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ACT LGBTIQ Ministerial Advisory Council

7 May 2018

The Executive Director
Australian Law Reform Commission
GPO Box 3708
Sydney NSW 2001

Dear Executive Director

The family law system and *Family Law Act 1975* (Cth) has a significant impact on the rights of lesbian, gay, bisexual, transgender, intersex and queer (LGBTIQ) people and their families. The ACT LGBTIQ Ministerial Advisory Council (the Council) welcomes the Australian Law Reform Commission's Review of the Family Law System (the Review) and the opportunity to make this submission.

The Council is an advisory body appointed by the Chief Minister of the ACT. The Council works with the Office of LGBTIQ Affairs to provide whole-of-government support to policies and programs relating to LGBTIQ people in the ACT. The Council also provides advice on matters in other jurisdictions where it is deemed in the interest of LGBTIQ people.

Our submission speaks primarily to question eight on the accessibility of the family law system to LGBTIQ people, but also to the broad issues raised in question 36, which pertain to a child's right to participate, express their views, and gain access to information that affects them. Our recommendations focus on the impact of the family law system and the Family Court's welfare jurisdiction over children with intersex variations. Our submission also looks at the recognition of multiple parents. Queer families, which are often differently structured, can be disproportionately affected by uncertainty in the law.

The Council makes the following recommendations:

Recommendation One: Oversight over the clinical treatment of children with intersex variations should be removed from the Family Court and given to an independent body that includes human rights experts, clinicians and intersex-led community organisations.

Recommendation Two: All non-deferrable procedures to change the sex characteristics of a child who does not have capacity to consent must come before an independent body that includes human rights experts, clinicians and intersex-led community organisations.

Recommendation Three: The factors to be considered in determining the best interests of the child in section 60CC of the Family Law Act should be considered holistically and not hierarchically.



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Recommendation Four: An independent body must provide the opportunity for the child affected to express their views freely and where provided must give those views due weight in accordance with the age and maturity of the child.

Recommendation Five: A broader definition of 'parent' be included in the Family Law Act. This definition should reflect different family structures and include non-biological parents.

If you would like to further discuss the Council's recommendations and comments, please contact us through LGBTIQcouncil@act.gov.au

Sincerely,

Anne-Marie Delahunt

Chair

ACT LGBTIQ Ministerial Advisory Council



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Understanding intersex

Intersex people are born with sex characteristics (including genitals, gonads and chromosome patterns) that do not fit typical binary notions of male or female bodies.¹ Intersex includes approximately 40 different physical variations.² Intersex is also clinically known as ‘disorders of sex development’ (DSD). Cases that go through the Family Court rarely use either term, but instead tend to refer to specific diagnoses, for example Denys-Drash Syndrome,³ Congenital Adrenal Hyperplasia,⁴ 5-alpha reductase deficiency.⁵

Intersex describes the body and not a gender identity; intersex people do not share a common gender identity. This distinction is important as the treatment of children with intersex variations and the treatment of children diagnosed with gender dysphoria within the family court system are very different. Intersex people have as many different gender identities as endosex (non-intersex) people. Council emphasises this point as it is noted that the Issues Paper appears to assume intersex people share a common gender identity, and/or that decision making around intersex surgeries relate to their gender identity.⁶ However, surgeries on intersex children may not relate to gender identity at all but may relate to the perceived necessity to ‘fix defects’. Where surgeries do relate to a child’s gender identity, it may be the case that it is a gender identity that the child is *assumed* to have or will have, coupled with a desire to align the child’s body with that gender identity. This is in contrast to interventions sought by trans and gender diverse children who may want to pursue interventions to affirm the gender they understand themselves to have.

Risks faced by intersex people and the role of the Family Court

Intersex people are at risk of non-consensual and medically unnecessary interventions (surgical and non-surgical) to change their bodies to conform to medical norms for typical male and female bodies. These practices were highlighted in the 2013 Senate inquiry into the involuntary or coerced sterilisation of intersex people in Australia,⁷ and case law from the Family Court reveals medical and judicial endorsement of these practices. Individuals with intersex variations discovered at birth or soon after, or during childhood or early adolescence, are at particular risk of the violation of their human rights given their limited ability to understand and consent to interventions. These rights include freedom from

¹ Office of the United Nations High Commissioner for Human Rights, *Free & Equal campaign: Intersex Fact Sheet* (5 September 2015).

² Tiffany Jones et al, *Intersex: stories and statistics from Australia* (Open Book Publishers, 2016) 82.

³ *Re: Sean and Russell (Special Medical Procedures)* [2010] FamCA 948.

⁴ *Welfare of A Child A Between: Mother Application and the Public Advocate* [1993] FamCA 68.

⁵ *Re: Sally (Special Medical Procedure)* [2010] FamCA 237.

⁶ Australian Law Reform Commission, *Review of the Family Law System* (2018). At https://www.alrc.gov.au/sites/default/files/pdfs/publications/issues_paer_48_19_march_2018_.pdf (accessed 25 April 2018) paras 32 and 45.

⁷ Senate Community Affairs References Committee, Parliament of Australia, *Involuntary or coerced sterilisation of intersex people in Australia* (2013).



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torture, cruel, inhuman or degrading treatment, the right to physical and mental integrity, the right to equality and non-discrimination, the right to the highest attainable standard of health, and the right to express views freely in all matters concerning them.⁸

The Family Court currently has jurisdiction to provide oversight over some medical interventions on intersex children. This falls under the Court's welfare jurisdiction and these procedures are known as 'special medical procedures'. The High Court's decision in *Secretary, Department of Health and Community Services v JWB (1992) 175 CLR 218* ('*Marion's case*'), outlines the types of cases that comprise 'special medical procedures' and require Court oversight. These includes situations where treatments are 'non-therapeutic' and there is 'invasive, irreversible and major' surgery, a 'significant risk of making the wrong decision' about the child's best interests, and where 'the consequences of a wrong decision are particularly grave'.⁹

Concerns arising from case law

Council notes with concern, however, that relatively few cases relating to medical procedures on intersex children appear to go through the family court system, and those that have all relate to sterilisation procedures or the removal of infertile gonads,¹⁰ and one case of hormone treatment (under an application for access to stage 2 treatment after diagnosis of gender dysphoria).¹¹

Procedures performed to 'normalise' a child's genitalia not only do not receive the same oversight, they are also not considered a point of concern in judgments describing a child's past medical history, amounting to tacit approval for these normalising interventions. For example, in the *Welfare of A Child A*, Mushin J made no comment on past feminising procedures performed on the child,¹² but instead criticised the parents and particularly the mother for not administering sufficient levels of hormone replacement to minimise masculinisation. Mushin J attributes this as the reason for the 'appalling situation which has now arisen' and the application before the Court for masculinising surgeries.¹³ Similarly, in *Re: Carla (medical procedure)*, references to past feminising surgeries (a labiaplasty and clitoral recession on a 3 year old) were stated as matter of fact without questioning the necessity or legality behind the procedures.¹⁴

⁸ *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) arts 2(1), 12, 24, 37(a); *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) arts 17(2), 24, 26.

⁹ *Marion's case* (1992) 175 CLR 218, [49].

¹⁰ *Re: Sarah* [2014] FamCA 208.

¹¹ *Re: Kaitlin* [2017] FamCA 83.

¹² *Welfare of A Child A Between: Mother Application and the Public Advocate* [1993] FamCA 68, [10].

¹³ *Welfare of A Child A Between: Mother Application and the Public Advocate* [1993] FamCA 68, [13].

¹⁴ *Re: Carla (medical procedure)* [2016] FamCA 7, [16].



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Re: Carla also reveals a heavy reliance on gender stereotyping as a basis for irreversible and unnecessary medical interventions undertaken. A review by a doctor at age 3 determined that Carla had developed a female gender identity, based heavily on stereotyped observations like Carla having ‘a range of interests/toys and colours, all of which were stereotypically female, for example, having pink curtains, a Barbie bedspread and campervan, necklaces, lip gloss and “fairy stations”’.¹⁵ Forrest J’s reliance on this kind of evidence to determine gender identity, coupled with the misconception that an individual’s body must look a certain way to align with a particular gender identity, resulted in approval for a gonadectomy for Carla at age 5, although as noted in the judgment, this procedure could have waited until the beginning of puberty to avoid masculinisation of her body.¹⁶

Judgments also reflect uncertainty over the scope of the Court’s jurisdiction over these kinds of procedures. In *Re Lesley (special medical procedure)*, and in *Re: Carla*, both children have 17-β/HSD deficiency; however, while Barry J in *Re Lesley* found that the procedure proposed (a gonadectomy) required the oversight of the Court,¹⁷ Forrest J in *Re: Carla* stated that the same procedure was ‘therapeutic’ and did not require Court sanction.¹⁸

Marion’s case raised the distinction between therapeutic and non-therapeutic treatments, however failed to define what constitutes each.¹⁹ Given this lack of certainty, it would appear that most interventions performed on intersex children do not go through the Family Court as they are considered by the medical profession as medically necessary and therefore constitute ‘therapeutic’ treatment, even where these interventions do not relate to the physical health of the child and where there is no or little time pressure to make these decisions.

In all cases involving children with intersex variations, no human rights body or intersex organisation has been involved in the proceedings.

Council is concerned that the current system does not adequately protect intersex children from human rights violations. Council therefore recommends that the role of oversight be removed from the Family Court’s jurisdiction and be held with an independent body, potentially state and territory civil and administrative tribunals or guardianship tribunals, to deal specifically with these cases. Council recommends that this independent body include greater expertise to overcome some of the challenges faced by judges and Independent Children’s Lawyers in previous cases, including a lack of understanding of the specific issues faced by intersex children and confusion around gender identity and medical risks. Any independent body should bring together ‘human rights experts, clinicians and intersex-led

¹⁵ *Re: Carla (medical procedure)* [2016] FamCA 7, [15].

¹⁶ *Re: Carla (medical procedure)* [2016] FamCA 7, [22]-[25].

¹⁷ *Re Lesley (Special Medical Procedure)* [2008] FamCA 1226, [38].

¹⁸ *Re: Carla (medical procedure)* [2016] FamCA 7, [52]-[53].

¹⁹ *Marion’s case* (1992) 175 CLR 218, [48].



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community organisations'.²⁰ This is in line with the Darlington Statement, a consensus statement produced by intersex advocates in Australia and Aotearoa/New Zealand.

Recommendation One: Oversight over the clinical treatment of children with intersex variations should be removed from the Family Court and given to an independent body that includes human rights experts, clinicians and intersex-led community organisations.

One of the key issues with the current system is the uncertainty over which cases should receive oversight (are 'therapeutic') in the first place. A reliance on the distinction between therapeutic and non-therapeutic to determine which cases require oversight should be abandoned. Instead, all non-deferrable procedures to change the sex characteristics of children should receive oversight where the child does not have capacity to consent.

Where children do have capacity to consent, this consent must be fully informed and the individual affected and their family must have access to independent peer and psychological support.

Recommendation Two: All non-deferrable procedures to change the sex characteristics of a child who does not have capacity to consent must come before an independent body that includes human rights experts, clinicians and intersex-led community organisations.

Council is concerned about the limited ability of children to express their views in matters affecting them and how this interacts with the Court's determination of their best interests. Section 60CC of the Family Law Act presents a hierarchy of considerations when determining the best interests of the child, divided into primary and additional considerations. This division is not supported by international human rights law which recognises that all the rights of the child, as outlined in the Convention on the Rights of the Child, together constitute the best interests of the child and must be treated holistically.²¹ This includes the right of the child to express views freely on all matters affecting them, with due weight in accordance with their age and maturity.²² This ought to be supported by providing greater opportunities for the views of the child to be heard. Where an Independent Children's Lawyer is involved, they must seek the views of the child and give it due weight.

Recommendation Three: The factors to be considered in determining the best interests of the child in section 60CC of the Family Law Act should be considered holistically and not hierarchically.

²⁰ Black et al, *Darlington Statement* (10 March 2017). At <https://darlington.org.au/statement/> (accessed 27 April 2018) [22].

²¹ Committee on the Rights of the Child, *General Comment No 14 (2013) on the rights of the child to have his or her best interests taken as a primary consideration (art. 3, para.1)*, UN Doc CRC/C/GC/14 (29 May 2013) [4].

²² *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) art 12.



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These same principles must also apply to determining cases of children with intersex variations by an independent body. This body ought to support the right of the child to express their views freely in all matters affecting them, and give those views due weight in accordance with the age and maturity of the child.²³

Recommendation Four: An independent body must provide the opportunity for the child affected to express their views freely and where provided must give those views due weight in accordance with the age and maturity of the child.

Children of same-sex parents

Council is concerned that certain parent-child relationships are at risk of not being legally recognised. The Family Law Act's definition of parent provides that when 'parent' is used in Part VII in relation to a child who has been adopted, it means an adoptive parent of the child. This is a specific definition and raises uncertainty more broadly about who may be considered a parent. This uncertainty has particular implications for children who have been born through artificial reproductive technology (ART) and for the recognition of non-normative family structures, including families with same-sex couples and families with more than two parents.

Recommendation Five: A broader definition of 'parent' be included in the Family Law Act. This definition should reflect different family structures and include non-biological parents.

²³ *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) art 12.