

19 November 2018

Dear Committee,

IHRA submission to the inquiry on legislative exemptions that allow faith-based educational institutions to discriminate against students, teachers and staff

Intersex Human Rights Australia (IHRA) is a Public Benevolent Institution that promotes the human rights (including the bodily integrity) of people born with intersex variations. We were formerly known as Organisation Intersex International Australia. We currently contract our two co-executive directors on a part-time basis, supported by foreign philanthropic funding.

Persons born with intersex variations are not currently subject to religious exemptions at federal level in the same manner as persons with minority sexual orientations and gender identities, and the religious freedoms inquiry appears to recommend that jurisdictions “abolish any exemptions to anti-discrimination laws that provide for discrimination by religious schools” on grounds of, *inter alia*, intersex status,¹ however, this is not the case at a state and territory level, nor in leaked proposals for federal reform. To this end, and also in solidarity with LGBT people, we are pleased to make a brief contribution to this inquiry.

We note that this submission is made brief due to the challenges imposed by a significant number of other ongoing inquiries at present, including inquiries: into forced and coercive medical practices by the Australian Human Rights Commission,² the welfare jurisdiction of the Family Law Act by the Australian Law Reform Commission,³ a UN Committee on the

¹ See recommendation 6 in Fairfax Media. 2018. ‘Read the Full 20 Recommendations from the Religious Freedom Review’. *The Sydney Morning Herald*, 11 October 2018.

<https://www.smh.com.au/politics/federal/read-the-full-20-recommendations-from-the-religious-freedom-review-20181011-p50918.html>

² Australian Human Rights Commission. 2018. *Protecting the Human Rights of People Born with Variations in Sex Characteristics in the Context of Medical Interventions Consultation Paper*.

<https://www.humanrights.gov.au/our-work/sexual-orientation-gender-identity-intersex-status/projects/protecting-human-rights-people>

Intersex Human Rights Australia. 2018. ‘Submission to the Australian Human Rights Commission: Protecting the Human Rights of People Born with Variations in Sex Characteristics’. <https://ihra.org.au/32490/ahrc-submission-2018/>

³ Australian Law Reform Commission. 2018. ‘Review of the Family Law System: Discussion Paper’.

<https://www.alrc.gov.au/publications/review-family-law-system-discussion-paper>

Intersex Human Rights Australia. 2018. ‘Submission to the Australian Law Reform Commission on the Review of the Family Law System – Issues Paper’. <https://ihra.org.au/32111/alrc-may-submission/>

Rights of the Child review of Australia,⁴ state and territory inquiries into reform of birth registration processes (some of which have made proposals that are opposed by IHRA),⁵ and discussions about the impact of Mackenzie’s Mission on the prenatal elimination of intersex traits.⁶ As a result of this brevity, we attach submissions by our co-executive directors to the religious freedoms review inquiry, in order to provide more background information.

IHRA defines intersex people in line with a 2016 statement by human rights experts, published by the Office of the High Commissioner for Human Rights and other international and regional human rights institutions:

*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.*⁷

We acknowledge the diversity of intersex people in our identities, legal sexes assigned at birth, genders, gender identities, and the words we use to describe our bodies. At least 40 different intersex variations are known,⁸ most genetically determined. Intersex traits can be identified prenatally (including through the use of genetic screening technologies), at birth or early in life, at puberty, and later in life, for example, when attempting to conceive a child. Clinicians frequently use a stigmatising label, “Disorders of Sex Development” (“DSD”), to refer to intersex variations.

Intersex persons may be heterosexual or not (and so may benefit from protections from discrimination on grounds of sexual orientation), and may identify with sex assigned at birth or not (and so may benefit from protections from discrimination on grounds of gender identity). The *Sex Discrimination Act* was amended in 2013 to incorporate these grounds and the additional ground of intersex status. Under our previous name, IHRA actively supported those developments, however, the attribute of intersex status has often been imputed to refer to matters of identity – even though the attribute refers solely to physical features – and the terminology used in the Act is based on a model of deficit, on what intersex people lack.⁹ Internationally and locally, protections of intersex (and other persons) are now recommended on grounds of ‘sex characteristics’.¹⁰

⁴ Intersex Human Rights Australia. 2018. ‘CRC Shadow Report on Australia’.

<https://ihra.org.au/32730/submissions-crc-2018/>. Australian Child Rights Taskforce. 2018. ‘NGO Coalition Report to the UN Committee on the Rights of the Child’.

⁵ For example, a NT proposal to create a sex classification named intersex is opposed on grounds that, as stated in the Darlington Statement, “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”, see

<https://darlington.org.au/statement>

⁶ Australian Genomics Health Alliance. 2018. ‘Australian Genomics - Mackenzie’s Mission’.

<https://www.australiangenomics.org.au/our-research/mackenzies-mission/>

⁷ OHCHR, et al. End violence and harmful medical practices on intersex children and adults, UN and regional experts urge. 2016.

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

⁸ Hiort O. I-03 DSDnet: Formation of an open world-wide network on DSD at clinician conference, “4th I-DSD Symposium”. 2013. http://www.gla.ac.uk/media/media_279274_en.pdf

⁹ *Sex Discrimination Act 1984* (Cth) s4

¹⁰ OHCHR, et al. see note 7.

We note that the *Sex Discrimination Act* does not permit religious exemptions that allow faith-based schools to discriminate on grounds of intersex status, and the leaked recommendations of the religious freedoms review panel take the same position.¹¹ This position is in line with submissions to that panel by co-executive directors of IHRA (appended), and the submission by Freedom for Faith.¹² Similarly, a recent paper by ARCSHS and the Human Rights Law Centre on sexual orientation and gender identity change efforts (“SOCE”)¹³ does not consider forced and coercive practices to change the bodies of intersex people, as these appear perceived to be secular in nature.

We note that the Human Rights Law Centre (HRLC) and the Public Interest Advocacy Centre (PIAC) have written to the Hon. Attorney-General expressing concern that proposed amendments to s38(3) of the *Sex Discrimination Act 1984 (Cth)* might expand existing exemptions to introduce exemptions on all grounds in that Act including pregnancy and intersex status.¹⁴ This is at odds with the recommendations of the religious freedoms review panel and we oppose this. We concur with the position taken by the HRLC and PIAC.

IHRA strongly takes the view that no-one – including no students, teachers or other staff – should suffer discrimination on grounds of sexual orientation or gender identity within faith-based educational institutions. Public and institutional attitudes also appear to have decisively shifted towards this position, now that these exemptions have become more widely known.

We also note that students with intersex variations suffer stigmatisation, bullying and discrimination in schools, including on the basis of our physical sex characteristics, and imputations of identities that arise from those characteristics. A 2015 Australian survey of people born with atypical sex characteristics found that 19% of respondents failed to

Androgen Insensitivity Syndrome Support Group Australia, Intersex Trust Aotearoa New Zealand, Organisation Intersex International Australia, Eve Black, Kylie Bond, Tony Briffa, Morgan Carpenter, et al. 2017. ‘Darlington Statement’. Sydney, New South Wales. <https://darlington.org.au/statement>

Asia Pacific Forum of National Human Rights Institutions. 2016. *Promoting and Protecting Human Rights in Relation to Sexual Orientation, Gender Identity and Sex Characteristics*.

<http://www.asiapacificforum.net/resources/manual-sogi-and-sex-characteristics/>

Yogyakarta Principles. 2017. *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*.

<http://www.yogyakartaprinciples.org/principles-en/yp10/>

¹¹ Fairfax media, see note 1

¹² In footnote 15 on page 25 of the Freedom for Faith submission, see, *inter alia*, “The rights and needs of those with intersex conditions do not conflict with religious values.” Please see the appended submissions to the religious freedoms inquiry for more information.

¹³ Jones, T, A Brown, L Carnie, G Fletcher, and W Leonard. 2018. *Preventing Harm, Promoting Justice: Responding to LGBT Conversion Therapy in Australia*. Melbourne, Victoria: GLHV@ARCSHS and the Human Rights Law Centre.

Human Rights Law Centre. 2018. ‘Report Reveals Harm Caused by LGBT Religious Conversion Therapy and Calls for Action’. *Human Rights Law Centre* (blog). 15 October 2018.

<https://www.hrlc.org.au/news/2018/10/12/lgbt-religious-conversion-therapy>

¹⁴ Public Interest Advocacy Centre, and Human Rights Law Centre. 2018. ‘Concerns about Proposed Amendments to the Sex Discrimination Act 1984 (Cth)’, 8 November 2018.

complete secondary school due to early dropout.¹⁵ These issues are not addressed by the current inquiry, nor by current curricula or programs of action in schools. Indeed, a politicisation of intersex and LGBT children, often a politicisation of intersex children by association with LGBT children and imputed matters of identification, helps to perpetuate such poor outcomes.

We would welcome positive acknowledgement in law of a right to freedom of thought, conscience and religion, in accordance with the *International Covenant on Civil and Political Rights*. In accordance with that *Covenant*, we also accept demands for recognition of a positive right to “freedom to manifest religion or belief, subject to limitations necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others”.¹⁶ Should this be considered, we strongly recommend enactment in law of the entirety of the *Covenant* and not only one article or clause.

An imputation to intersex status of matters of identity can be seen in South Australia which unfortunately permits religious exemptions on this innate biological ground in section 34 (3) of the *Equal Opportunity Act 1984 (SA)*, as amended in 2016.¹⁷ Some states, including Victoria and New South Wales, purport to include intersex people as people of “indeterminate sex” who live as a member of a “particular sex” within attributes on gender identity or transgender. Grounds that are substantively predicated on matters of gender transition undermine their broad applicability to our population.¹⁸ These too permit religious exemptions. In Victoria, the separate ground of “physical features” is likely to have more practical utility of benefit to people born with intersex variations.

These confusions are troubling: sound policy-making requires a comprehension of the population affected. At present, disjunctions in policy and practice are evident in multiple jurisdictions in Australia, where intersex people are regarded by medicine as *either* female *or* male, while also being regarded in many legal and regulatory contexts as *neither* female *nor* male. These disjunctions facilitate and cause harm, including a lack of comprehension of forced and coercive medical interventions – harmful practices – that continue and that adversely affect our population.¹⁹ The UN Committee on the Elimination of Discrimination Against Women (CEDAW) recently recommended that Australia tackle such practices:

Adopt clear legislative provisions that explicitly prohibit the performance of unnecessary surgical or other medical procedures on intersex children before they reach the legal age of consent, implement the recommendations made by the Senate in 2013 on the basis of its inquiry into the involuntary or coerced sterilization of intersex persons, provide adequate counselling and support for the families of intersex

¹⁵ Jones, Tiffany. 2016. ‘The Needs of Students with Intersex Variations’. *Sex Education* 16 (6): 602–18. <https://doi.org/10.1080/14681811.2016.1149808>

¹⁶ International Covenant on Civil and Political Rights. 1966.

¹⁷ *Equal Opportunity Act 1984 (SA)*

¹⁸ *Equal Opportunity Act 2010 (Vic)*. *Anti-Discrimination Act 1977 (NSW)*

¹⁹ Briffa, Tony. 2004. ‘Intersex Surgery Disregards Children’s Human Rights’. *Nature* 428 (April): 695. <https://doi.org/10.1038/428695a>

Carpenter, Morgan. 2018. ‘The “Normalization” of Intersex Bodies and “Othering” of Intersex Identities in Australia’. *Journal of Bioethical Inquiry*, May, 1–9. <https://doi.org/10.1007/s11673-018-9855-8>

children and provide redress to intersex persons having undergone such medical procedures²⁰

Our co-executive directors, Morgan Carpenter and Tony Briffa, and other directors of IHRA would be delighted to discuss these matters with the Committee. We can be contacted via:

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Thank you for the opportunity to put these matters to you.

Yours faithfully

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²⁰ Committee on the Elimination of Discrimination against Women. 2018. 'Concluding Observations on the Eighth Periodic Report of Australia'. CEDAW/C/AUS/CO/8.