# BRIEFING NOTE: HEALTH SAFEGUARDS FOR PEOPLE BORN WITH VARIATIONS IN SEX CHARACTERISTICS BILL 2025 (VIC)

## OVERVIEW

**This briefing note explains the purpose and operation of the Bill, the evidence base for reform, and why the Bill's safeguards – including criminal provisions – are necessary, proportionate and consistent with Victoria's human rights obligations.**

**Detailed information on the Bill is available in the Victorian Department of Health fact sheet, found here.**

## HARMFUL AND MEDICALLY UNNECESSARY INTERVENTIONS ON INTERSEX PEOPLE

People with innate variations in sex characteristics (**intersex people**) have a range of physical traits that differ from what medical and social norms for male and female bodies. Up to 1.7% of people may be intersex.

The adverse impacts of medically unnecessary procedures on intersex children are outlined in our report, The Missing Voice: A Thematic Analysis and Stories of Ongoing Medical Interventions on Intersex Children in Australia, released in December 2025 (**Report**). This report was informed by documents relating to medical procedures performed on intersex children, acquired through Freedom of Information requests. This Report found that:

- Intersex children continue to face a risk of harm from medical procedures that could be deferred until they have the capacity to provide informed consent; and
- The health system lacks a robust, independent framework to resolve complex cases involving intersex children.

Lasting impacts of these procedures include 'negative self-image, the need for further surgery, loss of sexual pleasure, loss of reproductive function and dysphoria for people placed in bodies that don't accord with their identity'.[1]

The Report also contains a series of case studies from intersex people who had experienced non-consensual medical interventions as a child and have faced ongoing physical, sexual and/or psychological issues as a result,[2] including from Victoria.[3]

## HUMAN RIGHTS OBLIGATIONS

The Bill directly addresses the human rights concerns raised by the Office of the United Nations High Commissioner for Human Rights in its recent report on *Discriminatory laws and policies, acts of violence and harmful practices against intersex persons.*[4]

The implementation of these measures in state law represents a concrete step towards giving domestic effect to the recent United Nations Human Rights Council resolution on *Combating discrimination, violence and harmful*

[1] Report, 6.

[2] Report, 27-36.

[3] See the stories of Jade and Tony in the Report at 28, 32.

[4] United Nations Human Rights Council, *Discriminatory laws and policies, acts of violence and harmful practices against intersex persons, Report of the Office of the United Nations High Commissioner for Human Rights*, UN Doc A/HRC/60/50 (8 August 2025), in particular paragraphs 10 – 14.

*practices against intersex persons* - a resolution which Australia co-sponsored.[5]

## CRIMINAL OFFENCE IS NECESSARY AND PROPORTIONATE

Clause 7 of the Bill creates a criminal offence for a person who knowingly or recklessly provides restricted medical treatment to a protected person without authorisation under the Bill. The offence is intended to deter unauthorised and potentially harmful interventions on applicable persons who lack capacity to give informed consent to the relevant restricted medical treatment.

Section 8 provides an exception for registered medical practitioners who believe on reasonable grounds that the restricted medical treatment is *urgently necessary* for a prescribed reason, including to save the person's life, prevent serious damage to health, or relieve or prevent significant pain or distress.

In practice, there are very few genuinely urgent medical interventions performed on intersex children. Examples may include:

• Salt-wasting congenital adrenal hyperplasia (**CAH**), a rare condition in which the body cannot retain sufficient salt, leading to life-threatening dehydration and electrolyte imbalance if not promptly treated; and

• Conditions where the urethra is not formed to an extent that allows urination, creating an immediate risk to the child's health.

## NO OTHER VIABLE OPTIONS

The architecture of the Bill requires a mechanism for enforcement to give effect to its safeguards. Without such a provision, the Bill would operate merely as a set of unenforceable guidelines.

Clinical guidelines have been shown to be ineffective. In a 2018 study regarding clinical adherence in relation to medical care provided to 6689 children in Australia that 'adherence to qualify of care indicators was estimated at 59.8%' leading to a finding that 'the overall prevalence of adherence to quality-of-care indicators for important conditions was not high'.[6]

Requirements such as approval processes for treatment plans must be anchored to a mechanism that carries consequences for non-compliance.

If the criminal provisions were removed, there would be no meaningful consequence for failure to comply. The only viable alternative would be a civil penalty regime, but this would be impractical. It would require the creation of a dedicated regulator, at significant cost, and given the expectation that breaches would be rare, such a body would be unlikely to have sufficient work to justify its existence.

Further, as seen in other jurisdictions such as Malta and Iceland, the absence of strong consequences for non-compliance has undermined the entire purpose of the laws.[7]

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[5] United Nations Human Rights Council, *Combating discrimination, violence and harmful practices against intersex* persons, 55th Sess, Agenda Item 3 , UN Doc, A/HRC/RES/55/14 (21 March 2024, adopted 4 April 2024).

[6] See Jeffrey Braithwaite et al, 'Quality of Health Care for Children in Australia 2012-2013' (2018) 319(11) *Journal of the American Medical Association* 1113, 1113 cited by, Morgan Carpenter, 'Clinical guidelines', *InterAction for Health and Human Rights* (online, revised 4 February 2025) https://interaction.org.au/resource/guidelines/.

[7] 'Eliminating Harmful Practices against and Promoting Human Rights Protection of Intersex People' (Equal Rights Coalition, 29 September 2023) 1:30:40–1:32:02 https://equalrightscoalition.org/webinars/eliminating-harmful-practices-against-and-promoting-human-rights-protection-of-intersex-people/; Fae Garland and Mitchell Travis, *Intersex*

## STRONGEST RECOGNITION OF HARM

The government has a duty to take reasonable and proportionate steps to prevent future harm, but also to acknowledge and respond to harm already done. In this context, the use of criminal law provides the strongest and clearest recognition of that harm, signalling that such conduct is no longer acceptable in Victoria today, and that children's bodily integrity must be protected as a priority.

## NOT A NOVEL APPROACH

The use of criminal law protections for vulnerable patients, against negligent or other harmful conduct by medical practitioners, is not novel in Australia, including in Victoria. For example, criminal penalties are prescribed for the following offences:

- carrying out special medical procedures without the consent of the Victorian Civil and Administration Tribunal (VCAT).[8]
- use and storage of gametes and embryos in fertility treatments.[9]
- female genital mutilation.[10]
- breaches of the safeguards around voluntary assisted dying procedures.[11]
- conversion practices.[12]
- administering medical research procedures without consent or without approval.[13]

Looking interstate, it is an offence in Queensland to perform or offer to perform a cosmetic procedure on a child.[14]

## PENALTY

The 2-year maximum penalty is not exceptional or disproportionate. Considering the lifelong harms that we know can result from unnecessary, non-consensual treatment on children, 2 years is relatively short with compared with other offences. For example, it is an offence, with the same maximum penalty, for a person to knowingly access the Victorian electronic patient health information system, without authorisation.[15]

## FLOODGATE OF PROSECUTIONS IS UNLIKELY

In practice, there is very little chance of prosecutions actually proceeding against practitioners in Victoria.

Criminal provisions are tightly confined so that criminal liability should arise only in very exceptional circumstances that warrant the strongest possible response. In practice, it would require a practitioner to ignore the available pathways for lawful treatment of a person who cannot consent to the treatment – including urgent treatment exceptions and independent approval through an authorised treatment plan – and to proceed with an intervention that is not even clinically required in the first place.

We note that any doctor falling foul of these provisions would likely be subject to professional discipline by the Australian Health Practitioner Regulation Agency (AHPRA) and civilly liable for medical negligence, for proceeding with medical care that is unnecessary and potentially harmful.

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*Embodiment: Legal Frameworks beyond Identity and Disorder* (Bristol University Press, 2023) 126

[8] *Guardianship and Administration Act 2019* (Vic) s 147.

[9] *Assisted Reproductive Treatment Act 2008* (Vic) ss 26-37.

[10] *Crimes Act 1958* (Vic) ss 32-34A

[11] *Voluntary Assisted Dying Act 2017* (Vic) ss 83-91

[12] *Change or Suppression (Conversion) Practices Prohibition Act 2021* (Vic) ss 10-14

[13] *Medical Treatment Planning and Decisions Act 2016* (Vic) ss 84-85.

[14] *Public Health Act 2005* (Qld) s 213B.

[15] See *Health Services Act 1988* (Vic) s 134ZP(1).

Proper adherence to the Bill's processes, and aligning with accepted standards of medical practice, will ensure that doctors acting in good faith are not exposed to criminal liability.

## REASONABLE EXPECTATIONS OF COMPLIANCE

The practitioners to whom the criminal provisions apply are highly trained, professionally regulated practitioners.

The long implementation period for the Bill, where reforms are expected to be implemented gradually until 1 December 2028 at the latest,[16] would provide ample opportunity to ensure that affected practitioners are aware of, and supported to comply with, the new requirements. This includes lead-in time, guidance materials, approved forms, and clear procedural pathways. The risk of inadvertent non-compliance is therefore low.

This context is materially different from concerns about over-criminalisation in settings such as youth justice, where criminal law may be applied to children or other marginalised groups with limited agency or access to legal knowledge. Here, the law is directed at a narrow group of sophisticated professionals who are well-placed to understand and comply with clearly articulated safeguards.

## DETERRENT EFFECT

While it cannot be said of all criminalisation, the criminal provisions in this particular Bill are likely to have a strong deterrent effect.

This is because deliberate or reckless unlawful conduct is not insurable and is incompatible with ongoing medical registration.

Practitioners who comply with the Bill's safeguards and with accepted standards of medical practice can continue to practice lawfully and maintain professional indemnity insurance. By contrast, those who knowingly operate outside the lawful framework face meaningful consequences that reflect the seriousness of the conduct.

In this way, the criminal law functions not as a punitive measure of first resort, but as a clear boundary-setting mechanism that reinforces best practice, deters unlawful behaviour, and protects children from irreversible harm.

## INTENTIONAL OR RECKLESS CONDUCT SHOULD BE RETAINED

The criminal offence in clause 7 of the Bill can be established either where a medical practitioner acted *intentionally* or *recklessly.*

Including recklessness recognises the professional duties owed by medical practitioners to their patients, including duties to act in accordance with accepted standards of care, to follow lawful processes, and to avoid foreseeable risks of serious harm.

Recklessness appropriately captures situations where a practitioner is aware of a substantial risk that their conduct is unauthorised or unlawful under the Bill and nonetheless proceeds with the treatment. This is a higher threshold than negligence and does not criminalise mere error, mistake, or inadvertent non-compliance.

The inclusion of recklessness is also necessary to prevent deliberate avoidance of the statutory framework. Without it, a practitioner could consciously disregard approval requirements, fail to make reasonable inquiries, or proceed in circumstances of clear

[16] Bill cl 2; Department of Health (Vic), 'New legislation to support people born with variations in sex characteristics' (Fact sheet, updated 2 December 2025) 4 .

legal uncertainty, while avoiding liability by asserting a lack of specific intent to contravene the law. Removing recklessness from the offence would undermine the entire protective purpose of the Bill.

## PARENTAL RIGHTS ARE APPROPRIATELY BALANCED

In matters involving medical decisions regarding children, while parental authority is ultimately important, it is the best interests of the child that must be the primary consideration. This understanding stems from article 3 of the Convention on the Rights of the Child as well as s 17(2) of the *Charter of Human Rights and Responsibilities Act 2006* (Vic).

The balancing of parental rights and the interests of children has been addressed in a series of Australian cases, including those involving procedures that can lead to sterilisation or loss of sexual function, similar in effect to medical interventions on intersex people. These cases have entrenched the principle that children's interests take precedence.

### HOW PARENTS REMAIN INVOLVED

Parents and guardians' role in their children's healthcare is not being usurped under this Bill, and the proposed reforms seek to ensure they are provided with information about their children's health and prospective treatment, and avenues for support in decision-making.

In the circumstances mentioned above, non-urgent treatment leading to permanent or difficult-to-reverse changes to sex characteristics, for children unable to provide informed consent, will require approval from the oversight panel.

Approved treatments will still require the consent of parents or guardians to the proceed. However, to protect the best interests of intersex children, treatments cannot proceed without panel approval, until the child gains capacity to provide informed consent, as they grow older, and over this time, the Victorian Department of Health will provide ongoing support for parents and children.

### PARENTS ALREADY HAVE LIMITS ON THEIR DECISION-MAKING

Under the status quo, parental authority to consent to medical treatment on behalf of a child is not unlimited.

This principle was clearly established by the High Court in *Secretary of the Department of Health and Community Services v JWB and SMB* (1992) 175 CLR 218 (***Re Marion***), which concerned a 14-year-old girl with severe intellectual disability whose parents sought approval for a hysterectomy and ovariectomy.

In *Re Marion*, the High Court held that court authorisation is required for the sterilisation of a minor, even where parents consent, because the procedure is irreversible, non-therapeutic, and engages fundamental rights. The Court characterised such interventions as "special medical procedures" that fall outside the scope of ordinary parental authority.

A procedure will fall outside parental authority where there is:

- a significant risk that an incorrect decision may be made; and
- particularly grave consequences if the wrong decision is made.

In these circumstances, the Court, not the parents, must determine whether the proposed procedure is in the best interests of the child.

Special medical procedures may include certain medical interventions performed on children with intersex variations, particularly where those interventions are irreversible, can

be deferred, and are not necessary to address an immediate threat to life or health.

Despite this established legal framework, court oversight of medical procedures performed on intersex children remains rare. In practice, where parents and clinicians agree on a proposed intervention, there is often no party with the incentive or capacity to initiate court proceedings.

## CLOSING GAP IN OVERSIGHT

A glaring gap in the protection for intersex children arose in the case of *Re Carla (Medical Procedure)* [2016] FamCA 7, where the Court found the parents of a 5-year-old could authorise treatment, including a gonadectomy (the removal of an ovary or testes), on their child without needing court authorisation.

This was despite the treatment arguably being non-urgent, with potential to result in the child's sterilisation. The Court determined the treatment fell within the scope of parental authority as it was therapeutic, on the basis that it was 'necessary to appropriately and proportionately treat a genetic bodily malfunction that, untreated, poses real and not insubstantial risks to the child's physical and emotional health'. The 5-year old child in question had previously undergone surgery twice to 'feminise [her] external appearance', including a clitorectomy and labioplasty, without court oversight or authorisation.

This Bill responds to this gap in oversight by establishing a specialised, multi-disciplinary approval body to provide structured oversight of restricted medical treatment for intersex children. This mechanism reflects and operationalises the principles in *Re Marion*, ensuring independent scrutiny of high-risk, irreversible decisions affecting children, without requiring families to navigate complex and costly court processes.

**For more information contact:**


Heather Corkhill
Legal Director
**Equality Australia**
**heather.corkhill@equalityaustralia.org.au**.

Morgan Carpenter
Executive Director
**Interaction for Health and Human Rights**
**morgan.carpenter@interaction.org.au**.