



# ACT LGBTIQ+ LEGAL AUDIT


REFORMS FOR AN INCLUSIVE ACT

**Equality Australia is a national LGBTIQ+ legal advocacy organisation. We work with LGBTIQ+ people to amplify the voices of our communities and achieve positive legal, policy and social change for LGBTIQ+ people and their families in Australia. Equality Australia is an independent, not-for-profit non-government organisation.**

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We acknowledge the invaluable pro bono assistance from King & Wood Mallesons in reviewing ACT legislation for potentially discriminatory language and provisions, and providing in kind support by hosting the consultations and proof-reading the report.

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We would also like to acknowledge and thank the ACT LGBTIQ Ministerial Advisory Council and the Expert Advisory Group for their contributions and advice.

This report is current as at 30 June 2019 and can be viewed online at [www.equalityaustralia.org.au](http://www.equalityaustralia.org.au).

**DISCLAIMER:** This audit report has been prepared for the purpose of outlining community views and reviewing current provisions of ACT legislation and regulations. It should not be used as legal advice.

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# 1/ EXECUTIVE SUMMARY

All human beings are born free and equal in dignity and rights.<sup>1</sup> This is the foundational principle of universality and equality which underpins international human rights law, and applies to all people regardless of sexual orientation, gender identity or expression and sex characteristics.<sup>2</sup>

The Australian Capital Territory (**ACT**) has a long history of being at the forefront of lesbian, gay, bisexual, trans, intersex and queer (**LGBTIQ+**) equality and human rights in Australia. The ACT was the first Australian jurisdiction to introduce fairer birth certificate laws for trans and gender diverse people. It was a leader in introducing civil unions and recognition of loving couples under law – many years before marriage equality became a reality. The ACT has updated its laws to remove direct discrimination for couples looking to start a family, and introduced protections from discrimination for intersex people. The ACT was also the first jurisdiction in Australia to introduce a Human Rights Act.

In recent years, the ACT Government has commissioned comprehensive reviews of gender recognition laws and anti-discrimination laws to be more inclusive of the diversity of LGBTIQ+ people already living in the ACT. The ACT Government has also been a leader in the development of LGBTIQ+ inclusive policies in a range of areas, including the development of the 2019-2023 *Capital of Equality: An ACT Government strategy to deliver equitable outcomes for Lesbian, Gay, Bisexual, Trans, Intersex & Queer (LGBTIQ+) people* strategy and consultations with the LGBTIQ Ministerial Advisory Council. The ACT Government has stated its public commitment to ensuring that the ACT is welcoming and inclusive of all LGBTIQ+ people living in the ACT. This includes ensuring that all people have equal legal status and recognition under ACT laws, and can enjoy their full human rights – regardless of their sexual orientation, gender identity or expression or sex characteristics.

In 2019, the ACT Government commissioned Equality Australia to conduct an independent and comprehensive legal audit of ACT legislation and regulations for laws which could discriminate against or cause harm to LGBTIQ+ people. The purpose of the independent legal audit was to identify areas for law reform to remove discrimination and help to make the ACT a safe, respectful and inclusive jurisdiction for all. As part of the legal audit, Equality Australia conducted research into ACT laws, consulted with LGBTIQ+ and Government stakeholders, and developed recommendations with the expert assistance of the project's Expert Advisory Group.

Key themes raised during consultations with LGBTIQ+ and Government stakeholders included:

- the importance of ensuring that laws and public comments do not conflate the experiences of trans and gender diverse people with the distinct experiences of people born with variations in sex characteristics (intersex people);
- the increasing numbers of gender diverse people – particularly gender diverse young people – living in the ACT, and the need to modernise laws and government policies to improve accurate data collection and access to inclusive services; and
- understandings of how best to protect LGBTIQ+ people's human rights and protect them from harm change over time as community attitudes shift, and the impact of previous laws which reflected contemporary understandings (at the time) require updating to reflect more recent research and current understandings of best practice.

The ACT LGBTIQ+ Legal Audit sets out recommendations for the ACT Government to continue its reforms to ensure that equal rights are reflected in ACT laws. The issues and recommendations outlined in this report largely relate to:

- removing remaining **discriminatory language** which is not inclusive of all members of our communities, particularly gender diverse people;
- introducing **new protections from harmful practices**, particularly for intersex people, survivors of anti-LGBTQ religious conversion therapy, and victims of hate speech and hate crime;
- replacing **discriminatory provisions** with best practice approaches, particularly respecting the principle of self-identification for trans and gender diverse people, consolidating existing civil union schemes and updating existing criminal justice policies;
- removing **unjustified exemptions** from anti-discrimination laws, particularly in education, employment, service delivery and sport; and
- ensuring existing laws do not have a **discriminatory impact**, particularly for rainbow families with diverse family structures, and for intersex people in relation to birth certificate laws.

Despite the ACT Government's strong track record to date, there are demographic groups within the LGBTIQ+ community where targeted legislative and regulatory reform is required to remove discrimination and promote equality, visibility, diversity and inclusion. Ensuring that discrimination is removed from ACT law and that individuals are effectively protected from discrimination is essential to enable all people to participate fully and invest their talent, passion, knowledge and ability in the ACT.



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# 2/ RECOMMENDATIONS

## URGENT PRIORITIES FOR REFORM

During consultations, LGBTIQ+ stakeholders urged the ACT Government to take action on the following issues as urgent priorities in the next two years:

- prohibit deferrable medical interventions on people born with variations in sex characteristics without full, free and informed consent;
- provide more accessible birth certificate laws for trans and gender diverse people, particularly young people;
- remove outdated permanent exceptions from anti-discrimination protections, particularly religious exemptions in service delivery and employment;
- prevent anti-LGBTQ religious conversion therapy; and
- review assisted reproductive treatment (ART) and surrogacy laws in the ACT.

## DISCRIMINATORY LANGUAGE IN LEGISLATION

### RECOMMENDATION 1

The ACT Government should amend the acts and regulations set out in Appendices A<sup>3</sup> and B<sup>4</sup> to replace binary gendered language with gender inclusive terminology, in order to remove potential discrimination against gender diverse people and ensure ACT laws are fully inclusive.

### RECOMMENDATION 2

The ACT Government should amend the acts and regulations set out in Appendix A<sup>5</sup> to ensure female specific provisions in relation to pregnancy and childbirth are gender inclusive.

### RECOMMENDATION 3

The ACT Government should amend the definition of 'intersex person' in the *Legislation Act 2001* (ACT) to ensure it is inclusive of all people born with variations in sex characteristics, and define 'sex characteristics' to mean "a person's physical features relating to sex, including genitalia and other sexual and reproductive anatomy, chromosomes, hormones, and secondary physical features emerging from puberty", consistent with the Yogyakarta Principles plus 10.<sup>6</sup>

### RECOMMENDATION 4

The ACT Government should consider whether to amend the acts and regulations set out in Appendix A to replace references to 'intersex person' in ACT laws to "person born with variations in sex characteristics", following the release of the Australian Human Rights Commission's report on the inquiry into *Protecting the human rights of people born with variations in sex characteristics in the context of medical interventions* and consultations with relevant stakeholders.

### RECOMMENDATION 5

The ACT Government should amend the acts and regulations set out in Appendix A<sup>7</sup> to ensure that trans, gender diverse and intersex people can nominate the gender of the person who will conduct an invasive procedure.

### RECOMMENDATION 6

The ACT Government should amend the acts and regulations set out in Appendix A<sup>8</sup> to amend references to 'sex' to 'sex or gender', and move towards using the term 'gender' where appropriate.

## **INCLUSION OF LGBTIQ+ PEOPLE IN SPECIAL MEASURES AND CONSULTATION MECHANISMS**

While the legal audit revealed some laws where special measures and consultation should be provided for LGBTIQ+ people, a comprehensive audit of similar provisions which apply to other designated groups was outside of the scope of this project's Terms of Reference. We make these recommendations to draw attention to the need for further consideration of these issues.

### **RECOMMENDATION 7**

The ACT Government should consider whether special measures which apply to other groups of people experiencing disadvantage (see examples in Appendix A<sup>9</sup>) should also apply to LGBTIQ+ people, in order to address structural and systemic discrimination.

### **RECOMMENDATION 8**

The ACT Government should amend the *Domestic Violence Agencies Act 1986* (ACT) to include a representative to raise issues experienced by LGBTIQ+ people in family violence on the family violence advisory council. The ACT Government should consider adding representation and consultation with LGBTIQ+ people to existing (see examples in Appendix A<sup>10</sup>) and future legislative advisory mechanisms to ensure effective consultation on issues where LGBTIQ+ people are disproportionately affected.

## **BIRTH CERTIFICATE LAWS**

### **RECOMMENDATION 9**

The ACT Government should amend the *Births, Deaths and Marriages Registration Act 1997* (ACT) to remove the requirement that sex be recorded on birth certificates.

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*If recommendation 9 is not implemented:*

### **RECOMMENDATION 10**

The ACT Government should amend the *Births, Deaths and Marriages Registration Act 1997* (ACT) to move towards collecting information on 'gender' rather than 'sex'.

### **RECOMMENDATION 11**

The ACT Government should amend the ACT Government's policy on available sex descriptors and the Birth Registration Statement (Form 201 – BRS) to remove the indeterminate/intersex/unspecified sex category and replace it with alternative gender markers (see recommendations 13 and 14).

### **RECOMMENDATION 12**

The ACT Government should amend the ACT Government's policy on available sex descriptors to allow for multiple gender markers on birth certificates to be made available in a free text field.

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*If recommendations 9 to 12 are not implemented:*

### **RECOMMENDATION 13**

The ACT Government should amend the ACT Government's policy on available sex markers to, at a minimum, allow for the use of 'non-binary' as a gender marker and for data collection purposes.

*If recommendations 9, 11, 12 or 13 are implemented:*

### **RECOMMENDATION 14**

The ACT Government should work with the Commonwealth Government to ensure that any rights or entitlements are not affected by people having different gender markers on their territory and federal identity documents.

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*If recommendation 9 is not implemented – and irrespective of the ACT Government's response to recommendations 10 to 14 – the following recommendations are also made:*

### **RECOMMENDATION 15**

The ACT Government should amend sections 24, 25, 29A and 29B of the *Births, Deaths and Marriages Registration Act 1997* (ACT) to remove the medical verification requirements for all applicants.

### **RECOMMENDATION 16**

The ACT Government should amend the *Births, Deaths and Marriages Registration Act 1997* (ACT) to allow children aged 16 or over to apply to change the gender marker and given name on their birth certificate, and allow children aged 12 to 16 to apply with the consent of one parent or person with parental responsibility.



## RECOMMENDATION 17

The ACT Government should amend the *Births, Deaths and Marriages Registration Act 1997* (ACT) to allow one parent to apply without the other parent's signature for 'some other reason', including on the basis of defined 'special circumstances'.

## RECOMMENDATION 18

The ACT Government should amend the *Births, Deaths and Marriages Registration Act 1997* (ACT) to allow a child to apply to the ACT Civil and Administrative Tribunal for an order allowing a change of given name and gender marker.

## RECOMMENDATION 19

The ACT Government should work with the ACT Civil and Administrative Tribunal to develop a specialist, fast-track process to streamline disputes in relation to applications to alter a person's gender marker.

## RECOMMENDATION 20

The ACT Government should amend the *Births, Deaths and Marriages Registration Act 1997* (ACT) to allow for applications to amend the given name and gender marker of a family member on a person's birth certificate.

## RECOMMENDATION 21

The ACT Government should amend the Birth Registration Statement (Form 201 – BRS) to allow any parent to be listed as mother, father or parent.

## RECOMMENDATION 22

The ACT Government should amend the *Births, Deaths and Marriages Registration Act 1997* (ACT) to prohibit a person's previous given name being disclosed on a birth certificate except where this has been requested by the applicant, and publicise the availability of amendments to non-required fields on birth certificates.

# ANTI-DISCRIMINATION LAWS

## RECOMMENDATION 23

The ACT Government should implement the remaining recommendations from the ACT Law Reform Advisory Council's Review of the *Discrimination Act 1991* (ACT), particularly recommendation 18 to replace permanent statutory exceptions with a justification defence.

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*If recommendation 23 is not implemented:*

## RECOMMENDATION 24

The ACT Government should amend the *Discrimination Act 1991* (ACT) to abolish the broad religious exception in s 32(1)(d).

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*If recommendations 23 or 24 are not implemented:*

## RECOMMENDATION 25

The ACT Government should amend the *Discrimination Act 1991* (ACT) to make employment a defined act as a limitation on the broad religious exception in s 32(1)(d) so that discrimination by religious organisations in employment is no longer permitted.

## RECOMMENDATION 26

The ACT Government should amend the *Discrimination Act 1991* (ACT) to make service delivery a defined act as a limitation on the broad religious exception in s 32(1)(d) so that discrimination by religious organisations in service delivery is no longer permitted.

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*If recommendations 25 to 26 are not implemented:*

## RECOMMENDATION 27

The ACT Government should insert provisions in the *Government Procurement Act 2001* (ACT) and amend government funding agreements to require all organisations to provide inclusive and non-discriminatory services, unless the organisation has a specific exemption in the *Government Procurement Act 2001* (ACT). In the alternative, the ACT Government should amend government funding agreements to require government funded organisations delivering services to the public provide inclusive and non-discriminatory services.

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*If recommendation 23 is not implemented:*

## RECOMMENDATION 28

The ACT Government should review the permanent statutory exceptions (other than religious exceptions) particularly in sections 28, 31, 34, 36, 37, 38, 39(3), 40 and 41 of the *Discrimination Act 1991* (ACT).

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*Recommendations 29 and 30 apply irrespective of the ACT Government's response to recommendations 23 to 28.*

## RECOMMENDATION 29

The ACT Government should amend the *Discrimination Act 1991* (ACT) to update the protected attribute of 'intersex status' to 'sex characteristics'.

## RECOMMENDATION 30

The ACT Government should amend the *Discrimination Act 1991* (ACT) to make clear that the attribute of 'gender identity' also provides protections from discrimination on the basis of gender expression.

## RAINBOW FAMILIES & FAMILY FORMATION

### RECOMMENDATION 31

The ACT Government should conduct a review into access to reproductive healthcare in the ACT, including whether to introduce legislation to regulate the provision of IVF and other assisted reproductive services and potential discrimination in accessing these services.

### RECOMMENDATION 32

The ACT Government should amend sections 42 and 43 of the *Parentage Act 2004* (ACT) to ensure that procurement and advertising offences do not apply for altruistic substitute parent agreements.

### RECOMMENDATION 33

The ACT Government should amend Parts 2 and 4 of the *Parentage Act 2004* (ACT) to modernise existing arrangements for substitute parent agreements in line with the Independent Review of Assisted Reproductive Treatment commissioned by the Victorian Government. In the alternative, the ACT Government should ensure that greater regulation of substitute parent agreements is considered in the review into access to reproductive healthcare (see recommendation 31).

### RECOMMENDATION 34

The ACT Government should amend sections 24 to 26 of the *Parentage Act 2004* (ACT) to allow for children born as a result of substitute parent agreements in other jurisdictions to obtain a parentage order for legal certainty of their family relationships.

### RECOMMENDATION 35

The ACT Government should amend the *Births, Deaths and Marriages Act 1997* (ACT) and the *Parentage Act 2004* (ACT) to allow for more than two parents of a child to be legally recognised.

### RECOMMENDATION 36

As part of the review into access to reproductive healthcare (see recommendation 31), the ACT Government should consider how to improve access to government funded reproductive services and fertility counselling for people born with variations in sex characteristics.

### RECOMMENDATION 37

The ACT Government should amend the *Health Records (Privacy and Access) Act 1997* (ACT) to require the electronic retention of health records of people born with variations in sex characteristics for 99 years.

### RECOMMENDATION 38

As part of the review into access to reproductive healthcare (see recommendation 31), the ACT Government should consider how to improve access to affordable fertility preservation options for transgender and gender diverse people.

## POLICING & CORRECTIONS

### RECOMMENDATION 39

The ACT Government should amend the *Corrections Management (Management of Transgender Detainees and Detainees Born with Variations in Sex Characteristics) Policy 2018* (ACT) to avoid references to self-identification for intersex people, and insert separate sections to address specific concerns for people born with variations in sex characteristics in line with the Victorian Corrections Commissioner's *Management of Prisoners who are Trans, Gender Diverse or Intersex* guidelines.

### RECOMMENDATION 40

The ACT Government should amend the *Corrections Management (Management of Transgender Detainees and Detainees Born with Variations in Sex Characteristics) Policy 2018* (ACT) to address additional specific considerations in the care and management of transgender, gender diverse and intersex people in prison, in line with the Victorian Corrections Commissioner's *Management of Prisoners who are Trans, Gender Diverse or Intersex* guidelines.

### RECOMMENDATION 41

The ACT Government should amend existing youth detention policies<sup>11</sup> to remove inappropriate terminology and definitions around 'sexual identity' and self-identification in relation to intersex people, and update the policies to address the specific needs of LGBTIQ+ young people.

### RECOMMENDATION 42

The ACT Government should further consult with LGBTIQ+ communities and work with ACT Policing to ensure its GLOO program is inclusive of all LGBTIQ+ people. If necessary, the ACT Government should develop publicly available policies and procedures outlining the Australian Federal Police's policies for treatment of LGBTIQ+ people in police custody and LGBTIQ+ victims of crime.

## RELATIONSHIP RECOGNITION

### RECOMMENDATION 43

The ACT Government should further consult with LGBTIQ+ communities on whether the *Civil Unions Act 2012* (ACT) should be amended to allow de facto couples to enter into civil unions regardless of whether marriage is available as an option.

## INTERSEX PEOPLE & HARMFUL PRACTICES

### RECOMMENDATION 44

The ACT Government should introduce legislation to prohibit surgical or other medical interventions on people born with variations in sex characteristics without free, prior and informed consent unless necessary to avoid serious, urgent and irreparable harm to the person, with human rights based oversight and effective remedies for people subjected to these medical interventions.

### RECOMMENDATION 45

The ACT Government should consider the Australian Human Rights Commission's report from the *Protecting the Human Rights of People Born with Variations in Sex Characteristics in the context of Medical Interventions* inquiry, and consult with relevant stakeholders on how to appropriately adapt any recommendations to the ACT context.

### RECOMMENDATION 46

As part of the review into assisted reproductive treatment, the ACT Government should consider the issues raised by the genetic deselection of intersex traits, including the need for training and education of genetic counsellors and practitioners working in the field responsible for disseminating information about intersex traits to potential parents.

## TRANS & GENDER DIVERSE PEOPLE'S RIGHTS

### RECOMMENDATION 47

The ACT Government should continue to undertake service improvements to ensure healthcare providers deliver more inclusive and accessible services for trans and gender diverse people, and work with the Australian Government to ensure that gender affirming medical treatment is made available under Medicare and the Pharmaceutical Benefits Scheme.

### RECOMMENDATION 48

The ACT Government should work with the Australian Federal Police to ensure that details of a person's former name which may disclose the sex they were assigned at birth is not included on the National Police Check that is provided to third parties (e.g. educational institutions, employers, volunteer organisations).

## RELIGIOUS CONVERSION THERAPY

### RECOMMENDATION 49

The ACT Government should introduce legislation to prohibit conversion practices, and define 'conversion practices' broadly for any conduct aimed at 'changing', 'suppressing', 'curing', 'healing', or 'repairing' a person's sexual orientation or gender identity in a way which has, or is likely to have, a significant negative impact on a person's mental health.

### RECOMMENDATION 50

The ACT Government should introduce legislation to prohibit conversion practices engaged in by:

- 'professionals' (defined to include social workers, unregistered and registered health practitioners, teachers and more) towards any adult, or
- 'any person' towards a child under 18 or people who are particularly vulnerable to coercion (e.g. a person with a cognitive impairment, intellectual disability or experiencing mental health issues),

as part of a package with non-legislative measures aimed at education, prevention and support.

### RECOMMENDATION 51

The ACT Government should insert a new offence in the *Crimes Act 1900* (ACT) which criminalises the removal, or attempted removal, of another person from Australia for the purposes of forced or coerced conversion practices which would constitute a criminal offence in the ACT.

*If recommendations 23 and 24 are not implemented:*

### RECOMMENDATION 52

The ACT Government should amend the *Discrimination Act 1991* (ACT) to include unlawful conversion practices as a 'defined act' as a limit to the broad religious exception in subsection 32(1)(d).

## HATE CRIME

### RECOMMENDATION 53

The ACT Government should amend section 33 of the *Crimes (Sentencing) Act 2005* (ACT) to ensure prejudice motivation is taken into account as a relevant consideration in sentencing.

### RECOMMENDATION 54

The ACT Government should insert a standalone 'hate crime' offence in the *Crimes Act 1900* (ACT).

## FAMILY VIOLENCE

### RECOMMENDATION 55

The ACT Government should develop specific policies through the Family Safety Hub to improve responses of ACT Policing and family violence support agencies to LGBTIQ+ people experiencing family violence.

## NON-LEGISLATIVE REFORMS

### RECOMMENDATION 56

The ACT Government should implement non-legislative measures to accompany any law reform around education, training, guidelines, policies and support programs.

# SUMMARY OF RECOMMENDATIONS

RECOMMENDED LAW REFORM	
LAWS SUMMARISED IN APPENDIX A AND B	Amend all ACT laws which may have a discriminatory impact on LGBTIQ+ people (recs 1-7)
BIRTHS, DEATHS AND MARRIAGES REGISTRATION ACT	Remove the requirement that sex be recorded on birth certificates (rec 9) Make necessary practical amendments to prevent potential data mismatch or disclosure to third parties (recs 20-22)
DISCRIMINATION ACT	Replace permanent exceptions in the Discrimination Act with a justification defence (rec 23) Update protected attribute of “intersex status” to “sex characteristics” (rec 29) Ensure “gender identity” is inclusive of gender expression (rec 30)
PARENTAGE ACT	Make clear that criminal offences for advertising and connecting parties to an agreement do not apply for altruistic surrogacy (rec 32) Legally recognise family relationships of children born through international surrogacy (rec 34) Allow for more than 2 parents of a child to be recognised (rec 35)
HEALTH RECORDS ACT	Require intersex people’s electronic health records to be retained for 99 years (rec 37)
CORRECTIONS POLICY	Address separate needs of trans and gender diverse people and intersex people (rec 39) Include more detailed provisions about specific issues facing trans, gender diverse and intersex people in prison (rec 40)
YOUTH DETENTION POLICIES	Update inappropriate terminology (rec 41)
NEW LEGISLATION – INTERSEX PEOPLE AND MEDICAL INTERVENTIONS	Prohibit medical interventions on intersex people without free, prior and informed consent unless necessary to avoid serious, urgent and irreparable harm, and ensure effective human rights based oversight and remedies (rec 44)
NEW LEGISLATION – ANTI-LGBT RELIGIOUS CONVERSION PRACTICES	Prohibit conversion practices engaged in by professionals towards any adult, or any person towards a child or person particularly vulnerable to coercion (rec 50)
CRIMES ACT	Introduce a new offence criminalising the removal or attempted removal of a person from Australia for forced or coerced conversion practices which are criminalised in the ACT (rec 51) Introduce a new standalone ‘hate crime’ offence (rec 54)
SENTENCING ACT	Ensure prejudice motivation is taken into account as an aggravating consideration in sentencing (rec 53)
NEW POLICIES – LGBTIQ+ PEOPLE AND FAMILY VIOLENCE	Family Safety Hub to develop new policies to improve responses of ACT Policing and family violence support agencies to LGBTIQ+ people experiencing family violence (rec 56)



## SEPARATE REVIEW NEEDED

Review existing special measures and consultative mechanisms in ACT laws and include LGBTIQ+ people where disproportionately affected (recs 8-9)

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Review access of reproductive healthcare for LGBTIQ+ people, including:

- need to regulate IVF and ART (rec 31)
  - modernisation of regulation of altruistic surrogacy (rec 33)
  - access to government funded reproductive services and fertility counselling for intersex people (rec 36)
  - access to affordable fertility preservation for trans and gender diverse people (rec 38)
  - genetic deselection of intersex traits (rec 46)
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Review into developing new youth justice policies to address the specific needs of all LGBTIQ+ young people (rec 41)

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Review legislative options recommended in Part 7(a) of this report following the release of the report from the Australian Human Rights Commission's current inquiry (rec 45)

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## COOPERATION WITH COMMONWEALTH GOVERNMENT NEEDED

Work with the Commonwealth Government to ensure any rights or entitlements are not affected by people having different gender markers on their territory and federal identity documents (rec 14)

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Work with Commonwealth Government to ensure government funding for reproductive services and fertility counselling for intersex people is available (rec 36)

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Work with Commonwealth Government to ensure affordable gender affirming medical treatment for transgender and gender diverse people is available (rec 47)

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Work with the Australian Federal Police to ensure that details of a person's former name is not included on a National Police Check provided to third parties (rec 48)

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## FURTHER CONSULTATION NEEDED

Consult with LGBTIQ+ communities on experiences with ACT Policing and develop LGBTIQ+ policies and procedures if necessary (rec 42)

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Consult with LGBTIQ+ communities on whether de facto couples may want to enter into civil unions post marriage equality (rec 43)

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# 3/ METHODOLOGY

Equality Australia was engaged by the ACT Government in January 2019 to undertake a fresh, independent audit of all ACT laws to identify any remaining provisions in ACT legislation that discriminate – or potentially discriminate – against people on the basis of their sexual orientation, gender identity, gender expression or sex characteristics.

As part of the ACT LGBTIQ+ Legal Audit, we conducted a technical legal audit to identify potentially discriminatory language within existing legislation and regulations, including a consideration of provisions which may be applied or implemented in a way which has a discriminatory outcome. While we conducted a thorough review of ACT legislation and regulations, Equality Australia did not have the time or resources to conduct a comprehensive review of all ACT Government policies. It is also not feasible for an external organisation to identify and access all existing ACT Government policies. However, Equality Australia was able to review existing acts and regulations for potentially discriminatory language or impact using key search terms and legal analysis, and consider potential legislative reform needed to respond to priority issues raised during consultations with ACT Government and LGBTIQ+ community stakeholders.

Equality Australia also held consultations with ACT Government experts and LGBTIQ+ community stakeholders.

This report also makes a series of recommendations to address existing discrimination in the law, and provides a roadmap for reform for the ACT Government to deliver best practice LGBTIQ+ laws, regulations and policies.

A number of other issues outside of the scope of the Terms of Reference of the legal audit are briefly mentioned at the end of this report, as broader areas of reform to promote the human rights of all LGBTIQ+ people.

## A) TERMS OF REFERENCE

In January 2019, the ACT Government commissioned Equality Australia to conduct a legal audit of all ACT laws to identify any provisions in ACT legislation that discriminate – or potentially discriminate – against people on the basis of their sexual orientation, gender identity, gender expression or sex characteristics. The Terms of Reference for the review included an analysis of provisions that may be applied or implemented in a way that has a discriminatory outcome.

In auditing ACT laws, Equality Australia was asked to have particular consideration of:

- discrimination and LGBTIQ rights;
- relationship recognition;
- rainbow families – adoption, surrogacy and parenting rights;
- trans and gender diverse rights;
- intersex rights; and
- domestic / family violence.

Equality Australia has also considered previous reviews undertaken by the ACT Law Reform Advisory Council, including:

- the *Beyond the Binary: legal recognition of sex and gender diversity in the ACT report*;<sup>12</sup> and
- the ACT Law Reform Advisory Council's inquiry into the scope and operation of the *Discrimination Act 1991 (ACT) (Discrimination Act)*.<sup>13</sup>

We have focussed on these particular areas of potential discrimination and acknowledge the extensive research and progress achieved as part of previous reforms in the ACT.

We have structured the substantive sections of this report to reflect the different levels of connection with the Terms of Reference:

- Part 4: Language and terminology in legislation which is not fully inclusive of all LGBTIQ+ people;
- Part 5: Inclusion of LGBTIQ+ people in special measures or consultation mechanisms (the absence of examples of LGBTIQ+ people in special measures or inclusion on legislative advisory mechanisms is flagged as an issue for further consideration);
- Part 6: Existing laws and policies which have a potentially discriminatory impact; and
- Part 7: Protecting LGBTIQ+ people from discrimination and harm (i.e. largely about gaps in existing laws).



## B) CONSULTATIONS

As part of the ACT LGBTIQ+ Legal Audit, Equality Australia was committed to ensuring that the legal audit was informed by consultation with relevant stakeholders (including government agencies) and the ACT's LGBTIQ+ community, to identify and further explore any issues under ACT laws, including the application, operation and implementation of ACT laws.

These consultations included:

- A roundtable of Government representatives and follow up meetings and correspondence with specific offices, directorates and agencies;
- A roundtable of LGBTIQ+ community representatives;
- Written submissions received in response to a public call for submissions; and
- Meetings with members of the ACT LGBTIQ+ Ministerial Advisory Council and the Expert Advisory Group.

We thank the ACT Government, LGBTIQ+ advocates and community organisations who attended consultations or provided submissions, and members of the ACT LGBTIQ+ Ministerial Advisory Council and Expert Advisory Group who provided feedback to inform the ACT LGBTIQ+ Legal Audit. We have taken into account their expert advice in preparing our recommendations.

### GOVERNMENT EXPERT ROUNDTABLE

In March 2019, Equality Australia met with a number of ACT Government representatives to discuss the impact of existing legislation, regulations and policies and potential areas for reform.

The following Government departments and statutory authorities provided input during the audit process:

- Access Canberra;
- ACT Human Rights Commission;
- ACT Parliamentary Counsel's Office;
- Education Directorate;
- Family Safety Unit;
- Justice and Community Safety Directorate;
- Office for LGBTIQ Affairs;
- Social Inclusion and Equality, Chief Minister's Directorate;
- Treasury; and
- Workforce Capability and Governance Division, Chief Minister's Directorate.

In summary, the information received in the course of the Government Expert Roundtable suggested that Equality Australia consider the following issues in particular detail:

- discrimination against trans, gender diverse and intersex people, particularly relating to employment and workplace participation;
- discrimination against LGBTIQ+ people in workplaces and employment, particularly in faith-based organisations where religious exceptions exist;
- discrimination against LGBTIQ+ people in housing, including religious exceptions in service delivery and protections from discrimination under tenancy laws;
- discrimination against trans and gender diverse young people seeking to change their legal name or gender, including trans and gender diverse young people whose parents do not support their gender identity or expression;
- discrimination and harm against intersex infants, children and adolescents as a result of medically unnecessary interventions without personal consent;
- discrimination against gender diverse young people in a range of service delivery contexts as a result of binary gender fields on forms and in data collection; and
- discrimination and harm against LGBTQ children and young people through anti-LGBTQ religious conversion practices, including recommendations around legislative models for reform.

### LGBTIQ+ STAKEHOLDER ROUNDTABLE

Equality Australia also convened an LGBTIQ+ Stakeholder Roundtable in March 2019 to discuss discriminatory laws and regulations from the perspective with members of the ACT LGBTIQ Ministerial Advisory Council and other front line community organisations working with or for LGBTIQ+ people.

In summary, the LGBTIQ+ Stakeholder Roundtable suggested that Equality Australia consider the following:

- discrimination in healthcare relating to deferrable medical interventions on intersex people, including different oversight models for surgeries and other forms of medical treatment on intersex infants and children;
- discrimination against trans and gender diverse people being denied self-identification on identity documents, including for children under 18 and particularly for children not supported by their parents;
- discrimination in policies relating to trans and gender diverse people's treatment by government authorities, particularly relating to Corrections, Youth Justice and Police;
- discrimination by faith-based organisations in education, employment and service delivery, including the need to introduce provisions in tender documents and funding contracts for organisations in receipt of taxpayer money that provide inclusive and non-discriminatory services;
- discrimination against rainbow families, including recognition of families formed with multiple parents or through international commercial surrogacy; and
- discrimination in accessing supports from the police and service providers for victims of family violence, including access to housing supports for trans and gender diverse people.



## SUBMISSIONS

Equality Australia received a number of submissions from experts, community organisations and members of the public, including from the following community organisations:

- A Gender Agenda;
- AIDS Action Council of the ACT;
- Intersex Human Rights Australia;
- Rainbow Families ACT; and
- Women’s Centre for Health Matters.

In summary, the key issues raised in the submissions related to:

- discrimination against same sex couples and rainbow families, particularly in relation to surrogacy, diverse family structures and access to IVF;<sup>14</sup>
- discrimination by faith-based organisations in delivering ACT Government funded services, and the need to ensure government funding does not allow for discrimination in service delivery;<sup>15</sup>
- discrimination and the lack of legislation which gives effect to self-determination of intersex people in health contexts, particularly around protections against medical treatment without explicit informed personal consent;<sup>16</sup>
- discrimination against intersex people and the need to update existing legislative and regulatory definitions of ‘intersex’, including in anti-discrimination laws and birth certificate regulations;<sup>17</sup>
- discrimination against LGBTIQ+ people and the need for community education and proper follow-up of discrimination complaints;<sup>18</sup>
- discrimination against intersex people in detention;<sup>19</sup> and
- discrimination against LGBTIQ+ people in education, and the need for an inclusive education policy.<sup>20</sup>

## EXPERT ADVISORY GROUP

The Expert Advisory Group was assembled to provide specialist advice to guide and provide feedback into the ACT LGBTIQ+ Legal Audit, ranging from technical legal experience, discrimination law expertise and on the ground LGBTIQ+ community knowledge, including:

- Anne-Marie Delahunt (Chair, ACT LGBTIQ Ministerial Advisory Council);
- Heidi Yates (ACT Victims of Crime Commissioner);
- Isabel Mudford (General Member, ACT LGBTIQ Ministerial Advisory Council);
- Karen Toohey (ACT Discrimination, Health Services, and Disability & Community Services Commissioner);
- Kristine Tay (General Member, ACT LGBTIQ Ministerial Advisory Council);
- Peter Hyndal (Consultant, Trans formative solutions);
- Suzanne Eastwood (General Member, ACT LGBTIQ Ministerial Advisory Council);
- Tate McAllister (General Member, ACT LGBTIQ Ministerial Advisory Council);
- Travis Wu (General Member, ACT LGBTIQ Ministerial Advisory Council); and
- Tushara Wickramariyaratne (General Member, ACT LGBTIQ Ministerial Advisory Council).

The Expert Advisory Group generally raised similar issues as raised in other consultations, but also raised the following issues:

- discrimination under permanent statutory exceptions under the Discrimination Act, including for voluntary bodies, in sport, and the lack of clarity regarding intersex and ‘X’ relating to exceptions under ‘sex’;
- discrimination against single men in starting a family through altruistic surrogacy in the ACT; and
- potential discrimination as a result of separate civil union schemes under separate acts (e.g. civil partnerships and civil unions) and the need to address confusion about recognition of different types of relationships under ACT law.

## C) REVIEW OF STATUTES

The central element of this report is an audit of 303 Acts and 203 Regulations. This review was undertaken by conducting a thorough search of key search terms, including:

- gendered terms (e.g. boy, female, woman, man, girl, male);
- gendered relationship descriptors (e.g. daughter, mother, father, nephew, sister-in-law, aunt, uncle, spouse, son, widow, uncle, stepson, etc);
- terms commonly used to define issues relating to LGBTIQ+ people (e.g. sex, gender, sexual orientation, gender identity, sex characteristics, intersex, transgender, same sex, gay, lesbian, heterosexual, bisexual, chromosome); and
- key areas for review (e.g. adoption, breastfeeding, surrogacy, marriage, civil union, exception, parent, family violence, disadvantage, de facto, strip search, discrimination).

A detailed review was conducted of key pieces of legislation (including subsidiary legislation) which were raised by LGBTIQ+ and Government stakeholders as particular areas of concern.



# 4/ DISCRIMINATORY LANGUAGE IN LEGISLATION

The ACT Government commissioned Equality Australia to conduct an independent legal audit of ACT legislative acts and regulations which discriminate or potentially discriminate on the basis of gender identity, sex characteristics, marital or relationship status and / or sexual orientation. In particular, we sought to identify legislation which discriminates against members of the LGBTIQ+ community by including language which may lead to people being excluded or ineligible for important legal protections.

As a general rule, the majority of ACT laws provide protection from discrimination for LGBTIQ+ people on the basis of sexual orientation, gender identity and intersex status. We have identified some pieces of legislation which use outdated terminology of 'sexuality'<sup>21</sup> or 'sexual identity' or which do not provide equal protections for LGBTIQ+ people<sup>22</sup> which are outlined in Appendix A.<sup>23</sup>

We refer to the summary table at **Appendix A** for a list of the legislative sections requiring amendment and the recommended amendments to remove potential discrimination against LGBTIQ+ people in the ACT. The legal audit revealed the following key findings.

## A) SIGNIFICANT USAGE OF BINARY GENDERED LANGUAGE

A significant proportion of ACT laws use binary gendered language (e.g. 'he', 'she', 'male', 'female', 'brother', 'sister', etc.).

These terms may not accurately describe a person's gender and may cause confusion and uncertainty about who is affected by laws which use 'sex'. The potential impact will be particularly acute where the person affected is in a position of particular vulnerability, including where they are a victim of crime or detained in prison or youth detention.

Currently, Australian and ACT laws often conflate 'sex' and 'gender'. The application of *NSW Registrar of Births, Deaths and Marriages v Norrie* [2014] HCA 11, the *Legislation Act 2001* (ACT) (**Legislation Act**) and the *Interpretation Act 1978* (Cth) provide guidance that these terms should be interpreted broadly. However, the reliance on courts to resolve such ambiguity is not ideal.

### ACT LAWS WHICH ARE LIKELY TO HAVE A DISCRIMINATORY IMPACT – APPENDIX A

LGBTIQ+ stakeholders raised the impact of binary gendered language and how it may allow for continued discrimination in accessing government and other services (e.g. where binary gendered language in legislation and policies supports the use of forms and data collection processes which are not fully inclusive of non-binary and gender diverse people).<sup>24</sup>

We refer to the summary table at **Appendix A** which sets out legislative provisions with binary gendered language which has a potentially discriminatory impact.

For example, section 114 of the *Land Titles Act 1925* (ACT) states that:

In the construction of a covenant or proviso or other provision implied by virtue of this Act, words importing the singular or plural number or the masculine gender shall be read as also importing the plural or singular number or as extending to females as the case requires.

This provision was intended to ensure that references to 'man' and 'men' also apply to 'woman' and 'women'. While the purpose of this provision is intended to ensure that women have access to the same property entitlements as men, the drafting of this provision would, on its face, exclude non-binary and gender diverse people who do not identify as a 'man' or a 'woman'. In the same way that this provision originally intended to have a beneficial impact for women, this provision should now be updated to ensure the language is gender inclusive and would apply equally for non-binary and gender diverse people.

Depending on the wording of each provision which must be considered within the context of each piece of legislation and its statutory context as a whole, it may be appropriate to add an additional term or to amend the term to be gender inclusive. In setting out our recommendations in Appendix A, we have stated the policy intention to ensure language is gender inclusive, in recognition that the ACT Office of Parliamentary Counsel is best placed to determine the most appropriate wording in each case.

### ACT LAWS WHICH ARE LESS LIKELY TO HAVE A DISCRIMINATORY IMPACT – APPENDIX B

In addition, the audit identified a number of acts and regulations which use binary gendered language but are unlikely to result in different treatment in practice. For example, subsection 35(3) of the *Tobacco and Other Smoking Products Act 1927* (ACT) states that:

An authorised officer ... is not authorised to remain on the premises if, when asked by the occupier, the officer does not produce **his or her** identity card [emphasis added].

In practice, courts would interpret this provision to apply to a person regardless of their sex or gender. However, the use of binary gendered language reflects an understanding of sex and gender which is not fully inclusive of non-binary and gender diverse people. This should be addressed through updating binary gendered language to be inclusive.

The language written into law has both a legal and a symbolic impact. Language which gender diverse people within our community sends a message which is not fully inclusive.



We have compiled a list of 201 ACT laws which use binary gendered language at **Appendix B** which should be amended to be gender inclusive, even though the provisions are unlikely to lead to discrimination as in practice, the language will likely be interpreted broadly.

### RECOMMENDATION 1

The ACT Government should amend the acts and regulations set out in Appendices A<sup>25</sup> and B<sup>26</sup> to replace binary gendered language with gender inclusive terminology, in order to remove potential discrimination against gender diverse people and ensure ACT laws are fully inclusive.

## B) FEMALE-SPECIFIC PROVISIONS IN PREGNANCY, CHILDBIRTH AND BREASTFEEDING

There are a number of statutes which make specific reference to 'women' or 'females', most commonly in the context of pregnancy or childbirth.

Transgender men and gender diverse people can and do become pregnant and give birth in the ACT. There is a risk that the gendered language in ACT laws may inadvertently exclude people with reproductive childbearing capacity in a way which discriminates on the basis of gender identity (e.g. trans men and non-binary people).

For example, section 37 of the Discrimination Act provides that:

Part 3 does not make it unlawful for a person to discriminate against a man on the ground of sex only because the person gives a woman rights or privileges in relation to pregnancy, childbirth or breastfeeding.

Where protection from discrimination is provided for the purposes of ensuring that a person does not receive less favourable treatment in situations including pre-natal medical appointments, to recover from childbirth or when requesting flexible working arrangements or reasonable adjustments for breastfeeding, the intention should be to provide protection for any person who gives birth in relation to pregnancy, childbirth or breastfeeding – including women, transgender men and gender diverse people.

### RECOMMENDATION 2

The ACT Government should amend the acts and regulations set out in Appendix A<sup>27</sup> to ensure female specific provisions in relation to pregnancy and childbirth are gender inclusive.

## C) REFERENCES TO 'INTERSEX PERSON'

There are a number of references to 'intersex person' in ACT legislation, particularly relating to body searches, photographic evidence and forensic procedures (see part 5(b) of this report).

### CURRENT DEFINITION OF 'INTERSEX PERSON'

Section 169B of the Legislation Act defines 'intersex person' as follows:

An intersex person is a person who has physical, hormonal or genetic features that are—

- (a) not fully female or fully male; or
- (b) a combination of male or female; or
- (c) not female or male.

This definition was based on the federal *Sex Discrimination Act 1984 (Cth) (SDA)* definition. The definition was actively supported by intersex led organisations including Organisation Intersex International Australia (**OII**) and AGA at the time of the 2013 SDA reforms, which provided for a significant advance in protections from discrimination for intersex people. OII opposed the adoption of this definition into ACT laws in the Births, Deaths and Marriages Amendment Bill 2013 (ACT), on the basis that it was too broad and unfit for use. Since 2013, the position of intersex led organisations including Intersex Human Rights Australia (**IHRA**) (formerly OII Australia) has changed in response to international and local developments and understandings of inclusive terminology.<sup>28</sup>

The key concerns raised by intersex advocates during consultations were that the definition:

- relies on and reinforces binary sex classifications;
- defines intersex people by reference to typical male and female traits that they lack;
- suggests that intersex people are a 'third gender' or that this definition relates to a person's identity, rather than a person's physical features; and
- is not limited to people born with variations in sex characteristics, given that the definition was intended to apply to people who are perceived as intersex.<sup>29</sup>

While few jurisdictions have introduced specific legislative definitions relating to intersex people, developments in Malta,<sup>30</sup> Tasmania,<sup>31</sup> the Yogyakarta Principles plus 10 and a recent Australian Human Rights Commission (**AHRC**) inquiry<sup>32</sup> provide useful guidance for the ACT Government.

The Yogyakarta Principles were updated in 2017 to reflect updated understandings of sexual orientation, gender identity or expression and sex characteristics, and provide crucial guidance for domestic lawmakers on international human rights best practice:

'sex characteristics' as each person's physical features relating to sex, including genitalia and other sexual and reproductive anatomy, chromosomes, hormones, and secondary physical features emerging from puberty.<sup>33</sup>

Increasingly, international jurisdictions are providing legal protections for people born with variations in sex characteristics on the basis of 'sex characteristics', rather than 'intersex status.'



### RECOMMENDATION 3

The ACT Government should amend the definition of 'intersex person' in the *Legislation Act 2001* (ACT) to ensure it is inclusive of all people born with variations in sex characteristics, and define 'sex characteristics' to mean "a person's physical features relating to sex, including genitalia and other sexual and reproductive anatomy, chromosomes, hormones, and secondary physical features emerging from puberty", consistent with the Yogyakarta Principles plus 10.<sup>34</sup>

#### TERMINOLOGY – 'INTERSEX PERSON' OR 'PERSON BORN WITH VARIATIONS IN SEX CHARACTERISTICS'

There are different terms used to describe people born with variations in sex characteristics.

Currently, a range of ACT laws use the term 'intersex person'.<sup>35</sup> The term 'intersex' is also increasingly used by UN treaty bodies in its recommendations to Australian Governments.<sup>36</sup> In 2013, the Senate References Committee on Community Affairs considered the issue of terminology and recommended that governments use the term 'intersex', not 'disorders of sex development' or 'DSD.' However, the Senate Committee was primarily concerned with patients being required to use or be subjected to terminology around 'DSD' or 'disorders of sex development' which they find distressing, and did not consider the term 'people born with variations in sex characteristics'.<sup>37</sup>

Since 2013, there have been further discussions in relation to appropriate and inclusive terminology. The Darlington Statement uses a combination of the terms 'intersex people' and 'people born with variations of sex characteristics'.<sup>38</sup> The Australian Human Rights Commission's (AHRC) current inquiry into *Protecting the human rights of people born with variations in sex characteristics in the context of medical interventions* recognises that "a number of people born with variations in sex characteristics do not use any collective term to describe themselves or their variation, but instead may only talk specifically about their variation or use their medical diagnosis, or may change the language they use in different contexts."<sup>39</sup> In light of this, the AHRC uses the term 'people born with variations in sex characteristics' for its project, to refer to people born with sex characteristics that do not conform to medical norms for female or male bodies, in order to avoid concerns around terminology, including the "need to avoid stigma, misconceptions, unnecessary pathologisation and unhelpful preconceptions".<sup>40</sup> However, the AHRC has not yet released its final report.

AGA recommended that the definition of 'intersex person' be amended to 'people born with variations in sex characteristics' as a descriptive term to ensure that the legislation covers the largest possible cohort of people.<sup>41</sup>

### RECOMMENDATION 4

The ACT Government should consider whether to amend the acts and regulations set out in Appendix A to replace references to 'intersex person' in ACT laws to 'person born with variations in sex characteristics', following the release of the Australian Human Rights Commission's report on the inquiry into *Protecting the human rights of people born with variations in sex characteristics in the context of medical interventions* and consultations with relevant stakeholders.

This report addresses related amendments to the *Discrimination Act and the Births, Deaths and Marriages Registration Act 1997* (ACT) (BDMR Act) in Part 6(b).

## D) REGULATION OF INVASIVE PROCEDURES

The audit identified a number of differences across various pieces of ACT legislation with respect to body searches, photographic evidence and forensic procedures – which this report collectively refers to as 'invasive procedures'.<sup>42</sup> The specific statutes are identified in Appendix A.<sup>43</sup>

The ACT Government has amended various pieces of legislation in response to concerns that a person whose affirmed gender was not reflected on their legal identity documents may be searched, photographed or have forensic samples inappropriately collected by a person of a different gender in a way which does not adequately respect the person's privacy. During consultations, intersex advocates supported the purpose of these reforms, but raised concerns about inappropriate terminology in policies which conflated the experiences of transgender and intersex people.

It is important to recognise that the ACT is ahead of other Australian jurisdictions which have not yet considered this issue. However, in the interests of considering best practice, this audit considers further reforms to address the technical drafting of these laws and the concerns raised by members of the LGBTIQ+ community.

#### POTENTIALLY DISCRIMINATORY LANGUAGE IN RELATION TO INVASIVE PROCEDURES

Some provisions require a person to be 'taken as' either male or female, based on whether they have requested the search to be conducted by a male or female. For example, subsection 211(6) of the *Casino Control Act 2006* (ACT) provides that "[i]f the transgender or intersex person requires the search to be conducted by a female, **the person is taken, for this section, to be female** [emphasis added]." These provisions were criticised during consultations by LGBTIQ+ stakeholders on the basis that they do not allow for bodily and gender diversity.

Similar provisions describe intersex people in terms of self-identification. For example, s 79(5) of the *Crimes (Child Sex Offenders) Act 2005* (ACT) states "[i]f the offender is a transgender or intersex person **who identifies as male**, the offender is taken to be male for this section [emphasis added]." Intersex people have diverse sex classifications, gender identities and gender expressions. Most intersex people identify with the sex assigned at birth, but some do not. It would be more helpful if the language of identification was avoided in relation to intersex people. For example, the wording could read "if the offender is a person who identifies as male".

In addition, some provisions use the term 'opposite sex'. For example, subsection 261(3)(a) of the *Children and Young People Act 2008* (ACT) provides that "[t]he strip search must not be conducted in the presence of someone of the **opposite sex** to the young detainee [emphasis added]". The Legislation Act was recently amended to update terminology of 'opposite sex' to 'different sex'. To avoid uncertainty in practice and ensure laws do not assume binary gender in a way which is not fully inclusive, all remaining references to 'opposite sex' in other pieces of ACT legislation should still be removed.

In order to address these concerns raised, the language in these laws could be amended to ensure that discrimination does not occur in practice by amending references to ‘same sex’, ‘opposite sex’ and ‘intersex’ in the context of self-identification, and not requiring a person to be ‘taken as’ either male or female. However, there may be a more effective way of ensuring that the broader policy purpose is achieved.

### **POLICY PURPOSE TO ENSURE RESPECT AND DIGNITY DURING INVASIVE PROCEDURES**

These laws recognise that there should be special provisions for trans, gender diverse and intersex people to nominate the gender of the person who conducts a search, takes photographs or collects forensic evidence of their bodies. The intention is for these provisions to require consideration of a trans or gender diverse person’s gender identity, or an intersex person’s sex characteristics. These provisions recognise that these are population groups who may have bodily characteristics that are not in accordance with other people’s assumptions, and appropriate regulation is required to ensure that people being subjected to these procedures do not face discrimination while in a particularly vulnerable position under the control and supervision of government authorities, and are treated with dignity and respect. For the same reasons, special regard should be had to ensuring that information about a person’s gender identity or sex characteristics should be kept private, and not disclosed to other parties without the full and informed consent of the person.

The Victorian Commissioner’s Requirements for the Management of Prisoners who are Trans, Gender Diverse or Intersex requires that strip searches and urinalysis:

- be conducted in the least intrusive manner possible, and within facilities that ensure the dignity and privacy of the prisoner being searched;
- are performed by officers of the gender nominated by the prisoner, including where this may be different from the prisoner’s own gender (e.g. to take into account where a person has not yet changed their legal gender);
- may require a top / bottom strip search to be conducted by officers of different genders alternating in sequence, depending on the area of the body being searched;
- take into account the sensitivities of individual officers when allocating responsibility for strip searching of prisoners whose external genitals are at variance to their gender identity;
- require consideration of whether a prisoner uses a prosthesis; and
- require consideration of the fact that strip searching may reinvolve traumatic experiences of sexual and physical violence, given the heightened vulnerability of trans, gender diverse and intersex people to sexual assault both in the general community and the correctional system.<sup>44</sup>

There may be practical considerations to take into account in relation to staffing of youth detention and corrections officers, police officers and authorised security personnel and the fact that – based on anecdotal accounts – it is unlikely that a gender diverse person will be available to perform a procedure. Given these practical constraints, it may be necessary to require a person to nominate whether a male or female person performs the procedure, where this is the case.

### **RECOMMENDATION 5**

The ACT Government should amend the acts and regulations set out in Appendix A<sup>45</sup> to ensure that trans, gender diverse and intersex people can nominate the gender of the person who will conduct an invasive procedure.

### **E) TERMINOLOGY – ‘SEX’, ‘GENDER’ OR ‘SEX OR GENDER’**

The legal audit reviewed the use of the terms ‘sex’ and ‘gender’ across ACT laws. While the term ‘sex’ is more commonly used, particularly in the BDMR Act, the Discrimination Act and laws regulating invasive procedures, the term ‘gender’ is also used. For example, rule 3 of the *Charitable Collections Regulation 2003* (ACT) requires adequate supervision of the child “having regard to the age, sex and maturity of the child”, whereas section 43 of the *ACT Teacher Quality Institute Act 2010* (ACT) requires details to be entered in the teacher’s register, including ‘the teacher’s gender’. While the term ‘sex’ is generally understood to refer to physical and biological indicators and ‘gender’ to a person’s personal and social identity,<sup>46</sup> these terms appear to be used interchangeably in ACT laws. These terms are also commonly used interchangeably in other Australian jurisdictions.<sup>47</sup>

In part 6(a) of this report, we discuss the use of these terms in the context of the BDMR Act and recommend that references to ‘sex’ be amended to ‘sex or gender’, and move towards using the term ‘gender’. For the reasons outlined in this section of the report, we consider that there are similar policy reasons why the continued conflation and interchangeable use of these terms – which may create confusion and inconsistency in the law, and potentially reinforce an unhelpful distinction between ‘biological sex’ and ‘social gender’ – should be addressed more broadly in other ACT laws.

Where appropriate, we consider that consistent terminology which reflects a person’s gender should be used to describe the social role played in the ACT community. This report provides the specific legislative provisions where the term ‘sex’ is used, which are likely to have a discriminatory impact, in Appendix A. However, it was outside the scope of this report to consider all potential consequences arising from a change in terminology within the context of each act. There may be situations in which the term ‘sex’ may need to continue to be used (e.g. where it relates to the legal sex that is stated on a person’s birth certificate) to ensure there are no unintended consequences, which the ACT Office of Parliamentary Counsel will be best placed to answer.

### **RECOMMENDATION 6**

The ACT Government should amend the acts and regulations set out in Appendix A<sup>48</sup> to amend references to ‘sex’ to ‘sex or gender’, and move towards using the term ‘gender’ where appropriate





# 5/ INCLUSION OF LGBTIQ+ PEOPLE IN SPECIAL MEASURES AND CONSULTATION MECHANISMS

During the analysis of ACT laws, the audit identified gendered references to 'women' and 'females' which relate to special measures or consultation mechanisms.

We note that the examples highlighted during the legal audit and in Appendix A arose during searches for gendered terms – in this case, references in legislation to 'women' or 'females'. It is likely that there are other provisions which require consideration of special measures on other grounds (e.g. for Aboriginal and Torres Strait Islander peoples or people with a disability). Because this audit searched for gendered terms, these other examples and special measures have not been uncovered during this process. Accordingly, this report is unable to provide a comprehensive list of all special measures and consultative mechanisms for the ACT Government to consider where a similar or comparable justification exists for LGBTIQ+ people.

However, a further review of ACT laws would likely produce additional examples highlighting the importance of considering how ACT laws include references to a diversity of groups within the ACT community. The underlying purpose of special measures is to address discrimination and disadvantage, and further consideration is required into how this can be holistically addressed in drafting new laws and policies. For example, instead of requiring the Minister to only consider gender equality in naming public places, whether it would be beneficial for the Minister to also consider whether the names of Aboriginal and Torres Strait Islander people, people from culturally and linguistically diverse backgrounds, people with a disability, and LGBTIQ+ people are also well-represented to reflect the demographic diversity of the ACT.

## A) SPECIAL MEASURES & LGBTIQ+ PEOPLE

The audit identified references to 'women' or 'females' as special measures (e.g. as part of gender diversity initiatives). The justification for special measures for women in specific contexts may also apply to LGBTIQ+ people, due to the systemic discrimination and inequality which LGBTIQ+ people also face.

For example, the example for subsection (1)(a) under section 27 of the Discrimination Act provides that:

An employer runs a management skills development course for female employees only. Part 3 does not make this unlawful if a purpose is to ensure that women have equal opportunities (in this case, for career development) with men. Women are 'members of a relevant class of people' (relevant class of people is defined in the dict) because they are a class of people whose members are identified by reference to a protected attribute, in this case, sex in s 7(1)(a).

In the ACT, the gender pay gap between full-time adult men and women for November 2017 to November 2018 was 14.3 per cent.<sup>49</sup> This gender pay gap varies depending on the industry, age, accounting for part-time work, parental leave, and the gender superannuation gap. The same justifications that highlight the importance of special measures for women would also likely apply for LGBTIQ+ people. Unfortunately, the Australian Bureau of Statistics does not collect comparable data on LGBTIQ+ people and workforce participation in the ACT. While 2016 census data collects some information about same-sex couples, this was extrapolated from questions in response to the 'relationship in household' question, meaning that only same-sex couples who were living together were counted (i.e. single people or couples not living together were not included).<sup>50</sup> However, available research indicates that LGBTIQ+ people – and particularly transgender, gender diverse and intersex people – are more likely to face workplace exclusion or discrimination in seeking employment, and be experiencing unemployment or underemployment.<sup>51</sup>

Another example is regulation 21 of the *Liquor Regulation 2010* (ACT), which requires that if female young people are expected at an event for young people, then at least 1 female crowd controller is employed to work at the event. The purpose of this provision is to ensure that there are women crowd controllers available at public events with young women (e.g. where a young woman is experiencing harassment in the crowd, she may feel more comfortable approaching another woman employed at the event for assistance). In similar circumstances, where an event is being held where LGBTIQ+ young people are expected to attend the event, it may be appropriate to ensure that staff are employed who have been trained in LGBTIQ+ cultural awareness or that there are visible signs advertising where special assistance may be available for LGBTIQ+ people seeking support, or experiencing discrimination or harassment at the event. Available research consistently shows that LGBTIQ+ young people are more likely to experience verbal and physical abuse in public spaces,<sup>52</sup> which would justify special consideration of special measures to protect LGBTIQ+ people in these situations.

As a further example, subsection 3(2)(b) of the *Public Place Names Act 1989* (ACT) requires the Minister to consider whether the names of women are well-represented for names of divisions or public places on Territory Land. The purpose of this provision is to ensure that public place names reflect gender equality in our community, by requiring consideration of the importance of commemorating the contributions of significant women to the community, which in turn has an impact on representation and celebrating diversity. In considering the naming of public places, a similar argument could be made for ensuring that the contributions of LGBTIQ+ people are reflected in public places in the ACT as a sign of recognition, diversity and inclusion.



Given that this report does not provide a comprehensive list of special measures, we recognise that our recommendation will likely require further consideration by the ACT Government. As a starting point, the ACT Government could consider:

- whether the special measures set out in Appendix A should also apply to LGBTIQ+ people;
- commissioning a further audit of special measures on other grounds; and
- whether drafting guidelines could be developed to ensure examples and special measures in new laws and policies are appropriately inclusive of LGBTIQ+ people where relevant.

## **RECOMMENDATION 7**

The ACT Government should consider whether special measures which apply to other groups of people experiencing disadvantage (see examples in Appendix A<sup>53</sup>) should also apply to LGBTIQ+ people, in order to address structural and systemic discrimination.

## **B) REQUIREMENTS TO CONSULT WITH AFFECTED COMMUNITIES**

The legal audit also identified where regulatory reform would assist in improving effective consultation and representation for LGBTIQ+ communities.

Effective consultation – including the appointment of LGBTIQ+ representatives to government advisory structures – will improve the development of laws, policies and procedures which are fully inclusive of LGBTIQ+ people's experiences. The AIDS Action Council raised concerns that while there have been legal and policy reforms which have benefited LGBTIQ+ people, "many of these have been piecemeal in nature, and too often they have been unnecessarily compromised by limitations or religious exceptions."<sup>54</sup> The AIDS Action Council highlighted the insufficient representation of LGBTIQ+ people in decision-making, policy development and program design and recommended the introduction of legislation requiring consultation with LGBTIQ+ communities when laws are made or amended which have an impact on these communities.<sup>55</sup>

For example, section 6 of the *Domestic Violence Agencies Act 1986* (ACT) establishes membership requirements for an advisory council. The Act requires representatives who can represent the views of Aboriginal and Torres Strait Islander people, people of non-English speaking backgrounds and a representative from the Domestic Violence Crisis Service. As discussed in part 7(f) of this report, recent research and consultations on family violence in the ACT reveal that LGBTIQ+ people are a particular at-risk group, where the response of existing services and access to information resources may not adequately respond to the experiences of LGBTIQ+ people experiencing family violence. In order to ensure that the experiences of LGBTIQ+ people are taken into account as part of responses to family violence, the ACT Government should consider whether similar requirements for representation by LGBTIQ+ community representatives should also be included.

There may be other advisory mechanisms to ensure consultation and feedback to the ACT Government where it is appropriate for a representative from LGBTIQ+ communities to be included. For example, section 240 of the *Mental Health Act 2015* (Act) sets out the membership of the mental health advisory council to include a person experiencing mental health issues, a carer of a person experiencing mental health issues, and representatives with experience in primary mental health, mental health research and practice and mental health promotion, prevention, treatment care or support. While most LGBTIQ+ people live healthy and happy lives, a disproportionate number of LGBTIQ+ people experience poorer mental health outcomes, including significantly higher rates of suicidal behaviours, particularly for LGBTIQ+ young people. The specific issues facing groups within the ACT community who are more likely to experience mental health issues (e.g. the impact of discrimination and bullying, barriers to seeking mental health support and fears of service exclusion for LGBTIQ+ people) should be taken into account by the mental health advisory council in providing advice on emerging or urgent mental health issues, or reforms to mental health services, policies and laws.

The ACT Government may consider a further audit of representative mechanisms to ensure that an LGBTIQ+ representative is added where appropriate, and drafting guidelines to ensure that new advisory mechanisms consider including representatives from groups which are significantly affected by the particular area (e.g. health and mental health advisory mechanisms, corrections and policing consultative bodies).

## **RECOMMENDATION 8**

The ACT Government should amend the *Domestic Violence Agencies Act 1986* (ACT) to include a representative to raise issues experienced by LGBTIQ+ people in family violence on the family violence advisory council. The ACT Government should consider adding representation and consultation with LGBTIQ+ people to existing (see examples in Appendix A<sup>56</sup>) and future legislative advisory mechanisms to ensure effective consultation on issues where LGBTIQ+ people are disproportionately affected.





# 6/ LAWS & POLICIES WHICH HAVE A DISCRIMINATORY IMPACT

This report now considers existing laws and policies which have a potentially discriminatory impact on LGBTIQ+ people. These primarily relate to areas of regulation where the laws either impose onerous barriers to accessing essential rights, or where general laws and policies do not explicitly consider the distinct experiences of LGBTIQ+ people.

## A) BIRTH CERTIFICATE LAWS

Every person should be able to control their own life, and be legally recognised as who they are.

The ACT played a leading role in reforming birth certificate laws in Australia. It was the first jurisdiction in Australia to remove requirements that a person undergo surgery or divorce the person they love in order to change the sex marker on their birth certificate, or be issued with a recognition certificate with the correct sex marker. The ACT was also the first state or territory to make available options other than 'male' and 'female' on birth certificates, and to make it easier for parents to apply on behalf of their children. This report primarily discusses birth certificates, but considers that the principles for the removal of barriers to access legal gender recognition should also apply to recognition certificates.

Since these reforms came into effect, there have been significant developments in understandings of legal recognition of sex and gender and how to ensure that the different needs of people affected by birth certificate laws are taken into account. As a result, there are a number of amendments which are necessary to ensure that the ACT Government removes discriminatory barriers to legal gender recognition in the ACT.

At the outset, it is important to acknowledge that there are distinct issues experienced by different populations within the LGBTIQ+ community separately, for example:

- intersex people – including the existence of sex categories on identity documents at all, the inadequacy of existing categories and the inaccurate framing of intersex as a 'third gender';<sup>57</sup>
- trans and gender diverse people – including the importance of self-identification without medical verification, greater support for young people with one or more unsupportive parents, and protecting people from being forced to disclose their gender identity; and
- rainbow families – ensuring that parents can be recognised using the terminology that best describes their relationship to their child, and ensuring family members' birth certificates can be updated to reflect a parent or sibling's change of legal gender.

## RELEVANCE OF THE BEYOND THE BINARY REPORT

Equality Australia recognises the substantial research conducted by the ACT Law Reform Advisory Council in its *Beyond the Binary: legal recognition of sex and gender diversity in the ACT (Beyond the Binary)* report.<sup>58</sup>

We do not seek to duplicate the thorough consideration of the human rights context of that report, international best practice or previous reports. As that report highlights, birth certificate laws impose substantial barriers for legal recognition and accessing services, and contribute to the stigma and discrimination which transgender and gender diverse people in the ACT experience. We note that the majority of the recommendations from *Beyond the Binary* have since been implemented by the ACT Government.<sup>59</sup>

As a result of the *Beyond the Binary* report, the *Births, Deaths and Marriages Registration Amendment Act 2014 (ACT)* introduced important changes to the BDMR Act, including:

- removing outdated and inappropriate references to 'sexual reassignment surgery' and 'transsexual person';<sup>60</sup>
- substituting the requirement for a person to undergo sexual reassignment surgery to change the record of their sex, to requiring that a person has "received appropriate clinical treatment for alteration of the person's sex" or is an intersex person;<sup>61</sup>
- making it easier for parents of, or people with parental responsibility for, a child under 18 to alter the record of the child's sex on the register;<sup>62</sup>
- replacing onerous evidence requirements with a requirement that the person provide a statutory declaration from a doctor or psychologist;<sup>63</sup>
- extending the time period for a parent to register a child's birth under the BDMR Act and BDMR Regulation from 60 days to 6 months;<sup>64</sup> and
- ensuring that a person does not lose any legal entitlements as a result of their sex being altered on the register.<sup>65</sup>

The report also led to other technical improvements in terminology such as updating definitions of 'transgender' and removing the term 'genetic condition' from the definition of 'intersex person' in the Legislation Act.

Since the *Beyond the Binary* report was written in 2012, there have been a number of developments in terms of best practice for the treatment of intersex, transgender and gender diverse people both internationally and across Australia.

## SEX CHARACTERISTICS

In 2014, the ACT Government looked to the Australian Government Guidelines and terminology in the SDA at a territory level. Since the *Beyond the Binary* report was written, there have

been substantial developments in the recognition of the need for protections from discrimination and to protect the right to bodily autonomy of people born with variations in sex characteristics, including:

- a change in intersex led organisations' position to replace the current definition of 'intersex status' adopted by the *Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Act 2013* (Cth) to 'sex characteristics';<sup>66</sup>
- amendments to the Australian Government Guidelines on the Recognition of Sex and Gender (**Australian Guidelines**);<sup>67</sup> and
- the development of community consensus positions prepared by a number of intersex organisations and advocates in the Darlington Statement.<sup>68</sup>

There are a range of further important developments discussed in detail in Pts 6(a), (b) and 7(a) of this report.

### **INTERNATIONAL HUMAN RIGHTS DEVELOPMENTS – LEGAL RECOGNITION OF SEX AND GENDER**

There have also been significant developments about the removal of barriers to the legal recognition of sex and gender under international human rights law, including treaty body guidance.<sup>69</sup>

In 2018, the United Nations' Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity (**Independent Expert**) delivered a report which highlighted "[a]busive requirements for gender recognition" that "violate human rights when a change of gender or name is sought in official records".<sup>70</sup> These include requiring that a person undergo a medical diagnosis, psychological appraisals or other medical procedures or treatment, or third-party consent for adults.<sup>71</sup> The Independent Expert recommends that any legal recognition processes should be a simple, accessible administrative process based on self-determination by the applicant which offers a multiplicity of gender marker options, and not contain unreasonable or pathologising medical, psychological and/or other certifications.<sup>72</sup>

The Yogyakarta Principles plus 10 provide critical guidance on updated understandings of sex and gender which are relevant to this audit, including recognition of the distinct and intersectional grounds of gender expression and sex characteristics<sup>73</sup> and recommending that governments remove sex and gender markers from identity documents, including birth certificates.<sup>74</sup> The Yogyakarta Principles plus 10 recommend that while sex or gender continues to be registered, governments should:

- ensure a quick, transparent, and accessible mechanism that legally recognises and affirms each person's self-defined gender identity;
- make a multiplicity of gender marker options available; and
- ensure that no eligibility criteria be a prerequisite to change one's legal name or gender (e.g. such as medical or psychological interventions, a psycho-medical diagnosis, minimum or maximum age, economic status, health, marital or parental status, or any other third party opinion).<sup>75</sup>

There have also been a number of developments in other jurisdictions, with a trend towards respecting self-identification for transgender and gender diverse people.<sup>76</sup>

### **DEVELOPMENTS IN OTHER AUSTRALIAN JURISDICTIONS – LEGAL RECOGNITION OF SEX AND GENDER**

In relation to legal recognition of sex and gender, all Australian states and territories have now followed the ACT's lead in passing laws to remove the discriminatory 'forced divorce' requirement following the passage of marriage equality in 2017. South Australia and the Northern Territory have implemented laws which remove requirements for surgery, provide non-binary options and make it easier for parents of children to apply to amend identity documents. In 2016, the Victorian Government tabled the Births, Deaths and Marriages Registration Amendment Bill 2016 (Vic) (**Victorian Bill**)<sup>77</sup>, which failed by one vote in the upper house. The Victorian Government implemented legislation removing the forced divorce requirement in 2018, and tabled a slightly amended version of this bill with the remaining provisions from the Victorian Bill.<sup>78</sup>

There have been proposals to remove the gender marker entirely from birth certificates such as in the Law Reform Commission of Western Australia's 2018 report reviewing legal recognition of sex and gender (**WALRC report**)<sup>79</sup> and initial proposals by the Labor Party and Greens to the Tasmanian Government's Justice and Related Legislation (Marriage Amendments) Bill 2018 (Tas).<sup>80</sup>

The Tasmanian Government passed a bill in 2019 which constitutes Australian best practice in removing key barriers to legal gender recognition, including any requirements for medical verification of gender. These reforms set a new national standard for removing discrimination in birth certificate laws.

The *Justice and Related Legislation (Marriage Amendments) Act 2018* (Tas) (**Tasmanian Act**) goes further than the ACT's BDMR Act by:

- allowing a child aged 16 or over to apply to add, change or remove the gender on their birth certificate on their own behalf;
- allowing a person to add, change or remove the gender on their birth certificate through a simple administrative process – namely, a completed application form and a statutory declaration;
- stating that the Registrar must not require applicants to provide medical documentation relating to sex or gender;
- requiring birth certificates to be issued without a record of the person's previous name – unless the person requests that this information be included; and
- allowing for a multiplicity of gender marker options.<sup>81</sup>

### **REMOVAL OF SEX MARKERS FROM BIRTH CERTIFICATES**

The Yogyakarta Principles plus 10 and the UN Independent Expert recommend that official identity documents should not include sex or gender information, as this is not relevant, reasonable, necessary and for a legitimate purpose.<sup>82</sup> The Australian Human Rights Commission's 2009 *Sex Files* report also recommends that "[w]here possible, sex or gender should be removed from government forms and documents."<sup>83</sup> The Darlington Statement also recommends that sex or gender categories should be removed from identity documents entirely.<sup>84</sup>



The Darlington Statement further provides that “sex and gender binaries are upheld by structural violence ... [and] [u]ndue emphasis on how to classify intersex people rather than how we are treated is also a form of structural violence. The larger goal is not to seek new classifications but to end legal classification systems and the hierarchies that lie behind them.”<sup>85</sup> The Darlington Statement recommends that “[a]s with race or religion, sex/gender should not be a legal category on birth certificates or identification documents for anybody.”<sup>86</sup>

The WALRC report concluded that proof of sex in the form of a person’s birth certificate is not required.<sup>87</sup> The Commission found that the removal of sex from birth certificates is unlikely to impact:

- identity security measures, as sex or gender is not a mandatory data input when using government identity verification tools or biometric face verification services;
- state-based policing measures, as usual practice is to identify and process a person based on their self-identified gender rather than the sex stated on their birth certificate;
- accurate data collection for statistical purposes, as the Commission recommended that the collection of data about sex continue at birth and death (but that sex is not recorded on a birth certificate);
- access to medical services, as it is not common practice to prove a person’s sex using a birth certificate;
- sport and recreation, as few sporting clubs and associations use a person’s sex on their birth certificate when registering participants and national sports policies support people being able to participate in sport based on their gender identity;
- management of prisons, as prisons take into account a prisoner’s self-identified gender before determining an appropriate prison placement; or
- enrolment of children in school, as there was no legal requirement to register a child’s sex or gender for school enrolment purposes, and a birth certificate is not required to prove a person’s gender.<sup>88</sup>

There is a difference between recording statistics of the sex assigned at birth for infants, recording a person’s sex on the register, and linking a person’s sex to their birth certificate and other state-based identity documents. While we recognise that there may be valid statistical reasons to collect disaggregated data about numbers of births and the gender of infants allocated at birth, this is a separate consideration as to whether a person’s sex needs to be connected to their personal record for the duration of their life, particularly where this currently results in discrimination for trans and gender diverse people through data mismatches between government records (e.g. automatic cancellation of Centrelink payments where information provided by territory agencies or private companies do not match information held by Commonwealth government agencies).

While statistical information about the numbers of infants born and the gender they were assigned at birth should be recorded, this information should not relate to an individual’s record on the register and should not be included on identity documents.

## RECOMMENDATION 9

The ACT Government should amend the *Births, Deaths and Marriages Registration Act 1997* (ACT) to remove the requirement that sex be recorded on birth certificates.

Recommendations 10 to 13 will consider other options for reform if the ACT Government does not support recommendation 9.

## COLLECTION OF GENDER INFORMATION

As highlighted above at recommendation 6, the use of the terms ‘sex’ and ‘gender’ can cause unhelpful confusion or act as a barrier to removing discrimination against trans and gender diverse people.

Equality Australia consulted with stakeholders on how to describe the information collected on the register and recorded on birth certificates, and whether this should be described as ‘sex’,<sup>89</sup> ‘sex and gender’,<sup>90</sup> ‘sex or gender identity’,<sup>91</sup> ‘sex or gender’<sup>92</sup> or ‘gender’.<sup>93</sup> There was general consensus that using both sex and gender appears to unhelpfully conflate these terms and cause confusion, as well as misunderstandings about the nature of the information being collected and what type of information is collected. In particular, trans and gender diverse advocates raised concerns that laws which reinforce the idea that ‘sex’ is a biological concept fixed at birth and ‘gender’ is a social concept which can change over time can perpetuate mistreatment by people who rely on this narrow concept of sex to attempt to deny trans and gender diverse people’s gender identities. The Australian Government Guidelines on Sex and Gender (**Australian Guidelines**) confirm that “the preferred Australian Government approach is to collect and use gender information”.<sup>94</sup>

LGBTIQ+ stakeholders discussed the difficulty of finding community consensus, but were drawn to the recent Tasmanian approach of using the term ‘sex or gender’ as a transitional provision to ensure that relevant provisions beneficially apply (e.g. both for people who were issued with ‘sex’ on their birth certificate under current laws and for people with ‘gender’ on their birth certificates when the Tasmanian Act comes into effect) and moving towards the collection of ‘gender information’ (rather than information about a person’s ‘sex’).<sup>95</sup>

## RECOMMENDATION 10

The ACT Government should amend the *Births, Deaths and Marriages Registration Act 1997* (ACT) to move towards collecting information on ‘gender’ rather than ‘sex’.

## INADEQUACIES OF EXISTING SEX CATEGORIES – UNSPECIFIED/INDETERMINATE/INTERSEX

While the BDMR Act does not set out available sex categories, the current Birth Registration Statement form allows people to choose between: male, female, unspecified/indeterminate/intersex, unspecified, indeterminate and intersex for an infant at birth. Any siblings of the child can be listed as: female, male or ‘unspec/indet/intersex’.

The provision of options outside male and female categories is very welcome. Broadening the available categories is supported by trans, gender diverse and intersex communities, was recommended by the Australian Human Rights Commission in its recent *Resilient Individuals Report*,<sup>96</sup> and aligns with national and international human rights principles.<sup>97</sup> However, the primary concern raised by intersex advocates in relation to the BDMR Act was the need to reform the sex categories currently available.<sup>98</sup>

The community concerns can be summarised as follows:

- the use of ‘unspecified’, ‘indeterminate’ and ‘intersex’ is likely to cause data integrity issues;
- it is inappropriate for ‘intersex’ to be available as a descriptor for an ‘X’ category;
- the Darlington Statement, a community declaration by intersex organisations and individuals in Australia and Aotearoa/NZ states that “attempts to classify intersex people as a third sex/gender do not respect our diversity or right to self-determination. These can inflict wide-ranging harm regardless of whether an intersex person identifies with binary legal sex assigned at birth or not”;
- the term ‘indeterminate’ implies a lack of a determined category and does not fit with terms used by gender diverse people to describe themselves; and
- there is no single term that people of all cultures use to describe people with diverse gender identities outside of the binary categories of ‘male’ and ‘female’.<sup>99</sup>

During consultations for this report, LGBTIQ+ advocates conveyed to Equality Australia that the ACT LGBTIQ Ministerial Advisory Council and other community organisations raised concerns about the inappropriateness of importing the definition in the Australian Guidelines into the ACT context at the time these were introduced.<sup>100</sup>

## RECOMMENDATION 11

The ACT Government should amend the ACT Government’s policy on available sex descriptors and the Birth Registration Statement (Form 201 – BRS) to remove the indeterminate/intersex/unspecified sex category and replace it with alternative gender markers (see recommendations 13 and 14).

### AVAILABLE SEX AND GENDER CATEGORIES

In terms of recommending which category should be available as a sex or gender marker, some organisations recommended that ‘non-binary’ should be available as a third category. Other advocates and organisations supported the availability of a free text field for people to be recognised using the terminology that best describes their sex or gender, with oversight by the Registrar to monitor potential misuse or inappropriate categories. The ACT LGBTIQ+ stakeholders we consulted with during the course of our audit were strongly supportive of this option.<sup>101</sup>

The Darlington Statement recommends that “sex / gender classifications must be legally correctable through a simple administrative procedure at the request of the individual concerned” and the sex / gender options should include “female (F), male (M), non-binary, alternative gender markers, or multiple options”.<sup>102</sup>

The Tasmanian Act and Victorian Bill both allow for a range of sex and gender options. In practice, an applicant can request a sex or gender marker using the terminology which most accurately describes their sex or gender. The Registrar would retain the discretion to refuse to record a sex or gender marker which is inappropriate or offensive.

While sex or gender continues to be registered, this approach aligns with international human rights guidance, recommendations from the UN Independent Expert on Sexual Orientation and Gender Identity, the Yogyakarta Principles plus 10 and the Darlington Statement.

## RECOMMENDATION 12

The ACT Government should amend the ACT Government’s policy on available sex descriptors to allow for multiple gender markers on birth certificates to be made available in a free text field.

### LEGAL RECOGNITION OF ‘NON-BINARY’ AS A MINIMUM STANDARD

If the ACT Government does not implement recommendations 9 to 12, we consider that it may be useful to provide a minimum standard gender category which should be made available to gender diverse people. As recognised above, terminology about additional gender categories changes over time. The ACT Government should allow for available categories to be set in regulation, and updated as contemporary understandings of gender diversity develop.

LGBTIQ+ stakeholders agreed during consultations that ‘non-binary’ should be the minimum legal term available in addition to ‘male’ and ‘female’ on birth certificates in the ACT.

## RECOMMENDATION 13

The ACT Government should amend the ACT Government’s policy on available sex markers to, at a minimum, allow for the use of ‘non-binary’ as a gender marker and for data collection purposes.

### TRANSITIONAL PROVISIONS TO NEW SYSTEM AND INCONSISTENCY WITH FEDERAL POLICY

LGBTIQ+ stakeholders highlighted the importance of implementation in changing this process, including a process for people who currently have an X marker or who are affected by inconsistency between jurisdictions (e.g. a person who has an X marker on their passport but would like to change their legal gender to ‘non-binary’ on their birth certificate). No one should face practical difficulties from having different sex or gender markers on their territory and federal identity documents (e.g. automatic suspension of Centrelink payments due to data mismatch issues).

The Australian Government is currently evaluating the Australian Guidelines and has announced that the updated guidelines should be available in mid-2019.<sup>103</sup>

Recommendation 14 is necessary if the ACT Government implements recommendations 9, 11, 12 or 13.

## RECOMMENDATION 14

The ACT Government should work with the Commonwealth Government to ensure that any rights or entitlements are not affected by people having different gender markers on their territory and federal identity documents.

Recommendations 15 to 23 apply if recommendation 9 is not implemented and irrespective of whether the ACT Government implements recommendations 10 to 14.

## REMOVAL OF CLINICAL TREATMENT AND MEDICAL VERIFICATION REQUIREMENTS

The audit revealed a number of evidence and application requirements in the BDMR Act including clinical treatment and medical verification requirements for access to birth certificates or recognition certificates.<sup>104</sup> LGBTIQ+ advocates in the ACT have advocated for the removal of these requirements.

### TRANS AND GENDER DIVERSE PEOPLE

For trans and gender diverse people, an application for alteration of the sex recorded on a person's birth certificate must be accompanied by a statement by a doctor or psychologist certifying that the person has received appropriate clinical treatment or is an intersex person.<sup>105</sup> Providing trans and gender diverse people with access to identity documents that reflect who they are will have a profoundly positive impact on their lives, reduce the discrimination and disadvantage they face, and support improved health and wellbeing for an already vulnerable cohort of people living in our community. A recent New South Wales blueprint for trans and gender diverse health (**NSW Blueprint**) recommends that people should be able to change the legal sex classification on their birth certificate through a "simple administrative procedure that does not require any medical intervention or verification by medical professionals".<sup>106</sup>

Internationally, it is now recognised that trans and gender diverse individuals should be able to self-declare their gender with supporting documentation that does not include medical certificates. Countries such as Ireland, Argentina, Belgium, Ecuador, France, Greece, Iceland, Denmark and Malta have reformed their laws to allow individuals to change the sex or gender on their birth certificates through simple administrative processes, similar to a change of name. These changes have been in effect for a number of years without any ill effects. In Australia, the Tasmanian Act requires applicants to provide a 'gender affirmation declaration' – namely, a statutory declaration in which the applicant affirms their gender identity.<sup>107</sup>

Requirements for clinical treatment and medical verification impose a discriminatory burden on trans and gender diverse people. These requirements also impose an administrative and financial burden, and send a damaging message to these cohorts that there is something 'wrong' with them that requires medical intervention and diagnosis. The idea that a medical practitioner can or should also 'verify' an individual's own sense of their gender identity is damaging to a person's sense of self. This harm is compounded by the generally negative experiences trans and gender diverse people have with the medical profession.

## INTERSEX PEOPLE

Intersex people must also provide a statement from a doctor or psychologist certifying that the person is intersex.<sup>108</sup> AGA raised the lack of trust between intersex people who have undergone non-consensual normalising surgeries and clinicians, and considered it inappropriate for an intersex person to require a doctor or psychologist to verify their variation in sex characteristics.<sup>109</sup>

We note that it is important to distinguish between the different needs and experiences of trans and gender diverse people within a 'self-identification model', and intersex people with a diversity of sex characteristics. The majority of intersex people are men or women, and the primary issue for concern is the ongoing practice of performing deferrable medical interventions on intersex infants and children without their full, prior and informed consent. We discuss this issue in detail in Pt 7(a).

It is important to acknowledge that intersex people who have undergone forced or coerced medical interventions may have significant concerns about medical practitioners acting in their best interests or supporting them outside of a pathologising medical model which treats them as having 'disorders of sex development'.

We consider that requiring an intersex person to obtain proof that they are intersex from a medical practitioner or psychologist is inappropriate and discriminatory. For the relatively small number of intersex people who want to change the sex marker on their birth certificates,<sup>110</sup> they should not be required to obtain permission from clinicians to do so.

## RECOMMENDATION 15

The ACT Government should amend sections 24, 25, 29A and 29B of the *Births, Deaths and Marriages Registration Act 1997* (ACT) to remove the medical verification requirements for all applicants.

### APPLICATION PROCESS FOR CHILDREN UNDER 18

Currently, the BDMR Act requires the consent of both parents, or the person with parental responsibility, to alter the record of a child's sex or name,<sup>111</sup> except where one parent supports the application and they are the only parent named in the register or there is no other surviving parent of the child.<sup>112</sup> This creates difficulties where one parent, both parents, or the person with parental responsibility do not support the child to change the sex or gender recorded on their birth certificate.

This was the most common concern raised by trans and gender diverse stakeholders during consultations for the audit. In addition, LGBTIQ+ stakeholders raised the importance of ensuring that there was a consistent and streamlined process for parents of a child to amend both their gender and their given name, to ensure that both can be changed at the same time. For example, a child should be able to affirm their gender by changing their given name and the legal gender on their birth certificate at the same time.

Equality Australia considered concerns raised by Government stakeholders about the potential difficulty involved with allowing for one parent to change a child's surname, given the number of disputes around changing a child's surname in the Family Court following the separation of parents, and the desirability of ensuring that disputes over changing a surname are dealt with as part of the larger family separation dispute and do not cause unnecessary delays to supporting a child to affirm their gender.

### OPTIONS FOR REFORM

Equality Australia discussed potential options for reform with stakeholders for allowing children to change their legal gender where they have the capacity to make the decision on their own behalf.

The Tasmanian Act allows children aged 16 or over to apply.<sup>113</sup> In the LGBTIQ+ Stakeholders Roundtable, we raised the introduction of a statutory age of capacity for medical and legal decision-making at 16 years old. LGBTIQ+ stakeholders were very supportive of creating a streamlined process for 16 and 17 year old children to apply on their own behalf. However, there were some concerns about drawing an arbitrary line in the sand that may fail to provide for individual circumstances.

LGBTIQ+ advocates were also supportive of children under 16 being able to apply where they have the capacity to make this decision on their own. Accordingly, LGBTIQ+ stakeholders were also supportive of introducing a process regarding a child under 16's capacity to understand the decision to change the legal gender and given name on their birth certificate – in recognition of the varied decision-making capacity of children at different stages of intellectual and emotional development.

The WALRC report recommended a tiered approach for a recognition certificate, where:

- a parent or guardian of a child under 12 child must obtain the consent of all responsible parent/s or guardian/s; and
- a child aged 12 or over can apply with the consent of one parent or guardian.<sup>114</sup>

The primary advantage of including a set age for applications is that it provides certainty for potential applicants to apply through a simple administrative process. The primary disadvantage is that it creates an arbitrary age limit which may result in unfair outcomes for younger people with the capacity to understand the nature, purpose and consequences of the amendment.

In contrast, a legislative provision which allows for an application to be made for any child with capacity would allow applications to be made for children in the broadest range of circumstances. However, in practice, there is a risk that the Registrar may have concerns about whether the child has capacity – which could lead to requiring more onerous requirements of capacity for all young people which could perpetuate barriers to legal gender recognition.

Following consultations with LGBTIQ+ stakeholders and the Expert Advisory Group, advocates supported both certainty and flexibility, and recognised potential concerns from the ACT Government about legislating decision-making capacity where children develop at different ages.

LGBTIQ+ stakeholders were generally supportive of combining the approaches in the Tasmanian Act and the WALRC report as an interim pathway forward and to address any potential practical concerns by the Registrar, as follows:

- a parent or guardian of a child under 12 child must obtain the consent of all responsible parent/s or guardian/s; and
- a child aged 12 or to 16 can apply with the consent of one parent or guardian; and
- a child aged 16 or over can apply.

This process should be available through a simple administrative process without requiring ACT Civil and Administrative Tribunal (ACAT) approval, in recognition of the more advanced maturity and competence of 16 and 17 year old young people to make decisions about their own affairs.

### RECOMMENDATION 16

The ACT Government should amend the *Births, Deaths and Marriages Registration Act 1997* (ACT) to allow children aged 16 or over to apply to change the gender marker and given name on their birth certificate, and allow children aged 12 to 16 to apply with the consent of one parent or person with parental responsibility.

### PRACTICAL CONSIDERATIONS TO ALLOW ONE PARENT TO LODGE AN APPLICATION

There are a range of reasons why a parent may not consent to the application, including where they do not consider that the child is mature enough to make the decision, where the parent rejects the child's gender identity or where the parent is estranged from or has no meaningful relationship with the child. There are also cases where the other parent has been a perpetrator of family violence, and either the supportive parent or the child is fearful of contacting them to obtain their approval.

LGBTIQ+ advocates are keen to find a pathway for removing inappropriate barriers. While ACAT is a no costs jurisdiction, this process nonetheless remains a significant barrier to parents applying on their child's behalf.

There are other decisions requiring parental responsibility where the consent of both parents is not required. In these situations, there are generally allowances for exceptional circumstances where it is not practically possible or appropriate to obtain consent from an absent parent. For example, the *Australian Passports Act 2005* (Cth) and section 10 of the *Australian Passports Determination 2015* (Cth) set out 'special circumstances' in which a parent who is unable to obtain the consent of all persons with parental responsibility for a child can explain why they cannot obtain consent and request that an application be considered without requiring a court order.



These 'special circumstances' include:

- the non-consenting parent being presumed missing or dead;
- the inability to contact a non-consenting parent for a reasonable period of time;
- the non-consenting parent being medically incapable of providing consent;
- the existence of a family violence order against the non-consenting parent;
- there has been no contact between the child and the non-consenting parent for a substantial period before the application is made; or
- the child is the subject of a child welfare order.<sup>115</sup>

In addition to the grounds in the BDMR Act, the *Births, Deaths and Marriages Registration and Other Legislation Amendment Act 2018 (NT) (NT Act)* also allows for a parent to apply on their child's behalf where the parents of a child are dead, cannot be found, or for some other reason cannot exercise their parental responsibilities to a child, or for 'some other reason'.<sup>116</sup> The Tasmanian Act allows an application to be made with a magistrate's approval.<sup>117</sup>

This process should be dealt with administratively, with the Registrar making a decision on the information provided and only referring the matter to ACAT where there is a serious issue to be determined by the Tribunal in relation to the application.

### RECOMMENDATION 17

The ACT Government should amend the *Births, Deaths and Marriages Registration Act 1997 (ACT)* to allow one parent to apply without the other parent's signature for 'some other reason', including on the basis of defined 'special circumstances'.

#### APPROVAL BY ACAT

In considering the need for a system which ensures that trans and gender diverse children are not subjected to onerous and discriminatory barriers to legal recognition, Equality Australia considered the limited situations in which Tribunal approval may be required.

ACAT approval may be required in cases which fall outside the situations outlined above. For example, where a child aged 12 to 15 is competent to make legal decisions about their identity documents on their own behalf but their parents have not signed the application, or where a child under 12 is competent to make the decision. In these cases, the matter should be referred to ACAT to determine whether the child has the capacity to make the decision and that the decision is in the child's best interests.

### RECOMMENDATION 18

The ACT Government should amend the *Births, Deaths and Marriages Registration Act 1997 (ACT)* to allow a child to apply to the ACT Civil and Administrative Tribunal for an order allowing a change of given name and gender marker.

### RESOLUTION OF DISPUTES IN ACAT

LGBTIQ+ stakeholders are generally of the view that while ACAT is available as an avenue, in practice requiring parents to resolve their disputes in ACAT poses a significant barrier for legal recognition of gender. Recommendations 17 and 18 seek to limit the possible use of ACAT where appropriate, by giving the Registrar broader discretion to consider an application where special circumstances exist.

There will, however, remain a small number of situations in which the dispute cannot be resolved and the use of ACAT will remain available. Where ACAT remains an avenue for resolving disputes, we recommend that any process should be age appropriate, straightforward, cost-free and avoid any possible delays.

Before the cases of *Re Jamie*, *Re Kelvin* and *Re Matthew*, parents were required to apply to the Family Court for magistrates' approval for gender affirmation treatment for their transgender children. During this time, Justice Connect's Stage 2 Access service surveyed parents of transgender children who had gone through the Family Court process and found that the process caused a significant toll on the mental health of the transgender child and their family. Family Court registries in some jurisdictions developed a specialist list with a fast-track process in recognition that there is a direct causal link between delays in children being able to affirm their gender and poorer mental health outcomes, including increased risks of self-harm and suicide.

### RECOMMENDATION 19

The ACT Government should work with the ACT Civil and Administrative Tribunal to develop a specialist, fast-track process to streamline disputes in relation to applications to alter a person's gender marker.

#### UPDATING DETAILS ON FAMILY MEMBERS' BIRTH CERTIFICATES

The BDMR Act and BDMR Regulation do not currently provide an avenue to update a younger sibling's birth certificate to reflect the change of name, sex or gender of their older sibling. This causes practical issues in situations where both children are required to provide birth certificates and the names and sexes on the birth certificates are inconsistent (e.g. when the children are beneficiaries of a deceased parent's superannuation). While the BDMR Act contains a provision which ensures that a person who is entitled as a beneficiary of a will, trust or otherwise by operation of law will not forfeit any legal rights or entitlements, mismatching identity documents can require disclosure of a sibling's gender identity to explain any discrepancy.

In addition, where a parent changes their legal name and gender, there should be a process for their child to apply to amend their birth certificate to reflect these changes (e.g. their new name and changing the descriptor from 'father' to 'mother'). This would also ensure that trans and gender diverse people and their family members do not face potential discrimination where their identity documents contain inconsistent information.

### RECOMMENDATION 20

The ACT Government should amend the *Births, Deaths and Marriages Registration Act 1997 (ACT)* to allow for applications to amend the given name and gender marker of a family member on a person's birth certificate.

## RECOGNITION OF PARENTS ON BIRTH CERTIFICATES

In the ACT, it is possible for a parent to amend the term used to describe their relationship to their child on their child's birth certificate to reflect their sex or gender (e.g. mother, father or parent). Section 5(2) of the *Births, Deaths and Marriages Registration Regulation 1998* (ACT) (**BDMR Regulation**) states that for the registration of births, "the word 'mother' or 'father' may be used to describe either or both of the parents of the child". Subsection 5(1) of the BDMR Regulation is written in a gender inclusive way.

However, the Birth Registration Statement only allows for recognition of a 'mother' and a 'father' / 'parent.' In practice, LGBTIQ+ stakeholders believe that these are the only potential descriptors which are available.

### RECOMMENDATION 21

The ACT Government should amend the Birth Registration Statement (Form 201 – BRS) to allow any parent to be listed as mother, father or parent.

## OPTIONAL INFORMATION ON BIRTH CERTIFICATES

The audit revealed that the BDMR Act and BDMR Regulations do not prescribe that a sex marker must be recorded on a person's birth certificate or registration certificate.

It is already possible in the ACT to be issued with a birth certificate which does not state your sex marker. This includes removing the entire 'sex' field (i.e. deleting the entire line from the birth certificate) or leaving the sex descriptor as blank. This option is currently available to any person on request, including parent/s for a child's birth certificate (i.e. not stating a child's sex on the birth certificate issued after birth) or to remove the sex marker at a later date.

LGBTIQ+ stakeholders support a person being able to request that no sex or gender marker be listed on their birth certificate, similar to the Tasmanian Act.<sup>118</sup>

While section 27 of the BDMR Act ensures that a person's previous sex is not included on the newly issued birth certificate, a person's previous name can still be included on the reverse side of a birth certificate. Government stakeholders raised the concern that this effectively undermines the purpose of this provision to protect people from discrimination through forced disclosure of the sex previously recorded on their birth certificate. While the BDMR Act does not appear to require previous names to be recorded on the reverse side of a birth certificate, stakeholders informed us during consultations that this practice is not prohibited and previous names are included as common practice.

A person's birth certificate is required to reflect the register, but does not have to include all of the details on the register (e.g. previous names). In relation to what information is included on a birth certificate, information can be removed on an 'opt out' basis. As outlined above, there are barriers to children under 18 removing the sex marker on their birth certificate if one of their parents does not consent.

However, there are options for the ACT Government to ensure that previous names are not recorded in a way which may result in forced disclosure of a previous recorded sex. For example, the Tasmanian Act prohibits a name being registered with any notation or indication that the person has changed their name except on the applicant's request.<sup>119</sup> It is also possible to be issued with two birth certificates. For example, an applicant can be issued with one birth certificate stating their amendment history to make it easier to prove their identity for the purposes of updating their details with services, such as banks, real estate agents or superannuation companies. An applicant can also be issued with a separate birth certificate which does not state their previous name or sex markers which can be provided without disclosing their gender identity, such as to prospective employers or schools. However, there are some practical difficulties in relation to document verification – with some organisations only accepting the most recent birth certificate, which may require potential disclosure of a person's gender identity to change their details or access essential services.

Consultations with LGBTIQ+ stakeholders revealed that these options are not widely known.

### RECOMMENDATION 22

The ACT Government should amend the *Births, Deaths and Marriages Registration Act 1997* (ACT) to prohibit a person's previous given name being disclosed on a birth certificate except where this has been requested by the applicant, and publicise the availability of amendments to non-required fields on birth certificates.

# SUMMARY OF RECOMMENDATIONS

## REMOVE THE REQUIREMENT THAT SEX BE RECORDED ON BIRTH CERTIFICATES

### IF NOT ACCEPTED:

Move towards collecting information on gender

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Remove the indeterminate/intersex/unspecified descriptor

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Allow for multiple gender markers using a free text field (with Registrar's discretion to refuse offensive, inappropriate or unestablished descriptors)

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In the alternative, add 'non-binary' at a minimum

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Remove medical verification requirements

---

Work with the Commonwealth Government to ensure any rights or entitlements are not affected by people having different gender markers on their territory and federal identity documents

---

Allow people to change details of their family member's given name, gender or parent descriptor on their birth certificates

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Prevent a person's previous given name being disclosed on birth certificates where this discloses the person's gender assigned at birth, except where requested

---

Publicise that people can already apply for a birth certificate without a sex descriptor or sex field

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### FOR CHILDREN UNDER 18:

16 and 17 year olds can apply to change the gender marker and given name on their birth certificate

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12 to 16 years old – parent or child with capacity can apply to change the gender marker and given name on the child's birth certificate – one parent or person with parental responsibility must consent unless special circumstances apply or with ACAT order

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Under 12 years old – parent can apply to change the gender marker and given name on their child's birth certificate – one parent or person with parental responsibility must consent unless special circumstances apply or with ACAT order

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## B) ANTI-DISCRIMINATION LAWS

In 2015, the ACT Law Reform Advisory Council's Review of the Discrimination Act 1991 (ACT) (**LRAC report**)<sup>120</sup> provided a number of recommendations to the ACT Government. While some of the recommendations have been implemented,<sup>121</sup> a number of recommendations have not yet been implemented. This audit does not seek to duplicate this work, and focuses on the specific recommendations relating to sexual orientation, gender identity and sex characteristics.

A number of recommendations from the LRAC report would improve the operation of the Discrimination Act more broadly in a way which would benefit LGBTQ+ communities (e.g. inclusion of a positive duty to eliminate discrimination, recommendations aimed at achieving substantive equality, and stronger powers for the ACT Human Rights Commission). In particular, recommendation 18 of the LRAC report stated that:

The Discrimination Act should be amended to repeal Part 4 (Exceptions to Unlawful Discrimination) and to replace it with a general limitations clause that operates as 'justification defence', allowing a person who has engaged in unlawful conduct (discrimination, harassment, vilification and offensive conduct) to show that their conduct was a justifiable limitation on the right to non-discrimination having regard to the factors set out in section 28(2) of the Human Rights Act 2004 (ACT).<sup>122</sup>

A general limitations clause is a simple and nuanced solution to a range of permanent, and inflexible exceptions which require ongoing legislative amendment over time as social attitudes change. Any general defence of justification in discrimination law, in place of permanent statutory exceptions, must properly incorporate the principles of necessity, reasonableness, and proportionality.<sup>123</sup>

### RECOMMENDATION 23

The ACT Government should implement the remaining recommendations from the ACT Law Reform Advisory Council's Review of the *Discrimination Act 1991* (ACT), particularly recommendation 18 to replace permanent statutory exceptions with a justification defence.

*Recommendations 24 to 28 provide alternative options if the ACT Governments does not support recommendation 23.*

### RELIGIOUS EXCEPTIONS – EDUCATION

On 29 April 2019, the *Discrimination Amendment Act 2018* (ACT) came into effect which amended religious exceptions for educational institutions conducted for religious purposes under the Discrimination Act.

This welcome move came about in response to the release of the Religious Freedom Review at a federal level. The ACT Government took the lead for jurisdictions where these religious education exceptions remained – committing to remove these provisions which allowed religious educational institutions to discriminate against students on the basis of their sexual orientation or gender identity (among other protected attributes) as an urgent priority.

As a result, the Discrimination Act makes it unlawful for a religious educational institute to discriminate against a student because of their sexual orientation, gender identity or other protected attribute under the Discrimination Act with the exception of a failure to accept a person's application for admission solely based on the student's 'religious conviction'.<sup>124</sup> This exception only applies where the educational institution has published a student policy outlining this, which is readily accessible by prospective and current students. This requirement to publish policies that outline otherwise discriminatory conduct increases transparency and provides greater certainty for potential students and parents. For example, this would allow a faith-based school with a publicly available policy that they only accept students from their faith to refuse admission for a student from a different faith, but not to expel a child from their faith who came out as LGBTQ at their school.

The Bill also made clear that the general exception for religious organisations in subsection 32(1)(d) of the Discrimination Act will not apply to a defined act, which includes the admission, treatment or continued enrolment of students in religious educational institutions.<sup>125</sup>

The Bill does not affect the operation of subsection 8(4) of the Discrimination Act which provides that the imposition of a condition or requirement on students will not amount to indirect discrimination if it is reasonable in the circumstances. The Revised Explanatory Statement to the Bill relevantly provides that:

This existing provision means that a religious educational institution is not prohibited from requiring a student to participate in religious education (which may include religious study, attendance at religious services and observance of religious practices) provided that this is reasonable in the circumstances. The publication by a religious educational institution of a policy that clearly sets out the religious participation requirements of the school (which is available to prospective students and their families prior to admission into the school) would be one factor that could be considered in determining whether a particular requirement is reasonable in the circumstances.<sup>126</sup>

We commend the ACT Government on removing these exceptions which allowed religious schools to discriminate against LGBTQ students.

## BROAD RELIGIOUS EXCEPTION

The permanent statutory exception in subsection 32(1)(d) of the Discrimination Act is broad and may apply to a broad range of activities which extend into the secular public sphere.

Subsection 32(1)(d) provides an exception from protections from discrimination for “any other act or practice (other than a defined act) of a body established for religious purposes, if the act or practice conforms to the doctrines, tenets or beliefs of that religion and is necessary to avoid injury to the religious susceptibilities of adherents of that religion”. This provision is almost identical to the exemption<sup>127</sup> in subsection 37(1)(d) of the SDA at a federal level. This broad religious exception has been interpreted by courts to apply broadly to include refusal of services in commercial business, provided that the nexus between the act or practice and the religious beliefs can be established. Importantly, there is no authoritative case law which provides guidance on the scope of ‘religious susceptibilities’.

The intention of the exemption when introduced into the SDA was to provide broad coverage consistent with the Australian Government’s international obligations. However, in being transposed from article 18 of the International Covenant on Civil and Political Rights (ICCPR), this exception extends the protection beyond the religious realm. Relevantly, article 18(1) provides that the right to freedom of thought, conscience and religion shall include freedom to manifest his [sic] religion or belief in **worship, observance, practice and teaching**.

The purpose of this provision is to protect *religious* worship, observance, practice and teaching – not any act or practice which takes place in the public sphere and affects the rights and freedoms of other people on the basis that it is consistent with religious beliefs.

The current exception in the Discrimination Act provides a blanket defence for all religious bodies; this can cause LGBTIQ+ people to fear discrimination and creates a sense of uncertainty about access to non-discriminatory and inclusive treatment. Instead of a broad permanent exception for religious organisations, religious bodies seeking to discriminate against LGBTIQ+ people or other groups in a way which would otherwise violate the Discrimination Act could apply for a limited exemption for specific religious acts and practices, where this is reasonable, necessary and proportionate, as assessed by the ACT Human Rights Commission.

This recommendation applies if recommendation 23 is not implemented by the ACT Government.

## RECOMMENDATION 24

The ACT Government should amend the *Discrimination Act 1991* (ACT) to abolish the broad religious exception in subsection 32(1)(d).

## RELIGIOUS EXCEPTIONS – EMPLOYMENT

### EMPLOYEES AND CONTRACTORS AT RELIGIOUS EDUCATIONAL INSTITUTIONS

The *Discrimination Amendment Bill 2018* (ACT) also amended exceptions for religious educational institutions relating to employees and contractors. The Bill removes exceptions which allowed religious educational institutions to discriminate against employees and contractors on the basis of sexual orientation and gender identity (amongst other attributes), except on the basis of ‘religious conviction.’ As in relation to admission of students, this exception only applies where the religious educational institution has published a readily accessible staff policy. Critically, discrimination on the basis of ‘religious conviction’ should not be used as a proxy for discrimination on the basis of sexual orientation, gender identity or expression. The Bill also explicitly states that the general exception for religious organisations in subsection 32(1)(d) of the Discrimination Act will not apply to employment or contracting by religious educational institutions.<sup>128</sup>

We commend the ACT Government on removing these religious exceptions which discriminated against LGBTQ teachers and staff in educational institutions.

### EMPLOYEES AND CONTRACTORS AT OTHER RELIGIOUS ORGANISATIONS

Subsection 32(1)(d) of the Discrimination Act states that protections from discrimination do not apply to:

any other act or practice (other than a defined act) of a body established for religious purposes, if the act or practice conforms to the doctrines, tenets or beliefs of that religion and is necessary to avoid injury to the religious susceptibilities of adherents of that religion.

AGA raised concerns about the breadth of the broad exception for religious bodies to discriminate against any current or prospective employees because of who they are, regardless of whether their work is directly connected to religious observance or instructions or not. AGA recommended that the ACT abolish religious exceptions in employment and require religious bodies to apply for a specific exception.<sup>129</sup>

We consider that a broad permanent exception for all religious bodies to discriminate against employees and contractors allows discrimination on the basis of sexual orientation or gender identity beyond what is reasonable or justifiable, and will likely result in unfair treatment for LGBTQ people at work and even more LGBTQ people not disclosing their sexual orientation or gender identity at work. Hiding an essential part of who you are prevents you from making full and active contributions in the workplace, affecting overall workplace culture, staff retention and satisfaction rates.

Experiencing discrimination also has a significant impact on the mental health of LGBTIQ+ people, who are disproportionately represented in statistics of mental health issues, self-harm and suicidal ideation.<sup>130</sup> LGBTIQ+ people already experience higher rates of discrimination, poverty and unemployment.<sup>131</sup> For example, more than 1 in 3 transgender adults and 1 in 5 intersex adults surveyed had attempted suicide. More than 1 in 2 bisexual women surveyed had been diagnosed with or treated for a mental disorder in the last 3 years.<sup>132</sup> Ensuring that all employers,

including religious organisations, have the same obligations to recruit and treat staff fairly will work to alleviate this disadvantage and allow for equal opportunity in employment.

In terms of federal protections, the SDA and *Fair Work Act 2009* (Cth) (FWA) also contain exemptions for religious bodies to discriminate in employment, and the FWA does not provide employment discrimination protections on the basis of gender identity or sex characteristics.

Section 44 of the Discrimination Act contains a narrower exception for workers which allows for discrimination on the basis of a person's religious conviction by an educational institution or a health service provided the work duties would involve participation in religious teaching, observance or practice.

The Human Rights Commission also has the power to grant an exemption from the obligations under the Discrimination Act under Part 10, having regard to the need to promote acceptance of and compliance with discrimination laws and the desirability of certain otherwise discriminatory actions being permitted for the purpose of redressing the effects of past discrimination, where relevant.<sup>133</sup>

If the ACT Government does not support recommendations 23 or 24, we provide alternative options in recommendations 25 and 26.

### **RECOMMENDATION 25**

The ACT Government should amend the *Discrimination Act 1991* (ACT) to make employment a defined act as a limitation on the broad religious exception in subsection 32(1)(d) so that discrimination by religious organisations in employment is no longer permitted.

### **RELIGIOUS EXCEPTIONS – SERVICE DELIVERY**

The broad religious body exception in s 32(1)(d) is particularly concerning where it may allow for discrimination in the provision of government funded service delivery.

LGBTIQ+ stakeholders expressed concern about LGBTIQ+ people accessing services where they were afraid of being turned away or mistreated because of existing religious exceptions from anti-discrimination laws.<sup>134</sup> There were different aspects to addressing this issue, from removing anti-discrimination carve-outs for service providers, to community education to ensure LGBTIQ+ people are aware of their human rights, and protections from discrimination under existing laws.<sup>135</sup>

### **RECOMMENDATION 26**

The ACT Government should make service delivery a defined act as limitation on the broad religious exception in subsection 32(1)(d) of the *Discrimination Act 1991* (ACT) so that discrimination by religious organisations in service delivery is no longer permitted.

## **GOVERNMENT FUNDING OBLIGATIONS FOR RELIGIOUS ORGANISATIONS**

Religious organisations receive government funding to provide essential services to members of the community. To the extent that organisations receive funding to provide public services, they should be required to uphold anti-discrimination laws without exception. We note that a number of religious organisations have stated that they do not rely on the defences available to religious organisations and are committed to providing inclusive and non-discriminatory services to all clients.<sup>136</sup>

The AIDS Action Council called for conditions in government funding agreements to ensure that religious service delivery providers provide inclusive and non-discriminatory services:

It is a factor of the development of the ACT over the past 100 years that religious organisations still provide many outsourced health and community services on behalf of the ACT Government under contract. There is a concern that this government funding is sometimes used to promote religious causes rather than being solely focussed on the provision of discrimination-free health and community services. This indirect discrimination against LGBTIQ people could be alleviated through conditions attached to government funding or legislative change. All ACT Government funding to service providers and through its grant programs should contain a requirement that funds are not be used to promote religious practice nor that a service user should be a member of a religion in order to access services.<sup>137</sup>

The AIDS Action Council recommended that standard contracts for ACT Government funded services be developed, and/or the ACT Government Procurement Act be amended to specifically restrict government funding being used for religious purposes or membership of religious codes or doctrines being used a criteria for access to services.<sup>138</sup> In the UK, religious organisations carrying out a public function (i.e. receiving government funding to provide a public service) are subject to the same non-discrimination obligations as non-religious service providers.<sup>139</sup>

*Recommendation 27 is an alternative recommendation if the ACT Government does not support recommendations 23 to 26.*

### **RECOMMENDATION 27**

The ACT Government should insert provisions in the *Government Procurement Act 2001* (ACT) and amend government funding agreements to require all organisations to provide inclusive and non-discriminatory services, unless the organisation has a specific exemption in the *Government Procurement Act 2001* (ACT). In the alternative, the ACT Government should amend government funding agreements to require government funded organisations delivering services to the public provide inclusive and non-discriminatory services.

## OTHER PERMANENT STATUTORY EXCEPTIONS

During the audit, Equality Australia reviewed the extensive permanent statutory exceptions in the Discrimination Act.<sup>140</sup> The Expert Advisory Group expressed concern about potential discrimination against LGBTIQ+ people due to the breadth and scope of broad exceptions in the Discrimination Act. For example, trans advocates raised concerns about discrimination by voluntary bodies, in sport, and the lack of clarity regarding intersex people relating to exceptions under 'sex'.

While some of the permanent exceptions appear neutral, they may have a disproportionate and discriminatory impact on LGBTIQ+ people in practice. For example:

- the exception for insurance allows discrimination where reasonable in the circumstances, having regard to actuarial or statistical data.<sup>141</sup> However, in practice, insurance companies have used statistical data on the high rates of mental health issues and suicide associated with a diagnosis of 'gender dysphoria' to deny access to travel insurance and life insurance, regardless of the mental health or personal circumstances of the individual trans or gender diverse person who has applied for insurance;
- the exception for services for members of one sex allows for discrimination on the ground of sex in relation to the provision of services only to members of one sex.<sup>142</sup> LGBTIQ+ advocates raised concerns about the lack of available homelessness shelters and family violence crisis accommodation particularly for trans women and gender diverse people; and
- the exception for sport allows discrimination on the ground of sex where 'the strength, stamina or physique of competitors is relevant' – regardless of whether it relates to social participatory programs or elite competition:<sup>143</sup>
  - Transgender advocates raised concerns that this exception allows sporting clubs to refuse to allow trans and gender diverse people to participate. This particularly applies to trans girls and young women seeking to be involved in youth sport. In addition, expert advisory members advised that the test of 'strength, stamina or physique' may not apply to all sports, and that different sports may require consideration of different attributes that place participants at a significant advantage in relation to the sport. In these cases, the relevant sporting body should be required to demonstrate the particular requirements of the sport and the evidence linking a person's physical attribute to levels of sporting achievement.
  - The participation of cisgender women with intersex variations associated with high testosterone, androgen sensitivity and XY chromosomes is currently contested in some athletics events, unless they undergo medical intervention to lower their testosterone levels.<sup>144</sup>

The AIDS Action Council recommended a review of the Discrimination Act and human rights legislation to modernise exceptions affecting LGBTIQ+ communities. The Council also recommended a review of the functions, structure, resources and purpose of the ACT Human Rights Act to ensure the Commission improve and update its ability to respond to LGBTIQ+ community concerns, including consideration of interstate developments (e.g. establishment of a Commissioner for Gender and Sexuality).

*Recommendation 28 is an alternative if the ACT Government does not support recommendation 23.*

## RECOMMENDATION 28

The ACT Government should review the permanent statutory exceptions (other than religious exceptions) particularly in sections 28, 31, 34, 36, 37, 38, 39(3), 40 and 41 of the *Discrimination Act 1991* (ACT).

Recommendations 29 and 30 apply irrespective of the ACT Government's response to recommendations 23 to 28.



## SEX CHARACTERISTICS

In 2016, the ACT Government passed amendments to introduce 'intersex status' as a protected attribute under the Discrimination Act, consistent with the LRAC report and the SDA. The Discrimination Act does not define 'intersex status' except as 'status as an intersex person',<sup>145</sup> which reflects the definition in the Legislation Act discussed in Pt 4 above.

During consultations for this report, intersex stakeholders and expert advisory group members raised the need to change 'intersex status' to 'sex characteristics', in line with updated terminology used by intersex advocates to more accurately describe the protected attribute.<sup>146</sup> While the term 'intersex status' was supported by OII Australia (now IHRA) during limited consultation periods at the time of amendments to the SDA in 2013, understandings of more appropriate terminology to describe intersex people and their experiences have developed since then.

AGA criticised protections from discrimination and vilification on the basis that "it requires individuals to identify with a particular intersex identity to be afforded protection".<sup>147</sup> Intersex organisations recommended that the ACT Government "[u]pdate the Discrimination Act 1991 (ACT) to match international best practice, protecting intersex people from discrimination and human rights violations on grounds of 'sex characteristics'". The definition of sex characteristics ensures universal protection for all people on the basis of their sex characteristics,<sup>148</sup> and is consistent with the Yogyakarta Principles plus 10 and the Darlington Statement.

### RECOMMENDATION 29

The ACT Government should amend the *Discrimination Act 1991* (ACT) to update the protected attribute of 'intersex status' to 'sex characteristics'.

## GENDER EXPRESSION

In 2016, the ACT Government implemented recommendation 8 from the LRAC report<sup>149</sup> to amend the definition of gender identity in the Discrimination Act to the following definition:

**Gender identity** means the gender-related identity, appearance or mannerisms or other gender-related characteristics of a person, with or without regard to the person's designated sex at birth.

*Note: Gender identity includes the gender identity that the person has or has had in the past, or is thought to have or have had in the past (see s7(2)).*

These were important reforms which improved protections from discrimination for trans and gender diverse people living in the ACT. However, there is growing acknowledgement that people who are perceived as not conforming to gender norms can also face discrimination on the basis of their gender expression. While the definition of gender identity is inclusive of appearance or mannerisms, the use of *identity* causes confusion about the scope of protections in practice. For example, where a person identifies as cisgender but is discriminated against because they do not conform to social expectations of dress or behaviour, this is properly categorised as discrimination on the basis of gender expression.

In order to provide certainty and a more accurate description of the basis of how you are discriminated against, the definition of gender identity should also refer to a person's gender expression (including appearance, mannerisms or other characteristics).

### RECOMMENDATION 30

The ACT Government should amend the *Discrimination Act 1991* (ACT) to make clear that the attribute of 'gender identity' also provides protections from discrimination on the basis of gender expression.



## C) RAINBOW FAMILIES & FAMILY FORMATION

The ACT has long been at the forefront of welcoming a diversity of families, including rainbow families. For many years, couples and step parents have been able to jointly adopt children regardless of their gender, and start a family using ART and altruistic surrogacy free from discrimination because of who they love.

During consultations, LGBTIQ+ stakeholders raised issues around the practicalities of accessing ART and altruistic surrogacy, legal recognition for children born through international commercial surrogacy, and co-parenting arrangements involving more than two parents.

### DISCRIMINATION BY ADOPTION AND IVF SERVICES

The AIDS Action Council raised concerns that “the providers of adoption and IVF services have applied their own ‘criteria’ around access to these services, which often follow moral or religious views and restrict access to these services by same sex couples and single lesbians.”<sup>150</sup> Expert advisory group members also advised that trans and gender diverse people face discrimination in accessing adoption and IVF services. For example, a Canberra clinic refused service to trans patients claiming the requirement of additional ethics approval or that it would constitute a substitute parent agreement in circumstances where this would not be the case.

Under ACT laws, these denials of services would constitute unlawful discrimination under the Discrimination Act. While outside the scope of this review, there appears to be a need for resources for LGBTIQ+ people and rainbow families setting out avenues to make a discrimination complaint and funding for a specialist LGBTIQ+ legal service to provide expert support for LGBTIQ+ people.

There have been a number of recent reviews of accessibility of assisted reproductive treatment services which are relevant for the ACT Government in removing barriers for couples to start a family using IVF and other ART services:

The Victorian Government recently commissioned an Independent Review of Assisted Reproductive Treatment, with a number of recommendations which would remove barriers to prospective parents in the ACT creating families using ART and surrogacy.<sup>151</sup> The interim recommendations are intended to remove discriminatory or outdated provisions, improve access to low cost services, and reduce unintended discrimination resulting in barriers to access for some women and members of the LGBTIQ+ community.<sup>152</sup>

The Western Australian Government commissioned an Independent Review of the *Human Reproductive Technology Act 1991 (WA)* and *Surrogacy Act 2008 (WA)* (**WA ART & Surrogacy Review**). The report makes a number of recommendations, including: regular reviews; improvements to data collection and reporting; access to information about donation, genetic parentage and donor conception;<sup>153</sup> and the removal of discriminatory limitations on access to surrogacy.<sup>154</sup>

The Northern Territory Government has also recently commenced a review into introducing surrogacy laws in the Northern Territory.<sup>155</sup>

A thorough review of assisted reproductive treatment in the ACT is outside the scope of this audit, but recommendations from the Victorian review may provide guidance on potential improvements to the ACT framework.

### RECOMMENDATION 31

The ACT Government should conduct a review into access to reproductive healthcare in the ACT, including whether to introduce legislation to regulate the provision of IVF and other assisted reproductive services and potential discrimination in accessing these services.

### ACCESS TO ALTRUISTIC SURROGACY

Rainbow Families ACT and other stakeholders raised concerns in relation to accessing altruistic surrogacy, including:

- restrictions on advertising not distinguishing between altruistic or commercial surrogacy, effectively prohibiting any form of advertising for a surrogate (e.g. an online search);<sup>156</sup>
- the lack of specificity about possible surrogacy arrangements and appropriate reimbursement mean that each couple attempting to enter into a surrogacy arrangement must effectively ‘reinvent the wheel’ in preparing a surrogacy agreement that is fair to all parties;
- the legal uncertainty and risk related to surrogacy in the ACT leads residents to look elsewhere, which in turn raises concerns about when the ACT’s extra-territorial offences relating to commercial surrogacy take effect;<sup>157</sup> and
- parentage orders are unnecessarily restrictive (i.e. they are only available for children conceived as a result of a procedure carried out in the ACT<sup>158</sup>) and do not provide sufficient legal protection for children born as a result of surrogacy of the intended parents.

We note that these practical difficulties apply to all ACT residents equally, regardless of sexual orientation, gender identity or sex characteristics. However, stakeholders reported that gay male couples and trans and gender diverse people are more likely to use altruistic surrogacy to start a family given the limited options otherwise available. Rainbow Families ACT reported that despite community desire for altruistic surrogacy, it is difficult to find advertising in the ACT, and gay couples seeking to start a family using altruistic surrogacy will generally travel or move to another jurisdiction. Rainbow Families ACT recommended that the ACT introduce a matching and clinical screening service for parents similar to the regulation model similar to the *Assisted Reproduction Treatment Act 2008 (Vic)*. The WA ART & Surrogacy Review also contains an analysis of the ACT’s surrogacy laws.

The audit also revealed criminal offences for procurement in surrogacy, regardless of whether this is an informal introduction of friends or a commercial brokerage arrangement.<sup>159</sup>

### RECOMMENDATION 32

The ACT Government should amend sections 42 and 43 of the *Parentage Act 2004 (ACT)* to ensure that procurement and advertising offences do not apply for altruistic substitute parent agreements.

This report does not go into all of the issues raised by substitute parent agreements in detail, which require close and careful consideration through further review.



### RECOMMENDATION 33

The ACT Government should amend Parts 2 and 4 of the *Parentage Act 2004* (ACT) to modernise existing arrangements for substitute parent agreements in line with the Independent Review of Assisted Reproductive Treatment commissioned by the Victorian Government. In the alternative, the ACT Government should ensure that greater regulation of substitute parent agreements is considered in the review into access to reproductive healthcare (see recommendation 31).

#### LEGAL RECOGNITION OF CHILDREN BORN THROUGH INTERNATIONAL COMMERCIAL SURROGACY

Commercial surrogacy is illegal in the ACT with a maximum penalty of 1 year imprisonment.<sup>160</sup> Section 41 of the *Parentage Act 2004* (ACT) (**Parentage Act**) does not indicate whether the commercial substitute parent agreement is unlawful whether entered into domestically or internationally. There have been calls within the ACT to decriminalise commercial surrogacy. We consider this discussion outside the scope of this audit. While the majority of people accessing surrogacy services are heterosexual, there is still a significant number of same-sex couples entering into substitute parent agreements. To the extent that these laws may have a disproportionate impact on same-sex couples travelling overseas to enter into commercial substitute parent agreements, and the high likelihood of facing discrimination in the ACT because they are a same-sex couple, we consider this issue relevant for this audit.

Equality Australia recognises that compensated substitute parenting agreements are a complex policy issue that requires careful consideration and ethical sensitivity, to appropriately protect the rights and interests of children and prevent the exploitation of surrogates.

#### ACCESS TO PARENTAGE ORDERS

Rainbow Families ACT submitted that some couples, particularly gay male couples, travel overseas to enter into international commercial surrogacy arrangements. When these parents return to the ACT, they are reluctant to apply for a parentage order because of restrictions under s 24 of the *Parentage Act*. As a result, there is no legal certainty about their child's legal relationship with the parents who care for them. Section 24 of the *Parentage Act* provides that substitute parents can apply for a parentage order if:

- the child was conceived as a result of a procedure carried out in the ACT;
- neither birth parent is a genetic parent of the child;
- there is a substitute parent agreement, other than a commercial substitute parent agreement, under which 2 people (the substitute parents) have indicated their intention to apply for a parentage order about the child;
- at least 1 of the substitute parents is a genetic parent of the child; and
- the substitute parents live in the ACT.

In addition, there are other barriers to applying for a parentage order, including:

- a requirement that the application be made when the child is between 6 weeks and 6 months old;<sup>161</sup>
- the application must be made to the Supreme Court (which involves significant legal costs);<sup>162</sup>
- consideration of whether payment or reward (other than for expenses reasonably incurred) has been exchanged between the substitute parents and the birth parents;<sup>163</sup> and
- anything else the Supreme Court considers relevant.<sup>164</sup>

LGBTIQ+ stakeholders confirmed that families are reluctant to seek a court order out of fear that the court will not recognise their relationship and that they may incur a penalty.

We received an individual submission from a parent of a child born through international surrogacy, who called for reform:

[T]he ACT should amend its laws in relation to surrogacy to build a system that facilitates surrogacy, rather than stigmatising it. In the process, the ACT can create a system that provides a fair and transparent balance of rights and responsibilities between all parties, and provide intended parents and surrogates an established path that need not be reinvented each time. The ACT has a commendable track record in leading the way for Australian jurisdictions when it comes to LGBTIQ+ rights, and the government promotes Canberra as the most LGBTIQ friendly city in Australia. I encourage it to take the lead in this vital area.<sup>165</sup>

Rainbow Families ACT confirmed that access to a parentage order that recognises both parents without the fear of prosecution is critically important for a child's wellbeing. In particular, children are placed in a legally precarious situation where only one of their parents is legally recognised as such, rather than both parents having full custody and legal recognition.

LGBTIQ+ advocates also raised concerns about whether parents who have engaged in international commercial surrogacy will be denied access to parental leave to care for their child. For example, LGBTIQ+ stakeholders confirmed that clauses in enterprise agreements which seek to restrict access to parental leave by requiring intended parents using surrogacy to obtain a parentage order before equivalent parental leave would be granted. In addition, the likelihood of discrimination is increased where same-sex couples are more likely to be questioned by authorities about their legal relationship with their child.

The Family Law Council's 2013 report<sup>166</sup> and the South Australian Law Reform Institute's review report<sup>167</sup> recommend improving access to legal recognition of children born through international surrogacy arrangements, through a discretionary power to transfer parentage from the surrogate mother to the intended parents where an international commercial surrogacy agreement has been in place provided that appropriate safeguards or criteria have been satisfied. However, we note that the WA ART & Surrogacy Review report disagrees with this recommendation on the basis that granting legal parentage conflicts with the policy on criminalising international commercial surrogacy arrangements.<sup>168</sup>



### RECOMMENDATION 34

The ACT Government should amend sections 24 to 26 of the *Parentage Act 2004* (ACT) to allow for children born as a result of substitute parent agreements in other jurisdictions to obtain a parentage order for legal certainty of their family relationships.

#### RECOGNITION OF DIVERSE FAMILY STRUCTURES

LGBTIQ+ stakeholders also raised concerns about the limit of two parents being recognised on a birth certificate. In response to the Victorian ART review, Rainbow Families Victoria submitted:

Rainbow families may include one, two, three, four or more LGBTIQ parents, co-parents or carers who care and nurture the children in their family. Family forms can include, but are not limited to: step parented families, separated families, children who are fostered, in permanent care or adopted, children conceived through assisted reproductive technology, children living across two or more primary homes as part of their parenting arrangement, families with donors and/or surrogates who helped create them, either through altruistic surrogacy in Victoria or through international surrogacy arrangements.<sup>169</sup>

This restriction on the numbers of parents who can be recognised affects all families with more than two co-parents equally, but rainbow families – who are more likely to start a family using ART and surrogacy – are also more likely to be affected by laws which restrict the number of parents who can be legally recognised. The recognition of multiple parents more accurately describes the people with parental responsibility for the child and provides legal certainty.

We note that there are few jurisdictions which have implemented laws allowing for recognition of more than two co-parents. However, this is an area where rainbow families over time are urging for the law to have sufficient flexibility to recognise increasingly diverse family structures. In terms of developing best practice policies, the ACT Government should prioritise the agreements between the parents of a child and the child's best interests, consistent with guidance in the Convention on the Rights of the Child. The experiences in foreign jurisdictions such as Ontario provide useful guidance. Unfortunately, detailed consideration of potential legislative reform in this area is outside the scope of this project.

### RECOMMENDATION 35

The ACT Government should amend the *Births, Deaths and Marriages Act 1997* (ACT) and the *Parentage Act 2004* (ACT) to allow for more than two parents of a child to be legally recognised.

### REPRODUCTIVE SERVICES AND PEOPLE BORN WITH VARIATIONS IN SEX CHARACTERISTICS

Intersex advocates raised concerns about the availability and access to reproductive services and fertility counselling during consultations. The Darlington Statement calls for "access to reproductive services and fertility counselling for all intersex people, with protection of our reproductive autonomy, regardless of whether or not our capacity for fertility is considered to be in line with our legal sex".

The Parentage Act does not restrict access to reproductive services for people born with variations in sex characteristics, but there are other barriers to access which should be considered, including cost and the importance of access to this advice to be able to make an informed decision about medical procedures which may affect a person's fertility. The importance of relevant information about relevant factors to consider in making decisions about medical treatment is further discussed in Part 7(a) of this report.

### RECOMMENDATION 36

As part of the review into access to reproductive healthcare (see recommendation 31), the ACT Government should consider how to improve access to government funded reproductive services and fertility counselling for people born with variations in sex characteristics.

#### ACCESS TO HEALTH RECORDS FOR PEOPLE BORN WITH VARIATIONS IN SEX CHARACTERISTICS

Intersex advocates raised concerns about access to paediatric health records to be accessed by people later in life. For example, where people with variations in sex characteristics have not been informed of medical treatments they were subjected to as children, or were not informed of their variations in sex characteristics until later in life, access to health records can provide crucial information to fill gaps in their knowledge to better understand their medical history.

The *Health Records (Privacy and Access) Act 1997* (ACT) (**Health Records Act**) requires record keepers to ensure personal health information is kept private and take reasonable safeguards to secure it from unauthorised access, loss, misuse or destruction, among other risks.<sup>170</sup> Consumer health records of children must be retained until the person turns 25 years old,<sup>171</sup> and criminal penalties apply for the unlawful destruction of health records.<sup>172</sup>

However, this 25 year limit acts as a barrier for intersex people who only become aware of their intersex variation in adulthood, are not aware of their ability to request this information, or may not be in position to seek this information (e.g. due to experiencing mental health issues or because they are relying on information provided to them without realising that accessing additional health information would be helpful).

ACT laws already provide for different time limits for which sensitive information is required to be retained by data controllers for children to access sensitive information about childhood decisions later in life. For example, 99 years is set as the limit for the destruction of child protection records for children,<sup>173</sup> and the destruction of records lodged at ACAT for care matters for children, including guardianship and mental health.<sup>174</sup>

Intersex advocates also raised concerns that requests for health information are not always fulfilled, which can lead to intersex people not having access to accurate and reliable information about their health, due to a lack of disclosure or only partial disclosure. The Health Records Act already states that a health record must be given provided that the relevant statutory requirements are met (e.g. the record contains personal health information, payment of fees, proof of identity, etc.)<sup>175</sup> unless there are grounds for refusal.<sup>176</sup> In addition, it is important that intersex people have control over how their personal health information is used and who has access to it (e.g. preventing access of personal health information for medical researchers without consent, or where research is aimed at eliminating intersex traits).

In recognition of the potential cost of storing physical copies of documents for an extended period of time, we consider it appropriate for the health records of intersex people to be retained in electronic form.<sup>177</sup>

### **RECOMMENDATION 37**

The ACT Government should amend the *Health Records (Privacy and Access) Act 1997* (ACT) to require electronic retention of health records of people born with variations in sex characteristics for 99 years.

## **ACCESS TO AFFORDABLE FERTILITY PRESERVATION OPTIONS FOR TRANS AND GENDER DIVERSE PEOPLE**

Parents of trans and gender diverse children raised the issue of affordable access to fertility preservation for trans and gender diverse young people in the ACT. In particular, the costs associated with fertility preservation including the retrieval and storage of eggs, sperm and embryos to later use in IVF or surrogacy procedures can mean that people who would otherwise want to undergo these processes cannot afford to do so. As discussed above, trans and gender diverse people are more likely to experience financial hardship as a result of being disproportionately affected by discrimination in employment.<sup>178</sup>

We note that access to Medicare rebates is regulated by the Commonwealth Government and outside the ACT Government's ability to influence. However, for completeness, we include this recommendation if the ACT Government chooses to progress the issue of the prohibitive cost of fertility preservation for trans and gender diverse people in the ACT.

We briefly discuss access to high quality and affordable healthcare for trans and gender diverse people more broadly at Part 7(b) of this report.

### **RECOMMENDATION 38**

As part of the review into access to reproductive healthcare (see recommendation 31), the ACT Government should consider how to improve access to affordable fertility preservation options for trans and gender diverse people.

## D) POLICING & CORRECTIONS

The ACT Government has taken a number of positive steps to address previous concerns LGBTIQ+ stakeholders have made in relation to relationships with police and in detention.

### TREATMENT OF PRISONERS IN DETENTION

The ACT Government recently introduced the Corrections Management (Management of Transgender Detainees and Detainees Born with Variations in Sex Characteristics) Policy 2018 (**Corrections Policy**). The ACT is one of few Australian jurisdictions to introduce a specific policy addressing the needs of transgender people in detention and people in detention born with variations in sex characteristics. This is an important policy to safeguard transgender and intersex people detained in prisons from potential mistreatment or discrimination.

However, LGBTIQ+ stakeholders raised two key concerns:

- the experiences of transgender and gender diverse people and intersex people are conflated and these populations should be understood as distinct and treated separately under the policy; and
- there are substantive policy issues designed at ensuring that the policy provides effective and comprehensive guidance for Corrections staff, which have been developed in other jurisdictions, which should be included in the Corrections Policy.

The Corrections Policy makes clear that transgender people must be managed in accordance with their gender based on self-identification, not their legal identity documents. As the Corrections Policy recognises, transgender people and intersex people are at an increased level of vulnerability and significant risk of discrimination and violence at the hands of other prisoners. This can lead to increased mental health risks and measures designed to protect them from others which have a punitive effect (e.g. limiting access to rehabilitation programs or solitary confinement 'for their own safety').

The Corrections Policy contains critical protective measures, including:

- individualised management (e.g. confirming a person's sex or gender prior to any searches being conducted, recording preferred pronouns, notification of Justice Health);
- positive protections for a person to live as their affirmed gender in detention;
- equal access to programs, education, employment and other activities; and
- separate transportation and accommodation arrangements, where possible.
- The Corrections Policy appropriately considers the specific needs and vulnerabilities of transgender people, and implementation of the policy through appropriate training of corrections personnel is critical to ensuring it is followed in practice.

There are potential amendments to the document to ensure that the language used is accurate and inclusive of people born with variations in sex characteristics and gender diverse people.

### TREATMENT OF PEOPLE BORN WITH VARIATIONS IN SEX CHARACTERISTICS

During consultations, intersex advocates criticised the Corrections Policy for describing people born with intersex characteristics in terms of self-identification.<sup>179</sup> For example, clause 4.1 of the Corrections Policy states that "[s]elf-identification as a transgender person or a person born with a variation in sex characteristics is the only criteria for identification under this policy in an ACT correctional centre". IHRA has highlighted the concerns as follows:

Policy frameworks predicated on matters of identity and self-identification are not likely to be sufficiently aware of the needs of people with intersex variations who use different language to terms associated with matters of identity, or the needs of people who have different self-conceptions, or no knowledge of their trait. Irrespective of an individual's terminological preferences and awareness of their characteristics, individuals may still be vulnerable to harm due to their physical characteristics.<sup>180</sup>

These concerns could be addressed by simple changes in the language used and / or by more clearly distinguishing between the needs of detainees who are trans and gender diverse and those born with intersex variations (recognising that these are not mutually exclusive categories). For example, a policy could be developed relating to the needs of detainees who are transgender or gender diverse and then a separate policy for detainees born with variations in sex characteristics.

The Corrections Policy should explain that people born with variations of sex characteristics include people who may use different language or terms to describe their variation or may have no knowledge of their trait. The Corrections Policy and associated training should enable staff working with detainees to be sensitive to these issues at intake and when managing detainees.

There are specific concerns relating to people born with variations in sex characteristics which should be included in the Corrections Policy. For example, a person born with physical sex characteristics which do not fit within medical norms for male or female bodies would be at a heightened risk of discrimination and violence from other prisoners if their confidential health information was disclosed by correctional staff, during searches conducted without appropriate privacy safeguards or in shared bathrooms. In addition, a person born with variations in sex characteristics may require medication and access to specialised medical care, which should be provided in accordance with privacy guidelines and in a way which ensures they are not targeted by other prisoners for perceived 'special treatment'. Similar concerns also apply for transgender and gender diverse people.

The Victorian Corrections Commissioner's *Management of Prisoners who are Trans, Gender Diverse or Intersex (Victorian Corrections Policy)* deals with the separate issues relating to intersex prisoners separately from trans and gender diverse prisoners.<sup>181</sup>

### RECOMMENDATION 39

The ACT Government should amend the *Corrections Management (Management of Transgender Detainees and Detainees Born with Variations in Sex Characteristics) Policy 2018* (ACT) to avoid references to self-identification for intersex people, and insert separate sections to address specific concerns for people born with variations in sex characteristics in line with the Victorian Corrections Commissioner's *Management of Prisoners who are Trans, Gender Diverse or Intersex* guidelines.

#### TREATMENT OF TRANSGENDER AND GENDER DIVERSE PRISONERS

Trans and gender diverse prisoners face particular risks in custodial settings. Transgender women in male prisons are at heightened risk of physical assaults and sexual violence, and gender diverse prisoners are generally forced into same-sex prison environments which do not accommodate their gender identity or expression.

We have been unable to locate specific research on the experiences of trans and gender diverse people in ACT prisons, but research from overseas indicates that trans and gender diverse people are particularly vulnerable to mistreatment, including humiliating and degrading treatment from staff and other prisoners, denying access to gender appropriate clothing or grooming items, decisions on admission based on the gender assigned at birth, decisions to isolate trans and gender diverse people from other prisoners or available programs 'for their own safety' and insufficient healthcare in relation to hormone therapy or transition-related care.<sup>182</sup>

The Victorian Corrections Policy also requires consideration of flexible arrangements to take into account how best to support vulnerable trans, gender diverse or intersex prisoners in custody. For example, requests for co-placement with another prisoner will be considered where both prisoners agree but priority given to the safety, security and good order of the prison,<sup>183</sup> and availability to clothing that accords with a person's gender identity.<sup>184</sup>

### RECOMMENDATION 40

The ACT Government should amend the *Corrections Management (Management of Transgender Detainees and Detainees Born with Variations in Sex Characteristics) Policy 2018* (ACT) to address additional specific considerations in the care and management of transgender, gender diverse and intersex people in prison, in line with the Victorian Corrections Commissioner's *Management of Prisoners who are Trans, Gender Diverse or Intersex* guidelines.

### TREATMENT OF YOUNG PEOPLE IN YOUTH JUSTICE

There are a number of policies and procedures which manage the treatment of transgender and intersex children and young people in youth detention.

The Children and Young People (Admission and Classification) Policy and Procedures 2018 (No.1) (**Youth Admissions Policy**) and Children and Young People (Health and Wellbeing) Policy and Procedures 2018 (No.1) (**Youth Health Policy**) include special considerations for the induction of transgender and intersex young people.<sup>185</sup> For example, the Youth Admissions Policy provides that a "transgender or intersex young person must be asked what sex they choose to be identified with".<sup>186</sup> If the young person does not nominate a sex, the Manager must obtain a report by a non-treating doctor or health professional about the young person's 'sexual identity' and may make a decision based on the young person's presentation.<sup>187</sup> However, these provisions appear to be largely concerned with the practicalities of how to determine a transgender or intersex person's sex in order to enter this information on the Register of Young Detainees, rather than a detailed consideration of best practice to induct a young LGBTIQ+ person into youth justice, taking into account particular concerns about decisions about placement, privacy, access to medication and a particular vulnerability to discrimination and assaults in youth detention. In practice, each young person should be asked to provide information that may be relevant to make decisions about youth justice.

The ACT Government is ahead of other Australian jurisdictions in introducing specific youth justice policies for the purposes of ensuring that transgender and intersex young people's specific needs are taken into account on admission to youth detention. However, as outlined above, the Youth Admissions Policy should be updated to ensure that the distinct needs of transgender young people and intersex young people are addressed and to update the terminology.

ACT youth detention policies should contain specific consideration of the needs of all LGBTIQ+ young people in youth detention. For example, sections 9(1) and 6.9 of the Children and Young People (Treatment of Convicted and Non-Convicted Young People) Policy and Procedures 2018 (No.1) set out relevant considerations for decision-makers to take into account in considering a young person's best interests, and should include consideration of a young person's gender, sexual orientation, gender identity or expression and sex characteristics to ensure these factors are taken into account. For example, the Youth Admissions Policy could be improved to better reflect best practice by referring to a transgender young person's self-identification and gender identity, and dealing separately with intersex young people's sex and specific medical needs or privacy concerns.



The Victorian Commissioner's Requirements set out a range of considerations which would be relevant for developing youth detention policies, but which would need to be appropriately adapted to take into account the specific needs of young people (e.g. around the prioritisation of rehabilitation and education). For example, the Youth Admissions Policy should also provide practical guidance to staff in youth detention on:

- appropriate use of terminology, names and pronouns;
- potential medical issues which they should be aware of;
- relevant and irrelevant factors to consider in determining where a young person is placed;
- developing an appropriate plan for addressing issues related to their placement and safety;
- a policy for a young person who wants to affirm their gender while in youth detention;
- ensuring equal access to rehabilitation, work, education and other programs; and
- access to clothing, cosmetics and toiletries.

LGBTIQ+ stakeholders raised concerns about how the policies in the Bimberi Youth Justice Centre (**Bimberi**) are applied in practice. There were also concerns about how Bimberi would deal with a situation where a young person and their parent/s disagreed about their sexual orientation or gender identity, and how any disagreement would be resolved.

The needs of young people in youth justice are different from adult prisoners, taking into account the specific needs and vulnerabilities of children, particularly LGBTIQ+ children. In addition, ensuring access to inclusive education for children in youth justice is a core aspect of rehabilitation and ensuring safety of LGBTIQ+ children in detention.

#### **RECOMMENDATION 41**

The ACT Government should amend existing youth detention policies<sup>188</sup> to remove inappropriate terminology and definitions around 'sexual identity' and self-identification in relation to intersex people, and update the policies to address the specific needs of LGBTIQ+ young people.

#### **TREATMENT OF LGBTIQ+ PEOPLE BY POLICE**

The audit was unable to locate publicly available documents from the Australian Federal Police (**AFP**) which outlined existing policies and procedures relating to inclusion of LGBTIQ+ people by police.

The AFP have established a Gay and Lesbian Liaison Officer (**GLLO**) Network which resources police officers and works to build the relationship between LGBTIQ+ people and the police. The GLLO program is intended to apply to all members of the LGBTIQ+ community. The ACT Policing website includes reference to referrals for LGBTI support services. In particular, LGBTIQ+ stakeholders reported more positive experiences dealing with the Family Violence Unit within ACT Policing for family violence matters (than if the report was made to a non-specialist unit).

LGBTIQ+ and Government stakeholders did not raise interactions with police during consultations. In other jurisdictions across Australia, relationships between LGBTIQ+ communities and police is a substantial issue raised during stakeholder consultations – particularly having regard to the historic legacy of laws which criminalised homosexuality. For example, in Victoria, La Trobe University recently released a report on *Policing for same sex attracted and sex and gender diverse (SSASGD) young Victorians* which found that there were mixed levels of trust in police and young people did not believe they would be treated with respect or taken seriously reporting offences and were unlikely to report sexual assault of prejudice motivated crime.<sup>189</sup> Victoria Police also commissioned the Victorian Equal Opportunity and Human Rights Commission's *Proud, visible, safe: Responding to workplace harm experienced by LGBTI employees in Victoria* Police report, which found that despite significant steps forward, there are a range of steps required to ensure that LGBTIQ+ employees do not continue to experience workplace harm including homophobic and transphobic comments, aggressive language, sexual harassment and discrimination.<sup>190</sup> In New South Wales, LGBTIQ+ community organisations released the *Policing at NSW Lesbian, Gay, Bisexual, Transgender, Intersex and Queer (LGBTIQ) Events and Venues* report, in response to complaints about excessive, violent or intimidating use of force by NSW Police.<sup>191</sup>

This gap in our report could be partly due to the organisations and advocates that were consulted as part of this audit, which did not include people accessing front line services in the criminal justice sector. We consider that further consultation with service delivery organisations supporting LGBTIQ+ people with direct interactions with ACT Policing is needed to better understand the current situation

#### **RECOMMENDATION 42**

The ACT Government should further consult with LGBTIQ+ communities and work with ACT Policing to ensure its GLLO program is inclusive of all LGBTIQ+ people. If necessary, the ACT Government should develop publicly available policies and procedures outlining the Australian Federal Police's policies for treatment of LGBTIQ+ people in police custody and LGBTIQ+ victims of crime.

## E) RELATIONSHIP RECOGNITION

### CONSOLIDATION OF EXISTING CIVIL UNION AND DOMESTIC PARTNERSHIP SCHEMES

Currently, the ACT has two separate laws which regulate legal partnerships:

- *Civil Unions Act 2012* (ACT) (**Civil Unions Act**); and
- *Domestic Relationships Act 1994* (ACT) (**Domestic Relationships Act**).

The ACT Government played a leading role in setting the domestic standard for providing legal certainty and recognition for de facto couples (including same-sex couples) and domestic relationships. These schemes were introduced to ensure that all de facto couples and domestic relationships could have access to legal recognition of their relationships.

Following marriage equality becoming a reality at a federal level, ACT couples can no longer enter into civil unions under subsection 7(c) of the *Civil Unions Act*. During consultations, we were unable to ascertain strong views within the LGBTIQ+ community about whether there is support for civil unions being available in the ACT separate from marriage.

The *Domestic Relationships Act* allows a relationship to be entered into between two adults who provide personal or financial support and commitment, including but not limited to de facto partnerships, which does not include a legal marriage.<sup>192</sup>

LGBTIQ+ stakeholders raised the confusion caused by the multiple schemes and a preference for these schemes to be consolidated, if possible. However, some interstate jurisdictions specifically state the name of the legislation under which reciprocal legal recognition is available.<sup>193</sup> In addition, there may be people who are in a recognised civil union under the *Civil Unions Act* who are not married.

We consider that both pieces of legislation provide an important function in the ACT. The *Civil Unions Act* continues to provide legal certainty and protection for unmarried couples in the ACT who entered into a civil union before they could legally marry (e.g. same-sex couples), and the *Domestic Relationships Act* provides for a process for legal recognition and certainty for all domestic relationships equally, including those who do not wish to marry into the future. Accordingly, we make no recommendation to amend or repeal these acts.

### RECOMMENDATION 43

The ACT Government should further consult with LGBTIQ+ communities on whether the *Civil Unions Act 2012* (ACT) should be amended to allow de facto couples to enter into civil unions regardless of whether marriage is available as an option.

# // PROTECTING LGBTIQ+ PEOPLE FROM DISCRIMINATION & HARM

The report now considers issues raised by LGBTIQ+ and Government stakeholders during consultations about areas where legislation is required to protect LGBTIQ+ people from discrimination and harm.<sup>194</sup> These primarily relate to areas where existing laws do not provide adequate protections from harm caused by third parties.

## A) INTERSEX PEOPLE

Intersex people are entitled to the same dignity, respect and bodily integrity that every human being is entitled to. This includes protection from forced and coercive medical procedures.

The ACT was one of the first jurisdictions in the world to provide protections for intersex people from discrimination and vilification. The ACT Government has also taken the lead in showing public support for intersex people as part of the LGBTIQ+ community, with Chief Minister Andrew Barr recognising the Darlington Consensus Statement on intersex human rights and committing to consider its impact in the ACT. To date, there has been no legislative reform aimed at oversight or regulation of medical interventions on intersex people in the ACT.

### INTERSEX PEOPLE AND MEDICAL INTERVENTIONS WITHOUT PERSONAL CONSENT

LGBTIQ+ and Government stakeholders raised the issue of deferrable medical interventions being performed on intersex infants and children without personal informed consent as a priority issue. For example, the AIDS Action Council highlighted the need for “the deferral of non-critical medical procedures until such time as a person can provide implicit and informed consent” and recommended legislation that gives effect to the right to self-determination for intersex people.<sup>195</sup>

Unfortunately, data on these surgeries is not publicly available and we have been unable to verify the extent to which these surgeries are taking place in the ACT, or how often parents are advised to travel interstate for surgery.

There are a range of different issues affecting people born with variations in sex characteristics – from patient informed healthcare to targeted educational support for children with cognitive impairments, and public awareness raising to remove stigma and the pathologisation of intersex people. Given the Terms of Reference and the priorities identified by ACT-based LGBTIQ+ stakeholders, this report focuses on prohibiting deferrable medical interventions but acknowledges the importance of further consultation with people born with variations in sex characteristics on the full range of community concerns requiring legislative and non-legislative reform across government departments and agencies.

### INTERNATIONAL FRAMEWORKS AND GUIDANCE

There is increasing international concern about reports of human rights violations experienced by intersex people.<sup>196</sup> Recent developments in comparative jurisdictions and commentary and views of United Nations human rights mechanisms, including treaty bodies and special procedures, provide guidance to governments on the importance of protecting the human rights of intersex people across all areas of public life. In particular, there is growing recognition that legal and policy frameworks that regulate medical treatment and anti-discrimination protections have a significant impact on intersex people.<sup>197</sup> Intersex people who have experienced so-called ‘normalising’ surgery or treatments have been recognised by UN treaty bodies as “victims of abuses and mistreatment”.<sup>198</sup> These medical treatments have been described by UN treaty bodies as a “harmful practice,”<sup>199</sup> which cause “physical and psychological suffering”.<sup>200</sup> The Committee against Torture regards medically unnecessary surgical and other treatment of intersex people without effective, informed consent as falling under the prohibition of torture and advises governments to take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction.<sup>201</sup>

A number of UN treaty bodies including the Human Rights Council have expressed concern about intersex children in Australia being subjected to early surgeries and medical interventions before they are able to provide full, free and informed consent.<sup>202</sup> For example, the UN Committee on the Elimination of Discrimination against Women recommended in 2018 that Australian governments:

Adopt clear legislative provisions that explicitly prohibit the performance of unnecessary surgical or other medical procedures on intersex children before they reach the legal age of consent, implement the recommendations made by the Senate in 2013 on the basis of its inquiry into the involuntary or coerced sterilization of intersex persons, provide adequate counselling and support for the families of intersex children and provide redress to intersex persons having undergone such medical procedures.<sup>203</sup>

The Yogyakarta Principles plus 10 confirm that everyone has the right to bodily and mental integrity, autonomy and self-determination – regardless of a person’s sexual orientation, gender identity, gender expression or sex characteristics.<sup>204</sup> Principle 32 of the Yogyakarta Principles plus 10 relevantly states that:

No one shall be subjected to invasive or irreversible medical procedures that modify sex characteristics without their free, prior and informed consent, unless **necessary to avoid serious, urgent and irreparable harm to the concerned person** [emphasis added].<sup>205</sup>

In 2015, Malta passed the *Gender Identity, Gender Expression and Sex Characteristics Act (Malta Act)*.<sup>206</sup> The Malta Act makes it unlawful for medical practitioners or other professions to perform surgical or medical interventions on children's sex characteristics where the intervention can be deferred until the person to be treated can provide informed consent.

Under the Malta Act, treatment is allowed in exceptional circumstances where:

- the child is unable to provide consent;
- the interdisciplinary team and the people exercising parental authority reach agreement;
- the interdisciplinary team (composed of professionals appointed by the Minister for Health) must ensure that the child's best interests are the paramount consideration and giving weight to the child's views having regard to their age and maturity; and
- the medical intervention is not "driven by social factors without the consent of the minor".<sup>207</sup>

### DOMESTIC FRAMEWORKS AND GUIDANCE

Existing legal frameworks regulate medical interventions for people who are unable to consent to particular types of medical treatment. Division 4.2.3 of the Family Law Rules set out the process for applying to the Family Court for a medical procedure. A 'medical procedure' is defined in *Re Marion*<sup>208</sup> as a major medical procedure for a child that is not for the purpose of treating a bodily malfunction or disease,<sup>209</sup> including proportionate cosmetic surgery.<sup>210</sup> A small number of medical procedure applications have been heard by the Family Court involving intersex children. In all but one case, the child was not *Gillick* competent<sup>211</sup> to provide informed consent on their own behalf, but the court nonetheless authorised the medical procedures to occur.<sup>212</sup>

In 2013, the Australian Senate Community Affairs References Committee released its report *Involuntary or Coerced Sterilisation of Intersex People in Australia (Senate Report)*,<sup>213</sup> but these recommendations have not been implemented. We note that the Tasmania Law Reform Institute recently released an Issues Paper on the Legal Recognition of Sex and Gender which also considers these issues.<sup>214</sup>

In the ACT, part 4 of the *Crimes Act 1900 (ACT)* sets out criminal offences to penalise female genital mutilation, including penalties for removing a child from the ACT for female genital mutilation.<sup>215</sup> However, section 76 provides an exception for medical procedures for genuine therapeutic purposes, including where "necessary for the health of the person on whom it is performed and is performed by a doctor".<sup>216</sup> Female genital mutilation is generally performed overseas for cultural, religious or social reasons by people without medical training, with significant risks of ongoing physical and mental health risks.

### DEFINING MEDICAL NECESSITY

Many intersex people do not require surgical intervention, or hormone treatment. As a starting point, intersex advocates have raised concerns that existing models presuppose the need for medical 'treatment' intended to 'correct' natural variations in bodily sex characteristics in a way which pathologises intersex people and has the effect of shifting the onus (i.e. intersex people have to argue why medical interventions are not necessary, rather than clinicians demonstrating the need for medical interventions in the first place).

On one end of the scale, there are a small number of intersex infants born with life-threatening medical conditions who require emergency and urgent interventions to live (e.g. an infant born with cloacal exstrophy with their bladder and a portion of their intestines exposed outside the abdomen requires surgery on their bladder and intestines to preserve their life and bodily function). In these extreme cases, urgent, life-saving treatment should be delivered without unnecessary delay. While these surgeries are performed without personal consent, there are strong rationales why performing these medical interventions is necessary and justified to save a child's life.

On the other end, medical interventions may be based on psychosocial rationales, such as cosmetic genital surgery (e.g. a labiaplasty may be considered for an infant born with partial androgen insensitivity syndrome who has masculinised genitalia).<sup>217</sup> The Senate Report considers that surgery is unlikely to be an appropriate response to external psychosocial reasons (e.g. facilitating parental acceptance and bonding, avoidance of harassment or teasing, body self-image).<sup>218</sup> Adopting a human rights proportionality analysis, surgeries conducted solely for psychosocial reasons or for cosmetic or 'normalising' purposes without the full and informed consent of the person directly affected are not reasonable, necessary or justified.

There are also cases where surgery is performed to manage health risks. The Senate Report expressed concern that the possible risk of cancer was being used to perform surgeries driven by psychosocial rationales, without requiring court authorisation or sufficient oversight (e.g. an infant born with gonadal dysgenesis may have an increased risk of cancer developing in the future and a treating team may seek a gonadectomy to remove this risk to physical health over alternative treatment to monitor the gonads for risk of cancer). The Senate Report expressed its concern about this blurring of the medical and non-medical rationales, and the possibility of basing a decision on cancer risk may "avoid the need for court oversight in a way that a decision based on other factors might not".<sup>219</sup> Alternative treatments which can defer decision-making until a child is mature enough to provide consent need to be taken into account when determining whether surgery is the least restrictive measure available to address the risk.

Transparency and oversight is essential to ensure that potential medical risks are appropriately considered, and that psychosocial rationales do not underlie these rationales. International human rights law standards support an approach to medical care of intersex people that would only allow medical surgery or treatment where it is reasonable, necessary and justified to do so without the person's full, free and informed consent. Individuals should be able to make their own decisions about medical interventions performed on their bodies based on informed consent.



The Senate Report recommends that:

In light of the complex and contentious nature of the medical treatment of intersex people who are unable to make decisions for their own treatment, the committee recommends that oversight of these decisions is required.<sup>220</sup>

For example, the Malta Act model in the ACT would involve a specialist, multi-disciplinary panel or tribunal comprised of experts in human rights, law, medicine, psychology and intersex community representatives to provide oversight for complex clinical decision-making processes involving minors. To ensure that people can provide informed consent, it is critical that intersex people be provided with appropriate and non-discriminatory healthcare and access to accurate information, resources and support.

LGBTIQ+ stakeholders raised concerns during consultations that parents are being referred from the ACT to children's hospitals interstate. Generally, ACT laws only criminalise parents removing their children from the ACT for 'medical treatment' in very limited cases (e.g. female genital mutilation where this is performed in non-clinical contexts in overseas jurisdictions). ACT laws do not criminalise parents travelling or moving to another state or territory in Australia seeking medical treatment for their children.

#### RECOMMENDATION 44

The ACT Government should introduce legislation to prohibit surgical or other medical procedures on people born with variations in sex characteristics without free, prior and informed consent unless necessary to avoid serious, urgent and irreparable harm to the person, with human rights based oversight and effective remedies for people subjected to these medical interventions.

#### NATIONAL CONSISTENCY FOLLOWING THE AHRC INQUIRY

The AHRC inquiry is likely to make recommendations for potential reform for a nationally consistent approach across states and territories. Where possible, a nationally consistent approach has the benefit of ensuring equal coverage in Australian jurisdictions. For example, if the Commonwealth Government establishes a Special Medical Procedures Advisory Committee at a national level to assist the Family Court in decision-making, in line with the Senate Report, this would likely supersede the need for an equivalent body in the ACT. Similarly, the development of nationally consistent guidelines to ensure treatment is managed by multidisciplinary teams within a human rights framework would also have a potential impact on ACT-based laws.

There are also different considerations for implementing and adapting any recommendations into the ACT context. For example, the ACT is a small jurisdiction which does not have to grapple with considerations of access to healthcare in remote locations. When the AHRC inquiry report is released, further consultations with intersex advocates and relevant stakeholders would be required to ensure that any recommendations are appropriately tailored to the ACT context.

#### RECOMMENDATION 45

The ACT Government should consider the Australian Human Rights Commission's report from the *Protecting the Human Rights of People Born with Variations in Sex Characteristics in the context of Medical Interventions* inquiry, and consult with relevant stakeholders on how to appropriately adapt any recommendations to the ACT context.

#### KEY FACTORS TO CONSIDER IN DEVELOPING LEGISLATION

This report outlines some key elements of potential legislation for the ACT Government to consider:

- an objects clause to guide interpretation which sets out the principles of affirming the human rights of people born with variations in sex characteristics, including bodily integrity and the right to liberty and security of person in section 18 of the *Human Rights Act 2004* (ACT);
- clear terminology which defines the term 'sex characteristics' consistently with the Yogyakarta Principles plus 10 and the recommendations in this report;
- oversight of all decisions relating to medical treatment of people born with variations in sex characteristics who are unable to make decisions for their own treatment by the ACT Civil and Administrative Tribunal, assisted by an independent Special Medical Procedures Advisory Committee (see further below);
- an exhaustive list of relevant considerations (e.g. emergency, life-saving surgery to prevent imminent death) and irrelevant considerations (e.g. psychosocial rationales) to take into account in determining medical necessity, consistent with decision-making guidelines setting out more detailed information;
- clear examples of cases which would and would not constitute 'serious, urgent and irreparable harm';
- appropriate prohibitions on non-emergency and deferrable medical interventions that alter a person's sex characteristics without their full, free and informed consent;
- an independent Special Medical Procedures Advisory Committee comprised of human rights experts, clinicians and intersex people to provide effective oversight of medical interventions on people born with variations in sex characteristics without their full, free and informed consent to assist the ACT Civil and Administrative Tribunal;
- access to 'negative licensing' complaints mechanisms about health service providers (e.g. in the *Health Complaints Act 2016* (ACT)) and avenues for effective remedies including compensation (e.g. under the *Civil Law (Wrongs) Act 2002* (ACT));
- a clear prohibition on medical practitioners in the ACT knowingly making referrals for medical procedures and interventions which would be unlawful in the ACT;<sup>221</sup> and
- a review process to evaluate the effectiveness of the legislation and whether further reform is required to ensure the policy purposes of the legislation are met.

As mentioned throughout this report, the ACT Government should consult with relevant stakeholders to ensure that the legislation will be effective.

## NON-LEGISLATIVE CONSIDERATIONS

There are also a range of non-legislative options which the ACT Government should also consider, including but not limited to:

- **Standards of Care** developed by clinicians and intersex-led organisations which comply with human rights principles;
- **systemic data collection** of the prevalence and types of medical interventions;
- **high quality information resources for parents** about options to make informed decisions with regard to medical treatment for their child;
- targeted **human rights training and education** for health professionals and public officials;
- funding to ensure **multidisciplinary teams** have dedicated coordination, record-keeping and research support capacity, and comprehensive membership from various medical and non-medical specialisations;
- funding to ensure **intersex-led support groups** can provide support and information to patients, parents, families and health professionals, and appropriate funding to ensure intersex people and their parents and families can access adequate counselling and support;<sup>222</sup>
- **broad public education campaigns** on intersex people and human rights to raise awareness about the existence of intersex people and their needs; and
- an **acknowledgement, apology and redress** for human rights violations experienced by people born with variations of sex characteristics.

We recommend that the ACT Government consider potential non-legislative options to accompany legislative reform (see recommendation 56).

## GENETIC DESELECTION OF INTERSEX TRAITS IN IVF

Intersex advocates raised concerns around IVF providers offering genetic screening against variations in sex characteristics, based on stigma and discrimination.<sup>223</sup> The Parentage Act does not explicitly consider genetic screening of intersex traits.

The Yogyakarta Principles plus 10 requires governments to:

- L. Combat the practice of prenatal selection on the basis of sex characteristics, including by addressing the root causes of discrimination against persons on the basis of sex, gender, sexual orientation, gender identity, gender expression and sex characteristics, and by carrying out awareness-raising activities on the detrimental impact of prenatal selection on these grounds;
- M. Take measures to address discriminatory attitudes and practices on the basis of sex, gender, sexual orientation, gender identity, gender expression and sex characteristics in relation to the application of prenatal treatments and genetic modification technologies.<sup>224</sup>

## RECOMMENDATION 46

As part of the review into assisted reproductive treatment, the ACT Government should consider the issues raised by the genetic deselection of intersex traits, including the need for training and education of genetic counsellors and practitioners working in the field responsible for disseminating information about intersex traits to potential parents.

## **B) TRANS & GENDER DIVERSE PEOPLE'S RIGHTS**

### **ACCESS TO AFFORDABLE, NON-DISCRIMINATORY HEALTHCARE**

During consultations, trans and gender diverse stakeholders highlighted concerns around high quality healthcare (particularly from GPs without specialist training) and barriers to gender affirming treatment in the ACT. There were a series of concerns raised, including medical professionals being seen as 'gatekeepers' to a person affirming their gender and GPs viewing any healthcare for trans and gender diverse people as 'specialist' and lacking adequate training to provide supportive and inclusive care.

These issues largely relate to gaps in existing health policies, rather than provisions of existing laws having a discriminatory impact which would fall within the scope of our legal audit of ACT acts and regulations. The issue of affordability of gender affirming medical healthcare is regulated by the Commonwealth Government, rather than the ACT Government.

There is increasing consideration of the need to ensure health services are more inclusive and accessible for trans and gender diverse people in other jurisdictions. The Victorian Department of Health commissioned Australian Healthcare Associates to produce the *Development of trans and gender diverse services in Victoria* report in June 2018, which outlined a series of barriers to healthcare, including demand outstripping supply, extensive waiting lists, lack of clear pathways for information and support, a lack of services where trans and gender diverse people feel safe and secure, the prohibitive costs of accessing services, and more.<sup>225</sup> The report recommends ensuring that services respect clients' right to informed consent and self-determination, provide client-centred care, are co-created in partnership with trans and gender diverse people, and resourcing peer support services.<sup>226</sup>

The NSW Blueprint identifies a series of priority areas to improve the health and wellbeing for the trans and gender diverse community which is relevant for the ACT, including the development of plain language resources, ongoing training for health professionals, covering gender-affirming healthcare under Medicare and the Pharmaceutical Benefits Scheme, and the development of a specific NSW health sector strategy.<sup>227</sup>

This report does not seek to duplicate the consideration of relevant health policies undertaken in this review, but Equality Australia considers that these documents could provide useful guidance for the ACT Government in considering improvements for healthcare for trans and gender diverse people in the ACT.

We acknowledge and welcome the ACT Government's commitment to undertake service improvements to deliver more inclusive and accessible services in the 2019 *Capital of Equality* strategy. While outside the scope of this legal audit, we encourage the ACT Government to continue consultations with the ACT LGBTIQ Ministerial Advisory Council on improving access to healthcare for trans and gender diverse people in the ACT, including the potential development of an ACT Health Strategy for Trans and Gender Diverse People.

### **RECOMMENDATION 47**

The ACT Government should continue to undertake service improvements to ensure healthcare providers deliver more inclusive and accessible services for trans and gender diverse people, and work with the Australian Government to ensure that gender affirming medical treatment is made available under Medicare and the Pharmaceutical Benefits Scheme.

### **DISCLOSURE OF PREVIOUS NAME, SEX OR GENDER MARKER FOR THIRD PARTY APPROVAL**

Trans and gender diverse stakeholders raised concerns about requirements to provide details of their previous name, sex or gender effectively 'outing' a person's gender identity to potential educational institutions, employers or other organisations in a way which could increase the risks of experiencing discrimination or prevent a person from guarding their privacy when dealing with service delivery organisations. The BDMR Act<sup>228</sup> and BDMR Regulation<sup>229</sup> require that a person's sex in accordance to the altered record must not be listed. However, a person's previous name may be listed on a birth certificate, and an AFP National Police Check Application Form requires a person to provide other names they have used, including former names, aliases and maiden names.<sup>230</sup>

During consultations, trans and gender diverse stakeholders were aware of valid reasons for requiring this information (e.g. to prevent fraud) but were unsure whether this information would be provided to potential employers, educational institutions or volunteer organisations in a way which would force disclosure of their gender identity.

### **RECOMMENDATION 48**

The ACT Government should work with the Australian Federal Police to ensure that details of a person's former name which may disclose the sex they were assigned at birth is not included on the National Police Check that is provided to third parties (e.g. educational institutions, employers, volunteer organisations).

## C) RELIGIOUS CONVERSION THERAPY

The ACT Minister for Health has publicly announced that she is committed to banning anti-LGBT religious conversion therapy in the ACT and is considering legislative options.<sup>231</sup> This commitment is significant to ensuring that LGBT people in the ACT have effective safeguards against harmful, outdated and discriminatory conversion practices.

A survivor of conversion practices in the ACT shared his experiences with the Human Rights Law Centre:

I spent probably about a year to eighteen months going through some form of reparative therapy or gay conversion therapy. Being told that you're broken, breaks you. Often during the night, I would lay in bed praying that God would keep me safe because I was at the stage where I wasn't coping and I was fairly certain I was going to kill myself.

Every major medical association in Australia has publicly condemned conversion practices.<sup>232</sup> However, conversion practices continue to take place, although these are increasingly occurring outside health contexts in religious contexts.

### PREVENTING HARM, PROMOTING JUSTICE REPORT

In 2018, La Trobe University, Gay & Lesbian Health Victoria and the Human Rights Law Centre released the *Preventing Harm, Promoting Justice: Responding to LGBT conversion therapy in Australia report (Preventing Harm, Promoting Justice report)*. The report researched the practice of religious anti-LGBT conversion therapy in Australia, and reveals the voices and lived experiences of 15 LGBT people who have struggled to reconcile their sexuality and transgender identities with the beliefs and practices of their religious community.

The *Preventing Harm, Promoting Justice* report found that research participants shared common characteristics in their experiences of religious anti-LGBT conversion practices<sup>233</sup> which resulted in a range of harms, including "self-hatred, shame, loneliness, thoughts of suicide, problems with being touched or loved, sexual dysfunction, causing harm to those they love including partners and spouses, grief, loss of faith, loss of community, depression, ongoing mental health problems and economic disadvantage".<sup>234</sup>

### DEFINITION OF 'CONVERSION PRACTICES'

The term 'conversion practices' is an umbrella term used to describe attempts to 'convert' or 'cure' a same-sex sexual orientation or transgender gender identity to an exclusively heterosexual and cisgender identity.<sup>235</sup> It includes formal ex-gay activities but is also embedded in conversion therapy messaging as part of day-to-day practices in faith communities.<sup>236</sup>

The experiences of religious conversion practices take place within a broad range of contexts – not just 'therapy', such as counselling and advice; attending church groups, courses and events; camps and church-run retreats; spiritual deliverance and aversion therapy.<sup>237</sup> Conversion practices are primarily not defined by the form in which they take (e.g. counselling or therapy provided by people without psychological training not based on medical evidence) but the ideology behind the conversion practices which is predicated on LGBTQ people being 'sick' or 'unnatural' people who need to be 'cured'. For these reasons, any legislation should appropriately capture the broad range of harmful practices taking place in the ACT which discriminate against LGBTQ people must consider the ideology, purpose and impact of these practices.

### RECOMMENDATION 49

The ACT Government should introduce legislation to prohibit conversion practices, and define 'conversion practices' broadly for any conduct aimed at 'changing', 'suppressing', 'curing', 'healing', or 'repairing' a person's sexual orientation or gender identity in a way which has, or is likely to have, a significant negative impact on a person's mental health.

### GAPS IN EXISTING ACT LAWS AND REGULATIONS

The ACT health services framework is subject to both national and territory laws. Registered health practitioners who engage conversion practices are regulated by the Health Practitioner National Law (**National Law**), but not unregistered health practitioners. However, the broad definition of a 'health service' under the *Human Rights Commission Act 2005 (ACT)*<sup>238</sup> (**HRC Act**) will apply to a broad range of unregistered health providers who engage in conversion practices. For example, a 'health service' includes a service provided in the ACT for the purpose of "assessing, recording, maintaining or improving the physical, mental or emotional health, comfort or wellbeing of the service user".

The Commission must consider a complaint about an unregistered health practitioner. It may refer the complaint to conciliation (and either facilitate the conciliation itself or delegate its authority), or refer the complaint to another relevant body in certain circumstances. There are civil penalties for failures to comply with the Commission's instructions in a written report with adverse findings, but there is no option for financial compensation for potential survivors of conversion practices. It is possible for survivors to receive financial compensation through conciliation before the Commission, but this is wholly dependent on the involvement and voluntary agreement of the complainant and the health services provider.

Importantly, 'health service' is defined to include any service performed in the ACT, as opposed to only those performed by a 'health practitioner' for the purposes of the National Law. As such, complaints with regard to providers of conversion practices will be caught by the legislation.



By way of example of the broad application of this definition, the Human Rights Commission website states that:

a complaint can be made against any health service provider, which is broadly defined. This includes hospitals, individual registered health professionals, alternative health providers, and anyone who collects, holds or discloses personal health information [emphasis added].<sup>239</sup>

However, we have not identified any instances of the HRC Act being used in relation to providers of conversion practices, or any publications made or penalties imposed by the Health Services Commissioner (as part of the ACT Human Rights Commission's handling of complaints about the provision of health services in the ACT) in relation to conversion practices.

In practice, while there is scope for the HRC Act to play a role for unregistered health practitioners, the regulatory framework is unlikely to provide compensation or other remedies to assist the survivor to recover from the harm they experienced. The only option of financial compensation is entirely voluntary and unlikely to be equivalent to damages. Unfortunately, it is unlikely that a survivor will meet the threshold of significant injury under the *Civil Law (Wrongs) Act 2002* (ACT) to be able to bring a civil claim for negligence.

## PROTECTING CHILDREN FROM HARM

International human rights law makes clear that the best interests of the child is a paramount consideration. The UN Committee on the Rights of the Child's General Comment No. 20 clearly considers "the rights of all adolescents to freedom of expression and respect for their physical and psychological integrity, gender identity and emerging autonomy" and condemned "the imposition of so-called "treatments" to try to change sexual orientation".

Subsection 11(2) of the Human Rights Act also recognises that "[e]very child has the right to the protection needed by the child because of being a child, without distinction or discrimination of any kind." The *Children and Young People Act 2008* (ACT) already sets out standards for protecting children in the ACT from harmful practices, including the regulation of reportable conduct. Reportable conduct is defined in section 17E of the *Ombudsman Act 1989* (ACT) to include ill treatment or neglect of a child, or exposing or subjecting a child to behaviour or a circumstance that psychologically harms the child.

Conversion practices which subject a child to harmful and discriminatory messages jeopardise the mental health of LGBTQ children, who are "already vulnerable and at much greater risk of depression, self-harm and suicide"<sup>240</sup> because of other experiences of discrimination and exclusion. There is a growing body of medical evidence that conversion practices damage a person's mental health, whereas providing supporting and accepting communities for young people to learn about and embrace their sexuality or gender identity leads to more positive health outcomes.

While the existing definitions of reportable conduct would likely apply to conversion practices, awareness of conversion practices and the availability of existing mechanisms to protect children from harm may be low.

## RECOMMENDATIONS FOR REFORM

The *Preventing Harm, Promoting Justice* report focused on Victorian laws and policies, and recommends that the Government:

- introduce specific legislation to prohibit conversion practices;
- fund survivor support programs;
- fund research into conversion therapy and safety standards in LGBT pastoral care;
- support children in schools by requiring training and prohibiting providing conversion therapy, or referring students to conversion therapy; and
- educate government agencies about conversion practices as child abuse.<sup>241</sup>

Specific legislative reform is required to address the harms caused by anti-LGBTQ religious conversion practices in the ACT, in conjunction with non-legislative measures.

There are different options to implement these recommendations in practice. As we soon describe, the difficulty with regulating conversion practices fall between the gaps of existing regulation. Importantly, there should be an accessible public-facing entry point for survivors of conversion therapy through a single complaints process (rather than separate pathways for redress depending on a person's age, vulnerability or the exact circumstances of the conversion practices). Information should also be made available through this single gateway.

There is a question about whether enforcing laws prohibiting conversion practices should be a standalone function, or whether responsibility for could be a subset of a broader, related function. This is largely a matter of resourcing and need within the ACT, where there may be a relatively small number of survivors who are willing to make complaints. In order to effectively implement the legislation, the legislation should also set out educative and other functions in relation to community outreach and education.

While the Health Services Commissioner is responsible for health complaints which would be likely to capture a large number of conversion *therapy* practices, increasingly conversion practices are likely to fall outside the health services regime. We consider that responsibility for enforcing the legislation prohibiting conversion practices could be regulated within the ACT Human Rights Commission, either as part of the role of the Public Advocate, the Human Rights Commissioner or as a separately established role.

## RECOMMENDATION 50

The ACT Government should introduce legislation prohibiting conversion practices being engaged in by:

- 'professionals' (defined to include social workers, unregistered and registered health practitioners, teachers and more) towards any adult, or
- 'any person' towards a child under 18 or a person people who are particularly vulnerable to coercion (e.g. a person with a cognitive impairment, intellectual disability or experiencing mental health issues),

as part of a package with non-legislative measures aimed at education, prevention and support.

## PROTECTION FROM EXTREME CONVERSION PRACTICES OVERSEAS

The *Preventing Harm, Promoting Justice* report also highlighted the potential risk posed by the potential removal of a person from Australia for extreme conversion practices which would constitute a criminal offence in Australia, including medical practices which have been discredited in Australia, physical assaults or 'corrective rape'.<sup>242</sup> For example, the report outlines a case study where a parent of a child under 18 attempted to coerce him to undergo conversion practices in his country of origin which posed a serious risk of physical harm.

### RECOMMENDATION 51

The ACT Government should insert a new offence into the *Crimes Act 1900* (ACT) which criminalises the removal, or attempted removal, of another person from Australia for the purposes of forced or coerced conversion practices which would constitute a criminal offence in the ACT.

## ANTI-DISCRIMINATION EXEMPTIONS FOR RELIGIOUS BODIES

As outlined above, subsection 32(1)(d) of the Discrimination Act includes a broad exemption for religious bodies for any act or practice which conforms to the doctrines, tenets or beliefs of that religion and is necessary to avoid injury to the religious susceptibilities of adherents of that religion. As the *Preventing Harm, Promoting Justice* report highlights, "anti-discrimination laws and the relatively modest damages available are not well suited to addressing the extensive psychological harm caused by conversion practices and are not likely to assist a person to recover from experiences such as loss of community support and spiritual identity."<sup>243</sup>

However, in order to ensure that religious bodies do not continue to engage in conversion practices in the belief that these are covered by the broad religious exception, any legislation should make clear that conversion practices do not fall under the religious body exemption in the Discrimination Act.

*Recommendation 52 applies if recommendations 23 and 24 are not implemented.*

### RECOMMENDATION 52

The ACT Government should amend the *Discrimination Act 1991* (ACT) to include unlawful conversion practices as a 'defined act' as a limit to the broad religious exception in subsection 32(1)(d).

## D) HATE CRIME

LGBTIQ+ stakeholders raised concerns about bullying, discrimination, harassment and abuse against members of LGBTIQ+ communities. Multiple research reports conducted over previous years have confirmed that LGBTIQ+ people experience higher levels of public harassment and abuse because of their actual or perceived sexual orientation, gender identity or expression or sex characteristics.<sup>244</sup> For example, the Australian Human Rights Commission has reported that 6 in 10 LGBTI people experienced verbal homophobic abuse and 1 in 5 experienced physical abuse in a 12 month period.<sup>245</sup> During the period of the marriage equality postal survey in 2017, LGBTIQ+ Australians reported an increase in hate speech and hate conduct, with specialist mental health services reporting a corresponding spike by up to 40 per cent in people seeking counselling and support.<sup>246</sup>

Section 67A of the Discrimination Act provides protections from unlawful vilification for LGBTIQ+ people on the grounds of sexuality, gender identity and intersex status. In addition, section 750 of the *Criminal Code 2002* (ACT) contains the offence of serious vilification for threatening acts which incite hatred, revulsion, serious contempt or severe ridicule of LGBTIQ+ people.

In 2018, the Human Rights Law Centre released the *End the Hate: Responding to Prejudice Motivated Speech and Violence against the LGBTI community report (End the Hate report)* in the Victorian context. The report highlighted the importance of specific laws which address prejudice motivated criminal offending in recognition of the increased seriousness, impact and culpability involved in targeting a person because of their membership (or perceived membership) of a social group.<sup>247</sup>

The *End the Hate* report highlighted a number of barriers to addressing hate speech and hate crime, including under-reporting of prejudice motivated incidents to police due to:

- a lack of trust in reporting to police;
- a lack of awareness about available offences;
- an inability to identify perpetrators;
- fears reporting will exacerbate bullying or escalate conflict; and
- barriers caused by the significant psychological trauma and ongoing mental health impacts of being a victim of crime.

Specific legislation which tackles hate crime is essential to demonstrate condemnation of crimes committed based on prejudice, and to acknowledge that hate crimes affect a broader community's sense of safety. Hate speech and hate crime laws draw a clear line in the sand about contemporary understandings of acceptable conduct, and serve an important preventative and standard-setting function. Importantly, adequate protections from discrimination, vilification and prejudice motivated offending are a necessary precondition for LGBTIQ+ inclusion and safety in a community.

The UN Independent Expert on Sexual Orientation and Gender Identity has recommended that all countries enact hate crime legislation with aggravated sentencing clauses as well as hate speech legislation, and hold perpetrators to account.<sup>248</sup> In addition, the ODIHR's *Hate Crime Laws: A Practical Guide* set out the importance of hate crime laws in increasing public awareness, require law enforcement agencies to determine motivation behind criminal offending and improve the collection of accurate data on hate crime.

In order to better protect LGBTIQ+ people in the ACT from prejudice motivated violence, the ACT Government should introduce:

an aggravated sentencing clause as a relevant consideration in section 33 of the *Crimes (Sentencing) Act 2005* (ACT) into which increases the penalty for any criminal offence which was motivated by prejudice, including on the basis of sexual orientation, gender identity, gender expression or sex characteristics, similar to the aggravated sentencing provision in subsection 5(daaa) of the *Sentencing Act 1991* (Vic);<sup>249</sup> and

- a substantive 'hate crime' offence in the *Crimes Act 1900* (ACT) which facilitates improved data collection and provides higher penalties for prejudice motivated violence.<sup>250</sup>

A substantive 'hate crime' offence has greater visibility and facilitates more accurate data collection, although prosecutors may be more reluctant to use it where proving a person's motivation may be difficult in court. In contrast, the aggravated sentencing clause ensures that prejudice motivation can be taken into account as an aggravating feature as part of any criminal offending, and can be raised in sentencing without having to prove the prejudice motivation as an element of the offence.

There are also a series of non-legislative reforms to consider, including public awareness campaigns, funded independent third party reporting centres, specialist supports, educational resources and improvement of databases and data collection procedures.<sup>251</sup>

### RECOMMENDATION 53

The ACT Government should amend section 33 of the *Crimes (Sentencing) Act 2005* (ACT) to ensure prejudice motivation is taken into account as a relevant consideration in sentencing.

### RECOMMENDATION 54

The ACT Government should insert a standalone 'hate crime' offence in the *Crimes Act 1900* (ACT).

## E) FAMILY VIOLENCE

The *Family Violence Act 2016* (ACT) (**Family Violence Act**) provides inclusive definitions of family violence which apply to LGBTIQ+ people in the ACT. It does not discriminate against LGBTIQ+ people, and is drafted in a way which does address some specific considerations of family violence which affects LGBTIQ+ people. For example, section 8 of the Family Violence Act includes examples about “threatening to disclose personal information about the family member” and “threatening to withhold medication”.

However, LGBTIQ+ stakeholders raised concerns about how the Family Violence Act is implemented in practice. In particular, there were concerns that the traditional gendered lens which views family violence within intimate partnerships through a male perpetrator / female survivor lens is not fully inclusive of all LGBTIQ+ people, and can lead to people not accessing family violence supports or experiencing difficulties seeking help. Stakeholders informed Equality Australia that LGBTIQ+ related family violence is generally not well understood in the community and often survivors do not recognise their experiences as violence. For example, where a person has experienced significant abuse and violence in their families of origin as children (including because of lack of family acceptance for their sexual orientation or gender identity) this can become normalised so that people do not recognise violence in their adult intimate partner relationships.

LGBTIQ+ and Government stakeholders raised the following concerns in relation to practical implementation of the legislation:

- a gendered service system response by family violence and support service providers based on a perception of a male perpetrator / female victim binary dynamic may exclude LGBTIQ+ people and affect the standard of care they receive;
- ACT Policing do not appear to have clear procedures in responding to family violence reports in same-sex couples of determining who is the victim, particularly where both parties allege violence or sexual assault;
- family violence services in the ACT do not always provide adequate support to victims or perpetrators that do not fit the standard model (e.g. transgender women seeking housing in women’s refuges, discrimination against transgender women about accessing combined spaces). For example, trans women escaping violence who are turned away from women’s refuges have access to limited options for safe accommodation available, and are assessed as ‘low priority’ in accessing emergency housing by workers;
- some services are available to members of the LGBTIQ+ community, but are not used by LGBTIQ+ people as they fear that it will not provide an inclusive service, particularly for gender diverse people;
- family violence support groups for women can be difficult for non-binary people to access; and
- Child and Youth Protection Services do not have adequate training to support children and young people who have left or been removed from families where they experienced family violence (e.g. failing to take into account sex characteristics in finding foster care placements).

LGBTIQ+ and Government stakeholders also raised the need for community education on family violence and harmful behaviours, including ensuring that LGBTIQ+ people recognise harmful and controlling behaviours within families and relationships as family violence. There are further concerns around the fact that the LGBTIQ+ community in the ACT is relatively small, which causes complications around connections with people who know the family member who has engaged in family violence, and fears of social isolation if a person leaves a situation of family violence.

The ACT Government’s Office of the Coordinator-General for Family Safety has undertaken significant consultations and consideration of how best to address family violence in the ACT. The ACT Government is developing and delivering the ACT Government Domestic and Family Violence Training Strategy to equip all ACT public servants with the ability to recognise and respond to domestic and family violence in the workplace and the community. This training will include content about the common barriers that LGBTIQ+ people experience when seeking help with domestic and family violence, as well as local referral points in the ACT.

The Office of the Coordinator-General for Family Safety has conducted a series of co-design workshops and released two Insights Reports – one following interviews with frontline workers, and another of people with lived experience of family violence. In summary, the current insights reveal that family violence is still not well understood, people are not seeking help because available supports do not meet their needs, the system is difficult for people to navigate and there are limited services for prevention, early intervention and recovery support.<sup>252</sup>

The Insights Report highlights specific aspects of family violence unique for LGBTIQ+ communities, including threats to ‘out’ a person, controlling access to gender affirming medication, family violence from family members when a person comes out, and the normalisation of violence in relationships.<sup>253</sup> In relation to barriers, the report highlighted that parents who do not have legal custody of their children may be less likely to leave violent situations especially if they aren’t the birth parent, and that the past criminalisation and continuing stigma around LGBTIQ people has led to many not feeling safe in reporting to police.<sup>254</sup>

The Women’s Centre for Health Matters also released the *Hear Me Out: Women’s experiences of seeking help for domestic violence in the ACT* report, which recommended a series of reforms to improve family violence service responses to women experiencing family violence.<sup>255</sup>

The Family Safety Hub is working to better integrate services and improve access to family violence supports for all people, and is placing particular emphases on the needs of groups who may need a tailored approach, including LGBTIQ+ people. Equality Australia considers that the thorough co-design process adopted by the Office of the Coordinator General for Family Safety is the appropriate pathway forward to further explore and develop appropriate policies to remove discrimination against LGBTIQ+ people experiencing family violence.

### RECOMMENDATION 55

The ACT Government should develop specific policies through the Family Safety Hub to improve responses of ACT Policing and family violence support agencies to LGBTIQ+ people experiencing family violence.





# 8/ FURTHER ISSUES FOR CONSIDERATION

During consultations, LGBTIQ+ and Government stakeholders raised a number of issues which are outside the scope of the Terms of Reference for this audit.

## FEDERAL ISSUES

LGBTIQ+ stakeholders raised a number of issues which require legislative and policy reform at a federal level, including:

- access to Medicare rebates for reproductive healthcare, including infertility treatments (e.g. ART);<sup>256</sup>
- privacy of MyHealth records, including the privacy of children's health records where their parents may not support gender affirming medical treatment;
- Commonwealth Government requirements for nationally consistent data collection which may not collect accurate data around gender reflecting the fact that ACT laws respect multiple gender categories;
- permanent exceptions in the SDA, particularly relating to discrimination against LGBTQ students and teachers in schools; and
- lack of adequate protection from discrimination in employment under the FWA, including the scope of existing religious exceptions and the lack of protections on the basis of gender identity or expression and sex characteristics.

## NON-LEGISLATIVE REFORMS

Whereas the Terms of Reference for this legal audit focus on legal reforms, each of the recommendations in this report also require crucial non-legislative measures dedicated to prevention, education, changing community attitudes and other essential aspects of reform. We acknowledge that the ACT Government is currently considering a range of non-legislative measures to promote diversity, inclusion and equality in the ACT, and encourage the ACT Government to consider accompanying non-legislative measures required to give effect to any legislative reform in this space.

Where the ACT Government engages in law reform to implement the recommendations from this report, we recommend that this legislation be accompanied by appropriately funded non-legislative measures to ensure:

- LGBTIQ+ people are consulted with in the development of relevant laws and policies;
- LGBTIQ+ people are aware of the nature of the reforms;
- government agencies, professionals, employees and organisations potentially affected by the reforms receive adequate education and training;
- accessible and detailed information sheets and guidelines are made available to explain the impact and availability of reforms; and
- support programs are made available where necessary to support a person to recover from experiences of abuses or harm.

## RECOMMENDATION 56

The ACT Government should implement non-legislative measures to accompany any law reform around education, training, guidelines, policies and support programs.

We note that LGBTIQ+ stakeholders also raised a number of concerns not raised elsewhere in this report that do not relate to reform of legislation, regulation or existing policies, including:

- inclusive and non-discriminatory school curriculum and education policies which support LGBTIQ+ students and staff in educational settings;<sup>257</sup>
- limitations of existing data collection processes, and the difficulties in advocating for law reform or additional healthcare funding where there is no repository of statistical information on the demographics and situation of LGBTIQ+ people living in the ACT;<sup>258</sup>
- medical practitioners seeking unnecessary and inappropriate assurances from parents in relation to a trans or gender diverse child's medical treatment in cases where the child has capacity to consent;<sup>259</sup>
- the need for LGBTIQ+ inclusive practice training within government and from services, particularly in health, education and social services;
- the need for broad-based education around avenues to make discrimination complaints and available avenues for redress;<sup>260</sup>
- health policies in relation to the treatment of people living with HIV / AIDS; and
- the Australian Red Cross' blanket ban on men who have sex with men donating blood, and inadequate policies to protect trans and gender diverse people from discrimination in blood donation.

There were also other issues raised in submissions where we considered that the nexus was not sufficiently connected with discrimination on the basis of sexual orientation, gender identity or sex characteristics, including sex work reforms.<sup>261</sup>





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# 9/ CONCLUSION

For many years, the ACT has been at the forefront of protecting and promoting equality in Australia. The ACT Government has demonstrated a clear commitment to engage in law reform where needed to remove discrimination and barriers to equal opportunities.

In particular, the ACT Government has taken a leading role in developing best practice laws in relation to protections from discrimination, equal parenting laws and being the first Australian jurisdiction to reform its birth certificate laws. The ACT Government is also invested in its *Capital of Equality* strategy and committed to taking further steps to promote social inclusion in the ACT.

As many of our stakeholders recognised, the majority of reforms for the LGBTIQ+ community have benefited lesbian, gay, bisexual and queer members of our community. While there have been positive developments to better protect the rights of trans and gender diverse people following the *Beyond the Binary* report, further reforms are needed to promote best practice and ensure that all problematic language is removed from ACT laws.

The ACT Government was also a leader in introducing protections from discrimination for intersex people which were consistent with Australian Government policies at the time. However, understandings of best practice have shifted and the key concern of intersex community advocates and organisations is that the ACT Government introduce legislative reforms to prohibit deferrable medical interventions on intersex infants and children without full, prior and informed consent.

All of the stakeholders involved in this review share a vision for an inclusive ACT which celebrates and accepts all members of the LGBTIQ+ community. The acts and regulations which we have identified as allowing potential discrimination remain as barriers to full equality and diversity. In addition, the ACT Government has a responsibility to enact appropriate laws and policies to protect LGBTIQ+ people from harmful practices from others in the community.

We commend the ACT Government for commissioning this audit and committing to an independent review of how to improve its laws to implement best practice. We look forward to the ACT Government's response and other measures to make the ACT a progressive and welcoming place for all members of the community – including LGBTIQ+ people – to live and thrive.

# APPENDIX A

The following table briefly summarises the key amendments required to remove potential discrimination against LGBTIQ+ people in the ACT.

#	ACT LEGISLATION	RELEVANT PROVISIONS	ATTRIBUTES AFFECTED	CATEGORY OF DISCRIMINATION	POTENTIAL AMENDMENTS
1.	<i>Adoption Act 1993</i> (ACT)	94(2)(b)	Gender identity Parental status	Family and relationships	Ensure language is gender inclusive (e.g. references to 'mother') – see recommendation 1
2.	<i>Adoption Regulation 1993</i> (ACT)	11, 61(2)(b)	Gender identity Parental status	Family and relationships	Ensure language is gender inclusive (e.g. references to 'mother' and 'father', and 'mother's maiden name') – see recommendation 1  Update language from 'sex' to 'gender' – see recommendation 6
3.	<i>Anglican Church of Australia Constitution Act 1961</i> (ACT)	Various references to 'him' / 'his'	Gender identity	Memberships / appointments	Ensure language is gender inclusive (e.g. references to 'him' and 'his') – see recommendation 1
4.	<i>Births, Deaths and Marriages Registration Act 1997</i> (ACT)	16, 16B, 24, 25, 27, 29, 29A, 29C, 29D	Gender identity Sex characteristics	Birth certificate laws	See Pt 6(A)  Update language from 'sex' to 'gender' – see recommendation 6
5.	<i>Births, Deaths and Marriages Registration Regulation 1998</i> (ACT)	4, 5	Gender identity Sex characteristics Parental status	Birth certificate laws	See Pt 6(A)  Update language from 'sex' to 'gender' – see recommendation 6
6.	<i>Boxing Control Act 1993</i> (ACT)	11, 13A, 14	Gender identity	Sport	Consider appropriateness of gendered language – see recommendation 1
7.	<i>Casino Control Act 2006</i> (ACT)	120(3)-(6)	Gender identity Sex characteristics	Body searches	Ensure trans, gender diverse and intersex people can nominate the gender of the person conducting the procedure – see recommendation 5  Update language from 'sex' to 'gender' – see recommendation 6
8.	<i>Children and Young People Act 2008</i> (ACT)	6(c)(iii), 362	Gender identity	Family and relationships Criminal law	Ensure language is gender inclusive (e.g. references to 'woman' and 'father's') – see recommendation 1
9.		166, 189, 250, 573	Gender identity Sex characteristics	Detention	See Pt 6(E) Update language from 'sex' to 'gender' – see recommendation 6
10.		250, 260, 261, 266, 270, 274, 592, 596, 600, 605, 611, 612, 615, 617, 633(4)	Gender identity Sex characteristics	Body searches	Ensure trans, gender diverse and intersex people can nominate the gender of the person conducting the procedure – see recommendation 5  Update language from 'sex' to 'gender' – see recommendation 6
11.	<i>Civil Law (Wrongs) Act 2002</i> (ACT)	217	Sexual orientation Relationship status	Family and relationship law	No amendment of gendered language required – abolition of historic legal obligation.

#	ACT LEGISLATION	RELEVANT PROVISIONS	ATTRIBUTES AFFECTED	CATEGORY OF DISCRIMINATION	POTENTIAL AMENDMENTS
12.	<i>Confiscation of Criminal Assets Act 2003 (ACT)</i>	211(4), (5)	Gender identity Sex characteristics	Body searches	See Pt 6(D)
13.	<i>Corrections Management Act 2007 (ACT)</i>	76, 79	Gender identity Sex characteristics	Criminal law Detention	See Pt 6(E) Update language from 'sex' to 'gender' – see recommendation 6
14.		109, 112, 114, 115, 117, 118, 120	Gender identity Sex characteristics	Body searches	See Pt 6(D) Update language from 'sex' to 'gender' – see recommendation 6
15.	<i>Corrections Management Regulation 2010 (ACT)</i>	20(3)	Gender identity	Detention Health	Ensure language is gender inclusive (e.g. references to 'male' and 'female') – see recommendation 1
16.	<i>Court Procedures Rules 2006 (ACT)</i>	650	Gender identity	Discovery	Update language from 'sex' to 'gender' – see recommendation 6
17.		751	Gender identity	Residential searches	Special measure for women – consider whether special measure should be available for LGBTIQ+ people – see recommendation 7
18.	<i>Crimes (Child Sex Offenders) Act 2005 (ACT)</i>	79	Gender identity Sex characteristics	Criminal law Privacy Body searches	Ensure trans, gender diverse and intersex people can nominate the gender of the person conducting the procedure – see recommendation 5 Update language from 'sex' to 'gender' – see recommendation 6
19.	<i>Crimes (Forensic Procedures) Act 2000 (ACT)</i>	49	Gender identity Sex characteristics	Criminal law Body searches	Ensure trans, gender diverse and intersex people can nominate the gender of the person conducting the procedure – see recommendation 5 Update language from 'sex' to 'gender' – see recommendation 6
20.		49B, 58	Gender identity Sex characteristics	Forensic procedures	Ensure trans, gender diverse and intersex people can nominate the gender of the person conducting the procedure – see recommendation 5 Update language from 'sex' to 'gender' – see recommendation 6
21.	<i>Crimes (Forensic Procedures) Regulation 2000 (ACT)</i>	Schedule 1	Gender identity Sex characteristics	Body searches	Ensure trans, gender diverse and intersex people can nominate the gender of the person conducting the procedure – see recommendation 5
22.	<i>Crimes Act 1900 (ACT)</i>	47, 48A, Dictionary	Gender identity Parental status	Criminal law Pregnancy	Ensure language is gender inclusive (e.g. references to 'mother', 'women' and 'woman') – see recommendations 1 & 2
23.		61B	Gender identity Sex characteristics	Criminal law People who identify as neither or both male and female	Ensure trans, gender diverse and intersex people can nominate the gender of the person conducting the procedure – see recommendation 5
24.		77	Gender identity Sex characteristics	Criminal law	See Pt 6(A) If recommendations 9 or 15 are not implemented, update language from 'sex' to 'gender' – see recommendation 6
25.		185A, 207(4), 228, 238, 240	Gender identity Sex characteristics	Searches	Ensure trans, gender diverse and intersex people can nominate the gender of the person conducting the procedure – see recommendation 5 Update language from 'sex' to 'gender' – see recommendation 6
26.		289	Gender identity Sex characteristics	Criminal law	No amendment of gendered language required – abolition of historic legal presumption

#	ACT LEGISLATION	RELEVANT PROVISIONS	ATTRIBUTES AFFECTED	CATEGORY OF DISCRIMINATION	POTENTIAL AMENDMENTS
27.	<i>Discrimination Act 1991 (ACT)</i>	5A, 37	Gender identity	Pregnancy	Ensure language is gender inclusive (e.g. references to 'woman') – see recommendations 1 & 2  Update language from 'sex' to 'gender' – see recommendation 6
28.		27(1)(a) Example	Gender identity	Discrimination	Special measure for women – consider whether an example of a special measure should be included for LGBTIQ+ people – see recommendation 7
29.		7(1)(s) & (v), 34, 38, 39, 40, 41	Gender identity	Accommodation  Employment	Update language from 'sex' to 'gender' – see recommendation 6  Ensure language is gender inclusive (e.g. references to 'opposite sex') – see recommendation 1
30.		Dictionary – definition of sexuality	Sexual orientation	Discrimination – excludes pansexuality and other diverse sexual orientations	Update definition of sexuality to 'sexual orientation'  Ensure language is gender inclusive (e.g. towards people of the same gender, different gender, or both) – see recommendation 1  Update language from 'sex' to 'gender' – see recommendation 6
31.		Dictionary – definition of gender identity	Gender identity	Terminology of designated sex at birth	Update language from 'sex' to 'gender' – see recommendation 6
32.	<i>Domestic Violence Agencies Act 1986 (ACT)</i>	6	Sexual orientation  Gender identity  Sex characteristics	Family violence  Memberships / appointments  Currently, there is no inclusion of community member from LGBTIQ+ communities	Special consultation requirement for population groups disproportionately affected by family violence – consider including a representative who is capable of representing the views and interests of LGBTIQ+ people – see recommendation 8
33.	<i>Drugs of Dependence Act 1989 (ACT)</i>	189	Gender identity  Sex characteristics	Criminal law  Searches  People who identify as neither or both male and female	Ensure trans, gender diverse and intersex people can nominate the gender of the person conducting the procedure – see recommendation 5  Update language from 'sex' to 'gender' – see recommendation 6
34.	<i>Electoral Act 1992 (ACT)</i>	121(3)(b)	Gender identity	Voting	Remove requirement to collect elector's gender on the certified list of electors – see discussion at recommendations 9 & 10
35.	<i>Electoral Regulation 1993 (ACT)</i>	4(2)(b)	Gender identity	Health  People who identify as neither or both male and female	Ensure language is gender inclusive (e.g. references to 'women') – see recommendation 1
36.	<i>Evidence Act 2011 (ACT)</i>	73	Gender identity	Criminal law – hearsay rule exception  People who identify as neither or both male and female	Ensure language is gender inclusive (e.g. references to 'a man and a woman') – see recommendation 1
37.	<i>Family Violence Act 2016 (ACT)</i>	Preamble 2(a)	Sexual orientation  Gender identity  Sex characteristics	Family violence	Substitute 'sexual identity' with 'sexual orientation, gender identity, sex characteristics'



#	ACT LEGISLATION	RELEVANT PROVISIONS	ATTRIBUTES AFFECTED	CATEGORY OF DISCRIMINATION	POTENTIAL AMENDMENTS
38.	<i>Gaming Machine Act 2004</i> (ACT)	171	Gender identity	Sport	Special measure for women – consider whether special measure should be available for LGBTIQ+ people – see recommendation 7
39.	<i>Government Agencies (Campaign Advertising Act 2009)</i> (ACT)	17	Gender identity	Government	Consider requiring that government campaigns realistically represent the interests, lifestyles and contributions of LGBTIQ+ people – see recommendation 7
40.	<i>Government Procurement (Secure Local Jobs) Amendment Regulation 2018 (No 1)</i> (ACT)	12AC(1)(f) Example	Gender identity	Government	Consider including example for LGBTIQ+ people – see recommendation 7
41.	<i>Government Procurement Regulation 2007</i> (ACT)	22G(6)(b)	Gender identity	Government	Consider including LGBTIQ+ people – see recommendation 7
42.	<i>Health Act 1993</i> (ACT)	80	Gender identity	Pregnancy	No amendment of gendered language required – amendments in the <i>Health (Improving Abortion Access) Amendment Act 2018</i> (ACT) which have not yet commenced will ensure this act is gender inclusive
43.	<i>Human Cloning and Embryo Research Act 2004</i> (ACT)	10, 11	Gender identity	Pregnancy	Ensure language is gender inclusive (e.g. references to ‘woman’) – see recommendations 1 & 2
44.	<i>Human Rights Act 2004</i> (ACT)	8 – Examples of discrimination	Gender identity Sex characteristics	Discrimination	Consider including reference to gender identity and expression and sex characteristics in the examples of discrimination (note: the examples listed are not exhaustive) – see recommendation 7  Update language from ‘sex’ to ‘gender’ – see recommendation 6
45.	<i>Intoxicated People (Care and Protection) Act 1994</i> (ACT)	6C	Gender identity Sex characteristics	Criminal law Body searches	Ensure trans, gender diverse and intersex people can nominate the gender of the person conducting the procedure – see recommendation 5  Update language from ‘sex’ to ‘gender’ – see recommendation 6
46.	<i>Land Titles Act 1925</i> (ACT)	5	Gender identity	Property	No amendment of gendered language required – clarification of application of historic laws dealing with married women’s property
47.		114	Gender identity	Property	Ensure language is gender inclusive (e.g. references to ‘females’) – see recommendation 1
48.	<i>Legal Aid Act 1977</i> (ACT)	68A	Sexual orientation  Gender identity  Sex characteristics	Employment	Include LGBTIQ+ people as a designated group – see recommendation 7

#	ACT LEGISLATION	RELEVANT PROVISIONS	ATTRIBUTES AFFECTED	CATEGORY OF DISCRIMINATION	POTENTIAL AMENDMENTS
49.	<i>Legal Profession (Barristers) Rules 2014</i> (ACT)	122	Sexual orientation Gender identity Sex characteristics	Discrimination	Include references to sexual orientation, gender identity and expression, and sex characteristics as protected grounds from discrimination  Update language from 'sex' to 'gender' – see recommendation 6
50.		122.2	Sexual orientation Gender identity Sex characteristics	Sexual harassment	Include references to sexual orientation, gender identity and expression, and sex characteristics as protected grounds from discrimination, and update terminology (e.g. references to 'sexual preference')  Update language from 'sex' to 'gender' – see recommendation 6
51.	<i>Legislation Act 2001</i> (ACT)	169(2)	Gender identity	Legal definitions	Ensure language is gender inclusive (e.g. references to 'whether of a different or the same sex') – see recommendation 1  Update language from 'sex' to 'gender' – see recommendation 6
52.		169A	Gender identity	Legal definitions	Update language from 'sex' to 'gender' – see recommendation 6
53.		169B	Sex characteristics	Legal definitions	Ensure the definition of 'intersex person' is inclusive of all people born with variations in sex characteristics – see recommendation 3
54.	<i>Liquor Regulation 2010</i> (ACT)	21(1)(i)	Gender identity	Public events	Special measure for women – consider whether special measure should be available for LGBTIQ+ people – see recommendation 7
55.	<i>Major Events Act 2014</i> (ACT)	19	Gender identity	Public events Body searches	Ensure trans, gender diverse and intersex people can nominate the gender of the person conducting the procedure – see recommendation 5  Update language from 'sex' to 'gender' – see recommendation 6
56.	<i>Married Persons Property Act 1986</i> (ACT)	3, 4, 5, 6, 8, 9	Gender identity	Access to justice	Ensure language is gender inclusive (e.g. references to 'married man', 'married woman' and pronouns) – see recommendation 1
57.	<i>Medicines, Poisons and Therapeutic Goods Regulation 2008</i> (ACT)	591, 593	Gender identity	Pregnancy	Ensure language is gender inclusive (e.g. references to 'woman') – see recommendations 1 & 2
58.	<i>Mental Health (Secure Facilities) Act 2016</i> (ACT)	37	Gender identity	Body searches	Ensure trans, gender diverse and intersex people can nominate the gender of the person conducting the procedure – see recommendation 5  Update language from 'sex' to 'gender' – see recommendation 6
59.	<i>Payroll Tax Act 2011</i> (ACT)	53	Gender identity Parental status	Family and relationships	Ensure language is gender inclusive (e.g. references to 'maternity leave', 'female' and 'her') – see recommendations 1 & 2
60.	<i>Perpetuities and Accumulations Act 1985</i> (ACT)	8	Gender identity Parental status	Family and relationships	Ensure language is gender inclusive (e.g. references to 'en ventre sa mere' and 'woman') – see recommendations 1 & 2
61.	<i>Public Place Names Act 1989</i> (ACT)	3	Gender identity	Government	Special measure for women – consider whether special measure should be available for LGBTIQ+ people – see recommendation 7
62.	<i>Rail Safety National Law (ACT) Act 2014</i> (ACT)	31(2)	Gender identity Sex characteristics	Body searches	Ensure trans, gender diverse and intersex people can nominate the gender of the person conducting the procedure – see recommendation 5  Update language from 'sex' to 'gender' – see recommendation 6

#	ACT LEGISLATION	RELEVANT PROVISIONS	ATTRIBUTES AFFECTED	CATEGORY OF DISCRIMINATION	POTENTIAL AMENDMENTS
63.	<i>Rates Act 2004</i> (ACT)	45	Gender identity Sex characteristics	Family and relationships	Update language from 'sex' to 'gender' – see recommendation 6
64.	<i>Road Transport (Alcohol and Drugs) Act 1977</i> (ACT)	18C(2)	Gender identity Sex characteristics	Body searches	Ensure trans, gender diverse and intersex people can nominate the gender of the person conducting the procedure – see recommendation 5  Update language from 'sex' to 'gender' – see recommendation 6
65.	<i>Road Transport (Driver Licensing) Regulation 2000</i> (ACT)	14	Gender identity	Government	Update language from 'sex' to 'gender' – see recommendation 6
66.	<i>Terrorism (Extraordinary Temporary Powers) Act 2006</i> (ACT)	43, Schedule 1 (1.5 - 1.7)	Gender identity Sex characteristics	Body searches	Ensure trans, gender diverse and intersex people can nominate the gender of the person conducting the procedure – see recommendation 5  Update language from 'sex' to 'gender' – see recommendation 6
67.	<i>University of Canberra Act 1989</i> (ACT)	11A	Gender identity	Memberships / appointments	No amendment of language required – use of 'gender' inclusive of all genders.
68.	<i>Victims of Crime Regulation 2000</i> (ACT)	23, 41, 48	Sexual orientation Gender identity Sex characteristics	Government	Consider including requirement that the person has qualifications of experience in working with victims and people from LGBTIQ+ communities
69.	<i>Workers Compensation Act 1951</i> (ACT)	63(3)	Gender identity	Workers compensation	Ensure differential loss of hearing provisions for a 'male' and 'female' beneficially apply for trans and gender diverse people – see recommendation 1
70.	<i>Workers Compensation Regulation 2002</i> (ACT)	Schedule 1, 23	Gender identity	Health	Ensure language is gender inclusive (e.g. references to '(female)') – see recommendation 1

# APPENDIX B

List of legislation which contains binary gendered language, but which is less likely to have a discriminatory impact than legislation analysed in detail in Appendix A:

1. *ACT Teacher Quality Institute Regulation 2010* (ACT)
2. *Administrative Decisions (Judicial Review) Act 1989* (ACT)
3. *Agents Act 2003* (ACT)
4. *Agents Regulation 2003* (ACT)
5. *Anglican Church of Australia Trust Property Act 1928* (ACT)
6. *Animal Diseases Act 2005* (ACT)
7. *Animal Welfare Act 1992* (ACT)
8. *Annual Reports (Government Agencies) Act 2004* (ACT)
9. *Architects Act 2004* (ACT)
10. *Architects Regulation 2004* (ACT)
11. *Associations Incorporation Regulation 1991* (ACT)
12. *Australian Crime Commission Act 2003* (ACT)
13. *Bail Act 1992* (ACT)
14. *Bail Regulation 1992* (ACT)
15. *Births, Deaths and Marriages Registration Regulation 1998* (ACT)\*
16. *Boilers and Pressure Vessels Regulation 1954* (ACT)
17. *Building Act 2004* (ACT)
18. *Casino Control Act 2006* (ACT)\*
19. *Charitable Collections Act 2003* (ACT)
20. *Children and Young People Act 2008* (ACT)\*
21. *Civil Law (Property) Act 2006* (ACT)
22. *Civil Law (Sale of Residential Property) Act 2003* (ACT)
23. *Civil Law (Wrongs) Act 2002* (ACT)\*
24. *Climate Change and Greenhouse Gas Reduction Act 2010* (ACT)
25. *Clinical Waste Act 1990* (ACT)
26. *Commercial Arbitration Act 2017* (ACT)
27. *Common Boundaries Act 1981* (ACT)
28. *Community Title Act 2001* (ACT)
29. *Confiscation of Criminal Assets Act 2003* (ACT)
30. *Construction Occupations (Licensing) Act 2004* (ACT)
31. *Coroners Act 1997* (ACT)
32. *Corrections Management Act 2007* (ACT)\*
33. *Court Procedures Act 2004* (ACT)
34. *Court Procedures Rules 2006* (ACT)
35. *Crimes (Controlled Operations) Act 2008* (ACT)
36. *Crimes (Forensic Procedures) Act 2000* (ACT)\*
37. *Crimes (Restorative Justice) Act 2004* (ACT)
38. *Crimes (Sentence Administration) Act 2005* (ACT)
39. *Crimes Act 1900* (ACT)\*
40. *Criminal Code 2002* (ACT)
41. *Dangerous Goods (Road Transport) Act 2009* (ACT)
42. *Dangerous Goods (Road Transport) Regulation 2010* (ACT)
43. *Dangerous Substances Act 2004* (ACT)
44. *Dangerous Substances (Explosives) Regulation 2004* (ACT)
45. *Disability Services Act 1991* (ACT)
46. *Discrimination Act 1991* (ACT)\*
47. *Domestic Animals Act 2000* (ACT)
48. *Domestic Violence Agencies Act 1986* (ACT)\*
49. *Drugs in Sport Act 1999* (ACT)
50. *Drugs of Dependence Act 1989* (ACT)\*
51. *Duties Act 1999* (ACT)
52. *Education Act 2004* (ACT)
53. *Electoral Act 1992* (ACT)\*
54. *Electricity Safety Act 1971* (ACT)
55. *Electronic Transactions Act 2001* (ACT)
56. *Emergencies Act 2004* (ACT)
57. *Energy Efficiency (Cost of Living) Improvement Act 2012* (ACT)
58. *Enforcement of Public Interests Act 1973* (ACT)
59. *Environment Protection Act 1997* (ACT)
60. *Epidemiological Studies (Confidentiality) Regulation 1992* (ACT)
61. *Evidence Act 2011* (ACT)\*
62. *Fair Trading (Fuel Prices) Act 1993* (ACT)
63. *Fair Trading (Motor Vehicle Repair Industry) Act 2010* (ACT)
64. *Family Provision Act 1969* (ACT)
65. *Family Violence Act 2016* (ACT)\*
66. *Firearms Regulation 2008* (ACT)
67. *Fisheries Act 2000* (ACT)
68. *Food Act 2001* (ACT)
69. *Fuels Control Act 1979* (ACT)
70. *Gambling and Racing Control Act 1999* (ACT)
71. *Gaming Machine Act 2004* (ACT)
72. *Gas Safety Act 2000* (ACT)
73. *Gas Safety Regulation 2001* (ACT)
74. *Gene Technology (GM Crop Moratorium) Act 2004* (ACT)
75. *Gene Technology Act 2003* (ACT)
76. *Government Agencies (Campaign Advertising) Act 2009* (ACT)\*



77. *Government Procurement (Secure Local Jobs) Amendment Regulation 2018 (No 1)* (ACT)
78. *Government Procurement Regulation 2007* (ACT)
79. *Guardianship and Management of Property Act 1991* (ACT)
80. *Health (National Health Funding Pool and Administration) Act 2013* (ACT)
81. *Health Act 1993* (ACT)\*
82. *Health Practitioner Regulation National Law* (ACT)
83. *Health Practitioner Regulation National Law Regulation 2018* (ACT)
84. *Health Professionals (Special Events Exemptions) Act 2000* (ACT)
85. *Health Records (Privacy and Access) Act 1997* (ACT)
86. *Heavy Vehicle National Law* (ACT)
87. *Hemp Fibre Industry Facilitation Act 2004* (ACT)
88. *Heritage Act 2004* (ACT)
89. *Human Rights Act 2004* (ACT)\*
90. *Independent Competition and Regulatory Commission Act 1997* (ACT)
91. *Integrity Commission Act 2018* (ACT)
92. *Interactive Gambling Act 1998* (ACT)
93. *Intoxicated People (Care and Protection) Act 1994* (ACT)\*
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95. *Lakes Act 1976* (ACT)
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99. *Legal Aid Act 1977* (ACT)\*
100. *Legal Profession Act 2006* (ACT)
101. *Legal Profession (Barristers) Rules 2014* (ACT)
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108. *Limitation Act 1985* (ACT)
109. *Liquor Act 2010* (ACT)
110. *Litter Act 2004* (ACT)
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112. *Long Service Leave Act 1976* (ACT)
113. *Lotteries Act 1964* (ACT)
114. *Magistrates Court Act 1930* (ACT)
115. *Married Persons Property Act 1986* (ACT)
116. *Medicines, Poisons and Therapeutic Goods Act 2008* (ACT)
117. *Medicines, Poisons and Therapeutic Goods Regulation 2008* (ACT)\*
118. *Mental Health Act 2015* (ACT)
119. *Mercantile Law Act 1962* (ACT)
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121. *Nature Conservation Act 2014* (ACT)
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134. *Public Health Act 1997* (ACT)
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141. *Rates Act 2004* (ACT)\*
142. *Registration of Deeds Act 1957* (ACT)
143. *Residential Tenancies Act 1997* (ACT)
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146. *Road Transport (Driver Licensing) Act 1999* (ACT)
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150. *Road Transport (Public Passenger Services) Act 2001* (ACT)
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176. *Transplantation and Anatomy Act 1978* (ACT)
177. *Tree Protection Act 2005* (ACT)
178. *Trespass on Territory Land Act 1932* (ACT)
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184. *Uniting Church in Australia Act 1977* (ACT)
185. *Utilities (Technical Regulation) Act 2014* (ACT)
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188. *Utilities (Water Conservation) Regulation 2006* (ACT)
189. *Victims of Crime (Financial Assistance) Act 2016* (ACT)
190. *Victims of Crime Act 1994* (ACT)
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192. *Waste Management and Resource Recovery Act 2016* (ACT)
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# ENDNOTES

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- 4 See Appendix B, 1-201.
- 5 Appendix A, 22, 27, 43, 57, 59, 60.
- 6 Appendix A, 53.
- 7 See Appendix A, 7, 18-21, 23, 25, 33, 45, 55, 58, 62, 64, 66.
- 8 See Appendix A, 2, 4, 5, 7, 9, 10, 13, 14, 16, 18, 19, 20, 24, 25, 27, 29, 30, 31, 33, 44, 45, 49, 50-52, 55, 58, 62-66. See also *Charitable Collections Regulation 2003* (ACT) r 3; *Legal Professional (Solicitors) Conduct Rules 2015* (ACT) Glossary of Terms.
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- 258 Above n 22. LGBTIQ+ advocates also discussed the conflict between the policy benefits of collecting disaggregated and de-identified data with privacy issues relating to the collection of this information, as considered in detail in the *Beyond the Binary* report.
- 259 The Privacy Act already protects a *Gillick* competent child's right to privacy in accessing medical treatment, but LGBTIQ+ stakeholders reported that this avenue was not pursued because of a lack of knowledge around existing privacy protections. However, there are also concerns about doctors potentially misrepresenting the legal situation or placing pressure on children to obtain their parents' approval in situations where this goes against the wishes of the child and may not be in the best interests of the child. LGBTIQ+ stakeholders considered that the issue of LGBTIQ+ cultural safety and privacy training with medical professionals should be considered as part of a broader review of trans and gender diverse healthcare in the ACT.
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