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Transgender Prisoner Reassignment Rights

A Highly Significant Human Rights Issue

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[The Michelle Kosilek decision] is highly significant because of the disproportionately high risk of assault, sexual assault, self-harm and murder that transgender people face in prisons.

On 4th September 2012, the United States District Court made a landmark decision, ordering an inmate to be provided with a taxpayer-funded gender reassignment operation. The decision has sparked controversy around the world. It exposes to the media and public scrutiny the important but rarely considered human rights issue of the entitlements of transgendered inmates.

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This issue is highly significant because of the disproportionately high risk of assault, sexual assault, self-harm and murder that transgender people face in prisons. A major cause of this is the strict male-female segregation within prisons, which is disturbed by people who do not fit into these clear-cut categories.

This article rationalises the decision in the context of rights of inmates to medical treatment in situations of necessity, examining how a case that may initially seem counter-intuitive and unjust is actually the implementation of equal, fundamental rights, and argues that the same standard needs to be applied internationally, including Australia.

A small percentage of people feel a genuine separation between their biologically determined sex and their own sense of gender. This condition has been recognised by the International Classification of Disease and the American Psychiatric Association as Gender Identity Disorder (G.I.D), although its status as a disorder is disputed. Importantly, it is not a mental illness and cannot be cured with psychiatric treatment.

The condition can lead to a sense of detachment from the physical prison of the body and affect interactions with other people. Constant feelings of confusion, unhappiness and a sense of disconnection can cause unbearable mental and emotional stress, which in extreme cases can lead to self-harm and be a contributing reason for criminal behaviour.

Entitlement to gender reassignment is a highly significant human rights issue. People should have the freedom to express themselves without interference or fear, as long as the behaviour causes no harm to others. This includes physical alteration to bring one's body in line with one's sense of self. For some, gender reassignment is the only way of alleviating the continual emotional pain caused by the sense of not belonging in one's own body. In many cases, in order to prevent harm inflicted by transgendered people on themselves or on others, surgery is a medical necessity, whether the person is inside or outside prison.

G.I.D. can be a significant contributory factor that can drive transgender people to commit violent crimes, as the stress it causes can have a serious impact on mental state. People may be even more in need of immediate treatment because the treatment may help relieve their stress and improve their psychological condition, thus aiding rehabilitation. At worst, treatment may be necessary to prevent transgender inmates from harming themselves or others.

This issue has been highlighted by the recent United States case of Michelle Kosilek, formerly Robert. After being convicted for murdering her wife in Massachusetts in 1990, she was sentenced to life in Norfolk prison. Kosilek, who suffers from G.I.D., was so tormented that she attempted castration and suicide (twice). She successfully sued the government in 2000 for violation of the Eighth Amendment, which protects against cruel and unusual punishments.

She subsequently received hormone treatments but not surgery. On 4th September 2012, in the District Court, Judge Wolf made a landmark decision directing state officials to provide gender reassignment surgery to Kosilek. Judge Wolf found that the state had breached Kosilek's constitutional rights by denying it, and that the treatment was the only way of addressing Kosilek's serious medical needs. This is the first decision of its kind, and inmates in Colorado, Idaho, California and Wisconsin have been unsuccessful in similar claims.

In Kosilek's case, gender reassignment surgery was considered a form of necessary medical treatment, which inmates are entitled to in both the United States and Australia. It was established to be necessary in order to deter Kosilek from self-mutilation and suicide. This emphasises the idea that, like many other medical conditions, G.I.D. can lead to pain, suffering and death. Even if the harm is mental or

self-inflicted, it can be just as, or even more, severe. It is important that inmates are able to receive medical treatment if it is necessary for the preservation of their physical and mental wellbeing. If the treatment is gender reassignment surgery, inmates should be entitled to receive it just as much as they would any other health service. Transgender inmates should not be prevented from necessary treatment because of their minority status and their unique circumstances. To exclude them from this basic right to medical treatment is a form of discrimination.

Moreover, Judge Wolf found that, by not allowing Kosilek to undergo surgery, the State was actually breaching her right under the Eighth Amendment to the United States Constitution that forbids cruel and unusual punishment. Although Australia does not have a Bill of Rights or an equivalent document prohibiting cruel and unusual punishment, Australia has readily signed documents such as the *United Nations Convention on Torture and Other Cruel, Inhuman Treatment or Punishment*, which, although not legally binding, should nevertheless be upheld.

It is crucial that the scope of this entitlement be limited to situations where the treatment is desired by the inmate and approved and determined to be necessary by a medical practitioner. After ensuring that the inmate wants gender reassignment, extensive investigation into whether an inmate is mentally suitable for surgery should first take place to confirm that it is the only viable option and will produce a positive outcome.

This is because the operation would need to be taxpayer-funded. This is the primary issue that incited criticism over the Kosilek decision. Transgender support organisations, however, have supported the decision, saying that it highlights the critical importance of gender reassignment surgery in situations like this.

The justification for taxpayer-funding is that gender reassignment surgery is simply a form of medical treatment that should be allowed if it has been established as being necessary for the improvement of an inmate's physical or mental health and the belief that failure to provide it would constitute cruel and unusual punishment.

The United States decision regarding Michelle Kosilek raises the important issue of the rights of transgender people in prisons. This is a human rights issue that essentially questions whether the right of inmates to receive medical treatment when it is deemed necessary for their physical or mental wellbeing is uniformly applied to transgender inmates. This article contends that gender reassignment surgery is simply a form of medical treatment, which inmates should have the right to access if it prevents harm to themselves or others. Therefore, transgender inmates should be able to receive taxpayer-funded gender reassignment surgery in prison if it is desired by the inmate and determined to be necessary by a medical professional. To deny them this right is to deny them a basic right against cruel and unusual punishment, a right that Australia has an obligation to uphold under international conventions. It is important that there is further international attention, education and exploration of this human rights issue, following this decision, in order to provide fair and equitable treatment for inmates, particularly transgender inmates who have so far been disadvantaged by the prison system.

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