



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

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## **Submission on the draft Sex and Gender Standards**

### **1. OII Australia**

Organisation Intersex International Australia Limited (OII Australia) is an intersex-led national Public Benevolent Institution. We engage in systemic and individual advocacy on human rights and health issues affecting intersex people in Australia, and provide information, education and peer support.

### **2. Intersex**

Intersex people are born with sex characteristics that do not meet medical and social norms for female or male bodies, and we suffer stigma and discrimination as a result. Diagnosis typically happens because of the stigmatisation of intersex traits. Intersex traits include a wide range of hormonal, genetic and gonadal differences that may be diagnosed prenatally, at birth, at puberty, when trying to conceive, or through random chance.

Intersex bodies and identities are diverse. Intersex people have a range of gender identities. Often these align with our sex assigned at birth, while some intersex people have chosen or other identities.

### **3. The draft sex and gender identity standards**

The proposed standards fail to respect the existing and diverse sex designations due to a conflation of “intersex status” with “sex”; it results in part from a failure to acknowledge other definitions of sex.

A series of adjustments to proposed labels and definitions would make the proposed standards acceptable.

The sorting method applied to the sex and gender identity standards appears to relate to apparent social status, rather than a logical methodology such as alphabetization. The sorting method also requires adjustment.

### **4. The Sex standard**

In their current form, the definitions in the sex standard represent a “purification” of male and female classifications purportedly based on biology, rather than legal sex. Although requiring respondents to self-select, they have the result of failing to recognize the legal sex of respondents and push many respondents into a new category based upon a new biological ideal. Such essentialist ideas are at odds with the reality of the diversity of people’s bodies, legal statuses and identities. They also fail to take account of social processes such as discrimination and stigmatization and their impacts on the bodies of intersex people.

## Assigning and recognizing legal sex

The sex standard does not exist in isolation. It must coexist politely and respectfully with other definitions of sex. In particular, it must coexist with legal sex, including sex assigned at birth, or when birth records of sex are corrected or changed. Failure to recognize a person's sex can result in discrimination on grounds of gender identity or sex.

Legal sex has a somewhat loose relationship with biological norms regarding sex, but biological norms regarding sex are also socially determined and applied.

Current medical practices are to assign intersex people as male or female; intersex traits are controversially regarded by medicine as "disorders of sex development" and consequently people with intersex bodies are subjected to medical interventions that fail to meet human rights norms.<sup>1</sup> A historical and deliberate process of silencing<sup>2</sup> has ensured that many people with intersex traits or variations are unaware of their original sex characteristics.<sup>3</sup>

Many intersex people do not discover their intersex trait until puberty, trying to conceive, or through random chance; such discoveries may frequently take place via blood tests. Their "sex" designation within the proposed ABS classification prior and post diagnosis is a matter of medical and social construction, not biology. Nevertheless, the mental health consequences of failing to respect someone's legal sex are profound.<sup>4</sup>

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<sup>1</sup> See Australian Senate, and 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);

Comisión Interamericana de Derechos Humanos. "Violencia contra Personas Lesbianas, Gays, Bisexuales, Trans e Intersex en América." Comisión Interamericana de Derechos Humanos, November 12, 2015. <http://www.oas.org/es/cidh/informes/pdfs/ViolenciaPersonasLGBTI.pdf>;

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);

United Nations High Commissioner for Human Rights. "Opening Remarks by Zeid Ra'ad Al Hussein, United Nations High Commissioner for Human Rights at the Expert Meeting on Ending Human Rights Violations against Intersex Persons," September 16, 2015. <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=16431&LangID=E>;

United Nations, UNDP, OHCHR, UNAIDS, ILO, UNESCO, UNFPA, et al. "Ending Violence and Discrimination against Lesbian, Gay, Bisexual, Transgender and Intersex People," September 2015; Confidential case study presented to Australian Human Rights Commission;

Carpenter, Morgan, and Organisation Intersex International Australia. "Submission to the Australian Human Rights Commission: Sexual Orientation, Gender Identity and Intersex Rights Snapshot Report." Sydney: Organisation Intersex International Australia, February 6, 2015. <https://oii.org.au/28347/human-rights-commission-submission-on-intersex-legal-reform-and-services/>

<sup>2</sup> Holmes, Morgan. "Is Growing up in Silence Better Than Growing up Different?" *Intersex Society of North America*. Accessed December 30, 2013. <http://www.isna.org/node/743>;

Intersex Society of North America. "What's Wrong with the Way Intersex Has Traditionally Been Treated?" Accessed March 11, 2015. <http://www.isna.org/faq/concealment#fn2>;

MacKenzie, Drew, Annette Huntington, and Jean A Gilmour. "The Experiences of People with an Intersex Condition: A Journey from Silence to Voice." *Journal of Clinical Nursing* 18, no. 12 (June 2009): 1775–83. doi:10.1111/j.1365-2702.2008.02710.x.

<sup>3</sup> Cabral, Mauro, and Morgan Carpenter, eds. *Intersex Issues in the International Classification of Diseases: A Revision*, 2014. <https://globaltransaction.files.wordpress.com/2015/10/intersex-issues-in-the-icd.pdf>;

Carpenter, Morgan. "Intersex Rights and Freedoms." *Court Of Conscience*, no. 9 (2015): 27–33. <http://morgancarpenter.com/intersex-rights-freedoms/>

<sup>4</sup> See for example Martínez-Patiño, María José. "Personal Account A Woman Tried and Tested." *The Lancet*, December 2005, 366–538;

Carpenter, Morgan, and Organisation Intersex International Australia. "Submission to the Australian

OII Australia and other intersex human rights organisations around the globe have endorsed a statement of the Third International Intersex Forum, including declarations on sex registration:

- *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>5</sup>*

It is not appropriate to strip or ignore intersex peoples' existing legal sex classifications. A failure to recognize an intersex person's legal sex is both a form of "misgendering" and may constitute discrimination.

### The Sex Discrimination Act

Sex, gender identity and intersex status are independent attributes in the Sex Discrimination Act, as amended in 2013. The explanatory memorandum that proposed addition of "intersex status" to the existing definition of "sex" and proposed definitions of "gender identity" and "sexual orientation" notes:

*including the separate ground of intersex status recognises that whether a person is intersex is a biological characteristic...<sup>6</sup>*

The explanatory memorandum notes some overlap between grounds of sex, gender identity and intersex status but clearly states that the "*definition is not intended to create a third sex in any sense*":

*15. The definition recognises that being intersex is a biological condition, not a gender identity. It does not require a person who is intersex to identify as either male or female in order to access protections under the SDA. The definition is not intended to create a third sex in any sense.<sup>6</sup>*

To conform to the requirements of the Act, the sex standard must similarly define intersex separately to sex.

A third classification is necessary to recognize the existence of people with legally recognized classifications different to female and male.

### Multiple choice responses

Permitting multiple choice responses is a more effective and respectful way of supporting people who are biologically both male and female, or who are legally classified as being both

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Human Rights Commission: Sexual Orientation, Gender Identity and Intersex Rights Snapshot Report." Sydney: Organisation Intersex International Australia, February 6, 2015.

<https://oii.org.au/28347/human-rights-commission-submission-on-intersex-legal-reform-and-services/>

<sup>5</sup> Various. "Public Statement by the Third International Intersex Forum." Malta, December 2, 2013.

<http://oii.org.au/24241/public-statement-by-the-third-international-intersex-forum/>

<sup>6</sup> Australian 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?bld=r5026](http://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bld=r5026)

male and female. This approach might also better support the coexistence of the sex standard with other definitions and legal classifications around sex.

We recommend that the ABS permit multiple choice responses.

### “Non-binary” and defining “others”

The philosopher Simone De Beauvoir introduced the notion of “the other” in *The Second Sex* (1949) as a construction opposing, and thereby constructing, “the self”,<sup>7</sup> based in part on work by Hegel in *The Phenomenology of Mind* (1910). Subsequently the concepts of “the other”, “othering”, and “otherness” have taken root in areas of thought and inquiry ranging from nursing science, to race and ethnicity – notably by Edward Said in *Orientalism* (1978). It describes a power relationship, placing an individual or group at societal margins.

The explicit “othering” of people with biologies, sex characteristics and/or gender identities that do not meet hegemonic norms in summary definitions of ‘X’ is therefore of significant concern.

There is growing community consensus regarding use of the word “non-binary” as a more inclusive and respectful term than “other”. OII Australia, Transgender Victoria, the National LGBTI Health Alliance, A Gender Agenda and other bodies have made submissions to the Attorney General’s Department proposing that the current definition of “X” be revised to “non-binary”, in part to meet obligations under the Sex Discrimination Act.<sup>8</sup>

## 5. Gender identity standard

As proposed, the gender identity standard appears to be based, like the sex standard, on purported biological characteristics. Further, definitions such as “*Persons who have masculine characteristics and identify themselves as being male*” inaccurately presume that only persons who have masculine characteristics may identify as being male.

This is not appropriate and would appear to obviate the purpose of a distinct gender identity standard. Definitions relating to gender identity must be based on self identification, rather than congruity between purported biological characteristics and self-identified gender.

## 6. Recommendations

We recommend that the definitions of sex, and the standard be amended as follows.

### Nominal definition of Sex

The term ‘sex’ refers to a person’s biological characteristics and/or legal sex classification. A person’s sex is usually described as being male or female. Some people may have other, mixed, both or neither male and female characteristics.

### Operational definition of Sex

Operationally, Sex is the distinction between male, female, and others who do not have biological characteristics and/or legal sex classifications typically associated with either the male or female sex, as reported by a respondent.

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<sup>7</sup> See, for example, Thurman, Judith. “Introduction to Simone de Beauvoir’s ‘The Second Sex.’” *The New York Times*, May 27, 2010. <http://www.nytimes.com/2010/05/30/books/excerpt-introduction-second-sex.html>

<sup>8</sup> copy appended, and at National LGBTI Health Alliance, A Gender Agenda, Organisation Intersex International Australia, Trans Formative, and Transgender Victoria. “RE: Commonwealth Attorney-General’s Department Review of the Australian Government Guidelines on the Recognition of Sex and Gender,” September 24, 2015. <https://oii.org.au/30043/joint-submission-federal-sexgender-guidelines/>

## Recommended Sex Standard Classification

Preferred Code	Alternate Code	Label	Definition
1	F	Female	Persons who have female or feminine biological characteristics, or female sex assigned at birth, or legally classified as female.
2	M	Male	Persons who have male or masculine biological characteristics, or male sex assigned at birth, or legally classified as male.
3	X	Non-binary	Persons who have mixed or non-binary biological characteristics (if known), or a non-binary sex assigned at birth, or are legally classified using different sex classifications.

### Multiple choice

Multiple choice answer must be possible, for people who are both male and female, and/or who have related sex classifications.

### Sorting method

We have sorted the codes alphabetically by “alternate code” and “label”, rather than by apparent social status.

## Recommended Gender Identity Standard Classification

Preferred Code	Alternate Code	Label	Definition
1	F	Woman	Persons who identify themselves as a woman.
2	M	Man	Persons who identify themselves as a man.
3	X	Non-binary	Persons who identify as non-binary, gender diverse, or with descriptors other than man or woman.

### Multiple choice

Multiple choice answer must be possible, for people who are both male and female, and/or who have related sex classifications.

### Sorting method

We have sorted the codes alphabetically by “alternate code” to match the proposed sex standard, rather than by apparent social status.

### Guidance

Consequential changes should be made to the guidance.