



# Submission to the Tasmania Law Reform Institute on the Legal Recognition of Sex and Gender

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## About the APS

The APS is the principal professional association for psychologists in Australia, representing more than 24,000 members. Psychology is a discipline that systematically addresses the many facets of human experience and functioning at individual, family and societal levels. Psychology covers many highly specialised areas, but all psychologists share foundational training in human development and the constructs of healthy functioning. Psychologists are experts in human behaviour and bring critical skills, experience and understanding to support people to live well.

A key goal of the APS is to actively contribute psychological knowledge to enhance community wellbeing and promote equitable and just treatment of all members of society. The APS regularly consults with psychologists, consumers of psychological services, communities and organisations, to best understand the psychological needs of the Australian population and to identify and address the individual, family and systemic issues that contribute to social problems, and to find better ways of addressing such problems.

The APS has a proud history of working in collaboration with Australian Government departments and other organisations in the successful delivery of policies and programs aimed at improving the health outcomes of Australians.

## Introduction

The Australian Psychological Society (APS) welcomes the opportunity to comment on the Tasmania Law Reform Institute's Issues paper on the Legal Recognition of Sex and Gender. The APS commends the Institute for this important work, which explores the legal recognition of gender identity on official documentation as well as consent to medical procedures to alter sex characteristics.

The Issues paper has been informed by the passing of the Justice and Related Legislation (Marriage and Gender Amendments) Act 2019 (Tas). The intention of the Act was to make it easier for Tasmanians to gain official documentation that reflects their gender identity, and reduce the discrimination and trauma experienced by intersex and gender diverse Tasmanians.

Like the Institute, the APS is concerned about the human rights protection available to people born with variations in sex characteristics, particularly in relation to the impacts of unnecessary medical interventions, surgical and non-surgical, at various stages in their lives, across infancy, childhood and adulthood, as well as issues around legal classifications and documentation. Further, the APS is concerned about the implications of legislation and societal attitudes on the mental health and wellbeing of people born with intersex variations. Having an intersex variation is not a mental health issue in itself, but mental health issues may arise due to perceived conflicts with social and cultural ideas about sex. Additional mental health issues can emerge as a result of unnecessary surgeries and hormone treatments that may be imposed on infants and young people throughout childhood and adolescence.

Similarly for gender diverse people, the APS argues that human rights protection is applicable. For gender diverse people, however, the point of difference is that rather than requiring protection from *unnecessary* medical treatment, gender diverse people require access to *necessary* medical treatment. For some people, including minors, this may require surgery. Again, gender diversity is not a mental health issue, but mental health issues can arise due to social attitudes, gatekeeping from services, and refusal of recognition of the veracity of gender diversity.

Overall, the APS believes that decisions and processes regarding medical intervention as applicable to people born with intersex variations need to focus primarily on the individual's wellbeing, over and above a concern for social integration, which often means normalisation. For gender diverse people, the APS believes that decisions and processes regarding medical intervention should not be restricted solely to adults, and that there is a pressing need to recognise the rights and competencies of gender diverse minors.

This submission responds to the most relevant discussion questions in the Issues paper (that is, those most pertinent to psychology and psychologists), and is based on psychological evidence and the expertise of APS members.

## Listening to the voices of sex and gender diverse people

Decisions made about the legal recognition of sex and gender should be underpinned, as much as possible, by evidence that has been informed by the views of people born with intersex variations and gender diverse people.

It is important to be critical of the available evidence about the experience of intersex variations. Often the evidence has been driven by the views of health professionals rather than the views of people born with intersex variations themselves, and it is always imperative to question whose interests the research served. Tiffany Jones and colleagues<sup>1</sup>, who have conducted the largest study to date of Australians with intersex variations (n=272), noted that there are “clear gaps in the literature around research on the perspectives of people with intersex variations” about interventions (p.101).

Similarly, gender diverse people have been strong advocates for the need for research that is informed, guided, and undertaken in collaboration with gender diverse people, which historically has not been the case (e.g., <sup>2</sup>). The lack of engagement with gender diverse people has resulted in research and clinical guidelines that have resulted in the unnecessary gatekeeping of access to services, has contributed to the pathologisation of gender diversity, and has thus contributed to the poor mental health experienced by gender diverse people excluded from services. Recent treatment guidelines developed in Victoria are an important example of the type of inclusive and affirming medical guidelines that can be developed when done in collaboration with gender diverse people<sup>3</sup>.

## **Question 1**

What, if any, administrative changes will be required to allow government agencies, notaries, or other officials to verify a person's sex or gender identity if their birth certificate does not include sex or gender information?

The position of the APS is that an individual is the person most capable of verifying their sex or gender identity. The simplest method to achieve this is by Affidavit, and should not require that individuals have additional verification from third parties (such as mental health or medical professionals). If it is necessary to collect statistical information about sex and gender, a 'two-step' model<sup>1</sup> has been developed and is considered the gold standard in terms of collecting this information from individuals<sup>4</sup>.

## **Question 2**

Should guidelines be developed to guide the exercise of the Registrar's discretion to refuse an application to register a change of gender?

This question is out of scope of the APS's expertise.

## **Question 3**

Are there potential implications for the interaction of the JRL Act with existing legislation that are not discussed in section 2.2 of this Issues Paper?

This question is out of scope of the APS's expertise.

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<sup>1</sup> The recommended two-step approach comprises two questions: (1) What is your current gender identity? (A gender identity list should be provided – male, female, non-binary and a free-text 'different identity' should be an absolute minimum data set) and; (2) What sex/gender were you assigned at birth? (Male or Female).

## Question 4

What policies are currently in place relating to access by sex and gender diverse people to gender-based locations or events? In your experience, what has been the outcome of implementing those policies?

The APS endorses a position whereby individuals are seen as capable of stating their own sex or gender, and does not endorse an approach that would cast undue suspicion on an individual's motives for stating a particular sex or gender. There is considerable variation in human physiology, and the presumption that a person of a particular sex or gender may gain unfair advantage in accessing a location or event that others deem not appropriate is ill-founded. Further, there is now evidence that restricting the use of facilities according to assumptions about sex or gender can have significant mental and physical health costs for sex and gender diverse people<sup>5</sup>. Conversely, there is no peer-reviewed evidence to suggest that individuals claim to be a particular sex or gender in order to access locations or events from which they may otherwise be prohibited.

## Question 5

What, if any, reforms should be made in relation to consent to medical treatment to alter the sex characteristics of an intersex minor? In particular:

- In what, if any, situations should Court approval be required for medical intervention on minors to alter sex characteristics?
- Should sex reassignment surgery on a minor be excluded from offences relating to female genital mutilation?
- Should Tasmanian laws prevent medical intervention to address sex characteristics in minors without their consent to the procedures (other than in emergency situations)? Should 'emergency situations' be defined by legislation for the purpose of this exception?

Tasmanian laws should prevent medical intervention to address sex characteristics in minors without their consent to the procedures other than in medical emergency situations.

'Medical necessity' should never pertain to assumptions about 'confusion', 'stigma', 'risk', 'difficulties' et cetera, and should solely pertain (and most definitely for children) to function (for example, if a variation means a child cannot urinate then that needs treatment. If a child has a large clitoris then that does not need treatment).

The diversity amongst people born with intersex variations means that issues and impacts are likely to be different for each person. This necessitates that each individual's situation should be managed on a case-to-case basis.

*Intersex Human Rights Australia's Position Statement on Genital Cutting*<sup>6</sup> argues against surgery until a child is able to participate in making decisions. In a small number of cases early surgery may be necessary, such as to assist bladder or bowel functions. These are the cases which should be defined as 'emergency situations' and therefore exceptions in the legislation, though this should always occur in consultation with parents.

Importantly, some surgeries are often treated as medically necessary – such as for hypospadias – when in fact perceived complications may self-correct as the child matures. 'Self-correct' does not necessarily mean that the issue will go away; rather it means that in many cases the person finds ways to happily live with the variation – an option that is denied if unnecessary treatment occurs. It is therefore important to have multiple assessments before any surgery is considered, particularly as surgery performed during infancy often requires repeated follow-up surgeries throughout childhood and adolescence, and parents may not be advised of this when first consenting to surgery<sup>7</sup>.

- What form should that prohibition take? Should it be a criminal offence to perform such surgery or should some alternative approach be adopted and, if so, what approach would best address this issue?
- Should there be any additional exceptions to that prohibition apart from emergency situations and, if so, what should those exceptions be?

- In what, if any, situations should an independent advocate be appointed to act on behalf of a minor where approval is sought for medical intervention to address sex characteristics?
- If parents are able to consent to medical procedures, should they be required to show that they have received counselling or advice (other than from the treating physician) about the implications of the proposed procedures?

If parents are able to consent to medical procedures, the APS endorses a position whereby parents should be offered access to counselling and/or advice, but that this should not be a requirement. Counselling should never be a requirement as it imposes an additional and often unnecessary burden on a person (both in terms of time and cost), as well as assuming everyone is uninformed and has not considered the implications of the proposed procedures.

It is important that parents and families are informed about their child's intersex variations and are supportive of their child's right to make decisions about their bodies. It is not recommended for infants to have surgery or take hormones unless medically necessary, meaning parents are advised to be careful about consenting to any medical interventions. Parents may need to negotiate with doctors to ensure any interventions are done with their child's informed consent, when the child is developmentally able to provide it. A European study found that while parents are asked for proxy consent to treat their child, they are often not well-informed or are not given sufficient information and time to make decisions<sup>8</sup>. Parents should generally wait until a child is able to communicate and participate in decisions about potential surgeries before proceeding. Many parents find that support groups run by and for people with intersex variations can be helpful and informative.

- Should a specialist tribunal be established to consider applications for medical procedures to alter the sex characteristics of minors and, if so, who should be members of the Tribunal?

This and the other sub-questions in Question 6 are out of scope of the APS's expertise.

## Question 6

What, if any, reforms should be enacted to enable minors to consent to medical treatment to alter their sex characteristics and to enable medical practitioners to act on their consent?

Different to question 5, which pertains to children born with intersex variations, this question potentially speaks to other groups likely affected by proposed legislative change, including gender diverse young people. Whilst in response to question 5 the APS would argue *against* unnecessary medical treatments performed upon children born with intersex variations, in response to question 6 the APS would argue that for some gender diverse young people medical treatments are *necessary*.

It is already the case in Australia that stage 1 (puberty suppression) and stage 2 (hormones) treatment for gender diverse young people no longer requires Court approval. There have also been cases where surgery has been approved for minors. This is especially true for minors who have entered into puberty and for whom the changes that have occurred in their bodies (such as in regards to the chest) are experienced as deeply distressing. For these minors surgery may be entirely appropriate, and indeed has been sought by the children themselves.

At present, however, all of the above requires parental or legal guardian authority to petition the Court. This is a significant barrier for children who are not supported by their parents or legal guardians. As such, mechanisms are needed for minors to access medical support, assessment and treatment that meets their needs in terms of their gender. Such mechanisms may include hospitals petitioning Courts for approval for treatment, engaging in advocacy work to gain parental support for treatment, and the availability of legal services to minors to prove Gillick competence so that they may authorise their own treatment.

## Question 7

Should there be an age requirement for valid consent to medical treatment to alter sex characteristics?

This question is out of scope of the APS's expertise.

## Question 8

Should there be additional conditions attached to the consent to enable medical practitioners to act on it, such as a requirement that minors receive expert counselling regarding the consequences of the surgery?

As with Question 5, counselling should never be a requirement as it imposes an additional and often unnecessary burden on a person (both in terms of time and cost). However, it should by all means be offered, preferably free of cost.

Facilitating access to an appropriately trained psychologist could enhance the capacity of people born with intersex variations and/or caregivers to provide informed consent. Although many psychologists may have some knowledge of intersex variations, few have received specific training in how to respond in an affirming and supportive way to parents of children with intersex variations. Those who combine their knowledge with an affirming attitude toward people with intersex variations may be able to help parents explain to children that they have an intersex variation and what this means. They can also confirm that people can live happy and fulfilling lives as adults without having surgery or hormones to change their bodies.

A psychologist is likely to be useful in:

- helping a child understand their intersex variation
- exploring a child's issues and feelings relating to their body
- discussing any wishes a child might have for medical intervention, including in relation to puberty.

Psychologists may also help parents to understand a child who has an intersex variation, and to work out the best ways to support their child. Considering the stigma and lack of awareness around intersex variations<sup>1</sup>, parents may feel that having a child with an intersex variation is very challenging. Psycho-education may help to combat this feeling through a better understanding of intersex variations as a normal part of human variation.

More broadly speaking, there is a need for better community education and information about intersex variations – what they are, what it means, and the impact of social norms and stigma on decision-making. Addressing such social stigma and misconceptions is likely to have a huge impact on people's decision-making about medical intervention. While community awareness and acceptance about sexual orientation is much greater than it has ever been, there is still confusion as to how sexual orientation relates to variations in sexual characteristics, gender identity and other LGBTI identities. Being transgender or gender diverse is different from having intersex variations (although a small number of

children are both). Intersex refers specifically to being born with variations in chromosomes, genitals, and/or reproductive organs, and not to a person's gender or sexual orientation.

In terms of gender diverse children, again mental health support should be available, and it is unlikely that a gender diverse child would ever enter a pathway to medical treatment without considerable medical oversight. At the same time, however, such oversight should operate from an affirming position, supporting young people to explore and express their gender. Such an affirming approach, as advocated for in the [APS position statement on affirming experiences of transgender people](#), must acknowledge that whilst some oversight is required in terms of medical treatment, such oversight should not serve to gatekeep or prevent access to services.

## Question 9

Should medical practitioners be able to act on the consent of minors under 16 years of age to medical treatment to alter their sex characteristics and, if so, in what circumstances? For example, should there be a requirement that two medical professionals (defined to include clinical psychologists) are satisfied that:

- the child is capable of understanding the nature, consequences and risks of the treatment; and
- the treatment is consistent with the 'will and preference' of the child; and
- the treatment

Yes, medical practitioners should be able to act on the consent of minors under 16 years of age to medical treatment to alter their sex characteristics as long as the medical professionals are competent in conducting decision-making capacity assessments as well as have an understanding of the nuances of such a request. Across Australia there are key medical centres with considerable expertise in working with children in regard to consent related to sex and gender. Such centres require ongoing and potentially increased funding, and have a significant role to play in the upskilling of other professionals. More broadly, organisations such as the APS have a role to play in contributing to evidence based practice, such as in ongoing CPD provided to members who may work with sex and gender diverse young people.

In terms of assessments, and given the bottle neck in accessing services for gender diverse young people, and the limited number of specialists working in this area, the requirement of two independent

assessments may unnecessarily restrict access to services. If the assessment is provided by a qualified, suitably trained specialist working in the field, then a dual assessment is likely not required. A second assessment may be required, however, for junior specialists, specialists new to the field, or when there are compounding factors influencing the assessment. Given concerns about a bottleneck in current service provision, the requirement that assessments are undertaken by medical professionals or a clinical psychologist would seem in some instances to be unnecessarily restrictive. Suitably trained mental health professionals from across a diverse range of fields are capable of providing an assessment, as clearly stated in the World Professional Association for Transgender Health *Standards of Care*.

## APS Activities related to Legal Recognition of Sex and Gender

The APS is committed to working to promote the health and wellbeing of Australians born with intersex variations. Recent and ongoing work relating to people with intersex variations which may be of interest includes:

- Information sheet - [Children born with intersex variations](#) - prepared for parents and families of children born with intersex variations and for psychologists and other mental health professionals who work with them.
- Information sheet for parents of [transgender and gender diverse children](#). These are part of a series of information sheets prepared by the APS in relation to [LGBTI+ parenting and families](#).
- [Submission to AHRC Project into people born with variations in sex characteristics](#)
- [Diverse Bodies, Genders and Sexualities Interest Group](#)
- Ethical Guidelines on working with sex and/or gender diverse clients
- Position Statement on [Mental health practices that affirm transgender people's experiences](#)

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