

Regulatory Impact Statement: Regulations to support the self-identification process for recognising gender on birth certificates

Coversheet

Purpose of Document	
Decision sought:	Agreement to regulations to fully operationalise the self-identification process for amending registered sex.
Advising agencies:	Department of Internal Affairs
Proposing Ministers:	Minister of Internal Affairs
Date finalised:	2 November 2022
Problem Definition	
<p>The self-identification process was introduced in the Births, Deaths, Marriages and Relationships Registration Act 2021 (the 2021 Act) to make it easier for individuals to apply to amend the sex shown on their birth certificate so that it aligns with their gender. There are further regulatory measures needed to ensure the process can be operationalised, and that it is widely accessible and inclusive. Without these measures, only transgender people over the age of 18 years would be able to access the self-identification process. Regulations are required to ensure the policy intent of the self-identification process is fully realised, to enable both transgender children and non-binary¹ people of all ages to access the process.</p>	
Executive Summary	
Summary of proposal	
<p>This regulatory impact statement (RIS) proposes the creation of regulations that will underpin the self-identification provisions established in the 2021 Act. Our analysis has led to the following preferred options:</p> <ul style="list-style-type: none">to specify 'another gender' and 'a non-binary gender' as additional sex and gender markers that can be selected other than male and female when applying to amend registered sex²; and	

¹ The term 'non-binary' is used in this RIS as a way of grouping all genders besides 'male' and 'female'. This is intended to incorporate western, Māori, and other culturally specific terms. Examples include: 'gender diverse' (western), 'takatāpui' (te reo Māori), 'fa'afafine' (Samoan). This reflects the approach taken in the 2018 Counting Ourselves survey. 'Non-binary' is also a specific gender that people identify with.

² Birth certificates have a 'sex' field (there is no additional gender field). 'Amending registered sex' means changing the marker in that field (e.g., from 'female' to 'male') on the birth certificate so that the marker reflects the person's gender. Both the 2021 Act and the Births, Deaths, Marriages, and Relationships Registration Act 1995 conflate sex and gender as they both generally refer to sex as inclusive of gender and keep birth certificates to only having a 'sex' field. In acknowledgement of this conflation, we refer to these markers as "sex and gender markers".

- to specify that a registered³ doctor, psychologist, nurse, social worker, counsellor, or a person that has known the child or young person for 12 months or more can act as a suitably qualified third party to provide a letter of support for children and young people's applications.

Why government intervention is required

The 2021 Act left much of the operational detail of self-identification to regulations to facilitate future adjustments to the process (e.g. as gender theory and terminology evolves, markers can be more easily updated in regulations) and to allow for consultation with affected stakeholders, including intended applicants of the process. The 2021 Act includes regulation making powers to:

- specify the number and terminology of sex and gender markers other than male and female that will be available;
- specify the types of persons who can act as a suitably qualified third party to support children's applications; and
- prescribe any additional requirements for people who apply to amend their registered sex more than once.

Without regulations, the policy intent of the self-identification process will not be fully realised, as children, young people and people who are non-binary will not be able to access the process. Only transgender people over the age of 18 years would be able to access self-identification.

Issue 1: Recognising genders outside the binary of 'male' and 'female' on birth certificates

The primary legislation allows people to amend their registered sex to 'male' or 'female' through the self-identification process, with any other options for registered sex to be prescribed in regulations.

The RIS provides four high-level options to recognise genders outside the binary of 'male' and 'female' on birth certificates. These options balance the interests in ensuring that everyone will have options that appropriately represent their gender with the interest in ensuring birth certificates will be widely accepted by service providers.

The preferred option, specifying 'another gender' and 'a non-binary gender' as additional markers that can be selected other than 'male' and 'female' as part of the self-identification process, will provide the greatest assurance that:

- the terms chosen will be broadly accepted by people who would use the self-identification process;
- the terms will likely be enduring and would not require frequent review; and
- service providers will recognise any sex or gender marker on a birth certificate - we think this is important for ensuring birth certificates are practical to use and would reduce the risk of the individual experiencing discrimination.

Importantly, these markers provide an option for people who are not 'male' or 'female' – so that even if the terminology does not specify a person's gender, they are not being misgendered by binary terms.

³ 'Registered' means a person who is registered with a regulatory or industry-led authority that is responsible for registration in respect of their profession.

The preferred option does not include te reo Māori markers or other culturally specific markers. Our engagement with Māori on this issue was with a relatively limited group of people. No consensus was reached in those discussions on the appropriateness of including takatāpui as a gender marker, and some people raised significant concerns. Concerns raised in engagement coupled with a limited level of engagement meant we did not consider it appropriate to include te reo Māori and other culturally-specific markers at this time. For similar reasons we also did not consider it appropriate to include markers specific to Pacific or other ethnic communities.

There are many interested stakeholders who have diverging views on the preferred option. Most stakeholders who do not identify with 'male' or 'female' will be satisfied there is an alternative option; however, some may be disappointed as these umbrella markers may not adequately represent their gender. Some stakeholders may consider that the limited choices are inconsistent with the objective of enabling people to self-determine how their gender is recognised. Some Māori may consider that not including te reo Māori markers is not consistent with Te Tiriti o Waitangi and is discriminatory. Other stakeholders may also consider the lack of culturally specific markers discriminatory.

Issue 2: Prescribing suitably qualified third parties to support a child's application

The 2021 Act sets out that children and young people aged 15 and under can access the self-identification process if the application is completed by their guardian⁴ and has a letter of support from a 'suitably qualified third party'. Young people aged 16 or 17 will be able to make their own application to amend their registered sex, and this must be accompanied by either written consent from their guardian or a letter of support from a 'suitably qualified third party'. The intention of a letter of support from a third party is to confirm that the child or young person understands what amending their registered sex means and it is what they want.

The RIS provides four high-level options for prescribing 'suitably qualified third parties' to support a child or young person's application. In broad terms, the options provide different ways to balance the interest in ensuring children and young people can access the process whilst ensuring the third parties can independently assess a child or young person's decision-making capability.

The preferred option, specifying both registered professionals and a person that has known the child for 12 months or more as suitably qualified third parties, will ensure that the self-identification is highly accessible and inclusive of most children and young people who expect to use the process. The types of persons included in the preferred option will provide applicants with a wide range of choice of who to approach for a letter of support. Access to the self-identification process will enable children and young people to have greater autonomy over how their gender is recognised on their birth certificate, which could improve access to services (e.g. enrolling in schools) with less risk of being 'outed' and improve their wellbeing.

⁴ 'Guardian means all guardians of a person with exceptions where there is a court order consenting to the application by one guardian or where another guardian is unknown, missing or of unsound mind, or unable to act by virtue of a medical condition.

There are many interested stakeholders and members of the public who have diverging views on the preferred option; however the majority of affected stakeholders (third parties) and intended users of the self-identification process, including children and young people, are supportive of a broad range of persons being specified in regulations as third parties. Those that oppose self-identification being available to children and young people will be critical that the preferred option is too broad and that there remains a risk children and young people could be subject to undue influence over their decision-making. Organisations that represent and advocate for transgender, intersex, non-binary and takatāpui communities will largely be supportive of the preferred option; however, some may think that the preferred option is too restrictive. These groups will raise that anyone over the age of 18 years old should be a third party, or that the range of persons could be broader.

Limitations and Constraints on Analysis

Scoping of the problem

The 2021 Act includes regulation making powers that relate to details required to operationalise the self-identification process. Our problem definition has therefore been limited to addressing these details.

As noted above, the 2021 Act enables regulations to prescribe additional requirements for people who apply to amend their registered sex more than once. This regulation-making power was created so that measures could be put in place to mitigate identity fraud risk. We consulted on potential regulatory and non-regulatory options. However, following further analysis of the risks, the Minister of Internal Affairs has decided that no additional regulatory requirements will apply to people who apply more than once. We have provided a summary of the analysis that informed the Minister's decision in Appendix One.

Range of options considered

The 2021 Act includes regulation-making powers to address each of the two issues. Non-regulatory options are not available as the self-identification process requires regulations to be fully operationalised.

The Act sets high-level criteria to ensure that the regulations for suitably qualified third parties remain in line with the policy intent of the self-identification process. The criteria are intended to ensure that regulations do not stop children and young people from accessing the self-identification process and that the process for children and young people is not medicalised.

The Act received Royal assent on 15 December 2021 and the self-identification provisions will come into force 18 months later (June 2023) alongside most of the Act. Under the Act, any regulations made relating to the self-identification provisions must be in place when these provisions commence. The 18-month timeframe has limited the period for policy development of feasible options.

Uncertainties for the impact analysis

The analysis and options have been informed by recent consultation and research, particularly:

- a discussion document and public engagement on these issues to get a clear picture of the public's views, particularly focussed on the views of people who are takatāpui,⁵ transgender,⁶ and intersex;⁷
- feedback received during select committee's consideration of the self-identification Supplementary Order Paper;
- settings for self-identification processes introduced overseas;
- StatsNZ's review of its data standards for sex and gender;
- *Counting Ourselves*, a 2018 survey of 1,178 transgender people and people who are non-binary in New Zealand; and
- previous consultation with other agencies about identity fraud risks and the ability to integrate different gender terms across government systems.

The impact analysis is constrained by limited information or evidence to support an understanding of:

- the views on the two issues among Māori, Pacific peoples, and ethnic communities;
- the practical constraints for service providers recording and sharing sex or gender information and to what degree these will be resolved by adopting the new data standard for gender, sex, and variations in sex characteristics; and
- the minimum period of time that can indicate a sufficiently enduring relationship between an adult and a child or young person.

We received 36 written submissions on the regulatory proposals, of which 19 came from individuals and 17 came from groups or organisations. We had 31 participants at our online meetings. This represents a reasonably small range of views, which may affect the strength of our analysis. We note that the population affected by these proposals is small, which will have contributed to a more limited response. In addition, engagement on the regulations was specifically targeted to impacted or affected stakeholders by the proposals. The wider public had an opportunity to comment on the self-identification provisions in the Act through the select committee submissions process (the self-identification provisions were introduced by a select committee in 2019 and reconsidered by a select committee in 2021).

Due to a limited amount of available information or evidence, we have made some assumptions to determine the range of feasible options discussed in this RIS and how they are assessed against the criteria we have set for assessing options. The assumptions we have made are based largely on feedback we received on the draft policy proposals included in the discussion document, submissions received by the select committee during its consultation on the self-identification provisions, overseas models for self-identification, and the recent research described above. Some of the key assumptions are:

- the sex and gender markers 'another gender' and 'a non-binary gender' will provide high-level coverage of genders outside the binary of 'male' and 'female' (although we acknowledge coverage for people who identify with Māori or other culturally specific genders will likely be limited) - we note that the limited number of submissions impacts level of confidence we can have in this assumption;
- gender terminology data from the Counting Ourselves survey (collected in 2018) is still accurate - the small number of recommendations for sex and gender markers in engagement, means that our reliance on the Counting Ourselves survey data is greater;
- our interpretation of community or professional standing as respected persons with a reputation; and

- the time period required to build a sufficiently enduring relationship between two people (for the purposes of being a suitably qualified third party).

We received limited feedback on what specific sex and gender markers should be included in regulations. This means that we have limited quantitative evidence from engagement. We have relied on a combination of feedback from submissions and engagement, data from the Counting Ourselves survey, as well as public feedback on the StatsNZ data standards to determine what sex and gender markers would be included across our options. We think this mitigates the gap in our quantitative evidence. We note that these other sources of data represent different contexts to birth certificates, so we acknowledge the evidence base is imperfect.

There are some costs involved in amending the sex or gender marker on birth certificates (it will cost \$88-90 to amend the marker and purchase a new birth certificate for customers). The Department runs a cost recovery model for providing births, deaths, and marriages services, so any additional costs will be passed on to customers. The individual cost may change following the fees review in 2024/25.

Responsible Manager(s) (completed by relevant manager)

Suzanne Doig
General Manager Policy Group
Department of Internal Affairs

Signature:



Date: 2 Nov 2022

Quality Assurance (completed by QA panel)

Reviewing Agency: Department of Internal Affairs

Panel Assessment & Comment: The panel considers that the information and analysis summarised in the RIS meets the quality assurance criteria.

The RIS outlines options considered within a tight scope, as prescribed by the regulation-making provisions under the Births, Deaths, Marriages, and Relationships Registration Act 2021. While the consultation feedback numbers were relatively small, the Panel considered this to be appropriate given the number of people likely to be affected by the changes. We considered that good efforts had been made to reach and consult with affected parties, including involving advocacy or support organisations. Information available from other sources and surveys was effectively used to supplement the evidence base and analysis.

⁵ A traditional term reclaimed by Māori to encompass both their culture and spirituality, as well as their diverse sexual orientations, gender identities and expressions, and sex characteristics.

⁶ This term describes a wide variety of people whose gender is different from the sex they were assigned at birth. Transgender people may be binary or non-binary.

⁷ An umbrella term used to describe people born with physical or biological sex characteristics (including sexual anatomy, reproductive organs, hormonal patterns and/or chromosomal patterns) that are more diverse than stereotypical definitions for male or female bodies. Like all people, intersex people may identify as male, female or non-binary.

The options analysis strikes a good balance between seeking an outcome that is as enduring as possible, while acknowledging that future changes may be desirable if stronger evidence emerges (such as appropriate Te Reo markers).

Assumptions, constraints and uncertainties are clearly stated and it provides balanced analysis. The RIS is a good length, uses plain language, and clearly sets out the legislative history and context for the proposed changes.

Background: Introduction of the self-identification process

Sex and gender are different – and a process to recognise gender on birth certificates has been in place since 1995

1. Gender is distinct from sex. Gender refers to a person's social and personal identity as a male, female, or another gender, such as 'non-binary'. Sex refers to a person's physiological features that characterise people as male, female or intersex. A person's gender is not always the same as their sex.
2. A person's sex is registered at birth, with details provided by someone present at the birth. People have been able to amend their registered sex, which is printed on their birth certificate, since the Births, Deaths, Marriages, and Relationships Registration Act 1995 (the 1995 Act) was enacted.
3. Under the 1995 Act, applicants have needed to provide evidence of medical treatment, which is then assessed by a Family Court judge who determines if the amendment to the birth record can be made. Under this process people could only amend their sex or gender marker to 'male' or 'female'. While this process is about amending sex information, it has been a mechanism for people to have their gender recognised.

The law no longer requires medical evidence of a person's gender

4. The 2021 Act introduces a self-identification process to replace the process established in the 1995 Act. The process will allow people to amend their registered sex by applying to the Registrar-General of Births, Deaths, and Marriages with a statutory declaration. The introduction of the self-identification process means there is no longer a requirement to present medical evidence to a Family Court.
5. The self-identification process will make amending registered sex accessible to people who do not want or are unable to access medical treatment, and people who are non-binary. The new process will support people's autonomy over how their gender is recognised, make birth certificates more inclusive, and support all New Zealanders to assert their identity to access services.
6. A diagram of key changes between the 1995 Act and the 2021 Act is shown in Appendix two.

The 2021 Act includes regulation-making powers to help operationalise the self-identification provisions

7. The 2021 Act includes regulation-making powers which may be used to prescribe:
 - any sex and gender terms other than male and female that people can select from to amend their registered sex;
 - the types of persons who can be 'suitably qualified third parties' to provide a letter of support for applications for children and young people; and
 - any additional requirements for a person to amend their registered sex if they have previously amended their registered sex.

8. The regulation-making powers also have additional statutory requirements:

Regulation	Additional statutory requirements
Prescribing sex and gender markers	There are no additional statutory requirements.
Prescribing suitably qualified third parties who can support applications of children and young people ⁸	<p>The Minister must be satisfied that each type of person specified:</p> <ul style="list-style-type: none"> • has sufficient professional or community standing to provide letters of support generally; OR • has known the child or young person for a period of time that indicates they have a sufficiently enduring relationship. <p>The Minister must also be satisfied that the regulations:</p> <ul style="list-style-type: none"> • provide applicants with reasonable level of choice; and • include people other than medical practitioners.
Prescribing additional requirements for people who amend their sex or gender marker more than once ⁹	<p>The Minister must be satisfied that the additional requirements:</p> <ul style="list-style-type: none"> • do not require provision of medical evidence; • are reasonably necessary to reduce the risk of fraudulent applications; and • do not create an unreasonable obstacle to the completion of an application under section.

9. The self-identification process will come into force in June 2023. Regulations need to be in place by this point to ensure that the process can be operationalised.

The transgender population makes up close to one per cent of the general population

10. We do not have any comprehensive measurement of the New Zealand transgender population as it has not been measured in a nationwide census. There have been surveys that provide approximate measurements of the transgender population. The surveys indicate that there is a small but significant transgender population, and a large proportion of this population is non-binary:

- StatsNZ Household Economic Survey 2020 surveyed 31,000 adults and measured 0.8 per cent of the general population as transgender. Of those who were identified as transgender, 38.5 per cent identified as a gender outside of the male and female binary;
- the 2018 'Counting Ourselves' survey surveyed 1,178 transgender people – 45 per cent of participants identified within a non-binary grouping of genders; and

⁸ See section 144(4) of the 2021 Act.

⁹ See section 144(3) of the 2021 Act. As we are not recommending additional requirements, these statutory requirements will not apply.

- in the Youth '19 survey of 7,724 adolescent students, one per cent identified as transgender (this was inclusive of people who are non-binary), while 0.6 per cent indicated they were not sure of their gender.

This is the third regulatory impact analysis about the self-identification process

11. There have been two previous regulatory impact analyses:
 - The first regulatory impact statement was prepared for introducing the self-identification process within the 2021 Act (May 2021). See: <https://www.treasury.govt.nz/sites/default/files/2021-06/ria-dia-isi-may21.pdf>.
 - The interim regulatory impact statement was prepared for seeking agreement to public consultation on regulations and other measures to support the self-identification process (May 2022). See: <https://www.treasury.govt.nz/sites/default/files/2022-06/ria-dia-rssi-may22.pdf>. It accompanied a discussion document and response form which were published on the Department of Internal Affairs website. See: <https://www.dia.govt.nz/bdmreview---recognising-gender-on-birth-certificates>.
12. Cabinet approved public consultation on the measures to support the self-identification process on 3 June 2022.¹⁰

We have consulted on the two proposals covered in this RIS

13. We consulted on proposals to:
 - specify sex and gender markers other than male and female that will be available for birth certificates under the self-identification process;
 - specify the types of persons who can act as a suitably qualified third party to support children's applications to amend their sex or gender marker; and
 - prescribe any additional requirements for people who apply to amend their sex or gender marker more than once.
14. As noted in the summary, the Minister has decided to not prescribe additional requirements for people who have previously amended their sex or gender marker. We have summarised the issue in Appendix one. The RIS provides substantive analysis on regulatory proposals for additional sex and gender markers and for suitably qualified third parties.
15. The primary focus of our engagement on these proposals was to hear from people who would be directly affected by the self-identification process – this included transgender, takatāpui and intersex people.¹¹ There was a secondary focus on those who support people who are directly affected (e.g. parents of transgender and gender diverse children). A discussion document was publicly available for feedback from the general public.
16. We worked closely with six community organisations¹² who supported the design of our engagement and supported us at our online meetings. We published our discussion document for feedback on 10 June 2022 and contacted a wider range of stakeholders and partners to inform them of the engagement process. The period for submissions

¹⁰ Cabinet minute - CAB-22-MIN-0210; and Cabinet Social Wellbeing Committee minute – SWC-22-MIN-0103.

¹¹ The engagement strategy was published on the Department's website at www.dia.govt.nz/bdmreview---recognising-gender-on-birth-certificates.

¹² These organisations were InsideOUT Kōaro, Intersex Trust Aotearoa, Tiwhanawhana Trust, F'INE, Gender Minorities Aotearoa, and NZ Parents and Guardians of Transgender and Gender Diverse Children. Each of these support people who are transgender, takatāpui and intersex.

was open from 13 June to 25 July 2022. We received 36 submissions, of which 19 came from individuals and 17 came from groups or organisations.

17. We held eight online meetings during the submission period, which were targeted at people who would be interacting with the self-identification process. Each of these meetings focussed on specific stakeholder groups to ensure their viewpoints could be aired. We held meetings specifically for people who are non-binary, takatāpui (transgender and intersex Māori), MVPFAFF+¹³ rainbow Pacific peoples, intersex people, transgender and intersex youth (14 – 18 year olds), and parents of transgender and gender diverse children. We also held two general meetings for transgender, takatāpui and intersex people. Overall, we had 31 participants at our online meetings.

This document considers the two proposals separately

The two proposals contribute to the self-identification objectives in different ways

18. The objectives for introducing a self-identification process were 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, including through ensuring everyone can assert their identity to access services; and
 - uphold public trust and confidence in how birth register information is used and maintained.
19. Removing the requirement for medical evidence and enabling people to apply without the assessment of a third party (Family Court) were important elements in achieving these objectives – particularly in improving people’s control over how their gender is recognised.
20. The two issues are specific problems that affect overlapping, but distinct, population groups (children and people who are non-binary). Addressing these will contribute to the overarching objectives of the self-identification process in different ways. For instance, ensuring that children are amending their registered sex based on their own decision-making contributes to the general aim of improving people’s control over how their gender is recognised. Ensuring that people who are non-binary have a suitable sex or gender marker on their birth certificate which they can present to service providers also contributes to that high-level objective but does so in a different way.
21. The two issues require different criteria which means they cannot be easily considered together. This document will consider the issues individually in ‘diagnosing the policy problem’ and ‘deciding upon an option to address the problem’. The document will consider the two issues together for the section on ‘delivering an option’.
22. The objectives and criteria of the two issues align with the overarching objectives and criteria of the self-identification process. This way, we have greater assurance that the preferred options support the overarching policy of the self-identification process. Where possible, the objectives and criteria of the two issues mirror those that were used in the RIS for introducing a self-identification process to ensure this alignment.

¹³ The letters stand for: Mahu (Tahitian/Hawaiian), Palopa (Papua New Guinea), Fa’afafine (Samoan), Akava’ine (Cook Islands Māori), Fakaleiti (Tongan), and Fakafifine (Niuean). We understand the acronym was first coined by Phylesha Brown-Acton (founder and executive director of F’INE) in 2011.

Issue 1: Recognising genders outside the binary on birth certificates

Section 1: Diagnosing the policy problem

What is the context behind the policy problem and how is the status quo expected to develop?

Gender diversity is increasingly recognised in New Zealand

23. People relate to gender in diverse ways and there are a range of gender terms that are outside of the binary of 'male' or 'female'. This terminology continues to evolve quickly; certain terms that are preferred now may not necessarily be preferred in the future.
24. Gender diversity has distinct characteristics and terminology for different cultural or ethnic groups. Participants in the 2018 'Counting Ourselves' survey identified with a wide range of genders, including western, Māori, and other culturally specific genders.¹⁴
25. Gender diversity is increasingly being recognised through official processes. For example, StatsNZ introduced the 'gender diverse' category in its statistical standard for gender in 2015. The standard was further developed to enable better recognition of the range of terms people use to describe their gender in 2021.¹⁵ Additionally, New Zealanders can select a non-binary gender for their passport and citizenship record.¹⁶

The Births, Deaths, Marriages, and Relationships Registration Act 2021 enables easier recognition of gender on birth certificates

26. Birth certificates are required to include a person's sex. A person may want to change this information if their gender does not align with the sex recorded. The self-identification process introduced with the 2021 Act will make it possible to recognise genders outside the binary on birth certificates. The 2021 Act provides that sex or gender terms other than 'male' or 'female' will be specified by regulations.¹⁷
27. A person's gender is a personal expression of self, forming a central part of how a person identifies and perceives themselves. Ensuring all people could have their gender recognised was a key objective of the 2021 Act. The RIS for introducing the self-identification process identified two ways in which the policy was intended to improve inclusivity:
 - enabling transgender men or women who do not want to or are unable to undertake medical treatment to have access to a birth certificate that reflects their gender; and
 - enabling people whose gender is outside the binary of 'male' and 'female' to have access to a birth certificate that reflects their gender.

¹⁴ There were between 15 and 18 individual terms (besides male or female) that at least one per cent of participants indicated was their gender. There were also a range of terms that less than one percent of participants identified with.

¹⁵ The 2021 standard uses the term 'another gender' and recommends that if people select 'another gender' that they can write in their gender in an open text field. The standard was mandated for use across the public service in 2022.

¹⁶ People can select 'non-binary' for their New Zealand citizenship record and 'X' for their passport.

¹⁷ These sex and gender markers are only available under the process to amend registered sex. The sex and gender markers for registering a child at birth will remain the same.

Status quo: birth certificates will be inclusive of people who identify as male or female but not of people who are non-binary

28. Without setting sex and gender markers in regulations, the 2021 Act will enable all transgender men and transgender women to have access to a birth certificate that reflects their gender but will exclude people who do not identify as 'male' or 'female'.

What is the policy problem or opportunity?

Additional sex and gender markers are needed to recognise people who are non-binary

29. Some people cannot get birth certificates that represent their gender because non-binary or culturally specific terms are not permitted. This means that they are being misgendered on their birth certificate and are less able to assert their gender with service providers. While the self-identification process would make birth certificates more inclusive for transgender men and transgender women, it would exclude people who are non-binary unless additional sex and gender markers are added.

Gender recognition on birth certificates would positively affect social participation and wellbeing

30. Birth certificates are not intended to provide conclusive evidence of someone's identity.¹⁸ However, they are often used by people to prove they are New Zealand citizens with the right to work and study in New Zealand or used in conjunction with other identity documents to prove their identity. 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.
31. People who are non-binary experience a range of issues when presenting identity documents, including:
- inconsistency between documents because there are not many widely used documents offering non-binary options;¹⁹
 - experiences of verbal harassment and being denied services if the gender in their identity document does not match their appearance;²⁰ and
 - experiences of being misgendered.
32. Enabling non-binary markers on birth certificates would mean people who are non-binary would have another accessible official document they can use to assert their gender with service providers.

¹⁸ See section 79(2) of the 2021 Act for how the marker on a birth certificate should be taken as evidence of sex or gender - https://www.legislation.govt.nz/act/public/2021/0057/latest/LMS613219.html?search=sw_096be8ed81c80a77_evidence_25_se&p=1&sr=6

¹⁹ The Government's evidence of identity standard recommends service providers ask for more than one document to verify a person's identity.

²⁰ From the Counting Ourselves survey, nine per cent of people who are non-binary reported they had been verbally harassed, and 11 per cent had reported they were denied services.

Stakeholders who supported self-identification at select committee agreed that there should be a non-binary option

33. The issue of sex marker options was submitted on as part of the select committee process for the self-identification legislation (approximately 398 submissions were made on this issue). Submitters had diverging views; people in support of the self-identification process also supported the inclusion of non-binary option(s). Some people who submitted on the legislation indicated they were non-binary and said they felt excluded from the Family Court process because there were no non-binary options. Further discussion of stakeholder views of the status quo is noted in the options analysis at paragraph 78.

Te Tiriti o Waitangi considerations

Modern terminology for Māori has been developing since the 1980s

34. Gender diversity is known and accepted across many cultures. The terms used have meanings specific to these cultures. This means that, while these terms can have loose translations to English, they represent distinct identities that can only really be understood within their cultural context.
35. For Māori, the term 'takatāpui' (originally meaning intimate companion of the same sex) was reclaimed in the 1980s as an umbrella term for diverse gender identities, sex characteristics, and sexualities.²¹ Following the re-emergence of 'takatāpui', other more specific terms have been established by takatāpui, including 'whakawahine' (like a woman), 'tangata ira tāne' (spirit of a man), and 'tāhine' (non-binary/transgender).²² In our consultation, one Māori submitter noted that they identify as 'irawhiti', which is most closely translated as transgender.

The principle of equity is relevant

36. We considered the Crown's obligations under Te Tiriti o Waitangi as the proposals in this paper affect takatāpui. A significant number of Māori identify with takatāpui and other terminology that is specific to te reo Māori (e.g., whakawahine and tangata ira tāne).
37. The inclusion of te reo Māori markers can be considered in light of the Tiriti principle of equity. The principle is reflected in the Waitangi Tribunal's commentary, "[i]t is through article 3 that Māori, along with all other citizens, are placed under the protection of the Crown and are therefore assured equitable treatment from the Crown to ensure fairness and justice with other citizens."²³ The principle of equity recognises that different people with different needs or circumstances require different approaches to achieve equitable outcomes.
38. The inclusion of te reo Māori markers could contribute to the Crown's obligations to ensure fairness and equitable treatment for takatāpui. By including te reo Māori markers, Māori would receive equal recognition of their gender to non-Māori. Consideration of Māori and other culturally-specific sex and gender markers is further discussed in section 2.

²¹ Four per cent of respondents to the Counting Ourselves Survey identified their gender as takatāpui.

²² One per cent of respondents to the Counting Ourselves Survey indicated they identified with each of these terms.

²³ Pp 33 of Hauora: Report on Stage One of the Health Services and Outcomes Kaupapa Inquiry: Wai 2576 / Waitangi Tribunal (2019) - https://forms.justice.govt.nz/search/Documents/WT/wt_DOC_152801817/Hauora%20W.pdf.

Gender terminology is acknowledged among Pacific and other ethnic communities

39. Many Pacific cultures have gender terms that are distinct from 'male' and 'female'. Respondents to the Counting Ourselves survey identified their gender as fa'afafine (Samoan), fakafifine (Niuean), and akava'ine (Cook Island Māori). MVPFAFF+ was introduced as an umbrella term for Pacific genders ten years ago.
40. We understand there are gender terms distinct from 'male' and 'female' among ethnic communities²⁴ that may be present in New Zealand, for example, there is a large population of people who are 'hijra' (a transfeminine gender) living in India, Pakistan and Bangladesh.

We could aim for high-level or specific recognition of gender

41. As noted above, passports and citizenship certificates provide a third gender option, in addition to 'male' and 'female'. We describe the types of markers that are used in these documents as umbrella markers.²⁵ Umbrella markers are intended to be a catch-all for a range of specific genders (e.g., 'demigender' or 'agender').
42. We consider that establishing umbrella markers would be a baseline for setting additional sex and gender markers in regulations. However, it is possible to also include more specific sex and gender markers in the regulations. The benefits and drawbacks of providing more specific gender recognition are discussed in the options analysis further below.

What objectives are sought in relation to the policy problem?

43. The objectives for improving recognition of gender diversity on birth certificates are to:
 - provide sex and gender markers that better reflect society's changing views on gender diversity;
 - improve people's autonomy 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 including through ensuring everyone can assert their identity to access services; and
 - ensure birth certificates are fit for purpose for people who are non-binary, takatāpui, or have another culturally specific gender.
44. Three of these objectives mirror three of the objectives for introducing a self-identification process. This approach is intended to ensure any regulations are aligned with the policy intent of the self-identification process. The objective to ensure birth certificates are fit for purpose is added to recognise the additional challenges that people may encounter when presenting a birth certificate to service providers who may be unfamiliar with identity documents that do not list 'male' or 'female'.

²⁴ 'Ethnic communities' here means communities that fall within the remit of the Ministry of Ethnic Communities (Asian, Middle Eastern, Latin American, African and Continental European).

²⁵ We note that people may specifically identify with the terms that are used as umbrella terms.

Section 2: Deciding upon an option to address the policy problem

What criteria will be used to compare options to the status quo?

45. The criteria used to assess the options for prescribing what sex and gender terms will be included in regulations are:
- **Inclusivity** – as many people as possible can access a birth certificate that they consider adequately represents their gender.
 - **Enduring** – is about ensuring the list of sex and gender markers are long lasting even as New Zealanders' views on gender terminology evolve over time. Regulations can be updated more readily than primary legislation, but significant time and resource is still needed to do so.
 - **Practicality** – is about ensuring that the markers that are available will not mean people will encounter difficulties when presenting a birth certificate. This criterion was not used for the policy to introduce a self-identification process but is appropriate here as the policy's effectiveness depends on birth certificates being able to be used.
 - **Community support** – people who are transgender, takatāpui, or intersex and organisations would support an option. This includes considering evidence of support for terms within an option.
46. The criteria have been loosely developed off the original criteria used to assess options for improving the process to amend sex on birth certificates because it is important that the regulatory options are consistent with the original policy intent of self-identification. Inclusivity was a criterion used to assess options for improving the process to amend sex on birth certificates.
47. One of the original criteria was 'flexibility' - to ensure the process for amending sex and gender markers could readily adjust with New Zealanders' evolving views on gender. This was intended to address the challenge of making the legislation keep pace with gender theory, which evolves quickly. Flexibility informed the decision to enable sex and gender marker options to be amended by regulations. 'Enduring' is a counterpoint to flexibility, it is intended to ensure the list of sex and gender markers are long lasting so that while there is flexibility to adapt by amending secondary legislation, this is not required too often.
48. Inclusivity, future-proof, and practicality were the initial criteria proposed to assess the options. Submitters were generally in favour of these three criteria, although some noted that inclusivity was the most important. We do not consider that inclusivity should have more weighting than the other criteria. While a large number of sex and gender markers would provide greater assurance that people would have a suitable sex or gender marker, there is not strong evidence that a significant number of people whose gender is outside the binary would not feel adequately represented by umbrella markers.
49. We have added 'community support' as a criterion in response to feedback that the list of sex and gender markers should be extensively consulted on. Prioritising the views of transgender, takatāpui, and intersex people and the organisations that support them contributes to meeting our objectives. In particular, it supports determining a list of sex and gender markers that reflects the views of society. It also contributes to determining a list that improves people's autonomy over how their gender is recognised as the available options reflect the community (people who are transgender, takatāpui and intersex) view.
50. We have changed the 'future-proof' criterion title to 'enduring', as it more accurately reflects the intention of the criterion.

51. Practicality to a certain extent will compete with inclusivity as it may constrain the number of sex and gender markers that would be desirable. Community support may also compete with inclusivity, as a smaller list of markers is more likely to have evidence of community support.

What scope will options be considered within?

52. The direction set by the 2021 Act means that non-regulatory options for establishing sex and gender markers are out of scope. Under sections 24(1)(a) and 25(1)(a) of the 2021 Act persons can apply for registration of 'any other sex or gender specified in regulations.
53. We did consider an exceptions process that would allow people to 'write in' their nominated sex in a free text field. This would be like processes developed in Victoria and Tasmania, where the Registrar-General has the discretion to determine whether the written-in sex or gender marker could be registered on the individual's birth record, regardless of its inclusion in regulations. The drafting of the legislation precludes this option, as the legislation only allows people to apply to amend their registered sex to terms "specified in regulations".
54. At least 15 other jurisdictions have introduced a self-identification process for amending registered sex. Most of these jurisdictions have either only 'male' or 'female' as options or have a third marker for genders outside the binary. We have identified Belgium, Iceland, Argentina, and Malta as countries that enable a third marker on birth certificates or civil registration documents. Each of these countries uses 'X' as their third marker.²⁶ Similar to the approach of having a third marker for genders outside the binary, one of the options includes only umbrella terms.
55. We note that the range of sex and gender markers available on birth certificates may not be reflected in how other agencies and organisations collect and record sex or gender information. Government agencies, for instance, may simply record any sex and gender markers outside of the binary as 'another gender', in line with the StatsNZ data standard. Decisions across government or the private sector to invest in systems to be able to record a greater range of sex or gender terms would be determined by individual agencies or organisations.
56. We do not consider that differences between identity documents that include genders outside the binary should present significant issues. Any agency compliant with the data standard would be able to use 'another gender' to represent markers other than male and female in their systems. If a person presented a passport stating 'X' and a birth certificate stating 'non-binary', for instance, the agency could record this as 'Another gender' in line with the common standard established by StatsNZ.
57. We have confirmed with StatsNZ that the data standard should not preclude any of our options for sex and gender markers.

What options are being considered?

58. We consulted on four high-level options, which described approaches to including sex and gender markers (e.g., one option was 'umbrella markers only'), rather than specifying sex and gender markers. Twenty-four people made submissions indicating a preferred option. We also asked submitters to indicate that if their gender is outside the binary of male and female which gender they would want to include on their birth certificate.

²⁶ This aligns with the 'X' that can be used to indicate a non-binary gender on a passport under the international civil aviation organisation standards.

59. Since the engagement period, we have further refined the options by including specific markers across options two and three. We do not consider that we have a strong enough rationale to determine a list of markers for option four. We have noted some examples of markers that could be included in option four.

60. The refined options are:

- **Option one** – Status quo: do not create additional sex and gender markers (only male and female sex and gender markers available);
- **Option two** – include the umbrella terms ‘Another gender’ and ‘A non-binary gender’ as sex and gender markers (**preferred option**);
- **Option three** – the markers included in option two and ‘Gender fluid’, ‘Genderqueer’, and ‘Agender’; and
- **Option four** – Include a more extensive list of non-binary sex and gender markers, e.g., ‘demigender’, ‘bigender’, and ‘pangender’. This option will incorporate the sex and gender markers from option two and three.

61. Before analysing the refined options, this section will discuss the rationale for excluding te reo Māori and other culturally-specific markers. It will also discuss the exclusion of two other western markers that were raised in our engagement.

We have not included te reo Māori and other culturally-specific markers across our options

Consideration of te reo Māori markers

62. As noted above, we considered the inclusion of te reo Māori markers under the Tiriti principle of equity. The inclusion of te reo Māori markers could provide equal access to sex and gender markers that are appropriate for Māori as there would be for non-Māori.

63. There were some submissions in favour of including ‘takatāpui’ and other te reo Māori terms as sex and gender markers. However, other submitters had concerns.²⁷ The table below outlines three of the key concerns, our interpretation of the potential impact, and possible mitigations. We consider the mitigations may not fully address the risks.

Concern	Potential impact	Potential mitigation
Non-Māori could use te reo Māori markers on their birth certificate	Gender terms that are specific to Māori are a part of Māori identity. Being takatāpui is imbued with a sense of being Māori. We are concerned that the appropriation of Māori genders by non-Māori could undermine, undervalue, and disrespect this sense of Māori identity.	As part of the application process, we could indicate that it is inappropriate to apply for the marker if the applicant is not Māori.
A te reo Māori marker could indicate a person’s ethnicity	Being recorded in an open register as Māori raises a concern of being a target for discrimination. This discrimination could add to existing experiences of discrimination due to gender.	As part of the application process, we could indicate to applicants that their gender may be considered a marker of their ethnicity.

²⁷ Gender Minorities Aotearoa and Te Ngākau Kahukura recommended not including te reo Māori markers. InsideOUT indicated that some of their kaimahi Māori shared these concerns.

‘Takatāpui’ can denote sexuality as well as gender	One concern specific to ‘takatāpui’ as marker is that it is broader than gender and can incorporate sexuality. The purpose of the self-identification provisions is to allow individuals to determine what gender appears on their birth certificate: there is no mandate to record sexuality or other aspects of identity.	As part of the application process, we could indicate to applicants that these markers are specifically about their gender, not their sexuality.
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We have limited evidence for determining which policy best promotes equity

64. We achieved only limited engagement with takatāpui in our policy development. We received few submissions from people who identified as Māori and had three participants at our takatāpui engagement meeting.
65. It is difficult to assess how concerned takatāpui are with the potential risks that have been identified and how they compare with the benefits of gender recognition which could include supporting a person’s sense of belonging. There is also a chance that some issues have not been surfaced through engagement.
66. We consider that stronger evidence of support is required before introducing te reo Māori terms. The potential negative impacts of introducing te reo Māori terminology are important and should be discussed further with the relevant communities before committing to include te reo Māori markers. This reflects our approach to assessing the sex and gender markers generally against the ‘community support’ criterion.

Exclusion of Pacific and other culturally specific markers

67. We consider that the concerns of cultural appropriation and racial discrimination that are present for te reo Māori markers are also relevant when considering other culturally-specific markers. We held one Pacific fono, which had six attendees, but did not receive any submissions from people who identified as coming from a Pacific culture. We note that there was some support for the inclusion of Pacific genders at our fono with Pacific peoples but there was not a clear consensus. Due to limited evidence of support, we have not proposed including Pacific genders as markers.
68. We did not receive any submissions from people from other ethnic communities on sex and gender markers and have not considered including markers for these communities.

Exclusion of other markers

Unspecified (x)

69. Several organisations submitted that ‘Unspecified (x)’ should be an available sex or gender marker. People who recommended this term saw it as having different purposes or meanings, for example:
 - as an option for people who do not want to disclose their gender; or
 - as an alternative to ‘a non-binary gender’, for those who do not identify with that terminology.
70. The policy intent of the legislation is to provide suitable gender markers for people who do not identify as ‘male’ or ‘female’. It would be contrary to the policy intent if people used the term to not record their gender.

Intersex

71. Submitters were opposed to including an intersex marker. Intersex Trust Aotearoa New Zealand also undertook independent consultation and concluded that while including ‘intersex’ would provide visibility of people with variations of sex characteristics which

could be positive, the intersex population was not ready to determine whether a sex or gender marker is appropriate or to commit to a specific marker.

72. At our intersex meeting there were significant concerns about how 'intersex' could work as a marker given the conflation of sex and gender. As intersex is not a gender (it refers to biological characteristics), being categorised with genders could be a form of erasure – the complexities and differences of intersex identities from gender identities would be ignored.
73. Given general opposition in submissions and the concerns raised we have determined it is not appropriate to include an intersex marker.

Option One – Status quo: do not add sex and gender markers to regulations

Key features

74. Under the status quo, regulations to provide for additional sex and gender markers would not be developed. People would only have the option to register their nominated sex as 'male' or 'female'. The introduction of the self-identification process means birth certificates will become more inclusive of transgender men and transgender women even if no sex and gender markers are added to regulations.

Analysis

75. Retaining only male and female fails to recognise people whose gender is outside of the binary. This would diverge significantly from the policy intention of the self-identification process, which is to make birth certificates inclusive of all transgender people.
76. This option would not be future-proof as non-binary sex and gender markers would not be available even if there is increasing demand for non-binary sex and gender markers. Also, by excluding non-binary sex and gender markers, birth records would be a step behind the StatsNZ data standards and the way other agencies will be collecting, sharing, and publishing gender information.
77. The status quo is somewhat unpractical. Data systems have been designed to include the male and female options, so the status quo would mean information could be recorded and shared easily. However, the status quo will not support people who are non-binary to have their gender recognised by service providers.
78. People who are transgender, takatāpui, or intersex would likely consider this option to be unacceptable, so the status quo does not have community (people who are transgender, takatāpui and intersex) support. Submitters on the regulations strongly supported having non-binary sex and gender markers. Submitters at select committee in 2021, who supported the introduction of the self-identification process, also strongly supported the inclusion of non-binary sex and gender markers.

Option Two - Include umbrella markers only: 'another gender' and 'a non-binary gender'

Key features

79. Under this option people would have the choices of 'male', 'female', 'another gender', and 'a non-binary gender'. 'A non-binary gender' and 'another gender' are umbrella markers.
80. We have assessed 'another gender', and 'a non-binary gender' as the most suitable umbrella terms. Six submissions indicated support for 'non-binary' or 'a non-binary gender', which was the most of any markers. 'Non-binary' was also the most common gender that people identified within the Counting Ourselves survey and many people who identified with a more specific gender also identified with 'non-binary'. Some submitters commented 'a non-binary gender' would be more inclusive than 'non-

binary'. We agree with this view and note it will be clearer that it is intended as an umbrella sex or gender marker.

81. We only received one submission that recommended the inclusion of 'Another gender'. However, we consider that other evidence supports its inclusion. As noted above 'Another gender' was implemented in the StatsNZ data standard and received favourable feedback in their public consultation.²⁸ We note that 'Another gender' and 'a non-binary gender' will have overlapping coverage. However, we consider the term 'Another gender' provides a useful alternative for people who do not identify with 'non-binary', as not all people feel comfortable with that terminology.
82. Following the public engagement process, we tested with three of our key stakeholders our preference for 'A non-binary gender' and 'Another gender' as the umbrella markers. Their response was generally favourable.²⁹
83. Under this approach, we consider there would be a reasonably high threshold to include new sex and gender markers over time. There would need to be strong evidence that a significant proportion of people whose gender is outside the binary are using a different umbrella term. This will likely mean the list of sex and gender markers would not change frequently. There would likely be some long-term quantitative data available that would support changes to the list of available markers. This would include data collected by the Department in relation to the self-identification process, through community-run surveys (e.g., Counting Ourselves) and through the national census. Decisions on sex and gender markers would also be informed by engagement with people whose gender is outside the binary or have a culturally-specific gender and community organisations that support transgender, takatāpui and intersex people.

Analysis

84. This option provides some recognition of people who do not identify as 'male' or 'female'. Importantly, these markers provide an option for people who are not 'male' or 'female' – so that even if the term does not specify a person's gender, they are not being misgendered by binary terms. However, we acknowledge that the available umbrella terms may not adequately describe some people's gender and would therefore exclude those people from the self-identification process. For instance, we note from StatsNZ consultation on the data standard, that some submitters considered 'Another gender' might not be suitable for some people who do not identify with any gender.
85. This option would be enduring. 'Non-binary' is a well-established umbrella term, with a significant number of people who identify with it. This is evidenced by the number of people who identified as 'non-binary' in the Counting Ourselves survey³⁰ and the fact that 'non-binary' or 'a non-binary gender' were the common suggestions for sex and gender markers by key organisations that support transgender, takatāpui and intersex people.³¹ These factors have led us to conclude that 'non-binary' is entrenched in the community and will therefore be long lasting. Submitters to the StatsNZ data standard noted that a strength of 'Another gender' as a marker is that it would likely endure even as gender language continues to evolve. The fact that this standard has been

²⁸ See pages 18-22 of StatsNZ's findings from consultation document - <https://www.stats.govt.nz/reports/sex-and-gender-identity-statistical-standards-findings-from-public-consultation-julyaugust-2020>.

²⁹ Gender Minorities Aotearoa were supportive of these markers, InsideOUT Kōaro was also supportive, but wanted 'unspecified' included as well.

³⁰ Forty per cent of respondents to the survey indicated the term 'non-binary' as one of the genders they identified with. This was out of the 45 per cent of respondents who identified as genders that were included in the general non-binary category (people whose gender was not male or female). Almost 70 per cent of respondents who identified with different genders (e.g., demigender) that were included in the non-binary category also identified with the term 'non-binary'.

³¹ This included the submissions from InsideOUT Kōaro, Gender Minorities Aotearoa, Intersex Trust Aotearoa, and Te Ngākau Kahukura.

mandated for government agencies, requiring system changes, also suggests the term will have enduring relevance.

86. This option would be highly practical as it will include umbrella markers that have been established in other official contexts.³² There would likely be broad recognition of umbrella markers by service providers – which would grow over time as service providers would more regularly encounter birth certificates that include these umbrella markers.
87. Overall, we consider that this option would have a reasonable level of community (people who are transgender, intersex, and takatāpui) support. There was some support for the high-level approach of including umbrella markers only in our draft policy proposals, particularly among key organisations who support people who are transgender, intersex, and takatāpui.³³ Support for this approach was based on a range of reasons, including making birth certificates practical to use and that umbrella terms would provide sufficient coverage of genders outside the binary. Some people may consider that this option is not sufficiently inclusive, but it is likely that the inclusion of the umbrella markers would be considered a significant improvement on including binary (male and female) markers only.
88. This option also has the clearest evidence of support for the terms that would be included. ‘Non-binary’ or ‘A non-binary gender’ had the most support of any markers from our engagement and is well established, and ‘Another gender’ was tested extensively by StatsNZ.

Option Three - Include umbrella markers and common markers: ‘Another gender’, ‘A non-binary gender’, ‘genderqueer’, ‘gender fluid’, and ‘agender’

Key features

89. Under this option there would be umbrella markers, as in option two, and commonly identified gender markers - ‘genderqueer’, ‘gender fluid’, and ‘agender’. We did not receive much feedback on these markers in our engagement. In determining a list of markers under this option, we have relied on data from the Counting Ourselves survey where respondents identified their gender. The three terms selected had both:
 - a high number of respondents indicating that these were genders that they identified with; and
 - a high number of respondents who indicated that they did not also identify as non-binary.
90. Because of these qualifications, we consider these three markers would add the most in terms of coverage and inclusivity. We note that some people who identify with these genders may be comfortable with having ‘Another gender’ marker; this has not been tested.
91. We consider that the process for updating the list of sex and gender markers under this approach would be similar to the process for updating markers under Option two.

Analysis

92. This option would be more inclusive of people who are non-binary than option two as it would include the most common non-binary gender terms. However, including some specific markers, and not others, may be perceived as delegitimising or excluding people whose specific gender is not included. A stakeholder who attended one of our meetings reflected this view when they noted that “the more [sex and gender markers] you add the more you exclude”.

³² Citizenship certificates include a ‘non-binary’ marker and ‘Another gender’ has been established in the StatsNZ data standard.

³³ Gender Minorities Aotearoa, Intersex Trust Aotearoa, Outline, and Te Ngākau Kahukura supported option two.

93. This option would be reasonably enduring. 'Genderqueer', 'genderfluid', and 'agender' are well established gender terms so will likely have longevity.
94. This option would be reasonably practical. Some of the gender or sex terms may not be broadly recognised by service providers at least initially, as they are not included as options in other official contexts. This could lead to some situations where birth certificates are questioned or, in extreme cases, not accepted by service providers.
95. Overall, we consider that this option would have more community (people who are transgender, intersex, and takatāpui) support than the status quo, but less than options two and four. There was some support for the high-level approach of including umbrella markers and a few common genders in our draft policy proposals, but it was not supported by key organisations who support people who are transgender, intersex, and takatāpui.
96. Submitters who supported this option considered that it provided an appropriate balance of inclusivity and being practical. In one of our online meetings there was some discussion about how the options would accommodate people who are gender fluid. It was raised that a 'non-binary' marker might not be suitable for these people. However, we consider that some stakeholders would not find it to be inclusive enough and others would question why some sex and gender markers have been included and not others.
97. The Counting Ourselves survey provides some evidence that the community would support the inclusion of 'agender', 'gender fluid', and 'genderqueer' as individual markers. However, we did not receive many submissions recommending the inclusion of these additional markers. Given that these markers would be selected over and above other specific markers, we consider that the absence of direct evidence of support from submissions is a weakness of this option.

Option Four – Include a more extensive list of sex and gender markers

Key features

98. Under this option there would be a more extensive list of markers. We did not receive enough feedback to establish a definitive list, but it could include markers such as 'demigender', 'bigender', and 'pangender'.
99. Under this approach, there would be a lower threshold for terms to meet criteria for inclusion in the regulations. Assessments of new terms would likely rely more heavily on a mixture of anecdotal evidence and the views of experts and key organisations. Long term, quantitative data on the use of less commonly used or established gender terms may not be so readily available.

Analysis

100. In our draft proposal, we considered that there could be an extensive list of markers so that most people would have a sex or gender marker they are comfortable with. However, from our research and engagement we have not gained a sufficient understanding of the number or types of terms that should be included under this approach. As we lack a strong rationale or evidence for determining markers under this approach, it is likely there would be inaccuracies. Like option three, there is some risk that including some specific markers, and not others, may be perceived as delegitimising of some genders. Overall, the increase in coverage compared with option three is unclear, as a shorter list may already provide suitable options for most people.
101. This option may not be very enduring. Some terms that would be eligible to be included in this option would likely have less longevity, as they would be less commonly used or established. Conversely, there would likely be more emerging genders that would qualify to be included as sex and gender markers. The list of sex and gender markers would become out of date more quickly than other options.

102. This option could be less practical than the other options, as the less common sex and gender markers might not be recognised by service providers and data systems. This effect would be ongoing as terms would be added more often over time. This approach would rely on individuals making the decision about whether they want to use a relatively specific term that accurately describes their gender, or an umbrella term that is more broadly recognised.
103. Overall, we consider this option would likely have a reasonable level of community (people who are transgender, intersex, and takatāpui) support. Submitters who supported this option considered that offering specific sex or gender markers for more people was important to ensure birth certificates are inclusive. The Counting Ourselves survey data provided some evidence of terms that people identify with, which could be considered for an extensive list. However, we did not receive many submissions on including these additional markers so do not have a full understanding of the support people who are transgender, intersex, and takatāpui would have for this list.

How do the options compare to the status quo/counterfactual?

	Option One – Status quo: do not establish any additional sex and gender markers in regulations	Option Two – umbrella sex and gender markers: ‘Another gender’ and ‘A non-binary gender’	Option Three – Include umbrella non-binary sex and gender markers: ‘Another gender’, ‘A non-binary gender’, ‘Gender fluid’, ‘Genderqueer’, and ‘Agender’	Option Four – Include a more extensive list of non-binary sex and gender markers
Inclusivity <i>People have access to birth certificates that represent their gender or sex</i>	0 Self-identification process will be inclusive of transgender men or women who do not wish to or cannot undertake medical treatment, but not of people who are non-binary.	+	++	++
Enduring <i>Markers are likely enduring even as New Zealanders views on gender evolve</i>	0 This option would provide no suitable terms for people who are non-binary even if there was increasing demand for non-binary or culturally specific options.	++	+	-
Practicality <i>Birth certificates can be effectively used to assert gender with service providers</i>	0 Current data systems would not be affected, and information could be shared across systems easily. People would not be supported to assert their gender with service providers and would likely be misgendered in those data.	++	+	0
Community support <i>There is evidence of support of markers in the option from people who are transgender, takatāpui and intersex (and the organisations that support them)</i>	0 We consider it fair to assume that the community supports the inclusion of male and female as sex and gender markers.	++	+	++
Overall assessment	0	++	+	+

Key for judgements:

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

What option is likely to best address the problem, meet the policy objectives, and deliver the highest net benefits?

104. As indicated by the analysis table above, the preferred regulation option is option two: umbrella sex and gender markers only. When compared to the status quo this option is better or much better at meeting all the criteria.³⁴
105. Providing some non-binary sex and gender markers is beneficial for people whose gender is outside the binary. It means that they would have access to a birth certificate that does not misgender them as 'male' or 'female', and it would enable them to use their birth certificate to assert their gender with service providers.
106. Option two is also equal, better or much better than the other regulatory options across all criteria except for 'inclusivity'. However, we consider that option two is sufficiently inclusive to provide the majority of people whose gender is outside the binary with a suitable, if not specific, sex marker. The level of support for this option from organisations that support transgender, takatāpui and intersex people gives us confidence in this view. This approach is also in line with approaches to passports and citizenship certificates.
107. Submitters indicated that the list of sex markers should be widely consulted. We consider that including a longer list of sex and gender markers, with limited evidence of support, would contradict this view. Future reviews of these regulations may help to bridge this evidence gap. There will also be future sources of data that might help, including the 2022 Counting Ourselves survey and the 2023 Census.
108. This option will likely make birth certificates easier to use for the purposes of accessing services as service providers are more likely to recognise sex and gender markers if they are well-established and if there are fewer markers. This option also means the government can more sustainably keep the list of sex and gender markers up to date.
109. As discussed above, we have recommended not including Māori or other culturally-specific sex and gender markers in any of the options. We note that some people who have a culturally-specific gender may not consider that the sex and gender markers included in our different options would adequately recognise their gender.

³⁴ In a broader sense, we consider transgender, takatāpui, and intersex would support our preferred option over the status quo. However, the 'community support' criterion is specifically about support for the individual sex and gender markers within an option.

Issue 2: Prescribing suitably qualified third parties

Section 1: Diagnosing the policy problem

What is the context behind the policy problem and how is the status quo expected to develop?

The self-identification process and children and young people

110. The self-identification process is available to children, as gender is not age-restricted, and children can, and do, have a strong sense of their gender.³⁵
111. Under the self-identification process, children and young people can apply to amend the sex or gender on their birth certificate however, the process is slightly different than that for applicants who are 18 years or older. Applications for children and young people aged 15 years and under must be made on their behalf by their guardian³⁶ and be accompanied by a letter of support from a suitably qualified third party.
112. A separate and less stringent process for 16- and 17- year olds exists where an application can either be accompanied by consent from a guardian, or with a letter of support from a suitably qualified third party. This approach reflects society's views that older adolescents are more able to make decisions on their own.
113. In the letter of support, the third party must confirm that –
 - the child understands the consequences of the proposed registration of the nominated sex; and
 - the child's preference is for the nominated sex to appear as their registered sex on their birth certificate.
114. The requirement of a letter of support from a third party was established under the 2021 Act to recognise the likelihood that children and young people have differing levels of cognitive understanding and may need support to make the amendment. The letter was also justified as a measure to uphold the integrity of birth register information, as it would help mitigate the risk of guardians improperly influencing their child to amend their registered sex.
115. The letter of support will enable a child or young person to use a birth certificate that reflects their gender. Regardless of what is on the birth certificate, individuals, organisations, and agencies (e.g., schools, medical centres, and sporting bodies) can continue to rely on their own policies and procedures to determine a person's sex or gender. Under the self-identification process people will be able to amend the sex on their birth certificate more than once, so a child or young person could reverse their decision.
116. The issue of suitably qualified third parties was submitted on as part of the select committee process for the self-identification legislation (approximately 106 submissions were made on this issue). Some requested that persons who fulfil this role should be medical professionals. Because of the non-medicalised nature of the assessment, the regulation-making power in the 2021 Act was drafted to ensure that the pool of third parties was not limited to medical practitioners. Most submitters supporting the introduction of a suitably qualified third party were supportive of the concept but

³⁵ A recent survey of New Zealand youth found that three quarters of those who identified as transgender and non-binary said they had started to do so before the age of 14.

³⁶ The guardian must have the child's consent to make the application and must verify in their statutory declaration that they believe the child identifies as a person of the nominated sex.

requested that consultation be undertaken with community groups to ensure that those who can act as a third party are accessible.

The role of a suitably qualified third party

117. The decision by the child or young person to amend the registered sex on their birth certificate is not within scope of a third party's assessment. The role of the third party is exclusively limited to providing a letter that confirms that the child or young person understands the change being made and the decision is based on their own perceptions of their gender.
118. The third party is not assessing what is in the child's best interests or any other factors, such as the child or young person's gender or that the child or young person physically conforms to their gender. The third party's letter is only to support an application for a child or young person to make an administrative change on a birth certificate – where the sex field will be updated to reflect the child or young person's sex or gender.
119. A person that will be eligible to act as a suitably qualified third party is not obliged to provide a letter of support if requested and can refuse.

Regulation making power

120. A suitably qualified third party is defined in the 2021 Act as a person who is 18 years old or older, and of a type specified in regulations. These regulations have not yet been established.
121. Specifying the types of persons who can act as a suitably qualified third party was delegated to regulations to ensure the right balance between having persons that can ensure a child or young person understands the decision and ensuring these people are accessible is made. Achieving this balance is essential to meeting the objectives of realising an accessible self-identification model.
122. Under section 144(4) the Minister must be satisfied that each type of suitably qualified third party specified in regulations –
 - has sufficient professional or community standing³⁷ to provide letters of support generally; or
 - is required to have known an eligible child or 16- or 17- year old for a period that indicates they have a sufficiently enduring relationship with them to provide a letter of support; and
 - the regulations provide applicants with a reasonable level of choice regarding the type of person who may provide a letter of support; and
 - the regulations include persons other than medical practitioners.
123. The existence and role of a suitably qualified third party was established in the 2021 Act – and is not within scope of the regulation-making powers. The purpose of any regulations is only to specify the types of persons who can act in this capacity.
124. The 2021 Act states that regulations that specify suitably qualified third parties must be made before the commencement of the self-identification provisions in the primary legislation, which is by June 2023. Regulations must be in place by this date for children and young people to have access to the self-identification process.

³⁷ 'Community standing' here refers to the community in general, not just among people who are transgender, non-binary, intersex, or takatāpui.

What is the policy problem or opportunity?

Without a broad range of third parties, access to self-identification may be limited for children and young people

125. If no regulations are made that specify the types of persons who can act as a suitably qualified third party, children under the age of 16 and young people without the support of their guardian will not be able to access the self-identification process. This is because the types of persons who can act as third parties have to be specified in regulations, and without doing so applicants will not be able to obtain a letter of support from an appropriate person.
126. Sixteen and seventeen year olds that can obtain guardian consent would still be able to access the self-identification process as they have a choice to seek support from a third party, or consent from their guardian. However, having no regulations would disproportionately impact all applicants aged 15 years and under and 16- and 17- year olds who do not have guardian consent as they would not be able to access the process at all.
127. Consequently, transgender and non-binary children and some young people would not have autonomy over how their gender is recognised on their birth certificate, which could impact their wellbeing.
128. Children and young people are high users of birth certificates as identity documents. Situations where their birth certificate is requested where the sex recorded does not align with their gender could lead to feelings of stress and anxiety or experiences of discrimination such as being denied access to services or benefits, and verbal harassment.

There needs to a broad range of third parties, to ensure the process is accessible

129. Even if regulations are created that specify who can act as a suitably qualified third party, it will not necessarily guarantee that children and young people will be able to access the self-identification process – as it will depend on whether the persons specified are accessible and able to provide a letter of support. Third parties that have a cost to access, have lengthy wait times, or require long-distance travel could limit some children and young people from seeking their support.
130. Feedback we received from children, young people and parents on the discussion document was that the process to obtain a letter of support from a suitably qualified third party needs to be easy and straightforward. Accessibility was also highlighted by our Victorian counterparts as an important aspect of the self-identification process in their engagement with children and young people. Children and young people were most concerned that the types of third parties who are specified in regulations should not prevent or deter them from amending the registered sex or gender on their birth certificate.
131. A key driver of introducing a self-identification process was to de-medicalise a person's deeply personal expression of their identity, and improve their autonomy over how their gender is recognised. For children and young people, there were concerns that the Family Court process could be seen to encourage medical treatment at a young age. It is important that the types of persons who are specified as third parties are not exclusively limited to medical practitioners or adjacent professions, to ensure the process for children and young people remains de-medicalised.

Te Tiriti o Waitangi considerations

132. As Treaty partners, we need to consider how our proposals impact Māori and wherever possible, seek to improve outcomes for Māori. The Department has a core responsibility to provide services for all New Zealanders. To effectively deliver services to Māori, we need to cater for the needs and expectations of Māori in relation to the

services, in this case providing for suitably qualified third parties in regulations that Māori consider appropriate and can comfortably access.

133. Through consultation we learnt that some whānau and/or communities may have a lack of trust towards mainstream social service providers. We have heard that it is more common for Māori to rely on people who are within their own circles, for example, their whānau, hapū, iwi, or friends. Each whānau determines their own support system and it will differ between whānau.
134. Given some Māori are more likely to rely on their own circle of support, it is important that persons who are specified as suitably qualified third parties meet Māori needs and expectations around who should provide a letter of support for their tamariki and rangatahi.

Supporting Pacific and ethnic communities to access a letter of support

135. We still do not fully understand the needs and expectations of Pacific and ethnic communities in relation to accessing third parties. Based on a few comments from consultation and feedback from agencies, we have assumed that there may be greater reliance on people within their own cultural communities to support important decisions for a child or young person.

The range of third parties must also have an ability to assess a child or young person's decision making capability

136. Persons specified as suitably qualified third parties need to have an ability to assess whether the child or young person understands the consequences of the proposed amendment, and that the decision is based on their own perceptions of their gender.
137. As described in the Regulatory Impact Statement: *for introducing a self-identification process to recognise gender on birth certificates* the original purpose of requiring a letter of support from a third party was to recognise that children and young people have differing levels of cognitive understanding and may need support to make the amendment.
138. Children mature gradually, so their competence to consent comes incrementally with growing maturity and experience. A child may be competent to make autonomous decisions in some areas but not others.
139. Without a broad range of suitably qualified third parties specified in regulations that can assess a child's decision-making capability, access to self-identification may be limited for children and young people. There is an opportunity to prescribe a broad range of persons that could act as a suitably qualified third party to make the self-identification process as accessible as possible to children and young people.

What objectives are sought in relation to the policy problem?

140. The objectives of specifying suitably qualified third parties in regulations are to:
 - ensure children and young people can access the self-identification process; and
 - have confidence that children and young people's applications are genuinely based on their own decision and that they understand the consequences.

Section 2: Deciding upon an option to address the policy problem

What criteria will be used to compare options to the status quo?

141. The criteria used to assess the options for prescribing who can act as a suitably qualified third party to provide a letter of support are:
- **Inclusivity:** children and young people can approach a suitably qualified third party they trust and feel comfortable with. This criterion is about ensuring children and young people from all socio-economic and cultural backgrounds can safely access a suitably qualified third party. It also aims to honour Te Tiriti o Waitangi obligations and contribute to better outcomes for Māori by recognising their needs and expectations around ensuring tamariki and rangatahi can access a suitably qualified third party.
 - **Accessibility:** children and young people can easily access a third party without any unnecessary barriers or complexity. This criterion is about reducing barriers to access a suitably qualified third party (e.g. cost, time and physical location), and that our Māori, Pacific, and ethnic communities are not disadvantaged.
 - **Assurance:** the types of persons have an ability to make an independent assessment of whether a child or young person is making a decision that is in their best interests as the child or young person perceives them. This criterion is making sure that the persons who can act as a third party can ensure that an application by, or on behalf of a child or young person is based on the applicant's own decision.
142. The criteria are consistent with the original criteria used to assess options for improving the process to amend sex on birth certificates. Accessibility and inclusivity were criteria used to assess options for improving the process to amend sex on birth certificate. These criteria have been slightly adjusted and used to inform the criteria to assess options for third parties. Assurance aligns with the criterion of integrity, which is to ensure that the information in the birth register is accurate. The assurance criterion works to have confidence that children and young people are making a genuine decision to amend the sex or gender on their birth certificate, which will ensure that the information in the birth register is accurate.
143. This is to ensure the regulatory options align with the original policy intent of self-identification.
144. To some extent the assurance criterion competes with the other criteria. This is because limiting the types of persons to those that have an independent ability to recognise that a child understands and wants the decision they are making, could negatively impact its inclusivity and accessibility.
145. The accessibility and inclusivity criteria are weighted more than the assurance criterion. This is reflective of the level of assurance required from the letter of support which is only to confirm that a child understands a decision being made, and the resulting consequence – which is an administrative change on a birth certificate. The importance of the accessibility criterion was strongly emphasised during consultation. The third party is not making a medical assessment of whether the child or young person physically conforms to their gender.

What scope will options be considered within?

146. The 2021 Act sets some limits for the scope of feasible options. In addition to the criteria in para 23, sub-section 144(1)(e) of the Act stipulates that the types of persons who can act as a suitably qualified third party can be specified including by reference to:
- the person's profession or qualifications; or
 - the period of time they have known the eligible child or eligible 16- or 17- year old.
147. Alternative options we heard during consultation included specifying that anyone over the age of 18 years old can act as a suitably qualified third party. We have ruled this option out as it is not within scope of the criteria specified in sections 144(1)(e) or 144(4).
148. We also heard competing views about what time period could indicate a sufficiently enduring relationship with a child or young person. We considered providing for a range of different timeframes that a person must have known a child or young person to be able to act as third party. There is a lack of evidence on the extent a time period can indicate an enduring relationship, so we ruled out options other than 12 months. Children and young people have a limited social circle of adults that they trust. A time period longer than 12 months or more could create significant access barriers for children and young people as it would limit the pool of persons known to them. The 12-months period was chosen as it is consistent with other known processes that require a time period to indicate an enduring relationship with a child or young person (e.g. identity referee to support a child's application for a passport).
149. Non-regulatory options are out of scope as a 'suitably qualified third party' is defined under section four of the 2021 Act as a person who is of a type specified in regulations.
150. Other countries' models for third parties have informed our analysis. Several other countries require a third party to support a child or young person's application, including Australia (Victoria), Canada (Quebec, Alberta), and Ireland. In these jurisdictions medical practitioners or psychologists/psychiatrists are included as third parties. Some also allow a registered social worker or a person that has known the child or young person for more than a year who is not their parent or guardian to act as a third party.

What options are being considered?

151. The options considered include:
- **Option One** – status quo: suitably qualified third parties are not specified in regulations.
 - **Option Two** – registered doctors, psychologists, social workers, and counsellors.
 - **Option Three** – a person that has known the child or young person for 12 months or more.
 - **Option Four** – registered doctors, psychologists, social workers and counsellors OR a person who has known the child or young person for at least 12 months (**preferred option**).
152. The registered professionals specified in options two and four do not need to know the child or young person for any specified period of time.
153. Under option four, the registered professionals specified may also fit in to the category of persons that have known the child or young person for at least 12 months (e.g. a family doctor or counsellor).
154. Under all options, a parent or guardian of the applicant cannot act as a suitably qualified third party.

Option One – status quo: suitably qualified third parties are not specified in regulations

Key features

155. Under the status quo, suitably qualified third parties that can provide a letter of support for children and young people's applications are not specified in regulations.

Analysis

156. Not specifying third parties in regulations would make the self-identification process inaccessible and not inclusive for children and young people aged 15 and under as without a letter of support, they would not be able to access the self-identification process.
157. For 16- and 17-year olds, accessing the self-identification process would become restrictive as they would need to rely on obtaining guardian consent. If they did not have supportive guardians, the self-identification would become inaccessible.
158. Without third parties, children and young people would not have access to the self-identification process so it is not possible to have assurance that children and young people understand, or want to amend, their nominated sex under the status quo. A suitably qualified third party is needed to provide confidence that the child or young person is making their own decision.
159. Almost all of those who commented on the draft policy proposals for third parties during engagement were supportive of an option that included specifying third parties in regulations. Transgender and non-binary children and young people, their whānau, and organisations that support them would be critical and disappointed should no third parties be specified in regulations. The few that supported the status quo option did not agree with the introduction of self-identification in general, which is not in scope for consideration.

Option Two – specify registered doctors, psychologists, social workers, nurses, and counsellors as suitably qualified third parties in regulations

Key features

160. Under option two, registered doctors, psychologists, social workers, nurses, and counsellors are specified as suitably qualified third parties who can provide a letter of support for children and young people to support their application. These types of professions are included because of the nature of their duties and their regular involvement or contact with children and young people.
161. Under this option 'registered' means a person who is registered with a regulatory or industry-led authority that is responsible for registration in respect of their profession.
162. Extending the selection of registered professionals to occupations that are not exclusively medical practitioners reinforces the policy intent of self-identification - that it is an administrative process and one not based on medical evidence.

Analysis

163. This option is only slightly more inclusive than the status quo. Specifying only registered professionals as a suitably qualified third party is likely to benefit applicants who trust and often engage with them. Some applicants may not feel safe or comfortable approaching registered professionals for a letter of support due to fear of being discriminated against or 'outed'. In Australia, a survey found that young people identified doctors, psychologists and psychiatrists as people they would feel least comfortable asking for a letter of support from.³⁸

³⁸ Findings were passed on by counterparts in Victoria, Australia who conducted a survey of transgender youth when designing their self-identification model.

164. Compared to the status quo, this option ensures children and young people can access the self-identification process as it provides for persons who can be approached for a letter of support. However, some children, young people and their whānau may find it difficult to access registered professionals as some require a cost or referral to access, have long wait times, or may not be available in rural or isolated areas.
165. A restricted list of registered professionals may impact the ability for tamariki, rangatahi and their support network, through their whānau, hapū and iwi, to comfortably access a suitably qualified third party they feel is appropriate. Some Māori have a lack of trust towards mainstream social service providers and prefer to rely on people who are within their own circles. Restricting third parties to registered professionals could inhibit some Māori from accessing a letter of support from someone they trust and feel comfortable approaching. Option two does also not reflect the status that kaumātua and kuia, or tuakana (mentors) hold in Māori communities.
166. It is assumed that the qualifications and experience of registered professionals will provide for a high level of assurance that the potential for undue influence over a child or young person's decision making is limited. This is because they have the qualifications or experience to take account of children and young people's developmental level and interpret if a child understands and wants the decision they are making.
167. The selected range of registered professionals are normally regarded as those with a reputation or character to uphold, as they are officially recognised for their competence and integrity. Some are also subject to ethical obligations to recognise that the interests of children and young people are paramount and to not exploit them in any way.
168. Transgender and non-binary children and young people, their whānau, and organisations that support them would be disappointed should third parties be exclusive to registered professionals. Many submitters who commented on the draft policy proposals for third parties, cited concerns around access to these persons and that it could limit their ability to access a letter of support.

Option Three – a person that has known the child or young person for 12 months or more

Key features

169. Under option three, a person who has known a child or young person for 12 months or more who is not a parent or guardian is specified in regulations as a suitably qualified third party. Examples for this option include an adult sibling, extended family member, cultural mentor, or a teacher.

Analysis

170. Allowing a person who has known a child or young person to act as their suitably qualified third party is a lot more inclusive than the status quo as it enables children, young people and their whānau to seek a letter of support from someone they personally trust and feel comfortable approaching. Children generally have a limited social circle of trusted adults, and for 16- or 17-year olds with a guardian not willing to support their application, it is likely they would seek the support of someone they know or have an enduring relationship with.
171. This option provides applicants with a wide range of choices, making the process to find a suitably qualified third party more accessible than the status quo. This option also does not necessarily present physical or cost barriers to access if someone approached is someone they know. It also provides some mitigation against people encountering registered professionals who may be unwilling to support their decision for reasons unrelated to their cognitive ability. However, this option assumes that children and young people know someone that would be willing to support their application, which may not be true for those who are estranged from their family and/or live in rural or isolated communities.

172. This option does not restrict the ability for tamariki, rangatahi and their support network through their whānau, hapū and iwi to be able to seek support from a person that they feel is most appropriate. Some children and their whānau may be more comfortable seeking support from people who have authority within their own community (e.g. a kaumātua), rather than registered professionals. One reason could be that a person from their community would have a greater understanding of gender diversity within their cultural context than a registered professional.
173. Persons who have known a child or young person for more than 12 months are likely to have an ability to understand if a child or young person is making a decision in their own capacity. The person is not assessing whether the child conforms to the sex or gender, or what is in their best interests. A relationship for 12 months or more is likely to indicate that a person understands a child or young person's past and present wishes and feelings, and any beliefs and values likely to have a bearing on their decision. It is assumed that because these persons cannot be a parent or guardian, they have an ability to make an independent assessment of a child or young person's decision-making ability. However, it may not guarantee the same level of assurance as option two as they do not necessarily have to uphold certain ethical or professional obligations to consider the child's interests as paramount. It is also difficult to ascertain the level and depth of relationship a person may have developed with a child or young person in a 12-month period to be able to genuinely assess a child's decision-making capabilities.
174. Transgender and non-binary children and young people, their whānau, and organisations that support them would be relatively satisfied with this option as it allows applicants to make their own choice on who to approach for a letter of support that meets their needs (e.g. financial means, level of comfort/trust or availability). However, some applicants may be critical of this option. We heard from engagement that some believed the 12-month period was too restrictive as some children and young people may not have known someone for that long. We also heard that some children, young people and their whānau may prefer to approach a registered professional that is supporting their transition.

Option Four (a combination of option two and three) – a range of registered professionals or someone who has known the child for 12 months or more

Key features

175. This option is a combination of options two and three, where registered doctors, psychologists, social workers, nurses, and counsellors OR a person who has known the child or young person for 12 months or more are specified as suitably qualified third parties in regulations.
176. Under this option, children, young people and their whānau would have the choice to seek a letter of support from either a registered professional or someone that has known the child or young person for 12 months or more.

Analysis

177. This option is highly inclusive because it provides for a broad range of persons that children and young people from all socio-economic and cultural backgrounds could access and feel comfortable approaching. Some applicants may seek support from a registered professional they trust, whereas others may feel more comfortable seeking a letter of support from someone known to them due to the access barriers associated with seeking support from a registered professional.

178. This option is more accessible than the status quo as it provides applicants with a reasonable level of choice of persons. If a child or young person did not have a person known to them for 12 months or more that would support their application, they would be able to access a registered professional instead. This is because a registered professional does not need to know the child or young person for 12 months or more due to their qualifications in being able to assess a child or young person's wants and needs. This option provides for a greater range of persons that could act as a suitably qualified third party than options two and three.
179. It is assumed that both registered professionals or a person known to the child or young person for 12 months or more has an ability to provide a letter of support that confirms the application is what the child or young person wants and that they understand what it means to make their application. These persons will also have some level of separation from the guardian and the child or young person, which makes it more likely they can provide an independent assessment that the child or young person wants to amend their registered sex and understands what it means to do so. However, this option provides the same level of assurance as option three because the level of assurance may not be as guaranteed with someone who has known a child for 12 months or more.
180. Transgender and non-binary children and young people, their whānau and the organisations that support them would largely be supportive of option four. A vast majority of submitters on the draft proposals for third parties supported this option as it makes the process of obtaining a letter of support relatively accessible as applicants have a broad range of persons to choose from.

How do the options compare to the status quo/counterfactual?

	Option One – do not specify suitably qualified third parties	Option Two – registered professionals	Option Three – person known to the child or young person for 12 months or more	Option Four – registered professionals or a person known to the child or young person for 12 months or more
Inclusive <i>Children and young people can approach a suitably qualified third party they trust and feel comfortable with</i>	0 Without a range of suitably qualified third parties specified in regulations, the self-identification process would not be inclusive, and less inclusive to 16- and 17- year olds without supportive guardians.	+	++	++
Accessible <i>Children and young people can easily access a third party without any unnecessary barriers or complexity</i>	0 Without a range of suitably qualified third parties specified in regulations, children aged 15 and under will not be able to access the self-identification process. For those aged 16 or 17, they will only be able to access the self-identification process with guardian consent.	+	+	++
Assurance <i>The types of persons have an ability to make an independent assessment of whether a child or young person is making a decision that is in their best interests as the child or young person perceives them</i>	0 Without a range of suitably qualified third parties specified in regulations, it would not be possible to have confidence that children and young people understand and want to amend their registered sex. This is mostly relevant to children aged 15 and under.	++	+	+
Overall assessment	0	+	+	++

Key for judgements:	
++	much better than the counterfactual
+	better than the counterfactual
0	about the same as the counterfactual
-	worse than the counterfactual
--	much worse than the counterfactual

What option is likely to best address the problem, meet the policy objectives, and deliver the highest net benefits?

181. As indicated by the analysis table above, the preferred option is option four: a range of registered professionals AND a person known to the child or young person for 12 months or more. When compared, this option meets all the criteria better or much better than the status quo.
182. Under option four, the broad range of persons ensures that most transgender and non-binary children and young people will know of someone in their life that would be eligible to act as a third party to provide them with a letter of support.
183. While options two, three and four are all better than the status quo, providing applicants with a choice between a range of registered professionals and a person that personally knows a child or young person best ensures the self-identification process is accessible and inclusive for children and young people. Under option four, children, young people and their whānau will likely be able to approach a person that best meets their cultural or accessibility requirements (e.g. location, cost).
184. Compared to options one or two, option four also ensures that children and young people have an alternative avenue to seek support. For example, if an applicant did not know of someone in their life that they have known for 12 months who could provide a letter of support they would be able to approach a registered professional, and vice versa.
185. An expansive definition of a third party under option four also best achieves equitable outcomes for Māori by not restricting the ability for tamariki, rangatahi and their support network through their whānau, hapū and iwi to be able to seek support from a person that they feel is most appropriate.
186. Option four does not provide more assurance than option two and provides the same level as option three. The independency and qualifications of a registered professional could provide slightly more assurance than persons known to a child for 12 months or more, as they are often subject to standards that require them to take account of children and young people's developmental level and not exploit them in any way. However, we consider that providing for persons that have known the child or young person for 12 months or more under options three and four provides a sufficient level of assurance in context of the nature of the third party's role – which is only to confirm that a child understands their decision to make an administrative change on a birth certificate.

Section 3: What are the marginal costs and benefits of the self-identification regulations?

187. The tables below provide analysis on the costs and benefits of the preferred regulatory options compared to the status quo.
188. We note that capital expenditure for implementing the self-identification process for the Department, as the regulating body, is estimated to be between \$0.86M – \$1.03M. This cost will be met by baseline budget of the Department. This cost was discussed in the May 2021 RIS (then estimated at approximately \$1M) on the self-identification process. This total incorporates the costs of adding new sex and gender markers to our systems. We are not currently at a stage of being able to estimate the specific cost of adding new sex and gender markers within that estimated total cost.

Issue 1 – Recognising genders outside the binary on birth certificates			
Affected groups <i>(identify)</i>	Comment <i>nature of cost or benefit (eg, ongoing, one-off), evidence and assumption (eg, compliance rates), risks.</i>	Impact <i>\$m present value where appropriate, for monetised impacts; high, medium or low for non-monetised impacts.</i>	Evidence Certainty <i>High, medium, or low, and explain reasoning in comment column.</i>
Additional costs of the preferred option compared to taking no action			
Regulated groups (people who are non-binary and children and young people)	Cost of amending registered sex on birth certificate and purchasing new birth certificate. Time spent on application process, including approaching an authorised witness for statutory declaration.	Low Cost for an individual - \$88-\$90 (\$55 for the application to amend the birth record and \$33-\$35 to purchase a new birth certificate). 9(2)(f)(iv)	High Fees are set in regulations. Forms will be provided in accessible format and there are no other evidence requirements.
Regulators (Department of Internal Affairs)	Implementation cost of adding sex and gender markers into our data management systems. These implementation costs will be met by the Department's baseline budget.	Low As noted above these costs will sit within the estimated \$0.86M – \$1.03M total costs for introducing the self-identification process.	Medium Costs will be covered within the overall \$0.86M - \$1.03M, but the precise figure is not known.
Wider Government and other service providers that record gender	Changes to the sex or gender terms are not mandatory for service providers – cost will depend on whether self-identification prompts voluntary changes by agencies	Low	Medium Unlikely to add significantly to volume of work for authorised witnesses as non-binary people make up small

	<p>and other service providers.</p> <p>There may be some costs for some agencies and other service providers if they need to update their systems to ensure they can receive or access birth record information with new sex and gender markers. This still needs to be tested.</p> <p>Time spent by authorised witness to witness statutory declaration for people who are non-binary.</p>		<p>proportion of population.</p> <p>Operational staff from the Department have identified the types of systems updates that could be required to receive or access new sex and gender markers. They expect that any costs to agencies and other organisations would be low.</p>
Total monetised costs	Uncertain – we are unsure of the number of people who are non-binary that will change how their gender is reflected on their birth certificate.		
Total non-monetised costs	Low – time spent on application process by applicants and authorised witnesses will be minimal.		
Additional benefits of the preferred option compared to taking no action			
Regulated groups (people who are non-binary)	<p>Official recognition of their gender will have positive impacts for the wellbeing of individuals.</p> <p>Reduction in cost barrier to accessing proof of identity with accurate gender (passport is a more expensive option).</p>	Medium In relation to the price of obtaining a passport, there is a cost saving of \$109 for adults and \$25 for children.	Medium We note that presenting a birth certificate with a non-binary marker may out the person as transgender. This may lead to cases of discrimination. Fees for birth certificates and passports are set in regulations.
Regulators	N/A	Nil	High We have not identified any potential areas of benefits.
Wider Government and other service providers that record gender	Official recognition of people who are non-binary will have positive impacts on their wellbeing and therefore will benefit wider society. Given the small population	Low - Medium	Medium We note that presenting a birth certificate with a non-binary marker may out the person as transgender. This

	group directly affected, wider societal effects will not likely be large.		may lead to cases of discrimination.
Total monetised benefits	Uncertain – we are unsure of the number of people who are non-binary that will change how their gender is reflected on their birth certificate.		
Total non-monetised benefits	High - official recognition of people's gender will support wellbeing and social cohesion.		

Issue 2 – Prescribing suitably qualified third parties

Affected groups <i>(identify)</i>	Comment <i>nature of cost or benefit (eg, ongoing, one-off), evidence and assumption (eg, compliance rates), risks.</i>	Impact <i>\$m present value where appropriate, for monetised impacts; high, medium or low for non-monetised impacts.</i>	Evidence Certainty <i>High, medium, or low, and explain reasoning in comment column.</i>
Additional monetised costs of the preferred option compared to taking no action			
Regulated groups (Third parties)	Time and effort required for third parties to make an assessment and write letter of support.	Low	High Guidance and templates for letters of support will be available to third parties.
Regulated groups (children and young people accessing the process)	Cost for making appointments with registered professionals. Time and effort required to approach a person to witness a statutory declaration and a suitably qualified third party.	Low	Medium Monetary cost will depend on how many applicants use a registered professional compared to someone they know. Time and effort will be low. Forms will be provided in accessible format and there are no other evidence requirements.
Regulators (Department of Internal Affairs)	Implementation cost of developing guidance for third parties and for processing a third	Low	Medium The specific cost of processing a third party statement has

	party statement as part of application.		not been budgeted but the process will not be resource intensive.
Wider Government and other service providers	N/A	Nil	High We have not identified any monetary costs.
Total monetised costs	Uncertain – we are unsure of the number children and young people who will change how their gender is reflected on their birth certificate.		
Non-monetised costs	Low		
Additional monetised benefits of the preferred option compared to taking no action			
Regulated groups (Third parties)	N/A	Nil	High
Regulated groups (children and young people accessing the process)	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. Reduction in cost barrier to accessing proof of identity with accurate gender (passport is a more expensive option).	High Monetary cost saving of \$25 for children. Cost for new child passport is \$115.00; this compares with \$90 cost of amending registered sex and purchasing new birth certificate.	High Fees for birth certificates and passports are set in regulations.
Regulators (Department of Internal Affairs)	N/A	Nil	High We have not identified any potential areas of monetary benefits.
Wider Government and other service providers	Official recognition of transgender and intersex children's gender will have positive impacts on	Low - medium	Medium

	their wellbeing and therefore will benefit wider society.		
Total monetised benefits	Uncertain - we are unsure of the number of children and young people who will change how their gender is reflected on their birth certificate.		
Total non-monetised benefits	High		

Section 4: Delivering an option

How will the new arrangements be implemented?

189. The self-identification process will be implemented in June 2023 by the Department's Service Delivery and Operations (SDO) branch. The 2021 Act does not require other organisations to change the way they record sex or gender information.
190. Communications related to the self-identification process including guidance, website updates and application forms, will also be available from June 2023. These communications will be shared with the following key stakeholder groups:
- community organisations who support transgender, takatāpui and intersex people;
 - peak bodies of registered professionals who can support a child's application;
 - peak bodies for relying parties³⁹ who receive birth certificates as proof of identity (including banking sector and education providers);
 - government agencies who receive birth certificates as proof of identity (Ministry for Social Development, Waka Kōtahi New Zealand Transport Agency, Inland Revenue and New Zealand Police);
 - services that provide the technology for the confirmation service used for proof of identity and information sharing;
 - peak bodies for funeral directors who record sex information relating to deaths;
 - peak bodies for celebrants to inform them that the new sex markers will be available on marriage and civil union certificates; and
 - companies and organisations who use the confirmation service to verify an individual's identity using a birth certificate (including banking sector and education providers).
191. Clear guidance relating to the role of a suitably qualified third party will be developed and included on the website and application forms.

Implementation risks for regulations

Sex and gender markers

192. We note that some service providers may not be ready to receive documents with the new sex and gender markers. This could lead to situations where the validity of a birth certificate is questioned. **9(2)(f)(iv)** [REDACTED]
[REDACTED]
[REDACTED] These risks will be actively managed.
193. We have identified government agencies and other organisations that access or receive data on sex and gender markers using third party software.⁴⁰ **9(2)(f)(iv)** [REDACTED]
[REDACTED] We are contacting the relevant agencies and organisations about this. [REDACTED]

³⁹ 'Relying parties' is a term used for service providers that receive evidence of identity from service users.

⁴⁰ This happens through the confirmation and retrieval service or through information sharing agreements.

[Redacted]

Suitably qualified third parties

194. We note that some people may be motivated to falsify letters of support. This risk is mitigated by potential criminal liability, as it is an offence to provide any false statement for applications to the Registrar-General. However, we note that the risk of this occurring cannot be totally removed.

General implementation risks for the self-identification process

195. The 2021 Act will require the Department to deliver and register several new services and related products. We have identified some risks related to costs and timing.

Costs

196. The Department notes that high demand and training requirements will require a high level of investment initially and there is a risk of cost overrun. The Department anticipates there will be a peak in applications for registering a sex or gender in the first 12 months after the changes are implemented. There will also be an initial cost for training staff on the new process.

197. The implementation of the self-identification project has been ranked as a high priority, which will mitigate the risk of not having the self-identification process available by June 2023. 9(2)(f)(iv)

[Redacted]

9(2)(f)(iv)

Timing

199. If we cannot implement the self-identification process when the legislation comes into force, it will be a highly visible breach of legislative compliance. 9(2)(f)(iv)

[Redacted]

200. However, the risks of delay are limited. This project is not considered complex as most of the changes are considered small functional changes of the systems that are already in place under the current process for amending registered sex. While there is a complex 'web' of systems and vendors in the Births, Deaths and Marriages registration domain, extensive planning and testing will manage this complexity. We consider that the likelihood of the implementation not being ready by June 2023 is very low.

How will the new arrangements be monitored, evaluated, and reviewed?

201. Efforts to monitor, evaluate, and review the self-identification process will be inclusive of the issues of this RIS.

202. We have identified a risk that some potential applicants may not use the self-identification process because it does not meet their expectations on accessibility in relation to affordability, finding an accurate sex or gender marker or finding a suitably qualified third party.

203. We will monitor the progress of implementing any changes in the self-identification process. Complaints will be monitored and evaluated through the already established contact centre channels such as service counters, phone, email and Facebook page to know if our approach to accessibility needs to be reviewed. We will consider seeking feedback through our customer experience surveys – this may include asking whether

applicants' preferred sex or gender markers are available, and what barriers children and young people have had to access a suitably qualified third party.

204. SDO has the capacity to provide derive statistical data from applications, including on the sex and gender markers preferred, the number of 16 and 17 year olds applying without guardian consent or the number of people applying to amend their marker more than once.
205. To ensure the objectives of changing to a self-identification process are being met, the self-identification provisions in the 2021 Act will be reviewed five years from commencement of the Act. Under the statutory review process, the Minister of Internal Affairs must consult the Human Rights Commissioner, the transgender and intersex communities and any other persons and organisations considered appropriate. It is open to stakeholders to contact the Department directly to raise any concerns they have.

Appendix one: Summary of analysis on the ‘additional requirements’ issue

Background – Self-identification could enable identity fraud

- 206. Under the self-identification process, a person will be able to amend their registered sex more than once. This approach recognises that gender can be fluid and how a person identifies may change over time.
- 207. A person who amends their registered sex will not have their previous name and sex displayed on their birth certificate. Their new birth certificate will accurately reflect their identity and will limit the chances of being ‘outed’ as transgender. This differs from a standard name change process, where the previous names are shown on a new birth certificate.
- 208. The self-identification process will provide a way for people to obtain multiple birth certificates with different names and registered sex. These birth certificates could be used to avoid detection or access services they are not entitled to through identity fraud. To respond to this risk, the 2021 Act enables additional requirements to be established in regulations where people apply to amend registered sex more than once. The additional requirements would not have applied the first time a person amends their registered sex.

There is only a low level of risk

- 209. The self-identification process would not likely add significantly to the risk of fraud in New Zealand as people can already commit fraud through other means, including through stealing other people’s identity information and using forged or counterfeit documents. There are also a range of protections in place that will help minimise the risk of the self-identification process enabling more identity fraud. **9(2)(c)**



- 210. There is still a small risk of birth certificates being used to create other identity documents. Combinations of these documents could be used to create multiple identities, which could enable fraudulent behaviour. Key documents to consider are driver licences, firearms licences, passports and kiwi access cards⁴¹. People can also use IRD numbers to support fraudulent behaviour.

⁴¹ Kiwi access cards are issued by HospitalityNZ, which unlike providers of other evidence of identity, is not a government agency.

Options and criteria

211. We consulted on three options:

- Option One – counterfactual: no additional requirements;
- Option Two – prescribe in regulations the requirement of a referee to provide statutory declaration that application is being made in ‘good faith’ (regulatory option); and
- Option Three – additional checks by the Department (non-regulatory solution).

212. In our engagement a significant majority of people supported option one, not creating additional requirements. Some people supported option three, an additional checking process.

213. In advising the Minister we considered these options under three criteria:

- **Accessibility:** applicants can easily apply to amend their registered sex without any unnecessary barriers or complexity.
- **Integrity:** have confidence applications are genuine and the opportunity to commit fraudulent or illegal intent under the self-identification process is limited.
- **Fairness:** the burden of preventing identity fraud is fairly allocated between individuals making genuine applications, and service providers and government.

We agreed with submitters that Option One was the best option






214. We considered that option one best ensured that transgender, takatāpui and intersex people could access self-identifications process. We also considered the measures in place (e.g., statutory declaration requirement) placed a fair level of burden on transgender, takatāpui and intersex people and that additional measures would likely be unfair.


215. While Option One does not provide additional protection against the risk of identity fraud, we think this is appropriate given the low risk of identity fraud being enabled.

How do the options compare to the status quo/counterfactual?

	Option One – status quo: no additional requirements	Option Two – requirement of a referee to provide statutory declaration that application is being made in 'good faith'	Option Three – Department managed process of additional checks
Accessible <i>Applicants can easily apply to amend their registered sex without any unnecessary barriers or complexity</i>	0 Because there are no additional requirements, there are no barriers created for applicants accessing the self-identification process more than once.	-- The requirement of a referee for any subsequent application may create a barrier or perceived barrier to access the self-identification process as some applicants may not know someone who is willing to act as a referee.	0 Although there is no requirement for the applicant to do anything, the checking process and potential investigation process could be perceived as breaching privacy. This was a concern for some submitters.
Integrity <i>Have confidence applications are genuine and the opportunity to commit fraudulent or illegal intent under the self-identification process is limited</i>	0 Under the status quo, the statutory declaration by an applicant may partly mitigate the potential for identity fraud due to the consequences of falsified statements. Existing operational processes for name changes would be relied upon as mechanism to pick up any potential cases of fraud.	+ A statutory declaration from a referee that confirms an applicant is making a subsequent application in 'good faith' may mitigate the potential for identity fraud due to the consequences of falsified statements. However, this type of statement has not been legally tested for establishing liability so it is unclear how effective this measure would be.	+ While the additional checking process could stop some fraudulent applications, it is unclear how much value it would add given existing processes.
Fairness <i>The burden of preventing identity fraud is fairly allocated</i>	0 Applicants are already required to provide a statutory declaration and evidence of identity. We consider this to be a fair burden. Information sharing, using other linking information on birth certificates, and reasonable evidence of identity requirements are all available tools for preventing fraud. Where the risk is significant, service providers should have effective fraud detection methods regardless of the self-identification process.	- The existing requirements put a reasonable burden on people who are genuinely applying to protect against identity fraud. We consider a further requirement could be unfair.	+ The existing requirements put a reasonable burden on people who are genuinely applying to protect against identity fraud. However, we do not consider the checking process would add any more of a burden.
Overall assessment	0	-	-

Appendix two: Key changes from 1995 Act to 2021 Act

	1995 Act (Family Court process)	2021 Act (Self-identification process)
<p>Application process (Adult)</p> 	<ul style="list-style-type: none"> • Application to amend registered sex is made to the Family Court. • Medical evidence is required. • The Family Court judge decides if the application is successful. • Family Court notifies Registrar-General 	<ul style="list-style-type: none"> • Application to amend registered sex is made to the Registrar-General. • A statutory declaration is required. • The applicant determines what nominated sex appears on their birth certificate in line with what reflects their gender.
<p>Medical evidence</p> 	<ul style="list-style-type: none"> • Evidence of medical treatment is required in the application. • What constitutes medical evidence is decided by the judge. This can range from hormone therapy to gender affirming surgery. 	<ul style="list-style-type: none"> • Medical evidence requirement removed and replaced with statutory declaration process.
<p>Statutory declaration</p> 	<p>N/A</p>	<p>The applicant is required to state that they:</p> <ul style="list-style-type: none"> • Identify as a person of the sex nominated in the application; • Intend to live as a person of this nominated sex; and • Understand the consequences of the application.
<p>Available sex and gender markers</p> 	<p>Binary sex and gender markers only:</p> <ul style="list-style-type: none"> • Male • Female <p>An 'indeterminate' marker is available for intersex people born with a variation of sex characteristics (through different process to Family Court)</p>	<p>Different sex and gender markers available:</p> <ul style="list-style-type: none"> • Male • Female • Other marker options to be set in regulations
<p>Process for 16 and 17 year olds</p> 	<p>Guardian of an eligible child applies to the Family Court (including 16 and 17 year olds).</p> <p>The Court must be satisfied that:</p> <ul style="list-style-type: none"> • The guardian intends to raise the child as the 'nominated sex'; and • There is expert evidence that shows medical treatment affirming the nominated sex has or will be undertaken. 	<p>Eligible 16- and 17- year olds make a statutory declaration. They also must have:</p> <ul style="list-style-type: none"> • Guardian consent; OR • Letter of support from a third party (third parties determined in regulations).

<p>Process for children under 16</p> 	<p>Same as process for 16 and 17 year olds.</p>	<p>Guardian of an eligible child makes a statutory declaration. They also must have:</p> <ul style="list-style-type: none">• Letter of support from a third party
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