Joint Submission | Australian Human Rights Commission

Response to the current and emerging threats to TGD people

5 May 2024

Thank you for the opportunity to submit to this inquiry. Contained in this document is the joint submission of Pride in Law, Liberty Victoria and Victorian Women in Law bringing a diversity of experience and expertise in preparing this response to **'the current and emerging threats to TGD people — Pride in Law, VWL and Liberty Victoria'**.

The contributing organisations

Pride in Law is a National non-political LGBTIQ+ Law Association, aimed at connecting lesbian, gay, bisexual, transgender, intersex, queer, and questioning (LGBTIQ+) members of the legal community and their allies. Pride in Law is Australia's first and only National LGBTIQ+ Law Association, which is '*Law Focused, Pride Inspired*'.

Since July 2017, Pride in Law has worked to provide visibility, education, and advocacy around LGBTIQ+ issues in the legal profession. We represent and promote legal professionals, increase community understanding of the law, particularly as it affects LGBTIQ+ individuals, help protect the rights of individuals and advise the community about the benefits legal professionals can provide.

Liberty Victoria (the Victorian Council for Civil Liberties) is one of Australia's leading human rights and civil liberties organisations. Founded in 1936, Liberty Victoria seeks to promote compliance with human rights, and campaigns extensively for the better protection and compliance with civil liberties. More information can be found at libertyvictoria.org.au.

Victorian Women Lawyers (**VWL**) is a voluntary association that promotes and protects the interests of women in the legal profession. Formed in 1996, VWL now has over 800 members. VWL provides a network for information exchange, social interaction and continuing education and reform within the legal profession and broader community of women lawyers.

Since 1996, VWL has advocated for the equal representation of women at all levels of the legal profession and has promoted the understanding and support of women's legal and human rights by identifying, highlighting and eradicating gender-based and sex-based discrimination, to achieve justice and equality for all women.

This submission highlights salient issues regarding threats to trans and gender diverse (**TGD**) individuals, as it relates to the law. This submission does not seek to capture all threats to TGD people and communities, but instead focuses on issues that sit squarely within the expertise of the authors.

Submission

1. Anti-vilification & conversion practices

Vilification

1.1 Trans and Gender Diverse (**TGD**) people and communities are disproportionately the target of hate, abuse and discrimination, both in-person[1] and online.[2] Australia lacks consistent protections against words that wound.[3] In some jurisdictions, anti-vilification laws protect LGBTIQ+ people from acts that are:

a) in public;

b) reasonably likely to vilify (offend, insult, intimidate or intimidate); and

c) done because of a protected attribute.

1.2 However, there are no national protections, and states including South Australia, Western Australia and Victoria do not protect LGTBIQ+ people from vilification. For example, in March 2023 an anti-trans rally was attended by neo Nazis and led by British anti-trans campaigner Kelly-Jay Keen-Minshull.[4] Consequently, the 'Nazi salute' was banned in Victoria, however no recourse nor deterrence mechanism is currently available via anti-vilification protections,[5] despite the rise in recent rallies and attacks on LGBTQ+ groups, and transgender people in particular.

1.3 It is vital that there are strong and consistent protections against words that wound for TGD people across Australia. In our view, legislation should provide civil law deterrence to conduct that is reasonably likely to harm.[6]

Conversion practices

1.4 Conversion therapy refers to therapeutic treatment or other practices which attempt to change or suppress a person's sexual orientation or gender identification. It is well established within the medical community that these practices lead to severe and life-long physical and mental pain and

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1 Strauss P, Cook A, Winter S, Watson V, Wright Toussaint D & Lin A. Trans Pathways: the mental health experiences and care pathways of trans young people, Summary of Results. https://www.telethonkids.org.au/globalassets/media/documents/brain--behaviour/trans-pathwayreport-web.pdf (Trans Pathways).

2 https://www.esafety.gov.au/lgbtiq/learning-lounge/dealing-with-online-abuse/online-hate-discrimination.

3 The "words that wound" triplet was the title of a Human Rights Commission anti-racism conference in 1983. Its value is both its simplicity, and its focus on harms, rather than "speech." The word "vilification" is ungainly and poorly understood, especially given its misuse in the Racial and Religious Tolerance Act 2001 ("RRTA") to mean "incitement" (see also final section), and the common term "hate speech" is an emotive but unhelpful exaggeration in many cases. "Words that wound" is used expansively, including images and gestures, and words both spoken and written, etc.

4 https://www.abc.net.au/news/2023-03-26/kellie-jay-keen-minshullanti-trans-rights-liberal-party-debate/102142130

5 Anti-vilification protections are currently contained in the Racial and Religious Tolerance Act 2001 (Vic), and do not extend to TGD people.

6 For a more detailed discussion on the approach that might be taken to legislation, see Liberty Victoria's submission to the Victorian Parliamentary inquiry into anti-vilification protections.

suffering. It is common ground that conversion therapy correlates with higher rates of self-harm among participants, including suicide.

1.5 There is no scientific evidence supporting the contention that conversion practices are in the interest of the individual. On the contrary, there is ample evidence of the mental, physical and social toll of these practices, including "*long-term anxiety, depression and alienation from family and community, suicidal ideation and attempts, and suicides*".[7]

Legal status

1.6 The lack of jurisdictionally consistent anti-vilification protections and conversion therapy prohibitions is a threat to TGD individuals.

1.7 The efficacy of anti-vilification protections as a remedial mechanism is unclear, whether with respect to race, LGBTQ+ and other vulnerable groups. However, a complex body of literature and jurisprudence can explain the link between the law and "social rules";[8] that is, how legal obligations become a standard of behaviour/social norm; a normative recognition that an act is wrong morally, ethically and/or legally.

1.8 We submit that legislated protection is vital to driving improved social norms. Reform is necessary to address the rise in (public) vilification and continued (private) conversion practices.

Table 1: Cross-jurisdictional summary for TGD (and broader LGBTQ+) community

	Anti-vilification protection for TGD?		Conversion practices banned?	
ACT	✓	*Discrimination Act 1991* (ACT), Part 6	✓	*Change or Suppression (Conversion) Practices Prohibition Act 2021* (ACT), Part 2 Div 1
NSW	✓	*Anti-Discrimination Act 1977* (NSW), Part 3A Div 5 & Part 4C Div 4	✓	*Conversion Practices Ban Act 2024* (NSW), Part 3. Only effective from 3 April 2025 and has no retrospective effect.
NT	✓	*Anti-Discrimination Act 1992* (NT), Part 3 Div 1 s 20A	✕	No official parliamentary consideration.
QLD	✓	*Anti-Discrimination Act 1991* (Qld), s 124A	✓	*Public Health Act 2005* (QLD), Chapter 5B
SA	✕	No official parliamentary consideration.	✕	No official parliamentary consideration, though Labor MP Ian

[7] Clark, M and Gogarty, B. Searching the Reins and Hearts: Conversion Practices Reforms in Australia. See eg. p 7.
[8] see generally Dworkin, Hart, Raz. See eg. HLA Hart, *The Concept of Law* (Clarendon Press, 2nd ed, 1994).

				Hunter urged the South Australian government to prohibit conversion therapy as recently as 29 November 2023.[9]
TAS	✓	*Anti-Discrimination Act 1998* (Tas), ss 3 & 19	×	In 2023, Tasmanian government announced intention to ban conversion therapy.
VIC	×	*Racial and Religious Tolerance Amendment (Anti-Vilification) Bill 2023* seeks to expand existing anti-vilification protections. The Victorian government is also currently considering responses to a general inquiry about anti-vilification laws.[10]	✓	*Change or Suppression (Conversion) Practices Prohibition Act 2021* (Vic), Part 2 Div 1
WA	×	No official parliamentary consideration.	×	In 2021, WA government announced intention to ban conversion therapy.

2. Discrimination law

2.1 The blanket exception that allows discrimination against LGBTIQ+ people in educational institutions on the basis of religion, as contained in s 38 of the *Sex Discrimination Act* (Cth) is a pressing threat to TGD people. While we wholeheartedly endorse the freedom of religion, there is a need to balance freedom of religion and belief with the right to equality, especially in educational settings. One type of religious belief (religious belief and activity) should not be prioritised over others (the rights of LGBTIQ+ people to equality).

2.2 We support the recommendations in the Australian Law Reform Commission's report on Religious Educational Institutions and Anti-Discrimination Laws.

3. Criminal Law

3.1 Coercive control can be used against TGD people in specific ways. Accordingly, there needs to be further education for police and first responders on identifying when coercive control tactics are being used against TDG people, as well as understanding the impact of such tactics on the TGD affected person. Some coercive control tactics towards TGD people are outlined in Victoria's

[9] Hansard Daily: Legislative Council - Wednesday, November 29 2023 (parliament.sa.gov.au)
[10] Response to the Inquiry into Anti-Vilification Protections | vic.gov.au (www.vic.gov.au)

Family Violence Multi-Agency Risk Assessment and Management Framework (**MARAM**). Examples in MARAM include:

a) 'outing a person', or threats to expose a person's sexuality or gender history;

b) pressuring someone to follow gender norms e.g., to dress a certain way or preventing gender affirming;

c) controlling or threatening behaviour to reveal/restrict someone's gender affirming healthcare, such as hiding or withholding medications and hormones;

d) threatening to reveal someone's HIV or related health status; or

e) using transphobia and homophobia and "lack of support as tools of control" (p. 34).

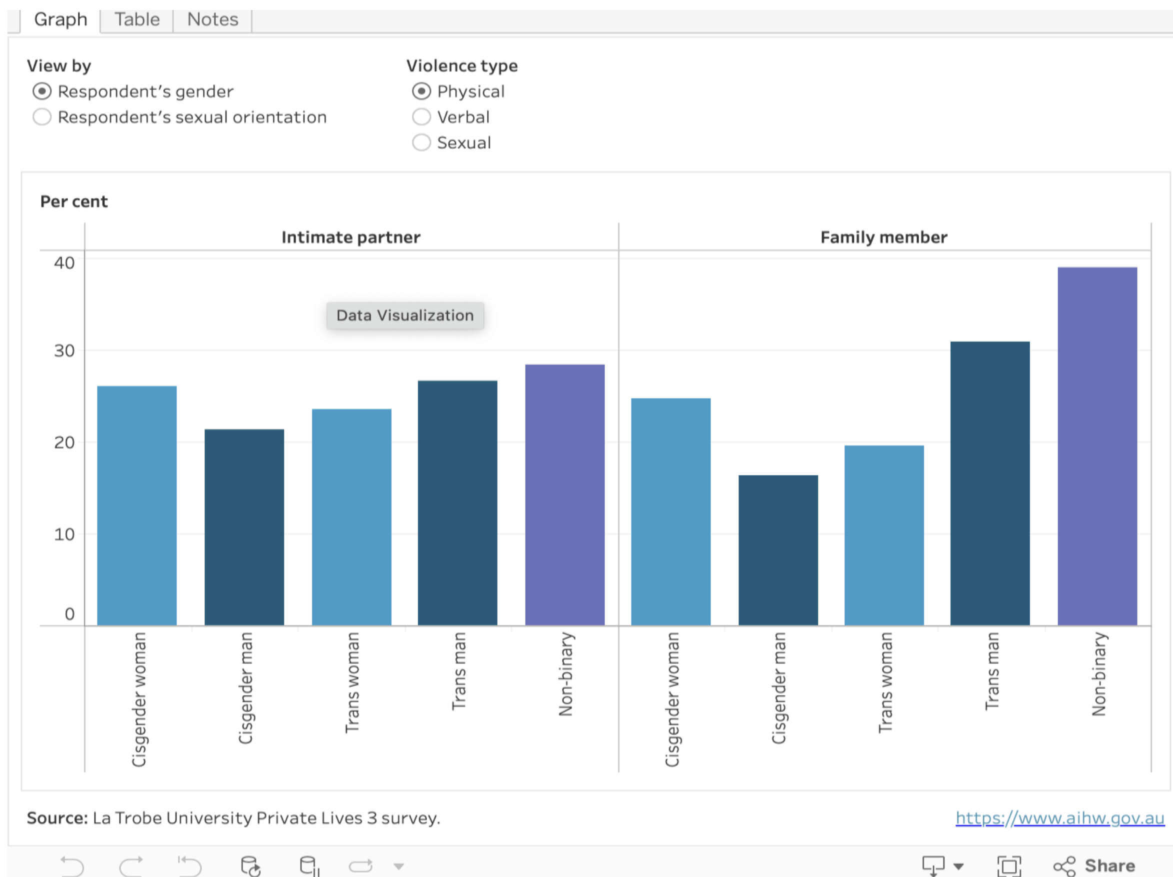
3.2 Gender significantly affects experiences of violence. In the La Trobe University Private Lives 3 Survey:

a) non-binary people reported higher proportions violence perpetrated against them (by any gender) when compared to other gender identities. This was consistent across all types of violence (except verbal) as perpetrated by a family member, which was highest for transgender men.

b) transgender men had the second highest proportion of violence perpetrated against them, followed by cisgender women, trans women and cisgender men;

c) cisgender men reported the lowest rates of violence across all types of violence by a perpetrator of any gender. (Figure 1).[11]

[11] Source: https://www.aihw.gov.au/family-domestic-and-sexual-violence/population-groups/lgbtiqa-people



4. Family Law - to the treatment of gender dyphoria

4.1 Family Court judgment in *Re Imogen*[12] imposes new and burdensome requirements for consent to treatment for young people with gender dysphoria. The role of the Courts in decision making for TGD young people to have stage 2 treatment has evolved significantly since 2004. Between 2004 and 2016, a TGD youth seeking stage 1 and 2 treatment for gender dysphoria needed Court approval. By 2017, in *Re Kelvin*[13]*,* the Full Court held that judicial intervention would not be necessary for stage 2 treatment if the TGD youth consented to the treatment, their medical practitioners determined they have *Gillick* competency to consent, and their parents did not object. The Full Court decision in *Re Kelvin* effectively reduced Family Court involvement in medical treatment for TGD youth.

4.2 The decision in *Re Imogen,* however, appears to reverse this trend. In *Re Imogen,* a single Judge held that if a parent or legal guardian does not consent to an adolescent's treatment for gender dysphoria, a medical practitioner should not administer treatment to an adolescent who wishes it, without court authorisation. Court authorisation is mandatory when there is parental dispute about *Gillick* competency, the diagnosis of gender dysphoria or the proposed treatment. The effect of *Re Imogen* is that the medical practitioner must inquire and obtain affirmative consent of both parents before administering stage 2 treatment. If one parent does not consent, or consent of one parent

[12] *Re: Imogen (No. 6)* [2020] FamCA 761
[13] *Re Kelvin* [2017] FamCAFC 258; (2017) FLC 93-809

cannot otherwise be obtained, then the medical practitioner cannot administer stage 2 treatment without Court authorisation.

4.3 Some of the key threats to TGD youth are as follows:[14]

a) The new legal requirements will delay access to treatment for TGD youth with *Gillick* competency in situations where parents are in conflict or where a parent is absent from a child's life. There is no requirement that parental objection be reasonable. Delayed access to treatment, alone and in combination with exposure to parental conflict, will cause TGD youth further psychosocial distress.

b) Related to the above, the requirement may put TGD youth at risk when a parent or guardian poses a threat to the TGD person's safety borne out of domestic violence, ideological opposition to the TGD's identity, or otherwise.

c) TGD youth who are *Gillick* competent but do not have supportive parents, and are forced to obtain Court approval, will experience further psychosocial and financial distress of increased exposure to the court system and lengthy litigation.

d) The above risks point to further increased exposure of TGD youth to unsupportive parents who can, irrespective of their role in the young person's life, veto the young person's treatment. Emboldening unsupportive family members contributes to TGD young people's depression, suicidality and self-harm.

e) The decision erodes the principle of *Gillick* competency, treating competency in TGD cases as a special category of case. In effect, for TGD youth wanting treatment, there is the additional requirement of an absence of parental dispute to either *Gillick* competency, or the diagnosis of gender dysphoria, or the course of treatment. This undermines the very purpose of *Gillick* competency in providing for adolescent autonomy. It also runs counter to other categories where if a child is *Gillick* competent, judicial intervention is not mandated for disputes about diagnosis and treatment.

f) *Re Imogen* creates resourcing challenges for medical professionals who are now required to obtain affirmative consent of both parents irrespective of the circumstances and, if unable to do so, endure lengthy litigation. Such resourcing challenges will ultimately be to the detriment of TGD young people.

5. Amending identity documents

5.1 NSW and WA[15] legislation prevents a person from amending their birth certificate unless they have undergone invasive and irreversible surgical procedures. All other states have amended

[14] https://www.mja.com.au/journal/2022/trans-youth-penalised-re-imogen-family-court-decsion, Jowett, Stephanie & Kelly, Fiona (2021) Re Imogen: A step in the wrong direction. Australian Journal of Family Law, 34(1), pp. 31-56 (https://eprints.qut.edu.au/210628/)

[15] *Births, Deaths and Marriages Registration Act 1995* (NSW) Part 5A, s32B(1)(b); *Gender Reassignment Act 2000* (WA) Part 3.

parallel provisions to allow amendments to birth certificates on the basis of affirming documentation.[16]

5.2 Australian research shows the detrimental impact to a person's mental well-being and health if forced to live with discordant identity documents. It risks forced exposure, which can be detrimental to mental health and may lead to discrimination, harassment and abuse.

5.3 Not all TGD people have undergone or wish to undergo invasive medical interventions; the current requirement to do so (and to undergo examination by two additional physicians), is pathologizing and stigmatizing. Global and domestic changes to remove such barriers have been successful, with no evidence of mis-use. Remaining barriers should be removed.

6. Transgender prisoners

6.1 Transgender people who are incarcerated are some of the most at-risk members within the TGD community. There are several key human rights issues that arise with respect to TGD people in incarceration:

a) **Lack of transparency and/or oversight.** Prisons inherently lack transparency creating a risk of human rights violations. Relevantly, it is unclear how many transgender people there are in Australian prisons,[17] the data that is available is likely to be an under-representation.[18]

b) **Gender segregated institutions**. In Australia, all prisons are segregated by gender, and prison authorities often have significant discretion to incarcerate prisoners in facilities that do not accord with prisoners' gender identities. In Victoria, the relevant policy provides that if a prisoner's 'external manifestation of their gender' does not accord with other prisoners with whom they are accommodated, the prisoner may be both at risk or present a risk to others.[19] These types of policies often result in transgender people being housed in environments that do not accord with their gender, in which they are at risk of violence.

c) **Use of isolation practices**. TGD prisoners are often segregated within institutions on the basis of safety. For example, in the Northern Territory, policy provides that "wherever possible", incarcerated TGD people should be separated from other incarcerated populations.[20]

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[16] *Births, Deaths and Marriages Registration Act 1996* (SA); *Births, Deaths and Marriages Registration Act* 1996 (Vic*); Births, Deaths and Marriages Registration Act* 1999 (Tas); *Births, Deaths and Marriages Registration Act 1997* (ACT); *Births, Deaths and Marriages Registration Act 2003* (Qld); *Births, Deaths and Marriages Registration Act 1996* (NT)

[17] Winter, C (2023) 'Correctional policies for the management of trans people in Australian prisons', International Journal of Transgender Health, 25(2) (Winter).

[18] Lynch, S., & Bartels, L. (2017), 'Transgender prisoners in Australia: An examination of the issues, law and policy', Flinders Law Journal, 19(2), 185–231.

[19] Corrections Victoria Commissioner, 'Commissioner's Requirements: Management of Prisoners who are Trans, Gender Diverse or Intersex', https://files.corrections.vic.gov.au/2021-06/2_63.docx.

[20] Winter, 139.

d) **Access to appropriate and safe medical care**. The denial of appropriate and safe medical care represents a significant risk for the rights of incarcerated TGD people. However, access to medical care, including gender affirming medical care, is variable.

e) **Access to legal change of name and gender processes**. TGD prisoners continue to face barriers to changing their legal names or gender/sex markers on their birth certificates. The process is the most restrictive in Victoria, where it is an offence for some prisoners to apply to change their name or sex/gender marker without having obtained the permission of the Secretary to the Department of Justice and Community Safety.[21]

6.2 In addressing benchmark recommendations that should be applied to Australian correctional facilities, the Commission may be aided by considering the World Professional Association of Transgender Health (**WPATH**) Standards of Care, Chapter 11.

7. Transphobia in Intersex health care

7.1 A key aim of medical interventions on intersex minors is to shape the body's sex characteristics to conform to assigned sex. Carpenter argues; '*Medicalisation is, in part, intended to construct people with heterosexual and cisgender identities, with bodies that can fulfil normative heterosexual functions.*'[22]

7.2 Clinical literature claims that conformity between assigned gender and bodily (including genital) appearance promotes the development of cisgender identity.[23] Surgical and medical efforts to match genitals with stereotypical male and female formation is assumed to be vital for stable psycho-social and psycho-sexual development. A recent article identifies two key aims of surgery as to 'Restore [sic] functional genital anatomy to allow future penetrative intercourse (as a male or a female) [and] facilitate future reproduction (as a male or a female) when possible.'[24] Stable development is equated with heterosexuality. As Clune -Taylor argues, '… contemporary intersex management both reifies the normalcy of cisgendered life and materially constitutes it as such.'[25]

7.3 For surgeons, and some therapists, the success of giving sex is based on how well the medically altered body functions and allows the patient to have a "normal" life, defined as living in a gender aligned with physiological sex and a heterosexual identity.[26]

7.4 The assumption that successful medical management of intersex embodiment equates to heterosexual cisgendered adulthood is echoed in legal decisions authorising sterilisation of young

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[21] Corrections Act 1986 (Vic) ss 47H, 47N.
[22] Morgan Carpenter, 'Intersex Human Rights, Sexual Orientation, Gender Identity, Sex Characteristics and the Yogyakarta Principles plus 10' (2021) 23(4) *Culture, Health and Sexuality* 516-532, 521.
[23] See, for example, Tom Mazur 'Gender Dysphoria and Gender Change in Androgen Insensitivity or Micropenis' (2005) 34(4) *Archives of Sexual Behavior* 411; Dana M Bakula et al, 'Gender identity outcomes in children with disorders/differences of sex development: Predictive factors' (2017) 41(4) *Seminars in Perinatology*, 214.
[24] Pierre D.E. Mouriquand, et al, 'Surgery in disorders of sex development (DSD) with a gender issue: If (why), when, and how?' (2016) 12(3) *Journal of Pediatric Urology*, 139-149.
[25] Catherine Clune-Taylor, 'Securing Cisgender Futures: Intersex Management under the 'Disorders of Sex Development" Treatment Model' (2019) 34(4) *Hypatia*, 690, 691. Clune-Taylor uses the term 'cisgender futures' in this context in a broad sense which extends beyond gender identity. 'Rather, I use this term to refer to a normalized trajectory of development across the lifespan in which multiple sexed, gendered, and sexual characteristics remain in dynamic but "coherent" alignment.' 691.
[26] G Davis, J M Dewey, and E L Murphy, 'Giving Sex: Deconstructing Intersex and Trans Medicalization Practices' (2015) 30(3) *Gender & Society* https://doi.org/10.1177/0891243215602102. 490-514.

children. In *Re Carla*[27], for example, the judge assumes that Carla will be heterosexual: 'Carla may also require other surgery in the future to enable her vaginal cavity to have adequate capacity for sexual intercourse.'[28]

7.5 Medical practices which carve sex into the bodies of infants and children to produce cisgendered heterosexual adults is a hidden form of violence based on trans-and homo-phobic attitudes, which threatens both TGD and cisgendered people.

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[1] *Births, Deaths and Marriages Registration Act 1995* (NSW) Part 5A, s32B(1)(b); *Gender Reassignment Act 2000* (WA) Part 3.

[2] *Births, Deaths and Marriages Registration Act 1996* (SA); *Births, Deaths and Marriages Registration Act* 1996 (Vic*); Births, Deaths and Marriages Registration Act* 1999 (Tas); *Births, Deaths and Marriages Registration Act 1997* (ACT); *Births, Deaths and Marriages Registration Act 2003* (Qld); *Births, Deaths and Marriages Registration Act 1996* (NT)

[3] P A Lee, et al, "Global Disorders of Sex Development Update since 2006: Perceptions, Approach and Care" (2016) 85 *Hormone Research in Paediatrics* 158 at 176 cited in United Nations Office of the High Commissioner for Human Rights *Human Rights Violations Against Intersex People: A Background Note*, (24 October 2019), available at Background Note on Human Rights Violations against Intersex People | OHCHR

[4] Tiffany Jones et al, *Intersex: Stories and Statistics from Australia* (Open Book Publishers, 2016)

[5] P A Lee, et al, "Global Disorders of Sex Development Update since 2006: Perceptions, Approach and Care" (2016) 85 *Hormone Research in Paediatrics* 158 at 176 cited in United Nations Office of the High Commissioner for Human Rights *Human Rights Violations Against Intersex People: A Background Note*, (24 October 2019), available at Background Note on Human Rights Violations against Intersex People | OHCHR citing

[6] Morgan Carpenter, 'Intersex Human Rights, Sexual Orientation, Gender Identity, Sex Characteristics and the Yogyakarta Principles plus 10' (2021) 23(4) *Culture, Health and Sexuality* 516-532, 521.

[7] See, for example, Tom Mazur 'Gender Dysphoria and Gender Change in Androgen Insensitivity or Micropenis' (2005) 34(4) *Archives of Sexual Behavior* 411; Dana M Bakula et al, 'Gender identity outcomes in children with disorders/differences of sex development: Predictive factors' (2017) 41(4) *Seminars in Perinatology*, 214.

[8] Pierre D.E. Mouriquand, et al, 'Surgery in disorders of sex development (DSD) with a gender issue: If (why), when, and how?' (2016) 12(3) *Journal of Pediatric Urology*, 139-149.

[27] *Re Carla (Medical Procedure)* [2016] FamCA 7, [18].

[28] Tiffany Jones et al, *Intersex: Stories and Statistics from Australia* (Open Book Publishers, 2016) ('*Intersex*').

[9] Catherine Clune-Taylor, ‘Securing Cisgender Futures: Intersex Management under the ‘Disorders of Sex Development” Treatment Model’ (2019) 34(4) *Hypatia*, 690, 691. Clune-Taylor uses the term ‘cisgender futures’ in this context in a broad sense which extends beyond gender identity. ‘Rather, I use this term to refer to a normalized trajectory of development across the lifespan in which multiple sexed, gendered, and sexual characteristics remain in dynamic but “coherent” alignment.' 691.

[10] G Davis, J M Dewey, and E L Murphy, ‘Giving Sex: Deconstructing Intersex and Trans Medicalization Practices’ (2015) 30(3) *Gender & Society* https://doi.org/10.1177/0891243215602102. 490-514.

[11] *Re Carla (Medical Procedure)* [2016] FamCA 7, [18].

[12] Tiffany Jones et al, *Intersex: Stories and Statistics from Australia* (Open Book Publishers, 2016) (‘*Intersex*’).