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Passports

The Road to Hell

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Article appeared in Polare magazine: October 2006 Last Update: October 2013 Last Reviewed: September 2015



They could be refused entry, or given invasive searches by males, even put into a male holding facility pending deportation, along with drug pushers, criminals, and the insane.

Notoriously paved with good intent. Now the following is conjecture, but its conjecture that fits the evidence. Its the story of how a well-intentioned legislative change can go catastrophically, horribly wrong.

... when given an "M" type passport and presenting as "F", they faced terrible difficulties at checkpoints and border crossings.

Originally, the situation regarding changing of gender was something like this [1]:

"722: Full validity passports issued to transsexuals may show the sex of re-assignment subject to production by the applicant of medical evidence of re-assignment and on provision to the applicant of written advice that the sex indicated in the passport is for that purpose alone (Paragraph 729)."

"723: Each request for a passport showing the sex of reassignment must be supported by a certificate from an appropriate Medical Practitioner stating that successful reassignment surgery has been performed, evidence of change of name, and usage of that name".

Persons travelling overseas for the specific purpose of undergoing a sex reassignment operation may be issued with a passport showing the intended sex on condition that appropriate medical evidence supporting the application is provided. Such a passport will have limited validity for one year and will only be replaced with a full validity passport stating the changed gender on presentation of medical evidence confirming that the operation was performed successfully. People who were transgendered - that is, fulltime cross-dressers, pre-operative transsexuals, and non-operative transsexuals were not considered.

Pre-ops could get a temporary passport in the correct gender to have their surgery, and of course, when post-operative, would get a passport showing their new gender, as a matter of course, and regardless of their marital status or where they were born. This caused considerable hardship in a number of cases. Women who had medical conditions such as diabetes or heart conditions that prevented surgery, yet who had lived in a female identity for years or decades, found that they had to apply as males - and that they had to find a guarantor who had known them for a long time and would attest to their masculinity. This was in many cases impossible. Worse, when given an "M" type passport and presenting as "F", they faced terrible difficulties at checkpoints and border crossings. They could be refused entry, or given invasive searches by males, even put into a male holding facility pending deportation, along with drug pushers, criminals, and the insane. The results were sometimes ... unfortunate. It would have been kinder just to give them a lethal injection. Just as fatal, but with less suffering. In the Re: Kevin decision, Justice Chisholm said in a judgement strongly affirmed by the Full Court on Appeal [2]: I agree with Ms. Wallbank that in the present context the word "man" should be given its ordinary contemporary meaning. In

determining that meaning, it is relevant to have regard to many things that were the subject of evidence and submissions. They include the context of the legislation, the body of case law on the meaning of "man" and similar words, the purpose of the legislation, and the current legal, social and medical environment. These matters are considered in the course of the judgement. I believe that this approach is in accordance with commonsense, principles of statutory interpretation, and with all or virtually all of the authorities in which the issue of sexual identity has arisen. As Professor Gooren and a colleague put it:

"There should be no escape for medical and legal authorities that these definitions ought to be corrected and updated when new information becomes available, particularly when our outdated definitions bring suffering to some of our fellow human beings."

So the Human Rights and Equal Opportunities Commission made a submission ^[3], which read, in part:

"The gender identity of transsexuals is recognised by the Federal Government to a certain extent in relation to passports. A person that has undergone gender reassignment surgery may obtain a new passport in their reassigned sex.

A person intending to travel overseas for sexual reassignment surgery may obtain a temporary passport in their new sex and once the surgery has been completed they will be eligible to apply for a full ten-year passport in their new sex. However, transgender people that have not undergone reassignment surgery are not able to have their identified gender recorded on their passport. A new passport does not mean that the Federal Government recognises transsexual gender identity in any other capacity and this document cannot be used as proof of gender identity for other purposes such as marriage.

It is recommended that the Federal Government review the status of transgender people in relation to the recording of gender identity on passports. Current practices allow for transgender people that have undergone gender reassignment surgery or are intending to undergo surgery to change the sex that is recorded on their passport.

This practice ignores the gender identity of many transgender people that are unable to have gender reassignment surgery for medical or financial reasons and those that have no desire to have such surgery and live comfortably in their identified gender. It is recommended that the Department of Foreign Affairs and Trade, *Manual of Australian Passports Issue* is reviewed to reflect the concerns of the transgender community to have their identified gender recognised on official documents."

Well, they didn't go quite that far. Instead, someone had the bright idea that a document of limited validity, good for five years (later changed to three) not ten, and not considered adequate as a passport by many countries, but with the great virtue that it made no statement about the holder's identity, could be used.

Such a document existed, the Document of Identity, or D.O.I. In response to a passport application by someone who was evidentially transgendered and pre-operative, a D.O.I. would be offered as an alternative to an arguably useless "M" type (for someone identifying as female) passport. No statement would be made about the holder's gender as far as the Government was concerned, and no admission that the holder was really of a gender other than the one they identified as would be required. It had its disadvantages.

Documents of Identity and Transgender people

1. Applicants who are living in the character of a member of the opposite gender may apply for the issue of a Document of Identity. Personal details on a Document of Identity do not include gender. Because of the possible disadvantages in using a Document of Identity for travel, the applicant should be advised in writing that:

- **Some countries do not regard a Document of Identity as a valid travel document;**
- **Customs/Immigration authorities in some countries may view the possession of a Document of Identity in lieu of a passport with suspicion and consequently delay or harass the bearer at entry points; and**
- **Should Customs/Immigration officers decide to conduct a body search there is a very real risk of embarrassment to the bearer (this may also occur to a pre-operative person issued with a limited validity passport).**

Overall though, it was a humane compromise: not quite as good as a full passport, but often good enough, and issue of it avoided all sorts of legal complexities and a possible test case about gender that the Government didn't want. The Re: Kevin decision hadn't gone their way, and who knows what the Courts may find?

A Transgendered applicant would be faced with the question of whether they wanted to fight for years, and have a possibly financially devastating loss and lose existing rights, or accept the compromise. By applying for a passport in an "F" identity, they asserted their right to be considered that, and the Government made no reply either way - just offered this alternative.

And the option of a twelve month validity "F" passport was still there for S.R.S., should they wish to travel for the operation to a country

where a D.O.I. was inadequate. Not perfect, but the hardship caused would be small. Not as good as the U.K. policy, of issuing a correctly gendered passport on evidence of living permanently in the new gender, but good enough. And so it came to pass that the Explanatory Notes to the Australian Passports Determination 2005 ^[4] said, in part:

60: Depending on the circumstances, rather than refuse to issue a passport, the Minister (or a delegate of the Minister) may decide to issue a passport but reduce the validity period, for example, to meet the immediate travel needs of the applicant. In other circumstances, the Minister (or a delegate) may refuse to issue a passport but issue a document of identity to meet the immediate travel needs of the applicant, as noted below (section 6.3).

Section 6.3 Documents of Identity

A document of identity is normally issued to Australian citizens in relation to whom the Minister (or a delegate of the Minister) considers it is either unnecessary or undesirable to issue a passport (paragraph 6.3(1)(a)).

87. An important example of when a document of identity may be issued when it is unnecessary or undesirable to issue a passport is when a person has lost or had stolen two or more passports and the Minister (or a delegate of the Minister) has decided to refuse to issue another passport. The person may be issued with a document of identity for international travel for a particular purpose. This enables the Government to balance the competing policy priorities in the International Covenant on Civil and Political Rights (1980 A.T.S. 23, Article 12) ensuring freedom of movement for a person while enabling the Minister (or a delegate) to act where there are reasonable grounds to believe that the person is allowing others to use the passports for identity fraud or other criminal activity, or that the applicant is simply not adequately protecting his or her passport.

Other examples include: Australian citizens travelling to or from Norfolk Island; and Australian citizens who request a document of identity instead of a passport; and Australian citizens who are transgender, that is are living in the identity of a member of the opposite sex; and Australian citizens being repatriated or deported to Australia or extradited; and Australian citizens in circumstances when an identity document is required to permit travel to a country in which there is an Australian embassy, high commission or consulate to obtain a passport; and Australian citizens to travel until the Minister (or a delegate of the Minister) is satisfied the person meets all the requirements (such as citizenship, no refusal requests, or full consent of all persons with parental responsibility for a child); and Australian citizens whose travel the Minister believes should be restricted.

The intent was not to require the transgendered person to apply for a D.O.I. - for then they would be Australian citizens who request a document of identity instead of a passport. No, by section 60, a D.O.I. would be issued to meet immediate travel needs, in response to a passport request. And there was a problem already. Instead of a full three-year unrestricted D.O.I., this would be only to meet immediate travel needs.

Arguably, the intent was to have the situation similar to that of a D.O.I. for travel to Norfolk island, unrestricted except for the three-year validity, and the restriction that many countries didn't accept a D.O.I. as adequate.

Worse, the notes went on to say:

Validity periods are expressed as maximums and may be reduced depending on the circumstances of the applicant. In most cases, a document of identity is issued for a short-term or single journey. For example, for a document of identity issued to a citizen of another Commonwealth country, a maximum validity period of three months is normally sufficient.

Documents of identity for travel to and from Norfolk Island have a validity of three years. No exception for the transgendered. Normally they would be issued a D.O.I. for a short-term or single journey.

Worst still (I'll be using that phrase a lot in this article), in Vak and Minister for Foreign Affairs and Trade [2002] Minister for Foreign Affairs and Trade [2002] A.A.T.A. 588 (11th July 2002) ^[5] it was held by the Administrative Appeals Tribunal that:

21. Vak has stated that he requires an Australian passport as he needs to attend to his business interests in Australia. He is the sole director of a company, which is registered in Australia and is the trustee of a property trust. The property trust owns and manages a number of investment properties in Australia. Vak and his children are the beneficiaries of that trust. Vak submitted that, in order to fulfil his duties as director, he needs to travel regularly to Australia to attend to matters associated with the investment properties.

Vak also submitted that his failure to be able to attend to the proper management of the Trust could have a considerable detrimental effect on the benefits that his children could obtain under the trust.

36. Given that a document of identity is more circumscribed than a passport and is only given to an Australian citizen, who does not also possess the nationality of a Commonwealth country, in circumstances in which the issue of a passport would be unnecessary or undesirable, it would follow that it should, as a

general proposition, only be given in circumscribed circumstances. It should not be issued in terms that would permit freedom of travel that equates with a passport even if for a shorter period of time.

37. On the material that I have been given, I am not satisfied that Vak should be given a document of identity permitting him any more latitude than one-way trip to Australia. His wish that he be able to bring his children to Australia and his wish to be in Australia to carry out functions as the sole director of a company do not lead me to a different conclusion. He may return to Australia with the document of identity given to him. Having done so, he may pursue his personal interests in Australia. Given that there is an outstanding warrant against him, it would be inappropriate to give him a document of identity that permitted him the freedom to come and go as he likes.

That freedom will be restored to him in the form of a passport when he has dealt with the warrant. It follows that I consider that the decision of the authorised officer to issue a document of identity for a one-way trip to Australia was correct.

The standard of immediate need is set very high. To answer an arrest warrant meets the requirement, to conduct business that would benefit one's children is not. I must assume this to be the case, as the A.P.O. did not consider my needing to travel internationally in order to complete my PhD. a sufficiently compelling reason, despite written testimony from my PhD. supervisor.

A Transgender person, not having the option to address an arrest warrant, but merely by being what they are, may face considerable difficulty getting a D.O.I. under any circumstances. To get necessary surgery was deemed a reasonable excuse in my case, but to enable me to complete my PhD. was not. To enable a Transgendered person merely to have a holiday would seem even less likely to qualify.

Thus Transgendered people are put on a par with criminals or suspects who have been refused passports, those with dodgy documentation, those who are being extradited or deported, those suspected of selling their passports, or suspected terrorists:

Australian citizens whose travel the Minister believes should be restricted.

They are to be kept on a tight leash, their travel restricted despite the International Covenant on Civil and Political Rights.

Why? One can assume because it enables the Government to balance the competing policy priorities, in which case one has to wonder what the policy on transgendered people is. Or one can assume that this is one gigantic train-wreck of unintended consequences to legislation of good intent.

Worse still (told you I'd be using that phrase a lot), the requirements to be issued a full passport after surgery are now more stringent. Merely having surgery is not enough.

A full validity passport in the new gender may be issued to a transgender person who has undergone gender affirmation surgery subject to the applicant meeting all relevant passport application requirements including:

- For applicants born in Australia a birth certificate from their state/territory R.B.D.M. showing the gender of reassignment;
- For applicants born overseas and resident in Victoria for at least twelve months Recognised Details certificate from the Victorian R.B.D.M. acknowledging their name and sex; or
- For other applicants born overseas medical certificates from two registered medical practitioners (who must be contacted to confirm authenticity of the certificate) verifying that the applicant has undergone gender affirmation surgery.

People travelling overseas for the specific purpose of gender affirmation surgery may be issued with a limited validity passport with maximum validity of twelve months showing the intended gender, on condition that certificates supporting the application from two registered medical practitioners (who must be contacted to confirm authenticity of the certificate) are provided stating that gender affirmation surgery is scheduled to take place in {country} on {date}.

Proof of travel could be requested if there are any doubts.

The applicant must meet all the usual passport application requirements (i.e. identity, citizenship and entitlement) first.

The passport will have limited validity for one year. At the time of issuing the limited validity document, the applicant must also be provided with a copy of Letter (XX). The applicant can apply for a gratis full validity passport in their new gender before the limited validity passport expires.

Applicants must meet the requirements outlined in the section above.

Thus we have the absurdity that the Minister can only determine a transgender person's identity if they're unmarried (and thus able to get their birth certificates changed). Unless they were born overseas. And not resident in Victoria for twelve months.

There are confirmed cases of women getting an "F" type passport for their surgery - then being denied a replacement because they were unable to get their birth certificates changed.

Worse still (last time, I promise), no less a person than the Acting Executive Director of the Australian Passport office has stated categorically, and in writing, that a person born overseas must not only be able to prove surgery, but under the Marriage Act, we can't have married people changing their gender and thus must divorce. This despite him being in possession of a letter from the Attorney-General stating exactly the opposite.

And thus by these steps have we entered the place on whose gate is written "Abandon Hope, All Ye Who Enter Here"

References

- [1] [M.A.P.I. circa 2000](#) (Website Link Broken)
- [2] [Re: Kevin in perspective, Deakin Law Review.](#)
- [3] [H.R.E.O.C. Submission to D.F.A.T. 2003.](#)
- [4] [Australian passports Determination 2005 Explanatory Statement.](#)
- [5] [Vak and Minister for Foreign Affairs and Trade \[2002\] Minister for Foreign Affairs and Trade \[2002\] A.A.T.A. 588 \(11th July 2002\).](#)

Getting a Passport Made Easier for Sex and Gender Diverse People

On 11th September 2011, the then Foreign Minister Kevin Rudd and the then Attorney-General Robert McClelland announced new guidelines to make it easier for sex and gender diverse people to get a passport in their preferred gender.

Under the guidelines, sex reassignment surgery will no longer be a prerequisite to issue a passport in a person's preferred gender. "Sex and gender diverse people now have the option of presenting a statement from a medical practitioner supporting their preferred gender", said Mr Rudd. "This amendment makes life easier and significantly reduces the administrative burden for sex and gender diverse people who want a passport that reflects their gender and physical appearance".

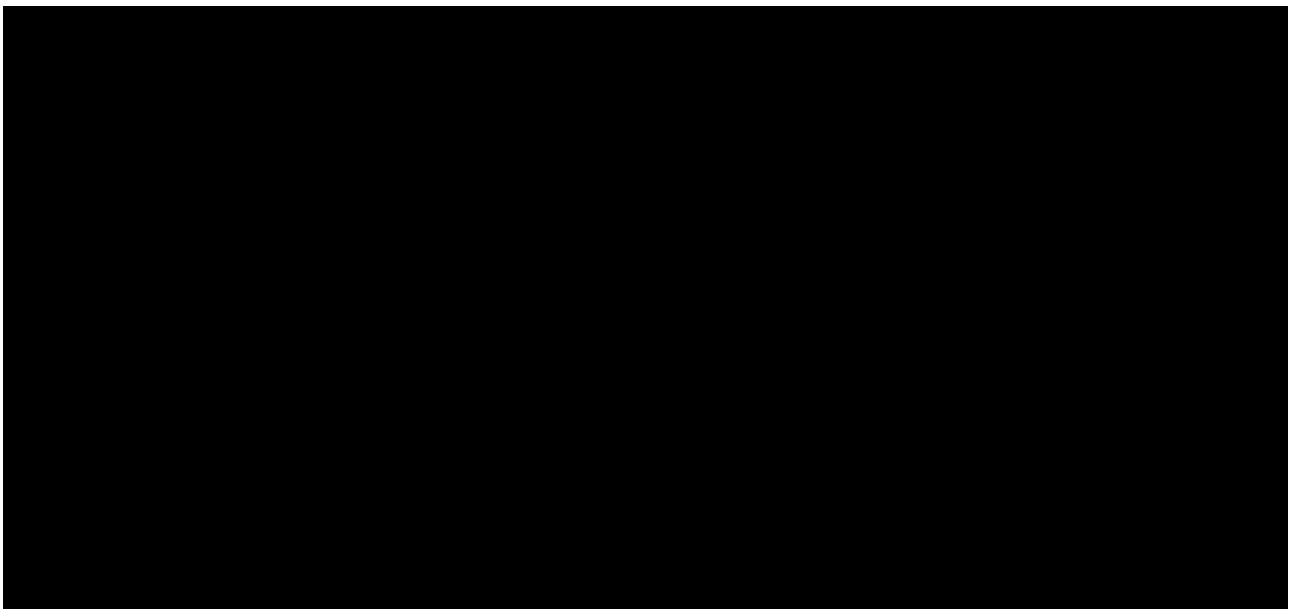
The initiative is in line with the Australian Government's commitment to remove discrimination on the grounds of gender identity and sexual orientation. "Most people take for granted the ability to travel freely and without fear of discrimination", Mr McClelland said. "This measure will extend the same freedoms to sex and gender diverse Australians. While it's expected this change will only affect a handful of Australians, it's an important step in removing discrimination for sex and gender diverse people. Importantly, this policy addresses a number of the recommendations contained in the Australian Human Rights Commissions' *Sex Files* report".

The Hon. Kevin Rudd M.P., Minister for Foreign Affairs
The Hon. Robert McClelland M.P., Attorney-General
Canberra - Wednesday 14th September 2011

Zoe Brain


Zoe's profile on her [award-winning blog](#) reads "Actually, I am a Rocket Scientist. Also hormonally odd (my blood has 46xy chromosomes anyway) and for most of my life, I looked male, and lived as one, trying to be the "best man a gal could be". Anyway, in May 2005 that started changing naturally for reasons still unclear, and I'm now Zoe, not Alan - happier and more relaxed not to have to pretend any more.

Her blog, simply titled: [A.E. Brain](#) has been archived by the Australian National Library and features topics like brains, current events, feminism, space, software, science, and a wealth of information about her personal life, her transition, politics and religion, often with a transgender flavour and transgender human rights.





Video courtesy of [A.B.C.'s Hungry Beast](#) program and YouTube.

In 2010, Zoe was featured on the [A.B.C.'s Hungry Beast](#) program, and as The [Star Observer](#)  newspaper reports: "Now *Hungry Beast* is turning its attention to telling the story of two intersex people. The [A.B.C.'s](#) new part-current affairs, part-sketch show speaks to Zoe Brain, a fifty-one-year-old aerospace engineer, who was born male. At the age of 47, her body suddenly changed to female over a three-month period. The *Hungry Beast* team follows Brain's meeting with twenty-three-year-old graphic designer Natalie Kirk, who was born with female anatomy except for under-developed ovaries. 'For some people it's just really hard to imagine anything but male and female. It's just that some people aren't either,' Kirk says. The show looks at the secrecy intersex people are often forced into, despite one in 100 people being intersex."

Polare Magazine is published quarterly in Australia by The Gender Centre [Inc.](#), which is funded by the Department of Family & Community Services under the [S.A.A.P.](#) program and supported by the [N.S.W.](#) Health Department through the [AIDS](#) and Infectious Diseases Branch. Polare provides a forum for discussion and debate on gender issues. Unsolicited contributions are welcome, the editor reserves the right to edit such contributions without notification. Any submission which appears in Polare may be published on our internet site. Opinions expressed in this publication do not necessarily reflect those of the Editor, The Gender Centre [Inc.](#), the Department of Family & Community Services or the [N.S.W.](#) Department of Health.

The Gender Centre is committed to developing and providing services and activities, which enhance the ability of people with gender issues to make informed choices. We offer a wide range of services to people with gender issues, their partners, family members and friends in New South Wales. We are an accommodation service and also act as an education, support, training and referral resource centre to other organisations and service providers. The Gender Centre is committed to educating the public and service providers about the needs of people with gender issues. We specifically aim to provide a high quality service, which acknowledges human rights and ensures respect and confidentiality.