

SUBMISSION TO EQUALITY AUSTRALIA | LGBTIQ+ LEGAL AUDIT

A Gender Agenda (**AGA**) welcomes the opportunity to make a submission to Equality Australia on law reform needed to remove discrimination against LGBTIQ+ people in the Australian Capital Territory (**ACT**).

I ABOUT A GENDER AGENDA

AGA is a unique, vibrant and peer-focussed community organisation that is actively engaged in increasing public awareness and understanding of issues regarding sex and gender diversity. Established in 2004, AGA is incorporated under the *Associations Incorporation Act 1991* (ACT) and is registered with the Australian Charities and Not-for-profits Commission (**ACNC**). AGA supports intersex, trans and gender diverse communities as well as their families, friends and allies. AGA often facilitates training, education and advocacy programs across the ACT, and frequently contributes to human rights and law reform initiatives.¹

II SUBMISSIONS

AGA recognises that there is an urgent need for legislative change to protect the rights and interests of intersex persons in the ACT. AGA proposes three areas of change to bring about that protection, as discussed **below**.

A Technical changes to ACT legislation

1 Changes to legislative definitions

AGA submits that the ACT Government must recognise intersex people on the basis of 'sex characteristics' in accordance with the *Yogyakarta Principles* and *Darlington Statement*.² These publications adopt the definition of 'intersex' put forward by the Office of the United Nations High Commissioner for Human Rights (**OHCHR**):

An **intersex person** is a person born with physical or biological sex characteristics (such as sexual anatomy, reproductive organs, hormonal patterns and/or chromosomal patterns) that do not fit the typical definitions for male or female bodies.³

The existing definitions of 'intersex' in ACT legislation are deficient because they:

- rely on binary sex classifications, defining intersex people by reference to typical male and female traits that they lack;
- suggest that intersex people are a third gender (again adopting a binary approach); and
- use language such as 'genetic condition' to describe intersex people⁴ (which suggests that these variable sex characteristics need to be remedied or 'fixed').

ACT legislation protects people from discrimination and vilification based on the protected attribute of their 'intersex status'.⁵ Intersex status is defined in the legislation as 'status as an intersex person'. This drafting is also

¹ For example, in 2018 AGA and other intersex advocacy organisations wrote jointly to the Hon Andrew Barr MLA, Chief Minister of the ACT, calling for the ACT to become the most intersex-competent, inclusive and friendly jurisdiction in Australia, in line with international best practice.

² Black E et al, *Darlington Statement: Joint consensus statement from the intersex community retreat in Darlington*, March 2017 [internet]. <<https://eprints.qut.edu.au/104412/>>; *The Yogyakarta Principles Plus 10L 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 Yogyakarta Principles [Internet] 2017. <http://www.yogyakartaprinciples.org/principles-en/yp10/>.

³ Office of the High Commissioner for Human Rights, *Intersex Awareness Day – Wednesday 26 October. End violence and harmful medical practices on intersex children and adults, UN and regional experts urge* [internet] 2016. <<http://www.ohchr.org/EN/NewsEvents/Pages?DisplayNews.aspx?NewsID=20739%LangID=E>>.

⁴ *Legislation Act 2001* (ACT) s 169B; *Children and Young People (Administration and Classification) Policy and Procedures 2018* (No. 1) (ACT) s 4. Note, this is similar to the Commonwealth *Sex Discrimination Act 1984* which defines "intersex status" using the terminology of section 169B of the *Legislation Act 2001* (ACT).

⁵ *Discrimination Act 1991* (ACT) ss 7, 67A and Dictionary; *Criminal Code 2002* (ACT) s 750(1)(iv).

deficient because, in practice, it requires individuals to identify with a particular intersex identity to be afforded protection.

The deficiencies identified above do not reflect the diversity of people born with variations in sex characteristics, nor their right to self-determination.

In light of the above, AGA proposes the following technical legislative changes:

1.	<u>Amend</u> all legislative references to 'intersex person' to 'people born with variations in sex characteristics'	Some people born with variations in sex characteristics do not identify as intersex, and may identify as male or female, or choose not to identify entirely. The term 'people born with variations in sex characteristics' is a literal descriptor that will reconcile individual terminology preferences.
2.	<u>Amend</u> all legislative definitions to reflect the OHCHR definition	For the reasons identified above .
3.	<u>Replace</u> 'intersex status' with a new protected attribute, 'sex characteristics'	A new protected attribute, 'sex characteristics', will widen the application of the legislation and reflect that some individuals choose not to identify with intersex status.

2 Right to self-determination

AGA also submits that the ACT Government should repeal legislative provisions that unnecessarily abrogate an individual's right to self-determination.

There are numerous legislative provisions that prescribe how searches and forensic procedures may be conducted on an intersex person or transgender person. These provisions generally require the search or procedure be conducted by a person of the same sex (**same sex rule**), and either requires the intersex person to identify themselves as male or female⁶ or allows the intersex person to elect to have the search or procedure conducted by a male or female.⁷

The provisions abrogate the autonomy of individuals to freely elect their sex and gender identity, or to not elect at all. Accordingly, AGA makes the following proposals:

1.	Repeal provisions that deem an intersex person to be a binary sex or require the individual to identify with a binary sex	For the reasons identified above .
2.	Include a general exception to the same sex rule for intersex persons	The following general exception should be included in the relevant legislation: ⁸ <i>If a transgender or intersex person is searched under this section, the person may require that the search be conducted by either a male or a female at their election.</i>

⁶ *Crimes (Forensic Procedures) Act 2000* (ACT) s 49B; *Children and Young People Act 2008* (ACT) ss 250 and 592; *Corrections Management Act 2007* (ACT) s 109; *Corrections Management (Management of Transgender Detainees and Detainees Born with Variations in Sex Characteristics) Policy 2018* (ACT) r 4.1.

⁷ *Terrorism (Extraordinary Temporary Powers) Act 2006* (ACT) s 1.7; *Drugs of Dependence Act 1989* (ACT) s 189; *Intoxicated People (Care and Protection) Act 1994* (ACT) s 6C; *Crimes Act 1900* (ACT) s 185; *Casino Control Act 2006* (ACT) s 120; *Confiscation of Criminal Assets Act 2005* (ACT) s 211; *Crimes (Child Sex Offenders) Act 2005* (ACT) s 116H; *Children and Young People (Search and Seizure) Policy and Procedures 2018* (No 1) (ACT) r 6.9.

⁸ *Crimes (Forensic Procedures) Act 2000* (ACT); *Children and Young People Act 2008* (ACT); *Corrections Management Act 2007* (ACT).

B Medical intervention regarding children with variations in sexual characteristics

AGA calls for law reform in the ACT to prohibit deferrable medical interventions, including surgical and hormonal interventions, that alter the sex characteristics of infants and children (**deferrable medical interventions**). New legislative provisions should be adopted that:

- prohibit deferrable medical interventions until the affected child is competent to give informed personal consent; and
- prohibit medical practitioners from providing referrals for, in relation to, or otherwise in connection with, deferrable medical interventions.

1 Medical interventions

AGA recognises that the distinction between 'therapeutic' and 'non-therapeutic' treatments in authorising medical interventions has not preserved the bodily autonomy of infants and children with variations in sex characteristics. AGA submits that medical interventions permitted to be performed that alter the sex characteristics of infants and children who are unable to give informed and personal consent should be restricted to non-deferrable medical interventions which are medically necessary to protect the child's physiological health.

AGA proposes that the ACT identify a procedure as 'medically necessary' to protect the child's physiological health if:

- (a) the child's life would be endangered if the procedure is not performed; or
- (b) it would be considered medically necessary for a child without variations in sex characteristics, in the same circumstances, to undergo the procedure.⁹

Other factors relevant to determining whether a procedure is deferrable should include the invasiveness of the procedure, whether the procedure is reversible, and future implications of the procedure for the child.¹⁰

Procedures that are not medically necessary and can be safely deferred, including those which alter the gonads, genitals or internal sex organs of a child, should not be performed without the child's informed personal consent. Deferrable medical interventions should not be conducted on the basis of gender stereotypes, social or cultural norms, or for financial reasons.¹¹

2 Consent and competency

Deferrable medical interventions should only be performed on a child where the child provides free, prior and informed consent regarding those interventions. Currently, a child cannot consent to medical treatment unless they are considered '*Gillick competent*' – that is, of sufficient intellectual intelligence and emotional maturity to understand the nature and consequence of the procedure to be performed.¹²

AGA calls for legislation which requires that:

- (a) deferrable medical interventions to be performed on a child must be delayed until the child is considered *Gillick competent* by a medical practitioner; and

⁹ See eg InterACT, *Providing Ethical and Compassionate Health Care to Intersex Patients*, (2018), 9-11; Kavot Zillen et al, *The Rights of Children in Biomedicine: Challenges posed by scientific advances and uncertainties* (Council of Europe, 2017), 43.

¹⁰ *Re Jamie* [2013] FamCAFC 110, [108].

¹¹ Parliament of Australia, Senate, *Involuntary or coerced sterilisation of intersex people in Australia* (25 October 2013); Senate of California, Resolution No 110 (September 11 2018).

¹² *Gillick v West Norfolk & Wisbech Area Health Authority* [1986] AC 112, adopted in *Secretary of the Department of Health and Community Services v JWB and SMB* (1992) 175 CLR 218, 311.

- (b) if the child is considered *Gillick competent*, the child and their parents/caregivers will participate in a mandatory and fully-funded information session and peer support group, independent of the medical practitioner recommending the intervention. To enable the child to make a free and informed decision, the information session should address the nature of the intervention, the consequences of the intervention (including those arising in the future), and any available alternatives to the intervention.

Relevantly, and in light of the decision of the Family Court of Australia in *Re Kelvin*,¹³ we do not consider courts or tribunals to be an appropriate forum for determining whether a child is *Gillick competent*, given the adversarial nature of, and delays and costs associated with, legal proceedings.¹⁴ Courts and tribunals should become involved in this process only as a method of last resort.

3 Referrals

AGA calls for medical practitioners in the ACT to be prohibited from providing referrals for, in relation to, or otherwise in connection with, deferrable medical interventions in respect of infants and children. New legislation should be introduced to contemplate the risk that prohibiting deferrable medical interventions in the ACT will result in an increase in 'jurisdiction shopping' by the parents/caregivers of infants and children with variations in sex characteristics (in effect, identifying medical practitioners in other jurisdictions where deferrable medical interventions are legal and routinely performed).

AGA recognises that it is not possible to wholly prevent parents from independently seeking deferrable medical interventions for an infant or child, but a prohibition on medical referrals for these interventions in the ACT goes toward protecting the rights and interests of children with variations in sexual characteristics in the ACT.

C Legislative exceptions for religious institutions engaging in discriminatory conduct

1 The model standard

AGA submits that the ACT should adopt a model standard in abolishing legislative exceptions that allow religious institutions to discriminate against current or prospective employees on the basis of its religious tenets. AGA submits that a new provision should be inserted into the *Discrimination Act 1991* (ACT) (**the Act**) requiring religious bodies to apply to the ACT Human Rights Commission (**ACTHRC**) for any exemptions to the Act (reflecting the application process imposed on institutions applying to the Australian Human Rights Commission for exemptions to Federal anti-discrimination legislation).

This position reflects the model reforms proposed by the Northern Territory's Department of the Attorney-General and Justice in September 2017 in response to similar provisions in the Northern Territory's anti-discrimination legislation that allow faith-based discrimination against persons with protected attributes.¹⁵

2 Deficiencies in the current legislative framework

Section 33 of the Act provides an exemption to prohibitions against discrimination by educational institutions conducted for religious purposes. Discrimination is permitted by these institutions against employees and contract workers to avoid 'injury to the religious susceptibilities of adherents of that religion or creed.' The exemption applies automatically, and acts to insulate institutions from being held accountable for that conduct.

AGA submits that the existing exemption afforded by section 33 is too broad, in that it allows religious institutions to discriminate against 'someone else'. In practice, using the phrase 'someone else' permits religious institutions to discriminate against current or prospective employees on the basis of any protected attribute including gender, intersex status, sexual orientation and gender identity. This exposes current and prospective employees

¹³ *Re Kelvin* [2017] FamCAFC 258.

¹⁴ Submission No 85, A Gender Agenda, Parliament of Australia, Senate, *Involuntary or coerced sterilisation of intersex people in Australia* (25 October 2013).

¹⁵ Department of the Attorney-General and Justice, *Discussion Paper: Modernisation of the Anti-Discrimination Act* (September 2017), 21.

who may identify as belonging to one or more of those categories to the adverse consequences of discrimination by religious institutions.

Relevantly, the Act does not contain a requirement that the relevant current or prospective employee be engaged in work directly connected to religious observance or instruction. The exemption can be utilised by religious institutions with respect to any person, simply because of who they are.

3 Proposed resolution

AGA submits that abolishing the exemption for religious institutions to discriminate against employees under section 33 would promote equality of opportunity for all persons living within the ACT.

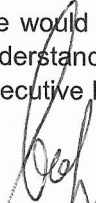
The ACT Government should adopt the model standard proposed in the Northern Territory and implement a compulsory mechanism by which religious bodies must actively seek permission from the ACTHRC to engage in discriminatory conduct. This would require religious institutions to present evidence as to the necessity of such an exception and the religious grounds on which the request is made.

By including a mandatory provision to this effect within the Act, religious institutions would be held to greater account for their conduct and for the process through which they engage their employees.

These submissions are supported by the recommendations handed down by the Religious Freedom Review (2018).¹⁶ The expert panel¹⁷ conducting the Religious Freedom Review proposed that any Australian jurisdiction allowing discrimination on the basis of religion be formally reviewed in line with current community standards, or abolished altogether.¹⁸ The recommendations also proposed that religious bodies show more transparency by establishing and distributing a policy outlining its beliefs and the basis on which it might discriminate.

Implementing an 'application mechanism' for an exemption to the Act would address issues regarding the accountability of religious institutions and the equality of LGBTIQ+ persons raised during the Religious Freedom Review. This proposal strikes an appropriate balance between the right to freedom of religion and the right to freedom from discrimination in Australian workplaces.

We would be pleased to assist Equality Australia by providing any further information it may require to better understand AGA's perspectives on the issues discussed above. In the first instance, please contact Sel Cooper, Executive Director of AGA at sel.cooper@genderrights.org.au.



Sel Cooper

Executive Director
A Gender Agenda

¹⁶ Australian Government, *Religious Freedom Review: Terms of Reference*, Department of the Prime Minister and Cabinet, 22 November 2017, <https://www.pmc.gov.au/resource-centre/domestic-policy/religious-freedom-review-terms-reference>.

¹⁷ Comprising the Hon Philip Ruddock (chair), Emeritus Professor Rosalind Croucher AM, the Hon Dr Annabelle Bennett AO SC, Father Frank Brennan SJ AO, and Professor Dr Nicholas Aroney.

¹⁸ Philip Ruddock on behalf of the Expert Panel, *Religious Freedom Review: Report of the Expert Panel* (18 May 2018).