SEX, GENDER, SEXUALITY AND THE LAW

Social and legal issues faced by individuals, couples and families

Samantha Hardy
Olivia Rundle
Damien W Riggs

Lawbook Co.

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Social and Legal Issues Faced by Individuals, Couples and Families

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Foreword

Gillian Triggs

"There is a great deal of diversity in all kinds of relationships".

This simple statement by Samantha Hardy, Olivia Rundle and Damien Riggs, authors of *Sex, Gender, Sexuality and the Law: Social and Legal Issues Faced by Individuals, Couples and Families* distils the critical point: human beings do not fit neatly into preconceived categories of sex and gender.

From a human rights perspective, each of us is entitled to respect and dignity, and to equality before the law, regardless of transgender, intersex or non-heterosexual diversity. The International Covenant on Civil and Political Rights requires that these fundamental rights are available to all, equally without distinction including on the basis of "status", a term interpreted by the Human Rights Committee to include sexual orientation, gender identity and intersex.

In recent years, Australian Federal and state laws have been amended to reflect its treaty commitments by prohibiting discrimination on the grounds of intersex status, gender identity and sexuality. A notable break-through for the LGBTI community is the amendment to the *Sex Discrimination Act* that denies publicly funded religious bodies the right to exclude same sex couples from their aged care facilities. In a seminal decision by the High Court, such laws have been upheld and applied in *Christian Youth Camps Ltd v Cobaw Community Health Services Ltd* (2014). Here the refusal by the Christian Brethren Church to allow gay young people to book a venue it owned constituted prohibited discrimination. Such cases require a careful balancing of religious freedom with the right to equality before the law, a balance the High Court decided in favor of the prohibition on discrimination on the basis of sexual orientation.

While law reform and judicial recognition go a long way to meet international standards, much remains to be done to ensure a more informed, inclusive culture for the LGBTI community in Australia. The recent amendments to the Commonwealth Government's Safe Schools Program is a reminder of the importance to LGBTI rights of wide community support and political leadership. The Program was designed to reduce homophobic and transphobic behavior in schools and to create a safe, supportive environment for students, consistently with the UN Convention on the Rights of the Child requiring states to protect all children irrespective of their sexual orientation. Despite a favorable review of the program, the Minister for Education has restricted participation to secondary schools where parental consent has first been obtained. This retrograde step risks diminution of the Safe Schools program to the detriment of young people.

The point is well made by the authors of this ground-breaking publication that the law is not effective for the vast majority of those in the LGBTI community who experience discrimination, and who often do not report discrimination for fear of further discrimination. It is for this reason that community attitudes must change through education and evidence-based understanding of the damaging effect such discrimination has, not only on the immediate victim, but also on their parents, children and extended family and friends. The authors have gathered together all available evidence of discrimination against the LGBTI community in Australia and have put their research to highly practical use. They have provided detailed advice for practitioners-lawyers, mediators, the courts and service providers – who work with those who have been marginalised on the basis of their sex, gender, or sexuality.

The public debate over law reform to recognise LGBTI rights has been largely supportive over the last few years, and significant amendments to the *Sex Discrimination Act* have proceeded relatively smoothly. As the authors point out, further reform is long overdue to allow marriage equality and to ensure legal recognition of diverse sexual and gender status.

The authors observe the paradox that, in order for the LGBTI community to have their sexual orientation, sex, and gender diversity respected, it has become necessary that they demonstrate how similar they are to cisgender heterosexuals. The extensive qualitative and quantitative research underpinning this publication provides evidence of the range of diversity within LGBTI communities. While recognising diversity, the overarching human rights principle of equality before the law applies to each of us, universally and without exception. I believe the research findings of Hardy, Rundle and Riggs provide an informed and reasoned foundation for public discussions about marriage equality, surrogacy, adoptions by same sex couples and many other emerging medical, social and legal issues for the Australian community in the future.

27 April 2016

About the Authors

Samantha Hardy PhD

Samantha Hardy is an Associate Professor in conflict resolution, currently holding appointments as Student Ombudsman at the University of Wollongong, Associate Professor of Conflict Resolution at James Cook University, Adjunct Associate Professor at the University of New South Wales, Adjunct Associate Professor at Bond University, Adjunct Associate Professor at University of Tasmania, Adjunct Professor at Hong Kong Shue Yan University, and Affiliate Scholar at the Center for the Study of Narrative and Conflict Resolution within the School for Conflict Analysis and Resolution at George Mason University.

Sam has published widely in conflict resolution, including her books *Dispute Resolution in Australia*, (3rd ed, 2014) co-authored with David Spencer, and *Mediation for Lawyers* (2010) co-authored with Olivia Rundle.

Sam was a board member and President of the Tasmanian Council for AIDS, Hepatitis and Related Diseases for many years and was awarded Honorary Life Membership for her contributions to that organisation.

Sam is a Nationally Accredited Mediator under the Australian Standards and a Certified Transformative Mediator by the US Institute of Conflict Transformation. She is an experienced mediator and conflict coach and the founder of the REAL Conflict Coaching System. She practices primarily in the workplace context, and in the university sector. She also provides coaching and mediation services for people of diverse genders and sexualities, and provides training for mediators working with this client group.

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Olivia Rundle is a Senior Lecturer in law at the University of Tasmania, with a research and teaching focus in the areas of conflict management, dispute resolution, formal legal procedures and family law.

Olivia has published journal articles, a book chapter and case notes in relation to the application of various laws to individuals, couples and families who experience marginalisation on the basis of their sex, gender and/or sexuality. She has also made contributions to scholarship in the dispute resolution field, with a particular focus on the role of lawyers, including *Mediation for Lawyers* (2010) co-authored with Samantha Hardy.

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Damien W Riggs PhD

Damien W Riggs is an Associate Professor in social work at Flinders University, and an Australian Research Council Future Fellow. He is the author of over 150 publications in the fields of gender/sexuality, family, and mental health, including *Pink Herrings: Fantasy, Object Choice and Sexuation* (Karnac, 2015). Damien also runs a small private psychotherapy practice, where he specialises in working with trans and gender diverse young people.

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Introduction

Despite claims to the contrary, the law is never neutral. The law is not neutral, in the sense that specific laws are shaped by the worldviews of those who develop them, worldviews that enshrine a particular moral and ethical code. The law is also far from neutral given the fact that not only does it not reflect a pre-given truth about the world, but that it must be interpreted by people who also hold their own morals and ethics about what constitutes a just society.

When it comes to laws that are aimed at countering discrimination, they too are bound by a set of assumptions about what constitutes a moral and ethical good. This is not to suggest that human rights or anti-discrimination laws are disingenuous or entirely unhelpful. Most certainly they are intended at their simplest to protect the vulnerable and the marginalised. But at their heart sits a series of definitions about what constitutes vulnerability, and what counts as marginalisation. Furthermore, laws aimed at countering discrimination are largely activated only once a harm has occurred. In this sense, human rights or anti-discrimination laws do not mitigate harm. Rather, they provide redress for it.

The above claims that we make about the law may seem entirely too deterministic and pessimistic, leaving little room for the law to truly protect people who experience marginalisation. Our intent in opening this book with these claims is to draw attention to a central argument of this book: namely that the ways in which we as a society treat our most marginalised members is always already shaped by cultural norms and assumptions about what counts as protection, the terms on which it is offered, and the extent to which it is enforced.

When it comes to people marginalised on the basis of their sex, gender identity, or sexuality, certainly it is the case that legal protections have increased exponentially over the past 100 years. Groups of people that would historically have received the punitive attention of the law – to incarcerate them as insane, or to justify their denial of liberty – are now recognised under the law as deserving protection. Additionally, in recent years there has been increasing visibility, acceptance and support for a wider range of people in terms of sex, gender and sexuality across the social sphere. There are now many examples of television shows that feature characters who historically would have been absent;[1] reality television programs with openly gay contestants;[2] movie and television stars,[3] politicians,[4] sporting

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1 For example, Will and Grace, The L Word, Queer as Folk, True Blood, Glee, Modern Family, Orange is the New Black, Transparent, Queer TV.

2 Australian Master Chef, My Kitchen Rules, The Block.

3 Ellen de Generes, Portia de Rossi, Ruby Rose, Magda Szubanzki.

4 Penny Wong, Bob Brown.

heroes,[5] musicians,[6] and other public figures[7] openly acknowledging their sex, gender and/or sexual diversity; and frequent positive media coverage of issues related to people marginalised on the basis of their sex, gender and/or sexuality.[8] There are also now governmental advisory committees and governmental appointments specifically aimed at protecting and promoting the interests of these groups of people,[9] and there is a range of educational programs available to promote diversity and anti-discrimination, particularly in schools.[10] There are social support groups for young people to find information and make connections with other people like them.[11]

But legal protection and social recognition arguably come at a price. The price, we argue in this book, is the imposition of a series of normative assumptions about what counts as a "correctly" enacted identity or form of embodiment. And it is the ways in which particular identities and forms of embodiment are enshrined within law – and the forms of protection that this does or does not offer – that is the focus of this book. Specifically, the book focuses on groups of people who experience marginalisation on the basis of their sex, gender and/or sexuality. It focuses on some of the legislative change that has occurred in Australia over the past few decades, and how this has increased the protection and redress available to these marginalised groups. But importantly, it also focuses on how the law at times continues to fail to offer protection: how it requires adherence to a narrow definition of what counts as legal intelligibility, and how this can perpetuate exclusion.

But the book is not without hope. Despite its critique of broader social norms and practices of exclusion, and the implication of the law with them, it nonetheless holds that social and legislative change is possible. Specifically, the book highlights the interdependence of social and legal issues relating to sex, gender and sexuality. Social changes can lead to law reforms, and law reform can lead to social changes. Social visibility can be a prompt for legal recognition, and legal recognition can promote social visibility. The law can be used to support social recognition, and social recognition can support campaigns for legal recognition. Individual cases can clarify the legal situation and have a significant social impact, ranging from individuals who realise that they are not alone in their experiences, to broader societal awareness of some of the challenges that people who experience marginalisation on the basis of their sex, gender and/or sexuality may face.

5 Tennis player Casey Dellacqua, Olympic gold medallist diver Matthew Mitcham and swimmer Ian Thorpe.

6 Elton John, Sia, Anohni and the Johnsons.

7 Former High Court Judge Michael Kirby, former AMA President Kerryn Phelps, former mayor Tony Briffa.

8 See for example shows on the ABC, SBS, articles in The Age and other newspapers.

9 See for example the appointment of Rowena Wallace as Victoria's Gender and Sexuality Commissioner in July 2015.

10 See for example the Safe Schools Coalition programs: www.safeschoolscoalition.org.au.

11 See for example Minus 18 – https://minus18.org.au.

As such, this book is aimed at informing practitioners so that they can better support those who experience such marginalisation. For this reason, the book focuses on difficulties and challenges, as these are the situations in which people need support. However, the book also highlights the resilience of individuals who experience marginalisation, including focusing on the support networks that they have, and the meaning that they attribute to their lives.

The book is structured in four parts. Part one focuses on outlining key terms and definitions, including theories of discrimination and exclusion. Part two considers couple relationships in which at least one person experiences marginalisation on the basis of their sex, gender and/or sexuality. Part three considers family relationships (parents and children) in which at least one parent experiences marginalisation on the basis of their sex, gender and/or sexuality. Finally, part four provides guidance for practitioners working with the broad client group of individuals who are marginalised on the basis of their sex, gender and/or sexuality, their partners, their children or extended family.

As a whole, then, this book provides an introduction to the key issues facing people who experience marginalisation on the basis of their sex, gender and/or sexuality, and advocates for approaches to understanding the role of the law in both combatting the discrimination and exclusion faced by such people, but also the barriers to this role in terms of how social norms in relation to sex, gender and sexuality are enshrined in the law in ways that can serve to limit the degree to which protection and redress is made available.