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From: Professor Sheila Jeffreys, School of Social and Political Sciences, University of Melbourne. Author of a number of book chapters and refereed journal articles on transgender politics and law.

Email: sheila@unimelb.edu.au

The right to 'gender identity': a clash with the rights of women

This submission addresses the addition of a new 'protected attribute' in the Human Rights Bill, that of 'gender identity'. The protected attribute of 'sex', under which women are protected from discrimination, is still in the list, but adding the new category of 'gender identity', could potentially create a clash of rights between male-bodied transgenders on the one hand, and those disadvantaged on the grounds of sex, women. In other jurisdictions, such legislation has seen the emergence of successful legal challenges in which male-bodied transgenders have sought access to spaces previously reserved for women, including women's services such as sheltered housing, women's toilets and women's prisons.

The demands of transgender activists to have ‘gender identity’ included in human rights legislation were first articulated in detail in the US in the 1995 International Bill of Transgender Rights (Frye, 2000). It demanded the right to express the ‘gender identity’ of choice in whatever way the exponent desired, particularly in any spaces previously reserved for women. An important right in the Bill is that of entering spaces set aside by or for women, ‘The Right of Access to Gendered Space and Participation in Gendered Activity’ (Frye, 2000: 213).

Since then, equality and human rights legislation has been updated and created in states across the western world that incorporates the ‘right’ to express ‘gender identity’. Women’s and feminist groups are not invited to contribute to consultation on such changes as if they would have nothing relevant to say, despite the fact that men may, under such legislation, gain the right to be recognised in law as ‘women’. Women are the ‘absent referent’, not officially referred to, despite the fact that it is ‘women’ that the majority of those persons who wish to express their ‘gender rights’ seek to emulate. There is no suggestion in legislation advancing a right to gender identity that women will be included in or advantaged by the developments. Rather, in an increasingly vigorous feminist challenge, critics argue that such legislation creates two singular difficulties for women’s interests (Brennan and Hungerford, 2011). It removes the possibility of women only spaces, and it promotes gender stereotypes that have long been recognised by feminist theorists as the basic organising mechanism of male domination (MacKinnon, 1989; Jeffreys, 2005).

The definition of gender identity in the Australian 2012 Draft legislation clashes with protections on the basis of sex, through a confusion of the two categories.

Gender identity will cover people, ‘born as one sex who identify as another sex’, in other words it is a mental condition. There is no requirement that to acquire protection on the grounds of gender identity, a person should have embarked upon hormonal or surgical treatment to change ‘gender’. Indeed it does seem likely to cover both those men who cross-dress occasionally, or on the weekend, as well as those who do so on a more permanent basis. Women’s need for sex-segregated spaces that offer protection for women’s dignity and privacy, and which take account of the vulnerabilities that women suffer in a society in which too many men are violent towards women and girls, has generally been recognised in exceptions to anti-discrimination legislation. The right to gender identity, however, has the potential to void this protection.

The retrogressive nature of the idea of ‘gender identity’

Feminist critics argue that the concept of ‘gender identity’ is founded upon stereotypes of gender, and, in international law, gender stereotypes are recognised as being in contradiction to the interests of women. The idea of ‘gender identity’ is retrogressive. It depends upon the notion that there can be an ‘essence’ of gender in a person of one sex, that more clearly approximates to the ‘gender’ that is expected of the other sex. Feminists and researchers for many years now have challenged the idea that there is an essential behaviour of ‘femininity’ for example, that is appropriate for women. The importance attributed to the elimination of these stereotypes is exemplified in the wording of the United Nations Convention on the Elimination of All forms of Discrimination against Women (CEDAW), which feminists advocated for throughout the 1970s until its promulgation in 1979. Article 5 of CEDAW calls upon States Parties, to ‘take all appropriate measures’ to ‘To modify the social

and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudice and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women' (United Nations, 1979: Article 5). 'Stereotyped roles' are, according to feminist critics of the practice, the very foundation and *sine qua non* of transgenderism, and the notion of 'gender identity'. Whilst women and feminists seek to unwrap the boa constrictor of gender roles from around the necks of women and girls, the notion of 'gender identity' supports and maintains them.

Women's spaces

In this submission I shall concentrate on two contexts in which the admission of men wishing to express their gender rights directly conflicts with the rights of women: women's toilets and women's prisons.

Women's toilets

Under the right to gender identity, male-bodied persons, in many cases with penises intact, are likely to be permitted to enter women's toilets. A situation that has arisen in the US in October 2012, in relation to male-bodied transgenders entering women's toilets, may be instructive as to what may transpire in Australia. In this case, a 45 year old person born male, thrice married, the father of five children, possessed of intact male genitalia, and who lived as a man until 2009, Colleen Francis, has established the right to use the

sauna in the women's locker room at Evergreen State College (Golgowski, 2012). The locker room is used by the girls from two neighbouring high schools and some parents complained that this male bodied person was naked in the locker room in the presence of their girl children. The college said that it had legally to protect Colleen's right to be naked in the women's locker room, directed the girls to a smaller, less adequate facility and then put up a curtain in the main locker room saying the girls could change behind it. In this case, Colleen's right to 'identify' trumped the rights of those born and raised female.

Men who do not cross-dress commit serious offences against women when they are able to enter women's toilets, and these include taking photographs of women urinating and defecating for circulation on upskirts sites on the Internet, rape and assault. Unfortunately, men who dress in clothing more usually associated with women are not immune from the commission of similar offences. There are a quite surprising number of cases in which men wearing women's clothing have been arrested for engaging in behaviour in women's toilets that harms women. The range of acts they engage in includes secret photographing of women using the toilets and showers, peeping at women from adjacent stalls or under stall dividers, demanding that women recognise them as women and becoming aggressive if women do not, luring children into women's toilets in order to assault them, and sexual assault.

In a British case, a man dressed up as a 'mannequin with a mask and a wig' to enter a cubicle in the women's toilets in a shopping mall, where he 'performed' an unspecified 'sexual act' (Ninemsn staff, 2011). The 22 year old man told police he 'found the sound of women on the toilet sexually exciting'. The man had filmed women's feet from beneath cubicle doors on his mobile phone, and recorded the sound of a flushing toilet. In another case, a man dressed as a

woman was observed peeping at women and using a cell phone to photograph them in a UC Berkeley women's locker room (Rufus, 2010). In a Little Rock, Arkansas, case, a 39-year-old man wearing women's clothing was arrested after exposing himself and masturbating in front of three children and trying to lure them into the women's bathroom (CW Arkansas, 2010).

Male sex offenders can use women's clothing to make their access to children easier. In Oregon, a registered sex offender dressed as a woman entered the women's locker room at a swimming baths and talked with several children before being apprehended (KATU, 2011). In this incident, the 39 year old man, 'put on a bra, lipstick and eyeliner' and entered the 'Aquatic park' where he, 'wandered around the center talking with children, went in the women's locker room and took a dip in the hot tub'. This man had a history of entering women's locker rooms in women's clothing, as well as a conviction for sexual abuse. He was listed as a "predatory" sex offender who targeted girls aged between five and nine years old.

It is not possible to know whether these are male-bodied persons who consider that they are expressing a 'gender identity', or just men adopting women's clothing in order to facilitate their access to women and children, but the problem of allowing persons with male bodies to enter women's toilets persists in either case. The cases covered here are likely to represent a fraction of the situations in which male-bodied persons, dressed in clothing stereotypically associated with women, enter women's toilets for various forms of sexual satisfaction. Usually women are unaware that they are being recorded or observed.

Women's prisons

Women's prisons are another space that male-bodied persons are seeking the legal right to enter in order to express their 'gender identity'. Male prisoners in western countries are using human rights laws successfully to gain access to transgender treatment at public expense in prison, and the right to then transfer to the women's estate. The men who are being given the right to live alongside women in prison are often precisely those who are most violent and dangerous to women's safety, having been convicted of grave crimes, including the murder of women.

In Australia, thus far, there has been no successful case in which a male-bodied offender has been placed in a women's prison in order to express a 'gender identity'. But there have been cases in which such demands have been made. A case where permission to transgender was refused, concerned Australian serial killer, Paul Denyer. Denyer killed three young women in bayside suburbs of Melbourne, over 7 weeks in 1993. He sought, during his sentence, to 'wear make-up in jail, have a taxpayer-funded sex change and formally alter his name by deed poll to Paula' (Dunn, 2012). In July 2012 it was reported that police were investigating four alleged rapes by Denyer of men with intellectual disabilities who were fellow inmates. The Denyer case illustrates the problems that might occur in the recognition of violent male criminals as 'women' and their transfer to women's facilities. There is no reason that a belief that they are 'women' will alter such men's tendencies to engage in a form of sexual violence which is specifically and clearly male.

In another Australian case, in 2012, Derek Lulu Sinden was refused permission in the Queensland courts to start hormone treatment for gender identity disorder. The Queensland Corrections Department argued that the refusal was consistent with its policy of only supplying hormones to men who started to take them before entering the prison system (Smith, 2012). Sinden had been convicted of an attack on Beryl Grace Brown, 71, in April 1999, in her home, which caused her to suffer a heart attack and fatal stroke.

In other jurisdictions, male bodied persons have acquired the right to hormones and surgery in order to express their ‘gender identity’ in prison. The question of transfer to a women’s prison is intertwined with such decisions. In 2009, an appeal from an unnamed male prisoner in the UK to be moved to a women’s prison was successful. The petitioner in this case was found guilty in 2001 of the manslaughter of his male lover who was strangled with a pair of tights, allegedly for refusing to fund the murderer’s sex change surgery. He was sentenced to five years imprisonment. Five days after his release he attempted to rape a female stranger and was sent back to prison (Allen, 2009). In order to obtain gender reassignment surgery, the prisoner was told that he must engage in the real life test, that is, 2 years living as a woman, in a women’s prison. The women in the prison where he was to be housed were not to be told of his identity or of his offence. His lawyer told the court that the crimes were all linked to ‘a desperation to become a woman’. The judge declared that ‘her continued detention in a male prison is in breach of her rights under Article 8 [the right to private and family life] under the European Convention on Human Rights'. Unfortunately, there seems to be no acknowledgement here of the more

serious and pressing right of women to avoid being compulsorily housed with violent men. The notion of human rights is trivialised thereby.

In response to the judgement, new guidelines were issued for the treatment of prisoners seeking gender reassignment in UK prisons in March 2011, which enabled prisoners to have treatment and to be located in women's prisons. The guidelines state, 'A male to female transsexual person with a gender recognition certificate may be refused location in the female estate only on security grounds – in other words, only when it can be demonstrated that other women with an equivalent security profile would also be held in the male estate' (Ministry of Justice, 2011). Gender recognition certificates in the UK can be obtained without any need for hormonal or surgical treatment.

Conclusion

Persons of one biological sex who consider that they have a 'gender identity' stereotypically associated with the other sex do suffer discrimination and need protection. A problem arises, however, when 'gender' and 'sex' are confused, to the extent that male-bodied persons gain a right to enter spaces set aside for women. In such a case, a clash of rights is created. Persons who wish to express a gender identity not usually stereotypically associated with their biological sex need to be accommodated in ways that protect them, but do not conflict with the rights of women.

Recommendations

* That there should be a recognition in the legislation that possession of a mental ‘gender identity’ is quite different from ‘sex’.

* That the legislation should be constructed in a way that does not allow a male-bodied person to have a right of entry to spaces that need to be women only (i.e. female only) for the purposes of security, privacy, dignity or in order to enable members of that group that suffers discrimination on the grounds of sex, to meet separately for political purposes.

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