



Organisation Intersex International Australia Limited
For intersex human rights, information, and peer support

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Submission on the Revised Australian Curriculum: Health and Physical Education: Foundation to Year 10

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1. What is intersex?

Intersex is a term which relates to a range of innate 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. In the first century BC, Diodorus Siculus, wrote:

Hermaphroditus, as he has been called, who was born of Hermes and Aphrodite and received a name which is a combination of those of both his parents. Some say that this Hermaphroditus is a god and appears at certain times among men, and that he is born with a physical body which is a combination of that of a man and that of a woman, in that he has a body which is beautiful and delicate like that of a woman, but has the masculine quality and vigour of a man. But there are some who declare that such creatures of two sexes are monstrosities, and coming rarely into the world as they do they have the quality of presaging the future, sometimes for evil and sometimes for good¹.

The term intersex was adopted by science in the early 20th century. Fausto-Sterling (2000) reports that 1-2% of the population are intersex². The NSW Ministry of Health reports data from the NSW Register of Congenital Conditions showing that births with visible reportable differences of sex anatomy between 2003-2009 comprised 0.59% of all births, while no breakdown of reported relevant chromosomal “anomalies” is given³. Intersex differences may also be determined during infancy, at puberty, when attempting to conceive, or through random chance.

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, at birth, or via amniocentesis, by chromosome, and other blood tests.

¹ Diodorus Siculus, *Library of History IV chapter 6*. Translated by C. H. Oldfather, 1935, Loeb Classical Library Volumes 303 and 340. Cambridge, MA, Harvard University Press; London, William Heinemann Ltd. <http://www.theoi.com/Text/DiodorusSiculus4A.html#6>, accessed 7 September 2012.

² Anne Fausto-Sterling, 2000, *Sexing the Body: Gender Politics and the Construction of Sexuality*, Basic Books, ISBN 0465077145, 9780465077144.

³ NSW Ministry of Health Centre for Epidemiology and Research, 31 October 2011, *NSW Mothers and Babies 2009*, NSW Public Health Bulletin Supplement, http://www0.health.nsw.gov.au/pubs/2011/mothers_babies_2009.html, accessed 3 December 2012.

2. 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 resourced entirely out of the voluntary contributions of its members 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.

3. Our interest in this submission

We welcome the opportunity to comment on the draft Revised Australian Curriculum: Health and Physical Education. Intersex people are known to be present in the school system from foundation through to age 18.

Intersex appears only once in the Curriculum document, in the glossary on page 45:

Gender-diverse

Refers to people who fall outside the typical range of masculinity or femininity with regards to gender identity and/or physical sex characteristics. Sex and/or gender diverse people include many different groups, including intersex, transsexual, transgender, androgynous, people without sex and gender identity and cross dressers.

Not only is this inappropriate – the biological basis of intersex has been recognised by medicine over centuries, and by the Australian government in legislation – it means that the issues that intersex children face will be misconstrued as a sexuality issue.

The Australian Government has recently included “intersex status” in anti-discrimination legislation, established an inquiry into our medical treatment, and adopted guidelines on sex and gender recognition. As intersex is innate, these issues are of relevance to schools, and school curricula.

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5. Intersex is a matter of sex, not gender

Several Australian government bodies already recognise that intersex is a matter of biology. The ACT Law Reform Advisory Council reviewed Territory arrangements for registering births in a 2012 report that clearly distinguishes between intersex status and a gender identity (our emphasis in second paragraph):

The forms for notification and registration of a birth – ‘Notification of Birth not Occurring in a Hospital’ (Form 218) and ‘Birth Registration Statement’ (Form 201) – are legislative instruments that must be complied with. The forms currently require that the sex of a child be marked as either ‘male’ or ‘female’. ... for a child who is known to be intersex at or

soon after their birth, the legislation requires a decision must to be made, within short time limits, to record the child's sex within the female/male binary.

*Parents may choose not to register their child as intersex, and it is common for parents, in consultation with medical practitioners, to assign a gender identity to an intersex child; this often involves surgery and medical treatment to 'confirm' the chosen gender identity. The chosen gender identity is the 'sex' that is recorded when formally notifying and registering the child's birth. **It will not be known until the child matures whether the assigned sex which was assigned at birth and implemented through surgery and medical treatment, does in fact accord with the child's gender identity.***⁴

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.*⁵

Surgical interventions on intersex people mean that most of us do not have an immediately apparent "indeterminate" sex, but will be assumed, visually when clothed at least, to be one sex or the other. However, this does not reflect what lies beneath. For many intersex people, a detailed examination is likely to reveal our intersex status. Intersex is a matter of sex (but, importantly, not a third sex); it is not a matter of gender diversity.

Recommendations

As an innate biological phenomenon, intersex status is a distinct concept to gender diversity and sexual orientation. Intersex status should be recognised as a distinct biological phenomenon in the Curriculum, and not presented as a matter of gender diversity.

It is our view that this recognition that intersex is a biological phenomenon means that intersex schoolchildren need to see themselves acknowledged, and see their needs and concerns reflected in the curriculum.

6. Intersex status in federal anti-discrimination legislation

Intersex status was introduced in the Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Act 2013, passed by Parliament on 25 June. The Act establishes intersex status as a distinct attribute from "gender identity" as intersex is a biological attribute related to sex, not gender. The Senate Report into the Human Rights and Anti-Discrimination Bill introduced this new attribute, recognizing explicitly that intersex should not be mistakenly included as a "gender identity":

⁴ ACT Law Reform Advisory Council, March 2012, *Beyond the Binary: legal recognition of sex and gender diversity in the ACT*, <http://www.justice.act.gov.au/publication/view/1897/title/beyond-the-binary-legal-recognition>, accessed 2 September 2012.

⁵ 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.

Intersex status

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 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....*

Recommendation 2

7.21 *The committee recommends that subclause 17(1) of the Draft Bill be amended to include 'intersex status' as a protected attribute. 'Intersex' should be defined in clause 6 of the Draft Bill as follows: intersex means the status of having physical, hormonal or genetic features that are: (a) neither wholly female nor wholly male; or (b) a combination of female and male; or (c) neither female nor male.⁶*

In the Explanatory Memorandum for the Sex Discrimination Amendment, the Attorney General stated:

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.⁷

This recognition that intersex is a biological characteristic affects the intended application of religious exemptions:

The Bill will not extend the [religious] exemption to cover the new ground of intersex status. During consultation, religious bodies raised doctrinal concerns about the grounds of sexual orientation and gender identity. However, no such concerns were raised in relation to 'intersex status'. As a physical characteristic, intersex status is seen as conceptually different. No religious organisation identified how intersex status could cause injury to the religious susceptibilities of its adherents. Consequently, prohibiting discrimination on the basis of intersex status will not limit the right to freedom of thought, conscience and religion or belief.⁷

⁶ Senate of Australia Legal and Constitutional Affairs Legislation Committee, February 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 24 July 2013.

⁷ Parliament of Australia, 2013, *Explanatory Memorandum on the Sex Discrimination Amendment*, <http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22legislation%2Fbillhome>

Indeed, amongst the submissions to a Senate Inquiry on the then Bill, the Australian Association of Christian Schools submission responded with “some sympathy for the proposals in relation to those of intersex characteristics”⁸.

We acknowledge that mistreatment of intersex people often originates in perceptions that we are not real men or women; in many ways this is the same issue of homophobic treatment that affects gay and trans students.

Many of us are visibly different in ways that may be apparent in some school settings, such as changing rooms.

The school curriculum must authentically acknowledge our existence, and ensure our full participation both in the life of a school and in a student’s experience of the curriculum.

Recommendations

Efforts need to be made to ensure that curriculum content on bullying and vilification accurately reflect new legislation including the anti-discrimination legislation attribute of intersex status.

We would welcome an explicit reference to homophobia, to help promote a safe learning environment for all students.

7. The medical treatment of intersex children

In recent times, the birth of an intersex infant has been treated as a “social emergency”. Current medical protocols, based on models established in the 1950s, promote surgical intervention to reinforce an assigned sex of rearing for “psychosocial rationales”. These rationales include “mitigating the risks of gender identity confusion”, “family distress”, marriageability and “eliminate cultural disadvantage”⁹. Many current intersex schoolchildren will have been subjected to clitoral “recession” (reduction), gonadectomies (sterilization) and other medical interventions during infancy.

The Age reports that each year, 10-15 such “genital reconstructions” take place at the Royal Children’s Hospital, Melbourne, often on infants aged under 2¹⁰. Other institutions around Australia undertake similar surgeries.

These issues are currently the subject of an important Senate Inquiry into involuntary or coerced sterilization which will report by early August. Clinician submissions to the Inquiry recognise:

[%2Fr5026%22](#), accessed 24 July 2013.

⁸ Australian Association of Christian Schools, 2013, *Submission to the Senate Inquiry on the Sex Discrimination Amendment*, <https://senate.aph.gov.au/submissions/comitees/viewdocument.aspx?id=d959adb8-745e-4a8f-a388-03374f8c4e0e>, accessed 24 July 2013.

⁹ OII Australia, 15 July 2013, *Clinicians acknowledge lack of justification for surgeries on intersex infants in Australia*, <http://oii.org.au/22925/clinicians-acknowledge-lack-of-justification-for-infant-surgeries/>, accessed 15 July 2013.

¹⁰ The Age, 20 June 2013, *It takes more than two*, <http://www.theage.com.au/national/it-takes-more-than-two-20130619-2oj8v.html>, accessed 24 July 2013.

- that genital “normalising” surgeries on infants, such as clitoral “reduction”, take place without adequate data on outcomes
- that surgeries take place without adequate long term follow-up
- without adequate data on the timing of surgery⁹.

The Royal Children’s Hospital, Melbourne states:

*we acknowledge that outcomes related to current approaches remain to be established.*¹¹

The Australasian Paediatric Endocrine Group submission states:

*There is limited evidence reporting long-term outcomes of early surgical management for reasons of appearance. The few outcome studies reported have conflicting results of good and poor outcomes (cosmetic, sexual, or psychological), with particular concern regarding sexual function and sensation.*¹²

OII Australia has called for an end to cosmetic surgery on intersex infants, arguing that our clitoris/phallus size and appearance should be as irrelevant to our childhoods as they are to those of other children.

We hope that the Senate will recognize the need for intersex children and adults to have autonomy over our own bodies, protecting our rights until we can determine our life paths ourselves.

We believe that the curriculum must acknowledge the existence of students in schools who have been subjected to such treatment. It is essential that intersex students today are treated with full respect and care.

Obviously schoolchildren should not be in a position of making their own judgment on such matters as sexual function and sensation, nevertheless, these issues should be addressed as part of education on sexual health, puberty, reproduction, relationships and related issues.

Recommendation

Intersex issues need to be a part of education on sexual health and related issues, to recognise and reassure the common humanity of intersex schoolchildren, and reflect the sexual concerns of intersex students in the material they are taught.

8. Physical education and a “Sporting activity exemption”

Intersex schoolchildren will have been assigned a binary sex of rearing, although it is increasingly likely that such assignments will become more easily mutable, as the implications of federal legislation become more widely understood.

The Sex Discrimination Act also introduces a sporting exemption which permits an exemption for “competitive sporting activity” in situations where strength, stamina or physique may be relevant.

¹¹ Royal Children’s Hospital, Melbourne, “DSD group”, 10 July 2013, Submission to the Senate Inquiry on Involuntary or Coerced Sterilisation, <https://senate.aph.gov.au/submissions/comitees/viewdocument.aspx?id=6f573f73-f41c-4e25-8f5d-c601653f08fa>, accessed 13 July 2013.

¹² Australasian Paediatric Endocrine Group, 27 June 2013, Submission to the Senate Inquiry on Involuntary or Coerced Sterilisation, <https://senate.aph.gov.au/submissions/comitees/viewdocument.aspx?id=a09cb055-962d-40aa-af5d-aa05131e0587>, accessed 30 June 2013.

In our submission to the Senate Inquiry on the Bill, we drew the Committee's attention to evidence that more than 1 in 400 female Olympic competitors are intersex. The Sydney Morning Herald reported in 2011 on an interview with Dr Bennett Foddy, "deputy director and research fellow for the program on ethics and the new biosciences at Oxford":

... intersex conditions in women are not as rare as you might imagine, especially in female athletes, where such a condition would assist them to rise to the top. It has been estimated that one in 500-600 female athletes have a detectable intersex condition with an XY chromosome (AIS, for example). Many will have an intersex condition, such as CAH, that is undetectable in a chromosome test but confers a distinct advantage.

"Over five Olympic Games, an average of one in every 421 female athletes was found to have a Y chromosome," he says.¹³

Jon Bardin, writing in the Los Angeles Times in 2012, states:

... In fact, androgen insensitivity is overrepresented among female athletes, [Eric Vilain] added: The general population has an incidence of 1 in 20,000, but for Olympic athletes it is about 1 in 400. No one knows why.¹⁴

Writing in the American Journal of Bioethics, Katrina Karkazis, Rebecca Jordan-Young, Georgiann Davis and Silva Comporesi say:

The policies raise troubling concerns about whether they succeed in balancing the aim of creating a "fair" playing field for women athletes against the aim of ensuring fairness for individual athletes. Given the very real documented harms that have come to female athletes who have undergone evaluation and sex testing, these policies are unlikely to protect against breaches of privacy and confidentiality that may arise because they are inconsistent and suspend athletes undergoing evaluation. Furthermore, they require female athletes to undergo treatment that may not be medically necessary and may, in fact, be medically and socially harmful, in order to compete. Finally, beyond those athletes who are directly affected by these investigations, the new policies may intensify the harmful "gender policing" that already plagues women's sports.¹⁵

The Attorney General's Department advised the Senate Inquiry into the then Bill that it was not expected to automatically exclude intersex people (or those with a gender identity that does not match their birth sex):

The Bill amends the existing exemption for competitive sport in the SDA to include gender identity and intersex status. The Government considers this is necessary to preserve existing policy in relation to this exemption, ensuring fair competition in competitive sporting events. The drafting mirrors the approach taken in in the HRAD Bill and State and Territory anti-discrimination laws.

The Department understands the operation of the exemption in State and Territory law will often involve a case-by-case assessment of individual circumstances. That is, the exemption is not intended to operate to require sporting competitions to have policies which automatically exclude people who are intersex, or people with a gender identity

¹³ Sydney Morning Herald, 8 December 2011, *Venus v Mars*, <http://www.smh.com.au/world/science/venus-v-mars-20111207-1oj4i.html>, accessed 4 February 2013.

¹⁴ Los Angeles Times, 30 July 2012, *Olympic Games and the tricky science of telling men from women*, <http://articles.latimes.com/2012/jul/30/science/la-sci-olympics-gender-20120730>, accessed 7 February 2013.

¹⁵ Karkasiz, Jordan-Young, Davis and Comporesi, 2012, "Out of Bounds", in *The American Journal of Bioethics*, 12(7): 3-16, 2012. DOI: 10.1080/15265161.2012.680533, http://www.katrinakarkazis.com/out_of_bounds_ajob.pdf, accessed 15 June 2012.

*which does not match their birth sex. Instead, it is to provide reassurance that organisers are able to make decisions to guarantee fair competition in sporting events.*¹⁶

Intersex athletes are not doping or cheating; they simply wish to compete as they were born and raised. We believe that intersex schoolchildren should be permitted to compete as they are, and should never be excluded from sporting activities.

Recommendation

The Curriculum should ensure that intersex schoolchildren are able to participate fully in sporting activities, including competitive sporting activities. The use of the competitive sports exemption should be carefully justified, preferably in consultation with the Australian Human Rights Commission.

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¹⁶ Attorney General's Department, May 2013, *Responses to Questions on Notice to the Senate Inquiry on the Sex Discrimination Amendment*, <https://senate.aph.gov.au/submissions/comitees/viewdocument.aspx?id=3755e19e-0d14-471d-af28-a4cd54acc770>, accessed 24 July 2013.