

**AMNESTY
INTERNATIONAL**



**SUBMISSION TO THE AUSTRALIAN HUMAN RIGHTS COMMISSION
CONSULTATION INTO PROTECTING THE HUMAN RIGHTS OF
PEOPLE BORN WITH VARIATIONS IN SEX CHARACTERISTICS
IN THE CONTEXT OF MEDICAL INTERVENTIONS**

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About Amnesty International

Amnesty International is the world's largest independent human rights organisation, comprising more than seven million supporters in more than 160 countries.

Amnesty International is a worldwide movement to promote and defend all human rights enshrined in the Universal Declaration of Human Rights (UDHR) and other international human rights instruments. Amnesty International undertakes research focused on preventing and ending abuses of these rights.

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1. Summary

- 1.1 Non-essential normalising surgeries and treatments surgeries are still occurring in Australia. People with variations in intersex characteristics in Australia are routinely subject to medical interventions without free, prior informed consent, typically in infancy, childhood or adolescence.
- 1.2 Amnesty International Australia (Amnesty) calls on Australia to end non-emergency, invasive and irreversible medical interventions on infants and children with variations in sex characteristics to ensure the full enjoyment of the rights of persons with variations in sex characteristics. Further, normalising surgery should never take place without personal informed consent.
- 1.3 Amnesty notes the work Intersex Human Rights Australia and AIS Support Group Australia do in advocating on issues affecting people with variations in sex characteristics, and calls upon the Commission to take particular note of their submissions.
- 1.4 This submission is strongly grounded on Principle 32 of the *Yogyakarta Principles plus 10* which states 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. Importantly, it states that 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.¹
- 1.5 Amnesty notes the importance of the Yogyakarta Principles as guiding principles for the implementation of international human rights law in relation to sexual orientation, gender identity, gender expression and sex characteristics. These principles, complemented by the Darlington Statement² and the Malta Declaration³, should be considered by the Commission in this inquiry.
- 1.6 Amnesty also notes the Australian Medical Association's position statement on sexual and reproductive health which identifies intersex people as a 'priority population' whom have vastly different health indicators than others, requiring them to be a focus of policymakers.⁴
- 1.7 Amnesty calls on governments to listen to the voices and experiences of people with variations in sex characteristics and to follow the expertise of intersex activists and in particular the Darlington Statement, which is a joint consensus statement by Australian and Aotearoa/New Zealand intersex organisations and independent advocates, signed in March 2017⁵. It sets out the priorities and calls by the intersex human rights movement in our countries, under six headings: a preamble, human rights and legal reform; health and wellbeing; peer support; allies; and education, awareness and employment.

¹ Yogyakarta Principles, 2017, *The Yogyakarta Principles plus 10: Additional Principles and State Obligations on the Application of International Human Rights Law in Relation to Sexual Orientation, Gender Identity, Gender Expression and Sex Characteristics, to Complement the Yogyakarta Principles*, available at: http://yogyakartaprinciples.org/wp-content/uploads/2017/11/A5_yogyakartaWEB-2.pdf

² Intersex Human Rights Australia, 2017, Darlington Statement: Joint consensus statement from the intersex community retreat in Darlington, available at: <https://ihra.org.au/darlington-statement/>

³ International Lesbian, Gay, Bisexual, Trans, Intersex Association, 2013, Malta Declaration: Public Statement by the Third International Intersex Forum.

⁴ Australian Medical Association, 2014, AMA Position Statement on Sexual and Reproductive Health, available at https://ama.com.au/sites/default/files/documents/position_statement_on_sexual_and_reproductive_health_2014_0.pdf.

⁵ Intersex Human Rights Australia, 2017, Darlington Statement: Joint consensus statement from the intersex community retreat in Darlington, available at: <https://ihra.org.au/darlington-statement/>

- 1.8 There have been numerous inquiries and reports into this issue. In 2013, the Senate Standing Committee on Community Affairs held an inquiry into the involuntary or coerced sterilisation of people with disabilities in Australia, and released the report *Involuntary or coerced sterilisation of intersex people in Australia*⁶.
- 1.9 The Committee on the Elimination of Discrimination against Women⁷ and the United Nations Human Rights Committee⁸ have both called on Australia to implement recommendations of Senate Standing Committee's report.
- 1.10 Amnesty recommends that the recommendations of the Senate Standing Committee on Community Affairs' report *Involuntary or coerced sterilisation of intersex people in Australia* be implemented as part of this inquiry and any ongoing law reform.

Recommendations

1.11 Amnesty recommends that:

- (1) The recommendations of the Senate Standing Committee on Community Affairs' report *Involuntary or coerced sterilisation of intersex people in Australia* be considered as part of this inquiry and any ongoing law reform.
- (2) Any law reform on the treatment of individuals with variations in sex characteristics is developed with the active participation of intersex organizations, activists, parents and peer support groups, and ensure accountability mechanisms. The views of children with variations of sex characteristics should also be taken into account when developing these policies.
- (3) A rights-based healthcare protocol, with binding guidelines for healthcare professionals, is implemented for individuals with variations of sex characteristics to guarantee their bodily integrity, autonomy and self-determination and to ensure that no child is subjected to non-emergency, invasive and irreversible surgery or treatment. This includes postponing non-emergency, invasive and irreversible genital surgery or hormone treatment on infants and children, and adults with reduced capacity, with variations in sex characteristics until they are able to make informed choices.
- (4) The Family Court's ability to make judgements on the necessity of medical interventions without free, prior informed consent be strengthened by the involvement of human rights experts, clinicians, and intersex-led community organisations.
- (5) The Family Court considerations are centred on the best interests of the child with variations in sex characteristics, rather than other factors such as normalising appearance of the child, social or cultural norms or the technical difficulty or cost of clinical interventions.
- (6) All levels of government increase the availability of fully-funded peer support, counselling and psychosocial support for children and adults with variations of sex characteristics, and for the parents of children with variations of sex characteristics. That it be mandatory that parents and caregivers be referred to peer support services.
- (7) Accurate and affirmative material on bodily diversity, including variations of sex characteristics, be included in school curricula, including in health and sex education.
- (8) Medical and healthcare professionals receive training on gender and bodily diversity, focusing on variations in sex characteristics, which does not perpetuate gender stereotypes.

⁶ Senate Standing Committee on Community Affairs, 2013, *Second Report: Involuntary or coerced sterilisation of intersex people in Australia*, available at: https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Community_Affairs/Involuntary_Sterilisation/Sec_Report/index

⁷ Committee on the Elimination of Discrimination against Women, 2018, *Concluding Observations on the Eight Periodic Report of Australia*, available at: https://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CEDAW%2FC%2FAUS%2F

⁸ United Nations Human Rights Committee, 2017, *Concluding Observations on the Sixth Periodic Report of Australia*, available at: https://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR%2FC%2FAUS%2FC

- (9) The government ensure that people who have had medical interventions without their free, prior informed consent have access to all relevant medical and legal documents to ensure they have full and complete information.
- (10) Research into the long term clinical, sociological and psychological impact of medical interventions be carried out. Research to assess the quality of life and health of individuals who have not undergone surgical or hormone treatment should also be undertaken.

2. International Legal Frameworks

- 2.1 Amnesty International has documented the specific human rights violations faced by children and adults with variations of sex characteristics. Amnesty International has specifically documented the practice of performing non-emergency, invasive and irreversible 'normalising' surgeries and other medical practices on young children violates the rights to the highest attainable standard of health, to private life, to physical and bodily integrity, to freedom from discrimination, and to the elimination of harmful practices based on gender stereotypes.
- 2.2 These rights are protected by international human rights law including the Convention on the Rights of the Child (CRC), the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), the International Covenant on Civil and Political Rights (ICCPR) and the UN Convention on the Rights of Persons with Disabilities – all of which have been ratified by Australia.

3. Process of law reform regarding people born with variations in sex characteristics

- 3.1 The laws regarding people born with variations in sex characteristics has traditionally been developed in a paternalistic way that focuses on biological, rather than sociological, determinants. This has meant that the long term well-being of children and others who are undergoing medical interventions without free and prior informed consent is not being taken into consideration.
- 3.2 Amnesty recommends that any law reform on the treatment of individuals with variations in sex characteristics is developed with the active participation of intersex organizations, activists, parents and peer support groups, and ensure accountability mechanisms. The views of children with variations of sex characteristics should also be taken into account when developing these policies.

4. Non-emergency, Invasive And Irreversible Medical Practice and the role of the Family Court

- 4.1 The term 'variations in sex characteristics', refers to people with characteristics that, either at birth or in developmental stages, do not fit the medical or societal standards of binary biological sex with regards to their internal or external sexual and reproductive anatomy. Some, but not all, individuals with such variations identify with the term 'intersex'.
- 4.2 While data on the prevalence of these procedures is not available, the 2015 report by AHRC notes that children born with variations in sex characteristics continue being subjected to non-emergency, invasive and irreversible medical intervention, including surgery and hormone treatment. The surgery and the early gender assignment can result in serious emotional and physical trauma to the individual, and can result in significantly reduced sexual sensitivity, loss of fertility, and urinary tract problems. Some intersex individuals assigned a particular gender and subjected to interventions to 'normalise' their bodies often later realize that they do not identify with the sex and gender they were assigned.
- 4.3 These issues are often compounded by a lack of information, as many have not been able to access their medical records.
- 4.4 Amnesty International has documented medical interventions and their consequences including:
 - a) Operations to hide an enlarged clitoris, which carry risk of nerve damage, scarring and pain
 - b) Vaginal surgery, or vaginoplasty, which may involve multiple surgeries over time on young children to create or enlarge a vaginal opening.
 - c) Gonadectomies – the removal of the gonads (including ovarian or testicular tissue) – which are irreversible and result in a need for lifelong hormone treatment.
 - d) Hypospadias repair operations – surgeries to reposition the urethra to the tip of the penis, which is done to create a penis that is considered functionally and cosmetically normal. These surgeries can lead to a number of long-term health complications.
 - e) Generally hormone treatment includes Hormone Replacement Therapy (HRT), induction of puberty when hypogonadism (diminished gonad activity) is present and in certain cases, suppression of puberty. While such treatment is often urgent and life-saving, hormones are frequently prescribed by physicians based on binary gender assignment and assumptions about gender identity. This policy and pattern may cause difficulties for individuals who don't identify as the gender they have been assigned at birth.

- 4.5 Rather than being based on medical research, non-emergency, invasive and irreversible interventions are frequently justified on the basis of deeply ingrained gender stereotypes: the perceived need to assign the child one of two binary options for sex and gender, as well as to enable penis-in-vagina sexual intercourse from adolescence.
- 4.6 Justification is also sought on the basis of 'psycho-social' reasons, such as preventing psychological damage and bullying of the child. While bullying harms the physical and emotional well-being of children and adolescents, and has a significant impact on their education; however, the risk of bullying cannot be used as a justification for harmful practices which themselves may be in conflict with the child's best interests.
- 4.7 While existing research remains limited, it has indicated a considerable degree of dissatisfaction with genital appearance and poor quality of life among adults who have undergone genital surgery as infants. Addressing the lack of long-term data to assess the quality of life and health of individuals who have not undergone surgical or hormone treatment should be a key factor in assessing the value of surgery and offering support and alternatives to early surgery.
- 4.8 Amnesty is opposed to any medical intervention with the intention of 'normalising' the appearance or function of sex characteristics.
- 4.9 Principle 32 of the *Yogyakarta Principles plus 10* states 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. Importantly, it states that 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.
- 4.10 A rights-based healthcare protocol, with binding guidelines for healthcare professionals, should be implemented for individuals with variations of sex characteristics to guarantee their bodily integrity, autonomy and self-determination and to ensure that no child is subjected to non-emergency, invasive and irreversible surgery or treatment. This includes postponing non-emergency, invasive and irreversible genital surgery or hormone treatment on infants and children, and adults with reduced capacity, with variations in sex characteristics until they are able to give free and informed consent.
- 4.11 The Family Court system in Australia has failed to adequately consider the human rights and autonomy of children born with variations of sex characteristics, and the repercussions of medical interventions on individuals and their families.
- 4.12 The Family Court's primary consideration should always be the best interests of the child with variations in sex characteristics, rather than other factors such as normalising appearance of the child, social or cultural norms or the technical difficulty or cost of clinical interventions.

5. Convention on the Rights of the Child

- 5.1 The Committee on the Rights of the Child and other treaty bodies, such as the Committee for the Elimination of Discrimination against Women, have repeatedly classified non-emergency, invasive and irreversible surgical and hormonal interventions in intersex children without consent as harmful and in violation of the rights of the child. In particular, these interventions violate the rights:
- a) to the highest attainable standard of health;
 - b) to a private life and to physical and bodily integrity;
 - c) to freedom from discrimination; and

d) to the elimination of harmful practices based on gender stereotypes.

Best Interests of the Child

- 5.2 Performing non-emergency, invasive and irreversible surgeries with harmful effects on children violates Article 3.1 of the Convention on the Rights of the Child (CRC) which states that the best interest of the child must be the primary consideration in all actions concerning the child. The Committee on the Rights of the Child has specifically noted that “an adult’s judgement of a child’s best interests cannot override the obligation to respect all the child’s rights under the Convention”.
- 5.3 Article 18.2 of the CRC requires states in order to guarantee and protect children’s rights, to render appropriate assistance to parents and legal guardians in the performance of their responsibilities. Yet, many parents have reported a lack of information regarding their child’s options, leaving them without the necessary knowledge to make an informed decision about medical interventions proposed for their children.

Evolving capacities and the right of the child to express its views

- 5.4 The medical standards and decision-making processes which lead to these non-emergency medical interventions being carried out on young children– which in many cases could wait until the child is able to express their views – may constitute a violation of the child’s right to express their views and to participate in decisions which affect them, as guaranteed by Article 12 of the CRC, and to the right to a private life - guaranteed by Article 16 of the CRC, Article 17 of the International Covenant on Civil and Political Rights (ICCPR).
- 5.5 Moreover, states must recognize that respecting young children’s evolving capacities - processes of maturation and learning whereby children progressively acquire knowledge, competencies and understanding, including acquiring understanding about their rights and about how they can best be realized - is crucial for the realization of their rights.

Right to bodily integrity, autonomy and self-determination

- 5.6 When performed without informed consent or adequate information, medical interventions can compromise the individual’s rights to bodily integrity, autonomy, and self-determination. It should be noted that children are especially vulnerable to such practices, as these are usually performed on people at a very young age when they are unable to speak up for and defend themselves. This includes repeated genital examinations and genital photography which can be traumatic to people born with variations in sex characteristics.
- 5.7 In its concluding observations on France and Ireland in 2016 and Switzerland in 2015, the Committee on the Rights of the Child stated its concerns about the routine practice of medically unnecessary surgeries and other treatment on intersex children that can be irreversible, while recommending states develop and implement a rights-based healthcare protocol for intersex children to guarantee their bodily integrity, autonomy and self-determination and to ensure that no child is subjected to unnecessary surgery or treatment.

6. Highest attainable standard of health

6.1 Non-emergency, invasive and irreversible medical treatment with harmful effects violates the right of the child to the highest attainable standard of health as guaranteed by Article 24.1 of the CRC and also by Article 12.1 of the International Covenant on Economic, Social and Cultural Rights (ICESCR). The Committee on Economic, Social and Cultural Rights (CESCR) has specifically noted in General Comment 14 that this right confers obligations on States to

respect the right to health, including by: “abstaining from enforcing discriminatory practices” as well as obligations to protect the right to health, including by: “tak[ing] measures to protect all vulnerable or marginalised groups of society.”

7. Torture

7.1 Under international law, medical interventions administered without the free and informed consent of the person to whom they are administered may constitute torture or inhumane treatment.

8. Freedom from Discrimination

8.1 International treaties highlight sex as a prohibited ground for discrimination, which includes discriminatory treatment of intersex people because of their atypical sex characteristics. Specifically, the Committee on Economic, Social and Cultural Rights in General Comment No. 20 on Non-discrimination in economic, social and cultural rights, asserts that: “the notion of the prohibited ground ‘sex’ has evolved considerably to cover not only physiological characteristics but also the social construction of gender stereotypes, prejudices and expected roles, which have created obstacles to the equal fulfilment of economic, social and cultural rights.”

9. Elimination of harmful practices based on gender stereotypes

9.1 Article 5 of the Convention on the Elimination of All Forms of Discrimination against Women calls on States to eliminate practices based on stereotyped roles for men and women. These practices also violate Article 2 of the UN Convention on the Rights of the Child (CRC) which prohibits discrimination of any kind against children, and Article 2 of the ICESCR which similarly prohibits discrimination of any kind on any ground including sex, which the Committee on Economic, Social and Cultural Rights has interpreted to “cover not only physiological characteristics but also the social construction of gender stereotypes, prejudices and expected roles.”