



Intersex Human Rights Australia Ltd
For intersex human rights, information, and education

PO Box 46, Newtown, NSW 2042, Australia
+61 405 615 942 info@ihra.org.au
ihra.org.au

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1 Introduction

We thank the Department of Justice and Attorney General of the Queensland Government for the opportunity to make a submission on proposed amendments to legislation on birth certificates.

Intersex Human Rights (IHRA) is a national intersex-led organisation that promotes the human rights and bodily autonomy of people born with intersex variations. Formerly known as Organisation Intersex International (OII) Australia, IHRA is a not-for-profit company, with Public Benevolent Institution (charitable) status.

2 Summary of recommendations

Recommendation 1: Queensland should protect children’s right to bodily integrity, in line with the *Darlington Statement* and the *Yogyakarta Principles plus 10*.

Recommendation 2: The Queensland government should protect people from discrimination and violence on grounds of ‘sex characteristics’, in line with the attribute defined in the *Yogyakarta Principles plus 10*.

Recommendation 3: Queensland should end legal classification of individuals by sex or gender, in line with the *Darlington Statement* and the *Yogyakarta Principles plus 10*.

Recommendation 4: In the absence of an end to legal classification of individuals by sex or gender, Queensland should recognise “non-binary”, alternative (for example, self-affirmed) and multiple sex markers. Changes should be available a simple administrative procedure, for example, via a statutory declaration.

Recommendation 5: The Queensland government should not create a sex marker termed ‘intersex’, because this would constrain a right to self-determination by intersex women and intersex men.

Recommendation 6: In the absence of legislation and regulation that implements prior BDM recommendations, the Queensland government should ensure that a separate, simple and accessible pathway is available for people born with variations of sex characteristics to *correct* details on birth certificates.

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4 Intersex

IHRA refers to intersex people in this document in line with a definition given in 2016 by the UN Office of the High Commissioner for Human Rights, African Commission on Human and Peoples' Rights, Council of Europe Commissioner for Human Rights and Inter-American Commission on Human Rights:

Intersex people are born with physical or biological sex characteristics (such as sexual anatomy, reproductive organs, hormonal patterns and/or chromosomal patterns) that do not fit the typical definitions for male or female bodies. For some intersex people these traits are apparent at birth, while for others they emerge later in life, often at puberty.¹

We use this term to include all people born with bodies that do not fit medical or social norms for male or female bodies. In doing so, we acknowledge the diversity of intersex people in terms of our identities, legal sexes assigned at birth, our genders, gender identities, and the words we use to describe our bodies.

Many forms of intersex exist; it is a spectrum or umbrella term, rather than a single category. At least 30 or 40 different variations are known to science;² most are genetically determined. Since 2006, clinicians frequently use a stigmatising label, “Disorders of Sex Development” or “DSD”, to refer to intersex variations.

Intersex variations can include differences in the number of sex chromosomes, different tissue responses to sex hormones, or a different hormone balance. Examples of intersex variations include androgen insensitivity syndrome (AIS), congenital adrenal hyperplasia (CAH), and sex chromosome differences such as 47,XXY (often diagnosed as Klinefelter syndrome) and 45,X0 (often diagnosed as Turner syndrome). Many persons do not have clear genetic diagnoses.² Some common intersex variations are diagnosed prenatally.³

¹ Office of the High Commissioner for Human Rights, African Commission on Human and Peoples' Rights, Council of Europe, Office of the Commissioner for Human Rights, Inter-American Commission on Human Rights, Special Rapporteur on torture and other cruel, inhuman, or degrading treatment or punishment, Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, et al. Intersex Awareness Day – Wednesday 26 October. End violence and harmful medical practices on intersex children and adults, UN and regional experts urge. Office of the High Commissioner for Human Rights; 2016 [cited 2016 Oct 24]. Available from:

<http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=20739&LangID=E>

² Hiort O. I-03 DSDnet: Formation of an open world-wide network on DSD at clinician conference, “4th I-DSD Symposium”; 2013: “DSD comprise a heterogeneous group of differences of sex development with at least 40 different entities, of which most are genetically determined. An exact diagnosis is lacking in 10 to 80% of the cases”, [cited 1 Jul 2013]. Available from

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

³ Davis G. The Social Costs of Preempting Intersex Traits. The American Journal of Bioethics. 2013;13(10):51–3.

5 Principles

In responding to the discussion paper, we are guided by the principles articulated in the *Darlington Statement* and the *Yogyakarta Principles*.

5.1 Darlington Statement

The *Darlington Statement* is a community consensus statement by Australian and Aotearoa/New Zealand intersex organisations and advocates, signed in March 2017.⁴ It makes the following relevant points:

*4. That the word 'intersex', and the intersex human rights movement, **belong equally to all people born with variations of sex characteristics**, irrespective of our gender identities, genders, legal sex classifications and sexual orientations.*

*7. We call for the immediate **prohibition as a criminal act** of deferrable medical interventions, including surgical and hormonal interventions, that alter the sex characteristics of infants and children without personal consent. We call for freely-given and fully informed consent by individuals, with individuals and families having mandatory independent access to funded counselling and peer support.*

*8. Regarding **sex/gender classifications**, sex and gender binaries are upheld by structural violence. Additionally, attempts to classify intersex people as a third sex/gender do not respect our diversity or right to self determination. These can inflict wide-ranging harm regardless of whether an intersex person identifies with binary legal sex assigned at birth or not.*

*Undue emphasis on how to classify intersex people rather than how we are treated is also a form of structural violence. The larger goal is not to seek new classifications but to **end legal classification systems** and the hierarchies that lie behind them. Therefore:*

- a. As with race or religion, sex/gender should not be a legal category on birth certificates or identification documents for anybody.*
- b. While sex/gender classifications remain legally required, sex/gender assignments must be regarded as provisional. Given existing social conditions, we do not support the imposition of a third sex classification when births are initially registered.*
- c. Recognising that any child may grow up to identify with a different sex/gender, and that the decision about the sex of rearing of an intersex child may have been incorrect, sex/gender classifications must be*

⁴ Androgen Insensitivity Syndrome Support Group Australia, Intersex Trust Aotearoa New Zealand, Organisation Intersex International Australia, Black E, Bond K, Briffa T, et al. *Darlington Statement*. Sydney, NSW; 2017 Mar. Available from: <http://darlington.org.au/statement/>

legally correctable through a simple administrative procedure at the request of the individual concerned.

- d. *Individuals able to consent should be able to choose between female (F), male (M), non-binary, alternative gender markers, or multiple options.*

9. *We call for **effective legislative protection** from discrimination and harmful practices on grounds of **sex characteristics**.*

The *Darlington Statement* is consistent with a global intersex community statement: the 2013 *Malta Declaration*.⁵

5.2 Yogyakarta Principles

We are also guided by the *Yogyakarta Principles* (2007)⁶ and the *Yogyakarta Principles plus 10* (2017).⁷ The *Principles* are authoritative sets of principles, supplemented in 2017, that apply international human rights law in relation to sexual orientation, gender identity, gender expression and sex characteristics. Australian signatories of the *Yogyakarta Principles plus 10* include Philip Alston, UN Special Rapporteur on extreme poverty and human rights; Morgan Carpenter, co-executive director, Intersex Human Rights Australia; and Chris Sidoti, international human rights specialist and former Australian Human Rights Commissioner (1995-2000).

Principle 31, “The Right to Legal Recognition” (YP+10) states:

Everyone has the right to legal recognition without reference to, or requiring assignment or disclosure of, sex, gender, sexual orientation, gender identity, gender expression or sex characteristics. Everyone has the right to obtain identity documents, including birth certificates, regardless of sexual orientation, gender identity, gender expression or sex characteristics. Everyone has the right to change gendered information in such documents while gendered information is included in them.

States shall:

A) Ensure that official identity documents only include personal information that is relevant, reasonable and necessary as required by the law for a legitimate purpose, and thereby end the registration of the sex and gender of the person in

⁵ Third international intersex forum. Malta Declaration: Public statement by the third international intersex forum [Internet]. Floriana, Malta; 2013 Dec [cited 2018 Mar 30]. Available from: <https://ihra.org.au/24241/public-statement-by-the-third-international-intersex-forum/>

⁶ Yogyakarta Principles. The Yogyakarta Principles. Principles on the application of international human rights law in relation to sexual orientation and gender identity. 2007. Available from: <http://www.yogyakartaprinciples.org/principles-en/>

⁷ Yogyakarta Principles. The Yogyakarta Principles Plus 10: Additional Principles and State Obligations on the Application of International Human Rights Law in Relation to Sexual Orientation, Gender Identity, Gender Expression and Sex Characteristics, to Complement the Yogyakarta Principles. 2017. Available from: <http://www.yogyakartaprinciples.org/principles-en/yp10/>

identity documents such as birth certificates, identification cards, passports and driver licences, and as part of their legal personality;

B) Ensure access to a quick, transparent and accessible mechanism to change names, including to gender-neutral names, based on the self-determination of the person;

C) While sex or gender continues to be registered:

i. Ensure a quick, transparent, and accessible mechanism that legally recognises and affirms each person's self-defined gender identity;

ii. Make available a multiplicity of gender marker options;

iii. Ensure that no eligibility criteria, such as medical or psychological interventions, a psycho-medical diagnosis, minimum or maximum age, economic status, health, marital or parental status, or any other third party opinion, shall be a prerequisite to change one's name, legal sex or gender;

iv. Ensure that a person's criminal record, immigration status or other status is not used to prevent a change of name, legal sex or gender.

Principle 32, "The Right to Bodily and Mental Integrity" (YP+10) states:

Everyone has the right to bodily and mental integrity, autonomy and self-determination irrespective of sexual orientation, gender identity, gender expression or sex characteristics. Everyone has the right to be free from torture and cruel, inhuman and degrading treatment or punishment on the basis of sexual orientation, gender identity, gender expression and sex characteristics. No one shall be subjected to invasive or irreversible medical procedures that modify sex characteristics without their free, prior and informed consent, unless necessary to avoid serious, urgent and irreparable harm to the concerned person.

States shall:

A) Guarantee and protect the rights of everyone, including all children, to bodily and mental integrity, autonomy and self-determination;

B) Ensure that legislation protects everyone, including all children, from all forms of forced, coercive or otherwise involuntary modification of their sex characteristics;

C) Take measures to address stigma, discrimination and stereotypes based on sex and gender, and combat the use of such stereotypes, as well as marriage prospects and other social, religious and cultural rationales, to justify modifications to sex characteristics, including of children;

D) Bearing in mind the child's right to life, non-discrimination, the best interests of the child, and respect for the child's views, ensure that children are fully consulted and informed regarding any modifications to their sex characteristics necessary to avoid or remedy proven, serious physical harm, and ensure that any such modifications are consented to by the child concerned in a manner consistent with the child's evolving capacity;

E) Ensure that the concept of the best interest of the child is not manipulated to justify practices that conflict with the child's right to bodily integrity;

*F) Provide adequate, independent counselling and support to victims of violations, their families and communities, to enable victims to exercise and affirm rights to bodily and mental integrity, autonomy and self-determination;
G) Prohibit the use of anal and genital examinations in legal and administrative proceedings and criminal prosecutions unless required by law, as relevant, reasonable, and necessary for a legitimate purpose.*

6 The existing policy context, and the need for additional reforms

Existing policy in Queensland, like in other Australian jurisdictions, is contradictory in its approach to intersex persons, and this causes harm. In a forthcoming book on *The Legal Status of Intersex Persons*, co-executive director Morgan Carpenter states that the effect of current medical and legal approaches to intersex people is that:

...intersex bodies remain “normalized” or eliminated by medicine, while society and the law “others” intersex identities. That is, medicine constructs intersex bodies as either female or male, while law and society construct intersex identities as neither female nor male.⁸

The *Discussion Paper* provides an example, in asking if intersex should be a sex classification. Such an action would exacerbate this situation and constrain the rights of intersex people to self-determination. We ask that law and regulation should not exacerbate this situation but should, instead, permit self-determination using universally-available terms such as ‘non-binary’. Law and regulation should also prohibit all forms of violence and discrimination on grounds of ‘sex characteristics’.

6.1 Ending violence and harmful practices

In 2012, the Department of Communities in Queensland wrote that:

Previously it was an accepted practice to assign the external genitalia of a child during their childhood, often through surgical intervention, to determine the sex of the child early in their life. Research and investigation now advises against any irreversible or long-term procedures being performed on intersex children, unless a condition poses a serious risk to their health.⁹

This rhetoric appears to differ from the reality.

⁸ Carpenter M. The ‘normalisation’ of intersex bodies and ‘othering’ of intersex identities, the experience in Australia. In: Scherpe J, Dutta A, Helms T, editors. *The Legal Status of Intersex Persons*. 1st ed. Cambridge, England: Intersentia; 2018 (forthcoming).

See also: Carpenter M. The ‘Normalization’ of Intersex Bodies and ‘Othering’ of Intersex Identities in Australia. *Journal of Bioethical Inquiry*. 2018 (forthcoming);15(4).

⁹ Department of Communities, Queensland. *Engaging Queenslanders: A guide to working with Lesbian, Gay, Bisexual, Transgender and Intersex (LGBTI) communities*. 2012.

Unlike law and regulation that seeks to define intersex people as other, medicine and the Family Court have framed intersex bodies as female or male with ‘disorders of sex development’. The following two Family Court cases adjudicated in Queensland illustrate the consequences of this framing of intersex bodies as disordered.

6.2 Re: Carla (Medical procedure) (2016)

The case of *Re: Carla (Medical procedure)* [2016] FamCA 7 was taken by the parents of a child pseudonymously named Carla, with participation as a friend of the court by an anonymous State government department in Queensland.¹⁰ The case was adjudicated by Justice Forrest, who sits in Brisbane.

Carla was “born in 2010, is now five years of age and is about to start school”, and “was born with a sexual development disorder, described, in more particular medical terms, as 17 beta hydroxysteroid dehydrogenase 3 deficiency” (at [1]), with XY sex chromosomes, testes, and predominantly female genitalia.¹⁰

Justice Forrest stated that “the proposed surgery for Carla involving the bilateral removal of her gonads (“gonadectomy”) ... may be authorised by either of Carla’s parents”.¹⁰

Justice Forrest argued that the gonadectomy (sterilisation) was justifiable on the basis of a potential cancer risk, stating that “the Consensus Statement for Management of Disorders of Sexual Development puts the risk of germ cell malignancy at 28% ... said to be an intermediate level of risk of malignancy” (at [19]) and it was “...virtually impossible to regularly monitor them for the presence of tumours” (at [20]). There is no evidence for this. A German multidisciplinary team advised Amnesty International in 2017 that, cancer risk can be monitored effectively even for high risk groups.¹⁰

Further, the actual “Consensus statement on management of intersex disorders” stating a risk of 28% itself states that clinicians should “monitor” gonads in children with 17 beta hydroxysteroid dehydrogenase 3 deficiency.¹¹ A more recent clinical review published in 2010 reduces risk levels to 17%.¹² According to clinical literature, the retention and monitoring of gonads should have been unambiguously supported. This is in line with best practice, as evidenced by the German team that advised Amnesty International.

Given the length and detail of the supporting information, it appears that gender stereotyping substantively comprises the rationale for sterilisation, mostly on the basis of parental reporting:

¹⁰ *Re: Carla (Medical procedure)* [2016] FamCA 7 (20 January 2016). Available from: <http://www.austlii.edu.au/cgi-bin/sinodisp/au/cases/cth/FamCA/2016/7.html>

¹¹ Hughes IA, Houk C, Ahmed SF, Lee PA, LWPES/ESPE Consensus Group. Consensus statement on management of intersex disorders. *Archives of Disease in Childhood*. 2006;91:554–63.

¹² Pleskacova J, Hersmus R, Oosterhuis JW, Setyawati BA, Faradz SM, Cools M, et al. Tumor Risk in Disorders of Sex Development. *Sexual Development*. 2010;4(4–5):259–69.

- a. Her parents were able to describe a clear, consistent development of a female gender identity;*
- b. Her parents supplied photos and other evidence that demonstrated that Carla identifies as a female;*
- c. She spoke in an age appropriate manner, and described a range of interests/toys and colours, all of which were stereotypically female, for example, having pink curtains, a Barbie bedspread and campervan, necklaces, lip gloss and 'fairy stations';*
- d. She happily wore a floral skirt and shirt with glittery sandals and Minnie Mouse underwear and had her long blond hair tied in braids; and*
- e. Her parents told Dr S that Carla never tries to stand while urinating, never wants to be called by or referred to in the male pronoun, prefers female toys, clothes and activities over male toys, clothes and activities, all of which are typically seen in natal boys and natal girls who identify as boys. (at [15])¹⁰*

We find such stereotyping to be disturbing, and Carla is not yet an independent agent. Given the absence of clear medical evidence in support of Carla's sterilisation, her current gender presentation and future gender identity are irrelevant. However, we note that Australian clinical literature, published in 2009, states:

As is well known, spontaneous change of gender identity from female to male occurs after the onset of puberty in 46,XY children with ... 17 β -hydroxysteroid dehydrogenase deficiency.¹³

Further, Justice Forrest stated that sterilisation should deliberately proceed early, prior to the child's ability to consent, stating that it would be:

less psychologically traumatic for Carla if it is performed before she is able to understand the nature of the procedure (at [30])

Despite this justification for early sterilisation, we note that Justice Forrest made no such remark about trauma arising from a different possible medical intervention:

Carla may also require other surgery in the future to enable her vaginal cavity to have adequate capacity for sexual intercourse. (at [18])

This focus on the suitability of Carla's body for heterosexual intercourse is related to a Victorian 2010 ethical framework's focus on marriage prospects as a rationale for medical intervention.¹⁴

¹³ Hewitt JK, Warne GL. Management of disorders of sex development. *Pediatric Health*. 2009;3(1):51–65.

¹⁴ Gillam LH, Hewitt JK, Warne GL. Ethical Principles for the Management of Infants with Disorders of Sex Development. *Hormone Research in Paediatrics*. 2010;74(6):412–8.
See also: Dreger A, Sandberg DE, Feder EK. From Principles to Process in Disorders of Sex Development Care. *Hormone Research in Paediatrics*. 2010;74(6):419–20.

The child's sterilisation should not have been approved. Further, this decision to enable parental choice on sterilisation has taken future sterilisation cases out of Court jurisdiction, for the "potential benefit of any parents, like them, who might find themselves in these very same factual circumstances in the future" (at [8]).

Finally, Carla's medical history was also put before the Family Court:

Surgery already performed on Carla has enhanced the appearance of her female genitalia. (at [2])

In 2014, Carla underwent ... a 'clitoral' recession and labioplasty (at [16])

These abhorrent, irreversible, non-therapeutic and invasive interventions were disclosed as incidental to a case brought to sterilise the child. The Australasian Paediatric Endocrine Group recommends such interventions to address psychosocial rationales despite "particular concern" about post-surgical "sexual function and sensation".¹⁵ The lack of evidence supporting those interventions has been criticised by intersex-led organisations and many other institutions, including the Australian Senate¹⁶ and the Committee on Bioethics of the Council of Europe.¹⁷ It is evident that such harmful practices take place within medical settings without any requirement for independent oversight, whether from the Family Court, the Queensland Civil and Administrative Tribunal, or other avenues.

It is not clear that either parents or the Court have been exposed to accurate and comprehensive information medical evidence supporting the interventions on the child, and it appears that the family have had no access to independent peer support. This will have long-term repercussions for the family. As stated by the report of the Council of Europe Committee on Bioethics:

Parental consent is inherently problematic as there is no credible evidence that children benefit from improved attachment with parents who want these interventions. Indeed, parental desire for the interventions complicates the eventual transfer of control over to the children for their own gender and sexuality¹⁷

¹⁵ Australasian Paediatric Endocrine Group, Hewitt J, Warne G, Hofman P, Cotterill A. Submission of the Australasian Paediatric Endocrine Group to the Senate Inquiry into the Involuntary or Coerced Sterilization of People with Disabilities in Australia: Regarding the Management of Children with Disorders of Sex Development. 2013 Jun [cited 2013 Jun 28]. Available from:

<http://www.aph.gov.au/DocumentStore.ashx?id=aafe43f3-c6a2-4525-ad16-15e4210ee0ac&subId=16191>

¹⁶ Community Affairs References Committee, Senate, Australia. Involuntary or coerced sterilisation of intersex people in Australia. Canberra: Community Affairs References Committee; 2013 [cited 2013 Oct 26]. Available from:

http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Community_Affairs/Involuntary_Sterilisation/Sec_Report/index

¹⁷ Zillén K, Garland J, Slokenberga S, Committee on Bioethics of the Council of Europe. The Rights of Children in Biomedicine: Challenges posed by scientific advances and uncertainties. 2017.

Overall, this 2016 Family Court of Australia case is deeply disturbing, exemplifying the way that the human rights of intersex children are violated with inadequate evidence for social and cosmetic purposes.

Members and the broader constituencies of IHRA and AISSGA have been greatly troubled by this case. Board members and other individuals have in many cases personally experienced similar interventions, with negative personal and familial consequences.¹⁸

6.3 Re: Kaitlin (2017)

The case of *Re: Kaitlin [2017] FamCA 83*, was taken by the parents of a child pseudonymously named Kaitlin. The case was adjudicated by Justice Forrest, who sites in Townsville.

Kaitlin was born in 2000 with a pituitary impairment.¹⁹ An intersex and transgender child:

she has not undergone stage one treatment, which comprises hormone blocking, because she suffers from hypopituitarism, in consequence of which her body is incapable of naturally producing testosterone, or indeed, many other hormones (at [2]).

Indeed, Kaitlin “identified as female from a very early age. She has always resented being characterised as male” (at [5]).

Unlike non-intersex transgender children in Australia, where such interventions require Family Court approval:

“At about age 12 or 13 she was prescribed testosterone in order to commence puberty” (at [6]).

This was an inappropriate, forced intervention.

¹⁸ Copland S. The medical community’s approach to intersex people is still primarily focused on “normalising” surgeries. SBS. 2016 [cited 2016 Dec 15]. Available from:

<http://www.sbs.com.au/topics/sexuality/agenda/article/2016/12/15/medical-communitys-approach-intersex-people-still-primarily-focused-normalising>

Overington C. Family Court backs parents on removal of gonads from intersex child. The Australian. 2016 Dec 7 [cited 2016 Dec 7]; Available from: <http://www.theaustralian.com.au/news/health-science/family-court-backs-parents-on-removal-of-gonads-from-intersex-child/news-story/60df936c557e2e21707eb198f1300276>

Overington C. Carla’s case ignites firestorm among intersex community on need for surgery. The Australian. 2016 Dec 8 [cited 2016 Dec 8]; Available from:

<http://www.theaustralian.com.au/national-affairs/health/carlas-case-ignites-firestorm-among-intersex-community-on-need-for-surgery/news-story/7b1d478b8c606eaa611471f70c458df0>

¹⁹ Family Court of Australia. *Re: Kaitlin [2017] FamCA 83*. Available from:

<http://www.austlii.edu.au/au/cases/cth/FamCA/2017/83.html>

When Kaitlin understood the nature of the hormone treatment, she was, because of her gender identity, understandably non-compliant with that testosterone treatment.

Justice Tree approved “cross-sex” hormone treatment.

This case should not have been necessary. Kaitlin should never have been prescribed testosterone in the first place. The adolescent child should have been consulted about her treatment, and her voice in relation to her treatment should have been respected.

6.4 Subsequent Queensland policy in relation to intersex children

2016 *Clinical Prioritisation Criteria* for paediatric surgery contain the following statements, calling for urgent referral, itself not inappropriate due to adrenal risks associated with congenital adrenal hyperplasia, but including prioritisation of referral to a paediatric surgeon:

Ambiguous genitalia and neonatal bilateral undescended testes are urgent referrals to service

Penile conditions ... Disorder of sexual development (DSD) – refer to paediatric surgeon or paediatric medicine immediately²⁰

Adrenal risks associated with congenital adrenal hyperplasia need urgent assessment, for what the Committee on Bioethics of the Council of Europe describes as “administration of endocrine treatment to prevent fatal salt-loss in some infants”, but this has no relationship to surgical assessment. Indeed, the report of the Committee on Bioethics of the Council of Europe remarked this year that no clinically-accepted standard of care:

has emerged to explain, as a matter of science, how infant surgery will be certain to coincide with the child’s actual identity, sexual interests, and desires for bodily appearance¹⁷

A 2016 “Sexual Health Strategy” published by Queensland Department of Health makes no statements about the sexual health implications of medical interventions on intersex infants, children or adolescents. It states:

Parents and carers of children born with an intersex condition which may require surgical intervention must be fully informed about the intersex condition specific to their child and have all available treatment options explained to them. Informed consent from legal guardians is also essential if treatment is to be undertaken on children and young people later in life for normalisation and gender affirmation. Medical management of children with intersex variation [sic] may be complex and ongoing interventions may include surgery and lifelong hormone therapy... Medical treatment is sometimes necessary to help

²⁰ Queensland Health. *Clinical Prioritisation Criteria – Paediatric Surgery*. 2016 Aug 16. Available at <https://cpc.health.qld.gov.au/Specialty/14/paediatric-surgery>

*development proceed as normally as possible and for some conditions, surgical treatment may be recommended.*²¹

These 2016 descriptions and justifications for early medical interventions are unsupported by evidence, and fail to acknowledge the human rights and ethical implications of medical interventions, including when and where surgery may be appropriate, or when and where parental consent is adequate or permissible. The document contains clear and repeated presumptions favouring so-called “normalisation” and ‘normal development’. We note that it was published in advance of press reporting of the case *Re: Carla (Medical procedure)*, in December 2016, and prior to *Re: Kaitlin*.

In summary, medical interventions take place in pursuit of an arbitrary “normality” that is not realised through surgery, without transparent human rights-based standards of care, and without effective, independent, human rights-based oversight. Medical interventions include experimental treatments; treatments deliberately proceeding prior to a child’s ability to consent; and treatments that may be described as “gender affirmation”, but that take place without adequate or appropriate consultation with the affected child, including awareness of an affected child’s gender identity. Such interventions are forced and coercive; forms of ill-treatment, and they contravene Australia’s human rights obligations under the International Covenant on Civil and Political rights, the Convention on the Rights of the Child,²² the Convention against Torture,²³ and the Convention on the Rights of Persons with Disabilities.²⁴

IHRA made a Shadow Report submission to the UN Human Rights Committee in August 2017, endorsed by the AIS Support Group Australia, Disabled People’s Organisations of Australia, National LGBTI Health Alliance, and People with Disability Australia.²⁵ It provided

²¹ Queensland Health. Queensland Sexual Health Strategy. 2016 [cited 2017 Jun 4]. Available from: <https://www.health.qld.gov.au/public-health/topics/sexual-health/strategy>

²² Attorney General’s Department. Australia’s joint fifth and sixth report under the Convention on the Rights of the Child, second report on the Optional Protocol on the sale of children, child prostitution and child pornography and second report on the Optional Protocol on the involvement of children in armed conflict. 2018 Jan. Report No.: INT/CRC/ADR/AUS/29898/E.

²³ Carpenter M, Organisation Intersex International Australia. Contribution to the List of Issues Prior to Reporting to the Committee against Torture for Australia. Sydney: Organisation Intersex International Australia; 2016 Jun [cited 2018 Mar 30]. Available from: <https://ihra.org.au/30546/loi-cat-review/>

Committee against Torture. List of issues prior to submission of the sixth periodic report of Australia. Geneva: United Nations; 2017 Jan. Report No.: CAT/C/AUS/QPR/6.

²⁴ Carpenter M, Organisation Intersex International Australia. Shadow Report submission to the Committee on the Rights of Persons with Disabilities on the situation of intersex people in Australia. 2017 Jun [cited 2018 Mar 30]. Report No.: INT/CRPD/ICS/AUS/28302. Available from: <https://ihra.org.au/31467/submission-crpd-2017/>

Committee on the Rights of Persons with Disabilities. List of issues prior to the submission of the combined second and third periodic reports of Australia. Geneva: United Nations; 2017 Sep. Report No.: CRPD/C/AUS/QPR/2-3.

²⁵ Carpenter M, Organisation Intersex International Australia. Shadow Report submission to the Human Rights Committee on the situation of intersex people in Australia. 2017 Aug [cited 2018 Mar

evidence of continuing forced and coercive practices in Australian hospitals, with support from Australian governments and the Family Court.

We are pleased that the Committee made strong recommendations in response,²⁶ citing Treaty articles on non-discrimination (articles 3 and 24), protection from torture and experimentation (article 7), the right to liberty and security (article 9), privacy (article 17), and equality before the law (article 26). These citations highlight the many ways in which current medical practices in Queensland and elsewhere in Australia violate our human rights:

25. The Committee is concerned that infants and children born with intersex variations are sometimes subject to irreversible and invasive medical interventions for purposes of gender assignment, which are often based on stereotyped gender roles and are performed before they are able to provide fully informed and free consent (arts. 3, 7, 9, 17, 24 and 26).

26. The State party should give due consideration to the recommendations made by the Senate Standing Committee on Community Affairs in its 2013 inquiry report on involuntary or coerced sterilisation of intersex people, and move to end irreversible medical treatment, especially surgery, of intersex infants and children, who are not yet able to provide fully informed and free consent, unless such procedures constitute an absolute medical necessity

Recommendation 1: Queensland should protect children’s right to bodily integrity, in line with the *Darlington Statement* and the *Yogyakarta Principles plus 10*.

6.5 Protection from violence and discrimination

We propose that the government protect intersex persons and other persons from discrimination and violence on the basis of “sex characteristics” as follows:

UNDERSTANDING ‘sex characteristics’ as each person’s physical features relating to sex, including genitalia and other sexual and reproductive anatomy, chromosomes, hormones, and secondary physical features emerging from puberty.

This definition is stated in the *Yogyakarta Principles plus 10* on the application of international human rights law in relation to sexual orientation, gender identity, gender expression and sex characteristics,⁷ an expert statement published in November 2017 to build upon the 2007 *Yogyakarta Principles*.⁶ The *Yogyakarta Principles plus 10* definition is,

30]. Report No.: INT/CCPR/CSS/AUS/28771. Available from: <https://ihra.org.au/31568/shadow-report-iccpr-2017/>

²⁶ Human Rights Committee. Concluding observations on the sixth periodic report of Australia. 2017 Dec. Report No.: CCPR/C/AUS/CO/6.

in turn, based on a definition of “sex characteristics” in a 2015 Maltese Act,²⁷ and a definition by the Asia Pacific Forum of National Human Rights Institutions.²⁸

It should not be necessary for the purposes of anti-discrimination law, nor legislation regulating classifications of sex and gender, for intersex to be defined in law, unless it is held necessary to support medical certification – a situation which is not best practice. If it is however felt necessary for other reasons for intersex to be legally defined, we would welcome discussion regarding those reasons and applications.

In the event a definition is required, we propose the following definition, consequential on the definition of “sex characteristics”:

Intersex people are born with variations of sex characteristics that do not fit typical definitions of male and female, including sex characteristics emerging from puberty.

Recommendation 2: The Queensland government should protect people from discrimination and violence on grounds of ‘sex characteristics’, in line with the attribute defined in the *Yogyakarta Principles plus 10*.

7 Changing legal sex classification

7.1 Primary goal

In line with the *Darlington Statement* and the *Yogyakarta Principles*, IHRA’s position is to call for an end to legally-imposed sex and gender markers.

We note that we recognise that voluntary disclosure of self-reported sex and gender information may be necessary, in the same way that self-reported Indigeneity, ethnicity and religion may be disclosed, to support statistical analysis and research in the public interest. This includes data collection by public bodies such as the ABS.

Recommendation 3: Queensland should end legal classification of individuals by sex or gender in line with the *Darlington Statement* and the *Yogyakarta Principles plus 10*.

²⁷ Malta. Gender Identity, Gender Expression and Sex Characteristics Act: Final version. 2015. Available from: <http://justiceservices.gov.mt/DownloadDocument.aspx?app=lp&itemid=26805&l=1>

²⁸ Asia Pacific Forum of National Human Rights Institutions. Promoting and Protecting Human Rights in relation to Sexual Orientation, Gender Identity and Sex Characteristics; 2016 [cited 2016 Jun 16]. Available from: <http://www.asiapacificforum.net/resources/manual-sogi-and-sex-characteristics/>

7.2 Interim measures

7.2.1 While legal classifications of sex/gender are required

Recognising that the goal of ending legal classification of sex/gender may not yet be achievable appears to demand a process of continual review, benchmarking, and definition of new procedures and processes.

As long as legal classification of sex/gender remains required, we favour legislation and regulations that enable all adults and consenting minors to change legal sex markers. We believe that all requirements for medical certification should be removed, for all applicants. It is acceptable that a minor be able to demonstrate capacity for consent, in circumstances that are fully accessible. We favour simple procedures that can be benchmarked with current best practices in Malta²⁷ and Argentina.²⁹

At present, federal sex and gender recognition guidelines state that:

Intersex people have a diversity of bodies and gender identities, and may identify as male or female or neither (para 12)³⁰

This should be regarded as a non-exhaustive list. Contradictorily, the guidelines state that:

individuals should be given the option to select M (male), F (female) or X (Indeterminate/Intersex/Unspecified). (para 19)

And also:

If the X descriptor set out at paragraph 19 is too lengthy for collection forms or data systems, the Australian Government's preference is to use either 'unspecified' or 'indeterminate'. This classification system is consistent with the Australian Government passports policy for applicants who are sex and gender diverse and Australian Standard AS4590 – Interchange of client information. (para 21)

The federal guidelines are currently under review and we hope that the contradictions written into the guidelines are resolved in the following ways.

²⁹ Byrne J Open Society Foundation, Open Society Foundations, Open Society Institute. License to Be Yourself Laws and Advocacy for Legal Gender Recognition of Trans People. New York: Open Society Foundations; 2014 [cited 2014 Oct 23]. Available from:

<http://www.opensocietyfoundations.org/reports/license-be-yourself>

³⁰ Attorney General's Department, Australia. Australian Government Guidelines on the Recognition of Sex and Gender. 2015 [cited 2015 Nov 18]. Available from:

<http://www.ag.gov.au/Publications/Pages/AustralianGovernmentGuidelinesontheRecognitionofSexandGender.aspx>

The Attorney General's Department has advised us that, in 2017, the Australian Standard AS4590 – *Interchange of client information* was updated such that the following changes have been made:

- 3.5.6 Gender Code change in definition of code 3 from 'indeterminate' to 'Non-Binary' (page 26).
- 3.5.5 Sex Code change in definition of code 3 from 'intersex or indeterminate' to 'indeterminate' (page 25).³¹

These changes are in line with a 2015 joint letter to the Attorney General's Department by the National LGBTI Health Alliance, A Gender Agenda, Organisation Intersex International Australia, Trans Formative, Transgender Victoria, requesting that the definition of 'X' be changed to non-binary.³²

IHRA continues to oppose use of the term intersex to signify a sex classification in line with paragraph 4 of the *Darlington Statement* and because of its collateral impact on intersex people with other sex classifications and binary gender identities; that is, a legal classification called intersex constrains their ability to self-determine sex and gender.

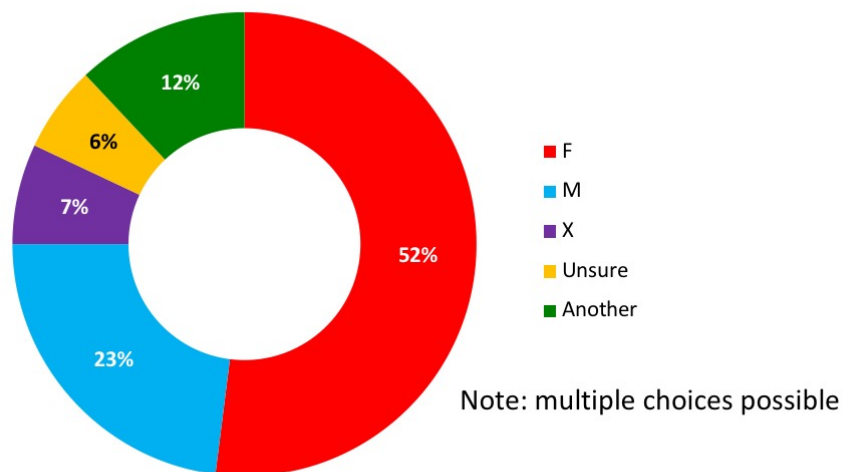
Indeed, *Darlington Statement* signatories reflect our diversity. Australian sociological research based on a survey of 272 people born with atypical sex characteristics shows that 19% of respondents chose X or other non-binary sex classifications,³³ while 75% choose binary sex classifications. Most intersex people identify with legal sex assigned at birth, while others do not. At the same time, 60% of participants use the term intersex to describe their sex characteristics.

³¹ Wallace L (Attorney General's Department). Update - Sex and Gender Recognition Guidelines [SEC=UNCLASSIFIED]. 2017.

³² National LGBTI Health Alliance, A Gender Agenda, Organisation Intersex International Australia, Trans Formative, Transgender Victoria. RE: Commonwealth Attorney-General's Department Review of the Australian Government Guidelines on the Recognition of Sex and Gender. 2015 [cited 2015 Oct 12]. Available from: <http://lgbtihealth.org.au/resources/submission-review-agd-guidelines/>

³³ Jones T. Intersex and Families: Supporting Family Members with Intersex Variations. *Journal of Family Strengths*. 2017;17(2). Available from: <http://digitalcommons.library.tmc.edu/jfs/vol17/iss2/8>

Sex of people born with atypical sex characteristics



Jones T. Intersex and Families: Supporting Family Members with Intersex Variations. *Journal of Family Strengths*. 2017;17(2).

As described in the *Darlington Statement*, all individuals able to consent should be able to choose between female (F), male (M), non-binary (X), alternative gender markers, or multiple options.

Recommendation 4: In the absence of an end to legal classification of individuals by sex or gender, Queensland should recognise “non-binary”, alternative (for example, self-affirmed) and multiple sex markers. Changes should be available a simple administrative procedure, for example, via a statutory declaration.

Recommendation 5: The Queensland government should not create a sex marker termed ‘intersex’, because this would constrain a right to self-determination by intersex women and intersex men.

7.2.2 While medical certification is required

As long as any form of medical certification is required, including for children, a separate, simple and accessible pathway should be available for people born with variations of sex characteristics to *correct* details on birth certificates. This recognises well established risks that initial sex assignment may not be accurate, and would ensure that children subjected to human rights violations including surgical and hormone interventions are not subject to further violating requirements for physical modifications.

The ability to correct a recording of sex recognises that the initial decision was incorrect and facilitates a simple administrative process for correcting details. Provisions to correct birth certificates have been used by intersex people in some Australian jurisdictions.

Provision for correcting birth certificates is made in sections 42 and 43 of the *Births, Deaths and Marriages Registration Act 2003 (Qld)*.

Section 42(2)(d) states that a correction may be made “to ensure the particulars in an entry about a registrable event conform with the most reliable information about the registrable event that is available to the registrar.”³⁴ Section 42(3) states that

The registrar may correct a register—

(a) by adding, or cancelling, an entry in the register; or

*(b) by adding, amending or deleting particulars in an entry in the register.*³⁴

Recommendation 6: In the absence of legislation and regulation that implements prior BDM recommendations, the Queensland government should ensure that a separate, simple and accessible pathway is available for people born with variations of sex characteristics to *correct* details on birth certificates.

³⁴ Births, Deaths and Marriages Registration Act 2003 (Qld)