

Genderfluidity and the law

by Alexandra Rose for the Human Rights Committee

Two-spirited, genderqueer, genderfluid, non-binary, gender neutral, gender expansive. These are some of the terms you may have heard people using in recent years to describe themselves, or others. But you may not know what it means.

The following is a brief introduction to the non-binary world and how the law is slowly catching up.

In 2009, Norrie May-Welby applied to the Registrar of Births, Deaths and Marriages of the State of New South Wales seeking a Change of Sex and Change of Name. Norrie did not want to be identified as 'male' or 'female' on documents, but rather as 'not specified'. The Registrar informed Norrie that he did not have the power to issue certificates with no gender specified. However, Norrie thought it would be a false statement to select either of the 'male' or 'female' options because Norrie self-identifies as neuter. A four-year legal battle ensued but in 2014, the High Court held that the *Births, Deaths and Marriages Registration Act 1995* (NSW) 'does not require that people who, having undergone a sex affirmation procedure, remain of indeterminate sex – that is, neither male nor female – must be registered, inaccurately, as one or the other. The Act itself recognises that a person may be other than male or female and therefore may be taken to permit the registration sought, as "non-specific."¹

The decision in *Registrar v Norrie* carries on from a series of cases in which Australian courts have had to consider the issue of self-perception and social perception regarding gender. For example, in *AB v Western Australia*² the High Court held that the question of what gender a person exhibits to other members of society is 'reached by reference to the person's appearance and behaviour, amongst other things. It does not require detailed knowledge of their bodily state'³. The Court said the recognition of someone as a particular gender 'does not require knowledge of a person's remnant sexual organs'.⁴

Registrar v Norrie directly challenged the underlying assumption that sex is a binary system of categorisation. Recognising that there are more than two genders, the Australian Government introduced *Guidelines on the Recognition of Sex and Gender* in 2013



(Guidelines), which apply to all Commonwealth Government departments and agencies.⁵ The introduction to the Guidelines states that '[t]he Australian Government recognises that individuals may identify and be recognised within the community as a gender other than the sex they were assigned at birth or during infancy, or as a gender which is not exclusively male or female. This

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should be recognised and reflected in their personal records held by Commonwealth Government departments and agencies.⁶ Accordingly, '[w]here sex and/or gender information is collected and recorded in a personal record, individuals should be given the option to select M (male), F (female) or X (Indeterminate/Intersex/Unspecified).'⁷

You may have already noticed this change in the 2016 Census or if you have recently applied for a passport. Barristers will also be asked whether they identify as M, F or X in our upcoming practicing certificate renewal applications.

So, what does 'X' mean? Well, the starting point is to distinguish between 'sex' and 'gender'. The Guidelines state that 'sex' refers

to 'chromosomal, gonadal and anatomical characteristics associated with biological sex'⁸ while 'gender' 'is part of a person's personal and social identity'.⁹

The website itspronouncedmetrosexual.com has created The Genderbread Person to help distinguish between gender identity, gender expression, biological sex and sexual attraction (see Figure 1). Gender identity is depicted on a sliding scale and described as '[h]ow you, in your head, define your gender, based on how much you align (or don't align) to what you understand to be the options for gender'.

The options for genderfluidity are numerous and includes anything that falls outside the male/female binary and cisnormativity (cisgender or cis being the term for people whose gender identity matches the sex that they were assigned at birth). Someone may feel that they are male and female at the same time. They may feel like they are male or female at various different times. They may feel neither male nor female.

In an interview with *Elle* magazine in 2015, Ruby Rose, who plays Stella on *Orange is the New Black* said that '[g]ender fluidity is not really feeling like you're at one end of the spectrum or the other. For the most part, I definitely don't identify as any gender. I'm not a guy; I don't really feel like a woman, but obviously I was born one. So, I'm somewhere in the middle, which – in my perfect imagination – is like having the best of both sexes. I have a lot of characteristics that would normally be present in a guy and then less that would be present in a woman.'¹⁰ Other celebrities who have identified as genderfluid include Miley Cyrus and Tilda Swinton. There is also a non-binary person, Asia Kate Dillon, playing a non-binary character on the US show *Billions*.

Being two-spirited or genderfluid is not the same as being intersex. Intersex persons have a diversity of bodies and gender identities and may identify as male, female, both or neither. Organisation Intersex International Australia Limited (OII Australia), a national body by and for people with intersex variations, states that approximately 1.7% of people are intersex, which is 'about as common as having red hair'.¹¹

There is no accurate data on the number of people in Australia who identify as genderfluid although the Australian Bureau of Statistics (ABS) counted 1,260 sex and/or gender diverse people in Australia following the 2016 Census. However, the ABS acknowledges that '[t]his count is not considered to be an accurate count, due to limitations around the special procedures and willingness or opportunity to report as sex and/or gender diverse' acknowledging that '[p]eople who have been treated with disrespect, abuse and discrimination because of their sex or gender may be unwilling to reveal their sex in an official document'.¹²

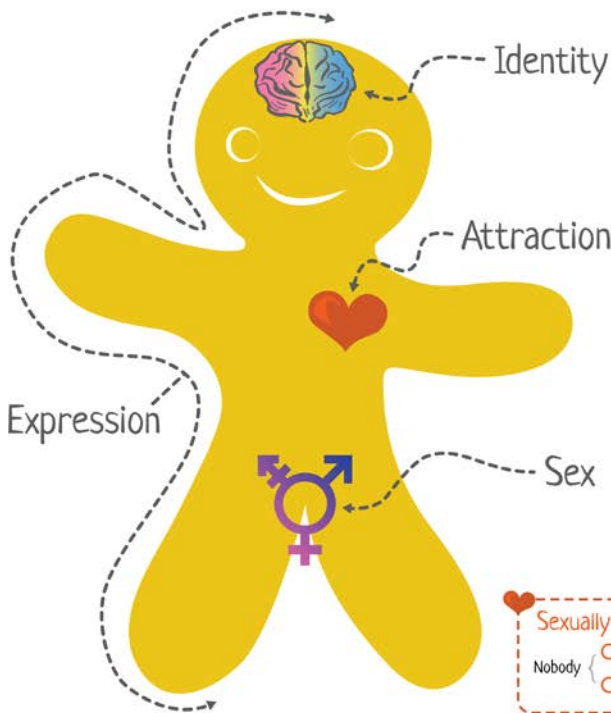
Australia was the first country to introduce laws to protect non-binary persons from discrimination when it introduced the *Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Act 2013* (Cth). This Act amended the *Sex Discrimination Act 1984* (Cth) to specifically prohibit discrimination on the basis of 'gender identity' and 'intersex status'. Under these amendments, 'intersex status' is defined as 'the status of having physical, hormonal or genetic features that are (a) neither wholly female nor wholly male; or (b) a combination of female and male; or (c) neither female nor male'.¹³ You will note that this definition is

squarely focused on a person's sex organs and not their identify. 'Gender identity' is defined broadly to mean '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'.¹⁴ The Explanatory Memorandum to the Bill states that 'gender' is a different concept to 'sex' 'understood to be part of a person's social identity (rather than biological characteristics). Gender refers to the way a person presents and is recognised within the community. A person's gender might include outward social

The Genderbread Person v3.3

by its pronounced **METROsexual**.com

Gender is one of those things everyone thinks they understand, but most people don't. Like *Inception*. Gender isn't binary. It's not either/or. In many cases it's both/and. A bit of this, a dash of that. This tasty little guide is meant to be an appetizer for gender understanding. It's okay if you're hungry for more. In fact, that's the idea.



Plot a point on both continua in each category to represent your identity; combine all ingredients to form your Genderbread

4 (of infinite) possible plot and label combos

⊘ Indicates a lack of what's on the right.

Gender Identity

Woman-ness

Man-ness

How you, in your head, define your gender, based on how much you align (or don't align) with what you understand to be the options for gender.

Labels: "woman", "man", "two-spirit", "genderqueer"

Gender Expression

Feminine

Masculine

The ways you present gender, through your actions, dress, and demeanor, and how those presentations are interpreted based on gender norms.

Labels: "butch", "femme", "androgynous", "gender neutral"

Biological Sex

Female-ness

Male-ness

The physical sex characteristics you're born with and develop, including genitalia, body shape, voice pitch, body hair, hormones, chromosomes, etc.

Labels: "man", "femme", "intersex", "Mid Female"

Sexually Attracted to

Nobody

(Women/Females/Femininity)

(Men/Males/Masculinity)

Romantically Attracted to

Nobody

(Women/Females/Femininity)

(Men/Males/Masculinity)

In each grouping, circle all that apply to you and plot a point, depicting the aspects of gender toward which you experience attraction.

For a bigger bite, read more at <http://bit.ly/genderbread>

markers, including their name, outward appearance, mannerisms and dress. It also recognises 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.¹⁵

This means it is now unlawful to discriminate against persons who are intersex or gender fluid in employment, education, the provision of goods and services and a number of other areas of life. However, when Mark Dreyfus, the then Attorney-General for the Commonwealth, gave the second reading speech for the Bill, he stressed that while the proposed Act was intended to 'acknowledge [the] reality' of sex and gender diversity in Australia it does 'not create a third sex in any sense'.¹⁶

Other countries are now following Australia's lead. Fiji has amended its Constitution to prohibit discrimination based on sexual orientation, gender identity and gender expression. Malta has similarly added gender identity to the list of prohibited grounds of discrimination in its Constitution.¹⁷ Nepal and Bangladesh created a legal "third gender" category and the Supreme Court of India affirmed the right of transgender persons to determine their own gender. Malta became the first State to prohibit sex-assignment surgery or treatment on intersex minors without their informed consent.¹⁸ In addition to Australia, there are now nine other countries that offer its citizens gender-neutral passports including Canada, Denmark, Germany, Malta, New Zealand, Pakistan, India, Ireland and Nepal. X passports are also approved by the ICAO, the UN agency that regulates international air travel.

The concept of multiple genders is acknowledged in other cultures too (if not the law), including the Buginese people of Sulawesi in Indonesia who recognise five genders including a 'metagender' known as the Bissu who are seen as a combination of the other four genders. Native Americans recognise that there are 'two-spirited people', while in Hawaii there are the *mahu* who fall somewhere between 'male' and 'female' and are respected as healers, teachers, and caretakers.

There is, however, continued resistance to the recognition and protection of gender diverse people in other areas of the world. In many States it is a crime to 'cross-dress' or 'imitate the opposite sex' – such as in Kuwait.¹⁹ Even in Germany, trans and intersex people are often characterised as mentally ill and have had their sexual and reproductive health rights violated.²⁰

So how might these changes affect your practice? Well, you may have colleagues, solicitors, or clients that identify as genderfluid or you might have cases in which you have to consider the rights of non-binary parties.

One tip to show respect for someone's non-binary status is to use the correct pronouns. If you aren't sure what someone prefers, then ask. They/them pronouns are commonly used but people also use pronouns such as he/him, she/her or xe/xem. Other pronouns include ze/hir and fae/faer. You can also use the gender-neutral title Mx instead of Mr or Ms and gender-neutral terms such as friends or colleagues instead of ladies and gentleman; students instead of boys and girls; partner instead of husband/wife.

In *Registrar v Norrie*, the High Court recognised that '[f]or the most part, the sex of the individuals concerned is irrelevant to legal relations', and that '[t]he chief, perhaps the only, case where the sex of the parties to the relationship is legally significant is marriage'.²¹ This is no longer the case after the definition of marriage in the *Marriage Act 1961* (Cth) was famously changed in 2017 from being 'the union of a man and a woman' to 'the union of 2 people' to the exclusion of all others, voluntarily entered into for life.²² There remain, of course, other areas of life where gender still matters. For example, admittance to many schools is gender based, so is inclusion in certain sports teams. The issue of which bathrooms or change-rooms a genderfluid person can, or chooses, to use and what insurance or health care they can obtain is also likely to raise concerns. But similar concerns were raised, discussed and worked through when society was made to confront and ultimately accommodate the needs of women and LGBTQI++ persons. No doubt Australian society, and the law, is robust enough to do it again.

END NOTES

- 1 *New South Wales Registrar of Births, Deaths and Marriages v Norrie* (2014) 250 CLR 490 at [46].
- 2 (2011) 244 CLR 390
- 3 *Ibid.* at [34].
- 4 *Ibid.* at [35].
- 5 <https://www.ag.gov.au/Publications/Documents/AustralianGovernmentGuidelinesontheRecognitionofSexandGender/AustralianGovernmentGuidelinesontheRecognitionofSexandGender.pdf>
- 6 *Ibid.* at [1].
- 7 *Ibid.* at [19].
- 8 *Ibid.* at [11].
- 9 *Ibid.* at [13].
- 10 <http://www.elle.com/culture/movies-tv/a28865/ruby-rose-ointb/>
- 11 <https://oii.org.au/allies/>
- 12 <http://www.abs.gov.au/ausstats/abs@.nsf/Lookup/by%20Subject%2071.0-2016-Main%20Features-Sex%20and%20Gender%20Diversity%20in%20the%202016%20Census-100>
- 13 Section 4.
- 14 *Ibid.*
- 15 Explanatory Memorandum, *Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Bill 2013* (Cth) at [13].
- 16 Commonwealth, *Parliamentary Debates*, House of Representatives, 21 March 2013, 2894 (Mark Dreyfus).
- 17 UN Human Rights Council report A/HRC/29/23 dated 4 May 2015 on *Discrimination and violence against individuals based on their sexual orientation and gender identity* at [72].
- 18 *Ibid.* at [73].
- 19 *Ibid.* at [44]. Concluding observations of the Human Rights Committee on Kuwait (CCPR/C/KWT/CO/2), at para. 30.
- 20 Concluding observations of the Committee on Economic, Social and Cultural Rights on Germany (E/C.12/DEU/CO/5), at [26].
- 21 [2014] HCA 11; (2014) 250 CLR 490, 500 [42] (The Court).
- 22 By the introduction of the *Marriage Amendment (Definition and Religious Freedoms) Act 2017* (Cth).