



# Te Ngākau Kahukura

## Submission to the Department of Internal Affairs on Recognising gender on birth certificates and exploring a gender registration process for people born overseas

July 2022

Te Ngākau Kahukura is a national initiative that works to make communities, environments and systems more safe and inclusive for rainbow<sup>1</sup> people across Aotearoa. We work collaboratively with professionals, organisations and wider systems that support people across Aotearoa, including health, housing, social, education and justice. We provide advice, best practice guidance and training to support systems change.

Our vision is an Aotearoa where rainbow people grow up feeling safe, valued and like they belong in the places where they live, learn and access healthcare and social support.

For any of us, being recognised and understood for who we are is fundamental to our wellbeing. Having official documents that accurately reflect our identity is a key to feeling like a valued part of society. Te Ngākau Kahukura welcomed the passing of the Births, Deaths, Marriages and Relationships Registration Bill last year, and strongly supports this ongoing work to reduce the barriers that trans, non-binary, takatāpui and intersex people face in accessing official documents that accurately reflect their identity.

This submission shares our perspectives as an organisation advocating for systems change, and as a group of people (including Māori, Pasifika, and people born outside of Aotearoa) affected by these changes. Our team is made up of people whose sex and gender are not accurately described by Western binary constructs.

Thank you for the opportunity to comment.

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<sup>1</sup> We use *rainbow* as an umbrella term to describe people whose sexual orientation, gender identity, gender expression or sex characteristics differ from majority, binary norms. This include people who identify with terms like takatāpui, lesbian, gay, bisexual, intersex, transgender, queer, non-binary or fa'afafine, as well as people who don't use specific words for their identity, people whose identity changes over time, and people who are in the process of understanding their own identity and may not have 'come out' to themselves or others. It's estimated that people under the rainbow umbrella make up between 6 and 15% of New Zealand's population.

## Issue 1 – including genders outside the binary on birth certificates

As is recognised in the consultation document, providing options outside of male and female is important to trans, non-binary and intersex people whose sex and gender is not affirmed within that binary construct. From the Counting Ourselves study, we know that most trans and non-binary people in Aotearoa have incorrect gender details on their birth certificate, and that the most common reason provided was that the gender options that were available (male or female) did not fit their gender.<sup>2</sup>

Given that it is not currently possible, within the framework of the law as written, to enable an open-text option where people can describe their individual gender in detail, no long list of options (such as those proposed in Options 3 or 4) will be able to capture the nuance of individual gender. We consider that Option 2, which provides for a smaller list of umbrella terms, will be the most effective way of ensuring that options are available which encompass people's self-determined gender, while recognising that specific details of the ways that individuals describe their gender will not be captured on birth certificates.

We understand that it is not currently possible to consider removing the gender marker from birth certificates, but note that this would be the preference for many people. As a personal characteristic that is not determined at birth, it is more appropriate that sex or gender are not recorded on birth certificates as if suggesting they are immutable facts. Further, gender is a personal characteristic that people may not wish to have described and denoted by the state.

In the absence of being able to provide the option to remove the gender marker entirely from a birth certificate at this time, we recommend that a “not disclosed” (X) option is available as a marker. Such a marker could be used by anyone who does not want to specify a sex or gender on their birth certificate, not only trans, non-binary and intersex people.

We suggest that another umbrella option, such as “a non-binary gender” (N), is provided for people who want to denote a gender that sits outside of the male/female Western binary. The wording of “a non-binary gender” would make it clear that this category is intended to capture a range of genders that are outside of the male/female binary, rather than to simply recognise people who use the term “non-binary” to describe their specific gender.

We strongly suggest that “gender diverse” is not considered as an umbrella term for birth certificates. This term was used in the previous, now deprecated Statistics New Zealand standard on gender, and subsequently gained popularity as a term for describing either non-binary genders, or trans people in general. It is no longer used by Statistics New Zealand,<sup>3</sup> who recognised that it is open to misinterpretation, and is not often used by

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<sup>2</sup> Veale, J., Byrne, J., Tan, K., Guy, S., Yee, A., Nopera, T. & Bentham, R. (2019) *Counting Ourselves: The health and wellbeing of trans and non-binary people in Aotearoa New Zealand*. Transgender Health Research Lab, University of Waikato: Hamilton NZ.

<sup>3</sup> Stats NZ Tatauranga Aotearoa. (2021). *Statistical standard for gender, sex, and variations of sex characteristics*. Retrieved from [www.stats.govt.nz](http://www.stats.govt.nz).

trans people to describe their own genders.<sup>4</sup> “Gender diverse” is ambiguous and not meaningful, since the concept of “gender diversity” more accurately refers to the full range of genders, rather than just those which are outside of the Western binary, or those which are marginalised. A term like “gender diverse” can be unhelpfully used as a euphemism to refer to non-normative genders, in a way that reinscribes cissexism by suggesting that some genders are “diverse” while others are “normal”.

We recommend that this process does not provide specific markers for noting indigenous gender markers on a birth certificate. It would not be appropriate for the state to be in a position of defining and recognising roles that are determined within a cultural context. Further, it would not be possible for the state to ensure that these markers are only claimed by people who have whakapapa connections with the cultures that have created these terms.

In summary, we support Option 2 with the options M (male), F (female), N (a non-binary gender) and X (not disclosed).

Alongside these terms, te reo Māori translations should be provided. We strongly recommend that further consultation is undertaken to determine what these translations should be. Recently-developed kupu that are translations of English gender terms are not necessarily suitable for these purposes. They were not developed with wide input from trans, non-binary and intersex communities, and do not refer to the same concepts as these suggested gender marker options (in particular, “non-binary” is a different concept to “a non-binary gender”).

We appreciate that the Department of Internal Affairs is prioritising lived experience through this consultation process, in making sure you are hearing from people who are non-binary, trans, intersex, takatāpui and MVPFAFF+ about the aspects of this question that affect them. We encourage you to prioritise input from those most affected by these processes.

## Issue 2 – Who can be a suitably qualified third party to support applications for children and youth

The process of changing birth certificate details should uphold a young person’s right to self-determination.

The process should be designed so that it does not disadvantage those who do not have the support of their wider whānau in affirming their identity, and therefore may find it more difficult to nominate a supportive adult who has known them for more than 12 months. It is also important that the process does not disadvantage those who face barriers in accessing services such as medical care and education. Relying on too narrow a list of registered professionals would disadvantage trans and intersex young people who are Māori,

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<sup>4</sup> Stats NZ Tatauranga Aotearoa. (2020). *Sex and gender identity statistical standards: Consultation*. Retrieved from [www.stats.govt.nz](https://www.stats.govt.nz/consultations/sex-and-gender-identity-statistical-standards-consultation): <https://www.stats.govt.nz/consultations/sex-and-gender-identity-statistical-standards-consultation>

Pacific and/or disabled,<sup>5</sup> as well as others who face institutional racism and discrimination within the settings where registered professionals work.

To ensure that the process is as accessible and inclusive as possible, we support Option 4 –having options to provide a support letter from either a registered professional or a supportive adult.

To the list of nominated registered professions, we suggest adding registered youth workers<sup>6</sup>, since some young people who are not engaged with other services will have worked closely with a youth worker.

In relation to supportive adults, the suggested timeframe of having known the young person for 12 months seems appropriate as it matches the time period for verifying someone’s passport application.

The Department of Internal Affairs should prioritise the safety, privacy and wellbeing of young people applying for this process, particularly when they may not have the support of their whole whānau. We recommend that the Department engaged further with rainbow-led support organisations, such as those who are members of the Rainbow Support Collective, to develop safety protocols and referral pathways to access further support for young people and their whānau going through this process.

To support safety, privacy and wellbeing, the process should be developed with self-determination and dignity of the young person as central considerations. Young people need to be provided with copies of any letters written in support of their application, and should be in control of determining who is allowed to know about their application. If an unsupportive whānau member, or any member of the public, is able to order a copy of their updated birth certificate, the young person needs to be made aware of this as part of the application process, so that they can determine whether to proceed.

### Issue 3 – Additional requirements for multiple applications

It is important that people have the option of accessing this process more than once, so that they can access identity documents that reflect their gender across the course of their lifetime. It is not uncommon for people’s gender identity to change over time. It is important that people do not feel pressure to delay changing their documentation for fear that it would be difficult to change again if they need to in future. It is also likely that there will be people who have already changed their gender marker through the existing Family Court process, who wish to change their birth certificate again when more relevant gender marker options are available.

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<sup>5</sup> Roy, R., Greaves, L. M., Peiris-John, R., Clark, T., Fenaughty, J., Sutcliffe, K., Barnett, D., Hawthorne, V., Tiatia-Seath, J., & Fleming, T. (2021). *Negotiating multiple identities: Intersecting identities among Māori, Pacific, Rainbow and Disabled young people*. The Youth19 Research Group, The University of Auckland and Victoria University of Wellington, New Zealand. This version published April 2021.

<sup>6</sup> Registered with Korowai Tupu, the Professional Association for Youth Work in Aotearoa:  
<https://arataiohi.org.nz/korowai-tupu/>

This process should be designed to uphold the fundamental human right to legal recognition.<sup>7</sup> Trans, non-binary and intersex people should not be required to meet unnecessary additional requirements when making subsequent changes to their sex marker. Very little detail is provided in the consultation document about what kinds of additional checks would be proposed under Option 3, or what criteria would be used to decide whether they should be applied. This makes it difficult to comment on whether a process like this would be invasive and unsafe for trans, non-binary or intersex individuals, or would have the potential to be applied in a discriminatory manner. On this basis, we recommend Option 1 to ensure there are no additional barriers for individuals.

The consultation document notes that there is a risk that this process could be accessed to engage in identity fraud. It is important to recognise that there is a parallel risk that this hypothetical scenario, though unlikely, will be used as a talking point to reinforce hatred and suspicion of trans, non-binary and intersex people, particularly trans women. It is important that the perceived risk of identity fraud is not overstated in discussion around these changes, particularly in media.

## Part 2: A process to register gender for people born overseas

Improving processes for people born overseas will benefit a large number of trans, non-binary and intersex people living in New Zealand. More than a quarter (26%) of the Counting Ourselves survey participants were born overseas, including a small number (1%) who came here as an asylum seeker or refugee.<sup>8</sup> For people who are new to Aotearoa, having accurate identification documents can be even more critical than it is for citizens, since birth certificates and other documents are often required to access public services for the first time, or apply for visas.

The Births, Deaths, Marriages, and Relationships Registration Bill passed in 2021 removed one avenue for legal gender recognition that has been available to permanent residents: the ‘declaration as to sex’ available through the Family Court process.

It is essential that the New Zealand state provides avenues for all people in Aotearoa to have legal documentation that reflects their self-determined gender. It is important that asylum seekers, refugees and migrants have options to obtain accurate documents through a simple administrative process, similar to that being introduced for people born in Aotearoa. We support Rainbow Path’s leadership and guidance on these matters.

In seeking to uphold its obligations under Te Tiriti o Waitangi, the state should also provide avenues for tangata whenua born overseas to obtain New Zealand identity documents that recognise their gender,

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<sup>7</sup> Yogyakarta Principles (2017). *Yogyakarta Principles Plus 10, principle 31*. Retrieved from: <https://yogyakartaprinciples.org/principle-31-yp10/>

<sup>8</sup> Veale, J., Byrne, J., Tan, K., Guy, S., Yee, A., Nopera, T. & Bentham, R. (2019) as above

regardless of whether they currently live here. This would go some way to restoring the mana of indigenous understandings of gender that were misunderstood, pathologised and criminalised through colonisation.

We appreciate that this consultation process is prioritising lived expertise. We encourage the Department of Internal Affairs to keep engaging and working with those born overseas, especially people from refugee and migrant backgrounds, and with tangata whenua born outside of Aotearoa, to address these critical issues that affect their wellbeing and everyday safety. It is crucially important that this work to develop processes for people born overseas continues beyond this current consultation process, and is well resourced to enable effective community engagement.