

THE PROBLEMATIC JUDICIAL VIEW OF GENDER DIVERSITY

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Ashleigh Bagshaw’s primary article provides an overview of historical developments in legal recognition of gender identity in Australian law. It tells the story of some improvement in the recognition of gender diversity. This response highlights some persistent problems with legal approaches, as demonstrated by the judicial decisions presented in the primary article and some of the language choices made in the article. This response seeks to humanise the experiences that sit behind the judicial determination of gender recognition in case law. There is room for considerable improvement in the

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understanding that legal decision makers have about the lived experiences of gender independent people.¹

I CLARIFYING THE DISTINCTION BETWEEN SEX AND GENDER

As noted in the primary article, the *Australian Government Sex and Gender Recognition Guidelines* make it clear that sex and gender are two different concepts; and, furthermore, that the Government's focus is on gender rather than sex. In Australian post-colonial culture there is a pervasive assumption that all people are either male or female in sex and either a man or a woman in gender.² This is a binary view of sex and gender. Neither concept is binary, with a range of sexes beyond male and female and genders beyond man and woman.

Sex is about biological characteristics, which are a combination of anatomy, internal sex organs and chromosomes. People who are intersex have a combination of male and female biological indicators of sex. The term 'hermaphrodite' is incorrect, because it refers to an animal with two fully functioning sets of 'male' and 'female' sex organs, and while this is possible in some animals, it is not possible in humans. The term is also seen as offensive to most intersex people. Most people are assigned a male or female sex at (or before) birth, based upon the look of their genitals. Sometimes a person's genitals are not clearly male or female. However, combinations of sex characteristics of intersex people vary considerably, and many live all their lives in the gender that corresponds to the sex they were assigned at birth without ever discovering that they are intersex. Some people discover that they are intersex at puberty or when they have medical interventions to explore infertility. Sex is not binary, and there are many natural variations in biological sex characteristics. Despite this, departure from a clear male or female sex is often treated as a disorder and many intersex people are subjected to invasive 'corrective' surgery to make their genitals and other reproductive organs appear consistent with the binary myth (ie, to make them appear more like a male or a female), often when they are young children.³ This kind of 'treatment' is criticised for prioritising looks over function, as

¹ 'Gender independence' includes people who identify as a gender other than the one that aligns with the sex that they were assigned at birth.

² This contrasts with the recognition of gender diversity in Australian Aboriginal communities: Stephen Craig Kerry, 'Sistergirls/brotherboys: The Status of Indigenous Transgender Australians' (2014) 15 *International Journal of Transgenderism* 173.

³ Katinka Schweizer et al, 'Gender Experience and Satisfaction with Gender Allocation in Adults with Diverse Intersex Conditions' (2014) 5(1) *Psychology and Sexuality* 56.

there is not usually a functional difficulty with the intersex person's body in its natural form, nor is there good evidence that people with non-conforming bodies suffer from psychosocial problems. In fact, when intersex individuals do suffer from psychosocial problems, they appear to be caused not by the intersex person's non-conforming body, but by the pressure imposed on them by others to try to conform.⁴

Gender is not the same thing as sex. Gender is about a person's personal and social identity. It is a social construct that attributes particular expectations about roles, behaviour, activities and attributes. People tend to draw conclusions about a person's gender identity from their gender presentation (or by asking them). Sex is not determinative of gender, and a person may identify as a gender that is independent from the sex they were assigned at birth. Most children identify as the gender that aligns with the sex that they were assigned at birth.

'Cisgender' is a term that means that a person's gender identity is congruent with the sex that they were assigned at birth. Cisgender is typically reinforced as 'normal' and departure from it as problematic.

'Gender independence' includes people who identify as a gender other than the one that aligns with the sex that they were assigned at birth. That gender may be as a man, woman, genderless, two-spirit, gender-fluid, or some other gender. Some gender independent people recognise a broad range of gender options, well beyond the traditional man, woman, transman or transwoman categories. Some people may identify as one gender but present as another, either by choice or because they have not been able to conform to stereotypical appearances of their identified gender.

The binary approach to gender is encouraged by gendered pronouns such as 'him' and 'her'. Gender independent people may prefer to use pronouns that are gendered, eg, 'him' or 'her', or gender neutral, eg, 'they' or 'zie'.

One subcategory of gender independent people includes those who identify as the gender stereotypically seen as the 'opposite' of the gender that normally corresponds to their sex assigned at birth. These people are often referred to as 'transgender', 'transman' or 'transwoman', but it is important to note that those people may also prefer to be identified simply as their identified gender ('man' or 'woman') without reference to their gender history.

⁴ Katrina Roen and Vickie Pasterski, 'Psychological Research and Intersex/DSD: Recent Developments and Future Directions' (2014) 5(1) *Psychology & Sexuality* 102.

Gender independent people who do not identify as a man or a woman will be excluded from recognition in many contexts. Exclusion is commonly demonstrated by the terminology and choices offered on administrative forms, public toilets, and gender specific services and sports. It is also demonstrated by the persistently heterosexist definition of marriage in Australia, with marriage only being recognised between a legally recognised man and woman.

Some gender independent people may show signs of distress and be diagnosed with gender identity dysphoria or similar pathologies.⁵ However, many object to their gender independent status being treated as a medical condition. When distress does exist, it is often based on a person's emotional reaction when their body and appearance do not conform to their identified gender. Some gender independent people undertake hormonal and/or surgical procedures to align their physical appearance with the gender with which they identify. Some people cannot afford to access such treatment and procedures, or may not be able to access them for other reasons. Others simply do not feel the need to alter their physical bodies to conform with stereotypes of how a person of a particular gender should appear.

II PERSISTENT PROBLEMS WITH THE JUDICIAL APPROACH

The judicial approach to gender identity persists with conflating the concepts of sex and gender and with preferring a binary view of both concepts. The natural diversity of human sex and gender is still not recognised within the legal approach. In most Australian jurisdictions, gender recognition as either a man or a woman depends upon a gender independent person having undergone some gender assignment medical treatment, usually surgical. This treats gender independence as a disorder that requires 'fixing' so that a person can be identified as either a man or a woman from their external physical appearance. Furthermore, gender fluid, genderless, and intersex identities are not accommodated easily within the predominant legal approach to sex and gender.

A *The Humans behind the Cases*

Here, some of the people who found their gender identity questioned in a court are introduced with appropriate, respectful language that recognises

⁵ American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* (DSM, 5th ed); *International Statistical Classification of Diseases and Related Health Problems* (ICD, 10th ed).

their gender identities. The medical histories are included because they were considered important by each of the courts involved in the cases.

1 *April*

April was a model who identified and expressed herself as a woman.⁶ April was assigned the male sex at birth. As an adult April lived as a woman and had gender reassignment surgery to align her body's appearance with her gender identity. Her surgery removed her male genitals and fashioned a vagina. She married a man, Arthur, who knew at the time of their marriage about her gender history, ie that she had been assigned the sex of male at birth. Arthur succeeded in his application for a declaration of nullity of their marriage on the basis that April was not a 'woman' according to law. Justice Ormerod determined that April's assigned sex at birth determined that she was a man, regardless of her gender identity and the physical attributes of her body post-surgery.

2 *Chris*

Chris was born intersex and assigned the male sex at birth.⁷ Chris identified and presented as a man. At puberty he started to grow breasts and menstruate. He underwent surgery in his early twenties to align his physical appearance with his gender identity. This surgery included removal of breast tissue and modification of his penis to enable him to urinate while standing. When he married Dorothea, she was unaware of Chris's gender history. Dorothea applied for a declaration of nullity on the basis that she was mistaken as to Chris's identity at the time of their marriage because she believed at that time that he was a male. Justice Bell ruled that the marriage was void because Chris was neither a man nor a woman, owing to him having sex characteristics of both male and female. In other words, Chris, as an intersex person, was incapable of marrying under Australian law.

3 *Lee and Phillis*

Lee and Phillis were both assigned the male sex at birth. However, both identified and expressed themselves as women.⁸ As women, they procured sex acts with undercover police men. They were charged with the offence of a male person procuring an act of indecency from another male person. They appealed their convictions on the basis that they were not male persons. Lee

⁶ *Corbett v Corbett* [1953] P 205.

⁷ *In the Marriage of C and D (falsely called C)* (1979) 35 FLR 340. I have assigned the names Chris and Dorothea to the people involved in this case who were identified as C and D.

⁸ *R v Harris and McGuinness* (1988) 17 NSWLR 158.

succeeded in her appeal because the Court held that she was psychologically a woman and had undergone hormonal treatment and gender reassignment surgery to affirm her gender identity. Chief Justice Street and Justices Carruthers and Mathews found Lee to be a woman for legal purposes. Phillis was unsuccessful in her appeal because although the court accepted that she was psychologically a woman, had hormonal treatment, and expressed her gender as a woman, she had not undergone gender reassignment surgery. Chief Justice Street, and Justices Carruthers and Mathews found Phillis to be a man for legal purposes, largely because she still had a penis and testicles.

4 *Kevin*

Kevin was assigned the female sex at birth but identified as a man from early in his childhood.⁹ Before his marriage to Jennifer he underwent hormonal and surgical treatment to make his bodily appearance consistent with his gender identity. Kevin's surgery included chest surgery and a full hysterectomy. Kevin had not had phalloplasty to construct a penis. (This surgery is not available in Australia.) Chief Justice Nicholson and Justices Ellis and Brown found Kevin to be a man for the purposes of marriage, on the basis of evidence that he identified, presented himself, and was identified by others as a man.

5 *Andrew and Alex*

Andrew and Alex were both assigned the female sex at birth, but identified and presented as men.¹⁰ They had undertaken hormonal treatment and had some sex reassignment surgery, including chest surgery. Neither had undergone hysterectomies or phalloplasty to construct a penis.¹¹ Chief Justice French and Justices Gummow, Hayne, Keifel and Bell recognised Andrew and Alex's gender identity as men. The High Court's decision meant that they were issued birth certificates confirming their gender identities.

6 *Norrie*

Norrie was assigned the male sex at birth.¹² Norrie did not identify as a man and underwent gender reassignment surgery to align her body¹³ with that

⁹ *Attorney-General (Cth) v "Kevin and Jennifer"* (2003) 172 FLR 300.

¹⁰ *AB v Western Australia; AH v Western Australia* (2011) 244 CLR 390. I have assigned the names Andrew and Alex to the people involved in this case who were identified as AB and AH.

¹¹ As noted above, phalloplasty is not available in Australia.

¹² *NSW Registrar of Births, Deaths and Marriages v Norrie* (2014) 250 CLR 490.

¹³ Norrie prefers to use feminine pronouns.

stereotypically expected of a woman's body. However, Norrie did not identify as a woman and rather, identified as genderless. Norrie applied to have her gender recorded as 'non-specific'. This was initially accepted by the NSW Registrar of Births, Deaths and Marriages, but the decision was later reversed. Norrie applied to the Human Rights Commission and the Court of Appeal and the Registrar appealed the Court of Appeal determination to the High Court. The High Court confirmed Norrie's identity as gender non-specific and the NSW Registrar of Births, Deaths and Marriages was required to record her gender as such on birth records.

B Pathologising Gender Independence

It is clear from the Australian cases outlined above that recognition of a gender that is different from the sex assigned at birth will usually require some medical treatment (and in some jurisdictions, surgical intervention) to align the person's physical appearance with their affirmed gender. The cases indicate that it is the bodily appearance that is prioritised, rather than internal reproductive organs or chromosomes. This focus on bodily appearance resulted in excruciating personal details of April, Chris, Lee, Phillis, Kevin, Andrew, Alex and Norrie's physical appearances and medical histories being not only revealed to the courts, but reported in the publicly available judgments.

Gender independent people are some of the most marginalised people in our community and many suffer discrimination, ill health, isolation, and financial difficulty.¹⁴ Gender assignment surgery is very expensive¹⁵ and not always available to everyone who desires it for various reasons. Many gender independent people also choose not to access medical intervention, and currently this results in their gender identity not being legally recognised.

The primary article cites examples of judicial caution about recognising gender according to a person's psychological identity because of fear of

¹⁴ Gabi Rosenstreich, *LGBTI People: Mental Health and Suicide* (Rev 2nd ed, 2013) Sydney: National LGBTI Health Alliance <https://www2.health.vic.gov.au/getfile/?sc_itemid=%7B9628310C-8018-4F8C-81CA-663424297A12%7D>; Working Group of the Gay, Lesbian, Bisexual, Transgender and Intersex Health and Wellbeing Ministerial Advisory Committee, *Transgender and Gender Diverse Health and Wellbeing: Background Paper* (2014) Department of Health State of Victoria <https://www2.health.vic.gov.au/getfile/?sc_itemid=%7B9628310C-8018-4F8C-81CA-663424297A12%7D>, 22.

¹⁵ Gay, Lesbian, Bisexual, Transgender and Intersex Health and Wellbeing Ministerial Advisory Committee, State Government of Victoria, *Transgender and Gender Diverse Health and Wellbeing: Background Paper* (2014), 25.

trickery from people asserting gender independence when there is some perceived advantage in doing so. The judicial fear about ‘imposters’ claiming gender independence is mirrored in hysterical reactions to the inclusion of gender independent people in sporting¹⁶ or gender specific public bathrooms.¹⁷ Is the fear of fraudulent claims to gender independence enough of a risk to deny the recognition of gender identity of some of the most marginalised individuals in our community? It would be impossible to do justice to this question here, but recommended reading is Andrew Sharpe’s *Transgender Jurisprudence: Dysphoric Bodies of Law*.¹⁸

III WHY DOES GENDER CATEGORISATION MATTER?

From a legal point of view, gender matters when a service or activity is restricted to a particular gender. Gender specific services are often aimed at promoting gender equity for women by providing spaces and opportunities removed from men’s dominance. However, this creates problems when gender independent people are excluded from access to participation in community life. Places where gender independent people may find themselves excluded include public change-rooms, bathrooms, shelters, and sporting activities.

Legal categorisation of gender also matters for the purpose of marriage as currently defined in Australia. As noted in the primary article, if the definition of marriage is amended to remove the requirement that the parties be ‘a man and a woman’, then gender identity will be less likely to require legal affirmation.

In conclusion, it is undeniable that the judicial approach to gender recognition has improved over the years. However, there is a need for better appreciation of the biological facts of sex characteristics, non-binary nature of the social construct of gender, and obstacles that gender independent people face in their daily life. The pathologised approach to gender

¹⁶ Alkira Reinfrank, ‘Transgender, Intersex People say they are Ostracised from Playing Sport in Australia’ ABC News (online) 23 August 2015 <<http://www.abc.net.au/news/2015-08-23/gender-diverse-community-ostracised-from-playing-sports/6710778>>.

¹⁷ See for example the successful campaigning in the US against gender independent people’s use of bathroom facilities: Russell Berman, ‘How Bathroom Fears Conquered Transgender Rights in Houston’ *The Atlantic* (Online) 3 November 2015 <<http://www.theatlantic.com/politics/archive/2015/11/how-bathroom-fears-conquered-transgender-rights-in-houston/414016/>>.

¹⁸ (Cavendish 2002).

independence places unnecessary obstacles in the way of people who could benefit from legal recognition of their gender identity.