



Women's Health Tasmania

Legal Recognition of Sex and Gender: response to issues paper

3rd SEPTEMBER 2019

EQUITY
CHOICE
IMPACT

About Women's Health Tasmania

About Women's Health Tasmania Women's Health Tasmania (WHT) is a universal service available to all women in Tasmania. WHT acknowledges the impact of societal influences such as income, education, gender, sexual orientation, ethnicity, disability and isolation on health outcomes and seeks to reduce the negative effects of these factors on individual women.

WHT's vision is for Tasmanian women to be informed, supported and active decision makers in their own health and wellbeing. As a result, WHT has also been a key advocate on issues such as a woman's right to make informed choices about her health. WHT consistently advocates on behalf of women with both State and Commonwealth governments on a range of legislation and policies impacting on women's health.

WHT continues to provide direct services to individual women and to advocate for, and promote, the health and well-being of all Tasmanian women. Our knowledge and expertise is based on 30 years' experience working with, and for, the women of this state

Introduction

WHT welcomes the opportunity to provide feedback on the *Legal Recognition of Sex and Gender: Issues Paper* (the *Issues Paper*).

At WHT we understand that gender is a lived experience and intensely personal. Gender is not determined by biology. We recognise the diversity of women and the way they experience gender. We work with cisgender women, transgender women and women who have intersex variations.

Our concern about the issue of non-consensual surgeries on minors with variations of sex characteristics goes to the heart of WHT's vision for all women to be active decision makers in their health and wellbeing. Choice has always been a central issue for feminist movements and organising. We extend our solidarity to people with variations of sex characteristics, who are also making the argument for their bodily autonomy, choice and self determination to be recognised and protected as a matter of urgency. It is our view that any decisions regarding policy and legislation should be guided by advocates from the intersex community.

The use of the descriptor 'intersex people' can be problematic. Not all people with variations of sex characteristics define themselves as intersex; many view themselves as male or female. Although many intersex advocacy groups use the term 'intersex' as an inclusive descriptor, where possible this submission will talk about 'people with variations of sex characteristics' as a more accurate term.

Consent to medical interventions for children with intersex variations

The *Issues Paper* highlighted that medical approaches understand intersex genital variations as medical disorders that should be corrected.¹ However, intersex variations can also be understood as part of the natural diversity of human bodies.

Intersex rights organisations argue that the decision making processes behind medical interventions are not transparent.² While the Australian Medical Association's position is that cosmetic genital surgery should be avoided until the child can participate in the decision,³ there is no professional code of conduct or practice standard that directs medical practitioners on intersex issues.

The *Issues Paper* also highlighted a concerning lack of evidence that shows how cosmetic interventions on children with intersex genital variations contribute to positive outcomes for intersex children.⁴

People with variations of sex characteristics and their advocates have provided much evidence of the very real experiences of shame, stigma, personal distress and physical and medical issues that result from medically unnecessary surgeries on intersex minors.

¹ Tasmanian Law Reform Institute, *Issues Paper 29 - Legal Recognition of Sex and Gender* (2019) 54.

² Morgan Carpenter, *Bodily Integrity* (4 January 2019) Intersex Human Rights Australia. <https://ihra.org.au/bodily-integrity/>

³ Tasmanian Law Reform Institute, *Issues Paper 29 - Legal Recognition of Sex and Gender* (2019) 62 citing Australian Medical Association, *Sexual and Reproductive Health* (2014) 12.

⁴ Tasmanian Law Reform Institute. *Issues Paper 29 - Legal Recognition of Sex and Gender* (2019) 56, 59.

There must be more scrutiny on medical professionals to make clear what principles, ideas and evidence guides their advice to parents and their medical interventions. Further, it is vital that the voices and lessons learnt by the intersex rights movement be heard in this conversation.

WHT believes that legislation coupled with practice standards for the medical profession and community education can achieve a landscape where the human rights of intersex people are honoured.

Intersex bodily integrity as a human rights issue

We believe that laws relating to surgeries on intersex minors should be made within a human rights framework.

We support the 2016 statement made by 11 Human Rights experts of the UN which holds that states must protect the autonomy of intersex people:

“States must, as a matter of urgency, prohibit medically unnecessary surgery and procedures on intersex children. They must uphold the autonomy of intersex adults and children and their rights to health, to physical and mental integrity, to live free from violence and harmful practices and to be free from torture and ill-treatment. Intersex children and their parents should be provided with support and counselling, including from peers.”⁵

A number of Human Rights instruments also pertain to intersex human rights, including:

- **International Covenant on Economic, Social and Cultural Rights.** As part of Article 12 the right to the highest attainable physical and mental health states have an obligation to act to prevent violations of the right to sexual and reproductive health through “forced sterilization [and]... medically unnecessary, irreversible and involuntary surgery and treatment performed on intersex infants or children.”⁶
- **Convention on the Rights of the Child: Children have rights to participation (Article 12) and for decisions to be made in their best interest (Article 3).**⁷ Infants are unable to give consent to medical procedures and it is up to parents or guardians to provide consent. Parents and guardians should be given the information to make a decision that is best for the child.⁸

⁵ *Intersex Awareness Day – Wednesday 26 October: End violence and harmful medical practices on intersex children and adults, UN and regional experts urge* (24 October 2016) United Nations Human Rights Office of the High Commissioner.

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

⁶ Committee on Economic, Social and Cultural Rights, *General Comment No. 22 (2016) on the Right to sexual and reproductive health (article 12 of the International Covenant on Economic, Social and Cultural Rights)* E/C.12/GC/22 (2 May 2016) paragraph 59.

<http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=4slQ6QSmIBEDzFEovLCuW1a0Szab0oXTdlmnsJZZVQfQejF41Tob4CvIjeTiAP6sGFQktiae1vlbbOAekmaOwDOWsUe7N8TLm%2BP3HJPzxiHySkUoHMavD%2Fpyfcp3YIzg>

⁷ UN General Assembly, *Convention on the Rights of the Child*, opened for signature 20 November 1989, UNTS 1577, (entered into force 2 September 1990).

⁸ Australian Human Rights Commission, *Surgery on Intersex Infants and Human Rights* (2009) 5.

- **Convention on the Elimination of all forms of Discrimination Against Women.** The CEDAW Committee named medically unnecessary, nonconsensual interventions on intersex minors as a harmful practice and recommended that Australia legislate to prevent such practices.⁹
- **The Yogyakarta Principles.** In particular, Principle 18 outlines the right to be protected from medical abuses based on gender identity: “No person may be forced to undergo any form of medical or psychological treatment, procedure, testing, or be confined to a medical facility, based on sexual orientation or gender identity. Notwithstanding any classifications to the contrary, a person's sexual orientation and gender identity are not, in and of themselves, medical conditions and are not to be treated, cured or suppressed.”¹⁰

We also highlight the principles of the Yogyakarta Principles Plus 10.¹¹ These principles compliment the original Yogyakarta Principles. The Yogyakarta Principles are not legally binding, but interpret other binding agreements. In particular, Principle 32 which calls on states to prohibit non-consensual modifications of children’s sex characteristics. This involves several elements, including:

- Children have a right to bodily integrity.
- The autonomy and bodily integrity of the child needs to be at the heart of decision making around modifications of sex characteristics.
- Ideas around the ‘best interest of the child’ should not be used to justify interventions that conflict with the child’s bodily integrity.
- States must address the use of stereotypes about sex and gender as well social, religious and cultural rationales, to justify modifications to sex characteristics, including of children.

We also draw attention to the Darlington Statement. This is a joint consensus statement by Australian and Aotearoa/New Zealand intersex organisations and independent advocates. This includes the following elements

- The right to bodily integrity, physical autonomy and self determination
- The prohibition as a criminal act of deferrable medical interventions that alter the sex characteristics of infants and children without personal consent.¹²

One proposal put forward in the Issues Paper, was for Tasmania to adopt specific regulatory framework for medical procedures that alter sex characteristics of minors. This legal framework could be complemented by guidelines that help medical professionals understand the laws and how to apply human rights, patient centered practice to children with sex characteristic variations.

⁹ Committee on the Elimination of Discrimination Against Women, *Concluding Observations on the eight periodic report of Australia*. CEDAW/C/AUS/CO/8 (25 July 2018).

https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CEDAW%2FC%2FAUS%2FCO%2F8&Lang=en

¹⁰ International Commission of Jurists, *Yogyakarta Principles - Principles on the application of international human rights law in relation to sexual orientation and gender identity* (March 2007). <https://yogyakartaprinciples.org/principles-en/>

¹¹ International Commission of Jurists, *Yogyakarta Principles Plus 10* (2017). <https://yogyakartaprinciples.org/principles-en/>

¹² Intersex Human Rights Australia, *Darlington Statement*, March 2017, <https://ihra.org.au/darlington-statement/>

Recommendations

In light of the position of intersex advocates, human rights instruments and international public health statements, WHT makes the following recommendations:

- **Medically unnecessary surgeries on intersex minors should be criminalised.**

In line with human rights law, it is vital that the bodily integrity of minors with sex characteristic variations is protected. Criminalisation of non-essential surgeries will have an impact on the number of medically unnecessary surgeries. We agree with the statement in the *Issues Paper* that following the legislative lead of Malta provides an example of how criminalisation could be enacted.

We believe criminalisation is preferable to a civil liabilities approach because it is a preventative measure, rather than reactive to errors. Criminalisation is forceful and reflects the seriousness of decision making and the potential for life time impacts. It allows time for decision to emerge with the child's input.

- **Specialised legislation should be introduced that comprehensively defines the legal framework for surgical interventions.**

As the *Issues Paper* suggests, alongside criminalisation, legislation that defines the legal framework could be introduced. This framework could codify the situations where surgery is permissible and formalise the principles that must inform decision making. We believe that human rights around the best interests of the child and the rights of people with sex characteristic variations to bodily integrity should be enacted in this legislation.

This is a very attractive option because it could allow the human rights framework outlined above to become meaningful in the Australian medical context. This would provide guidance to medical practitioners and lend itself to a unified response to intersex genital variations in Tasmania.

- **Introduction of a specialist, multidisciplinary tribunal.**

A specialist, multidisciplinary tribunal could form part of the legislative framework. This tribunal would assess applications for surgeries in light of the legislative framework discussed above.

We recommend that more investigation be conducted into what expertise would be needed on such a specialist multidisciplinary tribunal if it is to deliver decisions that protect intersex bodily autonomy that are in the best interests of the child. Intersex characteristics and lives are not the sole purview of the medical profession and we would expect that a multidisciplinary team would consist of a range of expertise, including those outside of the medical field. We suggest that people who have the experience of living with a sex characteristic variation could be considered experts and that their perspectives would add value to the deliberations of a tribunal.

- **Practice standards for medical professionals are developed in line with a legislative framework.**

Practice standards should be developed that reflect the legislative framework. Practice standards alone are insufficient, however in the context of a legislative framework and criminalisation, could assist medical professionals understand the operation of the law for their practice.

Resources and funding should be provided to intersex advocate groups to provide education and training.

- **Education and support.**

We agree with the *Issues Paper's* suggestion that more can be done to support community awareness of intersex characteristics. Further, education for medical professionals, including doctors, nurses and midwives around intersex variations should occur.

Despite the prevalence of variations in sex characteristics, most in the community have little awareness that these exist. This no doubt contributes to the distress of parents and guardians that sometimes occurs when they find out their child has a sex characteristic variation. Parents and guardians should have greater access to counselling and other kinds of support, including specialised support around sex characteristic variations as a means of helping parents understand the issues around genital variations and the legal framework.