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Law Reform Commission
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Submission in relation to Project 108 discussion paper

Please find overleaf a submission in respect of the Law Reform Commission's discussion paper, the *Review of Western Australian legislation in relation to the recognition of a person's sex, change of sex or intersex status.* This is a personal submission, acknowledging my role as a member of the drafting committee for the Yogyakarta Principles plus 10. It has been endorsed by Intersex Human Rights Australia (IHRA, formerly OII Australia). The submission considers a limited number of issues in the discussion paper.

The submission may be published if desired, omitting signature and personal contact information.

Kind regards

[redacted]

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Submission on the Review of Western Australian legislation in relation to the recognition of a person's sex, change of sex or intersex status

1 Introduction

Thank you very much for the opportunity to comment on the Law Reform Commission's discussion paper, the *Review of Western Australian legislation in relation to the recognition of a person's sex, change of sex or intersex status* (2018).

This submission is a personal submission by Morgan Carpenter. It has been endorsed by Intersex Human Rights Australia (IHRA, formerly OII Australia).

I welcome many aspects of the Commission's proposals. In particular, I welcome proposals to remove sex/gender from birth certificates. As with race and religion, the absence of sex/gender on birth certificates will not abolish such concepts, nor will it end the ability to collect data on lived experience. It will, however, meet the standards for birth registration set in the International Covenant on Civil and Political Rights (Office of the High Commissioner for Human Rights 1966) and the Convention on the Rights of the Child (United Nations 1989).

However, the discussion paper is overly reliant on a conceptual distinction between sex and gender. An approach to legal recognition that seeks to create legal recognition of sex and legal recognition of gender lacks practical utility and is likely to give rise to serious adverse consequences.

Further, insufficient attention is given to consequential and related matters arising from recognition of intersex status, a term derived from the Sex Discrimination Act (Cth). The Commission should make concrete proposals to amend the Equal Opportunity Act to bring it into line with international best practice. As a matter of urgency, it should also ensure that infants, children and adolescents are protected from harmful practices on the basis of their intersex status or (preferably) their sex characteristics.

The submission considers a limited number of issues in the discussion paper:

- The conceptual framework
- Harmful practices on intersex children
- Notification of births

2 The conceptual framework

The discussion paper erroneously conflates sex and sex characteristics, with serious harmful consequences.

The discussion paper conflates the terms in the following locations:

> *Sex is a* biological *concept that describes, in part, a person's physical features, including genitalia, other sexual reproductive anatomy, chromosomes, hormones and secondary physical features emerging from puberty. (page 10)*
>
> *Sex or sex characteristics*
> *The chromosomal, gonadal and anatomical characteristics associated with a person's biological sex. (page 79)*
>
> *Sex or sex characteristics*
> *Sex characteristics are 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. (page 11, also repeated within definition of "sex or sex characteristics" on page 79) (Law Reform Commission of Western Australia 2018)*

The tautology and circular reasoning of a definition of "sex or sex characteristics" where "sex characteristics are each person's physical features relating to sex" should be noted.

The Yogyakarta Principles plus 10 is cited as a source for these definitions of "Sex or Sex Characteristics". However, as a member of the drafting committee, and as a signatory, of the Yogyakarta Principles plus 10, I can confirm that there was never an intention to conflate these two concepts. The Yogyakarta Principles plus 10 define "sex characteristics" as:

> ***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 (Yogyakarta Principles 2017)*

The term "sex characteristics" has a much higher level of granularity than "sex", operating at the level of specific innate and acquired physical features relating to sex. The acquired nature of such features is a reason why conflating sex characteristics has deleterious consequences. Examples of acquired changes to sex characteristics include:

- Forced and coercive medical interventions to change the anatomy of children with intersex variations
- Female Genital Mutilation
- Changes associated with a medical gender transition

In the material on "proof of sex" and "sex identity certificate", these consequences are evident. The proposal mentions various sex characteristics, stating:

> *"sex is a biological concept that describes, in part, a person's physical features, including genitalia, other sexual reproductive anatomy, chromosomes, hormones and secondary physical features emerging from puberty. The evidence required to prove sex would depend*

> *on the specific sex characteristic(s) that must be proven on a case by case basis" (Law Reform Commission of Western Australia 2018, 76)*

Acknowledging that sex characteristics can be acquired, consider the following examples in relation to the issuing of a "proof of sex certificate":

- What certificate would be issued to someone assigned female at birth but who has subsequently had a hysterectomy and oophorectomy (removal of womb and ovaries) for medical reasons? Is she still female? What about a mastectomy? It seems to me that there is no use case that justifies ignoring her birth assignment and gender identity.
- What certificate would be issued to someone assigned female at birth who has had a hysterectomy, oophorectomy and/or mastectomy in order to obtain a gender recognition certificate, under prior legislation in Western Australia? Is this person still female? It seems to me that there is no use case that justifies ignoring his gender identity.
- What certificate would be issued to a woman, assigned female and birth and who identifies as female, who was diagnosed at age 14 with the intersex variation complete androgen insensitivity syndrome and subjected to a gonadectomy in order to "prevent ovarian cancer"? It seems to me that there is no use case that justifies ignoring her birth assignment and gender identity. There has been no apology and redress for people subjected to unnecessary forced and coercive medical intervention.

The proposals indicate that a "proof of sex certificate" may be sought "where a person either wishes to have their affirmed sex recorded or is required to prove their sex" – but it is not clear where or why or how such certification should be required, and basing this on the presence or absence of sex characteristics make the system open to abuse. The circumstances where such certification might be required need to be examined carefully. They are likely to be satisfied through the availability of a separate gender identity certificate.

Disentangling sex classifications and sex characteristics may impact upon the Commission's analyses of legislation in Appendices 2 and 3.

The term sex is not defined in the YP+10, however, the distinct concept of sex is mentioned. For example, in the following text from Principle 31, "The Right to Legal Recognition":

> *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 (Yogyakarta Principles 2017)*

The discussion paper assumes a distinction between sex and gender that is not evident in law. A distinction between sex and gender is often asserted. In practice, however, law and society treat sex and gender as synonymous:

- The ABS, for example, asks people to record sex in the national census, but the introduction of a third category was regarded as an opportunity for non-binary gender people to be counted (for example, Phillips 2016; Hill 2016).
- Passports record sex, but the certification required to change sex does not necessitate surgical or hormonal modifications (Attorney General's Department 2015), and such modifications are anyway not able to completely replace one set of sex characteristics with another.
- Some transgender people will assert, for example, a sex of female and a gender identity as a man. I have encountered this even in discussions with government about the legal recognition of sex and gender. However, such individuals will typically respond male to requests in forms and documents for their sex. It occurs to me that many people fail to consider the practical consequences of theoretical positions.

At present, legal sex appears to be (a) based on observation of external genitalia at birth, and (b) subject to reclassification on the basis of varying criteria, dependent upon jurisdiction and legal requirements, in the case of individuals whose gender identity differs from their initial sex classification. That is, it is a heuristic method of dividing a population into two (or more) socially-recognised categories that combine dominant features relating to initial observed characteristics and change relating to social gender. This lack of ontological clarity is indicative of the limitations of the concept.

Splitting this legal concept into two distinct legal concepts seems likely to have adverse, unforeseen and unpredictable consequences for people who may be marked as having a sex different to gender. For an intersex population, often framed legally and socially as representing a third sex, neither female nor male, this fails to recognise not only the diversity of our sex assignments and gender identities, but also a medical context where intersex people are regarded as either female or male (Carpenter 2018a, 2018c).

It may be better to accept that the law should, as far as possible, treat people in accordance with their gender. In matters relating to segregated facilities such as, *inter alia*, detention or sanitation, such practices should always take into account matters of gender, personal preference and personal safety. Policies and practices in relation to these matters are required irrespective of arrangements for legal sex/gender recognition.

I support the following recommendations:

- The removal of sex and gender from new and replacement birth certificates, as called for in the Darlington Statement and the Yogyakarta Principles plus 10 (Androgen Insensitivity Syndrome Support Group Australia et al. 2017, para. 8; Yogyakarta Principles 2017).
- Provision of Gender Identity Certificates for individuals who need to certify their sex or gender.
- Facilitating gender recognition based on self-identification, at least to the extent that the categories of male, female, and non-binary are made available but preferably supporting additional alternative options.
- Repeal of the Gender Reassignment Board.
- Facilitating access to legal recognition by minors, with independent oversight.

3 Harmful practices on intersex children

The Commission makes the suggestion, in relation to harmful practices on children born with intersex variations, that:

> *The Commission notes that each case is different and must be informed by appropriate medical evidence, which continues to evolve. The Commission understands that the current medical preference is to monitor, rather than intervene, for as long as is medically viable (Law Reform Commission of Western Australia 2018, 28)*

I am keen to see published the evidence put to the Commission to justify this assertion. It is my experience that a lack of transparency and vague reassurances about clinical practices are frequently made without supporting evidence (for example, Carpenter 2018b). The Commission, for example, made this assertion about "medical preference" in relation to a discussion of the Family Court case *Re: Carla (Family Court of Australia 2016)*. The judge in this case described how the child had already undergone surgery that had "enhanced the appearance of her female genitalia" at age ~3. It is not clear how this relates to the statements made by the Commission.

The Commission erred in its discussion of the facts in *Re A (Welfare of a Child A)* (1993). The discussion paper states that "the child was assigned the sex female at birth" (Law Reform Commission of Western Australia 2018, 27). However, this is at best unclear and at worst obfuscated in the judgment. The Family Court judgment states that:

> *despite the advice that A was in fact a female affected by the condition of congenital adrenal hyperplasia, both A's parents had the initial perception that A was in fact a male. As a result, although the child has been known by a female name, a male name was in fact given and the birth certificate of the child shows the registration of the male name. (Family Court of Australia 1993, para. 6)*

It is not clear from this published information which sex classification appears on the certificate, but it is clear that he was registered with a "male name". He appears to have been raised male; surprisingly his mother was blamed for his gender identity (Family Court of Australia 1993, para. 13). Neither the Family Court nor the Commission's discussion paper describe adequately why the child underwent early "feminising" surgeries. These were described in a clinical affidavit cited in the case as "genital reconstruction to give her a feminine appearance" (Family Court of Australia 1993, para. 10). The case further discusses how the "child therefore feels strongly that male gender assignment would be far more appropriate than continued assignments as a female", and surgery "to assign to A male sexual organs" (Family Court of Australia 1993, para. 10 and 16).

In neither of these two cases was court approval sought for early and irreversible medical interventions.

While it is pleasing that the Commission has cited the Yogyakarta Principles plus 10 in relation to Principle 31 on legal recognition, the Commission is invited to take equal consideration of Principle 32 on the right to bodily and mental integrity:

> *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.*

The Darlington Statement, a 2017 intersex community consensus statement calls for:

- **"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
- "mandatory independent access to funded counselling and peer support
- "appropriate **human rights- based, lifetime, intersex standards of care** with full and meaningful participation by intersex community representatives and human rights institutions
- "independent, effective **human rights-based oversight mechanism(s)** to determine individual cases involving persons born with intersex variations who are unable to consent to treatment, bringing together human rights experts, clinicians and intersex-led community organisations" (Androgen Insensitivity Syndrome Support Group Australia et al. 2017).

In late 2017, the UN Human Rights Committee responded to concerns raised about practices in Australia. That response cited 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):

> *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 (Human Rights Committee 2017).*

In mid 2018, the Committee on the Elimination of Discrimination against Women made strong observations, within the context of the *Joint general recommendation* with the UN CRC (Committee on the Elimination of Discrimination against Women and Committee on the Rights of the Child 2014). The Committee expressed concern at:

> *25 … (c) The conduct of medically unnecessary procedures on intersex infants and children before they reach an age when they are able to provide their free, prior and informed consent, and at inadequate support and counselling for families with intersex children and remedies for victims;*

And called for Australia to:

> *26 … (c) Adopt clear legislative provisions explicitly prohibiting the performance of unnecessary surgical or other medical treatment on intersex children before they reach the legal age of consent, implement the recommendations of the 2013 Senate inquiry on involuntary or coerced sterilisation of intersex persons, provide families with intersex children with adequate counselling and support, and provide redress to intersex persons having undergone medical treatment (Committee on the Elimination of Discrimination against Women 2018)*

Human rights defenders and institutions are not alone. The Senate Community Affairs References Committee has made similar calls (2013), and the Australian Medical Association has stated:

> *Normalising cosmetic genital surgery on intersex infants should be avoided until a child can fully participate in decision making (Australian Medical Association 2014).*

Recognition of people's intersex status – a term derived from the Sex Discrimination Act (Cth) requires that these issues are addressed.

The Commission has identified that the current Equal Opportunities Act (WA) does not protect people born with intersex variations on the basis of having an intersex variation (see, for example, Law Reform Commission of Western Australia 2018, 40) and proposes aligning with the Sex Discrimination Act (Cth) by inclusion of protections on the ground of intersex status (2018, 41).

To align with international best practice, and with both the Darlington Statement and Yogyakarta Principles plus 10, I recommend inclusion of an attribute of "sex characteristics" in place of "intersex status". This attribute can and should also be utilised in addressing harmful practices, as is the case in Malta (2018).

4 Notification of births

In section 7.5 of the discussion paper, the Commission makes proposals for notification of sex at birth, noting that current arrangements are for notification of gender, including male, female and "indeterminate" via an internal hospital report and a report from a hospital to the Registrar. The discussion paper comments:

> *The Commission understands the Intersex Human Rights Association's (sic) alternative preference is partly due to a desire to avoid the stigma of being classified as a third option (such as 'indeterminate' or 'other') and partly because it considers the intersex option has not been well utilised by parents in the Australian jurisdictions with this option (that is, the ACT and SA). The Commission attempts to alleviate both of these concerns in its proposed model (Law Reform Commission of Western Australia 2018, 63)*

It appears that these arrangements satisfy a need for the collection of statistical data while also fulfilling the goal of removing sex/gender from birth certificates. It also seems to me that removing sex/gender from birth certificates prevents the stigmatisation of children born with intersex variations, and could help to reduce pressure to modify the sex characteristics of such children.

In proposing modified arrangements, what information is the Commission relying upon regarding the number of children currently and historically notified as having an "indeterminate" gender? What information is recorded in the State on the numbers of children with intersex variations who undergo medical interventions to modify their sex characteristics?

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