

Sex and gender diverse people

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9.1 Some statistics¹

- **There are no reliable statistics on the number of NSW residents who have or might be perceived as having issues with their gender identity.** For example, there are no reliable statistics on the number of NSW residents who:
 - Would actively like to change their gender identity or who have changed their gender identity.²
 - Cross-dress but have no wish to change their gender identity.
 - Were born with a combination of male and female characteristics, that are not wholly male or female, that may be both male or female, or neither male or female (intersex) and either have changed or want to change or don't want to change the sex identity they were assigned.
- **The general community, however, is starting to recognise the existence of greater numbers of people who have, or might be perceived as having, gender identity issues** as they become more open about their desires and needs, and as Australian society, government services and the law slowly adapt to their needs.
- **There are no reliable statistics on whether the majority of transgendered people are male to female (MtF) or female to male (FtM).**³ Most members of the general community are less aware of people who have changed or wish to change from the female to male gender, than vice versa — partly because it is often easier for women who change their gender identity to male to “pass” as male (that is, to not be recognised as originally female), than vice versa.
- **The frequency of intersex in the NSW population is unknown but generally expected to be similar to that in other countries.** Researchers have put the number ranging from 1% to 4% of the population.⁴

1 Unless otherwise indicated, the information in 9.1 is drawn from The Gender Centre's website, at <www.gendercentre.org.au>, accessed 16 February 2011. The Gender Centre is a community organisation based in Sydney which is funded by the NSW Department of Community Services and supported by the NSW Department of Health to provide support services to people facing gender identity issues.

2 “Data from smaller countries in Europe with access to total population statistics and referrals suggest that roughly 1 per 30,000 adult males and 1 per 100,000 adult females seek sex gender reassignment surgery” — American Psychiatric Association, *The Diagnostic and Statistical Manual of Mental Disorders (DSM-IV-TR)*, 4th edn, Text Revision, American Psychiatric Association, Washington, DC, p 579. Note that these statistics only identify those who seek reassignment surgery and therefore indicate a much lower incidence than the reality. These figures are under constant revision. According to information received from The Gender Centre, the population trend is towards parity for MtF and FtM change — see n 1.

3 Although, see n 2.

4 “Intersexuality 101”, Kits and Factsheet, The Gender Centre Inc, at <www.gendercentre.org.au/kits.htm>, accessed 21 February 2011.

- **Despite the 1996 introduction of some protection against discrimination on transgender grounds under NSW anti-discrimination law,⁵ there is little doubt that people with, or perceived as having, gender issues are some of the most discriminated against and marginalised people in Australian society.⁶** Our gender is a fundamental part of who we are. Many people regard gender as a fixed matter. Those who act against that norm sometimes have a very difficult time in accepting their own gender identity needs and in being accepted by others. People who wish to surgically change their bodies to conform with their innate gender also have to go through an extensive and lengthy process before this is allowed to occur.
- **As a result:**
 - **Approximately 60% are unemployed⁷** — which means that this community experiences much greater than average levels of poverty.
 - **Of those who *are* employed** — many have felt the need to (or have felt forced to) change jobs during or following their gender identity change, or are working in jobs below their capacity, or are in marginal occupations, such as prostitution.
 - **Many have lost touch with their families and/or previous friends** — in the process of expressing their desired gender identity, although others, for example, have kept and are actively supported by the same partner throughout their gender identity change, and/or have maintained or managed to re-establish their family relationships.
 - **Many have been victims of violence** — Yet many persons with gender identity issues are “reluctant to report violence directed against them due to a number of factors, including low expectations of arrest, the trauma of reporting, and a widespread, shared experience of negative police attitudes”.⁸
 - **Many (although by no means all) did not achieve their full potential during their schooling** — due to the fact that their gender identity was becoming or had already become an issue at that time.

5 *Anti-Discrimination Act 1977* (NSW), ss 38A–38T. Note also that there is as yet no federal statutory anti-discrimination protection for people who have or are perceived as having gender identity issues although the Australian Human Rights Commission released a Discussion Paper in October 2010 and announced a consultation into federal protection from discrimination on the basis of sexual orientation and sex and/or gender identity.

6 See, for example, J Irwin, Australian Centre for Lesbian and Gay Research, *The pink ceiling is too low — Workplace experiences of lesbians, gay men and transgender people*, 1999, Australian Centre For Lesbian and Gay Research, University of Sydney, at <http://glrl.org.au/images/stories/the_pink_ceiling_is_too_low.pdf>, accessed 16 February 2011.

7 As cited on The Gender Centre’s website, at <www.gendercentre.org.au>, accessed 16 February 2011. Elizabeth Riley, General Manager, Gender Centre has confirmed that this figure is based on limited samples in two studies — one conducted by Roberta Perkins in 1994, and the other by the Hunter Area Health Service in 1998. She agreed that these may not be statistically reliable, but stated that both supported a figure of 60%. She confirmed that anecdotal information from The Gender Centre about their clients supports the same figure.

8 Supreme Court of Queensland, *Equal Treatment Benchbook*, 2005, Supreme Court of Queensland Library, Brisbane, p 252, at <www.courts.qld.gov.au/The_Equal_Treatment_Bench_Book/S-ETBB.pdf>, accessed 16 February 2011.

- Many have experienced, or continue to experience, greater than average levels of depression, drug and alcohol abuse and general ill health, and, as a result, there are relatively high levels of criminality within this community.
- Almost all (if not all) will have been discriminated against — often many times, by employers and/or various types of service providers, so are much more likely to be sensitive to this possibility. This may make some of them more likely to name *any* perceived problem, or *any* perceived difference in treatment from the way in which they think people born as male or female would have been treated as being a form of transgender discrimination — even when it is not. However, if you follow the guidance provided in 9.4, below, this should be less likely to occur.

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9.2 Some information

9.2.1 Common misconceptions⁹

There are many false assumptions made about people who have gender identity issues or who are perceived as having gender identity issues. Some of the most common are that:

- **The desire for a change in gender identity is related to or even based on sexual preference or sexuality, and that if only the person could come to terms with their sexuality they would not need to change their gender identity** — Gender identity is very different from sexuality. Some people who change their gender were previously homosexual, some were previously heterosexual and some were previously bisexual. Once they change or move towards changing their gender identity, some keep their original sexual preference towards people of a particular gender, or towards people of both genders, and some change their preference. For example, a person who has changed their identity from male to female may be attracted to men and identify as heterosexual, or they may be attracted to women and identify as lesbian. And, the majority of gay men and lesbians do not have any issues with their gender identity — see Section 8 for more about this.
- **All those with gender identity issues wish to medically and surgically change their gender** — While this is true of some, it is not true of all. Some choose to use only some of the medical and surgical changes available — for example, they may choose to take hormones, but not undergo any surgical changes. Some are medically unable to make use of medical and/or surgical options. Some cannot afford surgery or have religious or philosophical convictions against it, and some simply choose not to do anything medical or surgical.
- **All those with gender identity issues identify so strongly with their chosen gender identity that they behave and dress in a way that represents the more extreme masculine end of the male spectrum of dress and behaviour for those who have chosen to identify as or change to male, or the more extreme feminine end of the female spectrum of dress and behaviour for those who have chosen to identify as or change to female** — In fact, a person assigned a male gender who now identifies as female might or might not dress in an ultra-feminine style, and vice versa. Often there is a progression towards an appearance that coincides more closely with the general community's view of the relevant person's age, socio-economic status and occupation.
- **There is something mentally wrong with people who wish to change their gender identity** — There is increasing medical and research evidence that there is a biological basis for many people's innate gender identity conflicting with their assigned gender.¹⁰ Given the huge repercussions for every aspect of

9 The information in 9.2.1 is drawn from The Gender Centre's website, at <www.gendercentre.org.au>, accessed 16 February 2011.

10 Note the debate about definitions of sex and gender diversity at 4.1 of Australian Human Rights Commission, "Sex Files: the legal recognition of sex in documents and government records", 2009, at <www.humanrights.gov.au/genderdiversity/sex_files2009.html>, accessed 16 February 2011.

their life, no-one takes the decision to change their gender identity lightly. For some, this will be a decision starting to form, or actually taken, in childhood or adolescence. For others, this will be a decision taken much later in life, once they realise that it is no longer possible for them to live a life that is at odds with their innate identity.

9.2.2 Explanations and terminology¹¹

9.2.2.1 Transgender, transgendered and transsexual

Section 38A of the *Anti-Discrimination Act 1977* (NSW) uses the term “**transgender**” to refer to anyone:

- “(a) who identifies as a member of the opposite sex by living, or seeking to live, as a member of the opposite sex, or
- (b) who has identified as a member of the opposite sex by living as a member of the opposite sex, or
- (c) who, being of indeterminate sex, identifies as a member of a particular sex by living as a member of that sex,

and includes a reference to the person being thought of as a transgender person, whether the person is or was, in fact a transgender person.”

This definition does not include people who cross-dress — unless they live or seek to live as a member of the gender whose clothes they are dressing in.

The Gender Centre notes that the legislative definition has limitations and that the “transgender community itself allows for a far more multi-coloured umbrella definition that is inclusive of anyone who transgresses gender norms”.¹²

The term “**transsexual**” is generally used to refer to only those people who are undergoing or have undergone a medical and surgical “**gender transition**” or “**sex change**.”

9.2.2.2 Intersex

“**Intersex**” replaces previous inaccurate and stigmatising terms such as “hermaphrodite” and “pseudo hermaphrodite”. Intersex people are not intersexual, intersexed and do not have intersexuality.

Intersex refers to people who have congenital hormonal, physical or genetic differences that are neither wholly male or female, both male and female at once, or neither male nor female. In other words, intersex refers to an individual at birth who is not “unambiguously male or female”.¹³

11 The information in 9.2.2 is largely drawn from The Gender Centre’s website, see n 9.

12 Gender Centre website, “Kits and Fact Sheets”, see n 9.

13 *Kevin v Attorney-General* (Cth) [2001] Fam CA 1074; (2001) 165 FLR 404 at [224].

Intersex includes a wide variety of diagnoses although the diagnosis by itself does not necessarily indicate intersex. The most common underlying diagnosis that may lead to intersex are congenital adrenal hyperplasia (CAH), androgen insensitivity syndrome (AIS) and Klinefelter syndrome (XXX).

Intersex people are generally male or female, living as men or women who are comfortable with their gender. It is uncommon for an intersex person to reject the sex they were assigned at birth however there is a significant number who do.

Intersex births are often seen as presenting parents with a dilemma that can only be resolved with medical intervention that often means genital surgery. Most surgery conducted on intersex newborns is not life preserving, rather it is cosmetic and an attempt to provide parents with an apparently normal child. Long-term consequences of these interventions are not well documented.¹⁴

9.2.2.3 Male-to-female (MtF) and female-to-male (FtM)

Male-to-female (and its abbreviation MtF), and **female-to-male** (and its abbreviation FtM), are used to describe the gender direction that a transgendered or transsexual person has taken, or wants to take.

The terms “**male-to-female transgender(ed) person**” or “**male-to-female transsexual person**”, and “**female-to-male transgender(ed) person**” or “**female-to-male transsexual person**” are the best terms to use when describing the direction of a person’s gender identity change or desire for change.

However, those with legal recognition of their gender (see 9.3) may wish to be described as “**female**” or “**male**” instead of “male-to-female”, or “female-to-male”.

9.2.2.4 Cross-dressing and transvestism

The term “**Transvestite**” describes a person who cross-dresses rather than someone who believes that their gender identity is different to their assigned gender.

Some people cross-dress only in private or only on stage. However some do so more widely than this and may, for example, appear in court in cross-dress.¹⁵

Some cross-dressers are gay or lesbian and some are heterosexual.

14 The information in 9.2.2.2 is drawn from the Organisation Intersex Australia’s website, at <<http://oiaustralia.com/information/intersex>>, accessed 21 February 2011 and from The Gender Centre’s website, see n 9; Supreme Court of Queensland, *Equal Treatment Benchbook*, 2005, Supreme Court of Queensland Library, Brisbane, p 252; for information about intersexuality and the gender assigned early in life, see *Kevin v Attorney-General (Cth)* [2001] particularly at [209]–[273], above n 13.

15 Supreme Court of Queensland, *Equal Treatment Benchbook*, see n 8, p 252.

9.2.2.5 Other terms

Other terms used to describe transgendered people (for example, “trany” or “trannies”, “gender-bender”, “butch”, “drag queen”, “she-man”, “she-male”, “tomboy”) within transgendered communities in Australia and overseas, are generally not appropriate to use unless you are a part of that community, or have been given specific permission to use the particular term. Indeed, many are considered derogatory when used outside transgendered communities, and even at times when used inside or outside transgendered communities.

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9.3 Legal gender identity

In NSW, some transgendered people are legally recognised in terms of their new gender by being given a new birth certificate showing their new gender and name.

Those who can get a new birth certificate must:

- Be over 18.
- Have had gender reassignment surgery.
- Be unmarried.
- Either have been born in NSW, or be able to provide a “recognition certificate” or amended birth certificate of their transsexual status from another Australian State or Territory, or from their overseas place of birth.¹⁶

People who do not meet the above conditions cannot have their new gender legally recognised in NSW. However, NSW anti-discrimination law gives them the right to not be discriminated against in relation to employment and many types of service provision, which in many instances will mean that, for all practical purposes, they should be treated in public interactions as possessing the gender they identify with — including being able to use the toilets of their chosen gender.¹⁷

As yet, there are no Commonwealth statutory provisions for such legal recognition.¹⁸ However, the landmark case of *Kevin v Attorney-General (Cth)*¹⁹ (“Re Kevin”) and the subsequent appeal proceedings before the Full Court of the Family Court of Australia²⁰ appear to have substantially moved the goalposts by deciding that a female-to-male (FtM) transsexual was a man within the meaning of s 46(1) of the *Marriage Act* and s 43 of the *Family Law Act* at the time of the marriage, and that he was therefore legally entitled to marry a woman.²¹

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16 *Anti-Discrimination Act 1977* (NSW), s 4 and *Births, Deaths and Marriages Registration Act 1995* (NSW), s 32B.

17 Anti-Discrimination Board of NSW, *Transgender discrimination — Your rights*, fact sheet, at <www.lawlink.nsw.gov.au/lawlink/adb/ll_adb.nsf/pages/adb_transgender>, accessed 16 February 2011.

18 The Australian Human Rights Commission released a Discussion Paper in October 2010 and announced a consultation into federal protection from discrimination on the basis of sexual orientation and sex and/or gender identity. See <www.humanrights.gov.au/pdf/human_rights/lgbti/lgbticonsult/SOGIdiscussion_paper.pdf>, accessed 21 February 2010.

19 [2001] Fam CA 1074; (2001) 165 FLR 404.

20 *Attorney-General (Cth) v Kevin* [2003] Fam CA 94; (2003) 172 FLR 300.

21 For a discussion of *Kevin v Attorney-General (Cth)* by the lawyer who appeared for Kevin, see R Wallbank, “Neglected Communities — The Legal Environment Following Re Kevin: New Perceptions And Strategies”, speech presented at Parliament House, 25 February 2003, at <www.gendercentre.org.au/neglected2.htm>, accessed 16 February 2011.

9.4 The possible impact of gender identity issues in court

Unless appropriate account is taken of any gender identity needs of those attending court, transgendered people are likely to:

- Feel uncomfortable, resentful or offended by what occurs in court.
- Feel that an injustice has occurred.
- In some cases be treated unfairly and/or unjustly.

These problems are likely to be compounded if the person also happens to be Indigenous, from an ethnic or migrant background, a young person, gay or lesbian, female, a person with a disability, or if they practise a particular religion or are representing themselves — see the relevant other Section(s).

Section 9.5, following, provides additional information and practical guidance about ways of treating transgendered people, so as to reduce the likelihood of these problems occurring.

The boxed areas provide the practical guidance.

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9.5 Practical considerations

9.5.1 Mode of address and gender to use

It may not always be immediately clear (and in many cases will also not be legally relevant) **whether a particular person is legally recognised as the gender of their choice.**

It can also be easy to make a mistake about a transgendered person's identity of choice, given that he or she may not always look, dress or behave in a manner that fits with the general community's view about how people of that gender should look, behave or dress.

Points to consider:

- **Always address a transgendered or intersex person (whether transsexual, transgender, intersex or cross-dresser) using the name, gender-specific title (Ms, Mr) and gender they wish to use.**
- **If there is any doubt about the gender identity used by the particular person, sensitively ask what name and mode of address they want the court to use.**
- **Apologise if an initial mistake has been made about a person's gender identity.**
- **Once established, use the agreed gender or sex terminology (he or she, her or his, male female intersex) throughout the court proceedings.**
- **Ensure that the person is treated throughout the proceedings as a person of the gender or sex they identify with** — see also 9.5.4.
- **Ensure that any originally assigned sexual identity is only revealed or discussed where relevant to the proceedings.** — In other words, unless absolutely necessary, a person's gender or sex and any description of their gender should be based on self-identification.²²

9.5.2 Appearance and behaviour

Transgendered and intersex people must be accorded the same dignity and respect as anyone else.

Points to consider:

- **Be sensitive to the fact that a transgendered and intersex person's style of dress may or may not accord with the general community's view of how someone of that gender or sex should dress.** No discomfort should be shown with the person's chosen dress style. A transgendered and intersex person (including a cross-dresser) should be allowed to present their evidence in whichever gender or sex's dress they are wearing.
- **Be sensitive to the fact that a transgendered and intersex person's behaviour traits may or may not accord with the general community's views about how someone of that gender or sex should behave.** No discomfort should be shown with any behaviour that is more common in someone of the person's chosen gender or sexual identity (or indeed more common in someone of the person's originally assigned sex) than is comfortable for others.

²² Supreme Court of Queensland, *Equal Treatment Benchbook*, 2005, see n 8, p 251.

- **Be aware that you may need to ensure that the jury understands the need for such sensitivity early in the proceedings rather than waiting until you give your final directions to them** — otherwise, their initial assessment of a particular person may be unfairly influenced by false assumptions, and may not be able to be easily changed by anything you say in your final directions to them — see also 9.5.5.
- **As prescribed by law, intervene if it appears that any cross-examination is unfairly or inappropriately alluding to any particular (allegedly) gender or sex-determined difference in appearance or behaviour.**²³

9.5.3 Language and terminology

Points to consider:

- **Use sex or gender identity descriptors only when relevant to the matter before the court, and then use only those that are both accurate and acceptable to the particular transgendered person** — see 9.2.2 and 9.5.1.
- **Do not use any form of discriminatory or discriminatory-sounding language** — for example, do not state or imply, that a transsexual or intersex is not a real woman or man.²⁴
- **Treat everyone as an individual, and do not make statements that imply that all those with (or perceived as having) a particular gender identity issue, are the same, or likely to act in the same way.** Never assume or imply that even what you suspect or know to be the majority way of behaving, or thinking for a particular transgender group, is the standard by which any individual member of that group should be judged.

9.5.4 The impact of gender identity issues on any behaviour relevant to the matter(s) before the court

As indicated in 9.1, people who are transgendered or intersex have often had many more difficult issues to contend with than the average person.

Points to consider:

- **Treat a transgendered or intersex person, wherever legally possible, as someone of the gender or sex they identify with throughout the proceedings.** In this connection, note, for example, that the definition of the word “vagina” includes “a surgically constructed vagina”.²⁵

23 Note that s 41 of the *Evidence Act 1995* (NSW) provides that a judicial officer must disallow improper questions (for example, misleading, or unduly annoying, harassing, intimidating, offensive or repetitive) questions, and also provides that questions must not be put to a witness in a “manner or tone that is belittling, insulting or otherwise inappropriate” or “has no basis other than a stereotype (for example, a stereotype based on the witness’s sex, race, culture, ethnicity, age or mental, intellectual or physical disability)”. Sections 26 and 29(1) of the *Evidence Act 1995* also enable you to control the manner and form of questioning of witnesses, and s 135(b) of the *Evidence Act 1995* allows you to exclude any evidence that is misleading or confusing.

24 *ibid.*

25 *Crimes Act 1900* (NSW), s 61H.

- **Be careful not to let stereotyped views about transgendered or intersex people unfairly influence your (or others’) assessment.** For example, as prescribed by law, you may need to intervene if any of the common misconceptions listed in 9.2.1 appear to be unfairly behind any questioning.²⁶
- **Ensure that any values and practices that appear to be related to a person’s transgendered or intersex status are accorded respect by everyone in court** — while explaining and upholding the law where it conflicts with the particular value(s) or practice(s). For example, this may mean intervening if cross-examination becomes disrespectful, or if it fails to take into account a relevant gender or sexual identity difference.²⁷
- **Has the fact that the person is transgender or intersex, together with any difficulties they might have experienced as a result of this, been an influencing factor in the matter(s) before the court? If so, where possible, take appropriate account of these influences.** For example, you may need to decide whether the law allows you to take account of any such influences and, then, as necessary and at the appropriate time in the proceedings, so as to ensure that justice is done and seen to be done, explain why any such influences can/should be taken into account, or cannot/should not be taken into account. And, for example, you may need to explain this in any direction you make to the jury during the proceedings or before they retire, and in your decision-making or sentencing — see 9.5.5 and 9.5.6.

9.5.5 Directions to the jury — points to consider

As indicated at various points in 9.5, it is important that you ensure that the jury does not allow any ignorance of gender or sexual identity issues, or stereotyped or false assumptions about transgendered or intersex people to unfairly influence their judgment.

In your final directions to the jury, you may need to remind them of any points in relation to these aspects that you alerted them to during the proceedings, and/or cover them for the first time now.

This should be done in line with the *Criminal Trial Courts Bench Book*²⁸ or *Local Courts Bench Book*²⁹ (as appropriate), and you should raise any such points with the parties’ legal representatives first.

²⁶ See n 23.

²⁷ *ibid.*

²⁸ Judicial Commission of New South Wales, *Criminal Trial Courts Bench Book*, 2002–, Sydney, at <www.judcom.nsw.gov.au/publications/benchbks/criminal>, accessed 16 February 2011.

²⁹ Judicial Commission of New South Wales, *Local Courts Bench Book*, 1988–, Sydney, at <www.judcom.nsw.gov.au/publications/benchbks/local>, accessed 16 February 2011.

For example, you may need to provide specific guidance as follows:

- **That they must try to avoid making stereotyped or false assumptions** — and what is meant by this. For example, you may need to specifically remind them that while the transgendered or intersex person’s behaviour and/or gender or sexual identity may not accord with behaviour they themselves regard as morally acceptable, they must “remember that this is a court of law and not a court of morals”.³⁰ And then direct them to the specific questions they must decide. And finally explain that they must decide the matter(s) on the issues without prejudice to anyone.
- **On the other hand, that they may also need to assess the particular person’s evidence alongside what they have learned in court about the way in which transgendered or intersex people often have to live their lives** as opposed to the way in which they themselves might act. In doing this you may also need to provide guidance on any legal limitations that exist in relation to them taking full account of any of these matters. And you may also need to be more specific about the particular gender or sexual identity aspects that they need to pay attention to.

9.5.6 Sentencing, other decisions and judgment or decision writing — points to consider

Your sentencing, decision(s) and/or written judgment or decision must be fair and non-discriminatory to (and preferably be considered to be fair and non-discriminatory by), any transgendered or intersex person affected by or referred to in your sentencing, decision and/or written judgment or decision.³¹

Points to consider:

- **In order to ensure that any intersex or transgender(ed) person referred to or specifically affected by your sentencing, decision(s) and/or written judgment or decision also considers it/them to be fair and non-discriminatory, you may need to pay due consideration to (and indeed specifically allude to) any of the points raised in the rest of 9.5 (including the points made in the box in 9.5.5) that are relevant to the particular case.**
- **Whether to allow a victim impact statement to be read out in court.**³²

30 The “Court of Morals” Direction, NSW Criminal Law Review Division, *Homosexual Advance Defence: Final Report of the Working Party*, 1998, para 6.12, cited in Supreme Court of Queensland, *Equal Treatment Benchbook*, see n 7, p 253 and <www.lawlink.nsw.gov.au/_ca25674b002a159b.nsf/0/16fce0248500356cca25674b0029093e?OpenDocument>, accessed 16 February 2011.

31 See also Judicial Commission of New South Wales, *Sentencing Bench Book*, 2006, Sydney, “Sentencing procedures generally” at <www.judcom.nsw.gov.au/publications/benchbks/sentencing/toc-sentencing_procedures_generally.html>, accessed 16 February 2011 and *R v Henry* (1999) NSWLR 346 at [10]–[11].

32 See Pt 3, Div 2 of the *Crimes (Sentencing Procedure) Act 1999* (NSW) and the Charter of Victims Rights (which allows the victim access to information and assistance for the preparation of any such statement). Note that any such statement should be made available for the prisoner to read, but the prisoner must not be allowed to retain it.

- ▣ **Bear in mind that:**
 - **Many transgendered or intersex people live in poverty** — so a specific level of fine for any such transgendered or intersex person will often mean considerably more than the same level of fine for someone who does not live in poverty.
 - **Transgendered or intersex people who are sent to prison face particular difficulties because of the way their gender or sexual identity is perceived by other inmates.** In general, the practice of the NSW Department of Corrective Services is to send all those who fit the NSW Anti-discrimination law definition of a “transgender person” (see 9.2.2.1) to the prison of the gender they identify with. This means that in general only those who are cross-dressers who do *not* identify with the gender they cross-dress in will be sent to the prison of their originally assigned sex. In practice, most transgendered or intersex people end up in solitary confinement for their own protection.
 - When considering incarceration, sex appropriate accommodation must be taken into account. Intersex people because of their physical differences might be vulnerable to abuse and victimisation in both male and female facilities.

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9.6 Further information or help

- The following community organisation, funded by the Department of Community Services and supported by the NSW Department of Health, can provide further information or expertise about sex or gender identity, and also about other appropriate organisations, individuals, and/or written material, as necessary.

The Gender Centre

7 Bent Street
PO Box 2661
Petersham NSW 2049
Ph: (02) 9569 2366
Fax: (02) 9569 1176
www.gendercentre.org.au

Inner City Legal Centre

(includes Transgender Advice Service and the Intersex Advice Service)
Lower Ground Level
50–52 Darlinghurst Rd
Kings Cross NSW 2011
PO Box 25
Potts Point NSW 1335
Phone: 02 93321966
Fax 02 93321966
www.iclc.org.au

Organisation Intersex International Australia

22 Marion Street
Auburn NSW 2144
Ph: 0418 290336

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9.7 Further reading

American Psychiatric Association, *The Diagnostic and Statistical Manual of Mental Disorders* (DSM-IV-TR), 4th edn, Text Revision, American Psychiatric Association, Washington, DC.

Australian Human Rights Commission, “Sex Files: the legal recognition of sex in documents and government records”, 2009, at <www.humanrights.gov.au/genderdiversity/sex_files2009.html>, accessed 22 February 2011.

Australian Human Rights Commission, *Protection from discrimination on the basis of sexual orientation and sex and/or gender identity*, Discussion Paper, October 2010, at <www.hreoc.gov.au/human_rights/lgbti/lgbticonsult/index.html>, accessed 22 February 2011

The Gender Centre’s website, at <www.gendercentre.org.au>, accessed 16 February 2011.

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9.8 Your comments

The Judicial Commission of NSW welcomes your feedback on how we could improve the *Equality before the Law Bench Book*.

We would be particularly interested in receiving relevant practice examples (including any relevant model directions) that you would like to share with other judicial officers.

In addition, you may discover errors, or wish to add further references to legislation, case law, specific Sections of other Bench Books, discussion or research material.

Section 11 contains information about how to send us your feedback.

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