EQUALITY

# A VICTORIAN INTERSEX OVERSIGHT SCHEME:

A CONSULTATION PAPER ON A LEGAL SCHEME TO PROTECT PEOPLE FROM MEDICAL INTERVENTIONS ON THEIR SEX CHARACTERISTICS WITHOUT PERSONAL CONSENT

# CONTENTS

## 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.

Cover image by Jean Jacobs.

# INTRODUCTION

Equality Australia has been engaged by the Victorian Government to provide advice on the governance requirements, structure and the most appropriate regulatory system for establishing a Victorian Intersex Oversight Panel. To finalise our recommendations, Equality Australia will be consulting with people with innate variations of sex characteristics, their families, and clinicians and health professionals who are involved in providing healthcare in this area, as well as interested stakeholders. We intend to finalise our advice by mid-July 2021 and will present it to the Victorian Government for its consideration.

There are a range of ways that schemes protecting people from medical interventions on their sex characteristics have been framed by international human rights mechanisms, overseas laws, government policies and internationally significant statements, such as the *Darlington Statement*.[1] We have produced a Background Paper which summarises some of these key human rights principles, laws, and statements of policy.

In consultation with affected stakeholders (particularly people with innate variations of sex characteristics), our job is to help translate the various human rights principles and policy statements into a domestic proposal that ensures bodily integrity, physical autonomy, and self-determination for people with innate variations of sex characteristics in respect of the medical interventions performed on their sex characteristics.

This consultation paper sets out our draft proposal for a legal scheme for establishing a Victorian Intersex Oversight Panel. The chief intent of that scheme is to protect people with innate variations of sex characteristics from medical interventions modifying their sex characteristics without their personal consent, except in emergency and otherwise strictly limited circumstances.

In this consultation paper, we have set out the overall draft scheme proposal and its constituent parts, the detailed draft legal provisions that would sit under each part, and then defined some questions to help guide our consultations. Our final recommendations may depart from this draft proposal, including as we consider and incorporate your feedback. This is a complex area of work, and your feedback is both welcome and important to our work.

To provide feedback on our proposal, you can:

- sign up to one of our consultation workshops. Three workshops, running for 1.5 hours each, will be open specifically and separately to people with innate variations of sex characteristics; the families (inkling parents, guardians and carers) of people with innate variations of sex characteristics; and clinicians and health professionals. Another workshop will be open to all other stakeholders who have an interest in the proposed scheme. These workshops will be conducted under the Chatham House Rule, meaning that no information which would identify a person can be discussed outside the workshop, but the general themes and contributions can be disclosed, including in our final report.
- provide confidential feedback by emailing Zoe Barker (Zoe.Barker@equalityaustralia.org.au) before 31 July 2021. Feedback can be provided in writing, or if you have direct experience, we can organise a time to speak with you privately by telephone or videoconference.

Your feedback will be used to finalise our recommendations to the Victorian Government on the legal pathway forward. Unless you give us consent, any feedback provided to us will be communicated in a way which does not reveal the identity of any person in association with that feedback. You can also give us confidential feedback by email, which we will not use or refer to without seeking further consent from you.

[1] 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.

In our consultations, we will be centring the voices of people with innate variations of sex characteristics, as this scheme is built upon their advocacy and they must have trust and confidence in it if it is to succeed. We will also be seeking views from a number of other stakeholders, including clinicians, parents and guardians, to ensure the scheme is accessible, works in practice, and has no unintended consequences. We will also be seeking views from a wider group of stakeholders who may have an interest in the scheme, including people with disability and trans and gender diverse people (including those without innate variations of sex characteristics), given the scheme design could benefit from incorporating the experience and learnings of these groups in their interaction with other schemes, and must ensure that it does not adversely impact them or their healthcare.

# SIMPLIFIED OVERVIEW OF THE SCHEME

**Protections for people with innate variations of sex characteristics**

This paper sets out a proposed scheme to protect people with innate variations of sex characteristics from medical treatment modifying their sex characteristics without personal consent except:

- in certain emergency situations; or
- in limited circumstances, as defined by an oversight panel.[2]

**Establishing an oversight body**

Central to the proposed scheme is the establishment of an oversight body, headed by an oversight panel comprised of 9 members.

The panel should be chaired by a senior lawyer or former judge. The other members should include 3 representatives of people with innate variations of sex characteristics and their families, 3 health professionals, and 2 experts in bioethics and human rights.

Several safeguards ensure that decisions of the panel reflect the diversity of its members.[3]

**The proposed work of the oversight body**

The oversight body and its oversight panel have a range of responsibilities.[4]

The oversight body can help people with innate variations of sex characteristics, their families and health professionals to prepare and register an **individual care plan**. An individual care plan can allow medical treatment that modifies a person's sex characteristics without their personal consent but only when that **treatment cannot be deferred without being likely to cause harm to their health**. The scheme also contains several provisions that safeguard the right of people to make decisions about their own treatment whenever they can. The scheme also prohibits decisions which discriminate against people with innate variations of sex characteristics, by not allowing the oversight panel to simply assume that a person would be better off if their body appeared or functioned as if it did not have such variations.[5]

The oversight panel's decision-making functions should be supported by employed support workers who ensure people with innate variations of sex characteristics, their families and health professionals are supported throughout its decision-making processes.[6]

The oversight body can also make orders allow the provision of certain treatments that may benefit people with innate variations of sex characteristics without the need for an individual care plan. However, these provisions are subject to similar safeguards as above.[7]

**Reporting obligations**

Health professionals who provide medical treatment modifying a person's sex characteristics without personal consent must provide reports to the oversight body. These reports allow the oversight panel to monitor compliance with the scheme, including what treatments are being provided and in what circumstances.[8]

**Other parts of the scheme**

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[2] For information on the scope of the scheme and the prohibitions, see sections 3, 4 and 5.

[3] For information on the establishment of the oversight body and how the panel ensures diversity in decision-making, see section 6.

[4] For information on the overarching functions and powers of the oversight body, see section 7.

[5] For information on individual care plans and how and when they can be registered by the oversight body, see sections 2, 8 and 9.

[6] For information on the role of support workers, see section 9.

[7] For information on class exemption orders and how and when they can be made, repealed or amended, see sections 2, 8 and 10.

[8] For information on mandatory reporting obligations, see section 11 (together with section 7 and the emergency treatment exception in section 4).

The proposed scheme also includes a number of provisions to:

- protect the privacy of personal information;[9]
- allow the oversight body to refer suspected wrongdoing to relevant public bodies;[10]
- allow other states and territories to join the scheme;[11] and
- ensure other laws work in harmony with the scheme.[12]

[9] For more information on confidentiality, see section 12.

[10] For more information on the regulatory functions of the oversight body, see section 7 and 12.

[11] For more information on the future nationalisation provisions, see section 13.

[12] For more information on the interaction of the scheme with other laws, see section 14.

# THE PROPOSED SCHEME: IN DETAIL

## 1. OVERVIEW

The following diagram highlights the separate parts which together comprise our proposed legislative scheme. Each of these parts is then discussed in this consultation paper.

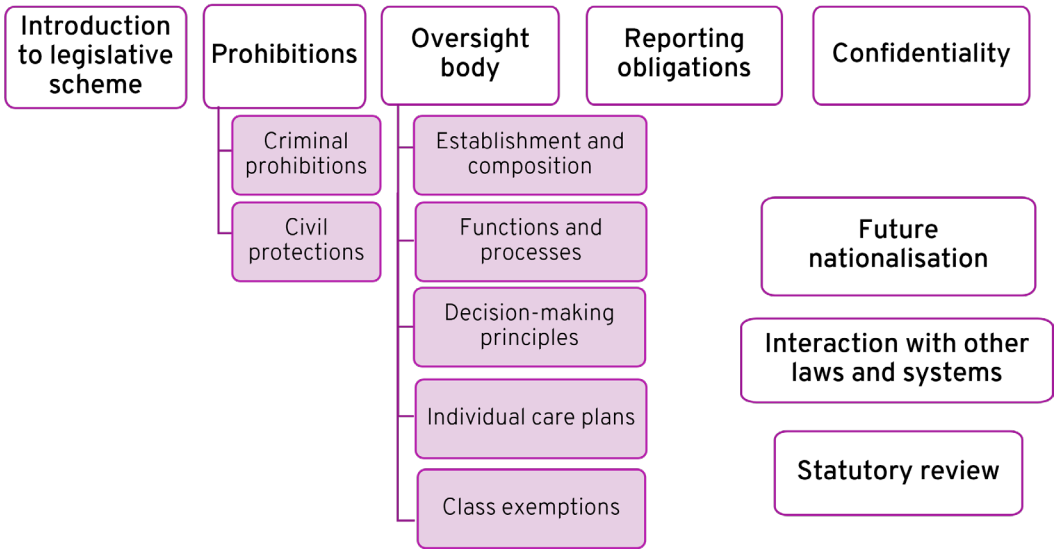


*Figure 1: Overview of proposed scheme*

Our proposal is for a legislative scheme. The principal legal reason for this is that the oversight body will need statutory powers to do its work, and existing statutory and common law rules[13] governing consent to medical treatment must be amended to ensure personal consent (rather than consent on behalf of another person) is centred in medical decision-making involving a person's sex characteristics.

Overall, our draft scheme has the following proposed features:

- **introduction**: provisions setting out the objects and purposes that the legislation is seeking to achieve, as well as the scope of the scheme;
- **prohibitions:** provisions that set out when medical treatment modifying a person's sex characteristics can be performed and in what circumstances, and that provide the framework for the oversight body's work;
- **oversight body:** the establishment of an oversight body and provisions detailing its functions and processes, including ensuring supported decision-making;
- **transparency and confidentiality:** provisions that ensure transparency through reporting obligations, while personal privacy is protected through confidentiality provisions;
- **future nationalisation:** provisions that allow the scheme to be adopted nationally in future, and which provide a mechanism for this to be achieved;
- **interaction with other laws and systems:** provisions that make consequential amendments to other laws so the scheme works harmoniously with existing systems;

[13] See section 5 of our paper, *Bodily Integrity, Physical autonomy and self-determination: A background paper on protecting intersex people from medical interventions without personal consent.*

- **statutory review:** provisions that mandate a review period so that the effectiveness and operation of the scheme can be reviewed.

Each of the parts is explored further below.

# 2. INTRODUCTION TO LEGISLATIVE SCHEME

## (a) Our proposal

This part of the proposed scheme sets out what the scheme is intending to achieve and when it will commence.

### PURPOSES AND OBJECTS OF THE SCHEME

The legislation should include a statement of its purposes and objects, and a statement of its intent.

The proposed main purposes of the legislation should be to:

- end harmful practices on people with innate variations of sex characteristics through prohibitions on medical treatment modifying their sex characteristics without personal consent, except in limited circumstances;
- establish oversight and transparency mechanisms that will:
  - ensure that any medical treatment modifying a person's sex characteristics which is deferrable without causing or being likely to cause harm to the health of a person is deferred until the person receiving the treatment is able to make a decision for themselves as to any medical treatment they wish to personally consent to;
  - ensure that any medical treatments modifying a person's sex characteristics performed without personal consent are done so in accordance with individual care plans that protect the rights of individuals and support decision-making by the person and their parents or guardians to the extent possible; and
- make consequential amendments to certain other legislation.

The proposed objects of the legislation should be to:

- end harmful practices performed on people with innate variations of sex characteristics by prohibiting, except in limited circumstances, medical interventions modifying a person's sex characteristics without their personal consent;
- further promote and protect the right of persons with innate variations of sex characteristics to bodily integrity, physical autonomy and self-determination in respect of any medical treatment that would modify their sex characteristics;
- support the provision of information to people with innate variations of sex characteristics and their families to empower a person to make fully informed decisions about any medical treatment that would modify their sex characteristics; and
- further promote and protect the rights set out in the Charter of Human Rights and Responsibilities.

The proposed intention of the Parliament in enacting this legislation should be to:

- affirm that innate variations in sex characteristics are a natural part of human diversity and do not, in and of themselves, require fixing or correcting;
- affirm that all persons, without discrimination against persons with innate variations in sex characteristics, are entitled to access healthcare that promotes and supports their

bodily integrity, physical autonomy and self-determination over what medical treatments (if any) are performed on their bodies; and

- denounce medical treatments modifying a person's sex characteristics which are justified by rationales which discriminate against people with innate variations of sex characteristics, including by reference to assumptions about how bodies should appear or function simply in order to accord with a particular gendered norm.

**HUMAN RIGHTS PRINCIPLES**

The legislation should clarify that nothing in it is intended to abrogate or limit the rights or freedoms, or obligations placed on public authorities, under the *Charter of Human Rights and Responsibilities Act 2006* (Vic).

The legislation should clarify that the oversight body is an entity that has functions of a public nature (and is therefore a public authority under the Charter) and that, without limitation, the following decisions do not constitute acts or decisions of a private nature under s 38(3) of the Charter:

- a decision to register or not to register an individual care plan, including with or without any amendments (see section 9 below);
- a decision to make, revoke or amend a class exemption order (see section 10 below).

**COMMENCEMENT OF SCHEME**

This scheme should commence on the earlier of:

- a day (or days) to be proclaimed for any particular part of the scheme; or
- 1 year after the legislation receives Royal Assent.

## (b) Explanation of proposal

**Purposes and objects**

The purposes and objects section of legislation sets out what the parliament intends to achieve by enacting the legislation. The purposes and objects help a decision-maker (including a court) to interpret and apply the legislation so that it has the effect that parliament intended it to have. While drafters will transform the precise words of these purposes and objects into customary statutory language, it is important that these purposes and objects capture what you consider the legislative scheme should achieve.

**Human rights principles**

By clarifying that the oversight body is a public authority under the *Charter of Human Rights and Responsibilities Act 2006* (Vic) and that its key decision-making powers are not of a private nature, a number of legal consequences follow.

First, subject to the statutory requirements established by this scheme, the oversight body cannot act in a way which is incompatible with the human rights contained in the Charter. The oversight body must also consider relevant human rights contained in the Charter when it makes its decisions.[14]

The human rights protected by the Charter include:

[14] *Charter of Human Rights and Responsibilities Act 2006* (Vic), s 38.

- recognition and equality before the law,[15]
- the right to be protected from torture and cruel, inhuman or degrading treatment (including medical or scientific experiment or treatment with full, free and informed consent),[16]
- the right to privacy,[17]
- the right of every child to protection without discrimination,[18] and
- the right of personal liberty and security.[19]

Second, these provisions would allow a person to include a legal claim that their human rights have been contravened in any legal proceedings challenging the decisions of the oversight body, such as judicial review proceedings.[20]

**Commencement of the scheme**

The commencement section of legislation sets out when the scheme will start operating. Our draft recommendation is for the scheme to fully operate within 1 year of the legislation receiving Royal Assent so that there is time for the oversight body to be established, set up its administrative processes, and make decisions on the registration of any individual care plans and any class exemptions orders (see further section 10 below). However, this provision will also allow parts of the scheme to state operating sooner, so that the preparatory work (such as the establishment and appointment of the oversight body itself) can start immediately after the legislation is passed.

### (c) Questions for consultation

**KEY QUESTIONS**

1. **Do you agree with the proposed purposes and objects?**
2. **Are there any purposes or objects which are missing?**
3. **Does 1 year give the oversight body sufficient time to get ready for the scheme to start working?**

## 3. PROHIBITIONS – SCOPE OF SCHEME

### (a) Our proposal

In our first consultation with the Intersex Expert Advisory Group, we were asked if there was a way to limit the scope of the scheme so that it maintains its focus on people with innate variations of sex characteristics. This proposal would make the prohibitions apply to a defined class of 'Protected Persons', being persons with innate variations of sex characteristics.

**'PROTECTED PERSON'**

The legislation could provide a definition of a *'protected person'* which means:

[15] *Charter of Human Rights and Responsibilities Act 2006* (Vic), s 8.

[16] *Charter of Human Rights and Responsibilities Act 2006* (Vic), s 10.

[17] *Charter of Human Rights and Responsibilities Act 2006* (Vic), s 13.

[18] *Charter of Human Rights and Responsibilities Act 2006* (Vic), s 17.

[19] *Charter of Human Rights and Responsibilities Act 2006* (Vic), s 21(1). See also *Kracke v Mental Health Review Board* [2009] VCAT 646 at [547]-[548].

[20] *Charter of Human Rights and Responsibilities Act 2006* (Vic), s 39.

*(a) a natural person with innate variations of sex characteristics that do not ascribe to medical norms for male or female bodies;*

*(b) without limitation to (a), a natural person with innate variations (whether diagnosed or not) known as:*

- *(i) 17-beta-hydroxysteroid dehydrogenase deficiency or 17β-Hydroxysteroid dehydrogenase III deficiency*
- *(ii) 48XXXX/XXXX Syndrome (also known as Tetrasomy X or Quadruple X)*
- *(iii) 49XXXXX, XXXXX Syndrome (also known as Pentasomy X)*
- *(iv) 5-alpha reductase deficiency (5-ARD)*
- *(v) androgen insensitivity syndromes such as Complete Androgen Insensitivity Syndrome (CAIS) or Partial Androgen Insensitivity Syndrome (PAIS)*
- *(vi) aphallia*
- *(vii) bladder exstrophy (also known as ectopia vesicae)*
- *(viii) clitoromegaly (also known as large clitoris)*
- *(ix) Congenital Adrenal Hyperplasia (CAH)*
- *(x) cryptorchidism (also known as undescended testes)*
- *(xi) De la Chapelle syndrome (also known as XX Male Syndrome)*
- *(xii) epispadias*
- *(xiii) Follicle-Stimulating Hormone Insensitivity (FSH)*
- *(xiv) Fraser Syndrome (also known as Meyer-Schwickerath's Syndrome, Fraser-François Syndrome or Ullrich-Feichtiger Syndrome)*
- *(xv) gonadal dysgenesis (partial and complete)*
- *(xvi) hypogonadism*
- *(xvii) hypospadias*
- *(xviii) Jacobs Syndrome (also known as XYY Syndrome)*
- *(xix) Kallmann Syndrome*
- *(xx) Klinefelter Syndrome (including 47XXY, 48XXXY or 49XXXXY variations)*
- *(xxi) Leydig cell gypoplasia*
- *(xxii) Mayer-Rokitansky-Küster-Hauser Syndrome (MRKH) (also known as vaginal agenesis, Müllerian agenesis, or Müllerian (duct) aplasia)*
- *(xxiii) micropenis*
- *(xxiv) Mild Androgen Insensitivity Syndrome (MAIS)*
- *(xxv) mosaicism or chimericism involving sex chromosomes*
- *(xxvi) ovo-testes*
- *(xxvii) Persistent Mullerian Duct Syndrome (PMDS)*
- *(xxviii) Poly-cystic Ovary Syndrome (PCOS) (also known as hyperandrogenism)*
- *(xxix) Progestin Induced Virilisation*
- *(xxx) Swyer Syndrome (also known as XY gonadal dysgenesis)*

*(xxxi)* *Triple-X Syndrome (also known as XXX, triple-X, trisomy X, XXX syndrome or 47XXX aneuploidy)*

*(xxxii)* *Turner Syndrome (also known as Ullrich-Turner Syndrome, Gonadal Dysgenesis, 45X0 or 45X)*

*(xxxiii)* *XY/XO Mosaics;*

*(c) such other innate variations of sex characteristics as may be declared by the Minister upon the recommendation of the oversight body.*

'*Sex characteristics*' should have the same meaning as in the *Equal Opportunity Act 2010* (Vic).[21]

## (b) Explanation of proposal

When this definition of 'Protected Person' is put alongside the prohibitions below, it limits the application of those prohibitions to people with innate variations of sex characteristics that do not ascribe to medical norms for male or female bodies. To provide clarity, the definition then includes a non-exhaustive list of innate variations of sex characteristics and allows the oversight body to recommend that the Minister declares further innate variations of sex characteristics. The definition also clarifies that a person does not need to be diagnosed with a variation of sex characteristics to fall within the protection of the scheme.

The key pros of this approach include:

- it centres the focus of the scheme on people with innate variations of sex characteristics;
- the definition of 'Protected Person' could be expanded by the oversight body in future if new innate variations of sex characteristics are discovered, or nomenclature changes;
- diagnosis of a variation of sex characteristics is not a requirement for protection, meaning the onus is on the person providing the medical treatment to ensure that the requirements of the scheme are complied with;
- it provides certainty by listing the innate variations of sex characteristics included within the scope of the scheme.

The key cons of this approach are that it establishes two different legal systems for medical treatment modifying a person's sex characteristics, depending on whether the person has innate variations of sex characteristics or not. This could result in some different treatment pathways for similar types of treatments. For example, an endosex young person with gender dysphoria might have to go to the Family Court where they do not have legal capacity to consent to their own gender affirming treatment, while an intersex young person with gender dysphoria could have access to the oversight body.

[21] Under the *Equality Opportunity Act 2010* (Vic), '*sex characteristics*' means a person's physical features relating to sex, including— (a) genitalia and other sexual and reproductive parts of the person's anatomy; and (b) the person's chromosomes, genes, hormones, and secondary physical features that emerge as a result of puberty.

### (c) Questions for consultation

**KEY QUESTIONS**

4. **Are there any innate variations of sex characteristics not listed above which should be included?**
5. **Are there any innate variations of sex characteristics which should be excluded, and why?**
6. **Do you see any challenges with the scheme only applying in circumstances where a person has a variation of sex characteristics, including where that variation is not known or diagnosed?**

## 4. PROHIBITIONS – CRIMINAL PROVISIONS

### (a) Our proposal

**CRIMINAL PROHIBITIONS**

The legislation should create two separate offences:

- *Offence 1:* An offence is committed by a person (Person A) if:
  - they provide *medical treatment** to *modify** the *sex characteristics** of another person (Person B) without Person B's *personal consent**; and
  - Person B is a *protected person**; and
  - no exception applies (see below).
- *Offence 2:* An offence is committed by a person (Person A) if:
  - they remove or cause to be removed from Victoria another person (Person B); and
  - they do so with the purpose of obtaining *medical treatment** to *modify** the *sex characteristics** of Person B without Person B's *personal consent**; and
  - Person B is a *protected person**; and
  - no exception applies (see below).

The proposed permitted exceptions are:

- **Emergency treatment.** Urgent *medical treatment** that:
  - is necessary to save the person's life, prevent serious damage to the person's health or prevent the person from suffering or continuing to suffer significant pain or distress; and
  - the person has not otherwise refused treatment; and
  - the person providing the treatment has made a report to the oversight body as soon as practicable after the treatment has been provided with the required particulars (see section 11 below).[22]
- **Individual care plans.** Treatments complying with an *individual care plan** registered by the oversight body (see section 9 below).

[22] Modelled on *Medical Treatment Planning and Decisions Act 2016* (Vic), s 53.

- **Class exemption orders.** Treatments permitted under a *class exemption order**, and if the class exemption requires a report to be made to the oversight body, that report has been made on the terms specified in the class exemption order (see section 10 below).
- **Male circumcision.**

Each of the terms marked with an asterisk (*) above has a specific legal definition, see below.

Definitions:

- *'medical treatment'* means any surgical or medical procedure or treatment, including the administration of any drugs, and includes any part of a procedure or treatment.
- *'modify'* means:
    - permanent or irreversible changes to a person's sex characteristics; or
    - changes to a person's sex characteristics which are reversible only with invasive medical treatment;

  but does not include:
    - changes to a person's sex characteristics which are reversible by ceasing medical treatment or with non-invasive medical treatment; or
    - the prevention of naturally occurring changes to a person's sex characteristics which is reversible by ceasing medical treatment or with non-invasive medical treatment.
- *'sex characteristics'* has the same meaning as in the *Equal Opportunity Act 2010* (Vic).[23]
- *'personal consent'* means the person receiving the medical treatment has given informed consent to that medical treatment.
- *'informed consent'* should be defined consistently with s 69(1) of the *Mental Health Act 2014* (Vic), but using gender inclusive language.[24]
- *'protected person'* has the meaning set out in section 3(a) above.
- *'individual care plan'* means a plan prepared and registered with the oversight body as set out in section 9 below.
- *'class exemption order'* means an order made by the oversight body as set out in section 10 below.

On the technical aspects of the offences:

- The offences should have extraterritorial application.[25]
- Consider resting the onus on a defendant to prove, on the balance of probabilities, that one of the permitted exceptions applies (i.e. make the exceptions defences rather than

[23] Under the *Equality Opportunity Act 2010* (Vic), *'sex characteristics'* means a person's physical features relating to sex, including— (a) genitalia and other sexual and reproductive parts of the person's anatomy; and (b) the person's chromosomes, genes, hormones, and secondary physical features that emerge as a result of puberty.

[24] For the purposes of treatment or medical treatment that is given in accordance with the *Mental Health Act 2014* (Vic), a person gives *'informed consent'* if the person (a) has the capacity to give informed consent to the treatment or medical treatment proposed; (b) has been given adequate information to enable the person to make an informed decision; (c) has been given a reasonable opportunity to make the decision; (d) has given consent freely without undue pressure or coercion by any other person; and (e) has not withdrawn consent or indicated any intention to withdraw consent.

A person has the *'capacity to give informed consent'* under the *Mental Health Act 2014* (Vic) if the person: (a) understands the information he or she is given that is relevant to the decision; (b) is able to remember the information that is relevant to the decision; (c) is able to use or weigh information that is relevant to the decision; and (d) is able to communicate the decision he or she makes by speech, gestures or any other means.

[25] Similar to s 8 of the *Change or Suppression (Conversion) Practices Prohibition Act 2021* (Vic).

part of the offence which must be proven by the prosecution beyond a reasonable doubt).

- In respect of the criminal mental elements, the prohibitions should require that the acts be performed intentionally but with recklessness as to:
    - whether personal consent was obtained (that is, the person knew or was reckless as to whether personal consent was obtained);
    - whether the person is a protected person.
- The prohibitions should commence once the oversight body has been established and has had time to register any individual care plans and make any necessary class exemption orders.

## (b) Explanation of our proposal

The criminal prohibitions set out when medical treatment modifying a person's sex characteristics will be permitted or prohibited. The prohibitions are important because these establish the basic framework for the scheme and oversight body to operate.

**Proposed scope of protection – no limitation on age**

Under the proposed prohibitions, persons of any age are protected – not just children.

The pros of this approach are:

- it protects both children *and* adults who are unable to, or do not give, personal informed consent;
- it allows the oversight body to develop special expertise in the healthcare of people with innate variations of sex characteristics, regardless of their age;
- it ensures people with no or limited capacity to consent have continuity of oversight in respect of any medical treatments to modify their sex characteristics as they move into adulthood.

The cons of this approach are:

- it may require adults with innate variations of sex characteristics who have limited or no capacity to consent to medical treatment to:
    - engage with the oversight body regarding medical treatment which modifies their sex characteristics; *and*
    - engage with other systems, such as the Victorian Civil and Administrative Tribunal, regarding other forms of treatment or care;[26]
- it requires the careful amendment of a number of laws dealing with special medical procedures, and other treatments, for adults who do not have decision-making capacity.[27]

**Proposed scope of protection – permanent changes or invasive treatment**

Under the proposed prohibitions, we suggest that medical treatment resulting in permanent changes to a person's sex characteristics, or changes that would require invasive medical treatment to reverse, are captured. This is done by restricting the definition of what constitutes a 'modification' of sex characteristics.

This means that any surgical or medical procedure or treatment (including the administration of drugs) that removes tissue, or effects a permanent change in the appearance or function of a person's primary or secondary sex characteristics, could be captured. As would medical treatments that affect reversible changes to a person's

[26] See, for example, *Guardianship and Administration Act 2019* (Vic), s 38(1)(a) and Part 6; *Medical Treatment Planning and Decisions Act 2016* (Vic), Part 3 and Part 4.

[27] *Guardianship and Administration Act 2019* (Vic); *Medical Treatment Planning and Decisions Act 2016* (Vic).

sex characteristics where those changes would require invasive medical treatment to reverse. In all of these cases, personal consent from the person receiving the treatment would be required, unless an exception applies.[28] This should capture treatments on persons with innate variations of sex characteristics such as clitoroplasties, clitoral reductions, clitoral recessions, gonadectomies, vaginoplasties, hysterectomies, vasectomies, mastectomies (top surgery), hormone treatments, and any procedure that lengthens or reroutes a urethra.

The definition of 'medical treatment' also includes any *part* of a treatment or procedure. This ensures the prohibition applies to any part of the treatment or procedure where there is no personal consent, unless an exception otherwise applies. For example, if an urgent procedure is being performed to address the inability to urinate, this does not allow any other procedure or treatment which is not urgent to also be performed at the same time.

However, these prohibitions would not apply to medical treatments that result in temporary changes, or the prevention of naturally occurring changes, to a person's sex characteristics. The prohibitions would therefore not apply to the administration of puberty suppressants that prevent the development of sex characteristics, as ceasing puberty suppressants would then allow sex characteristics to develop.

The prohibition will also not capture changes to a person's sex characteristics effected by treatments or procedures which are not medical in nature, such as genital or nipple piercings. (However, other laws may apply).

The key pros of this approach are:

- it focuses on the need for personal informed consent in all medical, surgical and pharmacological treatments and procedures (or parts of a procedure or treatment) that modify an intersex person's sex characteristics, no matter what they are called or whatever their purpose.

The key cons of this approach are:

- it adds a degree of uncertainty as to which treatments result in permanent versus temporary changes to a person's sex characteristics, and what constitutes 'invasive' medical treatment. However, this can be clarified in time through the oversight body processes (see below) and through the second reading speech or other explanatory memoranda when the legislation is presented to Parliament;
- it may capture a range of medical treatments that modify a person's sex characteristics, but which are not necessarily associated with a person's variation (such as cancer treatment that affects a person's future fertility), which will require detailed consideration by the oversight body through its class exemptions process (see below).

**Personal informed consent**

Medical treatment modifying a person's sex characteristics will always be permitted with 'personal consent'.

We are suggesting that personal consent be defined as the informed consent of the person receiving the treatment, with 'informed consent' being defined consistently with the *Mental Health Act 2014* (Vic).

Broadly speaking, that means that the person must have *capacity* to give informed consent and they must have in fact given *informed consent* to the treatment. Under the *Mental Health Act*, 'informed consent' requires being given adequate information and a reasonable time to make a decision, and consent must freely given and not withdrawn.

The key pros of this approach:

- it puts personal consent at the front of the prohibition, ensuring the right to bodily integrity, physical autonomy and self-determination;
- it requires personal consent to be meaningful and continuing, including through the provision of adequate information and the provision of a reasonable time to consider a decision;

[28] The exceptions would be: emergency treatment (as defined above), treatment complying with an individual care plan or class exemption order, and male circumcision.

- it is consistent with existing Victorian laws.

The key cons of this approach:

- it places a burden on medical practitioners to ensure the consent they have obtained complies with the legislative requirements. However, the oversight body can provide guidance on how that consent can be obtained.

**Specific exemptions**

Apart from the circumstances where personal consent has been obtained, medical treatment will also be permitted under specific exemptions. These are:

- in emergency situations, subject to a post-facto reporting requirement;
- when treatment complies with an individual care plan registered by the oversight body (see section 9 below); and
- if the treatment falls within a class of treatment under a class exemption order made by the oversight body (see section 10 below), subject to any conditions set in place by the oversight body.

Male circumcision will also be outside the scope of the prohibitions.

The key pros of this approach:

- it ensures all exceptions are, or can be, subject to oversight, so that the scheme is not 'gamed' but can also evolve with updated research and knowledge;
- it allows oversight over individual care plans, with decisions of the body subject to judicial review;
- it allows the scheme to be legislated now with detailed class exemptions to be determined before the scheme commences, using the expertise of the oversight body itself and subject to judicial review;
- it allows the oversight body to authorise unforeseen yet justified treatment, to ensure healthcare is not denied where it is warranted;
- it avoids a broader debate about male circumcision holding up reform;
- it depoliticises which exemptions are permitted and which are not by entrusting that function to an expert oversight body;
- it allows exemptions to narrow or expand as research and knowledge evolve.

The key cons of this approach:

- as opposed to a prohibition with specific legislated exceptions, it will require a delay in the commencement of the scheme to allow the oversight body to first be established and start its work (but this can be managed through commencement requirements);
- it removes democratic oversight over the exemptions (although the work of the oversight body will still be subject to judicial review);
- it adds a regulatory reporting burden when treatments are provided in emergencies (although this may be justified given the potential impact of the treatment);
- it does not prohibit male circumcision for those opposed to the practice (leaving parents able to consent to the circumcision of their child's foreskin).

**Technical aspects of the offences**

We have suggested that the prohibitions:

- have extraterritorial application, so that they cannot be evaded by simply taking a person out of Victoria or performing the treatments outside Victoria;
- criminalise treatments where a person is reckless as to whether personal consent is present, so

that obtaining informed consent from the person receiving the treatment is clearly the responsibility of the person providing the treatment;

- make the exemptions defences (rather than parts of the offence), so that the burden rests on a defendant to prove that an exemption applies on a balance of probabilities standard. This reflects that the responsibility of ensuring compliance with the exemptions falls on the person who is performing the treatment, given they will be the person with knowledge and expertise to know whether a treatment is urgent or authorised;
- have a staged commencement date, to allow time for the oversight body (and its processes) to be established and to give the body time to make any class exemption orders and registered individual care plans. Otherwise, the prohibitions will come into effect before the required exemptions are in place allowing critical treatments.

### (c) Questions for consultation

**KEY QUESTIONS**

7. **Do the proposed prohibitions meet the expectations of people with innate variations of sex characteristics?**
8. **Are the proposed prohibitions clear and workable for medical professionals?**
9. **Would the proposed prohibitions deny or delay any treatment to people with innate variations of sex characteristics which is necessary (particularly not related to their variations)?**
10. **Do the proposed prohibitions have any potential unintended adverse consequences?**

## 5. PROHIBITIONS – CIVIL PROTECTIONS

### (a) Proposal

**CIVIL PROTECTIONS**

Introduce a provision to ensure parental consent is not a sufficient defence for treatment that modifies a protected person's sex characteristics (e.g. '*In any action involving medical treatment modifying a person's sex characteristics, the consent of a person or persons with parental responsibility will not be an sufficient defence if the person is a Protected Person*').

Clarify the effect of the *Limitations of Actions Act 1958* (Vic) on the date of discoverability for actions for personal injury.

### (b) Explanation of proposal

**Parental consent not a defence**

With some notable exceptions, parents (or persons with parental responsibility) generally have the power to consent to treatment on behalf of a child who is not *Gillick* competent.[29]

This provision would effectively establish a parallel civil prohibition against treatment modifying a protected person's sex characteristics without personal informed consent or as otherwise permitted by the scheme.

[29] *Secretary, Department of Health and Community Services v JWB and SMB* (***Marion's Case***) (1992) 175 CLR 218.

It could therefore allow a person who has been subject to treatment without their personal consent to sue for trespass (such as in actions for assault or battery) or negligence, and receive compensation – notwithstanding their parents provided consent to their treatment.

In addition to causes of action available under common law, consumers of health services also have avenues available to them under existing complaints schemes that regulate health professionals. These avenues of complaint are lower cost and can be accessed without the need for legal representation. We anticipate that implementation of a future scheme will involve education of these bodies and regulators to ensure that complaints against health professionals can be dealt with appropriately.

This proposal would make clear that parental consent is not a sufficient defence in these health complaints mechanisms and health professional disciplinary schemes, too. The interaction between this prohibition and other schemes regulating health professionals is further considered in section 14 below.

The key pros of this approach:

- it reinforces the criminal prohibition with a civil prohibition, allowing an individual to obtain compensation for treatment which is not otherwise permitted by the scheme;
- it is consistent, so that health professionals know their obligations in respect of the need for personal consent for medical treatment on protected persons which modifies their sex characteristics.

The key cons of this approach:

- it would not establish a reparation scheme for people who received treatment before the scheme commenced;
- obtaining compensation through a court system can be costly and time consuming.

**Statute of limitations**

The *Limitation of Actions Act 1958* (Vic) imposes a time limitation on commencing actions for personal injury, which can be extended by a court if it is 'just and reasonable' (s 27K).

The time limitation can vary depending on a number of considerations (including whether the action is against a parent or guardian, or close associate of the victim). In some cases, however, the time limitation depends on the facts that are known or ought to be known by a 'capable parent or guardian' of the child (s 27J(3)). That is, the law imputes to a child the knowledge that a parent has.

Given the emphasis of the reform will be to separate the child's ability to consent from their parents (and potentially require both), the degree to which the time limitation on an action might be dependent only on what a parent knows or ought to know may have unintended consequences.

Consider whether the time limitation periods for a child bringing an action in respect of medical negligence or trespass arising from medical treatment on their sex characteristics, should run without reference to what their parents' know or ought to know.

### (c) Questions for consultation

**KEY QUESTIONS**

11. **Are there any other causes of action or avenues for individual recourse against clinicians for people with innate variations in sex characteristics that you would like us to consider?**
12. **Should the law be clarified to ensure that limitations periods for civil claims only start running (i.e. the clock starts ticking to bring a legal claim) by reference to the knowledge and capacity of a protected person rather than their parent?**
13. **Does the proposal have any potential unintended adverse consequences?**

## 6. OVERSIGHT BODY – ESTABLISHMENT AND COMPOSITION

### (a) Our proposal

**ESTABLISHMENT OF OVERSIGHT BODY**

The legislation should establish an oversight body exercising administrative (not judicial) powers.

The oversight body should have an oversight panel for making decisions (as set out below), as well as a secretariat supporting the work of the panel.

**Appointment of panel members**

The oversight panel should be comprised of 9 permanent members comprised of:

- a Chair who is a former judicial officer or senior lawyer;
- 3 health professional members comprising:
    - 2 clinicians with relevant clinical expertise;
    - an allied health professional (e.g. psychologist, social worker);
- 3 community members comprising:
    - 2 people with innate variations of sex characteristics;
    - 1 family member of a person with innate variations of sex characteristics;
- 2 other members comprising:
    - a bioethicist; and
    - a human rights or children's rights expert.

The permanent members should be appointed by the Minister for Health if the Minister is satisfied that the person has the knowledge, experience or skills relevant to their role.

The Minister for Health should have the power to appoint a further pool of reserve panel members.

The members and reserve members should be appointed for a term of 3 years and can be reappointed for further terms of 3 years.

The members' and reserve members' tenure should be terminable by the Minister or by resignation.

The members should be remunerated for work they perform as members of the oversight panel.

The members should be subject to a limitation on personal liability in connection with their functions.

**Full panel of the oversight body**

The full panel should comprise the 9 permanent members.

The Chair should have the discretionary power to substitute permanent members of the panel with an alternative member drawn from the reserve pool of panel members if:

- a permanent member is unable to attend a meeting of the body, or
- the issue before the panel includes an area of clinical, bioethics or rights expertise, or lived experience, not currently represented on the body, and in the opinion of the Chair, the panel's deliberations would be assisted by having that expertise or experience represented on the panel.

However, the Chair must only substitute a permanent member with a reserve member of the same type, such that the composition of the full panel of members retains its allocation as between health professional, community and other members.

The Chair should have the power to conduct the meetings of the panel.

The Chair should have powers to establish rules governing the process and procedures of the panel, subject to the requirements of the legislation.

7 members of the panel should constitute a quorum, provided that at least one of the health professional, community and other members are present at meetings of the panel.

Decisions of the panel should require the agreement of a majority of its present members, including at least one health professional and one community member.

**Three-member sub panel**

The Chair should have the power to establish a sub-panel comprised of three members to decide whether or not to register an individual care plan, including with or without amendment.

A sub-panel must be comprised of at least one health professional and one community member with knowledge, experience or skills relevant to the person or the medical treatment under consideration. The sub-panel can be drawn from either permanent or reserve members of the oversight panel.

All decisions of a sub-panel must be made by consensus and be reported to the full panel of the oversight body.

If the sub-panel fails to reach a consensus, the matter must be referred to the full panel of the oversight body for a decision.

All decisions of a sub-panel would also be open to internal review by the full panel of the oversight body. In that case, no member who has participated in a decision made by a sub-panel should sit on the full panel while the full panel is reconsidering that sub-panel's decision.

### (b) Explanation of proposal

We have suggested a board-like structure for the panel making decisions on behalf of the oversight body. This ensures decisions made by the oversight panel draws upon the various perspectives which can be provided by health professionals, people with lived experience, and bioethics, human rights and children's rights experts.

The Chair of this panel will have the ability to ensure that the composition of the panel making decisions can be customised, such that particular clinical perspectives or people with the specific variation being considered by the body can be represented at appropriate times.

A smaller group of members could be brought together by way of sub-panel so that decisions can be made in individual cases quickly, where they are not likely to be contentious. However, if the sub-panel fails to reach a consensus, the full panel of 9 members must consider the matter. There would also be an internal review mechanism such that all decisions of a sub-panel could be appealed with the matter decided by a full panel not including the original sub-panel members who made the decision.

The oversight panel also has a number of procedural safeguards to ensure decision-making remains a collective process with a range of views represented. These safeguards include:

- 7 out of 9 members will need to be present at meetings of the full panel to have a quorum;
- the Chair will be able to call up reserve members to sit in on meetings where a permanent members cannot attend, or to substitute a permanent member with a reserve member who has particular expertise or experience would assist the panel in its deliberations; and
- minimum attendance and voting requirements for the panel to make a decision, such as requirements that decisions include the support of at least one health professional and one community member as well as a majority of present members.

By making this an administrative body, the decisions of the oversight panel can be subject to judicial review if the panel does not follow the requirements of the legislation. Its decisions may also be reviewable if they would contravene a human right contained in the Charter.

### (c) Questions for consultation

**KEY QUESTIONS**

14. **Do you see any difficulty with the composition of the oversight panel or how the oversight panel would be making decisions?**

## 7. OVERSIGHT BODY – FUNCTIONS AND POWERS

### (a) Our proposal

**FUNCTIONS AND POWERS OF THE OVERSIGHT BODY**

The oversight body should be given the following functions and powers:

- to support persons in the preparation of an *individual care plan**;
- to consider and register *individual care plans** that contain any *medical treatment* modifying** a *protected person's* sex characteristics** for people who are unable to provide *personal consent**, including after reasonable support is provided;
- to consider and make, where appropriate, *class exemption orders**;
- to receive and consider reports from health professionals when exemptions are relied upon;
- to receive reports of possible contraventions of the prohibitions and refer them to relevant bodies (e.g. state and territory law enforcement bodies, Victorian Health Complaints Commissioner, Victorian Ombudsman, APHRA, Victorian Human Rights and Equal Opportunity Commission);
- to promote compliance with the scheme by the provision of information to persons who may benefit from the scheme, their family members, guardians, support persons or carers, health professionals and members of the general public;
- to issue guidance on the interpretation and operation of the scheme, including the interpretation of the prohibitions;
- to conduct analysis of, and carry out research in relation to, the operation of the scheme;

- to provide advice to the Minister of Health or Secretary of the Department of Health in relation to the operation of the scheme;
- to provide reports to the Minister of Health or Secretary of the Department of Health in respect of any matter relevant to the functions of the oversight body as requested; and
- such powers that are necessary or convenient to perform its functions.

Each of the above asterisked (*) terms have the same definitions as set out in the proposed prohibitions, see above.

### (b) Explanation of proposal

Subject to the further requirements set out below, the oversight body is being given a range of powers and functions that include decision-making as well as educative, research and advisory functions. How the oversight body would exercise these powers and functions is set out in further detail below.

### (c) Questions for consultation

**KEY QUESTIONS**

**15. Do you foresee any issues with providing the oversight body the above functions or powers?**

**16. Should the oversight body have any other functions or powers?**

## 8. OVERSIGHT BODY – DECISION MAKING PRINCIPLES

### (a) Our proposal

**HOW THE OVERSIGHT BODY MUST MAKE DECISIONS**

In making decisions under this legislative scheme, the oversight body:

- must comply with the requirements set down by the legislation and in other laws, including the Charter of Human Rights and Responsibilities;
- must be satisfied that any person who has capacity to provide personal consent, including with any reasonable support, will not be made subject to a decision which allows the provision of medical treatment contrary to that person's wishes;
- must be satisfied that any person who does not have capacity to provide personal consent, but who does have, with reasonable support, the ability to provide views on any proposed individual medical treatment affecting their body, is:
  - provided reasonable support to ensure those views can be expressed to the oversight body; and
  - the oversight body takes those views into account before it makes any decision in respect of that person;
- must be satisfied that any person who does not have capacity to provide personal consent is not provided medical treatment modifying their sex characteristics where that treatment can be deferred without causing or being likely to cause harm to the health of the person; and
- must not presume without substantive evidence that a person with innate variations of sex characteristics would experience any social or psychosocial benefits from having

their sex characteristics function or appear in a manner which conforms with norms for persons without that variation.

These principles apply (without limitation) to:

- a decision to register or not to register an individual care plan, including with or without any amendments; and
- a decision to make, revoke or amend a class exemption order.

## (b) Explanation of proposal

This section of the legislation would set out some minimum requirements whenever the oversight body is making a decision. These minimum requirements would apply in addition to any specific requirements set out elsewhere in the legislation, such as:

- requirements to defer medical treatment until a person can make their own decision about whether they want that treatment, or
- requirements to provide persons affected by a specific decision with the right to be heard by an impartial decision-maker (this is sometimes referred to as 'procedural fairness' or 'natural justice').

The minimum requirements set out in this section put in place both procedural and substantive protections.

**Substantive protections**

The substantive protections limit the oversight body making medical decisions:

- on behalf of people who can make those decisions for themselves; or
- about treatments which can be deferred without causing harm to the health of a person, so that people with innate variations of sex characteristics can make those decisions for themselves, if they wish to.

These substantive protections depart from existing powers of courts to make decisions that override the wishes of a person to refuse treatment. For example, the Family Court and Supreme Court have sometimes forced a person to undergo certain treatments (such as blood transfusions or treatments for drug addictions or eating disorders) even when they do not consent to that treatment.[30] This oversight body would not have that power (and nor would the Victorian Supreme Court retain that power, see section 14(a) below) in the context of medical treatment modifying a protected person's sex characteristics where the person has capacity to provide consent but has refused to do so.

Only the Family Court would retain a power to force medical treatment on a child who does not consent. The Family Court would have to be satisfied that is in the best interests of that child. Changes to federal laws would be required to amend this power.

**Procedural requirements**

The procedural protections include requirements on the oversight body to ensure:

- people who cannot give legal consent are nonetheless given reasonable support to express their views to the extent they can; and
- its decision-making is not discriminatory, by prohibiting the oversight body making presumptions, without substantive evidence, that a person would experience a social or psychosocial benefit from having their sex characteristics function or appear as if they were endosex.

[30] *X v The Sydney Children's Hospitals Network* [2013] NSWCA 320.

A failure to meet these requirements would make decisions of the oversight body able to be quashed (i.e. struck down) on judicial review.

### (c) Questions for consultation

**KEY QUESTIONS**

17. **Are there any circumstances in which you think the oversight body should be able to make medical decisions on behalf of a person who can legally consent but has refused to provide consent?**
18. **Are there any circumstances in which medical treatment modifying a person's sex characteristics may be necessary to preserve their life but they may otherwise not consent (for example, because of religious beliefs on blood transfusions)?**

## 9. OVERSIGHT BODY – INDIVIDUAL CARE PLANS

### (a) Our proposal

**INDIVIDUAL CARE PLANS**

**Eligibility to apply**

The legislation should allow an *interested person** to apply to the oversight body to register an *individual care plan** in respect of a *protected person** if:

- *medical treatment** is proposed which would *modify** the *sex characteristics** of the *protected person**; and
- the *protected person** does not have capacity to provide *personal consent**.

Definitions:

- '*interested person*' should mean any of the following:
  - a *protected person**, with or without of the support of their *supportive guardian**;
  - any person with parental responsibility for a *protected person**;
  - any person proposing to provide *medical treatment** that *modifies** the *sex characteristics** of a *protected person**;
  - any person concerned with the care, welfare or development of a *protected person**, including a *guardian**, *supportive guardian**, *medical treatment decision-maker** or *support person**, or other carer.
- '*guardian*' means a person appointed as a guardian with medical decision-making responsibilities under a guardianship order made under the *Guardianship and Administration Act 2019* (Vic).
- '*supportive guardian*' means a person appointed to support medical decision-making making under a supportive guardianship order made under the *Guardianship and Administration Act 2019* (Vic).
- '*medical treatment decision-maker*' means a person (whether appointed or not) with responsibility for making medical decisions on behalf of a person under the *Medical Treatment Planning and Decisions Act 2016* (Vic).
- '*support person*' means a person appointed under the *Medical Treatment Planning and*

*Decisions Act 2016* (Vic).

- all other defined terms have the same meaning as above.

**Preparing an application for an individual care plan**

The application to register an individual care plan should be made in a form prescribed by the regulations.

The regulations could require the application form to seek information on the following details:

- details regarding the protected person who is the subject of the application, including their age, particular variation of sex characteristics, names and contact details of all persons with parental or other responsibility for their care and wellbeing and the names and contact details of the medical team overseeing their healthcare;
- details, to be completed by their health professional, of any proposed medical treatment that would modify the sex characteristics of the person, including:
    - full particulars of the treatment proposed;
    - who will be performing the treatment;
    - when the treatment is proposed to be performed;
    - reasons for why the treatment is proposed;
    - any alternative treatments which have been considered and any reasons why they have been rejected;
    - what information has been provided to the person, and/or persons with parental or other responsibility for the care and wellbeing of the person, regarding the risks and benefits of the proposed treatment and risks and benefits of any alternative treatment which has been considered by rejected; and
    - any relevant medical history of the person;
- details of any steps taken to ascertain whether the person the subject of the application is capable of providing personal consent (if relevant);
- details of any facts or circumstances which might suggest that the person the subject of the application does not or would not consent to the medical treatment (if relevant).

The legislation should allow the oversight body to assist in the preparation of an application. (As an operational matter, this role should be delegated to a support worker employed by the oversight body who is independent from any decision-making functions exercised by the panel).

The legislation should require that the application form be completed by way of statutory declaration (such that there is a penalty for providing false or misleading information).

The legislation should require those completing the form or providing information to the panel to provide full and frank disclosure of any matters regarding the application (including the person and proposed treatment) which might be relevant to the oversight body's consideration of the application. There should be a penalty for failures to comply with this duty.

The application process should be free.

**Processing an application to register an individual care plan**

Once an application has been made, the oversight body (through a delegated support worker) should have powers to:

- review the application and confirm its eligibility;
- request further information from persons connected to the application if it may assist

the oversight panel in considering the matter;

- if it may assist the oversight panel in considering the matter, arrange for independent consultants (such as a psychologist) with relevant expertise to:
    - meet with the person who is the subject of the application and prepare a report containing, where relevant:
        - their views on the application;
        - the opinion of the expert as to the person's capacity to provide personal consent, including any support which could be provided to enable the person to provide personal consent;
    - meet with persons with parental or similar responsibility for the care and wellbeing of the person and prepare a report containing, where relevant:
        - their views on the application;
        - the extent of information provided to them about the medical treatment proposed in the application, including the risks and benefits of the proposed treatment and any alternatives;
    - prepare evidence on areas of medical or other research;
- obtain the opinion of other specialists or experts in formulating a recommendation to take to the oversight panel;
- prepare a brief for the oversight panel containing:
    - the application;
    - any reports (including expert reports);
    - a recommendation whether or not to register an individual care plan in respect of the person, including with or without any conditions;
    - if a recommendation is being made to a register an individual care plan, a copy of the draft individual care plan which is proposed detailing the proposed medical treatment and any conditions; and
    - any relevant additional evidence or material (including medical or scientific research) supporting the support worker's recommendation.

The brief should be made available to all relevant parties, including (as relevant) the person, persons with parental or other responsibility for the person, and their health professionals.

**Consideration of the application by the oversight panel**

Upon submission of the brief, the oversight panel (or sub-panel) must meet within 14 days to consider whether or not to register an individual care plan.

The meeting must be held in private with all affected people invited to attend the meeting.

The Chair must provide an opportunity for the person the subject of the application and any affected persons to address the panel, if they wish.

Attendees may be legally represented at the meeting, if they wish (at their own cost).

The Chair may otherwise make such other rules and procedures regulating these meetings, which does not contradict these principles, as they deem necessary.

**Making the decision**

The oversight panel (or sub-panel) must make a decision to:

- register an individual care plan, with or without any amendments;

- refuse to register an individual care plan; or
- defer the matter for another 30 days to allow for the collection of such information or evidence as may be necessary for it to make a decision on the application, and provide directions for the oversight body to obtain such other evidence as necessary (in accordance with its powers above).

The oversight panel (or sub-panel) must not make a decision to register an individual care plan allowing medical treatment that modifies a person's sex characteristics without their personal consent unless it is satisfied that:

- the person is a protected person; and
- the person does not have capacity to provide personal consent to the proposed treatment, even after the provision of reasonable support; and
- to the extent that the person can express any views regarding the proposed treatment, they have been given an opportunity, with reasonable support, to express those views and those views have been considered by the oversight panel; and
- if the person is aged under 18, to the extent that persons with parental responsibility wish to express any views regarding the proposed treatment, those persons have been given an opportunity, with reasonable support, to express their views and those views have been considered by the oversight panel; and
- there is no evidence before the oversight body which would indicate that the person would object to the proposed treatment if they could; and
- the medical treatment cannot be deferred without causing or being likely to cause harm to the health of the person.

In determining whether the medical treatment can be deferred without causing or being likely to cause harm to the health of a person, the following considerations must be taken into account by the oversight panel (or sub-panel):

- the likely benefits and risks of the medical treatment to the person's health;
- any likely adverse consequences to the person's health of the medical treatment not being provided; and
- any alternatives to the medical treatment being proposed that would preserve any expected ability of the person to provide personal consent in future, and the likely benefits and risks of those alternatives.

In determining whether medical treatment can be deferred without causing or being likely to cause harm to the health of a person, the oversight panel (or sub-panel) must not presume without substantive evidence that a person with innate variations of sex characteristics would experience any social or psychosocial benefits from having their sex characteristics function or appear in a manner which conforms with norms for persons without that variation.

**Provision of reasons**

The panel may provide written reasons for its decision, and must do so, if requested by an interested person.

The panel may publicly publish its reasons, or a summary of its reasons, provided that no information which may identify a person is included in the published reasons.

**Appeals**

Decisions of a sub-panel can be appealed on its merits to a differently-constituted full panel of the oversight body. In which case, the process for considering the application above is repeated by the full panel, which may reconsider the matter and make a fresh decision considering any evidence before the

sub-panel and any additional evidence or submissions.

Decisions of the full panel of the oversight body can be appealed on judicial review (including for contraventions of the Charter).

## (b) Explanation for proposal

This section of the legislation would set out a process for people with innate variations of sex characteristics and certain people who care for them (referred to as 'interested persons') to be able to register an individual care plan with the oversight body.

**What is an individual care plan?**

Individual care plans are intended to bring together people with innate variations of sex characteristics who are not able to consent to medical treatment on their own; their parents, guardians or others who provide them with support; and their health professionals to set out any medical treatment modifying their sex characteristics that will be made available to them.

Individual care plans have several purposes. Their key purpose is to ensure that non-consensual medical treatment modifying the sex characteristics of a protected person is not permitted if the treatment can be deferred without causing harm to their health.

Individual care plans also ensure that there is a supportive environment for people with innate variations of sex characteristics, and their parents, guardians and other carers, to express their views on any proposed treatment.

Individual care plans give certainty to health professionals over what medical treatments can and cannot be performed to comply with the scheme.

Finally, and importantly, they provide an avenue by which the oversight body can review and test the medical and scientific evidence, or other rationales, used to support any proposed treatment, as well as any alternative treatment pathways.

The process is designed to be as accessible and friendly to families (and as little like a court or tribunal) as possible. It recognises that, where a person is not able to make medical decisions for themselves, any decision to modify their sex characteristics should be deferred unless it would cause harm to their health, so that their decision-making autonomy is preserved to the extent possible. Where medical decisions cannot be deferred, the process ensures any proposed medical treatment is overseen by the oversight body to ensure it is not performed for unproven social or psychosocial reasons, such as those based on assumptions as to how bodies should appear or behave in order to be more consistent with norms for people without innate variations of sex characteristics.

**Who can apply?**

Any person with innate variations of sex characteristics can apply for an individual care plan, as can their parents, guardians, or other carers. A health professional who is proposing to provide medical treatment modifying the sex characteristics of a person can also apply.

However, the oversight body cannot make an individual care plan unless it is satisfied that the person for whom the plan is intended cannot provide personal consent to the proposed treatment, including after the provision of reasonable support. This means that there is no intrusion into the decision-making autonomy of a person who can make decisions about their own medical treatment.

**Procedure for registering individual care plans**

Apart from filling out a form, including information from a relevant health professional, the process for registering an individual care plan is intended to be as simple as possible for people with innate variations of sex characteristics and their families. It should also be free.

The process is facilitated by a support worker, employed by the oversight body. The support worker's role is to prepare the application and draft individual care plan for the oversight panel to consider, ensuring that the views of the person and their parents or other guardians are taken into account.

The scheme would allow the support worker to engage independent experts (such as psychologists) to meet with the person who is the subject of the application, and their parents or guardians. These independent consultants could assist in ensuring that the person who is the subject of the application does not have capacity to provide personal consent (even after reasonable support is provided) and that parents and guardians have been given a range of information relevant to the medical treatment proposed in the application.

The support worker could also collect any medical or scientific evidence necessary for the oversight panel to make its decision about whether or not to register the individual care plan.

The support worker would put all this information together in a brief which is presented to the oversight panel and provided to all affected people, so that people who are affected by the decision can provide any further views to the oversight panel.

Once the brief is presented to the oversight panel, it must make a decision within 14 days on whether or not to register the individual care plan. The panel can defer its decision for another 30 days if it needs further information or evidence. When the panel makes a decision, it must provide its reasons in writing if asked to do so by one of the affected people, and these decisions can be reviewed by a court for their legality (including for conformity with the Charter of Human Rights and Responsibilities).

While the process before the oversight panel is not intended to be like a court or tribunal, people can be legally represented (at their own cost) if they wish.

To ensure the integrity of the process, the legislation should ensure there is a duty to provide the oversight panel with full and frank disclosure of any matters relating to the application. This would ensure, for example, that:

- if a parent or guardian believed a person with innate variations of sex characteristics would not consent to the treatment, they would need to provide that information to the panel; and
- if a health professional thought there were particular risks or benefits associated with a proposed medical treatment, they would be required to disclose them.

#### Legal requirements for registering an individual care plan

The oversight panel cannot make a decision to register an individual care plan unless it is satisfied of a number of requirements. These requirements limit the powers of the oversight body.

These requirements are designed to preserve decision-making autonomy for a person with innate variations of sex characteristics who can consent to their own medical treatment, including after the provision of reasonable support. The role of the oversight body will be limited to registering individual care plans where personal consent cannot be obtained and the medical treatment modifying a person's sex characteristics cannot be deferred without harming the health of the person.

The oversight body is also required to take into account a number of considerations when making its decisions about whether treatments can be deferred, including the likely benefits and risks of the proposed treatment, as well as any alternatives. It cannot presume without positive evidence that there are social or psychosocial benefits with a body appearing or functioning more like a person without innate variations of sex characteristics.

Because the oversight body is a public authority, it must comply with these requirements to make a lawful decision. If it fails to do so, its decisions can be quashed on judicial review.

#### Pros and cons of this approach

The key pros of this approach are:

- it preserves the decision-making autonomy of people with innate variations of sex characteristics wherever medical treatment modifying a person's sex characteristics can be deferred without harming their health, and centres their voice in the process;
- it sets up a friendly and accessible framework for considering the case for and against proposed medical treatment that would modify a person's sex characteristics, by supporting both persons with innate variations of sex characteristics and their parents, guardians or carers to explore and provide views on the proposed treatment in a setting which is neither legal nor clinical;

- it provides a case-by-case consideration of proposed medical treatment so that the legislation remains flexible and responsive to individual needs, while still providing health professionals with certainty over what medical treatment can be performed and what cannot.

The key cons of this approach are:

- it establishes a layer of additional oversight for medical decision making, which will add time before decisions can be made unless the health professional is able to rely on the statutory emergency treatment exception;
- it sets up a separate forum for decision-making on medical treatment involving modifications of a person's sex characteristics, potentially making people with innate variations of sex characteristics subject to more than one system of decision-making if they have a range of medical treatment needs. For example, people with innate variations of sex characteristics with limited decision-making capacity may still need to go to the Family Court or Victorian Civil and Administrative Tribunal for decisions which are not related to medical treatment modifying their sex characteristics;
- it requires the Victorian Government to commit resources to guiding the process of decision-making.

### (c) Questions for consultation

**KEY QUESTIONS**

19. **What do you think about the proposed process for people with innate variations of sex characteristics, their parents, guardians or other carers or health professional being able to register individual care plans with the suggested safeguards and support mechanisms listed above?**

# 10. OVERSIGHT BODY – CLASS EXEMPTION REGIME

## (a) Our proposal

### CLASS EXEMPTION ORDERS

**Power to make class exemption orders**

Subject to the requirements of the legislation, the oversight panel should have power to make orders exempting a class of medical treatment from the criminal prohibition (such that persons with parental or other responsibility can consent to treatment in accordance with their powers, duties and responsibilities under law, and without further authorisation from the oversight body, when a person cannot provide personal consent).

A class exemption order can be made subject to any conditions or limitations that the oversight body thinks appropriate, including (without limitation):

- ensuring that, to the extent the views of the person receiving the treatment can be expressed with reasonable support, they do not object to the treatment; and
- placing an obligation on a person to report to the oversight body any reliance on the exemption, including the age of the person receiving the treatment, the type of treatment performed and reasons for the treatment.

The legislation should ensure that class exemption orders are not legislative instruments.

**The process for making class exemption orders**

Before making, amending or repealing a class exemption order, the legislation should require the oversight body to:

- consult with the Minister for Health;
- publish for public consultation any draft class exemption order or proposal to repeal an order, and its reasons for proposing the order or repeal; and
- publish any final class exemption order or repeal notice before it takes effect.

The oversight body should also have the power to obtain the opinion of other specialists or experts in forming its views on any draft class exemption order or repeal.

Each class exemption order should be subject to a 5-year sunset period, requiring a review by the oversight panel to repeal, amend or renew the order for further periods of 5 years. Reviews should follow the consultation process set out above.

**Challenging a class exemption order**

A class exemption order or decision to repeal an order should be subject to judicial review (including for contraventions of the Charter).

## (b) Explanation of proposal

This section of the scheme is designed to give the oversight body the power to make rules that exempt particular types of treatment from the prohibitions on providing medical treatment modifying a person's sex characteristics without personal consent.

The key purpose of these provisions is to provide the oversight body with the ability to respond to circumstances or treatments that can be dealt with together as a class, without the need for people to register individual care plans covering that treatment. For example, the oversight body could set out the circumstances in which treatment to address salt wasting associated with congenital adrenal hyperplasia (**CAH**) is permitted, so that no one with salt-wasting CAH requires an individual care plan covering that kind of treatment. This would reduce the burden on

individuals, families and health professionals where the oversight panel agrees that the treatment being provided is uncontroversial and can be permitted as a class without the need for an individual care plan.

These provisions also allow the scheme to respond to situations which emerge because of evolving scientific or medical knowledge, without the need for the legislation itself to be amended in every case. Further, by giving the oversight panel the power to make these orders rather than a Minister through regulations, it depoliticises these decisions and leaves them to the members of the oversight panel, who are appointed by the Minister for their particular expertise, skills and experience.

However, these class exemption orders can be reviewed and struck down by a court if they breach the procedural and substantive requirements set down by the scheme. Those requirements include the decision-making principles set out in section 8(a) above. This means that the oversight panel cannot make class exemption orders which:

- permit medical treatment that a person with capacity to consent does not consent to, or which can be deferred without harming the health of a person who does not have capacity to consent; or
- discriminate against people with innate variations of sex characteristics, by simply presuming that a person would be better off if their body appeared or functioned more like a person without such a variation.

The oversight body would also be required to publish draft exemption orders and consult with the public before any orders are made. This ensures that the oversight panel hears from a range of views about any impacts of its proposed orders.

Finally, all orders would have a 5-year expiration date, so that the oversight body would have to review each order every 5 years to ensure it remains in line with best practice, including with existing medical and scientific knowledge.

### (c) Questions for consultation

**KEY QUESTIONS**

20. **What do you think about the proposed process for the oversight panel being able to make class exemption orders to deal with certain treatments with the safeguards and mechanisms listed above?**

# 11. TRANSPARENCY – REPORTING OBLIGATIONS

## (a) Our proposal

### REPORTING OBLIGATIONS

**Obligations to report**

The legislation should require a health service provider to make a report to the oversight body, in a form prescribed by the oversight body, where it provides medical treatment without personal consent to a protected person that modifies their sex characteristics.

The report should require the following details to be included:

- age of person;
- treatment provided;
- reasons for treatment;
- whether the treatment was provided in accordance with the:
  - statutory emergency exception;
  - a registered individual care plan; or
  - a class exemption order.

Failure to make a report should be an offence and also be subject to professional disciplinary consequences.

**Protection for complying with reporting obligation in good faith**

A disclosure to the oversight body by any person in good faith under this obligation should not:

- constitute unprofessional conduct or a breach of professional ethics on the part of the discloser (such as a breach of confidentiality); or
- make the discloser subject to any liability in respect of the disclosure.

## (b) Explanation of proposal

This proposal introduces a mandatory reporting obligation on health professionals that provide medical treatment modifying a protected person's sex characteristics without personal consent. The reporting obligation would allow the oversight body to monitor use of the permitted exemptions under the scheme, such as whether the treatment was provided in accordance with a registered individual care plan. This reporting obligation ensures transparency.

Once these reports are received, the oversight body would then have the functions and powers set out in section 7(a) above, including the power to consider the reports, refer possible contraventions of the scheme to relevant bodies, conduct analysis and research on the operation of the scheme, and issue guidance on the interpretation and operation of the scheme.

Importantly, health professionals who make reports in good faith are protected from liability in respect of their disclosure. These protections, which are like the protections provided to people with mandatory reporting obligations under child protection legislation, ensure that a person feels confident in providing a full and frank disclosure without fearing that they may be prosecuted or liable for breaches of their professional obligations or other legal requirements. This is necessary because otherwise health professionals could be breaching their confidentiality obligations by disclosing information about the health and medical history of their patients.

### (c) Questions for consultation

**KEY QUESTIONS**

**21. Do you have any views on the proposed mandatory reporting obligations?**

## 12. CONFIDENTIALITY

### (a) Our proposal

**CONFIDENTIALITY**

The legislation should make it an offence for anyone, including the oversight body, to disclose (other than with the person's consent) any information that would identify a person connected to any medical treatment or proposed medical treatment, including:

- any person in respect of whom an application or report is made;
- any person related to that person (such as family members); and
- treating health professionals related to that treatment.

The legislation should provide an avenue for the oversight body to lawfully disclose information to relevant law enforcement bodies, courts or tribunals, as required by law or when necessary for its work. The Minister for Health should be allowed to prescribe law enforcement bodies in other states and territories.

The legislation should allow the oversight body to publish its decisions, subject to such directions as the Chair determines are necessary to preserve personal privacy.

### (b) Explanation of proposal

Given the oversight body will be working with highly confidential information about people's health and bodies, it is important that strong protections exist to protect personal privacy. These provisions would prohibit anyone disclosing personal information about the people involved in an application being heard by the oversight panel, except to relevant law enforcement bodies, courts or tribunals as required or necessary for the oversight panel to do its work. So, for example, the oversight panel could disclose information to Victoria Police or APHRA that might identify a health professional who had potentially breached a prohibition under the scheme, but the oversight panel could not disclose that information publicly for other purposes.

### (c) Questions for consultation

**KEY QUESTIONS**

**22. Are there any circumstances where personal information about a person, their family or health professional might need to be disclosed by the oversight body other than with their consent?**

# 13. TOWARDS A NATIONAL SCHEME

## (a) Our proposal

### 'OPT IN' PROVISIONS

To accommodate the potential for the oversight body being adopted nationally, the legislation should specify that:

- the Minister for Health can approve another state or territory of Australia 'opting in' to the scheme; and
- if another jurisdiction 'opts in' to the scheme, the Minister for Health must consult with their relevant counterparts in all participating jurisdictions prior to exercising their power to appoint members on the oversight panel; and
- the Minister for Health may make arrangements with participating jurisdictions regarding the sharing of costs involved in making the scheme accessible in jurisdictions outside Victoria.

## (b) Explanation of proposal

This section contains provisions aimed at allowing other states and territories to pass their own legislation enabling the oversight body to operate in their jurisdictions. If another a state or territory elects to 'opt in' to the oversight scheme with the consent of the Victorian Minister for Health, the legislation would require Victoria to consult with these jurisdictions on the appointment of future members to the oversight panel and could allow the Minister to make arrangements to share costs in the operation of the scheme.

## (c) Questions for consultation

### KEY QUESTIONS

**23. Are there any other provisions necessary to enable other states and territories to adopt the oversight body as a national or multi-jurisdictional body?**

# 14. INTERACTION WITH OTHER LAWS AND SYSTEMS

## (a) Our proposal

### INTERACTION WITH OTHER LAWS AND SYSTEMS

The legislation should make consequential amendments to other Victorian legislation such that the oversight scheme's jurisdiction and process is prioritised for decisions involving medical treatment modifying a protected person's sex characteristics without their personal consent.

The laws which need to be amended include:

- *Medical Treatment Planning and Decisions Act 2016* (Vic) to ensure that a person's medical treatment decision maker (including any appointed medical treatment decision maker), any health professional or Public Advocate cannot consent to medical treatment modifying a protected person's sex characteristics other than in accordance with this scheme;

- *Guardianship and Administration Act 2019* (Vic) to ensure that a guardian cannot consent to medical treatment modifying a protected person's sex characteristics other than in accordance with this scheme; and
- *Supreme Court Act 1986* (Vic) and *Constitution Act 1975* (Vic) to ensure the Supreme Court cannot exercise its *parens patriae* jurisdiction in respect of medical treatment modifying a protected person's sex characteristics other than in accordance with this scheme.

The laws should keep in place the right of a protected person to make an advanced care directive and preserve for a person the right to recover the ability to provide consent within a reasonable time under s 59 of the *Medical Treatment Planning and Decisions Act 2016* (Vic).

The legislation should also make consequential amendments to other Victorian legislation to ensure consistency with this scheme, including to the extent necessary with the:

- the *Health Complaints Act 2016* (Vic), to ensure the Health Complaints Commissioner can receive complaints referred to it from the oversight body, and consider complaints in respect of the breach of the civil prohibitions; and
- the *Health Records Act 2001* (Vic), *Privacy and Data Protection Act 2014* (Vic) and *Freedom of Information Act 1982* (Vic), to ensure the confidentiality settings in this scheme are reflected appropriately in legislation which protects personal privacy or allows the disclosure of information to the public.

A further audit of laws may be necessary to ensure that any public, complaints or law enforcement body receiving a referral from the oversight body has the power to deal with the issue in a manner which is consistent with the settings (including the confidentiality settings) set out in this legislation.

### (b) Explanation of proposal

The aim of these provisions is to ensure that this scheme sets out the only rules which regulate when medical treatment modifying a protected person's sex characteristics without personal consent is permitted. These provisions also ensure that the oversight body is the only decision maker that decides whether an exception should apply. Courts can review whether the oversight body has acted in accordance with the requirements of the scheme or the Charter of Human Rights and Responsibilities, but cannot otherwise make a decision to authorise treatment other than as permitted by the scheme. This means that for people covered by this scheme the Victorian Supreme Court or VCAT cannot be asked to make decisions instead of the oversight body.

However, as the jurisdiction of the Family Court is regulated by Commonwealth laws, Victorian laws cannot remove the possibility of the Family Court considering these issues. This would require federal law reform.

### (c) Questions for consultation

**KEY QUESTIONS**

**24. Are there any other laws which need to be amended to ensure this scheme works harmoniously with other state laws?**

# 15. STATUTORY REVIEW

## (a) Our proposal

**STATUTORY REVIEW**

The legislation should require a review and report on the operation and effectiveness of the scheme 5 years after its operation.

## (b) Explanation of proposal

This section would require the scheme to be reviewed 5 years after it begins it operation. Given this is a new area of law in Australia, a review would allow the scheme to be looked at again in detail to determine whether any amendments to the law are necessary.