



Organisation Intersex International Australia Limited

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Submission on the National Human Rights Action Plan, Consultation Version

Organisation Intersex International Australia Limited

What is intersex?

The term intersex was adopted by science in the early 20th century and applied to human beings whose biological sex cannot be classified as clearly male or female. An intersex person may have the biological attributes of both sexes or lack some of the biological attributes considered necessary to be defined as one or the other sex. Intersex is always congenital and can originate from genetic, chromosomal or hormonal variations.

Environmental influences such as endocrine disruptors can also play a role in some intersex differences. The term is not applicable to situations where individuals deliberately alter their own anatomical characteristics.

Intersex people represent a significant percentage of the population¹.

What is OII?

The Organisation Internationale des Intersexués (OII) is the world's largest intersex organization with members representing almost all known intersex variations. OII has affiliates in twenty countries, on six continents, speaking ten languages including Mandarin Chinese and Arabic.

OII is represented in Australia by **Organisation Intersex International Australia Limited**, a not-for-profit company. The company is referred to as **OII Australia** in this submission.

OII Australia is funded out of the contributions of its members. It receives no public funding. OII Australia employs no staff at present, working entirely through the voluntary contributions of its members. Unfortunately, these sometimes have an impact on our ability to respond to government consultations.

This is the first occasion where we have been able to make a submission in relation to the *National Human Rights Action Plan*.

¹ Fausto-Sterling: 2000 puts the intersex prevalence figure at a minimum of 1.9 % of the population. Genetic researchers state that it may be as high as 4%. The frequently quoted prevalence figures of 1:200 and 1:1000 are taken from unreliable sources especially Sax: 2002 who sought to minimize intersex by eliminating all but mixed gonadal dysgenesis (formerly known as "true hermaphrodite"). Australian registers of birth anomalies have newborns with visible and reportable differences of sex anatomy at around 29:1000 live births. The introduction of prenatal screening has reduced this number considerably for some intersex differences, due to pregnancy terminations.

OII's Mission:²

- To support intersex individuals by providing information and contact with other intersex people.
- Campaign in favour of human rights for intersex people.
- Encourage an exchange of ideas and different perspectives about intersex from various groups and geographical regions.
- Provide information concerning actual life experiences of people with intersex variations to medical personnel working with infants with atypical sex anatomy, to psychological experts, sexologists, sociologists and specialists in feminism.
- To assist families and friends of intersex individuals to understand intersex and to cope with the specific problems related to their role as a support person.

Our interest in this submission

The proposed *National Human Rights Action Plan* is of vital concern to OII Australia as the current draft does not satisfactorily represent the interests of intersex people. We have concerns in relation to the following recommendations in the *Exposure Draft*: 117, 118, 138, 140, 141, 143, 144, 145³.

Intersex is not a gender identity

Intersex is a term which relates to a range of natural biological traits or variations that lie between “male” and “female”.

We're concerned that the existing language in sections on “sex and/or gender diversity” do not make reference to existing policy or the needs of intersex people.

In particular, recommendations are framed in a manner that presupposes that intersex people, like gay men, lesbians and transgender people, would be covered by “sexual orientation and gender identity”.

State legislation covering discrimination on the basis of gender identity:

Although intersex people represent a significant percentage of the population, there is little substantive recognition of intersex people at federal level, or by states and territories. Where we have been the subjects of legal debate we have either fared very poorly or have been used in an appropriative manner to argue the case for non-intersex people⁴. Intersex people

² See OII Australia, <http://oiaustralia.com/about/mission/>

³ Australian Government Attorney-General's Department *National Human Rights Action Plan – Exposure Draft*, <http://www.ag.gov.au/Documents/National+Human+Rights+Action+Plan+-+Consultation+version.doc>

⁴ In the Victorian Supreme Court, Mushin J chastised two parents for not allowing surgical and hormonal interventions when the child was born before allowing hormone treatment so the child might more completely fulfil the role of a man when he matured. In the case of *Re:Kevin*, intersex was used to argue that human sex existed on a continuum between male and female and that absolute certainty in respect of sex role could not therefore be guaranteed. It was also argued that differences in the brain might constitute a kind of intersex. In the NSW Administrative Appeals tribunal the same argument was put and intersex people were used to argue for a third sex as justifying ‘sex not specified’ for a transgender person, see <http://www.caselaw.nsw.gov.au/action/PJUDG?jgmtid=151840>. In the cases of *Re: Kevin* and *Norrie*, intersex people were not represented and, if they had been, would argue strenuously that there are significant differences between the trans experience and the intersex one. Intersex people do not seek a separate category for a third sex; indeed no intersex organisation in the world supports that position. In both cases non-intersex people argued their case without intersex engagement. Earlier the work of John Money et al used intersex to bolster the feminist position that gendered behaviour was learned (Money was responsible for the use of gender as a sex

are thought to be protected by legislation under “gender identity”, a convention replicated in the *Yogyakarta Principles*⁵. For example the NSW, ACT and Victorian anti-discrimination acts all use near identical wording in their protection of “gender identity” or “transgender persons”.

Section 38A of the *NSW Anti-Discrimination Act 1977* No. 48 defines “a recognised transgender person ... (c) who, being of indeterminate sex, identifies as a member of a particular sex by living as a member of that sex”.

Similarly, the Victorian Human Rights Commission reports⁶:

The Equal Opportunity Act 2010 protects gender identity as a personal characteristic. Under the Act, gender identity is about people of one sex identifying as a member of the other sex, or people of indeterminate sex identifying as a member of a particular sex. People can do this by living, or seeking to live, as a member of a particular sex, or assuming characteristics of a particular sex. This could be through their dress, a name change or medication intervention, such as hormone therapy or surgery.

And in Queensland’s *Anti-Discrimination Act 1991*, the Schedule Dictionary defines “gender identity as follows:

*gender identity, in relation to a person, means that the person--
(a) identifies, or has identified, as a member of the opposite sex by living or seeking to live as a member of that sex; or
(b) is of indeterminate sex and seeks to live as a member of a particular sex.*

A casual read might suggest that these provisions would protect intersex people but, in fact, they require people to identify as either men or women, and do not protect those whose innate physical sex is intersex. This is for two reasons:

1. Sex is interpreted as a binary. The case of *Norrie v Registry of Births Deaths and Marriages [2011] NSWADT 102*⁷ found that references to “sex” are:

...premised on a binary division between the sexes into "male" and "female"...

In my view the Act is predicated on an assumption that all people can be classified into two distinct and plainly identifiable sexes, male and female.

2. The legislation was designed to provide for transgender people, not intersex people. For example, the NSW Administrative Decisions Tribunal reports in the case of *Norrie v Registry of Births Deaths and Marriages [2011] NSWADT 102*:

Part 5A of the Act deals with changes of sex. Part 5A (not including sections 32DA - 32DD) was inserted into the Act by the Transgender (Anti-Discrimination and Other Acts Amendment) Act 1996 on 3 October 1996. The same Act also inserted Part 3A ('Discrimination on transgender grounds') into the Anti-Discrimination Act 1977. The second reading speech for the underlying Bill stated that its purpose was "to provide for the legal recognition of post-operative transgender persons", in particular "to enable persons who were born in this State and have undergone sexual reassignment surgery to apply for new birth certificates showing their new sex" (Hansard, Legislative Assembly, Minister Yeadon, 1 May 1996).

role descriptor).

⁵ *Yogyakarta Principles on the Application of International Human Rights Law in relation to Sexual Orientation and Gender Identity*, <http://www.yogyakartaprinciples.org/>

⁶ Victorian Human Rights Commission, http://www.humanrightscommission.vic.gov.au/index.php?option=com_k2&view=item&layout=item&id=714&Itemid=543

⁷ *Norrie v Registry of Births Deaths and Marriages [2011] NSWADT 102*, <http://www.caselaw.nsw.gov.au/action/PJUDG?jgmid=151840>

The NSW Anti-Discrimination Board note, in their *2008-2009 Annual Report*, that despite the inclusion of “indeterminate sex” in Section 38A of the *NSW Anti-Discrimination Act 1977*, and the inclusion of “gender identity in legislation in several states, intersex people are not covered. Page 27 reads:

*Intersex discrimination – intersex people are not protected against discrimination anywhere in Australia. The President will bring this to the attention of the Attorney General.*⁸

Current legislation similarly fails to provide protection for people with a gender identity that is neither male nor female.

Proposals in the *National Human Rights Action Plan – Exposure Draft* do not extend this protection. They appear to merely reproduce, at a federal level, existing language on “gender identity”.

From the *National Human Rights Action Plan – Exposure Draft*:

Women

	Priority	Action	Lead agency	Performance indicator/ timeframe
117	Freedom from discrimination ⁹	The Australian Government will consider the recommendations made by the Senate Legal and Constitutional Affairs Committee in its 2008 inquiry on the effectiveness of the Sex Discrimination Act 1984, as part of the project to consolidate Commonwealth anti-discrimination laws into a single Act.	AGD	Exposure draft legislation due in 2012
118		The Victorian Government will monitor the effectiveness of the recently implemented Everybody Wins toolkit, which supports sporting clubs to build more inclusive and safe sporting environments for women, girls and other groups.	Victorian Government	Launched June 2011

Gay, lesbian, bisexual and sex and / or gender diverse people

	Priority	Action	Lead agency	Performance indicator/ timeframe
140	Freedom from discrimination ¹⁰	The Australian Government will introduce new protections against discrimination and harassment based on sexual orientation and gender identity, as part of the project to consolidate Commonwealth anti-discrimination law into a single Act.	AGD	Exposure draft legislation due in 2012
141		The Australian Government will amend data collection to allow for or encourage disclosure of sexual orientation and gender identity to establish a better evidence base for service provision and policy development.	AGD, ABS	In time to input into 2016 census reform, ongoing for other agencies

We contend that intersex people will not be covered by anti-discrimination legislation unless intersex is specifically provided for in legislation.

⁸ Anti-Discrimination Board of NSW, Annual Report 2008-09, [http://www.lawlink.nsw.gov.au/lawlink/adb/ll_adb.nsf/vwFiles/ADBAnnualReport0809.pdf/\\$file/ADBAnnualReport0809.pdf](http://www.lawlink.nsw.gov.au/lawlink/adb/ll_adb.nsf/vwFiles/ADBAnnualReport0809.pdf/$file/ADBAnnualReport0809.pdf)

⁹ UPR Rec 48 (Islamic Republic of Iran): A; UPR Rec 52 (Israel): A. Note that legislation to strengthen the *Sex Discrimination Act* was also passed in May 2011.

¹⁰ UPR Rec 66 (Colombia): A; UPR Rec 67 (Switzerland): A; UPR Rec 68 (New Zealand): A

If a policy is to include “Gay, lesbian, bisexual and sex and / or gender diverse people” then it can’t be restricted to “sexual orientation and gender identity”. It must explicitly include sex, as in “sex diverse people”, as well as “gender diverse people”.

Recent federal case law in the US has determined that discrimination on the basis of “gender non-conformity” constitutes sex discrimination¹¹ and this is a precedent that OII Australia seeks to see apply in Australia.

Intersex people must be specifically provided for in anti-discrimination legislation.

OII Australia believes that definitions of sex should never assume that everyone conforms to a binary consisting of male and female. It is critically important that the definition of sex is broad enough to acknowledge and include intersex variations in human biology.

OII Australia proposes that the sexes could be defined as female, male or unspecified. Alternatively, OII Australia proposes that sex be defined as “sex characteristics” which are typically, but not always, male or female.

Changing legal documentation on sex or gender

The *National Human Rights Action Plan Baseline Study* report¹² states:

3.5.4 Sex and/or gender diverse people

The concluding paper of the Australian Human Rights Commission’s Sex and Gender Diversity Project noted continuing discrimination against the sex and/or gender diverse community in the realm of legal recognition of sex in documents and government records.

The following points were raised:

- *Under most state and territory legislation a married person cannot apply to have their sex changed on their birth certificate.*¹³
- *A person cannot apply to have their birth certificate changed to note their sex identity if they have not undergone sex affirmation surgery.*¹⁴
- *Gender identification on official records is largely binary (male/female).*¹⁵

The paper also noted that the requirement to record an applicant’s previous name can reveal information about their previous legal identity if the name is gender specific. Submissions to the Baseline Study noted the need for data on matters specific to gay, lesbian, bisexual, and sex and/or gender diverse people. They also noted with concern the considerable financial cost and health risks associated with sex affirmation surgery and recommended that the surgery not be included in criteria for legally changing sex. The Federal Attorney-General has asked his department to coordinate a review of how and why the Australian Government collects sex and gender data. The department will also work with relevant Australian Government agencies and State and Territory Governments with a view to developing a nationally consistent approach to legally changing sex.

¹¹ United States Court of Appeals Eleventh Circuit, *Glenn v Brumby*, No. 10-14833, 10-15015, dated 6 December 2011.

¹² Australian Government Attorney-General’s Department, *Baseline Study*, [http://www.ag.gov.au/Documents/ILHRD+-+NHRAP+-+Baseline+Study+-+Final+\(05Dec2011\).doc](http://www.ag.gov.au/Documents/ILHRD+-+NHRAP+-+Baseline+Study+-+Final+(05Dec2011).doc)

¹³ Australian Human Rights Commission, *Sex Files: the legal recognition of sex in documents and government records—concluding paper of the Sex and Gender Diversity Project*, AHRC, Sydney, 2009, p 23.

¹⁴ *ibid.*, p 24.

¹⁵ *ibid.*, p 27.

The *National Human Rights Action Plan – Exposure Draft* states:

Gay, lesbian, bisexual and sex and / or gender diverse people

	Priority	Action	Lead agency	Performance indicator/ timeframe
143	<i>Sex and/or gender diverse people</i>	Governments will work with the States and Territories to develop a nationally consistent approach to legally changing sex.	AGD, States and Territories,	Ongoing
144		The Australian Government is coordinating a review of how and why the federal Government collects sex and gender information, with the aim of developing national guidelines to ensure sex and gender information is collected consistently across government and only where there is a legitimate purpose.	AGD	Draft guidelines will be released for public consultation in 2012

Intersex people are currently able if we wish, in most states and territories, to obtain an administrative correction of our birth certificate on the basis that there was an error in the original document.

In New South Wales, the *Births, Deaths And Marriages Registration Act 1995* Section 45 states¹⁶:

- (1) *The Registrar may correct the Register:*
 - (a) *to reflect a finding made on inquiry under Division 2, or*
 - (b) *to bring an entry about a particular registrable event into conformity with the most reliable information available to the Registrar of the registrable event.*
- (2) *The Registrar must, if required by a court, correct the Register.*
- (3) *The Registrar corrects the Register by adding or cancelling an entry in the Register or by adding, altering or deleting particulars contained in an entry.*

Tony Briffa, currently mayor of Hobsons Bay, Victoria, provides the first case of an administrative correction of which we are aware. The New South Wales Births Registry has provided us with information and a case study regarding administrative corrections in NSW¹⁷.

The main exception to administrative correction is in Western Australia. Under Western Australian law, intersex people who reject their birth assignments have no choice but to comply with the rules contained in the *Gender Reassignment Act 2000 (GRA)*. That entails, as it does for transsexual and transgender individuals, that sufficient parts of an intersex person's anatomy should be removed or modified so that they might be seen to be appropriately bodied for the sex they wish to live as.

When a sex assignment is made on an intersex child there can be no certain way to predict how that child might express their gender role as an adult. Many intersex people will have experienced non-consensual cosmetic surgery as an infant to reinforce an assigned sex. For those who discover their intersex as adults there is no certain way to say how their differences should inform their choice of gender roles.

Children and adults, with a perspective of fundamental human rights, must be able to retain both their right to choose and their right to bodily autonomy.

¹⁶ See http://www.austlii.edu.au/au/legis/nsw/consol_act/bdamra1995383/s45.html. The Victorian equivalent is at http://www.austlii.edu.au/au/legis/vic/consol_act/bdamra1996383/s43.html

¹⁷ See <http://oiaustralia.com/4856/australia-welcomes-south-wales-births-registrations-intersex/>

It is crucial that any nationally consistent approach to legally changing gender does not remove the right of intersex people to an administrative correction of the details on birth certificates.

It is crucial that intersex people are not forced, as in Western Australia, into a situation where we must surgically or hormonally modify their body to conform to the expectations of male or female gender.

A nationally consistent approach to changing gender must continue to facilitate the administrative correction of birth certificates for intersex people.

The case of passports

The *Baseline Study* report states in section 3.5.4:

In September 2011 the Australian Government announced changes to its passport policy to make it easier for sex and/or gender diverse people to obtain a passport in their preferred gender, including allowing people to have ‘x’ listed on their passport.

The *National Human Rights Action Plan – Exposure Draft* version states:

Gay, lesbian, bisexual and sex and / or gender diverse people

	Priority	Action	Lead agency	Performance indicator/ timeframe
145	Sex and/or gender diverse people	The Australian Government will support the implementation of the recently issued guidelines to make it easier for sex and gender diverse people to get a passport in their preferred gender.	DFAT	The guidelines were released on 14 September 2011 On 15 September, the first passport was issued using the guidelines The guidelines are ongoing

The first Australian was issued with a passport identifying sex with an ‘x’ marker in 2003¹⁸. In 2011, new policies by the Minister for Foreign Affairs and the Attorney General enabled intersex people, and those of indeterminate, unknown or non-specified gender, to choose an ‘x’ sex marker providing they have supporting documentation from a doctor.

This policy is a “*a matter within the discretion of the Minister*”¹⁹, rather than a matter of legislation.

OII Australia is not in favour of the creation of a third sex category but does welcome an alternative where people can choose not to specify their sex.

OII Australia believes that any adult should be able to choose to have ‘x’ listed on their passport or other legal documentation, as is inferred in the *Baseline Study* statement. OII Australia believes that this should be possible without any requirement for supporting medical documentation.

¹⁸ This was possible because Victoria permits the issuing of birth certificates to infants with indeterminate sex.

¹⁹ See paragraph 83, *Norrie v Registry of Births Deaths and Marriages* [2011] NSWADT 102, <http://www.caselaw.nsw.gov.au/action/PJUDG?jgmid=151840>

Collection of data on gender

The *National Human Rights Action Plan – Exposure Draft* version states:

Gay, lesbian, bisexual and sex and / or gender diverse people

	Priority	Action	Lead agency	Performance indicator/ timeframe
144	<i>Sex and/or gender diverse people</i>	The Australian Government is coordinating a review of how and why the federal Government collects sex and gender information, with the aim of developing national guidelines to ensure sex and gender information is collected consistently across government and only where there is a legitimate purpose.	AGD	Draft guidelines will be released for public consultation in 2012

OII Australia believes that a nationally consistent framework for sex and gender information must not:

- **Expose people to discriminatory treatment in access to healthcare, insurance, employment and services, especially if access to an ‘x’ sex marker is standardised across government and government-issue documents.**
- **Require intersex people to obtain an ‘x’, or ‘m’ or ‘f’, sex marker to access appropriate healthcare.**

OII Australia welcomes this review of how and why the federal Government collects and uses sex and gender information, and hopes to be able to participate in the consultation process.

Relationship recognition

The *National Human Rights Action Plan – Exposure Draft* states:

Gay, lesbian, bisexual and sex and / or gender diverse people

	Priority	Action	Lead agency	Performance indicator/ timeframe
138	<i>Same sex-relationships</i> ²⁰	The Australian Government supports a nationally consistent framework for recognition of same-sex relationships to be implemented by States and Territories.	AGD, States and Territories	Ongoing

On 20 April 1979, the Family Court of Australia at Brisbane annulled a marriage of an intersex person on the basis that the wife, *“did in fact believe that she was marrying a male. She did not in fact marry a male but a combination of both male and female, notwithstanding the fact that the husband exhibited as a male”*.

*(iv) further, the definition of “marriage” as understood in Christendom is the voluntary union of one man and one woman to the exclusion of all other for life and a marriage in the true sense of the word within that definition could not have taken place and did not exist.*²¹

A nationally consistent framework for recognition of same-sex relationships, just like a nationally consistent framework for recognition of opposite-sex marriages, risks institutionalising the exclusion of intersex people.

²⁰ UPR Rec 69 (United Kingdom): A

²¹ In the marriage of C and D (falsely called C), (1979) FLC 90-636.

OII Australia would prefer that the collection and recording of data on relationships did not have an impact on the ability of partners in a relationship to manage their joint legal affairs.

OII Australia would welcome a review of how and why the federal Government collects relationship information, with the aim of developing national guidelines to ensure that such information is collected consistently across government and only where there is a legitimate purpose.

OII Australia would welcome a nationally consistent framework for the recognition of all supportive adult relationships.

Physical autonomy and access to appropriate healthcare

Concerns about legal approaches to changes of gender, and medical approval for the issuing of a passport with an 'x' identifier touch on some fundamental issues about the right of intersex people to live with autonomy over our own bodies, and free, fully informed and prior consent to any surgical or hormonal procedure.

Current regulations:

- Enable cosmetic genital surgery on infants on the basis that they are in the “*best interests of the child*”, despite a legal framework that is supposed to prevent this²².
- Intersex people who take testosterone blockers, such as Androcur, might find themselves on a list of potential sex offenders, as use otherwise is regarded as “off label”²³.
- Intersex people who take testosterone, a hormone that is generally prescribed over a full adult lifetime, are subject to constraints on their freedom of movement due to state and federal prescribing and access restrictions²⁴.

These are human rights issues that are not currently referred to in the *National Human Rights Action Plan*, and which should be included.

OII Australia, 26 February 2012.

²² See, for example, John M Hutson, Garry L Warne, Sonia R Grover (editors), *Disorders of Sex Development: An Integrated Approach to Management*, Springer, 2012. Also see, for example, Birgit Köhler, Eva Kleinemeier, Anke Lux, Olaf Hiort, Annette Grüters, Ute Thyen and the DSD Network Working Group, *Satisfaction with Genital Surgery and Sexual Life of Adults with XY Disorders of Sex Development: Results from the German Clinical Evaluation Study*, 2011, <http://jcem.endojournals.org/content/early/2011/11/10/jc.2011-1441.abstract> and Lydia Guterman in Open Society Foundations, *Why Are Doctors Still Performing Genital Surgery on Infants?*, <http://blog.soros.org/2012/01/why-are-doctors-still-performing-genital-surgery-on-infants/>, 2012.

²³ See OII Australia, <http://oii australia.com/4117/intersex-australians-sex-offenders-register/>, 2009.

²⁴ See OII Australia, <http://oii australia.com/media/articles/hrt-suffering-system-medical-condition/>, 2009.