

When Sex Means ‘Condition’ or ‘Impairment’: Evaluating the Human Rights of Transgender and Intersex Peoples

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Introduction

Sexuality must not be thought of as a kind of natural given which power tries to hold in check, or as an obscure domain which knowledge tries gradually to uncover. It is the name which can be given to an historical construct: not a furtive reality that is difficult to grasp, but a great surface network in which the stimulation of bodies, the intensification of pleasures, the incitement to discourse, the formation of special knowledges, the strengthening of controls and resistances are linked to one another, in accordance with a few major strategies of knowledge and power.²

(T)he body is literally written on, inscribed by desire and signification, at the anatomical, physiological, and neurological levels. The body is in no sense naturally or innately psychical, sexual or sexed. It is indeterminate and indeterminable outside its social constitution as a body of a particular type...(T)he body...is an open-ended pliable set of significations, capable of being re-written, reconstituted in quite other terms than those which mark it, and consequently capable of reinscribing the forms of sexed identity and psychical subjectivity at work today.³

The recognition of human rights based on sexuality or gender identity at international law is only just beginning.⁴ This recognition has

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² Foucault M, *The History of Sexuality Volume one*, Allen Lane, London, 1978.

³ Grosz, Elizabeth *Volatile Bodies, Towards a Corporeal Feminism*, Allen and Unwin, Sydney, 1994, p.60.

⁴ When I wrote the first draft of this paper in 1998, there were no Australian articles giving an overview of the state of anti-discrimination laws and transgender people. Most authors chose instead to deal with transgenders' treatment by criminal, social security and family law. As far as I am aware, there are no articles dealing with anti-discrimination laws and intersex people. For a review of the lack of international protection for transgender people see for example, Amnesty International, *Crimes of Hate, Conspiracy of Silence: Torture and Ill-treatment Based on Sexual Identity*, Amnesty International Publications, 2001, and Heinz, E *Sexual Orientation, A Human Right: An Essay on International Human Rights Law*, Martinus Nijhoff Publishers, London, 1995. Although there are no instruments at international law which deal

begun to be implemented at a domestic level, in for example, Australia's anti-discrimination legislation. Most states and territories now incorporate 'transsexuality', 'transgender' or 'gender identity' as a ground of discrimination.⁵ In part one of this paper I evaluate the protection of human rights, contrasting those jurisdictions which do and do not include 'transgender' as a ground of discrimination. The crux of my argument is that narrow legal and medical constructions of 'sex', 'gender' and 'transsexuality' and even 'transgender' refuse to allow discrimination on the basis of gender identity to be conceived of as a form of sex discrimination. This refusal continues to obstruct the potentiality of human rights in this area. These constructions, I shall argue, are based upon a longing to preserve and protect the system and meaning of 'binary-sex', the sacred heart of a hetero-patriarchal economics. As Cixous has phrased it, '...Logocentrism subjects thought - all concepts, codes and values - to a binary system, related to 'the' couple, man/woman...'⁶

In part two I examine some rights which are specific to transgender. The right to marriage, privacy and rights in relation to the criminal law are three areas that I have looked at in detail. These rights are tied to more general demands for the right to determine sex or gender identity, an agenda that falls outside the scope of most anti-discrimination law.

In part three, I talk about the extent to which anti-discrimination laws might be invoked to protect intersex infants from genital mutilation. As is the case with transgender, there is a medico-legal tendency to inscribe intersexuality as an abnormality, disease or condition, rather than as a sex or human identity.

Throughout this article, I have chosen to use the term transgender. I use the term 'transsexual' only where it has been adopted as a term of self-definition, and where I am discussing the terms use in legal and medical contexts. The medico-legal definition of transsexual is 'a dissonance or maladjustment between the person's sex as apparent

specifically with transgender rights, see the *International Bill of Gender Rights*, drafted and adopted at the second annual meeting of the International Conference on Transgender Law and Employment Policy, Houston Texas, August 1993, as reproduced and discussed by Alston A, 'Transgender Rights as Legal Rights' (1999) 7 *Canterbury Law Review* 329-42.

⁵ *Anti-Discrimination Act* 1977 (NSW) Part 3A, *Anti-Discrimination Act* 1998 (Tas) s 16, *Equal Opportunity Act* 1995 (Vic) s 5(ac), *Equal Opportunity Act* 1984 (WA) s 35AA, *Discrimination Act* 1991 (ACT) s 7(1) c, *Equal Opportunity Act* 1984 (SA) s 5, *Anti-discrimination Act* 1992 (NT) s 19. QLD does not have any such provision, but only a ground of 'lawful sexual activity'.

⁶ Cixous H, 'Sorties' in Easthope A and McGowan K (eds), *A Critical and Cultural Theory Reader*, Allen and Unwin, Sydney, 1992, p.147.

from their physical body, and the person's sense of sexual identity'.⁷ Unlike many authors, I do not adhere to a medical definition of transsexual, which assumes transsexuality is a form of mental or physical illness for which there is a cure.

The term transgender has been described as 'one of community'.⁸ Transgender in its most inclusive sense refers to those whose identity, thoughts and actions do not conform to dominant ideas about what it means to be male or female, masculine or feminine. As Bolin expresses the term's meaning, 'transgenderist is a community term denoting kinship among those with gender-variant identities'.⁹ Arguably, the transsexual/transvestite dichotomy has been displaced by the term 'transgender', which has come to encompass a range of identities, and experiences, which exceed this division. The term transgender, in its political sense, questions the sex/gender dichotomy as a system of meaning. Some theorists argue for the recognition of a third sex/gender category.¹⁰

Pt 1: Transgender and anti-discrimination law: an overview

At the core of the problem of this recognition is the law's demand that a person must prove an essential sex/gender subjectivity exists before discrimination can be proved. I contend that most 'gender discrimination' stems from the fact that the subject does not have a unified or fixed sex or gender identity. Therefore, the addition of 'transgender' as a ground will do little to enhance the human rights of gender minorities.

In order to receive protection under Australia's anti-discrimination laws, transgendered people must present their bodies and subjectivities to fit a variety of particular conceptions of 'sex', according to jurisdiction.

⁷ This definition was adopted in *Menzies v Waycott* [2001] VCAT 13 at para 227.

⁸ Bolin A, *In Search of Eve: Transsexual Rites of Passage*, South Hadley, Massachusetts, 1988.

⁹ Bolin, note 8, p10.

¹⁰ Kogan T, 'Intersections of Race, Ethnicity, Class, Gender and Sexual Orientation: Transsexuals and Critical Gender Theory: The Possibility of a Restroom Labelled "Other"', (2000) 48 *Hastings Law Journal*, 1223, see also Herdt G (Ed), *Third Sex, Third Gender: Beyond Sexual Dimorphism in Culture and History*, Zone Books, New York, 1994.

These can be summarised as jurisdictions which:

- Cover sex discrimination¹¹
- Cover sexuality discrimination, but not transsexual/transgender discrimination¹²
- Include protection only for post-operative transsexuals¹³
- Include transgender as a ground of discrimination¹⁴
- Transgender/transsexuality not included as a ground, but transsexuality may be interpreted as falling under a separate ground such as ‘disability’, or ‘impairment’ discrimination.¹⁵

Jurisdictions that cover sex discrimination

Until recently, no Australian jurisdiction included transgender specifically as an attribute of discrimination. Proving discrimination for transgender was possible only under the ground of sex. In overseas jurisdictions such as the US, transgenders continue to rely upon this ground in order to bring a discrimination claim.¹⁶

Queensland is now the only state or territory which does not include transgender or transsexuality as an explicit ground. A transgender person in Queensland, where no gender identity ground exists, might choose to argue that discrimination had occurred on the ground of sex.¹⁷ The *Sex Discrimination Act 1984* (Cth) defines sex discrimination as ‘less favourable treatment’ in circumstances that are the same or are not materially different, the discriminator treats or would treat a person of the *opposite sex*’ (my italics).¹⁸ While most people take for granted that sex means ‘man’ and ‘woman’, ‘male’ and ‘female’, for gender minorities, the law’s understanding of these categories as pre-given rather than political and re-thinkable in itself

¹¹ For example UK, European and US jurisdictions.

¹² All State, Territory and Commonwealth jurisdictions.

¹³ SA, WA.

¹⁴ NSW, Vic.

¹⁵ See the *Equal Opportunity Act 1995* (Vic), prior to the enactment of the *Equal Opportunity (Gender Identity and Sexual Orientation Act) 2000*.

¹⁶ See for example, Flynn T, 'Transforming the Debate: Why We Need to Include Transgender Rights in the Struggles for Sex and Sexuality Orientation Equality' (2001) 101 *Columbia Law Review* 392.

¹⁷ *Sex Discrimination Act 1984* (Cth) s 5(1), *Equal Opportunity Act 1995* (Vic) s, *Anti-discrimination Act 1998* (Tas) s 16,

¹⁸ s 5(1)

amounts to a forced invisibility and discrimination. In presuming that sex is an essential human characteristic which is fixed, dual, and opposite, the law renders invisible certain acts of discrimination against the bodies of gender minorities. I would argue that while the law's role in actively constituting and maintaining the very meaning of 'sex' remains masked, the systemic nature of discrimination against gender minorities cannot be challenged.

In a number of countries where anti-discrimination legislation exists, the law has failed to see discrimination against transgenders on the ground of sex. In the American case of *Grossman v Bernards Township Board of Education*¹⁹ it was held that the plaintiff was discharged from the defendant school not because of her status as female, but because it became aware of her change in sex from the male to the female gender. The court stated that it was 'reluctant to ascribe any import into the term 'sex' other than its 'plain meaning'.²⁰

In *EA White v British Sugar Corporation*,²¹ the complainant, an anatomical female, appeared at an interview as a man and was offered a job. He was dismissed upon discovery of his biological 'sex'. The Industrial Tribunal stated that the complainant had no cause of action. A transsexual who is less favourably treated on the ground of his or her sex will have the same protection under anti-discrimination laws as other persons of that (anatomical) sex. This doesn't cover discrimination based on the sex one lives or identifies as, or recognition of sex change procedures. Nor does it cover being discriminated against on the basis of one's status as transgender.²² Where there are no specific provisions to discrimination on transgender grounds, sex discrimination provisions have historically been ineffective to offer protection against less favourable treatment in employment.

¹⁹ 11 F.E.P. Cases 1196 (1975) aff'd, 583 F.2d 319 (1976), cert. denied 429 US 897 (1976) cited by Pannick D, (1983) 'Homosexuals, Transsexuals and the Sex Discrimination Act' *Public Law*, p.289.

²⁰ Pannick, note 19.

²¹ [1977] I.R.L.R 121, cited by Pannick, note 19, p.289.

²² see also *Dobre v National Railroad Passenger Corp.* 850 F. Supp. 284 (E. Pa. 1993), *Holloway v Authur Anderson & Company* 566 F.2d 659 (9th Cir. 1977), *Ulane v Eastern Airlines* 742F.2d 1081 (7th Cir. 1984) as examples of US cases where it was held that 'sex' does not include 'sexual identity', and that it is lawful to discriminate on the basis of transsexuality. In *Columbia v Archer Management Services Inc.* 857F Supp. 96 (D.C Cir. 1994) the court held that 'sex' discrimination does not include discrimination against a post-transsexual.

However, a recent case decided in the European Court of Justice shows the possibility that sex discrimination provisions may be interpreted to protect transgenders. In *P v S and Cornwall County Council*, the majority held that the dismissal of a male-to-female transsexual amounted to direct sex discrimination.²³ P was dismissed after informing her employer of her intention to undergo gender reassignment. The court said, 'such discrimination is based essentially, if not exclusively, on the sex of the person concerned. Where the person is dismissed on the ground that he or she intends to undergo, or has undergone, gender reassignment, he or she is treated less favourably by comparison with persons of the sex to which he or she was deemed to belong before undergoing gender reassignment'.²⁴

Where is the basis of 'sex' located? In many sex discrimination cases, and sex discrimination legislation 'sex' is defined as a characteristic that is fixed and as something that is opposite. Thus, a woman is treated less favourably than a man is. But in transgender cases, where is the opposite sex? Hence, it is the definition of sex that is itself discriminatory and may result in the inability to see a discriminatory act based on 'sex'. There is a similar problem in trying to recognise discrimination based on sexuality as sex discrimination. Do we solve the problem, by identifying a new basis of discrimination (sexuality, transgender), or would the problem be better solved by challenging restricted conceptions of sex? Wintemute characterises the existence of the legal categories of 'man' and 'woman' and the refusal of the UK to permit transsexual persons to transfer from one to the other as forms of discrimination.²⁵ Thus I would argue that it is the existence of the sex/gender system, and the institutions of law and medicine which insist on sexual dualism, which produces discrimination against indeterminate bodies.

²³ Wintemute R, 'Recognising Kinds of Direct Discrimination: Transsexualism, Sexual Orientation and Dress Codes' (1997) 60 (3) *Modern Law Review*, p334.

²⁴ Wintemute, note 23.

²⁵ Wintemute, note 23.

Jurisdictions where discrimination is prohibited on the grounds of 'sexuality' or 'lawful sexual activity'.²⁶

In Queensland, a transgender person might also attempt to bring a claim under the Act for discrimination on the basis of 'lawful sexual activity'.²⁷ Whether this ground would extend to transgender discrimination is questionable. Gilmour-Walsh in her essay 'Exploring Approaches to Discrimination on the Basis of Same-Sex Activity', illustrated the inadequacy of sex discrimination legislation to interpret 'sex' to cover discrimination on the basis of sexuality.²⁸ It is perhaps even less likely that discrimination on the basis of a person's gender identity could be interpreted as discrimination on the basis of lawful sexual activity. A transgender identity can not easily be described as a sexual activity.

Stewart points out that the Victorian Act (as it stood in 1995) failed to recognise sexuality as an identity or a way of living.²⁹ Bunch posits an analysis of (hetero) sexuality as a system of privilege based on women's subordinate social and economic position under patriarchy: 'if you do not accept that definition, you're a queer - no matter whom you sleep with'.³⁰ Sexuality, when equated with lawful sexual activity, denies the political nature of same sex unions. It also denies the threat/challenge that same sex unions make to systems of heterosexual privilege. Discrimination, (particularly systemic discrimination) might be better understood not based on 'sexual activity', but on the perceived threat of certain bodies to a system of male dominance.

Kendall argues that there exists systemic links between homophobia and sexism.³¹ I would make the further link between homophobia, the subordination of women and the oppression of gender minorities. Muller, for example argues that 'transsexuality and how it is 'treated' by the medical and legal profession...provides a unique opportunity to witness the ways in which dominant and reductionist views about sex

²⁶ Note that the *Anti-discrimination Act 1998* (Tas) does not explicitly include transgender or transsexuality as a ground in itself, but includes 'transsexuality' as part of the definition of 'sexuality' under s 3.

²⁷ *Anti-Discrimination Act 1991* (Qld)

²⁸ Gilmour-Walsh B, 'Exploring Approaches to Discrimination on the Basis of Same Sex Activity' (1994) 3 *The Australian Feminist Law Journal*.

²⁹ Stewart M, 'Equal Opportunity: Except for you...and you...and you' (1995) 20 *Alt L.J.* 196.

³⁰ Bunch C, 'Heterosexual Privilege', in Gunew S (ed.), *A Reader in Feminist Knowledge*, Routledge, London, 1991.

³¹ Kendall C, 'Sexuality: What's Law got to do with it' 20 *Alt L.J.*, 268.

and gender, about the body, biology, 'male' and 'female' continue to exert their influence'.³² Morgan Holmes has argued that

'intersex bodies blur distinctions between the two recognised categories of sex as they are constructed in Western, heterosexist culture. Only by limiting the possibilities to two distinct sexes can a predominantly homophobic culture posit that heterosexuality is normal/natural and not a cultural imperative'.³³

Hence, when looking at discrimination against gender minorities, I believe that an analysis based on relations of domination and subordination between transgenders and non-transgenders is necessary.

There is no case law to suggest that a person discriminated against on the ground of their identity as transsexual or transgender might succeed under a sexuality provision that does not explicitly refer to 'transsexuality'. However, some Australian anti-discrimination legislation appears to have been drafted to encompass 'transsexuality' under the definitions of 'sexuality' or 'sexual orientation'.³⁴ I would argue that the transsexual body is characterised as an 'orientation' in order to exile transgender identities from the danger they might cause to the sacred category of 'sex'. This restricts a rights agenda based on demands to redetermine the historical and political meanings of sex.

Jurisdictions which include discrimination against post-operative transsexuals

Western Australian law contains provisions for the protection of persons on 'gender history grounds'.³⁵ A 'gender history' is defined to mean 'if the person identifies as a member of the opposite sex by

³² Muller V, 'Trapped in the Body: Transsexualism, The Law, Sexual Identity' (1994) 3 *Australian Feminist Law Journal*, p 115. Transgender authors Kate Bornstein, Sandy Stone and others make various connections between the oppression of women and transgenders.

³³ Holmes M, 'Queer Cut Bodies: Intersexuality and Homophobia in Medical Practice', <<http://www.isna.org>> (14 May 1998).

³⁴ *Equal Opportunity Act* 1984 (SA) s 3 'sexuality' means heterosexuality, homosexuality, bi-sexuality or transsexuality', *Anti-Discrimination Act* 1998 (Tas) s 3 'sexual orientation' includes transsexuality, *Anti-Discrimination Act* 1992 (NT) s 4 'sexuality' defined as 'the sexual characteristics or imputed characteristics of heterosexuality, homosexuality, bisexuality or transsexuality'.

³⁵ *Equal Opportunity Act* 1984 (WA) s 35AA(1).

living, or seeking to live, as a member of the opposite sex'.³⁶ At first glance this provision appears to encompass at least all persons who might meet a medical definition of 'transsexual'. However, the next section makes it clear that a transgender person does not have a 'gender history' unless they are a 'gender reassigned person'. A 'gender reassigned person' is defined to be 'a person who has been issued with a recognition certificate under the *Gender Reassignment Act 2000 (WA)* or a certificate which is an equivalent certificate for the purposes of that Act'.³⁷ In order to gain such a certificate, a person must a) desire to take the path of hormone therapy and genital reconstruction, b) be accepted for sex reassignment surgery which involves stringent requirements and surveillance (this is not an automatic right), c) have an application for a recognition certificate accepted by the Gender Reassignment Board.³⁸ They do not have a 'gender history' until gender reassignment is complete. It is only transgender people who meet these stringent requirements who will be recognised as a person who might succeed to prove discrimination on the grounds of gender.

In South Australia, 'transsexuality' means 'the condition of being transsexual'.³⁹ The body's relationship to surgery is not revealed through this brief definition. However, under South Australian law,⁴⁰ it is only post-surgical transsexuals who have the right to amend the 'sex' marked on their birth certificates. Thus, Australian law continues to give 'sex' a restrictive meaning; sex is equated only with its fundamental 'truth' as anatomy (whether the body has a penis or not). This further reifies transgenders' dependent relationship with the medical professions, entrenching the power of the gatekeepers' to define who is a 'real' transsexual (who may obtain surgery, that surgery equals 'sex-change'). The law maintains the divisions based on the body's relation to surgery: whether a body is pre, post and non-operative determines the extent of rights and protection offered.

³⁶ Note 35.

³⁷ Note 35, s 4.

³⁸ *Gender Reassignment Act 2000 (WA)* PT.1-4.

³⁹ *Equal Opportunity Act 1984 (SA)* s 5.

⁴⁰ *Sex Reassignment Act 1988 (SA)*. See also *Births, Deaths and Marriages Registration Amendment Act 1997 (NT)*.

Jurisdictions which include ‘transgender’ or ‘gender identity’ as a ground of discrimination

The term ‘transgender’ and ‘gender identity’ respectively have been introduced by amending legislation into the Anti-discrimination discourse of New South Wales and Victoria.⁴¹ ‘Transgender’ and ‘gender identity’ as terms of community have wide and encompassing meanings (see introductory discussion). However, the meaning of these words in the context of anti-discrimination law continues to exclude the gender identities of many people from its ambit.

The NSW Act specifically covers a number of areas, including discrimination in the workplace, the amendment of birth certificates, and makes unlawful the vilification of transgenders. A ‘transgender person’ is recognised according to a personal identification, and the fact of ‘living, or seeking to live, as a member of the opposite sex’, regardless of whether the individual has undergone surgery.⁴² Under the Victorian Legislation, ‘gender identity’ means:

- (a) the identification on a bona fide basis by a person of one sex as a member of the other sex (whether or not the person is recognised as such)-
- (b) by assuming characteristics of the other sex, whether by means of medical intervention, style of dressing or otherwise; or
- (c) by living, or seeking to live as a member of the other sex.⁴³

Whilst ‘gender identity’ displaces the compulsory relationship of the transgender body to surgery, the emphasis on the terms ‘opposite’ and ‘living’, retain the requirements that this identity be dual and fixed. This definition demands the maintenance of medical ideas of transsexual disharmony between original anatomical sex, and psychological gender, and the idea of passing from one distinct sex to another.

Under the new Victorian legislation, there is a broad situational context in which an employer may lawfully discriminate against a person on the basis of gender identity. The first is if the person does not give the employer adequate notice of the person’s gender identity. This contradicts the right of privacy (see pt 2 below) and also the reality of

⁴¹ *Transgender (Anti-Discrimination and Other Acts Amendment) Act 1996* (NSW), *Equal Opportunity (Gender Identity and Sexual Orientation) Act 2000* (Vic).

⁴² s.38A.

⁴³ *Equal Opportunity (Gender Identity and Sexual Orientation) Act 2000* (Vic) s 4(1).

fear of discrimination that might lead a person to choose not to disclose their gender identity to an employer or prospective employer. The second exception is that it is unreasonable in the circumstances for the employer not to discriminate against the person. Circumstances that might deem discrimination reasonable include the cost to the employer of not discriminating and 'the feasibility of the employer not discriminating'. These sections of the act are broadly drafted and allow an indeterminate amount of discrimination.

The term 'transsexual' is employed through SA, ACT and Northern Territory legislation. There is some uncertainty as to whether the term 'transsexual' encompasses as many people as are protected under legislation that includes transgender as a ground.

Transgender/transsexuality not included as a ground, but transsexuality is interpreted as falling under a separate ground such as 'disability', or 'impairment' discrimination

The case of *Menzies v Waycott*⁴⁴ occurred prior to the passing of the amending act, the *Equal Opportunity (gender and sexual orientation) Act 2000* (Vic), which makes 'gender identity' a ground of discrimination. The complainant Sharon Menzies was a male-to-female transsexual who had sex reassignment surgery during the course of her employment with Astrovac. Employment was terminated after the surgery and the complainant's decision to live and dress as a woman. The respondents argued that termination was due to poor work performance, but evidence proved the contrary. The complainant alleged discrimination on the basis of the attributes of 'sex', 'physical features' or 'impairment'. Dr G.P Lyons Senior member of the Victorian Civil and Administrative Tribunal determined that 'sex' and 'physical features' do not encompass transsexualism, but that transsexualism is included within the definition of impairment.⁴⁵

Lyons concluded

'...I consider there are clear grounds for finding that the condition of transsexualism is an "impairment" within the meaning of that term in s 4 of the EO Act. I find therefore that the condition of transsexualism amounts to a "malfunction of a part of the body" in the definition of "impairment" in s 4. I also find that the condition of transsexualism is a "mental or psychological...disorder", that phrase being a subcategory of

⁴⁴ [2001] VCAT 13.

⁴⁵ Note 44.

the term “malfunction of a part of the body” and that the condition has a mental component.’⁴⁶

This case, I would argue is a further example of the extent the law will go to in protecting the binary meaning of ‘sex’. Discrimination, it is claimed, was based on the ‘body’s malfunctioning’. Grosz has argued that ‘the condition under which patriarchy is psychically produced is the constitution of women’s bodies as lacking’.⁴⁷ In a binary logic, the male is constituted as whole and the woman as imperfect, as lack. The characterisation of transsexual sex as a bodily ‘malfunction’ not only preserves the terrain of male/female, but also reinforces the idea that any sex which cannot be read as male, must be classified as an ‘impairment’.

Part two: speaking specific rights

The law is unable to ‘think the difference’ through a failure to recognise that the areas of discrimination which face gender minorities are not always identical to those facing non-transgenders. For example, the right to privacy (linked to the laws forbidding the alteration of the sex registered on official documents) becomes an issue where the production of those documents may lead to situations of violence or discrimination. Adding ‘transgender’ as a ground to already existing legislation fails to address these issues of specific importance to transgenders.

Rights in relation to Criminal law: transgendered prisoners

The question of which prison a transsexual or intersex person should be sent to raises issues of discrimination, the constitutional right to a fair trial, and the prohibition at international law against cruel or unusual punishments.⁴⁸ These issues are easily overlooked when sex is presumed to be the characteristics of opposite bodies (and hence the assumptions about where transgender bodies fit in the existence of two

⁴⁶ Note 44, p.230.

⁴⁷ Grosz E, *Volatile Bodies: Toward a Corporeal Feminism*, Allen and Unwin, Sydney, 1994, p 60.

⁴⁸ see for example Universal Declaration of Human Rights Article 5 ‘No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment’, The UN Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment prevents torture carried out ‘by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity’.

separate penal institutions). Anita Barnes, writing from a US perspective, suggests that the placing of pre-operative transsexuals with prisoners of the same anatomical sex exacerbate the risks of harm to these people.⁴⁹ Some prisons place transsexual prisoners into protective custody where violence occurs, but this solution amounts to an additional and unwarranted form of punishment. Amnesty International recommends that segregation in prisons should avoid further marginalisation, rendering transgender people at risk of further ill-treatment within the prison community, and that transgender people should be placed in custody based on preferred gender identity.⁵⁰ Other rights issues for transgender prisoners include the right to hormone therapy, appropriate medical care or other therapeutic services.⁵¹

A series of criminal cases highlights the law's recognition of 'sex' in certain instances, but not others. In *R v Tan and Others*, a transsexual sex worker who had undergone sex reassignment procedures was considered as male for the purposes of the Sexual Offences Act (1956) which made male prostitution illegal.⁵² In *R v Harris and McGuinness*,⁵³ two transsexual sex workers were charged with attempting to procure the commission by two men (undercover police) of an act of indecency. s 81A of the *Crimes Act 1900* (NSW) made it a crime to procure the commission by any male person of an act of indecency with another male person. The majority of the court held that a male to female transsexual who has undergone sex reassignment surgery is a female for the purposes of the criminal law (they emphasised only for the purposes of the criminal law). Thus Harris, a post-operative transsexual escaped the homophobic gaze of the Acts' operation. However, McGuinness, who had not undergone any surgical procedures, was regarded as male. In effect, Harris escaped a prison sentence, whilst McGuinness did not.⁵⁴

⁴⁹ Barnes A, 'The Sexual Continuum: Transsexual Prisoners' (1998) 24 *New England Journal of Criminal Law and Civil Confinement* 599.

⁵⁰ Amnesty International, *Crimes of Hate, Conspiracy of Silence: Torture and Ill-treatment based on Sexual Identity*, Amnesty International Publications, 2001, Recommendation 3.

⁵¹ Note 50.

⁵² See discussion by Pannick, note 19, p 291.

⁵³ (1988) 35 A Crim R 146.

⁵⁴ See discussion by Otowski M, 'The Legal Status of a Sexually Reassigned Transsexual: *R v Harris and McGuinness* and Beyond', (1990) 64 *The Australian Law Journal*, p.70.

Although today there are few 'sex specific' offences, the cases of *Tan* and *Harris* highlight the laws' intolerance for bodies which do not fit. The cases might also be examined as an example of police harassment of transsexual sex workers which is beyond the scope of this paper. The criminal law may have licence to operate in a discriminatory fashion, in a way which anti-discrimination law fails to prevent. *Harris* exposes the judicial desire to interpret the post-operative transsexual male body as female. Sex-reassignment surgery re-scripted in this instance a situation that might otherwise have been classified as an act of indecency between two men. The transsexual body in the context of sexual exchange, particularly a criminally coded exchange, offers the possibility of tarring the male heterosexual body as 'other', and rendering him culpable, worthy of punishment. This judgment attempts to limit the dangers and damage posed by an indeterminate (male) body to the wholeness and unity of the Cartesian male self. Men desiring the post-operative transsexual are constituted through these dicta as heterosexual.

The Right To Privacy

Whilst sex is painted as a private, individual concern, and sexual difference as something which must be masked and hidden (see for example the laws forbidding nudity), the determination and identification of an individual's 'sex' is firmly a public issue. The right of the individual to privacy does not allow the individual to subvert a system of sexual categorisation based on birth genitals, by officially claiming membership as the 'opposite' sex: or by claiming a sex that is neither.

For most people, the request for identification marked with 'birth sex' is not an issue, but for a number of transgenders, the production of documents of sexual identity is an infringement of privacy which may lead to circumstances of sexual harassment or discrimination. The murder of female-to-male transgender Brandon Teena is one example. Teena's 'sex' was discovered by police when he was arrested for a misdemeanour. The police 'outed' him by telling the local newspaper of his biological status as 'female'. Two weeks later, Teena was raped and murdered by the former boyfriend of a woman Teena was dating.⁵⁵

In 1984, Mark Rees, a female-to-male transgender argued for the right to amend his birth certificate and to have his sexual identity as a man recognised for all legal purposes. He did so under the European

⁵⁵ Documented by Pat Califa, 'Sex Changes, The Politics of Transgendum', Cleis Press, San Francisco, 1997.

Convention for the Protection of Human Rights and Fundamental Freedoms. Article 8 sets out the right to private life and article 12, the right to marriage. Rees claimed the violation of these rights. Rees lost the case. It was argued that to hold for Rees would be to require that the UK adopt a system of determining and recording civil status which was not currently in existence in that country.⁵⁶

Thus the private right of the individual was weighed against the public policy of efficient record keeping. Such a decision institutionalises the 'truth' that sex is dually fixed at birth. Further it demonstrates the way in which discrimination is characterised as an individual issue, rather than something which is systematic. The state reserves the right to discriminate or deny rights (characterised as individual, private), in the public interest.

It is to be noted that a number of Australian states have introduced legislation that allows for the amendment of birth certificates.⁵⁷

Human rights and family law

Perhaps the most obvious 'sex specific' right is the freedom to marry the partner of one's choice and to be afforded the rights and obligations which flow from such a union.⁵⁸ For many, the denial of the right to marry for gender minorities demonstrates the gap between protection from discrimination in specific circumstances (unfavourable treatment) and deeper, more systemic forms of discrimination. A valid marriage under current Australian law involves 'a union between a man and a woman'.⁵⁹ Cases have therefore arisen in which it is necessary to determine the sex of the subject. There is no space for a subject who cannot easily be categorised as either male or female. The need to identify the sex of the subject stems from the condemnation and lack of recognition of same sex unions, but also reifies sexual difference as opposition and dualism.

⁵⁶ Finlay H, and Walters W, *Sex Change: Medical and Legal Aspects of Sex Reassignment*, Melbourne, 1988.

⁵⁷ *C v D* (1979) FLC 90, see also a discussion by Mountbatten J, 'Transsexuals, Hermaphrodites and other Legal Luminaries' (1991) 16 (5) *Legal Service Bulletin*, p.225.

⁵⁸ the *Statute Law (Relationships) Amendment Act 2001* (Vic) includes transgenders within its ambit. The Act introduces the term 'domestic partner' into various acts that concern domestic relationships. s 4(a) A domestic partner means a 'person to whom the person is not married but living as a couple on a genuine domestic basis (irrespective of gender).

⁵⁹ *Corbett v Corbett* (1970) 2 All ER, 33.

Sharpe points to the homophobia inherent in the dictum of transsexual marriage cases. A body that cannot be easily classified as male or female poses a threat to the heterosexual institution of marriage. He argues that ‘the figure of the homosexual haunts transgender jurisprudence as a body’, and that ‘this nascent jurisprudence emerges as a locus for the denigration and erasure of homosexuality...’⁶⁰ Sharpe believes that underlying the judgments there is an anxiety in the proximity of the transgender body to a homosexual one and a consequent fear that the court might sanction a homosexual marriage. For example, Sharpe points out that the capacity for heterosexual intercourse post surgery has been used as a test as to whether a male-to-female transsexual will be considered female for the purposes of marriage.⁶¹ Judgements that focus on the capacity and desire for heterosexual intercourse may be read as attempts to (re)inscribe the transgender body as heterosexual. In his earlier work, Sharpe characterised this anxiety as a ‘contradictory desire’.⁶² As he puts it

‘On the one hand, law desires to incorporate transsexual persons within an existing gender dichotomy so that transgender difference and “ambiguity” disappear...On the other hand law proves unable to satiate this desire checked as it is by a contradictory desire to privilege, and preserve a space for, “natural” heterosexual intercourse.’⁶³

C v D, involved a judicial determination as to whether a marriage existed between a woman and a hermaphrodite man. It was held that as the hermaphrodite husband was ‘biologically’ neither male nor female, his body a combination of the characteristics of both sexes, he was unable to enter into a valid union. The outcome of the case was therefore the pronouncement of a decree of nullity.⁶⁴

Corbett’s case involved the judicial determination of whether a marriage existed between a man and a transsexual woman. Omrod J argued that ‘having regard to the essentially heterosexual character of the relationship which is called marriage, the criteria must...be biological, for even the most extreme degree of transsexualism in a male or the most severe hormonal imbalance which can exist in a

⁶⁰ Sharpe A, ‘Transgender Jurisprudence and the Spectre of Homosexuality’ (2000) 14 (23) *The Australian Feminist Law Journal*, p.37.

⁶¹ Sharpe, note 60.

⁶² Sharpe A, ‘The Transsexual Marriage: Law’s Contradictory Desires’ (1997) 7 (1) *Australasian Gay and Lesbian Law Journal*, p1-2.

⁶³ Sharpe, note 62.

⁶⁴ *C v D* (1979) FLC 90, see Mountbatten, note 57.

person with male chromosomes, male gonads and male genitalia cannot reproduce a person who is naturally capable of performing the essential role of a woman in marriage'.⁶⁵

Corbett's case illustrates a specific instance in which the law made a determination about 'what' constitutes sex. The stuff of sex was painted as oppositional; sexual difference located in the chromosomal, gonadal and genital congruences of the body which are fixed at birth. Therefore no change of sex is possible in a person whose sex is unambiguously traceable by the above criteria. In contradistinction to mapping what he saw as the immutable characteristics of the sexed body, Omrod J set out those characteristics which might be defined as 'gender'. These include psychological and social factors as well as hormonal and secondary sexual characteristics. This is significant given that sex is a category of legal importance to a much larger degree than what is defined as gender. What effects does such a pronouncement have on the medicalisation of the transsexual? Where the law says that 'sex' is located in the immutable features of the body, yet the transsexual claims to have changed sex, to be a sex other than his or her 'truthful', medically surveillable one, that person is necessarily regarded as a biological male or female suffering a delusion located in the mind. Sex change therefore becomes a myth, an illness, a phantasm, and an hysteria.

The socio-historic specificity of judicial pronouncements about sex and the body are highlighted in later cases that locate sex in genital 'transformation'. In *Cogley*, for example, it was stated that 'the law should regard as a woman a male-to-female transsexual where core identity is established and where sexual reassignment surgery has taken place' and further 'a male transsexual who submits to a sex reassignment surgery is anatomically and psychologically a female in fact'.⁶⁶

However, the 2001 marriage case of *W v W*⁶⁷ relied heavily upon the thirty year old judgement in *Corbett*, demonstrating the case's continuing influence in this area of law. *W v W* involved a marriage, in which one of the parties was a person 'born of indeterminate sex'. In deciding whether the marriage was a nullity, the court affirmed the biological criteria laid down by Omrod J. However the court said, that in the case of a person born with ambiguous genitalia, psychological factors would also be taken into account. The court agreed that the

⁶⁵ *Corbett v Corbett* (1970) 2 All ER, 33.

⁶⁶ Mountbatten, note 57, p 224.

⁶⁷ *W v W* (nullity) [2001] 2 WLR 674.

capacity to consummate a marriage as a male or female was a factor in their determination, as per Omrod J in Corbett, however not a decisive factor.

Part 3: Intersex Children and Australia's Anti-Discrimination Laws

In this part I shall discuss how anti-discrimination legislation which includes transgender as a ground might be used to prevent the genital mutilation of intersex infants.⁶⁸ Several Australian jurisdictions include intersex people, referred to in the legislation as a person of 'indeterminate sex'.⁶⁹

Some argue that the 'umbrella' term transgender encompasses intersex people, while others argue it does not.⁷⁰ The term 'intersex' is usually used to describe what is understood as a 'medical condition'. For example, Mason defines intersexuality as 'a wide variety of different medical conditions, all of which can lead to anomalies in external genitalia'.⁷¹ As a political term intersex refers to 'any body who was born with anatomy that the Powers That Be define as "standard male" or "standard female"'.⁷² The term

⁶⁸ My focus is a human rights perspective. It is to be noted that the law of negligence/informed consent has been suggested as an alternative means to prevent medical abuse of intersex infants. This approach is outlined by Beh H and Diamond M, 'An emerging Ethical Dilemma: Should Physicians Perform Surgery on Infants with Ambiguous Genitalia?' (2000) 7 (1) *Michigan Journal of Gender and Law*. See also Greenberg JA *Defining Male and Female: Intersexuality and the Collision between Law and Biology*, (1998) 2 *Arizona Law Review* 265-328.

⁶⁹ NSW, Vic.

⁷⁰ Coombes argues that the term transgender encompasses intersex, see Coombes M, 'Sexual Dis-Oriented: Transgendered People and Same-Sex Marriage' (1998) 8 *UCLA Women's Law Journal* 219. Greenberg argues that the term transgender is not synonymous with intersex, see n 43 above. The confusion that many people make between the term's intersex and transsexual is perhaps why there is a demand for this linguistic distinction. See also Dreger A 'Top 10 Myths about Intersex' (2001) <<http://www.isna.org/newsletter/feb2001/feb2001.html>> (8/07/01). Dreger notes that while the terms should not be confused, transsexuals are sometimes people who were born intersexed.

⁷¹ Mason KA, 'The Unkindest Cut: Intersexuals Launch a Movement to stop Drs from "Assigning" Sex with a Scalpel' <<http://newhavenadvocate.com/articles/unkindcut.html>> (8/07/01).

⁷² See Dreger A, 'Top 10 Myths About Intersex' note 70.

'hermaphrodite' was once used to refer to people born with ambiguous genitalia.⁷³

I shall address why I think the legislation fails in this instance to offer protection, due to a failure to address systematic discrimination, and due to limited and discriminatory definitions of what legally constitutes sex. I shall explain why I believe that jurisdictions that include transgender as a ground are inadequate to prevent one of the most horrific forms of discrimination.

Firstly, due to the fact both the current situation of the intersex child and the medical practices are widely unknown, I feel it is necessary to provide some background information to contextualise my arguments. The Intersex Society of North America (ISNA), a peer support, education and advocacy group provides the following statement:

The current model of treatment for intersex infants and children, established in the 1950's asserts that since the human species is sexually dimorphic, all humans must appear to be exclusively male or female, and that children with visibly intersex anatomy cannot develop into healthy adults. This model therefore recommends emergency sex assignment and reinforcement in the sex of assignment with early genital surgery. It also encourages care providers to be less than honest with parents and intersexuals about their true status. As a growing number of us who are intersexual have shared our experiences with each other, we have reached the conclusion that, for most of us this management model has led to profoundly harmful sorts of medical intervention and to neglect of badly needed emotional support. Our intersexuality, our status as individuals who are neither typical males nor typical females---is not beneficially altered by such treatment. Instead, it is pushed out of the view of parents and care providers. This 'conspiracy of silence', the policy of pretending that our intersexuality has been medically eliminated in fact simply exacerbates the predicament of the intersexual adolescent or young adult that s/he is different, whose genitals have been mutilated by 'reconstructive'

⁷³ It is a word which gained currency in the Victorian era and derives from the Greek legend of the joining of Hermaphrodites and the nymph Salmacis into a single form that was neither male nor female. See Dreger A, *Hermaphrodites and the Medical Invention of Sex*, Harvard University Press, 1998. According to ISNA, the word hermaphrodite which was once used to label those with ambiguous genitalia is stigmatising and misleading: 'there is a growing momentum to eliminate the word "hermaphrodite" from medical literature and to use the word "intersex" in its place'. <<http://www.isna.org/hermaphrodite.html>> (7 July 2001).

surgery, whose sexual functioning has been severely impaired, and whose treatment history has made clear that an acknowledgment or discussion of our intersexuality violates a cultural and family taboo.⁷⁴

Attempts to prevent the widespread practice of infant genital surgery have been approached from a negligence/informed consent perspective.⁷⁵ As it is difficult to prove negligence in the case where prevailing medical standards and practices have been adhered to, they suggest claiming on the basis of failure to obtain informed consent. The typical case involves the lack of counselling received by parents before making the decision to agree to surgery and the wrongful characterisation by the medical profession of intersexuality as a medical emergency. Intersexuality is presented as life threatening, and surgery a medical necessity, rather than cosmetic. A full disclosure of the risks of surgery as well as alternatives to surgery is not discussed.⁷⁶

Is there a ground of discrimination?

There is a clear legislative intention that intersex people are covered by anti-discrimination laws in NSW and Victoria. The definition of 'transgender person' includes a person 'who being a person of indeterminate sex, identifies as a member of a particular sex by living as a member of that sex'.⁷⁷ However, because of this definition, there is some doubt as to whether the Act covers intersex infants. The act requires that the person of indeterminate sex 'identifies as a member of a particular sex, by living as a member of that sex'. If 'particular sex', means as 'male' or 'female', then at this age a baby cannot be said to identify with a 'particular sex'. The person must have a 'chosen sex'. Thus no protection is offered to someone who does not have a chosen sex. Attributing or ascertaining the sex cannot be seen as an act of discrimination where having a 'social sex' is necessary for the protection against discrimination.

Whether there is a ground of discrimination in this case depends upon how we understand 'sex'. A case of discrimination can be made out if intersex children were regarded as a sex that is neither male nor

⁷⁴ <<http://www.isna.org>> (11 July 1997).

⁷⁵ Beh H and Diamond M, 'An Emerging Medical and Ethical Dilemma: Should Surgeons Perform Sex Assignment Surgery on Infants with Ambiguous Genitalia?' (2000) 7 *Michigan Journal of Gender and Law* 1.

⁷⁶ Beh and Diamond, note 75.

⁷⁷ s.38C

female. Thus, the intersex child's body is subjected to invasive, damaging and non-consensual surgery, while the non-intersex child's body is not. It should be irrelevant that there is no social space as there exists in other cultures for a third sex. As mentioned above, however, it appears that the definition of a person of indeterminate sex requires that an intersex person must be living as a legally recognised sex, that is male or female. The possibility of recognising intersexuality as legally distinct sex may in fact be undermined by the new definition of 'indeterminate sex'. Thus, transgenderism, as a ground is not legally an instance of sex discrimination. Transgenderism and intersexuality are legally conceived of as a status not as a sex. A case for sex discrimination might be possible under the *Sex Discrimination Act 1984 (Cth)* if it did not refer to sex as something that is inherently 'opposite'. The assumption that sex is symmetrical is the cause of the discrimination in this case. I would argue that the body is being cut on the grounds of sex, yet paradoxically, cannot be seen as sex because 'sex' means the dichotomy man/woman.

Intersex bodies are not regarded as specifically sexed bodies (as are male and female bodies), but rather deformed bodies, bodies whose 'true' sex is obscured, or bodies without a sex. While such medical practices continue to be defined as emergency rather than cosmetic, and while sex is defined as being opposite and fixed at birth, rather than continuous, these acts of violence will continue.

A person with a sex that is neither male nor female is not given citizenship under patriarchy.

In what ways are intersex children treated less favourably?

The issue of unfavourable treatment centres on the medical policy and practices of the treatment of intersex infants. It might be argued that these procedures are beneficial for the child. Further, is the issue of whether the requirement that a sex be registered on the birth certificate at birth is discriminatory. I shall argue that whether less favourable treatment can be established cannot be severed from the issue of the specific definition of sex that is adopted. The evidence for unfavourable treatment that I shall rely on is based on intersex adults' evaluation of medical practices and definitions of sex as they have experienced it.

In summary, this less favourable treatment includes;

- the mutilation of the infant's genitals at an age when the child cannot give informed consent. The surgical procedures are cosmetic and not necessary to the child's health.
- the surgical procedures may cause a total lack of sensation in the person's genitals.

- the child may experience the surgical procedures and follow up examinations as a form of sexual abuse.
- although many intersex adults would have been infertile regardless of surgery, there is some evidence to suggest that the medical practices (for example, the removal of ovaries) may cause that child to be rendered infertile.
- the requirement that the sex of the child be registered at birth as either male or female. This policy arguably justifies the mutilation of intersex infants and not non-intersex infants. There is no choice to live as a sex other than male or female, or for the child to make a decision when they become older: the right to self determination.
- because there is no right to a birth certificate without a sex, (or as some lobby groups have argued a third sex marked as 'I') therefore the requirement restricts the right of the intersex infant to be accorded the status of a citizen unless they are given an official sex at birth. The intersex child is less likely to feel comfortable with the assigned sex than a non-intersex child, and thus when older may be forced to undergo surgery in order to have the birth certificate amended with the sex he or she feels comfortable with.

I would argue that the requirement or condition that a child's sex must be recorded as male or female at birth amounts to sex discrimination.

The medical practices of 'managing' intersex infants and children amount to discrimination. Is the treatment really less favourable?

It might be argued that every child is born male or female. Thus, surgery is non-discriminatory, but rather necessary to reveal the child's true sex. Hence, the treatment is necessary so that the male/female child beneath the artifice of ambiguous genitalia can be treated as any other male/female child. Thus, intersex is deemed deformity, and surgery not as less favourable treatment, but rather as necessary to give the intersex child the 'equal opportunity' to a culturally sanctioned sex. As Holmes points out, 'Doctors routinely mislead parents as to the nature of their child's condition, revealing only that the genital condition is ambiguous because nature hasn't finished its job'⁷⁸.

As is the case with establishing a ground of discrimination, whether treatment is 'less favourable' depends on competing definitions of

⁷⁸ Holmes M., 'Queer Cut Bodies: Intersexuality and Homophobia in Medical Practice', at <<http://isna.org>> (11 July 1997)

what sex is. Understanding sex as a system of social organisation, allows us to see that assumptions about the symmetry of the sexes may in themselves constitute 'less favourable treatment' for the intersex child.

I shall now look at the specific instances of less favourable treatment in more detail.

Below are two extracts recounting intersex children's experiences of surgery and the impact of the medical practice of hiding information regarding these surgeries.

'Surgery was performed on BGS when she was 18 months old...Although BGS has a very large scar on her abdomen running from the navel to the pubis, no labia minora and a pad of scar tissue where one would expect to find a clitoris, her Doctors and family refused to tell her anything about her surgeries except to say that she'd had exploratory surgery during an appendectomy'.

'Angela Moreno was told at 12 that she had to have her ovaries removed for health reasons, although her parents had been given information about her true condition. Angela has Androgen Insensitivity Syndrome (AIS), a condition in which an XY foetus fails to respond to androgens in utero and is born with normal appearing external female genitalia. At puberty, the undescended testes began to produce testosterone, resulting in the enlargement of her clitoris. 'It was never addressed to me that they were going to amputate my clitoris. I woke up in a haze of Demerol and felt the gauze, the dried blood. I just couldn't believe they would do this without telling me''.⁷⁹

It might be asked, whether a non-intersex 12 year old child would be denied so totally the right to informed consent in relation to surgery? What of the right of the child to decide at an older age whether and what surgery they wish to have, and the right to bodily integrity? Clearly such procedures amount to less favourable treatment.

⁷⁹ Alexander T, 'The Medical Management of Intersexed Children: An Analogue for Child Sexual Abuse' (1997) <http://www.qis.net/-triea/medical_abuse.html> (11 July 1997) See also Moreno A, 'In Amerika They Call Us Hermaphrodites' (2001) Reprinted from *Chrysalis: The Journal of Transgressive Gender Identities*, <<http://www.libidomag.com/nakedbrunch/archive/hermaphrodites.html>> (8 July 2001).

There is a growing amount of scholarship as to the effects of surgery on the body and psyche of the intersex child. One of the most prominent researchers in the field is Tamara Alexander. As Alexander has expressed it,

‘Like victims of child sexual abuse, children with intersex conditions are subjected to repeated sexual traumas which are kept secret both within the family and in the culture surrounding it. They are frightened, shamed, misinformed and injured. Those children experience their treatment as a form of sexual abuse, and view their parents as having betrayed them by colluding with the medical profession who injured them...as in CSA, the psychological sequelae of these treatments includes depression, suicide attempts, failure to form intimate bonds, sexual dysfunction, body image disturbance and dissociative patterns’.⁸⁰

I would argue that the legislation fails to recognise the systematic nature of the discrimination against people of ‘indeterminate sex’. As Holmes points out, ‘interpersonal violence does not have to be seen as a one-on-one act...in fact teams of doctors in large institutional settings, within the context of large institutional settings, within the context of a larger social web, are perpetrators of interpersonal violence as soon as they set out to diagnose and treat intersex children’.⁸¹ Examining the medical practices for the ‘managing’ of intersex children, Kessler argues that doctors make decisions about gender ‘on the basis of shared cultural values’ as opposed to merely ‘biological factors’.⁸² Thus decisions about which sex to assign the intersex infant are based primarily upon phallic size, shape and prospective (hetero)sexual capacity.

Kessler concludes that the role of the physician is as ‘interpreter of the body, trained and committed to uncovering the ‘actual’ gender obscured by ambiguous genitals’.⁸³

Are there any exceptions, which might be applied in this case?

What exceptions are there which might be used as a defence in this case? The *EOA* provides an exception whereby ‘the discrimination is necessary for the first person to comply with the person’s genuine

⁸⁰ Alexander, note 79.

⁸¹ Holmes, note 78.

⁸² Kessler S, ‘The Medical Construction of Gender: Case Management of Intersexed Infants’ (1990) 16 (11) *Signs: Journal of Women in Culture and Society*, p.19.

⁸³ Kessler, note 82, p.20.

religious beliefs or principles'.⁸⁴ A belief in the fundamental truth of the existence of two sexes, (the Christian doctrine 'Man and woman created He them') could be used to define intersexuality as deformity, to justify surgery as 'giving' the child a sex, or unmasking the 'true' sex. Here, the parent's rights to the free exercise of religion might be weighed against the discriminatory impact medical practices. However, one might argue that a child might be 'given' a sex without medical intervention, and hence given a chance to give informed consent at an appropriate age to surgery if desired. It is difficult to argue that the rights to free exercise of religion and the child's right to informed consent cannot be reconciled.

A further exemption provides that discrimination is lawful 'to protect the health or safety of any person (including the person discriminated against)'.⁸⁵ The definition of sex here is crucial to whether the discrimination is lawful. The discriminatory treatment might be deemed to be necessary to protect the health of the child. Or it might be deemed not to be discriminatory treatment at all, as I have explained above. Under the religious exemption, religious definitions of sex might be privileged; under the protection of health provisions, the intersex child's sex is defined as unhealthy (deformed in a physical sense) and unhealthy (the psychological danger to the child and parent in leaving the child 'without' a culturally accepted sex).

It is more likely than not that the new transfer procedures would be applied in this case. Under the Victorian *Equal Opportunity Act 1995*, a complaint may be deemed a special complaint if its resolution 'may have significant social, economic or financial effects on the community'.⁸⁶ It is likely that the policy issues would be given greater weight than if the complaint was heard at tribunal. Policy issues include the social effects. It could be argued that to change the current medical practices would be socially controversial.

84 s.77.

85 s.80.

86 s.125.

Conclusion

Foucault has argued that the human body is ‘the ultimate material which is seized upon and shaped by all political, economic and penal institutions. Systems of production, domination and socialisation fundamentally depend upon the successful subjugation of bodies’.⁸⁷ The medical pronouncement of sex after a brief surveillance of the infant’s genitals, intersecting with the compulsory sealing M/F on the birth certificate, the most fundamental document of identification in our culture, and the marking of the child as a legal citizen, and as a human being. Through such practices, sex is produced as truth, as origin, and as the uncontested proof of the binary nature of humanity. I would argue that the institutions of law and medicine are unable to think difference, and actively produce and discipline bodies as particularly sexed subjects.

The transsexual and intersex subjects are coerced through systems of knowledge that can only define the relation between the sexes by privileging the male and defining the Other (women, transsexuals) as His Opposite. The law fails to recognise its role in the active production of ‘sex’, insisting that sex is a pre-given and neutral, natural category. Legal definitions of sex are in themselves discriminatory. As I have argued, the very meanings of sex and gender through discourse must be challenged in order to affect change. The legal and medical fictions of the original anatomical and binary nature of sex must be seen as a socio-historical production that protects certain bodies and institutionalises practices of violence and invisibility against others.

⁸⁷ Howe, A, *Punish and Critique: Towards a Feminist Analysis of Penalty*, Routledge, London, 1994, p.88.