

# Regulatory Impact Statement: Introducing a self-identification process to recognise gender on birth certificates

## Coversheet

Purpose	
Decision Sought:	<i>Agreement to update the Births, Deaths, Marriages, and Relationships Registration Act 1995 to introduce a self-identification process to recognise a person's gender on their birth certificate.</i>
Advising Agencies:	<i>Department of Internal Affairs</i>
Proposing Ministers:	<i>Minister of Internal Affairs</i>
Date:	<i>3 May 2021</i>
Problem Definition	
<p>The Family Court process that enables a person to amend the sex shown on their birth certificate is not inclusive and fails to support people's autonomy over how their gender is recognised. Situations where presenting a birth certificate is required can be distressing for transgender<sup>1</sup> and intersex people where the sex shown is different to their gender. This impacts their wellbeing, leading to feelings of stress, anxiety and experiences of discrimination. The Family Court process can magnify this and is often considered inaccessible, time-consuming and disempowering.</p>	
Executive Summary	
<h3>The proposal summary</h3> <p>This regulatory impact statement (RIS) proposes a self-identification process to enable a person to have their gender recognised on their birth certificate. Under a self-identification process a person would apply to the Registrar-General of Births, Deaths and Marriages to amend their registered sex to reflect their gender. As part of this the person would complete a statutory declaration where they self-identify their gender.</p> <p>Children and young people under 18 years of age would also be able to access a self-identification process, however, the process would be slightly altered. For children and young people 15 years and under, applications would require guardian consent <i>and</i> a letter of support from a third party. In recognition of their generally higher level of cognitive development, 16 and 17 year olds would only need to provide either the</p>	

<sup>1</sup> The term transgender is used in this RIS as an umbrella term to describe people whose gender is different to their sex at birth. It encompasses transgender people who identify as male or female, those who are non-binary, and those who use culturally specific terms for gender diverse people.

consent of their guardian or a letter of support from a third party. The third party would be assessing if the child or young person understands and that the decision is based on their own perceptions of their gender.

### **Why government intervention is required**

This RIS proposes that the self-identification process replaces the existing process under the Births, Deaths, Marriages, and Relationships Registration Act 1995 (the BDMRR Act). The existing process is not inclusive and fails to support people's autonomy over how their gender is recognised. It medicalises a deeply personal expression of self-identity by requiring applicants to provide evidence of medical treatment. This requirement excludes those who cannot or choose not to undertake medical treatment. This evidence is then assessed by a Family Court judge who determines if the amendment can be made. The Family Court process is perceived to be costly, intimidating and difficult to navigate, making it inaccessible for many people. It also excludes those who identify outside of the binary options of male or female or whose gender changes over time. Government intervention is required as a legislative amendment is needed to resolve the above issues.

### **The other option considered**

An alternative option to a self-identification process or the existing process (status quo) is assessed in this RIS. This would require a person to provide a statutory declaration and medical evidence they have undergone treatment to physically conform with their gender. A self-identification process is preferred ahead of this option and status quo.

### **The impact of the preferred option - a self-identification process**

A self-identification process will provide for a more accessible and inclusive process that enables birth certificates to reflect a person's gender. The change will:

- align better with human rights discourse and society's understanding of sex and gender, including by de-medicalising the experience of being transgender or intersex;
- better enable transgender and intersex New Zealanders to access services with less risk of being 'outed' or experiencing discrimination;
- support the validation of transgender and intersex people, contributing to a greater sense of social belonging and improving their wellbeing;
- provide greater accessibility to a birth certificate that reflects a person's gender due to lower costs and reduced administration involved in an application; and

- create a more consistent approach to how gender is determined and changed on official documentation. Self-identification is already available for amending gender on New Zealand passports and on a driver licence record.<sup>2</sup>

A self-identification process to allow for a person's gender to be reflected on their birth certificate does not change the underlying requirements to register sex at birth. It also does not change the existing intent of the BDMRR Act that birth certificates should not provide conclusive evidence of a person's sex or gender.

A self-identification process may have a low or perceived social impact on women's rights and protections. For example, some believe a self-identification process undermines sex-based protections in society and will create opportunities for 'predatory' men to abuse access to women-only spaces (eg changing rooms and refuges) and allow men to access women-only resources and services (eg single-sex schools or sports teams). We have found no evidence of this occurring either in New Zealand (gender is already self-identified on passports without evidence of this being abused) or internationally in countries that have adopted a self-identification process. We also consider the risk, if it exists, is low as birth certificates are not considered conclusive evidence of someone's sex or gender and are not required to access women-only spaces.

#### What stakeholders think

There are many interested stakeholders who have diverging views on the preferred option. Introducing a self-identification process will be generally welcomed by transgender and intersex New Zealanders and the organisations that support them. These views are evidenced in recent consultation by Statistics New Zealand (StatsNZ), the Human Rights Commission and the Transgender Health Research Lab at the University of Waikato.

Groups opposed to self-identification will be critical of the preferred option. These groups will raise the lack of opportunity for them to comment during the policy development process and the unintended consequences of the change on women's rights and protections. The views of these groups are evidenced in the responses to the Bill when it was in Select Committee and in recent public events and letters to ministers.

#### Limitations or Constraints on Analysis

##### Limitations on consultation and assumptions about public views

The Minister of Internal Affairs has directed that the existing Births, Deaths, Marriages and Relationships Registration Bill (the Bill) progress this year with a self-identification process to recognise gender on birth certificates. This timeframe has meant the

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<sup>2</sup> While gender is not displayed on a driver licence, this information can be changed on the driver licence record via a self-identification process.

Department's ability to undertake consultation on introducing a self-identification process or how this may best be given effect to has been limited.

While a self-identification process was not in the Bill as introduced, 51 of the 64 submissions received by the Select Committee commented on self-identification. Twenty-two submissions opposed self-identification and were in favour of retaining the Family Court process. Twenty-nine were in favour, and many of those expressed support for a third sex marker to recognise non-binary genders. These submissions informed the development of the self-identification provisions recommended by the Select Committee.

Since 2018, there has been considerable public debate on self-identification through public events, published material and letters to Ministers. This has informed our understanding of public views on this matter. Our analysis has also been informed by recent consultation and research, particularly:

- StatsNZ's review of its statistical standards for sex and gender;
- *Counting Ourselves*, a 2019 survey<sup>3</sup> of 1,178 transgender people in New Zealand; and
- Human Rights Commission's 2020 report, *PRISM: Human Rights issues relating to Sexual Orientation, Gender Identity and Expression, and Sex Characteristics in Aotearoa New Zealand*.<sup>4</sup>

We have assumed that broad public views have been canvassed from the above and that there are unlikely to be new concerns or substantive matters raised for or against self-identification. We have also assumed that the Select Committee considered and reflected the public interest in recommending a self-identification process, which would generally be supported by New Zealanders. Despite this, it would have been beneficial to understand specific population group's perspectives on self-identification better, such as young people and Māori, Pacific and ethnic communities.

The Minister of Internal Affairs intends to refer the self-identification process back to Select Committee so that the public has an opportunity to comment. The Department recognises that this does not mitigate the consultation expectations during policy development. Some policy changes will be made through regulations rather than the Bill, which will allow for more time for consultation on specific issues. Making some changes through regulations works to future proof the legislation as they can be more easily updated.

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<sup>3</sup> Counting Ourselves. <https://countingourselves.nz/index.php/community-report/>

<sup>4</sup> Human Rights Commission. PRISM: Human Rights issues relating to Sexual Orientation, Gender Identity and Expression, and Sex Characteristics (SOGIESC) in Aotearoa New Zealand June (2020). [https://www.hrc.co.nz/files/9215/9253/7296/HRC\\_PRISM\\_SOGIESC\\_Report\\_June\\_2020\\_FINAL.pdf](https://www.hrc.co.nz/files/9215/9253/7296/HRC_PRISM_SOGIESC_Report_June_2020_FINAL.pdf)

### Range of options considered

The Department provided the Minister with a range of options for progressing the Bill. The Minister decided to progress the Bill with a self-identification process. This has constrained our consideration of alternative options to self-identification and wider changes, such as whether a separate and new marker be developed for gender or the removal of sex or gender information from birth certificates altogether.

### Scoping of the problem

The debate on self-identification of gender often covers issues broader in scope than the BDMRR Act. It raises questions about when a person's sex or gender needs to be determined and how this should be determined in different circumstances (eg when accessing single sex services such as bathrooms). These questions are broader than birth certificates, which are not intended as conclusive evidence of a person's sex or gender.<sup>5</sup>

### Responsible Manager(s) (completed by relevant manager)

Suzanne Doig  
 General Manager Policy Group  
 Department of Internal Affairs

Signature: 

Date: 3/5/2021

### Quality Assurance (completed by QA panel)

Reviewing Agency/Agencies: Department of Internal Affairs

Panel Assessment & Comment: The Department of Internal Affairs' Regulatory Impact Analysis Panel considers that the information and analysis summarised in the RIS partially meets the quality assurance criteria.

The RIS clearly explains complex concepts using plain English and is concise relative to the nature of the issues discussed. It convincingly describes the issues and sets out the full range of options. Assumptions, constraints and uncertainties are clearly stated and it provides balanced analysis. Complete information is provided setting out likely costs, where they fall, risks and mitigation measures. Time constrains owing to ministerial direction has meant officials have been unable to undertake full consultation on the preferred option, however the RIS addresses this deficiency to some extent by drawing on available research

<sup>5</sup> This is the meaning of section 33 of the BDMRR Act and clause 22I of the Bill, which state that a person's sex should be determined by the "general law of New Zealand."

as well as previous submissions to the Select Committee on this issue. The RIS identifies a lack of full consultation as a deficiency and aims to address it as part of further consultation when developing regulations. Within this limitation and broader context the RIS clearly articulates the risks and trade-offs involved.

## Section 1: Outlining the problem

### Context/Background Information

#### Sex and gender are different, and society is changing to recognise gender diversity and fluidity

1. Gender refers to a person's social and personal identity as male, female, or another gender, such as non-binary. This is different to sex, which refers to a person's physiological features that characterise them as male, female or intersex. For most people, their sex matches their gender but for some, it does not, or their gender may change over time.
2. A person's gender is a deeply personal expression of self, forming a central part of how a person identifies and perceives themselves. New Zealand society is changing to recognise that a person's gender can differ from their sex and that it can change over time, with clear shifts in attitudes to transgender people being shown.<sup>6</sup> However, there appears to be a struggle to find consensus on issues related to transgender people, including whether it should be easier for them to have their gender recognised on official documents.
3. Despite this, changes in social attitudes are being reflected through official processes. For example, in July 2015 StatsNZ introduced a 'gender diverse' category as part of its statistical standard for gender identity; people's gender can be recognised on passports and on the driver licence database via a self-identification process; and internationally at least 15 countries have introduced a self-identification process to recognise gender since 2012.<sup>7</sup>

#### The status quo: birth certificates include a person's sex and this information can be changed

4. Birth certificates are required to include a person's sex.<sup>8</sup> A person may want to change this information where their gender does not align with the sex recorded. Since 1995, people have been able to change the sex recorded on their birth certificates through a Family Court process. While this process is about amending sex information, its

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<sup>6</sup> The National Council for Women Gender Attitudes study, conducted in 2019, showed that younger people have a much stronger understanding of the terms 'transgender, non-binary and cis-gender' than older people. The survey also indicated higher levels of acceptance than the equivalent 2017 survey for transgender people filling important roles such as being a doctor, being the prime minister, or being parents (generally being above 50 per cent support).

<sup>7</sup> This includes the Australian states of Victoria and Tasmania.

<sup>8</sup> As prescribed in the Births, Deaths, Marriages, and Relationships Registration (Prescribed Information) Regulations 1995

existence recognises that a person's gender can be different to their sex. While it conflates sex with gender it is a mechanism for people to have their gender recognised.

5. Under the Family Court process adults must satisfy the court that they are living as a person of their "nominated sex" and will maintain this gender. People can choose between the binary sex markers of female or male. Applicants must provide evidence that they have undergone medical treatment to physically conform with the sex they want recorded. The medical evidence is assessed by a Family Court judge who decides whether the application should be supported. Depending on the judge, the medical treatment required could be widely interpreted to be only hormone therapy through to full gender confirmation surgery.
6. People under 18 years can also change the sex on their birth certificates. Their guardian must apply to the Family Court on their behalf. The Court then determines if the child's birth certificate can be changed and if it is in the best interests of the child to be raised "as a person of the sex specified in the application". The guardian must satisfy the court that they intend to bring the child up as a person of the "nominated sex". They must also provide evidence the child has undergone or will undergo medical treatment to enable them to assume their nominated sex.

#### **Select Committee's recommended changes to the Births, Deaths, Marriages, and Relationships Registration Bill to introduce self-identification**

7. The Bill was introduced shortly before the 2017 election. It aimed to improve the way people can digitally access information held on the registers of births, deaths, marriages and relationships and make other enhancements.
8. In 2018, the Select Committee considering the Bill recommended new provisions to replace the Family Court process for amending sex on birth certificates. Instead, people would complete a statutory declaration to have their gender recognised on their birth certificate – a self-identification process.
9. Select Committee made this recommendation in response to a petition that was heard separately from the Bill. Supporters of the petition submitted that the Family Court process is inaccessible for many and proposed a self-identification process. Select Committee also considered submissions it received on the Bill. As mentioned above, while a self-identification process was not in the Bill as introduced, 51 of the 64 submissions received commented on self-identification. The new self-identification provisions were included in the Bill as reported back by Select Committee.
10. The previous Minister of Internal Affairs deferred the Bill in February 2019 because of lack of consultation on the self-identification provisions. The Minister of Internal Affairs now wishes to progress the Bill with a self-identification process.

#### **Some operational improvements will be made to the current process to amend sex on birth certificates...**

11. When the previous Minister of Internal Affairs deferred the Bill, they announced work to make practical improvements to the Family Court process. The Working Group for Reducing Barriers to Changing Registered Sex (the Working Group) was appointed to advise on non-legislative improvements. The Working Group made a range of recommendations covering better guidance and support to help people understand and

access the process. The Government has responded to these recommendations and work is underway to implement operational improvements.<sup>9</sup>

**...but operational improvements will not resolve the problem**

12. The Working Group made it clear that it does not consider its proposed changes to be an alternative to legislative reform. This is because operational changes cannot change the medical treatment requirement or make the process accessible to those unable to access medical treatment or who are non-binary and would not address the legal costs associated with a court process.

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<sup>9</sup> <https://www.dia.govt.nz/BDMReview-Working-Group-for-reducing-barriers-to-changing-registered-sex#Report>



## What is the policy problem or opportunity?

### The Family Court process to amend registered sex in the BDMRR Act needs reform

14. The Family Court process to amend registered sex is not inclusive and fails to support people's autonomy over how their gender is recognised.

*It medicalises a deeply personal expression of self-identity and is inaccessible*

15. The process medicalises a deeply personal expression of self-identity and is out of step with gender being about how a person perceives themselves. The process requires applicants to provide evidence they have undertaken medical treatment to physically conform with the sex they want recorded. This requirement excludes those who cannot or choose not to undertake medical treatment. For children and young people, the requirement could be seen to encourage medical treatment at a young age. Issues with the medical evidence requirement are compounded by issues with access to publicly available gender affirming care,<sup>10</sup> and the cost of private gender affirming care.
16. The Family Court process is perceived to be costly, intimidating and difficult to navigate, making it inaccessible for many people.<sup>11</sup> *Counting Ourselves*, a 2019 survey of transgender and non-binary people in New Zealand, found that 83 per cent of respondents "did not have the correct gender marker on their birth certificate." This is also reflected by the low number of applications to the Family Court to amend registered sex.

*It excludes people who do not identify as male or female or whose gender changes*

17. Some people are excluded from the Family Court process due to the lack of non-binary markers. The existing options of male or female exclude people who are non-binary or a culturally specific gender, such as takatāpui (Māori), fa'afafine (Samoan), or fakaleiti (Tongan). The *Counting Ourselves* survey found the primary reason for having the incorrect gender identity on birth certificates was because existing options did not fit the respondent's gender.<sup>12</sup>
18. Others may be excluded from the Family Court process as the requirements lend themselves to the amendment being permanent. While there is no limit on the number of times a person can apply, the court must be satisfied a person intends to *maintain* their nominated sex. This fails to recognise that gender can be fluid and excludes people whose gender may change at different stages of life.

*It is out of step with international human rights discourse*

19. The Family Court process is out of step with international human rights discourse for transgender and intersex people. While not legally binding, the Yogyakarta Principles<sup>13</sup> recommend that where sex and gender information is officially registered it is based on

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<sup>10</sup> In its 2020 'PRISM' report, the Human Rights Commission noted there are "many delays and long waitlists for interventions, as well as demand for procedures not provided for by the public system."

<sup>11</sup> Further detail on the barriers within the Family Court process and issues with the medical evidence requirement are set out in the report of the Working Group for Reducing Barriers to Changing Registered Sex.

<sup>12</sup> This reason was more likely reported by non-binary respondents.

<sup>13</sup> The Yogyakarta Principles are a set of non-binding international principles on sexual orientation and gender identity developed by human rights experts.

an accessible self-identification process with no eligibility criteria such as medical treatment and that a multiplicity of gender marker options are available.<sup>14</sup>

20. In New Zealand the Human Rights Commission recommended that the process for people to update the nominated sex on a birth record is based on a rights-based model of self-determination. It also recommended that people can nominate a non-binary gender.<sup>15</sup>

#### *An accessible process that works for transgender and intersex New Zealanders is important*

21. Birth certificates are not intended to provide conclusive evidence of someone's identity. However, they are often used by people to prove they are a citizen with the right to work and study in New Zealand and are listed as an acceptable form of identification in government guidance.<sup>16</sup> There are many processes where birth certificates can be requested, including setting up a bank account or enrolling a child in school. While other documents can be used in many of the same processes (such as a passport or driver licence), birth certificates are often more practical as they are low cost and do not expire. Everyone born in New Zealand can access their birth certificate, including children who have limited options for documentation that enable them to prove their identity.
22. Any situation where a birth certificate is requested can be distressing for transgender and intersex people if the sex recorded does not align with their gender. It can place an extra administrative burden on transgender and intersex people to prove who they are. It creates a risk of people being 'outed' as transgender or intersex or referred to as the wrong gender, leading to feelings of stress and anxiety or experiences of discrimination, such as being denied access to services or benefits, and verbal harassment.<sup>17</sup> These experiences impact the wellbeing of transgender and intersex people, which contributes to higher rates of psychological distress, harmful substance use, and suicidal ideation and behaviour.<sup>18</sup>
23. Being able to have their gender recognised on a birth certificate is likely to have symbolic importance to transgender and intersex New Zealanders. It shows that the government recognises who they are, supporting their sense of belonging and wider social cohesion.

#### **There are highly interested stakeholders with diverging views on amending sex on birth certificates**

##### *Support for a self-identification process*

24. In support of changing to a self-identification process are the transgender and intersex New Zealanders who are affected by this issue and the organisations who support

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<sup>14</sup> Yogyakarta Principle 31 recommends that if sex and gender information is registered, this is based on an accessible self-identification process with no eligibility criteria such as medical treatment.

<sup>15</sup> See the Human Rights Commission's PRISM Report.

<sup>16</sup> For example, the anti-money laundering and countering financing of terrorism identity verification code of practice.


<sup>17</sup> *Counting Ourselves* recorded respondents' experiences from not having an identity document that matched their appearance. The most common negative consequences were being denied services and being verbally harassed.

<sup>18</sup> *Counting Ourselves* found that 71 per cent of participants had experienced high or very high psychological distress and 56 per cent of participants had seriously thought about committing suicide in the last 12 months.

them. These stakeholders' support is demonstrated through public commentary and campaigns, such as Gender Minorities Aotearoa's "YES to BDMRR" campaign in support of the self-identification provisions.

25. Stakeholder support was also demonstrated through submissions received on the Bill. Of the 51 submissions that raised the issue of self-identification, 29 were in support. In addition, a further 468 form submissions promoted by the Green Party were received in support. The Human Rights Commission was one of the submitters in support and continues to express support for having a self-identification process.<sup>19</sup>
26. Some transgender and intersex people may oppose having sex or gender shown on birth certificates. This is while human rights discourse recommends a self-identification process where sex or gender information is registered, it firstly recommends that official identity documents exclude the registration of sex and gender. As outlined above, wider consideration of this as an option is out of scope given previous decisions of the Minister.

#### *Opposition to a self-identification process*

27. There are groups and individuals who oppose changing from the Family Court process to a self-identification model. They have demonstrated opposition through public commentary and campaigns, and submissions on the Bill. Of the 51 submissions that raised self-identification, 22 were in opposition.
28. Groups opposed to self-identification raise concerns that the process:
  - replaces a robust and shared biological definition of sex with a socially constructed notion based on gender; and
  - undermines sex-based protections in society creating opportunities for 'predatory' men to abuse access to women-only spaces (eg changing rooms and women's refuges) and for men to access women-only resources and services (eg single-sex schools or sports teams).
29. In addition, the above concerns often go broader than the scope of the Bill as birth certificates are not the determining factor in deciding access to women-only spaces or services. A birth certificate is not considered conclusive evidence of someone's sex or gender. It is not required to access women-only spaces, such as changing rooms or refuges. Enabling a self-identification process will not directly affect access to women-only spaces.
30. There is only one instance in legislation where birth certificates determine someone's sex or gender. The Corrections Regulations 2005 say that where a birth certificate is supplied a person should be placed in a prison that aligns with the sex on their birth certificate. If a birth certificate is not provided, a review can be initiated where considerations include a person's gender, safety and wellbeing, and wider considerations. 9(2)(f)(iv)  

31. Groups opposed to self-identification are also critical of the policy process in developing the self-identification provisions, particularly the level of public consultation. For example, the self-identification provisions were added to the Bill after public submissions closed, meaning people were unable to comment on the process recommended by the Select Committee or on self-identification generally. Groups

confidentiality  
of advice  
tendered by  
officials

<sup>19</sup> <https://www.hrc.co.nz/news/birth-certificate-changes-welcomed-takatapui-trans-and-non-binary-people/>

opposed to self-identification will be disappointed in any progression of the Bill without wider public conversation on self-identification of gender.

### **Problems with the current process may disproportionately impact specific population groups**

32. Only recognising binary genders may have had a negative impact specific to Māori. Research suggests that there was gender diversity within te ao Māori that has diminished with colonisation. This has negatively affected the acceptance and participation of gender diverse Māori in their own communities.
33. As noted above there are also specific impacts for children and young people. Birth certificates may be one of the only forms of identification available to children and young people and are used to enrol in education or apply for jobs. Other forms of identification are more expensive (eg passports) or age restrictive (eg driver licences). As children and young people more frequently rely on birth certificates, they will face more daily stressors when the sex recorded does not align with their gender, such as 'outing', invasive questions, discrimination or bullying.

### **What objectives are you seeking in relation to this policy problem or opportunity?**

34. The objectives of improving the process to amend sex on birth certificates are to:
  - provide a process that better reflects society's changing views on gender diversity and gender fluidity;
  - improve people's control over how their gender is recognised, a deeply personal part of how a person understands and perceives themselves;
  - improve people's sense of social belonging and their general wellbeing; and
  - uphold public trust and confidence in how birth register information is used and maintained.

## Section 2: Option identification and impact analysis

### What criteria will be used to evaluate options against the status quo?

35. The criteria used to assess the options for improving the process to amend sex on birth certificates are:
- **Inclusivity:** The process is inclusive of all New Zealanders and promotes wider social inclusion and cohesion. It supports people's autonomy over how their gender is recognised, improving their sense of belonging and ability to access services without stress or discrimination.
  - **Flexibility:** The process can readily adjust with New Zealanders' evolving views on gender.
  - **Accessibility:** The process is easy to understand and access.
  - **Integrity:** The integrity of the information in the birth register is accurate and protections are in place to prevent the process being used for unlawful reasons (eg identity fraud).
  - **Cost:** Minimises costs and time-consuming steps for individuals and government.
36. The inclusivity and accessibility criteria are different. Accessibility is about removing barriers to the process that exist for those who are technically eligible (eg, cost and time barriers). Inclusivity is about not excluding specific groups from the process (eg non-binary people, or people who cannot undergo medical treatment) and supporting wider social cohesion.
37. To some extent the integrity criteria competes with the other criteria. This is because:
- creating requirements to maintain the integrity of a process could negatively impact its accessibility and inclusivity, including a person's control over how their gender is recognised; and
  - the integrity criterion can increase cost and negatively impact flexibility.
38. In assessing the options against the criteria, the integrity criterion has been considered on balance. This is in recognition that strong measures to uphold integrity would result in a process that is not suitable for the transgender and intersex New Zealanders it is intended to assist. The cost criterion has also been considered on balance in that ensuring integrity and flexibility may give rise to additional costs.

### What scope are you considering options within?

39. All options developed are mutually exclusive. Other countries' models for changing gender on official documentation have informed our analysis. A range of countries have adopted a self-identification process, including Argentina, Malta, Canada (Ontario), Belgium, Australia (Tasmania and Victoria), Ireland and Malta. Due to time constraints to develop this policy and as the self-identification models have only recently been adopted by many jurisdictions, we have not thoroughly considered overseas experiences since they have changed to a self-identification model. This has been influenced by the jurisdictions closest to New Zealand only introducing a self-identification model in the last few years (eg Tasmania in 2019 and Victoria in 2020).
40. In February 2021, the Minister of Internal Affairs directed the Department to progress the Bill with a self-identification process to recognise gender on birth certificates. This

direction, in combination with time constraints, has affected our ability to develop and consider alternative options to a self-identification process.

#### Options ruled out...

41. The Minister's direction to progress the Bill with a self-identification process has excluded from consideration options that:
  - are wider in scope than a self-identification process;
  - are regulatory and non-regulatory improvements to enhance the existing process (as outlined in section one, some operational improvements have already been commissioned, however the Working Group has made it clear that these cannot make the needed improvements to the process);
  - create a separate and new gender marker to be shown on birth certificates; and
  - remove sex or gender information from birth certificates altogether.
42. Considering how sex is registered at birth<sup>20</sup> is also out of scope. The problem relates to the process for people to have their gender recognised on their birth certificates. It is not possible to know gender at birth and therefore the existing birth registration process based on sex will remain unchanged and was not considered.
43. We did consider retaining the Family Court process while not requiring any medical evidence to be produced. This would have operated as an application to the Family Court based on self-identification. The Family Court could then grant a declaration that the Registrar-General update the sex on the applicant's birth certificate. This option was excluded as there was no substantive benefit to have the Family Court check the application versus the Registrar-General without consideration of medical evidence. It would also fail to remove the issues identified with a Court process around time, cost and access.

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<sup>20</sup> The sex is recorded by a health professional based on an assessment of primary sex characteristics, namely the appearance of the external genitalia and is recorded as either female or male. Babies who have a variation of sex characteristics can be registered as indeterminate. Indeterminate is most commonly used for babies who were stillborn or die soon after birth where their sex could not be determined. It is not intended to be a non-binary identity option.

## Describe and analyse the options

44. The options considered include:

- Option One – Status quo: Family Court process with evidence of medical treatment;
- Option Two – Statutory declaration process with evidence of medical treatment; and
- Option Three – Self-identification process: Statutory declaration without evidence of medical treatment (**Preferred Option**).

### Option One – Status quo: Family Court process with evidence of medical treatment

#### Key features

45. Under the status quo the Family Court process described in section one would continue with many of the operational improvements recommended by the Working Group implemented. The operational improvements would result in better guidance and support to help people understand and access the process. However, the underlying process would not be changed. This includes an intimidating court process, the medical evidence requirement, and the binary selection of sex markers.

#### Analysis

46. This option does not support New Zealanders autonomy over how their gender is recognised. The decision is instead that of a Family Court judge, which is influenced by health professionals through the medical evidence provided to the Court. This removes a person's autonomy over a deeply personal issue.
47. The court process and medical evidence requirement mean the process is inaccessible to many transgender and intersex people. The medical evidence can be difficult, time consuming and costly to obtain. Despite planned changes<sup>21</sup> in response to the Working Group's report to make the process easier to navigate, it is likely these barriers will remain, with some people continuing to see the process as intimidating and disempowering.
48. The process is also not inclusive of all New Zealanders. The medical evidence requirement excludes those who cannot undergo gender affirming care for medical reasons or because they are unwilling to do so. The binary options exclude those who do not identify as exclusively male or female. The requirements still lend themselves to a person making a permanent change excluding those whose gender may change over time.
49. The lack of autonomy, inclusivity and accessibility of the process will have negative impacts on a person's social belonging and wellbeing. This is because having the incorrect gender on a birth certificate can mean people experience stress or even discrimination when accessing services.
50. The inaccessibility and requirements of the court process mean it is unlikely that people would use it for unlawful reasons or unless they are confident and committed to their

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<sup>21</sup> The Working Group made 38 recommendations and the Government will undertake work in response to 23 recommendations including (but not exclusive to), developing further guidance and material on the Family Court process, establishing a face-to-face and call centre service to guide people through the Family Court process, and developing draft guidance about trans-inclusive and affirming language and behaviour for the Family Court's internal resources for staff.

gender. However, these benefits are at the expense of a process that meets the needs of the transgender and intersex New Zealanders it is intended for.

#### *Key features – how the Family Court process applies to children and young people*

51. As described in section one, guardians must apply on behalf of a child or young person who is under 18 years of age. The guardian must satisfy the court that they intend to bring the child up as a person of the “nominated sex”. They must also provide evidence the child has undergone or will undergo medical treatment to enable them to assume their “nominated sex”.

#### *Analysis – how the Family Court process applies to children and young people*

52. The status quo enables children and young people to amend their registered sex on their birth certificate. However, the court process and the requirement for medical evidence remains a barrier.
53. This option does not fully support children and young people’s autonomy over how their gender is recognised. The application is submitted by the guardian and the decision is made by a Family Court judge, which is influenced by health professionals through the medical evidence requirement. The process does not directly require evidence from the child or young person to demonstrate that they understand the decision and it is based on their own perception of their gender.
54. The court process excludes young people whose guardians are not willing to support them through a court process, which can result in children and young people not having their gender officially recognised. This can cause problems for children and young people’s inclusion in society when presenting a birth certificate that does not match their gender.
55. Applying a single process to under 18-year-olds fails to recognise common views that older adolescents generally have a higher level of maturity and understanding. It also fails to align with other legislation that recognises older adolescents’ ability to make decisions. For example, 16 is the age at which you can apply for a learner driver licence, and consent to general medical procedures. Treating everyone under 18-years-old the same could place barriers on older adolescents who understand the implications of the application. This is particularly true where the young person’s guardian is not supportive of their gender and would refuse consent.

#### *What stakeholders might think*

56. Transgender and intersex New Zealanders and the organisations who support them will be critical and disappointed should a Family Court process remain. Conversely, groups opposed to self-identification would be supportive of no change.

### **Option Two – Statutory declaration process with evidence of medical treatment**

#### *Key features*

57. Under this option the Family Court process would be replaced with an application to the Registrar-General. This process would require a person to provide a statutory declaration and medical evidence that they have undergone treatment to physically conform with their gender. The medical evidence would be provided via a report from a health professional. The report would detail the medical treatment undergone and be accompanied by a letter of support from the health professional.
58. On receiving the statutory declaration and medical evidence, it would then be up to the Registrar-General to decide whether the individual’s birth certificate could be updated



to reflect their gender. Under this option a person could choose between the binary options of male and female and would only be able to make one application in their lifetime unless they wanted to revert to their sex at birth.

#### *Analysis*

59. This option only partly supports New Zealanders autonomy over how their gender is recognised. The removal of the court process means that the final decision is no longer that of a judge but retaining the need for medical evidence means health professionals will continue to influence the outcome of an individual's application, limiting the applicant's control over a deeply personal issue.
60. The option is more accessible than the status quo as it will no longer involve a time consuming and costly court process. However, the medical evidence requirement will still present a barrier as:
  - medical treatment can be difficult to obtain, is costly and can take time;
  - it excludes those who cannot undergo gender affirming care for a medical reason or because they are unwilling to do so;
  - it "medicalises" the process by implying that physical conformation is necessary for gender recognition; and
  - it could have negative privacy implications as people need to share sensitive medical information.
61. Like the status quo, this process is not inclusive of non-binary genders or people whose gender may change over time.
62. This option provides a high level of integrity. The medical evidence requirement and letter of support from a health professional practically limit the likelihood of fraudulent applications. The statutory declaration requirement also acts to provide integrity. Statutory declarations are already included in the BDMRR Act as one way a person's name change information can be verified. Under this process applicants will need to verify that they intend to live as their chosen gender, want that gender to appear on their birth certificate and understand the consequences of that decision. False declarations are an offence under both the Crimes Act 1961 and the BDMRR Act, punishable by a term of imprisonment. As such, there are repercussions for changing gender information where a person is not genuine or changes their gender for unlawful reasons.

#### *Key features – how option two applies to children and young people*

63. As with option one, the process will be the same for all children and young people aged 18 years and under. The guardian will need to apply on the child or young person's behalf, completing the statutory declaration and providing evidence of medical treatment.

#### *Analysis – how option two applies to children and young people*

64. As with option one, the process enables children and young people to amend their registered sex on their birth certificate. However, the requirement for medical evidence remains a barrier.
65. This option does not fully support children and young people's autonomy over how their gender is recognised. The application is submitted by the guardian and is influenced by health professionals through the medical evidence requirement. Like option one, the

process does not directly require evidence from the child or young person to demonstrate that they understand the decision and it is based on their own perception of their gender.

66. The medical evidence requirement excludes young people whose guardians are not willing or able to seek medical treatment for their child, which could result in children and young people not having their gender officially recognised. This can cause problems for children and young people's inclusion in society when presenting a birth certificate that does not match their gender.
67. Like option one, applying a single process to under 18-year-olds fails to recognise common views that older adolescents generally have a higher level of cognitive understanding. It could place barriers on older adolescents who understand the implications of the application, for example, where the young person's guardian is not supportive of their gender and refuses consent.
68. A single process is considered necessary under this option because the requirement to provide evidence of medical treatment means the consequences of an application are more significant. For example, medical treatment could result in potentially irreversible physical changes to support an application. Therefore, older adolescents may still need a guardian's support to make the decision. In comparison, the self-identification process described in option three (below) requires no medical treatment.

#### *What stakeholders might think*

69. Transgender and intersex New Zealanders and the organisations that support them will be still be critical and disappointed should this be the new process because it "medicalises" gender and does not fully respect a person's autonomy to determine how their gender is recognised.
70. However, groups opposed to self-identification are also unlikely to be supportive of this option as it would be perceived as a less stringent process without the Family Court and they may reiterate concerns about its impact on protections for women and women's rights.

### **Option Three – Self-identification process – statutory declaration without evidence of medical treatment (Preferred option)**

#### *Key features*

71. Like option two, this option would require a statutory declaration to be provided to the Registrar-General. However, an applicant would not need to provide supporting medical evidence.
72. Under this option a person can amend their registered sex multiple times. However, where a person applies more than once they will have to meet additional requirements to ensure the application is genuine. These additional requirements will be prescribed in regulations. Under this option a person would be able to select markers outside the binary options of male and female. A range of non-binary markers will be prescribed in regulations. A regulation making power to enable these regulations will be included in the Bill.

#### *Analysis*

73. This option best supports a person's autonomy over how their gender is recognised on their birth certificate. While a person will need to make a statutory declaration in front of a person authorised to receive it, the individual is the one who makes the

determination, it is not dependent on another party's assurance around how they identify themselves.

74. Accessibility would be improved as it is not dependant on a lengthy, costly and difficult to navigate court process. There is no medical treatment requirement, so people are not impeded by the cost of, or lack of access to, gender affirming care.
75. The process is inclusive of all people, including those who cannot or do not wish to receive medical treatment, whose gender may change over time and who identify as non-binary genders. This supports a person's wider social inclusion and reduces transgender and intersex people's experiences of stress, or discrimination, when accessing services. The inclusion of a range of non-binary markers is a critical component of introducing self-identification and would bring the process in line with the human rights discourse that recommends a multiplicity of gender markers.
76. Prescribing a range of non-binary markers in regulations will also be inclusive as it allows for consultation to be undertaken on the number and terminology of markers. This will enable the Department to gauge transgender and intersex perspectives and the perspectives of specific population groups, such as young people and Māori, Pacific and ethnic communities. Setting the markers in regulation also allows for more flexibility and will future-proof the legislation. Gender theory and terminology evolves rapidly, and regulations can be more easily reviewed and updated than primary legislation to ensure they meet the needs of transgender and intersex people.
77. Like option two, the statutory declaration provides a level of integrity as it ensures the applicant understands the consequences of their decision. Criminal offences for false declarations can help to deter applications by people who are not genuine or wish to change their gender for unlawful reasons.
78. Integrity will also be maintained by people having to meet additional requirements where they amend their sex more than once. These additional requirements will be prescribed in regulations and act to ensure applications are genuine and mitigate a risk of identity fraud. Where a person amends their registered sex their previous name and sex are not displayed on their birth certificate. This is important as it will stop a person being 'outed' as transgender and most accurately reflect their identity. However, it does mean a person cannot be easily linked to their previous identity.
79. The above risk may be exacerbated if people can amend their registered sex multiple times. This is particularly true given birth certificates are fundamentally different to "transactional" documents, such as a passport or driver licences, which can be revoked and must be renewed periodically. People could abuse the process to obtain birth certificates to create new identities to avoid detection or access services they are not entitled to. Worst case scenarios of fraudulent behaviour include a person receiving multiple benefits<sup>22</sup> or circumventing safeguards preventing money laundering and terrorism financing.<sup>23</sup>
80. This risk will be mitigated through the proposed additional requirements. The Bill will make it clear that any additional requirements will be to ensure an application is genuine to mitigate the risk of identity fraud. Additional requirements would not include providing evidence of medical treatment and should be designed to not be overly

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<sup>22</sup> Work and Income identification guidance enables a person to apply for a benefit using a birth certificate and a utility bill. The Ministry of Social Development can access previous records for people who changed their name and gender, but only if the person is being investigated.

<sup>23</sup> People can obtain a Kiwi Access card with a birth certificate and confirmation from another person who can prove your identity. A Kiwi Access card in combination with a birth certificate meets the identification guidance set out in the Anti Money Laundering and Countering Financing of Terrorism Identity Verification Code of Practice.

burdensome or reinstate the barriers that the self-identification process aims to remove. Potential additional requirements could include requiring applicants to return any previous birth certificates, provision of an identity referee or a letter of support from an adult who has known the applicant for over a year.

81. Prescribing the additional requirements in regulations allows flexibility for some experimentation about how to achieve the right balance between mitigating identity fraud and making the process accessible. Achieving this balance is essential to meeting the objectives of improving the current process and realising an accessible self-identification model. To get this balance right consultation would be beneficial, which could happen during the development of the regulations. Flexibility in the next few years is also beneficial as the requirements may need to respond to the outcomes of a Justice Sector Identity Management Strategy that is under development.
82. A five-year statutory review of the self-identification process is proposed. At this time, consideration should be given to whether the additional requirements achieve this balance and if they can be shifted to primary legislation.

#### *Key features – how the self-identification process will apply to children and young people*

83. The self-identification process will apply to children and young people with additional measures in place to ensure they understand the amendment and that it is based on their own decision about their gender. The additional measures are in recognition that children and young people have differing levels of cognitive understanding and may need support to make the amendment. The requirements will differ to reflect the cognitive development of different age children and young people:
  - young people aged 16 or 17 years can apply on their own behalf and this must be accompanied by either:
    - written consent from their guardian; *or*
    - a letter of support by a third party;
  - applications for children and young people aged 15 years and younger must be:
    - made on behalf of the child or young person by their guardian; *and*
    - be accompanied by a letter of support from a third party.
84. The additional measures above reflect that 16 and 17 year olds are in later adolescence and generally have a higher level of cognitive development and can live independently from their guardians. Requiring both consent and the letter of support for those 15 years and under reflects that guardians have responsibilities for their child's development and are there to help them determine important decisions. This responsibility is more pronounced where children and young people are younger and less ready to make decisions on their own.
85. The role of the third party would be to assess that the child or young person understands the amendment and that the decision is based on their own perceptions of their gender. The people who can act as a third party will be prescribed in regulations with a regulation making power to enable this included in the Bill.

#### *Analysis – how the self-identification process will apply to children and young people*

86. Applying a self-identification process to children and young people reflects society's changing views that gender is not age restrictive and children can, and do, have a

strong sense of their gender from an early age.<sup>24</sup> A separate and less stringent process for older adolescents reflects society's views that 16 and 17 year olds are more able to make decisions on their own.

87. Recognising 16 and 17 year olds as more able to provide consent is consistent with the process for changing a young person's name under BDMRR Act. Under this process, the guardian applies on a young person's behalf but must have the young person's consent if they are aged 16 or over. It is consistent with other legislation in New Zealand, for example, 16 is the age when you can apply for a learner driver licence, and consent to general medical procedures. It also aligns with other jurisdictions where self-identification policies are often eased once a person turns 16, such as in Norway, Portugal, and Belgium.
88. The process is more accessible and better supports the autonomy of children and young people than options one and two as there is no medical evidence requirement. Assurance is instead provided by a third party. The Bill will make it clear that the third party's role is to ensure the child or young person understands the decision and that it is based on their own self-identification. The third party is not assessing any other factors, such as a medical assessment about if a child or young person physically conforms to their gender. However, there may still be access barriers where guardians refuse consent or if a third party is difficult to access.
89. The process recognises the higher cognitive ability of 16 and 17 year olds and empowers this age group to choose between providing guardian consent or a letter of support from a third party. This gives them more autonomy in situations where they do not feel comfortable asking a guardian for consent,<sup>25</sup> where they are estranged from their guardian<sup>26</sup> or where the guardian would refuse consent. The risk of these scenarios occurring still applies to children and young people aged 15 years and under. For this age group, the risk is balanced against the need to recognise a guardian's responsibilities for their child's development and to help them determine important decisions.
90. The process will better support transgender and intersex children and young people's sense of belonging and wellbeing. Having their gender correctly reflected on their birth certificate would improve their ability to access services without stress or discrimination (eg enrolling in school). This is particularly important as, compared to adults, children and young people are more reliant on birth certificates to prove their identity. The process could also remove any real or perceived pressure on a guardian to get their child medical treatment to enable their child to assume and maintain their gender.
91. The process for children and young people upholds the integrity of birth register information as the letter of support mitigates the risk of guardians improperly influencing their child to amend their registered sex. The letter of support from a third party will ensure the child or young person has an appropriate level of understanding of what is occurring, and that it is what they want. To ensure accessibility, it is important that a variety of third parties are available who are easy to access. These could include, for example, health professionals; people outside of the health sector, such as councillors; or people who may know a child or young person well. They must also be

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<sup>24</sup> A recent survey of New Zealand youth found that three quarters (73%) of those who identified as transgender and gender diverse said they had started to do so before the age of 14.

<sup>25</sup> The Youth19 survey found that only a third of transgender and gender diverse participants had told their parents or caregivers they were transgender or gender diverse.

<sup>26</sup> The *Counting Ourselves* survey found that 8 per cent of respondents had been kicked out of home because they were transgender.

capable of assessing if a child or young person understands the decision and that it is based on their own gender.

92. Prescribing the third parties in regulations allows flexibility to experiment about how to achieve the right balance between prescribing third parties that can ensure a child and young person understands the decision and ensuring these third parties are accessible. Again, achieving this balance is essential to meeting the objectives of improving the current process and realising an accessible self-identification model. To get this balance right consultation would be beneficial which could occur during the development of the regulations.
93. At the proposed five-year review of the self-identification process, consideration could be given to whether the right balance has been achieved and if the third parties should be set in primary legislation or if ongoing flexibility is beneficial. There made be a need for ongoing flexibility if it is found that further classes of people become able to assess if a child or young person understands the decision as society changes and people become more familiar with gender diversity.

#### *What stakeholders might think*

94. Transgender and intersex New Zealanders and the organisations that support them will largely be supportive of the self-identification process described. Some may prefer not recording sex or gender on birth certificates, however this option has been ruled out of scope.
95. It is assumed that transgender and intersex New Zealanders will be pleased that a range of non-binary markers will be prescribed in regulations. This is based on the results of the *Counting Ourselves* survey, which found that the primary reason for having the incorrect gender identity on birth certificates was because existing options did not fit the respondent's gender. Depending on the number and terminology of markers prescribed in regulations, some people may be disappointed at the markers available. Consultation in developing the markers will mitigate this to some extent.
96. Conversely, groups opposed to self-identification will not be supportive of the change and may reiterate concerns about its impact on protections for women and women's rights. These concerns are low risk if they exist at all. As stated above, a birth certificate is not considered conclusive evidence of someone's sex or gender and is not required to access women-only spaces, such as changing rooms or refuges. Gender is already represented on passports via a self-identification process without evidence of this being abused.

## Multi-Criteria Analysis

	Option One – Status Quo: Family Court process with evidence of medical treatment	Option Two – Statutory declaration process with evidence of medical treatment	Option Three – Self-identification Process: Statutory declaration without evidence of medical treatment (preferred option)
<b>Accessibility</b> <i>The process is easy to understand and access.</i>	<p>0</p> <ul style="list-style-type: none"> <li>Family Court process is lengthy, and difficult to navigate.</li> <li>Medical evidence requirement is difficult to meet due to the lack of access to and cost of gender affirming care.</li> </ul> <p><b>Considerations specific to children and young people</b></p> <ul style="list-style-type: none"> <li>Barriers exist for children and young people to obtain medical evidence or whose parents will not support them through the court process.</li> </ul>	<p>+</p> <ul style="list-style-type: none"> <li>Medical evidence requirement will be difficult to meet due to the lack of access to gender affirming care.</li> <li>Authorised persons who can witness statutory declarations are reasonably accessible for a one-off (or non-reoccurring) event.</li> </ul> <p><b>Considerations specific to children and young people</b></p> <ul style="list-style-type: none"> <li>Barriers exist for children and young people to obtain medical evidence or whose parents will not support them through the process.</li> </ul>	<p>++</p> <ul style="list-style-type: none"> <li>No longer requires evidence of medical treatment, which can be difficult to obtain.</li> <li>Authorised persons who can witness statutory declarations are reasonably accessible for a one-off (or non-reoccurring) event.</li> </ul> <p><b>Considerations specific to children and young people</b></p> <ul style="list-style-type: none"> <li>Less barriers than options 1 and 2 but the requirement for under 15s to provide guardian consent and a letter of support raises potential barriers (eg when guardians refuse consent, or if third parties are difficult to access).</li> <li>Is more accessible for 16 and 17 year olds as they are not reliant on guardian consent, mitigating a risk that this cannot be obtained.</li> </ul>
<b>Inclusivity</b> <i>The process is inclusive of all New Zealanders should they need it and promotes wider social inclusion and cohesion</i>	<p>0</p> <ul style="list-style-type: none"> <li>Excludes people who have not had gender affirming care, whose gender changes over time and who identify as a non-binary gender.</li> <li>Third parties determine a person's gender, limiting a person's control over a deeply personal issue.</li> </ul> <p><b>Considerations specific to children and young people</b></p> <ul style="list-style-type: none"> <li>Guardians, the court and medical professionals determine the child or young person's gender limiting their autonomy and excluding those who cannot obtain medical evidence or guardian support.</li> </ul>	<p>0</p> <ul style="list-style-type: none"> <li>Excludes people who have had not gender affirming care, whose gender changes over time and who identify as a non-binary gender.</li> <li>Third parties determine a person's gender, limiting a person's control over a deeply personal issue.</li> </ul> <p><b>Considerations specific to children and young people</b></p> <ul style="list-style-type: none"> <li>Guardians and medical professionals determine the child or young person's gender limiting their autonomy and excluding those who cannot obtain medical evidence or guardian support.</li> </ul>	<p>++</p> <ul style="list-style-type: none"> <li>Inclusive of people who have not had gender affirming care, whose gender changes over time and who identify as a non-binary gender.</li> <li>Provides people with autonomy over how their gender is recognised and supports social inclusion by enabling transgender and intersex people to access services without stress and discrimination.</li> </ul> <p><b>Considerations specific to children and young people</b></p> <ul style="list-style-type: none"> <li>Supports a child or young person's autonomy over how their gender is recognised through focusing on ensuring that the application is based on their self-identification.</li> <li>Provides more autonomy to older adolescents recognising their generally higher level of cognitive development.</li> </ul>
<b>Integrity</b> <i>The integrity of the information in the birth register is accurate and protections are in place to prevent the process being used for unlawful reasons.</i>	<p>0</p> <ul style="list-style-type: none"> <li>Court process and medical evidence requirement will reduce the likelihood people changing their gender for unlawful reasons.</li> <li>Process is difficult to access so it is unlikely to be used by people not confident of/or committed to their gender.</li> </ul> <p><b>Considerations specific to children and young people</b></p> <ul style="list-style-type: none"> <li>The court process mitigates the risk of guardians improperly influencing their child. However, the process does not directly require evidence that the child or young person understands the decision.</li> </ul>	<p>0</p> <ul style="list-style-type: none"> <li>The medical evidence and statutory declaration requirements provide assurance people are committed and genuine about their decision.</li> </ul> <p><b>Considerations specific to children and young people</b></p> <ul style="list-style-type: none"> <li>The medical evidence requirement mitigates the risk of guardians improperly influencing their child. However, the process does not directly require evidence that the child or young person understands the decision.</li> </ul>	<p>-</p> <ul style="list-style-type: none"> <li>A statutory declaration is less rigorous than the existing process but helps ensure people are committed and genuine about their decision.</li> <li>Additional requirements for when people apply more than once mitigate the risk of identity fraud.</li> </ul> <p><b>Considerations specific to children and young people</b></p> <ul style="list-style-type: none"> <li>Recognises a child's developing cognitive ability as it requires guardian consent and /or third party assurance. The third party assurance can act to mitigate against any potential for undue influence from guardians.</li> </ul>
<b>Flexibility</b> <i>Can adjust with New Zealander's evolving views on gender</i>	<p>0</p> <ul style="list-style-type: none"> <li>The court process and medical evidence requirement are out of step with human rights discourse and international trends.</li> <li>The medical evidence requirement is out of step with social discourse as it implies people need to physically change to confirm to their gender.</li> </ul> <p><b>Considerations specific to children and young people</b></p> <ul style="list-style-type: none"> <li>A single process for under 18 year olds fails to recognise social views that older adolescents are more ready to make decisions.</li> </ul>	<p>0</p> <ul style="list-style-type: none"> <li>The medical evidence requirement is out of step with much social discourse as it implies people need to physically change to confirm to their gender. It does not fully recognise a person's ability to self-identify their gender as the decision is still influenced by health professionals.</li> </ul> <p><b>Considerations specific to children and young people</b></p> <ul style="list-style-type: none"> <li>A single process for under 18 year olds, fails to recognise social views that older adolescents are more ready to make decisions.</li> </ul>	<p>+</p> <ul style="list-style-type: none"> <li>Allows multiple changes in recognition that gender can be fluid and aligns with human rights discourse about recognising a person's gender on official documents in an accessible way that provides a multiplicity of markers.</li> <li>Will still be difficult for legislation to change to stay up to day with the speed at which gender theory evolves.</li> </ul> <p><b>Considerations specific to children and young people</b></p> <ul style="list-style-type: none"> <li>Recognises existing social views that 16 and 17 year olds are more ready to make decisions.</li> </ul>
<b>Cost</b> <i>Minimises costs and time-consuming steps for individuals and government.</i>	<p>0</p> <ul style="list-style-type: none"> <li>The court process and obtaining medical evidence is time consuming and costly.</li> <li>Government resources are required for the court process and provision of medical evidence by public health providers.</li> </ul> <p><b>Considerations specific to children and young people – same as adults above</b></p>	<p>+</p> <ul style="list-style-type: none"> <li>No longer involves a costly and time-consuming court process but may still be time consuming and costly to obtain medical evidence.</li> <li>Requires government resources to produce medical evidence.</li> </ul> <p><b>Considerations specific to children and young people – same as adults above</b></p>	<p>++</p> <ul style="list-style-type: none"> <li>No longer involves a costly and time-consuming court process.</li> <li>While there may be set up costs for the Department, government resources will not be required for providing medical evidence or the court process.</li> </ul> <p><b>Considerations specific to children and young people</b></p> <ul style="list-style-type: none"> <li>The process will be less time consuming and costly than options 1 and 2, but there may still be costs involved in obtaining the letter of support.</li> </ul>
<b>Overall assessment</b>	<p>0</p>	<p>+</p>	<p>++</p>

**Example key for qualitative judgements:**

++	much better than doing nothing/the status quo/counterfactual
+	better than doing nothing/the status quo/counterfactual
0	about the same as doing nothing/the status quo/counterfactual
-	worse than doing nothing/the status quo/counterfactual
--	much worse than doing nothing/the status quo/counterfactual

## Conclusions

97. As indicated by the analysis table above, the preferred process option is option three: a self-identification process that requires a statutory declaration process without evidence of medical treatment. When compared, this option meets all the criteria (except integrity) better or much better than the status quo and is better at meeting the criteria than option two.
98. A self-identification process is worse than the status quo in respect of the integrity criterion because of the removal of any form of third party assurance that can act to mitigate fraudulent applications. However, unlike the other options, this option provides a process that is primarily based on self-identification and is likely to better meet the needs of transgender and intersex people.
99. We consider the risk of the preferred process option being used for unlawful reasons is sufficiently mitigated by the requirement for a statutory declaration and additional requirements where a person applies more than once.
100. The self-identification process is beneficial for children and young people. This option increases the accessibility and inclusivity of the process for children and young people and mitigates risk that 16 and 17 year olds may not be able to obtain guardian consent. It is flexible and recognises existing views that gender is not age restrictive and that older adolescents are more able to understand important decisions. Lastly this option supports the integrity of birth register information and the autonomy of children and young people through requirements that focus on ensuring the child or young person understands the decision and it is based on their self-identified gender.



## Summarise the costs and benefits of your preferred option

Affected groups	Comment: nature of cost or benefit (e.g. ongoing, one-off), evidence and assumption (e.g. compliance rates), risks	Impact <i>\$m present value where appropriate, for monetised impacts; high, medium or low for non-monetised impacts</i>
<b>Additional costs of the preferred option compared to taking no action</b>		
Regulated groups	<p>Applicants will need to pay a prescribed fee to have their gender updated and a fee for a new birth certificate.</p> <p>Applicants may incur a small cost to have a statutory declaration witnessed.</p>	<p>Low</p> <p>This is expected to be similar to current prescribed fees. These are \$55 to change recorded sex and \$33 for a new certificate.</p>
Regulators	<p>The Department will incur costs to update our internal systems to enable the new process and a non-binary gender marker/s.</p> <p>Given IT systems changes will be required we have assumed a six to 12 month period will be required following enactment before self-identification can be implemented fully.</p>	<p>Low-Medium</p> <p>Currently estimated at \$1 million.</p>
Other groups (e.g. wider government, consumers etc.)	<p>Some wider government expenditure may be required to inform, and train individuals authorised to witness statutory declarations.</p> <p>Some wider government expenditure may be required to modify/update data systems.</p> <p><b>9(2)(g)(i)</b></p> <p>[REDACTED]</p> <p>There will be also a minor resource cost for the Department of Corrections to update Corrections Regulations 2005.</p> <p>There may be a low or perceived social impact on women's rights and protections. This is likely to be low as birth certificates are not the determining factor for a</p>	<p>Low</p> <p>Free and frank expression of opinion</p>

	<p>person's access to women only services or entitlements.</p> <p>There may be potential cost relating to an increased risk of identity fraud. The statutory declaration process and associated offences will mitigate this potential cost.</p>	
<b>Total monetised costs</b>	<i>Uncertain – this is as we are unsure of the number of New Zealanders who will change how their gender is reflected on their birth certificate. It is likely to increase when the process becomes more accessible.</i>	
<b>Non-monetised costs</b>	Low	
<b>Additional benefits of the preferred option compared to taking no action</b>		
Regulated groups	<p>Provides benefits to transgender and intersex New Zealanders, including improving their ability to access services without stress or discrimination. Official recognition of their gender will have positive impacts for the wellbeing of these individuals and their sense of inclusion in society.</p> <p>Reduces the cost barrier to guardians to seek medical treatment for their child and would enable public recognition of the gender they identify with irrespective of their gender expression.</p>	High
Regulators	<p>There will not be a cost saving to the Department as we will still need to be involved in the process to a similar extent to the Status Quo.</p> <p>The Department takes a cost recovery approach to the provision of its identity services so a fee will need to be developed to reflect the cost of assessing the application and amending the birth certificate.</p>	Nil
Other groups (e.g. wider government, consumers etc.)	There will be reduced costs for wider government as the courts will no longer need to facilitate the process and public health providers will not need to produce medical evidence.	Medium

	Official recognition of transgender and intersex people's gender will have positive impacts on their wellbeing and therefore will benefit wider society.	
<b>Total monetised benefits</b>	<i>Unknown</i>	
<b>Non-monetised benefits</b>	<i>Medium-high</i>	

## Section 3: Implementing the preferred option

### How will it be implemented?

101. The BDMRR Act will be amended to give effect to the self-identification process. The Bill that re-enacts the Act is awaiting second reading. Provisions that would introduce a self-identification process are already in the Bill as reported back by Select Committee. It is intended that these self-identification provisions will be amended through a supplementary order paper, which will be referred to Select Committee for further consideration. At Select Committee, the public will be able to comment on the self-identification process. It is intended that the Bill, with the self-identification provisions, will be passed in early 2022.
102. The Department is working with Te Puni Kōkiri, the Ministry for Pacific Peoples, and the Office for Ethnic Communities to encourage participation in the select committee process by young people, Māori, Pacific peoples and ethnic communities. An engagement plan is being developed to support this work. This will include providing written information about the Bill to Iwi authorities, community organisations and media networks that have reach in these communities.
103. The Department will undertake work to update our systems, processes and application forms to implement the new self-identification process. It is possible that this will take up to 12 months, so delayed commencement of the provisions may be required. We are considering if transitional arrangements are required for any people who may have begun the Family Court process at the time of commencement.
104. The Department will undertake consultation and regulation development to determine:
  - the number and terminology of non-binary sex markers;
  - the third parties who can provide the letter of support for applications for children and young people; and
  - the extra requirements for where a person applies more than once.
105. The Department will work with the Department of Corrections on necessary amendments to the Corrections Regulations 2005. The Department will also work with the Ministry of Justice and organisations that support transgender and intersex people

to notify affected people and the courts of the change. We will work across government to update relevant websites.

106. Improvements to the process may trigger an increase in applications. The Department is aware of this and will prepare for this as part of implementation.
107. The Department is considering how to include a range of non-binary and culturally specific markers into its applications and IT systems. We will also need to build in flexibility to allow the systems to adapt with evolving gender terminology.

### **Monitoring, Evaluation, and Review**

108. To ensure the objectives of changing to a self-identification process are being met, the process will be reviewed five years from commencement of the Bill. As part of this the Minister must consult the Human Rights Commissioner, the transgender and intersex communities and any other persons and organisations considered appropriate.
109. Ahead of this formal review, the Department will survey applicants in the first few years after implementation to understand if the new process is meeting their needs. It is open to other stakeholders to contact the Department directly to raise any concerns they have with the new process. Depending on this feedback and these surveys the formal review could be brought forward.