



Sex And Gender Education Foundation

PO BOX 879,
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Legal Policy Document

This document has been prepared in order to stimulate and expand on opening negotiations with the AG concerning the potential for changes in the law and legal recognition of the status of sex and gender diverse people – that is those who identify themselves as being **transsexual, transgendered, intersex, androgynous** or **without sex and gender identity** and those with other variant sex and gender identities. The extensive range of identities within various societies do not conform to the male/female bi-polar heterosexual models that have been the ones previously recognised mainly within societies of European derivation.

The five previous headings can cover a range of 50 or more diverse identities that come under the general heading of sex and gender variance. Since Australia is now multi-cultural and embracing further evolvement of human rights, the group SAGE wishes to further negotiations with the AG's department to help the department understand the difficulties many sex and gender diverse people and their families, partners, friends and employers find themselves in, both legally and socially. Unfortunately previous government documents have often referred to the group of above people as coming under the label of 'transgendered'. However, this is neither scientifically, medically, psychologically or sociologically correct and highly offensive to many of the diverse groups mentioned (O'Keefe 1997 & 1999); (Money 1986); (Devor 1997); (Feinberg 1996); (More & Whittle (Eds) 1999); (Atkins (Ed) 1998); (Dreger 1998 & 1999). At this point, it is necessary to clarify the difference between sex, gender and sexuality.

Sex

When we talk about sex, we mean the physiological breeding concomitants of the reproductive system. Sex is neither static nor immutable and all people are only partly one sex or another, even though they generally present reproductively as mainly one particular kind of breeding sex known as male or female. People are born with many different physical primary and secondary sex characteristics and both males and females are often born with physiological features generally associated socially with their opposite biological sex type (Jones 1997).

Gender

Gender is the personal and sociological presentation of sex type or absence or variance of sex type within a performance context. In other words, it is how a person presents themselves to the world and their degrees of or lack of femininity or masculinity in the way they dress and act. In looking very carefully at people's identity from a scientific perspective it is imperative not to confuse sex with gender presentation (Ramet (Ed) 1996); (Ekins & King 1996).

Sexuality

This is solely the involvement and direction of sexual libido and attraction, and also concerns who people have sex with and how. It also expands to social groups who band together with similar sexualities, forming singular and plural identities (Atkins (Ed) 1998).

SAGE is an education and campaigning body that is concerned with individuals and groups who present as sex and/or gender variant. Because sex and gender variant people reflect the same diverse sexualities possible within the general community, *the organisation does not campaign and is not involved with campaigning for the rights of individuals based on their sexuality.*

Australian law does not currently cater for people who do not fit into the strict male/female bipolar identity spectrum. It is useful to consider that 1 in every 200 children, an extremely conservative estimate, is neither strictly male nor female but has physiological variants causing them to be medically classified as intersex. This may include genetic variations on the XY for male and XX for female chromosome continuum (some legal males are not XY and some legal females are not XX (Money 1986), congenital variations of the vagina or penis (some females are born with penis-like structures and some males without a typically developed penis (Hurst, Shafir, & Lancaster 1997), congenital variations of male and female reproductive system (some people are born with both an ovary and a testicle or with streaked gonads containing both ovarian and testicular tissue, hormonal fluctuation (cross-sex hormone levels can be the congenital glandular activity or influence of the mother's hormones within the womb), brain sex (post-mortem dissection has shown that many males and females have brain features generally associated with their opposite biological



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sex (Gooren 1995), psychological sex and gender identity variants and people who socially identify as being something other than strictly male or female.

Also EEGs have shown that living persons naturally use unusual parts of their brains for cognitive processes that are not normally associated with their sex type. There are further classifications of sex and gender variant people that have not been mentioned in this document as it is an exploration, but would be included in this category in later expanded documentation.

A devastating mistake in the law concerning the classification of sex by chromosome and gonadal recognition was made in the English case of *Corbett v Corbett* in 1970 (Ashley & Fallowell 1982). In this case, a woman of transsexual origin, April Ashley, had married a man in England but during this divorce case, Justice Ormrod set a precedent by ruling that Ashley could not be divorced since she had not been legally married as female in the first place, and that since she had XY chromosomes and testicles she was not legally female. Himself a physician, Ormrod based his decision on bad advice from a group of other physicians who refused to rely on the scientific knowledge of the time concerning sexation of transsexuals.

It was known then and has been known since that a person's physical sex and gender presentation cannot be based solely on their chromosome and gonadal type since these are only a small number of the overall concomitants that make up a person's whole sex and gender identity. The decision made by Justice Ormrod was corrupt in its nature in that it was based on bad scientific advice, but has set precedents in many English-speaking countries over the past 30 years, preventing people who are transsexual from changing their birth certificates and getting married under their new identities, or being accepted as their self-evolved identity. In Australia the most notorious decision based on *Corbett v Corbett* was the decision of Justice Bell that the respondent was not male or female in law because they had genital reconstruction surgery to repair an intersex condition in the marriage of *C and D (falsely called C)* (1979); (Finlay 1997).

Many countries and states have overturned and ignored the original decision made by Ormrod, recognising it as bad science and contrary to the human rights of an individual, as Human Rights Acts stipulate that an individual should have a right to name and present themselves as they so desire in order to live a well and happy life, without contravening any criminal laws. Europe has now put pressure on the UK to put in place new laws that fully recognise a person of transsexual origins as a person of their chosen sex and gender identity, including the changing of birth certificates and allowing those individuals to marry whoever they wish.

The group SAGE represents its members who are from the whole spectrum of these identities and therefore is not strictly campaigning for the rights of one particular sub-group but is seeking to educate government departments and society that the law needs to be adapted to accommodate and protect these people's physical, mental and social needs. SAGE is affiliated to similar organisations internationally and within Australia, which are working towards parallel achievement of human rights.

Many of the above people need to change their identities during their life from male to female or vice versa or to become androgynous or have no sex or gender identity (neuter). The reasons for these changes may be physiological, psychological or social and none should be higher up the ladder than any of the others. What we are asking the AG's department to do is to participate in changing the law so that people changing their sex and gender identity may obtain personal documentation after having made a statutory declaration about the sex and gender they need or wish to be known as. It is extremely embarrassing and psychologically and socially disruptive for a person who is assumed to be one sex at birth to have to present incorrect documents later in their life when they may be living as another sex or gender identity.

1. Over the past 30 years the law has often not allowed individuals to self-identify their own sex or gender. For those individuals to be psychologically and socially well, in accordance with the World Health Organisation's definition of health, it is necessary to take a personal-centred point of view and allow those individuals to define their own sex and gender based on what they are commonly known as within a social context. This declaration could be made before a Justice of the Peace and thereafter all legal documents should be changed to give no trace of the previous sex or gender identity.

2. Individuals should not have to produce birth certificates containing incorrect information. According to recent scientific findings no person is either totally male or female. People should be able to apply and succeed in changing their birth certificates and attain all rights and other documents appropriate to their new identity. This would include passports, tax file numbers, driving licences, and all the necessary documentation citizens need to carry out their everyday life.

2A) These provisions must also apply to immigrants to Australia whose documentation may have been issued by countries which deny them the right to amend their documents in accordance with their revised sex or gender. Such persons would need to be



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issued with Australian documentation to save them from being embarrassed by the need to present unsuitable documentation from their country of origin.

3. Individuals should be allowed to marry or form a permanent relationship recognised by law in accordance with their new identity benchmarked by their own self-declaration of which sex or gender they might be. It needs to be recognised that surgical intervention is not applicable to all individuals as some people may not want surgery (and that should not be forced upon them), are too unwell or old to undergo surgery, or are psychologically unsuitable to undergo certain medical or surgical procedures. In addition, there are people who do not have the necessary financial resources for medical or surgical treatment.

4. Individuals should not be forced to separate from previous partners, become divorced, or legally separated in any way in order to change their legal sex or gender. This is a contravention of human rights since no government, state or organisation has the right to separate individuals who have voluntarily entered into a personal, conjoint relationship.

5. All such aforementioned persons should have access to their medical records at any time.

6. Individuals of any age should not have enforced upon them surgery or psychological or psychiatric treatment in order to reassign their sex or gender against their will to dissuade them from being other than they wish to present. While there are some children born with intersex conditions which mean they need immediate surgical or medical intervention to save their lives, for example Congenital Adrenal Hyperplasia, traditionally surgeons and parents have taken it upon themselves to reassign the sex and gender of children without the child's permission. This practice has now scientifically proved to be quite unreliable and many individuals have grown up having to realign their sex and gender identity years after the surgery (Hendricks 2000). The practice is a form of genital mutilation and assault. For this reason we are asking for it to be illegal for doctors or parents to force upon minors a change of sex and gender identity and that those children should be allowed to choose their own sex and gender identity.

In the case of David Reimer, John Colapinto (2000) tells how Reimer, as a child of 18 months, was subjected to a sex conversion operation by clinicians after a circumcision had gone wrong. Throughout Reimer's childhood he was forced to live as female and was not told of his origins until he was 14 when he insisted on changing back to his male identity, having felt profoundly uncomfortable as a female.

In the autobiography of Lady Colin Campbell (1997), she tells of how, having been born intersex, she was forced to live as a boy and injected with testosterone while restrained in hospital at the onset of puberty. This was extremely disturbing for her and she was unable to undergo corrective medical procedures until she left home at 18 to claim her true female identity.

Dawn Langley Simmons (1995) tells in her autobiography of how she lived her life until her mid-twenties as a male but then underwent surgery which disclosed ovaries within her abdomen. She later went on to marry a man in the United States and give birth to her son.

Dreger (1998 & 1999) chronicles a litany of clinical abuse that has been standard practice in medicine of using medication and surgical procedures to force children to live under sexual identities which later they are uncomfortable with. This practice can only be paralleled with female circumcision as it is foisted upon those human beings without their permission.

Diamond (1997) has published guidelines for clinicians on how to bring up intersex children but has asked for a moratorium on surgery until an individual is of an age when they are consciously able to make their own decisions about which sex they wish to be.

7. Individuals should not have to prove their sex, gender or undergo medical intervention in order to gain legal documentation. This can be paralleled with individuals not having to prove that they have genetic Aboriginal ancestors in order to be called a true Australian. The government needs to recognise the human right for a person to self-declare their own identity with regard to sex and gender in order to carry out their everyday life in society; this can also be supported by a letter from a specialist in the field of sex, gender and sexuality, educated to doctorate level. In the case of Indigenous cultures, this letter may be substituted by a letter from a tribal elder. If we compare it to the experience of international sporting bodies, the last two Olympics witnessed the scrapping of the sex testing of female athletes without due hardship or problem (Myron 2000).

8. All individuals who are sex and gender variant should be entitled to rights of privacy concerning their medical and social identity and any attempt to place an individual in a compromising position by exposing their identity without the individual's



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permission should be considered an act of discrimination. Individuals should not be disadvantaged personally, socially, within the workplace or society because of their sex and/or gender identity, and all anti-discrimination legislation should allow for prosecution of persons or bodies that carry out such acts of discrimination. Although this aspect is covered by the NSW Anti-Discrimination Act of 1999, there is a weakness in the Act in that only a sub-set of New South Wales residents are legally recognised as their new sex/gender identity. They must satisfy the criteria of having been born in New South Wales and must be single.

Individuals carrying identification such as passport, driving licence, any document bearing a photograph issued by the government, or any document that would normally be required by ordinary people, should not be prohibited from entering into single sex spaces in accordance with their appropriate identification.

9. Individuals with sex or gender diversity should not suffer discrimination or undue hardship on payment of superannuation. The majority of Australians have superannuation contributions, and when they die this is paid to their partner, whether married or de facto. This payment does not apply, however, if the partner is not legally of the opposite sex. This means that a woman with children dependent on her transman partner may, in the event of his death, receive absolutely nothing, simply because her partner was transsexual. This situation can also occur with individuals who are medically classified as intersex or sex and gender variant.

10. Individuals with sex and gender diverse identities can often be in need of medical and psychological assistance. They need to have access to state or federal healthcare systems that will enable them to redress any physiological and/or psychological incongruity with regard to their sex and gender identity, in co-ordination with internationally accepted clinical procedures for that group of people.

The members of SAGE understand that for government ministers and civil servants the complex issues of sex and gender can be very confusing when trying to generate good law to serve all the citizens of Australia. Public opinion can be subverted by poor understanding of science, social science, sexation and matters of sex and gender identity (Money 1985).

There have, however, been many individuals who have had shifting sex and gender identities throughout history (Kates 1995); (Jorgensen 1967); (Souhami 1988); (Collis 2001). Also in many cultures it is acceptable for individuals to adopt the sex and gender role, other than given to them at birth, by means of nothing more than a self-declaration (Young 2000); (Roscoe 1998); (Ramet (Ed) 1996). In the case of Elizabeth Forbes-Sempill, who became Ewan Forbes-Sempill, a long court case was fought on the right to change legal sex by declaration, as an estate and title depended on the outcome, with the courts deciding in favour of Ewan Forbes-Sempill (Playdon 1996).

Before the *Corbett v Corbett* case it was also common practice in the English-speaking world to allow people to change their birth certificates from male to female or vice versa upon declaring that they had physically been altered or were identifying as being a sex and gender other than they had been registered at birth (Hodgkinson 1989); (Cowell 1954).

The dilemma for the Australian government has been that since *Corbett v Corbett*, cases have continually barraged the courts seeking to set precedents in the Australian courts to give back to the individual the right to define their own sex and gender. The future also promises continuing legal action before and against the state to allow individuals who are sex and gender variant to identify as they so wish. When the state attempts to bestow upon individuals definitions of that individual's sex and gender, the individual often refuses to accept this, which will lead to conflict between those individuals and the state.

Since science has now destroyed the myth that sex and gender are immutable, it would be wise for the state to allow individuals to define themselves, by legally declaring, as they so wish, their sex and gender identity status (Fausto-Sterling 1985). This would undoubtedly free the state from this dispute and allow the individual the freedom to self-identify as they did formerly, having documents changed simply on request. Time, money and energy would no longer be lost by the state on this conflict that will not go away without legal resolution. People will always be born and develop identities that are sex and gender diverse and they are unlikely to stop fighting for the human right to self-identify.

The government would be wrong to rely solely on medical evidence that an individual is either male, female or other, because very few medics are trained in sexology, and even fewer in sex and gender variance. Those qualified, according to international standards to help sex and gender variant people, are from a multi-disciplinary range including endocrinologists, gynaecologists, urologists, plastic surgeons, psychiatrists, psychologists, psychotherapists, counsellors and social workers, specially trained or experienced in the field of sex and gender variance, educated to doctorate level and such professionals are rare (Ettner 1999).



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There are also no tests, either physiological or psychological, to see if a person is truly transsexual, transgendered or androgynously identified. Even though science suggests that some people's cross-sex self-identification may have a physiological causation, this would not be true of all persons in that position (Gooren 1995).

In 2001 in Australia, Justice Chisholm of the Family Court concluded in his judgement in the case of Kevin, a transman whose birth certificate originally stated 'female', that Kevin was entitled to be legally married as a male. In reviewing the case, Justice Chisholm stated that he believed because Kevin had presented socially as a male, dressed as a male and considered himself a male, changed his birth certificate to state 'male', as well as having undergone medical treatment to masculinise himself, he was entitled to all rights and privileges in marriage as a male. The axis of this case was not based solely on medical evidence that Kevin was a man of transsexual origin and that transsexualism may have a physiological derivation, but that Kevin has presented himself socially as a male and should, in human rights terms, be considered as such.

The Australian Attorney General, Daryl Williams, appealed the verdict, attempting to overturn the decision that Kevin was entitled to all rights and privileges as a male. But in the logical conclusion that Kevin was allowed to change his birth certificate and was legally identified as male by birth, it would naturally follow from a human rights perspective that he could not be denied all rights and privileges that go with the re-issuing of his birth certificate.

SAGE understands that at times any AG can find themselves in a difficult position when classifying people's sex and gender identity when they enter into the penal system. There are guidelines in place in many areas that instruct the police to treat people as the sex and gender identity they are presenting as, at the time of their arrest. It is permissible, within certain societies, that individuals who change their sex and gender identity during a prison term are able to have their sex and gender documentation changed according to their new identity and be reclassified within the penal system – for instance transferred to a prison or detention centre that accommodates their new identity.

SAGE also understands that an AG must protect inmates within the penal system and that it would be inappropriate, for instance, for a male to be present in a female facility under the guise of a female identity, or vice versa, without verification of a specialist opinion in the field of sex and gender identity. So SAGE proposes that an AG considers the classification of inmates with sex and gender diverse identities to be guided by specialists in the field qualified in accordance with the previously mentioned internationally recognised criteria. Such specialists would include psychologists, psychiatrists, counsellors, psychotherapists and social workers. Classification should not be based solely on the medical opinions of physicians not trained in the area of sex and gender identity. It is also suggested that in future, inmates with sex and gender diverse identities who would have difficulty functioning in the general prison population could be housed in special facilities that could deal with their particular needs, if they so wish.

The state should draft new laws to allow an individual to declare or change their own sex and/or gender status via statutory declaration. Australia has prided itself on the 'FAIR GO' motto and the right to equal treatment. A person's genitals, genetics and personal sex and gender presentation are not a matter for the state to determine.

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