



A Gender Agenda
PO Box 4010 Ainslie ACT 2602
www.genderrights.org.au

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Submission

to the Senate Standing Committee on Community
Affairs

**Inquiry into the Involuntary or Coerced Sterilisation
of People with Disabilities in Australia**

19 June 2013

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Introduction

A Gender Agenda welcomes the opportunity to provide this submission to the Senate Standing Committee on Community Affairs regarding the involuntary or coerced sterilisation of people with disabilities in Australia.

This submission is directed towards the inquiry's second term of reference concerning current practices and policies relating to the involuntary or coerced sterilisation of intersex people; including sexual health and reproductive issues and the impacts on intersex people. A Gender Agenda is particularly concerned with the issue of coerced sterilisation in the context of legal recognition of sex and gender identity. The submission is provided in support of the more detailed submission and recommendations of Organisation Intersex International Australia Limited (OII Australia), Androgen Insensitivity Syndrome Support Group Australia (AISSGA) and the National LGBTI Health Alliance.

A Gender Agenda works with the sex and gender diverse community which includes intersex people, transsexuals, transgender people, cross-dressers and other sex or gender variant or gender non-conforming people as well as their partners and other family members. We provide information, community education, support and advocacy services in relation to issues affecting transgender and intersex communities.

A Gender Agenda is committed to achieving legal and social recognition and protection of human rights for all people regardless of their legal or biological sex, or their gender identity or expression. We work collaboratively and inclusively with other organisations on a local, national and international basis. We are committed to the fundamental values of bodily autonomy and the celebration of diversity.

In preparing this submission we have consulted widely within our own membership, the broader sex and gender diverse communities within the ACT, interstate and national transgender and intersex organisations, as well as a number of 'mainstream' organisations on both a local and national level.

If you require any further information, we can be contacted via Peter Hyndal
We consent to any part of this submission
being made public.

Summary of Recommendations

A Gender Agenda provides in principle support for the recommendations contained in the submission of OII Australia, Androgen Insensitivity Syndrome Support Group Australia (AISSGA) and the National LGBTI Health Alliance. The following recommendations reflect the outcome of extensive consultations undertaken by A Gender Agenda and supplement those already provided by these organisations.

The following recommendations are made within a framework of international human rights principles which clearly affirm the right of all people to have autonomy over their own bodies. Within this framework, there is no legitimate justification for the continued sterilisation of intersex people without full and free consent being provided by the individual.

Recommendation One

To avoid confusion, there should be a blanket, legislative prohibition on the sterilisation of children prior to reaching the age of consent.

Recommendation Two

Where medical intervention which will result in or carries a risk of resulting in sterilisation, is necessary for the physical health of the child, medical practitioners should be required to apply to an external body such as the Family Court of Australia, for approval before proceeding, irrespective of whether the parents of the child have consented to the procedure.

Recommendation Three

In consideration of such matters the external body reviewing applications must seek, and give equal weight to, the expert advice provided by intersex people and advocates as that provided by medical experts.

Recommendation Four

The legislative prohibition of involuntary or coerced sterilisation when it is not medically necessary.

Recommendation Five

The legislative prohibition of involuntary or coerced sterilisation where it is solely for 'psychosocial reasons'.

Recommendation Six

In accordance with the 3rd Yogyakarta Principle, all Australian jurisdictions should follow the example set by other countries including Argentina, Britain, Spain and Portugal in introducing provisions that allow individuals to change their legal sex without undergoing sterilisation surgery. Options for recognition of legal sex must include an option of "unspecified" which intersex and transgender people can *choose to opt into* if they so desire.

Defining Key Terminology

Biological Sex refers to the biological indicators of sex that people are born with including chromosomes, hormones, genitals, and reproductive organs/capacity. Everyone has a biological sex. It is commonly assumed that all people have a biological sex that is either 'male' or 'female'. This assumption does not accurately reflect the naturally occurring variation in biological sex characteristics that exist in all species.

Disability is defined by the International Classification of Functioning, Disability and Health (ICF) to include impairments, activity limitations, and participation restrictions. Impairment is defined to include perceived 'problems' in body function or structure.¹ Although many medical practitioners regard intersex bodies as have an 'impairment', A Gender Agenda maintains that this framework unnecessarily pathologises, medicalises and stigmatises bodies that function perfectly well, but that simply vary from cultural binary notions of biological sex.

Gender Identity refers to how a person identifies themselves in gendered terms. Everyone has a gender identity. Most commonly, there is congruence between a person's biological sex and their gender identity, however this is not always the case. Across cultures and throughout history, people have developed gender identities independently of their biological sex characteristics.

Gender Presentation refers to how a person portrays their gender to other people. This is most commonly done through clothing, hairstyle, voice and mannerisms. Everyone has a gender presentation. Social norms about 'appropriate' gender presentations are culturally determined and change over time. For example the social norms regarding what clothing was appropriate for women to wear in Australia in the 1950's were far more constraining than our current social conventions.

Sex and gender diversity is an "umbrella term" that describes two different groups of people – intersex people and gender diverse people.

Being intersex means that you are born with biological characteristics such as chromosomes, hormones, genitalia and/or reproductive organs that are not completely female, not completely male, or are partially male and partially female. Being intersex is about the biological reality of a person's body. It has nothing to do with a person's gender identity or their sexuality. It is estimated that up to 4% of the population are intersex².

Being gender diverse means that you identify or present yourself in ways that do not fall neatly within traditional assumptions about the alignment of biological sex and gender. Some gender diverse people are **transsexual or transgender** which means that their gender identity is different from their biological sex (for example someone who was born female, but who identifies and lives as a man or vice versa). Other people are gender diverse because their gender identity or presentation does not always fit neatly within the category of 'female' or 'male'. It is estimated that up to 8% of the population experience gender identity issues that are significant enough to require professional assistance at some point during their lifetime.³

¹ World Health Organisation 'Disabilities' <http://www.who.int/topics/disabilities/en/> (16/06/13).

² Professor Peter Koopman cited in *Intersex – a challenge to conventional binary gender – construction, de-construction or re-construction?* Ann Stewart, University of QLD, 2004.

³ *Transgender Lifestyles and HIV-AIDS Risk* (1994), Roberta Perkins, School of Sociology University of NSW, p 19.

The Context for Discussions

1. General lack of knowledge about intersex, transgender and gender diversity issues

- 1.1. There is a huge lack of knowledge about intersex, transgender and gender diverse issues. This lack of knowledge exists not only in the general community but also amongst legislators and policy makers at all levels of government.
- 1.2. This lack of knowledge is generally not caused by any malicious intent, but rather is the result of the extremely high rates of social isolation and marginalisation experienced by intersex and transgender people, combined with an almost uniform lack of funding for community education work in this area.
- 1.3. The lack of knowledge about intersex issues, and the invisibility of intersex people is even more extreme than for other sections of the sex and gender diverse community.
- 1.4. The existing lack of knowledge about issues of sex and gender often results in the drafting of legislative protections that are ineffective in delivering the intended outcome.
- 1.5. The existing lack of knowledge also feeds misunderstandings, assumptions and prejudice that contribute to the extremely high rates of discrimination experienced by intersex and transgender people.

2. Growing awareness of the magnitude of issues requiring attention

- 2.1. Despite this lack of knowledge, there is growing awareness from all levels of government that intersex, transgender and gender diversity issues are legitimate areas requiring urgent attention. At a Commonwealth level this has been evidenced by policy changes and new guidelines by a number of different departments,⁴ as well as public statements by members of all three major parties regarding the need for urgent attention to issues of sex and gender diversity.⁵
- 2.2. A Gender Agenda commends the Senate Standing Committee on Community Affairs for extending the scope of its inquiry to consider the issue of involuntary or coerced sterilisation experienced by intersex people.

⁴ Including but not limited to Department of Foreign Affairs and Trade and Commonwealth Attorney-General's Department.

⁵ Including comments made at launch of Diversity in Health report on 27th November 2012 and also as recorded in House of Representatives Hansard 10th September 2012.

Combatting Common Myths about Intersex

Much of the discussion around issues of sex and gender diversity is still driven by a lack of information and incorrect assumptions, which makes real engagement with the issues impossible. There is a particularly high level of misunderstanding about intersex issues. The following section seeks to provide some additional clarity about these issues.

3. Being intersex is **not** a 'gender identity'.

- 3.1. Being intersex refers to biological characteristics which someone is born with and which are either not completely male, not completely female, or are partially both male and female. Being intersex is defined by this biological reality. It has nothing to do with how a person identifies or presents their gender.

4. Intersex does **not** refer to only one particular set of characteristics

- 4.1. There are many different ways that a person could be intersex. As the Tasmanian Anti-Discrimination Amendment Bill 2012 recognised, intersex may refer to the status of having 'physical, hormonal or genetic features that are:

- (a) neither wholly female nor wholly male; or*
- (b) a combination of female and male; or*
- (c) neither female nor male*

- 4.2. There are a number of intersex variations, including (but certainly not limited to);

- (a) Androgen Insensitivity Syndrome (AIS), in which people have bodies which are either *completely* insensitive to testosterone and other androgen hormones (CAIS) or *partially* insensitive to androgens (PAIS).
- (b) People born with an additional sex chromosome: 47, XXY.
- (c) Congenital Adrenal Hyperplasia (CAH), which affects the adrenal glands and, consequently affects varying degrees of prenatal virilisation.

5. "Normalising" surgical or other medical interventions performed without full and free consent from the individual are **not** in the best interests of intersex people.

- 5.1. Evidence strongly suggests that the serious long term risks associated with surgical and hormonal medical interventions on intersex children far outweigh any potential benefits. A study published in the British Journal of Urology evaluated all existing studies and found that in relation to intersex children, "there are no publications of evidence of the association between genital surgery and an improved psychosocial outcome. There is also no evidence that surgery promotes a stable gender identity development or that gender will develop as assigned"⁶.

⁶ Oii United States "Your beautiful child: information for parents" information sheet.

Current Practices and Policies Relating to the Involuntary or Coerced Sterilisation of Intersex People

The terms of reference of this inquiry relate to 'sterilisation treatments', which include 'treatments that prevent menstruation or reproduction, and exclusion or limitation of sterilisation treatments.

A Gender Agenda submits that such treatments are medically unnecessary, invasive and constitute complex surgery that is prone to complications, often requires a number of separate surgical procedures, can detrimentally affect later sexual functioning, and provides no proven benefits to the individual.

6. Policies and Practices of the Executive

- 6.1. All State and Territory jurisdictions currently contain legislation and policies which import a surgical requirement into the legal recognition of gender in respect of identification documentation. These issues were considered in detail in the ACT Law Reform Advisory Council's inquiry into the legal recognition of sex and gender diverse people in the ACT. Which found that "previous reports, international developments, human rights considerations, the recent High Court case of AB, and submissions to and consultations by this inquiry leave the Council in no doubt that the requirement for sexual reassignment surgery as a prerequisite for legal recognition of a change of sex should be abolished"⁷.
- 6.2. These requirements relate specifically to the ability of transgender people to have their gender identity legally recognised, and constitute a clear breach of internationally accepted human rights principles. The fact that surgical sterilisation is currently a pre-requisite for appropriate recognition before the law raises questions about whether full and free consent can ever be provided for sterilisation procedures that are undertaken within this context.
- 6.3. These requirements also set a context in which it is assumed that people's bodies should be surgically altered to match cultural notions of binary sex characteristics. This is important to note because it informs the existing medical framework that attempts to justify the sterilisation of intersex children.
- 6.4. A Gender Agenda notes, with approval, that in 2011 the Australian Passport Office issued a policy which enables people to obtain a passport which shows their preferred sex/gender as either F, M or X without requiring surgical sterilisation.⁸ On 13th June, the Federal Attorney-General also released Australian Government Guidelines on the Recognition of Sex and Gender which provide for similar levels of recognition across all Commonwealth Government Departments and agencies.⁹

⁷ *Beyond the Binary: legal recognition of sex and gender diversity in the ACT, ACT Law Reform Advisory Council, Report 2, March 2012, p38.*

⁸ *Australian Passport Office at: www.passports.gov.au/web/sexgenderapplicants.aspx*

⁹ *www.ag.gov.au/genderrecognition*

7. Policies and Practices of the Judiciary

- 7.1. In speaking to medical practitioners, A Gender Agenda has observed that there is confusion amongst practitioners about whether they must apply to the Family Court to sterilise children whenever children are under the age of consent. Anecdotal evidence confirms that it is common practice to undertake unnecessary medical intervention, including genital surgery, on intersex infants and children who are unable to provide informed consent, without seeking approval from the Family Court.
- 7.2. In speaking to intersex people and their parents, A Gender Agenda has observed that medical interventions are often undertaken on intersex infants, children, and adults, without full disclosure of the existing situation, proposed intervention, or accurate information regarding expected outcomes and associated risks.
- 7.3. In her submission to the inquiry into the Exposure Draft of the Human Rights and Discrimination (HRAD) Bill, the Chief Justice of the Family Court, the Hon Diana Bryant, noted that the Family Court has jurisdiction to determine applications ‘in respect of young people born with an ambiguous or indeterminate sex to undertake medical treatment (surgical or otherwise) that would enable them to have the appearance of a particular sex’.¹⁰ As noted previously, such treatment may result in the sterilisation of that young person.
- 7.4. It is important to note that the adversarial nature of the court process privileges the voices of the immediate parties to the dispute; specifically, the medical practitioners and parents, to the detriment of intersex people, who may only be heard if the court grants leave to the intersex person or representatives to intervene as *amicus curiae* or otherwise.¹¹ The costs and administrative burden of intervening in proceedings, combined with the traditionally strict approach of the courts to granting leave to intervene, make it unlikely that intersex people will have a voice in such matters.

To avoid confusion, there should be a blanket, legislative prohibition on the sterilisation of children prior to reaching the age of consent.

Where medical intervention which will result in or carries a risk of resulting in sterilisation, is necessary for the physical health of the child, medical practitioners should be required to apply to an external body such as the Family Court of Australia, for approval before proceeding, irrespective of whether the parents of the child have consented to the procedure.

In consideration of such matters the external body reviewing applications must seek, and give equal weight to, the expert advice provided by intersex people and advocates as that provided by medical experts.

¹⁰ Submission on the Human Rights and Anti-Discrimination Bill 2012 by The Hon Diana Bryant, AO, Chief Justice of the Family Court, <https://senate.apf.gov.au/submissions/committees/viewdocument.aspx?id=129543e5-fd82-46bb-8a2d-e11002f46f90>

¹¹ OII Australia submission 19

8. Policies and Practices of the Medical Profession

8.1. Medical practitioners have employed a variety of different terms to refer to intersex variations, including 'intersex', 'testicular feminisation' and 'hermaphroditism'.¹² Since 2006, intersex variations have been described as 'disorders of sex development' (DSDs). As noted in the submission by OII, the use of disordering language by the medical profession further pathologises intersex people.¹³

8.2. The submission by OII Australia explains the current protocols for treatment of intersex people contained in the 2006 *Consensus Statement on Intersex Disorders and their Management*.¹⁴ The *Consensus Statement* is premised on the Prader scale, which divides visible genitalia into seven different stages, with defined male and female categories at either end of the scale which are classified as 'normal'. Since 2006, the *Consensus Statement* has advised surgery for persons satisfying three of the seven Prader Scale stages.

8.3. As the OII Australia submission highlights,¹⁵ the rationales provided for 'early reconstruction' in the 2006 *Consensus Summary Statement* include 'minimising family concern and distress' and 'mitigating the risks of stigmatisation and gender-identity confusion'.¹⁶ These concern 'psycho-social' issues, rather than any intervention for medical reasons.

The legislative prohibition of involuntary or coerced sterilisation when it is not medically necessary.

The legislative prohibition of involuntary or coerced sterilisation where it is solely for 'psychosocial reasons'.

9. Policies and Practices at International Law

9.1. The prohibition on torture and other cruel, inhuman or degrading treatment or punishment

As noted in the submission by OII Australia,¹⁷ the UN Special Rapporteur on Torture has observed that "members of sexual minorities are disproportionately subjected to torture and other forms of ill-treatment because they fail to conform to socially constructed gender expectations".¹⁸ The Rapporteur includes forced sterilisation procedures as examples of such torture and other forms of ill-treatment.

¹² Garry Warne and Jacqueline Hewitt, 'Disorders of sex development: current understanding and continuing controversy' *Medical Journal of Australia* 190 (11) 2009 612.

¹³ OII Australia submission, p. 18

¹⁴ OII Australia submission, p. 5

¹⁵ OII Australia submission, p. 5.

¹⁶ Houk, Hughes, Ahmed, Lee, Writing Committee for the International Intersex Consensus Conference Participants, 2006, *Summary of Consensus Statement on Intersex Disorders and Their Management*, in *Pediatrics*, doi:10.1542.peds.2006-0737, <http://www.pediatrics.org/cgi/doi/10.1542/peds.2006-0737> accessed 21 November 2012.

¹⁷ OII Australia submission, p. 7

¹⁸ OHCHR, 1 February 2013, *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment*, Juan E. Méndez, http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session22/A.HRC.22.53_English.pdf, accessed 16 June 2013.

9.2. The *Convention on the Rights of the Child* (CRC)

Australia is a signatory to the CRC. The CRC contains a number of human rights which may be breached as a consequence of the involuntary or coerced sterilisation of intersex children.¹⁹ These include:

- the right to non-discrimination (article 2)
- a child's right to have their best interests as a primary consideration in all actions concerning them (article 3)
- the right to survival and development (article 6(2))
- the preservation of identity (article 8)
- the right to express views and have those views respected (article 12)
- the right to freedom of expression (article 13)
- the right of freedom of thought (article 14)
- the right to privacy (article 16) the right to protection from physical or mental violence, injury, abuse or exploitation (article 19)
- the right to health (article 24)
- the right to an adequate standard of living (article 27).

9.3. The Yogyakarta Principles

The Yogyakarta Principles are a set of principles devised by distinguished international human rights experts to provide guidance on the interpretation and application of international human rights treaties in relation to gender diversity.²⁰ These principles are necessary because, as the Council of Europe Commissioner for Human Rights, Thomas Hammarberg observed, matters relating to gender identity, including intersex status, are not often explicitly mentioned in international human rights treaties.²¹

Yogyakarta Principle 3 relevantly states that '[n]o one shall be forced to undergo medical procedures, including sex reassignment surgery, sterilization or hormonal therapy, as a requirement for legal recognition of their gender identity'.²²

In accordance with the 3rd Yogyakarta Principle, all Australian jurisdictions should follow the example set by other countries including Argentina, Britain, Spain and Portugal in introducing provisions that allow individuals to change their legal sex without undergoing sterilisation surgery. Options for recognition of legal sex must include an option of "unspecified" which intersex and transgender people can *choose to opt into* if they so desire.

¹⁹ See the discussion of the CRC in the ACT Law Reform Advisory Council's Report on 'Beyond the Binary: Legal Recognition of Sex and Gender Diversity in the ACT' 15-16.

²⁰ http://www.yogyakartaprinciples.org/principles_en.htm

²¹ Thomas Hammarberg, *Council of Europe Commissioner for Human Rights, Human Rights and Gender Identity*. July 2009. Available at: <http://wcd.coe.int/ViewDoc.jsp?id=1476365>

²² *Yogyakarta Principles on the Application of International Human Rights Law in relation to Sexual Orientation and Gender Identity*, p 11-12.

Conclusion

This submission has identified and highlighted some of the key practices and policies of the executive, judiciary and medical profession concerning the involuntary or coerced sterilisation of intersex people.

A Gender Agenda supports the comments and recommendations made by OII Australia, the Androgen Insensitivity Syndrome Support Group Australia (AISSGA) and the National LGBTI Health Alliance in their submissions to this inquiry, and reiterates the supreme value of respecting bodily autonomy and celebrating diversity. As this submission has demonstrated, certain current practices and policies infringe on these values to an unacceptable degree.