

## RESPONSE: SEX/GENDER DIVERSITY AND THE LIMITATIONS OF LEGAL IDENTIFICATION

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The primary article ‘Exploring the Implications of Gender Identification for Transgender People Under Australian Law’ is a timely reminder of the parlous state of Australian law in relation to the legal rights and recognition afforded to transsexual people. As the primary article rightly points out, these laws have a troubled history of focusing narrowly on biological criteria, are somewhat uncertain in their contemporary application, and vary not only between the federal and state/territory levels but also within the state/territory level across the various different jurisdictions. The article suggests that the answer to these problems, and the way forward for Australian law in this area, is to adopt a uniform, consistent approach that cuts across these jurisdictional divides and that de-emphasises the importance of biological criteria in favour of other factors, such as social recognition and personal (psychological) identity. In particular, the article identifies that *Re Kevin*<sup>1</sup> and recent New Zealand developments provide legal models that should be emulated Australia-wide.

I am in broad agreement with the general sentiment behind the article, which is that transsexual people should have easier and clearer access to the legal recognition of the sex/gender with which they identify. I also agree with the general need for consistency in this area of law, and legal uniformity is one key way of guaranteeing this. However, there are three key issues raised by the argument put forward in the article that I would like to expand on here.

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<sup>1</sup> (2001) 165 FLR 404.

Firstly, sex and gender diversity goes beyond transsexualism and this would need to be factored into any future legal developments. Secondly, the implications of any change to marriage law could be profound for sex and gender diverse people, but only if this change proceeded in a certain way. Thirdly, debates about the fine detail of legal regulation in this area beg the question of whether law should even be in the business of identifying and recording people's sex/gender in the first place.

## I SEX AND GENDER DIVERSITY

As flagged in the primary article, transsexual people in Australia currently face a confusing and oftentimes restrictive set of legal regulations around the recognition of their sex/gender identity. However, when considering how the legal regulations around sex/gender could be developed it is important to think not only about the interests of transsexual people but also about the interests of a broader range of sex and gender diverse people in Australia. This would include taking into account people who are intersex,<sup>2</sup> as well as people who claim a sex/gender identity other than male or female, such as 'genderqueer', 'agender' or 'pangender'. Australian law is beginning to engage with the issue of the legal recognition of sex/gender identities outside the male/female binary, such as the recent case of *New South Wales Registrar of Births, Deaths and Marriages v Norrie*<sup>3</sup> where the High Court permitted the registration of 'non-specific' as a legal category of sex/gender on NSW birth certificates.

The issue here is thus not so much with what is included in the article but with what has not been included. By focusing narrowly on the legal definitions and tests involved in shifting between the categories of 'male' and 'female' what is lost is the recognition that the binary nature of these categories does not provide an inclusive schema for the full range of sex and gender diversity in Australia. If legal reforms of the type suggested in the article were to proceed, they would also need to be framed in a way that considered and incorporated a broader conceptualisation of sex/gender.

<sup>2</sup> An intersex person is someone who is born with biological characteristics that are neither clearly nor unambiguously identifiable with what is typically regarded as being male or female.

<sup>3</sup> (2014) 250 CLR 490.

## II REDEFINING MARRIAGE

The doctrinal analysis in the article rightly engages with the current (and historical) state of marriage law in Australia, namely that marriage has been heterosexistly confined to ‘the union of a man and a woman’.<sup>4</sup> Given the contemporary push for the revision of this definition, the article notes that ‘perhaps this is an opportune time for Australia to once again consider the broader debate revolving around same-sex marriage’. It should be emphasised here that such a legal change would not only be both symbolically and practically significant for homosexual and bisexual people throughout Australia, but that such a legal change also has the capacity to benefit sex and gender diverse people by removing the legal barrier of identifying their sex/gender identity in order to determine whom they can lawfully marry.

This capacity would not be fully engaged, however, if law were to develop in a way that simply extended legal recognition to include ‘same-sex’ marriage, that is if law were to recognise marriage as constituting the union of ‘a man and a man’ or ‘a woman and a woman’ alongside the union of ‘a man and a woman’. While such a change would undercut the legal significance of distinguishing between men and women here, it would still preserve a binary model of sex/gender and would retain male/female as central legal categories. Rather, this capacity would only be substantively actualised if law were to develop in a way that recognised marriage broadly as the union of ‘two people’ or ‘two persons’.<sup>5</sup> Such phrasing would undercut the legal relevance of sex/gender identity in this area of law altogether: historical and ongoing debates about how best to recognise the sex/gender identity of a transsexual person here would thus be rendered obsolete. Furthermore, such a shift would create space for people with non-binary sex/gender identities to marry, and to be married by, whomever they wish. Such a shift would also defuse the potential concern raised by the case of *In the Marriage of C and D (falsely called C)*<sup>6</sup> that if someone is legally recognised as being neither male nor female then they will have no legal right to marry anyone at all.

<sup>4</sup> *Marriage Act 1961* (Cth) s 5(1), drawing on the longstanding common law definition of marriage as found in cases such as *Hyde and Hyde v Woodmansee* (1866) LR 1 P&D 130.

<sup>5</sup> This phrasing is typical of recent Australian proposals for change, such as the Marriage Equality Amendment Bill 2013 (Cth) and the Marriage Amendment (Marriage Equality) Bill 2015 (Cth). However, the phrasing used in the *Marriage Equality (Same Sex) Act 2013 (ACT)* was ‘two people of the same sex’, although this language was specifically adopted as part of an unsuccessful attempt to ward off the inevitable High Court challenge (see: *Commonwealth v ACT* (2013) 250 CLR 441).

<sup>6</sup> (1979) 35 FLR 340.

## III THE LEGAL RELEVANCE OF SEX/GENDER

This article scrutinises a set of legal regulations around the recognition of sex/gender that have been the subject of ongoing development across the course of decades of legal and academic work. Close attention has been paid to a variety of factors in determining whether someone should be legally recognised as ‘male’ or ‘female’, including how they personally identify, how they are regarded by broader society, how their bodies/reproductive organs are structured, and what medical or surgical treatments they have undergone. In addition to questioning what factors should be relevant here, and advocating, as the article does, for a less restrictive set of factors, it is also important to think about why the law should even be involved in the process of identifying and recording someone’s sex/gender in the first place.

As the High Court noted in *New South Wales Registrar of Births, Deaths and Marriages v Norrie*:<sup>7</sup> ‘[f]or the most part, the sex of the individuals concerned is irrelevant to legal relations’. While it may be argued that there are legal areas where sex/gender distinctions are important, such as the segregation of prisons, other legal areas, such as marriage law, may draw distinctions on the basis of sex/gender without any compelling basis in principle or policy. There is therefore a sense in which detailed legal discussion about who should legally be recognised as ‘male’ or ‘female’ is a form of fiddling around the margins of a much bigger, more central question: does the law have any business dividing and differentially assigning rights to people on the basis of sex/gender? The article’s proposal of a looser and more empowering set of legal criteria for recognising a transsexual person’s sex/gender is one way forward for the future; an alternative proposal would be the removal of legal sex/gender recognition altogether in these areas.<sup>8</sup> Even if we were to reject such an alternative proposal, at the very least it forces us to think critically about whether, and why, sex/gender identity should have any legal relevance at all.

<sup>7</sup> (2014) 250 CLR 490, 500 [42].

<sup>8</sup> The merit of this kind of alternative proposal is something that I have engaged with elsewhere, see: Theodore Bennett, ‘No Man’s Land: Non-Binary Sex Identification in Australian Law and Policy’ (2014) 37(3) *University of New South Wales Law Journal* 847.