



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

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## **Submission in response to Labor's National Platform – Consultation Draft**

### **Introduction**

This submission presents six recommendations for the inclusion of policy proposals affecting intersex people in Australia. The recommendations are summarised, followed by a presentation of rationales justifying their inclusion.

People with intersex variations are born with atypical physical sex characteristics. Many intersex variations exist; people with intersex variations have many varied kinds of bodies, sex characteristics, life experiences and identities. Some intersex people may change gender assignment, while others do not. Some intersex people are same sex attracted while others are heterosexual.

Organisation Intersex International Australia Limited (“OII Australia”) is a national body by and for people with intersex variations. It promotes the human rights and bodily autonomy of people with intersex variations in Australia, and provides information, education and peer support. OII Australia is a not-for-profit company, with Public Benevolent Institution status. This submission is wholly a product of volunteer input. Its focus is on intersex issues.

The submission was written on behalf of OII Australia by Morgan Carpenter, president of the organisation, in consultation with the board. Contact: Morgan Carpenter, President, OII Australia, morgan@oii.org.au, +61 405 615 942.

### **Recommendations**

#### **1. Inclusion of “intersex status”.**

Change each instance of “*sexual orientation and gender identity*” to “*sexual orientation, gender identity and intersex status*”, throughout the document.

#### **2. Add specific content about intersex health and human rights.**

Add content on intersex health to the section on “*Lesbian, gay, bisexual, transgender and intersex health*”, including the following objectives:

- *The deferral of non-necessary medical interventions on infants and children with intersex variations until such times as the person concerned can give informed consent.*
- *The prohibition of modifications to sex characteristics undertaken for social rationales, without informed consent.*
- *Ensuring that intersex persons' right not to undergo sex assignment treatment is respected.*

### **3. Create a specific institutional framework.**

In “*LGBTI place in a stronger democracy*”, remove references to intersex people in discussion about a National Gender Centre. In place of this, add to the section on “*Lesbian, gay, bisexual, transgender and intersex health*” the following:

- *Fund national intersex-led organisations to provide support to intersex persons and their families, and advocate on intersex issues.*

### **4. End PBS and Medicare discrimination.**

In paragraph 78, recognise that current access to PBS and Medicare remains discriminatory in some contexts. Examples include access to testosterone by women with Complete Androgen Insensitivity Syndrome, and other people with gender markers other than male.

### **5. End discrimination against intersex women athletes.**

Paragraph 62 should include a commitment to end discrimination against women athletes with intersex variations.

### **6. Ensure consent and proportionality in improvements to sex or gender markers on identification documents.**

In paragraph 62:

- *Ensure proportionality in the use of sex and gender markers on official documents so that any presence of such markers fulfills a genuine and proportionate need.*
- *Ensure that all people with intersex variations are able to exercise autonomy regarding sex/gender markers, and obtain identification options that match their sex characteristics and/or gender identities, as preferred.*

## Rationales

The following rationales explain and justify these recommendations.

### **Recommendation 1: inclusion of intersex status.**

***Change each instance of “sexual orientation and gender identity” to “sexual orientation, gender identity and intersex status”, throughout the document.***

This recommendation is in line with the Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Act 2013,<sup>1</sup> passed by the 43<sup>rd</sup> Parliament of Australia, under a Labor government. This Act correctly differentiates “intersex status” from “gender identity” and “sex”.

The Explanatory Memorandum for the Bill that became this Act 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.”<sup>2</sup>*

This change affects multiple sections of the National Platform – Consultation Draft.

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<sup>1</sup> ComLaw. *Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Act 2013*, ComLaw Authoritative Act C2013A00098. Canberra, 2013. <http://www.comlaw.gov.au/Details/C2013A00098/>

<sup>2</sup> Australian Parliament, House of Representatives. “Explanatory Memorandum, Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Bill 2013,” 2013. [http://www.aph.gov.au/Parliamentary\\_Business/Bills\\_Legislation/Bills\\_Search\\_Results/Result?bId=r5026](http://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bId=r5026)

## **Recommendation 2: Add specific content about intersex health and human rights.**

***Add specific content about intersex health to the section on “Lesbian, gay, bisexual, transgender and intersex health”, including the following objectives:***

- ***The deferral of non-necessary medical interventions on infants and children with intersex variations until such times as the person concerned can give informed consent.***
- ***The prohibition of modifications to sex characteristics undertaken for social rationales, without informed consent.***
- ***Ensuring that intersex persons’ right not to undergo sex assignment treatment is respected.***

This recommendation is in line with recommendations and statements by the following institutions and reports:

- The Senate Community Affairs Committee cross-party report, “Involuntary or coerced sterilization of intersex people in Australia”, October 2013.<sup>3</sup> Recommendation 3 states:  
*“3.130 The committee recommends that all medical treatment of intersex people take place under guidelines that ensure treatment is managed by multidisciplinary teams within a human rights framework. The guidelines should favour deferral of normalising treatment until the person can give fully informed consent, and seek to minimise surgical intervention on infants undertaken for primarily psychosocial reasons.”*
- World Health Organization, OHCHR, UN Women, UNAIDS, UNDP, UNFPA and UNICEF report, “Eliminating forced, coercive and otherwise involuntary sterilization”, 2014.<sup>4</sup>  
*“It has been recommended by human rights bodies, professional organizations and ethical bodies that full, free and informed consent should be ensured in connection with medical and surgical treatments for intersex*

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<sup>3</sup> Senate, Community Affairs References Committee. *Involuntary or Coerced Sterilisation of Intersex People in Australia*. Canberra: Community Affairs References Committee, 2013.

[http://www.aph.gov.au/Parliamentary\\_Business/Committees/Senate/Community\\_Affairs/Involuntary\\_Sterilisation/Sec\\_Report/index](http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Community_Affairs/Involuntary_Sterilisation/Sec_Report/index)

<sup>4</sup> World Health Organization, OHCHR, UN Women, UNAIDS, UNDP, UNFPA, and UNICEF. *Eliminating Forced, Coercive and Otherwise Involuntary Sterilization, An Interagency Statement*, 2014.

[http://apps.who.int/iris/bitstream/10665/112848/1/9789241507325\\_eng.pdf?ua=1](http://apps.who.int/iris/bitstream/10665/112848/1/9789241507325_eng.pdf?ua=1)

persons (64, 150) and, if possible, irreversible invasive medical interventions should be postponed until a child is sufficiently mature to make an informed decision, so that they can participate in decision-making and give full, free and informed consent (15, 149). It has also been recommended that health-care professionals should be educated and trained about bodily diversity as well as sexual and related biological and physical diversity, and that professionals should properly inform patients and their parents of the consequences of surgical and other medical interventions (149; 150, para 20; 160–162).“

- The Council of Europe report, “Human rights and intersex people”, April 2015.<sup>5</sup> Recommendation 1:  
*“Member states should end medically unnecessary “normalising” treatment of intersex persons, including irreversible genital surgery and sterilisation, when it is enforced or administered without the free and fully informed consent of the person concerned. Sex assignment treatment should be available to intersex individuals at an age when they can express their free and fully informed consent. Intersex persons’ right not to undergo sex assignment treatment must be respected.”*
- Joint NGO submission, “Australia's 2nd Universal Periodic Review, Joint NGO Submission on behalf of the Australian NGO Coalition”, signed in full or in part by 190 Australian NGOs, in March 2015.<sup>6</sup> Paragraph 71 stated:  
*“Australia should reduce the high levels of violence faced by LGBTI Australians<sup>131</sup> by adopting the Australian Senate’s recommendations to ban unnecessary medical intervention<sup>132</sup> (including genital surgeries) on people with intersex variations; and conduct activities to reduce bullying and harassment of LGBTI people, particularly youth.”*
- These recommendations are also in line with recommendations of the following United Nations Human Rights Committees: Committee on the Rights of Persons with Disabilities,<sup>7</sup> Committee against Torture,<sup>8</sup> and Committee on the Rights of the Child.<sup>9</sup>

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<sup>5</sup> Council of Europe, Commissioner for Human Rights. “Human Rights and Intersex People, Issue Paper,” April 2015.  
[https://wcd.coe.int/ViewDoc.jsp?Ref=CommDH/IssuePaper\(2015\)1&Language=lanEnglish&Ver=original](https://wcd.coe.int/ViewDoc.jsp?Ref=CommDH/IssuePaper(2015)1&Language=lanEnglish&Ver=original)

<sup>6</sup> Human Rights Law Centre, Kingsford Legal Centre, and National Association of Community Legal Centres. *Australia’s 2nd Universal Periodic Review, Joint NGO Submission on Behalf of the Australian NGO Coalition*, March 2015.  
<http://hrlc.org.au/wp-content/uploads/2015/04/Final-UPR-NGO-Submission1.pdf>

<sup>7</sup> United Nations, Committee on the Rights of Persons with Disabilities. *Concluding Observations on the Initial Report of Germany (advance Unedited Version)*. Geneva: United Nations, April 17, 2015.  
[http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=CRPD%2FCO%2FDEU%2FCO%2F1&Lang=en](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRPD%2FCO%2FDEU%2FCO%2F1&Lang=en)

- The forthcoming SOGII Snapshot Report by the Australian Human Rights Commission is likely to reference these issues, and may contain relevant recommendations.

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<sup>8</sup> United Nations, Committee against Torture. *Consideration of Reports Submitted by States Parties under Article 19 of the Convention, Concluding Observations of the Committee against Torture*. Geneva: United Nations, December 12, 2011.

[http://www2.ohchr.org/english/bodies/cat/docs/co/CAT.C.DEU.CO.5\\_en.pdf](http://www2.ohchr.org/english/bodies/cat/docs/co/CAT.C.DEU.CO.5_en.pdf)

<sup>9</sup> United Nations, Committee on the Rights of Child. *Concluding Observations on the Combined Second to Fourth Periodic Reports of Switzerland (Advance Unedited Version)*. Geneva: United Nations, February 4, 2015.

[http://tbinternet.ohchr.org/Treaties/CRC/SharedDocuments/CHE/CRC\\_C\\_CHE\\_CO\\_2-4\\_ADVANCE\\_UNEDITED\\_VERSION\\_19492\\_E.doc](http://tbinternet.ohchr.org/Treaties/CRC/SharedDocuments/CHE/CRC_C_CHE_CO_2-4_ADVANCE_UNEDITED_VERSION_19492_E.doc)

### **Recommendation 3: Create a specific institutional framework.**

***In “LGBTI place in a stronger democracy”, remove references to intersex people in discussion about a National Gender Centre. In place of this, add to the section on “Lesbian, gay, bisexual, transgender and intersex health” the following:***

- ***Fund national intersex-led organisations to provide support to intersex persons and their families, and advocate on intersex issues.***

While we support proposals for a National Gender Centre, this recommendation recognises that intersex status is a physical attribute, rather than a gender identity, in line with the federal Sex Discrimination Amendment Act.

It implements the following recommendations of the Senate Community Affairs References Committee report on “Involuntary or coerced sterilisation of intersex people in Australia”:

*Recommendation 11*

*5.70 The committee recommends that the provision of information about intersex support groups to both parents/families and the patient be a mandatory part of the health care management of intersex cases.*

*Recommendation 12*

*5.72 The committee recommends that intersex support groups be core funded to provide support and information to patients, parents, families and health professionals in all intersex cases.*

*Recommendation 13*

*6.11 The committee recommends that the Commonwealth Government support the establishment of an intersex patient registry and directly fund research that includes a long-term prospective study of clinical outcomes for intersex patients.*

This recommendation also implements the following recommendations of the Council of Europe report:

*3. Intersex persons and their families should be offered interdisciplinary counselling and support, including peer support. Intersex persons’ access to medical records should be ensured.*

*7. Member states should carry out research into the situation and human rights protection needs of intersex people in different settings. There is an urgent need to improve public awareness and professional training about the problems encountered by intersex persons. Intersex people and organisations representing them should be enabled to*

*participate actively in research concerning them and in the development of measures improving their enjoyment of human rights.*

By offering peer support that underpins the ability to provide informed consent, this recommendation also implements recommendations of United Nations human rights committees, and recommendations of other human rights institutions.



#### **Recommendation 4: End PBS and Medicare discrimination.**

***In paragraph 78, recognise that current access to PBS and Medicare remains discriminatory in some contexts. Examples include access to testosterone by women with Complete Androgen Insensitivity Syndrome, and other people with gender markers other than male.***

Access to some medications, such as testosterone, on PBS (paragraph 78) is currently discriminatory, restricted according to legal sex.<sup>10</sup> Difficulties are also evident in access to Androcur.<sup>11</sup> Access to testosterone is concern to women with Complete Androgen Insensitivity Syndrome, whose bodies naturally produce testosterone and who have typically been sterilized unnecessarily, on the basis of an inflated risk of cancer. The Senate committee report on “Involuntary or coerced sterilization” heard that routine sterilisations of women with CAIS may have been discontinued at some point. Access to testosterone is also an issue to other people with intersex variations whose legal sex is not male.

Access to Medicare for treatments deemed to be in line with assigned sex is unproblematic, however, there is limited access to treatments deemed not to be in line with assigned sex, as these may be deemed to be related to gender transition. Sex assignments for many people with intersex variations are arbitrary, due to physical ambiguity, and this is discriminatory.

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<sup>10</sup> For more information, see OII Australia (9 April 2015) PBS policy change on testosterone, <https://oii.org.au/28630/pbs-policy-change-on-testosterone/>

<sup>11</sup> For more information, see OII Australia (15 October 2009) Intersex Australians... are Placed on a Sex Offenders Register... <https://oii.org.au/4117/intersex-australians-sex-offenders-register/>

## **Recommendation 5: End discrimination against intersex women athletes.**

***Paragraph 62 should include a commitment to end discrimination against women athletes with intersex variations.***

Paragraph 62 should include a commitment to end discrimination against women athletes with intersex variations.

The Sex Discrimination Act contains an exemption permitting discrimination on grounds of “intersex status” in competitive sport, with consequences for the participation of intersex women in all sport.

Sex verification in women’s competitive sport has a long and controversial history. Historical practices have led to the humiliation and exclusion of multiple women with intersex variations. Current methods focus on testosterone levels in women. In a recent peer-reviewed paper by clinicians at the International Association of Athletics Federations Medical and Anti-Doping Department, it was found that:

*there is no clear scientific evidence proving that a high level of T [testosterone] is a significant determinant of performance in female sports.<sup>12</sup>*

A peer reviewed paper this month has established that actual natural testosterone levels in female and male athletes overlap, with some male athletes falling into the range for females, and vice versa. Karkazis and Jordan-Young quote the IAAF study and note:

*Others see a very different problem: Women who have lived and competed as women their whole lives suddenly find themselves having to undergo medical interventions in order to remain eligible to compete in a category to which everyone agrees they belong.<sup>13</sup>*

Those medical interventions include irreversible and unnecessary sterilisations and “partial clitoridectomies”.<sup>14</sup> Given that athletes are otherwise excluded from competing in an activity that may be central to their lives and self-esteem, such interventions appear to form part of a coercive process.

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<sup>12</sup> Bermon, Stéphane, Pierre Yves Garnier, Angelica Lindén Hirschberg, Neil Robinson, Sylvain Giraud, Raul Nicoli, Norbert Baume, et al. “Serum Androgen Levels in Elite Female Athletes.” *The Journal of Clinical Endocrinology & Metabolism*, August 19, 2014, jc.2014–1391. doi:10.1210/jc.2014-1391.

<sup>13</sup> Karkazis, Katrina, and Rebecca Jordan-Young. “Debating a Testosterone ‘sex Gap.’” *Science* 348, no. 6237 (May 22, 2015): 858–60. doi:10.1126/science.aab1057.

<sup>14</sup> Jordan-Young, R. M., P. H. Sonksen, and K. Karkazis. “Sex, Health, and Athletes.” *BMJ* 348, no. apr28 9 (April 28, 2014): g2926–g2926. doi:10.1136/bmj.g2926.

In 1992, the IAAF determined that women “who were raised as girls and classify themselves as female should not be excluded from competition as women”.<sup>15</sup> This approach does not discriminate on grounds of “intersex status”.

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<sup>15</sup> Ljungqvist, Arne. “Medical Examination for Health of All Athletes Replacing the Need for Gender Verification in International Sports: The International Amateur Athletic Federation Plan.” *JAMA* 267, no. 6 (February 12, 1992): 850. doi:10.1001/jama.1992.03480060096038.

## **Recommendation 6: Ensure consent and proportionality in improvements to sex or gender markers on identification documents.**

*In paragraph 62:*

- ***Ensure proportionality in the use of sex and gender markers on official documents so that any presence of such markers fulfills a genuine and proportionate need.***
- ***Ensure that all people with intersex variations are able to exercise autonomy regarding sex/gender markers, and obtain identification options that match their sex characteristics and/or gender identities, as preferred.***

Many people with intersex variations never change assignment, while others may change sex assignment after having had sex characteristics that they consider desirable removed during infancy or childhood.

OII Australia encourages respect for the many different gender identities of people with intersex variations, including respect for non-binary, non-specified and multiple classifications – when freely chosen by the person concerned. This diversity means ensuring that the word “intersex” is not designed as a sex or gender classification.

We recommend conformity with an international community consensus statement on identification documents:

- *To register intersex children as females or males, with the awareness that, like all people, they may grow up to identify with a different sex or gender.*
- *To ensure that sex or gender classifications are amendable through a simple administrative procedure at the request of the individuals concerned. All adults and capable minors should be able to choose between female (F), male (M), non-binary or multiple options. In the future, as with race or religion, sex or gender should not be a category on birth certificates or identification documents for anybody.<sup>16</sup>*

These recommendations implement recommendation 4 of the 2015 Council of Europe document:

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<sup>16</sup> “Public statement by the third international intersex forum” (1 December 2013). Available at <https://oii.org.au/24241/public-statement-by-the-third-international-intersex-forum/> and in multiple locations and languages internationally.

*4. Member states should facilitate the recognition of intersex individuals before the law through the expeditious provision of birth certificates, civil registration documents, identity papers, passports and other official personal documentation while respecting intersex persons' right to self-determination. Flexible procedures should be observed in assigning and reassigning sex/gender in official documents while also providing for the possibility of not choosing a specified male or female gender marker. Member states should consider the proportionality of requiring gender markers in official documents.*<sup>5</sup>

Recommendation 5 of the Human Rights Commission report "Sex Files" also supports non-binary assignments only for people who can consent to them:

*Recommendation 5: A person over the age of 18 years should be able to choose to have an unspecified sex noted on documents and records.*<sup>17</sup>

These principles also match international good practice recommendations on the recognition of trans and gender diverse people. The Open Society Foundations report, "License to Be Yourself" states:

*From a rights-based perspective, third sex / gender options should be voluntary, providing trans people with a third choice about how to define their gender identity. Those identifying as a third sex / gender should have the same rights as those identifying as male or female... As Mauro Cabral, co-director of Global Action for Trans\* Equality, notes:*

*"People tend to identify a third sex with freedom from the gender binary, but that is not necessarily the case. If only trans and/or intersex people can access that third category, or if they are compulsively assigned to a third sex, then the gender binary gets stronger, not weaker."*

*Finally a single third sex / gender option may not sufficiently encompass the full range of gender and sex diversity, including specific regional and cultural identities. A more inclusive approach would be to increase options for people to self-define their sex and gender identity.*<sup>18</sup>

A self-definition approach is consistent with the manner in which ethnic origin and religion are recorded.

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<sup>17</sup> 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*. Sydney: Australian Human Rights Commission, 2009.

<sup>18</sup> Byrne, Jack, Open Society Foundation, Open Society Foundations, Open Society Institute, and Open Society Public Health Program Public Health Program (Open Society Institute). *License to Be Yourself Laws and Advocacy for Legal Gender Recognition of Trans People*. New York: Open Society Foundations, 2014.  
<http://www.opensocietyfoundations.org/reports/license-be-yourself>