



Impacts of Transactivism on the Human Rights of Women and Girls

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1. Introduction and background

Within Australia there is a mounting campaign for transgender people to be able to alter the sex stated on their birth certificates, even without having had gender reassignment surgery or having to obtain a court approval.¹ The ACT² and South Australia³ have been the first to introduce legislation with this effect. However, the Victorian Parliament narrowly voted down a similar bill following a speech by the MP Louise Staley opposing it on feminist grounds – rejecting the idea as ‘postmodern mumbo jumbo’ and an example of ‘mansplaining, telling women what really makes a woman’.⁴ Similar measures have also been suggested in the United Kingdom, where a Parliamentary Women and Equalities Committee has recommended a simple online form procedure for change of gender.⁵ This procedure is available to all individuals even if they have not undergone gender reassignment surgery, and has also been criticised by MPs as having ‘a profound impact on the rights of others to maintain sex-based boundaries, protections and rights’.⁶

Tension in relation to transgenderism has also been evident in the anxiety surrounding the Safe Schools Program.⁷ This opposition extends beyond the Christian lobby and conservative forces. Many feminists who are otherwise supportive of anti-bullying programs that challenge gender stereotypes and broaden acceptance of diverse sexuality, have raised concerns about the content being taught in relation to transgenderism.⁸ There are concerns that the use of puberty blockers and early hormone treatment may in fact constitute a form of child abuse and that promoting these measures to children is anything but safe.⁹

However, internationally feminists who have spoken out raising concerns about issues relating to transgenderism, such as Germaine Greer and Shelia Jeffreys, have been labelled

¹ See, eg, Jordan Hirst, ‘Judge Slams Court Process for Australian Trans Youth as “Inhumane”’, *QNews* (online), 29 January 2017, quoting *Re: Lucas* [2016] FamCA 1129 [4] (Tree J) <<http://www.qnews.com.au/judge-slams-court-process-for-australian-trans-youth-as-inhumane/>>.

² *Births, Deaths and Marriages Registration Amendment Act 2014* (ACT), amending *Births, Deaths and Marriages Registration Act 1997* (ACT).

³ *Births, Deaths and Marriages Registration (Gender Identity) Amendment Bill 2016* (SA) pt 2, amending *Births, Deaths and Marriages Registration Act 1996* (SA).

⁴ Lane Sainty, *A Tale of Two Bills: SA Passes Trans Reform, Victoria Cans It* (6 December 2016) Buzzfeed <https://www.buzzfeed.com/lanesainty/landmark-transgender-rights-bill-passes-in-south-australia-n?utm_term=.pvz3y526OR#.pekE6VQqPX>; Matthew Wade, ‘Victorian Liberal MP Louise Staley under Fire for Transphobic Comments’, *Star Observer* (online), 14 September 2016 <<http://www.starobserver.com.au/news/national-news/victoria-news/louise-staley-transphobic/152766>>.

⁵ United Kingdom Parliament, Women and Equalities Committee’ *Transgender Equality Inquiry*, 14 January 2016, 78-81.

⁶ David TC Davies MP, ‘Transgender Rights Versus Women’s Privacy’, 9 October 2017, <<https://www.david-davies.org.uk/news/transgender-rights-versus-womens-privacy>>.

⁷ Gay Alcorn, ‘The Reality of Safe Schools’, *The Guardian* (online), 13 December 2016 <<https://www.theguardian.com/australia-news/2016/dec/14/safe-schools-roz-ward-life-saving-support-queer-theory-classroom>>.

⁸ See, eg, Laura McNally, ‘Gender Neutrality or Enforcement? “Safe Schools” Isn’t as Progressive as it Seems’, *ABC Religion and Ethics* (online), 24 March 2015 <<http://www.abc.net.au/religion/articles/2015/03/24/4204018.htm>>.

⁹ Sheila Jeffreys, ‘Judicial Child Abuse: The Family Court of Australia, Gender Identity Disorder, and the ‘Alex’ Case’ (2006) 29 *Women’s Studies International Forum* 1. <https://www.youtube.com/watch?v=4gtx7OVYby0>

'TERFS' (Trans Exclusionary Radical Feminists) and subjected to boycotts, abuse and death threats.¹⁰ For example, in September 2017, a feminist debate about transgender issues in Hyde Park in the UK was interrupted by trans activists who were reported to have harassed attendees and assaulted a woman attempting to film them. This is particularly concerning given the history of this location as a 'home of free speech'.¹¹ Indeed, in the same month, Bath Spa University refused funding to psychotherapist James Caspian for a study about people who regret gender reassignment surgery. As Caspian noted, this is worrying as 'a university exists to encourage discussion, research, dissent even, to challenge ideas that are out of date or not particularly useful'.¹² All of this has arguably impeded further open and critical discussion of trans activism. Despite this some commentators have continued to speak out, with Camille Paglia recently stating publicly:

*The cold biological truth is that sex changes are impossible. Every single cell of the human body remains coded with one's birth gender for life. Intersex ambiguities can occur, but they are developmental anomalies that represent a tiny proportion of all human births.*¹³

Paglia added: 'Like Germaine Greer and Sheila Jeffreys, I reject state-sponsored coercion to call someone a 'woman' or a 'man' simply on the basis of his or her subjective feeling about it.' Feminists have long argued that 'sex' refers to physiological differences while 'gender' describes socially constructed characteristics.¹⁴ Ironically radical feminists who led the way in challenging gender stereotypes that exaggerate the differences between the sexes, now find themselves under attack for maintaining that some biological sex differences are real and not just determined by 'feelings'.

This paper will explore some of the reasons for feminist concerns and opposition to conflating sex and gender, by considering the impacts of these changes to the law on the human rights of women and girls. These views, though perhaps not popular with some, and with which some may disagree and take issue, nevertheless do raise important issues relevant to the human rights of women and girls.

¹⁰ Mark Hodges and John Jalsevac, 'Feminist Icon: Transfer 'Women' like Bruce Jenner Aren't Women. They're Delusional', LifeSite (online) 27 October 2015 < <https://www.lifesitenews.com/news/feminist-icon-germaine-greer-males-who-call-themselves-transgender-arent-wo>> TERF is a slur, *Threats of Violence, Harassment, and Abuse* <<https://terfisaslur.com>>.

¹¹ Meghan Murphy, 'Historic Speaker's Corner Becomes Site of Anti-Feminist Silencing and Violence', *Feminist Current* (online), 15 September 2017 < <http://www.feministcurrent.com/2017/09/15/historic-speakers-corner-becomes-site-anti-feminist-silencing-violence/>>.

¹² Author Unknown – BBC News, 'Bath Spa Uni Brans Transgender Reversal Plan 'Politically Incorrect' BBC News (online), 25 September 2017 <<http://www.bbc.com/news/uk-england-somerset-41385299>>.

¹³ Hank Berrin, 'Feminist Camille Paglia on Transgenderism: 'The Cold Biological Truth Is that Sex Changes Are Impossible'', *DailyWire* (online), 15 June 2017 <<http://www.dailywire.com/news/17591/feminist-camille-paglia-transgenderism-cold-hank-berrien#>>

¹⁴ Debra W Soh, 'Are Gender Feminists and Transgender Activists Undermining Science?', *Los Angeles Times* (online), 10 February 2017 <<http://www.latimes.com/opinion/op-ed/la-oe-soh-trans-feminism-anti-science-20170210-story.html>>. See further as regards biological differences in the brain: Adam M Chekroud et al, 'Patterns in the Human Brain Mosaic Discriminate Males from Females' (2016) 113(14) *PNAS* E1968; Marco Del Giudice et al, 'Joel et al.'s Method Systematically Fails to Detect Large, Consistent Sex Differences' (2016) 113(14) *PNAS* E1965.

2. Impact on Safety

a. Loss of women's safe spaces

One of the major concerns held by feminists about the impact of trans activism is the loss of safe spaces for women and girls generally.¹⁵ This includes not only traditionally sex segregated spaces such as bathrooms, change rooms and hospital wards, but also hard-won concessions achieved by the women's liberation movement such as women's refuges, women's health centres, courthouse safe rooms, women's libraries and women's rooms at universities. These exclusively female spaces and services are under threat and in many cases, have been or are being actively dismantled as a result of combined pressure from men's rights groups and transgender activists.¹⁶ Concerns have also been raised by those operating homeless shelters that laws forcing them to disregard complaints of shelter residents about living with someone who is transgender would mean in some circumstances subjecting women who have frequently been abused by male domestic partners to feelings of insecurity in what is supposed to be a 'safe haven'.¹⁷

The bathroom wars have been raging in the United States for some time.¹⁸ Transgender activists claim there is no impact on the safety of women and girls in giving access to public

¹⁵ Women Analysing Policy on Women, Submission to the Women and Equalities Committee, UK House of Commons, *Transgender Equality Inquiry*, 19 August 2015

<<http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/women-and-equalities-committee/transgender-equality/written/19382.pdf>>.

¹⁶ Dene Moore, 'How a Feminist Library Opening Became All About the Definition of a Woman', *Vice* (online), 14 March 2017 <https://www.vice.com/en_ca/article/wnkzew/how-a-feminist-library-opening-became-all-about-the-definition-of-a-woman>; Catherine Piner, 'Michigan States Open a Women-Only Study Space to Men After a Title IX Complaint' *Slate* (online) 29 July 2016 <http://www.slate.com/blogs/xx_factor/2016/07/29/msu_opens_a_women_only_lounge_to_men_after_a_title_ix_complaint.html>; Justin Wm. Moyer, 'Harvard Women Protest Sanctions on Single-Gender Clubs', *Washington Post* (online) 9 May 2016; Victoria A. Bronworth, 'Michigan's Womyn's Music Festival to End After 40 Years', *Curve* (online) 23 May 2015 <<http://www.curvemag.com/News/Michigan-Womyns-Music-Festival-to-End-after-40-Years-447/>>.

¹⁷ Tim Devany, 'Transgender Rules for Homeless Shelters Spark Firestorm', *The Hill* (online) 16 August 2016, <<http://thehill.com/regulation/pending-regs/291522-transgender-rules-for-homeless-shelters-spark-firestorm>>.

¹⁸ Richard Wolf, 'Supreme Court Won't Decide Transgender Bathroom Case, Vacates Earlier Ruling', *USA Today* (online), 6 March 2017 <<https://www.usatoday.com/story/news/politics/2017/03/06/supreme-court-transgender-bathroom-trump-obama/98800264/>>; Richard Craver, 'In HB2 Suit, GOP Leaders Want Plaintiff Health Records; Judge to Decide Today', *Winston-Salem Journal* (online), 17 November 2016 <http://www.journalnow.com/news/elections/local/delay-in-hb-lawsuit-means-no-trial-until-days-or/article_8cd3eb07-012a-5b47-bb91-4bd8296955d8.html>; Michael A Fuoco, 'Pine-Richland Sued over Bathroom Policy for Transgender Students', *Pittsburgh Post-Gazette* (online), 7 October 2016 <<http://www.post-gazette.com/local/north/2016/10/06/Pine-Richland-students-file-lawsuit-against-district-over-transgender-bathroom-policy-pittsburgh-pennsylvania/stories>>; John Riley, 'Pine-Richland School District Settles Lawsuit over Transgender Bathroom Policy', *Metro Weekly* (online), 26 July 2017 <<http://www.metroweekly.com/2017/07/pine-richland-school-district-settles-lawsuit-transgender-bathroom-policy/>>; Casey Leins, 'Texas Takes Obama to Court over Transgender Rules', *US News* (online), 12 August 2016 <<https://www.usnews.com/news/articles/2016-08-12/texas-other-states-begin-battle-against-obamas-transgender-rules>>;

<https://genderidentitywatch.files.wordpress.com/2016/11/students-and-parents-for-privacy-v-united-states-department-of-education-report-and-recommendation.pdf>

<https://genderidentitywatch.files.wordpress.com/2016/11/whitaker-vs-kenosha-usd-complaint.pdf>

bathroom spaces and services to any individual who claims to be female. This ignores the reality of voyeurs, exhibitionists, rapists and pedophiles that actively use these changes in the law as an opportunity to engage in sexual misconduct targeting women and children. There are in fact reports of sex offenders who assume a female identity to commit sexual offences against women and girls and/or to evade detection.¹⁹ For example, in March 2016, Toronto man Christopher Hanbrook was arrested for sexually assaulting several women in a women's shelter after he gained access to the shelter and its shower facilities as 'Jessica'.²⁰ In October 2015 The University of Toronto had to change its gender-neutral bathrooms after male students were caught holding their cellphones over female students' shower stalls and filming them as they showered.²¹ However, feminists alone seem to be keeping track of these transgressions on sites such as *This Never Happens* (Australia)²² and *Gender Identity Watch* (US)²³, the *Decide for Yourself* videos on You Tube,²⁴ and the *Woman means something* campaign (Canada).²⁵

There are similar concerns in relation to extending women-only benefits and scholarships to transgender people. This issue was raised in an *amicus curiae* brief tendered in the US by Women's Liberation Front and Family Policy Alliance in a trial concerning the right for a trans man to use the male high school bathrooms. It was argued that 'one of the primary means by which women are trying to overcome the centuries – millennia – of being denied education' would be lost, that is, preferences afforded to women in the form of scholarships, especially for traditionally male-dominated areas of education such as law and science. The rationale was that there was a risk that some males would identify themselves as female solely for the purposes of applying for female-only scholarships, meaning many women could lose the opportunity to achieve equality in education.²⁶ This logic can be extended to other forms of preferential treatment for groups of persons treated as second-class. Rebecca Reilly-Cooper, political theorist at University of Warwick, argues that it would be an 'extraordinary amount

¹⁹ For a recent example, see Jonathan Glover, 'Jury Convicts Donna Perry of Serial Killings', *The Spokesman-Review* (online), 29 June 2017 <<http://www.spokesman.com/stories/2017/jun/29/jury-reaches-verdict-in-donna-perry-murder-trial/>>; Thomas Clouse, 'Cellmate of Transgender Murder Suspect Says Donna Perry Claimed to Have Killed Dozens', *The Spokesman-Review* (online), 23 June 2017

<<http://www.spokesman.com/stories/2017/jun/23/cellmate-of-transgender-murder-suspect-says-donna/>>.

²⁰ Amanda Prestigiaco, '5 Times 'Transgender' Men Abused Women and Children in Bathrooms', *The Daily Wire* (online), 22 April 2016, <http://www.dailywire.com/news/5190/5-times-transgender-men-abused-women-and-children-amanda-prestigiaco>.

²¹ Jessica Chin, 'University of Toronto Gender-Neutral Bathrooms Reduced After Voyeurism Reports', *The Huffington Post Canada* (online), 6 October 2015, <http://www.huffingtonpost.ca/2015/10/06/u-of-t-bathrooms-voyeurism_n_8253970.html>.

²² An archive of content relating to violent and sexual crimes committed by 'males posing as or claiming to be women', that is intended for public viewing: Malinda Q Magpie, *This Never Happens*, 2016 <https://www.facebook.com/groups/1722756661380462>.

²³ A blog of content relating to legislation and case law that concern gender identity and sex discrimination in various jurisdictions: Cathy Brennan, *Gender Identity Watch*, 2012 <<https://genderidentitywatch.com/>>

²⁴ *Women: Decide for Yourself* (Created by Jane Williams, YouTube, 12 March 2016).

<<https://www.youtube.com/watch?v=uzwMJAFWltQ>>; *Decide for Yourself: Transgender Crime* (Jane Williams) (Created by BabyradfemTV, YouTube, 11 August 2016) <<https://www.youtube.com/watch?v=qzfwANtmnc>>.

²⁵ *Woman means something campaign* <<http://womanmeanssomething.com/>>.

²⁶ Women's Liberation Front and Family Policy Alliance 'Transgender Laws Threaten To Erase Women', Mercatornet (online), 19 June 2017, <https://www.mercatornet.com/conjugality/view/transgender-laws-threaten-to-erase-women/19973> >.

of naïveté or wilful blindness' to believe that some men will not exploit looser legal protections and access spaces and privileges set aside for women.²⁷

Enabling the alteration of birth certificates in any manner amounts to a changing of history - always something that should be carefully considered - but in the manner proposed²⁸ it will have the consequence that individuals who were born men, and who now identify as female, with or without male genitals, will have the right to be accepted as women in *all* contexts and *all* respects. Aside from anything else, a loosening of requirements for the alteration of birth certificates makes it impossible to preserve women only spaces and protect women from abusive or criminal intentions. This open access to women's spaces has significant consequences in many contexts.

Aside from the fact that these changes to the law could arguably appear to facilitate the commission of sexual crimes, there is also the question of whether the comfort and security of women should generally be compromised in this manner. Many women have histories of traumatic experiences at the hands of men and consequently seek out exclusively women only community spaces for this reason.²⁹ This change in the law effectively deprives these women of 'penis free zones' in which they can find some refuge. In a society in which so many spaces are dominated by men and masculine culture, is it fair or just for women to be denied some spaces where they can meet in the absence of men? It has been argued that the human rights of transgender people to feel accepted have eclipsed the rights of women and girls to feel safe, and secure rather than constantly on guard.³⁰

b. Women's prisons

One particular concern that has been raised is the safety of women prisoners. There are increasing demands by male prisoners who identify as women to be transferred from a male to a female prison. Calls for the placement of transgender individuals in a prison of their choosing arguably ignores the safety implications for female inmates and the gendered nature of violent and sexual crime.³¹ The danger to female inmates was demonstrated earlier this year in Britain when a double rapist Martin Ponting, now identifying as Jessica Winfield, was transferred to a female prison despite still having a penis intact. The prisoner was

²⁷ Rebecca Reilly-Cooper, 'Equality for Trans People Must Not Come at the Expense of Women's Safety', *Politics.co.uk* (online), 26 January 2016 <<http://www.politics.co.uk/comment-analysis/2016/01/26/equality-for-trans-people-must-not-come-at-the-expense-of-wo>>

²⁸ In Queensland, one of the jurisdictions considering changes to its *Births, Deaths and Marriages Registration Act 2003*, a person who has not undergone sex affirmation surgery, including genital surgery, currently cannot apply to change their birth certificate to reflect their sex identity. By contrast, the ACT (s 24(1)) and SA (s 29K) Acts now only require "appropriate clinical treatment", which can fall short of surgery.

²⁹ Women Analysing Policy on Women, above n 11.

³⁰ Jessica Shepherd, 'Planet Fitness Cancels Woman's Membership after Her Complaints of Transgender Woman in Locker Room', *MLive* (online), 6 March 2015 <http://www.mlive.com/news/saginaw/index.ssf/2015/03/transgender_members_welcome_in.html>.

³¹ Maria L La Ganga, 'US Prohibits Imprisoning Transgender Inmates in Cells Based on Birth Anatomy', *The Guardian* (online), 24 March 2016 <<https://www.theguardian.com/us-news/2016/mar/24/transgender-prison-gender-identity-anatomy-doj-rules>>.

segregated after making inappropriate advances to female prisoners.³² Another example is provided in Australia by Paul or 'Paula' Denyer, a serial killer who in 1993 was convicted of murdering three women in that year.³³ Denyer has sought a transfer to a women's prison on the basis that he is now a woman and has defied court orders not to wear female clothing and cosmetics.³⁴ This request has to date been denied as has Denyer's attempts to seek to have taxpayer-funded reassignment surgery and a name change.³⁵ Similarly, in February 2017, the murderer Paris Green (formerly Peter Laing) was removed from a female wing in an Edinburgh prison after sexual advances toward the inmates. Green had also been removed from the Corton Vale women's prison in 2013 after similar incidents.³⁶ In 2014, a transgender girl at a juvenile female facility in Connecticut was transferred to an adult female prison after concerns about assaults on girls and female staff members.³⁷ Campaigning to further the safety and well-being of transgender inmates, who identify as women, while down playing or ignoring the potential for human rights transgressions against the female prison population, arguably smacks of hypocrisy.³⁸

There is concern that transgender activism can often be a disguised form of men's rights activism that it is largely focused on the liberation of males from oppressive masculinity – regardless of the cost to women.³⁹ The concerns expressed in this paper focus largely on

³² Sean-Paul Doran, 'Transgender Rapist moved to Women's Jail Put in Segregation After Making 'Unwanted Advances' On Other Lags', *The Sun* (online), 5 September 2017 <<https://www.thesun.co.uk/news/4400327/transgender-rapist-womens-prison/>>.

³³ 'Stop pandering to 'sicko', says Doyle', *The Age* (online), 28 June 2004 <<http://www.theage.com.au/articles/2004/06/28/1088392586147.html?from=storylhs>>

³⁴ Jon Kaila, 'Serial killer Paul Denyer defies prison order to stop dressing as woman', *Herald Sun* (online), 9 April 2013 <<http://www.heraldsun.com.au/news/law-order/serial-killer-paul-denyier-defies-prison-order-to-stop-dressing-as-woman/news-story/dee7fe2f4bb8d993f509ef1f13aa0eb7>>

³⁵ Mark Dunn, 'Serial killer Paul Denyer quizzed on four jail rapes in just six weeks', *News* (online), 26 July 2012 <<http://www.news.com.au/national/victoria/serial-killer-paul-denyier-quizzed-on-four-jail-rapes-in-just-six-weeks/news-story/d2fc19a859ac1b7d72fd0cb4a5d1c493>>

³⁶ Natalie Evans, 'Transgender Murderer Moved from Women's Prison After Having Sex With Female Inmates', *The Mirror* (online), 7 February 2017 <<http://www.mirror.co.uk/news/uk-news/transgender-murderer-moved-womens-prison-9770465>>.

³⁷ Associated Press (author unknown), 'Connecticut Judge Puts Transgender Girls in Women's Prison, Sparks Debate', *Daily New* (online), 30 April 2014 <<http://www.nydailynews.com/news/crime/connecticut-judge-puts-transgender-girl-women-prison-sparks-debate-article-1.1774263>>.

³⁸ Renee Gerlich, 'Why Can't We Just Make Up?: On the Hypocrisy of Transactivism in the Prison Abolition Movement' on Renee Gerlich, *Writing by Renee* (23 March 2017) <<https://reneejg.net/2017/03/23/transactivism-in-prison-abolition/>>.

³⁹ See generally: Niko Bell, 'Why is a trans woman leading a men's rights group?', *Xtra* (online), 21 January 2016 <<https://www.dailyxtra.com/why-is-a-trans-woman-leading-a-mens-rights-group-69998>>; Dawn Ennis, 'This friend of our enemy is our enemy: meet a trans woman men's rights activist', *LGBTQ Nation* (online), 14 December 2016 <<https://www.lgbtqnation.com/2016/12/friend-enemy-enemy-meet-trans-woman-mens-rights-activist/>>; Deborah L Davis, 'Are Transgender Women Just Reinforcing Sexist Stereotypes?', *Psychology Today* (online), 15 September 2015, <<https://www.psychologytoday.com/blog/laugh-cry-live/201509/are-transgender-women-just-reinforcing-sexist-stereotypes>>; Meghan Murphy, 'What's Current: Trans activists complain about 'man-free' Swedish music festival', *Feminist Current* (online), 20 September 2017 <<http://www.feministcurrent.com/2017/09/20/whats-current-trans-activists-complain-man-free-swedish-music-festival/>>; FireInMyBelly, 'RadFem 2013: we didn't kill any men', *Feministuk – Fire In My Belly* (online blog), 19 June 2013 <<https://feministuk.wordpress.com/2013/06/19/radfem-2013-we-didnt-kill-any-men/>>; stavvers, 'RadFem2013 cancellation: the plot thickens', *Another Angry Feminist* (online), 1 May 2013 <<https://stavvers.wordpress.com/2013/05/01/radfem2013-cancellation-the-plot-thickens/>>; Elizabeth Hungerford, 'A Gender Critical Response to: A Statement of Trans-Inclusive Feminism and Womanism', *Sex*

impacts of male to female transgenderism, since female to male transgenderism poses a risk only to the safety and well-being of the individual themselves rather than to others. For obvious physiological reasons, few men hold fears when a woman identifying as a man enters a male bathroom or change room or chooses to compete against them in a male sport. Unsurprisingly there is also no clamouring of transgender female to male individuals to be accommodated in male correctional centres.

c. Skewing of crime statistics & community perceptions

It has been reported that violent crimes committed by women are increasing. As women are responsible for only a very small proportion of these offences overall, it does not take much to achieve a significant increase in this crime rate.⁴⁰ However, one contributing factor may be the attribution to women of violent crimes committed by men who identify as women, with a Swedish study finding that sex-reassigned male-to-female individuals had a higher risk for all criminal convictions (including violent crimes) than female controls.⁴¹ For example, the woman responsible for a recent terrifying axe attack in a 7-Eleven was actually a man named Karl until a sex change operation two years ago.⁴² Much of this crime perpetrated by transgender or transsexual persons is in part a consequence of their strong risk of homelessness, poor socioeconomic status, historical criminalisation of their identities, unemployment and poverty, violence and victimisation, and institutional discrimination.⁴³ Nevertheless, for the most part mainstream media did not report that the attacker was transgender, but attributed the violence to a young woman.⁴⁴

Matters (online), 19 September 2013 <<https://sexnotgender.com/2013/09/19/a-gender-critical-response-to-a-statement-of-trans-inclusive-feminism-and-womanism/>> ; Jess Denham, 'Death Threats Force Feminist Campaigner out of University Debate', *The Independent* (online), 17 September 2013 <<http://www.independent.co.uk/student/news/death-threats-force-feminist-campaigner-out-of-university-debate-8821362.html>> ; Taylor Fogarty, 'Why Trans Activists Will Destroy Homosexual Rights', *The Federalist* (online), 2 May 2017 <<http://thefederalist.com/2017/05/02/trans-activists-will-destroy-homosexual-rights/>>
⁴⁰ Australian Bureau of Statistics, *Recorded Crime- Offenders, 2015-2016* (2017) [3]; Queensland Government Statistician's Office, *Recorded Crime- Offenders, Queensland, 2014-2015*, Report (2016) 3; Jessie Holmes, *Female Offending: Has There Been An Increase?*, Issue Paper No. 46, NSW Bureau of Crime Statistics and Research (2010) 4-5; Mandy Wilson et al., 'Women Who Commit Violent Crimes Need Programs to Help Them While in Prison', *The Conversation* (online) [5]-[7], <<https://theconversation.com/women-who-commit-violent-crimes-need-programs-to-help-them-while-in-prison-72279>> .

⁴¹ Cecilia Dhejne et al, 'Long-Term Follow-Up of Transsexual Persons Undergoing Sex Reassignment Surgery: Cohort Study in Sweden' (2011) 6(2) *PLOS One* e16885.

⁴² Nic White, 'Transgender Woman, 24, Accused of Bludgeoning Two Innocent People with an Axe at a 7-Eleven Was Born as a Boy Named Karl – but Had a Sex Change Two Years Ago in Thailand to Become Evie', *Daily Mail* (online), 10 January 2017 <<http://www.dailymail.co.uk/news/article-4104642/Evie-Amati-accused-Sydney-7-Eleven-axe-attack-born-boy-named-Karl.html>>.

⁴³ Chassitty N Whitman, 'Transgender Criminal Justice: Ethical and Constitutional Perspectives' (2017) 27(6) *Ethics & Behavior*, 445-457; Sari L Reisner, Zinzi Bailey and Jae Sevelius, 'Racial/Ethnic Disparities in History of Incarceration, Experiences of Victimization, and Associated Health Indicators Among Transgender Women in the U.S.' (2014) 54(8) *Women & Health* 750-767, 751,

⁴⁴ 'Woman Charged over Alleged 7-Eleven Axe Attack in Sydney's Inner-West', *ABC News* (online), 9 January 2017 <<http://www.abc.net.au/news/2017-01-07/woman-charged-over-alleged-7-eleven-axe-attack/8168030>>; Candace Sutton, 'Exclusive: Video of Terrifying Moment Axe-Carrying Woman Attacks Two Customers in Suburban 7-Eleven', *News.com.au* (online), 10 January 2017 <<http://www.news.com.au/national/courts-law/exclusive-video-of-terrifying-moment-axecarrying-woman-attacks-two-customers-in-suburban-7eleven/news-story/d0bbcf82bef2a10914fd075614c6b037>>.

The failure to attribute these crimes accurately has a potentially negative impact on community perceptions of female violence. Due to the exaggerated media representation of women committing violent crimes, the community already has a distorted perception in relation to female criminality.⁴⁵ The sensationalist reporting of the few violent crimes actually committed by women results in a widespread lack of appreciation of the extent to which violent crime is committed by men and thereby further mutes community outcry over male violence.⁴⁶

In combatting the mistreatment of transgender individuals, there has also arguably been a failure to acknowledge that transgender individuals also suffer, not at the hands of questioning feminists, but from male violence.⁴⁷ Meanwhile by representing all transgender individuals as exclusively harmless victims, we are exposing women and children to risk by encouraging an approach of unquestioning acceptance in circumstances where it is sensible to exercise some degree of caution.⁴⁸ Evidence indicates that transgender male to female individuals may continue to act like men even following hormone treatment and gender reassignment surgery.⁴⁹

3. Impact on sex based inequity

a. Impact on women's participation in sport & culture

In January 2016, the International Olympic Committee (IOC) announced changes to its policy so that transgender athletes are now able to compete in women's competitions, even without undergoing sex reassignment surgery.⁵⁰ Two-time Olympic gold medallist Caster Semenya from South Africa has been at the centre of related controversy. Semenya was raised a girl and a woman but has hyperandrogenism, a condition in which testosterone levels are far greater than the majority of women. In 2009 Semenya was forced to undergo 'gender testing'

⁴⁵ Australia's National Research Organisation for Women's Safety and Our Watch, *Media Representations of Violence against Women and Their Children* (Report, November 2015) 14.

⁴⁶ Jessica Abrahams, 'Are Men Natural Born Criminals? The Prison Numbers Don't Lie', *The Telegraph* (online), 13 January 2015 <<http://www.telegraph.co.uk/women/womens-life/11342408/Are-men-natural-born-criminals-Prison-numbers-dont-lie.html>>.

⁴⁷ Rebecca L Stotzer, 'Violence against transgender people: A review of United States data' (2009) 14 *Aggression and Violent Behaviour* 170, 173, 176; Loree Cook-Daniels and Michael Munson, 'Sexual Violence, Elder Abuse, and Sexuality of Transgender Adults, Age 50+: Results of Three Surveys (2010) 6(2) *Journal of GLBT Family Studies*, 142, 146.

⁴⁸ See, eg, Whitney Bermes, 'Manhattan Sex Offender Facing New Rape Charge', *Bozeman Daily Chronicle* (online), 17 November 2016 <http://www.bozemandailychronicle.com/news/crime/manhattan-sex-offender-facing-new-rape-charge/article_c54467d0-3cac-535f-ac9c-926ab376fb3f.html>.

⁴⁹ Germaine Greer, *The Whole Woman* (Doubleday: Milson's Point, 1999); Lorene Gottschalk, 'Transgendering Women's Space: A Feminist Analysis of Perspectives From Australian Women's Services' (2009) 32 *Women's Studies International Forum* 167–178; Sheila Jeffreys, 'They Know it When They See It: the UK Gender Recognition Act 2004' 10 (2) *British Journal of Politics and International Relations* (2008) 328–334; Janice Raymond, *The Transsexual Empire: The Making of the She-male* (Teachers College Press: Columbia University, 2nd Ed. 1994).

⁵⁰ Associated Press, 'IOC Rules Transgender Athletes Can Take Part in Olympics without Surgery', *The Guardian* (online), 25 January 2016 <<https://www.theguardian.com/sport/2016/jan/25/ioc-rules-transgender-athletes-can-take-part-in-olympics-without-surgery>>.

after dominating her field and after concerns about her unusual advantage were raised.⁵¹ Semenya is an intersex person, as someone who does not fit into typical binary notions of male or female bodies, and is not a transgender person.⁵² Nevertheless her case demonstrates the advantages that transgender women would have over female competitors if allowed to compete in these events, given their similar advantages in testosterone levels.

The now reformed IOC Guidelines require transgender competitors to have identified as female for four years and to have reduced testosterone levels only for twelve months prior to competition.⁵³ However, a 2017 study in *Sports Medicine* found this rule was an arbitrary one. At the moment there has not been sufficient enquiry into the exact measures needed to level out transgender athletes' athletic advantage. Other sports medicine professionals have noted an 'urgent need' for research in the area.⁵⁴ However, as all of these articles conclude, male-to-female transgender athletes will have, relative to height and build, in almost all cases, a physiological advantage in terms of greater size and strength.⁵⁵ This change in policy will have strong impacts on women's sports, and arguably impacts adversely only on women's sport, not men's competition. Female athletes already face huge disadvantages in pay compared to men, and this disparity has deeply entrenched causes: significantly in a 2016 study of the 129 National Olympic Committees governing Olympic sports, women made up only 16.6 percent of the boards.⁵⁶

This issue has also gained attention in Australia in the case of transgender woman Hannah Mouncey applying for eligibility to take part in the AFL Women's competition 2018 draft. The AFL rejected the application, considering 'transgender strength, stamina, physique', though perhaps exemplifying the lack of clarity over this issue, Mouncey has played several games in the ACT's women's AFL competition in 2017.⁵⁷

⁵¹ Juliet Macur, 'The Line Between Male and Female Athletes Remains Blurred', *New York Times* (online) 28 July 2015 < <https://www.nytimes.com/2015/07/29/sports/win-for-dutee-chand-but-line-between-male-and-female-athletes-remains-blurred.html>>; 'Semenya told to take gender testing', *BBC* (online), 19 August 2009 <<http://news.bbc.co.uk/sport2/hi/athletics/8210471.stm>>

⁵² 'What is an intersex athlete? Explaining the case of Caster Semenya', *The Guardian* (online) 29 July 2016 < <https://www.theguardian.com/sport/2016/jul/29/what-is-an-intersex-athlete-explaining-the-case-of-caster-semenya>>

⁵³ International Olympic Committee, *IOC Consensus Meeting on Sex Reassignment and Hyperandrogenism* November 2015, <https://stillmed.olympic.org/Documents/Commissions_PDFfiles/Medical_commission/2015-11_ioc_consensus_meeting_on_sex_reassignment_and_hyperandrogenism-en.pdf>; Jason Blevins, 'Jillian Bearden, First Female Transgender Cyclist to Ride in a Pro U.S Peloton, Emerges as a Beacon For Other Trans Athletes', *Denver Post* (Online) 7 August 2017, < <http://www.denverpost.com/2017/08/07/first-female-transgender-pro-cyclist-colorado-classic-2017/>>.

⁵⁴ Pitsailadis, Yannis et al, 'Beyond Fairness: The Biology of Inclusion for Transgender Intersex Athletes' (2016) 15 *Current Sports Medicine Reports* 386.

⁵⁵ Bethany Alice Jones, Jon Arcelus, Walter Pierre Bouman and Emma Haycraft, 'Sport and Transgender People: A Systematic Review of the Literature Relating to Sport Participation and Competitive Sport Policies' (2017) 47(4) *Sports Medicine* 701, 713.

⁵⁶ Rosamond Hutt, 'Sport has a huge gender pay gap – and it's not about to close', *World Economic Forum* (online) 15 September 2016 < <https://www.weforum.org/agenda/2016/09/sport-has-a-huge-gender-pay-gap-and-it-s-not-about-to-close-soon/>>.

⁵⁷ 'Transgender footballer Hannah Mouncey ruled ineligible for 2018 AFLW draft', *ABC News* (online), 18 October 2017 < <http://www.abc.net.au/news/2017-10-17/transgender-footballer-ruled-ineligible-for-aflw-draft/9059108>>

The recognition of the rights of transgender individuals will necessarily mean that many women will effectively have to give up their dreams of achievement in high level sport and of Olympic success.⁵⁸ This impact is being felt in all other levels of sport as well.

There are certainly increasing reports that transgender athletes are having an adverse impact on women's sport by dominating female events as a consequence of their physiological advantage.⁵⁹ However, enabling transgender athletes to compete in women's sports is not only potentially very unfair in terms of competition to women, but it also exposes them to increased risks. Athletes in team sports and contact sports such as martial arts are already reporting being overpowered and injured by the unusual strength of their transgender adversaries.⁶⁰ Women's sport has been unfairly overlooked for a long time. It is troubling that just as it is finally starting to gain widespread cultural participation and approval, this issue threatens to discourage women from participating for fear of injury and injustice.

In advocating for this change transgender activists have also arguably avoided countenancing the possibility that this policy will be exploited by ambitious male athletes and unscrupulous nations. The Iranian football team, for example, reportedly already boasts eight men who claim to be awaiting sex change operations.⁶¹ The Iranian state since a 1986 fatwa has considered gender-confirmation surgery and hormone-replacement therapy religiously acceptable, and today it allows trans citizens to have their gender identity recognised by law and even subsidises sex reassignment, as a 'medical solution' to outlawed homosexual and trans identities.⁶²

It should also be noted that some men's rights groups are actively encouraging members to identify as transgender women with the express purpose of undermining feminism by obscuring sex based inequalities and sabotaging any affirmative action measures.⁶³ There is arguably an increasing trend to nominate transgender individuals for leadership positions, awards and honours, including those specifically created to benefit women.⁶⁴ One such

⁵⁸ AJ Willingham, 'People Are Skeptical about This Record-Setting Trans Weightlifting Champ', *CNN* (online), 23 March 2017 <<http://edition.cnn.com/2017/03/23/health/transgender-weightlifter-controversy-trnd/index.html>>.

⁵⁹ For example, see Anna588, *Outrage after Transgender Weight Lifter Wins Comp* (21 March 2017) Feminist Legal Clinic <<https://feministlegal.org/2017/03/21/outrage-after-transgender-weight-lifter-wins-comp/>>; Ezra Amacher, 'Transgender Cyclist is Top Female Finisher at El Tour de Tucson', *Arizona Daily Star* (online), 19 November 2016 <http://tucson.com/sports/local/transgender-cyclist-is-top-female-finisher-at-el-tour-de/article_2c7d291f-4376-57a6-9578-3831353032bc.html>.

⁶⁰ Brandon Morse, 'Allowing Transgender Olympians is Unfair to Women', *The Federalist* (online), 27 January 2016 <<http://thefederalist.com/2016/01/27/allowing-transgender-olympians-is-unfair-to-women/>>.

⁶¹ Barney Henderson, 'Eight of Iran's Women's Football Team "Are Men"', *The Telegraph* (online), 30 September 2015 <<http://www.telegraph.co.uk/news/worldnews/middleeast/iran/11903290/Eight-of-Irans-womens-football-team-are-men.html>>.

⁶² Neha Thirani Bagri, 'Everyone treated me like a saint'—In Iran, there's only one way to survive as a transgender person', *Quartz* (online), 19 April 2017 <<https://qz.com/889548/everyone-treated-me-like-a-saint-in-iran-theres-only-one-way-to-survive-as-a-transgender-person/>>

⁶³ *MGTOW: The Solution: Part 2: Immediate Solutions* (Created by Turd Flinging Monkey, YouTube, 2 Jan 2016) <<https://www.youtube.com/watch?v=oVkeV0mV1Xc>>.

⁶⁴ Vanesha Shuretheran, 'Malaysia's Courageous Transgender Nisha Ayub Awarded' *Malaysian Times*, 30 March 2016; Leigh Hill, 'Group Captain Cate McGregor Wins Queenslander of the Year', *Out In Perth* (online), 4 November 2015 <<http://www.outinperth.com/group-captain-cate-mcgregor-wins-queenslander-of-the->

example is Cate McGregor AM (formerly Malcolm McGregor), a former Lieutenant Colonel and speechwriter for Chief of Army David Morrison AO, who in 2013 publically announced that she was transgender and in 2014 was named 48 on the *The Australian Women's Weekly* Power List.⁶⁵ McGregor has since taken up women's first grade cricket and hopes to play in the Women's Big Bash League.⁶⁶

Instead of women directing their focus on providing much needed support and recognition to their sisters, they are now frequently preoccupied instead with providing reassurance and acknowledgement to transgender individuals. This focus, it may be argued, is resulting in the advancement and liberation of transgender individuals at the expense of women. Once offered a position of influence, transgender individuals may pursue a very different agenda from women – for example arguing that abortion and other issues associated with reproductive rights are not women's issues because not inclusive of all who claim to be women.⁶⁷ The centring of transgenderism therefore has the effect of derailing feminist political discourse altogether.⁶⁸

b. Erasure of lesbian community

Even amongst LGBTI people, there is a diversity of views in relation to transgenderism.⁶⁹ It is important to recognise that not all transgender individuals adopt the same position, but have views as diverse as those held by feminists in relation to this issue.⁷⁰ It should not be assumed that the most vociferous necessarily represent the majority. There are male to female transgender individuals who regard 'woman' as an honorific and do not insist on it as a

year/;> Staff Writes, 'Julie Bishop Tops the Australian Women of Power List 2014', *News.com.au* (online), <<http://www.news.com.au/lifestyle/real-life/julie-bishop-tops-the-australian-womens-weekly-power-list-2014/news-story/75fc6192fd29c1c920edf5c139156c6f>>; Siobhan Morgan, 'Germaine Greer Tells Cambridge University Students That Transphobia Doesn't Exist', *Huffington Post* (online), 29 January 2015, <http://www.huffingtonpost.co.uk/2015/01/28/germaine-greer-returns-to_n_6561232.html>; Fairfax Media, 'Caitlyn Jenner's Woman of the Year Award Angers Rose McGowan and 9/11 Widower', *The Sydney Morning Herald*, 18 November 2015; Meena Jang, 'Spirit Awards: 'Tangerine' Star Mya Taylor Makes History as Transgender Winner', *Hollywood Reporter* (online), 27 February 2016 <<http://www.hollywoodreporter.com/news/mya-taylor-wins-best-supporting-869796>>.

⁶⁵ Staff Writes, 'Julie Bishop Tops the Australian Women of Power List 2014', *News.com.au* (online), <<http://www.news.com.au/lifestyle/real-life/julie-bishop-tops-the-australian-womens-weekly-power-list-2014/news-story/75fc6192fd29c1c920edf5c139156c6f>>

⁶⁶ Sarah Blake, 'Catherine McGregor's pitch for the Big Bash at 60 boosted by win in first cricket match', *News.com.au* (online) 21 November 2016 <<http://www.news.com.au/lifestyle/real-life/true-stories/catherine-mcgregors-pitch-for-the-big-bash-at-60-boosted-by-win-in-first-cricket-match/news-story/b355c2a7f7f52d903523ef11ac1ec626>>

⁶⁷ See, eg, Lindsay King-Miller, 'The Reproductive Justice Movement Has a Gender Inclusion Problem', *The Establishment* (online), 2 August 2017 <<https://theestablishment.co/the-reproductive-justice-movement-has-a-gender-inclusion-problem-cf88e3a4ce61>>; Katherine Timpf, 'Abortion Is Not a "Women's" Issue Because "Men Have Abortions" Too', *National Review* (online), 13 March 2015. <<http://www.nationalreview.com/article/415391/abortion-not-womens-issue-because-men-have-abortions-too-katherine-timpf>>.

⁶⁸ TERF is a slur, *Centering Trans Women in Feminism and Women's Spaces* <<https://terfisaslur.com/centering-trans-people-in-all-discussions/>>.

⁶⁹ <http://www.asage-au.org/2016/09/22/finally-gay-men-reach-peak-trans/>

⁷⁰ See e.g. Bronwyn Winter in 'IQ2 Debate: Society Must Recognise Trans People's Gender Identities', The Ethics Centre, 30 March 2016, <https://www.youtube.com/watch?v=N91s1j1YD_w>.

reality.⁷¹ These individuals distance themselves from trans activism. They view gender dysphoria as a mental disorder and do not support the transitioning of children.⁷² Similarly, radical feminists have always supported gender non-conforming individuals and continue to do so, but do not agree with the denial of biological realities and sterilization of non-conforming children.⁷³

It should also be considered that there is strong opposition on the grounds that transgenderism is eroding the rights of lesbians – particularly their freedom of assembly and association.⁷⁴ Certainly there are arguments that transgenderism and homosexuality are essentially incompatible.⁷⁵ Although these views in no way detract from support for the protection of transgender and gender non-conforming individuals from violence and humiliation, the inclusion of ‘gender identity’ as a distinct category in relation to discrimination laws, arguably creates difficulty.

*Protection on the basis of sexual orientation should be contained in federal anti-discrimination laws prohibiting discrimination. However, the inclusion of the category of ‘gender identity’ is undesirable unless it is able to provide equal protection for all identities and does not privilege one identity over another, thus inadvertently providing a context where the rights of one group violate the rights of another. At present, the inclusion of ‘gender identity’ in the proposed anti-discrimination legislation excludes, or works against, women who are born with female bodies and raised female.*⁷⁶

One difficulty has been the reports of transgendered male to female individuals who enter exclusively female spaces, including lesbian groups, where they make sexual advances on others and claim discrimination when they find themselves rejected. They refer to their difficulties as ‘the cotton ceiling’.⁷⁷

Sheila Jeffreys argues that legislation that legitimises gender identity and allows men who seek to be women to have all the rights of women, directly conflicts with the rights of women born and raised as females.⁷⁸ Certainly it is making it virtually impossible for women to meet

⁷¹ See, eg, *Transwomen Are Not Women: A Chat with Miranda Yardley* (Created by HeyThisIsRya, YouTube, 30 June 2017) <<https://www.youtube.com/watch?v=PyUNuD8WUSY&feature=share>>; also *There Are Only Two Gender* (Created by Blaire White, 31 October 2016) <<https://www.youtube.com/watch?v=rnQbgShb6r8>>.

⁷² <https://www.youtube.com/watch?v=wUOjuiAikrU>; <https://www.youtube.com/watch?v=h9VihbrehGc>

⁷³ Susan Cox, ‘Coming Out as ‘Non-Binary’ Throws Other Women under the Bus’ on *Feminist Current* (10 August 2016) <<http://www.feministcurrent.com/2016/08/10/coming-non-binary-throws-women-bus/>>.

⁷⁴ Erinyes, Submission No 143 to Australian Human Rights Commission, *Consultation on Protection from Discrimination on the Basis of Sexual Orientation and Sex and/or Gender Identity*, 2010; Taylor Fogarty, ‘Why Trans Activists Will Destroy Homosexual Rights’, *The Federalist* (online), 2 May 2017, <<http://thefederalist.com/2017/05/02/trans-activists-will-destroy-homosexual-rights/>>.

⁷⁵ *Can Transgender Ideology and Gayness Go Together?* (Created by Charlie Rae, YouTube, 13 July 2017) <<https://www.youtube.com/watch?v=ID8ksTD2kTs&sns=fb>>.

⁷⁶ Erinyes, above n 70.

⁷⁷ Avory Faucette, ‘The Cotton Ceiling is Real and It’s Time for All Queer and Trans People to Fight Back’ on *Queer Feminism* (27 March 2012) <<https://queerfeminism.com/2012/03/27/the-cotton-ceiling-is-real-and-its-time-for-all-queer-and-trans-people-to-fight-back/>>; TERF is a slur, *Cotton Ceiling and Autogynephilia* <<https://terfisaslur.com/cotton-ceiling/>>.

⁷⁸ Jeffreys, above n 30.

in the absence of individuals with male genitals, as was seen in the closing down of the much loved Michigan Womyn's Music Festival.⁷⁹

The expansion of the definition of women has also resulted in women born and raised female being denied the freedom to choose to associate specifically with other women born and raised female in certain circumstances such as festivals, counselling groups, women's refuges, spiritual practices, sporting teams, and Lesbian social support groups.⁸⁰

While there are now protections against the vilification of transgender individuals,⁸¹ there continues to be no protection against the vilification of women and girls. Women who want to maintain their right to meet in the absence of individuals who are biologically male, are subject to boycotts and extreme levels of harassment and abuse including rape and death threats.⁸² A number of legal challenges have also been made by transgendered individuals against the right of lesbians to meet in their absence.

While to date, these challenges in Australia have been won by lesbians, the effort and expense of defending these cases is a financial and emotional drain on the women involved and is a traumatizing experience.⁸³ Already going to great lengths to carve out what little safe spaces they can for themselves, having to defend their legitimacy is an insult to injury. Moreover, there are indications these victories will become more and more difficult to achieve. South Australia has recently passed legislation that will allow trans adults to change their gender on their birth certificate if they can show that they have consulted a doctor, without any reassignment surgery or court process.⁸⁴ There is a prospect of lesbian-positive events being forced to go 'underground' to avoid persons who are biologically male from attending. This will mean lesbians who are not already connected to lesbian networks will struggle to gain access, a development that would marginalise especially those from vulnerable socioeconomic groups.

Impact on reproductive rights

c. Dangers of hormone interventions for children

Overseas there is an emerging trend in which decisions about the care of children who have been identified as transgender have been taken away from parents, and are instead being made by the state and the medical profession.⁸⁵ The Canadian province of Ontario has

⁷⁹ Trudy Ring, 'This Year's Michigan Womyn's Music Festival Will Be the Last', *The Advocate* (online), 21 April 2015 <<https://www.advocate.com/michfest/2015/04/21/years-michigan-womyns-music-festival-will-be-last>>.

⁸⁰ Erinyes, above n 70, 5.

⁸¹ See *Anti-Discrimination Act 1977* (NSW) pt 3A div 5; *Anti-Discrimination Act 1991* (Qld) s 124A; *Discrimination Act 1991* (ACT) s 67A; *Anti-Discrimination Act 1998* (Tas) s 19.

⁸² TERF is a slur, above n 8.

⁸³ See, eg, *O'Keefe v Sappho's Party Inc* [2009] SAEOT 50.

⁸⁴ Shannon Power, 'South Australia celebrates while Victoria disappoints on trans laws', *Star Observer* (online), 8 December 2016 <<http://www.starobserver.com.au/news/south-australia-celebrates-victorian-disappoints-trans-laws/154366>>

⁸⁵ Mary Emily O'Hara, 'Minnesota Mom Sues Her Trans Child over Gender Reassignment', *NBC News* (online), 17 November 2016 <<http://www.nbcnews.com/feature/nbc-out/minnesota-mom-sues-her-trans-child-over-gender-reassignment-n685266>>.

recently passed a law that will give the government the right to take a child away from parents that do not accept their child's chosen gender identity.⁸⁶ However, in other cases it is the parents who are the driving force, demanding acknowledgement of their child's right to choose their gender.⁸⁷

This latter path appears to be the direction that Australia is taking, as the Federal Court was recently asked to reconsider the need of court approval before hormone replacement treatment.⁸⁸ But regardless of whether it is the state, the medical profession, the parents or the children themselves who are driving the decision – there is no doubt there are major ramifications.

In the past, gender non-conforming individuals were often labelled homosexual. However, increasingly the same behaviour is now being interpreted as evidence of transgenderism. This in some cases can reinforce traditional conceptions that there is a set way of being 'female' and a set way of being 'male'.⁸⁹ Gender stereotypes are frequently conflated with gender identity,⁹⁰ though it is equally important to recognise that transgender individuals often critically reflect on problems of gender norms and conventional conceptions of men and women and do not by definition strengthen patriarchal power structures, as is often asserted or implied.⁹¹ One cannot consider all children who do not conform to cultural notions of gender as one group.⁹² Feminists have long pointed out that all gender identities are social constructs and studies have suggested that the relationship between childhood gender non-conformity and adult sexuality or gender identity is subject to the meaning with which the individual imbues their non-conformity.⁹³ Gender Dysphoria is a condition recognized by the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders, 5th edition ('DSM 5'). It refers to clinically significant distress that can result when a person's

⁸⁶ Grace Carr, 'Ontario Makes Disapproval of Kid's Gender Choice Potential Child Abuse', *Daily Caller* (online), 6 May 2017 <<http://dailycaller.com/2017/06/05/ontario-makes-disapproval-of-kids-gender-choice-child-abuse/>>.

⁸⁷ See, eg, 'Transgender Canadian Parent Kori Doty Wins Case to Allow Child to be Given Unassigned Gender', *ABC News* (online), 12 July 2017 <<http://www.abc.net.au/news/2017-07-12/parent-wins-case-to-allow-child-to-be-given-unassigned-gender/8702796>>; Francis C Morris, Jr, 'Transgender Teenager's Death Leads to ACA \$ 1557 Discrimination Suit Against Hospital', *The National Law Review* (online), 31 October 2016 <<http://www.natlawreview.com/article/transgender-teenager-s-death-leads-to-aca-1557-discrimination-suit-against-hospital>>; Grace Carr, '8-Year-Old Sues Private School over Gender Identity', *The Daily Signal* (online), 7 August 2017 <<http://dailysignal.com/2017/08/07/8-year-old-sues-private-school-over-gender-identity/>>.

⁸⁸ Tom Lodewyke, 'Transgender Teens Should Not Need Legal Approval for Hormone Treatment, Court Hears', *Lawyers Weekly* (online), 25 September 2017 <https://www.lawyersweekly.com.au/wig-chamber/21949-transgender-teens-should-not-need-legal-approval-for-hormone-treatment-court-hears?>>.

⁸⁹ Bronwyn Winter, 'Tomboys and Sissies: Where We're Going Wrong' *The Age*, 1 March 2016.

⁹⁰ Sarah Ditung, 'Transgender Kids: why doctors are right to be cautious about childhood transition' (online), 12 January 2017 < <https://www.newstatesman.com/politics/feminism/2017/01/transgender-kids-why-doctors-are-right-be-cautious-about-childhood> >

⁹¹ Paddy McQueen, 'Feminist and trans perspectives on identity and the UK Gender Recognition Act' (2016) 18(3) *The British Journal of Politics and International Relations* 671, 679-80.

⁹² Kristina Olson and Lily Durwood, 'Are Parents Rushing to Turn Their Boys Into Girls?' (online) 14 January 2016 <http://www.slate.com/blogs/outward/2016/01/14/what_alarmist_articles_about_transgender_children_get_wrong.html >

⁹³ Lorene Gottschalk, 'Same-Sex Sexuality and Childhood Gender Non-Conformity: A Spurious Connection' (2003) 12(1) *Journal of Gender Studies* 35.

gender identity differs from the person's assumed gender at birth. If left untreated, Gender Dysphoria may result in profound psychological distress, anxiety, depression, and even self-harm or suicidal ideation.⁹⁴ It is these risks that are used to justify radical medical intervention in the case of individuals identified as transgender. Such intervention is advocated despite evidence that transgenering a child may not be the most effective way of treating gender dysphoria. For example, in the *amicus curiae* brief submitted to the United States Supreme Court (mentioned above), three psychiatrists were asked to evaluate 'gender-affirming' policies and practices within schools. They argued that these policies were likely to confuse gender dysphoric children and cause distress to other children (for example, girls encountering boys in a female bathroom). They concluded that 'conditioning children into believing that a lifetime of impersonating someone of the opposite sex, achievable only through chemical and surgical interventions, is a form of child abuse'. This was also the view of the American College of Pediatricians.⁹⁵ The American Psychological Association indicates that between 12 to 50 percent of children diagnosed with gender dysphoria continue to identify as transgender when reaching late adolescence and young adulthood.⁹⁶ Nevertheless, Ehrensaft points out that there is frequently a double standard in the acceptance of a child's ability to self-identify gender, where cisgender children are frequently assumed to know their own gender from the age of six, whereas children who 'deviate' from the sex assigned to them at birth are assumed to be suffering from gender confusion or gender disorder.⁹⁷

There continue to be concerns that the mutilation of healthy bodies to align with a socially constructed ideal is also a violation of human rights. This is particularly highlighted by comparisons drawn with the transabled persons, able-bodied individuals who wish to acquire an impairment so that they can become 'transabled'.⁹⁸ The DSM-5 currently lists transability, or 'body integrity identity disorder', in its emerging measures and models appendix.⁹⁹

This is clearly a complex area with difficult issues to navigate with respect to choice and consent. However, there are particular concerns about the use of medical interventions in the case of children, including the safety of using puberty blockers and hormones.¹⁰⁰ There is

⁹⁴ Amanda Davey et al, 'Social Support and Psychological Well-Being in Gender Dysphoria: A Comparison of Patients with Matched Controls' (2014) 11 *Journal of Sexual Medicine* 2976.

⁹⁵ Brief of Dr Paul R. McHugh, Dr Paul Kruz, and Dr Lawrence Mayer as Amicus Curiae, *Gloucester County School Board v G.G.*, 16-273, 4th Cir. (2017).

⁹⁶ Ryan Kost, 'Research on transgender children still in its infancy' (online), 18 June 2017 <

<http://projects.sfchronicle.com/2017/transgender-child/research/> >; See also:

Lawrence S Mayer and Paul R McHugh, 'Sexuality and Gender: Findings from the Biological, Psychological, and Social Sciences' (2016) 50 *The New Atlantis* 10, 115.

⁹⁷ Diane Ehrensaft, 'We trust children to know what gender they are – until they go against the norm' (online), 26 May 2015 < <https://theconversation.com/we-trust-children-to-know-what-gender-they-are-until-they-go-against-the-norm-42093> >

⁹⁸ Alexandre Baril, 'How dare you pretend to be disabled?' The discounting of transabled people and their claims in disability movements and studies' (2015) 30(5) *Disability & Society* 689, 689.

⁹⁹ Sarah Boesveld, 'Becoming disabled by choice, not chance: 'Transabled' people feel like impostors in their fully working bodies', *National Post* (online), 3 June 2015 < <http://nationalpost.com/news/canada/becoming-disabled-by-choice-not-chance-transabled-people-feel-like-impostors-in-their-fully-working-bodies> >

¹⁰⁰ Naomi Schaeffer Riley, 'Hormone Therapy is a Horrible Risk for Kids', *New York Post* (online), 20 June 2017 <<http://nypost.com/2017/06/20/hormone-therapy-is-a-horrible-risk-for-kids/>>; Paul W Hruz, Lawrence S Mayer and Paul R McHugh, 'Growing Pains: Problems with Puberty Suppression in Treating Gender Dysphoria' [2017] (Spring) *The New Atlantis* 3.

an emerging cultural practice of placing children who have been identified as transgender on puberty delaying drugs until they are 16 years old and then cross-sex hormones until they are 18 years old, when they may choose to have their sexual organs surgically removed or altered.¹⁰¹ Male-to-female sex reassignment involves removal of the testicles and most of the penis, with skin being refashioned into a 'largely functional' vagina and parts of the penis being used to form a 'neoclitoris'.¹⁰² Female-to-male reassignment is more difficult and riskier: breasts, uterus and ovaries are removed, a 'neophallus' is constructed using tissue from parts of the body that allow sexual sensation, and the urethra is extended.¹⁰³ This practice impacts on both girls and boys and at root arises from the imposition of the same stereotypical notions of gender that have been used to oppress women for generations. Jeffreys argues persuasively that this practice constitutes a 'custom or practice' which constitutes discrimination on the basis of sex (although not only against women) and is based on ideas of 'stereotyped roles for men and women'.¹⁰⁴ As such, it constitutes a breach of the *Convention on the Elimination of All Forms of Discrimination against Women*.¹⁰⁵

The damaging effects of this medical intervention are manifold, of which the most obvious is that it renders the individual sterile.¹⁰⁶ Sterilization of those too young to give consent has long been a human rights concern, although more typically in relation to girls with an intellectual disability.¹⁰⁷ The campaign must now also be extended to oppose the sterilization of children through transgendering them. In countries such as Finland individuals wishing to change gender must be sterile by law.¹⁰⁸ The Finnish law requires a person to present a medical statement stating that they permanently feel that they belong to the opposite gender, and that 'he or she has been sterilised or is for some other reason infertile'.¹⁰⁹ This sterilisation must be 'irreversible'.¹¹⁰

¹⁰¹ Priyanka Boghani, 'When Transgender Kids Transition, Medical Risks Are Both Known and Unknown', *PBS* (online), 30 June 2015 <<http://www.pbs.org/wgbh/frontline/article/when-transgender-kids-transition-medical-risks-are-both-known-and-unknown/>>.

¹⁰² Lenny Bernstein, 'Here's how sex reassignment surgery works', *The Washington Post* (online), 9 February 2015 <https://www.washingtonpost.com/news/to-your-health/wp/2015/02/09/heres-how-sex-reassignment-surgery-works/?utm_term=.2777f498083e>

¹⁰³ *ibid.*

¹⁰⁴ Sheila Jeffreys, *Comment on Harmful Practices: The Transgendering of Children as a Harmful Emerging Practice in Australia* (2011)

<<http://www.ohchr.org/Documents/HRBodies/CEDAW/HarmfulPractices/SheilaJeffreys.pdf>>

¹⁰⁵ *Convention on the Elimination of All Forms of Discrimination against Women*, opened for signature 1 March 1980, 1249 UNTS 13 (entered into force 3 September 1981) art 5(a).

¹⁰⁶ Hruz, Mayer and McHugh, above n 59, 25.

¹⁰⁷ See, eg, *Secretary, Department of Health and Community Services v JWB ('Marion's Case')* (1992) CLR 218, where the High Court of Australia held that sterilising an intellectually disabled girl was outside the scope of parental authorisation.

¹⁰⁸ Jamie Wareham, 'Finland Will Keep Sterilising Trans People After It Rejects Law Reform', *Gay Star News* (online), 29 August 2017 <https://www.gaystarnews.com/article/finnish-government-continue-sterilization-trans-people/?utm_content=buffer8b743&utm_medium=social&utm_source=facebook.com&utm_campaign=buffer#gs.qRB8M9A>.

¹⁰⁹ Act on Legal Recognition of the Gender of Transsexuals, No. 563/2002 2 § para 1.

¹¹⁰ 'The battle for transgender rights: which human right must I drop?', *Amnesty International UK*, 18 November 2014 <<https://www.amnesty.org.uk/blogs/lgbti-network/battle-transgender-rights-which-human-right-must-i-drop>>

Transgendering further damages bone health, alters height and in girls may lead to early hysterectomy and premature menopause.¹¹¹ The lifelong administration of drugs required to sustain a transgender identity also has other harmful health consequences such as cancer of the liver.¹¹² Genital surgery, if undertaken, may additionally interfere with the ability to experience sexual sensation.¹¹³ While puberty blockers, as the first step usually recommended in this cascade of medical interventions, are promoted as harmless,¹¹⁴ there is in fact inadequate research available to be able to predict the long-term effects.¹¹⁵ Research on the use of puberty suppressants is still in its infancy, particularly concerning the effects on brain development.¹¹⁶

There is certainly a risk that children who are not allowed to experience puberty will be sterile, regardless of what other interventions take place. The practice of effectively sterilizing children to ensure they conform with gender stereotypes is also an issue for many intersex people who have a very different experience and agenda to that of transgender individuals. Increasing numbers of them are speaking out to protest damaging medical interventions undertaken while they were still infants and children to ensure that they conformed with society's rigid notions of gender. 'Normalising' operations conducted on babies with ambiguous genitalia to ensure they can tick the box 'male' or 'female' have had devastating life-long consequences.¹¹⁷ Intersex individuals are now lobbying to have cosmetic and gender assignment surgeries on infants banned, so that they can decide for themselves later in life what course to take.¹¹⁸ Perhaps guided by this lobbying, the Parliamentary Assembly of the Council of Europe in 2013 adopted resolution 1952 that under the framework of the 'right to bodily integrity' sought to ensure in para. 7.5.3 that 'no-one is subjected to unnecessary medical or surgical treatment that is cosmetic rather than vital for health during infancy or childhood'.¹¹⁹ However, Francesca Ammaturo points out that conceptions of bodily integrity,

¹¹¹ Hruz, Mayer and McHugh, above n 59, 11.

¹¹² Hayley Braun et al, 'Cancer in Transgender People: Evidence and Methodological Considerations' (2017) 39(1) *Epidemiologic Reviews* 93.

¹¹³ Verena Schönbacher et al, 'Sexual Quality of Life of Individuals with 46,XY Disorders of Sex Development' (2012) 9 *Journal of Sexual Medicine* 3154; Lina Michala et al, 'Practice Changes in Childhood Surgery for Ambiguous Genitalia?' (2014) 10 *Journal of Pediatric Urology* 934.

¹¹⁴ Endocrine Society, 'Medical Intervention in Transgender Adolescents Appears to be Safe and Effective' (Media Release, 15 June 2013) <<https://www.endocrine.org/news-room/press-release-archives/2013/medical-intervention-in-transgender-adolescents-appears-to-be-safe-and-effective>>. This support is reflected in their published clinical practice guideline: Wylie C Hembree, 'Endocrine Treatment of Transsexual Persons: An Endocrine Society Clinical Practice Guideline' (2009) 94(9) *Journal of Clinical Endocrinology & Metabolism* 3132.

¹¹⁵ Hruz, Mayer and McHugh, above n 59. See also American College of Pediatricians, *Gender Dysphoria in Children* (June 2017) <<https://www.acped.org/the-college-speaks/position-statements/gender-dysphoria-in-children>>.

¹¹⁶ Guido Giovanardi, 'Buying time or arresting development? The dilemma of administering hormone blockers in trans children and adolescent' (2017) 5(2) *Porto Biomedical Journal* 153, 154.

¹¹⁷ Michala et al, above n 67; Caroline L Minto et al, 'The Effect of Clitoral Surgery on Sexual Outcome in Individuals Who Have Intersex Conditions with Ambiguous Genitalia: A Cross-Sectional Study' (2003) 361(9365) *Lancet* 1252.

¹¹⁸ Emily Greenhouse, 'A New Era for Intersex Rights', *The New Yorker* (online), 30 December 2013 <<http://www.newyorker.com/news/news-desk/a-new-era-for-intersex-rights>>.

¹¹⁹ Francesca Romana Ammaturo, 'intersexuality and the 'Right to Bodily Integrity': Critical Reflections on Female Genital Cutting, Circumcision, and Intersex 'Normalizing Surgeries' in Europe' (2016) 25(5) *Social & Legal Studies* 591, 595.

including operations on intersex children, are ‘significantly mediated by cultural, social and religious factors’, which complicates the relationship between human rights and intersex surgeries.¹²⁰

Trans activists often disregard the many accounts of individuals who go on to regret their transition and opt to cease hormone treatments and live their lives as their birth sex.¹²¹ There are estimates that up to 20% of individuals regret their transition,¹²² although clearly further longitudinal studies will need to be conducted that are not sponsored by pharmaceutical companies with a vested interest in this lucrative new industry. However, as mentioned above in the case of James Caspian at Bath Spa University, it can be difficult for such studies to receive funding. Caspian has stated his proposed study on gender change regret was refused funding, on the basis that it might generate social media criticism of the university, and because ‘it [was] better not to offend people’.¹²³ This decision was surprising given Caspian’s sixteen years of experience in counselling transitioning individuals and his position as trustee of the Beaumont trust, an English charity for transgender persons. As he notes, he ‘just wanted to find out’ about the experiences of those who regret their transition.¹²⁴

Despite the paucity of research, there are indications of a real risk that self-esteem issues and suicidal tendencies may in fact increase rather than abate following transition.¹²⁵ A 2011 Swedish study found significant risk of mortality from suicide and depression in post-sex reassignment patients, and that even after controlling for psychiatric hospitalisation prior to sex reassignment, there was an increased risk of psychiatric hospitalisation after sex reassignment.¹²⁶

4. Conclusion

There is no doubt this discussion paper presents some arguments that depart from current trends. However, the fact that a movement is *de rigeur* does not make it right. There have been many fashionable movements throughout history that have been strongly marketed to and implemented by women despite being designed to control and oppress them - from foot binding and traditional female genital circumcision to the current craze in hair removal and

¹²⁰ Ammaturo, above n 119, 600.

¹²¹ https://www.facebook.com/60Minutes9/videos/1375839655818679/?hc_ref=ARRiPbCG_KddnQXPIAawTOLdpcZCtjXUDI4O-wFYjVzwx0NzK0Zih2KM1muwKO4bTNI&fref=gs&dti=1593450017593722&hc_location=group.

¹²² David Batty, ‘Sex Changes are not Effective, Say Researchers’, *The Guardian* (online), 30 July 2004 <<https://www.theguardian.com/society/2004/jul/30/health.mentalhealth>>.

¹²³ Author Unknown – BBC News, ‘Bath Spa Uni Brans Transgender Reversal Plan ‘Politically Incorrect’ BBC News (online), 25 September 2017 <<http://www.bbc.com/news/uk-england-somerset-41385299>>.

¹²⁴ Janice Turner, ‘Even Asking Questions Is Now ‘Transphobic’, *The Times*, 23 September 2017.

¹²⁵ Kirsty Johnston, ‘“It Sounds Weird”: How This Girl Became a Boy, Then Changed Her Mind’, *News.com.au* (online), 1 May 2017 <<http://www.news.com.au/lifestyle/real-life/true-stories/it-sounds-weird-how-this-girl-became-a-boy-then-changed-her-mind/news-story/a50010fa8625fd6825834d04c8742d2f>>; ‘Experience: I Regret Transitioning’, *The Guardian* (online), 3 February 2017 <<https://www.theguardian.com/lifeandstyle/2017/feb/03/experience-i-regret-transitioning>>. See also Dhejne et al, above n 24.

¹²⁶ Cecilia Dhejne et al, above n 41, 6.

cosmetic surgery. In their anxiety to win the male approval required for survival and success, there is sadly a long history of women willing to subject themselves and their offspring to extensively cruel treatment.

The current framing of these issues within a narrative of 'choice' arguably disguises the fact that these decisions are often made in a context of sexism which renders the concept of choice problematic to say the least. Despite the work of second wave feminists, the pressure to comply with gender stereotypes (for both men and women) is now greater than ever, so that many individuals feel there is no option but to resort to drastic measures to ensure conformity. Transitioning to the opposite 'gender' arguably needs to be understood within this context.

There have always been individuals who do not comply with rigid notions of what is a man or what is a woman – whether due to diverse physiology or alternative thinking. Feminists, above all others, have championed and celebrated these individuals for their non-conformity. However, now that pharmaceutical and medical industries have the technology available to exploit this opportunity, forcible steps are being taken to curb these departures from gender norms. It may be argued that tomboys and sissies, butch lesbians and transvestites are now being targeted for 'corrective' medical intervention, sometimes with the effect of sterilising them.

Enabling men who wish to identify as women to be treated in all respects *as* women by law, risks undermining institutions and laws that have been hard fought for and established over time for the express purpose of protecting the human rights of women and girls. These changes to law and policy fail to acknowledge the ongoing reality of male violence. These changes also deny women the right to have meetings and spaces exclusively for women who were born and raised female and will thereby impede their ability to organize politically and advance feminist causes. They will undermine temporary special measures or affirmative action strategies that have been put in place to redress the disadvantages experienced by females, and may work to reverse progress made in terms of women's participation in political and cultural life through sport and leadership positions. Finally, the promotion of medical interventions likely to result in the sterilization of children who are gender non-conforming is a major breach of human rights. It is also likely to have ramifications into the future by placing additional pressure to commodify women's reproductive capacities.

For all these reasons we need to seriously step back and put considerable time and energy, including consultation with women's rights activists, into very carefully considering the impacts of laws promoting transgenderism on the human rights of women and girls.

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