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Submission on the proposed federal Human Rights and Anti-Discrimination Bill

9 December 2012

1. Summary

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

We thank the government for its intention to include intersex in the proposed Human Rights and Anti-Discrimination Bill. In this submission to the Senate Inquiry on the bill we identify our concerns with the effectiveness of the proposals, and present recommendations to ensure appropriate and effective inclusion.

Intersex is a matter of biology, not gender identity

1. Intersex is a term which relates to a range of natural biological traits or variations that lie between “male” and “female”. An intersex person may have the biological attributes of both sexes, or lack some of the biological attributes considered necessary to be clearly defined as one or the other sex. Intersex is always congenital and can originate from genetic, chromosomal or hormonal variations. In many cases, intersex variations can be determined prenatally, via amniocentesis.

2. Intersex people suffer stigmatization and discrimination, and we need explicit protection in human rights and anti-discrimination legislation. This can only be achieved by explicitly recognizing intersex as a biological state, as in proposed Tasmanian anti-discrimination legislation, or by recognizing our diverse sex characteristics.

Intersex is not a third sex

3. We do not support the creation of a third sex; intersex is a spectrum of possibilities, not an arbitrary third category. We believe that any creation of a third sex would increase stigmatization of intersex differences, rather than ameliorate them.

4. Sex is customarily defined as being the two binary sexes, excluding people with atypical biologies. This is supported by extensive case law, and it is also implied in the proposed bill. Including intersex in anti-discrimination protection measures – as is proposed in Tasmania – does not require the creation of a third sex category.

Gender identity and "genuine" identification

5. While it is neither accurate nor appropriate for intersex to be defined as a gender identity, all intersex people (like other people) have a gender identity. The existing proposals on gender identity explicitly exclude the most vulnerable intersex people. Explicitly excluding people who do not identify as either male or female fails to protect those of us who are amongst the most easily identifiable, the most obviously different, and so the most vulnerable.

6. The proposals do not fully live up to the government's objective of protecting LGBTI people from discrimination: Explicitly excluding some LGBTI people fails to achieve stated government objectives to protect LGBTI people.

7. The proposed test for authenticity conflicts with provisions to protect people on the basis of actual or perceived status: We believe that the words "on a genuine basis" should be omitted where they appear. No other attribute is tested in this way. This test appears to be a new provision, which does not appear in State legislation in NSW or Queensland.

Current State legislation is not effective

8. The Anti-Discrimination Board of NSW has found that existing State legislation does not effectively protect intersex people. The legislation in four States uses wording nearly identical with the proposed federal legislation.

   We are unable to provide any evidence of successful cases brought under State laws anywhere in Australia as such cases simply can't exist. Intersex people have, on more than three occasions in the last three years, attempted to use the provisions on indeterminate sex to bring a case. On all occasions applications were rejected on the basis that the issues were physical anatomical differences not gender identity. State anti-discrimination boards do not publish detailed data from point of contact.

The Tasmanian model

9. The current standard in State and Territory law is expected to shift in the near future, with an intersex-inclusive Tasmanian Anti-Discrimination Amendment Bill (No. 45 of 2012). This bill may pass before the first reading of federal legislation, at which point it would no longer claim to match the highest standard in State and Territory legislation.

   If the Tasmanian bill does not progress to early implementation, for any reason, it still provides an important benchmark as a professionally-drafted bill that effectively includes intersex as a protected category.

10. Including intersex explicitly as a separate category in a current Tasmanian Anti-Discrimination Amendment Bill (No. 45 of 2012) has not been controversial. Inclusion of intersex as a separate protected category received bipartisan support during the bill's second reading.

Religious exemptions

11. The proposed religious exemptions provide us with major grounds for concern. The application of a religious exemption to any group with distinct biological characteristics is a weighty undertaking. It should not occur by misconstruing intersex as a gender identity, particularly where exemptions could impact on children's access to education, and on healthcare.

2. Proposals for federal anti-discrimination legislation

1. **Intersex should be defined and listed as a protected attribute separate to Gender Identity**. Intersex is a matter of biological sex characteristics, not a gender identity**.**

2. **Gender Identity should be defined inclusively**. Gender identity should protect all binary and non-binary gender identities, including culturally-specific genders, and not only those that are considered mainstream. It should also protect on the basis of gender expression. We do not believe that inclusion of all gender identities would have any new regulatory impact.

3. **"On a genuine basis" should be omitted**. This criterion is not applied to other protected categories; selective application would contradict provisions to protect people on the basis of their actual or perceived membership of a protected category.

4. **The definition of intersex in the Tasmanian 2012 Anti-Discrimination Amendment Bill should be inserted**: The definition of intersex is independent of a definition of gender identity. We do not believe that inclusion of intersex as a discrete category would have any new regulatory impact.

5. **Intersex should not be subject to religious exemptions**. The application of a religious exemption to any group with distinct biological characteristics is a weighty undertaking. It should not occur by misconstruing intersex as a gender identity. We do not believe it is appropriate to grant religious exemptions that could impact intersex children attending school.

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4. What is intersex?

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

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

5. OII Australia

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

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

6. Our interest in this submission

> *All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.*
> *Article 7 of the Universal Declaration of Human Rights* [3]

The proposed *Human Rights and Anti-Discrimination Bill* is of vital concern to OII Australia as it seeks to ensure that all Australian citizens are entitled to a life free from discrimination. The proposed legislation seeks to implement the government’s commitment to equality for LGBTI people, and it affords an opportunity to effectively include intersex people in human rights and anti-discrimination in federal legislation for the first time.

OII Australia thanks the government for its intention to include intersex in the proposed Human Rights and Anti-Discrimination Bill. In this submission, we explain how the current proposals do not yet effectively include intersex people, and provide some recommendations about how we might be effectively included.

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

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

3 UN, *The Universal Declaration of Human Rights*, http://www.un.org/en/documents/udhr/, accessed 3 December 2012.

7. The proposed legislation

Intersex people are currently thought to be included in the proposed bill in section 6, where it is defined as a "gender identity". From the exposure draft, page 15:

> *gender identity means:*
> *(a) the identification, on a genuine basis, by a person of one sex as a member of the other sex (whether or not the person is recognised as such):*
> *(i) by assuming characteristics of the other sex, whether by means of medical intervention, style of dressing or otherwise; or*
> *(ii) by living, or seeking to live, as a member of the other sex; or*
>
> *(b) the identification, on a genuine basis, by a person of indeterminate sex as a member of a particular sex (whether or not the person is recognised as such):*
> *(i) by assuming characteristics of that sex, whether by means of medical intervention, style of dressing or otherwise; or*
> *(ii) by living, or seeking to live, as a member of that sex.* [4]

The Explanatory Notes give more explanation as to the purpose of the definition. The Notes also state that the definition "matches highest current standards" and explicitly excludes all people who do not identify as either men or women. It is thought to include people "born intersex who identify as either sex":

> ***85. Gender identity:*** *gender identity is introduced in this Bill as a protected attribute at the Commonwealth level. Gender identity will cover people:*
> - *born as one sex who identify as another sex, or*
> - *born intersex who identify as either sex.*
>
> *86. The introduction of gender identity as a protected attribute in this Bill matches the highest current standards in State and Territory anti-discrimination law and will be subject to exemptions in clauses 32 and 33 relating to religion.*
>
> *87. This clause does not require recognition of, or provision of facilities for, people who do not identify as either sex. Protection against discrimination on the basis of gender identity implements recommendation 43 of the SDA report.* [4]

We recognise the government's intention to include intersex, and we welcome this. However, the means by which we are included is inappropriate and has proven to be ineffective.

8. Intersex is a matter of biology, not gender identity

Many intersex variations are diagnosed at birth, or earlier, via amniocentesis. Gender identity is not apparent prenatally, nor in the first years of life. This is significant, as we believe that the failure of the proposed bill to accurately define intersex as a matter of biology, rather than gender identity, is a key reason for the ineffectiveness of preceding State legislation.

Several Australian government bodies already recognise that intersex is a matter of biology. For example, the ACT Law Reform Advisory Council reviewed Territory arrangements for registering births in a 2012 report that clearly distinguishes between intersex status and a gender identity (our emphasis in second paragraph):

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[4] Attorney General's Department, 2012, *Human Rights and Anti-Discrimination Bill*, exposure draft and explanatory notes, http://www.ag.gov.au/Humanrightsandantidiscrimination/Australiashumanrightsframework/Pages/ConsolidationofCommonwealthantidiscriminationlaws.aspx, accessed 26 November 2012.

> *The forms for notification and registration of a birth – 'Notification of Birth not Occurring in a Hospital' (Form 218) and 'Birth Registration Statement' (Form 201) – are legislative instruments that must be complied with. The forms currently require that the sex of a child be marked as either 'male' or 'female'. ... for a child who is known to be intersex at or soon after their birth, the legislation requires a decision must to be made, within short time limits, to record the child's sex within the female/male binary.*
>
> *Parents may choose not to register their child as intersex, and it is common for parents, in consultation with medical practitioners, to assign a gender identity to an intersex child; this often involves surgery and medical treatment to 'confirm' the chosen gender identity. The chosen gender identity is the 'sex' that is recorded when formally notifying and registering the child's birth.* ***It will not be known until the child matures whether the assigned sex which was assigned at birth and implemented through surgery and medical treatment, does in fact accord with the child's gender identity****.* [5]

The following two examples from medical journals illustrate how intersex is an experience of the body, and biology, rather than an issue of gender identity. The 2006 "Consensus Statement on management of intersex states:

> *The birth of an intersex child…*

While:

> *Gender identity development begins before the age of 3 years, but the earliest age at which it can be reliably assessed remains unclear.* [6]

Surgical interventions on intersex people mean that most of us do not have an immediately apparent "indeterminate" sex, but will be assumed, visually when clothed at least, to be one sex or the other. However, this does not reflect what lies beneath. For many intersex people, a detailed examination is likely to reveal our intersex bodies, irrespective of interventions. Any medical interventions that do not take our anatomical differences into account can lead to serious adverse outcomes.

Intersex people are frequently discriminated against by privacy violations that are not permitted against other people. This is particularly notable in the sports arena, for example, typically for people who do not know they are intersex prior to such invasion.

Case study 8.1: Sex of rearing is provisional until a gender identity can be established

Peggy Cadet writes as a person with Androgen Insensitivity Syndrome and XY chromosomes. Her chromosomes are typically associated with being male, but her body is insensitive to testosterone. Peggy changed sex-of-living at age 21:

> *A child's apparent "gender identity" may consist of his or her perception of an immutable reality. Children know that, in the ordinary course of events, people do not choose their own sex. They may perceive the word of an authority like a physician, not merely as one human being's opinion, but as a simple statement of an unchangeable fact.*

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5 ACT Law Reform Advisory Council, March 2012, *Beyond the Binary: legal recognition of sex and gender diversity in the ACT*, http://www.justice.act.gov.au/publication/view/1897/title/beyond-the-binary-legal-recognition, accessed 2 September 2012.

6 I. A. Hughes, C. Houk, S. F. Ahmed,, P. A. Lee, 19 April 2006, *Consensus statement on management of intersex disorders*, in Arch Dis Child 2006;91:554-563 doi:10.1136/adc.2006.098319, http://adc.bmj.com/content/91/7/554.extract accessed 2 May 2012.

> *My own history indicates that clinicians are not extremely perceptive about intersex children's gender identity and can even be complexly wrong about it. Records from when I was age 13 stated that I was "...expending a great deal of energy in attempting to maintain a facade of maleness when, indeed, he did not seriously believe himself to be male..." but then, only a few days later, "...He is firmly fixed in the male gender role..." What kept me fixed in that role was not, however, a strong desire to be male, but being uninformed and inhibited in communication. I ultimately changed my sex-of-living to female, not due to gender dysphoria, but to avoid continuing as a social and sexual invalid…*
>
> *In my own childhood, I would have been better served by a pragmatic approach to my gender assignment that emphasized providing information and informed decision making based on what was possible, not a fatalistic approach giving primacy to "gender identity."*[7]

This case demonstrates the provisional nature of a sex-of-rearing for intersex people. A gender identity must be articulated by an individual on the basis of informed knowledge.

Case study 8.2: Health insurance coverage

K says:

> I was laughed at by staff at a health insurer for the nature of necessary medical examination. The staff member refused to reimburse the cost, as they didn't cover the examination in men. In a busy public office, this made me blush intensely, but I really needed that money back. Everyone there had overheard and I had nothing left to lose. After a stand up row, her supervisor used what I understood was her discretionary authority to reimburse an equivalent amount.

K's case has nothing to do with his gender or gender identity; his need for medical services was specifically related to his sex and his anatomy.

Case study 8.3: Adult surgical treatment

A, an intersex person who is generally regarded as male, talks about the impact of medical treatment as an adult that assumed A's gender identity was conventionally male:

> *I generally present as masculine, simply because that's how hormones affect my presentation. Most of my documentation now doesn't specify a gender. In 2003, I sought a breast reduction, in the hope of better balancing my own understanding of my body with social demands. I'd recently moved … to Australia, a much warmer country than where I grew up and, due to testosterone treatment, my increasing age and the climate, my differences were becoming far more noticeable. Despite written exchanges with the surgeon before the surgery, the reduction turned out to be a mastectomy. Surgical consent statements were ambiguous, although the paper trail leading to surgery is not. A second surgery, provided at no charge by the surgeon, was necessary after just three months, but failed to address my loss of sense of self.*
>
> *The week after the first surgery, I was diagnosed with reactive depression, and this persisted for around three years. I wasn't treated according to my expressed wishes. It was as if the surgeon had done what he thought I must need according to the way I presented. He tried to make me into a 'normal' man, although the scarring and other characteristics about my body belie that.*
>
> *I still struggle with what was done to me, close to a decade later. It was the most difficult period of my life, and led directly to the break-up of a longstanding relationship and employment stress.*

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[7] Peggy Cadet, 2 August 2011, *Androgen Insensitivity Syndrome with Male Sex-of-Living*, in Archives of Sexual Behavior, DOI 10.1007/s10508-011-9823-4.

A would not be protected under the proposed definition of gender identity; it is the non-conformity between A's gender presentation and A's sex that is at issue.

Case study 8.4: Disclosure of medical data to an employer

P is a citizen of Australia who came here as a sponsored, skilled migrant:

> *Close to the start of discussions with my employer about the relocation process, I felt I had to disclose some of my medical history to my employer's migration agent. A full medical history is a necessary part of the visa application process, and I was concerned about the implications. The migration agent required me to disclose that data to the employer, on the basis that it could affect the offer of a position to me in Sydney. It could have. It could also have affected my existing role in the business, but I felt obliged to comply. Thankfully it made no difference, but a different employer might not have been so accepting.*

Case study 8.5: Harassment at a networking event

N had confided in a colleague, and subsequently found herself harassed at a networking event:

> *I had worked at the top end of advertising overseas, where I was well accepted for being myself, for being different, by my colleagues there [but] my marriage was breaking up due to [my] being biologically different. When I came back I began having problems finding work in the capital city of another state where I had gone to university and had worked in the creative professions for some years. I was at an advertising event, networking, when a creative director at an agency I had visited and had helped out with a research white paper, started casting [aspersions] on my sex, my biological variation, in front of everyone there. I had shared a little of my history with him when I had been working on the white paper - he wanted to know about my life overseas and why I had come back to Australia. He seemed trustworthy by then so I told him about my marriage.*

N was harassed for the differences in her sex characteristics, not her gender identity.

Case study 8.6: Brisbane Family Court definition of intersex person

In the marriage of C and D (falsely called C), (1979) FLC 90-636, the Family Court of Australia at Brisbane annulled the marriage of an intersex man, with a male gender identity, to a woman. The court found:

> *She did not in fact marry a male but a combination of both male and female, notwithstanding that the husband exhibited as a male.*

This case would not be influenced by the proposed legislative provisions on gender identity. What was at issue in this case was not the gender identity of the husband, but his sex characteristics.

Recommendation 1: Define intersex as a protected attribute

Intersex should be defined and listed as a protected attribute separate to Gender Identity. Intersex is a matter of biological sex characteristics, not a gender identity.

9. Intersex is not a third sex

OII Australia does not support the creation of a third sex

OII Australia opposes the creation of a third sex or gender. A third sex was also rejected by the government in paragraph 87 of the Explanatory Notes, but this resulted in a consequential rejection of "recognition of, or provision of facilities for, people who do not identify as either sex".

We do not believe that a third sex can be created via anti-discrimination legislation; Tasmanian legislators have not expressed a belief that inclusion of intersex as a separate category in anti-discrimination legislation creates a third sex. We believe that the Tasmanian bill is insightful because it does not find it necessary to define intersex as a sex. It simply defines intersex in relation to the binary sexes.

We believe that concerns regarding the *de facto* creation of a third sex are overstated. In our view, a third sex can only be created by State Birth, Deaths and Marriage Registries, if they specify a third sex on birth certificates.

If regulations that protect intersex people create, by default, a third sex then this has already has been done in Aged Care legislation. If the 2003 and 2011 regulations governing an X sex descriptor on Australian passports create a third sex then this has already been done. Nevertheless, no branch of government acts as if such an event has happened.

Fears that recognition of intersex people in anti-discrimination law would give rise to a third sex seem to be predicated, in part, on an assumption that intersex people are a newly identifiable classification of people. This is not the case; the term hermaphrodite was historically used to describe intersex people, and the term originates in Greek mythology. Intersex people have always been part of human societies. In the first century BC, Diodorus Siculus, wrote:

> *Hermaphroditus, as he has been called, who was born of Hermes and Aphrodite and received a name which is a combination of those of both his parents. Some say that this Hermaphroditus is a god and appears at certain times among men, and that he is born with a physical body which is a combination of that of a man and that of a woman, in that he has a body which is beautiful and delicate like that of a woman, but has the masculine quality and vigour of a man. But there are some who declare that such creatures of two sexes are monstrosities, and coming rarely into the world as they do they have the quality of presaging the future, sometimes for evil and sometimes for good*[8].

In a very real sense, the contingent way in which our human rights are circumscribed in the proposed legislation shows to us that our lives are still subject to ancient superstitions.

OII Australia does not support the creation of a third sex for several reasons. Among these is that intersex is a highly variable spectrum of possibilities between male and female rather than a discrete and arbitrary category by itself.

It seems to us that that the sex binary originates in bivalent logic: the principle of identity partitions the world into “self” and other”; that the two states are mutually exclusive, either true or false. If one is not male then one is female. Our existence, however, disproves simplistic notions of male and female. We show that nature is analogue; it does not work in purely binary terms.

Intersex shows that what is not male can also be not female. Yet, while the definitions of male and female each depend on the other, neither depends on a definition of intersex. Concluding that a third category is required to capture the spectrum of intersex biological states is also simplistic.

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8 Diodorus Siculus, *Library of History IV chapter 6*. Translated by C. H. Oldfather, 1935, Loeb Classical Library Volumes 303 and 340. Cambridge, MA, Harvard University Press; London, William Heinemann Ltd. http://www.theoi.com/Text/DiodorusSiculus4A.html#6, accessed 7 September 2012.

Rather than define a catch-all "other" category, we would prefer to minimize our participation in gender constructs. We do not wish for the creation of an equally confining third box. For this reason, our approach has been to call for an opt out to declaring a sex or gender – through the provision of a “not specified" option on passports and other documentation.

The primary reason we reject a third sex is believe that it would further entrench stigmatization of intersex people. Parents and doctors would further endeavour to avoid the assignment of infants to such a category and – as has been expressed to us – what toilet would such people utilise?

Toilet facilities and Premises Standards, Subsection 31(1) DDA

The issue of toilet provision has been raised with OII Australia as a key concern, apparently underlying both the absence of effective intersex inclusion, and the explicit rejection of any facilities for people with non-binary gender identities.

In relation to this, we can state that no members of OII Australia, regardless of biology, are in any doubt about which toilet it is appropriate for us to use, and we are not aware of any situations where serious concern has been expressed to our members by any third party regarding which toilet facility they should use.

But how should we handle a situation that might occur where a third sex or gender exists, and only two toilet choices are available? We argue that we simply have to pragmatically utilize what is available through customary practice, and use what seems appropriate to our personal situation in the face of community expectations. It is just the same as the way we utilize what seems most appropriate when faced with the choice of one unisex toilet.

We recognise that some people may still have a problem with this, believing both that any form of effective intersex inclusion creates a third sex, and toilet facilities are a barrier to such inclusion. In this context, we note that the Premises Standards made under subsection 31(1) of the Disability Discrimination Act have already made provision for unisex accessible toilets:

> *The Premises Standards will require a unisex accessible toilet wherever there is a male and female toilet block.*
>
> *The only exception to this is where there are more than one male and female toilet blocks on a single floor such as in a sports stadium or shopping centre. In this situation a unisex accessible toilet will only be required at 50% of the toilet blocks.*
>
> *If male and female toilet blocks are spread out, such that male toilets are on one floor and female toilets are on another, then a unisex accessible toilet will only be required at either the male or the female block.*[9] [10]

These provisions continue in the consolidated bill. As a result of these Premises Standards, we do not believe that any recognition of a third sex or gender in anti-discrimination law would create any new regulatory impact.

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[9] Attorney General’s Department, 24 September 2011, *Premises Standards – Frequently Asked Questions (FAQ),* http://www.ag.gov.au/Documents/Premises%20Standards%20-%20Frequently%20Asked%20Questions%20(FAQ).pdf via http://www.ag.gov.au/Humanrightsandantidiscrimination/Pages/DisabilityStandardsforPremises.aspx, accessed 3 December 2012.

[10] Australian Human Rights Commission, 13 May 2011, *Frequently asked Questions – Disability Standards on Access to Premises Standards*, http://www.humanrights.gov.au/disability_rights/faq/access/standards.html, accessed 3 December 2012.

Case study 9.1: Domestic travel with non-gender specific documentation

Passport reforms introduced in 2003 and extended in 2011 facilitated access to passports with an 'X' sex descriptor by intersex people, and by others with non-specific sex. While this does not appear to have prompted concern over the establishment of a third sex or gender, it has created issues for people seeking to ensure that their travel documentation is consistent, and their identity is not deemed uncertain. OII Australia member L says:

> *I can't book a flight on an Australian airline with a gender that matches my Australian passport. My passport shows my sex as "X", not specified.*

L's passport is a legal document issued by the Australian government. The non-specific descriptor is not supported by airlines' electronic booking systems for domestic or international flights. Travellers with a non-specific sex descriptor on their passport are not protected while in Australia under the proposed gender identity definitions.

10. Gender identity and "genuine" identification

While it is neither accurate or appropriate for intersex to be defined as a gender identity, all intersex people (like other people) have a gender identity.

We believe that the current proposals explicitly exclude the most vulnerable intersex people: the most easily identifiable. Explicitly excluding people who do not identify as either male or female, excluding "gender expression" and applying a test requiring identification as male or female "on a genuine basis" fails to protect the human rights of many intersex (or trans) people, including those of us who are amongst the most easily identifiable, the most obviously different, and so the most vulnerable.

We believe that the proposal to introduce a test of authenticity does not live up to the government's objective of protecting LGBTI people from discrimination as it explicitly excluding some LGBTI people from protection.

Further, a test for authenticity is in conflict with provisions to protect people on the basis of both actual and perceived attributes. No other attribute is tested for "genuineness" in this way. Applying a concept of "authenticity" would undermine the aims of anti-discrimination legislation.

This test appears to be a new provision, which does not appear in State legislation in NSW or Queensland.

Further, as detailed in a case study earlier in this submission, travellers with a non-specific sex descriptor on their Australian-issued passport are not protected while in Australia under the proposed gender identity definitions.

We believe that the words "on a genuine basis" should be omitted where they appear.

Swiss report on biomedical ethics

In November 2012, the Swiss National Advisory Commission on Biomedical Ethics published a new report on the ethics of intersex infant surgeries which states:

> *The long-established constitutional principle that no-one is to be subjected to discrimination on grounds of sex also applies to people whose sex cannot be unequivocally determined. Any discrimination resulting from existing regulations must be eliminated…*

> *Categorization as male or female which is driven by social factors or a desire for legal certainty, rather than being based on medical considerations or the sincere wishes of the individual concerned, represents an unacceptable violation of personal liberty. It also leads to unjustifiable discrimination.* [11]

Protection only of intersex people who authentically self-define as male or female in anti-discrimination legislation constitutes a desire for legal certainty. We believe that we are just as entitled to legal protection whether or not our sex can be unequivocally determined.

Case study 10.1: Medicare staff treatment

E said:

> *I was left standing at the counter at Medicare once she heard me speak. The staff member simply walked away. I was expecting her to come back but after fifteen minutes realized she would not. The other counter staff said 'she's gone for lunch; you had better get back in line'.*

Whereas this case could be covered under "gender identity", if that definition included third party perceptions, E does not identify as either male or female. Thus E's authenticity would be in doubt because E does not identify as with a recognised gender identity, instead identifying as neither female nor male.

Case study 10.2: Genuine identification

Michael writes about an assumption that his gender identity should be that of a "real man":

> *Around the age of 23, an endocrinologist discovered that my body had never produced enough testosterone for me to undergo a full puberty. He therefore suggested I commence testosterone therapy. Initially, I resisted the pressures placed on me to commence therapy. Yet, eventually, I crumbled under the constant onslaught of threats and horror stories of what my future would be like if I didn't undergo therapy, which the doctors claimed would turn me into a 'real man'. It was insinuated, even blatantly stated on occasions, that my life would be worthless; that I would be a freak; that I would never achieve my potential, and that I would never have any self-esteem (apparently the self-esteem I already had was invalid as it existed outside of the predefined paradigm of being a real man). So, eventually, from the age of 28, after about 6 years of constant threats and 'counselling' by my medical specialists, I began testosterone therapy. And I found it to be a horrifying experience.*
>
> *Testosterone therapy generated profound and traumatic changes in me. I lost contact with who I was and thus my sense of self. I was mortified when I began to grow large amounts of hair, where hair had never been. My voice dropped. I developed a very strong libido, but found the feelings unwelcome. I lost contact with my heart and the ability to relate to people in a nonsexual manner… I just couldn't function as a 'normal' male, and this caused me significant psychological and physical distress.*
>
> *Worst of all, however, was that the therapy turned me into someone I was not.* [12]

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[11] Swiss National Advisory Commission on Biomedical Ethics, November 2012, *On the management of differences of sex development, Ethical issues relating to "intersexuality"*, http://www.bag.admin.ch/nek-cne/04229/04232/index.html?lang=en&download=NHzLpZeg7t,lnp6I0NTU042l2Z6ln1ad1IZn4Z2qZpnO2Yuq2Z6gpJCKfX96f2ym162epYbg2c_JjKbNoKSn6A--, via http://www.bag.admin.ch/nek-cne/04229/04232/index.html?lang=en, accessed 20 November 2012.

[12] Michael Noble, 19 July 2010, *I am me and I am OK*, http://oiiaustralia.com/18138/opinion-michael-noble/, accessed 2 May 2012.

Does Michael "genuinely" identify as a man? Michael would not be protected under the proposed definition of gender identity. To receive protection under the bill as currently proposed, Michael would need to persist with traumatic medical treatment that would turn him into someone he is not.

Case study 10.3: Androgynous intersex person, contract not renewed

Case H:

> *I'm very androgynous. People at work had a meeting about me, which I was not invited to - I only know it was about me because I could overhear some of the discussion, which was held down the other end of the office. It seemed the guys who played rugby were uncomfortable with me. My contract wasn't renewed.*

H does not identify as male or female, and has an appearance which makes them vulnerable to discrimination. H would not be protected under the proposed definitions in federal anti-discrimination legislation.

Recommendation 2: Gender Identity should be defined inclusively

Gender identity should protect all binary and non-binary gender identities, including culturally-specific genders, and not only those that are considered mainstream. It should also protect on the basis of gender expression. We do not believe that inclusion of all gender identities would have any new regulatory impact.

Recommendation 3: "On a genuine basis" should be omitted

This criterion is not applied to other protected categories; selective application would contradict provisions to protect people on the basis of their actual or perceived membership of a protected category.

11. Current State legislation is not effective

The proposed bill attempts to incorporate best practice from State and Territory legislation. However, until the Anti-Discrimination Amendment Bill currently before the Tasmanian parliament, the legislation has not been effective. This is because the legislation has sought to protect intersex on the basis of gender identity for people of "indeterminate sex", rather than biological sex characteristics.

Intersex people have, on more than three occasions in the last three years, attempted to use the indeterminate provisions to bring a case. Not one case has been brought before a tribunal by an intersex person under these provisions. On all occasions proceedings were rejected on the basis the issues were physical anatomical differences not gender identity. We are unable to provide any evidence of successful cases brought under State laws anywhere in Australia as such cases simply can't exist. State anti-discrimination boards do not publish detailed data from point of contact.

Section 38A of the *NSW Anti-Discrimination Act 1977* No. 48 is the oldest State antecedent for the proposed bill's definition of gender identity. Point (c) of the definition relates to intersex:

> *a recognised transgender person ...*
> *(a) who identifies as a member of the opposite sex by living, or seeking to live, as a member of the opposite sex, or*
> *(b) who has identified as a member of the opposite sex by living as a member of the opposite sex, or*

> *(c) who, being of indeterminate sex, identifies as a member of a particular sex by living as a member of that sex.*[13]

The Queensland's Anti-Discrimination Act 1991, in the Schedule Dictionary, defines "gender identity" in a way that is almost identical to that in the current federal proposal:

> *gender identity, in relation to a person, means that the person–*
> *(a) identifies, or has identified, as a member of the opposite sex by living or seeking to live as a member of that sex; or*
> *(b) is of indeterminate sex and seeks to live as a member of a particular sex.* [14]

Despite legislation in place by 2009, the NSW Anti-Discrimination Board concluded, in their 2008-2009 Annual Report, that intersex people are not protected. we understand that this conclusion was reached in part due to a number of attempted cases brought before the ADB, as well as case law. Page 27 of the 2008-2009 Annual Report reads bluntly:

> *Intersex discrimination – intersex people are not protected against discrimination anywhere in Australia.* [15]

Legislation passed since 2009 has not changed this situation because it has not changed the terminology used. For example, the Victorian Human Rights Commission reports:

> *The Equal Opportunity Act 2010 protects gender identify as a personal characteristic. Under the Act, gender identity is about people of one sex identifying as a member of the other sex, or people of indeterminate sex identifying as a member of a particular sex. People can do this by living, or seeking to live, as a member of a particular sex, or assuming characteristics of a particular sex. This could be through their dress, a name change or medication intervention, such as hormone therapy or surgery.* [16]

In a letter to OII dated 20 March 2012, the President of the Anti-Discrimination Board describes how state action was deferred in anticipation of national work on anti-discrimination legislation:

> *Your submission quotes the Anti-Discrimination Board's 2008-2009 Annual Report, which reads:*
>
> > *Intersex discrimination – intersex people are not protected against discrimination anywhere in Australia*
>
> *As promised in that Annual Report, I wrote to the Attorney-General about the lack of protection for intersex people under the Anti-Discrimination Act 1977 (NSW), and*

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13 New South Wales Consolidated Acts, 1977, Section 38A of the *NSW Anti-Discrimination Act 1977* No. 48, http://www.austlii.edu.au/au/legis/nsw/consol_act/aa1977204/s38a.html, accessed 1 September 2012.

14 Queensland Consolidated Acts, 1991, *Anti-Discrimination Act 1991 - Schedule - Dictionary*, http://www.austlii.edu.au/au/legis/qld/consol_act/aa1991204/sch1.html, accessed 1 September 2012.

15 Anti-Discrimination Board of NSW, 2009, *2008-2009 Annual Report*, http://www.lawlink.nsw.gov.au/lawlink/%20adb/ll_adb.nsf/vwFiles/ADBAnnualReport0809.pdf/$file/ADBAnnualReport0809.pdf, accessed 20 March 2012

16 Victorian Human Rights Commission, 25 January 2012, *Gender identity, lawful sexual activity, sexual orientation discrimination - Know your rights*, http://www.humanrightscommission.vic.gov.au/index.php?option=com_k2&view=item&layout=item&id=714&Itemid=543, accessed 1 September 2012.

> *understand from the Attorney-General's response that there is currently substantial national level work being taken in relation to anti-discrimination laws and on issues facing intersex people.*
>
> *…The Anti-Discrimination Board recommends broad, inclusive coverage of sexual orientation, gender identity, sex characteristics, and gender expression under a Consolidated Federal Act.*
>
> *Any definition should ensure that it includes variations in sex characteristics, and people who are neither wholly male nor wholly female. In this way people who are intersex, androgynous and other individuals who do not fit within the current binary approach to defining sex would be afforded protection under anti-discrimination law in this context. The Board recommends that broad and inclusive language be used in any definitions of discrimination. In particular, any definition should be wide and inclusive enough to cover people who are intersex without a requirement that any person should identify as either male or female. Discrimination should be prohibited on grounds of actual or perceived sex, sexual orientation and/or gender identity.* [19]

The current bill proposes to transpose existing state legislation into federal law.

The Anti-Discrimination Amendment Bill currently before the Tasmanian parliament is the first to explicitly include intersex, and it will provide a new benchmark for legislation elsewhere. Our preference is for the Tasmanian definitions to be applied at federal level.

Case study 11.1: Religious exemptions, and attempts to bring cases to the NSW ADB

B says:

> *While in hospital for life-preserving surgery, an aged care community visitor provided by a religious organization removed the person I was responsible for was taken from the home to a solicitor, had an intervention order taken out against me, had a power of attorney revoked and attempted to have the will of the person I was caring for changed. The visitor had told my old friend I had left for good and would never come back. My friend was understandably devastated. She had forgotten I was only in hospital. The organization that provided the visitor was unapologetic. The whole business cost in excess of $4,000 in legal fees that I had to spend on getting the intervention order dismissed, the power of attorney reinstated, the will reverted and regaining my guardianship from the guardianship tribunal.*
>
> *Refusal to provide me with assistance getting respite and in-home care when I was ill by the aged care assessment team, and aged care package provider. Both of them are religion-based and are contracted by the Government to provide the service.*

B has attempted to pursue a case with the Anti-Discrimination Board of NSW, but the ADB has found that definitions used in the NSW Act do not protect intersex people. The definitions in the NSW Act mirror those proposed in the federal bill.

Case study 11.2: Donating blood

Intersex person J attempted to donate blood through the Australian Red Cross.

Issues where the Red Cross initially thought J was Transgender were addressed through the mediation process available in the NSW ADB. Issues in regard to J's intersex differences were not dealt with, neither by the Red Cross as an act of good will, nor by the NSW ADB because they were powerless to do so.

Anatomical issues in donating blood relate to specific levels of certain chemicals that are different for males and females. The Red Cross was unable to specify what those levels should be for an intersex person and could not therefore decide if it was safe for an intersex person to donate blood. In not addressing the issue, the Red Cross continues to take blood from intersex people without knowing whether it is medically safe to do so and what the consequences are in the long term.

12. The Tasmanian model

The Tasmanian proposals provide fully inclusive and explicit protection for all intersex people for the first time in Australia. They provide an excellent model for federal legislation, and one that has received bipartisan support within Tasmania.

Amongst other things, the Tasmanian Anti-Discrimination Amendment Bill 2012 inserts the following two separate definitions into the 1998 Tasmanian Anti-Discrimination Act:

> ***gender identity*** *means the gender-related identity, appearance or mannerisms or other gender-related characteristics of an individual (whether by way of medical intervention or not), with or without regard to the individual's designated sex at birth, and includes transsexualism and transgenderism; …*
>
> ***intersex*** *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* [17]

Bipartisan support

Legislators in the lower house have not found these two points to be controversial, as can be seen in Hansard, from the second reading. Mr Wightman (Bass, Labor) moved the second reading on 14 November 2012:

> *The changes include a new definition of 'gender identity', to be included in section 16 as an attribute which must not be a ground for discrimination. The definition covers gender related identity such as transexualism and transgenderism. In line with this definition, modern definitions of transgender and transsexual have been inserted.*
>
> *In a separate sex related definition 'intersex' has been inserted to mean a person who is born with physical, hormonal or genetic features that are not wholly identifiable as male or female. Intersex has also been added to the list of attributes …*
>
> *One cannot imagine that there would be widespread support for the view that people should be allowed to humiliate or insult others because of, for example, their race, age or sex.* [18]

Ms Archer (Denison, Liberal) responded:

> *The amendment proposes that gender identity and intersex be inserted … and I do not have a concern with that.* [18]

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[17] Parliament of Tasmania, 2012, *Anti-Discrimination Amendment Bill, No. 45 of 2012*, http://www.parliament.tas.gov.au/bills/Bills2012/pdf/notes/45_of_2012-SRS.pdf, accessed 3 December 2012.

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

We are grateful for the bipartisan support, and we hope that the inclusion of intersex and gender identity as separate protected attributes in federal legislation might also enjoy bipartisan support.

Recommendation 4: Insert the Tasmanian definition of intersex

The definition of intersex in the Tasmanian 2012 Anti-Discrimination Amendment Bill should be inserted: The definition of intersex is independent of a definition of gender identity. We do not believe that inclusion of intersex as a discrete category would have any new regulatory impact.

13. On referencing "sex characteristics" rather than intersex

In discussion relating to mechanisms by which intersex might be effectively included in the federal anti-discrimination legislation, the attribute of "biological sex characteristics" has been canvassed. Our preference is for the adoption of the Tasmanian definitions but, should that not prove acceptable for some reason, we would welcome inclusion in the bill on the basis of "biological sex characteristics".

We are concerned that this would not intrinsically address intersex people. We believe that the term is somewhat euphemistic and could be taken to refer simply to the biological characteristics of the two recognised binary sexes, without being accompanied a clear statement that it is to be interpreted broadly enough to include intersex people.

For example, where the Anti-Discrimination Board of NSW advise us on proposals for anti-discrimination legislation, that they recommend:

> *inclusive coverage of ...gender identity, sex characteristics, and gender expression*

But then go on to say:

> *Any definition should ensure that it includes variations in sex characteristics and people who are neither wholly male nor wholly female...* [19]

To ensure that any definition meets the government's objectives regarding clarity, and to enable business to understand its legal obligations, we recommend that any definition posited as an alternative to the Tasmanian definition should include the term 'intersex'.

14. Religious exemptions

Via inclusion under the definition of "gender identity", the provisions for intersex people in the proposed legislation permit religious exemptions. No religious exemption under this same umbrella exists in NSW State law, and so allowing this now would be creating a new exemption.

Intersex is a biological issue, one that may be determined through prenatal testing. As such, our view is that an exemption is no different to creating an exemption on the basis of characteristics like skin colour or disability.

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[19] Stepan Kerkyasharian AO, President of the Anti-Discrimination Board of New South Wales, 20 March 2012, Letter to OII Australia titled '*Submission and speech received from Oii Australia'*, copy with name of recipient redacted at http://oiiaustralia.com/downloads/Letter+from+Anti-Discrimination+Board+of+NSW+, accessed 4 April 2012.

The application of a religious exemption to any group with distinct biological characteristics is a weighty undertaking. It should not occur by misconstruing intersex as a gender identity. We do not believe that intersex infants and children should be subject to religious exemptions in school or healthcare.

The following three cases are hypothetical in that they assume that the only protection for intersex people is available, as proposed, as a gender identity subject to a religious exemption.

Case study 14.1: 47,XXY child at school

Two siblings are expected to commence attendance at a religious school. Child R1, a 6-year old boy may attend without any concern. He has the typical 46 chromosomes, and his sex chromosomes are XY, which is more typical for a male; women usually have XX sex chromosomes. His 5-year old brother R2 has been diagnosed as having 47 chromosomes; his sex chromosomes are XXY. R2 is being raised as a male, which is the standard protocol for children with XXY. He is too young to be able to articulate his own perceived gender identity.

The federal government's proposals allow for a religious exemption on the grounds of gender identity, which includes intersex people who have been assigned to a binary gender. We do not believe there any grounds where the exclusion of child R2 should be considered acceptable.

Case study 14.2: PAIS child at school

S is 4 years old and has Partial Androgen Insensitivity Syndrome (PAIS) and XY chromosomes. His chromosomes are typically associated with being male, but his body is partially insensitive to testosterone. At birth, he was tentatively assigned a female sex of rearing, as he was thought to have Complete Androgen Insensitivity Syndrome (CAIS). A reassessment of his assignment has just taken place due to two factors:

- improved biochemical testing capabilities, and
- a reassessment of his likely future gender identity due to the nature of his play activity.

Warne and Hewitt note that "about 40% of patients with 46,XY … are left without a precise diagnosis. The application of microarray (gene chip) technology… is an exciting and promising step forward" in the identification of genetic variations [20]. Additional information on revisiting diagnoses can be found in [21].

Both before and after that change in assignment, S had been tentatively assigned a gender in consultation with a specialist paediatric medical team and family counsellors. In both before and after scenarios the proposed legislation creates the potential for exclusion from a religious school due to religious exemptions.

We do not support any grounds for exclusion on religious grounds with the initial assignment of sex rearing or the changed assignment.

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[20] Warne and Hewitt, June 2009, *Disorders of sex development:current understanding and continuing controversy*, Medical Journal of Australia Volume 190 Number 11, https://www.mja.com.au/journal/2009/190/11/disorders-sex-development-current-understanding-and-continuing-controversy

[21] Minto et al, October 2005, *XY females: revisiting the diagnosis*, BJOG: an International Journal of Obstetrics and Gynaecology DOI: 10.1111/j.1471-0528.2005.00664.x, Vol. 112, pp. 1407–1410.

OII Australia believes that legal certainty is not an acceptable ground for the assignment, or maintenance, of an unsuitable sex of rearing.

Case study 14.3: 47,XXY adolescent at school

T is a 15 year old child, with male sex of rearing, who has just been diagnosed with 47,XXY when his doctor ran some tests as a result of significant breast development and other physical changes. T has been shunned by other pupils at school and has experienced bullying due to his physical differences. These include allegations that this makes him partly a woman, or gay. His religious school has recently banned a gay couple from a school formal.

T should be protected from harassment at any school.

Recommendation 5: Intersex should not be subject to religious exemptions

The application of a religious exemption to any group with distinct biological characteristics is a weighty undertaking; it should not occur by misconstruing intersex as a gender identity. We do not believe it is appropriate to grant religious exemptions that could impact intersex children attending school.

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