



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

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Response to Discussion Paper: Removing surgical requirement for changes to birth certificates

1. OII Australia and this submission

Organisation Intersex International Australia Limited (“OII Australia”) is a national body by and for people born with intersex variations. We promote the human rights and bodily autonomy of intersex people in Australia, and provides information, education and peer support. OII Australia is a not-for-profit company, with Public Benevolent Institution status.

We are aware that many submissions to this inquiry will include statements or assumptions about the needs of people born with intersex variations, including comments on non-binary classifications, thus we feel it helpful to make a submission to clarify our perspectives.

We observe that intersex persons and organisations are frequently invited to comment on policy in relation to birth certificates, but rarely invited to comment on issues of health, involuntary or coerced sterilisation, the bodily autonomy of intersex persons, and the availability of human rights-focused peer and family support. We are very grateful for your separate engagement with us on these matters.

We also observe that it may be inappropriate to disentangle the issue of forced medical treatment of trans people due to their sex characteristics from involuntary or coerced medical treatment on intersex persons due to our sex characteristics.

This submission, like almost all other advocacy and service delivery activities by OII Australia, is wholly a product of volunteer input. It was written on behalf of OII Australia by Morgan Carpenter, president of the organisation, in consultation with members, board, and broader constituency. Contact: Morgan Carpenter, President, OII Australia, morgan@oii.org.au, +61 405 615 942.

2. Intersex variations

People with intersex variations are born with atypical physical sex characteristics that don't meet stereotypical definitions of male or female. We share in common an experience of stigma due to our sex characteristics.

Many intersex variations exist; intersex is a spectrum or umbrella. A German researcher states they "comprise a heterogeneous group ... with at least 40 different entities of which most are genetically determined. An exact diagnosis is lacking in 10 to 80% of the cases".¹ It can mean a different number of sex chromosomes; different physical responses to sex hormones; or different developmental hormone balances and anatomies. It includes many varied kinds of bodies, experiences and identities.

As a group, intersex people face a range of health and human rights issues, caught between two contrasting visions of who and how we should be. On the one hand, this includes medical interventions in infancy and childhood, explicitly intended to make intersex bodies conform to social norms for a specific sex or gender.² On the other hand, we increasingly face misgendering, through expectations to identify as a third gender or sex, to transgress gender norms. Generally, people with intersex variations may face some of the same stigma faced by trans people, particularly if we change our sex classification, but we also face stigma and failures to recognise our birth sex assignment.

3. Background

In making this submission, we draw upon current legislation, our broader constituency of intersex people in Australia; other intersex-led organisations, including those in the global OII network; evidence from community-based and clinical research; and reports by the Australian Human Rights Commission, the Senate Community Affairs References Committee, the Council of Europe, and Open Society Foundations.

The Australian Human Rights Commission report *Resilient Individuals* called for self-declaration, and raised concerns about the possibility that intersex infants and children might be arbitrarily and involuntarily classified as a third sex.³

¹ Hiort, in University of Glasgow. "Proceedings of the 4th International Symposium on Disorders of Sex Development." In Proceedings of the 4th International Symposium on Disorders of Sex Development. Glasgow: University of Glasgow, 2013.

http://www.gla.ac.uk/media/media_279274_en.pdf.

² Senate, Community Affairs References Committee, and Rachel Siewert. 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.

³ Australian Human Rights Commission. *Resilient Individuals: Sexual Orientation, Gender Identity & Intersex Rights*. Sydney: Australian Human Rights Commission, 2015.

<https://www.humanrights.gov.au/our-work/sexual-orientation-sex-gender-identity/publications/resilient-individuals-sexual>

The Council of Europe Issue Paper on *Human rights and intersex people* is the first such report by an international human rights institution and its recommendations are highly relevant to the situation in Australia. The OSF report *Licence to Be Yourself* focuses on the needs of trans persons, documenting the international best practice of self-determination, and identifying risks and challenges.

Regarding community-based research, we have recently participated in a first community survey of 272 Australians born with atypical sex characteristics.⁴ The preliminary data available so far seems likely to confirm our understanding that the majority of intersex people never change sex assignment. They also confirm our understanding about the diversity of intersex persons in relation to legal sex and gender identity.

Finally, our proposals reflect detailed discussions with a range of Australian State LGB and trans organisations, and representatives of the AIS Support Group Australia. In our view, there appears to be much consensus about key principles and desired outcomes.

4. Intersex people and NSW's current model

The existing model that applies to intersex people who need to change assignment in NSW is one that supports a correction to a birth registration at any age under section 45:

45 Correction of Register

(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.⁵

Similar provisions for intersex persons who need to change assignment are available in most other jurisdictions in Australia.

This facility has been used on occasion by members of OII Australia and our broader constituency. It exists because errors are made in initial sex assignment; medical evidence of intersex status is typically required to demonstrate that initial error in sex assignment.

⁴ Jones, Tiffany et al, forthcoming, Survey of Australians born with congenital atypical sex characteristics.

⁵ New South Wales. *Births, Deaths and Marriages Registration Act, 1995*, 1995.
http://www.austlii.edu.au/au/legis/nsw/consol_act/bdamra1995383/

While there is no specific surgical requirement attached in these cases, it should be noted that individuals so affected have, in many cases, already experienced “sex normalising” interventions aimed at reinforcing characteristics of the wrongly assigned sex. The somatic and other health consequences of this error are not addressed by the Act, nor are they addressed by a failure of Medicare to fund reparative medical treatment.

In common with trans persons in NSW, we are concerned that an individual may be required to be single.

Any replacement model in NSW should simplify and improve the current model.

5. Our principles

Community consensus statement

OII Australia fully endorses the framework established in the 2013 community consensus statement from the Third International Intersex Forum:

- *To put an end to mutilating and ‘normalising’ practices such as genital surgeries, psychological and other medical treatments through legislative and other means. Intersex people must be empowered to make their own decisions affecting own bodily integrity, physical autonomy and self-determination.*
- *To put an end to non-consensual sterilisation of intersex people.*
- *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.⁶*

Our recommendations at the end of this submission reflect this framework.

Ending legally enforced sex classifications

The Netherlands has explored the potential for removing sex or gender classifications from official documents, noting in 2014:

⁶ “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.

civil registrars were asked if they foresaw problems if gender would no longer be registered or if the possibility would be extended to state gender as 'undetermined'. A majority of the civil registrars who answered this question foresaw problems when information on gender would no longer be available, especially for research, identification and cross-border travels...

However:

A majority of the persons concerned and interest groups with whom exploratory talks were conducted, would prefer that gender is no longer registered at all, or that at least it would no longer be included on identity documents. The persons concerned also would like to see that both government bodies as well as private companies no longer, or at least not systematically ask for information on gender.

... Gender increasingly seems to be perceived as a 'sensitive' identity feature, but so far is not regarded, nor protected as such in privacy regulations.⁷

In our view, legally enforced sex classifications are, like Australian marriage laws, a legacy of discrimination. It is now inconceivable that race or religion be legally defined on birth certificates.

Third classifications

The idea that intersex is, or should be, associated with a non-binary sex or gender classification appears based on a deterministic conception that persons born with atypical sex characteristics are inherently neither female nor male. To us this appears simplistic, reflecting neither our reality nor our diversity. In practice, it comes across as a kind of purification of the traditional binary sexes, not simply excluding us from narrowly defined classifications, but also underpinning medical intervention aimed at making our bodies conform to stereotypical social sex and gender norms.

We recall that intersex people share a common experience of being born with stigmatised atypical sex characteristics, not a common gender identity, nor a common sexual orientation. Most people with intersex variations never change assignment, while others may change sex assignment after having had sex characteristics that they identify with removed during infancy or childhood.

Our experience, and the preliminary data from the first Australian community survey of 272 people born with atypical sex characteristics, show that most intersex people are female or male. This population faces widespread

⁷ van den Brink, Marjolein, and Jet Tigchelaar. "M/F and Beyond, Gender Registration by the State and the Legal Position of Transgender Persons. English Summary." Ministerie van Veiligheid & Justitie, 2014. <https://www.wodc.nl/onderzoeksdatabase/2393-de-mogelijkheid-en-consequenties-van-het-onbepaald-laten-van-het-geslacht.aspx?cp=44&cs=6796#publicatiegegevens>

“misgendering” (failure to acknowledge their legal sex and gender identity) due to misconceptions that intersex is a non-binary gender identity.

OII Australia encourages respect for the many different gender identities of people with intersex variations, including respect for those of us with non-binary, multiple,⁸ and non-specified classifications – when freely chosen by the person concerned. Our diversity means ensuring that the word “intersex” is not designed as a sex or gender classification.

The available evidence from ACT is that no parents are choosing a non-binary classification for their child, available since early 2014.⁹ This can be expected to be due to clinical advice about the best interests of their child, but it may also indicate a flight towards traditional classifications in recognition of limited community acceptance, and the lesser rights afforded to people with non-traditional classifications. This understanding matches concerns evidenced in the Council of Europe report, and the available information from communities in other jurisdictions such as France, Germany and NZ.¹⁰ OII Australia is deeply concerned that such flight reinforces tendencies to unnecessarily modify the sex characteristics of a child to match their assigned sex. There is no firm clinical or community evidence of good outcomes from medical interventions despite a long and contentious history of their imposition.¹¹

The Council of Europe Issue Paper, in common with the positions of German intersex organisations, identifies numerous problems with a blank sex/gender designation field in the case of early identified intersex births in that country:

However, the sex/gender marker field in the birth register is left blank once a child has been diagnosed as being “affected by DSD”. This means that the assignment decision is passed to the doctors and subsequently enforced by law. Human rights practitioners fear that the lack of freedom of choice regarding the entry in the gender marker field may now lead to an increase in stigmatisation and to “forced outings” of those children whose sex remains undetermined. This has raised the

⁸ Some members of OII Australia and others in our broader community have identified that they are both male and female. See, for example: Briffa, Tony. “Proud Intersex Person Tony Briffa Tells Story of Self Discovery.” *News.com.au*, September 8, 2014.

<http://www.news.com.au/lifestyle/real-life/proud-intersex-person-tony-briffa-tells-story-of-self-discovery/story-fnixwvgh-1227051164954>

⁹ Hyndal, Peter and Heidi Yates, “Progressing Legislative Reform of Change of Sex Provisions”, presentation at Health in Difference 2015 conference, Canberra, 14 August 2015.

<http://healthindifference.org/change-sex-provisions/>

¹⁰ See, for example, <https://oii.org.au/24097/flexible-or-open-birth-sex-assignments-have-no-impact-on-surgical-interventions/> and <https://oii.org.au/23183/germany-third-gender-birth-certificates/>

¹¹ Carpenter, Morgan, and Organisation Intersex International Australia. “August Submission to the Senate Inquiry on the Involuntary or Coerced Sterilisation of People with Disabilities.”

Sydney: Organisation Intersex International Australia, August 29, 2013.
<http://oii.org.au/23387/august-submission-senate-inquiry-sterilisation>

concern that the law may also lead to an increase in pressure on parents of intersex children to decide in favour of one sex.¹²

The Issue Paper comments that “further reflection on non-binary legal identification is necessary” while recommending:

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.

Recommendation 5 of the Human Rights Commission report *Sex Files* also supports non-binary assignments – but 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.¹³

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.¹⁴

¹² Council of Europe, and 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)

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*. Sydney: Australian Human Rights Commission, 2009.

¹⁴ 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*

These factors support the removal of sex or gender classifications from official identification documents.

Movement towards recognition of non-binary sex or gender classifications cannot occur in isolation without reform or regulation of medical practices aimed at “normalizing” intersex bodies.

Medical intervention

Despite the presence of a coercive requirement for sterilisation of trans people in the current *Births, Deaths and Marriages Registration Act*, there has been limited discussion of the utility of such legislation to prohibit coercive modifications to sex characteristics. We believe that this is highly desirable, and the Maltese *Gender Identity, Gender Expression and Sex Characteristics Act* provides a precedent. Passed earlier this year, Malta became the first country to prohibit non-medically necessary changes to the sex characteristics of minors, outlawing modifications undertaken for social rationales:

- 14. (1) It shall be unlawful for medical practitioners or other professionals to conduct any sex assignment treatment and/or surgical intervention on the sex characteristics of a minor which treatment and/or intervention can be deferred until the person to be treated can provide informed consent:
Provided that such sex assignment treatment and/or surgical intervention on the sex characteristics of the minor shall be conducted if the minor gives informed consent through the person exercising parental authority or the tutor of the minor.*
- (2) In exceptional circumstances treatment may be effected once agreement is reached between the interdisciplinary team and the persons exercising parental authority or tutor of the minor who is still unable to provide consent:
Provided that medical intervention which is driven by social factors without the consent of the minor, will be in violation of this Act.*¹⁵

The Act established an interdisciplinary team to review individual cases, and a working group to “review the current medical treatment protocols in line with current medical best practices and human rights standards” and issue “recommendations for revision of the current medical treatment protocols”.

The legislation was passed in the Maltese Parliament by consensus. We would welcome movement by the NSW Parliament to follow this precedent.

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>

¹⁵ Malta. “Gender Identity, Gender Expression and Sex Characteristics Act: Final Version,” March 2015. <http://justiceservices.gov.mt/DownloadDocument.aspx?app=lp&itemid=26805&l=1>

6. Recommendations

1. Changes to medical requirements and classifications need to be addressed as part of a more extensive discussion about requirements for sex classifications and medical treatment in NSW. This consultation may have engendered such a debate.
2. There should be no requirement for surgical or hormonal treatment to change sex classification, for anyone.
3. Noting the current requirement in births, deaths and marriages legislation for surgical or hormonal interventions to modify sex characteristics, consideration should be given to the use of the opportunity for reform to outlaw such practices without the personal informed consent of the person choosing such interventions. Malta provides a precedent.
4. A non-binary sex classification option termed either “not specified” or “non-binary” should be available to individuals who can provide informed consent.
5. Some members of OII Australia and other persons in the intersex community are both male and female. A new classification, M+F, should also receive recognition, on the same basis as a non-binary option.
6. Parents should be given an extended period of up to three years to declare the sex of their child. While we have reservations about any deadline for sex registration due to the possibility that an approaching deadline may prompt unnecessary and damaging sex assignment treatments, developmental psychologists suggest that children become able to identify their gender at around the age of 3.
7. The sex registration of any child should be changeable via a simple declaration by one parent. This should occur in a manner that reflects the rights and freedoms of the child, consistent with the evolving capacities of the child.
8. All adults should be able to self-declare their preferred sex classification through a simple declaration.
9. Individuals changing assignment should not be required to be single.