

Submission to the Australian Law Reform Commission Review of the Family Law System

Australian Law Reform Commission
via familylaw@alrc.gov.au

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To whom it may concern

Submission in response to the Review of the Family Law System Discussion Paper

Thank you for the opportunity to provide a submission to this review.

While there are a number of important issues raised in the Discussion Paper, I will restrict my comments to one issue in particular: the welfare jurisdiction, and specifically its impact on people born with variations in sex characteristics.

This issue is discussed in Chapter 9 of the Discussion Paper, and specifically addressed in Question 9-1:

In relation to the welfare jurisdiction:

- *Should authorisation by a court, tribunal, or other regulatory body be required for procedures such as sterilisation of children with disability or intersex medical procedures? What body would be most appropriate to undertake this function?*
- *In what circumstances should it be possible for this body to authorise sterilisation procedures or intersex medical procedures before a child is legally able to personally make these decisions?*
- *What additional legislative, procedural or other safeguards, if any, should be put in place to ensure that the human rights of children are protected in these cases?*

I will seek to answer these questions as both an advocate for the overall lesbian, gay, bisexual, transgender and intersex (LGBTI) community, and specifically as an ally for intersex people, including as a supporter of Intersex Human Rights Australia (IHRA).

In this capacity – as an intersex ally – I have affirmed the March 2017 Darlington Statement of intersex advocates and organisations from Australia and Aotearoa/New Zealand.
<https://darlington.org.au/affirmation/>

That Statement provides a clear set of principles which guide the response to the current Discussion Paper. This includes:

*Article 5: Our rights to **bodily integrity, physical autonomy and self determination.***

*Article 7: We call for the immediate **prohibition as a criminal act** of deferrable medical interventions, including surgical and hormonal interventions, that alter the sex characteristics of infants and children without personal consent. We call for freely-given and fully informed consent by individuals, with individuals and families having mandatory independent access to funded counselling and peer support.*

*Article 16: Current forms of **oversight of medical interventions** affecting people born with variations of sex characteristics have proven to be inadequate.*

a. We note a lack of transparency about diverse standards of care and practices across Australia and New Zealand for all age groups.

b. We note that the Family Court system in Australia has failed to adequately consider the human rights and autonomy of children born with variations of sex characteristics, and the

repercussions of medical interventions on individuals and their families. The role of the Family Court is itself unclear. Distinctions between 'therapeutic' and 'non-therapeutic' interventions have failed our population.

*Article 22: We call for the provision of alternative, independent, effective **human rights-based oversight mechanism(s)** to determine individual cases involving persons born with intersex variations who are unable to consent to treatment, bringing together human rights experts, clinicians and intersex-led community organisations. The pros and cons for and against medical treatment must be properly ventilated and considered, including the **lifetime health, legal, ethical, sexual and human rights implications.***

*Article 23: Multi-disciplinary teams must operate in line with **transparent, human rights-based standards of care** for the treatment of intersex people and bodies. Multi-disciplinary teams in hospitals must include human rights specialists, child advocates, and independent intersex community representatives [emphasis in original].*

I also endorse the 7 May 2018 submission by Intersex Human Rights Australia to the Review of the Family Law System – Issues Paper. <https://ihra.org.au/wp-content/uploads/2018/05/IHRA-20180507-ALRC.pdf>

This includes supporting their analysis of the serious problems caused by the jurisprudence of the Family Court to date in this area (on pages 33 to 42), specifically:

- *Welfare of a Child A* (1993)
- *Re: Carla (Medical procedure)* (2016)
- *Re: Lesley (Special Medical Procedure)* (2008), and
- *Re: Kaitlin* (2017).

The horrific circumstances of the *Re: Carla* case in particular demonstrate the acute failure of the Family Court to adequately protect the human rights of children born with intersex variations. Instead, the Family Court appears more likely to be complicit in, and sign off on, these same human rights violations.

It is hard not to agree with IHRA's conclusion that: 'this 2016 Family Court of Australia case is deeply disturbing, exemplifying the way that the human rights of intersex children are violated with inadequate evidence for social and cosmetic purposes' (page 39).

I further endorse the summary findings of the IHRA submission (on page 42) including that:

- *The Family Court system has not understood the intersex population, nor the nature of procedures in cases that it has been asked to adjudicate. Most cases are not subject to even this limited form of oversight.*
- *The Family Court has failed to properly utilise its procedures in order to ensure that the best interests of intersex children have been thoroughly investigated and understood within the medical context, and within the human rights context, and*
- *The 'best interests of the child' has been interpreted through a narrow lens, manipulated to facilitate experimental treatments that, contrary to Article 3 of the Convention on the Rights of the Child, conflict with the child's human dignity and right to physical integrity. This has been facilitated through appeals to gender stereotypes and social norms with insufficient attention to the long-term health and well-being interests of the child.*

And I support the recommendations made by IHRA on pages 43 and 44, including that:

Recommendation 4. Any non-deferrable interventions which alter the sex characteristics of infants and children proposed to be performed before a child is able to consent on their own behalf should be identified as medical treatment outside the scope of parental consent and

requiring authorisation of an independent body (hereafter referred to as the 'decision-making forum'). A decision-making forum must bring together human rights experts, clinicians, and intersex-led community organisations.

Recommendation 5. Whether consent is provided by the intersex minor or a decision-making forum, the pros and cons of medical treatment must be properly ventilated and considered, including the lifelong health, legal, ethical, sexual and human rights implications. Consent or authorisation for treatment must be premised on provision of all the available medical evidence on necessity, timing, and evaluation of outcome of medical interventions. Where this is no clinical consensus, this must be disclosed.

Recommendation 10. The current threshold criteria to determine whether or not a procedure is within the scope of parental authority is whether it is therapeutic or non-therapeutic. This criterion has failed to distinguish between interventions that are strictly clinically necessary and those that are not; between interventions based on culturally-specific social norms and gender stereotypes and those that are not. This criterion should be abandoned as a threshold test of whether a medical procedure requires oversight or authorisation from a decision-making forum, and

Recommendation 11. Children born with variations of sex characteristics must be treated by multi-disciplinary teams. Multi-disciplinary teams must operate in line with transparent, human rights-based standards of care for the treatment of intersex people and bodies. Multi-disciplinary teams in hospitals must include human rights specialists, child advocates, and independent intersex community representatives.

Based on all of the above factors, and returning to Question 9-1 in the Discussion Paper, my approach to these issues is therefore:

- All deferrable medical interventions, including surgical and hormonal interventions, that alter the sex characteristics of infants and children with variations in sex characteristics without personal consent should be prohibited as criminal acts.
- Where medical interventions on infants and children with variations in sex characteristics are considered non-deferrable, this must be subject to genuine independent oversight.
- Based on the advice of Intersex Human Rights Australia, the experiences of far too many people born with intersex variations, and the jurisprudence cited earlier, adequate oversight is *not* being provided currently. The Family Court has failed, in its welfare jurisdiction, to protect the welfare of intersex infants and children.
- Given this, the Family Court should no longer perform this function. Instead, a new independent authority should be created to oversee issues related to non-deferrable medical interventions on infants and children with variations in sex characteristics.
- This new independent authority should primarily be guided by human rights considerations, including the human rights of the child concerned – rather than the current approach which both prioritises and privileges a medicalised approach to these questions.
- Consequently, this new independent authority should receive evidence and information from human rights and children's rights experts, from intersex-led community organisations and peers, alongside clinical and psychosocial experts. Only by hearing from *all* of these sources can the issues be properly ventilated.
- This new independent authority should be national, both so that it can help ensure greater consistency, but also to assist with the transparency of and accountability for its decision-making.

Thank you for the opportunity to provide this submission to this important inquiry. Please do not hesitate to contact me, at the details provided, should you require additional information.

Sincerely,

Alastair Lawrie

