

## INQUIRY INTO SAME SEX MARRIAGE LAW IN NSW

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## Organisation Intersex International Australia Limited

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Honourable members of the Legislative Council

## Introduction

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.

Intersex people represent a significant percentage of the population. Anne Fausto-Sterling puts the intersex prevalence figure at a minimum of 1.9 % of the population and a maximum, derived from research by John Money, of up to 4%1. 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.

## 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.

The mission of OII Australia is **to**:

- support intersex individuals by providing information and contact with other intersex people.
  - 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.
- 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 Same Sex marriage bill seeks to include people who are currently unable to marry within the law according to the federal marriage bill be allowed to do so under a state bases marriage act. OII Australia contends that Intersex people irrespective of sex assignment are unable to marry in Australia with certainty and those who have unspecified sex on their passports or birth certificates are certainly unable to marry.

### **Our position in respect of Marriage and Intersex people.**

OII Australia supports the rights of all Australians to marriage. We support the submissions of the NSW Gay and Lesbian Rights Lobby, The LGBTI Health Alliance , Australians for Marriage Equality and those that demonstrate the positive mental health outcomes for LGBTI (Lesbian Gay Bisexual Transgender and Intersex) people when equally rights are available to them.

We note the many submissions to the Legislative Council enquiry demonstrating that marriage is a state institution and not religious, that religious organisations already enjoy wide-ranging discretion around who they may or may not admit to their church and be involved the ceremonial practices of their religion. No church is currently bound to marry people irrespective of them being male or female or in a heterosexual relationship.

We support those submissions who insist that marriage equality is a rights issue and not a religious one.

We make the following observations in so far as marriage and Intersex is concerned. Where the Federal Marriage Act currently insists that a marriage must be between a man and a woman the act makes no attempt to clarify exactly what a man or a woman is. We feel the proposed State same sex marriage bill follows this path.

### **Can Intersex marry under current Federal law?**

From the legal cases we have been able to study we understand those terms would have the normal meaning as found in either the Macquarie or Oxford dictionaries.

Three cases have been contested in Australian courts of law where the sex of an Intersex person was the issue in deciding if an Intersex person can marry under the Federal marriage act.

The first is in the supreme court of Victoria in 1911, the second in the late 1960's and the third in the Family Court of Australia in 1979. The later known as: "the case of C and D (falsely known as C)".

We are aware that a Transsexual case known as re :Kevin was also heard in the FCA and is widely understood to have resolved the issues for Intersex people raised in C and D.

We contend that is not the case. We understand that in the matter of re: Kevin the individual in question was Transsexual not Intersex and was understood to be wholly male after successfully transitioning from being whole female. For such people the complete transition under State law with appropriate amendments to cardinal documents qualifies them for marriage.

Intersex are people who are not wholly male or female and in the matter of C and C his honour found that being of indeterminate sex we were barred from marriage. The intersex individual in that matter had undergone significant surgery to confirm a male sex assignment and had cardinal documents revised to reflect that surgery. The Intersex individual had differences remarkable enough to feature in medical journals of the time and was incontestably Intersex.

So in the matter of C and C the issue was not one of transitioning from male to female, man to woman, the issue was having being born as neither male or female. His honour contended irrespective of birth assignment or the sex male on cardinal documents, and that irrespective of surgery or other medical interventions to confirm assignments if one is born Intersex one remains intersex. OII Australia agrees that Intersex is not curable by surgical interventions and Intersex remain so, irrespective of surgeries or assignments.

The situation then, for all Intersex people in Australia today, is the security of our marriages, where we have them, is unsure. In those cases where we have unspecified sex on our cardinal documents it is impossible.

### **How does Intersex fare under the proposed State law?**

If same sex marriage is allowed, how then would Intersex be viewed? We, under current precedent, do not qualify for heterosexual marriage. If the same logic is applied as has been applied to federal law, that we are neither male or female, we would likewise not qualify for same sex marriage when that marriage is confined to the binary terms of man and woman. Though some effort has been made to indicate people of unspecified sex should not be

disqualified under the State law in this bill ,our view is that people of unspecified sex need a more certain inclusion if we are to enjoy the same certainty that might be afforded to same sex couples.

OII Australia contends that no one can be sure of their sex in absolute terms. Each one of us is placed on a continuum somewhere between the ideals of male and female, no one ever being either absolutely.

Given the large numbers of Australian Intersex people, the technical impossibility of determining what exactly makes a man or a woman and the lack of clarity in the current marriage act when it refers to a “man and a woman” and State based legislations referring to men and women and same sex, we consider these acts, proposed and existing extraordinarily unfair and discriminatory against Intersex people. The proposed state “Same Sex marriage act” does little to clarify the issues facing Intersex people.

Where an argument might be run that LGB people can opt to marry a person of the opposite sex if they choose, however uncomfortable that might be, and Transsexual people can marry someone of the opposite sex following surgery and cardinal document change the situation remains that Intersex people can never marry if their Intersex is contested in the courts or their cardinal documents do not specify a sex.

It is our view that rather than attempt to resolve the irresolvable and make all human beings conform to male or female anatomies irrespective of how they are born, and thereby place the burden of Heterosexual or Homosexual certainty on Intersex bodies, the marriage act, be it a state same sex marriage act or the federal act should either not specify sex or gender in declaring who might qualify for that institution in the case of a federal act thus rendering it a full marriage equality act, or allow people of indeterminate sex marry any other person and that that marriage qualify as a same sex marriage within proposed state law.

It is our view that in the states allowing Intersex people to marry there can be no possible infringement on federal law given that the federal law only recognises males and females and only opposite sex marriages are allowed.

### **The complication of people who do not have a sex specified on qualifying cardinal documents.**

The situation is exacerbated for those people who now have an unspecified sex on their passports or their birth certificates. Australia allows such passports to be issued as do a number of other countries with more indicating they will. Australian states are also allowing or will allow sex other than male or female, including not specifying a sex, on cardinal documents as do some countries.

Under the proposed state law people who were born in a country other than Australia can produce their passport as a qualifying document to marry; the same provision is available under federal law. OII Australia has members who were born overseas and possess such a document that does not specify a sex. Oii Australia is also aware that some people born in Australia have birth certificates that likewise do not specify their sex.

We understand such people are unable to marry under any Australian law. We hold this to be a fundamental breach of human rights and a breach of several United Nations Charters to which Australia is a signatory including an individual's right to start a family.

Article 16 of the United Nations charter of Rights says:

"Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family. They are entitled to equal rights as to marriage, during marriage and at its dissolution.

Marriage shall be entered into only with the free and full consent of the intending spouses.

The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.

Intersex people already bear an unfair burden in ensuring sex binaries of male and female, we are subjected to conforming surgeries as children before we can consent, often with dreadful outcomes, we are subjected to behaviour modification and reinforcement from our families and councillors, we are subjected to hormone therapies where the long term outcomes are unknown. All of this to ensure we are marriage qualified.

Then in spite of these imposts, whether we accede willingly or not, we remain unqualified to marry, we simply have the anatomical appearance of being marriageable without lawful certainty.

I urge the members of the legislative council to extend the right to marry to same sex couples and I urge you to make whatever changes are necessary to ensure that Intersex people may enjoy married life with legal certainty irrespective of whether they have been assigned male or female or have sex unspecified on their cardinal documents.

Gina Wilson

President OII Australia