



Organisation Intersex International Australia Limited

Australian affiliate of the world's largest organization of intersex people.

PO Box 1553, Auburn NSW 1835, Australia

+61 (0)418 290 336

oiiaustralia@bigpond.com

oiiaustralia.com

Submission on the Consolidation of Commonwealth Anti-Discrimination Laws

Organisation Intersex International Australia Limited

What is intersex?

The term intersex was adopted by science in the early 20th century and applied to human beings whose biological sex cannot be classified as clearly male or female. An intersex person may have the biological attributes of both sexes or lack some of the biological attributes considered necessary to be defined as one or the other sex. Intersex is always congenital and can originate from genetic, chromosomal or hormonal variations. Environmental influences such as endocrine disruptors can also play a role in some intersex differences. The term is not applicable to situations where individuals deliberately alter their own anatomical characteristics.

Intersex people represent a significant percentage of the population¹.

What is OII?

The Organisation Internationale des Intersexués (OII) is the world's largest intersex organization with members representing almost all known intersex variations. OII has affiliates in twenty countries, on six continents, speaking ten languages including Mandarin Chinese and Arabic.

OII is represented in Australia by **Organisation Intersex International Australia Limited**, a not-for-profit company.

This document will use the contraction **OII Australia** from now onwards.

OII's Mission:²

- To support intersex individuals by providing information and contact with other intersex people.

¹ Fausto-Sterling: 2000 puts the intersex prevalence figure at a minimum of 1.9 % of the population. Genetic researchers state that it may be as high as 4%. The frequently quoted prevalence figures of 1:200 and 1:1000 are taken from unreliable sources especially Sax: 2002 who sought to minimize intersex by eliminating all but mixed gonadal dysgenesis (formerly known as "true hermaphrodite") as . Australian registers of birth anomalies have newborns with visible and reportable differences of sex anatomy at around 29:1000 live births. The introduction of prenatal screening has reduced this number considerably for some intersex differences, due to pregnancy terminations.

² <http://oiiaustralia.com/about/mission/>

- Campaign in favour of human rights for intersex people.
- Encourage an exchange of ideas and different perspectives about intersex from various groups and geographical regions.
- Provide information concerning actual life experiences of people with intersex variations to medical personnel working with infants with atypical sex anatomy, to psychological experts, sexologists, sociologists and specialists in feminism.
- To assist families and friends of intersex individuals to understand intersex and to cope with the specific problems related to their role as a support person.

Our interest in this submission

The proposed *Equality Act* is of vital concern to OII Australia as it represents an opportunity for the first legislation to protect intersex people and it should do so primarily as a matter of a person's sex, not gender identity.

OII Australia's key recommendations

Recommendation 1:

Discrimination must be prohibited then where it is on grounds of actual or perceived sex, sexual orientation and/or gender identity.

Recommendation 2:

Definitions of discrimination must allow for the fact that not all people are male or female and, in general, fully inclusive language should be used so that intersex people are protected.

Recommendation 3:

Discrimination must be prohibited where such discrimination

- (i) causes or perpetuates systemic disadvantage;
- (ii) undermines human dignity; or
- (iii) adversely affects the equal enjoyment of a person's rights and freedoms in a manner that is comparable to discrimination on the prohibited grounds stated above.

Recommendation 4:

Legal rules related to evidence and proof should be adapted to ensure that victims of discrimination are not unduly inhibited in obtaining redress. In particular, the rules of proof in all proceedings should be adapted to ensure that when a person who alleges that they have been subject to discrimination establishes, before a court or other competent authority, facts from which it may be presumed there has been discrimination (prima facie case), it will be for the respondent to prove that there has been no breach of the right to equality.

Recommendation 5:

In considering special measures, definitions of sex should include variations in sex characteristics, and people who are neither wholly male nor wholly female.

Recommendation 6:

If an employer or service provider cannot arrange reasonable access to existing toilet facilities for an employee or service user, then adjustments should be made. Those adjustments could, for example, include making provision for access to unisex toilets.

Recommendation 7:

Public sector organisations should have the positive duty to eliminate discrimination and harassment in the provision of services, employment, and in the utilization of public funds and resources.

Recommendation 8:

Harassment on the basis of all actual or perceived protected attributes should be prohibited

Recommendation 9:

Definitions of sex should never assume that everyone conforms to a binary consisting of male and female. It is critically important that the definition of sex is broad enough to acknowledge, and include, intersex variations in human biology.

Recommendation 10:

OII Australia is not in favour of the creation of a third sex category but would welcome an alternative where people can choose not to specify their sex.

Recommendation 11:

OII Australia proposes that the sexes could be defined as female, male or unspecified. Alternatively, OII Australia proposes that sex be defined as “sex characteristics” which are typically, but not always, male or female.

Recommendation 12:

OII Australia also believes that where third options exist, such as an X sex marker on a passport, that this should be available on a non-discriminatory basis to any person over the age of majority.

Recommendation 13:

References to the same or opposite gender should be avoided in favour of references to the same or different genders.

Recommendation 14:

Sexual orientation should include lesbians, gay men, bisexuals and heterosexuals.

Recommendation 15:

Gender identity should include people of diverse sex and gender, and any other people who may have actual or perceived non-standard gender identity or presentation.

Recommendation 16:

Discrimination should be prohibited if it is on the basis of actual or perceived characteristics. It should never be necessary for a person to be legally recognised as a member of a specific sex.

Recommendation 17:

All protected groups should be covered under provisions against associate discrimination

Recommendation 18:

The 'sex' attribute should include people with indeterminate or intermediate sex. The existence of intersex and other people with indeterminate or unspecified sex should be recognised in law, and such people should be protected under the 'sex' attribute of anti-discrimination legislation.

Recommendation 19:

Direct and indirect discrimination on the basis of a combination of two or more protected characteristics should be prohibited.

Recommendation 20:

Policies, law and legislation should use language that is sufficiently inclusive as to include people with differences of sex characteristics are offered fair and equal treatment.

Recommendation 21:

Access to public places and facilities, and freedom of movement within Australia and through Australian borders, should not be constrained on the basis of protected attributes. Freedom of movement within and through Australian borders must be ensured for people with an X sex marker on their passport.

Recommendation 22:

Intersex people volunteering in any capacity should not be the subject of discrimination unless their physical differences might directly prevent them from fulfilling their roles as a volunteer.

Recommendation 23:

An intersex athlete should be able to compete on the basis of their *bona fide* lived sex role without being subjected to sex tests

Recommendation 24:

Intersex people should have full access, without financial liability, to any information pertinent to their differences and any medical interventions they may have been subjected to.

Recommendation 25:

No third party should be provided with personal information regarding a person's intersex differences without the prior, full and informed consent of the person subject to the enquiry.

Recommendation 26:

Intersex infants, children, adults and their families should not be subject to exemptions from anti-discrimination law against on the basis of their biological sex or gender identity.

Recommendation 27:

Religious persons, bodies or organisations should not be able to discriminate on grounds of sex, sexual orientation or gender identity if they are service providers providing a service to the public. For example, a hostel or bed and breakfast property should not be able to

discriminate against guests on the basis of their sex, sexual orientation or gender identity.

Recommendation 28:

Private membership clubs and institutions providing services to their members should not generally be entitled to discriminate on the basis of sex, sexual orientation or gender identity, unless each exemption is licensed, publicised and subjected to timely review.

Recommendation 29:

An effective conciliation facility needs to be incorporated within the Australian Human Rights Commission or elsewhere. Such a facility should provide mediation, information, and a process whereby contending parties can reach agreement. The conciliation process should, nonetheless, recognise if any of the parties are not engaging with a *bona fide* intention to resolve the dispute. In such cases, where there is no real intention by one of the parties, the matter should be sent to a formal hearing.

Recommendation 30:

OII Australia holds that the Australian Human Rights Commission should be expanded to provide mediation and a tribunal for the resolution of disputes involving discrimination. Alternatively, a new tribunal should be established to facilitate mediation and resolve such disputes.

Meaning of Discrimination

1. What is the best way to define discrimination? Would a unified test for discrimination (incorporating both direct and indirect discrimination) be clearer and preferable? If not, can the clarity and consistency of the separate tests for direct and indirect discrimination be improved?

We see discrimination as a denial of equal treatment and equal rights in all areas of social interaction. OII Australia is in favour of distinct tests for direct and indirect discrimination.

OII Australia concurs with the policy of the Equal Rights Trust (UK)³ in relation to direct and indirect discrimination. That policy states:

“Direct discrimination occurs when for a reason related to one or more prohibited grounds a person or group of persons is treated less favourably than another person or another group of persons is, has been, or would be treated in a comparable situation; or when for a reason related to one or more prohibited grounds a person or group of persons is subjected to a detriment. Direct discrimination may be permitted only very exceptionally, when it can be justified against strictly defined criteria.

“Indirect discrimination occurs when a provision, criterion or practice would put persons having a status or a characteristic associated with one or more prohibited grounds at a particular disadvantage compared with other persons, unless that provision, criterion or practice is objectively justified by a legitimate aim, and the means of achieving that aim are appropriate and necessary.”

UK law also covers perceived discrimination: that based on a perception that an individual is a member of a protected group.

³ <http://www.equalrightstrust.org/>

Recommendation 1:

Discrimination must be prohibited then where it is on grounds of actual or perceived sex, sexual orientation and/or gender identity.

Recommendation 2:

Definitions of discrimination must allow for the fact that not all people are male or female and, in general, fully inclusive language should be used so that intersex people are protected.

Recommendation 3:

Discrimination must be prohibited where such discrimination

(i) causes or perpetuates systemic disadvantage;

(ii) undermines human dignity; or

(iii) adversely affects the equal enjoyment of a person's rights and freedoms in a manner that is comparable to discrimination on the prohibited grounds stated above.

2. How should the burden of proving discrimination be allocated?

As in the United Kingdom, European Union and Canada, the burden of proof should shift to the respondent once the complainant has established a *prima facie* case of discrimination. Complainants should not have to prove matters related to the state of mind of the respondent.

Recommendation 4:

Legal rules related to evidence and proof should be adapted to ensure that victims of discrimination are not unduly inhibited in obtaining redress. In particular, the rules of proof in all proceedings should be adapted to ensure that when a person who alleges that they have been subject to discrimination establishes, before a court or other competent authority, facts from which it may be presumed there has been discrimination (*prima facie* case), it will be for the respondent to prove that there has been no breach of the right to equality.

3. Should the consolidation bill include a single special measures provision covering all protected attributes? If so, what should be taken into account in defining that provision?

OII Australia supports the position of the Australian Human Rights Commission, section 4.6, paragraphs 60-65.

Recommendation 5:

In considering special measures, definitions of sex should include variations in sex characteristics, and people who are neither wholly male nor wholly female.

4. Should the duty to make reasonable adjustments in the DDA be clarified and, if so, how? Should it apply to other attributes?

In the case of some visibly intersex people, other people with indeterminate gender presentation, and people who are transitioning gender, access to facilities for specific sexes (such as toilets) can be an issue.

Recommendation 6:

If an employer or service provider cannot arrange reasonable access to existing toilet facilities for an employee or service user, then adjustments should be made. Those

adjustments could, for example, include making provision for access to unisex toilets.

5. Should public sector organisations have a positive duty to eliminate discrimination and harassment?

OII Australia believes that public sector organisations should have this positive duty.

Recommendation 7:

Public sector organisations should have the positive duty to eliminate discrimination and harassment in the provision of services, employment, and in the utilization of public funds and resources.

6. Should the prohibition against harassment cover all protected attributes? If so how would this most clearly be expressed?

OII Australia supports, in general, the Australian Human Rights Commission submission section 6, paragraphs 101-155. OII Australia does not have the resources to consider these aspects more fully.

Recommendation 8:

Harassment on the basis of all actual or perceived protected attributes should be prohibited.

Protected Attributes

7. How should sexual orientation and gender identity be defined?

This question is framed in a manner that presupposes that intersex people, like gay men, lesbians and transgender people, would be covered by “sexual orientation and gender identity”. Existing legislation makes the same assumptions.

It is the view of OII Australia that discrimination against intersex people is, at root, based in homophobia – but people who have differences of sex characteristics, or who fall outside of current definitions of transgender, are, in fact, excluded from existing legislation.

State legislation covering discrimination on the basis of gender identity:

Although intersex people represent a significant percentage of the population⁴, we are not currently included in any legislation against discrimination at a federal level, and only partially included in the legislation of two states (NSW and Victoria) and the ACT.

Where we have been the subjects of legal debate we have either fared very poorly or have been used in an appropriative manner to argue the case for non-intersex people⁵. Intersex

⁴ Fausto-Sterling: 2000 puts the figure at a minimum of 1.9 % of the population. Genetic researchers state that it may be as high as 4%. The figure of 1:200 or 1:1000 frequently quoted is taken from unreliable sources especially Sax: 2002 who sought to minimise intersex numbers by eliminating all but mixed gonadal dysgenesis (formerly “true hermaphrodite”) as really being intersex. Australian registers of birth anomalies have newborns with visible and reportable differences of sex anatomy at around 29:1000 live births. The introduction of prenatal screening has reduced this number considerably for some intersex differences.

⁵ In the Victorian Supreme Court Mushin J chastised two parents for not allowing surgical and hormonal interventions when the child was born before allowing hormone treatment so the child might more completely fulfil the role of a man when he matured. In another Victorian case a marriage was dissolved on the basis that it was not a relationship between a man and a woman given one of the couple in question was intersex. More recently in the case of *Re:Kevin*, intersex was used to argue that human sex existed on a continuum between male and female and that absolute certainty in respect of sex role could not therefore be guaranteed. It was also argued that differences in the brain might constitute a kind of intersex. In the NSW Administrative Appeals tribunal the same argument

people are thought to be protected by legislation in some acts under gender identity.

For example the NSW, ACT and Victorian anti-discrimination acts all use near identical wording in their protection of “gender identity” or “transgender persons”. Section 38A of the *NSW Anti-Discrimination Act 1977* No. 48 defines “a recognised transgender person ... (c) who, being of indeterminate sex, identifies as a member of a particular sex by living as a member of that sex”.

This is said to protect intersex people but, in fact, it requires intersex people to identify as either men or women and does not protect people whose innate physical sex is intersex.

Federal legislation covering discrimination on the basis of sex:

While discrimination on the basis of sex is currently a key component of federal anti-discrimination legislation, it does not include people with biology that varies from male or female.

In 2003, the first Australian was issued with a passport identifying sex with an X-marker⁶. In 2011, the Minister for Foreign Affairs and the Attorney General enabled people to choose an X sex marker providing they have supporting documentation from a doctor.

There exists a growing cohort of people in Australia who, for various reasons, have chosen, on federally issued legal documents, to identify their sex as other than male or female. OII Australia also believes that this should be available to anyone over the age of majority who wishes to opt out of providing information on their sex.

Recent federal case law in the US has determined that discrimination on the basis of “gender non-conformity” constitutes sex discrimination⁷ and this is a precedent that OII Australia seeks to see apply in Australia.

All intersex people should have protection, against discrimination and for equal treatment, without having to subject ourselves to interventions and without having to participate in the false notion that we are wholly male or wholly female.

Key Recommendation 9:

Definitions of sex should never assume that everyone conforms to a binary (male or female). It is critically important that the definition of sex is broad enough to acknowledge and include intersex variations in human biology.

was put and intersex people were used to argue for a third sex as justifying ‘sex not specified’ for a Transgender person. In the cases of *Re: Kevin* and *Norrie May Welby*, intersex people were not represented and, if they had been, would argue strenuously that there are significant differences between the trans experience and the intersex one. Intersex people do not seek a separate category for a third sex; indeed no intersex organisation in the world supports that position. In both cases non-intersex people argued their case without intersex engagement. Earlier the work of John Money et al used intersex to bolster the feminist position that gendered behaviour was learned (indeed Money was responsible for the use of gender as a sex role descriptor) and Berenbaum likewise appropriated us to bolster her argument that tomboy behaviour and lesbian orientation were caused by exposure to prenatal hormones.

⁶ This was possible because Victoria permits the issuing of birth certificates to infants with indeterminate sex.

⁷ United States Court of Appeals Eleventh Circuit, *Glenn v Brumby*, No. 10-14833, 10-15015, dated 6 December 2011.

Key Recommendation 10:

OII Australia is not in favour of the creation of a third sex category but would welcome an alternative where people can choose not to specify their sex.

Key Recommendation 11:

OII Australia proposes that the sexes could be defined as female, male or unspecified. Alternatively, OII Australia proposes that sex be defined as “sex characteristics” which are typically, but not always, male or female.

Key Recommendation 12:

OII Australia also believes that where third options exist, such as an X sex marker on a passport, that this should be available on a non-discriminatory basis to any person over the age of majority.

Recommendation 13:

References to the same or opposite gender should be avoided in favour of references to the same or different genders.

Recommendation 14:

Sexual orientation should include lesbians, gay men, bisexuals and heterosexuals.

Recommendation 15:

Gender identity should include people of diverse sex and gender, and any other people who may have actual or perceived non-standard gender identity or presentation.

Recommendation 16:

Discrimination should be prohibited if it is on the basis of actual or perceived characteristics. It should never be necessary for a person to be legally recognised as a member of a specific sex.

8. How should discrimination against a person based on the attribute of an associate be protected?

Discrimination on the basis of association with an intersex person should be prohibited.

Recommendation 17:

All protected groups should be covered under provisions against associate discrimination.

9. Are the current protections against discrimination on the basis of these attributes appropriate?

Intersex is primarily about biology – people born of indeterminate or intermediate sex. It is only secondarily, in some cases, related to gender identity.

The Department of Foreign Affairs and Trade has issued passports with sex unspecified since around 2003. Initially, this was available on request to people with a birth certificate stating that the certificate holder’s sex was “indeterminate”, only available in Victoria. There is now a policy in place enabling intersex and other people of intermediate or unspecified sex to

receive a passport with an 'X' sex marker on the basis of supporting medical documentation⁸. A passport is a primary identification document with a variety of purposes in addition to those facilitating international travel.

Recommendation 18:

The 'sex' attribute should include people with indeterminate or intermediate sex. The existence of intersex and other people with indeterminate or unspecified sex should be recognised in law, and such people should be protected under the 'sex' attribute of anti-discrimination legislation.

10. Should the consolidation bill protect against intersectional discrimination? If so, how should this be covered?

OII Australia believes that laws and policies must provide effective protection against multiple discriminations, that is, discrimination on more than one ground. Many intersex people are discriminated on the basis of their physical differences, their perceived sexual orientation, their perceived gender identity or combinations of all three. OII Australia believes that positive action measures may be required to overcome past disadvantage related to intersectional discrimination on two or more grounds⁹.

Recommendation 19:

Direct and indirect discrimination on the basis of a combination of two or more protected characteristics should be prohibited.

Protected Areas of Public Life

11. Should the right to equality before the law be extended to sex and/or other attributes?

Australia should aspire to treat all people as equal before the law. Currently, intersex people have little recognition at law, no recognition in federal legislation, and only partial recognition in some states and territories, as previously noted.

As long as policy, law and legislation are framed in terms of sex binary absolutes – male and female – those who have physical differences of sex characteristics outside of those binaries will have no protection.

Recommendation 20:

Policies, law and legislation should use language that is sufficiently inclusive as to include people with differences of sex characteristics are offered fair and equal treatment.

12. What is the most appropriate way to articulate the areas of public life to which anti-discrimination law applies?

OII Australia believes that discrimination should not be limited only to employment, the provision of goods and services, or government laws or programs. We believe that it is crucial to ensure that discrimination should be prevented where it impairs any human right or fundamental freedom, including freedom of movement.

Most intersex people, and many other people of diverse sex and gender, will be taking lifelong hormonal treatment, and their freedom of movement should not be constrained on

⁸ See <https://www.passports.gov.au/Web/SexGenderApplicants.aspx>

⁹ Some of this language comes from the UK Equal Rights Trust's *Declaration of Principles on Equality* at <http://www.equalrightstrust.org/endorse/index.htm>

the basis of their medication¹⁰. Such constraints should be considered *prima facie* acts of discrimination.

Recommendation 21:

Access to public places and facilities, and freedom of movement within Australia and through Australian borders, should not be constrained on the basis of protected attributes. Freedom of movement within and through Australian borders must be ensured for people with an X sex marker on their passport.

13. How should the consolidation bill protect voluntary workers from discrimination and harassment?

Intersex people volunteering in any capacity should not be the subject of discrimination unless their physical differences might directly prevent them from fulfilling their roles as a volunteer. That should not be taken to mean that, because an organisation or group of individuals who find their differences objectionable, should have a right to discriminate. Rather, it should mean that a physical difference might prevent a person from wearing, for example, breathing apparatus, if they wish to be a volunteer fire-fighter.

Recommendation 22:

Intersex people volunteering in any capacity should not be the subject of discrimination unless their physical differences might directly prevent them from fulfilling their roles as a volunteer.

14. Should the consolidation bill protect domestic workers from discrimination? If so, how?

Intersex people should be protected on the same basis as in 13, above.

15. What is the best approach to coverage of clubs and member-based associations?

Private membership clubs and institutions providing services to their members should not be entitled to discriminate on the basis of sex, sexual orientation or gender identity.

16. Should the consolidation bill apply to all partnerships regardless of size? If not, what would be an appropriate minimum size requirement?

The consolidation bill should apply to all partnerships regardless of size.

17. Should discrimination in sport be separately covered? If so, what is the best way to do so?

Intersex individuals have been subjected to routine discrimination on the basis of perceived advantage since at least the time that the International Olympic Committee came into being.

Despite more than 100 years of medical research and intense investigation, no absolute way

¹⁰ In NSW, for example, pharmacies are required to retain testosterone prescriptions on presentation, see http://www.austlii.edu.au/au/legis/nsw/consol_reg/patgr2008398/s42.html. Federal rules mean that an import permit is required when returning to Australia, see <http://www.health.gov.au/internet/main/publishing.nsf/Content/general-guidance-for-travellers-bringing-medicines-to-and-from-australia>. Neither of these regulations applies in, for example, the European Union. Intersex people taking Androcur, an anti-androgen, may only qualify for that medication if they are prepared to concede that the drug is to reduce sexual urges that may lead them to commit a crime and agree to be registered as a potential sexual offender. See <http://oiaustralia.com/4117/intersex-australians-sex-offenders-register/>

of determining a person's sex has been found. Current athletic regulations that determine if an intersex person has an advantage in the end devolve down to satisfying the needs of aggrieved female athletes who thought that they were competing against someone they imagined to be male¹¹.

OII Australia holds that a person should be able to compete on the basis of their *bona fide* lived sex role without being subjected to sex tests. OII Australia holds that all elite athletes have genetic advantages that enable them to win in competitions of their choice. Singling out intersex differences, above all other differences that confer an advantage, is fundamentally discriminatory and cannot be justified.

Recommendation 23:

An intersex athlete should be able to compete on the basis of their *bona fide* lived sex role without being subjected to sex tests.

18. How should the consolidation bill prohibit discriminatory requests for information?

Requests for information on intersex are an especially vexed issue.

For an intersex person seeking to discover what medical procedures they may have been subjected to as infants, obtaining information often proves to be nearly impossible.

Intersex people, likewise, find it nearly impossible to gather information that would validate the kinds of treatment that they have been subjected to, or how they may fare into old age as a consequence of the treatments they have been subjected to.

OII Australia holds that, in both cases, intersex individuals should have free access (that is, with no financial burden, and readily available) to any medical information that is of a concern to them. We consider the withholding of such information to be discriminatory.

OII Australia also holds that, where the provision of information on an individual's intersex differences to third parties may lead, or does lead, to those parties exercising discrimination on the basis of that information, then that information should not be available. In any event, the intersex individuals themselves should have the right to say who does and does not have access to private medical information about themselves.

OII Australia has deep concerns with the current Department of Health and Ageing policy of making medical information available to all medical practitioners on the basis of the presentation of an individual's Medicare card. For example, a person who has been prescribed Androcur on the basis of being a potential sex offender might find that, in a small town, ancillary staff to a doctor may access their Medicare records and rumours about their use of that drug could circulate to that person's disadvantage in that community.

Recommendation 24:

Intersex people should have full access, without financial liability, to any information pertinent to their differences and any medical interventions they may have been subjected to.

Recommendation 25:

No third party should be provided with personal information regarding a person's intersex differences without the prior, full and informed consent of the person subject to the enquiry.

¹¹ See, for example, <http://oii australia.com/5814/ioc-gender-inquisition/>

19. Can the vicarious liability provisions be clarified in the consolidation bill?

OII Australia supports the Australian Human Rights Commission submission in respect of vicarious liability, section 6.8 paragraph 144.

Exceptions and Exemptions

20. Should the consolidation bill adopt a general limitations clause? Are there specific exceptions that would need to be retained?

Given that intersex is not, and never has been, the subject of federal anti-discrimination laws, no specific exceptions or exemptions have ever been proposed in respect of intersex differences. Saving for the considerations outlined elsewhere in this submission, OII Australia contends that no exceptions or exemptions should be made in respect of intersex differences in anti-discrimination law.

21. How should a single inherent requirements/genuine occupational qualifications exception from discrimination in employment operate in the consolidation bill?

Inherent requirements and genuine occupations qualifications should only apply to intersex insofar as real physical difference may preclude, prevent or inhibit a person from fulfilling their role in their occupation or employment.

22. How might religious exemptions apply in relation to discrimination on the grounds of sexual orientation or gender identity?

In framing this question as one of sexual orientation or gender identity, the position of intersex people is unclear. People who are intersex may be diagnosed with differences that are seen as a medical condition at birth, at puberty, when attempting to conceive a child, or serendipitously. Diagnosis at birth or puberty often results in surgery or hormone treatment to make that child visually conform to gender norms.

We argue that such surgeries take place without the free, fully informed consent of the children concerned, or their parents. We also argue that such surgeries are essentially homophobic in nature: they seek to eliminate differences perceived as “queer” and they also seek to facilitate heterosexual relations and intercourse as an adult.

OII Australia is concerned to ensure the fair and reasonable treatment of intersex children in religiously run hospitals, schools and other institutions.

We oppose the application of religious exemptions to intersex people. We particularly oppose the application of religious exemptions to intersex infants, children and their families.

Key Recommendation 26:

Intersex infants, children, adults and their families should not be subject to exemptions from anti-discrimination law on the basis of their biological sex or gender identity.

Key Recommendation 27:

Religious persons, bodies or organisations should not be able to discriminate on grounds of sex, sexual orientation or gender identity if they are service providers providing a service to the public. For example, a hostel or bed and breakfast property should not be able to discriminate against guests on the basis of their sex, sexual orientation or gender identity.

Key Recommendation 28:

Private membership clubs and institutions providing services to their members should not generally be entitled to discriminate on the basis of sex, sexual orientation or gender identity, unless each exemption is licensed, publicised and subjected to timely review.

23. Should temporary exemptions continue to be available? If so, what matters should the Commission take into account when considering whether to grant a temporary exemption?

OII Australia does not support the availability of temporary exemptions against people with intersex differences.

Complaints and Compliance Framework

24. Are there other mechanisms that would provide greater certainty and guidance to duty holders to assist them to comply with their obligations under Commonwealth anti-discrimination law?

OII Australia contends that widespread education and advertisements in regard to anti-discrimination law, and especially in respect of intersex differences, would enable people to fully understand what discrimination is, what intersex is, and how they might more fully comply with the law.

25. Are any changes needed to the conciliation process to make it more effective in resolving disputes?

Recommendation 29:

An effective conciliation facility needs to be incorporated within the Australian Human Rights Commission or elsewhere. Such a facility should provide mediation, information, and a process whereby contending parties can reach agreement. The conciliation process should, nonetheless, recognise if any of the parties are not engaging with a *bona fide* intention to resolve the dispute. In such cases, where there is no real intention by one of the parties, the matter should be sent to a formal hearing.

26. Are any improvements needed to the court process for anti-discrimination complaints?

OII Australia considers all the processes currently available to be financially burdensome, deficient in access to legal resources. The requirement for an aggrieved person to establish the burden of proof is onerous.

27. Is it necessary to change the role and functions of the Commission to provide a more effective compliance regime? What, if any, improvements should be made?

Recommendation 30:

OII Australia holds that the Australian Human Rights Commission should be expanded to provide mediation and a tribunal for the resolution of disputes involving discrimination. Alternatively, a new tribunal should be established to facilitate mediation and resolve such disputes.

Interaction with Other Laws and Application to State and Territory Governments

28. Should the consolidation bill make any improvements to the existing mechanisms in Commonwealth anti-discrimination laws for managing the interactions with the Fair Work Act?

Where possible, the consolidation bill should incorporate mechanisms that improve all federal legislation in terms of anti-discrimination, including the *Fair Work Act*. Where inconsistencies in federal law might not immediately be apparent, the legislation needs to be sufficiently robust to ensure that it can be applied to previously unnoticed areas of discrimination.

29. Should the consolidation bill make any amendments to the provisions governing interactions with other Commonwealth, State and Territory laws?

Where possible, the consolidation bill should strengthen anti-discrimination protection measures.

30. Should the consolidation bill apply to State and Territory Governments and instrumentalities?

OII Australia believes that it should apply to all state and territory governments and instrumentalities.

Ideally, federal legislation should provide the lead for the states and territory governments to harmonise and strengthen their legislation.

Provision for civil action by persons or organisations with a sufficient interest in the matter

OII Australia would like to take this opportunity to underline and commend, in particular, section 8.14, paragraphs 281-299, and recommendation 48, of the Australian Human Rights Commission's submission.