



GRIFFITH JOURNAL OF
LAW & HUMAN DIGNITY



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Volume 7 Issue 2
2019

Published in December 2019, Gold Coast, Australia by the *Griffith Journal of Law & Human Dignity*

ISSN: 2203-3114

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MAKING THE INVISIBLE VISIBLE AGAIN: PATHWAYS FOR LEGAL RECOGNITION OF SEX AND GENDER DIVERSITY IN AUSTRALIAN LAW

DR SARAH MOULDS*

People that identify as gender diverse or who are born with non-binary sex characteristics have traditionally been excluded from the law, lawfully discriminated against, or been made invisible by the law. In recent years, this has begun to shift as law reform bodies in Australian explore pathways for providing legal recognition of sex and gender diversity within our community. This article explores the legislative reforms that have taken place in this area in recent years, which has resulted in significant changes to State and Territory laws regulating the way sex and gender is recorded and altered on Birth Deaths and Marriages Registers, with important consequences for the way sex and gender is legally recognised in those jurisdictions. The article then explores the extent to which the new provisions align with the self-identification model of reform and whether these new forms of legal recognition have translated into meaningful legal protection for sex or gender diverse people in Australia. The article concludes that, despite the significant positive steps forward achieved by legislative reforms in this area, there are still many gaps when it comes to the protection and promotion of the rights of non-binary or gender diverse individuals.

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*Dr Sarah Moulds is a Lecturer in Law at the University of South Australia, with research and teaching interests the area of anti-discrimination law, public law, administrative law and constitutional law. Before entering academia, Sarah had an extensive career in law reform and legal policy, including at the South Australian Law Reform Institute and the Law Council of Australia.

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I INTRODUCTION

People that identify as gender diverse, or who are born with non-binary sex characteristics, have traditionally been excluded from the law, lawfully discriminated against, or made invisible by the law. In recent years, this has begun to shift as law reform bodies in Australia explore pathways for providing legal recognition of sex and gender diversity within our community. While the results of this legislative shift have generally been positive, they continue to contain features that detract from a self-identification model of reform, and have occurred in the context of a volatile and potentially damaging public debate on the rights of lesbian, gay, transgender, bisexual and queer people in Australia. This raises questions about the extent to which legal recognition has translated into meaningful legal protection for sex or gender diverse people in Australia.

This article touches on these themes in three short parts. Part 1 explores the ways in which the law has traditionally rendered sex or gender diverse people ‘invisible’ and restricted their access to legal rights the rest of the community take for granted. Part 2 describes the important shift towards legal recognition of sex and gender diversity that has occurred in some Australian jurisdictions in recent years, with a particular focus on reforms relating to Births, Deaths and Marriages (‘BDM’) regimes in the Australian Capital Territory, South Australia, Western Australia, Victoria and Tasmania. The final Part of this article explores the challenges associated with translating legal recognition of sex or gender diversity into substantive rights protection for sex or gender diverse Australians. Some of the challenges associated with moving away from a medical model (requiring sex or gender diverse people to *prove* their non-binary status by reference to medical evidence) towards a self-identification model (where individuals have the autonomy to nominate or change their sex or gender status without the requirement of medical evidence) will be noted, as will the broader political context that serves to cloud

legal reform in this area.

This article is acutely aware of the significance of language when discussing the identities and interests of those people who fall outside binary sex and gender norms, and the contested nature of 'sex' and 'gender'. A deliberately broad approach to terminology is adopted, which aims to acknowledge and celebrate the full range of sex and gender identity and expression.¹ The term 'gender diversity' is used to describe gender identities that extend beyond simply 'male' or 'female', such as people who identify as trans or non-binary. This article recognises that gender can be conceptually separate from sex, for example 'gender' can refer to a social construct that relates to the presentation or lifestyle of a particular sex, rather than to a physiological or biological characteristic. The term 'sex diversity' is used to describe physiological or biological characteristics that are not determinatively male or female. Phrases such as 'sex and gender diversity' and 'sex or gender diverse people' are used to describe both categories discussed above, but these phrases do not intend to conflate the lived experience, rights or interests of these different groups, which can be significantly different.

II MAKING THE INVISIBLE VISIBLE AGAIN: RECOGNISING SEX AND GENDER DIVERSITY IN THE LAW

[O]ne day, quite unexpectedly, Hush said, "Grandma, I want to know what I look like. Please could you make me visible again?"

"Of course I can," said Grandma Poss, and she began to look through her magic books.

She looked into this book and she looked into that. [B]ut the magic she was looking for wasn't there at all.²

Since the time of colonisation, Australia's legal system has made assumptions about sex

¹ This approach aligns broadly with that adopted by Sarah Winter, 'Are Human Rights Capable of Liberation? The Case of Sex and Gender Diversity' (2009) 15(1) *Australian Journal of Human Rights* 151, 153. For further discussion of the significance of language and terminology, see, eg, Judith Butler, (1990) *Gender Trouble: Feminism and the Subversion of Identity* (Routledge, New York); Laura Grenfell, 'Maxing Sex: Law's Narratives of Sex, Gender and Identity' (2003) 23 *Legal Studies* 66; Louis Gooren, 'The Biology of Human Psychosexual Differentiation' (2006) 50(4) *Hormones and Behaviour* 589; Dylan Vade, 'Expanding Gender and Expanding the Law: Towards a Social and Legal Conceptualization of Gender that is More Inclusive of Transgender People' (2005) 11 *Michigan Journal of Gender & Law* 253, 278-284.

² Mem Fox, *Possum Magic* (Scholastic, Australia, 1983).

and gender (as well as race and other attributes). It began by assuming that ‘persons’ with legal rights and responsibilities are men (the default pronoun was ‘he’), which eventually gave way to the recognition that women may also be active agents in the law.³ Within this context, the law became comfortable acknowledging the legal rights of ‘men’ and ‘women’ but ‘not necessarily for people who transgress those categories’.⁴

Given the prevalence of binary gender norms within our legal system, the challenge of recognising the legal status and rights of gender diverse people, and people with diverse sex characteristics, is broad in scope and complex in nature. For example, when the South Australian Law Reform Institute (‘SALRI’) was asked to inquire into all South Australian laws to identify those that discriminated against people on the grounds of gender, sexual orientation and intersex status, it found over 146 laws that potentially discriminated on such grounds.⁵ The vast majority of these laws had the effect of excluding, ignoring or disadvantaging South Australians who did not fit into assumed binary gender norms, or heteronormative relationships.⁶ For example, until recently, binary pronouns (‘he’ or ‘she’) were used as a matter of course throughout South Australian laws, and laws regulating families, parentage, and relationships generally assume heterosexual arrangements (such as ‘husband’ and ‘wife’, and ‘mother’ and ‘father’).⁷ These assumptions work to make non-binary, gender diverse and non-heterosexual people invisible in the law, and often have significant impacts on people’s lives and wellbeing, particularly when these assumptions work to restrict access to legal rights or legal recognition of individual identity or relationships.⁸

The implications are particularly pronounced in the context of BDM regimes. As Blincoe documents, whilst most people go through life identifying as the gender of the sex assigned to them at birth (cisgender), people whose identities do not match their birth

³ See, eg, Grenfell (n 1); Gooren (n 1); Dylan Vade (n 1).

⁴ Winter (n 1) 154.

⁵ South Australian Law Reform Institute, *Audit Report: Discrimination on the Grounds of Sexual Orientation, Gender, Gender Identity and Intersex Status in South Australian Legislation* (Report, September 2015). In 2015, the South Australian Attorney General asked the Institute, an independent law reform body based at the Adelaide University Law School, to undertake a detailed review of all South Australian laws to identify areas of discrimination on the grounds of sexual orientation, gender identity and intersex status, and to make recommendations to the Government as to how to best reform those laws.

⁶ Ibid.

⁷ South Australian Law Reform Institute, *Legal Registration of Sex and Gender and Laws Relating to Sex and Gender Reassignment* (Report, February 2016).

⁸ Ibid.

sex are 'frequently denied legal recognition, or heavily scrutinised in order to attain it'.⁹ This has flow-on consequences for a range of other legal and social rights. The Victorian Law Reform Commission ('VLRC') has observed that:

Without a birth certificate, a person may not be able to take full advantage of their rights as a citizen. These rights include enrolling at school or to vote, obtaining a passport, a Medicare card (as an adult), driver's licence or tax file number, and accessing various government benefits.¹⁰

The binary gender norms and heteronormative assumptions that were found by SALRI to dominate South Australian BDM regimes were also evident in other legislative regimes, such as laws regulating family relationships and anti-discrimination laws, which generally failed to understand or protect gender diverse people and people with diverse sex characteristics from unfair or detrimental treatment.¹¹ As discussed below, similar 'audits' in other Australian states and territories generated similar findings. The law just simply did not 'see' gender diversity or diverse sex characteristics. For those engaged in law reform efforts or advocating for rights-enhancing change, the first challenge was to make the invisible visible again! Only then could substantive rights issues be addressed through the law.

III MAKING CHANGES TO LEGALLY RECOGNISE DIVERSITY IN SEX AND GENDER: A SPECTRUM OF REFORM OPTIONS

Whilst some legal protections against discrimination with respect to transgender status began to emerge in the late 1990s,¹² it has only been within the last decade that legislative reforms have begun to be implemented, explicitly recognising the lived experience and legal rights of gender diverse Australians and those born with diverse sex characteristics. As Blincoe explains, even under 'reformed' regimes, the legal rights and status of sex or gender diverse people is often compromised:

⁹ Emily Blincoe, 'Sex Markers on Birth Certificates: Replacing Model with Self-Identification' (2015) 46(1) *Victoria University of Wellington Law Review* 57, 57–8.

¹⁰ Victorian Law Reform Commission, *Birth Registration and Birth Certificates* (Report 2013) 13.

¹¹ South Australian Law Reform Institute (n 7).

¹² See, eg, *Transgender (Anti-Discrimination and Other Acts Amendment) Act 1996* (NSW).

Trans people are frequently subjected to medical and legal scrutiny in order to achieve recognition of their sex/gender. This high standard is often impossible to attain, leaving people with identity documents that do not match their identity.¹³

One of the important landmarks in the journey towards legal recognition of gender diversity and diversity of sex characteristics is the High Court's decision in *NSW Registrar of Births, Deaths and Marriages v Norrie*.¹⁴ This case concerned the meaning of the word 'sex' in the *Births, Deaths and Marriages Registration Act 1995* (NSW), and provided the opportunity for the High Court to clearly acknowledge the fact that sex is not necessarily a binary concept, and that a person can have sex characteristics of either male, female, neither, or of no sex — and that the person may identify as male or female, neither or both.¹⁵ The High Court's decision in *Norrie* also follows a number of other cases raising the issues of legal recognition of sex. Through cases such as *AB v Western Australia*¹⁶ and *Kevin v Attorney-General (Cth)*,¹⁷ a body of jurisprudence is slowly being built that recognises that sex is more nuanced and complex than a simple 'male' and 'female' binary, and that irreversible gender affirmation surgery should not be a prerequisite to changing a person's registered sex or gender. For example, in the Family Court case of *In Re Alex*,¹⁸ Nicholson J expressed his 'regret that a number of Australian jurisdictions require surgery as a prerequisite to the alteration of a transsexual person's birth certificate in order for the record to align a person's sex with his/her chosen gender identity'.¹⁹ These cases prompted jurisdictions around Australia to review their legal processes for recognising and registering sex and gender, and for facilitating legal and administrative processes that would accommodate changes to legally recognised sex and gender beyond binary norms.

Around the same time as these judicial developments, the Australian Human Rights Commission ('AHRC') was undergoing significant community engagement in the area of sex and gender diversity,²⁰ which culminated in legislative reforms in 2013, extending

¹³ Blincoe (n 9) 57, 59.

¹⁴ [2014] 250 CLR 490.

¹⁵ *Ibid* [33]–[35].

¹⁶ *AB v State of Western Australia; AH v State of Western Australia* (2011) 244 CLR 390.

¹⁷ *Kevin v Attorney-General (Commonwealth)* (2001) 165 FLR 404

¹⁸ *Re Alex* (hormonal treatment for gender dysphoria) (2004) 31 FamLR 503.

¹⁹ *Ibid* [234].

²⁰ See, eg, Human Rights and Equal Opportunity Commission, *Sex Files: The Legal Recognition of Sex in*

federal anti-discrimination protections to grounds of 'sexual orientation, gender identity and intersex status'.²¹ Changes were also made to certain federal administrative practices, including the Australian Passports Office, which provided applicants with the option of indicating [x] as a sex category in addition to male and female.²² In its detailed *Resilient Individuals*, released in 2015, the AHRC also canvassed the need for extensive law reform in all Australian jurisdictions to provide for legal recognition of the status and rights of gender diverse Australians, and those born with diverse sex characteristics.²³ In the report, AHRC recommended that 'all states and territories legislate to require that a self-identified legal declaration, such as a statutory declaration, is sufficient proof to change a person's gender for the purposes of government records and proof of identity documentation'.²⁴

An important leader in the area of BDM reform has been the Australian Capital Territory ('ACT') with its comprehensive 2012 *Beyond the Binary* report.²⁵ This recommended legislative changes to the ACT *Births Deaths and Marriages Registration Act 1997* that aimed to move away from binary notions of sex and gender, as well as away from the 'medical model' approach of moving between binary categories of sex, towards a 'self-identification' model. For example, the ACT report recommended that sex and gender diverse people who are not defined by the female/male binary be legally recognised,²⁶ the 'requirement to undergo sexual reassignment surgery to change the a person's recorded sex be abolished',²⁷ and the 'requirement for a person to change their sex and gender should not be more onerous' than that required to change these details on an Australian Passport.²⁸ Not all of these recommendations were adopted in full, but

Documents and Government Records – Concluding Paper on the Sex and Gender Diversity Project (Report, March 2009) ('*Sex Files*').

²¹ *Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Act 2013* (Cth).

²² Australian Government Department of Foreign Affairs and Trade, 'Sex and Gender Diverse Passport Applicants: Revised Policy' *Australian Passport Office* (Web Page) <<https://www.passports.gov.au/passports-explained/how-apply/eligibility-citizenship-and-identity/sex-and-gender-diverse-passport>>.

²³ Australian Human Rights Commission, *Resilient Individuals: Sexual Orientation, Gender Identity and Intersex Rights 2015* (Report, June 2015).

²⁴ *Ibid* 3.

²⁵ ACT Law Reform Advisory Council, *Beyond the Binary: Legal Recognition of Sex and Gender Diversity in the ACT* (Report No 2, March 2012).

²⁶ *Ibid* Recommendation 9.

²⁷ *Ibid* Recommendation 17.

²⁸ *Ibid* Recommendation 18. This was a reference to changes made at the Commonwealth level in 2011 that allowed individuals greater ability to be issued a passport with an 'X' marker and recognised transgender people as their affirmed gender without the need for surgery. The Commonwealth has since

important legislative changes were made and the ACT reforms, and the community consultation process undertaken by the ACT Law Reform Advisory Council became an important template for other jurisdictions to follow.²⁹

For example, in 2015, SALRI identified the need to reform South Australia's BDM regime and recommended the repeal of the rights-abrogating and inaccessible *Sexual Reassignment Act 1988* (SA). This legislation set up a complex, Ministerial-supervised regime that was effectively inaccessible in practice.³⁰ The *Sexual Reassignment Act 1988* (SA) required a person to obtain a 'recognition certificate' from the Magistrates Court that certified the person was the sex to which they had been 'reassigned',³¹ by way of a 'reassignment procedure'.³² A reassignment procedure was defined in the Act as:

A medical or surgical procedure (or a combination of such procedures) to alter the genitals and other sexual characteristics of a person, identified by birth certificate as male or female, so that the person will be identified as a person of the opposite sex and includes, in relation to a child, any such procedure (or combination of procedures) to correct or eliminate ambiguities in the child's sexual characteristics.³³

The legislation further provided that 'reassignment procedures' could only be carried out by hospitals or doctors approved by the South Australian Attorney General.³⁴

In its review of this law, SALRI recommended that these provisions be replaced with a change of sex process based on the existing change of name process, with additional safeguards for applicants under the age of 18. SALRI explicitly rejected the suggestion that evidence of surgical intervention should be required before a person can apply to have their legally recognised sex or gender changed. The South Australian Parliament

expanded their passports policy to all government records under the Australian Government Guidelines on the Recognition of Sex and Gender.

²⁹ This approach is detailed in the Council's Report: see *ibid*, pt 2.

³⁰ South Australian Law Reform Institute (n 7) 19.

³¹ *Sexual Reassignment Act 1988* (SA) ss 7-9.

³² *Ibid*.

³³ *Ibid* s 4. As noted in South Australian Law Reform Institute (n 7) 18 n 22: 'The High Court considered a similar definition of reassignment procedure in *AB v Western Australia* (2011) 244 CLR 390. It noted that a reassignment procedure could alter genitals or other gender characteristics, whether by medical or surgical procedure. The High Court found that the Western Australian provision did not require a person to take "all possible" steps to have undergone a reassignment procedure (at 404 [32]). This would suggest that non-surgical treatment, such as hormonal therapy, could constitute a reassignment procedure in South Australia.'

³⁴ *Sexual Reassignment Act 1988* (n 31) s 7(8)-(9).

accepted the general framework recommended by SALRI,³⁵ but retained aspects of a 'medical model' (described further below). Under the enacted South Australian changes, a person can apply to the BDM Registrar for a change of sex or gender identity without the need for gender affirmation surgery.³⁶ However, an application of this type must be accompanied by a 'statement by a medical practitioner or psychologist certifying that the person has undertaken a sufficient amount of appropriate clinical treatment in relation to the person's sex or gender identity'.³⁷ 'Clinical treatment' need not involve invasive medical treatment and may include or be constituted by counselling.³⁸ The changes made in response to SALRI's report also allow for the recording of a person's sex or gender identity as 'male', 'female' or 'non-binary'.³⁹

The need to reform the process of registering, and changing, sex and gender on birth certificates has also been subject to extensive consideration in Western Australia. Prompted by the High Court's decision in *AB v Western Australia*,⁴⁰ where the High Court upheld appeals regarding a refusal to issue recognition certificates to two applicants who had undertaken female to male gender reassignment under the *Gender Reassignment Act 2000 (WA)*,⁴¹ the Law Reform Commission of Western Australia (LRCWA) was asked to conduct an inquiry into Western Australian legislation relating to the recognition of a person's sex, change of sex, or intersex status. Among the LRCWA's terms of reference was whether another category for classification of sex should be introduced and how any new category should be designated, and whether the role of the Gender Reassignment Board should be retained or whether there should be another process administered by the Registrar of Births, Deaths and Marriages for registering change of sex or intersex status.⁴² Following an extensive inquiry involving extensive community level engagement, the LRCWA recommended the *Births, Deaths and Marriages Registration Act*

³⁵ *Births, Deaths and Marriages Registration (Gender Identity) Amendment Bill 2016 (SA)*.

³⁶ *Births, Deaths and Marriages Registration Act 1996 (SA)* s 291 ('*Births, Deaths and Marriages Registration Act*').

³⁷ *Ibid* s 29K.

³⁸ *Ibid*.

³⁹ *Births, Deaths and Marriages Registration Regulations 2011 (SA)*, reg 7A.

⁴⁰ *AB v State of Western Australia; AH v State of Western Australia* (n 16). In this case, the High Court held that, for the purposes of the Act, the physical characteristics by which a person is identified as male or female are confined to external physical characteristics that are socially recognisable. Social recognition of a person's gender does not require knowledge of a person's remnant sexual organs [33].

⁴¹ *Ibid*.

⁴² Law Reform Commission of Western Australia, *Review of Western Australian Legislation in Relation to the Recognition of a Person's Sex, Change of Sex or Intersex Status* (Project 108, Discussion Paper 2018).

1998 (WA) be amended to provide for the gender classifications of 'male', 'female', and 'non-binary'.⁴³ It further recommended that an additional category of sex be included (such as non-binary for adults seeking to change their sex and 'indeterminate' for children born with diverse sex characteristics),⁴⁴ and that the *Births, Deaths and Marriages Registration Act 1998* (WA) be amended to provide an administrative application process for a person born in Western Australia to apply for a Gender Identity Certificate (that should not require evidence of surgical intervention).⁴⁵ When making these recommendations, the LRCWA reflected on the opposition it had received to these reform proposals by some sections of the WA community, observing that:

In many cases those opposed to this reform may not have understood the proposal in detail (for example, why it was being proposed and how it would be likely to impact on their daily lives) [...] Importantly, removal of the sex classification field from birth certificates will not make anyone less male or less female, rather it should reduce the likelihood of trans people being accidentally 'outed' and it should reduce the pressure on the parents of intersex children to assign a sex to their child at a time when there can be no medical certainty that the assignment is correct.⁴⁶

To date, no changes have been made to the *Births, Deaths and Marriages Registration Act 1998* (WA) to implement the LRCWA recommendations.

Similar reforms have been enacted in Victoria through the enactment of the *Births, Deaths and Marriages Registration Amendment Bill 2019* (Vic) which seeks to remove the current requirement in the Victorian legislation for an applicant seeking to change their registered sex to have undergone gender affirmation surgery. The Bill introduces an alternative process that would permit an adult to apply to the BDM Registrar to alter their recorded sex by way of a statutory declaration made by the applicant and supported by a statement from an adult who has known the applicant for at least 12 months.⁴⁷ The categories of sex to be included in the application could include 'male', 'female' or 'any

⁴³ Ibid Recommendation 9.

⁴⁴ Ibid Recommendation 4.

⁴⁵ Ibid Recommendation 11.

⁴⁶ Ibid 3.

⁴⁷ Victoria, *Parliamentary Debates*, Legislative Council, Thursday 19 August 2019 (Jenny Mikakos, Minister for Health, Minister for Ambulance Services), 2575.

other gender diverse or non-binary descriptor nominated by the applicant'.⁴⁸ As the statement accompanying the Bill explains: '[t]his means a person will be able to describe their sex in a way that reflects their identity'.⁴⁹ The legislation, enacted in August 2019, also contains a process to allow the parent(s) or guardian of a child to apply to the Registrar to alter the sex recorded on the child's birth registration.⁵⁰

More radical reforms were pursued in Tasmania during 2018,⁵¹ removing the requirement to indicate sex on birth certificates. Under the new provisions,⁵² birth registration statements and hospital records would still be required to collect information about a baby's sex for statistical purposes, but there would be no requirement to indicate sex on the formal birth certificate issued to an individual.⁵³ The issue of the ongoing need to indicate sex on birth certificates also formed part of a Queensland Government review of its 2018 BDM legislation.⁵⁴

IV TOWARDS A SELF-IDENTIFICATION MODEL OF LEGAL RECOGNITION OF SEX AND GENDER

Each of the reforms described above constitutes an important step forward in the legal recognition of sex and gender diversity, which many hope is a precursor to improved legal protections for the rights of sex or gender diverse people. However, many of Australian BDM regimes continue to contain components that require sex or gender diverse people to *prove* their non-binary status by reference to medical evidence.⁵⁵ While some Australian jurisdictions have now taken steps to remove the requirement of irreversible surgical reassignment of sex as a pre-requisite to applications for changes to the BDM register,⁵⁶ many continue to require evidence of 'clinical treatment' such as

⁴⁸ Ibid.

⁴⁹ Ibid.

⁵⁰ Ibid.

⁵¹ See, eg, Fiona Kelly and Hannah Robert, 'Explainer: Why Removing Sex from Birth Certificates Matters to Gender Diverse People' *The Conversation* (online, 25 October 2018) <<https://theconversation.com/explainer-why-removing-sex-from-birth-certificates-matters-to-gender-diverse-people-105571>>.

⁵² *Justice and Related Legislation (Marriage and Gender Amendments) Act 2019* (Tas) Part 4.

⁵³ Ibid, in particular ss 15–16.

⁵⁴ Queensland Government, *Registering Life Events: Recognising Sex and Gender Diversity and Same-sex Families – Review of the Births, Deaths and Marriages Registration Act 2003 (Qld)* (Discussion Paper 1, March 2018).

⁵⁵ See, eg, *Births, Deaths and Marriages Registration Act* (n 36) s 29K.

⁵⁶ See Laura Grenfell and Anne Hewitt 'Gender Regulation: Restrictive, Facilitative or Transformative Laws?' (2012) 34 *Sydney Law Review* 761, 771–772 for what they call 'sex as congruent anatomy and psychology model'; see also Franklin Romeo 'Beyond the Medical Model: Advocating for a New Conception of Gender Identity in the Law' (2005) 36(1) *Columbia Human Rights Law Review* 713, 724.

counselling or therapy. This comes closer to what Grenfell and Hewitt have classed as the ‘transformative model’ of legal recognition of sex, which the authors describe as an approach that ‘allows a greater degree of agency over sex without demanding substantial anatomical change’,⁵⁷ facilitating change of sex more readily than previous models, but still demanding some engagement with the medical profession, rather than relying on behaviour or psychology alone.⁵⁸ An example of this ‘transformative approach’ is the requirement to undertake ‘clinical treatment’ from a medical practitioner that could include gender affirmation surgery or other forms of treatment such as hormone replacement therapy or psychological treatment.⁵⁹ While this model can be seen as representing an important compromise between the medical model and self-identification approach (discussed below), Blincoe argues that requiring any form of medical intervention as a threshold requirement for changing a person’s legally recognised sex or gender is problematic as it continues to be based on normative expectations of the trans experience where some kind of external certification process is required to ‘confirm’ the individual’s gender identity.⁶⁰ Some of these normative assumptions have been critically examined by the AHRC in its 2009 *Sex Files* report, where it found that medical treatment may be only part of the sex affirmation process that an individual undertakes, and that the process for legally changing a person’s sex is inappropriately medicalised and undermines the role of self-identification of sex and gender.⁶¹

The alternative approach, which can be described as a ‘self-identification’ approach, is based on the idea that ‘a person should be able to determine their own sex/gender for all purposes’ and that gender is ‘a healthy and legitimate expression of a person’s identity’.⁶² Under this approach, it is inappropriate to require an individual to ‘support’ their application for a particular sex or gender to be included on the legal register of births

⁵⁷ Grenfell and Hewitt (n 56) 762.

⁵⁸ *Ibid* 772–773.

⁵⁹ *Ibid* 772.

⁶⁰ Blincoe (n 9) 65.

⁶¹ *Sex Files* (n 20) 25.

⁶² Blincoe (n 9) 65; Romeo (n 56) 739. As discussed below, this approach has been subject to some criticism, see, eg, Holly Lawford-Smith, ‘Talking Past Each Other about Trans/gender’ *Medium* (online, 16 June 2019) <<https://medium.com/@aytchellis/talking-past-each-other-about-trans-gender-1da8e058caf8>>; Holly Lawford-Smith, ‘Misgivings about Racial and Religious Tolerance Amendment Bill’ *The Age*, (online, 21 September 2019) <<https://www.theage.com.au/national/victoria/misgivings-about-racial-and-religious-tolerance-amendment-bill-20190919-p52syb.html>>.

with medical evidence of any kind. Instead, the process should be akin to other administrative processes for altering or confirming legal identity, such as change of name processes.

Both the 'transformative approach' explored by Grenfell and Hewitt and the 'self-identification' approach discussed above can be described as consistent with the Yogyakarta Principles,⁶³ which provide persuasive guidance on how international human rights treaties should be interpreted in relation to the protection of gender diversity. For example, Yogyakarta Principle 3 explains that '[n]o one shall be forced to undergo medical procedures, including sex reassignment surgery, sterilisation or hormonal therapy, as a requirement for legal recognition of their gender identity'.⁶⁴ These principles are reflected to varying extents within the changes recommended by SALRI, explored by LRCWA and enacted in Victoria and Tasmania.

In the course of the law reform inquiries described above, this self-identification approach has come under sustained criticism from those opposed to legal recognition of sex or gender diversity, including on the basis that such an approach could give rise to the risk of fraud being committed,⁶⁵ or that it might lead to the problem (or perception) that a person might be able to change this identity category more than once, undermining the stability and certainty of the BDM regime.⁶⁶ As SALRI observes, at least in the South Australian context, this criticism appears to lack weight having regard to the features of the regimes for legally changing a person's name, which contain no requirements to provide 'evidence' in support of the change, and have not generally been found to be misused for nefarious means.⁶⁷ The self-identification approach has also been criticised on the grounds that it would give rise to the risk of men changing their sex for the purpose

⁶³ *Yogyakarta Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity* (International Guidelines, March 2007) <yogyakartaprinciples.org/wp-content/uploads/2016/08/principles_en.pdf> ('The Yogyakarta Principles'). See also *Sex Files* (n 20) 12, which outlines that '[t]he Yogyakarta Principles are not legally binding themselves, but are an interpretation of already binding agreements from the view point of sexual orientation and gender identity. Therefore, the Yogyakarta Principles are persuasive in shaping our understanding of how existing binding human rights obligations apply and relate to people who are sex and gender diverse.'

⁶⁴ The Yogyakarta Principles (n 63) Principle 3.

⁶⁵ For a comprehensive analysis of these claims, see Alex Sharpe, *Sexual Intimacy and Gender Identity 'Fraud': Reframing the Legal & Ethical Debate* (Routledge, 2018); Alex Sharpe 'Endless sex: The Gender Recognition Act and the Persistence of a Legal Category' in Hale B, Monk D, Cooke E, Pearl D (eds), *The Family, Law and Society: Cases and Materials* (Oxford University Press, 6th ed, 2008).

⁶⁶ Some of these concerns were raised in the context of the SALRI inquiry; see, eg, South Australian Law Reform Institute (n 7) 53.

⁶⁷ South Australian Law Reform Institute (n 7).

of accessing special privileges or advantages only available to women, or entering places or accessing services reserved exclusively for women. Blincoe responds to this criticism by observing that

Underlying this concern is that people with “male” genitalia will be allowed in female spaces in an implicit fear that trans women are more likely to be physically or sexually violent towards other women, which is a baseless assumption. Additionally, arguments like this tend to shift the focus away from policies which actually make those spaces safer for women.⁶⁸

For other commentators, such as Lawford-Smith, the self-identification model gives rise to potential conflicts between rights of trans people and the rights of women, particularly where transwomen are treated as women in ‘all social and legal respects’ which creates a ‘conflict with women’s sex-based rights specifically’.⁶⁹ Regardless of the substantive basis for criticism like these, it is clear from the differences between the recommendations made by law reform bodies in the ACT and SA and the legislative response from Parliaments that there remains some hesitation from law makers when it comes to fully implementing a self-identification approach to reform in this area.

This is not surprising when the broad political context is considered, wherein the rights of sex or gender diverse people have been coarsely equated with the interests of ‘progressives’ or the ‘gay rights lobby’, and opposed by certain conservative groups who use these types of reforms as examples of ‘political correctness gone mad’.⁷⁰ The intensity of this political context has increased since the 2017-2018 debate on marriage equality reforms,⁷¹ and the more recent debate on the question of how to balance religious

⁶⁸ Blincoe (n 9) 82; see also Kristin Wenstrom “‘What the Birth Certificate Shows’: An Argument to Remove Surgical Requirements from Birth Certificate Amendment Policies’ (2008) 17 *Law & Sex* 131, 148–150.

⁶⁹ See, eg, Lawford-Smith, ‘Talking Past Each Other about Trans/gender’ (n 62); Lawford-Smith, ‘Misgivings about Racial and Religious Tolerance Amendment Bill’ (n 62).

⁷⁰ For a summary of the type of media coverage of these issues see ABC TV, ‘Transgender Agenda’, *Media Watch* 19 August 2019 <<https://www.abc.net.au/mediawatch/episodes/trans/11427782>>. See also Josh Taylor ‘How Children Became the Target in a Right Wing Culture War over Gender’ *The Guardian Online* (online, 25 Aug 2019) <https://www.theguardian.com/society/2019/aug/24/how-children-became-the-target-in-a-rightwing-culture-war-over-gender?CMP=share_btn_link>; Joan Westenberg, ‘New birth certificate laws spark anti-trans campaign’ *The Saturday Paper* (online, 17-23 August) <<https://www.thesaturdaypaper.com.au/news/politics/2019/08/17/new-birth-certificate-laws-spark-anti-trans-campaign/15659640008617>>.

⁷¹ For a comprehensive overview of the legislative history of the marriage equality reforms, see Shirleene Robinson and Alex Greenwich, *Yes Yes Yes: Australia’s Journey to Marriage Equality* (2018, NewSouth

freedoms with protections against discrimination on the grounds of gender identity and sexual orientation.⁷²

Often the casualties in these debates are the individuals seeking to have their gender identity recognised by the law and accepted by the community in which they live,⁷³ whose mental and physical health is already at risk as a result of erroneous, transphobic public debate and media reporting. Dr Fiona Bisshop, a specialist in transgender healthcare and vice-president of the Sexual Health Society of Queensland, has observed that:

Using transgender children as a conservative rallying call to arms against progressive changes in society will undoubtedly lead to an increase in stigma, discrimination, social exclusion, family rejection, bullying, harassment and assaults, and ultimately may also lead to increased rates of self-harm and suicide in this vulnerable population.⁷⁴

This risk of harm has the potential to intensify unless and until political leaders and lawmakers not only respond to recommendations for legislative reform, but are prepared to enter the broader public debate on these issues with a view to sharing the evidence-based, carefully collected information collated by the law reform bodies who have inquired into these matters.

V CONCLUSION

In *Possum Magic*, Grandma Poss and Hush travel around Australia and eventually find the many different ingredients needed to make Huss visible again. Just to be sure, once a year, they revisit these ingredients, so that Hush can stay visible forever. A similar approach may be needed to ensure that sex or gender diverse Australians remain visible within the Australian legal system, and to begin the long journey to ensuring substantive equality for all people regardless of these attributes. In recent years, many law reform bodies have identified the necessary ingredients for a self-identification approach to legal

Books); Deirdre McKeown, *A Chronology of Same-sex Marriage Bills Introduced into the Federal Parliament: A Quick Guide* (Research Paper Series, 2016-17, February 2018).

⁷² See, eg, Department of Prime Minister and Cabinet, *Religious Freedom Review: Report of the Expert Panel* (Report, 2018) ("*Religious Freedom Review*"); Australian Government, *Australian Government Response to the Religious Freedom Review* (Report, 13 December 2018) <<https://www.ag.gov.au/RightsAndProtections/HumanRights/Documents/Response-religious-freedom-2018.pdf>>.

⁷³ Taylor (n 70).

⁷⁴ Westenberg (n 70).

recognition of sex and gender, and have collated a wealth of information for law and policy makers to reflect upon and use to prosecute legislative change. Unfortunately, the broader political debate gives rise to serious risks that these ingredients will be misunderstood or manipulated for other political goals. Like Grandma Poss and Hush, law reform advocates must be vigilant in revisiting these ingredients. We must continue to remind law and policy makers of the benefits of ensuring that each one of us can be recognised for who we are, particularly in the face of commentary that seeks to make some of us invisible again.

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