

Trans Pregnancy

An International Exploration of
Transmasculine Practices of Reproduction

Law and Policy Review Australia

Damien Riggs

Flinders University
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1. Introduction

In Australia, the rights of transgender people are covered by both laws and institution-specific policies, with the latter most commonly guided by the former. This review focuses largely on laws given their diversity across Australian states and territories, though specific applications of the law with regard to individual policies are noted where applicable to transgender people.

There is relatively little specific attention paid to transgender people and reproduction/parenting in Australian law or policy. However, there are specific instances where certain laws or policies are either explicitly inclusive or implicitly exclusionary of transgender people. These pertain to how pregnant people are referred to in law or in policy, the barriers to accessing services that transgender people might face, and laws that may prevent transgender people from retaining their reproductive capacities.

2. Trans Rights: National Legal Frameworks

Australia is comprised of six States (Western Australia, South Australia, Tasmania, Victoria, New South Wales, and Queensland) and two Territories (Northern Territory and the Australian Capital Territory).

As such, in Australia there are both federal laws (with, for example, Family Law courts operating at the federal level), and state or territory laws (such as is the case with regard to birth certificates). This report first examines federal materials, before then exploring state- or territory-specific materials.

2.1 Federal Frameworks

There have been a number of policy changes in recent years at the federal level which impact on transgender people, mostly reflecting an increase in rights and recognition, and a move away from requiring gender affirming surgery to change gender on official documents.

In 2013 amendments were made to the *Sex Discrimination Act* to protect transgender people (as well as intersex, gay, and lesbian people) from discrimination (*Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Act 2013*). These amendments included a specific mention of 'Discrimination on the ground of gender identity'.

Also in 2013, the Australian Government published the *Australian Government Guidelines on the Recognition of Sex and Gender* (Australian Government, 2013).

In brief, these Guidelines state their intention to:

- provide consistency for recognition of gender in Australia
- provide protection from discrimination on the grounds of sexual orientation, gender identity and intersex status
- require all departments, agencies and business to adopt the Guidelines by 1 July 2016.

The Guidelines also require three options to be given to people where sex and/or gender information is collected:

- M (male)
- F (female)
- X (indeterminate/intersex/unspecified).

While the introduction of these Guidelines could be seen as a positive move and a response to the Australian Human Rights Commission's (2011) Consultation Report *Addressing Sexual Orientation and/or Gender Identity Discrimination*, they remain ambiguous in terms of their implications in some areas (including marriage and birth certificates).

Changes to federal policy in 2012 mean that transgender people who have not had surgery but *have* had clinical counselling towards transitioning can now carry a passport in their affirmed gender (Rudd & McClelland, 2011).¹ Furthermore, passports can be issued as M (male), F (female), or X (indeterminate/intersex/unspecified).²

People are also able to change their gender on their Medicare (government-funded health system) card, without having surgery or hormone therapy, although a statement from a registered medical practitioner or psychologist or a document showing a person's gender (e.g. passport, birth certificate, Gender Recognition Certificate) is required (Department of Human Services, 2017a).

The Department of Human Services manages Centrelink, which is responsible for welfare payments and services such as unemployment benefits, student allowances, and parental leave pay. Gender details can be updated for Centrelink (Department of Human Services, 2017b). However, the Department of Human Services only currently records gender as either 'male' or 'female', with a note added to a person's record if they are non-binary. This has caused issues for people who are non-binary and gender diverse. For instance, university students whose university enrolment details differ to their Centrelink details have experienced payment delays or cancellations (Sargeant, 2017).

It is also important to note that there are some laws and acts in which transgender people (or gender identity) are not mentioned. In Australia this includes the *Fair Work Act 2009* and

¹ For further information regarding the policy, see: <http://dfat.gov.au/about-us/publications/corporate/passports/online-passport-information/policy/index.htm>

² <https://www.passports.gov.au/passportsexplained/theapplicationprocess/eligibilityoverview/Pages/changeofsexdoborpop.aspx>

the *Australian Human Rights Commission Act 1986*, where grounds upon which people should not be discriminated against are given (e.g. race, colour, sex, religion) but gender or gender identity is not mentioned.

2.2 States and Territories

Policies relating to transgender people at the State or Territory level vary widely and on the whole are less inclusive than the federal policies.

2.21 Birth certificates

Birth certificates come under State or Territory legislation. While previously all States and Territories required transgender people to have had some form of gender affirming surgery or medical treatment before they were able to obtain a new birth certificate, this has changed in some jurisdictions.

In **South Australia**, a change of sex or gender on a birth certificate for people born in the State can be issued if the person has a statement from a medical practitioner or psychologist. However, children under the age of 18 years can only have their birth certificate changed with Court approval (*Births, Deaths and Marriages Registration (Gender Identity) Amendment Act 2016* (SA)).

Similarly, in the **Australian Capital Territory**, the sex on a birth certificate from a birth registered in the Territory can be changed for people 18 years old and over if they have received 'clinical treatment for alteration of the person's sex', or if they are intersex. This is the same for those under 18, who must also have the approval of the parents or person with parental responsibility and a statement by a doctor or a psychologist (*Births, Deaths and Marriages Registration Act 1997* (ACT)).

Western Australia requires a 'reassignment procedure' which refers to 'a medical or surgical procedure (or a combination of such procedures) to alter the genitals and other gender characteristics of a person' (*Gender Reassignment Act 2000* (WA)). However, a precedent was set in *AB v. Western Australia* in 2011, where the High Court focused on social acceptance of gender transition rather than surgery in its decision, adding impetus to a move away from requirements for surgery to establish gender transition.

Victoria still requires 'sex affirmation surgery' in order to change the sex marker on a birth certificate (*Births, Deaths and Marriages Registration Act 1996* (VIC)). While legislative changes were proposed to remove this, the *Births, Deaths and Marriages Registration Amendment Bill 2016* (VIC) was defeated in the upper house.³

Similarly, while **Tasmania** requires people to undergo 'sexual reassignment surgery' to change their birth certificate (*Births, Deaths and Marriages Registration Act 1999* (TAS)), a document issued by the Tasmanian Anti-Discrimination Commissioner has advocated for this to be removed (Anti-Discrimination Commissioner, 2016).

³http://www.legislation.vic.gov.au/domino/Web_Notes/LDMS/PubPDocs_Arch.nsf/5da7442d8f61e92bca256de50013d008/ca257cca00177a46ca25801300117077!OpenDocument

Queensland and the **Northern Territory** still require ‘sexual reassignment surgery’ (*Births, Deaths and Marriages Registration Act 2003* (QLD); *Births, Deaths and Marriages Registration Act 1996* (NT)) and **New South Wales** requires ‘a sex affirmation procedure’ *Births, Deaths and Marriages Registration Act 1995* (NSW).

It is important to note that the cost of gender affirming surgery is prohibitive for many transgender people, and some surgery is not available in Australia, meaning that many cannot meet the requirements for a change the sex or gender on their birth certificate. Moreover, requiring the removal of reproductive organs in effect sterilises the individual, which is a significant reproductive rights issue.

2.22 Marriage recognition

Given the fact that marriage between two men or two women in Australia was not legal until December 2017, the ‘choice’ facing transgender people who were married prior to transitioning was to remain in their marriage and not have their affirmed gender legally recognised via their birth certificate (so that in effect they remain in a heterosexual marriage in law), or to transition and have their affirmed gender legally recognised, and thus their marriage voided. This situation therefore represented a conflict between State/Territory and Federal legislation.

There were two exceptions to this rule: the **Australian Capital Territory** and **South Australia**, both of which allow for people who are married to change their registered sex or gender without dissolving the marriage. The Australian Capital Territory removed a requirement that a person must not be married to record a change of sex (*Births, Deaths and Marriages Registration Act 1997* (ACT)), whereas South Australia has explicitly inserted this statement in the ‘Application to change sex or gender identity’ section: ‘An application may be made under this section even if the person is married’ (*Births, Deaths and Marriages Registration (Gender Identity) Amendment Act 2016* (SA) s91I 3).

2.23 Drivers’ licences

Drivers’ licences are also under the jurisdiction of individual States and Territories. Changing gender on a driver’s licence is allowed in **New South Wales** (Roads & Maritime, 2015), **Queensland** (Queensland Government, 2016), **South Australia** (Government of South Australia, 2017), **Victoria** (Vic Roads, 2014). **Western Australia** (Department of Transport, n.d.) requires a letter from a registered doctor or psychologist confirming the person’s gender and/or a variety of identification documents or birth certificates with the person’s affirmed gender. Surgery is not a requirement to change gender on a driver’s licence in these states.

Changing gender on a driver’s licence is also allowed in the **Northern Territory** for ‘gender reassignment’ although no further details of what this procedure actually entails are provided on the Government website (NT Government, 2017).

Tasmania and the **Australian Capital Territory** do not mention change of gender in relation to drivers' licences on their websites outlining drivers' licences.^{4,5}

South Australia (Government of South Australia, 2017) and **Western Australia** (Department of Transport, n.d.) specifically allow for the gender options of male, female, or 'X' on a driver's licence, and **Victoria** (Vic Roads, 2014) states that a title can be changed to Mx.

2.24 Equal opportunity/anti-discrimination Acts

Each State and Territory has its own equal opportunity or anti-discrimination Act. These vary considerably in terms of how transgender people are mentioned ('gender identity', 'recognised transgender person', 'transsexuality', 'transgenderism', 'gender reassigned person', and/or 'gender history'), and in the amount of detail set out. Importantly, while some Acts also mention people of an 'indeterminate sex', people who are non-binary are not specifically mentioned, although they may be included in acts which do not limit 'gender identity' to changing from one sex to another (through the use of terms such as 'opposite' or 'other' sex).

South Australia and **New South Wales** have the most detailed acts, which extensively outline provisions against discrimination in relation to 'gender identity' (SA) and for people who are transgender, as well as a number of exemptions to this (NSW) (*Anti-Discrimination Act 1977* (NSW); *Equal Opportunity Act 1984* (SA)). However, it is important to note that the New South Wales Act allows protections only for a 'recognised transgender person' whose sex is altered in accordance with the *Births, Deaths and Marriages Registration Act 1995* (NSW), which requires 'a sex affirmation procedure', as discussed above .

Queensland has several mentions of protections for 'gender identity', as well as exemptions (*Anti-Discrimination Act 1991* (QLD)).

Victoria mentions 'gender identity' in a list of attributes on the basis of which discrimination is prohibited, as well as outlining exemptions to this in the form of sports and religious beliefs (*Equal Opportunity Act 2010* (VIC)).

The **Australian Capital Territory** Act briefly mentions protections for people who are transgender, where protected attributes against discrimination include 'gender identity' and a record of a person's sex being altered under the *Births Deaths and Marriages Registration Act 1997* (ACT) or equivalent in another jurisdiction. In addition, 'gender identity' is included under unlawful vilification in the *Discrimination Act 1991* (ACT).

Western Australia details protections against discrimination based on 'gender history grounds in certain cases' (*Equal Opportunity Act 1984* (WA)), meaning that people who are transgender are not comprehensively protected in the Act. It also refers to 'gender reassigned persons'.

⁴ <http://www.transport.tas.gov.au>

⁵ <https://www.accesscanberra.act.gov.au>

Tasmania includes definitions of ‘gender identity’ and ‘transgender’ (including ‘transsexualism’ and ‘transgenderism’), but the only other mention of ‘gender identity’ is where it is included in a list of attributes for which a person may not be discriminated against (*Anti-Discrimination Act 1998* (TAS)).

Finally, the **Northern Territory** includes ‘transsexuality’ under the definition of ‘sexuality’ (alongside heterosexuality, homosexuality, and bisexuality) in the *Anti-Discrimination Act 1996* (NT), representing an incorrect grouping of transgender people under the banner of sexuality.

2.25 Pregnancy, childbirth and breastfeeding

For the most part, the aforementioned equal opportunity and anti-discrimination Acts discuss pregnancy, childbirth, and breastfeeding specifically in relation to women, which effectively excludes transgender men. However, there is inconsistency within some of the Acts.

New South Wales, Western Australia, and both the **Australian Capital** and **Northern Territories** include a paragraph stating that it is not unlawful to discriminate against a man because of women’s rights in relation to pregnancy, childbirth, or breastfeeding (*Anti-Discrimination Act 1977* (NSW); *Anti-Discrimination Act 1996* (NT); *Discrimination Act 1991* (ACT); *Equal Opportunity Act 1984* (WA)).

While **Western Australia** includes a paragraph with this gender distinction, the rest of the Act specifically uses ‘person’ or ‘persons’ who are pregnant or breast feeding.

South Australia largely refers to women in relation to pregnancy and childbirth, although the phrase ‘another [person]’ is used in relation to breastfeeding once, and the Act discusses ‘students’ and breastfeeding, although the word ‘herself’ is used once (*Equal Opportunity Act 1984* (SA)). It is also important to note that the *Equal Opportunity Act 1984* (SA) mentions that registered objectors may refuse to provide assisted reproductive treatment to a person on the basis of sexual orientation, gender identity, or marital status. This is further detailed in South Australia’s *Assisted Reproductive Treatment Act 1988* where providers of assisted reproductive treatment may register as objectors due to religious objections.

Victoria mentions pregnancy and childbirth in relation to women but breastfeeding is not gendered, although it is only mentioned twice (*Equal Opportunity Act 2010* (VIC)).

Queensland and **Tasmania** mention that it is unlawful to discriminate on the grounds of pregnancy or breastfeeding in a list of attributes without mentioning the gender of the person, but do not include any more detail about this (*Anti-Discrimination Act 1991* (QLD); *Anti-Discrimination Act 1998* (TAS)).

3. Trans Reproduction and Fertility: National Policy Guidelines

Issues of reproduction and fertility are complex for transgender people in Australia. As noted above, several states and territories require surgery of some kind in order to change gender or sex on a birth certificate, which would likely result in sterilisation.

However, there are no specific laws or policies banning transgender people from undergoing fertility preservation or assisted reproductive technology. At the same time, many of these procedures are costly and are often not covered by Medicare.

3.1 Sterilisation

The federal *Australian Government Guidelines on the Recognition of Sex and Gender* do not require surgery for the recognition of affirmed gender: 'Sex reassignment surgery and/or hormone therapy are not pre-requisites for the recognition of a change of gender in Australian Government records' (Australian Government, 2013). This means gender on documents such as passports can be changed without undergoing surgery.

However, these federal guidelines do not cover birth certificates, as these are the responsibility of individual states and territories. As discussed above, in order to change gender or sex on a birth certificate, most states and territories (apart from South Australia, Western Australia, and the Australian Capital Territory) require surgery of some kind. This means in order to change the gender or sex on a person's key 'cardinal document', transgender people are required to undergo surgery which will most likely result in sterilisation.

It is important to note that this effective requirement of sterilisation for legal gender recognition contravenes numerous international human rights guidelines. For example, the Yogyakarta principles (2007) state that: 'No one shall be forced to undergo medical procedures, including sex reassignment surgery, sterilisation or hormonal therapy, as a requirement for legal recognition of their gender identity' (pp. 11-12). See also: European Court of Human Rights (2017); OHCHR, UN Women, UNAIDS, UNDP, UNFPA, UNICEF, & WHO (2014).

3.2 Fertility preservation

There are no laws or policies in Australia that specifically address fertility preservation for transgender people.

The **Victorian** Assisted Reproductive Treatment Authority (VARTA) discuss options such as egg freezing, embryo freezing, and sperm freezing prior to taking hormones (or after ceasing hormones), and later options including surrogacy.⁶ Similar options for

⁶ <https://www.varta.org.au/information-support/fertility-and-infertility/fertility-preservation/transgender-and-gender-diverse>

fertility preservation are discussed on several fertility clinic websites, such as Rainbow Fertility in Victoria⁷ and Flinders Fertility in South Australia.⁸

While there are no laws preventing fertility preservation for people who are transgender (though as noted above, in South Australia a provider may register an objection to doing this), the costs of doing this can be high. Storage fees for gametes are expensive and not covered by Medicare, and egg retrieval is expensive and is not entirely covered by Medicare.

Estimates from 2010 (Smith, 2010) suggest that, depending on the clinic:

- sperm banking costs \$300-\$400 a year
- sperm aspiration costs \$1,000-\$1,500
- egg banking or embryo storage costs \$300-\$500 a year
- IVF may cost \$15,000-\$20,000

All figures are in Australian dollars.

In addition, if a transgender woman does not have a partner who can carry a baby and wishes to use her sperm to create an embryo, she may use altruistic surrogacy. This not covered by Medicare, unlike other forms of IVF. Commercial surrogacy is illegal in Australia.

3.3 Assisted reproductive technologies

In terms of assisted reproductive technology, the National Health and Medical Research Council Guidelines (2017) explicitly state that:

In determining an individual's or a couple's eligibility to access ART services, there must be no unlawful or unreasonable discrimination, for example, on the basis of:

- race, religion, sex, sexual orientation, relationship status, *gender identity* or intersex status, social status, disability or age
- the reason(s) for seeking assisted conception
- refusal to participate in research. (p. 26, emphasis added)

As mentioned above, **South Australia's Assisted Reproductive Treatment Act 1988** allows providers to register as objectors and they may refuse to provide assisted reproductive treatment to a person on the basis of sexual orientation, gender identity, or marital status. There is no reference to gender identity or being transgender in the assisted reproductive technology Acts in the three other States which have them: **New South Wales, Victoria** and **Western Australia** (*Assisted Reproductive Technology Act 2007* (NSW); *Assisted Reproductive Treatment Act 2008* (Vic); *Human Reproductive Technology Act 1991* (WA)).

⁷ <http://www.rainbowfertility.com.au/family-building-for-transgender>

⁸ <http://www.flindersfertility.com.au/Treatments-Services/Transgender>

The **South Australian** Act which covers surrogacy defines a ‘qualifying relationship’ to mean ‘a marriage-like relationship between 2 people who are partners (irrespective of their sex or gender identity)’ (*Family Relationships Act 1975* (SA)).

However, gender identity or being transgender are not mentioned at all in any of the other individual State and Territory acts covering surrogacy (*Assisted Reproductive Technology Regulation 2014* (NSW); *Assisted Reproductive Treatment Act 1988* (SA); *Assisted Reproductive Treatment Act 2008* (VIC); *Parentage Act 2004* (ACT); *Status of Children Act 1974* (VIC); *Surrogacy Act 2008* (WA); *Surrogacy Act 2010* (NSW); *Surrogacy Act 2010* (QLD); *Surrogacy Act 2012* (TAS)).

3.4 Medical services including childbirth

In 2013 the Federal Government announced that Medicare would no longer offer gender-specific services, removing gender discrimination (Plibersek, & McLucas, 2013). According to one news article, of the nearly 6,000 services Medicare covers, 43 needed to be changed (Harrison, 2013).

One of the Medicare items which was changed was Item 16519 ‘MANAGEMENT OF LABOUR and delivery by any means (including Caesarean section) including post-partum care for 5 days’.⁹ From 1 July 2015 to 30 June 2016, Medicare recorded this item as being accessed by 44,876 females and 44 males (Medicare Australia, 2017).

While it is the case that services are available regardless of gender, gendered language is still used in some Medicare items e.g. ‘male factor infertility’ (Department of Health, 2017). However, it is still the case that benefits relating to the purchase of medication under the Pharmaceutical Benefits Scheme are usually gender-specific, such as in relation to hormones, despite requests for this to be changed (e.g. Drug utilisation sub-committee, 2016). Recently, this has had implications for transgender men accessing hormones, with tighter regulations introduced on the prescribing of testosterone in response to the alleged over-prescription of testosterone in the treatment of impotence amongst cisgender men. This has introduced further barriers for transgender men accessing testosterone (i.e. having to see an endocrinologist rather than just a GP).

3.5 Adoption

Adoption Acts for individual States and Territories generally do not mention gender identity or transgender people.

South Australia’s *Adoption Act 1988* uses a similar definition of ‘qualifying relationship’ as the *Family Relationships Act 1975* (SA) discussed above: “‘qualifying relationship’ means the relationship between 2 persons who are living together in a marriage or marriage-like relationship (irrespective of their sex or gender identity)’.

⁹ <http://www9.health.gov.au/mbs/fullDisplay.cfm?type=item&qt=ItemID&q=16519>

Adoption acts in the other States and Territories do not mention gender identity or being transgender explicitly (*Adoption Act 1984* (VIC); *Adoption Act 1988* (TAS); *Adoption Act 1993* (ACT); *Adoption Act 1994* (WA); *Adoption Act 2000* (NSW); *Adoption Act 2009* (QLD); *Adoption of Children Act 1994* (NT)).

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About the Trans Pregnancy Project

This international research project aims to address the social, legal and health care implications of, and for, people who become pregnant and/or give birth after transitioning.

The project explores the experiences of transmasculine people (including trans men and non-binary individuals) who become pregnant after transition, attitudes towards future pregnancy among young transmasculine people, and the legal and policy context in which transmasculine people might become pregnant and give birth.

For further information, please visit our website: <http://transpregnancy.leeds.ac.uk>.



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