

Transgender
Health Research
Lab



Submission to
the Governance and Administration Committee

on the
Inquiry into Supplementary Order Paper 59

on the
**Births, Deaths, Marriages and Relationships
Registration Bill**

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Introduction

1. This is a joint submission from the Counting Ourselves research team at the Transgender Health Research Lab, at the University of Waikato and the Professional Association for Transgender Health Aotearoa (PATHA).
2. We welcome the proposed amendments to the Births, Deaths, Marriages and Relationships Registration (BDMRR) Bill, that will enable people to self-identify their sex on their birth certificate by making a statutory declaration. These were signalled in the proactive release of the redacted Cabinet paper and associated briefings in June this year, and then detailed in Supplementary Order Paper (SOP) 59.
3. This submission focuses on the health impacts of the proposals. It includes identifying areas where the SOP requires improvements to address gaps in access to legal gender recognition for asylum seekers, refugees and migrants; improve access for children and young people; affirm the existing rights of trans, non-binary and intersex people; and ensure their participation in the development of implementing regulations and the five-year review.
4. We welcome the opportunity to submit on the Inquiry into Supplementary Order Paper 59 on the Births, Deaths, Marriages and Relationships Registration Bill and request the opportunity to provide an oral submission to the Select Committee.

About the Transgender Health Research Lab

5. The Transgender Health Research Lab is part of the School of Psychology / Te Kura Whatu Oho Mauri at the University of Waikato / Te Whare Wānanga o Waikato. We study health and wellbeing inequities faced by transgender people – binary and non-binary. Our research focuses on the social determinants of these health outcomes, including experiences of discrimination, violence, harassment and barriers to accessing appropriate healthcare. We also consider how social and community support, self-determination, legal gender recognition, and gender affirmation can reduce these effects.
6. The Transgender Health Research Lab works closely with transgender community leaders, health professionals and policy makers to make sure that our research is relevant to stakeholders. Our initial project is *Counting Ourselves: The Aotearoa New Zealand Trans and Non-Binary Health Survey*.¹ This was the first comprehensive national

¹ <https://countingourselves.nz/>

survey of the health and wellbeing of trans and non-binary people living in Aotearoa New Zealand. A second wave of the survey is planned for 2022.

About PATHA

7. PATHA is an interdisciplinary professional organisation working to promote the health, wellbeing, and rights of transgender people. We have more than 170 members who work professionally for transgender health in clinical, academic, community, legal and other settings. Our vision is that all transgender people have full access to appropriate healthcare, and that all healthcare providers have access to information and resources which enable them to provide appropriate healthcare.

Legal gender recognition and the right to health

8. Health professionals occupy a unique space with regards to trans and non-binary people's ability to obtain official identity documents with their correct name and gender. This is because the current provisions in the BDMRR Act rely on supplying expert medical evidence.

The BDMRR Act: an example of the outdated "medical phase" of gender recognition laws

9. In this respect, Aotearoa's provisions can be categorised as a late example of the first wave of gender recognition laws internationally. These framed gender diversity as a medical problem, to be solved by surgery, and made medical evidence a prerequisite for legally changing someone's registered sex details.

"Medical requirements generally formed the core of any legal recognition regime. . . . It is apparent that many of these 'well-meaning' statutes or administrative / court procedures inflicted (and continue to inflict) unnecessary suffering on the persons concerned. . . many of the requirements of this stage today are outdated and lagging behind social and legal (and particularly human rights) developments and medical/psychological research".²

10. Subsequently, the language of human rights informed a second wave of gender recognition laws, often after significant decisions by national and international courts. One primary example is the United Kingdom Gender Recognition Act 2004 which resulted from the European Court of Human Rights' 2002 decision, *Goodwin v United Kingdom*.³

² Scherpe, J (ed.) (2015) *The Legal Status of Transsexual and Transgender Persons*, p. 621. Cambridge: Intersentia.

³ *Goodwin v United Kingdom* (application no. 28957/95) [2002] ECHR 588 (11.07.2002)

“[L]egal recognition was no longer simply viewed through the lens of medicine, but began to be conceived through the language of human rights”.⁴

Human rights based gender recognition laws

11. The most recent phase of gender recognition laws has moved away from pathologisation, which defined gender diversity through medical diagnoses, to a more explicit focus on human rights. These more recent laws, including those adopted in Argentina and Malta, frame legal gender recognition around self-determination and self-definition, and reject medical requirements as an impingement on this fundamental civil and political right. Typically, they explicitly reference the *Yogyakarta Principles on the application of international human rights law in relation to sexual orientation and gender identity*⁵ or its 2017 supplement, the *Yogyakarta Principles Plus 10*.⁶

“Principle 3: The Right to Recognition before the Law

. . . Each person’s self-defined sexual orientation and gender identity is integral to their personality and is one of the most basic aspects of self-determination, dignity and freedom. No one shall be forced to undergo medical procedures, including sex reassignment surgery, sterilisation or hormonal therapy as a requirement for legal recognition of their gender identity.”⁷

“Principle 31: The Right to Legal Recognition

. . . Everyone has the right to obtain identity documents, including birth certificates, regardless of sexual orientation, gender identity, gender expression or sex characteristics. Everyone has the right to change gendered information in such documents while gendered information is included in them.

States shall:

A. Ensure that official identity documents only include personal information that is relevant, reasonable and necessary as required by the law for a legitimate purpose, and thereby end the registration of the sex and gender of the person in identity documents such as birth certificates, identification cards, passports and driver licences, and as part of their legal personality;

B. Ensure access to a quick, transparent and accessible mechanism to change names, including to gender-neutral names, based on the self-determination of the person;

⁴ Scherpe, J (ed.) (2015) p. 623

⁵ For definitions of sexual orientation and gender identity, see [The Yogyakarta Principles: Principles on the application of international human rights law in relation to sexual orientation and gender identity](#) (Geneva, 2007) p. 6

⁶ For definitions of gender expression and sex characteristics, see [The Yogyakarta Principles plus ten: Additional principles and state obligations on the application of international human rights law in relation to sexual orientation, gender identity, gender expression and sex characteristics to complement the Yogyakarta Principles](#) (Geneva, 2017) p. 6

⁷ The Yogyakarta Principles, 2007

C. While sex or gender continues to be registered:

- i. Ensure a quick, transparent, and accessible mechanism that legally recognises and affirms each person's self-defined gender identity;
- ii. Make available a multiplicity of gender marker options;
- iii. Ensure that no eligibility criteria, such as a 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, shall be a prerequisite to change one's name, legal sex or gender;
- iv. Ensure that a person's criminal record, immigration status or other status is not used to prevent a change of name, legal sex or gender.⁸

12. For the purpose of this SOP, the most relevant obligations are those set out in B and C of Yogyakarta Principle 31 . However, it is timely to note that a growing number of agencies and jurisdictions are reconsidering whether sex or gender details are required to be registered on specific identity documents, as recommended in A above. In June 2021, the American Medical Association recommended that sex should be removed as a legal designation on the public part of birth certificates.⁹

WPATH's Identity Recognition Statement

13. The World Professional Association for Transgender Health (WPATH) has affirmed the importance of such a human rights approach, most comprehensively in its Identity Recognition Statement in 2017.¹⁰ The statement's opening paragraph conveys that legal gender recognition is a health and human rights issue:

"The World Professional Association for Transgender Health (WPATH) recognizes that, for optimal physical and mental health, persons must be able to freely express their gender identity, whether or not that identity conforms to the expectations of others. WPATH further recognizes the right of all people to identity documents consistent with their gender identity, including those documents which confer legal gender status. Such documents are essential to the ability of all people to enjoy rights and opportunities equal to those available to others; to access accommodation, education, employment, and health care; to travel; to navigate everyday transactions; and to enjoy safety."¹¹

⁸ The Yogyakarta Principles Plus 10, 2017

⁹ <https://www.webmd.com/a-to-z-guides/news/20210616/remove-sex-from-public-birth-certificates-ama-says>

¹⁰ WPATH Identity Recognition Statement, 15 November 2017.

<https://www.wpath.org/media/cms/Documents/Web%20Transfer/Policies/WPATH%20Identity%20Recognition%20Statement%2011.15.17.pdf>

¹¹ WPATH Identity Recognition Statement, 15 November 2017.

<https://www.wpath.org/media/cms/Documents/Web%20Transfer/Policies/WPATH%20Identity%20Recognition%20Statement%2011.15.17.pdf>

Challenges for health professionals under the existing BDMRR Act

14. The existing BDMRR Act undermines trans, non-binary and intersex people’s right to legal recognition. It also presents challenges for health professionals required to provide expert medical evidence. The final report of the *Working Group for reducing barriers to changing registered sex*, established by the previous Minister of Internal Affairs, described the negative impacts of high variability in the level and type of expert medical evidence that Family Court judges have required:

“117. Many people provide letters from a psychologist, surgeon, or endocrinologist or affidavits from these medical experts. The more evidence a person provides, the more costly, invasive and time consuming the process becomes. . . .

119. Each time an applicant is required to seek further medical information it can result in significant cost to the applicant and delays to the process. It may take a long time for a medical specialist at an over-subscribed and under-resourced service to write the required letter or affidavit. . . .

120. Some judges have asked applicants to provide letters from specialists, such as an endocrinologist or psychiatrist, even though the applicant has had no recent contact with specialist physicians. It is now common for a GP to provide ongoing gender-affirming care. Some judges simply request ‘full medical records’. In November 2019, a medical professional wrote to the Working Group about such a request:

“The Family Court lawyer contacted me. I was surprised by the level of detail she wanted to know but, with the patient’s consent, I provided an updated summary letter which I believed would comply. The lawyer has only now revisited our paperwork and I have just been contacted and advised that my reports to date do not contain sufficient detail that is likely to satisfy this particular judge. I was very concerned to have a person’s full medical history disclosed unnecessarily. The lawyer argued that the person had consented to provide the court with their full medical file whereas my view is that it’s not truly consensual when you feel you have no choice.”

Clinical Director | Sexual Health Service¹²

15. This section of the Ministerial Working Group’s report concluded:

“122. The inconsistency with which applications are treated can result in stress, confusion and adverse mental health outcomes. Some applicants make their application based on advice from transgender people who have previously applied

¹² Final Report of the Working Group for reducing barriers to changing registered sex: Recommendations to the Minister of Internal Affairs. 2020. <https://www.beehive.govt.nz/sites/default/files/2021-04/Report-of-the-Working-Group-for-reducing-barriers-to-changing-registered-sex-%28full-report%29.pdf>

and medical experts who have supported other applications. If they are asked to provide significantly more evidence, it can make them feel unfairly scrutinised.”

16. We agree with the Working Group’s final assessment that “the process can be made a lot better, but the law needs to change”.

“If the Government makes all the changes in this report, . . . the process will still exclude those who have not taken medical steps to transition or who have a non-binary gender. The Working Group agrees with the widespread community concerns that the current law medicalises gender diversity and forces transgender people to go to court to have their gender identity recognised on their birth certificate.”¹³

17. We welcome the removal of any requirements for medical evidence and the expansion of options on birth certificates to include terms other than male or female. Supplementary Order Paper 59 proposes these and other key improvements that better realise trans, non-binary and intersex people’s right to self-determination and legal recognition.

Health impacts of identity documents with an incorrect gender marker

Most trans and non-binary people have incorrect details on their birth certificate

18. The 2018 Counting Ourselves survey provided the first published quantitative data about the extent to which trans and non-binary people in Aotearoa have identity documents that do not contain their correct name and/or gender.¹⁴ Those findings were based on responses from 1,178 trans and non-binary aged 14 or over living here. The research was conducted by the Transgender Health Research Lab at the University of Waikato, and designed in collaboration with a Community Advisory Group, with additional peer review of the survey questionnaire by health professionals and government agencies.

19. As the Minister and a number of other politicians emphasised during the Bill’s second reading, 83% of Counting Ourselves participants who had a NZ birth certificate had an incorrect gender listed on it.

Associations between barriers to changing ID details and poor mental health

20. The Transgender Health Research Lab has undertaken further detailed analysis of the Counting Ourselves data to explore the relationship between someone having gender-

¹³ *Ibid*, p. 7

¹⁴ Veale J, Byrne J, Tan K, Guy S, Yee A, Nopera T and Bentham R (2019) *Counting Ourselves: The health and wellbeing of trans and non-binary people in Aotearoa New Zealand*. Transgender Health Research Lab, University of Waikato: Hamilton NZ.

incongruent identity documents, where the sex / gender listed did not match their gender, and their mental health.¹⁵ Our findings show that barriers to legal gender recognition are associated with worse mental health.

21. We looked at the mental health experiences of participants who had the incorrect gender marker on their birth certificate and/or passport, and those who faced barriers trying to change their gender marker on these documents. Compared with those with correct gender markers listed on their birth certificate and passport, those who had experienced barriers to legal gender recognition had:
 - higher reported psychological distress, which includes depression and anxiety
 - more than two times the odds of reporting suicidal ideation and
 - three times the odds of having attempted suicide.

22. Asian participants, young people, non-binary people, those who had not taken any gender-affirming medical steps, and those on low incomes and/or low education qualification were less likely to report possessing gender-congruent birth certificates and passports.

23. Even after accounting for age, gender, education qualification, income level, and gender-affirming medical steps someone had taken, these findings persisted. Those who had experienced barriers to legal gender recognition had higher psychological distress, suicidal ideation and suicide attempts.

24. In summary, we found associations between barriers to accessing gender concordant IDs and poor mental health. These findings are consistent with the hypothesis that having gender-discordant IDs directly contributes to elevated levels of mental health problems.

25. Counting Ourselves participants who had the incorrect gender listed on documents were asked a follow-up question to clarify why those details were incorrect. Participants who had the wrong gender on their birth certificate and passport commonly experienced these barriers:
 - The gender options that are available (male or female) do not fit my gender (44%)
 - I cannot afford to change this (32%)
 - I am worried that changing my gender would put me at risk of harm or discrimination (27%)
 - I do not know how to change this (23%) and
 - I am not allowed to change my gender because I have not taken medical transition steps (18%).

¹⁵ Tan, KKH, Watson, RJ, Byrne, JL, & Veale, JF. Barriers to Accessing Gender-Concordant IDs are Associated with Transgender People's Mental Health. Submitted for review.

26. Steps proposed in the SOP and Bill will reduce many of these barriers by:
- expanding the list of options for registered sex beyond male or female,¹⁶
 - no longer requiring a costly Family Court application process that many find hard to navigate, particularly young people, and
 - removing the requirement to provide evidence of medical steps taken.
27. We welcome these improvements and their potential to help reduce the glaring mental health disparities present for trans and non-binary people in Aotearoa.¹⁷

Comments on changes contained in the SOP

Additional amendments to the application process for children and young people

28. *New clause 22A(2)* requires the guardian of a child to have the child's consent to apply for registration of a nominated sex for the child. We support this explicit requirement that a child gives their consent for the application.
29. PATHA members who work with youth have significant knowledge and practical experience around assessing when a young person is competent to make an informed decision about medical care. Decisions regarding medical interventions are ideally made collaboratively between the trans young person, their whānau and a health team.
30. The Counting Ourselves survey found that having support from family is a significant protective factor for trans and non-binary people's mental health and wellbeing. Participants who were supported by at least half of the family members they grew up with were almost half as likely to have attempted suicide in the last 12 months (9% compared to 17%).
31. Young people, those aged 14-24, were the age group most likely to report positive support from family. This included family members who had researched how to support them best or had helped them to change their name or gender on their identity documents.
32. It is important that whānau have access to information that affirms the diversity of gender identities, expressions, and sex characteristics, so they are equipped with the knowledge needed to support their trans, non-binary, gender-questioning or intersex child. This includes access to specific material about options for amending a child or

¹⁶ *New clause 22B(1)(a) and new clause 22C(1)(a)* enable a person to specify male, female, or any other sex or gender specified in regulations as the person's nominated sex.

¹⁷ Clark TC, Lucassen MFG, Bullen P, et al.: The health and well-being of transgender high school students: Results from the New Zealand Adolescent Health Survey (Youth'12). *J Adolesc Health*. 2014;55:93-99; Tan KKH, Ellis SJ, Schmidt JM, et al.: Mental health inequities among transgender people in Aotearoa New Zealand: Findings from the Counting Ourselves survey. *Int J Environ Res Public Health*. 2020;17(8):2862.

young person's name or gender on official documents such as a birth certificate and in school and other administrative records.

33. Young people aged 16 years and older are considered able to make decisions about their medical care (under section 36 of Care of Children Act 2004). In addition, under the Code of Health and Disability Services Consumers' Rights 1996, younger people are not prohibited from consenting to medical interventions if they are deemed to be competent to make an informed choice.¹⁸
34. This recognition of young people's evolving capacity to give informed consent is not reflected fully in the SOP's provisions for applications by young people to change their registered sex. *New clause 22B(1)(c)* does enable 16- and 17-year-olds to make their own application, which is an improvement on the Bill's previous proposal. However, a 16 or 17 year old applying to amend the sex details on their birth certificate still requires the written consent of their guardian *or* a letter of support from a suitably qualified third party.
35. We recommend removing *new clause 22B(1)(c)*, so that a 16 or 17 year old can make their own informed decision about amending their birth certificate.
36. For anyone under the age of 16, the SOP retains the requirement that a legal guardian makes an application on their behalf. This means those aged 15 or younger automatically require the consent of the guardian making that application. *New clause 22C(1)(c)* also requires a letter of support from a qualified third party. *New clause 147(1)(bc)* provides for a regulation-making power to specify who would meet the definition of a "suitably qualified third party" and be able to provide such a letter of support. Again, it is vital that organisations supporting trans, non-binary and intersex young people and their whānau are resourced to be involved in the development of these regulations defining suitably qualified third parties.
37. The Cabinet paper acknowledges that guardians may not be accepting of their child's gender and therefore may not consent to their child amending their registered sex. In addition, some children and young people may not feel comfortable asking for their guardian's consent or may be estranged from them. The SOP proposes that having the option of a letter of support from a qualified third party, as an alternative to written consent from a legal guardian, mitigates this risk for those aged 16 and 17. However, it does not provide this as an option for those aged 15 or younger.

¹⁸ Oliphant, J., Veale, J., Macdonald, J., Carroll, R., Johnson, R., Harte, M., Stephenson, C., Bullock, J., Cole, D. & Manning, P. (2018), p.17. "Guidelines for Gender Affirming Healthcare for Gender Diverse and Transgender Children, Young People and Adults in Aotearoa, New Zealand." *New Zealand Medical Journal* 131(1487).

38. We support providing an alternative option for those aged 15 or younger who are not able to obtain a statutory declaration from their legal guardian. This could involve requiring a statutory declaration, rather than simply a letter of support, from a suitably qualified third party. At the same time, we suggest that whenever someone under the age of 16 requests a change in their birth certificate without their guardian's consent, that a package of support is available to that child or young person and their whānau. This would recognise that supporting children and their whānau at this time is the priority, rather than increasing administrative barriers to legal gender recognition.

39. In the Cabinet paper, the Minister states her position on the application process for those under 16:

“I am not prepared to remove guardians from the process for those aged under 15 years. This recognises a guardian's responsibilities for their child's development and helping their child determine important decisions. Any negative consequences of provisions requiring guardian consent can be considered as part of the proposed statutory review of the self-identification provisions.”

40. If the statutory review is to accurately assess the impact of these additional requirements for children and young people, it is important that timely research is undertaken to inform that assessment. In the interim, it is important that children, young people and their whānau have access to information about the process for amending birth certificates or school records (which can reflect a student's gender whether or not the birth certificate has been changed).¹⁹

Recommendation 1

41. Better protect the best interests of trans, non-binary and intersex children and young people by:

- Removing new clause 22B(1)(c), so that a 16 or 17 year old can make their own informed decision about amending their birth certificate
- Amending new clause 22C (1)(c), so that *either* a legal guardian *or* a suitably qualified third party may make the application on behalf of a child aged 15 or under, to mitigate the risks for those without support from a guardian, ensuring support is available for the child and their wider whānau through this process
- Ensuring that organisations supporting trans, non-binary and intersex young people and their whānau are resourced to be involved in the development of regulations defining suitably qualified third parties who may provide a letter of support for applications by children and young people under the age of 18 and

¹⁹ New Zealand Human Rights Commission (2020) Prism: Human rights issues relating to Sexual Orientation, Gender Identity and Expression, and Sex Characteristics (SOGIESC) in Aotearoa New Zealand - A report with recommendations. Wellington: New Zealand.

- If clauses 22B(1)(c) and 22C (1)(c) are retained, undertaking research to assess how requiring a guardian and/or qualified third party's support has affected trans, non-binary and intersex children and young people's ability to amend their birth certificate, including wider impacts on their lives.

Enabling sex markers other than male or female to be made through regulations

42. We support the development of sex markers other than male or female for inclusion on birth certificates and consultation on possible options that will then be confirmed in regulations.
43. Participants who answered the Counting Ourselves survey were asked "what gender or genders do you currently identify with" followed by a long list of potential options and an open text response. Participants gave a broad range of responses, with 70% choosing more than one option. Notably the most common response, non-binary (40%), is currently not an option on a New Zealand birth certificate.
44. It is important that consultation signalled in the SOP involves a wide range of trans, non-binary and intersex people. This should include takatāpui and those from Pasifika and other ethnic communities where there are culturally-specific identities and terms for gender diverse people. Trans, non-binary and intersex organisations are best placed to facilitate the involvement of others from their communities in these conversations and should be resourced to undertake this role.

Recommendation 2

45. Resource trans, non-binary and intersex organisations to facilitate the participation of a diverse range of voices in consultations about additional sex marker options for birth certificates.

Multiple changes of a sex marker over time

46. We support the SOP provisions which have introduced a simpler process for subsequent amendments to a persons' registered sex than those set out in clause 22B in the Bill that was referred back from Select Committee
47. *New clause 22B(1)(d)* signals that additional requirements may be imposed in regulations for second or subsequent changes to a person's registered sex. The SOP does not provide any details about the potential extent of such regulations. This has raised some concerns that the regulations could be a backdoor way to reintroduce requirements that are contrary to human rights standards.
48. However, background policy briefings proactively released in June explain that the purpose of such regulations is to mitigate the risk of identity fraud and that these

requirements should not be overly burdensome. Potential examples given include returning previous birth certificates and providing an identity referee or a letter of support from an adult who has known the applicant for over a year.

49. It would be helpful if the limited nature and extent of these regulations was more transparent in the SOP and the Bill once amended. Again, there should be a clear commitment to resourcing trans, non-binary and intersex people's participation in consultation around development of these regulations.

Recommendation 3

50. Ensure that trans, non-binary and intersex people are not required to meet unnecessary additional requirements when making subsequent changes to their sex marker by:

- clarifying new clause 22B(1)(d) is limited to providing proof of identity and does not require any further evidence about one's gender and
- consulting trans and intersex led organisations and individuals on what, if any, additional regulations are developed, including by resourcing them to participate fully in those processes.

Asylum seekers, refugees and migrants

51. More than a quarter (26%) of the Counting Ourselves survey participants were born overseas, including a small number (1%) who came here as an asylum seeker or refugee.

52. PATHA members work closely with Rainbow asylum seekers, refugees and migrants including in clinical contexts. When people born overseas have no official documentation from their country of origin or from New Zealand with their correct name and gender, it places significant barriers when they attempt to access services, including health services.

53. Being able to have the correct gender on health records is important for trans and non-binary people's interactions with the health system and is recommended in the Aotearoa New Zealand Guidelines for Gender Affirming Healthcare.²⁰ While it is possible for anyone to select their self-defined name and gender in the National Health Index,²¹ there are significant practical difficulties for people wishing to do so or to have that information consistently applied across patient management systems. These difficulties are compounded for anyone who has no other form of documentation with their correct name or gender.

²⁰ Oliphant, J., Veale, J., Macdonald, J., Carroll, R., Johnson, R., Harte, M., Stephenson, C., Bullock, J., Cole, D. & Manning, P. (2018). "Guidelines for Gender Affirming Healthcare for Gender Diverse and Transgender Children, Young People and Adults in Aotearoa, New Zealand." *New Zealand Medical Journal* 131(1487).

²¹ Ministry of Health. (2016). Identity-NHI User Reference Information & Best Practice Advice. Wellington: New Zealand.

54. Currently, people born overseas who are “entitled, under the Immigration Act 2009, to be in New Zealand indefinitely”²² can apply to the Family Court for a Declaration as to Sex. In practice, this means that trans, non-binary and intersex permanent residents can change their sex details from male to female or *vice versa* and obtain an official document with the correct sex listed. In a backwards step, the Bill removes this option. Specifically, clause 4 of the SOP limits the definition of an eligible child and eligible person, for legal gender recognition purposes, to someone who is able to have their birth registered in New Zealand.

55. At the moment, asylum seekers, refugees and migrants who are here on temporary visas cannot legally change their name or access the Family Court process to obtain a Declaration as to Sex. Therefore, alternative options are required for them to obtain an official identity document with the correct name and gender marker. We support Rainbow Path’s submissions and its following three key recommendations.

Recommendation 4

56. Enable all trans, non-binary and intersex people in Aotearoa New Zealand to have access to an official document with their correct name and gender by:

- Ensuring permanent residents retain their right to change to their name and sex / gender marker, through an administrative process based on self-determination (self-identification) so that it is consistent with the changes the Bill is making for other trans and intersex people in Aotearoa.
- Issuing trans asylum seekers and Convention refugees on temporary visas with an official document with their correct name and gender e.g. a certificate of identity issued by the Department of Internal Affairs and/or Immigration NZ.
- Exploring options for migrants on temporary visas to be able to obtain an official document with their correct name and gender through a simple, administrative, self-declaration process.

The status of birth certificates as evidence of sex and gender

57. Section 33 of the current BDMRR Act reads:

“New information not to affect general law

Notwithstanding this Part, the sex of every person shall continue to be determined by reference to the general law of New Zealand.”

58. Clause 221 of the BDMRR Bill proposed that “the sex of every person must continue to be determined by reference to the general law of New Zealand”. This provision is now replaced by *new clause 80(2)* in the SOP which reads:

²² Section 27A of the Births, Deaths, Marriages and Relationships Registration Act 1995.

“Clarification of status of birth certificates as evidence of sex and gender

New clause 80(2) clarifies that “any individual, private sector agency, or public sector agency authorised or required to ascertain an individual’s sex or gender for a particular purpose may take into account matters other than the information in a person’s birth certificate in accordance with any other applicable legislation (including the Human Rights Act 1993) and the rules of the common law.”

59. The Cabinet paper outlining this proposal included confusing statements that leave some doubts about its intent, namely:

- “A birth certificate is not considered conclusive evidence of someone’s sex or gender and is not required to access women-only spaces or entitlements”²³ and
- “The legislation would provide clarity for organisations about not relying on birth certificates to determine a person’s access to women-only places or services. This provides assurance that there is little risk of information on birth certificates allowing men to access women-only places or services.”²⁴

60. The first statement, from the Appendix to the Cabinet paper, implies trans women are not required to show birth certificates to access women-only spaces or entitlements. Conversely the second statement, from the Cabinet paper itself, could be interpreted as misgendering a trans woman as a man and implying that someone who has changed their birth certificate from male to female should not be allowed to access women-only spaces.

61. It is imperative that there is clear signalling in this Bill that *new clause 80(2)* does not undermine existing legal protections for trans, non-binary and intersex people, including those provided under the Human Rights Act 1993. *New clause 80(2)* is very broad in scope and there is a risk that it is interpreted as a blanket right to ignore a trans person's birth certificate. Yet, the law, including sex exceptions in the Human Rights Act, does not provide a blanket right to discriminate against trans, non-binary or intersex people.

62. Counting Ourselves research findings illustrate the importance of clear legal protections, and the detrimental impact when people do not consider their rights will be protected under the law. The survey included two questions about trans and non-binary people’s perceptions of the level of legal protection against discrimination. The results are sobering.

²³ Appendix A of the Cabinet paper, 19 May 2021

²⁴ Minor and Technical policy decisions for the self-identification SOP, 19 May 2021

63. The first relevant Counting Ourselves question read:

“This question is to ask you about your understanding of New Zealand law. Do you think New Zealand law protects people against discrimination for being trans or non-binary?”

64. Only 1 in 6 participants said “Yes, I think we are all protected”. A majority of participants (62.9%) thought either none (25.9%) or only some (37.0%) of trans or non-binary people are legally protected against discrimination. One in five (20.5%) did not know.

Do you think New Zealand law protects people against discrimination for being trans or non-binary?

	No.	%
Yes, I think we are all protected	141	16.6
I think only some of us are protected	314	37.0
No, I do not think any trans or non-binary people are protected	220	25.9
I don't know	174	20.5
Total	849	100.0

65. The second question was about people’s confidence that the legal system would protect them if they were discriminated against because they are trans or non-binary. Only a small minority were very confident (5.1%) or completely confident (2.0%) they would be legally protected. More than half (51.3%) were not at all confident.

If you were discriminated against because you are trans or non-binary, how confident are you that the New Zealand legal system would protect you?

	No.	%
Not at all confident	434	51.3
Moderately confident	352	41.6
Very confident	43	5.1
Completely confident	17	2.0
Total	846	100.0

66. Clearly there is a huge gap in trans and non-binary people’s perception and confidence in current legal protections, suggesting that amendments to the prohibited grounds of discrimination in section 21 of the Human Rights Act are needed for clarity. In the words of one survey participant:

“I wish there was a law that clearly said what protections trans people are entitled to” (Trans man, adult)

67. Proposed amendments to the Human Rights Act would also benefit from being framed as “a clarification of the status quo rather than a fundamental change in the law”, as

they were in the Ministry of Justice’s recent consultation on its proposals against incitement of hatred and discrimination.²⁵

68. Those gaps in perceived legal protection identified through the Counting Ourselves research should also inform the development of related laws, including the Select Committee’s consideration of SOP 59.

69. There is no New Zealand statute that provides the legal definition of a person’s sex and the general law should be interpreted consistently with New Zealand’s domestic and international human rights obligations.²⁶ The importance of these human rights obligations should be signalled in the Select Committee’s Inquiry report.

70. This Bill is based on the premise of self-determination and self-identification. When someone positively asserts the right to define their gender by amending the sex details on their birth certificate, that document should be conclusive evidence of that person’s gender.

71. This is also in line with States’ obligations under Yogyakarta Principle 3 to:

“E. Ensure that changes to identity documents will be recognised in all contexts where the identification or disaggregation of persons by gender is required by law or policy”

Recommendation 5

72. That the Bill:

- Recognises existing legal protections for trans, non-binary and intersex people, including those provided under the Human Rights Act 1993 and
- Amends new clause 80(2) to provide that a person who has changed their nominated sex on their birth certificate must be treated as a person of the nominated sex for all legal purposes

Delayed commencement

73. This Bill’s passage through Parliament has been a long one. This Select Committee reported back on Allyson Hamblett’s petition over four years ago, recommending that the Government instruct officials to review s28 of the BDMRR Act “with a view to amending it to an approach predicated on self-identification”.

²⁵ Those proposals would change the wording of the ground of “sex” to include “sex characteristics or intersex status” and add a new ground of “gender including gender expression and gender identity”.

²⁶ New Zealand Human Rights Commission 2008 *To Be Who I Am: Report of the Inquiry into Discrimination Experienced by Transgender People*, Chapter 8.

74. It is concerning that the 12-month delayed commencement outlined in the proactively released policy briefings has already extended to 18 months in the SOP. It is important that the scope of the regulations being developed are tightly defined, and that they do not become attempts to undermine the Bill's stated intention. It may be helpful if the Bill's explanatory note is expanded to further emphasise the importance of trans, non-binary and intersex people being able to self-identity their gender on identity documents, and in being able to use those documents to participate in all aspects of their daily life.

Recommendation 6

75. Resource trans, non-binary and intersex organisations to participate in timely consultation on the development of regulations set out in *clause 147(1)(ba), (bb) and (bc)*, to ensure the Bill's provisions are implemented as soon as feasible.

Five-year statutory review

76. We welcome the proposed 5-year statutory review and suggest that is more clearly premised on the SOP's stated aim "to provide better support for the needs of transgender, non-binary, and intersex communities". This review should be informed by research about the impacts of the changes implemented through the Bill on trans, non-binary and intersex people's ability to amend their registered sex and/or to obtain official documentation reflecting their correct name and gender.

77. The research undertaken by the Department of Internal Affairs in relation to the Ministerial Working Group provides one recent example of a productive model to follow. It was a collaborative process informed by the knowledge of Working Group members, Department of Internal Affairs officials and other officials and experts approached to inform the Working Group's report. It is important that trans, non-binary and intersex organisations are resourced to participate in the co-design of the review process and the research underpinning it.

Recommendation 7

78. Resource trans, non-binary and intersex organisations to participate in the co-design of the 5-year review process and the research underpinning it.

Collated recommendations

Recommendation 1

Better protect the best interests of trans, non-binary and intersex children and young people by:

- Removing new clause 22B(1)(c), so that a 16 or 17 year old can make their own informed decision about amending their birth certificate
- Amending new clause 22C (1)(c), so that *either* a legal guardian *or* a suitably qualified third party may make the application on behalf of a child aged 15 or under, to mitigate the risks for those without support from a guardian, ensuring support is available for the child and their wider whānau through this process
- Ensuring that organisations supporting trans, non-binary and intersex young people and their whānau are resourced to be involved in the development of regulations defining suitably qualified third parties who may provide a letter of support for applications by children and young people under the age of 18 and
- If clauses 22B(1)(c) and 22C (1)(c) are retained, undertaking research to assess how requiring a guardian and/or qualified third party's support has affected trans, non-binary and intersex children and young people's ability to amend their birth certificate, including wider impacts on their lives.

Recommendation 2

Resource trans, non-binary and intersex organisations to facilitate the participation of a diverse range of voices in consultations about additional sex marker options for birth certificates.

Recommendation 3

Ensure that trans, non-binary and intersex people are not required to meet unnecessary additional requirements when making subsequent changes to their sex marker by:

- clarifying new clause 22B(1)(d) is limited to providing proof of identity and does not require any further evidence about one's gender and
- consulting trans and intersex led organisations and individuals on what, if any, additional regulations are developed, including by resourcing them to participate fully in those processes.

Recommendation 4

Enable all trans, non-binary and intersex people in Aotearoa New Zealand to have access to an official document with their correct name and gender by:

- Ensuring permanent residents retain their right to change to their name and sex / gender marker, through an administrative process based on self-determination (self-identification) so that it is consistent with the changes the Bill is making for other trans and intersex people in Aotearoa.
- Issuing trans asylum seekers and Convention refugees on temporary visas with an official document with their correct name and gender e.g. a certificate of identity issued by the Department of Internal Affairs and/or Immigration NZ.
- Exploring options for migrants on temporary visas to be able to obtain an official document with their correct name and gender through a simple, administrative, self-declaration process.

Recommendation 5

That the Bill:

- Recognises existing legal protections for trans, non-binary and intersex people, including those provided under the Human Rights Act 1993; and
- Amends new clause 80(2) to provide that a person who has changed their nominated sex on their birth certificate must be treated as a person of the nominated sex for all legal purposes

Recommendation 6

Resource trans, non-binary and intersex organisations to participate in timely consultation on the development of regulations set out in *clause 147(1)(ba), (bb) and (bc)*, to ensure the Bill's provisions are implemented as soon as feasible.

Recommendation 7

Resource trans, non-binary and intersex organisations to participate in the co-design of the 5-year review process and the research underpinning it.