



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

PO Box 1553, Auburn, NSW 1835, Australia
+61 418 290 336 info@oii.org.au
oii.org.au

Submission on the Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Bill, 2013

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1. Summary

OII Australia is a national body by and for intersex people. We promote the human rights of intersex people in Australia, and provide information, education and peer support. OII Australia is a not-for-profit company, recognised by the Australian Taxation Office as a charitable institution. We are not publicly-funded; we rely on the contributions of our members.

We thank the government for its inclusion of intersex in the Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Bill, 2013. We made a comprehensive submission to the Senate regarding the then proposed Human Rights and Anti-Discrimination Bill 2012. In this submission, we focus our attention on the proposed exemptions.

Preamble

We would welcome reference to the innate nature of intersex in the preamble and explanatory memorandum.

Sport

We recommend that people are permitted to compete according to their legal sex. An exemption on grounds of intersex status or gender identity is not necessary to achieve this.

Marriage

We believe that the government should explicitly state and justify its position on intersex people and marriage.

Identity records

Any exemption to the Sex Discrimination Act relating to 'X' gender documentation should be temporary, to match proposed guidelines for federal departments and agencies.

The Sex Discrimination Amendment Bill should put the proposed guidelines on gender recognition by government departments and agencies onto a regulatory footing.

Religion

We seek the full application of recommendations on religious exemptions from the Senate Inquiry report on the Human Rights and Anti-Discrimination Bill. Failing that, we ask that there will be no exemptions applicable to aged care provision.

Commissioner

The seek the appointment of a human rights commissioner with responsibility for issues relating to sexual orientation, gender identity and intersex status.

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3. What is intersex?

Intersex is a term which relates to a range of natural biological traits or variations that lie between “male” and “female”. An intersex person may have the biological attributes of both sexes or lack some of the biological attributes considered necessary to be defined as one or the other sex. Intersex is always congenital and can originate from genetic, chromosomal or hormonal variations. Historically, the term “hermaphrodite” was used, originating in classical mythology. The term intersex was adopted by science in the early 20th century.

Fausto-Sterling (2000) reports that 1-2% of the population are intersex¹. The NSW Ministry of Health reports data from the NSW Register of Congenital Conditions showing that births with visible reportable differences of sex anatomy between 2003-2009 comprised 0.59% of all births, while no breakdown of reported relevant chromosomal “anomalies” is given². Intersex differences may also be determined during infancy, at puberty, when attempting to conceive, or through random chance.

¹ Anne Fausto-Sterling, 2000, *Sexing the Body: Gender Politics and the Construction of Sexuality*, Basic Books, ISBN 0465077145, 9780465077144.

² NSW Ministry of Health Centre for Epidemiology and Research, 31 October 2011, *NSW Mothers and Babies 2009*, NSW Public Health Bulletin Supplement, http://www0.health.nsw.gov.au/pubs/2011/mothers_babies_2009.html, accessed 3 December 2012.

4. OII Australia

Organisation Intersex International Australia Limited (OII Australia) is a national body by and for intersex people. We promote the human rights of intersex people in Australia, and provide information, education and peer support.

OII Australia is a not-for-profit company, recognised by the Australian Taxation Office as a charitable institution. It is funded entirely out of the voluntary contributions of its members and receives no public funding. OII Australia is the Australian affiliate of a global network of intersex organisations, and a member of the National LGBTI Health Alliance.

5. Our interest in this submission

We thank the government for its inclusion of intersex in the Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Bill, 2013.

We made a comprehensive submission to the Senate regarding the then proposed Human Rights and Anti-Discrimination Bill 2012.

We note that the Bill will introduce a new ground of discrimination on the basis of intersex status, recognising that intersex is a biological characteristic. We agree that this is the correct approach to recognising intersex. The approach positions intersex as distinct from gender identity, as intersex is an innate biological phenomenon. It also positions intersex as distinct from sex, as intersex is not an arbitrary third sex.

In this submission, we focus our attention on the proposed exclusions. The Bill introduces new exemptions in the areas of sports, religion, marriage, and records. We address these in turn.

6. Preamble

We recommend that the preamble make further reference in support of LGBTI equality should be made in the preamble to the bill, and in the explanatory memorandum. In particular, we draw attention to the following passage from the second reading of the Tasmanian Anti-Discrimination Amendment Bill, which makes it clear that intersex is innate:

In a separate sex related definition 'intersex' has been inserted to mean a person who is born with physical, hormonal or genetic features that are not wholly identifiable as male or female.³

Similarly we note point 7.19 of the Senate Report on the Exposure Draft Human Rights and Anti-Discrimination Bill:

7.19 As a concluding point, the committee is of the view that since intersex status is a condition related to the innate biological characteristics of an individual, it should not be an attribute to which any religious exceptions apply.⁴

While the explanatory memorandum makes it clear that intersex is a biological characteristic, we believe that this would be helpful.

³ Parliament of Tasmania, Wednesday 14 November 2012, Hansard, Anti-Discrimination Amendment Bill 2012 (No. 45), Second Reading, <http://www.parliament.tas.gov.au/ParliamentSearch/isysquery/77359725-0d1c-42f1-b333-2f8aa859c76e/1/doc/h14november2.htm>, accessed 3 December 2012.

⁴ Senate of Australia, 2013, Exposure Draft of the Human Rights and Anti-Discrimination Bill 2012, http://www.aph.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=legcon_ctte/anti_discrimination_2012/report/index.htm, accessed 21 February 2013.

Recommendation

We would welcome reference to the innate nature of intersex in the preamble and explanatory memorandum.

7. Sport

The sporting exemption is addressed at enabling separate sports events for men and women:

Exemption for competitive sporting activity, which ensures that the Act does not make it unlawful to restrict competitive sporting events to people who can effectively compete. It is legitimate to recognise that biological differences between men and women are relevant to competitive sporting activities. Limiting this exemption to situations in which strength, stamina or physique are relevant is a proportionate means of achieving this objective.

We note that the IAAF and IOC have established policies and frameworks for competitive sport which enable intersex, and transgender, people to compete. The IAAF and IOC policies are not based on strength, stamina or physique, but are currently based on testosterone levels, and are only of concern in women. The introduction of a distinct alternative biological basis for an eligibility test is unhelpful.

Some intersex variations are overrepresented amongst Olympic athletes

Intersex athletes with some intersex variations are more commonly found within athletic circles than in society. The Sydney Morning Herald reported in 2011 on an interview with Dr Bennett Foddy, “deputy director and research fellow for the program on ethics and the new biosciences at Oxford”:

... intersex conditions in women are not as rare as you might imagine, especially in female athletes, where such a condition would assist them to rise to the top. It has been estimated that one in 500-600 female athletes have a detectable intersex condition with an XY chromosome (AIS, for example). Many will have an intersex condition, such as CAH, that is undetectable in a chromosome test but confers a distinct advantage.

"Over five Olympic Games, an average of one in every 421 female athletes was found to have a Y chromosome," he says.⁵

Jon Bardin, writing in the Los Angeles Times in 2012, states:

... In fact, androgen insensitivity is overrepresented among female athletes, [Eric Vilain] added: The general population has an incidence of 1 in 20,000, but for Olympic athletes it is about 1 in 400. No one knows why.⁶

Current IAAF and IOC protocols

Current protocols are controversial, but are based on an assertion that testosterone levels are distinct. Katrina Karkazis, is a bioethicist and medical anthropologist at the Center for Biomedical Ethics at Standord, and Rebecca Jordan-Young, is an associate professor and sociomedical scientist at Barnard College, Columbia University. In response to new IAAF and IOC guidelines, they were published in a diverse range of publications. New Scientist, write:

⁵ Sydney Morning Herald, 8 December 2011, *Venus v Mars*, <http://www.smh.com.au/world/science/venus-v-mars-20111207-1oj4i.html>, accessed 4 February 2013.

⁶ Los Angeles Times, 30 July 2012, *Olympic Games and the tricky science of telling men from women*, <http://articles.latimes.com/2012/jul/30/science/la-sci-olympics-gender-20120730>, accessed 7 February 2013.

In a shift from earlier routine sex testing for female athletes, which the IAAF and the IOC abandoned in the 1990s, the sports bodies no longer overtly aim to determine whether someone is "really" a woman. Instead, they focus on women with hyperandrogenism - naturally raised testosterone levels. The new rules effectively say they are too masculine to compete in the female category, based on the idea testosterone is the key reason for men's often superior strength and speed

They note:

Clinical studies do confirm that testosterone, among many other factors, helps improve muscle size, strength and endurance ([New England Journal of Medicine, vol 335, p 1](#); [European Journal of Applied Physiology, vol 111, p 2249](#)). It may seem logical to infer, then, that having more testosterone gives an athletic advantage.

But responses to it differ dramatically between individuals, and testosterone is just one factor in a complex feedback system.

A striking counter example to the idea that testosterone is the key factor in athleticism is women with complete androgen insensitivity syndrome, whose cells are totally unresponsive to testosterone but who are overrepresented among elite athletes ([The Journal of the American Medical Association, vol 284, p 1568](#)). Some women with androgen insensitivity are, under the new rules, exempt from a ban. And a quarter of elite male athletes might have testosterone levels below the typical male range, with many in the typical female range, according to endocrinologist Peter Sönksen.

Bardin, in the Los Angeles Times notes:

if testosterone were essential to athletic success, Martinez-Patiño would have been doomed to fail because her body can't use the hormone. Many women with androgen insensitivity have competed in the Olympics, and "the idea that testosterone is a necessary ingredient for elite athletic performance is really undermined by these cases," [University of Michigan biopsychologist Sari] Van Anders said.

The impact on athletes

The story that Semenya was intersex was first claimed in an Australian newspaper. On 11 September 2009, the Sydney Morning Herald ran a story with the salacious headline, "[Secret of Semenya's sex stripped bare](#)"⁷, but Semenya is far from the only case to receive public attention – and humiliation.

Bardin describes the case of Spanish hurdler Maria José Martínez-Patiño, and an interview with Eric Vilain, director of the Center for Gender-Based Biology at UCLA:

A gender test revealed that she had a Y chromosome, which normally makes a person male. She also had complete androgen insensitivity syndrome, or CAIS, which prevented her body from responding properly to testosterone and caused her to develop as a woman.

The Spanish Athletic Federation got her test results in 1986, just before a major competition that would have set her up for an Olympic run. Though she won the 60-meter hurdles, the federation declared her ineligible for the 1988 Summer Games in Seoul.

The International Olympic Committee has struggled with cases like these, variously using hair patterns, chromosomes, individual genes and other factors in their long-running attempts to distinguish men from women. All of these tests have been discarded...

⁷ Sydney Morning Herald, 11 September 2009, *Secret of Semenya's sex stripped bare*, <http://www.smh.com.au/news/sport/secret-of-semenyas-sex-stripped-bare/2009/09/11/1252519599453.html>, accessed 8 February 2013.

Athletes like Maria Jose Martinez-Patiño and South African runner Caster Semenya are not doping, and they have not cheated; they simply wish to compete as they were born and raised.

Hida Viloria, the president of OII USA, and the chair of OII globally, notes that the policy is applied in a way that targets only butch women, those with a more masculine appearance. Writing with María José Martínez-Patiño in the American Journal of Bioethics, they say:

...the proposed policies target only masculine looking women, despite the lack of evidence of their advantage. Some agreed, while some countered that Semenya had been targeted due to her speed, not her physical appearance. However, discussion that followed included that an athlete who is currently faster than Semenya had not been accused (Viloria 2011). An Internet search revealing that she has long hair and presents as typically female confirmed my assertion that physical appearance compels testing.⁸

Indeed, comments about the perceived masculinity of woman competitors are widespread, and not limited to cases like Caster Semenya. Jordan-Young and Karkazis note:

Dominika Cibulkova of Slovakia recently said that she lost at the French Open [because her opponent "played like a man."](#) Such comments do not do female athletes any favors.
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Let people compete in their legal gender

All athletes possess a genetic advantage. Karkazis and Jordan-Young:

Even if a decisive link had been established, should it be viewed as any different to other biological advantages broadly accepted in some elite athletes?

For example, several runners have mitochondrial conditions that enhance aerobic ability ([Mitochondrion, vol 11, p 774](#)). Some basketball players have acromegaly, a hormonal condition that results in enlarged hands and feet.

Writing in the American Journal of Bioethics, Katrina Karkazis, Rebecca Jordan-Young, Georgiann Davis and Silva Comporesi say:

The policies raise troubling concerns about whether they succeed in balancing the aim of creating a "fair" playing field for women athletes against the aim of ensuring fairness for individual athletes. Given the very real documented harms that have come to female athletes who have undergone evaluation and sex testing, these policies are unlikely to protect against breaches of privacy and confidentiality that may arise because they are inconsistent and suspend athletes undergoing evaluation. Furthermore, they require female athletes to undergo treatment that may not be medically necessary and may, in fact, be medically and socially harmful, in order to compete. Finally, beyond those athletes who are directly affected by these investigations, the new policies may intensify the harmful "gender policing" that already plagues women's sports.

We believe that it is essential that the Sex Discrimination Amendment Bill enable all intersex people to compete as they are born and raised, in their legal gender, without being obliged to undertake hormonal or surgical intervention to be able to compete.

Legal status is the best measure we have to establish a person's gender. Karkazis *et al*:

⁸ Hida Patricia Viloria and Maria José Martínez-Patiño 13 June 2012, "Reexamining Rationales of "Fairness": An Athlete and Insider's Perspective on the New Policies on Hyperandrogenism in Elite Female Athletes", in *The American Journal of Bioethics*, Volume 12, Issue 7, 2012. <http://dx.doi.org/10.1080/15265161.2012.680543>, accessed 15 June 2012.

*Considerations of fairness support an approach that allows all legally recognized females to compete with other females, regardless of their hormonal levels, providing their bodies naturally produce the hormones. While a legal definition of sex opens up a scrutiny of its own, it is currently the single best sex categorization measure we have to rely on.*⁹

In the New York Times, Jordan-Young and Karkazis state:

Bruce Kidd, a former Olympian who is a professor of kinesiology and physical education at the University of Toronto, favors prioritizing athletes' rights to bodily integrity, privacy and self-identification, and promoting broad inclusiveness. "If the proclaimed human right of self-expression is to mean anything, surely it should protect the right to name one's own gender," he says.

*We agree. At present, though, because most nations do not offer their citizens the right of self-defining gender, the best bet might be to let all legally recognized women compete. Period.*¹⁰

They sum up by saying:

*sex segregation is one means to achieve fairness, not the ultimate goal. Ensuring gender equity through access to opportunity is just as important.*¹⁰

We recognise that sporting exemptions designed to enable separate male and female sporting activities are likely to be considered necessary, but we believe that this is already satisfactorily achieved through the Sex Discrimination Act.

Exemptions should not be used to exclude intersex athletes from competing. A blanket exemption applying to intersex people is disproportionate, and might broadly limit our access to sporting activities, with adverse consequences for our health and well-being.

Intersex people at all levels of sporting activity should be encouraged through access to sporting activities. Exemptions should not be used to justify excluding intersex people from sporting activities.

María José Martínez-Patiño would be permitted to compete today, and Caster Semenya was allowed to compete in the 2012 Olympic Games. Given the relatively high proportion of women with some intersex variations at an elite level, a sporting exemption could even place Australia at a competitive disadvantage.

It is far more appropriate to enable people to compete on the basis of their legal sex. An exemption on grounds of intersex status or gender identity is not needed to achieve this.

Recommendation

We recommend that people should be allowed to compete on the basis of their legal sex. An exemption on grounds of intersex status or gender identity is not needed to achieve this.

⁹ Katrina Karkazis, Rebecca Jordan-Young, Georgiann Davis and Silva Comporesi, 13 June 2012, Out of Bounds? A Critique of the New Policies on Hyperandrogenism in Elite Female Athletes, in *The American Journal of Bioethics*, 12(7): 3–16, 2012.

http://www.katrinakarkazis.com/out_of_bounds_ajob.pdf, accessed 15 June 2012.

¹⁰ Rebecca Jordan-Young and Katrina Karkazis, 17 June 2012, You Say You're a Woman? That Should Be Enough, in *The New York Times*, http://www.nytimes.com/2012/06/18/sports/olympics/olympic-sex-verification-you-say-youre-a-woman-that-should-be-enough.html?_r=0, accessed 18 June 2012.

8. Marriage

The explanatory memorandum describes the necessity of an exemption on marriage in the context of the impact on same-sex couples:

The first new exception makes clear that introducing protections against discrimination on the basis of sexual orientation does not affect the current policy position regarding same-sex marriage... It is not contrary to the ICCPR for a State to refuse to do so, provided that the status of marriage does not give couples treatment that is more favourable than couples who are not married and have no possibility of being married because of the restriction on the basis of sexual orientation.

We note that intersex is a matter of biology and not sexual orientation. However, while the same exemption is applied to intersex people, no rationale specific to our case is described.

We accept that this bill will not affect government (or opposition) policies on marriage.

From our perspective, the current requirement that marriage is between a man and a woman excludes us from fully participating in this institution, as our status as real men or real women can be (and has been) called into question.

We are obligated to note our concern that the stated policy position on “same-sex marriage” is meaningless to intersex people who possess valid legal Australian documenting stating that we are of intersex, indeterminate or unspecified sex.

Recommendation

We believe that the government should explicitly state and justify its position on intersex people and marriage.

9. Identity records and data collection

The explanatory memorandum states:

The second new exception applies to requests of information and keeping of records that do not allow for identification as being neither male nor female. This seeks to achieve the legitimate objective of minimising regulatory impact on organisations. Mandating that all forms must be amended to offer an alternative category could have a significant regulatory impact for a wide range of organisations. This impact would be disproportionate to the small number of people who do identify as neither male or female. The limited nature of the exception is a proportionate means of achieving this objective.

This proposed exemption is somewhat at odds with proposed federal guidelines on sex and gender identity recognition, which are scheduled to come into effect on 1 July 2013. We broadly welcome that draft policy, which roll out the existing requirements for M, F and X passports across federal institutions. It is proposed that federal departments and institutions will be required to update their systems within 3 years. We believe that these guidelines would benefit from a legislative or regulatory footing; this bill provides an opportunity to make those guidelines a matter of regulation.

While we agree that the take up of ‘X’, intersex/indeterminate/unspecified documentation, is likely to be low, perpetuating indefinitely a situation where people have their gender or sex recognised in different ways by different institutions.

This is of particular concern when a form constitutes a legal contract. It is possible that, in some cases, failure to amend a form to enable accurate, contractually-compliant submission of data by a client might result in an inability to access a service.

*These Guidelines will come into force on 1 July 2013. Australian Government departments and agencies will progressively align their existing and future business practices with these Guidelines by 1 July 2016.*¹¹

We believe that, if amendment of government records within a three year timescale is deemed acceptable, as is proposed in the draft guidelines, than a similar timeframe should be considered proportionate in the private sector.

Recommendations

Any exemption to the Sex Discrimination Act relating to 'X' gender documentation should be temporary, to match proposed guidelines for federal departments and agencies.

The Sex Discrimination Amendment Bill should put the proposed guidelines on gender recognition by government departments and agencies onto a regulatory footing.

10. Religious exemptions

We welcome the statement in the explanatory memorandum that there will not be a religious exemption on grounds of intersex status:

The Bill will not extend the exemption to cover the new ground of intersex status. During consultation, religious bodies raised doctrinal concerns about the grounds of sexual orientation and gender identity. However, no such concerns were raised in relation to 'intersex status'. As a physical characteristic, intersex status is seen as conceptually different. No religious organisation identified how intersex status could cause injury to the religious susceptibilities of its adherents. Consequently, prohibiting discrimination on the basis of intersex status will not limit the right to freedom of thought, conscience and religion or belief.

Given that intersex is a biological matter, we believe that this is the correct approach. However, we would welcome the further application of the religious exemptions defined in the report of the Senate Inquiry on the Exposure Draft of the Human Rights and Anti-Discrimination Bill. In particular, we support the following recommendations of the Senate Inquiry:

Recommendation 11

7.80 The committee recommends that the Draft Bill be amended to remove exceptions allowing religious organisations to discriminate against individuals in the provision of services, where that discrimination would otherwise be unlawful. The committee considers that the Australian Government should develop specific amendments to implement this recommendation, using the approach taken in the Tasmanian Anti-Discrimination Act 1998 as a model.

Recommendation 12

7.81 The committee recommends that clause 33 of the Draft Bill be amended to require that any organisation providing services to the public, and which intends to rely on the exceptions in that clause, must:

- make publicly available a document outlining their intention to utilise the exceptions in clause 33;*
- provide a copy of that document to any prospective employees; and*
- provide access to that document, free of charge, to any other users of their service or member of the public who requests it.*⁴

¹¹ Attorney General's Department, Australian Government Guidelines on the Recognition of Sex and Gender, <http://www.ag.gov.au/Consultations/Pages/AustralianGovernmentGuidelinesontheRecognitionofSexandGender.aspx>, accessed 22 March 2013.

We support the recommendations of the Senate report on the Human Rights and Anti-Discrimination Bill, Exposure Draft. We note the stated government position calling for no religious exemptions in aged care provision, and believe that this amendment provides an ideal opportunity to legislate for this.

Recommendation

We seek the full application of recommendations on religious exemptions from the Senate Inquiry report on the Human Rights and Anti-Discrimination Bill. Failing that, we ask that there will be no exemptions applicable to aged care provision.

11. Commissioner

We strongly favour the appointment of a well-resourced human rights commissioner and supporting unit, to take responsibility for human rights matters relating to sexual orientation, gender identity and intersex status. This would help ensure that the legislation will be effective and well communicated to industry and the broader community.

Recommendation

The appointment of a human rights commissioner on sexual orientation, gender identity and intersex status.

OII Australia
Organisation Intersex International Australia Limited
PO Box 1553, Auburn, NSW 1835, Australia
info@oii.org.au
oii.org.au
ABN 73 143 506 594