

What do intersex people want from the law?

– Dr Fae Garland and Dr Mitchell Travis

Introduction

Intersex is a term that is increasingly recognised in legal jurisdictions throughout the world. Despite the growth in recognition, the ways in which states have recognised intersex people have been diverse. Some, such as, Germany have made intersex a mandatory third gender. Australia, in contrast, allows opt-in 'X' markers on passports and have altered anti-discrimination law to include intersex characteristics. Malta, and more recently Portugal, in turn, have prohibited non-therapeutic medical interventions on intersex persons without their informed consent. This Briefing Paper reports the findings of an empirical study (funded by the Socio-Legal Studies Association (SLSA)), which is the first to scrutinise these different legal approaches drawing upon the perspectives of members of the intersex community (Garland & Travis 2018).

Method

Semi-structured interviews were conducted with 17 intersex rights activists of whom 14 identified as intersex. Respondents came from a diverse range of legal jurisdictions: Germany, Australia, UK, Denmark, USA and Sweden. Interviews were designed to explore how far the approaches adopted in different jurisdictions responded to the actual rather than perceived needs of the intersex community.

While this sample is non-representative of the entire intersex populace, the global awareness within the intersex activist community meant that respondents were able to effectively draw upon the practical experience within their own jurisdiction as well as offer comparisons with other legal approaches.

Given the sensitive nature of this topic, the authors ensured that the study complied with the SLSA's ethical guidelines.

Summary of key findings

1. Intersex people want non-therapeutic medical interventions on the bodies of intersex children to be prohibited by law until the children are able to provide informed consent.
2. Intersex people gave mixed results about anti-discrimination law. Some felt that it could be useful as a stepping-stone towards point 1. Others felt it would harm this objective by giving policy makers an 'easy win' and allow them to rest on their laurels.
3. Intersex people felt that X markers or third genders on passports or birth certificates were for the most part not relevant to the intersex community.
4. Intersex people felt that children should not be raised as third gender or as non-binary.
5. Intersex people reported that parents of intersex children were being given false or misleading information by healthcare practitioners to encourage them to consent to unnecessary and deferrable interventions.
6. Intersex people reported that intersex children and their families did not have much opportunity to meet other intersex people and their families and that such meetings could usefully be facilitated by the healthcare profession.
7. Intersex people reported a continuing lack of societal understanding of intersex issues and that broad educational reform was needed.

What is Intersex?

Intersex is an umbrella term that covers a range of different hormonal, chromosomal and gonadal variances that leave people with differing combinations of male and female characteristics. Whilst most of these variances are relatively benign, intersex people often encounter problems with law (and other institutions) that order people in terms of male or female.

What are non-therapeutic medical interventions?

Since at least the 1960's intersex people have been subjected to a range of different non-therapeutic medical interventions in order to make their genitals seem aesthetically more masculine or feminine. These include surgical interventions where a high percentage of intersex people were 'feminised' as one surgeon noted "you can make a hole but you can't build a pole" (Fausto-Sterling 2000: 59). Whilst surgical interventions have received the most attention from intersex activists, there are also a range of other medical interventions that include widening the newly constructed vagina with implements (such as dildos) by healthcare professionals or parents. Intersex people have, since the 1990's, questioned these practices highlighting that these surgical interventions are effectively sterilisation and the subsequent scar tissue can cause intersex people to have a severe lack of sexual sensitivity or function. Similarly, the broader medical interventions can cause notable psycho-social trauma. **Our research found these issues to be the main concern of intersex people and they wanted to see a prohibition of these interventions where the informed consent of the individual had not been obtained.** This type of legislation has now been introduced in Malta and Portugal and is being considered in Iceland. Such prohibitions draw sharp divisions between therapeutic and non-therapeutic medical interventions as well and encourage medical practitioners to consider whether interventions are deferrable. Intersex people felt that these issues clearly demarcated them from the LGBT community and that these issues were often neglected by LGBTI groups in favour of points of commonality.

What is the problem with third genders?

Germany has introduced a third gender to accommodate intersex people. Unfortunately, this legislation has led to a number of problems. For example, people who are third gender cannot marry anyone at all. It is also unclear how people can legally change their third gender (Travis 2015). This means that the battle to change societal perceptions of sex and gender falls unfairly on to children. This legislation has led to an increase in non-therapeutic medical interventions on children rather than a decrease (Amnesty International 2017) and our participants were concerned that automatically labelling

intersex individuals as 'X' would lead to an increased social stigmatisation and ostracisation. **As a result our participants did not support the need for the recognition of a third gender in law particularly where these were mandatory.**

Is there a need for Anti-Discrimination Law?

Australia has introduced anti-discrimination law in order to protect people who are perceived as having intersex variances. Our participants were split as to the desirability of anti-discrimination law. Some felt that it sent an important symbolic message about intersex equality and also raised the visibility of intersex people. Some saw that it might have some practical application allowing intersex people to feel safer disclosing their status to employers (in order to assist greater access to healthcare facilities for example). Others however, felt that a focus on anti-discrimination law took attention away from the more important issue of non-therapeutic medical interventions. Participants reported that anti-discrimination law was an easy win for policy makers as it coincided with the needs of LGBT campaigners. Intersex people were concerned though that these changes would then lead to stagnation in regard to intersex specific issues. **We recommend, therefore, that anti-discrimination law should be brought in alongside legislation that prohibits non-therapeutic medical interventions.**

Supporting Intersex People (according to intersex people):

- Non-therapeutic surgeries on the bodies of intersex children must be prohibited until the children are able to provide informed consent.
- Therapeutic surgeries must be closely monitored in order to ensure that they do not adhere to reasoning that relies upon aesthetics or normativity or present statistical information in a manner that is unduly biased.
- Intersex embodied children and their families should have the opportunity for contact with other intersex persons. This would enable a mixture of education and support for these families allowing them to raise concerns or ask questions in a de-pathologized environment. This, however, would require state funding of intersex organizations or new roles to be created within the National Health Service – relying on voluntary contributions would make the application of this policy unreliable and patchy.
- Educational reform is needed in order to combat binary understandings of sex and gender. Such an approach should highlight sex and gender as a spectrum rather than as a dichotomy. Long

term, this strategy would destabilize constructions of non-therapeutic surgeries as 'emergencies' allowing for a greater range of choices to be available to intersex embodied people. This reform is needed not only for medical personnel but should be built into the education system from a young age.

- At least for the medium term, children should continue to be raised as male or female, but with greater fluidity built into the legal categorizations of sex and attention paid to their wishes and desires. Reform is particularly necessary in regards to building ease and fluidity into the Births and Deaths Registration Act 1953.
- Anti-discrimination law can be a useful tool, but only when used in conjunction with bodily integrity. If bodily integrity is not prioritised anti-discrimination law risks being symbolic and worse, potentially entrenches intersex embodied persons into systems of marginalization. Consequently, where States like Germany and Australia have begun to introduce status-based reform, these must be accompanied by more holistic measures to offer any real resilience to intersex embodied people.
- Third gender markers (on passports and birth certificates) are largely unhelpful to the intersex community. Mandatory third gender markers on birth certificates for children may actually harm intersex embodied children and as such should not be an area of legislative reform. Third gender markers could be an option for interested adults.

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