BODILY INTEGRITY, PHYSICAL AUTONOMY AND SELF-DETERMINATION:

A BACKGROUND PAPER ON PROTECTING INTERSEX PEOPLE FROM MEDICAL INTERVENTIONS WITHOUT PERSONAL CONSENT

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ABOUT EQUALITY AUSTRALIA

Equality Australia is a national LGBTIQ+ organisation dedicated to achieving equality for LGBTIQ+ people.

Borne out of the successful campaign for marriage equality, and established with support from the Human Rights Law Centre, Equality Australia brings together legal, policy and communications expertise, along with thousands of supporters, to redress discrimination, disadvantage and distress experienced by LGBTIQ+ people.

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We acknowledge that our offices are on the land of the Kulin Nation and the land of the Eora Nation and we pay our respects to their traditional owners.

BACKGROUND

Several countries have considered and undertaken reforms that prohibit medical interventions modifying a person's sex characteristics without their personal consent. This paper brings together considerations relevant to the development of reforms in Australia to end harmful practices and ensure to all people the right to bodily integrity, physical autonomy and self-determination over what happens to their bodies.

This background paper draws from a paper prepared for the ACT Government, which is currently considering reforms in this area. Equality Australia thanks the ACT Government for its support in developing that paper and allowing it to be used to continue the discussion about reforms elsewhere in Australia.

1. INTRODUCTION TO THE ISSUE

People with intersex variations comprise a diverse group whose sex characteristics differ from typical binary notions of male or female bodies. 'Sex characteristics' are physical features relating to sex, including chromosomes, genitals, gonads, hormones, and other reproductive anatomy, and secondary features that emerge from puberty.[1] For this paper, 'intersex' is taken to mean innate sex characteristics that do not fit medical and social norms for female or male bodies.[2]

A range of sex characteristic variations come under the banner of 'intersex',[3] and the needs of people with each of these variations differ greatly, as can the needs of individual people with the same kind of variation. Variations of sex characteristics may sometimes also be referred to as 'intersex conditions' or 'differences of sex development' (**DSD**). Further, like for other marginalised groups, there is no universal agreement on a list of variations or conditions that are considered intersex, with disagreement both among clinicians and between clinicians and other stakeholders. **Appendix E** provides a glossary of key terms.

People with intersex variations may identify as male or female or as another gender, and may be attracted to the same or different genders. 'Intersex' describes a difference related to a person's bodily sex characteristics, not a gender identity or sexuality.

Some medical treatment provided to people in connection with their intersex variations can be necessary and urgent, such as interventions to address salt wasting[4] or the inability to urinate. But treatments in connection with sex characteristics may also be inappropriately justified by reference to sex, gender and sexuality stereotypes and other psychosocial factors.

There can be life-long and significant physical and psychological consequences for a person who receives treatment modifying their sex characteristics, especially without their personal consent. Those consequences can include the loss of physical sensation or capacity for sexual or reproductive function; the need for additional surgery or treatment; a poor self-image or self-esteem; and a body that does not accord with the gender identity of the person.

2. THE DARLINGTON STATEMENT

The demands of intersex advocates, peer support volunteers and organisations for reform were crystallised in a 2017 statement, known as the Darlington Statement, for the Australian and Aotearoa/New Zealand region. The Darlington Statement criticised the lack of transparency in standards of care and practices affecting people with

[1] *Yogyakarta Principles Plus 10*.

[2] See UN Office of the High Commissioner of Human Rights (UNCHR) *Background Note on Human Rights Violations against Intersex People*, at 4.

[3] Variations in sex characteristics that are widely discussed in this context include: Congenital Adrenal Hyperplasia (**CAH**); hypospadias; Klinefelter syndrome (47,XXY); Turner's syndrome (45,X and variants); Partial Androgen Insensitivity Syndrome (**PAIS**); Complete Androgen Insensitivity Syndrome (**CAIS**); Mayer-Rokitansky-Küster-Hauser Syndrome (MRKH); gonadal dysgenesis (including, depending on the classificatory approach, Frasier syndrome, Denys-Drash syndrome); 5α-Reductase Deficiency; 3β-Hydroxysteroid Dehydrogenase Deficiency; 17-Ketosteroid Reductase Deficiency and 17β-Hydroxysteroid Dehydrogenase Deficiency. Of these, CAH and hypospadias account for a large majority of variations.

[4] Salt wasting can result from CAH, a condition that affects hormone production by the adrenal glands. Persons who have CAH do not produce enough aldosterone, a hormone which helps to regulate salt levels in the body.

intersex variations and stated that the approach of the federal family courts to interventions on intersex infants had failed the intersex population. In this regard, intersex advocates and peer support volunteers have been particularly critical of the Family Court's approach in the case of *Re Carla* (discussed in section 5(b) below). The facts in *Re Carla* evidence their concern that there is both:

- a general lack of appropriate oversight in respect of decisions currently made only between clinicians and parents affecting the bodies of intersex children, and
- a willingness by clinicians, courts and (inadequately supported) parents to accommodate gender, sex or sexuality-based stereotypes and other psychosocial rationales in such decisions, which tend to favour early interventions over a deferral of such interventions until a person can provide their own consent.

The Darlington Statement calls for a criminal prohibition on deferrable medical interventions that alter the sex characteristics of children without personal consent, and a human rights-based oversight mechanism (comprised of human rights experts, clinicians, and intersex-led community organisations) to determine individual cases where a person is unable to consent.

THE HUMAN RIGHTS LEGAL FRAMEWORK

3. INTERNATIONAL HUMAN RIGHTS LAW

There are several human rights recognised in international law that may be relevant to a discussion about how a prohibition on medical interventions on intersex people could operate in Australian jurisdictions. These include prohibitions against torture, and cruel, inhuman or degrading treatment or punishment; the right to health; several rights recognised under the Convention on the Rights of the Child and the right to physical and mental integrity recognised under the Convention on the Rights of Persons with Disabilities.

The human rights implications of medical interventions performed on people with intersex variations without their personal consent have been considered by several international human rights bodies, including with specific recommendations made to Australia. The growing consensus is that deferrable medical or surgical treatment undertaken on intersex people, particularly children, without their personal consent contravenes international human rights law.

Appendix A contains a summary of key relevant international human rights obligations and recommendations made to Australia by international human rights bodies regarding medical interventions undertaken on intersex people.

4. DOMESTIC HUMAN RIGHTS LAWS

Several states and territories have statutory human rights charters that contain human rights relevant to this area, including the ACT, Victoria and Queensland. Rights protected under these charters include:

- The right to protection against torture or cruel, inhuman or degrading treatment or punishment;[5]
- The right to protection from medical or scientific experimentation or treatment without free consent;[6]
- The rights of children to the protection needed by them because of being a child, without distinction or discrimination of any kind;[7]
- The right to equality;[8]
- The right to protection of the family;[9]
- The right to privacy.[10]

The protections in these human rights statutes are subject to general limitation clauses.[11] For example, human rights may be reasonably limited by laws that can be demonstrably justified in a free and democratic society.[12]

New legislation introduced in states and territories where such human rights legislation exists must be reviewed for their conformity with the rights protected by these charters.[13]

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[5] *Human Rights Act 2004* (ACT), s 10(1); *Charter of Human Rights and Responsibilities Act 2006* (Vic), s 10; *Human Rights Act 2019* (Qld), s 17.

[6] *Human Rights Act 2004* (ACT), s 10(2); *Charter of Human Rights and Responsibilities Act 2006* (Vic), s 10(c); *Human Rights Act 2019* (Qld), s 17(c).

[7] *Human Rights Act 2004* (ACT), s 11(2); *Charter of Human Rights and Responsibilities Act 2006* (Vic), s 17(2); *Human Rights Act 2019* (Qld), s 26(2).

[8] *Human Rights Act 2004* (ACT), s 8; *Charter of Human Rights and Responsibilities Act 2006* (Vic), s 8(3); *Human Rights Act 2019* (Qld), s 15(3).

[9] *Human Rights Act 2004* (ACT), s 11(1); *Charter of Human Rights and Responsibilities Act 2006* (Vic), s 17(1); *Human Rights Act 2019* (Qld), s 26(1).

[10] *Human Rights Act 2004* (ACT), s 12; *Charter of Human Rights and Responsibilities Act 2006* (Vic), s 13; *Human Rights Act 2019* (Qld), s 25.

[11] *Human Rights Act 2004* (ACT), s 28; *Charter of Human Rights and Responsibilities Act 2006* (Vic), s 7; *Human Rights Act 2019* (Qld), s 13.

[12] *Human Rights Act 2004* (ACT), s 28.

[13] *Human Rights Act 2004* (ACT), s 37; *Charter of Human Rights and Responsibilities Act 2006* (Vic), s 30; *Human Rights Act 2019* (Qld), ss 38-39.

Another effect of the protections contained in these charters is to place a legal obligation on public authorities or entities to act, subject to any laws to the contrary,[14] in a way that is compatible with a human right, and when making a decision, to give proper consideration to a relevant human right protected by these charters.[15] The definition of a public authority/entity generally extends these obligations to private entities exercising public functions,[16] but not all private entities are covered by these obligations.

Each charter contains different provisions regarding when and how a person can seek certain relief in respect of a contravention of their rights. One thing common to all charters, however, is that a person may rely on their charter rights in other legal proceedings, such as in proceedings for judicial review.[17]

[14] *Human Rights Act 2004* (ACT), s 40B(2); *Charter of Human Rights and Responsibilities Act 2006* (Vic), s 38(2); *Human Rights Act 2019* (Qld), s 58(2).

[15] *Human Rights Act 2004* (ACT), s 40B(1); *Charter of Human Rights and Responsibilities Act 2006* (Vic), s 38(1); *Human Rights Act 2019* (Qld), s 58.

[16] *Human Rights Act 2004* (ACT), s 40B(1); *Charter of Human Rights and Responsibilities Act 2006* (Vic), s 4(1)(c); *Human Rights Act 2019* (Qld), s 9(1)(h).

[17] *Human Rights Act 2004* (ACT), s 40C(2)(b) and 40C(5); *Charter of Human Rights and Responsibilities Act 2006* (Vic), s 39; *Human Rights Act 2019* (Qld), s 59.

PROHIBITIONS ON MEDICAL INTERVENTIONS ON SEX CHARACTERISTICS WITHOUT PERSONAL CONSENT

5. CONSENT TO MEDICAL TREATMENT

(a) Current law on consent

Under the common law, a competent adult can give (or refuse) consent to their own medical treatment.[18] However, a person may not be capable of giving consent to medical treatment where they lack capacity (e.g. due to impaired decision-making ability). In cases of emergency, consent may not be required.

A child will generally gain the capacity to consent to their own medical treatment once they are *Gillick* competent,[19] although it appears that may not be in all circumstances (e.g. in cases where a court deems to be against their best interests a decision to refuse treatment made by a *Gillick* competent child;[20] or in cases involving treatment for gender dysphoria where the parents do not consent).[21] Subject to the courts' *parens patriae* or welfare jurisdiction (which may preclude the power of a parent to consent without court authorisation),[22] people with parental responsibility for a child can generally give consent to medical treatment on behalf of a child. However, there is also an implicit constraint that parental authority must be exercised in the best interests of the child.[23]

These common law principles may also be modified or supplemented by statutory schemes, such as laws governing guardianship or prohibiting certain practices.[24]

However, the interaction between Commonwealth and State or Territory laws regarding medical consent by children is complex. For example, currently, there is a degree of legal uncertainty over whether state laws that require the authorisation of certain treatment through certain state-based processes can be avoided if authorisation is otherwise obtained through the federal family courts: see *Re Imogen (No 6)* [2020] FamCA 761 at [64]. At least two states (NSW and SA) have sought to modify or clarify the law on medical consent for minors: see e.g. *Minors (Property and Contracts) Act 1970* (NSW), s 49; *Children and Young Person (Care and Protection) Act 1998* (NSW), s 175 and *Consent to Medical Treatment and Palliative Care Act 1995* (SA). However, the federal family courts have expressed doubts over such laws exhaustively answer whether and when medical treatment is authorised: see *Re Kelvin* [2017] FamCAFC 258 at [76]-[84].

(b) Intersex interventions and consent

The Family Court has previously determined that persons with parental responsibility have the authority to consent to medical treatment on behalf of a child with intersex variations without the need for court authorisation.

In *Re Carla (Medical Procedure)* [2016] FamCA 7, Justice Forrest of the Family Court determined that the parents of a 5-year-old child could authorise treatment, including a gonadectomy,[25] on their child without the need for court

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[18] *Ms B v An NHS Hospital Trust* [2002] EWHC 429 (Fam) at [100]. Applied, for example, in *Brightwater Care Group Inc v Rossiter* [2009] WASC 229 at [23] per Martin CJ and *LNE (Medical Consent)* [2010] TASGAB 25 at [19].

[19] *Gillick v West Norfolk and Wisbech Health Authority* [1986] 1 AC 112; affirmed in *Secretary, Department of Health and Community Services v JWB and SMB* (***Marion's Case***) (1992) 175 CLR 218.

[20] *The Sydney Children's Hospital Network v X* [2013] NSWSC 368 (refusal of blood transfusion by a 17-year-old competent child who was a member of the Jehovah Witness' faith).

[21] *Re Imogen (No 6)* [2020] FamCA 761 at [35(d)].

[22] See *Marion's Case*.

[23] *Marion's Case*, particularly at [26]-[27] per Mason CJ, Dawson, Toohey and Gaudron JJ.

[24] See, for example, *Public Health Act 2005* (Qld), s 213B (offence to perform, or offer to perform, cosmetic procedure on a child).

[25] A gonadectomy is the removal of an ovary or testis.

authorisation,[26] notwithstanding that the treatment would invariably result in the child's sterilisation and arguably may not be considered urgent.[27] Carla was born with 17 beta hydroxysteroid dehydrogenase 3 deficiency, meaning she was born with a female appearance but with intra-abdominal male gonads (rather than gonads contained in a scrotum). Following the principles in *Re Marion*,[28] Forrest J determined that the treatment was within the scope of parental authority because it was therapeutic; namely that, it was *'necessary to appropriately and proportionately treat a genetic bodily malfunction that, untreated, poses real and not insubstantial risks to the child's physical and emotional health'*.[29] Carla had also previously undergone surgery twice to – as the Court described it – *'feminise… [her] external appearance*', including a clitorectomy and labioplasty (without court oversight or authorisation).[30]

6. EXAMPLES OF PROHIBITIONS OVERSEAS

There is currently no Australian law that specifically prohibits medical interventions on intersex people without personal consent. However, a range of overseas jurisdictions have attempted to regulate these interventions. **Appendix C** sets out a summary of the overseas jurisdictions that have legislation, regulations, policies, or proposed reform in this area.

The models adopted or proposed overseas vary considerably, including:

- In the scope of the prohibition. For example:
  - Some prohibitions apply to all children (e.g. Malta) while others apply only to children with intersex variations (e.g. Iceland; Germany; Portugal; Californian Bill);
  - Some prohibitions apply to permanent medical changes (Iceland), surgical interventions (Malta), surgical or pharmacological treatments (Portugal), interventions with the aim of altering a body's physical appearance to be ascribed to male or female norms (Germany), or specific procedures (Californian Bill).
- In the exceptions to the prohibition. For example, in exceptions allowing treatment without personal consent:
  - For health reasons (which cannot include social, psychological and appearance-related reasons) (Iceland);
  - In exceptional circumstances (which cannot include social reasons) (Malta);
  - Where interventions are vital and not deferrable, or with court approval (Germany);
  - Where there a specifically defined immediate risks of physical harm (Californian Bill); and
- In who makes the decision to consent to treatment where personal consent cannot be obtained, and how those decisions are made. For example, sometimes the oversight of a specifically constituted body is required (Iceland, Malta), together with court oversight (Germany).

7. LEGAL CONSIDERATIONS IN FRAMING A PROHIBITION

There are several possible variations in how a prohibition on medical interventions on intersex people without personal consent might be framed. In drafting a prohibition, important legal questions to consider include:

- What is the scope of the prohibition, and how are key terms within it defined?

[26] *Re Carla (Medical Procedure)* [2016] FamCA 7 at [50]-[53].

[27] *Re Carla (Medical Procedure)* [2016] FamCA 7 at [51].

[28] *Re Carla (Medical Procedure)* [2016] FamCA 7 at [50].

[29] *Re Carla (Medical Procedure)* [2016] FamCA 7 at [52].

[30] *Re Carla (Medical Procedure)* [2016] FamCA 7 at [16].

    - E.g. Does it apply to all persons, only persons with intersex variations, persons of a certain age (children) etc.?
    - E.g. Does it prohibit all alterations of sex characteristics without personal consent (subject to exceptions) or a defined list of procedures?
    - E.g. Does it apply only to health professionals, or to everyone?
- Who should determine the exceptions?
    - E.g. Decided by parliament/government and embedded in law/policy?
    - E.g. Decided by a specialist expert body within defined parameters, and prescribed by class?
    - E.g. Through a decision-making process in individual cases?
    - E.g. Or some combination of the above?
- What should the scope of any exceptions be?
    - E.g. Emergency cases where consent cannot be obtained?
    - E.g. Particular procedures or procedures conducted for particular purposes?
    - E.g. Processes for authorising individual procedures? (and if so, what mechanisms should be put in place to oversee these processes, as explored further in the section on *'Oversight and transparency'* below);
    - E.g. Or some combination of the above?
- How will the prohibition interact with existing laws and systems to ensure it cannot be circumvented? (as explored further in the section on *'Interaction with existing laws and systems'* below)
    - E.g. An exclusive jurisdiction vs. concurrent jurisdiction with existing court or tribunal mechanisms?
    - E.g. What is the interaction between Commonwealth and State or Territory law?
- What are the legal consequences of a contravention of the prohibition?
    - E.g. Criminal?
    - E.g. Civil only (such as disciplinary consequences or private actions for trespass or negligence)?
- Who will enforce the prohibition if it is contravened, and how?

In answering those legal questions, some of the related practical and policy considerations include:

- How to accommodate the diversity of intersex variations and medical responses which may be justified in particular contexts?
- How to ensure that the prohibition does not deny or delay necessary and appropriate treatment to intersex people or others, particularly if urgent or uncontentious?
- How should children be given a voice in decisions on treatments which affect their bodies when they are not at an age where they are legally capable of consent?
- The role of parents and others with parental responsibility, and how they are supported in any decision-making framework;
- Any cost or delay associated with any oversight and transparency mechanisms;
- Whether (and how) to address medical interventions which occur outside the jurisdiction in respect of children who are ordinarily resident or domiciled in that jurisdiction?

- If the prohibition defines personal consent by reference to *Gillick* competence, and the prohibition is applicable to any treatment modifying a person's sex characteristics without personal consent, how will this impact on consent to medical treatment for children generally?
- The implications of the scope of any prohibition and any exceptions on the composition, powers, functions, expertise and resourcing necessary for any oversight or transparency mechanisms (see below).

OVERSIGHT AND TRANSPARENCY

8. THE DEMAND FOR OVERSIGHT AND TRANSPARENCY

The Darlington Statement calls for alternative, independent, effective human rights-based oversight mechanism(s) to determine individual cases involving persons born with intersex variations who are unable to consent to treatment, bringing together human rights experts, clinicians and intersex-led community organisations.[31]

The Darlington Statement raises concerns regarding the approach taken by the federal family courts in cases involving intersex children, such as *Re Carla*. It is also concerned that an unknown number of decisions affecting intersex children are being made solely by clinicians and parents (who may not be provided with a full range of perspectives) in private without any transparency.

Intersex Human Rights Australia (**IHRA**) has previously stated that an oversight mechanism is required, and that it should be constituted in a way which is not dominated by clinicians, to ensure transparency and accountability.[32] However, the legal powers, functions and role of such an oversight body, and how it may sit alongside (or replace) existing Commonwealth and State or Territory mechanisms has not been fully developed to date.

9. EXAMPLES OF OTHER OVERSIGHT MECHANISMS

Examples of oversight mechanisms both overseas and in Australia may provide inspiration for any oversight mechanism introduced for this purpose.

Internationally, by way of example:

- The Icelandic *Act on Gender Autonomy* constitutes two bodies of experts, one that is a decision-making body[33] and one that provides a child under 16 years and their family with information, counselling and treatment (subject to the approval requirements conferred on the decision-making body).[34] The decision-making body comprises three members: a paediatrician, appointed by the Directorate of Health; a psychologist with child psychology as a field of expertise, appointed by the Icelandic Psychological Association; and a lawyer with special knowledge in the field of children's rights, appointed by the Minister responsible for human rights issues.[35]

  The decision-making body's role appears limited to cases where:

  - a child aged under 16 years has atypical sex characteristics and treatment is proposed which will effect permanent changes to their sex characteristics;
  - the child is unable to give consent or express their will;
  - the treatment is not hormonal treatment to trigger puberty;[36] and
  - the treatment is not surgical treatment on account of a short urethra (hypospadias)[37] or medication for micropenis[38] (whereby a detailed assessment of the possible

[31] Darlington Statement, [22].

[32] The IHRA submission was also endorsed by Intersex Peer Support Australia (IPSA) and the Intersex Trust Aotearoa New Zealand (ITANZ).

[33] *Act on Gender Autonomy No 80 /2019 as amended by Act No. 159/2019, No. 152/2020 and No. 154/2020* (Iceland), art. 9, taken together with art. 11a.

[34] *Act on Gender Autonomy* (Iceland), art. 13a.

[35] *Act on Gender Autonomy* (Iceland), art. 9.

[36] *Act on Gender Autonomy* (Iceland), art. 11a.

[37] A condition in which the opening of the penis is on the underside rather than the tip.

[38] Micropenis refers to a condition where the penis of a child is significantly below the average for their age. As it can be caused by foetal testosterone deficiency, hormones to stimulate growth may be proposed as treatment.

advantages and consequences of deferring treatment until a child can express their will must be undertaken).[39] (However, this exception is subject to a three-year review period as to whether it should be deleted, which is to be conducted by a specially constituted working group comprised of certain clinicians, intersex and queer representatives, an ethicist, and children's rights and human rights experts).[40]

The decision-making body must follow several requirements when making its decision, but these are not expressed in a way which can easily be translated into the Australian public law context. The decision-making framework appears to require consideration of the child's best interests; conformity with the child's will and 'level of gender identity'; consent of the guardians (who, along with the child, must receive counselling and support); and satisfaction of a requirement that the treatment which will effect permanent changes to a child's sex characteristics (whether through surgery, medication or other irreversible medical interventions) is required solely for health reasons (with social, psychosocial and appearance-related reasons *excluded* from consideration as health reasons).[41] Decisions of the decision-making body to reject an application for treatment may be appealed to the Director of Health, and then onto the Ministry of Health.[42] The Icelandic law also requires the logging of decisions on a person's health record, the reporting by health care professionals of information regarding the number and nature of treatments and the age of persons undergoing treatment, and guardians to disclose to a child once they have reached sufficient maturity that a treatment has been performed on their body.[43]

- The Maltese *Gender Identity, Gender Expression and Sex Characteristics Act* provides two mechanisms:
    - A working group, comprised of 10 members appointed by the Minister for Equality (after consultation with the Minister for Health), to review current medical best practices and human rights standards and, within one year, issue a report recommending revisions to current medical protocols. The Chair of the workgroup must be a doctor with at least 12 years' experience, with the remaining members consisting of: three experts in human rights, three psychosocial professionals and three medical experts.[44]
    - In exceptional circumstances, a (clinical) interdisciplinary team along with persons exercising parental authority for a child who is not able to consent, may authorise sex assignment treatment and/or surgical interventions on the sex characteristics of a child. The 'exceptional circumstances' cannot be 'driven by social factors'.[45] The interdisciplinary team must be composed of professionals which the Minister considers are appropriate, and who are appointed for a period of three years (with an option to renew their term for another three years).[46] The law also stipulates that, *'when the decision for treatment is being expressed by a minor with the consent of the persons exercising parental authority or the tutor of the minor'*, the medical professionals must ensure that the best interests of the child are the paramount consideration and weight

[39] *Act on Gender Autonomy* (Iceland), art. 11a.

[40] *Act on Gender Autonomy* (Iceland), art. 18(2).

[41] *Act on Gender Autonomy* (Iceland), art. 11a.

[42] *Act on Gender Autonomy* (Iceland), art. 14a.

[43] *Act on Gender Autonomy* (Iceland), art. 11a.

[44] *Gender Identity, Gender Expression and Sex Characteristics Act 2015* (Malta), art. 16.

[45] *Gender Identity, Gender Expression and Sex Characteristics Act 2015* (Malta), art. 14(3).

[46] *Gender Identity, Gender Expression and Sex Characteristics Act 2015* (Malta), art. 14(4)-(5).

is given to the views of the child having regard to their age and maturity.[47] The Maltese law does not otherwise provide further detail as to the circumstances which would be considered 'exceptional' to enliven these powers, nor the processes of the interdisciplinary team.

Domestically, while there are multidisciplinary teams in clinical settings, there are no independent oversight bodies dealing specifically with medical interventions on intersex people. However, apart from guardianship models in each state and territory, two domestic examples of oversight bodies that exist for medical treatments are:

- In the ACT, a doctor who seeks to perform psychiatric surgery on a person must apply to the chief psychiatrist and seek authorisation from a multidisciplinary committee appointed under s 175 of the *Mental Health Act 2015* (ACT). The committee is comprised of a psychiatrist, neurosurgeon, lawyer, clinical psychologist and social worker. The committee must not recommend that the chief psychiatrist approve the surgery unless it believes on reasonable grounds that the surgery will result in substantial benefit to the person and no alternative treatment is available, and at least the psychiatrist and neurosurgeon support the recommendation.[48]
- In Victoria, individuals and couples who wish to access assisted reproductive treatment in connection with surrogacy and certain other assisted reproductive services are required to apply to a Patient Review Panel. The Panel is guided by principles made under the *Assisted Reproductive Treatment Act 2008* (Vic), and its decisions are reviewable by the Victorian Civil and Administrative Tribunal. The Panel is comprised of 14 members, including the Chairperson and two Deputy Chairpersons, and at least one member must have expertise in child protection. Members are appointed for a period of no longer than three years.

Appendices C and D sets out further details on these examples, as well as others in the international and domestic context. Best efforts have been undertaken to summarise the text of these foreign laws but the authors of this paper are limited by unauthorised English translations of some of these laws and are not lawyers in the relevant foreign law jurisdictions.

10. LEGAL CONSIDERATIONS FOR ESTABLISHING OVERSIGHT AND TRANSPARENCY

There are several legal questions arising from the establishment of any mechanisms for oversight and transparency. These include:

- If an oversight body is established:
  - what should be its role, functions and powers? Should it have power to make decisions, and if so, what kind of decisions? For example, will it have a role in authorising proposed individual treatment? Will it review past decisions which have been made? Will it provide overall practice guidance?
  - how should the body be constituted?
  - what processes and procedures should it be required to adopt in making decisions, if it has been empowered to do so?
  - how will its jurisdiction interact with existing laws and systems, if the body is required or empowered to make decisions in individual cases (see further in the *'Interaction with existing laws and systems'* section below)?
  - should (and to what extent) its decisions be reviewable, and how?

[47] *Gender Identity, Gender Expression and Sex Characteristics Act 2015* (Malta), art. 14(6).

[48] *Mental Health Act 2015* (ACT), ss 167-172.

- Are there opportunities for a nationally consistent approach?

INTERACTION WITH EXISTING LAWS AND SYSTEMS

Any proposal to prohibit medical interventions of sex characteristics without personal consent will need to interact with existing Commonwealth and State or Territory legislation, and Australian common law. This is to ensure that the new scheme works in harmony, subject to any Constitutional limitations, with existing laws and scheme.

For example, if (and depending on how) an oversight body is implemented by way of legislation, its functions and powers may need to be carved out from existing legal schemes that authorise medical treatment, such as guardianship and family law mechanisms. This will ensure that appropriate cases go through the oversight body instead of these other mechanisms, and if the proper processes are followed under the scheme, then it will not be necessary to obtain further authorisation from a court or tribunal.

11. LIST OF INTERACTING LAWS THAT MAY NEED CONSIDERATION

The interaction of any proposal with at least the following laws and systems may need to be considered:

- Statutory human rights charters, where the State or Territory has enacted such legislation.[49]
- The child welfare and parental responsibility jurisdiction of the federal family courts under the *Family Law Act 1975* (Cth) (especially as it pertains to special medical procedures).
- The *parens patriae* jurisdiction of the State or Territory Supreme Courts regarding the authorisation of medical treatment.
- State and Territory legislation relating to the rights of children, including the child protection jurisdiction of State and Territory children's courts.[50]
- If a prohibition extends to all persons (including adults), State and Territory laws relating to guardianship and the guardianship jurisdiction of courts or tribunals.[51]
- If a prohibition extends to all persons (including adults), the powers of an enduring power of attorney under State or Territory legislation.[52]
- The general common law rules governing consent to medical treatment by parents as set out in *Gillick v West Norfolk and Wisbech Health Authority* [1986] 1 AC 112, and endorsed in *Secretary, Department of Health and Community Services v JWB and SMB* (***Marion's Case***) (1992) 175 CLR 218.
- The health professions' disciplinary processes established under the Health Practitioner Regulation National Law.
- Criminal laws dealing with offences against the person, including female genital mutilation.

[49] E.g. *Human Rights Act 2004* (ACT); *Human Rights Act 2019* (Qld); *Charter of Human Rights and Responsibilities Act 2006* (Vic).

[50] E.g. *Children and Young People Act 2008* (ACT); *Children and Young Persons (Care and Protection) Act 1998* (NSW); *Care and Protection of Children Act 2007* (NT); *Child Protection Act 1999* (Qld); *Children's Protection Act 1993* (SA); *Children, Young Persons and their Families Act 1997* (Tas); *Children, Youth and Families Act 2005* (Vic); *Children and Community Services Act 2004* (WA).

[51] E.g. *Guardianship and Management of Property Act 1991* (ACT); *Guardianship Act 1987* (NSW); *Adult Guardianship Act 1988* (NT); *Guardianship and Administration Act 2000* (Qld); *Guardianship and Administration Act 1993* (SA); *Guardianship and Administration Act 1995* (Tas); *Guardianship and Administration Act 1986* (Vic); *Guardianship and Administration Act 1990* (WA).

[52] E.g. *Powers of Attorney Act 2006* (ACT); *Powers of Attorney Act 2003* (NSW); *Powers of Attorney Act 1980* (NT); *Powers of Attorney Act 1998* (Qld); *Powers of Attorney and Agency Act 1984* (SA); *Powers of Attorney Act 2000* (Tas); *Powers of Attorney Act 2014* (Vic); *Guardianship and Administration Act 1990* (WA).

- Statutes of limitations that may limit common laws actions, such as medical negligence or trespass, to a period of time which may expire before a child discovers they have been provided medical treatment in breach of any new prohibition.

APPENDIX A: SUMMARY OF RELEVANT INTERNATIONAL HUMAN RIGHTS LAW AND RECOMMENDATIONS

12. INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS

Among other provisions, the *International Covenant on Civil and Political Rights* (**ICCPR**) proscribes torture, and cruel, inhuman or degrading treatment or punishment (including, without limitation, medical or scientific experimentation without a person's free consent).[53]

With reference specifically to the situation for people with intersex variations,[54] the 2013 Report of the UN Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment has called upon all States to repeal any law allowing intrusive and irreversible treatments, including forced genital-normalising surgery and involuntary sterilisation, when enforced or administered without the free and informed consent of the person concerned. The Special Rapporteur has also called upon states to outlaw forced or coerced sterilisation in all circumstances and provide special protection to individuals belonging to marginalised groups.[55]

The ICCPR also protects the right to liberty and security,[56] privacy,[57] and equality before the law,[58] as well as the right to non-discrimination[59] and the rights of children to protection.[60] With reference to these rights and the prohibition against torture, and cruel, inhuman or degrading treatment or punishment, a 2017 UN Human Rights Committee Report has recommended that Australia *'give due consideration to the recommendations the Senate Standing Committee on Community Affairs made in its 2013 inquiry report on involuntary or coerced sterilization of intersex persons, and move to end irreversible medical treatment, especially surgery, of intersex infants and children, who are not yet able to provide fully informed and free consent, unless such procedures constitute an absolute medical necessity'*.[61]

13. INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS

Among other provisions, the *International Covenant on Economic, Social and Cultural Rights* (**ICESCR**) recognises the right of everyone, without discrimination,[62] to the enjoyment of the highest attainable standard of physical and

[53] International Covenant on Civil and Political Rights (**ICCPR**), art 7.

[54] UN Human Rights Council, *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment*, 1 February 2013, A/HRC/22/53, at [77].

[55] UN Human Rights Council, *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment*, 1 February 2013, A/HRC/22/53, at [77] and [88].

[56] ICCPR, art. 9.

[57] ICCPR, art. 17.

[58] ICCPR, art. 26.

[59] ICCPR, art. 2.

[60] ICCPR, art. 24.

[61] UN Human Rights Committee, *Concluding observations on the sixth periodic report of Australia*, 1 December 2017, CCPR/C/AUS/CO/6, at [26].

[62] International Covenant on Economic, Social and Cultural Rights (**ICESCR**), art 2(2).

mental health.[63] ICESCR calls on States to take steps, to the maximum of their available resources, to progressively realise the rights recognised by ICESCR, including particularly the adoption of legislative measures.[64]

With reference to the right to health, a 2017 UN Committee on Economic, Social and Cultural Rights Report expressed concerns that children born with intersex variations were subject to early surgeries and medical interventions before they were able to provide full and informed consent. The Committee urged Australia to implement the recommendations of the 2013 Senate Community Affairs References Committee Report on involuntary or coerced serialisation of intersex people in Australia, which is discussed further below.[65]

14. CONVENTION ON THE RIGHTS OF THE CHILD

The *Convention on the Rights of the Child* (**CRC**) provides that:

- no child may be subjected to cruel, inhuman or degrading treatment;[66]
- States must assure to a child who is capable of forming their own views the right to express those views freely in all matters affecting them, and the views of the child must be given due weight in accordance with their age and maturity;[67]
- States are required to take all appropriate legislative, administrative, social and educational measures to protect children from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation;[68]
- States are required to take all effective and appropriate measures with a view to abolishing traditional practices prejudicial to the health of children.[69]

The CRC also requires States to:

- respect the responsibilities, rights and duties of parents (and other people either customarily or legally responsible for the child) to provide, in a manner consistent with the evolving capacities of the child, appropriate direction and guidance in the exercise by the child of their rights under the CRC;[70]
- use their best efforts to ensure recognition of the principle that both parents have common responsibilities for the upbringing and development of the child. Parents or, as the case may be, legal guardians, have the primary responsibility for the upbringing and development of the child. The best interests of the child will be their basic concern;[71]
- render appropriate assistance to parents and legal guardians in the performance of their child-rearing responsibilities for the purpose of guaranteeing and promoting the rights in the CRC.[72]

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[63] ICESCR, art 12(1).

[64] ICESCR, art 2(1).

[65] UN Committee on Economic, Social and Cultural Rights, *Concluding observations on fifth periodic report of Australia*, 11 July 2017, E/C.12/AUS/CO/5, at [49]-[50].

[66] Convention on the Rights of the Child (**CRC**), art 37(a). See UN Human Rights Council, *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment*, 1 February 2013, A/HRC/22/53, at [77].

[67] CRC, art 12(1). See also CRC, *General comment No. 12 (2009): The right of the child to be heard*, 20 July 2009, CRC/C/GC/12, at [100]-[101].

[68] CRC, art. 19(1). See also UN Committee on the Rights of the Child (**CRC**), *General comment No. 13 (2011): The right of the child to freedom from all forms of violence*, 18 April 2011, CRC/C/GC/13, at [61]; CRC, *General comment No. 12 (2009): The right of the child to be heard*, 20 July 2009, CRC/C/GC/12, at [91].

[69] CRC, art 24(3). See also CRC, *Concluding observations on the combined fifth and sixth periodic reports of Australia*, 1 November 2019, CRC/C/AUS/CO/5-6, at [31]; European Parliament, *Resolution on the rights of intersex people*, 14 February 2019, 2018/2878(RSP), at [7].

[70] CRC, art. 5.

[71] CRC, art. 18(1).

[72] CRC, art. 18(2).

States are also called to implement programs that support parents in involving their children in decision-making.[73]

A 2019 UN Committee on the Rights of the Child Report has urged Australia to address harmful practices[74] against children by enacting *'legislation explicitly prohibiting coerced sterilization or unnecessary medical or surgical treatment, guaranteeing the bodily integrity and autonomy of intersex children and providing adequate support and counselling to families of intersex children'*.[75]

15. CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN

The *Convention on the Elimination of All Forms of Discrimination against Women* (**CEDAW**) requires States to take all appropriate measures, including legislation, to eliminate discrimination against women, including customs and practices which constitute discrimination against women.[76]

The UN Committee on the Elimination of Discrimination against Women, along with the UN Committee on the Rights of the Child, has published a joint general recommendation/general comment on harmful practices, recognising that these practices are grounded in discrimination based on sex, gender and other grounds, and have multidimensional causes including stereotyped sex- and gender-based roles.[77]

Recalling the joint general recommendation/general comment on harmful practices, a 2018 UN Committee on the Elimination of Discrimination against Women Report has urged Australia to *'adopt clear legislative provisions that explicitly prohibit the performance of unnecessary surgical or other medical procedures on intersex children before they reach the legal age of consent, implement the recommendations made by the Senate in 2013 on the basis of its inquiry into the involuntary or coerced sterilization of intersex persons, provide adequate counselling and support for the families of intersex children and provide redress to intersex persons having undergone such medical procedures'*.[78]

16. CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES

The *Convention on the Rights of Persons with Disabilities* (**CRPD**) provides that persons with disabilities have a right to respect for their physical and mental integrity on an equal basis with others.[79] States must recognise that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life, and take appropriate measures to provide access to the support that people may require in exercising their legal capacity.[80]

To protect the integrity of the person, a 2019 UN Committee on the Rights of Persons with Disabilities Report recommended that Australia *'[a]dopt clear legislative provisions that explicitly prohibit the performance of unnecessary, invasive and irreversible medical interventions, including surgical, hormonal or other medical procedures on intersex children before they reach the legal age of consent; also provide adequate counselling and support for the families of intersex children and redress to intersex persons having undergone such medical procedures.'*[81]

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[73] CRC, *General comment No. 12 (2009): The right of the child to be heard*, 20 July 2009, CRC/C/GC/12, at [94].

[74] See further discussion on harmful practices at section 15 below.

[75] CRC, *Concluding observations on the combined fifth and sixth periodic reports of Australia*, 1 November 2019, CRC/C/AUS/CO/5-6, at [31(b)].

[76] Convention on the Elimination of All Forms of Discrimination against Women, art 2.

[77] UN Committee on the Elimination of Discrimination against Women and UN Committee on the Rights of the Child, *Joint general recommendation/general comment No. 31 of the Committee on the Elimination of Discrimination against Women and No. 18 of the Committee on the Rights of the Child on harmful practices*, 4 November 2014, CEDAW/C/GC/31-CRC/C/GC/18, at [14]-[16].

[78] UN Committee on the Elimination of Discrimination against Women, *Concluding observations on the eighth periodic report of Australia*, 25 July 2018, CEDAW/C/AUS/CO/8, at [26(c)].

[79] Convention on the Rights of Persons with Disabilities, art. 17.

[80] Convention on the Rights of Persons with Disabilities, art. 12.2-12.3.

[81] UN Committee on the Rights of Persons with Disabilities, *Concluding observations on the combined second and third periodic reports of Australia*, 15 October 2019, CRPD/C/AUS/CO/2-3, at [34(b)].

APPENDIX B: SUMMARY OF KEY DOCUMENTS DISCUSSING INTERSEX REFORM

17. AUSTRALIAN HUMAN RIGHTS COMMISSION PAPER (2009)

In 2009, the Australian Human Rights Commission published a paper on the human rights implications of surgeries performed on intersex infants. Since that paper was published however, the Commission has indicated that it is reassessing the principles which have guided decision-making about medical interventions and their human rights implications, in light of domestic and international human rights developments.

18. AUSTRALIAN SENATE REPORT

In 2013, the Australian Senate Community Affairs References Committee conducted an inquiry into the involuntary or coerced sterilisation of intersex people in Australia. The 2013 Senate Report signified the first comprehensive Australian inquiry into surgical and medical treatment modifying the sex characteristics of people born with intersex variations without their personal consent.

The report included a summary of common intersex variations;[82] considered evidence, including from witnesses, regarding the impact and prevalence of medical interventions on people with intersex variations;[83] discussed the absence of medical consensus around the conduct of normalising surgery;[84] and discussed the potential for interventions among people with certain intersex variations that are ostensibly justified by the management cancer risks to mask underlying psychosocial rationales.[85]

Among the Report recommendations included:

- The development of guidelines that ensure treatment is managed by multidisciplinary teams within a human rights framework, and that those guidelines favour the deferral of normalising treatment until a person can give fully informed consent, and seek to minimise surgical interventions on infants undertaken for primarily psychosocial reasons;[86]
- Funding to ensure multidisciplinary teams are established for intersex medical care that have dedicated coordination, record-keeping and research support capacity, and comprehensive membership from the various medical and non-medical specialisms. All intersex people should have access to a multidisciplinary team;[87]
- A number of recommendations regarding oversight mechanisms in respect of decisions made for medical interventions without personal consent, including by civil and administrative tribunals, the Family Court, a special medical procedures advisory committee drafting guidelines for the treatment of common intersex conditions, and referrals to a special medical procedures advisory committee for complex intersex medical interventions.[88]

[82] Australian Senate Community Affairs References Committee (2013) *Involuntary or coerced sterilisation of intersex people in Australia*, at [1.11], [1.21]-[1.42].

[83] Id, at [2.33], [2.38], [3.22], [3.48]-[3.54] and [3.63]-[3.78].

[84] Id, at [3.103]-[3.108] and [3.125]-[3.128].

[85] Id, at [4.20]-[4.42].

[86] Id, recommendation 3.

[87] Id, recommendation 4.

[88] Id, recommendations 5-10.

- The mandatory provision of information about intersex support groups as part of the healthcare management of intersex cases,[89] and funding for peer support[90] and research.[91]

19. DARLINGTON STATEMENT (2017)

In 2017, a significant group of Australian and New Zealand intersex advocates, peer support volunteers and organisations gave expression to the Darlington Statement for the Australian and Aotearoa/New Zealand region.[92] Among other things, the current demand for a prohibition, with oversight and transparency, was first crystallised in the Darlington Statement.

The Darlington Statement includes:

- a call for the immediate prohibition as a criminal act of deferrable medical interventions, including surgical and hormonal interventions, that alter the sex characteristics of infants and children without personal consent, and a call for consent to be freely-given and fully informed by an individual, with individuals and families having mandatory independent access to funded counselling and peer support;[93]
- a statement that current forms of oversight of medical interventions affecting people born with intersex variations had proven to be inadequate, and in particular that:
  - there was a lack of transparency about diverse standards of care and practices, and
  - the role of the Family Court was unclear, distinctions between 'therapeutic' and 'non-therapeutic' interventions (affirmed in Australia in High Court decision in *Re Marion*[94]) had failed the intersex population, and the court system had failed to adequately consider the human rights and autonomy of intersex children;[95]
- a call for the provision of alternative, independent, effective human rights-based oversight mechanism(s) to determine individual cases involving persons born with intersex variations who are unable to consent to treatment, bringing together human rights experts, clinicians and intersex-led community organisations. The pros and cons of medical treatment must be properly ventilated and considered, including the lifetime health, legal, ethical, sexual and human rights implications.[96]

[89] Id, recommendation 11.

[90] Id, recommendation 12.

[91] Id, recommendation 13.

[92] Joint statement by Australian and Aotearoa/New Zealand intersex community organisations and independent advocates, including the Androgen Insensitivity Syndrome Support Group Australia (AISSGA), Intersex Trust Aotearoa New Zealand (ITANZ), Organisation Intersex International Australia (OIIAU), Eve Black, Kylie Bond (AISSGA), Tony Briffa (OIIAU/AISSGA), Morgan Carpenter (OIRRAU/Intersex Day Project), Candice Cody (OIIAU), Alex David (OIIAU), Betsy Driver (Bodies Like Ours), Carolyn Hannaford (AISSGA), Eileen Harlow, Bonnie Hard (AISSGA), Phoebe Hart (AISSGA), Delia Leckey (ITANZ), Steph Lum (OIIAU), Mani Bruce Mitchell (ITANZ), Elise Nyhuis (AISSGA), Bronwyn O'Callaghan, Sandra Perrin (AISSGA), Cody Smith (Tranz Australia), Trace Williams (AISSGA), Imogen Yang (Bladder Exstrophy Epispadias Cloacal Exstrophy Hypospadias Australian Community – BEECHAC) and Georgie Yovanovic.

[93] Darlington Statement, [7].

[94] See *Department of Health & Community Services v JWB & SMB* (***Marion's Case***) [1992] HCA 15; (1992) 175 CLR 218 per Mason CJ, Dawson, Toohey and Gaudron JJ at [48]; per Brennan J at [11], [19]-[44]; per Deane J at [11]-[12], [14].

[95] Darlington Statement, [16].

[96] Darlington Statement, [22].

20. YOGYAKARTA PRINCIPLES PLUS 10 (2017)

In 2017, a panel of experts in international human rights law, sexual orientation, gender identity, gender expression and sex characteristics updated the Yogyakarta Principles from 10 years earlier.[97] The Yogyakarta Principles articulate the views of international human rights legal experts on the application of international human rights law on matters concerning sexual orientation, gender identity and expression, and sex characteristics.

Principle 32 of the Yogyakarta Principles plus 10 states:

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

21. ACT LGBTIQ+ LEGAL AUDIT (2019)

In 2019, Equality Australia completed a legal audit of ACT laws with a view to the promotion of inclusion and equality for LGBTIQ+ people in the ACT. To protect intersex people from harmful practices, the 2019 Audit Report recommended that the ACT Government introduce legislation to prohibit surgical or other medical interventions on people born with variations in sex characteristics without free, prior and informed consent unless necessary to avoid serious, urgent and irreparable harm to the person, with human rights based oversight and effective remedies for people subjected to these medical interventions.[98]

22. TASMANIAN LAW REFORM INSTITUTE (2020)

In 2020, the Tasmanian Law Reform Institute (**TLRI**) published its report on the legal recognition of sex and gender, following reforms to birth certificate laws in Tasmania.

Among its recommendations were:

- criminalising non-consensual medical interventions on the following terms:[99]

  > *178F Unnecessary medical intervention to change the sex characteristics of children*
  >
  > *(1) Any person who performs a surgical, hormonal, or other medical intervention to alter or modify the sex characteristics of a child is guilty of a crime, unless:*
  >
  > > *(a) it is performed to address a clear danger to the life or health of the child and it cannot be deferred until the child is able to give informed consent; or*
  > >
  > > *(b) it takes place with the informed consent of the child.*
  >
  > *(2) Nothing in this Section is intended to apply to interventions involving a consenting transgender child seeking treatment to delay puberty or secondary sexual differentiation.*

- amendments to the *Civil Liability Act 2002* (Tas) to allow intersex people to pursue claims for compensation for personal trespass and breach of professional duty against doctors where medical interventions to alter intersex variations of sex characteristics have resulted in physical or mental harm, irrespective of any parental consent to the intervention at the time it was performed. Informed consent by the child to the treatment would be a defence, unless the

[97] Mauro Cabral Grinspan, Morgan Carpenter, Julia Ehrt, Sheherezade Kara, Arvind Narrain, Pooja Patel, Chris Sidoti and Monica Tabengwa, *The Yogyakarta Principles Plus 10*, 10 November 2017.

[98] Equality Australia (2019) *ACT LGBTIQ+ Legal Audit: Reforms for an inclusive ACT*, recommendation 44.

[99] Tasmanian Law Reform Institute (2020) *Legal recognition of sex and gender*, recommendation 7.

treatment was negligently performed, and the child did not voluntarily assume the risk of such negligence;[100]

- a new *Consent to Medical Treatment Act* that covers the field with respect to children's consent to medical care. The Act should enable a 16-year-old child to consent to treatment on their own, with the *Gillick* competence standard enshrined in law for children under 16 (that is, enabling children under 16 to consent to their own treatment once they are *Gillick* competent).[101]

[100] Id, recommendation 8.

[101] Id, recommendation 9.

APPENDIX C: OVERSEAS PROHIBITIONS AND REGULATION OF INTERSEX MEDICAL INTERVENTIONS

Note: The summaries in this table use the language and terminology used in legislative instruments. Where available, we have consulted English language versions published by the relevant legislature, these are not authoritative versions.

23. FOREIGN LAWS

	ICELAND	MALTA	GERMANY	PORTUGAL
General				
Legislation	*Act on Gender Autonomy No 80/2019 as amended by Act No 159/2019, No 152/2020 and No 154/2020*	*Gender Identity, Gender Expression and Sex Characteristics Act 2015*	19/24686 Note: we have not located an English-language version of this law, and instead make our comments based on a summary prepared by OII Europe.	Law No. 38/2018 Note: we have not located an English-language version of this law, and instead make high level comments based on the English-language automated translation of this webpage version.
General prohibition or regulation	Permanent medical changes to the sex characteristics of a child under the age of 16 born with atypical sex characteristics can only be made in accordance with the will of the child. (Art 11a(2))	The Maltese Act prohibits medical practitioners or other professionals from performing sex assignment treatment or surgical intervention on a minor (under 16) until that person can provide informed consent. (Art 14(1))	The German legislation prohibits interventions which solely aim to alter a child's physical appearance with the intention of making it similar to that of the male or female sex, where that child has differences of sex development.	Surgical and pharmacological procedures that imply changes in the body and characteristics of a minor intersex person should not be carried out until the moment their gender identity is manifested.
Exceptions	Where a child is unable to give its consent, the child's sex characteristics may be changed if required for health reasons, following a detailed assessment of the need for and consequences of such changes. Social, psychosocial and appearance-related reasons are expressly excluded from the scope of 'health reasons'. (Art 11a(2))	In 'exceptional circumstances', an Interdisciplinary Panel and the minor's parent / guardian can consent to treatment where the minor is unable to provide consent. However, this decision cannot be driven by social factors. (Art 14(3))	Where interventions are vital and not deferrable (as in, there is a danger to life or health if an operation is not performed quickly), parents are able to consent to such an operation without any further oversight. Other procedures (that are not urgent) are permissible where parents or guardians have approval of the family court, provided those procedures are not solely aimed at	The above does not apply where there is proven risk to health.

	ICELAND	MALTA	GERMANY	PORTUGAL
			aligning the child's physical appearance to male or female sex characteristics.	
Penalties or consequences	Fines can be imposed on the Article 9 committee or other specialists who breach the confidentiality obligation in Art 9(3). (Art 15(1)) The limitation period for claims for damages established due to violations of the Act start on the day an injured party reaches 18 years (effectively extending the limitation period to commence from the time that the child is an adult). (Art 15(3))	Medical professionals or other professionals who breach the relevant provisions are liable to punishment of imprisonment of up to five years, or a fine of between 5000 and 20,000 euro. (Art 14(2)) Otherwise, Art 11 provides that any person who knowingly violates any provisions of the Act is liable to a fine of between 500 and 1000 euro.	Possible penalties under the criminal and civil code (but there do not appear to be any specific provisions for penalties in the legislation)	The practice of any discriminatory act confers on the injured person a right to compensation under the Civil Code (unclear if this applies to unauthorised surgical interventions)
Oversight mechanisms				
Composition and appointment of oversight mechanism	The Icelandic model provides for two consultative panels. The primary focus of this table is the committee with decision-making powers established under Article 9.[102] The committee is to be comprised of three members (who serve a four-year term): • One paediatrician, appointed by the Directorate of Health; • One psychologist with child psychology as a field of expertise, appointed by the Icelandic Psychological Association; and • One lawyer with special knowledge in the field of	The Maltese Act establishes a working group, comprised of 10 members appointed by the Minister for Equality (after consultation with the Minister for Health), to review current medical best practices and human rights standards and, within one year, issue a report recommending revisions to current medical protocols. The Chair of the workgroup must be a doctor with at least 12 years' experience, with the remaining members consisting of: three experts in human rights, three psychosocial professionals and three medical experts. (Art 16)	The legislation establishes an interdisciplinary commission that consists of: • The person treating the child; • At least one other medical person; • One person with a professional qualification in psychology, child and youth psychotherapy or child and youth psychiatry; and • One person trained in ethics. At the request of parents, the commission may involve a counsellor with a variant of sex development.	The legislation does not appear to establish any decision-making or oversight panel. However, it appears that the Directorate-General for Health must define an 'intervention model, through guidelines and technical standards' to be implemented by health professionals within the scope of issues related to *inter alia* sexual characteristics of people.

[102] The other panel, established under Article 13a, is an interdisciplinary panel appointed by the Minister responsible for health care services. The team is interdisciplinary and composed of professionals with relevant knowledge and experience. This 'team of experts' provides information, counselling and treatment to children under the age of 16 born with atypical sex characteristics and their parents / guardians.

	ICELAND	MALTA	GERMANY	PORTUGAL
	children's rights, appointed by the Minister responsible for human rights issues. The decision-making committee can obtain the opinion of other specialists if necessary. It must handle its cases confidentially. (Art 9(2)-(3))	The Maltese Act also establishes an 'interdisciplinary team' under Article 14. The team is appointed by the Minister, and is to be composed of professionals considered appropriate by the Minister. The interdisciplinary team is appointed for a period of three years, which may be renewed for another period of three years. (Art 14(4) and (5))	Subject to the court process outlined below, there is no independent oversight mechanism established outside the clinical context.	
Decision making framework, function and scope	The decision-making committee appears to have a role in assessing cases where treatment that will have a permanent effect on sex characteristics is proposed for a minor under 16 years who is unable to give consent (and that treatment is not hormonal treatment to trigger puberty). There is also currently an exception relating to surgical treatment for a short urethra or medication for micropenis, which is subject to review (see 'other notable features' below). The decision-making framework appears to require consideration of the child's best interests; conformity with the child's will and 'level of gender identity'; consent of the guardians (who, along with the child, must receive counselling and support); and satisfaction of a requirement that the treatment which will effect permanent changes to a child's sex characteristics (whether through surgery, medication or other irreversible medical interventions) is required solely for health reasons (with social, psychosocial and appearance-related reasons *excluded* from consideration as health reasons).	The working group has one year to provide its report and apart from its composition, there are no further rules as to its processes. (Art 16) The interdisciplinary team, in agreement with parents / guardians of a minor, may approve treatment 'in exceptional circumstances' where a minor is still unable to provide consent. However, any medical intervention driven by social factors without the minor's consent is prohibited by the Act. (Art 14(3)) There are no express considerations for the interdisciplinary team to take into account when making a decision. Contrast that with the obligation on medical professionals when consulting a minor who has requested treatment to take into account the best interests of the child as expressed in the Convention on the Rights of the Child, as well as the minor's own views. (Art 14(6))	Parents must provide an opinion of the interdisciplinary commission when applying to the family court for approval of non-urgent interventions. The commission must determine whether the planned intervention is in the best interest of the child. The legislation also provides for a set of questions the commission must address. If the interdisciplinary commission is in favour of the intervention, it is presumed that the planned intervention is in the best interests of the child. This ultimately acts as an approval, as the family court may grant permission where the planned intervention is in the best interests of the child.	N/A

	ICELAND	MALTA	GERMANY	PORTUGAL
	(Art 14a)			
Appeals	Decisions to reject consent made by the Article 9 expert committee may be appealed to the Director of Health. Decisions of the Directorate of Health may be appealed to the Ministry of Health. (Art 14a)	No appeal rights expressed in the legislation.	No information available.	N/A
Other notable features				
	The legislation includes a right for children born with atypical sex characteristics to physical integrity in relation to their sex characteristics and the right to receive the best health care available at any given time. In implementing the Act, care must be taken to respect their right to self-determination regarding personal matters. (Art 11a(1)) The legislation also includes transparency provisions, requiring the keeping of health records, the provision of information to the Director of Health by healthcare professionals regarding treatments provided, and places obligations on guardians to disclose that treatment has been performed once the child is mature enough to understand. (Art 11a(4) and (7)). The exception for treatments on account of a short urethra (hypospadias) and micropenis are subject to a three-year review period as to whether these exemptions should be deleted. This review must be conducted by a specially constituted working group comprised of certain clinicians, intersex and queer		The legislation provides for an evaluation of the law in 5 years' time, as well as a set of questions about extending the protections that the Federal Government must consider at that point.	

	ICELAND	MALTA	GERMANY	PORTUGAL
	representatives, an ethicist, and children's rights and human rights experts. (Art 18(2)),			

24. OTHER REGULATIONS OR PROPOSED LAWS

JURISDICTION	SOURCE	NOTES
California	Bill introduced in January 2021 by Senator Weiner (text here) *An act to add section 2295 to the Business and Professions Code, relating to medical procedures*	• The Californian Bill was stalled in April 2021 for the third time • The Bill would have prohibited physicians and surgeons from performing specified procedures on a child under the age of 12 born with variations in their physical sex, unless the procedure was required to address an immediate risk of physical harm. • The specified procedures are: o Clitoroplasty, clitoral reduction, and clitoral recession, including corporal-sparing procedures; o Gonadectomy; o Any procedure that lengthens or reroutes a urethra from its native orifice; o Vaginoplasty, urogenital sinus mobilization, and vaginal exteriorization. • The exceptions constituting an immediate risk of physical harm are: o Surgery to remove tissue that poses a significant heightened clinical risk of malignancy relative to that of the general population. o Surgery to allow urine to exit the body, to treat urinary incontinence, or to make a minimally invasive adjustment to urinary function in order to decrease a risk of infection or renal complication in a patient whose current urinary function puts them at a demonstrated clinical risk of infection or renal complication. o Surgery that is required to treat complications of a previous surgery and cannot be delayed without increasing physical health risks to the patient. o Any other surgery necessary to preserve life in the event of a medical emergency. • The Bill does not establish any specific oversight mechanisms. However, a violation of the Bill would have constituted unprofessional conduct.
Tamil Nadu	Arunkumar v Inspector General of Registration (decision of the Madurai bench of Madras High Court; 22 April 2019) Order of the Tamil Nadu Government dated 13 August 2019	• The case concerned a trans woman's right to marry under the Hindu Marriage Act • The court issued a directive to the Secretary to Government, Health and Family Welfare Department (Tamil Nadu) to make a Government Order prohibiting the performance of sex reassignment surgery on intersex infants and children • The order bans sex reassignment surgeries on intersex infants and children except in life-threatening situations • The Director of Medical Education must form a committee comprising of: o one paediatric surgeon / urologist; o one endocrinologist; o one social worker / psychology worker / intersex activist; and

JURISDICTION	SOURCE	NOTES
		○ one Government representative; which determines and recommends to the government whether there is a 'life-threatening situation'.
Ecuador	Proposed Organic Health Code (unable to locate full text)	• The proposed Organic Health Code included a prohibition on offering or performing medical procedures that violate the personal integrity of an intersex person who has not yet reached puberty, except where the person's health or life is at risk • The code was approved by the National Assembly on 25 August 2020 • However, the code was vetoed by the president (see statement of UN Special Rapporteurs here)
Chile	Circular No 18 (22 December 2015) Circular No 7 (23 August 2016) English translations by Morgan Carpenter, Camilo Godoy and Laura Inter available here and here	• Circular No 18, issued by the undersecretaries for healthcare network and public health, instructed people to stop unnecessary 'normalisation' treatment of intersex children, including irreversible genital surgeries, until children are old enough to decide what to do with their bodies • Circular No 18 also sought to establish a working group which would act as a review committee to determine what actions to take / regulate treatment. The committee is to be comprised of professionals with different specialties including endocrinology, gynaecology, psychiatry, paediatrics, family medicine, and members of the health service ethics committee • Circular No 7 provided additional information to Circular no 18, including: • The reference to 'unnecessary genital surgery' does not apply to situations where there is a 'clearly defined sex', meaning that certain surgeries are exempt from the prohibition
Albania	Medical Protocol for the Assessment of Children with Atypical Genital Development (July 2020) (unable to locate full text, see OII Europe press release here and article here)	• The Albanian Government Ministry of Health issued binding guidelines for health professionals • Surgical intervention on intersex children can only take place if deemed necessary for health reasons

APPENDIX D: EXAMPLES OF SOME AUSTRALIAN OVERSIGHT MECHANISMS

	COMMITTEE FOR DETERMINING APPLICATIONS FOR PSYCHIATRIC SURGERY *MENTAL HEALTH ACT 2015* (ACT)	PATIENT REVIEW PANEL *ASSISTED REPRODUCTIVE TREATMENT ACT 2008* (VIC)	NCAT – GUARDIANSHIP DIVISION *CIVIL AND ADMINISTRATIVE TRIBUNAL ACT 2013* (NSW)	NCAT – ADMINISTRATIVE AND EQUAL OPPORTUNITY DIVISION *CIVIL AND ADMINISTRATIVE TRIBUNAL ACT 2013* (NSW)
Establishing legislation	The committee is established under s 175 *Mental Health Act 2015* (ACT).	The Patient Review Panel is established under s 82 of the *Assisted Reproductive Treatment Act 2008* (Vic).	The Guardianship Division of NCAT is established under s 16 and Schedule 6 of the *Civil and Administrative Tribunal Act 2013* (NSW). The Guardianship Division Exercises functions under the following acts: • *Guardianship Act 1987* • *Powers of Attorney Act 2003* • *Children and Young Persons (Care and Protection) Act 1998*	The Administrative and Equal Opportunity Division of NCAT (AEO Division) is established under s 16 and Schedule 3 of the *Civil and Administrative Tribunal Act 2013* (NSW). The AEO Division exercises functions under several acts, including: • *Anti-Discrimination Act 1977* • *Public Health Act 2010*
Function of the panel	Committees under the Act may only consider applications of a psychiatrist for a named neurosurgeon to perform psychiatric surgery on a person: s 169(1). These applications are made to the Chief Psychiatrist, who then refers the application to the committee to make a recommendation: s 170(1)	The Panel is constituted to consider a range of application under the Act (see s 85), including applications for: • surrogacy arrangements • posthumous use of gametes and embryos; • treatment in circumstances where a doctor or ART provider is concerned about risk of abuse or neglect of a child that may be born • treatment where the applicant does not meet the criteria for treatment • extended storage periods for gametes or embryos; or removal from storage	The Guardianship Division of NCAT exercises functions and powers under several acts. Broadly speaking, the Guardianship Division determines matters impacting adults with impaired decision making capacity, including: • appointment and review of guardianship orders; • appointment and review of financial management orders; • consent for certain medical and dental procedures; • reviewing enduring powers of attorney	The AEO Division exercises functions under several acts.
Appointment and other provisions relating to panel members				
Appointment to the panel	The Minister appoints members of the committee: s 175	The Governor in Council appoints the Panel: s 83	The President of NCAT appoints the Division Head and members of NCAT to the Guardianship Division; s 18. The Act also provides for 'occasional members', who may be appointed to	The President of NCAT appoints the Division Head and members of NCAT to the AEO Division; s 18.

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			particular proceedings if they have particular expertise: s 11	The Act also provides for 'occasional members', who may be appointed to particular proceedings if they have particular expertise: s 11
Membership of panel	All committees must consist of: • a psychiatrist; • a neurosurgeon; • a lawyer; • a clinical psychologist; and • a social worker: s 175(1). The Minister must appoint one member as the chairperson: s 175(2)	There is no cap on members on the Panel. Rather, the Governor in Council must appoint 'as many members… as to enable the proper functioning of the panel': s 83(c) The Governor in Council also appoints a chairperson of the Panel, and up to 3 deputy chairpersons: s 83(a) and (b)	The Guardianship Division constitutes the Division Head and such other members assigned to the Division by or under the Act: Schedule 6, s 2	The AEO Division constitutes the Division Head and such other members assigned to the Division by or under the Act: Schedule 3, s 2
Constitution of panel for hearings	As above	Sections 85(2) and (3) outline who on the Panel exercises certain functions. The chairperson (or a single member determined by the chairperson) must exercise the Panel's role in considering applications for gamete / embryo storage periods, or removal of embryos from storage. For all other roles outlined above, a 'Division' of the Panel must consider the application, made up of: • the chairperson; • a deputy chairperson; and • 3 members, one of whom must have expertise in child protection matters	When exercising substantive functions of the Guardianship Division, the Tribunal must consist of: • one member who is an Australian lawyer; • one member with a professional qualification; and • one member with a community based qualification: Schedule 6, s 4 A member is taken to have professional qualifications if they are, eg, a medical practitioner, psychologist or social worker who has experience assessing or treating people to whom the Guardianship Act applies. A member is taken to have a community based qualification if they have experience with people to whom the Guardianship Act applies: Schedule 6, s 1 Additionally, s 27 provides a more general power for the President to give directions as to the members that should constitute the Tribunal for particular proceedings, having regard to:	For exercising certain functions in the AEO Division, the Tribunal is to be constituted by people with certain qualifications or expertise. For example: • When exercising functions under the Anti-Discrimination Act, the Tribunal must consist of at least one Division member who is an Australian lawyer; • When exercising certain functions under the Public Health Act (for example, reviewing public health orders), the Tribunal must be constituted by 3 members, being a presidential member, an Australian lawyer, and a registered medical practitioner with experience in public health Additionally, s 27 provides a more general power for the President to give directions as to the members that should constitute the Tribunal for particular proceedings, having regard to: • the degree of public importance and complexity of the subject-matter; • the need for special knowledge or expertise in the subject-matter of the proceedings

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			• the degree of public importance and complexity of the subject-matter; • the need for special knowledge or expertise in the subject-matter of the proceedings	
Tenure	Unlike other schemes, the committees under the Act appear to be convened on the receipt of an application, for the purposes of considering that one application	The chairperson, deputy chairpersons and members of the Panel can hold office for a period of no longer than 3 years as specified in their instrument of appointment: s 86(1); s 87A(1)	Members hold office for a period of no longer than 5 years as specified in their instrument of appointment (but can be re-appointed): Schedule 2, s 2	Members hold office for a period of no longer than 5 years as specified in their instrument of appointment (but can be re-appointed): Schedule 2, s 2
Remuneration	Members of the committee must be paid the remuneration and allowances prescribed by regulation: s 175(5)	Members of the Panel who are not already members of the public service (under the *Public Administration Act 2004*) are entitled to fees: s 88	Tribunal members are entitled to remuneration as determined by the Minister: Schedule 2, s 5	Tribunal members are entitled to remuneration as determined by the Minister: Schedule 2, s 5
Decision-making				
Matters to which bodies must have regard / decision-making process	The committee must not recommend approval of the surgery unless: • the committee believes that the surgery will result in 'substantial benefit' to the subject; and that all alternative forms of treatment have failed or are likely to fail, to benefit the subject person; and • the psychiatrist and the neurosurgeon on the panel support the recommendation: s 170(4). • The committee must make decisions in accordance with the opinion of a majority of members (subject to the psychiatrist / neurosurgeon requirement above): s 175(4) The chief psychiatrist must determine the application in accordance with the committee's recommendation: s 172	In determining the application, the Panel must have regard to the guiding principles in s 5 and any other criteria in the Act relevant to the application: s 91(2). The principles in s 5 include: • the welfare and interests of persons born as a result of treatment procedures are paramount; • procedures must not be for the purpose of exploiting, in trade or otherwise, the reproductive capabilities of men and women; or children born as a result of procedures; • children born as a result of donated gametes have the right to information about genetic parents; • health and wellbeing of persons undergoing treatment must be protected at all times;	The Guardianship Division must make decisions in accordance with principles outlined in the Guardianship Act: Schedule 6, s 5(1). Section 4 of that Act provides that people working with people with disabilities have a duty to: • give the person's welfare and interests paramount consideration; • restrict the person's freedom as little as possible; • encourage the person to live a normal life un the community; • take the person's views into consideration; • recognise the importance of preserving family relationships and cultural / linguistic environments;	Unlike other bodies, there is no specific criteria that must be taken into account by the AEO Division, likely reflecting the wide range of matters it oversees

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		• persons seeking treatment must not be discriminated against on the basis of sexual orientation, marital status, race or religion	• encourage persons to be self-reliant in managing personal, domestic and financial affairs; • protect the person from neglect, abuse and exploitation; and • encourage the community to apply and promote these principles	
Reasons	The committee must provide a report of their reasons for making or not making a recommendation; in addition to any conditions to which the recommendation should be subject and a statement that the committee is satisfied that the nominated neurosurgeon has the necessary qualifications for the procedure: s 170(2)	The Panel must give reasons for a decision to the applicant: s 92(1) Where a decision may have a significant impact on how treatment procedures are carried out in Victoria, the Panel must give a copy of the reasons to the Victorian Assisted Reproductive Treatment Authority: s 92(2)	The Tribunal must give each party to proceedings a copy of written reasons for any decision made: Schedule 6, s 11(1) Note this overrides the general NCAT obligation to only provide reasons when requested under s 62 Certain minor or interlocutory decisions are exempt from this requirement: Schedule 6, s 11(2)	No specific requirement to provide reasons in Schedule 3 Therefore, only required to provide reasons on request: s 62
Liability	The chief psychiatrist and members of the committee are not civilly liable for anything done honestly and without recklessness in the exercise of a function under the Act: s 265 Any civil liability that would otherwise attach to a member of the Panel attaches to the Territory: s 265(2)	Members of the Panel are not personally liable for anything done in good faith in the exercise of powers under the Act: s 94(1)(b) Any liability that would otherwise attach to a member of the Panel attaches to the Crown: s 94(2)	Tribunal Members, when exercising functions of a member, have the same protection and immunities as a Judge of the Supreme Court: Schedule 2, s 4	Tribunal Members, when exercising functions of a member, have the same protection and immunities as a Judge of the Supreme Court: Schedule 2, s 4
Procedural matters				
Applicant's role in hearing	The subject (or their guardian etc) are entitled to make oral or written submissions to the committee; which the committee is obliged to consider: s 170(3)	The applicant is entitled to be present at the hearing, make submissions and be accompanied by one other person: s 90(3)(c)	Schedule is silent; however s 50 of the Act provides that all parties to a hearing are to be given the opportunity to make submissions	Schedule is silent; however s 50 of the Act provides that all parties to a hearing are to be given the opportunity to make submissions
Public hearings	Legislation is silent	Hearings are not open to the public: s 90(3)(d)	Schedule is silent; however s 49 of the Act provides that hearings are public unless the Tribunal orders otherwise	Schedule is silent; however s 49 of the Act provides that hearings are public unless the Tribunal orders otherwise

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Legal representation	Legislation is silent	Applicants have no right to legal representation without leave of the Panel: s 90(3)(b)	For functions under s 175 of the *Children and Young Persons Act*, which relate to certain medical treatments performed on children, parties are entitled to legal representation without leave of the Tribunal: Schedule 6, s 9 In all other functions, parties have no right to representation without leave of the Tribunal: s 45	For all proceedings under the AEO Division, parties are entitled to legal representation without leave of the Tribunal: Schedule 3, s 9
Evidence and information gathering	The committee may request the chief psychiatrist to gather additional information or documents from the doctor who made the application: s 171	The Panel is not bound by the rules of evidence and may inform itself in any way it thinks fit: s 90(3)(f)	Schedule is silent; however s 38 of the Act provides that the Tribunal is not bound by the rules of evidence and may inquire or inform itself of any matters it thinks fit	Schedule is silent; however s 38 of the Act provides that the Tribunal is not bound by the rules of evidence and may inquire or inform itself of any matters it thinks fit Additionally, certain provisions of the acts under which the AEO Division exercises functions confer additional rights to information gathering – for example, for proceedings under ss 64 and 65 of the Public Health Act (regarding public health orders) NCAT is entitled to seek the assistance of any person with medical or otherwise relevant qualifications
Natural justice	Legislation is silent	The Panel is bound by the rules of natural justice: s 90(3)(e)	Schedule is silent; however s 38 of the Act provides that the Tribunal is bound by the rules of natural justice	Schedule is silent; however s 38 of the Act provides that the Tribunal is bound by the rules of natural justice
Conduct of hearing	Legislation is silent	Procedure of hearings is at the Panel's discretion: s 90(2) Proceedings must be conducted with as little technicality and formality as the application permits: s 90(3)(a)	The Guardianship Division is required to hold a hearing when exercising a substantive function of the Division: Schedule 6, s 6	No express requirement to hold a hearing in AEO Division proceedings under Schedule 3
Time frame for decision making	The committee is obliged to provide its recommendation and written report to the chief psychiatrist as soon as practicable: s 170(c)	The Panel must make a decision within 14 days of hearing an application whether or not to approve that application: s 91(1)	Legislation is silent	Legislation is silent
Rights of review or appeal				

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Are decisions appealable?	Decisions about psychiatric surgery are not reviewable decisions under Schedule 1 of the *MH Act*.	An application may be made to VCAT for review of a decision made by the Panel: s 96	An appeal against an 'appealable Division decision' may be made to either an Appeal Panel or the Supreme Court – however, an appeal to either body precludes an appeal being made to the other: Schedule 6, s 12	Certain designated decisions under this Division are not internally appealable; and others can be appealed directly to the Supreme Court. Otherwise, usual appeal procedure for decisions of NCAT
Conduct of appeal	N/A	Governed by VCAT legislation	**Appeal Panel** An Appeal Panel under the Guardianship Division of NCAT must be constituted by: • one member who is a lawyer of over 7 years' standing; • one member who is a lawyer; and • one senior or general member who is not a lawyer: Schedule 6, s 13(1) **Supreme Court** The Supreme Court may permit fresh evidence or determine an appeal by way of a new hearing, if it considers the grounds of appeal warrant a new hearing: Schedule 6, s 14(3) The Supreme Court may make such orders as it considers appropriate, including: • confirming, affirming or varying the decision; • quashing or setting aside the decision; • making a new decision; • requiring reconsideration by the Tribunal: Schedule 6, s 14(4)	Usual appeal procedure for decisions of NCAT
Who may apply for review	N/A	A person whose interests are affected by a decision of the Panel may apply for review: s 97	Any party to proceedings under the Division may appeal an 'appealable Division decision'	Usual appeal procedure for decisions of NCAT
Time frame for review application	N/A	An application for review must be made within 28 days of the day after the decision is made: s 98	**Appeal Panel** Legislation is silent **Supreme Court**	Usual appeal procedure for decisions of NCAT

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			Applications for appeal to the Supreme Court must be made within 28 days of the day written reasons were provided: Schedule 6, s 14(2)	

APPENDIX E: GLOSSARY OF KEY TERMS

The Australian Senate Community Affairs Reference Committee conducted an inquiry into the involuntary or coerced sterilisation of intersex people in Australia in 2013. It published a report with a glossary helpful to understanding the terms used in this space. We have reproduced an extract from that glossary here to assist you.

EXTRACT OF GLOSSARY FROM AUSTRALIAN SENATE REPORT

Chromosome

Chromosomes are found in each cell in the body. Each human cell normally contains 46 total chromosomes – organised in two sets of 23 chromosomes – that come in two types: sex chromosomes and autosomal chromosomes. Each cell in the human body contains these chromosomes which contain genetic material (genes) that make up an individual's DNA (deoxyribonucleic acid). Sex chromosomes determine gender. In the final of the 23 sets of chromosomes, females have two X chromosomes, while males have an X and a Y chromosome; in some intersex people, there are variations in the configuration of the 23rd chromosome set. Phenotypes are produced by multiple chromosomes acting together.

Cryptorchidism

Cryptorchidism refers to the condition in which the testes fail to descend into the scrotum and are retained within the abdomen or inguinal canal.

Clitoroplasty, clitoridectomy

Clitoridectomy is the surgical excision of the clitoris. Until the 1960s clitoridectomy was the principal surgical procedure used to manage enlargement of the clitoris in intersex. Clitoroplasty is a surgical procedure to alter the physiology of the clitoris, and includes procedures in which part of the erectile tissue of the clitoris is removed (clitoral reduction) or relocated (clitoral recession) to reduce the apparent size of the clitoris.

Cloacal Extrophy

Cloacal Extrophy is a condition in which an infant has the bladder and a portion of the intestines exposed outside the abdomen. In males the penis is either flat and short or sometimes split. In females the clitoris is split and there may be two vaginal openings. Frequently the intestine is also short and the anus may not be open.

Dysgenesis

Dysgenesis refers to abnormal organ development during embryonic growth and development of a foetus. Gonadal and adrenal dysgenesis are two of the more common types of dysgenesis. Gonadal dysgenesis may result in a streak gonad.

Endocrinology

Endocrinology is a medical specialisation dealing with the body's production, use and response to hormones.

Genitoplasty

Genitoplasty is the surgical alteration of external genitalia, and is a procedure sometimes performed on individuals with ambiguous genitalia. The two essential elements of feminising genitoplasty are clitoral reduction/recession (clitoroplasty, see above) and vaginoplasty (see below).

Genotype

A person's genotype describes all of the genetic information that is encoded in his or her chromosomes (for example 46,XY or 46XX, among others). It also refers to the genetic information carried by a pair of genes (one from each parent) which controls a particular characteristic.

Germ cell tumour

Germ cells are those embryonic cells that have the potential to develop into gonads. Germ cell tumours are tumorous growths based in those cells, and can be cancerous or non-cancerous.

Gonad

Gonads are reproductive glands; the term can refer to either testicles or ovaries. Gonads in foetuses develop into either testes or ovaries depending on the chromosomal constitution of the foetus. In some intersex people, gonads do not differentiate fully into one type or the other.

Streak gonad

Streak gonads consists of fibrous tissue without any germ cells, and therefore are unable to function.

Gonadectomy

A gonadectomy is the removal of an ovary or testis. In some intersex cases, gonadectomy is undertaken if the testes are inconsistent with the sex of assignment. In some CAIS individuals the testes are intra-abdominal or contained in inguinal herniae (a protrusion of the abdominal cavity).

Histology

Histology is the science dealing with the microscopic identification of specific cells and tissue.

Hypospadias

Hypospadias is a development disorder affecting the urethra. In the male, it is a developmental anomaly in which the urethra opens on the underside of the penis or on the perineum. In females hypospadias is a developmental anomaly in which the urethra opens into the vagina.

Immunohistochemistry

Immunohistochemistry is a medical diagnostic tool. Histochemistry is the study of the chemistry of organic tissue through observing chemical reactions. Immunohistochemistry is a form of histochemistry which relies on the principle of certain antibodies binding specifically to certain receptors (antigens) in biological tissue; these reaction patterns can then be assessed. Immunohistochemistry is widely used to detect specific structures in tissues and in the diagnosis of abnormal cells such as those found in tumours.

Inguinal

Inguinal refers to the region of the groin. In the male foetus the inguinal canals are a pair of openings that connect the abdominal cavity with the scrotum. An inguinal hernia is a protrusion through the lower abdominal wall.

Intra-abdominal

Intra-abdominal refers to the area of the body in which the ovaries and uterus are found. In some intersex conditions, the position of the testes is intra-abdominal rather than scrotal.

Karyotype

A karyotype refers to the number and structure of chromosomes in the nucleus of a cell; that is, the complete set of chromosomes in an individual. The karyotype is usually identical in all the cells of an organism (but not in some rare types of intersex). The standard human karyotype contains 22 pairs of autosomal chromosomes and one pair of sex chromosomes (46 chromosomes in total). The standard karyotype for females is denoted as 46,XX whereas the standard male karyotype is expressed 46,XY.

Labiaplasty

Labiaplasty is a surgical procedure to modify, usually by reducing the size of, the labia, the folds of flesh and skin that surround the female genitals.

Neoplastic

Neoplasty is any abnormal growth of new tissue.

Prophylactic

A prophylactic is an agent or procedure that prevents the development of a condition or a disease.

Phenotype

Phenotype refers to the complete observable characteristics of an individual, including anatomical, physiological, biochemical and behavioural traits, as determined by the interaction of both genetic makeup and environmental factors.

Scarification

Scarification is the creation of scar tissue following surgical procedures.

Scrotal

In relation to the position of the testes, scrotal testes are in the scrotum. Testes can in some intersex variations be intra-abdominal or inguinal.

Vaginoplasty

Vaginoplasty is a surgical procedure to create a vaginal canal. Some intersex conditions such as Complete Androgen Insensitivity Syndrome may cause individuals to develop a blind vaginal pouch that averages 2.5 to 3.0 cm in depth, compared to an average of 10-12 cm depth for non-CAIS individuals. Some individuals in these circumstances will undergo vaginoplasty.