

Let's talk about sex (-based rights for Australians)



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The week before last, the Births, Deaths and Marriages Registration Amendment Bill 2019 was introduced to the Victorian Parliament. The Bill proposes an amendment to the Births, Deaths and Marriages Registration Act 1996, allowing people to alter their sex in the birth register through a statutory declaration, and to obtain documents stating a name and sex different to that recorded at birth. The bill also makes related amendments to four other Acts.

In this piece, I summarize the bill, and other relevant pieces of legislation, with a particular view to establishing how sex is being understood, and how these legal changes will affect the sex-based rights (if at all) of people who live in the Australian state of Victoria.

VIC Births, Deaths and Marriages Registration Amendment Bill 2019

The current requirement to change sex in VIC is to 'have undergone sex affirmation surgery', which is understood as a 'surgical procedure involving the alteration of a person's reproductive organs carried out for the purpose of assisting the person to be considered a member of the opposite sex'. The new bill removes that requirement (Part 1, subsection (iii)), and replaces it with 'acknowledgement of sex application', to be made to and approved by the Registrar (except in cases where the applicant is a detainee, prisoner, prisoner on parole, offender, or registrable offender, in which case the application must be made to the Registrar only after being approved by other officials specified in the Bill). To make this application, the person must *believe* their sex to be as nominated in the application (so for example, a male person applying to have his sex acknowledged as female must believe that he is female), and make a statutory declaration to that effect. The application must be accompanied by a supporting statement from another person, in which it is affirmed that the application 'makes the application to alter the record of the sex of the applicant in good faith', and that the person writing the supporting statement 'supports the application'. Parents can also make an application on behalf of their children. Acknowledgement of sex applications can be made as often as once a year.

One might immediately be interested in gatekeeping: can anyone change their sex, and for any reason? The bill contains one general gatekeeping requirement, which is that ‘the alteration of the record of sex is not sought for fraudulent or other improper purposes’. But it also has further gatekeeping requirements for specific classes of persons: detainees, prisoners, prisoners on parole, offenders, or registrable offenders. In these cases, the application to change sex must be approved by a specified official before being made to the Registrar (like the Chief Commissioner of Police, in the case of sex offenders). Furthermore, the relevant official must not approve the application if they think the change of sex would be reasonably likely ‘to be regarded as offensive by a victim of crime or an appreciable sector of the community’.

Related legislation: Equal Opportunity Act & Sex Discrimination Act/Amendment

The next question is what this change means when it comes to other legislation, at the state level, and at the federal level. In particular, does this change what sex is, according to the law, and does this change hold up against e.g. the Victorian Equal Opportunity Act 2010, or the Australian Sex Discrimination Act 1984 and the Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Act 2013?

Let’s start with VEOA 2010. This act *does not define sex*. It defines sexual orientation as ‘homosexuality (including lesbianism), bisexuality or heterosexuality’, and it defines gender identity as ‘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)’, ‘by assuming characteristics of the other sex, whether by means of medical intervention, style of dressing or otherwise’, or ‘by living, or seeking to live, as a member of the other sex’. So there is recurrent reference to sex, which seems to mean biological sex (what could homosexuality be if not attraction to the same sex? What could it mean to assume the characteristics of the ‘other’ sex, if not that there are two sexes and you are not the one you assume characteristics of?), and yet sex remains undefined.

Sex is listed as an attribute on the basis of which there can be discrimination, and the example given later for when sex discrimination is lawful refers to the exclusion of a girl from a boys’ competitive sporting activity. The exceptions for ‘genuine occupational requirements’ refer to sex (p. 37), as do those for educational institutions (p. 47–48), insurance discrimination (p. 55), welfare measures, student accommodation, sexual services accommodation (pp. 65–66), clubs (p. 68), competitive sporting activities (p. 70), superannuation (p. 75), religion (p. 76), and religious schools (p. 77). There is an added caveat under ‘competitive sporting activities’ which allows the exclusion on grounds of both sex and gender identity (p. 70): ‘a person may exclude people of one sex or with a gender identity from participating in a competitive sporting activity in which the strength, stamina or physique of competitors is relevant’.

This weakly implies that where gender identity is not mentioned, no exclusion is permissible on its basis. But if we can discriminate on the basis of sex, and can’t discriminate on the basis of gender identity, it’s not clear where we end up when it comes to single-sex services.

How about the SDA 1984 and SDA 2013? The SDA 1984 did define ‘woman’ and ‘man’ with reference to sex, but the definitions were repealed by the 2013 Amendment and the definitions were removed. They were: “‘woman’ means a member of the female sex irrespective of age”, and “‘man’ means a member of the male sex irrespective of age”. Still, the 1984 Act did not define sex itself, despite referring to it in its title and more than 259 times throughout its text. It does define ‘official record of a person’s sex’, as “(a) a record of a person’s sex in a register of births, deaths and marriages (however described); or (b) a document (however described), issued under a law of a State or Territory, the purpose of which is to identify or acknowledge a person’s sex’. The 2013 Amendment does not define sex, repeals the definitions of ‘man’ and ‘woman’ in terms of sex, defines sexual orientation in terms of ‘same’ or ‘different’ sex (instead of the SDA 1984’s ‘opposite sex’), and defines gender identity as ‘the gender-

related identity, appearance or mannerisms or other gender-related characteristics of a person (whether by way of medical intervention or not), with or without regard to the person's designated sex at birth'.

The explanatory memoranda to the 2013 Amendment distinguished sex from gender in a way that suggests sex is biological, not legal:

“‘Gender’ is used in this definition rather than ‘sex’ as it is a different concept, understood to be part of a person’s social identity (rather than biological characteristics). Gender refers to the way a person presents and is recognized within the community. A person’s gender might include outward social markers, including their name, outward appearance, mannerisms and dress. It also recognizes that a person’s sex and gender may not necessarily be the same. Some people may identify as a different gender to their birth sex. and some people may identify as neither male nor female” (Item 6, paragraph 13, p. 12).

– and it also said explicitly that in repealing the definitions of ‘man’ and ‘woman’ from the 1984 Act, ‘to the extent these terms appear in the Act, they will take their ordinary meaning. These definitions are repealed in order to ensure that ‘man’ and ‘woman’ are not interpreted so narrowly as to exclude, for example, a transgender woman from accessing protections from discrimination on the basis of other attributes contained in the SDA’ (Items 8 and 14, paragraph 18, p. 13).

Discrimination on the basis of sex under the SDA can be made on the basis of ‘the sex of the aggrieved person’, ‘a characteristic that appertains generally to persons of the sex of the aggrieved person’, or ‘a characteristic that is generally imputed to persons of the sex of the aggrieved person’. Note that these all refer to your sex or people who have the same sex as you. We can’t understand the idea of characteristics that people of my sex generally have, or characteristics generally imputed to people of my sex, if we don’t know which class of people have my sex. (This may seem obvious, but it’s upset by the divorce of legal sex from biological sex).

The SDA includes a long list of exemptions for where it’s not unlawful to discriminate on the grounds of sex, including for occupations where it is a genuine occupational qualification to be of a particular sex; where duties can only be performed by people with particular physical attributes (except strength and stamina); where authenticity, aesthetics, or tradition in dramatic performance require it; where necessary to preserve decency or privacy because the job involves the fitting of clothing to persons of the same sex; where searches of clothing or bodies are conducted; where the worker would have to enter toilets of the same sex; where the job requires sleeping accommodations and these only exist for the same sex; and where the job requires entering areas where people of the same sex will be undressed.

Note in particular, then, that it is lawful to discriminate against a male person in favour of a female person in hiring for a job that would require him to fit clothing to female people (e.g. women’s clothing store assistants), to search female bodies (e.g. airport security officers), to enter female toilets (e.g. cleaners), to sleep at work where the only accommodations are female (e.g. firefighting), or to enter female changing rooms (e.g. women’s gym staff). It’s hard to make sense of these claims unless sex is understood as biological sex, not legal sex (‘official record of a person’s sex’). If it’s legal sex, then the SDA is saying there’s lawful discrimination against males in all of these cases except against any who have the legal sex ‘female’ (which in TAS, and proposed in VIC, can be acquired by mere statutory declaration). But then it’s not sex discrimination at all, it’s something else entirely.

Discrimination on the basis of gender identity can be made on the basis of ‘the aggrieved person’s gender identity’, ‘a characteristic that appertains generally to persons who have the same gender identity as the aggrieved person’, or ‘a characteristic that is generally imputed to persons who have the same gender identity as the aggrieved person’. Note that all these also require making sense of the idea that people have the same gender identity as you. This is made difficult by the definition of ‘gender identity’, which was weak: appearance, mannerisms, or other gender-related characteristics (it is not clear what this last item refers to).

The ACT Law Reform Advisory Council states explicitly in its 2012 'Beyond the Binary' report that 'It is the view of the Council that it is not necessary or appropriate to define 'female' or 'male' in ACT legislation. Those terms do have an ordinary binary meaning and legislation is not necessary to confirm that. It is, however, appropriate to define terms of sex and gender diversity that are outside these binary terms, so that diverse sex and gender identity is given recognition as a part of a process of its being normalised' (ACT Law Reform Advisory Council 2012, p. 32–33). The report does, however, define sex! (Finally). It says:

'Sex, when it is not used in conjunction with 'gender' (e.g. 'sex and gender'), is intended to refer to a person's biological sex, which can be any of female, male and intersex' (p. 13).

But unfortunately there is not a definition of 'sex' in the ACT's Births, Deaths and Marriages Registration Act 1997 (which is still effective), and only hint at a distinction by referring to both 'sex' and 'altered sex' e.g. 'the person believes their sex to be the sex nominated in the application (the altered sex)' (p. 28). Here we could take 'sex' to mean biological sex and 'altered sex' to mean legal sex, assuming the application is successful. But we could also take both to refer to legal sex, which is consistent with the VIC Bill's language of 'acknowledging' sex rather than changing or reassigning it. It remains unclear.

Relevant case law

When something is unclear or ambiguous in the law, as the definition of 'sex' is in the law we've reviewed so far, one can look to the case law for further clarification. Unfortunately, there does not appear to be anything decisive on this. One related case comes from Western Australia (WA) in 2011, and establishes that even though WA requires sex reassignment surgery to change official documents, transmen who have undergone a double mastectomy count as having had this surgery, and so can be taken to have the legal sex 'male' even if their female reproductive anatomy is intact ('they had not had hysterectomies'). The High Court said further that 'the sex of a person is not, and a person's gender characteristics are not, in every case unequivocally male or female' (Rundle 212, p. 182). Dr Olivia Rundle of the University of Tasmania comments that this case 'may have implications for intersex and transgender people in future legal cases where there is a need to define their sex' (Rundle 2012, p. 184).

Another two cases, one from Victoria (VIC) in 2001, and the other from Queensland (QLD) in 1996, found sex to be biological. The Victorian Civil and Administrative Tribunal said that 'transsexualism is not covered by the attribute of 'sex'... because transsexualism is 'the condition of one who firmly believes that he (or she) belongs to the opposite sex to his (or her) biological gender'. A member of the Queensland Anti-Discrimination Tribunal said that sex discrimination did not cover cases 'where the discrimination occurs because of the very change from sex to sex itself'. But both of these cases occurred before gender identity was listed as a protected attribute in the SDA, and so involved an attempt to accommodate gender identity within the protected attribute of sex. In a 2003 case, the Australian Full Family Court said that the words 'man' and 'woman' in legislation 'have their ordinary contemporary meaning', which means their interpretation can change over time. Arguably, the meaning of sex is changing at the moment, which is why we're in this situation of unclarity.

In their survey of Anglo-American law when it comes to legal change of sex, Laura Grenfell and Anne Hewitt argue that there is evidence of three very different approaches: sex as biology ('fixed and immutable'); sex as congruent anatomy and psychology (by which they mean, a trans person has taken steps to bring their anatomy into line with how they think of themselves); and sex as psychology (by which they mean, sex as how a trans person thinks of themselves) (Grenfell & Hewitt 2012, p. 765). But they note that in Australia in particular, there has been little evidence of the first of these – sex as biology – since 2004, when the final state (which was actually VIC) introduced legislation to allow for the amendment of birth certificates. They say they the federal approach to passports is an example of the third approach – sex as psychology (which is basically self-identification) – and the state-level approaches to birth certificates are an example of the second approach, with important differences between different states (although of course, quite a lot has changed since their time of writing, because by now the ACT,

SA, NT, and TAS have all introduced much lower bars to legal change of sex, e.g. ‘clinical treatment’; and only VIC, NSW, QLD, and WA still require sex reassignment surgery).

The upshot!

We’re in an unusual position. The law itself is ambiguous. When it refers to sex, does it mean biological sex, altered sex, or legal sex? It could be either. There’s not sufficient case law to settle the matter. The fact that the VEOA 2010 lists gender identity alongside sex in talking about sport is a weak reason to think that sex is *not* being understood as biological sex (otherwise, gender identity wouldn’t need to be mentioned). The fact that the 2011 WA case said that people can have a sex of male while having intact female reproductive anatomy is a further weak reason to think that sex is not being understood as biological sex. But this doesn’t settle which of the other two it is. Overall, the matter is uncertain, and it will take a court actually hearing a case on this issue to figure it out. This means that at best, there’s a significant question mark over sex-based rights, which depend on what sex is. It’s completely reasonable to be concerned, at this point, even if it turns out after a legal test that there was nothing to worry about. At worst, sex-based rights are threatened by the new bill. Here’s what this does and doesn’t change.

If a transwoman is excluded from a single-sex space in VIC, she would not have a sex discrimination claim. Rather, she would have a gender identity discrimination claim. Her sex is important in establishing whether single-sex exemptions apply to her or not. So, say we’re talking about a female-only high school. If the law counts the transwoman as female, then she is the same sex as those who already attend the high school, and so if she is excluded from it that can’t be because of her sex; it must be for some other reason. If the law counts the transwoman as male, then she is the opposite sex to (or, as the current legislation all seems to prefer, a different sex from) those who already attend the high school, and so the single-sex exemption means she is not discriminated against by being excluded. Either way, she is not discriminated against on the grounds of sex.

If the law understands sex as biological sex (whether at birth, or at a later time, counting particular surgical or medical interventions as sufficient to change biological sex) then the proposed bill would have no impact on sex-based rights for Victorians. That’s because either a transwoman is always considered to be male, so all single-sex exemptions granting female-only spaces and provisions would exclude her; or, she is male unless she has had the relevant surgical or medical interventions, so all single-sex exemptions granting female-only spaces and provisions would exclude her if she hasn’t had the interventions, and include her if she has.

It is only if the law understands sex as legal sex (which, as we have seen, we have weak evidence for) that there is cause for concern. That’s because the new bill makes it much easier for people to acquire a legal sex that differs from their biological sex than it was before. Under this scenario, all transwomen who make the relevant statutory declaration count as female, and so are included for the purposes of all single-sex services and provisions pertaining to female people. I’ve explained already that, if she’s excluded, the transwoman can’t then make a sex discrimination claim. But she can make a direct or indirect discrimination claim on the basis of her protected characteristic of gender identity. For the former to succeed, she has to establish that she’s excluded because of her gender identity. For the latter to succeed, her exclusion would have to count as ‘unreasonable’ (and some single-sex spaces or provisions could argue that it was reasonable, in light of what they were set up to accomplish). (This has quite a bit in common with the UK Equality Act 2010’s test for exclusion being whether exclusion of a transwoman from a female-only spaces is a ‘proportionate means of achieving a legitimate aim’ (Section 19, p. 10).)

Let’s proceed on the assumption that sex in the Australian law is legal sex. Should we be happy for legal sex to be based on a statutory declaration of belief about biological sex?

One legal threat here is that more single-sex clubs or organizations have discrimination claims brought against them on the basis of excluding transwomen. But another, which I take to be much more serious,

is that a legal provision aimed at doing one thing, namely providing single-sex spaces and services to female people (understood biologically), is slowly being changed to do something quite different, namely provide same-belief-about-sex services to people who believe themselves to be female (have a female/woman/feminine gender identity, which they have made official through a statutory declaration) regardless of their biological sex. That changes the demographic of the people who are making use of single-sex spaces, and this in turn might affect the benefits of those spaces. Of course it might not, too, but we should at least be having a conversation about that.

The earlier changes from biological to legal sex in the cases of transwomen tracked sex reassignment surgery, which meant that people with superficially similar bodies would be sharing intimate spaces. But the change proposed by the new bill, which tracks only a belief about your sex, means that people with clearly different bodies will be sharing intimate spaces. Given all the exemptions listed for excluding people of the opposite ('a different') sex in the VEOA 2010 and the SDA 1984 & SDA 2013, how does this make sense? If this isn't a matter of biological sex, then it's hard to see why we want to have any single-sex spaces or discrimination exemptions. Biological sex comes with clear and obvious difference in both bodies and socialized behaviour. But beliefs about sex does not (or at least, has not been established to do so). So a question arises: if sex is understood as legal sex, and legal sex is a matter of mere belief confirmed through a statutory declaration, why should we have a Sex Discrimination Act at all?

Thinking about what sex is, and what we want it to be

In the 2012 Report 'Beyond the Binary' from the ACT Law Reform Advisory Council, sex and gender are referred to together: 'transgender people... having been born as physiologically either male or female, have changed or are changing their identity from one sex and gender to another' (p. 9); and [legislation should be amended] 'to recognize three sex and gender identities: female, male and intersex' (p. 9). By treating these together (and assuming that as in ordinary discourse 'male' and 'female' are sex terms, and 'woman' and 'man' are gender terms), the thought is that a transwoman goes from being legally classed as a male/man to being 'acknowledged' as a female/woman, and a transman goes from being legally classed as a female/woman to being 'acknowledged' as a male/man.

But we need not treat sex and gender together (as we have already seen, the Explanatory Memoranda to the SDA 2013 does not).

Many feminists of the second-wave believed that they could be fully decoupled, and indeed, some people with nonbinary gender identities today believe this too. On this view, sex is one thing, and gender is another. For the second-wavers, gender is a set of social norms and expectations that are applied to people on the basis of their sex. Generally 'feminine' is used for the group of expectations applied to women, and 'masculine' for the group of expectations applied to men. There is debate over whether 'man' and 'woman' go along with sex or gender on this view, I will assume here that it's the former. So females/women are expected to be feminine, and males/men are expected to be masculine. Sex and gender come apart, because we could get rid of the social norms and still be the sexes that we are.

For some nonbinary people, an appealing conception of gender is gender identity. On this view, a female person can have the gender identity woman, man, or nonbinary; and a male person can have the gender identity man, woman, or nonbinary. Again, sex and gender come apart. Some trans people also accept this view of sex and gender, and claim only to be a particular gender (woman/feminine), not anything other than their biological sex. Other transwomen say they are no longer male, but neither are they female: they occupy a third category, or a middle ground.

We have seen from the Australian and Victorian law that sex is not defined, and might be any of:

i) biological sex

ii) 'altered' sex (brought about through surgical or medical intervention)

iii) official record of sex (which I have been calling 'legal sex')

We have good reason to value biological sex as a political and legal category. We have reason to care, in particular, about the sex class 'female people'. After all, it names a social group that has been historically oppressed and whose oppression has not yet been fully mitigated. It tracks a group that has particular common interests relating to their bodies. It tracks a group whose members still have a high likelihood of being subject to certain sorts of treatment, including violence at the hands of male people. Some of this is what justifies there being single-sex provisions in the first place (e.g. female sports, or female-only educational institutions).

It is not at all clear whether this group benefits from the inclusion of male people who have 'altered' their sex to female, or male people who have obtained an official record of sex (legal sex) that states them as female. It is not enough to say that those groups benefit from being included. That much may be true. But if the original understanding of sex, and the importance of defining it and protecting it, stand (which it is clear they do, at least morally speaking), we should be worried not just about the new bill which radically liberalises the category of legal sex (opening up female sex class membership to any male with the belief that he is female and who is willing to make a statutory declaration to that effect), but about all the previous changes that eroded the understanding of sex as biological, including the 2014 Amendment to the SDA which repealed the definitions of 'man' and 'woman'.

Conclusion

This bill is likely to be bad news, but it doesn't have sole responsibility for the state of things when it comes to (biological) sex and (biological) sex-based protections. The removal of the definitions of 'man' and 'woman' were already a backward step (at least for biological sex-based rights). The failure of relevant legislation to define 'sex' while claiming to protect against sex discrimination or having sex as a protected attribute are already a serious issue. And finally, passports are also a significant official document, and it is already easy to change sex on these. The least stringent requirement is "a statement from a registered medical practitioner or psychologist that you have had or are receiving appropriate clinical treatment for gender transition" (where 'clinical treatment' can mean as little as a few sessions of counselling). It might be possible for a trans person to argue for inclusion on the basis of having the relevant legal sex according to this document, or to bring a case for wrongful exclusion on the basis of having the relevant legal sex according to this document. The bill is another large chip away at Australians' sex-based rights. It should not need to be said, but biological sex matters politically, and should be protected legally. We can protect trans and intersex people without rolling back the protections of female people.

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