph 37 refers to the obligation on departments and agencies to review their requirements regarding the collection of sex or gender information and “pursue amendments as required”. This phrase should be deleted and replaced with “amend their requirements where they do not comply with these Guidelines”.

62. Paragraph 37 goes on to state that:

Where there is no legislative or regulatory authority or policy or business need for the information, consideration should be given to removing the requirement within three years.

This requirement is too vague and is unlikely to prompt effective action. It should be amended to state that:

Where there is no legislative or regulatory authority or policy or business need for the information, the requirement must be removed by 1 July 2016.

63. The Section should also emphasise that information provided about the legal recognition of sex and gender must be easily accessible and user-friendly. This was a key recommendation made by the AHRC Report in response to problems identified in the sex and gender diverse community.²⁹

64. As stated above, the Law Council considers that a central body should have oversight of the implementation of the Guidelines across Australian Government agencies. Without such a central body, there will be no way of knowing whether the Guidelines have been implemented effectively.

65. The role of a central body could include:

- (a) Liaising with agencies to provide assistance and advice regarding implementation and training issues and handling complaints and queries. This could include addressing issues common to several agencies to ensure consistent outcomes;
- (b) Liaising with agencies and officials regarding how, at the implementation level, the Guidelines’ requirements intersect with other Australian Government requirements, including under the IPPs or APPs and the National Identity Security Strategy;
- (c) Providing an additional contact point regarding individual complaints and queries;

²⁹Page 36, above at n3

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- (d) Ensuring that both the Guidelines, and information about how they are implemented with information agencies, are clear and accessible;
 - (e) Reporting to the Attorney-General on progress achieved in implementing the Guidelines by the proposed timeframes, and advising on any changes necessary to improve their effectiveness. The Law Council considers that these reports should be made public; and
 - (f) Liaising with the sex and gender diverse community regarding the implementation of the Guidelines, and responding to any issues raised.

66. The Law Council is concerned that without changes of the kind proposed above, the Australian Government will not meet its commitment under the National Action Plan to “ensure” changes in the way sex and gender information is collected.

Further comments

Amendments to the Sex Discrimination Act

67. The Law Council’s concerns regarding the implementation of the Guidelines are exacerbated by clause 43A of the *Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Bill 2013* (the Bill), which is currently being considered by the Senate Legal and Constitutional Affairs Legislation Committee (the Committee).

68. Clause 43A inserts a new exemption into Division 4 of the *Sex Discrimination Act 1984* (Cth) (SDA) applying to requests for information and the keeping of records that do not allow for identification as being neither male nor female:

- Subsection 43A(1) provides that it is not unlawful discrimination to request information in a way that does not allow for a person to identify as being neither male nor female; and
- Subsection 43A(2) provides that it is not unlawful discrimination to make or keep records in a way that does not provide for a person to be identified as being neither male nor female.

69. The Explanatory Memorandum to the Bill states that this exemption seeks to achieve the legitimate objective of minimising regulatory impact on organisations by ensuring that they are not required to amend all relevant forms.³⁰ It notes that:

*The need for these exemptions may be reconsidered in the future, if organisations (both government and private sector) have revised their data collection and record keeping practices to allow for a person to identify as neither male nor female. For example, the Government is currently developing guidelines on gender recognition for departments and agencies. Changes as a result of these guidelines may mean those departments and agencies would no longer require this exemption.*³¹

The Law Council is concerned that while the Explanatory Memorandum notes that the exemption proposed in clause 43A may not be necessary in the future, it is nevertheless framed as a permanent exemption. With respect to Australian Government agencies in particular, this makes it likely to undermine the Guidelines’ overall effect and raises

³⁰ Explanatory Memorandum to the Bill, pages 6-7, 22

³¹ *Ibid.*, page 22

questions about the Government's commitment in practice to the principles set out in both the Guidelines and the Bill.

70. The Law Council notes that under the existing provisions of the SDA, the AHRC can exempt a person or class of persons from the unlawful discrimination provisions in Division 1 and Division 2 of the SDA.³² Such an exemption can be made on application to the AHRC and can be subject to certain terms and conditions. Its maximum duration is five years and applications made under these provisions are subject to review by the Administrative Appeals Tribunal.
71. The Law Council suggests that this temporary exemption process could be utilised as an alternative to a permanent exception relating to record keeping arrangements. This approach would align more closely with the objects and purpose of the Bill, as it would require consideration of the individual circumstances of each business or organisation by the AHRC before permitting discrimination to occur in the area of record keeping. It would also explicitly acknowledge that the barriers that may be faced by business and organisations in making appropriate changes to their record keeping arrangements are temporary. This approach also has the advantage of being likely to be included in any future consolidation of Commonwealth anti-discrimination laws and was a feature of the Exposure Draft of the *Human Rights and Anti-Discrimination Bill 2012* (Cth).
72. If this approach is considered to be unduly onerous, the Law Council recommends in the alternative that a sunset clause of four years be introduced in relation to clause 43A, with a specific obligation to conduct a review to consider removing the clause's application to Australian government agencies, in light of the obligations introduced under the Guidelines. The Attorney-General should be required to report to Parliament on the review, and on progress made by agencies in implementing the Guidelines, three years after the Bill's commencement. This would allow sufficient time for agencies to implement the Guidelines.
73. The Law Council anticipates providing a submission to the Committee regarding the Bill which incorporates the above recommendations.³³
74. One of the Law Council's Constituent Bodies, the Law Society of New South Wales has suggested that the Guidelines should be placed on a legislative or regulatory footing.

Marital status

75. The Law Council is concerned that the Guidelines do not address issues relating to marital status which flow from a person changing sex or gender.
76. As emphasised in the AHRC report, married people who are sex and gender diverse face difficulties both in having their sex recognised *and* having their marriage recognised. Referring to its 2008 consultations, it noted that while a married person could change the sex noted on their Medicare or Centrelink records, they consequently lost recognition of their status as a married person. The AHRC report discussed the negative implications which could flow from losing recognition of a person's marital status at that time, including financial detriment.³⁴
77. The Law Council notes that as a result of the 2008 same-sex reforms, all couples whether married or defacto, opposite-sex or same sex, are given the same treatment

³² ss 44 – 47, SDA

³³ The Senate Legal and Constitutional Affairs Legislation Committee is seeking submissions by 26 April 2013.

³⁴ Above at n3, pages 30-31

by Commonwealth law (other than that, of course, same-sex couples are not permitted to marry under the *Marriage Act 1961*). Therefore, the kinds of financial implications discussed in the AHRC report should not eventuate as a result of a married person seeking a change in sex or gender in Australian Government records.

78. The Law Council notes that in its 2012 report *Beyond the Binary: Legal Recognition of Sex and Gender Diversity in the ACT*, the ACT Law Reform Advisory Council stated that it had been advised that “in the view of the Commonwealth, a marriage remains valid despite one party to the marriage changing their sex and gender identity.”³⁵
79. However, no such confirmation of this policy position is provided in the Guidelines. It is likely that without such confirmation, if married persons were to seek a change in sex or gender in Commonwealth documents or records, government officials would consequently change their status from “married” to (same-sex) “couple”, due to the restriction of marriage under the *Marriage Act 1961 (Cth)* to the union of a man and a woman. This would have the practical effect of ending the recognition of their marriage by the Australian Government.
80. The Law Council has consistently advocated for marriage equality for all people regardless of sex, sexuality and gender identity.³⁶ It believes that marriage is a human right which should be made available to all people, and that the legal restriction on same-sex marriage is an important human rights and rule of law issue. All people are equal before the law and should be entitled to the same fundamental rights.
81. On this basis, the Law Council agrees with the AHRC’s recommendations that:
- (a) a person should not be forced to end their marriage in order to have a change in sex legally recognised; and
 - (b) marital status should not be a relevant consideration as to whether or not a person can request a change in legal sex.
82. The Law Council notes that clause 52 of the Bill exempts discriminatory conduct which is carried out in direct compliance with the *Marriage Act*. It intends to raise its concerns about this exemption, and the Government’s continuing failure to recognise same-sex marriage, in its submission on the Bill.³⁷
83. With respect to the Guidelines, the Law Council considers that these should be amended to clarify, in accordance with the AHRC recommendations, that:
- (a) a person should not be forced to end their marriage in order to have a change in sex legally recognised; and
 - (b) marital status should not be a relevant consideration as to whether or not a person can request a change in legal sex.

³⁵ Above at n24, page 41

³⁶ See for example, the Law Council’s Submissions to the Senate Legal and Constitutional Affairs Committee regarding: the *Marriage Equality Amendment Bill 2010*, 2 April 2012; and the *Marriage Equality Amendment Bill 2009*. Both submissions are available at:

<http://www.lawcouncil.asn.au/programs/criminal-law-human-rights/human-rights/discrimination.cfm>

³⁷ See n33 above

Special needs of children and young people

84. The AHRC Report noted that during its consultations, it was informed that due to greater awareness of sex and gender diversity, more children and young people are expressing a sexual identity which is different to that noted on their birth certificate.
85. It also noted that children and young people only rarely undergo sex affirmation surgery before they are 18, and many of the difficulties faced by children in gaining appropriate documentation are due to the fact that they have not had this surgery.
86. The fact that the Guidelines do not require surgery to be undertaken in order to seek a change in sex or gender is therefore particularly welcome, in light of the needs of children and young people.
87. Nevertheless, the Law Council considers that many government agencies will require guidance as to the approach to be taken to requests by children and young people for changes in their sex and gender documentation. It considers that the Guidelines should specifically address this issue, in line with the AHRC's recommendations that the special needs of children and young people who wish to amend their documents and records should be considered.³⁸ The AHRC also suggested that requiring a statutory declaration of support from the child or young person's parent or guardian could provide an additional safeguard.

Corresponding National Human Rights Action Plan Commitments

Nationally Consistent Approach

88. The National Human Rights Action Plan includes an Australian Government commitment to work with the states and territories to develop a nationally consistent approach to legally changing sex.³⁹ The relevant timeframe is described as "ongoing".
89. The Law Council would welcome information about progress being made under this commitment. Better recognition by state and territory governments of changes in sex or gender is important, noting their responsibility for issuing fundamental records such as birth certificates.
90. The Law Council considers that the development of the Guidelines should include consultation with state and territory governments regarding the proposed Guidelines, for example through the Standing Council on Law and Justice, with a view to ensuring consistency, as far as possible, between the Guidelines and the nationally agreed approach.
91. However, it considers that the Australian Government should not delay issuing the Guidelines if it appears that the broader national approach will require a longer timeframe. Finalising the Australian Government's Guidelines will help to demonstrate some needed leadership on the issue of legally recognising sex and gender.
92. The Law Council notes that the Australian Capital Territory (ACT) Government has recently announced that it intends to introduce a number of legislative changes regarding the recognition of sex and gender.⁴⁰ The ACT Government is therefore

³⁸ Recommendation 4, AHRC Report, page 9

³⁹ Acton 208, National Human Rights Action Plan

⁴⁰ Attorney-General, Simon Corbell MLA, *Report to the Legislative Assembly for the Australian Capital Territory, Beyond the Binary: Legal Recognition of Sex and Gender Diversity in the ACT – Law Reform Advisory Council: Government Response*, 19 March 2013

likely to be particularly interested in commenting on the Guidelines' consistency with its approach to sex and gender diversity in the proposed amendments.

93. The ACT Government commitments have been made in response to the ACT Law Reform Advisory Council's 2012 report, *Beyond the Binary: Legal Recognition of Sex and Gender Diversity in the ACT* (2012).⁴¹ The ACT Law Society has drawn the Law Council's attention to this report, highlighting its acknowledgment of the central importance of the views of the sex and gender diverse community. The Law Council recommends that the AGD give due weight to the ACT Law Reform Council's views, noting the level of expertise amongst its membership and its expert advisory subcommittee. It considers that many of the issues canvassed in the report transcend jurisdictional boundaries.

ABS Data collection

94. The National Human Rights Action Plan also includes an Australian Government commitment to amend data collection to allow for, or encourage disclosure of, sexual orientation and gender identity to establish a better evidence base for service provision and policy development.⁴²
95. This commitment will principally be achieved by the AGD and the ABS in time to incorporate into the 2016 census reform. The National Human Rights Action Plan also implies that the commitment shall also be taken up by Australian Government agencies more generally, as part of their data collection requirements, on an ongoing basis.
96. The Law Council would welcome information about the progress being made under this measure, and any consultation process being undertaken. It will be important to ensure some consistency between the collection of information under the Guidelines and under this separate commitment. As discussed above, the Law Council also considers that the Guidelines should specifically refer to this commitment, as it helps to provide important context for agencies about their relevant responsibilities.

Education and Training programs

97. In addition to the implementing both the Guidelines and the Bill, the Law Council considers that the Government will need to demonstrate further leadership and undertake education initiatives in order to achieve greater public acceptance and recognition of sex and gender identity.
98. To that end, it recommends that additional funding be provided for both tailored education and training for government employees and a public education campaign. As well as generally supporting the recognition of sex and gender diversity, these would address the practical steps being taken towards their achievement, including through the introduction of the Guidelines and the Bill (when passed), and the other commitments made under the National Human Rights Action Plan. Support and advisory services should also be available for people who are sex and gender diverse, their employers, workplaces and educational institutions.

⁴¹ Above at n24

⁴² Action 205, National Human Rights Action Plan

Conclusion

99. The Law Council considers that record keeping, classification and consistency of standards are very important when issues of identity are involved. The Guidelines help to provide clarity on the proposed approach by the Government towards these issues as they relate to sex and gender recognition. They place an important emphasis on “gender” rather than “sex”, which is consistent with a human rights-based approach of recognising individuals according to their self-defined identity.
100. However, the Law Council is concerned that the implementation obligations in the Guidelines must be strengthened significantly if the Australian Government is to meet its National Human Rights Action Plan commitment of “ensuring” changes in the way sex and gender information is collected. It is concerned that the Guidelines are not sufficiently clear regarding their application to all agencies, or the responsibilities or timeframes involved. It also considers that a central body must have overall responsibility for implementing the Guidelines and be required to report on progress made.
101. These concerns are exacerbated by clause 43A in the Bill, which provides a permanent exemption applying to requests for information and records that do not allow for identification as being neither male nor female. This undermines the Guidelines’ overall effect and raises questions about the Government’s commitment to the principles underlying the Guidelines and the Bill. The Law Council considers that the exemption must be temporary in its application to Government agencies.
102. The Law Council also recommends that a number of further changes are needed to improve and clarify the Guidelines. These include: extending their application to the Government’s role as an employer; emphasising that sex *and* gender information must only be collected for a legitimate purpose; allowing Gender Recognition Certificates to be accepted from non-medical practitioners in appropriate community positions; strengthening the emphasis on respecting individual privacy; and specifically addressing the needs of children and young people. It further emphasises the need to clarify that a person should not be forced to end their marriage in order to have a change in sex legally recognised.
103. The Law Council considers that broad consultation will be important in order to build recognition and understanding of the Guidelines. This will also help ensure their consistency with other commitments made under the National Human Rights Action Plan, including the commitment of Commonwealth, State and Territory Governments to develop a nationally consistent approach to legally changing sex. However, it considers that the Australian Government should not delay issuing the Guidelines if it appears that the broader national approach will require a longer timeframe. Finalising the Australian Government’s Guidelines will help to demonstrate some needed leadership on the issue of legally recognising sex and gender. Subject to the views of the sex and gender diverse community in particular, the Law Council looks forward to the Guidelines’ finalisation and implementation.

Attachment A: Profile of the Law Council of Australia

The Law Council of Australia exists to represent the legal profession at the national level, to speak on behalf of its Constituent Bodies on national issues, and to promote the administration of justice, access to justice and general improvement of the law.

The Law Council advises governments, courts and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council also represents the Australian legal profession overseas, and maintains close relationships with legal professional bodies throughout the world.

The Law Council was established in 1933, and represents 16 Australian State and Territory law societies and bar associations and the Large Law Firm Group, which are known collectively as the Council's Constituent Bodies. The Law Council's Constituent Bodies are:

- Australian Capital Territory Bar Association
- Australian Capital Territory Law Society
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Independent Bar
- The Large Law Firm Group (LLFG)
- The Victorian Bar Inc
- Western Australian Bar Association

Through this representation, the Law Council effectively acts on behalf of approximately 60,000 lawyers across Australia.

The Law Council is governed by a board of 17 Directors – one from each of the Constituent Bodies and six elected Executives. The Directors meet quarterly to set objectives, policy and priorities for the Law Council. Between the meetings of Directors, policies and governance responsibility for the Law Council is exercised by the elected Executive, led by the President who serves a 12 month term. The Council's six Executive are nominated and elected by the board of Directors. Members of the 2012 Executive are:

- Mr Joe Catanzariti, President
- Mr Michael Colbran QC, President-Elect
- Mr Duncan McConnel, Treasurer
- Ms Fiona McLeod SC, Executive Member
- Mr Justin Dowd, Executive Member
- Ms Leanne Topfer, Executive Member

The Secretariat serves the Law Council nationally and is based in Canberra.
