Discrimination against Intersex people in codes of conduct

Introduction

In the FOSS world there has been, over the better part of the last decade, a strong push to make most communities more accepting of the differences in its midst and foster a welcoming environment. Not to mention ensure that certain types of incidents in a number of communities never occurred again.

These are laudable goals and there are few who would disagree with the intent. The problem here is not with the intent, though, it's with the execution. Specifically with the adoption and enforcement of the Contributor Covenant,[1] the Community Covenant,[2] and certain source documents upon which those are based.[3]

What is Intersex?

The simplest working definition of intersex, as published by Intersex Human Rights Australia (IHRA) is:

> *Intersex people are born with physical sex characteristics that don't fit medical and social norms for female or male bodies.*[4]

While the United Nations' Office of the High Commissioner for Human Rights (UN OHCHR) used this definition in the 2019 background briefing note on intersex human rights issues:

> *Intersex is an umbrella term used to describe a wide range of innate bodily variations of sex characteristics.*
>
> *Intersex people are born with physical sex characteristics (such as sexual anatomy, reproductive organs, hormonal patterns and/or chromosomal patterns) that do not fit typical definitions for male or female bodies.*[5]

The IHRA website provides a very gentle introduction to what this all means and addresses some common misconceptions of intersex issues on their *Intersex for Allies* page.[6] As well as explaining the need for intersex inclusive language and how best to achieve it in their *Media and style guide*.[7]

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1   http://www.contributor-covenant.org/
2   https://community-covenant.net/version/1/0/
3   https://geekfeminism.wikia.org/wiki/Meta:Editorial_guidelines
4   https://ihra.org.au/18106/what-is-intersex/
5   https://www.ohchr.org/EN/Issues/Discrimination/Pages/BackgroundViolationsIntersexPeople.aspx
6   https://ihra.org.au/allies/
7   https://ihra.org.au/style/

To understand where the problems originate, it's necessary to examine the source documents and, to an extent, their principal author and his[8] motivations. The documents were mostly written between 2009 and 2012 under the auspices of the Geek Feminism project. The principal author, referred to here as T.C.,[9] is moderately well known in some technical circles and has been known for his very public political statements, along with a legal dispute with a former employer over some of these statements. His handle on the Geek Feminism wiki is Monadic.[10]

As a transgender individual of his age, T.C. has clearly been strongly influenced by some very controversial political views which were far more common in the 2000s. Specifically that sex differences are essentially meaningless and that the only lens to view anything of that nature is one of gender; furthermore that in the coining of the term cisgender and defining it the way it has been, it was possible to redefine other minorities without regard for the views of those minorities. The focus being one particular minority: intersex people. The motivations for that get fairly convoluted and not really relevant to the current situation beyond knowing that it happened. Though it has also led to some other very poor outcomes with other international organisations (e.g. WPATH).

At the time of T.C.'s authoring of these documents and in the years since, T.C. held the view that intersex was merely a subset of transgender, rather than its own separate thing. This is in contradiction with every intersex advocacy group in the world; who recognise that while there are some intersex people who identify as transgender, the majority do not.[11] While many lay people don't understand the difference and understandably so, particularly with intersex issues which have been largely suppressed until this century, this made them ripe to be exploited for their lack of knowledge.

T.C. also held the view that anyone who objected to this arbitrary redefining of what intersex is, including if those objecting were themselves intersex, was "biological essentialism" and inherently transphobic. Beyond that, T.C. and others holding similar views, have asserted that in order for an intersex person to not be transphobic then that intersex person must agree to this redefinition and ensure that transgender needs must be made a priority before any other consideration. Up to and including accepting that non-consensual intersex surgeries, what we call intersex genital mutilation (IGM), is an acceptable price to achieve this.

This, unsurprisingly, is anathema to intersex people and organisations. Non-consensual medical interventions and bodily integrity matters are the single biggest human rights issue facing intersex people in the modern world. To ask us to accept it would be like asking a rape victim if their rapist was sexy enough to think twice about. To simply expect that we will and classify non-compliance as bigotry is grossly insulting, at the very least.[12]

T.C.'s work on the Geek Feminism policy documents inevitably resulted in his biases affecting the work. In fact the entire collection was worded just carefully enough to ensure that in spite of all the text preventing discrimination, he was still able to achieve the specific type of discrimination he

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8   The original author identifies as a transgender man and uses he/him pronouns.
9   I can name him, but it won't make much difference and I'd rather fix the mess he's left behind than waste energy on him.
10 https://geekfeminism.wikia.org/wiki/User:Monadic
11 https://ihra.org.au/18194/differences-intersex-trans/
12 https://darlington.org.au/statement/

desired. This was achieved by leaving sex out as a protected category. Though some other feminists also complained about the lack of sex as a protected category, such things were usually covered enough by classifying "woman" and "girl" under gender, and there were already specific sections to cover sexual harassment and related issues. Leaving only the people for whom the point of differentiation is genetic; sex and not gender, with no grounds for protection and conflict due to that exclusion simply inevitable.

I discovered this situation in 2016, when I was at the time the most recent of who knows how many intersex people to encounter T.C. via the Geek Feminism wiki. A polite request for clarification on the differences between transgender and intersex resulted in an interphobic tirade,[13] a ban (only the beginning of this is still publicly visible online),[14] and then a few days later the same treatment for another user on the site who spoke up about it. It had been while I had been trawling through that project's policies in order to appeal T.C.'s actions and pronouncement that I analysed it in explicit detail and realised that according to those documents I had no grounds for appeal. This lack of recourse was solely due to being intersex and the whole matter rested on intersex not being what T.C. wanted to define it as.

That was frustrating, but the Internet is full of objectionable websites, so I moved on. I had not realised that that was merely the beginning, because at that stage I had not realised that this extremely problematic text had already formed the basis of Coraline Ada Ehmke's Contributor and Community Covenants. By the time I did, it had already been adopted by a lot of projects, including some I've contributed to in the past.

When I did finally have my attention drawn to that document I did, of course, have those realisations. I also thought that with a different maintainer, it might be possible to have the errors in the text with the insertion of sex as a protected category and thus cover all sex variations. This was when I discovered that there had already been some attempts to include sex as a protected class, particularly when it had previously been covered by some interpretations of "gender" and then that term had been removed in favour of "gender identity and expression." So if anything it had become a little more exclusionary and few had noticed or cared.

Sometime since then, however, a more recent moderator of the Geek Feminism wiki added this banner to their policies:

> The Geek Feminism Wiki is effectively in archival mode. New accounts are restricted from editing due to vandalism, and we do not have the volunteer labor available to whitelist new accounts and monitor activity. The content of the wiki (most of which was written between 2009 and 2012) likely reflects many undesirable biases, such as racism and ableism. We are keeping the content available as a community resource, but cannot update it, despite its flaws. You are welcome to fork and update content under the terms of the wiki's CC license.[15]

Though intersex issues aren't directly mentioned, it's likely that there were a number of other very undesirable effects resulting in the policies spreading further afield than its participants ever considered.

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13 Interphobia is the term for hatred of and discrimination against intersex people (ref.: homophobia, biphobia, etc.).
14 https://geekfeminism.wikia.org/wiki/Talk:TERF
15 https://geekfeminism.wikia.org/wiki/Meta:Editorial_guidelines

Contributor Covenant

The problematic part is mostly here, though any document built on such a tainted foundation will take a lot more than just a couple of edits to counter the damage of its adoption in the first place.

> In the interest of fostering an open and welcoming environment, we as contributors and maintainers pledge to make participation in our project and our community a harassment-free experience for everyone, regardless of age, body size, disability, ethnicity, gender identity and expression, level of experience, education, socio-economic status, nationality, personal appearance, race, religion, or sexual identity and orientation.

The only way to include intersex people on this list is to either do what T.C. did and wrongly classify it as a gender identity, or to classify it as a disability like the medical establishment does in order to justify performing IGM on intersex infants and children.

Neither of those are acceptable.

After the release of version 1.4 of the Covenant this text was slightly modified in an attempt to silence some of the criticisms in past issues[16] and pull requests.[17] This modification inserted "sex characteristics" between "ethnicity" and "gender identity and expression."

This is essentially a deflection. Sex characteristics could be generously interpreted as a shortened version of "variations of sex characteristics" which some intersex organisations are advocating as an alternative to the extraordinarily contentious disorders of sex development (DSD). More likely, however, it was meant to refer to sex characteristics which anyone might have. Thus it wouldn't afford any protection in an incident predicated on exploiting the existing flaws in both the intent and crafting of the Contributor Covenant.

Regardless of which of these things Coraline meant, let alone what she will say on the development of the Contributor Covenant, it's *very* clear that there was no attempt whatsoever to consult with any intersex people before proceeding. Nor did she seek advice from any intersex advocacy organisations, like InterACT.[18]

The Problem

Aside for providing cover for some truly objectionable views by at least T.C. and possibly also Coraline, as well as the means to discriminate against those intersex people who do object, the Covenant's structure is designed to prevent opposition from the outset. The wording of the Covenant mandates compliance and the acceptance of its terms from the moment of initial participation. In essence contribution at all requires accepting its fundamental goals.

Which means that someone with fundamental ethical and human rights based concerns with that policy and implicit contract can't even raise those concerns without automatically breaching the

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16 https://github.com/ContributorCovenant/contributor_covenant/issues/443
17 https://github.com/ContributorCovenant/contributor_covenant/pull/442
18 https://interactadvocates.org/

Code of Conduct.

This latter catch-22 situation has since been strengthened in the implementation of these types of policies by the Django Project with the addition of their diversity statement.[19] As with all the preceding documents, a careful reading of the Django Project's community conduct policies will show there's still nothing preventing the policies being enforced as originally intended by T.C. it is entirely unknown whether that was intentional or accidental.[20]

So for those intersex people who recognise this policy for what it is, they'll be kept out by an inability to accept those kinds of terms. For those who don't, then they will right now be participating in communities which are designed to ostracise them and keep them down, and sooner or later one or more of them will experience the full extent of what these policies can do.

The Australian Context

Other issues of concern in the Contributor Covenant issues archive include that the Covenant creates a formal contract between the maintainer(s) and the participants.[21] Another issue was raised with the potential conflicts with European laws and the various human rights treaties affecting the member states of the European Union.[22]

There are similar concerns affecting the Covenant and all similar documents in Australia, which should be of particular concern to any organisation adopting it or trying to enforce it in Australia.

In 2013, following a Senate Inquiry into forced sterilisations in Australian medical treatment of disabled[23] and intersex people,[24] the *Sex Discrimination Act 1984* was amended to include "intersex status" as a protected category. That amendment became law from January 1st, 2014.[25]

Since Commonwealth law definitively trumps a code of conduct, that protection creates a real problem for a document which was deliberately designed to enable such discrimination.

It would be fair to assume that the adoption of such a code or policy within Australia's borders is probably unlawful, and attempting to enforce it against intersex people the way it was by its original author is almost certainly illegal.

It is likely that there will be similar problems in many other countries, but I haven't checked any of them. Mainly because this is the point where adopters of the Covenant should be calling a lawyer.

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19 https://www.djangoproject.com/diversity/
20 Don't worry, I think well enough of most geeks to assume it was an attack of gross stupidity until actually told otherwise. On the other hand, I have been told otherwise before and by more than just T.C.
21 https://github.com/ContributorCovenant/contributor_covenant/issues/284
22 https://github.com/ContributorCovenant/contributor_covenant/issues/640
23 https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Community_Affairs/Involuntary_Sterilisation/First_Report
24 https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Community_Affairs/Involuntary_Sterilisation/Sec_Report/index
25 https://www.legislation.gov.au/Details/C2018C00499

Recommended Solutions

The primary recommendation, before even looking at whether or not to try salvaging the Contributor Covenant or even if that will help, is that on any matter affecting intersex people, then intersex people *must* be consulted.

In Australia that means listening to Intersex Human Rights Australia.[26] In the USA that means listening to InterACT.[27] Many countries have a national advocacy organisation, often under the banner of Organisation Intersex International (OII), but not all do.

My personal view is that codes of conduct which seek to regulate behaviour by explicitly protecting a list of classes for protection is a fundamentally flawed approach which is susceptible by design to be engineered to achieve discriminatory results. The Covenant and its origin are the proof of exactly that in action. Whereas codes of conduct which seek to regulate behaviour across an entire group regardless of who they are is more fair and less prone to being engineered in order to enforce a particular bias. It's the difference between a code of *conduct* and a code of *acceptable people*.

This is why I have said in the past, just to focus on the Python communities for a moment, that the old code of conduct of the Python Software Foundation (PSF) was actually superior to that of the Django Project with its diversity statement. Unfortunately it seems that the PSF has recently adopted[28] this same hateful policy without regard for the harm it will cause to approximately 1.7% of the population,[29] a demographic likely to be reflected across development communities.

As for fixing the Covenant and any similar documents. There's a law of diminishing returns on that given how widespread the existing versions are. Still, at the very least it would be necessary to counter all aspects of the document where the absence of protecting sex or natural genetic variation provides cover for discrimination. That's going to take some work to pick apart properly and address. Probably a fair bit more than merely inserting a couple of words.

Then that fix needs widespread adoption. Including making the case for it to be applied by all projects[30] which have already adopted the tainted Covenant.

Each and every organisation to do so (including the PSF, the Linux kernel, FreeBSD, the Django Project, and *many* others) has, whether knowingly or not, adopted a policy deliberately designed to adversely discriminate against a minority which already faces massive, systemic human rights violations on matters of bodily integrity,[31] eugenics,[32] and discrimination[33] in *every* country in the world.

That, finally, is the point at which each affected project bears some responsibility in creating this situation, because that is when they chose to perpetuate one person's hatred of intersex people as a matter of public policy.

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26 https://ihra.org.au/
27 https://interactadvocates.org/
28 http://pyfound.blogspot.com/2019/09/the-python-software-foundation-has_24.html
29 https://ihra.org.au/16601/intersex-numbers/
30 https://github.com/search?q="Contributor+Covenant"+fork%3Afalse&type=Code
31 https://ihra.org.au/bodily-integrity/
32 https://ihra.org.au/eugenics/
33 https://ihra.org.au/discrimination/