

SPORT

Naturalising sex difference through sport An examination of the New South Wales transgender legislation

*There is no such thing as nature, only
the effects of nature:
denaturalisation or naturalisation*
Derrida

Through an examination of the *Transgender (Anti-Discrimination and Other Acts Amendment) Act 1996* (NSW) this article aims to highlight the significance of sport and the sport/sex/law nexus in contemporary culture. The binary opposition of sex, that is of male and female, is a division generally considered immutable and self evident. However, as transgender persons have increasingly brought their sex claims into the public domain, the 'coherence' of sex has been problematised. The importance of sport in this context is that it serves as a sign of authentic sex. In a world where sex can increasingly be misread, sport provides a space for 'correct' readings.

The NSW legislation recognises the problematic nature of the category of sex in providing for the legal recognition of the sex claims of post-operative transgender persons. Thus by virtue of the second schedule to the Act male to female transgender persons who have undergone sex 'reassignment' surgery are eligible to have their birth certificates altered to indicate their female sex. Upon completion of this administrative act the male to female transgender person is considered to be female ('a recognised transgender person') for the purposes of the law of New South Wales (s.32I).

While the second schedule to the Act is concerned with legal recognition of the sex claims of transgender persons the first schedule is primarily concerned with, and makes unlawful, discrimination on transgender grounds. The anti-discrimination protection provided extends to all transgender persons whether pre, non or post-surgical subjects. However, and irrespective of the surgical status of transgender persons, the legislation provides exceptions to the unlawfulness of discrimination on transgender grounds. For present purposes attention is drawn to s.38P of the legislation which makes clear that nothing in the legislation 'renders unlawful

the exclusion of a transgender person from participating in any sporting activity for members of the sex with which the transgender person identifies'.

It is through this provision, a provision which appears as an internal contradiction to the legislation as a whole, that the naturalisation of sex difference finds its most emphatic realisation. The logic of the provision is particularly suspect with regard to 'recognised transgender persons'. In relation to pre or non-surgical male to female transgender persons protection against discrimination is based on transgender not female status. Accordingly, the exclusion of such a person from a sporting competition for women does not point to any formal inconsistency in the legislation. Conversely, in the case of post-surgical persons ('recognised transgender persons') the effect of s.38P is to exclude from women's sport, persons recognised by the Act to be female.

It would appear that the overarching and denaturalising tendency of the legislation as a whole is undercut by considerations of sport which serve to place the nature and value of legal recognition in issue. Indeed, it would appear that sport serves to unmask legal recognition as a therapeutic concession to 'gender dysphoric' subjects. Thus the male to female transgender person while both surgically and discursively produced as female is in fact juxtaposed in law with 'real', 'authentic', 'natural' woman, in relation to whom she cannot hope to be more than a poor copy. Despite legal recognition of post-surgical transgender persons it would seem that the 'truth' of sex continues to be biological, a 'truth' rendered particularly visible through sport.

However, s.38P not only serves to reproduce and naturalise sex difference in law. Rather, the provision, and the parliamentary debates surrounding women's sport, reveal that in legal discourse sex difference bears an inferior/superior relation. Specifically, the body sexed female is marked as inferior. Indeed, the view that women are something less than men, in a physical sense, is common to the arguments of both

parliamentary proponents and opponents of s.38P. While those who favour the provision argue directly from this premise their opponents do so inadvertently. Thus members opposing s.38P make reference to less than perfect sporting performances by transgender persons. Thus Renee Richards' failure to win Wimbledon is presented as evidence that she is a woman.¹ In both instances it is defeat which serves to locate 'woman'. On the one hand, the exclusion of transgender persons is a response to the fear of defeat, while on the other, proof of a transgender person's womanliness lies in her own defeat. Further, groups such as The Women in Sport Foundation prove to be complicitous in marking the female body as inferior:

We believe that post operative male transsexuals have an unfair physical advantage over females in sport because of their pre-existing superior anatomical and physiological characteristics, which develop as a result of puberty.²

Yet, the division of sport along sexed lines contains a certain arbitrariness. Differences in factors such as heart size, lung capacity, muscle mass and body fat often traverse, rather than parallel, the division of sex. As Australian Democrats MP Elizabeth Kirkby points out the precise configuration of these attributes in any particular individual is more a matter of genetics than sex.³ If there were a genuine concern to institute a level playing field in the arena of sport it would be necessary to take into account differences among men and women as well as between them and to consider the pertinence of these various differences to a multiplicity of sports. Further, it would be necessary to consider the effects of 'reassignment' surgery and hormone therapy on the competitive edge of a transgender person as well as matters such as the removal of ovaries on female performance.

While one parliamentarian considered s.38P's failure to ensure, in practice, the exclusion of transgender persons from women's sport to be a betrayal of women,⁴ it is in fact s.38P that represents a betrayal of all women, including transgender women. For it is

through this legislative exception that women are represented as inferior and that inferiority is naturalised. It would seem then that the sport/sex/law nexus is an important site of cultural production, and one which, in the present context, serves to envelope and normalise the female body.

References

1. See the Hon. Dr B.P.V. Pezzutti, Debates of the Legislative Council, 4 June 1996, p.2390. See also Birrell, S. and Cole, C.L., 'Double fault: Renee Richards and the Construction and Naturalization of Difference', (1990) 7 *Sociology of Sport Journal* 1-21.
2. See the Hon. J.P. Hannaford, Debates of the Legislative Council, above, p.2367.

3. Debates of the Legislative Council, above, at p.2371.
4. See the Hon. Dr M. Goldsmith, Debates of the Legislative Council, above, at p.2391.

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The Super League case: a level playing field at last

This article will examine the contrasting *News Ltd v ARL* (Super League) decisions in the context of the transformation of sport from recreation to commodification. It will become apparent that the recent Super League appeal decision not only ended the ARL monopoly on Rugby League but laid to rest the myth that sport is purely for sport's sake. The appeal court chose to recognise the commercial context in which sport exists — corporate sponsorship, merchandising, advertising, pay television — refusing to insulate sport from the economic realm.

The legal point at issue

The *News Ltd v ARL* case highlights the commodification of sport as two corporations fought for the rights to a marketable product — Rugby League. *News Ltd* contended, among other things, that the ARL had breached s.45(2) of the *Trade Practices Act 1974* (Cth). This section prohibits a corporation from making a contract or arrangement which contains exclusionary provisions which would have the effect of substantially lessening competition in a 'relevant market'. *News Ltd* argued that a 'relevant market' did exist in the form of a 'Rugby League Competitions Market' which involved the provision of goods and services in the form of entertainment — broadcasting, merchandising and sponsorship.

News Ltd v ARL (No.1)¹

At first instance Burchett J held that a 'relevant market' for Rugby League did not exist because its products were readily substitutable. In other words, if goods can be substituted then a market for them cannot exist. This form of judicial reasoning and economic analysis is suspect because it views sport as a monolithic category, characterised by its sameness rather than the highly differentiated and culturally rich phenomena that it is in reality. Thus none dare confuse Rugby Union 'the game

they play in heaven' with Rugby League.

The insistence of Burchett J that no 'relevant market' for Rugby League exists appears to be explicable as a form of purposive judicial reasoning concerned to insulate sport, and the values traditionally associated with it, from the domain of commerce. Further, in seeking to locate Rugby League beyond the claims of commerce Burchett J contended that while most clubs engage in 'incidental trade' they were formed for the purpose of playing and promoting their respective codes of sport and not for the purpose of trade or commerce. While this may have been the case in 1907 it is a far cry from the commercial reality of rugby league in 1996. It is also important not to lose sight of the fact that Rugby League emerged in 1907 as a departure from Rugby Union, motivated by the desire to pay players for their services.

News Ltd v ARL (No.2)²

On appeal Lockhart, von Doussa and Sackville JJ held that the terms of the commitment and loyalty agreements made between the ARL, clubs and players had the purpose of preventing, restricting and limiting competition and were therefore void under the *Trade Practices Act*. While the appeal court did not address the question of 'relevant markets' it would appear implicit that the court viewed Rugby League as constituting a market.

Further the court rejected Burchett's attempt to characterise, indeed idealise, the activities of the ARL, its clubs and players as unrelated to and distinct from business:

Much of the reasoning of the trial judge and the submissions of the respondents proceeded on the basis that the relationship between the League and the ARL and the Clubs existed outside the sphere of business activity. In our view the League were engaged in trade and commerce . . . Plainly the League, ARL and Clubs were concerned to strengthen the

national competition so as to enhance revenue potential. [at 212]

Conclusion

The appeal court decision is to be welcomed. As the appeal court judges point out 'a decision as to where the best interests of the game lie is not one that lends itself to judicial determination'. Ultimately, it will, and ought to be, the players and spectators of Rugby League who will decide where the best interests of the beloved game lie. The ruling that the ARL does not have a monopoly over Rugby League was a necessary precondition for effective player-spectator participation in the game's future.

Further, the decision helps explode the myth of traditional values of sport (sport for sport's own sake) which no longer appear to operate in the contemporary world, if they ever did. In this sense Burchett J's judgment gazes back romantically to a bygone, perhaps mythical, age whereas the appeal court recognised the reality of sport as having complex relations with various dimensions of the wider society in which it is located.

References

1. *News Ltd v ARL Ltd & NSWRL Ltd & Ors* No. NG 197 of 1995, Fed. No. 72/96.
2. *News Ltd & Ors v ARL Ltd & Ors* No. NG 213/96.

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