

# THE SEX CONUNDRUM

Even under the new *Equal Opportunity Act*, some people are more equal than others. People who choose to live as neither man nor woman are among those who miss out. **By Jason Donnelly**

With the recent enactment of the *Equal Opportunity Act 2010* (Vic) ("EOA10"), it is perhaps appropriate to examine a key limitation, and indeed the *Equal Opportunity Act 1995* (Vic) ("EOA95"). Both Acts, although seeking to promote equality and diminish discrimination by making certain acts unlawful, leave, at least for the most part, shortcomings in the form of protection for people who choose to live as neither male nor female. That is, people of indeterminate sex who do not identify as a member of the male or female sex.

## STATUTORY AMBIGUITY

It is clear that sex is a recognised attribute or ground that can be used as a basis to allege unlawful discrimination in a wide variety of circumstances.<sup>1</sup> However, it is not so apparent what meaning is to be given to the term "sex" as a matter of law. Two constructions may seem apparent. First, a narrow construction to the term could be taken to mean either a male or female. That is, reference to the word "sex" is limited to either a "man" or "woman", and, as was outlined in *Re Kevin and Jennifer*,<sup>2</sup> unless the context requires a different interpretation, the words "man" and

"woman" when used in legislation have their ordinary contemporary meaning according to Australian usage. Second, on a broader approach, sex could be construed as a male or female or a person of indeterminate sex who identifies as being neither male nor female.

The definition section of the EOA95 and EOA10 provides no express explanation of what is meant by the term "sex". Accordingly, at least on a literal reading, given that it is unclear what is meant by the term, it seems apparent that regard must be had to applying relevant principles of statutory interpretation to it to remedy the apparent ambiguity. It is suggested that the term should not be factually viewed as binary, in the sense of being limited to members of the "male" or "female" gender. An intersex individual may have biological characteristics of both the male and the female sexes<sup>3</sup> due to various recognised medical abnormalities (i.e. androgen insensitivity syndrome, clitoromegaly, aphallia), and, for this reason, among others, choose to live as neither a "man" nor "woman".

The function of the court is to construe, by the application of accepted canons of construction,<sup>4</sup> the intention of the legislature through the words used in a statute,<sup>5</sup> and in Victoria, to ensure that all statutory provisions are interpreted so far as is possible in a way that is compatible with human rights.<sup>6</sup>

## PURPOSIVE APPROACH

In light of the foregoing, it is suggested that given that a literal interpretation of the term "sex" is ambiguous and unclear, regard may be had to the "object or purpose" of both the EOA95 and the EOA10.

Section 3 of EOA95 sets out the relevant objectives of the Act. For present purposes, possible applicable objectives for the statutory interpretation exercise are section 3(a) (to promote recognition and acceptance of everyone's right to equality of opportunity), section 3(b) (to eliminate, as far as possible, discrimination against people), and section 3(d) (to provide redress for people who have been discriminated against or sexually harassed).

It is suggested the key words in the objectives of EOA95 for statutory interpretation purposes are "everyone" and "people". It may be argued that a person of indeterminate sex who chooses to live as neither a man nor woman falls within the scope of the terms "everyone" and "people". However, a closer examination appears otherwise.

In determining the ordinary and natural sense of a word, courts tend to rely on a range of dictionaries.<sup>7</sup> The term "everyone" is defined in the Macquarie Dictionary as "every person".<sup>8</sup> The term "person" is defined



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in the Macquarie Dictionary as "human being, whether man, woman, or child".<sup>9</sup> The Oxford Dictionary defines the term "everyone" as "everybody".<sup>10</sup> The term "everybody" is further defined in the Oxford Dictionary as "every person",<sup>11</sup> and the word "person" is defined as "individual human being; living body of human being".<sup>12</sup> It seems readily apparent that the objectives of the EOA95, to the extent that they use the words "everyone" and "people", are limited to people of the male or female sex.

Such a construction is consistent with the meaning of the word "person" as it appears in the Macquarie Dictionary, which seems to limit "person" to persons of either the male or female sex. Although it is equally true that the term "person" in the Oxford Dictionary seems more liberal, in the sense that it does not use the words "man" or "woman" and "person" includes "an individual human being", in light of the ambiguity between the two meanings in the different dictionaries of the term "person", it is difficult to reconcile that the broader construction of the term "sex" can be preferred. This construction, which would then on the face of it prefer the narrower approach of the term "sex", is further reinforced for three reasons.

## EXTRINSIC AID

First, the word "sex" is defined in the Macquarie Dictionary as the "condition of being either male or female".<sup>13</sup> It is also further defined in that dictionary as "the total of physical differences by which the male and the female are distinguished".<sup>14</sup> The meaning of "sex" in the Oxford Dictionary is consistent with that in the Macquarie Dictionary. The term "sex" is defined there to mean "being male or female; males or females collectively".<sup>15</sup>

Clearly, then, having regard to the term "sex" as it appears in various dictionaries, the apparent ambiguity of that term is remedied. That is, a person of indeterminate sex who is not considered either male or female, for biological reasons, and who does not choose to live as either a male or female, does not come within the scope of the word "sex" within the meaning of either EOA95 or EOA10.

## DESIRABILITY OF JURISDICTIONAL CONFORMITY

Second, in construing the term "sex" for the purposes of Victorian discrimination law, it is suggested that regard should also be had to the *Sex Discrimination Act* 1984 (Cth) ("SDA 84"). This Act, at least in part, was enacted to eliminate, so far as is possible, discrimination against people on the ground of sex.<sup>16</sup> Again, the term "sex" is not defined expressly in the definition or interpretation section of that Act.

Interestingly, unlike the relevant discrimination Acts in Victoria, one key object outlined in the SDA 84 is "to promote recognition and acceptance within the community of the principle of the equality of men and women".<sup>17</sup> As a result, it would seem inconsistent to interpret the word "sex" as including persons of indeterminate sex who do not identify as a "man" or "woman". To suggest otherwise could be argued to go beyond the objects or purposes of the SDA 84, which appear to be limited to creating a statutory cause of action for sex discrimination on the basis of eliminating discrimination against a person who is either male or female.

This analysis seems further reinforced when regard is had to the interpretation section of the SDA 84. There, pursuant to section 4(1), the Act peculiarly defines "man" as "a member of the male sex irrespective of age", and "woman" means "a member of the female sex irrespective of age". On this approach, it is suggested that the term "sex" in the SDA 84 is implicitly defined to mean members of either the male or female sex, irrespective of age.

If it is accepted that the term "sex" in the SDA 84 is limited to people of either the male or female gender, then a construction of the word "sex" in either EOA95 or EOA10 which included people of indeterminate sex who did not identify with members of the male or female sex could have potential constitutional implications. The indirect inconsistency would be that the Victorian discrimination laws, by construing the term "sex" to include persons of indeterminate sex who choose to live with no sex, go beyond the meaning

of the term "sex" as it was intended by the Commonwealth equivalent.

In that sense, the *Sex Discrimination Act* 1984 (Cth) appears to limit the term "sex" to a person of either the male or female sex. A person of indeterminate sex who identifies as being neither male nor female could not take the benefit of the broad construction of the word "sex" under Victorian discrimination law without potentially violating the more restrictive approach apparently favoured by the Commonwealth SDA 84. The net effect would be that s109 of the Federal Constitution would be invoked to invalidate and make unconstitutional a reading of the term "sex" in the Victorian discrimination Acts that favoured the broad approach.

However, it is conceded this argument would turn upon it being accepted that the Commonwealth intended to "cover the field" or that there was an "indirect inconsistency" in relation to sex discrimination. This appears likely, given that if the Victorian sex discrimination provisions are not properly described as both "capable of operating concurrently" with the SDA 84 and characterised as furthering the objects of the conventions upon which the federal Act is based, it will not meet the threshold test and will be inoperative.<sup>18</sup> That is arguably so, for the reason that, except where the threshold test is met, the SDA 84 is intended to cover the field on the elimination of sex discrimination.<sup>19</sup>

Section 109 of the Constitution will invalidate a law of a state in so far as the state law would require what the law of the Commonwealth would forbid, or in so far as the state law would vary, detract from, or impair the operation of the law of the Commonwealth.<sup>20</sup> It seems inescapable that a construction of the word "sex" under Victorian discrimination law that favoured the broad approach would clearly vary and impair the more limited reading of the term "sex" intended by the Commonwealth SDA 84.

## OBJECTIVES OF DISCRIMINATION LAW

Third, a fundamental purpose of the Equal Opportunity legislation when it was drafted back in 1976 in Victoria was made clear in the speech of Sir Rupert Hamer:

"Its - that is, the Bill's - purpose is to prohibit certain kinds of discrimination on the grounds of sex or marital status, and to promote equality of opportunity between men and women".<sup>21</sup>

It seems readily apparent, then, that the purpose of the equal opportunity legislation, as far back as 1976 in Victoria, was not aimed at protecting people of indeterminate sex.

However, despite the fact that in more recent times discrimination law in Victoria has become more expansive to provide some measure of protection for transgender people, with the enactment of the "gender identity" attribute,<sup>22</sup> the Second Reading speeches of both the *Equal Opportunity Bill* 1995 (Vic) or *Equal Opportunity Bill* 2010 (Vic) are silent in support of the proposition that the term "sex" was designed to include people of indeterminate sex who do not identify as members of the male or female gender.

Although the gender identity attribute provides some scope of protection to people of indeterminate sex, that level of protection is limited to a person of indeterminate sex living as a member of a particular sex (whether or not the person is recognised as such).<sup>23</sup> Again, the term "particular sex" is not unsurprisingly undefined in the EOA 95. It is assumed that the term "particular sex" within the meaning of s4(1) of the Act means a person of indeterminate sex identifying as a member of either the male or female sex.

The basis for this view is twofold. First, such an interpretation would favour the narrower construction of the term "sex" as outlined above. Second, the definition section which provides the statutory meaning of the term "gender identity" bespeaks of a member of a particular sex identifying as a member of the "other sex". That would mean a person who is a male identifies as a person of the female sex, and vice versa. However, given that a person of indeterminate sex cannot live as a member of the "other sex", the term "particular sex" would seem to be limited to a person of the male or female sex. This view is consistent with the term "sex", which is not defined in various dictionaries to include persons of indeterminate sex.

It is suggested that if it were otherwise, the legislature would have clearly enacted a statutory provision to the effect that "gender identity" includes a person of indeterminate sex who chooses to live with no particular sex. An interpretation of the "gender identity" attribute inconsistent with this would, to my mind, import the introduction of words never intended by the legislature!

## VICTORIAN CHARTER OF RIGHTS IMPLICATIONS?

Despite the foregoing analysis of the term "sex", the enactment of the *Charter of Human Rights and Responsibilities Act* 2006 (Vic) ("COHRRA 06") warrants some consideration. Section 32(1) of this Act makes clear that so far as is possible with their purpose, all statutory provisions in Victoria must be interpreted in a way that is compatible with human rights.

Notably, s8 of the same Act sets out one of the key human rights, that is, recognition and equality before the law. In more specific terms, s8(2) outlines that "every person has the right to enjoy his or her human rights without discrimination". A literal reading of this provision would appear to limit "person" to a male or female, as the words "his" or "her" human rights are outlined in the provision. However, s3(1) of the COHRRA 06 defines the word "person" to mean a "human being". That being the case, and, given discrimination in relation to a person means discrimination (within the meaning of the EOA 95 on the basis of an attribute set out in s6 of that

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Act),<sup>24</sup> it may be argued that the term "sex" in the EOA 95 and EOA 10 must include a person of indeterminate sex who chooses to live as neither male nor female because such a construction is consistent with the object of that Act which refers to "person". And, as the COHRRRA 06 makes clear, person means a "human being", which surely would include a person of indeterminate sex who chooses to live as neither a male nor female.

## CONCLUSION

It seems readily apparent that an interpretation of the word "sex" in the EOA 95 and EOA 10 that does not include persons of indeterminate sex who choose to live as neither a male or female would, at least on one view, challenge a fundamental purpose of the Act, namely, to eliminate as far as possible discrimination against "people". As the COHRRRA 06 makes clear, "people" is said to include all "human beings". As Creighton suggested, an important aim of anti-discrimination law is a prescription for change, encouraging, even requiring, thoroughgoing social change to reduce or eliminate unfair discrimination which to many seems pervasive in our society.<sup>25</sup> With this in mind, the current state of law with respect to the term "sex" needs closer consideration within the context of discrimination law.<sup>26</sup>

Favouring the narrower interpretation, however, although limiting the term "sex" to a person of either the male or female sex in the EOA 95 and EOA 10, would, at best, mean such a construction is arguably inconsistent in an indirect sense with the discrimination provisions in the COHRRRA 06. The inconsistency stems from the fact that regard can be had to the object and purpose of the equal opportunity legislation in Victoria, given the apparent ambiguity of the term "sex" which

on a literal reading appears ambiguous and remains undefined in the relevant Acts.

The matter is further complicated by the potential constitutional implications that may flow from a broad reading of the term "sex" in the Victorian discrimination legislation. That being the case, the EOA 10 should be amended to provide an express definition of the term "sex", so as to not only avoid the complicated and confusing statutory interpretation exercise that has been briefly undertaken, but, to ensure the words of Mr Carli of Brunswick truly ring true: "There is no doubt that the purposes of this Bill [Equal Opportunity Bill 2010] and the aims of the Attorney-General and the government are clearly to ensure and define equal opportunity".<sup>27</sup> ●

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1. Beth Gaze, "Context and Interpretation in Anti-Discrimination Law" (2002) 18 *Melbourne University Law Review*.
2. *Attorney-General for the Commonwealth v Kevin and Jennifer* (2003) 30 Fam LR 1 at 2 (per Nicholson CJ, Ellis and Brown JJ).
3. *In the Marriage of C & D (falsely called C)* (1979) 28 ALR 524.
4. *Cooper Brookes (Wollongong) Pty, Ltd v Cmr of Taxation (Cth)* (1981) 147 CLR 297 at 320 (per Mason and Wilson JJ); *Director of Public Prosecutions v George* [2008] BC200810436 at [193] (per White J).
5. *Mills v Meeking* (1990) 169 CLR 214 at 233-4; *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 72 ALJR 841 at 851 (per Brennan ACJ).
6. Section 1(2)(b) of the *Charter of Human Rights and Responsibilities Act 2006* (Vic).
7. There is no single dictionary that will be preferred by the court. In *John While & Sons Pty Ltd v Changleng* (1985) 2 NSWLR 163 at 164, Samuels JA made initial reference to the *Oxford English Dictionary* and then to the *Macquarie Dictionary* "to which we should now perhaps make equal reference". In all Australian jurisdictions, the *Macquarie Dictionary* is being consulted in addition to the traditionally accepted *Oxford English Dictionary*: *Fletcher v Cooper* 1991 Tas R 298 at 307 (per Crawford J).
8. The Pocket *Macquarie Dictionary*, edited by David Blair, first edition, The Jacaranda Press, Macquarie University NSW, 1982, at 306.

9. Note 8 above, at 668.
10. The Little Oxford Dictionary, edited by Julia Swannell, sixth edition, Clarendon Press, Oxford, 1986, at 187.
11. Note 10 above.
12. Note 10 above, at 399.
13. Note 8 above, at 826.
14. Note 13 above.
15. Note 10 above, at 503.
16. Section 3(b) of the *Sex Discrimination Act 1984* (Cth).
17. Section 3(d) of the *Sex Discrimination Act 1984* (Cth).
18. See ss10(3) and 11(3) of the *Sex Discrimination Act 1984* (Cth).
19. See further *Central Northern Adelaide Health Service v Atkinson* [2008] SASC 371 at 72-74 (per Gray J); *University of Wollongong v Metwally* (1984) 158 CLR 447 at 454 (per Gibbs CJ).
20. *Telstra Corporation Ltd v Worthing* (1999) 197 CLR 61 at 76-7 (per Gleeson CJ, Gaudron, McHugh, Gummow, Kirby, Hayne and Callinan JJ); *University of Wollongong v Metwally* (1984) 158 CLR 447 at 455-6; 56 ALR 1 at 5-6 (per Gibbs CJ); *Victoria v Commonwealth* (1937) 58 CLR 618 at 630; [1938] ALR 97 at 100-1 (per Dixon J); and *Stock Motor Ploughs Ltd v Forsyth* (1932) 48 CLR 128 at 136-7; [1932] ALR 408 at 411 (per Dixon J).
21. Sir Rupert Hamer, quoted by Louise Asher (Brighton), *Equal Opportunity Bill 2010*, Second Reading Speech, Legislative Assembly, 24 March 2010, p1050.
22. See s6(ac) of the *Equal Opportunity Act 1995* (Vic). In Victoria, it is a breach of the *Equal Opportunity Act 1995* (Vic) to discriminate against a person on the basis of their actual or assumed gender identity: *Re Alex* [2009] FamCA 1292 at [185] (per Bryant CJ).
23. Section 4(1) of the *Equal Opportunity Act 1995* (Vic).
24. See s3(1) of the *Charter of Human Rights and Responsibilities Act 2006* (Vic).
25. W B Creighton, "The Equal Opportunity Act — Tokenism or Prescription for Change?" (1978) 11 *Melbourne University Law Review* 503, 535.
26. See further Joan Eveline, "The Politics of Advantage" (1994) 19 *Australian Feminist Studies* 129; Stephanie Wildman and Adrienne Davis, "Language and Silence: Making Systems of Privilege Visible" in Richard Delgado (ed), *Critical Race Theory* (1995) 573; Beth Gaze, "Some Aspects of Equality Rights: Theory and Practice" in Brian Galligan and Charles Sampford (eds), *Rethinking Human Rights* (1997) 189. See also Trina Grillo and Stephanie Wildman, "Obscuring the Importance of Race: The Implications of Making Comparisons between Racism and Sexism (or Other -isms)" [1991] *Duke Law Journal* 397.
27. Carlo Carli (Brunswick), *Equal Opportunity Bill 2010*, Second Reading Speech, Legislative Assembly, 24 March 2010, Page 1056.



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