

**Threats to TGD Mobility and Migration:
Non-Binary Legal Recognition and Security Technologies**
CQ Quinan (University of Melbourne)

Introduction

I am a Senior Lecturer in Gender Studies at the University of Melbourne. My expertise lies in the fields of transgender studies, queer theory and critical security studies. I publish widely on (1) the impacts of biometric security practices (e.g. body screening, facial recognition) on trans migrants and travellers, and (2) trans and non-binary legal recognition, including how sex/gender data collection affects trans and gender diverse communities. This research is fundamentally shaped by my lived experience as a trans non-binary person and my attention and sensitivity to the needs of my participants and collaborators. As one of the region's leading academics in the field, I have also designed and implemented Australia's first university-based subject focused entirely on transgender studies.

Trans and gender diverse (TGD) people regularly experience discrimination when migrating and traveling across borders. While Australia has been at the forefront of addressing gender diversity and has invested significant resources into TGD inclusion and legal recognition, bureaucratic measures and biometric technologies continue to adversely impact TGD people's right to free movement. This submission seeks to outline how changes to both legal gender recognition and border security technologies impact the mobility, wellbeing and human rights of TGD people. This is supported by my ongoing research, including qualitative interviews and surveys with self-identified TGD individuals in Australia and overseas.

Security Structures and Obstacles to Mobility

TGD populations experience distinct obstacles when crossing borders. These can include identity verification challenges and difficulties in accessing legal documents that do not accurately reflect gender identity; interrogation when passing through biometric checkpoints; and intrusive full-body scanning. TGD individuals are often questioned or detained because of documentation that does not meet the expectations of border control authorities and security technologies. This treatment is often due to discrepancies between physical appearance (e.g., gender expression, dress, behaviour) and the sex/gender marker and/or photograph included in identity documents. Due to the administrative and medical hurdles of updating documentation, many trans people have inconsistencies across documents, which can be cause for being stopped due to alleged falsification of identity documents. Full body scans and pat-downs can also result in humiliation or harassment.

With the rise of advanced biometric technologies, the targeting of populations who do not match gender norms has increased in recent decades. Premised on the idea that the body is static and composed of measurable characteristics, biometrics make assumptions about both gender and race based on skin colour, facial structure, body type and body parts, which are then encoded in predictive algorithms. Growing empirical evidence has pointed to the obstacles and acute dangers that these sorts of AI-driven systems pose for TGD individuals (Clarkson, 2019; Hamidi et al. 2018; Keyes 2018).

Millimetre-wave body scanners (which are in operation in the majority of domestic and international airports) are particularly problematic, as they require security agents to interpret every passenger's gender by pushing either a pink ('female') or a blue ('male') button when approaching the machine. Bodies that do not match the agent's reading as unequivocally male or female activate various security responses. Moreover, because hormone therapy changes facial structure, some facial recognition technologies in use at border checkpoints exhibit high error rates when it comes to detecting, analysing and recognising the faces of TGD people (Quinan & Hunt 2022; Scheuerman et al. 2019).

Holding a passport that does not accurately reflect one's gender identity (including name, photo and gender marker) can cause additional problems when traveling, migrating or interacting with border security and

law enforcement. Some TGD people have developed strategies to prevent questioning or actively conceal their gender identity by traveling as a gender that matches their documents but not their true identities. Many TGD individuals also experience high levels of anxiety and stress before, during and after traveling. These obstacles have been a reason for many to avoid international travel or migration altogether out of threats to safety or fear of discrimination. This is also confirmed by my own field research (Quinan & Bresser 2020; Quinan & Hunt 2022; Quinan & Oosthoek 2021).

According to a recent report conducted by the Williams Institute at UCLA School of Law, transgender people face unique obstacles to obtaining identification documents that reflect their gender (O'Neill & Herman 2020). Because many jurisdictions still require documentation of having undergone forms of medical transition to update gender markers in passports, international travel and migration effectively remains impossible for some TGD individuals. It is out of reach for many who cannot afford such costly procedures, while others choose not to undergo medical transition.

TGD refugees also encounter significant – sometimes insurmountable – obstacles when seeking humanitarian protection. While there is a significant body of literature on the challenges faced by gay and lesbian asylum seekers, the barriers encountered by TGD asylum seekers are only just beginning to be explored. Despite the fact that gender identity and gender expression are grounds for international protection since many TGD people may fear persecution in their country of origin, TGD refugees encounter many impediments in being granted asylum, including pathologisation and invasive questioning in the credibility assessment process (Avgeri 2021; Camminga 2019).

Changes to Legal Gender Recognition

When it comes to state recognition of sex and gender, there have typically only been two possibilities to choose from: male and female. Recent legal interventions that recognise non-binary gender – in particular, the X gender marker – have purported to rectify some of the aforementioned problems TGD people face in accessing accurate documentation that allows for international mobility.

The introduction of the X marker has generally been celebrated as a victory and as rectifying outdated understandings of gender as strictly binary. Australia became the first country to adopt the X for transgender and intersex individuals on a wide scale in 2011. Additional countries have since introduced non-binary possibilities in passports and other legal documents, including Argentina, Austria, Bangladesh, Canada, Colombia, Denmark, Germany, Iceland, India, Malta, Nepal, the Netherlands, New Zealand, Pakistan, and the United States. Although this trend is increasing, an analysis of its effectiveness in improving TGD mobility and human rights has yet to be undertaken. It is a priority to understand the effects of these legal reforms to ensure positive impacts that do not further entrench discrimination.

Access to non-binary legal recognition is, however, uneven across jurisdictions. Australia, for example, requires a statement from a medical practitioner attesting that the applicant is transgender and identifies as X, is intersex, or is of indeterminate sex. In New Zealand a statutory declaration of transgender, nonbinary, or intersex identity is required, while in the US an X passport can be granted by pure self-identification. In the Netherlands – which is often seen as a paragon of LGBTQI+ friendliness – a complex legal procedure is required and begins by filing a lawsuit against the municipality in which one was born, after which a judge must rule if the plaintiff's documentation can be changed to X. The X is purely optional in most countries that allow for it. However, in Nepal and Pakistan, the marker is mandatory for *all* transgender people seeking to update their documents. That is, even binary trans people who identify as male or female are assigned an X marker, which has dissuaded many TGD people from traveling and/or updating legal documents, as it may open them up to increased scrutiny at border checkpoints.

Consequences of Non-Binary Legal Recognition

Given that border regimes frequently pose a challenge for those not conforming to gender norms, there may be advantages to forms of non-binary legal recognition like the X marker. Most importantly, the impact

that state recognition has on TGD health and wellbeing cannot be overstated. Some TGD people with X passports have said that they have not encountered any issues and that travel is logistically and emotionally easier with their amended documentation. The X may also be a way of sidestepping the requirement for all individuals (including cisgender people) to share gender in legal documentation.

However, even as governance strategies may appear to become more inclusive, bureaucratic structures and security technologies create new challenges for TGD individuals. For instance, the X remains unknown to many border control agents and passport screeners, partly because the uptake has been relatively low. And low uptake is, in part, due to some TGD people's scepticism that they will be safe while traveling with such a marker. Similarly, not all security technologies and computer systems have been updated to include a third option. Given that many visa applications and airline systems only offer binary options, the X inevitably leads to incongruency between documents, which can provoke other security responses. For many, this has inhibited possibilities for economic- and religious-based migration. Several Pakistani transgender individuals with X passports who applied for a visa to perform the Hajj and Umrah in Saudi Arabia were denied because the visa only includes binary options (Wasif 2017). Even in countries that do allow for the X, there may be administrative and bureaucratic challenges, as visa forms and paperwork are not always updated to include other markers outside male and female. Such small inconsistencies can trigger denial, rejection and delay of visa processing.

Even countries that offer the X in passports cannot guarantee that border control in other nations will allow entry, transit or even legal protection. On the Australian Government's Department of Foreign Affairs Smart Traveller site, for example, it indicates that individuals traveling with an X passport to the United Arab Emirates will be barred from entry: 'If you are travelling on an Australian passport showing "X" (indeterminate/intersex/unspecified) in the sex field you will not be permitted to enter UAE. You can only enter the UAE if you carry a passport bearing the sex specified as "F" (female) or "M" (male).' This is a significant concern for Australians with X passports traveling internationally given that Dubai is one of the most common transit airports for outbound international flights. More broadly, DFAT acknowledges the challenges of international travel with an X marker, stating, 'If you're travelling on a passport showing "X" in the sex field you may encounter difficulties when crossing international borders.'

Although border management relies on security protocols and algorithmic surveillance, humans remain essential as interpreters of this information. Despite international security laws that allow for the X marker, most border agents are unfamiliar with it and are left to interpret its meaning due to lack of formal training. Transphobic laws and social attitudes can also filter down to border control. This is a serious concern and one that has dissuaded many TGD people from electing an X passport in countries where it is allowed. For this reason, some national advocacy groups have been lobbying for an option like that offered by Malta. For reasons of safety, Malta will issue individuals holding an X passport with a second passport containing a 'male' or 'female' marker.

Conclusion

Border-crossing is often regarded as a national security issue, and individuals with anomalies in documentation set off alarm bells and may be treated as suspicious or threatening. Given the fact that many – if not the majority of – TGD people have mismatches between gender presentation and gender markers in passports and/or may hold identity documents with differing gender markers, they are susceptible to being detained, interrogated and humiliated at border checkpoints. This is even further exacerbated for those experiencing intersecting forms of oppression, including racial and religious discrimination. Because most non-binary people worldwide do not have access to the X, this also means that they are forced to lie when it comes to selecting gender when only 'male' and 'female' are included.

With the relatively rapid pace at which jurisdictions have been introducing X gender markers in identity documents, it is likely that non-binary legal recognition will further expand in the coming years. However, the haphazard implementation of these policies could signify that TGD people with such designations are at higher risk of scrutiny, potentially exacerbating the problem these measures intend to solve. A careful

assessment of the consequences of both non-binary gender markers and biometric technologies is needed to ensure that the safety and human rights of TGD migrants and travellers are protected.

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