

“Change can never be ‘complete’”: the legal right to self-identification and incongruous bodies

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Abstract

At the time of writing, New Zealand's government is considering select committee recommendations to simplify the process for changing the sex recorded on a birth certificate (Governance and Administration Committee 2018). This article argues that the inconsistent requirements for binary and non-binary transgender people to amend their documentation indicates a scepticism of the legitimacy of non-binary identities. The current process for transgender people seeking to change their sex marker is onerous and often expensive (Noonan and Liddicoat 2008). Attaining an "indeterminate" marker on a birth certificate is so difficult as to be functionally impossible. Crown Law have suggested that “social factors” (how a person’s gender is perceived by others) would be considered by the courts when deciding on the veracity of their stated gender identity, indicating that being identifiable as a binary-gendered person is a contributor to achieving legal recognition of one’s gender. The proposal presumes that recording an "official" gender is natural and necessary. Legal recognition of non-binary people signals an expanded understanding of recognisable gender identities, but requires situating oneself within a bureaucratic framework. In light of the new process being proposed, I argue that if passed this Bill implicitly raises the question of why identity documents must have a sex marker on them at all.

Keywords

Transgender; Nonbinary; Identity documents; Gender identity

Biography

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Introduction

Administrative law is a key site at which the vulnerability of transgender² populations is reproduced (Spade 2015, p. 89). The ability to update identity documents and other official records so that the information they contain is accurate and consistent has been identified as of critical importance to the safety and dignity of trans people (Noonan and Liddicoat 2008, p. 66). Inconsistent documentation (differences between the sex markers or names displayed on different documents, for example) or documents which list previous sex markers or names, restrict the ability of trans people to access housing, employment, social services, education, and countless other services and facilities without their trans status becoming known, or without being suspected of using fraudulent documents if their presentation and the sex listed on their documents are incongruous (Noonan and Liddicoat 2008, pp. 66-67). Policies which allow for documents to be updated only if specific and frequently expensive conditions are met (including accessing specific medical or surgical procedures) make updating documents impractical or impossible for many trans people. The necessity of legal representation to navigate the various processes adds to these burdens.

The impact of accurate documents being difficult or expensive to access is greater on those who are already marginalised along other axes, such as race or class (Beauchamp 2019, pp. 36-49). Official identity documents are central to everyday life and are frequently taken as an expression of fact or proof in “naming or sexing the subject” (Namaste 2000, p. 260). An inability to present documents which accord with one’s self-identity renders one an illegitimate body, out of place. In addition to the practical aspects, there is also the dysphoria and stress caused by being implicitly viewed as an unreliable narrator of one’s own life whenever inaccurate documents must be presented, or when attempts to update documents are declined or made labyrinthine and onerous. Trans people report that successfully updating documentation is an affirming experience, while being unable to update identity documents is frustrating and can place their safety at risk (Couch et al. 2008; Noonan and Liddicoat 2008, p. 66).

Currently in New Zealand, Section 28 of the *Births, Deaths, Marriages, and Relationship Registration Act 1995* requires trans people to apply to the Family Court to update the sex listed on their birth certificate. The applicant must prove to the court

² Hereafter ‘trans’.

that they are “*not* a person of the nominated sex” (emphasis mine), but that they do have a gender identity congruent with the nominated sex, intend to maintain it, and desire to have the nominated sex listed on their birth certificate (Section 28 (3)(b)). Additionally, applicants must provide “expert medical evidence” of their gender identity, and to prove that they have undergone medical treatment “usually regarded by medical experts as desirable” to allow them to accord with the “physical conformation” of a person with their gender identity (Section 28 (3)(c)). The Department of Internal Affairs specifically notes in their advice to people seeking to change the sex on their birth certificate that it is “not possible to use Section 28 to change the sex on the birth register from male or female to “indeterminate”” (2013, p. 4). These requirements link the legitimacy of an individual’s gender identity to the medical interventions they have accessed. Obliging the applicant to prove they are *not* a person of the nominated sex (their self-identified sex) requires them to be hailed as their assigned sex one final time before being granted permission to change their birth certificate. Additionally, the inability to change a birth certificate to ‘indeterminate’ indicates a refusal to acknowledge the validity of genders outside of the female/male binary.

In August 2018, a select committee report was released proposing additional changes be made to the *Births, Deaths, Marriages and Relationship Registration Bill* which was under consideration in New Zealand’s parliament. The bar-2 Bill proposed changes to the 1995 Act which would alter the process for amending the sex recorded on a birth certificate for adults, children, and eligible 16 and 17 year olds, as well as making it possible for individuals to choose to be listed simply as “parent” on their child’s birth certificate, a neutral alternative to being listed as “mother” or “father” (Governance and Administration Committee 2018). The select committee proposed that the current Family Court process be replaced with an administrative process, with the applicant making a statutory declaration directly to the Registrar General (or in the case of a child, their guardian making a declaration). The committee also suggested amending the process to allow applicants to select “X (unspecified)” or “intersex”, writing that this would ensure “the bill would recognise non-binary sexual and gender identities” (2018, p. 2). The committee wrote that the existing Act was “progressive in 1995 but is now outdated and inconsistent with global developments” and proposed “replacing the Family Court process with an administrative process based on self-identification” (2018, p. 2).

This paper examines the current process for updating birth certificates in New Zealand, considering the wording of existing policy and law, the proposed changes of

the bar-2 Bill, and correspondence issued by the Minister for Internal Affairs and Crown Law regarding the select committee report and subsequent deferral of the Bill. The specific language of the existing Bill, the bar-2 Bill, and supplementary policy documents are examined: a report from the New Zealand Human Rights Commission, writing about the legal frameworks used to establish an individual's sex, note that Section 33 of the Births, Deaths and Marriages Act 1995 clarifies that "notwithstanding this part of the Act [amending sex details on a birth certificate], the sex of everyone person shall be determined by reference to the general law of New Zealand" (2008). The report goes on to note that "general law" in this context is made up in part by the guidelines and resources produced and disseminated by the agencies responsible for administering and overseeing updates to legal documentation, and the decision to give equal consideration to guidelines issued by Government agencies is informed by this (2008, p. 88). Using theoretical frameworks from Bacchi, but particularly her "what's the 'problem' represented to be?" (WPR) model, and Foucault's work on explanatory or confessional discourses, as well as his theories of biopower, I argue that current legislative frameworks construct categories of sex³ and make some identities more legitimate and comprehensible than others. I focus particularly on the process for non-binary people and the virtual impossibility of updating a birth certificate to an 'indeterminate' sex marker. Recording the sex or gender of citizens is a form of enacting control and surveillance by governments, and making some sexes or genders inaccessible in a formal sense indicates a scepticism of their legitimacy or intelligibility.

Both Bacchi and Fairclough situate themselves within a Foucauldian post-structuralist framework, and Bacchi identifies how the WPR method can be applied to identify how policy makes and unmakes subjects and obliges those it affects to assume particular subject positions (Bacchi and Goodwin 2016, pp. 69-71). I draw on Foucault for discussions of the explanatory discourses required of individuals seeking to update their birth certificates. Bacchi has been careful to identify that WPR is distinct from critical discourse analysis, and notes that this is due largely to its application in reflecting on what knowledges are implicit in policy (2018). The decision to apply some aspects of discourse analysis, using Fairclough, has been made, in part, because the texts being examined are not solely policy; they also include summaries of policy intended to be read by the affected group, correspondence from

³ I say 'sex' rather than 'sex and gender' here, as many of the analysed documents suggest that gender identity is one factor which is weighed up when 'proving' sex. As discussed later in this article, policy documents often slide between the terms 'sex' and 'gender', but Statistics New Zealand, for example, seem confident that gender identity can be understood as fluid and existing across a spectrum while still desiring a cut-and-dried distinction between sexes.

official bodies, and a report into the human rights of trans people, all of which shape understandings of under what circumstances and by what means official documentation may be altered. There are, I contend, several discourses which are intertwined within these texts: one about the way governments (try to) define “sex” and their reasons for doing so, another about whose input and expertise should be respected in individual and policy decisions about this, a third considering the specific terms used within communications in policy and to affected parties. The decision to use both Bacchi and Fairclough has been made in order to account for the varying purposes and anticipated audiences of the different documents considered.

Tracey Martin, the MP sponsoring the Bill, announced in February 2019 that it would be deferred to allow for further public consultation, drawing criticism and expressions of frustration from several transgender rights groups (Small 2019). A report from the New Zealand Human Rights Commission into the experience of transgender New Zealanders, *To Be Who I Am*, which was published in 2008 and drew on interviews and research conducted in 2006, identified four key policy action points to improve trans people’s access to rights, and their ability to participate fully and without discrimination in public and private life. One of these was simplifying and streamlining the process of updating formal identity documents, including passports and birth certificates, and another was ensuring that trans people were involved in the decision-making process regarding policies that would affect them.

While the current law does not specifically require that individuals have had GRS/SRS⁴ to change their birth certificate, the Human Rights Commission found that this was often how it was interpreted, and that trans people had been informed GRS was required to update a birth certificate by staff at the Department of Internal Affairs or the Family Court (Noonan and Liddicoat 2008, pp. 68-69). At the time the report was written, the Department of Internal Affairs confirmed the Family Court had often interpreted the law to mean GRS was required, but added the court might approve an update to a birth certificate if “substantive, but not complete, surgery has taken place” (Noonan and Liddicoat 2008, p. 73).⁵ The expectation that surgical or medical interventions will be sought, and that movements across gender lines can only be from male to female or vice versa are an example of the “corporeal consequences” of binaristic conceptions of gender (Preves 2000, p. 43). Essentially, an assumption that transition is a linear process with a clearly defined “complete” end point, is embedded

⁴ GRS/SRS refers to gender reassignment surgery/sex reassignment surgery.

⁵ Given the varying surgical techniques for transmasculine people in particular, the phrasing gives little clarity about what constitutes a ‘complete’ GRS in the eyes of the court.

in the application of policy. Following Bacchi, the 'problem' is an incongruity between a body and a sex marker: the solution is to discipline corporeal forms into knowable models.

When *To Be Who I Am* was published, the process for updating passports was significantly more onerous and many binary trans people were issued passports with an (X) or (-) marker in the sex field if they had not undergone genital surgery. In the ensuing years the process has been simplified, and the sex marker on a passport can now be updated by enclosing a statutory declaration confirming the individual would like to alter the sex listed on their passport with a new application. As of June 2019, the Department of Internal Affairs confirmed that there had been no passports issued with a (-) marker since 2005, that there were 109 valid passports with an (X) gender marker, and a further 105 which had expired. They indicated a reduction in the number issued after 2012 was likely because of the operational change to self-identification, making a switch from one binary gender to another easier (Department of Internal Affairs, Personal Correspondence, 2019). This data suggests there are certainly people who would make use of the ability to update their birth certificate to indicate a sex or gender identity other than male or female if it were reasonably practicable, and implies the existence of number of individuals with inconsistent sex markers on two or more Government issued identification documents.

The proposal put forward by the Governance and Administration Committee in their August 2018 report was for birth certificates to be updated via a self-identification process. The current process starts from a position of requiring proof of what an individual claims about their own sense of self. It must be validated by an external site of power; one which is recognised by the courts. It also reinscribes a linkage between physical sex characteristics and gender identity, and the first requirement of the Family Court process – to prove that the applicant is a person of the opposite sex to their nominated sex – requires them to identify themselves in their assigned sex one last time before they can be granted the right to divest themselves of it. The self-identification process, in contrast, would make accessing accurate documentation easier and less stressful, as well as making non-binary identities literally possible in governmental terms. Earlier work has identified that non-binary people make up a meaningful proportion of trans populations but are disproportionately marginalised within an already marginal population when it comes to accessing accurate identity documents (Wipfler 2016; Fiani and Han 2018; James et al. 2016).

While the proposal would make the process easier, it does still presume that recording “sex” is natural, desirable and necessary.⁶ The Solicitor-General, on behalf of Crown Law, wrote to the Department of Internal Affairs in relation to the proposed changes, noting that the 1995 Act and the proposed changes both made allowances for “general law” to ultimately determine the sex of any person in New Zealand over their own self-identification, but asked how this would be determined if not through reference to the sex recorded on a document such as a birth certificate (2019). The letter requested clarification on whether the Government’s intention was to maintain or collapse a distinction between registered sex (recorded on identity documents) and sex for the purposes of accessing sex-specific roles, opportunities, and obligations; this highlights the competing concerns with either a lack of statutory guidance or being “overly prescriptive” and failing to account for the wide variety of circumstances when an individual’s gender may need to be established (2019, p. 6). Addressing the breadth of situations in which guidance would be required if a distinction was retained, the letter noted: “a policy project to identify all settings in which a person’s sex may need to be determined, and to provide statutory guidance that is appropriate in those particular settings, may be a substantial undertaking” (2019, p. 6).

I therefore conclude this article by exploring the necessity of recording sex or gender on identity documents at all, arguing that sex data is used by agencies such as Statistics New Zealand as a proxy for other information (for predicting population growth and healthcare needs, for example). Following earlier work in this area, I wish to note that improving the process for updating documents in the short term is a sensible goal to enable immediate benefits for trans populations, but the ultimate goal should not be finessing the state’s policing of acceptable gender identities (Wipfler 2016, p. 494). At present trans people are often reliant on recognition from the same apparatuses which “functionalize gender normativities and create systemic exclusions” (Puar 2017, p. 35). I argue that passing the bar-2 Bill would indicate a tacit acknowledgement that sex or gender, while clearly important and useful categories for individuals, are not subject positions which have a consistent linkage to data which might be biopolitically useful for governmental bodies. The introduction of such a bill therefore inherently furthers an argument for removing sex identifiers from identification documents altogether: it delinks the physical form and the felt gender,

⁶ Within Aotearoa New Zealand’s post-colonial context, it should also be noted that the insistence that individuals express their gender identity within prescribed terms also requires trans people to legitimate themselves within a system which privileges colonial ideas about gender identity (Kerekere, 2017, pp. 41-42; Wilton, 2018, p. 162).

and acknowledges that sex is something which can be declared by an individual but must not necessarily be proven through 'expert' advice.

Methodology

The analysis for this paper was conducted by gathering information published by New Zealand government agencies and statutory bodies issued by Parliamentary Services, and obtained via Official Information Act (OIA) requests (both those made by the author, and those published by relevant bodies as being in the public interest). The information collected included both official policy and guidance to citizens seeking to change the sex recorded on their official documents, but primarily their birth certificate and passport.

The documents were then examined using elements of Bacchi's policy-as-discourse and WPR approaches, supported by aspects of Fairclough's critical discourse analysis approach (being mindful of the distinctions Bacchi has drawn between these two schools). The existing legislation, the application of policy, and the ways that evidence or proof was conceptualised were then considered with regard specifically to their impact on non-binary people.

Bacchi's model examines policy as a mode of discourse. Instead of discussing different approaches to solving a 'problem', her model rather considers what the 'problem' has been conceptualised to be. It also allows for an examination of how it has come to be a 'problem' which ought to be solved by government (Bletsas 2012, p. 40). She proposes examining policy to identify what has been represented as the 'problem' the policy aims to remedy, then considering what the framing reveals about the underlying premises which such an understanding depends on.

"the focus is not on intentional issue manipulation or strategic framing. Instead, the aim is to understand policy better than policy makers by probing the unexamined assumptions and deep-seated conceptual logics within implicit problem representations. This focus means paying attention to the forms of knowledge that underpin public policies, such as psychological or biomedical premises, producing a broad conception of governing that encompasses the place of experts and professionals." (2012a, p. 22)

Bacchi's model proposes considering what cannot be discussed under the current rendering of the 'problem', where the 'problem' has been produced and where it could then be questioned or disrupted. Bacchi also discusses how measuring tools are used to shape norms, then to situate people as outside them, as well as implicitly shaping understandings of the phenomena being measured (2012b, pp. 143, 146). In the case of birth certificates, the existing regulations establish a model transgender citizen and linear transition, what Spade identifies as the medicalised "norms of transness" (2015, p. 66) and Puar has theorised as "trans(homo)nationalism" (2017, p. 35). Applicants are then measured against their adherence or divergence from these rubrics.

In examining the source texts for this analysis, I have used some elements of Fairclough's critical discourse analysis method. I have applied his work which proposes considering who is permitted (or compelled) to speak, and who is spoken for, as well as drawing on his work which endorses considering the existing intertextual discourses which are present in analysed texts (1992, pp. 271-272). Additionally, Fairclough has mentioned the existence of "processes without agents", of occurrences which "just happen" to groups, but mostly to already othered groups, a useful framework for some of the analysis in this paper (1995, p. 123).

Bacchi also identifies that research is always a political practice, and other theorists have also discussed how personal relationships to the material being discussed will affect how it is approached and considered (Bacchi 2012b; Letherby 2003; Ahmed 2014, p. 14). In the interests of situating myself within this research, and stating my relationship to the material, I first became aware of and interested in this issue before debates about the bar-2 Bill entered the news media, as I encountered the practical impossibility of updating a birth certificate to show an 'indeterminate' sex marker when attempting to correct my own. Ahmed, writing about orientations, has proposed the directions we take place some things, physical objects, but also objects of thought, within our reach, and others outside it (Ahmed 2006, pp. 552-553). Some of the questions which prompted the writing of this paper were within my reach because of directions I took, or directions I was pushed in, while trying to acquire consistent identity documents. When I highlight inconsistencies across policy in this paper, I am not writing with the intention of catching policymakers in logical failures as a kind of intellectual gotcha exercise. I am instead personally frustrated, and tired of my private medical history inadvertently being revealed whenever I produce two forms of identification which list me as two different sexes.

Discussion

Policy indications: denying bodies outside the governmental regime

Bacchi's WPR approach considers the stated aims and intentions of policy, to establish what 'problem' they intend to 'solve'. The report from the Governance and Administration Committee and their recommendations for the bar-2 Bill says the "proposed administrative process would allow people to have greater autonomy over their identity and would make it easier for people to change their registered sex" (2018, p. 2). Crown Law's correspondence with the Department of Internal Affairs notes that "Government agencies rely upon birth certificates when issuing other identity documents" and "[a] number of entitlements, facilities, services, roles and opportunities are reserved exclusively or predominantly for persons of a particular sex or gender" (2019, p. 2). Statistics New Zealand, in correspondence released under an OIA, said they "had assumed that Birth certificates would capture things like Biological sex rather than gender identity...Intersex is most commonly used as a biological sex term, rather than a gender term" (Bloomer 2018). The 'problem' is represented differently by different Governmental agencies: competing understandings foreground the 'problem' of trans people denied agency over their own identity; the 'problem' of using a birth certificate as proof of sex or gender identity; and the 'problem' of "intersex" as an identifying category being interpreted differently by those it may apply to and Statistics New Zealand. It is apparent that the 'problem' being represented in the policy documents related to the bar-2 Bill is not understood to be trans people as an entire group.⁷ The 'problem' is produced as a governmental need to classify citizens according to their sex and gender to permit a secure anchorage to an unchanging identity document (Curragh and Moore 2013); the 'problem' then becomes the disjuncture produced by expressions of sex and gender which are not clearly intelligible within a cisnormative⁸ and binary framework, and the solution is seen to be creating a series of rules and procedures to codify trans people within existing frameworks. The proposed bar-2 Bill would expand these frameworks to encompass non-binary and intersex identities, although this possibility

⁷ I stress here I am discussing this from the perspective of official policy, procedures, documents and correspondence. The 'problem' as it is produced by trans-exclusionary feminists is very much transgender people as a whole, and especially the imagined threat posed by trans women being able to change their birth certificates through self-identification. While concerning and certainly an influence on policy direction, discussing this issue in detail is outside the scope of the paper. I refer to Phipps' work theorising the growth of this movement for additional explanation (2019).

⁸ The term 'cisnormative' refers to the assumption that the subject being addressed is cisgender – that their gender identity is congruent with their assignment sex.

has been flagged as a concern by Statistics New Zealand who requested the Department of Internal Affairs clarify if this proposed designation on birth certificates was intended to serve as a “biological sex” marker or to indicate “intersex” as a gender identity (Bloomer 2018).

Further applying Bacchi’s WPR steps, the underlying pre-suppositions of this ‘problem’ representation are that it is normal and natural to record sex on birth certificates, and that it is necessary for this information to be governmentally validated. Crown Law identify that this designation has only one direct implication: the sex recorded on a birth certificate dictates where an individual is placed if imprisoned. Using the WPR approach indicates that the ‘problem’ is *how* incongruous bodies should be classified, and, continuing to apply Bacchi’s framework, this ‘problem’ has come to be understood as a Governmental concern through the unquestioned assumption that sex is a category which *of course* must be recorded for effective population-level caretaking (healthcare, for example) and control (incarceration). As Spade points out, the normalisation of gathering specific data points can function to make the categories appear apolitical, at least to those to whom their belonging in a category has never been called into question (2015, p. 76).

Another knowledge embedded in this representation of the ‘problem’ is an implied or causative linkage between sex characteristics (be they physical, hormonal, chromosomal, or based on presentation) and gender, which can be codified and quantified (as discussed in more detail in the following sub-section). Also embedded is the expectation that sex is a characteristic which is (mostly) unchanging, or which can move from one discrete category to another in an orderly and linear fashion. Although the bar-2 Bill does not problematise all trans people, it is clearly an extension of the existing legislation which extends acceptability and legitimacy to binary trans people who have the financial means to fulfil the stringent criteria for updating a birth certificate.

As discussed in the introduction to this article, current policies about changing one’s sex on a birth certificate indicate a scepticism of non-binary identities, with the Department of Internal Affairs noting a birth certificate cannot typically be amended from male or female to indeterminate (a change from indeterminate to male or female is possible) (Department of Internal Affairs 2013). The bar to clear in terms of evidence is higher than for the process of changing one’s sex marker from one binary sex to the other, and so specific it has only been met in one case (Department of Internal Affairs

2013). While it is in theory possible to change a birth certificate to 'indeterminate', the applicant must prove their sex was indeterminate at birth but was incorrectly recorded as male or female. The applicant's identity must be proved via a medically sexed body. Intersex conditions or other indications of anything other than a binary sex designation which arise in later life, or could not have been detected at birth, are not considered sufficient proof. Under this policy, one must be born, but cannot become, non-binary.

The requirements for changing a sex marker to a binary identity versus a non-binary one indicates a denial of the possibility of bodies outside a governmental regime. The capacity exists for individuals with a birth certificate which currently lists them as 'indeterminate' to change their sex marker to male or female, or from one binary gender to another. The movement towards a norm is permitted, if the (difficult but not impossible) standards are met, but movement further from them is made virtually impossible in a legal sense. Even the terminology 'indeterminate' suggests the designation is a waypoint: bodies which are waiting to be assigned and have not yet arrived at a destination or identity. It implies subjects who are problematic by nature, a liminal identity category.

The requirement that indeterminate bodies may only be legitimised through medical discourses, and that trans people generally must access treatment "regarded by medical experts as desirable" speaks as well to the privileging of some kinds of bodily alteration over others (Section 28 (3(c))). It suggests that physical characteristics which are either immutable (chromosomes, one of the indicators of an intersex identity which could have been detected at birth) or which cannot be changed without medical assistance will be given greater consideration in deciding an individual's sex than their own claims of identity. Chromosomes cannot be altered, but they also cannot be discerned visually. Hormones, and the secondary sex characteristics they produce, can be administered without medical supervision (although typically they are not). Orchi- or Oophrectomies, and reassignment surgeries require engagement with the medical profession, or to put it another way, surgical interventions indicate that an individual's sex has been judged and validated by one site of power, lending greater weight than self-identification. Medicine testifies to the courts as to the legitimacy of an identity. The locus of power to decide what sex one is, is mutable, but predominantly external to the individual in question under the current structure.

Medicalisation: varying Degrees of Proof, varied access, contingent acceptability

The medicalisation of transness and trans bodies under existing legislation requires that trans people who wish to correct their birth certificates submit to and then disclose a comprehensible narrative of transition as linear and binary, moving from one sex to another. The explanation of oneself and one's body required is a confessional discourse, in that if judged acceptable it then "produces intrinsic modifications in the person who articulates it" (Foucault 2008, p. 62). Even the proposed bar-2 Bill still compels an explicatory narrative: the self-identification requires a statutory declaration which expresses both the applicants nominated sex, and their intention to continue identifying as that sex. This is at odds with an understanding of gender identity as explained by Statistics New Zealand who note that "gender identity can change over [a] lifetime" (2015b). The language used about medical and surgical transition in official advisories is indicative of an expectation that reassignment surgery is desired and a natural end point of a transition, with Statistics New Zealand indicating that someone "currently undergoing" procedures allowing them to take "steps towards" their identified sex should be classified as that sex (Statistics New Zealand 2010). Although the Department of Internal Affairs identifies that previous rulings have acknowledged transition is never 'complete', they add that decisions about when the threshold of "permanent physical change" is reached are determined by medical opinion on a case-by-case basis. Leaving aside the fact that achieving a non-binary marker on a birth certificate is not an option, this also raises the possibility of pursuing permanent bodily changes to satisfy a legal framework and access documents which make one intelligible within a system. Or, more commonly, in practice they make legal recognition and the ability to live a "normal life" a privilege available only to those who have the means to access gender-affirming medical care, in addition to the desire to follow a transition path which as much as possible aligns them within a binaristic framework of sex and gender (Spade 2015).

The language around this part of the legislation is also curious. The current Section 28 provisions require, in part, that expert medical opinion agrees the applicant:

- (a) Has assumed (or has always had) the gender identity of a person of the nominated sex; and
- (b) Has undergone such medical treatment as is usually regarded by medical experts as desirable to enable persons of the genetic and physical conformation of the applicant at birth to acquire a physical conformation that accords with the gender identity of a person of the nominated sex; and

(c) Will, as a result of the medical treatment undertaken, maintain a gender identity of a person of the nominated sex;

In a document providing information about declarations to the Family Court regarding the sex shown on birth certificates, the Department of Internal Affairs quote "*Michael v Registrar-General of Births, Deaths and Marriages* (2008) 27 FRNZ 58 (FC), which notes what is required by the wording of the current Act is that an applicant will prove "some degree of permanent physical change as a result of the treatment (including psychological treatment) received" ([50]).

The implication here of the wording "as a result of the medical treatment" is of a causative link between medical (although in practice this has often been taken to mean surgical) treatment and a felt sense of gender, in that direction (Noonan and Liddicoat 2008, pp. 68-69). In Foucault's phrasing, this is the utilisation of power to affect distribution around a norm: bodies which deviate from binaristic heuristics are a problem to be corrected or solved (Foucault 2008, p. 144). Crown Law's letter to the Department of Internal Affairs also consults the existing case law for guidance on how to determine an individual's gender if sex characteristics are incongruent (2019). Under this format there is no imagined situation in which a non-binary identity is the 'correct' answer (all the case law referred to concerns transitioning from one binary identity to another), but the difficulty encountered by instruments of governmentality in trying to find a watertight definition is revealing. The attempts seek to draw a hard line where none exists.

This medicalisation of bodies also ignores material realities for most trans people in New Zealand. Applying WPR suggests the 'problem' is bodies which need to be re-coded to be intelligible, and implicit is the assumption that trans people will necessarily access gender affirming healthcare. While this is publicly funded in New Zealand, in practice the waiting lists are so long and the services so under-resourced that most people self-fund some or all of their transition-related medical treatment (Noonan and Liddicoat 2008, pp. 52-56). Plemons has identified the issues which occur when plural medical and governmental systems attempt to work in concert to provide gender affirming healthcare, where failures to understand the multiple consecutive and parallel processes required often lead to delayed treatment (2019). Under this model, while it is frustratingly protracted, a kind of self-determination is available to a very few trans people – those who have the financial and other means to access healthcare deemed 'appropriate' by external powers. As Aizura points out, granting access to social legitimacy only to trans people who have accessed reassignment

surgery “forecloses the possibility that some people never wholly cross that particular border; or that for some, gender transition might be a lifelong project” (2007, p. 296), thereby structurally embedding the expectation of a linear progression of transition from one’s assigned gender to a recognisable and normative opposite sex.

The social acceptability of trans people is often restricted only to those who can perform the role of “proper social subjects”, and who are able to adhere to norms in other ways by being economically productive, neurotypical, and willing to explain themselves within existing gendered frameworks (Irving 2008, p. 39). Work on transnormativity may be referred to here, for its identification of how engagement with normative “civic and economic practices” is often invoked when arguing for the legal recognition of *some* trans people (Aizura 2007, p. 299). As Spade puts it, legal equality for trans populations typically “opens doors... for those who are already closest to inclusion”, and the existing policy and application for changing birth certificates perpetuates this, creating a situation in which accurate documentation is only contingently available (2015, p. 27).

Legal protections as they stand divide trans populations into deserving and undeserving, legitimate and illegitimate, and fail to account for, or do not care about, the practical barriers to accessing affirming care. Indeed, legal protections reproduce existing marginalisations, functionally limiting inclusion as a “proper social subject” to trans people willing and able to prove their adherence to norms of gendered presentation and behaviour, which “strive to manifest wholeness or an investment in the self as coherent” (Irving 2008, p. 39; Puar 2017, p. 35). The proposed bar-2 Bill would go some way to remedying this, acknowledging that transness is not a state which is conferred by accessing medical services.

Punishing non-conforming bodies

The existing legislation attempts to make trans people fit within a binary conception of sex and gender, and one in which there is a naturally occurring linkage between bodies and identity. The present model for changing sex on birth certificates only recognises the legitimacy of gender expressions which fit within an existing structure, and those which do not conform are punished through exclusion. As discussed earlier, an inability to present identity documents which have consistent and/or accurate

information is evidence of a failure to fully inhabit the subject position of citizen, with one's identity legitimized by sites of power (Beauchamp 2019, p. 14).

Research indicates that many trans people do not attempt to update their documents, and among those who do these attempts are often slow, invasive, and sometimes unsuccessful (Noonan and Liddicoat 2008, pp. 68-69, 97; Namaste 2000, pp. 242-254, 260-261; Couch et al. 2008). The effect here is of being reminded that one is a body out of place, if the issue is one of failures of systems to accommodate a change (as in the reverting to former markers and names reported by some trans people), or of being judged an unreliable source of information about one's own identity by a site of power. A hyperawareness of the difficulty of updating documents may be partly to blame for this. Foucault's theorising of the self-surveillance and monitoring which results from panoptic power may be applied here as an explanation for individuals deciding not to attempt to update their identity documents (1995, pp. 201-203). If the likelihood of failure or obstruction of these attempts is well known, then it is unnecessary for them to be formally declined, the disciplinary power which doubts the veracity of their gender identity having been internalised.

This self-monitoring and adherence to constructed gendered behaviours and presentations is the process by which the production of subjected "docile bodies" occurs (Foucault 1995, p. 138). A history of medical care and correct documentation being delivered or declined on the basis of a persuasive performance is well known among trans people (Serano, 2016, p. 189); so too are the risks of harassment and violence which come with being gender-nonconforming (Namaste, 2006). Without knowing when one is actively being monitored for signs of adherence or transgression, the safest route is to constantly monitor oneself for adherence to established norms of dress, presentation and behaviour.

Sites of power, external loci of control

Crown Law's letter to the Department of Internal Affairs acknowledges that social factors, or "how society perceives the individual", would likely be taken into account if a court in 2019 were to decide on the legal sex of an individual (Jagose and Perkins 2019). This raises questions about what is left unspecified: which social group's perception is being granted the status of benchmark here? A trans or non-binary person may be perceived very differently depending on who else is in the social group

and where it is. I would expect to be gendered correctly more often in a group of other trans and non-binary people than I would by assistants in a shop. Then again, this changes depending on what I am buying and where: I may be perceived differently in a queer bookshop than when buying milk, for example. In which social contexts is the perception of gender to be drawn from? The inclusion of this point, about the importance of societal perception, by Crown Law is a tacit acknowledgement that cis-passing trans people are more likely to be judged to be the sex they self-identify as, rather than that which was assigned. It does not provide a great deal of comfort for people who do not pass as cisgender, or for non-binary people, who in the social contexts imagined and implied by this language get a raw deal. The provision of medical treatment to trans people on the basis of their current and presumed future ability to pass as cisgender has a long and unpleasant history (Wilton 2018, pp. 162-163, 189-190; Serano 2016, p. 189). The inclusion of this point in policy draws upon a history of capricious provision of care, and arbitrary allocation of rights and complete personhood according to an external, usually cisgender, gatekeeper.

In February 2019 the Minister for Internal Affairs, Tracey Martin, announced via press release that the Bill would be “deferred to deal with problems caused by the select committee process” (Martin 2019). The release noted changes to the Bill relating to “gender self-identification” made by the select committee had not been made with “adequate public consultation”, meaning “stakeholders may have missed an opportunity to comment” (Martin 2019). The press release goes on to say that public consultation for a similar bill in England and Wales was open for almost four months. While the submission period for the bar-2 Bill was shorter than it might otherwise have been had the proposed changes been introduced prior to the select committee process, it is clear that there was an opportunity for affected parties to share their views, and that a significant number of advocacy bodies did so. Trans rights organisations, and LGBTQI+ organisations released a joint statement in favour of the proposed changes, and Gender Minorities Aotearoa also circulated information about how to make a submission to the select committee (Scoop News 2018; Wi Hongi et al. 2018). News media reports indicated that as debate about the Bill increased, so did harassment of trans and non-binary people, as well as of organisations who supported the proposed changes (Strongman 2019). Martin’s claim that ‘stakeholders’ had been denied the opportunity to comment could be argued to have a link to the “social factors” discussed by Crown Law, in that cisgender perceptions of a trans person’s gender are given weight when deciding its validity. Trans rights organisations, representing arguably the stakeholders most affected, did have an opportunity to comment. The harassment of individuals and organisations who spoke up in support of self-identification, coupled with the deferral to allow for further consultation,

implies a structural organisation of “social factors”. The perception of individual trans people from an unspecified public may impact their ability to update documents, and in Martin’s formulation of ‘stakeholders’ so too may the public perception of trans people as a group affect policy decisions.

Beauchamp has theorised how gender nonconformity is frequently constructed and perceived as an implicit threat, discussing how a “broad link between gender nonconformity and deception manifests” including through the treatment of trans people who attempt to update identity documents (2019, p. 9). The monitoring of individuals for evidence of il/legitimacy follows a Foucauldian model: formally adjudicated by obvious sites of power (the courts) and assisted by monitoring from other members of the general population, running horizontally as well as top-down. Fairclough’s theorising of “processes without agents” can be applied here (1995, p. 123). The social perspective of a trans person’s gender is clearly conveyed by individuals making judgements about them, but the language of ‘social factors’ renders these discrete judgements part of a corpus of knowledge. Other members of the public are ‘stakeholders’ in the legitimacy of another’s gender identity. The judgements of what someone’s sex ‘really’ is “just happen”, the agent behind them not acknowledged or defined (Fairclough 1995, p. 123).

Conclusion

Within the analysed documents, particularly those released as debate around the bar-2 Bill gathered momentum and as the Bill was deferred, there was an acknowledgement of some of the issues highlighted in *To Be Who I Am*: namely that the process for updating a birth certificate was time-consuming, stressful, financially onerous, and felt by many applicants to invade their privacy unnecessarily (Martin 2019; Jagose and Perkins 2019). There was a suggestion that steps would be taken to “mitigate” issues relating to updating birth certificates as much as practicable.⁹ Many of the issues, however, are caused by the existing legislation and cannot be mitigated without the steps proposed by the bar-2 Bill. While one document, *To Be Who I Am*, does posit the possibility of removing sex markers from passports completely in response to the increased use of biometric data (biometric data, but particularly facial recognition has been criticised as a technology with potential to harm trans

⁹ At the time of writing it had just been announced that the \$95 fee to change the sex listed on a birth certificate would be waived (Radio New Zealand, 2019).

populations (Keyes 2018)), the analysed documents do not engage in any meaningful critique of the assumed necessity of recording sex. As Bacchi's WPR framework makes clear, one of the underlying knowledges embedded in the policy is an assumption that naturally governments need information about the sex of citizens which is 'accurate' for their purposes.

As the Crown Law letter indicates, the sex recorded on a birth certificate is usually but not always taken as proof of a person's sex, but this may be superseded with reference to "general law". Medical situations are often presented as an example of where this information is necessary, but the multiple possibilities for hormonal and/or surgical interventions mean that appropriate care and assessment of risk factors will vary between individuals anyway. Statistics New Zealand suggests that recording sex is necessary for projecting population growth, but the Human Rights Commission identified that historically the expectations for surgery in order to obtain an updated birth certificate rendered the applicant sterile. It seems perversely cruel to suggest that projecting population growth is a rationale for continuing to record this data, given this fact. As Spade identifies, population "care-taking" always includes a degree of surveillance (2015, p.75). A justification for Statistics New Zealand gathering data on sex then seems to be based on an assumption that sex will *naturally* be a core variable in data if it is to be usefully put to biopolitical ends.

The introduction of X and Intersex markers on birth certificates would expand possibilities for self-identification, and introducing a simpler mode of amending documents based on self-identification would foreground a felt sense of gender as a deciding factor. Questions of how to retain the perceived integrity of sex and gender categories, maintaining a link of some sort between bodily characteristics and recorded sex are a recurring theme in policy and correspondence relating both to the bill as it stands, and the deferral of the bar-2 Bill. Many policy documents slip between referring to 'sex' and 'gender' regardless of what term is used on the documents they refer to (New Zealand Government 2016; New Zealand Government 2018). Statistics New Zealand make a clear distinction between sex and gender, and caution that gender is a data point which should only be gathered when it is explicitly necessary, but make no such caution of gathering data about sex, with the implication that collecting this information is unremarkable (Statistics New Zealand 2010; Statistics New Zealand 2015b). Spade discusses a societal tolerance of particular information being gathered, and the concurrent assumption that it is natural for government agencies to ask for certain information, with such categories taken for granted as "apolitical" and crisply defined truths (2015, p. 76). Existing policy approaches echo

this: adjustments can be made to how data is gathered or what is accepted as ‘proof’ of belonging, but the categories referred to remain unchanged or may be expanded with reference to male and female as the standards from which other identities are a deviation.

Passing the bar-2 Bill then would constitute a tacit acknowledgement of the failures of existing models of defining sex and gender. Crown Law’s correspondence to the Department of Internal Affairs reveals the anxiety caused by this, and the resultant imprecision of references of “general law” in relation to deciding sex for specific purposes. The porous nature of categories as they stand is revealed when attempts are made to draw clear lines, and the implications of an ad-hoc approach to such distinctions is identified when Crown Law comment that it would be a “substantial undertaking” to identify and produce guidelines for every situation in which someone’s sex may need to be known, and that legal definitions of sex have been outstripped by social understandings (Jagose and Perkins 2019).

Objections to a move to self-identification presume that trans people must trade their medical privacy for accurate identification, an expectation which is not applied to cisgender people (a cisgender woman who has had a hysterectomy, for instance, is not required to present a letter confirming that fact along with a psychological assessment of her identity to the Family Court to *retain* the sex marker on her birth certificate). New Zealand’s Privacy Commissioner has additionally stated his support for the proposed changes, on the basis that the existing system denies trans people dignity and privacy (Edwards 2019). That the current mechanisms for defining sex are inchoate is not the fault of trans people, and nor should their ability to live a normal life be indefinitely paused while increasingly granular distinctions are decided upon. The bar-2 Bill prompts questions about the necessity of recording gender, recognising it as a felt sense, and potentially lays the framework for removing it from identity documents altogether.

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