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Feedback on the ACT Government Response to "Beyond the Binary" DRAFT

4 April 2013

1. OII Australia

Organisation Intersex International Australia Limited (OII Australia) is a national body by and for intersex people. We promote the human rights of intersex people in Australia, and provide information, education and peer support.

OII Australia is a not-for-profit company, recognised by the Australian Taxation Office as a charitable institution. It is funded entirely out of the voluntary contributions of its member. OII Australia employs no staff and receives no public funding. OII Australia is the Australian affiliate of a global network of intersex organisations, and a member of the National LGBTI Health Alliance.

2. What is intersex?

Intersex is a term which relates to a range of biological traits or variations that lie between "male" and "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. Historically, the term "hermaphrodite" was used, originating in classical mythology. The term intersex was adopted by science in the early 20th century.

In the interests of clarity, intersex is not the same as transgender, or transsexuality. Trans people include people who are *born unambiguously* one gender but who, later in life, identify and present in the world differently. In contrast, intersex is not based on identity, even though non-standard identities might be regarded as a logical possible consequence of non-standard anatomies. Unlike trans people, intersex people are diagnosed visually, or via amniocentesis, or chromosome and other blood tests.

Fausto-Sterling (2000) reports that 1-2% of the population are intersex[1]. Intersex differences may be determined prenatally, at birth, during infancy, at puberty, when attempting to conceive, or through random chance. Three relatively common intersex variations include:

- Androgen Insensitivity Syndrome (AIS). People with Androgen Insensitivity Syndrome (AIS) have bodies that are *completely* insensitive to testosterone and other androgen hormones (CAIS) or *partially* insensitive to androgens (PAIS). A person with AIS has XY sex chromosomes, more typically associated with men, yet their bodies develop partially or mostly along female lines because of the way their body respond to androgens. People with AIS will have testes, rather than ovaries, but their natural external appearance will vary. The overwhelming majority of people with CAIS will be

[1] Anne Fausto-Sterling, 2000, *Sexing the Body: Gender Politics and the Construction of Sexuality*, Basic Books, ISBN 0465077145, 9780465077144.

perceived, assigned, raised and identify as women; this is much less clear cut with people with PAIS.

- 47,XXY, also diagnosed as Klinefelter's Syndrome. People with 47,XXY are born with an extra sex chromosome, and are typically assigned male.
- Congenital Adrenal Hyperplasia (46,XX CAH), the most common type of intersex affecting people with XX sex chromosomes (typically associated with women). It affects adrenal glands such that and CAH will experience some degree of prenatal virilisation. The degree of virilisation can vary significantly. CAH is also associated with adrenal insufficiency, which initially requires urgent medical attention.

3. Our interest in this submission

OII Australia made a submission to the Law Reform Advisory Commission, and a response to the "Beyond the Binary" report in July 2012. Nevertheless, the report appears to have been drafted without response to input by intersex persons. We have serious and fundamental concerns with the LRAC report, and the response to it, and we urgently hope that these concerns will be taken into account.

4. Recommendations

1. Infants must be assigned to one or other binary sex-of-rearing.
2. Assignments must be easily mutable, including by the child when Gillick competency can be established. Certification requirements should match those for passports.
3. Concomitant with the government's commitment to no longer require sexual reassignment surgery, infant sex assignments must not be regarded as necessitating surgical or hormonal intervention. Guidelines should be established to prevent surgery for "psychosocial" purposes. Criminal sanctions should be applied where such surgeries are carried out.
4. The birth of an intersex infant must be documented and reported, along with data on the binary assignment of sex-of-rearing. Data on along with intersex stillborn births and terminations must also be reported.
5. We support the availability of an X or "unspecified" option on a birth certificate where chosen by an adult.
6. The government should use the term 'intersex' to refer to intersex people, and not conflate intersex with gender diversity issues.
7. Guidelines for the recognition of adults' genders must match federal proposals.

5. Contents

6. Surgical interventions on infants must cease first

Recommendation 9
In the Births, Deaths and Marriages Registration Act 1997 and Births, Deaths and Marriages Registration Regulation 1998 to give legal recognition to sex and gender diverse people who are not defined by the female/male binary, wherever the BDMR Act and BDMR Regulation refer to two sexes, male and female, they should be amended to recognise three sex and gender identities: female, male and intersex.
The Government supports this recommendation in-principle.

Recommendation 11
In the Births, Deaths and Marriages Registration Act 1997 and Births, Deaths and Marriages Registration Regulation 1998 the sex of a child when it is notified (s5 BDMR Act; s4(1) BDMR Regulation) should be any of female, male, intersex, to be advised, or indeterminate.
The Government supports this recommendation.

Establishing a third (or more) sex assignments for infants, especially an “intersex” assignment at birth, is irresponsible in an environment where “normalisation” surgeries on intersex infants are still permitted, this legislation will encourage such interventions. Parents, and clinicians, may well wish to avoid their child becoming a social pariah, media frenzy, anti-discrimination test case or guinea pig.

Psychosocial therapeutic rationales for surgery

“Therapeutic” treatments permitted in Australia include clitorectomy in children with 46,XX CAH, and gonadectomy (sterilisation) in children with AIS. These are permitted for psychosocial and risk avoidance rationales that OII Australia contests.

It is essential that surgeries with “psychosocial” rationales cease before the introduction of any potential intersex assignment at birth.

Psychosocial therapeutic rationales for "early reconstruction" (that is, cosmetic surgeries on the genitals of infants) were described in the foundational 2006 *Summary of Consensus Statement on Intersex Disorders and Their Management,* published in *Pediatrics* journal by the American Academy of Pediatrics as including the following:

> *"minimizing family concern and distress"*
> *“mitigating the risks of stigmatization and gender-identity confusion".*[2]

Infant surgeries are supported by the Family Court of Australia. For example, in her February 2013 submission to the Senate Inquiry on the involuntary sterilisation of people with disabilities, the Chief Justice of the Family Court refers to:

> *scenarios whereby permission is sought to perform surgery on a young child to give them the appearance of one sex or another...*[3]

The Chief Justice referred to *In the Matter of the Welfare of a child A* (1993) FLC 92-402 (per Mushin J):

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[2] Houk, Hughes, Ahmed, Lee, Writing Committee for the International Intersex Consensus Conference Participants, 2006, *Summary of Consensus Statement on Intersex Disorders and Their Management*, in Pediatrics, doi:10.1542.peds.2006-0737, http://www.pediatrics.org/cgi/doi/10.1542/peds.2006-0737, accessed 21 November 2012.
[3] The Hon. Diana Bryant AO, Chief Justice of the Family Court of Australia, submission #36 on the senate inquiry on involuntary sterilization of people with disabilities, via http://aph.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=clac_ctte/involuntary_sterilisation/submissions.htm, accessed 25 February 2013.

> *5. At the time of A's birth he was diagnosed as suffering from a condition known as congenital adrenal hyperplasia…*
>
> *10. The background for this is well expressed by the surgeon. His report, to the extent that it is relevant, is in the following terms:*
>
> > *Following investigation after birth, this child was correctly assessed as being a genetic female with an extreme degree of masculinization. The degree of masculinization is variable and depends on the severity of the original abnormality in the adrenal gland. In some children this is mild and in others it is severe. However, in all cases it would be standard medical practise (sic) to raise the child as a female with a potential for normal female fertility. The genitalia are therefore operated on in the postnatal period to make them feminine in appearance. This advise (sic) and treatment was carried out in (A's) early years and she had genital reconstruction to give her a feminine appearance.* [4]

To summarise the case:

- It describes an individual aged 14¾ who was treated since infancy under the standard "therapeutic" protocol for their 46,XX CAH diagnosis.
- The "psychosocial" therapeutic rationale for treatment involved a clitorectomy/removal of phallus, and irreversible genitoplasty during infancy, to give a "feminine appearance".
- In other 46,XX children this would commonly be described as "female genital mutilation".
- The case was brought before the court to provide for surgeries to enable the child to live as male, i.e. the original sex-of-rearing assignment, and the postnatal surgery "*to make them feminine in appearance*" were inappropriate.
- Family Court approval was necessary to support a change in assignment.
- Reassignment was given to require sterilisation through oophorectomy, even though there's no evidence that this was necessary to enable male sex of living.
- The child was suicidal.[5]

The Victorian Health Department has recently published a decision-making framework which reports the controversy on "psychosocial" rationales:

> *Most of the international debate about the healthcare of intersex conditions has been concerned with the ethics of performing genital surgery on infants and children. Generally, the focus of concern is not on medically necessary treatment done to avoid physical harm that is proportionate to the level of physical risk that the condition poses to the patient (for example, ensuring a functioning urinary system). The focus of concern is in cases where treatments for cosmetic effect are carried out for conditions that pose little or no physical risk to the patient (for example, to 'normalise' the person's body to make it look more typically male or female).*
>
> *Treatments where the medical imperative for intervention is not obvious include those performed to protect against potential psychosocial stress associated with 'looking different' and being known by others to look different. Some advocates for intersex people*

[4] Family Court of Australia, 1993, *Welfare of A Child A* Between: Mother Applicant and the Public Advocate Respondent Number of Pages - 6 [1993] FamCA 68; (1993) FLC 92-402 16 Fam Lr 715 Children (30 June 1993), http://www.austlii.edu.au/au/cases/cth/FamCA/1993/68.html, accessed 26 February 2013.

[5] For more information see the OII Australia submissions to the Senate Inquiry on involuntary sterilization, accessible via http://www.aph.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=clac_ctte/involuntary_sterilisation/submissions.htm

> *now firmly argue that protection against potential psychosocial stress associated with looking different alone should no longer provide a satisfactory rationale for surgical intervention, and no longer provide a basis for characterising a treatment as therapeutic. Instead, the focus of treatment should be on functional outcomes appropriate for the child's age (Swiss National Commission of Bioethics, 2012).* [6]

The framework document provides a new benchmark for best practice in Australia, however, it reports the debate on psychosocial rationales, rather than ensures that surgical intervention cease where their therapeutic intention is to give the appearance of a particular sex. Current medical protocols mean that other children may still be placed in the same circumstances as Child A, *In the Matter of the Welfare of a child A*.

The Swiss National Advisory Commission on Biomedical Ethics prepared a report on intersex in November 2012 which recommended:

> *2. Decisions on medical treatments of a pharmacotherapeutic or surgical nature are to be taken jointly in a multidisciplinary team with the involvement of the parents and, as far as possible, the affected child. As soon as capacity is attained, the affected individual decides for him/herself. The family and cultural context may only be taken into account if the welfare of the child is not jeopardized as a result.*
>
> *3. The following basic principle should apply to the management of [intersex]: on ethical and legal grounds, all (non-trivial) sex assignment treatment decisions which have irreversible consequences but can be deferred should not be taken until the person to be treated can decide for him/ herself. This includes genital surgery and the removal of gonads, unless there is an urgent medical indication for these interventions…*
>
> *4. Protection of the child's integrity is essential. Given the uncertainties and imponderables involved, a psychosocial indication cannot in itself justify irreversible genital sex assignment surgery in a child who lacks capacity.* [7]

The Commission's report also called for criminal sanctions to be investigated:

> *12.There should be a legal review of the liability implications of unlawful interventions in childhood, and of the associated limitation periods. Questions of criminal law, such as the applicability of offences of assault (Art. 122 and 123, StGB) and the prohibition on genital mutilation (Art. 124, StGB), should also be investigated.*

It is doing this while, on infant assignments, it recommends retaining a binary assignment of sex-of-rearing:

> *The Commission takes the view that at present the binary classification system should be maintained, as it is deeply embedded socioculturally and [intersex people] often also wish to find their place in society as a man or woman. Accordingly, the introduction of additional categories of sex… could lead to renewed stigmatization.*

We support these recommendations. The burden for challenging stigmatization should not be placed on infant children and their families.

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[6] Victoria Health Department, February 2013, *Decision-making principles for the care of infants, children and adolescents with intersex conditions*, http://docs.health.vic.gov.au/docs/doc/Decision-making-principles-for-the-care-of-infants-children-and-adolescents-with-intersex-conditions, accessed 27 February 2013.

[7] Swiss National Advisory Commission on Biomedical Ethics, November 2012, *On the management of differences of sex development, Ethical issues relating to "intersexuality, Opinion No. 20/2012"*, available in English via http://www.bag.admin.ch/nek-cne/04229/04232/index.html?lang=en, accessed 21 November 2012.

We note the ACT government's statement in their response to 'Beyond the Binary' that:

> ***Recommendation 20***
> *… The Government will develop a policy that removes the requirement for sexual reassignment surgery*

Sex assignment surgery in infancy must also cease – and it must cease before any consideration of an intersex category for assignment of sex-of-rearing. Assignments must be easily mutable, without requiring sterilisation or other surgical intervention as a consequence.

Data

The current situation where intersex infants are assigned to a binary sex-of-rearing means that no data is collected on the numbers of intersex people. Similarly, there is no documentation on our health outcomes, other than that associated with small scale studies by some institutions of patients at their institutions.

The birth of an intersex infant, stillborn births and terminations must be documented and reported, along with data on the binary assignment of sex-of-rearing. This is to ensure that data on intersex births, stillborn births and terminations is collected. To do this, it is not necessary to create a new 'intersex' category for infants.

Recommendations

1. Infants must be assigned to one or other binary sex.
2. Assignments must be easily mutable, including by the child when Gillick competency can be established. Certification requirements should match those for passports.
3. Concomitant with the government's commitment to no longer require sexual reassignment surgery, infant sex assignments must not be regarded as necessitating surgical or hormonal intervention. Guidelines should be established to prevent surgery for "psychosocial" purposes. Criminal sanctions should be applied where such surgeries are carried out.
4. The birth of an intersex infant must be documented and reported, along with data on the binary assignment of sex-of-rearing. Data on along with intersex stillborn births and terminations must also be reported.

7. Sex and gender are different

> ***Recommendation 30***
> *In the ACT public sector when it is relevant for an ACT public authority to require a person to identify their sex – other than for notifying and registering a birth and for changing the birth record of their sex – the person should be asked their 'sex and gender identity', and should be given the option of identifying as any of:*
> *(a) female (b) male (c) intersex (d) none of the above.*
> *The Government supports this recommendation in-principle.*
> *… a person's gender identity may be different to the person's sex.*

We are glad that the government recognises that a person's gender identity may be different to their biological sex.

We respectfully argue that the conflation of biology and identity in a recommendation of the LRAC report is indicative of serious conceptual flaws. It is insufficient to support this recommendation in principle.

8. Intersex is not a gender identity

> *Under the Discrimination Act, gender identity is defined as …*
> *(b) the identification on a genuine basis by a person of indeterminate sex as a member of a particular sex (whether or not the person is recognised as such)—*
> *(i) by assuming characteristics of that sex, whether by way of medical intervention, style of dressing or otherwise; or*
> *(ii) by living, or seeking to live, as a member of that sex.*
>
> *While acknowledging that amending the Discrimination Act as recommended by LRAC would result in a more detailed listing of attributes, the current Discrimination Act provides broad protection and recognition for most sex and gender diverse people.*

The legislation has sought to protect intersex on the basis of gender identity for people of "indeterminate sex", rather than biological sex characteristics.

Intersex people have, on more than three occasions in the last three years, attempted to use the indeterminate provisions to bring a case. Not one case has been brought before a tribunal by an intersex person under these provisions. On all occasions proceedings were rejected on the basis the issues were physical anatomical differences not gender identity. We are unable to provide any evidence of successful cases brought under State or Territory laws anywhere in Australia as such cases simply can't exist.

Intersex is a matter of biology, it is not a gender identity. Intersex people have the same range of gender identities (and sexual orientations) as the rest of the population. Further, requirements that people of indeterminate sex "genuinely" identify as a member of a particular sex fail to protect people with non-binary gender identifications. In doing so, the legislation explicitly excludes the most vulnerable intersex people: the most easily identifiable, and the most obviously different.

The federal government has recognised these concerns in the Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Bill 2013:

> *A separate ground of discrimination on the basis of intersex status is also introduced. People who are intersex may face many of the same issues that are sought to be addressed through the introduction of the ground of gender identity. However, including the separate ground of intersex status recognises that whether a person is intersex is a biological characteristic and not an identity.*[8]

In the report of the Senate Inquiry on the Human Rights and Anti-Discrimination Bill Exposure Draft 2012, the Senate stated:

> *7.16 The committee received considerable evidence regarding the coverage of intersex status in the Draft Bill. The committee recognises that intersex individuals are often the subject of discrimination in public life, and that as such there is a need for protection on the basis of intersex status in Commonwealth anti-discrimination law.*
>
> *7.17 The committee agrees with the evidence presented by Organisation Intersex International Australia, and other submitters, that intersex status is a matter of biology rather than gender identity, and as such should not be covered within the definition of gender identity in the Draft Bill. Further, the committee considers that the current requirement in the Draft Bill that intersex individuals identify as either male or female is*

[8] Parliament of Australia, 2013, Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Bill 2013, http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query%3Did%3A%22legislation%2Fbillhome%2Fr5026%22;rec=0, accessed 22 March 2013.

> *misguided, and is unhelpful for intersex individuals whose biological characteristics do not necessarily accord with a male or female identification.*
>
> *7.18 The committee considers, therefore, that intersex status should be listed as a separate protected attribute under the Draft Bill. The committee notes comprehensive evidence from witnesses that the definition of 'intersex' found in the Tasmanian Anti-Discrimination Amendment Bill 2012 most accurately provides coverage for intersex individuals. The committee supports this definition as the preferred option for inclusion in the final form of the Commonwealth legislation.*
>
> *7.19 As a concluding point, the committee is of the view that since intersex status is a condition related to the innate biological characteristics of an individual, it should not be an attribute to which any religious exceptions apply.*[9]

The same analysis applies to the ACT legislation. “Gender identity” is an inappropriate way to define intersex, and the requirement for people of indeterminate sex to “genuinely” identify as a member of a particular sex is misguided.

The definitions of intersex in the Tasmanian Anti-Discrimination Amendment Bill 2012, and in the Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Bill 2013 represent the state of the art in definitions of intersex in anti-discrimination legislation.

9. Intersex is not a third sex, or a “sex identity”

> ***Recommendation 9***
> *In the Births, Deaths and Marriages Registration Act 1997 and Births, Deaths and Marriages Registration Regulation 1998 to give legal recognition to sex and gender diverse people who are not defined by the female/male binary, wherever the BDMR Act and BDMR Regulation refer to two sexes, male and female, they should be amended to recognise three sex and gender identities: female, male and intersex.*
> *The Government supports this recommendation in-principle.*

The recommendation is premised on a fallacy. People are not born with an identity. The following two examples from medical journals illustrate how intersex is an experience of the body, and biology, rather than an issue of gender identity. The 2006 “Consensus Statement on management of intersex states:

> *The birth of an intersex child...*

While:

> *Gender identity development begins before the age of 3 years, but the earliest age at which it can be reliably assessed remains unclear.*[10]

OII Australia does not support the creation of a third sex for several reasons. Among these is that intersex is a highly variable spectrum of possibilities between male and female rather than a discrete and arbitrary category by itself.

Intersex shows that what is not male can also be not female. Intersex also shows that what is

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[9] Parliament of Australia, Senate Legal and Constitutional Affairs Legislation Committee, 2013, Exposure Draft of the Human Rights and Anti-Discrimination Bill 2012, http://www.aph.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=legcon_ctte/anti_discrimination_2012/report/index.htm, accessed 21 February 2013.

[10] I. A. Hughes, C. Houk, S. F. Ahmed,, P. A. Lee, 19 April 2006, *Consensus statement on management of intersex disorders*, in Arch Dis Child 2006;91:554-563 doi:10.1136/adc.2006. 098319, http://adc.bmj.com/content/91/7/554.extract accessed 2 May 2012.

male can also be female. Yet, while the definitions of male and female each depend on the other, neither depends on a definition of intersex. Our existence disproves simplistic notions of male and female. We show that nature is analogue; it does not work in purely binary terms. Concluding that a third category is required to capture the spectrum of intersex biological states is also simplistic.

Rather than define a catch-all "other" category, we would prefer to minimize our participation in gender constructs. We do not wish for the creation of an equally confining third box. We believe that fewer categories are better than many, and fewer requirements to collect sex or gender data are better than many. For these reasons, our approach has been to call for an opt out to declaring a sex or gender – through the provision of a “not specified" option on passports and other documentation.

The primary reason we reject a third sex is believe that it would further entrench stigmatization of intersex people. Parents and doctors would further endeavour to avoid the assignment of infants to such a category.

We do not support the creation of a new category for intersex people. We do support the establishment of an “unspecified” category.

Recommendation

5. We support the availability of an X or “unspecified” option on a birth certificate where chosen by an adult.

10. “Sex and Gender Diversity” is not respectful to intersex people

> *‘Sex and gender diverse’ encompasses people whose sex and gender is something other than just ‘male’ or ‘female’*

Intersex people may identify as intersex, or they may identify as male, female, both or neither. To imply that intersex people will have a sex and gender other than male or female is a simplification that does not reflect reality.

The use of terminology like “Sex and gender diverse community” implies a commonality of interest between trans and intersex people that is fallacious. Peter Hyndal of A Gender Agenda, speaking at the Parliamentary Friends of LGBTI meeting in November 2012 said:

> *There’s been all this talk of “sex and gender diversity” this evening. It seems to me that very few people really understand what that term actually means. “Sex and Gender Diversity” is a term that describes two different groups of people.*
>
> *The first are intersex...Being intersex is a biological reality. It has nothing to do with a person’s gender identity. And It has nothing to do with a person’s sexuality.*
>
> *The second group of people we refer to as part of the term “Sex and Gender Diverse”, are people whose gender identity happens to be different from cultural assumptions of ‘normality’. This includes (but certainly isn’t limited to) people like me – who were born female, but who identify and present in the world as male...*[11]

In January 2013, OII Australia explained in a discussion paper why the term is unhelpful:

[11] Supplied by Peter Hyndal, A Gender Agenda.

> *A view has been developing within OII Australia that the terms "sex and gender diversity" (SGD) and "diverse sex and gender" (DSG) are confusing the media, activists, lawyers, politicians and the public about intersex.*
>
> *We believe they do this because the terms are euphemistic, abstracted, conflate identities and biology, and lack legibility. We believe that misconceptions are partly generated and perpetuated through the poor use of umbrella terms, often by third parties. They are misused in ways that elide differences between intersex and trans groups.*
>
> *We believe that a move away from obscure innovative terms would make information more intelligible to a general audience, and an international audience. We believe that consistency and clarity in terminology would help us to talk more effectively about intersex, and more easily help us work together on areas of common concern with trans and other communities.*[12]

The ACT government's response to 'Beyond the Binary' states:

> *The term 'sex and gender diversity' is consistent with accepted terminology, recommended and used by, for example, the Australian Human Rights Commission, A Gender Agenda and the Australian Passport Office.*

This is currently true. However, in response to community input, the National LGBTI Health Alliance has now discontinued use of the term in favour of "Intersex, Trans and Gender Diversity", as it is more easily disambiguated, and does not imply synonymy with trans.

A Gender Agenda has also now shifted away from "sex and gender diversity" to other terms that are more easily understood. The federal government does not use the term in the Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Bill 2013. The term is used in only a limited way in the federal government's draft guidelines on gender recognition; largely only when quoting existing regulations.

> *The Government acknowledges that referring to sex and gender diverse people in an appropriate and respectful way is a necessary step in remedying other gaps in legal recognition.*

Usage by many organisations implies that the term is synonymous with "trans", and the term is not used or supported by either national intersex organization in Australia (OII Australia and the Androgen Insensitivity Syndrome Support Group Australia). Both organisations use the term 'intersex'.

Recommendation

6. The government should use the term 'intersex' to refer to intersex people, and not conflate intersex with gender diversity issues.

11. Proposed federal guidelines on gender recognition

Federal proposals on sex and gender recognition were published for public consultation on 22 March 2013. They dovetail with proposals on anti-discrimination legislation:

> *5. These Guidelines support the Australian Government's introduction of legal protections against discrimination on the grounds of gender identity and intersex status in Commonwealth anti- discrimination law and recent changes to the Australian Government passport policy for sex and/or gender diverse applicants.…*

[12] For more information, see the OII Australia January 2013 Discussion Paper on this issue, http://oii.org.au/21550/sex-and-gender-diverse-discussion-paper/

The proposed guidelines provide a clear overview of the scope and purpose of sex, gender, and data collection requirements. In contrast to the ACT proposals, the guidelines avoid any conflation of sex and gender:

> ***Sex and Gender***
> *10. For the purposes of these Guidelines, sex is understood to refer to the chromosomal, gonadal and anatomical characteristics associated with biological sex.*
>
> *11. Being intersex is a biological condition. People who are intersex 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.*
>
> *12. Gender is part of a person's social identity. It refers to the way a person presents and is recognised within the community. A person's gender refers to outward social markers, including their name, outward appearance, mannerisms and dress.*
>
> *13. A person's sex and gender may not necessarily be the same. Some people may identify as a different gender to their birth sex and some people may identify as neither male nor female.*
>
> *14. The preferred Australian Government approach is to collect and use gender information. Information regarding sex would ordinarily not be required.*
>
> *15. Information about people's sex should only be collected where there is a legitimate need for that information, e.g. if a service or benefit to be provided to the individual is directly related to biological sex. However, the necessity of a medical service or associated benefit should be determined by the physical need, regardless of a person's recorded sex and/or gender.*
>
> *16. Departments and agencies should ensure when they collect sex and/or gender information they use the correct terminology for the information they are seeking.*

The guidelines push the existing passport 'X' category out across federal government departments and agencies:

> ***Sex and Gender Classification in Australian Government Records***
> *17. Where sex and/or gender information is collected and recorded in a personal record, individuals should be given the option to select M (male), F (female) or X (Indeterminate/Intersex/Unspecified).*
>
> *18. This classification system is consistent with the Australian Government passports policy for sex and gender diverse applicants and Australian Standard AS4590 – Interchange of client information.*

The guidelines have been developed with consultation with both intersex, and trans and gender diverse input. The guidelines do not assume intersex people have a non-binary gender, nor do they oblige intersex people to identify with a specific gender.

The guidelines do not impact on assignments at birth, only self-assignment as an adult. Importantly, they do not single intersex people out as a separate group for separate, and potentially discriminatory, treatment. We regard this as essential for any new category.

We support the availability of an "unspecified" category to all adults who seek it.

Recommendations

7. We strongly recommend that the ACT proposals match federal guidelines for recognition of adult's gender.

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