

Australian Law Reform Commission
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Submission regarding the consultation paper on religious educational institutions and anti-discrimination laws

Thank you for inviting submissions regarding the Commission's consultation paper on religious educational institutions and anti-discrimination laws, and for the opportunity to meet project staff during the consultation period.

Intersex Human Rights (IHRA) is a national charity. We promote the health and human rights of people with innate variations of sex characteristics, including rights to bodily autonomy and self-determination. Our goals are to help create a society where intersex bodies are not stigmatised, and where our rights as people are recognised. We build community, evidence, capacity, and provide education and information resources. Our staff and directors engage in work promoting consistent legislative and regulatory reform, reform to clinical practices, improvements to data collection and research. We also work to grow the intersex movement and the available pool of advocates and peer support workers, and address stigma, misconceptions and discrimination.

IHRA defines people with innate variations of sex characteristics in line with a 2016 statement by human rights experts, published by the UN Office of the High Commissioner for Human Rights: *"Intersex people are born with physical or biological sex characteristics (such as sexual anatomy, reproductive organs, hormonal patterns and/or chromosomal patterns) that do not fit the typical definitions for male or female bodies"*¹

We acknowledge the diversity of this population in our diagnoses, identities, legal sexes assigned at birth, genders, gender identities, and the words we use to describe our bodies, including clinical terms such as 'differences of sex development' or 'differences of sex development'.

At least 40 different traits or variations are known, most of which are genetically determined. Respondents to a large Australian sociological study of people born with

¹ OHCHR. 2019. 'Human Rights Violations Against Intersex People: A Background Note'.
<https://www.ohchr.org/en/documents/tools-and-resources/background-note-human-rights-violations-against-intersex-people>

atypical sex characteristics in 2015² had more than 35 different variations, including 5-alpha-reductase deficiency, complete and partial androgen insensitivity syndrome (AIS), 45,X0 (Turner's syndrome or TS), 47,XXY (Klinefelter syndrome), bladder exstrophy, clitoromegaly, congenital adrenal hyperplasia (CAH), cryptorchidism, epispadias, Fraser syndrome, gonadal dysgenesis (including Swyer syndrome), hyperandrogenism, hypospadias, innate forms of hypogonadism (for example Kallmann syndrome), leydig cell hypoplasia, micropenis, mosaicism involving sex chromosomes, mullerian (duct) aplasia, mullerian agenesis and vaginal agenesis (Mayer-Rokitansky-Küster-Hauser syndrome or MRKH), ovotestes, progesterin induced virilisation, XX male (De la Chapelle syndrome), Triple-X syndrome (XXX).

Because our bodies are perceived as different, we can experience stigmatisation, discrimination and harmful practices, including medical interventions to make our bodies appear or function in ways that are more typically female or male.

Misconceptions frequently associate particular gender identities or sex classifications with innate variations of sex characteristics – for example, an incorrect assumption that people with innate variations of sex characteristics necessarily have non-binary gender identities.

People with innate variations of sex characteristics may grow and express the same range of identities as those represented in the wider community. Many grow to express an LGBTQ identity (that is, to be same sex attracted or gender diverse) but equally many grow to identify in other ways (for example, heterosexual and/or cisgender women and men). The development of these identities should lie with the individual as they come to understand themselves and should not be attributed arbitrarily according to medical or social norms or beliefs. People with innate variations of sex characteristics are at risk of human rights violations irrespective of the words we use and our agency to express any identity.

The consultation paper, and the federal government, recognise that intersex traits are not a sexual orientation or gender identity.³ In the House of Representatives, the government has acknowledged a need to update legislative protections from discrimination on grounds of 'intersex status', to 'sex characteristics'.⁴

The Ruddock inquiry identified that discrimination against people with innate variations of sex characteristics is generally not sought by religious institutions; that inquiry recommended that jurisdictions with religious exemptions allowing discrimination on grounds of intersex status should remove them.⁵ Only South Australia has such an exemption. In our view it would be a perverse outcome for the possibility of discrimination to be made permissible through this inquiry.

At the same time, we are aware that more people with intersex traits grow up to have LGBTQ identities compared to the general population. People discriminating against intersex

² Jones, Tiffany. 2016. 'The Needs of Students with Intersex Variations'. *Sex Education* 16 (6): 602–18. <https://doi.org/10.1080/14681811.2016.1149808>

³ Letter to Morgan Carpenter from Tony Burke, 'Re: Fair Work Act', 22 December 2022

⁴ 'Hansard, 10 November 2022'. 2022. Canberra: House of Representatives

⁵ Ruddock, Philip, Rosalind Croucher, Annabelle Bennett, Frank Brennan, and Nicholas Aroney. 2018. 'Religious Freedom Review: Report of the Expert Panel'.

and LGBTQ people often do not distinguish between our populations or care about the distinctive characteristics of each group. In this regard, we are aware that people with more evident intersex traits have greater risks and experiences of discrimination. For these, as well as broader human rights considerations, we hope that the Commission will ensure that no forms of discrimination on religious grounds are permitted against sexual or gender minorities.

We discuss these issues in the attached recent submission on intersex people and religious discrimination. The submission also identifies a range of historical and current responses to our population.

Yours sincerely



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Executive director



20 December 2021

Submission on Religious Discrimination Bill 2021 and related bills

Intersex Human Rights Australia (IHRA)



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2 Introduction

Thank you for inviting submissions on the Religious Discrimination Bill 2021 and related bills the religious discrimination legislative package. We are pleased to submit this response.

2.1 About this submission

This submission by Intersex Human Rights Australia (IHRA) has been written by Morgan Carpenter, M.Bioeth (Sydney), M.InfTech (UTS), executive director of IHRA. It has been supported through review and feedback by our board of directors.

Intersex Human Rights Australia is a national charitable organisation run by and for people born with intersex variations, formerly known as Organisation Intersex International (OII) Australia. We registered as a not-for-profit company in 2010 and became a charity in 2012. Since December 2016 we have been funded by foreign philanthropy to employ two part-time staff to engage in policy development and systemic advocacy work.

We promote the health and human rights of people with innate variations of sex characteristics, including rights to bodily autonomy and self-determination. Our goals are to help create a society where intersex bodies are not stigmatised, and where our rights as people are recognised.

Our organisations has three paid part-time staff, and nine directors. Together we bring expertise in bioethics, medicine, law, public service, and education. Our executive director, senior project officer and board directors work to promote consistent legislative and regulatory reform, reform to clinical practices, social and community services and education. We also develop and share information, feedback and lived experience aimed at improving representation, data collection and research. We also work to grow the intersex movement, build the capacity of advocates and peer support workers, address stigma, misconceptions and discrimination. We build community, evidence, capacity, and provide education and information resources.

Our work is conducted in line with a 2017 community-designed platform, the Darlington Statement, which sets out priorities for the intersex movement in our region (AIS Support Group Australia et al. 2017).

We live and work on unceded First Nations land across Australia. We pay our respects to Elders. We acknowledge the resilience of First Nations peoples in the face of adversity and continuing harm.

We acknowledge the intersectional needs of intersex people across the Australian community – including age, gender, race, class, ethnicity, linguistic diversity, faith and religious affiliations.

We are willing to discuss our submission, if the committee would find this helpful. This submission may be published.

2.2 The context for our submission

Historical documents show that Christian religious (canon) law has long recognised the rights of intersex people, including the right to marry, and the ability of intersex men to witness a testament and be ordained (for example, in Medieval texts by Gratian and Huggucio; see also Finlay 1980). Similar provisions exist in Islam (Uddin 2017; Gesink 2018). Different treatment of men and women by religious institutions on grounds of sex means that religions can be expected to treat people born with intersex variations differently on the basis of sex, hence only intersex men have been ordained according to canon law (Gratian 12th century).

Many religious institutions are neglecting ancient teachings, and many policy-makers and LGBT institutions have only considered the meaning of intersex people to them within a modern LGBT context. Increasing polarisation on issues of sexual orientation and gender identity creates new risks to intersex people arising from a conflation of LGBT and intersex issues.

Some religious bodies have decried the construction of third sex categories (for example, Congregation for Catholic Education 2019); yet the Darlington Statement (AIS Support Group Australia et al. 2017), a regional community consensus platform, describes the construction of intersex as a third sex as harmful, and the consignment of intersex people to such categories appears to have its origins in an ahistorical Family Court of Australia decision (1979) that cited marriage norms in Christendom. These contradictions and inconsistencies are evident in federal legislative debates on marriage (for example, see Smith 2017a; Fawcett and Paterson 2017a) and NSW debates on abortion (Tudehope 2019a, 2019b); they illustrate assertions that policy-making is disjointed (Carpenter 2018a, 2018b). Varying attitudes and beliefs evidenced in religious, judicial and legislative debates on the existence and meaning of intersex people risk being grounded not in fact but in misconceptions, stigma and disgust, often based on physical appearance.

3 Specific areas of concern with the legislative package

The religious discrimination legislative package contain multiple features that place religious freedoms over other human rights. In our view, the package exacerbates existing inequalities, risking the right of Australian people with intersex variations to full participation in all aspects of social and community life including education, employment, health and wellbeing services.

3.1 Selective inclusion of religion and not freedom of thought and conscience

The *Religious Discrimination Bill* elevates religious speech over other forms of speech, including on grounds of thought or conscience that are identified by the same article 18 of the *International Covenant on Civil and Political Rights* (United Nations 1966) that identifies freedom of religion as a fundamental right.

The Bills fail to provide protections for students from discrimination on grounds of sexual orientation or gender identity (no exemption permits discrimination on the ground of intersex status).

In section 12, statements of belief are considered acceptable whenever an individual “genuinely considers” their statement to be in line with their understanding of their religion. Section 12 imposes no requirement that statements be made in good faith, unlike Section 18D of the *Racial Discrimination Act 1975* (Commonwealth of Australia 1975).

Protections for non-religious belief are asymmetric, as described in the case of halal vs vegan beliefs about meat in paragraph 172 of the Explanatory Memorandum (Cash 2021, 55).

3.2 The Bills override State and Territory law

Section 12(1)(c) of the *Religious Discrimination Bill 2021* explicitly overrides State and Territory law, exemplifying an additional manner in which freedom of religion is given priority over the rights of others to freedom from discrimination. This significantly increases the complexity and cost associated with complaints of discrimination.

3.3 Fair Work provisions omit protections for intersex people, again

During September 2021, the government had the opportunity to rectify an omission in the *Fair Work Act* that means that people with intersex variations are not adequately protected from discrimination on grounds of ‘intersex status’ or ‘sex characteristics’ in workplaces (additionally, there are no protections for gender diverse people on grounds of ‘gender identity’). Protections from harassment on the ground of sex, including intersex status, were implemented, and we thank Parliament for this provision (Burke 2021). However, proposals in the Senate to rectify these omissions via amendments to the *Sex Discrimination and Fair Work (Respect at Work) Amendment Act 2021* (Rice 2021a, 2021b) did not receive government support.

It is our strong preference for enactment of protections on grounds of ‘sex characteristics’, as in ACT, Victorian and Tasmanian law, in place of protections on grounds of ‘intersex status’. A failure to take this opportunity, while now proposing to amend the Fair Work Act to offer protections on grounds of religious belief or activity, again places freedom of religion above other rights.

We recommend that Parliament enact Fair Work protections on grounds of sex characteristics or, in the alternative, protections on grounds of intersex status. (For consistency, protections should also be implemented on grounds of gender identity.)

3.4 Update ‘intersex status’ to ‘sex characteristics’ in the Sex Discrimination Act

In line with our proposed changes to the Fair Work Act to provide protections for people with intersex variations commensurate with those proposed on grounds of religious belief, we ask Parliament to update the Sex Discrimination Act in line with best practice in ACT, Victorian and Tasmanian law, replacing the attribute of ‘intersex status’ with ‘sex characteristics’.

- The meaning and scope of ‘intersex status’ as defined in the Act is broader than normative definitions of intersex.
- ‘Sex characteristics’ more accurately represents the intent of the attribute of ‘intersex status’.
- The attribute of ‘intersex status’ is defined in relation to deficits.
- The attribute of ‘intersex status’ has been misinterpreted as referring to an identity category.

These issues can be resolved by updating the attribute, replacing ‘intersex status’ with ‘sex characteristics’ defined as follows:

sex characteristics means a person’s physical features relating to sex, and includes:
(a) the person’s genitalia and other sexual and reproductive parts of the person’s anatomy; and
(b) the person’s chromosomes; and
(c) the person’s hormones and secondary physical features emerging as a result of puberty.

3.5 Endorsement of Equality Australia submission

Intersex Human Rights Australia endorses the recommendations made by Equality Australia to this inquiry.

4 About intersex and community priorities

The information in this section is presented to promote an understanding of the population of people with intersex variations, in a context where misconceptions are widespread.

Intersex Human Rights Australia refers to intersex people in this document in line with definitions used by the UN Office of the High Commissioner for Human Rights, for example, in a 2019 Background Note on Human Rights Violations against Intersex People:

Intersex is an umbrella term used to describe a wide range of innate bodily variations in sex characteristics. Intersex people are born with sex characteristics that do not fit typical definitions for male or female bodies, including sexual anatomy, reproductive organs, hormonal patterns, and/or chromosome patterns (Office of the High Commissioner for Human Rights 2019)

Many forms of intersex exist; the word intersex is an umbrella term for a heterogeneous population. We use a variety of terms, including ‘innate variations of sex characteristics’, intersex, intersex variations, and specific diagnostic terms. Since 2006, clinicians frequently use a stigmatising label, ‘Disorders of Sex Development’ or ‘DSD’, to refer to intersex variations (Carpenter 2018a).

At least 30 or 40 different variations are known to science; most are genetically determined. Intersex variations can be determined prenatally (Davis 2013), at birth, during puberty, when trying to conceive a child, or at other times.

Intersex variations can include differences in the number of sex chromosomes, different tissue responses to sex hormones, or a different hormone balance. Examples include androgen insensitivity syndrome, gonadal dysgenesis, micropenis, sex chromosome variations, and congenital adrenal hyperplasia with XX or mosaic sex chromosomes.

Because our bodies are perceived as different, we can experience stigmatisation, discrimination and harmful practices, including surgical and other medical interventions intended to make our bodies more typically female or male.

4.1 Misconceptions

Misconceptions frequently associate particular gender identities or sex classifications with particular intersex traits. These misconceptions also wrongly situate intersex as a gender identity or a sex classification. Intersex people may grow up to express an LGBT identity (that is, to be same sex attracted or gender diverse) or they may grow up to identify in other ways (for example, heterosexual and/or identify with sex assigned at birth/cisgender). Intersex traits are innate, and experienced differentially by individuals across their communities.

The words that individuals use to describe themselves typically respond to what we have been taught by parents and clinicians, to our poor experiences of education about human

biological diversity, and to our experiences of misconceptions. Misconceptions can include beliefs that presume that people with intersex variations necessarily identify as non-binary or other than as female or male.

We strongly encourage respect for our diversity as a population, including respect for sexes observed or assigned at birth on the basis of sex characteristics observed at birth, respect for the diversity of our identities, and for the nomenclature that individuals use. People with intersex variations are at risk of stigmatisation, discrimination and other human rights violations irrespective of the words we use and our agency to express any identity. Along with a history of silence, secrecy, and shaming, these issues create significant health and wellbeing risks for our community.

4.2 Some examples of innate variations of sex characteristics

The purpose of this section is to provide sufficient understanding to enable consideration of the impact of policies, policy proposals, and practices affecting people with innate variations of sex characteristics.

Respondents to a large Australian sociological study of people born with atypical sex characteristics in 2015 (Jones et al. 2016) had more than 35 different variations, including 5-alpha-reductase deficiency, complete and partial androgen insensitivity syndrome (AIS), bladder exstrophy, clitoromegaly, congenital adrenal hyperplasia (CAH), cryptorchidism, De la Chapelle (XX Male) syndrome, epispadias, Fraser syndrome, gonadal dysgenesis, hyperandrogenism, hypospadias, Kallmann syndrome, Klinefelter syndrome/XXY, leydig cell hypoplasia, Mayer-Rokitansky-Küster-Hauser syndrome (MRKH, mullerian agenesis, vaginal agenesis), micropenis, mosaicism involving sex chromosomes, mullerian (duct) aplasia, ovotestes, progestin induced virilisation, Swyer syndrome, Turner's syndrome/XO (TS), Triple-X syndrome (XXX).

Below we detail the characteristics and experiences of people with several distinct intersex variations due, in some cases, to their higher frequency, and in one case due to the existence of relevant recent Family Court decisions.

4.2.1 Androgen insensitivity

Persons with androgen insensitivity syndrome ('AIS') have XY sex chromosomes (typically associated with men), testes (typically intra-abdominal), and a phenotype or physical appearance that may vary. The majority of people with complete AIS appear to be cisgender women and a high proportion are heterosexual (Warren 2017). People with partial AIS grow up to understand themselves in diverse ways, including many women and girls with a largely typical female phenotype, and people who look and understand themselves in different ways.

Diagnosis may take place at any point during infancy or childhood (for example, if testes are mistaken for herniation) or during puberty (due to lack of menstruation). The nature of AIS means that women with complete AIS will never 'virilise' ('masculinise') if their gonads are retained or if they take testosterone replacement therapy. Women and girls with partial AIS

may experience some virilisation if their gonads are retained or if they take testosterone replacement therapy depending on the degree of insensitivity to androgens. Men and non-binary people with partial AIS may seek virilisation where this is possible. Women and other people with 'higher grades' of partial AIS have limited capability for virilisation.

Once diagnosed, people with AIS are frequently subjected to gonadectomies, or sterilisation. Historically, rates of potential gonadal tumour risk have been overstated, particularly in the case of complete AIS. Current papers suggest a low gonadal tumour risk of 0.8% associated with the gonads of people with complete AIS (Pleskacova et al. 2010). Following sterilisation, individuals require hormone replacement to maintain bone health, libido and general health.

Women with complete AIS report assumptions behind medical intervention that include the idea that women should not have testes. These include assumptions that women with complete AIS need oestrogen as post-sterilisation hormone replacement, even though their bodies naturally produced testosterone. People with partial AIS may experience surgeries and other treatments that fail to respect their self-understandings and preferences.

We are aware of clinical claims that prophylactic sterilisations of women with complete AIS no longer take place, including claims that such interventions are 'in the past' (for example in Australasian Paediatric Endocrine Group et al. 2013). However we are unable to pinpoint any moment in time that divides that past from the present, and we are unaware of any Australian women with AIS aged under 50 who have not been sterilised. It was only very recently, in 2019, that a team of clinicians in the United States published a first management protocol for preservation of gonads in individuals with AIS (Weidler et al. 2019).

We are aware of cases where people with AIS have been unaware of their diagnosis, and so unable to manage key aspects of their life, including the consequences of sterilisation (for example, Kirkland 2017).

Historically, some women with complete AIS were excluded from competitive sport following chromosomal tests. Some women with partial AIS remain excluded. Women in such situations often have no prior knowledge of their intersex variation, and suffered humiliation, loss of career and, in at least one documented case, home and relationship (Martínez-Patiño 2005).

Chromosomal testing was abandoned as an unjust method of determining sex before the end of the twentieth century (Simpson J et al. 2000) before being reintroduced by World Athletics in recent years (International Association of Athletics Federations 2019). In recent years, hormonal testing has become accompanied by the reintroduction of chromosomal testing, affecting women with partial AIS and some other intersex variations such as 17-beta hydroxysteroid dehydrogenase 3 deficiency, 5-alpha reductase deficiency. This testing is contested, and key evidence supporting testing has been amended to remove an unsubstantiated claim of what Jeré Longman summarises as a 'causal connection between high testosterone levels and enhanced athletic performance among elite female athletes' (Longman 2021; BMJ Publishing Group Ltd and British Association of Sport and Exercise

Medicine 2021). Earlier this year, the International Olympic Committee introduced new guidelines that oppose these test regimes (International Olympic Committee 2021).

4.2.2 Congenital adrenal hyperplasia

Children with congenital adrenal hyperplasia (CAH) may necessitate immediate medical attention from birth to manage salt wasting. Salt wasting is potentially fatal and neonatal bloodspot screening is being introduced nationally to identify and treat children at risk (Department of Health 2020).

Children with congenital adrenal hyperplasia and XX chromosomes (typically associated with women) may also have genitalia that appears 'virilised' or atypical. Atypical genitalia, and higher rates of same sex attraction and gender transition are problematised in persons with CAH and XX sex chromosomes.

A 1990 paper by Heino Mayer-Bahlburg entitled *Will prenatal hormone treatment prevent homosexuality?* highlights 'an increase in bisexual and homosexual orientation' in women with CAH attributing this to prenatal androgen exposure (Meyer-Bahlburg 1990). Research to date has, however, found that a diverse range of potential factors including genetics and environmental factors, may be responsible for sexual attraction (Richards 2017). According to a 2010 paper by clinicians in New York City:

Without prenatal therapy, masculinization of external genitalia in females is potentially devastating. It carries the risk of wrong sex assignment at birth, difficult reconstructive surgery, and subsequent long-term effects on quality of life. Gender-related behaviors, namely childhood play, peer association, career and leisure time preferences in adolescence and adulthood, maternalism, aggression, and sexual orientation become masculinized [sic] in 46,XX girls and women with 21OHD deficiency (Nimkarn and New 2010).

These characteristics, including behavioural 'masculinisation' were described as 'abnormalities'. The paper went on to state:

The rates of gender dysphoria and patient-initiated gender change in this population are higher than the rates ... in the general population... Genital sensitivity impairment and difficulties in sexual function in women who underwent genitoplasty early in life have likewise been reported ... We anticipate that prenatal dexamethasone therapy will reduce the well-documented behavioral masculinization and difficulties related to reconstructive surgeries (Nimkarn and New 2010).

At the time of a 2013 Senate inquiry, this prenatal therapy was available in Australia. The Senate sought to end such interventions due to associated cognitive risks to the children concerned (Senate of Australia Community Affairs References Committee 2013). However, their current status in Australia is undocumented.

These rationales for treatment have proven controversial (Dreger, Feder, and Tamar-Mattis 2012). Future clinical papers appear to have abandoned disclosure of such rationales – however, the same treatments, including ‘genitoplasties’, persist. This appears to mean that rationales are now simply undisclosed or undocumented.

Despite acknowledgement of impaired sensation and sexual function, and higher than typical rates of gender assignment change, at time of writing a resource published by an agency of the Department of Health in Victoria omits consideration of human rights concerns and normalises early elective surgeries, stating:

Most surgical correction [sic] is now delayed until 6 months of age or later. Opinion currently varies between centres as to surgical management options (Victorian Agency for Health Information and Safer Care Victoria 2018)

In November 2017, an SBS Insight program on intersex heard from Professor Sonia Grover of the Royal Children’s Hospital Melbourne, commenting that surgical practices today are better than they used to be, implying certainty about future gender identity, sexual orientation and normative ideas about future preferences for body morphology (Insight SBS 2017).

No disclosure is made about risks to sexual function and sensation, however, reference is made to vaginal scar tissue in the context of pregnancy and vaginal delivery. The need for such interventions is, however, not indicated or substantiated. Evidence of necessity is lacking, and reliable evidence of good outcomes is lacking. Globally, there remains no accepted evidence to support surgical practices. For example, a 2016 clinical update states that:

There is still no consensual attitude regarding indications, timing, procedure and evaluation of outcome of DSD surgery. The levels of evidence of responses given by the experts are low (B and C), while most are supported by team expertise... Timing, choice of the individual and irreversibility of surgical procedures are sources of concerns. There is no evidence regarding the impact of surgically treated or non-treated DSDs during childhood for the individual, the parents, society or the risk of stigmatization (Lee et al. 2016).

4.2.3 17-beta hydroxysteroid dehydrogenase 3

Infants with 17-beta hydroxysteroid dehydrogenase 3 (17 β -HSD3) have XY chromosomes and may have genitals that appear at birth to be somewhere between typically female and typically male. In cases where visible genital variation is evident at birth, the currently proposed World Health Organization *International Classification of Diseases* ICD-11 beta suggests that gender assignment be made based on a doctor’s assessment of the technical results of masculinising genitoplasty, and that genital surgeries must occur early. Elimination via selective embryo implantation during IVF is also stated as possible:

If the diagnosis is made at birth, gender assignment must be discussed, depending on the expected results of masculinizing genitoplasty. If female

assignment is selected, feminizing genitoplasty and gonadectomy must be performed. Prenatal diagnosis is available for the kindred of affected patients if causal mutations have been characterized (Carpenter 2018a; World Health Organization 2020).

The Australasian Paediatric Endocrine Group acknowledges such interventions, even while advising the Senate in 2013 that such early interventions are controversial and known to be associated with ‘particular concern’ regarding post-surgical sexual function and sensation (Australasian Paediatric Endocrine Group et al. 2013).

Additionally, according to a review paper, rates of gender change in persons with 17-beta-hydroxysteroid dehydrogenase 3 deficiency assigned female at birth are ‘39–64% of cases’ (Cohen-Kettenis 2005). This means that children subjected to feminising genitoplasties may not be girls at all.

In 2006, a clinical ‘consensus statement’ described the risk of gonadal tumours associated with 17 β -HSD3 to be 28%, a ‘medium’ risk, recommending that clinicians ‘monitor’ gonads (Hughes et al. 2006). A more recent clinical review published in 2010 reduced risk levels to 17% (Pleskacova et al. 2010) and a German multidisciplinary team advised Amnesty International in 2017 that, in any case, ‘cancer risk even for the high risk groups is not so high. We can monitor with ultrasound and for tumour markers’ (Amnesty International 2017). However, like the WHO ICD-11 classification (World Health Organization 2020), current medical journal articles on this trait (for example, Lee et al. 2016) recommend gonadectomy with female gender assignment, and not on the basis of cancer risks.

In 2008, in the Family Court case *Re Lesley (Special Medical Procedure)*, a judge approved the sterilisation of a young child with 17 β -HSD3 (Family Court of Australia 2009). This was intended to prevent the child’s body from virilising at puberty. According to a submission by counsel, the alternative to sterilisation included (at [39]) to:

(a) take no action and allow [Lesley] to virilise and make a determination about her gender later

That is, sterilisation was not predicated on clinical urgency regarding cancer risk, but instead to surgically reinforce a female gender assignment and pre-empt later determination. Risks of gonadal tumour were stated to be ‘significant’ (at [40]).

In 2016, in the Family Court case *Re: Carla (Medical procedure)*, a judge approved the sterilisation of a 5-year old child with 17 β -HSD3, surprisingly claiming that ‘it would be virtually impossible to regularly monitor them for the presence of tumours’ (at [20]) (Family Court of Australia 2016). This does not accord with the German experience (Amnesty International 2017) and nor does it accord with a 2006 clinical ‘consensus’ statement recommending monitoring (Hughes et al. 2006). The judge described how (at [30]):

It will be less psychologically traumatic for Carla if it is performed before she is able to understand the nature of the procedure

This indicates a lack of urgency related to tumour potential, in addition to a deliberate constraint on the capacity of 'Carla'. Gender stereotyping appears to form the substantive basis of the decision to sterilise 'Carla', including an assumption of a future female gender identity (at [15]):

- a. *Her parents were able to describe a clear, consistent development of a female gender identity;*
- b. *Her parents supplied photos and other evidence that demonstrated that Carla identifies as a female;*
- c. *She spoke in an age appropriate manner, and described 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';*
- d. *She happily wore a floral skirt and shirt with glittery sandals and Minnie Mouse underwear and had her long blond hair tied in braids; and*
- e. *Her parents told Dr S that Carla never tries to stand while urinating, never wants to be called by or referred to in the male pronoun, prefers female toys, clothes and activities over male toys, clothes and activities, all of which are typically seen in natal boys and natal girls who identify as boys.*

The judge also expressed, at [18], an assumption of future heterosexuality: 'Carla may also require other surgery in the future to enable her vaginal cavity to have adequate capacity for sexual intercourse'.

The judge also stated, when the child was 3-years of age (at [2]):

Surgery already performed on Carla has enhanced the appearance of her female genitalia.

This was a clitorrectomy and labioplasty,(at [16]) sometimes termed a 'vulvoplasty'. This statement is quite extraordinary. Australia, in common with many other countries, maintains a legal prohibition on Female Genital Mutilation (FGM). FGM refers to all procedures involving partial or total removal of the external female genitalia or other injury to the female genital organs for 'non-medical reasons' (World Health Organization et al. 2008). In societies where female genital mutilation is a norm, it is recognised to be carried out to, *inter alia*, enable a woman to fully participate in society, prepare for adulthood, and meet cultural standards for female appearance. The World Health Organization and other bodies recognize that medicalization, including as a form of harm reduction, does not justify female genital mutilation. Yet, intersex girls are exempt from such protections, including in the Criminal Code of Western Australia (Western Australia 2004). The gender stereotyping evident in *Re: Carla (Medical procedure)* demonstrates a moral hypocrisy in such exemptions.

4.2.4 47,XXY/Klinefelter syndrome

People with Klinefelter syndrome are clinically defined as men with an extra X sex chromosome (i.e. XXY sex chromosomes, or 47,XXY). Klinefelter syndrome is associated with

small testes, hypogonadism (low sex hormone levels, in this case low levels of testosterone), and also may be associated with cognitive issues such as ADHD, and a range of other health risks (Skakkebak, Wallentin, and Gravholt 2015). As with other intersex variations, innate physical characteristics of people with XXY are socially stigmatised. Men with Klinefelter syndrome have poorer socioeconomic outcomes (Skakkebak, Wallentin, and Gravholt 2015); this 2015 clinical review states that 90% of people with Klinefelter syndrome are diagnosed after age 15, and only a quarter of individuals expected to have this variation are ever diagnosed.

It is possible that persons with XXY who are not diagnosed may potentially escape some stigma associated with the variation; alternatively, they may either suffer in silence, or clinical signs may be skewed towards those evident in people more likely to be diagnosed.

Not all people with XXY sex chromosomes are male (Röttger et al. 2000) but, due to the current medical paradigm that assumes all people with XXY chromosomes are men, women with XXY and people who understand themselves in other ways face additional challenges in accessing appropriate medical care, with their health and social experiences needs largely unreported.

In 2003, reports emerged, originally in the Western Australian newspaper, that Alex MacFarlane, a person with XXY sex chromosomes living in Perth Hills who identified as 'androgynous', received the first 'X' passport (Butler 2003). Alex had received a birth certificate from Victoria stating 'indeterminate – also known as intersex'. This conflation of intersex with a third category of sex is unfortunate in that it fails to acknowledge the diversity of the population of people with intersex variations. It should never be inferred from this development that all people with XXY, or all people with intersex variations, wish to be marked as neither female nor male. Julie Butler, writing for Western Australian, stated 'Not all 47XXY people identify as androgynous. Some perceive themselves as male or female, and many, like Alex, were surgically altered at birth to appear male or female' (Butler 2003).

4.3 Community priorities

Community priorities are set out in the *Darlington Statement*. This Statement is a community consensus platform developed by Australian and New Zealand intersex organisations and advocates in 2017 (AIS Support Group Australia et al. 2017). It covers a range of priorities in relation to protections for bodily integrity, anti-discrimination law, and sex markers.

4.3.1 Bodily integrity

Community demands include:

- ***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***

- *mandatory independent access to funded counselling and peer support [including integration within multidisciplinary teams in hospitals]*
- *appropriate **human rights- based, lifetime, intersex standards of care** with full and meaningful participation by intersex community representatives and human rights institutions*
- *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 (AIS Support Group Australia et al. 2017)*

None of these demands are currently met. Forced and coercive medical interventions persist. The surgery on ‘Carla’ detailed in the Family Court case *Re: Carla* is not unique.

A 2014 Department of Health Medicare Benefits Schedule Review on ‘vulvoplasties’¹ identifies 371 Medicare-funded vulvoplasties for ‘congenital malformations’ during the period 2007/8 to 2011/2; an average of 74.2 per year (Department of Health 2014). Medicare procedures data published by the Australian Institute of Health and Welfare (AIHW) show an average of 71.5 vulvoplasties per year in children aged under 15 between 2002/3 and 2014/5, with a range from 57 to 95 procedures per year (Australian Institute of Health and Welfare 2017). These data are not associated with diagnostic data or claimed rationales for interventions.

The same AIHW data also show that the numbers of vulvoplasties in the 0-19 year age groups have increased significantly from 101 in 2002/3 to 258 in 2015/5.

The number of masculinising surgeries shows no particular trend over the period from 2002/3 to 2014/5. Of particular note, the Institute reports 200 *repeat* surgeries on persons aged under 20 for ‘repair of postoperative urethral fistula’ in 2013/4, including 125 such repeat procedures in children aged 1 to 4 years. To be clear, these are follow-up surgeries for iatrogenic conditions, caused by prior medical intervention.

Research published in 2018 shows that there is no evidence of any reduction in the number of surgeries relevant to children born with intersex variations over the period 2002/3 to 2014/5 (Carpenter 2018b).

Bodily integrity and international law

The right to security of the person, including freedom from injury to the body and the mind, or bodily and mental integrity are protected by the first substantive right in the *Universal Declaration of Human Rights*, article 3, as well as the *International Covenant on Civil and Political Rights*, article 9, and the *Convention on the Rights of Persons with Disabilities*, article 17 (Committee on Civil and Political Rights 2014, para. 3; United Nations 2006).

¹ Defined in the Review as ‘any surgery performed on the outside female genital structures’

States have an obligation to eliminate forced, coercive, and unnecessary medical interventions to modify variations of sex characteristics, and violence against intersex persons. For example, in October 2016, UN agencies and experts, and regional institutions, made the following joint statement:

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.

Intersex children and adults should be the only ones who decide whether they wish to modify the appearance of their own bodies – in the case of children, when they are old or mature enough to make an informed decision for themselves...

States should investigate human rights violations against intersex people, hold those found guilty of perpetrating such violations accountable and provide intersex people subjected to abuse with redress and compensation (Public statement of UN and regional human rights experts 2016).

Reflecting developments in international law, the 2017 *Yogyakarta Principles plus 10* on the application of international human rights law in relation to sexual orientation, gender identity, gender expression and sex characteristics state in Principle 32 that:

Everyone has the right to bodily and mental integrity, autonomy and self-determination irrespective of sexual orientation, gender identity, gender expression or sex characteristics. Everyone has the right to be free from torture and cruel, inhuman and degrading treatment or punishment on the basis of sexual orientation, gender identity, gender expression and sex characteristics. No one shall be subjected to invasive or irreversible medical procedures that modify sex characteristics without their free, prior and informed consent, unless necessary to avoid serious, urgent and irreparable harm to the concerned person (Yogyakarta Principles 2017).

In 2015, Malta became the first jurisdiction to protect the rights to bodily integrity of intersex and other children. The legislation prohibits non-essential modifications to children's sex characteristics, provides for oversight of decision making on cases where necessity is claimed, and provides for the development of standards of care (Malta 2018).

IHRA made a submission to the UN Human Rights Committee regarding current practices in Australia and our country's obligations under the *International Covenant on Civil and Political Rights*, and the Committee's Concluding Observations in 2017 stated:

25. The Committee is concerned that infants and children born with intersex variations are sometimes subject to irreversible and invasive medical

interventions for purposes of gender assignment, which are often based on stereotyped gender roles and are performed before they are able to provide fully informed and free consent (arts. 3, 7, 9, 17, 24 and 26).

26. The State party should give due consideration to the recommendations made by the Senate Standing Committee on Community Affairs in its 2013 inquiry report on involuntary or coerced sterilisation of intersex people, and move to end irreversible medical treatment, especially surgery, of intersex infants and children, who are not yet able to provide fully informed and free consent, unless such procedures constitute an absolute medical necessity (Human Rights Committee 2017).

The cited articles of the *International Covenant on Civil and Political Rights* are on non-discrimination (articles 3 and 24), protection from torture and experimentation (article 7), the right to liberty and security (article 9), privacy (article 17), and equality before the law (article 26). These citations highlight the many ways in which current medical practices violate our human rights. The same *Covenant* underpins international law recognising the right to freedom of belief and religion (article 18). In 2018, the Committee on the Elimination of Discrimination against Women called for Australia to enact specific legal protections (2018, para. 26). In September this year, the Committee on the Rights of Persons with Disabilities made a similar call (2019, para. 34).

Bodily integrity in Australia

In 2013, as part of a broader inquiry on the involuntary or coerced sterilisation of people with disabilities in Australia, the Senate Community Affairs Reference Committee published a report on the involuntary or coerced sterilisation of intersex people in Australia. It called for substantive changes to medical practices to protect the rights of children. Amongst its statements, the cross-party report stated that:

3.107 ... there is no medical consensus around the conduct of normalising surgery...

3.128 ... Normalising appearance goes hand in hand with the stigmatisation of difference... There is frequent reference to 'psychosocial' reasons to conduct normalising surgery. To the extent that this refers to facilitating parental acceptance and bonding, the child's avoidance of harassment or teasing, and the child's body self-image, there is great danger of this being a circular argument that avoids the central issues... Irreversible medical treatment, particularly surgery, should only be performed on people who are unable to give consent if there is a health-related need to undertake that surgery, and that need cannot be as effectively met later, when that person can consent to surgery. (Senate of Australia Community Affairs References Committee 2013)

The recommendations of the cross-party report have not been implemented in any Australian jurisdiction. In a response to the report, the federal government approvingly

cited non-binding and abstract guidelines produced in Victoria (Attorney General's Department 2015b). However, the guidelines appear to be disregarded in that State (Intersex Human Rights Australia 2019).

4.3.2 Australian Human Rights Commission inquiry

The Australian Human Rights Commission published a report on a major 3-year inquiry on protecting the human rights of people born with variations of sex characteristics in medical settings on Monday 19 October 2021. The report identified significant problems with current medical practice, meaning that infants and children with intersex variations are at risk of unnecessary and unwanted medical interventions intended to make our bodies appear or function more typically female or male before we have agency to express our values and preferences.

We welcome this report and seek implementation of all recommendations on proposed legislation and regulation of medical practices, and community-based participatory research.

4.3.3 Anti-discrimination law

Contemporaneously with the Senate inquiry on involuntary or coerced sterilisation, Australia was the first country to introduce standalone protection for intersex people from discrimination in access to services and employment, through welcome cross-party support for amendments to the *Sex Discrimination Act 1984* in 2013. Intersex status is defined in the amended Act:

Intersex status means 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.

As with the UN definition of intersex, this Australian legal definition refers to *features* or characteristics. It does not specify any legal sex, sexual orientation or gender identity. According to the explanatory memorandum for the amending bill, the attribute was not intended to create a third sex (House of Representatives 2013).

Unfortunately, changes to anti-discrimination law in 2013 have, however, been imputed to imply matters of identity (Yoosuf 2015). These misinterpretations have unfortunately been given impetus by poorly-formed federal guidelines on the recognition of sex and gender that simultaneously recognise that intersex people may be female, male or identify otherwise as 'X', and also include the word intersex within a definition of 'X' (Attorney General's Department 2015a). In a positive move to respond to this issue, Australian Standard AS4590 on data interchange now defines 'X' gender as 'non-binary'.

Many submissions to the inquiry may unfortunately reflect these misconceptions, for example, through a framing of issues affecting 'LGBTI' populations or an 'LGBTI community' as issues of sexuality and gender diversity. Perhaps the most challenging effect of such misunderstandings is that they have made intersex more incomprehensible or obscured. We

invite the inquiry to carefully examine submissions that extrapolate the characteristics and needs of an intersex population from an exclusive or primary analysis of the characteristics and needs of LGBT people.

Internationally, a different attribute of ‘sex characteristics’ has been implemented in law by multiple national governments to protect intersex and other people from discrimination and violence (Malta 2018). This attribute has been cited by the Asia Pacific Forum of National Human Rights Institutions (Asia Pacific Forum of National Human Rights Institutions 2016), and a major 2017 supplement to the *Yogyakarta Principles* on the application of international human rights law in relation to sexual orientation, gender identity, gender expression and sex characteristics.² Use of this updated attribute is also supported by the *Darlington Statement* (AIS Support Group Australia et al. 2017) for several reasons, including that it usefully cannot be imputed as a matter of identity rather than embodiment.

The *Darlington Statement* calls for access to reasonable accommodations in education and employment, including ‘special needs requirements, workplace adjustments, job access assistance, and provisions for medical leave’ (2017, para. 57).

4.3.4 Education

Current and recent clinical statements refer to the distress of parents and even delivery room staff on the birth of an infant with visible intersex characteristics (Department of Health and Human Services 2015). Education – including schooling and clinical education – does not adequately prepare individuals for the birth of an infant with intersex variations. This situation can exacerbate risks of forced and coercive medical interventions, and makes it more difficult for people with intersex variations to flourish.

Access to knowledge about intersex variations in an appropriate, affirming, and age appropriate manner can enhance the agency and capacity of people with intersex variations to provide informed consent, free of coercion. Inclusive education is also imperative for a free and equal society against bigotry, stigmatisation and discrimination within educational settings that inform participation access, engagement and participation is all aspects of a person’s life (Brömdal et al. 2020; Zavros-Orr 2021).

4.3.5 Sex markers

An involuntary consignment of intersex persons in Australia to a *de facto* third or non-binary status has occurred since the annulment of the marriage of a man deemed a ‘true hermaphrodite’, based on an ahistorical appeal to marriage ‘as understood in Christendom’, in the 1979 Family Court of Australia case *In the marriage of C and D (falsely called C) (1979) FLC 90-636*. Some individuals (intersex and non-intersex) have freely chosen third or non-binary sex markers since 2002/3 (Butler 2003).

² The *Yogyakarta Principles plus 10* defines ‘sex characteristics’ as follows: ‘UNDERSTANDING “sex characteristics” as each person’s physical features relating to sex, including genitalia and other sexual and reproductive anatomy, chromosomes, hormones, and secondary physical features emerging from puberty’

Current federal guidelines (Attorney General's Department 2015a), South Australian regulations (Consumer and Business Services 2017) and ACT regulations (Office of Regulatory Services and Australian Capital Territory Government 2014) position intersex within a third sex/gender category. In response to involuntary association with third sex markers, the *Darlington Statement* declares that:

*8. Regarding **sex/gender classifications**, sex and gender binaries are upheld by structural violence. Additionally, attempts to classify intersex people as a third sex/gender do not respect our diversity or right to self determination. These can inflict wide-ranging harm regardless of whether an intersex person identifies with binary legal sex assigned at birth or not. Undue emphasis on how to classify intersex people rather than how we are treated is also a form of structural violence. (AIS Support Group Australia et al. 2017)*

A persistent harmful framing of intersex as a third sex classification, together with diverse personal preferences while sex classifications remain stated on legal identification documents, led to a declaration that 'The larger goal is not to seek new classifications but to **end legal classification systems** and the hierarchies that lie behind them':

- a. As with race or religion, sex/gender should not be a legal category on birth certificates or identification documents for anybody.*
- b. While sex/gender classifications remain legally required, sex/gender assignments must be regarded as provisional. Given existing social conditions, we do not support the imposition of a third sex classification when births are initially registered.*
- c. Recognising that any child may grow up to identify with a different sex/gender, and that the decision about the sex of rearing of an intersex child may have been incorrect, sex/gender classifications must be legally correctable through a simple administrative procedure at the request of the individual concerned.*
- d. Individuals able to consent should be able to choose between female (F), male (M), non-binary, alternative gender markers, or multiple options. (AIS Support Group Australia et al. 2017)*

In respect of the long-term aspirational goal stated here, we note that Australian governments are increasingly relying on, and sharing, biometric data, and a call to end sex markers on legal identification documents has no consequences for the census and other surveys beyond those caused by the absence of racialised and religious classifications on identification documents.

Reforms to at least end construction of intersex as a third category require change to current federal guidelines on recognition of sex and gender (Attorney General's Department 2015a).

Since early 2015, we have publicly and jointly with a range of other organisations asked the government to change the definition of X from 'indeterminate/intersex/unspecified' to 'non-binary', as a minimum reform of current standards (National LGBTI Health Alliance et al. 2015). IHRA has also made submissions to ACT and SA governments on this matter, prior to establishment of such regulations (Briffa 2013; Carpenter and Organisation Intersex International Australia 2017b).

5 What we know about religious teachings in relation to intersex people

5.1 Christian teachings and attitudes

Here we present data on some early and some modern Christian attitudes towards intersex persons. We acknowledge that a diverse range of religious beliefs exist within Christian traditions, as with non-Christian traditions. We therefore also acknowledge that some religious institutions seek to make space for people who are same sex attracted and people who are gender diverse and they may also assert inclusivity for intersex people.

5.1.1 Canon law and early common law

Early canon law, apparently based on Roman law, recognised intersex people as ‘hermaphrodites’, a term that has in recent centuries narrowed in meaning to define fertile organisms that possess both female and male reproductive organs. Historic legal definitions, in contrast, recognise a diversity that should be recognised in present-day intersex populations. The 12th century *Decretum Gratiani* states:

Whether an hermaphrodite may witness a testament, depends on which sex prevails (Hermaphroditus an ad testamentum adhiberi possit, qualitas sexus incalescentis ostendit). (Gratian 12th century)

Raming cites the work of the near contemporary Italian canon lawyer Huguccio in *causa* 4, l. 2 and 3, c. 3, 22 *ad v. sexus incalescentis*, which suggests that ordination of intersex men is ‘of course’ possible:

If someone has a beard, and always wishes to act like a man (exercere virilia) and not like a female, and always wishes to keep company with men and not with women, it is a sign that the male sex prevails in him and then he is able to be a witness, where a woman is not allowed, that is, in a will and in final wishes, and then, of course, he is able to be ordained (Raming 2004, 2:113)

Finlay cites Freisen who, in a history of canon marriage law (*‘Geschichte des kanonischen Eherechts’*), quotes from the *Tractatus de matrimonio*:

The question naturally arises, whether a hermaphrodite can contract marriage with a man or a woman. On this matter, the authority of the fathers of the church is emphatic that if the sexual drive of mature years is evident, a hermaphrodite can contract marriage either with a man or a woman according to its indications; consequently, if the hermaphrodite comes closer to the male sex than the female and has the signs of virility, a beard and so forth, he should be understood to be able to contract marriage with a woman (Finlay 1980, 120)

Raming identifies the same perspective on consecration in canonical literature from the 1940s and 1950s:

*Even in modern canonical literature, for instance, the question whether a hermaphrodite can be consecrated is solved in exactly the same fashion used by Huguccio (and thus by Roman law). Cf. Heribert Jone, *Gesetzbuch der lateinischen Kirche*, 2nd ed. (Paderborn, F. Schöningh, 1950-1953), 3 vols., 2:191; A Lanza, "De requista sexus virilis certa determinatione et distinctione ad ordines," in *Apollinaris* 19 (1946):49-66. (Raming 2004, 2:113)*

Coincidentally, Edward Coke held substantively the same position in his *Institutes of the Laws of England*, for example, in relation to inheritance:

Every heire is either a male, a female, or an hermaphrodite, that is both male and female. And an hermaphrodite (which is also called Androgynus) shall be heire, either as male or female, according to that kind of sexe which doth prevaile (Greenberg 1999, 41)

Such examples do not provide a basis for self-determination, but nor are they stigmatising; they indicate that intersex people were able to participate in their societies, including participation in religious practices.

A medicalisation of intersex bodies in the nineteenth and twentieth centuries essentially framed intersex people as a social problem that could be medicalised to prevent the possibility of homosexuality. Elizabeth Reis, for example, states that:

Doctors believed that surgery was warranted in many cases of atypical genitalia, not necessarily for the health, comfort, or pleasure of the patient, but to preclude the undesirable potential for homosexual sex. Even life-long celibacy was preferable to homosexuality. Physicians in the 1880s and 1890s wanted their patients to understand their hermaphroditic conditions as deformities and not as a physical license to commit sexual immorality (Reis 2012, 68).

In addition to the term hermaphrodite, other historical terms applied to some intersex people include 'eunuch' and 'barren woman'.

5.1.2 The Family Court (1979), a break with the past

In Australia, this historical Christian position was overturned in the 1979 Family Court case *In the marriage of C and D (falsely called C)*, inaccurately citing marriage norms in Christendom to consign intersex people to a *de facto* third sex category. In this case, Bell J stated:

The wife's consent to the marriage was not a true consent because she was mistaken as to the identity of the husband at the time of the marriage. She

believed that she was marrying a male whereas in fact she was marrying a combination of both male and female.

Marriage as understood in Christendom is the voluntary union of one man and one woman to the exclusion of all others for life, and since the respondent was a combination of both, a marriage in the true sense could not have taken place and did not exist (Family Court of Australia 1979)

While since repudiated, the case is still cited, as a case of mistaken identity involving someone with *de facto* third sex status, for example in *Tien-Lao & Tien-Lao* [2018] FamCA 953 (21 November 2018):

Although C and D has since been authoritatively repudiated for reasons unrelated to the conclusion reached about the wider meaning of mistaken identity... [54]

even if the broader test adopted by Bell J were to be applied in this instance, it would not afford the parties any advantage. In C and D, at the time of marriage, the husband was found to be a hermaphrodite: neither a male nor a female (at 528). The wife mistakenly believed she was marrying a man, so the marriage was void. [55] (Family Court of Australia 2018)

The analysis in the case was ahistorical, and failed to acknowledge the then available historical record, including that identified by Henry Finlay in a response to the case (Finlay 1980). It preceded the existence of an intersex movement, and continues to call into question the identity and status of people born with intersex variations, even where alternative identities have been unavailable, where they identify with their sex assigned at birth and where they have never understood themselves as anything else. The man in this troubling case was also the subject of a 1966 *Medical Journal of Australia* case, which established that he freely chose surgeries as an adult in line with his sex assigned at birth (early surgeries were not performed when the man was a child) (Fraser, O'Reilly, and Rintoul 1966).

5.1.3 Current positions by Christian institutions

Current Christian approaches often appear unaware of the historical treatment of people with intersex variations in church law. The specific circumstances of intersex people appear to be sometimes unthinkingly subsumed in debates between conservative Christian interests and LGBT interests. Sometimes the existence of intersex people is brought into in a contested, increasingly polarised, debate about concepts of nature, nurture and sin. In the context of marriage, some argue that sexual orientation and gender identity have biological components, that LGBT people are 'born that way', while religious organisations opposing marriage equality have contended that same sex attraction is behavioural and not innate. In this politicised environment, the meaning of intersex people has been reinterpreted through lenses primarily focused on same sex attraction, or transgender people. Such reinterpretations thus carry many risks – particularly for people born with intersex

variations who are not LGBT. Careful regard should be had to the potential impact of these debates on people born with intersex variations – and particularly those who are not LGBT.

Some other religious bodies have framed their analysis around a concept of ‘the fall’ where, in common with other people with physical differences, intersex traits are seen as evidence of a ‘fall’ from Eden.

Religious institutions presently often cite *Matthew 19:12*. The following text comes from a 2017 report by the Sydney Anglican Diocese:

For there are eunuchs who have been so from birth, and there are eunuchs who have been made eunuchs by men, and there are eunuchs who have made themselves eunuchs for the sake of the kingdom of heaven. Let the one who is able to receive this receive it. (Matt 19:12) (Sydney Diocesan Doctrine Commission 2017)

5.1.4 Focus on the Family (2015)

Some religious institutions medicalise intersex people, framing us directly or indirectly as tragic, confused and lonely, and as examples of ‘the fall’ from Eden, alongside anyone with (Price 2015) any kind of disability or chronic condition. For example, a 2015 statement by Focus on the Family on transgender people makes a number of comments about intersex people, including:

- That humans live in a ‘fallen’ state that leads to ‘genetic, biological and congenital conditions’ that ‘plague our physical existence’.
- That intersex people do not demonstrate gender fluidity.
- That intersex people ‘often walk confusing, challenging and lonely journeys through life’ (Price 2015).

Focus on the Family stated that Christians should help intersex people to carry a ‘heavy yoke’ ‘and steward their assigned gender’, thus apparently opposing changes from an original sex assignment, but affirming a right to heterosexual marriage (Price 2015).

So how should we, as Christians, minister to those among us who deal with the unique and often traumatic circumstances associated with intersexuality? Some intersex individuals will marry, and some may never discover their underlying condition. But Jesus' own words, as recorded in Matthew 19, should serve as our guide for those who cannot or don't marry due to intersex issues. (Price 2015)

5.1.5 The Nashville Statement (2017)

In August 2017, a group of evangelical pastors in the US signed the *Nashville Statement*, a position statement, primarily focusing on their position towards LGBT people. However, Article 6 comments on intersex people, stating that:

WE AFFIRM that those born with a physical disorder of sex development are created in the image of God and have dignity and worth equal to all other image-bearers. They are acknowledged by our Lord Jesus in his words about “eunuchs who were born that way from their mother's womb.” With all others they are welcome as faithful followers of Jesus Christ and should embrace their biological sex insofar as it may be known.

WE DENY that ambiguities related to a person's biological sex render one incapable of living a fruitful life in joyful obedience to Christ (Coalition for a Biblical Sexuality 2017).

Lianne Simon of Intersex & Faith, Inc., has stated in response that she is ‘troubled that this affirmation appears to require us to give up our bodily integrity and embrace some doctor’s guess at what sex God meant us to be’ (Simon 2017a). However, Intersex & Faith contacted more than 100 *Nashville Statement* respondents, and it found that:

- None of the signatories ‘appeared to be in favor of childhood genital surgeries’, with Denny Burk, an architect of the *Nashville Statement*, explicitly opposing them.
- Most respondents felt that they lacked experience and could not properly comment, or felt that individual cases needed to be considered more deeply.
- The largest plurality of respondents suggested that ‘biological sex’ could be reduced to the presence or absence of a Y chromosome, citing an opinion by Denny Burk (Simon 2017b). This is an approach that does not work in cases of AIS, and it has explicitly been rejected as a method of sex determination by sporting authorities.

5.1.6 Sydney Anglican Diocesan Doctrine Commission (2017)

A 2017 statement entitled *A Theology Of Gender And Gender Identity*, the Anglican Sydney Diocesan Doctrine Commission makes the following statements:

2.9 Intersex: This is a general term that covers a range of rare ‘disorders of sex development’ (or ‘disorders of sex differentiation’) where there is some biological ambiguity in a person’s genitalia or gonads or, more rarely still, in their chromosomes. Except in very rare instances, a person’s biological sex can be known from their DNA. Because intersex conditions are medically identifiable deviations from the sexual binary norm they are not regarded as constituting a third sex. Because they are biologically (rather than psychologically) based, some intersex people do not wish to be associated with the LGBTQ movement (Sydney Diocesan Doctrine Commission 2017).

The Commission notes that ‘For this reason, we will use the acronym LGBTQ, rather than LGBTIQ, throughout this report.’ They state:

The biblical account of creation thus indicates that God has created each human being as either male or female. We are given no encouragement to consider male and female as two extremes at either end of a broad continuum, or to consider those with an intersex condition as intended from the beginning as a third sex.

The Commission are, indeed, most concerned with challenging the idea that intersex is a third sex. Referring to Matthew 19:12, the Commission states:

Jesus' first two categories were, no doubt, informed by the Jewish distinction between "eunuchs of the sun"— i.e., those who have been eunuch from birth – and "eunuchs of man"— whether made so by accident or design. The first of these categories, most likely, would have included conditions that today would be regarded as disorders of sex development. However ... Scripture nowhere presents eunuchs as a third sex.

The Commission appears to accept changes to sex classifications in persons who are medicalised as having a disorder of sex development, stating 'that certain intersex conditions may contribute to gender dysphoria in the person with the condition' (Sydney Diocesan Doctrine Commission 2017, footnote 8). Different intersex variations are each associated with different rates of 'gender dysphoria', however, the associated distress is exacerbated by medical interventions. For example, if 'Carla' in *Re: Carla* identifies as male from puberty, in line with a clinical review showing that 39 – 64% of people raised female with 17β-HSD3 are men, then early 'feminising' surgeries will significantly exacerbate distress.

Despite a framing as tragic, these religious arguments are not concerned with the way that intersex people are treated, but are instead more concerned with our meaning for their attitudes towards LGBT people. Further, the approach of the Sydney Diocese unfortunately adds to pressures whereby transgender people may seek recognition of being transgender as a form of intersex in order to gain acceptance and access to genital surgeries (an example of this, expressed as a claim for access to therapeutic genital surgeries that avoids association with mental disorders, is provided by National Foundation for Australian Women and The University of Melbourne 2016).

5.1.7 Parliamentary debate on marriage (2017)

A 2015 Australian sociological study found that 12% of respondents who answered a question on marriage and relationships were legally recognised as married in Australia. 1% of respondents were widowed, and 14% were separated or divorced. A further 8% of people had married overseas (6%) or in Australia (2%) but their marriage was not recognised here. These data demonstrate the diversity of the intersex population (Intersex Human Rights Australia 2016).

However, despite attempts to present this diversity (Carpenter and Organisation Intersex International Australia 2017a), reference to the experiences of intersex people were largely absent from parliamentary and civil debates on marriage. The Senate Select Committee inquiry into the Exposure Draft of the Hansard Marriage Amendment (Same-Sex Marriage) Bill did not discuss or comment on the inclusion of intersex people within these exemptions. Nor was there any specific mention or discussion of intersex people in the debate on the *Marriage Amendment (Definition and Religious Freedom) Act 2017* (Cth), except to the

extent that we are supposed to challenge the idea that a marriage is the union of a man and a woman.

The *Marriage Amendment (Definition and Religious Freedoms) Act 2017* replicated exemptions in the *Sex Discrimination Act 1984* discrimination on grounds of 'intersex status' (Smith 2017b), a status which is legally distinct from sex and gender, as intended (House of Representatives 2013; Carpenter and Organisation Intersex International Australia 2012). However, in his explanatory memorandum, Senator Dean Smith gave the following single example of an intersex person, accompanying an example of a gender diverse person with non-specific gender:

For example, this would include an intersex person who is legally recognised as both male and female and a gender diverse person who is legally recognised as having a non-specific gender (Smith 2017a)

No jurisdiction in Australia legally recognises any intersex person as both female and male. This is therefore a highly unusual choice of example and one that does not reflect the reality for either the intersex population or the individual who identifies in this way.

Amendments proposed during the course of parliamentary debates proposed to broaden exemptions from discrimination laws for marriage celebrants appeared focused on traditional view of the family and marriage, but without awareness of the history of intersex inclusion in Christianity. Andrew Hastie MP, and Senators Fawcett and Paterson, proposed that a 'relevant belief' might include a 'genuine religious or conscientious belief that':

the normative state of gender is binary and can, in the overwhelming majority of cases, be identified at birth (Hastie 2017; Fawcett and Paterson 2017b, 2017c)

This recognises that there are cases where gender cannot be 'identified at birth', suggesting an acknowledgement that intersex people exist, but it provides no guidance on what the authors believe should happen in such instances. Some amendments proposed by the same parliamentarians also stated that marriage celebrants can 'disregard ... intersex status' in the same way that they might 'disregard ... current legal status of ... sex or gender':

in determining whether the other person is a man or a woman, if the authorised celebrant, chaplain or authorised officer reasonably believes and genuinely believes that the current legal status of the other person as a man or a woman is different from the legal status of the other person as a man or a woman at the time of the other person's registration following the other person's birth, the authorised celebrant, chaplain or an authorised officer may disregard the current legal status of the other person's sex or gender, or their gender identity or intersex status (Hastie 2017; Fawcett and Paterson 2017b) (a similar paragraph was proposed in Fawcett and Paterson 2017a).

The implications of this for people with intersex variations are unclear.

It seems likely that those proposing these amendments were poorly informed about the existence of people with intersex variations, church positions, and the biological definition of the legal attribute of 'intersex status'. The proposals also encourage appearance-based determinations; matters of appearance may be entirely unrelated to personal identity.

5.1.8 New Catholic church position (2019)

While the Catholic church historically, and into the mid-20th century is established to have had a place for intersex people, termed hermaphrodites, in Canon law (see section 5.3.1), this position has very recently been overturned with the publication in 2019 of a statement by the Congregation for Catholic Education, entitled '*Male and Female He Created Them' Towards a Path of Dialogue on the Question of Gender Theory in Education*'.

This document refers to an unnamed population in paragraph 24 who are to be subjected, without reservation, to medical interventions:

From the point of view of genetics, male cells (which contain XY chromosomes) differ, from the very moment of conception, from female cells (with their XX chromosomes). That said, in cases where a person's sex is not clearly defined, it is medical professionals who can make a therapeutic intervention. In such situations, parents cannot make an arbitrary choice on the issue, let alone society. Instead, medical science should act with purely therapeutic ends, and intervene in the least invasive fashion, on the basis of objective parameters and with a view to establishing the person's constitutive identity. (Congregation for Catholic Education 2019)

We discuss this point in the next section, on abortion law reform in NSW and efforts by Minister Damien Tudehope and the Rev Fred Nile to include intersex within amendments aimed at preventing sex selective terminations.

Paragraph 25 of the Congregation's statement associates the word intersex with identification, 'Efforts to go beyond the constitutive male-female sexual difference', and being transgender.

This ahistorical analysis, including its separation of nomenclature from discussion on embodiment and the surrendering of intersex bodies to clinicians, has been the subject of debate within the intersex movement globally. A joint statement signed by 1043 organisations and individuals (including some Catholic theologians) was submitted to the Congregation on 25 June. Commenting on the document, Morgan Carpenter (co-executive director of Intersex Human Rights Australia) stated:

The Joint Statement demands that the Catholic Church should acknowledge its own history. The existence of people born with variations of sex characteristics has been recognised by the institution since its earliest times. Our existence cannot be associated with any particular contemporary fashion, theory or ideology. (Carpenter 2019b)

Tony Briffa (co-executive director of Intersex Human Rights Australia) stated:

As a Catholic person born with an intersex variation, it is disappointing the Church has taken a position that encourages unnecessary, irreversible, non-consensual and damaging intervention on bodies like mine – all in their need to easily classify people into narrow boxes of what it means to be female or male. God’s diversity does not work in this way. The document will cause harm to children and families. (Carpenter 2019b)

5.1.9 New South Wales abortion debate (2019)

On 26 August 2019, Danielle Le Messurier of the Daily Telegraph reported that former spokesman for the Australian Family Association:

Finance Minister Damien Tudehope will move a motion in the upper house stating “termination not be used for sex- selection if the foetus is confirmed or suspected to be a female foetus, a male foetus or an intersex foetus” (Messurier 2019).

An editorial on the same day in the Daily Telegraph stated:

It is one issue to decide on an abortion because a foetus is male or female. What happens, however, if a foetus cannot be easily classified as either? What if the foetus is intersex, or as obstetrician Dr Gregory Jenkins puts it, has “undifferentiated genitalia”? ...

The precise wording of the amendment, soon to be moved in the upper house, requires that “termination not be used for sex selection if the foetus is confirmed or suspected to be a female foetus, a male foetus or an intersex foetus”. (The Daily Telegraph 2019)

On the one hand, the elimination of fetuses with intersex traits is a known phenomenon, and one that significantly reduces the number of live births of infants with some intersex variations such as sex chromosome variations (Carpenter 2019a).

On the other hand, this proposal, put before the NSW Legislative Assembly in amendments c2019-057F and c2019-057H and debated on 18 September 2019 (Tudehope 2019a, 2019b), both frame intersex as a third category that is, to use the words of the Congregation for Catholic Education ‘beyond the constitutive male-female sexual difference’, and it disputes the ability of medicine to make what is framed as ‘a therapeutic intervention’ (Congregation for Catholic Education 2019).

In the same debate, the Reverend the Hon. Fred Nile stated, ‘I support the proposed amendments on behalf of the Christian Democratic Party’. Commenting on the inclusion of ‘an intersex foetus’, he recognised our existence as people with human dignity, but also referenced the old language of hermaphrodites, offensive clinical language such as ‘physically malformed’, and commented:

The synonyms listed there confirm the definition cited above, namely, a person who is physically malformed such that their external sexual organs have either indeterminate gender or elements of both male and female...

As early as 1919 the condition was recognised as genetic but rare and in following decades through to today the physical genetic basis of this condition has been confirmed by medical science. Intersex people have been born in the past and have lived stigmatised lives. The condition may also have rendered them infertile in some cases. Nevertheless, they are still people and have human dignity. Radical activists may use this unfortunate condition that some people suffer from as an excuse to further undermine the fact that our human species is composed of male and female. But those of us who oppose abortion on moral grounds cannot accept a situation where abortion is allowed for eugenic purposes. (NSW Parliament 2019, 56–58)

It is the construction and use of intersex as a third sex category, and our meaning in relation to LGBT populations, that exercises many Christian commentators. In this regard, we draw attention back to the *Darlington Statement* and its demand for recognition that construction of intersex as a third sex denies our diversity and rights to self-determination.

As with debate on reform of marriage law, this is surprising given the description of intersex as a third sex category in the proposed amendments, and the origins of such constructions in a 1979 Family Court case that annulled the marriage of an intersex man, based on an ahistorical appeal to marriage norms in Christendom.

5.2 Islamic teachings and attitudes

5.2.1 Inheritance

Uddin describes a standard process for the inheritance of intersex people (termed hermaphrodites or ‘khuntha’) in Islamic law. He states that the gender of intersex people is determined, traditionally according to method of urination (2017, 227). In certain cases of ‘difficulty’, termed ‘khuntha mushkil’, different authorities apply different approaches, but generally such an individual was traditionally regarded as male and female and receives a variable lesser inheritance share, based on a model where women receive smaller inheritance shares. Uddin remarks:

There is no conflict upon the inheritance of hermaphrodites in contemporary Muslim world and all jurists are agree upon that hermaphrodites will take share according to sex dominancy. If organs of male are prominent then it would be consider as male and if organs of female are present then it would be consider as female. But there is conflict on inheritance of khuntha mushkil (whose sex is ambiguous) that how much share it would inherit. (Uddin 2017)

5.2.2 Medical interventions

Sachedina states in a 2009 paper that surgery is intended to eliminate the possibility of ‘abnormal sexual behaviour’:

The hermaphrodite possesses physical traits of both sexes; such a person might have ambiguous genitalia or an otherwise amorphous sexual makeup. The common medical justification for such corrective surgery for hermaphroditism was to provide a strict social boundary between two sexes so that those patients whose bodies were not immediately recognizable as male or female could overcome the fears of abnormal sexual behavior. (Sachedina 2009)

Islamic teachings appear to endorse so-called ‘corrective’ surgical interventions:

increased efforts to surgically establish norms for gender identification were treated as corrective surgery and hence accepted as part of the solution to help an individual whose male or female identity was anatomically aberrant. In general, the jurists endorsed corrective surgical procedures to treat both types of hermaphrodites: the nonproblematic hermaphrodites that had an additional or defective private part of the opposite sex, or the problematic hermaphrodites that could not be categorized as a man or a woman (Sachedina 2009)

Some views in Islam support female genital mutilation, labelled as ‘female genital circumcision’. For example, on 10 February 2018, and following the launch of a global social media campaign against FGM, an academic and member of the Islamic Cultural Centre of Ireland called for the legalisation of ‘female circumcision’, stated:

I am not an advocate of female genital mutilation, but of female circumcision. If we see female circumcision in the same way as male circumcision, it might be needed for one person and not another, it has to be determined by a doctor and practiced in a safe, medical environment... It has been described in a horrible way, it's always described as 'barbaric' and we always hear the term mutilation, it is portrayed as a dark skin practice, or something that belongs in the Dark Ages (Armstrong 2018).

It should be noted that female genital cutting is practiced in Australia. A 2013 Australian government framework against FGM prohibits such interventions. However, it permits genital surgeries on intersex people, described as ‘sexual reassignment procedures’ that ‘give a female, or a person whose sex is ambivalent,[sic] the genital appearance of a particular sex’ (Attorney General’s Department 2013).

This policy framework does not discuss issues of necessity or evidence in support of medical interventions, perhaps assuming that medical interventions will be supported by both. Policy-makers responsible for this language may not have intended it to support, *inter alia*, the clitorrectomy and labioplasty in *Re: Carla*. Disclosure of the rationales, including the

gender stereotyping, in *Re: Carla* undermine the moral authority of arguments against FGM based on grounds of culture, appearance or gender roles.

Further, despite this prohibition of FGM, labioplasties and other vulvoplasties, including for aesthetic purposes, are permitted (Spriggs 2016). The Department of Health has investigated a 'marked increase' of 105% in numbers of Medicare-funded vulvoplasties and labioplasties in adolescents and adults between 2003/4 and 2012/13 (Department of Health 2014). Aesthetic rationales for surgery appear in promotional literature on labioplasties produced by Australian plastic surgeons. It is not clear on what basis such practices can be supported when conducted for cosmetic or aesthetic reasons, other than by the informed consent of the recipient. In our view, the Yogyakarta Principles plus 10 offer a clear and universal framework for the protection of the bodily integrity of all children (Yogyakarta Principles 2017).

5.3 Other traditions

As an organisation, we are constantly drawing on learning about intersex human rights from our local and international communities and peoples who have sought refuge in Australia. As a small organisation (with limited capacity) we continue to develop an intersectional understanding of the needs of people with innate variations in sex characteristics who are members of diverse ethnic, cultural and faith communities. We note and acknowledge that a range of other religious traditions and beliefs have places for intersex people, and these have had limited impact on the construction of Australia's laws. We also acknowledge limitations in our understanding of the situations of First Nations people with intersex variations.

We specifically note that some non-Western traditions may have had particular roles and places for some intersex and non-intersex people that do not mirror the norms identified in traditional Christian and Islamic teaching (Holmes 2004).

IHRA is also aware of multiple refugees with intersex variations who have fled regions and countries due to the social stigmatisation of their bodies.

5.4 The religious freedoms review (2018)

The Religious Freedoms review positioned intersex alongside race, disability and pregnancy, and not with sexual orientation and gender identity:

Recommendation 1

Those jurisdictions that retain exceptions or exemptions in their anti-discrimination laws for religious bodies with respect to race, disability, pregnancy or intersex status should review them, having regard to community expectations. ...

Recommendation 6

Jurisdictions should abolish any exceptions to anti-discrimination laws that provide for discrimination by religious schools in employment on the basis of

race, disability, pregnancy or intersex status. Further, jurisdictions should ensure that any exceptions for religious schools do not permit discrimination against an existing employee solely on the basis that the employee has entered into a marriage. ...

Recommendation 8

Jurisdictions should abolish any exceptions to anti-discrimination laws that provide for discrimination by religious schools with respect to students on the basis of race, disability, pregnancy or intersex status. ...

1.141 While the Panel accepted that some variation in approaches between jurisdictions was appropriate to reflect the values of different communities, it could see no justification for exceptions in existing law relating to race, disability, pregnancy or intersex status. The Panel is of the view that those jurisdictions retaining exceptions should review them having regard to community expectations. (Ruddock et al. 2018)

Little justification was presented in support of this positioning of intersex status, however, the reasoning can be discerned from the presentation of historical information on religious attitudes towards intersex people, and the following statements by Patrick Parkinson, author of the submission to the religious freedoms inquiry by Freedom for Faith:

The rights and needs of those with intersex conditions do not conflict with religious values. (Freedom for Faith 2018, footnote 15, page 25)

Nevertheless, Parkinson was concerned about instrumentalisations of the existence of intersex people:

The alleged scientific basis for these beliefs [in multiple genders or gender fluidity] rests upon a claim that the prevalence of intersex conditions is a figure that is almost 100 times greater than as understood in conventional medical science. (Freedom for Faith 2018)

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