

# ANU GENDER IDENTITY AND SEXUALITY LAW MOOT 2021

## INTERNATIONAL COURT OF JUSTICE

2021

### The Rights of the Intersex Child (New Zealand v Australia)

1. In 2018, the New Zealand Human Rights Commission released its *Intersex Roundtable Report 2017 into Ending the Practice of Genital Normalisation on Intersex Children in New Zealand*.
2. In response to this report, lobbying groups such as the Intersex Trust Aotearoa and Intersex Awareness New Zealand lobbied the New Zealand Government to ban unnecessary gender 'normalising' surgery on children born with intersex characteristics.
3. These groups argued that surgery performed on intersex children can have serious lifelong physical and psychological consequences. This includes irreversible physical effects, including loss of sexual function and sensation, infertility and the need for ongoing medical intervention. Physical side effects are often accompanied by severe psychological distress, including depression and shame associated with an erasure of identity.
4. In response, the New Zealand government passed the *Human Rights (Autonomy of Intersex Children - Prohibition of Normalising Surgery) Amendment Act 2019* which amends the Human Rights Act 1993 (NZ) to the following effect:

#### Enactment

- (1) This Act comes into effect on 1 May 2019.

#### Section 62B Prohibition of gender normalising surgery on children with intersex characteristics without consent

- (1) Everyone has the right to:
  - (a) the recognition of their gender identity;
  - (b) The free development of their person according to their gender identity;
  - (c) Bodily integrity and physical autonomy.
- (2) It is recognised that, subject to their developing capacity, children have the right to:
  - (a) form a view and to express those views freely in all matters affecting the child; and
  - (b) express a view in relation to their healthcare; and
  - (c) make decisions in relation to their healthcare
- (3) It shall be unlawful for medical practitioners to conduct sex assignment treatment, surgical intervention, or other medical intervention, on a child where that treatment or intervention could be deferred until the child can provide informed consent.

- (a) For the purposes of this section, **child** is defined as any individual under the age of 18.
  - (b) For the purposes of this section, **informed consent** is obtained where a child has sufficient understanding and awareness to enable that child to understand fully what is proposed, and freely consents to what is proposed.
5. Nikau Manukau and Kishwar Chowdhury are Aotearoa/New Zealand citizens, who live in Auckland. On 15 March 2014 they had their first child, Manaia. Manaia was born with male gonads and no female reproductive organs. However, the doctors at the hospital assess Manaia as having the external appearance of a biologically female child.
6. Nikau and Kishwar are informed they could have surgery performed on Manaia to remove the male gonads. Nikau and Kishwar decide to wait a few years before they make a decision about medical intervention as they want to see how Manaia's gender identity develops socially. In line with the advice from the hospital, Nikau and Kishwar decide to raise Manaia as female.
7. By the time Manaia reached the age of five, Nikau and Kishwar considered that Manaia's gender identity had developed socially as female. They decide to seek further medical advice about possible surgical intervention.
8. Paediatrician Dr Pete Campbell, of Auckland City Hospital recommends that Manaia undergo "gender normalising" surgery, which would involve a clitoral recession and labiaplasty in order to 'feminise' Manaia's external genitalia as well as a gonadectomy to remove Manaia's gonads. Dr Evans additionally advises that there may be an increased risk of cancer if the surgery is not performed. For the greatest success, Dr Evans recommends that the surgery be performed before Manaia reaches puberty.
9. The surgery is scheduled for the 15 May 2019. However, following the passage of the *Human Rights (Autonomy of Intersex Children - Prohibition of Normalising Surgery) Amendment Act 2019*, Dr Evans informs Nikau and Kishwar that he is no longer legally able to perform the surgery.
10. Nikau and Kishwar are concerned about Manaia's long-term wellbeing. They fear that she will face stigma and are worried about the cancer risk if the surgery is not performed.
11. Manaia is not asked her views on whether or not she wants to have the surgery.
12. Nikau and Kishwar do some research and discover that gender normalising surgery is still legal in Australia. They therefore decide to fly to Sydney and have the surgery performed at the Sydney Private Hospital on 21 June 2019.
13. Nikau and Kishwar's circumstances are not unique. Many Aotearoa/New Zealand parents begin circumventing the prohibition against gender normalising surgery by flying to Australia to have the surgery performed there.
14. The New Zealand government is alerted to this trend and contacts the Australian government requesting that they prevent Aotearoa/New Zealand parents and guardians from undertaking surgery in Australia in circumstances that would not be permitted under the Human Rights Act 1993 (NZ).

15. The Australian Government refuses this request. They refer to the official position of the Australian Medical Association that:

*gender affirmation surgery is a medical, not a cosmetic procedure, that is necessary and beneficial for intersex children. It is left to the individual treating medical practitioners to recommend and perform those interventions that they consider are in the best interests of the child.*

16. Dissatisfied with this response, New Zealand commences a diplomatic protection claim against Australia in the International Court of Justice (ICJ) on behalf of Manaia. They alleged that Australia, by allowing gender normalising surgery without consent on children, has violated articles of the International Covenant on Civil and Political Rights (ICCPR) and the Convention on the Rights of the Child (CROC), to which both Australia and New Zealand are parties.

17. Australia consents to the jurisdiction of the ICJ to determine the dispute.

18. Aotearoa/New Zealand, as the applicant, respectfully requests the Court to:

- a. Adjudge that Australia's performance of surgery on intersex children without their consent is in violation of articles 7, 9(1) and 17 of the ICCPR.
- b. Adjudge that Australia's performance of surgery on intersex children without their consent is in violation of article 12(1) of the CROC.

19. Australia opposes New Zealand's application.

20. A preliminary hearing was conducted in August 2021. The Court accepted the following documents as expert evidence:

Australian Medical Association, *Sexual and Reproductive Health* (Position Statement, 2014)

<[https://www.ama.com.au/sites/default/files/documents/position\\_statement\\_on\\_sexual\\_and\\_reproductive\\_health\\_2014\\_0.pdf](https://www.ama.com.au/sites/default/files/documents/position_statement_on_sexual_and_reproductive_health_2014_0.pdf)>

Carmack, Adrienne et al., 2015, 'Should Surgery for Hypospadias Be Performed Before An Age of Consent?' (2016) 53(8) *The Journal of Sex Research* 1047 <<https://www.tandfonline-com.virtual.anu.edu.au/doi/full/10.1080/00224499.2015.1066745>>

Disorder of Sex Development Multidisciplinary Team at the Royal Children's Hospital, Submission No 92 to Senate Community Affairs Reference Committee, Parliament of Australia, *Involuntary or Coerced Sterilisation of Intersex People in Australia* (10 July 2013)

<[https://www.aph.gov.au/Parliamentary\\_Business/Committees/Senate/Community\\_Affairs/Involuntary\\_Sterilisation/Submissions](https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Community_Affairs/Involuntary_Sterilisation/Submissions)>

Gillam, L. H., Hewitt, J. K., & Warne, G. L. 'Ethical Principles for the Management of Infants with Disorders of Sex Development' (2010) 74(6) *Hormone Research in Paediatrics* 412 <<https://www.karger.com/Article/Abstract/316940>>

Hughes, Leuan A et al, 'Consensus Statement on the Management of Intersex Disorders' (2006) 91(7) *Archives of Disease in Childhood* 554 <<https://adc-bmj-com.virtual.anu.edu.au/content/91/7/554>>

Kuther, T 'Medical Decision-Making and Minors: Issues of Consent and Assent' (2003) 38(150) *Adolescence* 343 <<https://www-proquest-com.virtual.anu.edu.au/docview/195942431?pq-origsite=summon>>

McCabe, M 'Involving Children and Adolescents in Medical Decision Making: Developmental and Clinical Consideration' (1996) 21(4) *Journal of Paediatric Psychology* 505 <<https://academic.oup.com/jpepsy/article/21/4/505/1059946>>

Mouriquand, Pierre et al, 'The ESPU/SPU Standpoint on the Surgical Management of Disorders of Sex Development (DSD)' (2014) 10 *Journal of Paediatric Urology* 8 <<https://www-sciencedirect-com.virtual.anu.edu.au/science/article/pii/S1477513113003136>>

Grootens-Wigers, Petronella, 'Medical Decision-Making in Children and Adolescents: Developmental and Neuroscientific Aspects' (2017) 17(1) *BMC Paediatrics* 1 <<https://doaj.org/article/4387686855b643deaa4b6c44443ab27c>>

21. Teams are **not** required to address questions of jurisdiction or the criteria for diplomatic protection.

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