

SAGE submission to the

Supported by the Australian Sex and Gender Alliance (ASAGA)

Australian Passport Office Department changing its policy for issuing passports to Sex and/or Gender Diverse People (SGD) July 2011

Sex and Gender Education (SAGE Australia) is a group campaigning for the civil rights of sex and/or gender diverse (SGD) people. <http://www.sageaustralia.org/>

Sex and/or gender diverse (SGD) people are made up from many differing groups including people who are intersex, transexed, transsexual, transgendered, androgynous, without sex and gender identity, cross dressers and people with sex and gender culturally specific differences. They are people who experience variations in physical presentation and social behaviour that is other than stereotypically male or female. Each group may have its own physical, psychological, social, legal and political issues that may not necessarily relate to any of the other groups.

What happens if someone reaches a boarder control and their passport does not match their identity?

Proposed guidelines for people changing the sex and/or gender marker on their passport.

Documents that should be required:

- 1. Two form of previous identity.**
- 2. A statutory declaration by the person themselves that their sex and/or gender has changed.**
- 3. A statutory declaration by a medical practitioner, psychologist, psychotherapist, counsellor, sexologist, or social worker stating the person is living in that role full time and that they need to be treated socially as that sex and/or gender.**
- 4. A written request by the person be issued with a full passport stating male, female or X in accordance with International passport guidelines.**
- 5. Certified copy of any name change document.**
- 6. In the case of minors parental or guardian representation.**

A passport should be a document for safe travel that the bearer feels confidently matches their identity.

Definitions for this paper

Sex is defined as a person's biological concomitants with regard to reproductive characteristics, secondary physical characteristic, hormonal psychological and even sociological status. In Australia it even legally includes brain sex in accordance with the judgement of the Kevin case (Re Kevin : Validity of Marriage of Transsexual (2001)). Most people are majorly male or female in their biological characteristics but many people may not fit into those unrealistic polarised categories. Common law in Australia does not presently define what makes a person male or female. Medicine is also unable to do that with absolute certainty.

Gender is social presenting of one's feminine or masculine performances in society. It is a culturally specific social construct. Most persons perform the gender performance of their biological sex but not all people. The law again in Australia does not define gender performance.

Intersex is someone who is born with sex dimorphic physical characteristics that are either a mix of male or female or experience the absence of female or male physical characteristics. Such people may have genitals that are atypically male or female and other reproductive and ancillary sex organs or brains that are none stereotypically male or female. There can be genetic differences that effect sex characteristics or function. Being intersex is not always obvious at birth. People may also be discovered to be or become intersex during their life due to organs failure of dysfunction.

Transsexual people appear to be one sex but seek to transition to another sex, generally through hormones treatment and surgery, although such medical treatments are not always options in some cases due to medical contradictions. Some transsexual people also do not want to undergo what can be life threatening surgery that carries a risk of death. In the Kevin (Re Kevin: Validity of Marriage of Transsexual (2001) case Justice Chisholm took physical evident as to the cause of Kevin's transsexualism and set a precedent that transsexual people in Australia may be considered intersex. Not all transsexual may be intersex but scientifically is has become unquestionable clear that some are.

Transexed people are those who prefer the term to transsexual because transsexual it implies a sexual derivation not sex and/or gender differences. Transexed people see themselves as have a sex difference.

Transgender was originally used by an American Virginia Prince to describe a cross dresser who took hormones and had no genital surgery. The original phrase was 'transgenderist' to describe a heterosexual cross dresser who goes full time (A Gender Variance, 2008). In the 1990's Americans began to use it to describe all sex

and/or gender diverse people. That has been a complete failure because many transsexual people are deeply offended when being called transgender. A complication however arises when some transsexual people describe themselves a transgendered.

Sex and/or Gender Diverse (SGD) people is a more complete phrase that describes the collective of all groups that have some kind of sex and/or gender diversity that is other than stereotypically male or females, masculine or feminine. Around 1 in 100 people experience some kind of sex and/or gender diversity (O'Keefe, 2009).

Background

In Australia all people who have changed their birth certificates from male to female or female to male are able to acquire a new passport with the new sex notation. The first qualifying types of people this applies to are those who are medically indentified as intersex. The second are people who may be indentify as transexed, transsexual or transgendered and who have had genital surgery. In all states genital surgery is not a requirement for many intersex people to change their birth certificate but at the moment legally it is for transexed, transsexual and transgendered people. The law on this however is in a state by state flux because many of the second group of people can be considered intersex under Australian law. Unfortunately because Australia has six states and different sets of laws there is no uniformity for people changing their documents at the moment.

This paper concerns itself specifically with those who might not have had genital surgery who have at times had trouble getting the sex designation on their passports changed. It also however addresses the issue that the way the passport office is operating at the moment for people changing their sex and/or gender markers on passports is overly bureaucratic, cumbersome, intimidating and a contravention of human rights.

Before 1970 people changing legal sex status were able to get their documents changed in Australia with simply a letter from their doctors, as with most English speaking worlds. However in 1970 the British Corbertt vs Corbertt Divorce Case (Italiano, 2002), concerned the annulment of the Model April Ashley and the Honorable Arther Corbertt. In order to divorce his wife transsexual without having to pay a settlement he claimed she was still male. His case succeeded but has been overturned since by the British Gender Recognition Act (2004). The Corbertt case changed the way governments thought about changing documents for many years and unruly and poorly thought out strategies for denying amended documents came into being.

Judge Ormrod, who heard the case decreed that April Ashley, who had been registered a male at birth, was not in law considered a women therefore the marriage was annulled. This decision thereafter influenced Australian Bureaucracy and changes of details certificates and change of sex on documents was ceased in Australia.

This left Australian transsexual people in a difficult position as they were presenting as one gender in public but having sex identifiers on cardinal and others documents as their original registered sex. There may ever have undergone hormone and surgical treatment to present as their destination sex but were unable to get documents to match. As far as mismatched passports were concerned it put them in very dangerous position when travelling not having the correct documents.

Many intersex people have always been able to change the sex on their document in Australia on the production of documents from medical practitioners redefining their sex status. Unfortunately the Corbett vs Corbett case also affected the rights of some intersex people to marry (C and D Case, 1979) until the Kevin (Re Kevin : Validity of Marriage of Transsexual (2001) case surpassed that decision. Intersex is a wide description of physical difference and some of those people may also transsexed, transsexual, or transgendered.

In the 1980's the transsexual woman Estelle Asmodel (Wikipedia, 2011) managed to get her birth certificate changed from male to female and overturn the principles of Corbett Vs Corbett case in Australia. The ability to change birth certificates and other documents however was only available to transsexuals who had confirmation of genital surgery.

The Passport office's present web site gives the following advice to transitioning people who have not had genital surgery or who cannot get their birth certificates changed.

“I am unable to complete gender reassignment surgery. Am I able to obtain a passport in my preferred gender?”

Applications will be considered by the Australian Passport Office on a case-by-case basis where an applicant claims they are unable to obtain a revised birth certificate in their preferred gender because they are unable to complete sex reassignment surgery due to a pre-existing medical condition or because the surgery in the applicant's case carries a higher than normal risk and is considered by a relevant medical practitioner to be dangerous or life-threatening. The following documentation should accompany an application:

- documentary evidence that the applicant has approached the relevant government agency in their state or territory seeking recognition of their change of sex and the agency's written advice as to why it has declined to recognise a change of sex;
- a statement from the client's medical practitioner providing the following information:
 - confirmation that hormone therapy treatment has been on-going for at least two years;
 - evidence of any initial surgery completed e.g. mastectomy;
 - details of pre-existing health condition and advice why surgery carries a higher than normal risk;
 - confirmation that completion of sexual reassignment surgery would have a higher than normal risk or be life-threatening for the particular applicant.

- evidence of you living in your preferred gender such as a driver's licence, Medicare card, Centrelink card or rates notice." (Australian Passport Office website, 27.6.11)

Notable cases changing passport policy

The Estelle Asmodel (Wikipedia 2011) case in 1987 re-established in Australia that all transsexual people could fully change their documents from male to female and visa versa after genital surgery.

Many none genital surgically altered transsexual and some intersex people in Australia however have often been unable to change their birth certificates and passports since 1970.

What also happened over the years since 1970 is that many people who transition lied and got their documents changed anyway whilst still not undergoing genital surgery. So there are many transexed, transsexual and transgender people in Australia who never had genital surgery who have passports stating the gender they live as.

C. (Identity masked) 'No I never had the sex change operation. I got my Australia passport here in the 1970's. I told them I had had surgery so they give me the female passport. I could have had the surgery when I was young. I had the money but I was always a little afraid of such a big operation. I've lived as a women all my life since around twenty. I'm old now and can get quite ill and it would not be right for me to have such surgery. Sometimes I still go abroad but I never go through those X ray machines.'

Sometimes transiting people lie to their doctors and tell them they have had the surgery so the doctors sign the relevant forms to support an application for the new sex on the passport. Some doctors only ask the questions they know their patients can answer in order to support their well being.

Julia (pseudonym) GP. 'My job is to help people be well and safe not to collude with a dangerous lack of insight by government departments. My duty first of all is to my patients. It is dangerous from transsexual or transgender people to travel on the wrong documents. They can be arrested, thrown into jail, embarrassed and harassed. The passport office needs to do its job and issue a passport that matches a person presenting identity not blackmail people into having genital surgery when it might not be right for them.'

For some transexed, transsexual, and transgendered men genital surgery is beyond their economic means. It can also include life threatening surgery in some cases and not all people who undergo such surgery get good results. Phalloplasty is rarely available in Australia to a level that can be considered medically safe. Such operations can lead to a high risk factor of failure producing necrosis and life

threatening infections. Many trans men, living as men, chose not to undertake these life threatening risks.

In the Conor Montgomery (Gibson, 2011) case, a transsexual man, was issued with a passport without having changed his birth certificate. His medical condition prevented him from undergoing any genital surgery. This has been an adaption by the passport office's realisation that trans men might not be able to access surgery or might not want such operations.

Many trans men have had passports for many years as males without having had genital surgery. In the Peter Hyndal case (Canberra Times, 2011), a transsexual man, the passport office conceded that he had had a passport as male for twenty years without having had genital surgery. In replacing his passport they had no choice other than to reissue him with a ten year passport as male.

For a few years now the Australian passport office has come to realise that it has had no other choice than to offer full passports to intersex, transexed , transsexual and transgendered men whether they have had genital surgery or not.

Grace Abrahams (Administrative Appeals Tribunal (AAT), 2007) was a transsexual woman who had previously got married before genital surgery and remained married after surgery. In this case the AAT established that a person did not need to have their birth certificate changed in order to be awarded a passport in their new sex/and gender.

In the Stephanie Imbruglia case (Horin, 2009) the passport office apologised publically for withholding a female passport to this transsexual woman who was going abroad for genital surgery. They concede that despite their previous protestations the Document of Identity (DOI) issued by the passport office, that did not state sex, was not a safe option to offer transsexual people.

In the Marcelle (2011) (surname withheld) case, a non genitally surgically altered transsexual woman, the passport office had been advertising on its website for years that each case for sex and/gender diverse people would be considered on humanitarian grounds. When pressed the passport office admitted that it actually did not have such guidelines and could not produce those non existing guidelines. So each application was being judged without guidelines.

Eventually the passport office agreed to an out of court settlement that it would offer Marcelle, a transsexual woman with no plans for surgery, a full ten year passport. This case demonstrated that in fact no kind of trans person needs to undergo genital surgery to gain ten year passport. Neither does any kind of trans person, supported by specialists letters, applying for a ten year passport in their new identity have to promise to undergo surgery.

There is confusion in Australia around who is intersex and who is not. In some states they used different laws to guide the changing of documents for intersex people and

transsexual people. In the Kevin case(Re Kevin: Validity of Marriage of Transsexual (2001), the judge in accepting physical evidence as to the derivation of Kevin being transsexual moved Australia into the position of transsexual people being considered intersex. This must also apply to those transgendered people who describe the same experience.

Human Rights Principles

World Health Organisations (WHO) guidelines on human health state: 'Health is a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity.' (1946)

The Universal Declaration of Human Rights (1948) By the United Nation (UN) states in article 2 that all people are entitled to rights of freedom regardless of sex.

In Article 13.1 the UN declaration (1948) also state that "Everyone has the right to freedom of movement and residence within the borders of each state'

The World Professional Association of Transgender Health (WPATH) previously known as the Harry Benjamin International Gender Dysphoria Association (HBIIGDA) issues guidelines for sex and/or gender diverse people, the latest being version 6 (2001). In those guidelines it does not requires genital surgery to be a prerequisite for recognition a person's new transitioned identity.

The Yogyakarta Principles (2006), sets out international guidelines for the treatment of people who were from transitioning groups. It states that such persons should not have to have had genital surgery to be issued with new documentation indicating present gender presentation.

The Australian Human Rights Commission's Sex Files Report: (2009) recommend that non genital operated trans people be provided with a gender appropriate passport. It contained the following recommendations:

'Recommendation 2: The definition of sex affirmation treatment should be broadened so that surgery is not the only criteria for a change in legal sex.

Recommendation 3: The evidentiary requirements for the legal recognition of sex should be relaxed by reducing the quantity of medical evidence required and making greater allowance for people to self-identify their sex.

Recommendation 4: The special needs of children and young people who wish to amend their documents and records should be considered.

Recommendation 5: A person over the age of 18 years should be able to choose to have an unspecified sex noted on documents and records.

Recommendation 6: Information on the process and criteria for the legal recognition of sex should be easily accessible and user-friendly.

Recommendation 7: Documents of identity and processes required for the legal recognition of sex should not reveal personal information about a person's past identity in relation to sex.

Recommendation 8: Laws and processes for the legal recognition of sex should use empowering terminology.

Recommendation 9: Where possible, sex or gender should be removed from government forms and documents.'

New recommendations for assessing an application for a passport for sex and/or Gender diverse people.

The passport office over the years has been extremely confused about who should or who should not be issued with sex appropriate passports when dealing with people transitioning socially from male to female or vice versa. It has on more than one occasion sited that such people may be security risks or their application may be potentially associated with acts of terrorism as in the Imbruglia case (Horin, 2009). This is purely hysteria and ignorance about transitioning people and their need for sex and/or gender appropriate documents, and founded on prejudice no fact. It has been nothing more than a witch hunt.

It has been shown in case after case that for people to travel on gender inappropriate passports for their identity proves dangerous for them when crossing borders, particularly in cultures where there is little understanding of such people (Estelle Asmodel Case, Wikipedia, 2001), (Grace Abrhams case, Administrative Appeals Tribunal (AAT), 2007) (Stefanie Imbruglia case, Horin 2009) (Peter Hyndal case, The Canberra Times, 2011) (Marcelle, 2011).

Transition is a complicated medical, psychological and social journey for those involved. The medical concomitant and procedures involved are always patient specific and cannot addered to absolute and specific guidelines because different patients have different needs. The World Professional Association of Transgender Health (WPATH, 2001) lays out clinical guidelines under version six of Standards of Care (SOC) but they are recognised as flexibly and that that cannot apply specifically to every patient.

Some people take hormones for extended periods of time before they transition role socially. Others take hormones after they have transitioned socially. There are also individuals who due to medical conditions like low white blood cell count, red blood cells disorders, liver dysfunction, thrombotic disorder and certain cancers are unable to be prescribed hormones. Other people may have adverse reactions to synthetic hormones. All administration of hormones carries certain pathological risks.

Some people have dramatic physical changes due to the administration of hormones and others who have very few changes. There are also people who experience no or changes due to the administration of hormones; for example in cases like someone

who has Androgyn Imitatively Syndrome (AIS), where testosterone has little or no effect. Therefore administration of hormones, the length of time administered or the effectiveness of those hormones can never be used as a marker as to whether a person has started or is part way along a journey of transition.

One cannot judge the validity of claim to be male or female solely on external physical characteristics. Some non trans women look like men, have facial hair, are muscular and have deep voices. Some non trans men have very feminine features, low muscular developmental and high voices.

There are intersex and trans women who spend years on hormones and still look very masculine. Trans men tend to masculinise more effectively because testosterone is extremely powerful and quickly masculinises the body but there are also trans men who do not masculinise well. So it is inaccurate and inappropriate for a passport official to judge whether someone is eligible for a gender appropriate passport on the grounds of their looks.

It has also now been established that genital surgery cannot be a marker of a person's entitlement to a gender appropriate passport. Some people may not medically be able to have genital surgery, others might not be able to afford such treatments and still further some may not choose such medical procedures.

Time of living in the new role as the destination sex and/or gender is also not a good measure of whether someone could be entitled to gender appropriate passport. These are matters solely for transitioning people themselves, their health care professionals and not the edict of the passport office.

This leaves the dilemma of how the passport office can determinate whether someone should be entitled to a new gender appropriate passport in the destination gender. I must emphasis here that in reality what a passport shows is a gender marker even though it states sex. For many people sex is indeterminable with any kind of medical absolutism. When one goes through customs one does not undergo medical tests to verify that the sex stated on the passport matches ones predominate biological sex. A border patrol officer makes a brief visual inspection that the passport matches the person's presenting gender.

What happens if the border control officer tries to match up the sex stated on the passport with the gender that person presents and it does not match? When they cannot make those matches alarm bells go off for the customs officers and the individual is subjected to an interrogation that can be embarrassing and sometimes dangerous in certain parts of the world.

We come to the question of who validates sex and/or gender identity in transitioning people. The passport office obviously wants to have some kind of validation that

someone is living as male or female if they say they are when their birth certificates might not have been changed.

The passport office is not qualified to make such assessments, they have no medical knowledge or no specialists in sexology so they are unqualified to make such assessments. This is plain to see with the cases that have been brought against the passport office when they try to determine a person sex and/or gender status based on their own opinions.

What needs to happen in future is that the passport office takes external evidence to validate a person's sex and/or gender status in people transitioning from male to female and female to male. This could come in the form of a statutory declaration, by the person themselves, stating that the person is now living in the role of the destination sex and/or gender.

In the case of a minor this could be a statutory declaration stating the minor has transitioned by the parent of guardian.

The external validation can be used by the passport office as a letter from specialists in the field of sex and gender identity. WPATH suggests guidelines (SOC) for professionals who treat such people. These professionals include medical practitioners, psychologists, psychotherapists, counsellors, and social workers. This would comply with the WPATH Standards of care that recognised those practitioners as being principle carers for such people. Sexologists must also be included in this list.

According to the passport offices agreement in the Stefanie Imbruglia case verifying professionals (Imbruglia Letter 2009) those professionals would include specialist in the field who are medical practitioners, psychologist, psychotherapists, counsellors, sexologist, or social workers.

As a second piece of evidence the passport office could except is the person themselves signing a statutory declaration stating they have transitioned or in the case of a minor a declaration by a parent or guardian.

The question still remains about how long along transition a person should be considered to be accepted by the passport office to be issued with a new passport in their appropriate gender. No time has ever been established that can be defended legally for reasons as has been stated previous in this document in that all people transition differently.

The answer however is quite simply. The passport office under its obligation to the UN guidelines is to provide a person with a passport for safe passage. A person may travel at any time after the beginning of official transition therefore the passport office must legally comply and issue a new passport after they have had evidence the person has socially transitioned. Not to do so would be a breach of the passports obligations to the UN guideline.

The use of the X

Under civil aviation rules governments have three options for indicating sex markers on passport – male female and X. The history of using the X came out of the second world war when people escaping from Germany needed passports for travel but governments could not be sure what sex that person would be before they arrived as refugees. So the X was used to provide a passport for travel when not knowing the escapees sex in advance.

In Australia the X has been used in the case of Alex ((Butler, 2003) an intersex person who wanted neither male nor female on their passport.

As can be seen from the Sex Files Report (2009) there are people in Australia who do not indentify as male or female or cannot be medically considered either of those two sexes like Norrie (Gibson, 2011).

The Sex files report mentions these kinds of people. It also recommended a relaxation of documents needed to prove sex and suggested that sex be removed from documents when not necessary (AHRC, 2009).

Under the Abrahams (ATT, 2007) the ATT decreed that a person should be issued with a passport safe travel in line with their identity even if their birth certificate does not match the sex and/or gender identity.

For people who do not indentify as male or female or cannot medically be determined to be either, and wish to have a neutral passport, the passport office now needs to extend the use of the X facility on passports.

Validation of this status can be verified by both a statutory declaration from the person themselves and a further statutory declaration from a medical practitioner, psychologist, psychotherapists, counsellor' sexologist, or social worker who specialises in the field for sex and/or gender identity.

For some people sex and/or gender is not absolute, permanent or immutable.

Summary

The sex test applied by Justice Ormrod in the April Ashley (Italiano, 2002) case now appears with hindsight to have been a social construct of the times and cannot be scientifically tenable. It consisted of considering genitals, hormones, and gonads present at birth being verification of lifelong sex. This has been progressively legally overturned in all Western cultures including Australia.

As time passes scientifically we learn that sex is far more complicated than previous generations perceived it to be. Assessment of sex includes genetics, genitals, gonads, ancillary sex organs, hormonal status, secondary sex characteristics, brain structure, psychological, linguistic and social sex. It should not be artificially bound to

historical sex and in many people is evolutionary throughout the life span. The law and society must recognise any changes in person sex and/or gender status.

One in one hundred people (O'Keefe, 1999) are sex and/or gender diverse in some way. Some people who transition their sex may save sperm or ovum before they transition and then become parents after they transition. So it is easy to see the way the passport office has been viewing sex is antiquated to the point of being uneducated. Yes men can become mothers and women can become fathers.

Gender on the other hand really is a social construct and interpreted in different cultures differently. In Native American cultures there were four genders and in India there are three genders.

Australia influenced by Judaeo Christian religions however has falsely bought into the delusion that there are only two sexes and genders which is unrealistic. There are around 200,000 sex and/or gender diverse people in Australia that may not be able to fit into a strictly male and female, masculine, feminine only paradigm.

A person transitioning will need a new full ten year passport.

Proposed new criteria of documents needed to support such an application

- 1. Two form of previous identity.**
- 2. A statutory declaration by the person themselves that their sex and/or gender has changed.**
- 3. A statutory declaration by a medical practitioner, psychologist, psychotherapist, counsellor, sexologist, or social worker stating the person is living in that role full time and that they need to be treated socially as that sex and/or gender.**
- 4. A written request by the person to be issued with a full passport stating male, female or X in accordance with International passport guidelines.**
- 5. Certified copy of any name change document.**
- 6. In the case of minors parental or guardian representation.**

Each application is judged quickly on its own merits.

To be sex and/or gender diverse means a person is different from the average citizen but such people still need passports that match their presenting gender identity for safe travel.

Simply because sex and/or gender diverse people are not the average person their applications need to be considered on humanitarian grounds.

Humanitarian guidelines need to be in place for this group of people as part of the passport offices guidelines for passport applications. Such guidelines need to be

given to every passport officer along with training about those guidelines. Those guidelines need to be displayed publically on the passport offices website.

The process of obtaining a new passport needs to be simplified and expedient whether that is for M, F or X on the passport. The simplified process needs to be as easy as a person changing their name on their passport because they have gotten married applied to all people changing their sex and/or gender.

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