

Transgender Inclusion and Australia's Failed *Sexuality Discrimination Bill*

In 2013, one of the final acts of the Gillard Government was to amend Australia's *Sex Discrimination Act* to add sexuality, gender identity and intersex variations as protected categories. This was not the first time ~~that~~ the Commonwealth had considered anti-discrimination legislation protecting LGBTI people. The most prominent example was the Democrats-sponsored Sexuality Discrimination Bill, introduced to Parliament in November 1995, which included provisions to protect transgender people as well as gays, lesbians and bisexuals. The Senate referred the ~~proposed~~-bill to an inquiry by the Senate Legal and Constitutional References Committee, which received 436 submissions ~~from various sectors of Australian society~~. Approximately 100 of these submissions specifically addressed transgender discrimination, some advocating for the rights of transgender Australians, and others focusing their attacks against the bill based on the transgender provisions. This article draws on the concept of transgender citizenship to examine the transgender-related aspects of the inquiry ~~and, as well as~~ the debates in parliament, to understand the ways that the public and politicians framed transgender rights in the mid-1990s. These debates are telling in how transgender issues and anxieties over gender fluidity have consistently become an easy target in wider debates about equality for sexual and gender minorities.

In November 1995, Australian Democrats Senator Sid Spindler introduced a *Sexuality Discrimination Bill* into the Commonwealth Parliament. Spindler had taken an interest in sexuality discrimination after the Commonwealth passed the *Human Rights (Sexual Conduct) Act* in 1994, overruling Tasmania's sodomy laws. Spindler's bill would introduce wide-ranging anti-discrimination protections for lesbian, gay, bisexual and transgender (LGBT) people akin to laws such as the *Racial Discrimination Act* (1975), *Sex Discrimination Act* (1984) and *Disability Discrimination Act* (1992). Spindler explained: "The bill seeks to remove discrimination in areas of Commonwealth law including employment, education, superannuation, industrial relations, the provision of goods and services, sporting activities, clubs and associations. It also contains protection against vilification and the incitement of hatred on the basis of a person's sexuality or transgender identity."¹ The *Sexuality Discrimination Bill* was the first proposed Commonwealth legislation that included protections for transgender people, and this profoundly shaped the debates that followed.

In May 1996 the Senate referred the bill to an inquiry by the Senate Legal and Constitutional References Committee. The Inquiry into Sexuality Discrimination received 436 submissions from all sectors of Australian society including religious institutions, individuals, sporting organisations, gay and lesbian rights groups, state equal opportunity commissions and, importantly, the few existing transgender support associations. The majority of submissions focused on sexuality or referred to "sexuality and transgender", but there were about 100 submissions that specifically addressed transgender issues either in minute or substantial detail. The Senate Legal and Constitutional Reference Committee held hearings in all capital cities except Darwin from August to October 1996. The Committee twice requested an extension, and finally tabled its report in December 1997. The 302-page

¹ Commonwealth of Australia, Senate, Official Hansard, No. 176, 29 November 1995, 4127.

document canvassed the types of discrimination faced by LGBT Australians and explained the ways the *Sexuality Discrimination Bill* could function as an instrument to protect them.²

The Inquiry into Sexuality Discrimination received minimal media attention, and notwithstanding the efforts of the Democrats and the Greens, the *Sexuality Discrimination Bill* never had a proper parliamentary debate. Yet, the inquiry was significant as a national forum which exposed the many complex problems confronting LGBT Australians. Even though the inquiry focused primarily on LGB people, what garnered the most media and political attention were transgender issues because they challenged long-held, embodied assumptions about gender and power. This article examines the transgender-related aspects of the inquiry to show how transgender activists, the public and politicians framed transgender rights in the mid-1990s. Several issues the inquiry grappled with are now, twenty years later, hot button topics subject to significant public debate: religious freedom, [employment discrimination](#), the free speech ramifications of vilification protections and transgender women in sport. Analysis of the Inquiry into Sexuality Discrimination presents two key findings about Australian transgender history. First, the inquiry represented a testing ground for activism deploying ideas of transgender citizenship. Transgender Australians expressed rights claims based on their lived experiences of being marginalised, calling for the same economic opportunities and protections as all Australians. Second, the media and conservative politicians' responses to the inquiry foreshadowed how anxieties over gender fluidity and power would consistently deflect from wider debates about rights for sexual and gender minorities.

This article proceeds chronologically and thematically. It first explains the concepts of sexual and transgender citizenship as lenses to explore how sexual and gender minorities often frame their relationship to the state. Ideas about sexual and transgender citizenship

² Intersex people were not mentioned in the inquiry, so this article uses the acronym LGBT instead of LGBTI.

expose the inherent tensions between the fight for inclusion (often criticised as assimilationism) and the desire to challenge normative understandings of gender and sexuality. The article then explores how transgender participants in the inquiry used respectability to express their claims to transgender citizenship. Although respectability lent itself to assimilationism, the transgender activists were cautious to express the importance of anti-discrimination laws protecting everyone regardless of their gender identity or expression. The article then shifts to what other submissions said about transgender issues. The hearings [shifted away from transgender citizenship and instead](#) focused extensively on the definition of transgender and on transgender women in sport, highlighting popular anxieties about gender fluidity. The final section then shows how conservative media and politicians manipulated unfounded fears about transgender women in sport as a wedge to undermine the entire inquiry. The conservative framing drew on myths and misunderstandings about gender and the body, framing arguments which continue to drive conservative opposition to transgender rights.

Sexual and Transgender Citizenship

Theories about the relationship between sexuality, gender identity and citizenship help to explain how and why the Inquiry into Sexuality Discrimination was important for LGBT activists. Neither historians nor political scientists have examined the inquiry,³ but Michelle Arrow's work on the 1974-76 Royal Commission on Human Relationships provides model analysis into how women and LGB Australians have used government inquiries to argue for rights.⁴ Arrow draws on sexual citizenship: a conceptual lens to analyse how marginalised

³ The inquiry receives a brief mention in Graham Willett, *Living out Loud: A History of Gay and Lesbian Activism in Australia* (St Leonards, N.S.W.: Allen & Unwin, 2000), 243.

⁴ Michelle Arrow, "These Are Just a Few Examples of Our Daily Oppressions: Speaking and Listening to Homosexuality in Australia's Royal Commission on Human Relationships, 1974-1977," *Journal of the History of Sexuality* 27, no. 2 (2018): 234-363; "Public Intimacies: Revisiting the Royal Commission on Human Relationships, 1974-77," in *Acts of Love and Lust: Sexuality in Australia from 1945-2010*, ed. Robert Reynolds,

sexual and gender minorities have fought either for inclusion within normative citizenship, or to redefine citizenship and expand its relationship to people of diverse sexes, sexualities and genders.⁵ As Jeffrey Weeks notes, sexual citizenship may not be dissimilar to other claims to citizenship in its focus on inclusion, equality and civil rights for hitherto disenfranchised groups. He says, "What is different about it is that it is bringing to the fore issues and struggles that were only implicit or silenced in earlier notions of citizenship."⁶

Diane Richardson categorises the discourses about sexual citizenship rights into three main groupings: conduct-based, identity-based, and relationship-based. Conduct rights would, for LGB people, be about decriminalisation of same-sex activity. Identity-based rights were the focus especially in the 1970s and '80s as LGB groups fought to participate in society while being open about their sexuality. Relationship rights were about access to the same entitlements as heterosexual couples, most recently fought out through the marriage equality debates.⁷ These categories also apply to transgender people, though the specific rights would be different. For instance, conduct-based rights would be about the right to free gender expression (e.g. wearing clothing associated with the affirmed gender). Identity-based rights would be about acquiring documentation and public recognition of one's affirmed gender (e.g. birth certificates, use of pronouns, toilet access). Finally, relationship-based rights would be similar to LGB people, such as access to spousal benefits regardless of their or their partner's affirmed gender. As will be discussed shortly, all these types of rights were central to transgender people's claims in the Inquiry into Sexuality Discrimination.

Lisa Featherstone, and Rebecca Jennings (Newcastle upon Tyne: Cambridge Scholars Publishing, 2014), 23-43; "An Inquiry into the Whole Human Condition? Whitlam, Sexual Citizenship and the Royal Commission on Human Relationships (1974-77)," in *Making Modern Australia: The Whitlam Government's 21st Century Agenda*, ed. Jenny Hocking (Clayton, VIC: Monash University Publishing, 2017), 3-34.

⁵ Diane Richardson, "Claiming Citizenship? Sexuality, Citizenship and Lesbian/Feminist Theory," *Sexualities* 3, no. 2 (2000): 257.

⁶ Jeffrey Weeks, "The Sexual Citizen," *Theory, Culture & Society* 15, no. 3-4 (1998): 39.

⁷ Diane Richardson, "Constructing Sexual Citizenship: Theorizing Sexual Rights," *Critical Social Policy* 20, no. 1 (2000): 107-23.

There are inherent tensions when thinking about sexual citizenship and claims to rights. On the one hand, the appeal of sexual citizenship is that so many sexual and gender minorities want the same rights, protections and access to economic markets and social institutions as heterosexual, cisgender people (cisgender refers to people whose gender identity align with their sex assigned at birth). Yet the critique is that by seeking access and inclusion – becoming “ordinary” and participating with(in) normative constructs of society and citizenship – sexual citizenship can reinforce the very heterosexual institutions and gender hierarchies that have marginalised gender and sexual minorities. This has the added effect of marginalising those gender and sexual minorities who do not fit the new boundaries of normativity, thus reinforcing the subjugation that sexual citizenship was meant to challenge.⁸ This critique of assimilationism establishes a false binary: either one wants to be included as equal *or* one supports diverse expressions of gender and sexuality. As Richardson and Surya Monro note, sexual and gender minorities’ fights to be accepted as “ordinary” do not necessarily constitute assimilationism if being seen as ordinary can allow for diversity and difference in sexual practices and identities.⁹

Much of the literature on sexual citizenship treats LGBT people together when, in reality, white gay men’s stories have dominated discussions.¹⁰ Transgender people’s experiences of marginalisation are often quite different from LGB people because theirs is grounded in gender expression and the body, whereas LGB people’s difficulties are related to their sexuality. Indeed, LGB categories by their nature rest on gender binaries, whereas transgender people – particularly in more recent years – have sought to disrupt gender

⁸ Richardson, "Claiming Citizenship?" 266; Sally Hines, "A Pathway to Diversity? Human Rights, Citizenship and the Politics of Transgender," *Contemporary Politics* 15, no. 1 (2009): 95; Diane Richardson, "Rethinking Sexual Citizenship," *Sociology* 51, no. 2 (2017): 213; David Bell and Jon Binnie, *The Sexual Citizen: Queer Politics and Beyond* (Cambridge: Polity, 2000), 141-46; Michael Warner, *The Trouble with Normal: Sex, Politics, and the Ethics of Queer Life* (New York: The Free Press, 1999), 60.

⁹ Diane Richardson and Surya Monro, *Sexuality, Equality and Diversity* (New York: Palgrave Macmillan, 2012), 79-80.

¹⁰ Richardson, "Claiming Citizenship?" 262.

binaries.¹¹ It is for this reason that transgender citizenship is an offshoot of sexual citizenship. Transgender citizenship is similar in that it represents a marginalised group drawing on their lived experiences of discrimination to demand inclusion in the social, political and economic mainstream as equals. Transgender citizenship rights also may be conduct, identity or relationship based. Where transgender citizenship differs from sexual citizenship is, as Surya Monro and Lorna Warren explain, around the *types* of rights and freedoms that transgender people seek: “the rights to freedom from psychiatric diagnosis based on gender identity and to appropriate medical care, the right to equality of employment, the right to freedom from harassment and abuse, the right to self-expression and rights to relationships and parenthood.”¹² Ideas about transgender citizenship have similar tensions as those surrounding sexual citizenship: the threat of marginalising some people through references to universalism;¹³ an Anglo-centred approach not accounting for other cultures;¹⁴ appeals to participate in existing institutions without attempting to alter them;¹⁵ assimilationist aims versus those celebrating “queer as transgressive.”

For transgender people the tension between assimilationism and visibility is even more heightened because of the different ways people affirm their gender identities. Until the early 1990s most (though not all) transgender people wanted to be seen in their affirmed gender as indistinguishable from cisgender people.¹⁶ This was both a matter of safety and also a way of feeling genuinely accepted as their authentic selves. Radical transgender activism emerged in the early 1990s, especially in the wake of Leslie Feinberg’s *Trans*

¹¹ Surya Monro and Lorna Warren, “Transgendering Citizenship,” *Sexualities* 7, no. 3 (2004): 352.

¹² *Ibid.*, 350. Same quote appears in Surya Monro, “Introducing Transgender Citizenship: The UK Case,” in *The Limits of Gendered Citizenship: Contexts and Complexities*, ed. Elzbieta H. Oleksy, Jeff Hearn, and Dorota Golariska (New York; London: Routledge, 2011), 126.

¹³ Hines, “A Pathway to Diversity?” 99.

¹⁴ Surya Monro and Janneke Van Der Ros, “Trans* and Gender Variant Citizenship and the State in Norway,” *Critical Social Policy* 38, no. 1 (2018): 57-78; Sally Hines and Ana Cristina Santos, “Trans* Policy, Politics and Research: The UK and Portugal,” *ibid.*: 35-56.

¹⁵ Monro and Warren, “Transgendering Citizenship,” 357.

¹⁶ “Passing” is a term some transgender people use, but it is a controversial expression. See “GLAAD Media Reference Guide – Transgender,” available from <https://www.glaad.org/reference/transgender>, accessed 9 January 2019.

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Gender Liberation: A Movement Whose Time Has Come, arguing that people should not try to hide their transgender identities.¹⁷ They should be free to disrupt and live outside gender binaries, not being so concerned about appearance that would conform to heteronormative gender constructs. For some assimilationists, this was problematic because binaries were central to their affirmed gender; for radicals, the emphasis on assimilation made it harder to organise transgender people because many would disappear (or go stealth to use present-day parlance) after they transitioned, and it was not respectful or reflective of gender diversity.¹⁸ Surya Monro argues that transgender citizenship needs to be about gender pluralism if it is to be truly representative of all people. Gender pluralism creates a space to allow new and diverse categories of gender identity, and celebrates a broad spectrum of genders while not threatening those who identify with conventional gender identities.¹⁹

As Arrow notes, the Royal Commission on Human Relationships was one of the first opportunities for LGB Australians to assert sexual citizenship in a Commonwealth government inquiry. In doing so, they were disrupting what had traditionally been a rigid divide between public and private spheres. Only three out of the 1,264 submissions to the Royal Commission addressed transvestism or transsexualism (to use the language of the time): one who identified as a heterosexual transvestite, one from a clinical psychologist and one from Seahorse (NSW), Australia's first and at the time only transgender support organisation.²⁰ These submissions had little impact, and none of the Royal Commission's recommendations addressed transgender issues. Twenty years later, through the Inquiry into Sexuality Discrimination, transgender people would be more prominent in making public

¹⁷ Leslie Feinberg, *Trans Gender Liberation: A Movement Whose Time Has Come* (New York: World View Forum, 1992).

¹⁸ Surya Monro, *Gender Politics: Citizenship, Activism and Sexual Diversity* (London and Ann Arbor: Pluto Press, 2015), 99-100. See also Monro and Warren, "Transgendering Citizenship," 358; Monro and Van Der Ros, "Trans* and Gender Variant Citizenship and the State in Norway," 60.

¹⁹ Monro, *Gender Politics*, 86-88; Monro and Van Der Ros, "Trans* and Gender Variant Citizenship and the State in Norway," 72.

²⁰ See National Archives of Australia, M3655, SUBMISSION 462, FOLDER 285; SUBMISSION 245, FOLDER 283; SUBMISSION 545, FOLDER 291.

what had been a private, often dangerous, and sometimes shameful aspect of their lives. Ken Plummer notes, “The power to tell a story, or indeed to not tell a story, under the conditions of one’s own choosing, is part of the political process.”²¹ Thus by telling stories via submissions or by testifying before the Inquiry into Sexuality Discrimination, transgender Australians – especially transgender women – were asserting transgender citizenship rights.

Transgender Submissions to the Inquiry into Sexuality Discrimination

All the Inquiry into Sexuality Discrimination’s terms of reference related to examining discrimination or vilification “on the grounds of sexuality or transgender identity,”²² explicitly legitimising transgender citizenship. Much of the literature on sexual citizenship talks about breaching the public/private divide, bringing what were traditionally viewed as private or intimate matters into the public sphere.²³ Nine individual submissions to the Inquiry into Sexuality Discrimination came from self-identified trans people (seven women, one man and one non-binary), and there were two submissions from trans support organisations in Brisbane and Perth.

Just being visible was not enough to influence change; transgender people needed to frame their submissions in a way that was meaningful to themselves and could translate their experiences across to a cisgender audience that had little understanding of what it meant to be transgender.²⁴ They also needed to present their cases [for transgender citizenship](#) in language that was amenable to politicians and the public, and that was the language of respectability.

Framing respectability was a longstanding practice which disempowered groups – be they

²¹ Ken Plummer, *Telling Sexual Stories: Power, Change and Social Worlds* (London and New York: Routledge, 1995), 26. See also Angelia R. Wilson, “The ‘Neat Concept’ of Sexual Citizenship: A Cautionary Tale for Human Rights Discourse,” *Contemporary Politics* 15, no. 1 (2009): 82.

²² Commonwealth of Australia, Senate Legal and Constitutional References Committee, *Inquiry into Sexuality Discrimination* (December 1997), 2-3.

²³ Weeks, “The Sexual Citizen,” 36; Plummer, *Telling Sexual Stories*, 119-22; Richardson, “Constructing Sexual Citizenship,” 110; Diane Richardson, “Extending Citizenship: Cultural Citizenship and Sexuality,” in *Culture and Citizenship*, ed. Nick Stevenson (London: SAGE Publications, 2001), 343; Carol Johnson, “Sexual Citizenship in a Comparative Perspective: Dilemmas and Insights,” *Sexualities* 20, no. 1-2 (2017): 160.

²⁴ Wilson, “The ‘Neat Concept’ of Sexual Citizenship,” 82.

marginalised by race, class, gender or any other status – had deployed to garner sympathy from those in power. Welfare historians have written about how working class people, especially women, constantly presented themselves in a manner reflecting white middle-class values when appealing for charity or even child custody. Respectability regularly was framed as a binary opposition to an “other,” whether that other be the “vagrant,” “undeserving poor,” “immoral” or “drunk.”²⁵ This is not to say that marginalised groups have universally adopted respectability in their fights for change. Robert Reynolds’ history of gay politics in 1970s Sydney highlights the rift within the Campaign Against Moral Persecution (CAMP) between those who emphasised respectability politics, and liberationists who rejected respectability and instead demanded the reshaping of societal attitudes towards sex and sexuality.²⁶ Similar ruptures have occurred in social movements around the world ([e.g. between advocates of non-violence and Black Power in civil rights movements](#)), but such divisions had not yet penetrated the emerging transgender organisations and activists in mid-1990s Australia.

Like CAMP and other gay rights advocates who made submissions to the Royal Commission into Human Relationships, the transgender submissions to the Inquiry into Sexuality Discrimination adopted respectability politics. They described themselves in opposition to an imagined, stereotypical transgender flamboyance and immorality. Janice Aspen, for instance, described herself as “not one for the nightlife and don’t frequent nightclubs. I am not gregarious or flamboyant and prefer the relative peace and quiet of small gatherings when I do socialise.”²⁷ Linda Darling similarly described herself as educated and

²⁵ See Anne O’Brien, “‘Homeless’ Women and the Problem of Visibility: Australia 1900–1940,” *Women’s History Review* 27, no. 2 (2018): 135-53; Nell Musgrove, *The Scars Remain: The Long History of Forgotten Australians and Children’s Institutions* (North Melbourne: Australian Scholarly Publishing, 2013); Christina Twomey, *Deserted and Destitute: Motherhood, Wife Desertion and Colonial Welfare* (Melbourne: Australian Scholarly Publishing, 2002); Shurlee Swain, “In Our Midst: The Church, Prostitutes and the Poor,” in *Anglo-Catholicism in Melbourne: Papers to Mark the 150th Anniversary of St Peter’s Eastern Hill 1846-1996*, ed. Colin Holden (Parkville, VIC: University of Melbourne, Department of History, 1997), 99-109.

²⁶ Robert Reynolds, *From Camp to Queer: Re-Making the Australian Homosexual* (Carlton South, VIC: Melbourne University Press, 2002), 57-66.

²⁷ Submission 5, Janice Aspen.

“conservative in both dress and behaviour.”²⁸ Reynolds summarises the purpose of this respectability strategy for CAMP in the 1970s: “it was through respectability that they could prove themselves worthy of citizenship.”²⁹ The respectability strategy may be effective at winning over sceptics who can see these “others” as actually “like us”. Yet, as Monro points out, constructing a respectable transgender community inherently means constructing an unrespectable transgender community, thus marginalising those transgender people who do not fit the new idea of normativity.³⁰ Notwithstanding this valid criticism, historians of race have argued that respectability politics were a pragmatic strategy when seen in historical context. The lives of activists were under threat, and respectability politics aimed to disrupt the sexualised stereotypes of promiscuity that rendered (black) women’s bodies readily available for (white) men’s consumption and desire.³¹ A central way that submissions constructed transgender respectability was to focus on employment. Transgender women wanted to work and, as Janice Aspen wrote, this would mean “less dependence by those who have been ‘tossed aside’ on social security as they will be able to stay in jobs in which they no longer feel threatened.”³² In a private submission, Kayleen White noted “I have met, by my best estimate, about 40 transsexuals. Of these, only **three** have managed to maintain their employment when they transitioned.”³³ The connections between employment and respectability also aimed to shift attention from the stereotype of the transgender sex worker. Transgender woman Marie-Desiree D’Orsay-Lawrence remarked at the hearings: “Unfortunately, some of our people have had to go into the sex industry because that is the only way that they could earn a living. That is a damning piece of evidence against humanity

²⁸ Submission 24, Linda Darling.

²⁹ Reynolds, *From Camp to Queer*, 62.

³⁰ Monro, *Gender Politics*, 164-65.

³¹ See Brittney C. Cooper, *Beyond Respectability: The Intellectual Thought of Race Women* (Urbana, IL: University of Illinois Press, 2017), 15; 19-23.

³² Submission 5, Janice Aspen.

³³ Kayleen White, confidential submission, 16 July 1996, courtesy Kayleen White. Original emphasis.

– that it is forcing some of its citizens to go into areas that are not so universally accepted.”³⁴ D’Orsay-Lawrence’s careful choice of language did not condemn the profession but rather acknowledged the social stigma attached to it. Even so, by not actively challenging that stigma, these sorts of examples were marginalising sex workers as the counter-example to the employment aspirations of “respectable” transgender Australians. The focus on respectability meant, as Michael Warner argues about the gay and lesbian movement in the 1990s, choosing “to articulate the politics of identity rather than to become a broader movement targeting the politics of sexual shame.”³⁵

Further issues raised in the transgender submissions broadly aligned with other aspects of transgender citizenship: marriage rights; changing birth certificates; being recognised fully in their affirmed gender for documents; access to healthcare.³⁶ The documents issue was particularly important, for as S.C. Else wrote: “If any document identifies the person as being of their birth sex, then it serves only to announce to a chosen few that the person in question is living an unusual lifestyle. Do they really need to know?”³⁷ Some transgender submissions aligned documents and access to healthcare with what Lisa Duggan describes as LGBT conservative, “third-way” arguments of the 1990s calling for equal rights so that they may return to a “right to privacy.”³⁸ Transgender people could cross from the private (e.g. dressing at home) to the public (gender expression publicly in their affirmed gender) to the private (being indistinguishable from cisgender people) through the very process of transitioning. As Janice Aspen explained:

³⁴ Marie-Desiree D’Orsay-Lawrence, Secretary and Counsellor, The Chameleons, “Reference: Sexuality discrimination inquiry,” Adelaide, 16 August 1996: p. 510. See also Roberta Perkins, *The ‘Drag Queen’ Scene: Transsexuals in Kings Cross* (Sydney: Allen & Unwin, 1983). Roberta Perkins, interview with Noah Riseman, 28 February 2018, Sydney.

³⁵ Warner, *The Trouble with Normal*, 31.

³⁶ David Evans, *Sexual Citizenship: The Material Construction of Sexualities* (London and New York: Routledge, 2004 [1993]), 199; Monro and Warren, “Transgendering Citizenship,” 349; Monro, “Introducing Transgender Citizenship,” 126.

³⁷ Submission 61, S.C. Else.

³⁸ Lisa Duggan, “The New Homonormativity: The Sexual Politics of Neoliberalism,” in *Materializing Democracy: Toward a Revitalized Cultural Politics*, ed. Russ Castronovo and Dana Nelson (Durham, NC: Duke University Press, 2002), 190.

Others like myself want to be part of the community and be treated no differently than any other female. This means not to be identified in any special category. With hormone treatment, speech therapy and psychiatric and psychological counselling this is now very achievable [sic]. With surgery now available in both Melbourne and Sydney the complete transition is being sought by many.³⁹

The one submission from a transgender man pointed out that the very nature of FtM (female-to-male) transitions meant “many trans men became absorbed into the wider community, leading relatively integrated lives and becoming the men they always knew themselves to be.”⁴⁰

As the literature on sexual and transgender citizenship suggests, there was a constant tension between the assimilationist strategy of positioning transgender people as respectable just like everyone else, and arguments about difference and the need to support more fluid understandings of gender identity and expression. Linda Darling’s submission advocated “a celebration of diversity and seeing Transgender people as having a gift and special way of seeing the world that could find creative outlet in many forms of employment and life generally.”⁴¹ The Gender Council of Australia (WA) focused on making life as smooth as possible for those who *wanted* to assimilate, whilst also acknowledging that gender reassignment “is by no means appropriate for all transgender persons and that anti-discrimination protection is needed for all transgender people.”⁴² Jasper Laybutt expressed the existential assimilation challenge for trans men: “This ability to visually integrate so well is a double-edged sword – on the one hand, it makes life easier and less hostile, yet on the other hand, it means that there hasn’t been a sense of community, history, or experienced

³⁹ Submission 5, Janice Aspen.

⁴⁰ Submission 375, Jasper Laybutt.

⁴¹ Submission 24, Linda Darling.

⁴² Submission 127, Gender Council of Australia (WA) Inc.

elders consistently available to us.” Even though trans men may present as indistinguishable from cisgender men, state laws still mandated medical interventions to change their documents to their affirmed gender.⁴³ Julie Peters and Jane Langley effectively summarised the way that the law discriminated against transgender people regardless of medical interventions: “people who would be happy to live an intergender life are forced to have surgery in order to have their papers changed and those who have just changed over who desperately need a job to give them self esteem and possibly save to pay for their surgery are denied work.”⁴⁴

Intergender is a dated term that refers to those who do not identify as exclusively male or female. It is not the same as intersex, which refers to people who “are born with physical sex characteristics that don’t fit medical and social norms for female or male bodies.”⁴⁵ The more common present-day terminology for intergender is either “non-binary” or “genderqueer”. The reference to “intergender” is one of only two allusions to what we now call non-binary or gender diverse individuals. Besides the Peters and Langley reference to intergender, only one other submission alluded to non-binary: The other came from Norrie May-Welby, who in 2014 would win a High Court case forcing the NSW Registry of Births, Deaths and Marriages to recognise their gender as “non-specific”. May-Welby’s submission to the Inquiry into Sexuality Discrimination focused primarily on biphobia in the gay community. As a sidenote they declared, “I am a tranny, and do not see myself as having any particular sex or gender, but others often assign one to me, and in this case assumed I was female.”⁴⁶ Notwithstanding these assertions, neither May-Welby nor Peters and Langley was urging a societal rethink of gender binaries. Rather, as Monro writes about transgender

⁴³ Submission 375, Jasper Laybutt

⁴⁴ Submission 2, Julie Peters and Jane Langley.

⁴⁵ “What is Intersex?” *Intersex Human Rights Australia*, available from <https://ihra.org.au/18106/what-is-intersex/>, accessed 10 January 2019.

⁴⁶ Submission 184, Norrie May-Welby.

citizenship, they were simply seeking reform to the mainstream system to accord transgender people with equal rights.⁴⁷

Most of the [transgender citizenship](#) arguments supporting ~~transgender people in~~ the *Sexuality Discrimination Bill* fit the assimilationist perspective. This is not surprising because taking part in an inquiry that aimed to include transgender people in the mainstream lent itself to the assimilationist, reformist push, rather than a radical transgender agenda (which was only in its infancy in Australia). As Duggan notes, LGBT organisations in the 1990s sought a third way between the extremes of liberationism and prohibitionism, drawing on heterosexual normative language to promote LGBT rights.⁴⁸ Thus the aims of the *Sexuality Discrimination Bill* and transgender submissions were not to challenge the notion of the state and citizenship, but rather to advocate for transgender access [to those citizenship rights](#).

The Hearings' Focal Transgender Topics: Definitions and Sport

While the transgender submissions framed respectability and concentrated especially on [transgender citizenship issues like](#) documentation, healthcare, employment and the importance of gender affirmation, the hearings [overlooked the transgender citizenship arguments and instead](#) focused on other themes. The key points of contention were around the constitutionality of the *Sexuality Discrimination Bill*, its intersection with state laws, the definition of transgender, and transgender women in sports. On the first issue, there was some concern that the Commonwealth may not have constitutional authority to pass legislation relating to transgender rights. Several law professors, the Attorney-General's Department and Human Rights and Equal Opportunity Commission all expressed confidence that the Commonwealth could use the external affairs power by invoking the International Covenant

⁴⁷ Monro, *Gender Politics*, 166.

⁴⁸ Duggan, "The New Homonormativity," 184.

on Civil and Political Rights.⁴⁹ On the intersections with state laws, equal opportunity commissions noted the inadequate state protections and welcomed Commonwealth intervention.

The proposed definition of transgender, though, caused angst for both the committee members and transgender participants. The draft bill defined transgender as:

a person of one sex who

- (a) assumes any of the characteristics of the other sex, whether by medical intervention (including a reassignment procedure) or otherwise; or
- (b) identifies himself or herself as a member of the other sex; or
- (c) lives or seeks to live as a member of the other sex; or
- (d) attempts to be, or identifies himself or herself as, a transsexual.⁵⁰

This broad definition of transgender reflected Monro's concept of gender pluralism.⁵¹ The authors drafted the expansive definition to ensure that everyone, regardless of how they identified, could be protected. The definition of transgender proved to be one space where critics focused their attention, using it to attack the entire *Sexuality Discrimination Bill*.

The problem was that the definition generated anxieties because it destabilised gender binaries. For instance, the Commonwealth Attorney General's Department questioned the bill protecting people who did not "in some more permanent way" transition.⁵² Dr Henry Finlay, a lawyer who had long researched and advocated for the rights of transsexuals (those who had completed gender reassignment surgery), argued that the imprecise definition allowed "persons to move from one persona to another, for whatever reason, and to move back again,

⁴⁹ *Inquiry into Sexuality Discrimination*, 57-78.

⁵⁰ *Sexuality Discrimination Bill* 1995, section 5.

⁵¹ Monro, *Gender Politics*, 86-88; Monro and Van Der Ros, "Trans* and Gender Variant Citizenship and the State in Norway," 72.

⁵² Henry Burmester, Chief General Counsel, Attorney-General's Department, in Senate, Legal and Constitutional References Committee, "Reference: Sexuality discrimination inquiry," Canberra, 6 August 1996: 6.

and to do so ad lib in both directions any number of times.”⁵³ Finlay’s assertion fed the false idea that transgender people merely change their gender identities for personal gain. The Australian Defence Force, for instance, worried that men may self-identify as female to avoid combat roles and conversely women may self-identify as male to access combat positions.⁵⁴ Medical professionals such as Dr Trudy Kennedy of the Monash Gender Dysphoria Clinic debunked this notion, firmly declaring: “It is not something that people can choose – ‘I think I will be a man today’ or ‘I think I will be a woman tomorrow’ – that sort of thing...The urge to change one’s gender has to be extremely strong, otherwise no-one would do it.”⁵⁵ Still, the doubts raised by Finlay and others (who were all cisgender) left scope for critics to attack the bill.

Other definitional concerns questioned whether transsexuals were a subcategory of transgender or should be seen distinctly. This was a debate occurring within the trans community at the time, and submissions from cisgender allies and state equal opportunity commissions were split.⁵⁶ Committee members, especially Senator Eric Abetz, took a keen interest in the definition and questioned all trans witnesses about the definition. There were different answers, with Jenny Scott distinguishing: “My definition of transgender is all those people who have some form of gender confusion. I would prefer to describe myself, personally, as transsexual. I am medically diagnosed as transsexual. I am post-operative. That is my choice. That is the direction I have taken.”⁵⁷ Conversely, D’Orsay-Lawrence believed: “You are transgendered if you wear the apparel of the opposite sex. Then you break the

⁵³ Dr Henry Finlay, in “Reference: Sexuality discrimination inquiry,” Hobart, 9 August 1996: 383.

⁵⁴ Commodore James O’Hara, Director General, Personnel Policy and Plans, Headquarters, Australian Defence Force, in “Reference: Sexuality discrimination inquiry,” Canberra, 6 August 1996: 18; submission 172, Department of Defence. See also Noah Riseman, “Transgender Policy in the Australian Defence Force: Medicalization and Its Discontents,” *International Journal of Transgenderism* 17, no. 3-4 (2016): 145.

⁵⁵ Dr Trudy Kennedy, Director, Gender Dysphoria Clinic, Monash Medical Centre, in “Reference: Sexuality discrimination inquiry,” Melbourne, 8 August 1996: 297.

⁵⁶ See, for example, submission 128, Abbie Hughes, advocating transsexual as a separate category, versus submission 54, Brendon Entrekin, pleased that the definition of transgender is broad.

⁵⁷ Jenny Scott, President, Gay and Lesbian Counselling Service of SA Inc. and Convenor, South Australian Transsexual Support, in “Reference: Sexuality discrimination inquiry,” Adelaide, 16 August 1996: 478.

transgenderism down to transsexual, transvestite, cross-dresser.”⁵⁸ Notwithstanding these differing definitional opinions, there was a universal case presented by the transgender participants and their allies: the need to protect everyone from discrimination. Julie Peters summarised it best: “I believe that the definition is good because it means that somebody who is even in the slightest way transgendered, or seen or believed to be transgendered, even if that person is unaware of it, it would be illegal to discriminate against them on those grounds.”⁵⁹

The other point of contention was transgender women in sport. Like the definition of transgender, opponents seized on anxieties about gender fluidity and its impact on sport to derail the conversations about transgender discrimination. The Women in Sport Foundation went so far as to describe gender reassignment surgery as “genital mutilation” and that transgender women were actually just men who had “chosen to have healthy reproductive organs removed and cosmetic surgery in order to pass as women.”⁶⁰ This language aligned with the writings of what many critics now call TERFs (trans-exclusive radical feminists), at that time most prominent in the writing of Janice Raymond.⁶¹ The Women in Sport Foundation also scare-mongered when their president testified: “What could happen in the end is that you would have one sport for men, and women’s sport could be taken over by men in drag, virtually.”⁶²

The Australian Sports Commission was more moderate in its submission, acknowledging that there was not enough research into transgender women’s potential physical advantages. The Australian Sports Commission recommended either amending the definition of transgender, or granting exemptions to sporting associations to exclude pre-

⁵⁸ Marie-Desiree D’Orsay-Lawrence, Secretary and Counsellor, *The Chameleons*, in *Ibid.*, 514.

⁵⁹ Julie Peters, in “Reference: Sexuality discrimination inquiry,” Melbourne, 8 August 1996: 296.

⁶⁰ Submission 69, Women in Sport Foundation.

⁶¹ Janice Raymond, *The Transsexual Empire: The Making of the She-Male*, 2nd ed. (New York: Teachers College Press, 1994 [1979]).

⁶² Katherine de Bry, President, Women in Sport Foundation, in “Reference: Sexuality discrimination inquiry,” Sydney, 7 August 1996: 201.

operative transgender women.⁶³ At the hearings the Australian Sports Commission representatives were even more cautious, emphasising that they wanted research into the physical consequences of transgender women participating in sport.⁶⁴ The committee also questioned equal opportunity commissions, medical professionals and other witnesses for their thoughts about transgender women in sports. It became a dominant line of inquiry, distracting from the core concerns of discrimination facing transgender people.

For the transgender women, sport was a relatively low priority, with transgender witnesses expressing annoyance at having to address this issue and preferring to discuss transgender citizenship. Kristine Johnson and Gina Mather of the Brisbane-based Australian Transgender Support Association explained:

Ms Mather: No-one who is committed to having gender reassignment does it just for sport. No, it is not acceptable. I totally disagree with it. Those that have the operations and still continue with their sport, I admire. But they do not do it just for that reason. There is no advantage to be gained by having gender reassignment just to play sport. Far from it, I think there is a disadvantage to be gained, if anything. Some of the guys get notoriety. You will get public awareness and lose a lot of rights. People will recognise you and, again, you will be victimised, humiliated and vilified. I would say they would do that because they love sport.

Ms Johnson: I think 99.9 per cent of transgenders will give up sport gladly, because that sport that they endure will end up building muscles that they want to get rid of.

⁶³ Submission 142, Australian Sports Commission.

⁶⁴ Katherine Simms, Manager, Women in Sport Division, Australian Sports Commission, in "Reference: Sexuality discrimination inquiry," Canberra, 6 August 1996: 96-97.

Ms Mather: We have female to males. Does that mean to say they have their sex change so they can get a pension when they are 65 instead of 60?⁶⁵

Marie-Desiree D'Orsay-Lawrence similarly challenged claims about transgender women gaining an advantage in sport. She was the only one to point out that trans men may want to play sport: "Except for the army, of course, I notice that these people pick on only the male to female transsexuals. I think my brothers, who are female to male, will feel neglected. They too are a part of life and, for the same reason, where we lose strength and speed they gain it."⁶⁶

Twenty years later it is clear that transgender women have always wanted to partake in all aspects of society, including sport. Yet, the key point Johnson, Mather, D'Orsay-Lawrence and others were making was about priorities and needs for transgender people: anti-discrimination in their daily lives [and transgender citizenship rights](#) came first.

Notwithstanding the low priority transgender women placed on sport, the media picked up on it in the limited coverage of the inquiry. This is not surprising given the central place sport plays in Australia's imagined national identity,⁶⁷ as well as the gender binaries prevalent across all sports. This was not the first time that transgender women's participation in sport generated public anxieties. The most prominent example was American tennis player Renée Richards in 1976; her case forced sporting bodies around the world to consider developing policies on transgender participation, and Richards received substantial media coverage in Australia.⁶⁸ In other countries' transgender histories, though, there is no sign of sport being

⁶⁵ Gina Mather and Kristine Johnson, in "Reference: Sexuality discrimination inquiry," Brisbane, 1 October 1996: 795-796.

⁶⁶ D'Orsay-Lawrence, in "Reference: Sexuality discrimination inquiry," Adelaide, 16 August 1996: 511.

⁶⁷ Dwight Zakus, James Skinner, and Allan Edwards, "Social Capital in Australian Sport," *Sport in Society* 12, no. 7 (2009): 986-98.

⁶⁸ Lindsay Parks Pieper, "Gender Regulation: Renée Richards Revisited," *The International Journal of the History of Sport* 29, no. 5 (2012): 675-90. Examples of the Australian coverage include: Peter Stone, "Bring Renee here, says LTAV chief," *The Age* (19 August 1976); "Sex Tests, LTAA Decides," *The Age* (7 October 1976): 30; Bob MacDonald, "Marg refuses \$1 million match," *Herald* (8 September 1976): 1.

deployed in the 1990s as a political argument against transgender rights.⁶⁹ Conservatives in Australia clearly recognised the significance of sport to the nation's imagined identity and used it to attack transgender people as a threat.

The *Daily Telegraph* focused its first coverage of the inquiry almost entirely on the testimonies of the Australian Defence Force and the Australian Sports Commission, disregarding the more wide-ranging discussions of LGB discrimination. The opening line of the article "Army finds gender law a real drag" set the tone by perpetuating misunderstandings about what it meant to be transgender: "Laws banning discrimination based on sexuality could allow soldiers to dodge combat and men to compete in women's sports."⁷⁰ A few days later conservative Piers Akerman wrote a column called "How to tell a man from a woman," which again only focused on the Defence and sports arguments against transgender rights. He described the bill's opponents as sensible people "who find it difficult to toe the politically correct line and shut their eyes to the obvious differences between Arthur and Martha."⁷¹ A few weeks later the Victorian Returned and Services League president, Bruce Ruxton, wrote a letter to the editor praising Akerman and condemning the bill for its transgender protections: "A man is a man and a woman is a woman. A man who dresses as a woman defies description."⁷² Such comments and media coverage foreshadowed the vulnerability of the *Sexuality Discrimination Bill*: opponents could focus their biopolitical attacks not on discrimination, which was the key issue for all LGBT people. Instead, critics could ~~focus their attacks on~~ target transgender people because they were open to manipulation with misleading information. Transgender people challenged rigid understandings of gender

⁶⁹ See Christine Burns, ed. *Trans Britain: Our Journey from the Shadows* (London: Unbound, 2018), 185-93; Susan Stryker, *Transgender History: The Roots of Today's Revolution*, 2nd ed. (New York: Seal Press, 2017); Sarah Teetzel and Charlene Weaving, "Gender Discrimination in Sport in the 21st Century: A Commentary on Trans-Athlete Exclusion in Canada from a Sociohistorical Perspective," *Sport History Review* 48, no. 2 (2017): 185-93.

⁷⁰ Kim Sweetman, "Army finds gender law a real drag," *Daily Telegraph* (7 August 1996): 7.

⁷¹ Piers Akerman, "How to tell a man from a woman," *Sunday Telegraph* (11 August 1996): 125.

⁷² Bruce Ruxton, "Three cheers for Piers," *Sunday Telegraph* (8 September 1996): 54.

and power,⁷³ and this bill would allow those transgressions to infiltrate the most sacred of Australian institutions: sport and the military.

The Final Report and its Aftermath

Senator Jim McKiernan of the ALP, who chaired the inquiry, tabled the final report on 2 December 1997. McKiernan framed the *Sexuality Discrimination Bill* as an affirmation of sexual and transgender citizenship: “The Committee worked from the premise that there were homosexual people, and transgender people, and that they had rights which weren’t acknowledged and responsibilities that they were sometimes prevented from meeting.”⁷⁴ The final report was a methodical, respectful document that made a conscious effort to grapple with the issues raised by all parties. The report made thirty-three recommendations to improve the *Sexuality Discrimination Bill*. Among the transgender-related ones were: a more precise definition which only included those who identify with the gender other than that assigned at birth; to change the bill title to *Sexuality and Gender Status Discrimination Bill*; that it define transsexuals as those who have or intend to go through gender affirmation surgery; that refusing to recognise someone’s affirmed gender be considered a form of harassment; to prohibit discrimination on the basis of dress or appearance; the establishment

⁷³ Another way to look at opposition to transgender citizenship rights is through the Foucauldian concepts of bio-power and bio-politics. Michel Foucault describes bio-power as “numerous and diverse techniques for achieving the subjugation of bodies and the control of populations.” His related concept of bio-politics refers to the ways “The disciplines of the body and the regulations of the population constituted the two poles around which the organization of power over life was deployed.” Social scientists and philosophers have debated the meanings of these terms for decades, and it is not the intention of this article to visit those debates. One could read the transgender submissions to the Inquiry into Sexuality Discrimination as a challenge to bio-power norms, which viewed gender as embodied in two sexes with assigned genitalia. Conservative opposition to transgender citizenship rights thus represented bio-politics which aimed to reinforce gender binaries and dominant, embodied conceptions of sex and gender. See Michel Foucault, *The History of Sexuality, Vol. 1: An Introduction*, trans. Robert Hurley (London: Penguin, 1990), 139-44. [On the scholarly interpretations and debates over bio-power and bio-politics, see](#) Vanessa Lemm and Miguel Vatter, “Michel Foucault’s Perspective on Biopolitics,” in *Handbook of Biology and Politics*, ed. Steven A. Peterson and Albert Somit (Cheltenham, UK: Edward Elgar Publishing Limited, 2017), 40-52.

⁷⁴ Senator Jim McKiernan, Senate, Official Hansard, No. 188, 2 December 1997, 10125.

of a states-Commonwealth working party to discuss document changes for transgender people.⁷⁵

The report devoted only two pages to the question of sport, briefly addressing the key pro- and anti-transgender arguments. It concluded that transgender people should not be excluded from playing sport on the grounds of their gender, but “an individual organisation could...exclude a (male to female) transgender person if they believed that person was still assisted by biology (‘still has physical characteristics which to a large extent belong to their former gender’).” Moreover, in response to the far-fetched but much-propagated idea that men may pose as women to participate in sport, the inquiry drew on Julie Peters, Jane Langley and Team Sydney’s suggestion that such unlikely cases could be prosecuted for fraud.⁷⁶

Notwithstanding its minor mention in the inquiry, transgender women in sport became the lightning rod for opposition to the entire *Sexuality Discrimination Bill*. In their dissenting opinions to the inquiry, Coalition Senators Eric Abetz and Bill O’Chee drew on embodied conceptions of gender to oppose transgender inclusion: “Even if such an athlete were to undergo surgery to become female, they would retain the height, muscle and bone structure (e.g. pelvic shape, shoulder width and limb length) of a man, as well as the power to weight of a man. A natural woman of comparable ability would be incapable of competing on a fair and equal basis.”⁷⁷ Senator O’Chee continued to target transgender women in sport, calling them a threat to cisgender women. The shadow attorney-general, ALP Senator Nick Bolkus, issued a press statement calling out O’Chee’s misleading comments. Bolkus further stated, “Senator O’Chee has tried to rely on a lack of community understanding about these issues and has sought to pander to bigoted views in the community about people with other sexualities. His attitudes reflect the very sort of discrimination this Bill is designed to protect

⁷⁵ *Inquiry into Sexuality Discrimination*, ix-xvii.

⁷⁶ *Ibid.*, 117.

⁷⁷ “Sexuality Discrimination Bill Report: Response by Coalition Senators,” in *Ibid.*

against.”⁷⁸ O’Chee continued to hone on the sport angle, writing a letter to the *Daily Telegraph* that said, “I know no one in sporting circles who supports the bill or sees this as anything but destructive to women’s sport. Perhaps the better assessment was by AOC medical chief Dr Ken Fitch, who described the recommendation as ‘a political decision by a bunch of idiots’.”⁷⁹

Targeting particular findings to undermine an entire inquiry is a longstanding practice, particularly for the conservative side of politics. Returning to the Royal Commission into Human Relationships, just ten days before the 1977 election, the media reported leaked portions of the report. The sensational coverage focused on recommendations relating to decriminalisation of prostitution, homosexuality, incest between adults and abortion. The Royal Commission further tarnished an already-weak ALP and its leader Gough Whitlam in that election. As Arrow summarises: “In the debate that followed, the report was depicted as an illegitimate child, the product of an intimate encounter whom no one would now acknowledge.”⁸⁰ Similarly, in 1997 the release of the *Bringing Them Home* report into the Stolen Generations of Aboriginal children sparked a backlash from conservative critics.⁸¹ They looked for errors in the particular stories of Stolen Generations survivors and used those inaccuracies as “evidence” to denounce the entire inquiry.⁸² Such examples reflect the ways that politicians, pundits and the media have been able to take selective extracts that they suspect will undermine marginalised social groups’ claims to citizenship, respectability and rights.

⁷⁸ Senator Nick Bolkus, media release “O’Chee scaremongering over transsexuals in sport,” no. 67/97, 4 December 1997.

⁷⁹ Senator Bill O’Chee, “Idiocy over sport gender benders,” *Daily Telegraph* (9 December 1997): 12.

⁸⁰ Arrow, “An Inquiry into the Whole Human Condition?” 24.

⁸¹ Human Rights and Equal Opportunity Commission Australia, National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families., *Bringing Them Home: Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families* (Sydney: Human Rights and Equal Opportunity Commission, 1997).

⁸² Kelly Jean Butler, *Witnessing Australian Stories: History, Testimony, and Memory in Contemporary Culture* (New Brunswick, NJ: Transaction Publishers, 2013), 208. See also Robert Manne, *In Denial: The Stolen Generations and the Right*, Australian Quarterly Essay (Melbourne: Schwartz Publishing, 2001).

The battle over the Inquiry into Sexuality Discrimination resurfaced in February and March 1998, and again the criticism focused almost exclusively on transgender people. In a scathing opinion piece in the *Sunday Herald Sun* titled “Sir or Madam, as the Case may be,” Michael Barnard’s mocking tone refused to accept the complexities surrounding sexuality and gender identity. He even remarked, “Discrimination would include an employer baulking at the attire of a Fred who had decided to become Frederica, or vice-versa. Refusing a job for a transgendered applicant would be fraught with peril.”⁸³ Barnard invoked Eric Abetz’s minority opinion, which mentioned private conversations with alleged ex-gays and a transgender woman who regretted her transition. Based on those conversations, Abetz opposed the bill, arguing that both gender identity and sexuality were learned behaviours which could be undone.⁸⁴ Abetz and Barnard preferred to disregard the entire submission and hearing process, instead picking the evidence (from supposed private conversations) which reinforced their essentialist, embodied views of gender and sexuality.⁸⁵

In March 1998, Democrats Senator Andrew Bartlett addressed the Legal and Constitutional References Committee about the bill and inquiry. He indicated that in the past week he had been inundated with a series of letters condemning the bill as “everything from an endorsement of paedophilia to a concerted attack upon religious teachings. It is clear from the tone and phrasing of these letters that a smear campaign or a misinformation campaign is under way.” Bartlett noted that the purpose of the inquiry had been to give LGBT people a voice and to make public their personal experiences of discrimination.⁸⁶ He was affirming Johnson’s description of sexual citizenship as “a form of *affective* citizenship in that

⁸³ Michael Barnard, “Sir or Madam, as the Case may be,” *Sunday Herald Sun* (1 February 1998): 35.

⁸⁴ “Additional Comments by Senator Eric Abetz,” in *Inquiry into Sexuality Discrimination*.

⁸⁵ A letter to the editor from the mother of a transgender person, condemned Barnard for his prejudiced article. She wrote “I am not familiar with the text of the aforementioned document, but I know it is necessary because many people are unable to be kind to other human beings who may appear a little different.” Letter signed “Just a Mum,” “Sex laws needed,” *Sunday Herald Sun* (8 February 1998): 42.

⁸⁶ Senator Andrew Bartlett, The Senate Committees, Legal and Constitutional References Committee, 12 March 1998: 995.

citizenship identity and entitlements are partly shaped around which *emotional* relationships between citizens are recognized as legitimate (as well as how citizens are encouraged to *feel* about 'others').⁸⁷ Bartlett further appealed to emotion when he specifically addressed transgender ~~inclusion-citizenship rights in the bill~~, framing empathy around gender dysphoria:

I am sure that senators would agree that it is inappropriate and unfortunate that some people have chosen to ridicule persons who are receiving medical treatment for a medical condition, and the report recommended that the bill's aim be to protect those people who are gender dysphoric. After all, who amongst us would like to be treated the way we as a society treat gay, lesbian, bisexual and transgender Australians every day of the week?⁸⁸

Although pathologising transgender identities is problematic, like the framing of transgender respectability, Bartlett was using language he believed could generate empathy from an ill-informed public.

Again, transgender women in sport became a point to attack the entire bill. Senator O'Chee spoke against the bill on the grounds that transgender women had more testosterone and a physical advantage over cisgender women. He also rebuked claims that sporting organisations would have scope to exclude transgender women on physical grounds, saying that they would have to apply for exemptions and that would constitute a significant financial cost on already cash-strapped women's sporting organisations.⁸⁹ Transgender people found an ally in *Courier Mail* columnist Peter Wear, who wrote: "O'Chee's contribution to the debate was either ignorant or mischievously misleading. The least exposure to the transgender community would have shown him that most of its members are too preoccupied trying to drag themselves back to the right side of the sexual divide to have the least interest

⁸⁷ Johnson, "Sexual Citizenship in a Comparative Perspective," 164. Original emphasis.

⁸⁸ Senator Andrew Bartlett, The Senate Committees, Legal and Constitutional References Committee, 12 March 1998: 995.

⁸⁹ Senator Bill O'Chee, in *Ibid.*, 996-997.

in some kind of blitzkrieg on the local netball club.” Wear continued, “O’Chee might not know that, of course, because even though he was a member of the very committee that produced the report, O’Chee attended not one of its public hearings. Not one.”⁹⁰

It was unfortunate for the Australian Democrats that the final report came down during the prime ministership of John Howard. As political scientist Carol Johnson notes, the Howard government privileged ideas of citizenship as heterosexual/heteronormative, and in the process downplayed or overlooked issues of discrimination against LGBT people without even considering the discriminatory consequences of policies. Whereas sexual and transgender citizenship sought to bring LGBT people and their concerns into the public sphere, Howard believed “Same-sex relationships are a ‘private’ matter, which should be neither ‘endorsed’ by government nor, he claims, ‘discriminated against’.”⁹¹ Yet, while Howard espoused that LGBT issues were private matters, as the transgender (and other) submissions and testimonies indicated, matters of employment discrimination and casual harassment and violence on the streets were clearly public.

The Democrats reintroduced the *Sexuality and Gender Status Discrimination Bill* in May 1998. Bartlett repeated much from his remarks in March, and again O’Chee condemned the bill for letting transgender women participate in sport. Abetz reiterated the claims from his minority opinion, again focusing on the transgender woman who allegedly regretted her transition, and Greens Senator Bob Brown again expressed his support for the bill. Perhaps what is most important is the position the two ALP speakers adopted. One was the shadow attorney-general, Senator Nick Bolkus. He opened his speech with a long explanation of the ALP’s history of support for LGB rights, including passing the *Human Rights (Sexual Conduct) Act* 1994 to override Tasmania’s sodomy laws. Bolkus then condemned the Government role during and after the inquiry: “At best we have seen an abrogation of

⁹⁰ Peter Wear, “Misguided concept of truly fair play,” *Courier Mail* (18 March 1998).

⁹¹ Carol Johnson, “Heteronormative Citizenship: The Howard Government’s Views on Gay and Lesbian Issues,” *Australian Journal of Political Science* 38, no. 1 (2003): 49.

responsibility by some of them. At worst we have seen a deliberate campaign to mislead the Australian public about the nature of this bill in an attempt to play off the fears and prejudices that this bill seeks to end.”⁹² Bolkus implied support for the bill, but importantly, he never explicitly indicated a position.

Senator McKiernan, who had chaired and authored the inquiry, expressed disappointment over the misleading scaremongering campaigns. He called O’Chee a liar and said, “One would have thought the matter of sport had occupied the majority of the report instead of a few paragraphs in the report. The reason for that is that my colleague Senator O’Chee of the National Party of Queensland went to the media and beat up this issue.”⁹³ McKiernan read excerpts from the vile correspondence he received against the bill. McKiernan indicated that while he supported the aims of the bill, he would not support it in its current form. McKiernan did not provide any reason beyond a vague suggestion that it was imperfect. Without support from either the ALP or Coalition, the bill was doomed to failure, and the inquiry relegated to the piles of cast-off, inactioned government reports and recommendations.⁹⁴

The 28 May 1998 was the last time the *Sexuality and Gender Status Discrimination Bill* was debated in Parliament, notwithstanding the Democrats continuing to advocate for it and the bill remaining on the Notice Bill every year. In 2000, the ALP Shadow Minister for Family Services and the Aged, Senator Chris Evans, said that the ALP would not support piecemeal legislative changes to recognise same-sex couples. Instead, he argued the need for a thorough review of same-sex couples’ entitlements and the social security system, ignoring

⁹² Senator Nick Bolkus, Senate, Sexuality Discrimination Bill 1995 [1996], Second Reading Speech, 28 May 1998, 3403.

⁹³ Senator Michael McKiernan, in *Ibid.*, 3413.

⁹⁴ On multiple inquiries into the same topics, see Katie Wright, "Remaking Collective Knowledge: An Analysis of the Complex and Multiple Effects of Inquiries into Historical Institutional Child Abuse," *Child Abuse & Neglect* 74 (2017): 16; Katie Wright and Shurlee Swain, "Speaking the Unspeakable, Naming the Unnameable: The Royal Commission into Institutional Responses to Child Sexual Abuse," *Journal of Australian Studies* 42, no. 2 (2018): 140, 143.

the fact that the Inquiry into Sexuality Discrimination canvassed all those issues and more. As Johnson notes, during the Howard years the ALP was running a double-standard, regularly saying they preferred a broad approach to LGB (not necessarily transgender) equality while concurrently refusing to support the *Sexuality Discrimination Bill*.⁹⁵ It seems the ALP would only support legislation on its own terms rather than back the Australian Democrats. That opportunity would not come until they were back in government, with all rights and entitlements extended to same-sex couples in 2008 (except marriage) and LGBTI protections from discrimination finally enshrined in amendments to the *Sex Discrimination Act* in 2013.⁹⁶

Conclusion

Arrow says of the Royal Commission on Human Relationships:

Many commentators suggested that the Commission's report would be shelved and forgotten. To some extent, this is exactly what happened... Yet while not all of the Royal Commission's recommendations were accepted, it is remarkable the extent to which Australian society today resembles the world imagined by the Royal Commissioners; and, conversely, how many of the problems that it identified still persist.⁹⁷

Replace the words "Royal Commission" with "Inquiry into Sexuality Discrimination," and this sentence is just as valid. Perhaps what is even more remarkable is that twenty years since the inquiry, many of the issues flagged are now heavily debated, hot-button topics: transgender participation in sport, [employment discrimination](#), questions about religious freedom versus anti-discrimination, and even debates over vilification versus free speech.

⁹⁵ Johnson, "Heteronormative Citizenship," 59.

⁹⁶ Commonwealth of Australia, *Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Act 2013*, No. 98, 2013.

⁹⁷ Arrow, "Public Intimacies," 24.

Just like during the recent marriage equality campaign, opponents targeted transgender people to undermine the entire *Sexuality Discrimination Bill*, drawing on inaccurate, misleading and outright lying information about what it means to be transgender. Twenty years later, as the case of Hannah Mouncey's fight to play in the AFLW exemplifies, myths persist about transgender people (particularly women) in sport.⁹⁸ This is despite that fact that scientific evidence now suggests that hormone levels are a more accurate (albeit still imperfect) determinant of transgender people's sporting ~~abilities~~ *physicality*.⁹⁹

Yet, there was a subtle but important shift that came out of the Inquiry into Sexuality Discrimination. Just as the Royal Commission on Human Relationships brought marginalised voices of women, children and LGB people to the public sphere,¹⁰⁰ so too did the Inquiry into Sexuality Discrimination introduce transgender voices to public discussions. For the first time, a Commonwealth inquiry examined and validated transgender people's lived experiences. By taking part in the inquiry, transgender people were active agents asserting their own transgender citizenship.

Writing about the 1990s, Richardson and Monro describe the emergence of a new LGBT politics "whose aims are more reformist than transformist, seeking incorporation into the mainstream rather than critiquing social institutions and practices as did gay and lesbian/feminist activists in the 1960s and 70s."¹⁰¹ Monro and Richardson are perhaps too narrow in their analysis. The very assertion of transgender rights *was* transformist, both for

⁹⁸ There are numerous news articles, tweets and Facebook posts tracking the saga of Hannah Mouncey, a transgender AFLW footballer denied permission to play at the elite level. One good summary article is David King, "Hannah Mouncey can play in Aussie rules state leagues but not AFLW," *The Australian* (13 February 2018), available from <https://www.theaustralian.com.au/news/nation/hannah-mouncey-can-play-in-aussie-rules-state-leagues-but-not-aflw/news-story/46f3456ef4ffc92bd9f80f727bcfb320>, accessed 29 May 2018.

⁹⁹ See Joanna Harper, "Race Times for Transgender Athletes," *Journal of Sporting Cultures and Identities* 6, no. 1 (2015): 1-9. "IOC Consensus Meeting on Sex Reassignment and Hyperandrogenism," November 2015, available from https://stillmed.olympic.org/Documents/Commissions_PDFfiles/Medical_commission/2015-11_ioc_consensus_meeting_on_sex_reassignment_and_hyperandrogenism-en.pdf, accessed 30 May 2018; Tracy Holmes and Kristen Worley, "Laurel Hubbard: five myths about transgender athletes debunked," ABC News online, 9 April 2018, available from <http://www.abc.net.au/news/2018-04-09/transgender/9634496>, accessed 30 May 2018.

¹⁰⁰ Arrow, "An Inquiry into the Whole Human Condition?" 6.

¹⁰¹ Richardson and Monro, *Sexuality, Equality and Diversity*, 17.

the activists and for the receptive members of the committee and public. In the years following the inquiry, transgender support and advocacy organisations grew across the country and pushed for the extension of state anti-discrimination laws. At the time of the inquiry only the ACT and New South Wales recognised transgender, gender identity or gender history as protected categories, while South Australia protected “transsexuality [sic]” under its definition of sexuality. The spur of activism after the inquiry successfully pushed for amendments to anti-discrimination laws to protect transgender people in Victoria and Western Australia in 2000 and Queensland in 2002. South Australia updated the definition of “transsexuality [sic]” with “chosen gender” in 2009 and Tasmania added protections for transgender people in 2014, while the Northern Territory still has not enshrined transgender protections in law (though their anti-discrimination laws are currently under review). Arrow says of the Royal Commission on Human Relationships, “While many of these men and women articulated the ways that their sexual identity was bound up with suffering, the inverse of this suffering was hope about the lives they might have in a postreform world.”¹⁰² Kristine Johnson’s testimony before the inquiry perhaps best summarises the hopes transgender people pinned to the *Sexuality Discrimination Bill*: “it is a start – it is a foot in the door. At least it will give us something, and we can only go from there.”¹⁰³

¹⁰² Arrow, “These Are Just a Few Examples of Our Daily Oppressions,” 257.

¹⁰³ Gina Mather, President, Australian Transgender Support Association Inc., in “Reference: Sexuality discrimination inquiry,” Brisbane, 1 October 1996: 792.