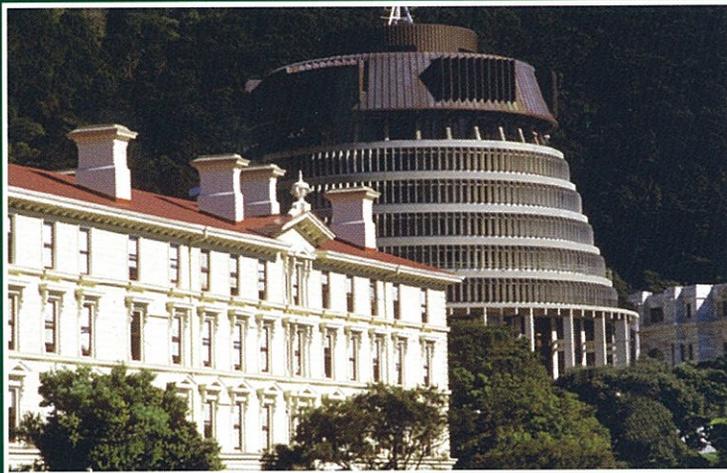


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Jeremy Waldron  
Petra Butler

David J Mullan  
Heike Polster  
Holger Wenning  
A H Angelo and Andrew Townend

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VICTORIA UNIVERSITY OF WELLINGTON

*Te Whare Wānanga o te Ūpoko o te Ika a Māui*



FACULTY OF LAW  
*Te Kauhanganui Tatai Ture*

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# GENDER IDENTITY AS A NEW PROHIBITED GROUND OF DISCRIMINATION

*Heike Polster\**

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*This paper examines the New Zealand Bill of Rights Act 1990 and the Human Rights Act 1993 to see whether transgender concerns and the issue of "gender identity" are already covered under existing prohibited grounds of discrimination. It concludes that they are not, and argues for the amendment of New Zealand's anti-discrimination legislation to include "gender identity" as a new prohibited ground of discrimination.*

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## **I INTRODUCTION**

Anti-discrimination legislation has been in place in New Zealand for several years. The two important statutory instruments of anti-discrimination legislation that build the framework of human rights protection in New Zealand are the New Zealand Bill of Rights Act 1990 (BORA) and the Human Rights Act 1993 (HRA). The HRA stipulates grounds on which discrimination is impermissible.

Over the years, the law has been amended to address more grounds of discrimination. This suggests that New Zealand is a modern society that is promoting and moving further towards values such as tolerance, equality, freedom from discrimination, and a higher standard of human rights protections.

One issue that has not—at least not explicitly—yet been addressed in New Zealand's human rights legislation is discrimination against transgender people, such as transsexuals and intersex people, including discrimination based on gender stereotyping. Internationally, however, there is growing recognition of the need to legislate against discrimination based on "gender identity".

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\* This is an edited version of a paper submitted in fulfilment of the requirements of the LLM degree, Victoria University of Wellington, 2002. I would like to thank my supervisors Elisabeth McDonald and Dean Matthew Palmer for their support during the writing of this paper.

The purpose of this paper is to examine whether it is necessary and desirable to add a new ground covering discrimination based on gender identity to New Zealand's anti-discrimination framework. The paper will first deal with matters of background including terminology (Part II), and then present the situation for transsexuals in New Zealand in order to highlight some of the issues (Part III). After dealing with the current anti-discrimination standard in the BORA and the HRA, and paying particular attention to the question of whether there is already sufficient protection under existing anti-discrimination grounds (Part IV), the paper will present the arguments for and against an amendment (Part V).

Finally the paper will focus on some practical aspects of the realisation of an amendment (Part VI), before concluding that there are convincing arguments for the inclusion of a new ground into New Zealand's anti-discrimination legislation, and that society is ready for this change (Part VII).

## II DEFINITIONS AND ISSUES OF GENDER IDENTITY

Before the issue of gender identity as a new ground for discrimination in New Zealand can be fully discussed, it is necessary to deal with some matters of background, with particular focus on the correct terminology.

### A *Sex versus Gender*

The terms sex and gender are often used as synonyms in everyday life as well as in legal contexts.<sup>1</sup> While both terms describe two related ideas, they are nevertheless different from each other.<sup>2</sup> For the purpose of this paper it is important to clearly distinguish between them.

Sex usually refers to one's physical anatomy at birth—that is, being born male or female.<sup>3</sup> Society considers a variety of biological factors in defining "male" and "female"<sup>4</sup>

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- 1 Paisley Currah and Shannon Minter *Transgender Equality* (Policy Institute of the National Gay and Lesbian Task Force, Washington, 2000) 2 <<http://www.nglft.org/downloads/transeq.pdf>> (last accessed 25 September 2003).
  - 2 Gay and Lesbian Advocates and Defenders "Statement by Jennifer Levi, Esq, Staff Attorney, Gay and Lesbian Advocates and Defenders before the Committee on Health, Education and Welfare concerning an Act Relating to Civil Rights" 1 <<http://www.transgenderlaw.org/resources/ritestimony.pdf>> (last accessed 25 September 2003).
  - 3 Gay and Lesbian Advocates and Defenders, above, 1.
  - 4 Rachel L Toker "Multiple Masculinities: A New Vision for Same-Sex Harassment Law" (1999) 34 Harv CR-CL L Rev 577, 580-581.

and in specifying one's status as a man or a woman.<sup>5</sup> In order to establish the sex of an individual, the following factors may be relevant: sex chromosomes, gonads (that is the presence or absence of testes or ovaries), sex hormones, internal reproductive organs, external genitalia, secondary sex characteristics, and psychological sex.<sup>6</sup>

In contrast, gender is a more complex<sup>7</sup> and socially constructed<sup>8</sup> matter. It relates to those factors traditionally associated with being male or female<sup>9</sup> and can be defined as the sum of the characteristics which are traditionally or culturally associated with being male or female.<sup>10</sup>

### ***B Gender Identity, Gender Expression, and Sexual Orientation***

The next question is what constitutes gender identity and how it differs from other qualities, such as sexual orientation and gender expression.

Gender identity is an aspect of identity<sup>11</sup> and can be defined as the psychological sex.<sup>12</sup> It is part of the individual's sense of self, particularly the sense of being male or female, and does not necessarily have to conform to the sex assigned at birth.<sup>13</sup> For example, a

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5 Julie A Greenberg "Defining Male and Female: Intersexuality and the Collision between Law and Biology" (1999) 41 *Ariz L Rev* 265, 271.

6 Debra Sherman Tedeschi "The Predicament of the Transsexual Prisoner" (1995) 5 *Temple Pol & Civ Rts LR* 27, 31-32.

7 Gay and Lesbian Advocates and Defenders "Statement by Jennifer Levi, Esq, Staff Attorney, Gay and Lesbian Advocates and Defenders before the Committee on Health, Education and Welfare concerning An Act Relating to Civil Rights" 1 <<http://www.transgenderlaw.org/resources/ritestimony.pdf>> (last accessed 25 September 2003).

8 Greenberg, above, 274.

9 Gay and Lesbian Advocates and Defenders, above, 1-2.

10 Paisley Currah and Shannon Minter *Transgender Equality* (Policy Institute of the National Gay and Lesbian Task Force, 2000) 2 <<http://www.ngltf.org/downloads/transeq.pdf>> (last accessed 25 September 2003).

11 Mary Coombs "Transgenderism and Sexual Orientation: More than a Marriage of Convenience" (1997) 3 *NJSOL* 4, 6 <<http://www.ibiblio.org/gaylaw/issue5/issue5.html>> (last accessed 25 September 2003).

12 Debra Sherman Tedeschi "The Predicament of the Transsexual Prisoner" (1995) 5 *Temple Pol & Civ Rts LR* 27, 31.

13 Ontario Human Rights Commission "Policy on Discrimination and Harassment because of Gender Identity" <<http://www.ohrc.on.ca/english/publications/gender-identity-policy.shtml>> (last accessed 25 September 2003).

person biologically born as male can have a female gender identity.<sup>14</sup> There are indications that gender identity either develops during early childhood as a result of parental education and social influences and then builds up through hormonal changes during puberty,<sup>15</sup> or that it is already neurologically established before birth.<sup>16</sup>

Since gender identity refers to a person's internal, invisible, deeply felt sense of being male or female (or something else or in between)<sup>17</sup> it is sometimes called core (gender) identity.<sup>18</sup> Its nature is such that it cannot simply be measured by objective standards, and can only be experienced by the individual in question.

Nevertheless the relation between gender identity and the social constructions of maleness and femaleness is important.<sup>19</sup> An individual's gender identity may or may not conform to society's gender ideals.<sup>20</sup> Recently the term "gender identity" has been used particularly in the context of people whose physical characteristics are not traditionally connected to their biological maleness or femaleness.<sup>21</sup>

Related to gender identity, but focused on the external perspective, is a person's gender expression. This term refers to how an individual is socially perceived through external characteristics and behaviours, socially defined as either masculine or feminine, such as social interactions,<sup>22</sup> body styling, and clothing.<sup>23</sup> A person's gender identity and gender

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14 UCLAGLBT <[http://www.saonet.ucla.edu/lgbt/findout\\_gloss.html](http://www.saonet.ucla.edu/lgbt/findout_gloss.html)> (last accessed 25 September 2003).

15 Infoplease.com <<http://www.infoplease.com/ipd/A0455041.html>> (last accessed 25 September 2003).

16 Genderbridge Inc "Submission to the Justice and Electoral Committee on the Human Rights Amendment Bill 2001" para 4.

17 Paisley Currah and Shannon Minter *Transgender Equality* (Policy Institute of the National Gay and Lesbian Task Force, 2000) 3 <<http://www.ngltf.org/downloads/transeq.pdf>> (last accessed 25 September 2003).

18 Infoplease.com, above.

19 Amnesty International *Crimes of Hate, Conspiracy of Silence* (Amnesty International Publications, London, 2001) vii <[http://www.amnestyusa.org/stoptorture/lgbt/lgbt\\_fullreport.pdf](http://www.amnestyusa.org/stoptorture/lgbt/lgbt_fullreport.pdf)> (last accessed 25 September 2003).

20 Rachel L Toker "Multiple Masculinities: A New Vision for Same-Sex Harassment Law" (1999) 34 Harv CR-CL L Rev 577, 581.

21 F M Chester in Paisley Currah and Shannon Minter *Transgender Equality* (Policy Institute of the National Gay and Lesbian Task Force, 2000) 30 <<http://www.ngltf.org/downloads/transeq.pdf>> (last accessed 25 September 2003).

22 Currah and Minter, above, 3.

expression are not necessarily congruent. It is, for example, possible that an individual's gender expression may be perceived as gender non-conforming (for instance if a woman self-identifies as female but is seen by others as masculine), but that the person's gender identity nevertheless conforms with his or her anatomical sex.<sup>24</sup>

It is also important to realise that gender identity and gender expression are not the same as sexual orientation.<sup>25</sup> While gender identity deals with who a person is, how they perceive themselves, and which gender they belong to, sexual orientation is concerned with whom individuals are attracted to—that is, whether they are homosexual, heterosexual, or bisexual. Sexual orientation is not determined by a person's gender identity<sup>26</sup> and transgender people have the same range of sexual orientation as non-transgender individuals.<sup>27</sup>

### C *Gender Identity Issues*

Many people never encounter gender identity issues in their lives. The gender assigned to them at birth is suitable; they feel comfortable and do not experience a conflict or incongruity between their physical sex and their internal psychological identification as male or female.

However, some people's gender identity is in conflict with their physical sex, and their gender expression or physical characteristics may differ from their sex as assigned at birth.<sup>28</sup> They feel uncomfortable with their assigned gender and instead identify with the opposite gender to their birth sex, or they may even find the two-gender system generally too restrictive.<sup>29</sup> Most people with gender identity issues have to deal with emotional and

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23 Jilian Todd Weiss "The Gender Caste System: Identity, Privacy, and Heteronormativity" (2001) 10 *Law & Sex* 123, 131.

24 Gay and Lesbian Advocates and Defenders "Statement by Jennifer Levi, Esq, Staff Attorney, Gay and Lesbian Advocates and Defenders before the Committee on Health, Education and Welfare concerning an Act Relating to Civil Rights" 1 <<http://www.transgenderlaw.org/resources/ritestimony.pdf>> (last accessed 25 September 2003).

25 Currah and Minter, above, 8.

26 Ontario Human Rights Commission "Policy on Discrimination and Harassment because of Gender Identity" <<http://www.ohrc.on.ca/english/publications/gender-identity-policy.shtml>> (last accessed 25 September 2003).

27 International Conference on Transgender Law and Employment Policy "Discrimination against Transgendered People in America" (1997) 3 *NJSOL* 1, 1-3 <<http://www.ibiblio.org/gaylaw/issue5/issue5.html>> (last accessed 25 September 2003).

28 International Conference on Transgender Law and Employment Policy, above, 1-3.

29 UCLAGLBT <[http://www.saonet.ucla.edu/lgbt/findout\\_gloss.html](http://www.saonet.ucla.edu/lgbt/findout_gloss.html)> (last accessed 25 September 2003).

psychological problems from a very early age, and their everyday life is significantly affected by the incongruity of their gender identity and society's perception of them. How people deal with this discomfort varies between internal processes and behaviour that is evident to others.<sup>30</sup>

### 1 *Transgenderism*

Transgender is an umbrella term used to describe people or groups of people with gender identity issues. It refers to anyone whose appearance, behaviour, or other personal characteristics differ from traditional gender norms,<sup>31</sup> and who does not present features traditionally associated with that person's biological sex.<sup>32</sup> The "transgender" label encompasses a variety of identities and experiences, such as pre-operative, post-operative, and non-operative transsexual individuals, intersex people, cross-dressers, and men and women whose appearance or characteristics are perceived to be gender non-conforming.<sup>33</sup> This last group includes, effeminate men, "butch" women,<sup>34</sup> and those who are in any other way "gender-bending", including people who are androgynous.<sup>35</sup>

Transgenderism also encompasses those who are perceived by others as transgender despite not self-identifying as transgender.<sup>36</sup> Synonyms for transgender are gender variant, gender different, and gender non-conforming.<sup>37</sup> Despite the fact that transgender

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30 UCLAGLBT, above.

31 Taylor Flynn "Transforming the Debate: Why We Need to Include Transgender Rights" (2001) 101 *Colum L Rev* 392, 392.

32 F M Chester in Paisley Currah and Shannon Minter *Transgender Equality* (Policy Institute of the National Gay and Lesbian Task Force, Washington, 2000) 30 <<http://www.ngltf.org/downloads/transeq.pdf>> (last accessed 25 September 2003).

33 Currah and Minter, above, 3-4. Originally, the term "transgender" was used as a synonym for transsexuals alone, which has to be kept in mind when dealing with statistical material. In the context of this paper it is used as the wider umbrella term as defined above unless otherwise stated.

34 Currah and Minter, above, 30.

35 Currah and Minter, above, 7.

36 Currah and Minter, above, 3-4.

37 Currah and Minter, above, 3-4.

people have been known in every society in recorded human history,<sup>38</sup> they are often seen in our culture as mentally ill.<sup>39</sup>

## 2 *Transsexuals*

One subset of the group "transgender" comprises transsexual individuals.<sup>40</sup> Transsexualism<sup>41</sup> is the "enduring, pervasive, compelling desire to be a person of the opposite sex".<sup>42</sup> The most common way of describing this condition is the mental picture of a transsexual as a woman/man trapped in a man's/woman's body.<sup>43</sup> Unlike most people who have a gender identity that matches the sex they were born with, transsexuals experience a conflict between their physical sex and their gender identity as a man or woman.<sup>44</sup> While having the physical characteristics of one gender, psychologically they are

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38 International Conference on Transgender Law and Employment Policy "Discrimination against Transgendered People in America" (1997) 3 NJSOL 1, 1-3 <<http://www.ibiblio.org/gaylaw/issue5/issue5.html>> (last accessed 25 September 2003).

39 Katherine K Wilson and Barbara E Hammond "Myth, Stereotype, and Cross-Gender Identity in the DSM-IV" (21st Annual Feminist Psychology Conference, Portland, 1996) <<http://www.transgender.org/tg/gidr/kwawp96.html>> (last accessed 25 September 2003).

While transsexualism is not a mental illness, "gender identity disorder" or "gender dysphoria" is a recognised mental disorder under the American Psychiatric Association's *Diagnostic and Statistical Manual of Mental Disorders IV* (DSM-IV), a set of diagnostic guidelines that is used worldwide. See *DSM Diagnostic and Statistical Manual of Mental Disorders* (4 ed, American Psychiatric Association, Arlington, 2000) <[http://www.psych.org/clin\\_res/dsm/dsmintro81301.cfm](http://www.psych.org/clin_res/dsm/dsmintro81301.cfm)> (last accessed 25 September 2003).

40 Genderbridge Inc "Submission to the Justice and Electoral Committee on the Human Rights Amendment Bill 2001" para 4.

41 "Transsexualism", "gender identity disorder", and "gender dysphoria" are used as synonyms throughout this paper.

42 Debra Sherman Tedeschi "The Predicament of the Transsexual Prisoner" (1995) 5 Temple Pol & Civ Rts L R 27, 30.

43 Sam Keller "Operations of Legal Rhetoric; Examining Transsexual and Judicial Identity" (1999) 34 Harv CR-CL LR 329, 353.

44 Paisley Currah and Shannon Minter *Transgender Equality* (Policy Institute of the National Gay and Lesbian Task Force, Washington, 2000) 3 <<http://www.nglft.org/downloads/transeq.pdf>> (last accessed 25 September 2003).

members of the opposite gender.<sup>45</sup> Though the cause for this condition is unknown,<sup>46</sup> present indications are in favour of a multifactorial biological cause.<sup>47</sup>

Medically this state can be defined as a persistent distress arising from one's physical sex characteristics or the associated social role.<sup>48</sup> While all transgender people suffer this condition, it is more acute for transsexuals.<sup>49</sup>

Contrary to popular belief, transsexualism occurs in both males and females,<sup>50</sup> so that transsexuals are either male and have a female gender identity (male-to-female transsexuals—MTFs), or female and have a male gender identity (female-to-male transsexuals—FTMs).<sup>51</sup> There are no exact statistics regarding the occurrence of transsexuals.<sup>52</sup> Estimates are one in every 150,000 people for female to male transsexuals and one in every 37,000 for male to female transsexuals.<sup>53</sup> However, recent data from the Netherlands suggests that one in 11,900 males and one in 30,400 females are transsexual.<sup>54</sup> For New Zealand it is thought that there are between 2,000<sup>55</sup> and 3,000<sup>56</sup> transsexuals in the country.

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45 Margaret Otlowski "The Legal Status of a Sexually Reassigned Transsexual: *R v Harris and McGuinness and Beyond*" (1990) 64 ALJ 67, 67.

46 Jennifer L Nye "The Gender Box" (1998) 13 Berkeley Women's LJ 226, 232.

47 Russell Reid, Domenico de Ceglie and others *Transsexualism: The Current Medical Viewpoint* (2 ed, Press for Change, London, 1996) <<http://www.pfc.org.uk/medical/mediview.htm>> (last accessed 25 September 2003).

48 Reid, de Ceglie, and others, above.

49 International Conference on Transgender Law and Employment Policy "Discrimination against Transgendered People in America" (1997) 3 NJSOL 1, 1-3 <<http://www.ibiblio.org/gaylaw/issue5/issue5.html>> (last accessed 25 September 2003).

50 Jilian Todd Weiss "The Gender Caste System: Identity, Privacy, and Heteronormativity" (2001) 10 Law & Sex 123, 139.

51 Paisley Currah and Shannon Minter *Transgender Equality* (Policy Institute of the National Gay and Lesbian Task Force, 2000) 3 <<http://www.ngltf.org/downloads/transeq.pdf>> (last accessed 25 September 2003).

52 Genderbridge Inc "Submission to the Justice and Electoral Committee on the Human Rights Amendment Bill 2001" para 4.

53 E Peter Walker (Plastic and Reconstructive Surgeon), personal communication, 16 April 2002.

54 Harry Benjamin International Gender Dysphoria Association *Standards of Care for Gender Identity Disorders* (6 ed, Harry Benjamin International Gender Dysphoria Association, Minneapolis, 2001) 3-4 <<http://www.hbigda.org/socv6sm.pdf>> (last accessed 25 September 2003).

55 Vicki Harvey (Genderbridge), personal communication, 19 March 2002.

56 Tim Barnett, MP, personal communication, 26 March 2002.

Many transsexuals decide that permanent living in their non-birth gender is the only effective solution,<sup>57</sup> and so undergo hormone therapy and sex reassignment surgery to change their physical sex.<sup>58</sup> They aim to bring their physical characteristics into conformity with their gender identity<sup>59</sup> and consequently to live in, and be recognised as having, a different gender from the one attributed to them at birth.<sup>60</sup> The term for a transsexual who has completed sex reassignment surgery is post-operative transsexual. For a post-operative transsexual all relevant sex factors are congruent with his or her gender identity except for the chromosomes.<sup>61</sup> A transsexual who has not undergone surgery is called a pre-operative transsexual.

Once transsexuals begin to live their lives in the gender that conforms with their gender identity they are in "transition". This is the process of becoming the desired "true" gender and usually involves explaining themselves to their families, employers, and others.<sup>62</sup> During this time, consequences such as job termination due to the change of gender can arise. These issues will be addressed in more detail in Part III of this paper.

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57 Genderbridge Inc "Submission to the Justice and Electoral Committee on the Human Rights Amendment Bill 2001" para 4.

58 Paisley Currah and Shannon Minter *Transgender Equality* (Policy Institute of the National Gay and Lesbian Task Force, Washington, 2000) 3 <<http://www.ngltf.org/downloads/transeq.pdf>> (last accessed 25 September 2003). Since sex and gender issues overlap for transsexuals in various ways the distinction between issues of sex and of gender is sometimes complicated. See Transsexualism FAQ <<http://www.tsfaq.info/cgi-bin/index.cgi?page=terms>> (last accessed 25 September 2003). As a result, the terminology is not always consistent either. For example, both "gender reassignment surgery" and "sex reassignment surgery" are used even by transsexual interest groups.

59 Amnesty International *Crimes of Hate, Conspiracy of Silence* (Amnesty International Publications, London, 2001) vii <[http://www.amnestyusa.org/stoptorture/lgbt/lgbt\\_fullreport.pdf](http://www.amnestyusa.org/stoptorture/lgbt/lgbt_fullreport.pdf)> (last accessed 25 September 2003).

60 Sam Keller "Operations of Legal Rhetoric; Examining Transsexual and Judicial Identity" (1999) 34 Harv CR-CL LR 329, 329.

61 Debra Sherman Tedeschi "The Predicament of the Transsexual Prisoner" (1995) 5 Temple Pol & Civ Rts LR 27, 32.

62 International Conference on Transgender Law and Employment Policy "Discrimination against Transgendered People in America" (1997) 3 NJSOL 1, 1-3 <<http://www.ibiblio.org/gaylaw/issue5/issue5.html>> (last accessed 25 September 2003).

### 3 *Intersex people*

Another group of transgender people for whom gender identity can be relevant are intersex individuals. At least one out of every 2,000 babies is born with an intersex condition.<sup>63</sup>

Intersex is the generic medical term for individuals who are born with an anatomy or physiology that varies from the present cultural ideals of maleness and femaleness.<sup>64</sup> Intersex refers to a whole set of medical conditions that consist of congenital anomaly of the reproductive and sexual system. Intersex people are born with sex chromosomes, external genitalia, or internal reproductive systems that are not considered "standard" for either male or female.<sup>65</sup> While this does not imply that they are born with two complete sets of genitals, some intersex babies have a sexual anatomy that makes it difficult to label them male or female. This could, for instance, be a set of ambiguous genitalia such as a penis that is considered "too small" or a clitoris that is "too large".<sup>66</sup> Intersex can also describe a person with a combination of male and female sexual characteristics.<sup>67</sup> The causes of this condition are hormonal imbalances, chromosomal abnormalities, and abnormalities of the tissues that develop into genitals.<sup>68</sup>

Many intersex people identify as either a man or a woman<sup>69</sup> so that they do not face any identity dilemmas once they live in their true gender. Some however identify as a member of an alternative, "third" gender,<sup>70</sup> or as just not male or female ("intergender").<sup>71</sup>

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63 Alice Dreger "Top Ten Myths about Intersex" (February 2001) *ISNA News* Seattle 3.

64 Intersex Trust Aotearoa New Zealand (ITANZ) (2000) *Newsletter Whakaari Special Edition* Wellington 1.

65 Intersex Society of North America (ISNA) "Medical Questions about Intersexuality" <<http://www.isna.org/faq/faq-medical.html#what>> (last accessed 25 September 2003).

66 Paisley Currah and Shannon Minter *Transgender Equality* (Policy Institute of the National Gay and Lesbian Task Force, 2000) 5-6 <<http://www.nglhf.org/downloads/transeq.pdf>> (last accessed 25 September 2003).

67 Shana Brown "Sex Changes and 'Opposite-Sex' Marriage: Applying the Full Faith and Credit Clause to Compel Interstate Recognition of Transgendered Persons' Amended Legal Sex for Marital Purposes" (2001) *San Diego L Rev* 1113, 1119.

68 The Gender Centre "Ambiguous Genitalia" <<http://www.gendercentre.org.au/ambiguousgenitalia.htm>> (last accessed 25 September 2003).

69 Intersex Society of North America (ISNA) "Medical Questions about Intersexuality" <<http://www.isna.org/faq/faq-medical.html#what>> (last accessed 25 September 2003).

70 ISNA, above.

71 Donna Lynn Matthews "What is Intergendered?" <<http://www.gabrielhermelin.com/custom3.html>> (last accessed 25 September 2003).

Based on the assumption that any child could be made into a boy or a girl if the genitals looked "right", "gender correcting" surgery was until very recently standard medical practice whenever an intersex condition occurred.<sup>72</sup> While the motivation for this procedure is usually the wish to help the parents and the intersex child to be socially accepted, the current view is that this is not the best way of resolving the issue and will rather lead to further harm.<sup>73</sup> Intersex individuals treated in this manner frequently manifest identities that differ from their assigned sex.<sup>74</sup> Others feel in-between the recognised genders. This often results in serious psychological problems and in a change back to the original sex, which requires the same medical treatment as for transsexuals and leads to the same social obstacles and prejudices.<sup>75</sup>

#### 4 *Cross-dressers*

The largest group of transgender persons are probably cross-dressers, formerly called transvestites.<sup>76</sup> This group mostly consists of heterosexual men, although there are also women who cross-dress. Apart from their occasional cross-dressing, they typically lead an ordinary life and are often married and have families.

Cross-dressing has existed throughout recorded history.<sup>77</sup> As in the context of transsexuals, current medical opinion suggests multi-causal factors involving prenatal processes will lead to this condition.<sup>78</sup> While cross-dressers do not wish to change their physical sex, from early childhood onwards their need to express their gender identity by cross-dressing may lead to serious emotional distress caused by society's reaction.<sup>79</sup>

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72 Alice Dreger "Top Ten Myths about Intersex" (February 2001) *ISNA News* Seattle 5.

73 Australian Civil Liberties Union <<http://www.angelfire.com/folk/aclu/gaylesbianrights.htm>> (last accessed 25 September 2003).

74 International Conference on Transgender Law and Employment Policy "Discrimination against Transgendered People in America" (1997) 3 *NJSOL* 1, 1-3 <<http://www.ibiblio.org/gaylaw/issue5/issue5.html>> (last accessed 25 September 2003).

75 Paisley Currah and Shannon Minter *Transgender Equality* (Policy Institute of the National Gay and Lesbian Task Force, Washington, 2000) 5-6 <<http://www.ngltf.org/downloads/transeq.pdf>> (last accessed 25 September 2003).

76 International Conference on Transgender Law and Employment Policy, above, 1-3.

77 The Gender Centre "Crossdressing" <<http://www.gendercentre.org.au/crossdressing.htm>> (last accessed 25 September 2003).

78 The Gender Centre, above.

79 See for example Ontario Human Rights Commission "Policy on Discrimination and Harassment because of Gender Identity" <<http://www.ohrc.on.ca/english/publications/gender-identity-policy.shtml>> (last accessed 25 September 2003).

### III GENDER IDENTITY ISSUES—LAW AND PRACTICE IN NEW ZEALAND

"Discrimination" has been described as:<sup>80</sup>

[A] distinction ... based on grounds relating to personal characteristics of the individual or group, which has the effect of imposing burdens, obligations, or disadvantages on such individual or group not imposed on others, or which withholds or limits access to opportunities, benefits, and advantages available to other members of society.

Since there are no official statistics regarding discrimination against transgender people, this section of the paper draws significantly from anecdotal evidence from transgender individuals and representative organisations.

All over the world transgender people face discrimination in regard to the provision of goods and services.<sup>81</sup> Issues include employment and housing discrimination and denial of public accommodation and transport facilities.<sup>82</sup> They may also face problems in the criminal justice system where verbal abuse by the police, for example, is not uncommon.<sup>83</sup> Another area in which they are discriminated against is retirement pensions, where a post-operative transsexual for example will remain classified according to the birth gender, and therefore be treated differently from those who have not undergone reassignment surgery.<sup>84</sup> Transgender people are also much more likely than general society to become victims of "hate crimes".<sup>85</sup> They suffer social and economic stigmatisation,<sup>86</sup> which makes

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80 *Andrews v Law Society of British Columbia* (1989) 56 DLR (4th) 1, 18 (SCC).

81 Australian Civil Liberties Union <<http://www.angelfire.com/folk/aclu/gaylesbianrights.htm>> (last accessed 25 September 2003).

82 Paisley Currah and Shannon Minter *Transgender Equality* (Policy Institute of the National Gay and Lesbian Task Force, Washington, 2000) 10 <<http://www.nglhf.org/downloads/transeq.pdf>> (last accessed 25 September 2003).

83 Lord Chancellor's Department *Report of the Interdepartmental Working Group on Transsexual People* (Home Office, London, 2000) 8-18 <<http://www.lcd.gov.uk/constitution/transsex/wgtrans.pdf>> (last accessed 25 September 2003).

84 Lord Chancellor's Department, above, 8-18.

85 Calum Bennachie "Supplementary Submission to the Justice and Electoral Committee on the Sentencing and Parole Reform Bill 2001". Hate crimes are motivated by hatred against a victim based on characteristics such as race.

86 TNet Arizona <<http://www.tnetarizona.org/gender101.htm>> (last accessed 25 September 2003).

them subject to homelessness and poverty.<sup>87</sup> There are also indications that the suicide rate for transgender people is exceptionally high.<sup>88</sup>

According to the New Zealand transgender community, the degree of discrimination against transgender people has decreased over the years, but is nevertheless still common in many areas such as employment.<sup>89</sup> Discrimination based on gender stereotyping remains a frequent occurrence.<sup>90</sup>

The following section focuses in more detail on the issues which arise for transsexuals as an illustration of the current concerns for transgender people.

#### A *Current Issues for Transsexuals*

##### 1 *Ability to change sex and status*

According to section 28 (3) of the Births, Deaths, and Marriages Registration Act 1995 (BDMA), a transsexual in New Zealand can apply to the Family Court for a change of gender on the birth certificate if the applicant is of a sex opposite to the nominated gender or is of indeterminate sex, or if the old birth certificate does not contain any information on the applicant's sex.<sup>91</sup> An application also requires that the applicant not be of the (new) nominated sex, but have assumed the nominated sex and wish to maintain it<sup>92</sup> after having undergone medical treatment to give the physical appearance of a person of the nominated gender.<sup>93</sup> The Court issues a declaration requiring the Registrar-General to change the person's birth certificate.<sup>94</sup> However, if the applicant is married to a person of the new sex the marriage has to be dissolved before the new gender can be registered.<sup>95</sup>

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87 TGNNet Arizona, above.

88 Australian Civil Liberties Union <<http://www.angelfire.com/folk/aclu/gaylesbianrights.htm>> (last accessed 25 September 2003).

89 New Zealand Transsexualwomen.com <<http://www.nztranssexualwomen.com/bdm.htm>> (last accessed 25 September 2003).

90 See for example Ministry of Women's Affairs *Status of Women in New Zealand – Draft Report to the United Nations Committee on the Elimination of All Forms of Discrimination Against Women (CEDAW)* (2001) 30 <<http://www.mwa.govt.nz/pub/RPT-final-draft%20CEDAW%20Cabinet-291101.doc>> (last accessed 25 September 2003).

91 Births, Deaths and Marriages Registration Act 1995, s 28(3)(a).

92 Births, Deaths and Marriages Registration Act 1995, s 28(3)(b).

93 Births, Deaths and Marriages Registration Act 1995, s 28(3)(c).

94 Births, Deaths and Marriages Registration Act 1995, s 30.

95 Births, Deaths and Marriages Registration Act 1995, s 30(2).

A transsexual who has not undergone all available surgery cannot apply for a declaration.

A change of name by statutory declaration is possible according to section 21 of the BDMA and as a result a new birth certificate is issued.

In the case of post-operative transsexuals the new name and sex designation will appear on the new birth certificate. Any previously recorded details will not be mentioned,<sup>96</sup> although it is theoretically possible to access this information under certain circumstances.<sup>97</sup>

For pre-operative transsexuals the situation is different. The new birth certificate will list previous names above the new name<sup>98</sup> as well as the sex designation recorded at birth.<sup>99</sup> This can cause situations where pre-operative transsexuals are forced to explain themselves and may lead to very intrusive questions and embarrassing situations.

A change of name on a passport is also only possible for post-operative transsexuals. This means that pre-operative transsexuals can sometimes be placed in difficult or unsafe situations—for example, when travelling overseas and having to go through passport controls—because of the difference between their represented gender and their passport documentation.<sup>100</sup> Pre-operative transsexuals can request that no sex be included, which might be possible after a statutory declaration explaining the reasons.<sup>101</sup> This does not necessarily avoid the risk of being in a position where further explanations are required when dealing with officials and may in practice prevent transsexuals from travelling to less tolerant countries.

Changing the name or sex on other documents such as driver's licences and bank records usually requires formal proof of the change, such as a copy of the official documentation of the change or a birth certificate.<sup>102</sup> Transsexuals report that in practice

96 Births, Deaths and Marriages Act 1995, s 64.

97 New Zealand Transsexualwomen.com <<http://www.nztranssexualwomen.com/bdm.htm>> (last accessed 25 September 2003). For example, the Police and certain government departments may apply to the Court to access a closed record, if they have reasonable grounds to do so.

98 New Zealand Transsexualwomen.com, above.

99 The Benjamin's Syndrome Information Site "Changing Your Legal Name" <<http://cloud.prohosting.com/~benjsynd/nz/name.html>> (last accessed 25 September 2003).

100 *Agender Submission On Same Sex Couples and the Law* <<http://www.agender.org.nz/articles/Items/Same%20Sex%20Marriage.html>> (last accessed 25 September 2003).

101 New Zealand Transsexualwomen.com, above.

102 Personal communication with several New Zealand banks. There seem to be no official guidelines, so the policies vary slightly from institution to institution.

much depends on the official dealing with the matter.<sup>103</sup> The requirement of formal proof makes it particularly problematic for pre-operative transsexuals to have their sex changed on documents, though their chances for a name change are better. In the case of life insurance policies a change of name is relatively easy to obtain. When it comes to policy benefits however, insurances for transsexuals will stay the same, even for post-operative transsexuals, because genetic makeup is the criterion for classification.<sup>104</sup>

Hence post-operative transsexuals are in most cases legally regarded as a member of the acquired gender.<sup>105</sup> Pre-operative transsexuals can have most information changed to show their new name and—with the exception of the birth certificate—even their new sex,<sup>106</sup> although they will nevertheless often be regarded as members of their birth sex.<sup>107</sup> This different treatment of post- and pre-operative transsexuals is problematic since, due to financial or health reasons, not every transsexual has the option of undergoing surgery. In any case, regardless of their status, transsexuals often face difficulties in explaining their situation and further embarrassment when they are required to prove their status.

## 2 *Transsexuals and the Marriage Act*

In the English case of *Corbett v Corbett*<sup>108</sup> the High Court held that the validity of a marriage involving post-operative transsexuals depends on the biological sex of the individuals concerned, which is fixed at birth and cannot be changed. In consequence, post-operative transsexuals may not marry a person of the opposite anatomical, but same chromosomal sex.<sup>109</sup> Over the years this jurisprudence has been confirmed several times in

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103 New Zealand Transsexualwomen.com, above.

104 Personal communication with several New Zealand life insurance companies; see also the experiences described at New Zealand Transsexualwomen.com, above.

105 International Lesbian and Gay Association "World Legal Survey—New Zealand" <[http://www.ilga.org/Information/legal\\_survey/asia\\_pacific/new\\_zealand.htm](http://www.ilga.org/Information/legal_survey/asia_pacific/new_zealand.htm)> (last accessed 25 September 2003).

106 New Zealand Transsexualwomen.com, above.

107 *The Laws of New Zealand* (Butterworths, Wellington, 1995) Husband and Wife, para 2, 22.

108 *Corbett v Corbett* [1970] 2 All ER 33 (P).

109 Richard F Storrow "Naming the Grotesque Body in the 'Nascent Jurisprudence of Transsexualism'" (1997) 4 Mich J Gender & Law 275, 285–286.

various jurisdictions.<sup>110</sup> However, some Commonwealth courts have taken different approaches.<sup>111</sup>

In New Zealand, the Marriage Act 1955 is gender neutral, but the classic interpretation of marriage is the union between "one man and one woman".<sup>112</sup> This has been confirmed by the New Zealand Court of Appeal in *Quilter v Attorney-General*.<sup>113</sup> The terms "man" and "woman" are not defined however.<sup>114</sup> In two cases it has been established that it is possible for a post-operative transsexual to marry someone of the same genetic sex.

The Family Court case *M v M*<sup>115</sup> dealt with the validity of the marriage of a born male who underwent sex-reassignment surgery and was married as a woman. The Court held that this marriage was valid because the transsexual's gender and genitalia had been harmonised through medical treatment.<sup>116</sup> The genetic factor was balanced against, and outweighed by, a number of other characteristics such as genitals and gender.<sup>117</sup> To refuse reclassification of the sex of a post-operative transsexual was also seen as inconsistent with society's commitment to the privacy and dignity of its citizens.<sup>118</sup>

This view was confirmed in *Attorney-General v Otahuhu Family Court*,<sup>119</sup> where the High Court held that a transsexual who had undergone gender reassignment surgery could marry someone as a person of that reassigned sex.<sup>120</sup> The Court expressed the view that if society permits transsexuals to undergo therapy and surgery to be recognised as a person of the opposite sex, then it should also allow them to function as fully as possible in that

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110 See for example *Littleton v Prange* (1999) 9 SW 3d 223 (Tex App). For an overview of case law see Press For Change <<http://www.pfc.org.uk/legal/index.htm>> (last accessed 25 September 2003).

111 See for example: *MT v JT* (1976) 3 SSA 2d 204 (NJ Supp); *R v Harris* (1988) 17 NSWLR 158, analysed in Robin MacKenzie "Transsexuals' Legal Sexual Status and Same Sex Marriage in New Zealand: *M v M*" (1992) 7 Otago LR 556, 563-565.

112 *Hyde v Hyde* (1866) LR 1 P & D 130.

113 *Quilter v Attorney-General* [1998] 1 NZLR 523 (CA).

114 *The Laws of New Zealand* (Butterworths, Wellington, 1995) Husband and Wife, para 2, 22.

115 *M v M* [1991] NZFLR 337 (FC).

116 *M v M*, above, 343.

117 Robin MacKenzie "Transsexuals' Legal Sexual Status and Same Sex Marriage in New Zealand: *M v M*" (1992) 7 Otago LR 556, 557-558.

118 *M v M*, above, 346.

119 *Attorney-General v Otahuhu Family Court* [1995] 1 NZLR 603 (HC).

120 *Attorney-General v Otahuhu Family Court*, above, 603.

acquired sex, which includes the ability to marry.<sup>121</sup> It was also reaffirmed that a person's gender identity is strongly influenced by psychological and social factors, in addition to aspects such as chromosomes.<sup>122</sup>

Despite this relatively positive case law, some issues remain unresolved or uncertain. For example, Ellis J in *Attorney-General v Otahuhu Family Court* held that a sex change on a birth certificate is no guarantee of automatic approval for a transsexual marriage in all cases, since a court could still hold that attributes required for a marriage were missing.<sup>123</sup> The question of the validity of a transsexual marriage also does not resolve questions in other areas of the law such as the criminal law.<sup>124</sup> And a remaining inconsistency is that under current case law, pre-operative transsexuals cannot marry, although Ellis J stated that pre-operative transsexuals might be regarded as members of their chosen gender in areas such as employment law.<sup>125</sup>

In practice, the legal treatment of transsexuals with regard to marriage can lead to paradoxical situations. For example, a transsexual who was born male and lives as woman but does not or cannot change her birth certificate can only marry a woman, irrespective of the sexual orientation.<sup>126</sup> However, a transsexual born male who is married to a woman and undergoes surgery to become a woman without changing the birth certificate, is able to live as a woman legally married to another woman. If, on the other hand, a transsexual who underwent surgery to become a woman wants to change her birth certificate, then she must divorce her partner. She cannot remarry her because this would be a same-sex marriage, currently not possible under New Zealand law.

### 3 *Transsexuals in prisons*

In New Zealand, there is a national policy for transsexual prison inmates which aims to provide them with an environment that recognises their gender identification.<sup>127</sup> Post-operative transsexuals are placed in a prison according to their gender identity and are treated consistently with the institution they are located in.<sup>128</sup> Hormonal treatment that

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121 *Attorney-General v Otahuhu Family Court*, above, 607.

122 *Attorney-General v Otahuhu Family Court*, above, 610.

123 *Attorney-General v Otahuhu Family Court*, above, 616.

124 *Attorney-General v Otahuhu Family Court*, above, 629.

125 *Attorney-General v Otahuhu Family Court*, above, 615.

126 This and the following examples are taken from *Agender Submission on Same Sex Couples and the Law* <<http://www.agender.org.nz/articles>> (last accessed 25 September 2003).

127 Department of Corrections *Policy and Procedures Manual* (2001) D.07.

128 Department of Corrections *Policy and Procedures Manual*, above.

started prior to imprisonment may be continued at their own cost.<sup>129</sup> Pre-operative transsexual inmates, however, are placed in a prison opposite to their desired gender, although they are allowed single cells or to mix with other transsexuals.<sup>130</sup>

To place pre-operative transsexuals in a prison that is not congruent with their gender identity can cause considerable psychological damage; someone who is, for example, psychologically a woman is treated like a man.<sup>131</sup> In Zealand women and men are housed in different prison facilities,<sup>132</sup> but even if they were housed in the same institution, gender mixing would still be prohibited.<sup>133</sup> Given the possible negative psychological effects<sup>134</sup> of treating a transsexual as the opposite of the destined sex, this is arguably a "less favourable"—and consequently discriminatory—treatment in comparison to those whose gender identity matches their sex.<sup>135</sup>

Another matter of concern is the frequent occurrence of physical and sexual abuse of transsexuals in prison, which also affects the success of rehabilitation.<sup>136</sup> Public debate is also needed regarding the desirability of allowing transsexuals hormone treatment regardless of whether it has been commenced before imprisonment<sup>137</sup> in order to avoid further psychological harm by ignoring the individual's gender identity.

#### 4 Medical costs

In order to receive hormone treatment and surgery, transsexuals usually have to undergo a counselling procedure in accordance with the the *Standards of Care for Gender Identity Disorders* developed by the Harry Benjamin International Gender Dysphoria

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129 Department of Corrections *Policy and Procedures Manual*, above.

130 Department of Corrections *Policy and Procedures Manual*, above.

131 Agender *Submission On Same Sex Couples and the Law* <<http://www.agender.org.nz/articles/Items/Same%20Sex%20Marriage.html>> (last accessed 25 September 2003).

132 Ministry of Women's Affairs *Status of Women in New Zealand – Draft Report to the United Nations Committee on the Elimination of All Forms of Discrimination Against Women (CEDAW)* (November 2001) 105 <<http://www.mwa.govt.nz/pub/RPT-final-draft%20CEDAW%20Cabinet-291101.doc>> (last accessed 25 September 2003).

133 Penal Institutions Regulations 2000, reg 8.

134 Department of Corrections *Better Corrections Law – Summary of Submissions on Better Corrections Law for New Zealand* (Department of Corrections, Wellington, 2001) 115.

135 Nigel Christie "Supplementary Submission to the Justice and Electoral Select Committee on the Human Rights Amendment Bill 2001".

136 Agender *Submission On Same Sex Couples and the Law* <<http://www.agender.org.nz/articles/Items/Same%20Sex%20Marriage.html>> (last accessed 25 September 2003).

137 Department of Corrections *Better Corrections Law*, above, 115.

Association.<sup>138</sup> These guidelines are used to determine whether a transsexual is emotionally and psychologically suited for sexual reassignment<sup>139</sup> and are followed in New Zealand.<sup>140</sup>

Despite this procedure and the status of transsexuals under the DSM-IV,<sup>141</sup> most insurance companies and official funding exclude coverage for counselling, hormone treatment and sex-reassignment surgery from their services, arguing that this treatment is purely cosmetic and not medically necessary.<sup>142</sup> Insurance companies in New Zealand follow this approach.<sup>143</sup> Though the cost of surgery can exceed \$20,000,<sup>144</sup> there is no funding for the procedure from the public health system.<sup>145</sup> This shows that transsexuals not only have to deal with psychological, medical, social and legal issues, but also have to face sometimes insuperable financial obstacles.

##### 5 *Employment and education*

Overseas statistics indicate that transsexuals who mention to employers that they are planning to undertake gender reassignment surgery or have undergone surgery lose their job in up to 95 per cent of cases, while 60 per cent remain underemployed or unemployed after transition.<sup>146</sup> Reports from individuals in New Zealand indicate that transsexuals in

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138 Harry Benjamin International Gender Dysphoria Association *Standards of Care for Gender Identity Disorders* (6 ed, Harry Benjamin International Gender Dysphoria Association, Minneapolis, 2001) 3-4 <<http://www.hbigda.org/socv6sm.pdf>> (last accessed 25 September 2003).

139 TGNNet Arizona <<http://www.tgnetarizona.org/gender101.htm>> (last accessed 25 September 2003).

140 E Peter Walker "The Programme" <<http://www.plasticsurgery.co.nz/grs-programme.asp>> (last accessed 25 September 2003).

141 *DSM Diagnostic and Statistical Manual of Mental Disorders* (4ed, American Psychiatric Association, Arlington, 2000) <[http://www.psych.org/clin\\_res/dsm/dsmintro81301.cfm](http://www.psych.org/clin_res/dsm/dsmintro81301.cfm)> (last accessed 25 September 2003).

142 TGNNet, above.

143 "Canterbury Surgeon a Pioneer" (8 April 2002) <<http://www.plasticsurgery.co.nz/pr-main.asp>> (last accessed 25 September 2003).

144 E Peter Walker "The Costs" <<http://www.plasticsurgery.co.nz/grs-costs.asp>> (last accessed 25 September 2003).

145 Peter Day *Transgender Reassignment Surgery* (New Zealand Health Technology Assessment, Christchurch, 2002) <<http://www.nzhta.chmeds.ac.nz/Trans-gender.PDF>> (last accessed 25 September 2003).

146 Australian Civil Liberties Union <<http://www.angelfire.com/folk/aclu/gaylesbianrights.htm>> (last accessed 25 September 2003).

this country also suffer discrimination in employment due to their transsexual status.<sup>147</sup> Discrimination is most apparent in the case of pre-operative transsexuals in transition,<sup>148</sup> the stressful time when they live in the desired gender role—a requirement before surgery—and when the change becomes obvious to the employer and co-workers.<sup>149</sup>

A recent survey by the New Zealand University Students' Association showed that 40 per cent of "queer" students said that they had experienced harassment based on sexual orientation and gender identity while at university.<sup>150</sup> This demonstrates that the educational sector is not immune to discriminatory practices.

#### 6 Parental rights

Another area where transgender people, and transsexuals in particular, are disadvantaged is child custody and adoption.<sup>151</sup> In New Zealand the well-being of the child is the paramount factor in these situations.<sup>152</sup>

The case law indicates that a transsexual father, for example, could gain access to his children under certain conditions—such as therapy for the children.<sup>153</sup> It is problematic, however, that there is no statute explicitly addressing this issue and the number of cases is very small. Overseas experiences often show that custody to transgender parents is only granted when the parents agree to hide their status.<sup>154</sup> When it comes to adoptions, adoption agencies and the courts can refuse to make an adoption order based on the

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147 Calum Bennachie "Submission to the Justice and Electoral Select Committee on the Human Rights Amendment Bill 2001" para 20.

148 New Zealand Transsexualwomen.com <<http://www.nztranssexualwomen.com/bdm.htm>> (last accessed 25 September 2003).

149 International Conference on Transgender Law and Employment Policy "Discrimination Against Transgendered People In America" (1997) 3 NJSOL 1, 1-3 <<http://www.ibiblio.org/gaylaw/issue5/issue5.html>> (last accessed 25 September 2003).

150 Human Rights Network of Aotearoa New Zealand <<https://www.amnesty.org.nz/HRNet.nsf>> (last accessed 25 September 2003).

151 Press For Change *Recognising the Identity and Rights of Transsexual and Transgender People in the United Kingdom* (Press For Change, London, 1999) 15-16 <<http://www.pfc.org.uk/workgrp/pfcrpt1.pdf>> (last accessed 25 September 2003).

152 See for example Adoption Act 1955, s 11; Guardianship Act 1968, s 1.

153 *C v D* (1991) 8 FRNZ 338.

154 Shannon Minter "Representing Transsexual Clients: An Overview of Selected Legal Issues" <<http://www.transgenderlaw.org/resources/translaw.htm>> (last accessed 25 September 2003).

assumption that living with a transsexual parent is not in the best interests of the child—the decisive criterion in these cases.<sup>155</sup>

### **B Conclusion**

The preceding section of this paper has sought to demonstrate, using the specific example of transsexuals, that transgender people encounter problems in several areas of life. The issues vary depending on the group an individual belongs to. The presented areas and issues nevertheless indicate that many issues remain unsolved at present, some in the legal sphere, others in a social framework. To address the social implications is outside the scope of this paper; the legal ones will be explored further in the next section.

## **IV NEW ZEALAND'S CURRENT ANTI-DISCRIMINATION STANDARD**

The following section of this paper examines New Zealand's current human rights protections and anti-discrimination legislation in order to establish whether there is a gap that needs to be filled in relation to transgender people.

### **A General**

The two important statutory anti-discrimination instruments in New Zealand are the New Zealand Bill of Rights Act 1990 and the Human Rights Act 1993.

#### **1 The New Zealand Bill of Rights Act 1990**

According to its long title, the BORA is intended to affirm, protect, and promote human rights and fundamental freedoms in New Zealand, and to affirm New Zealand's commitment to the International Covenant on Civil and Political Rights.<sup>156</sup> Consequently the Act contains provisions dealing with the protection and promotion of individual human rights, as well as non-discrimination and minority rights protections. Section 3 stipulates that the BORA applies to the legislative, executive, and judicial branches of government, and also to bodies performing a public function. Hence the Act regulates and limits the power of the Government and public actors<sup>157</sup>—since 1 January 2002 additionally by way of a declaration of inconsistency by the Human Rights Review

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155 Press For Change *Recognising the Identity and Rights of Transsexual and Transgender People in the United Kingdom* (Press For Change, London, 1999) 17 <<http://www.pfc.org.uk/workgrp/pfcrpt1.pdf>> (last accessed 25 September 2003).

156 International Covenant on Civil and Political Rights (19 December 1966) 999 UNTS 171.

157 Ministry of Justice *Re-Evaluation of the Human Rights Protections in New Zealand Part Two: New Zealand's Human Rights Law* (Report for the Associate Minister of Justice and Attorney-General, Ministry of Justice, Wellington, 2000) para 25 <[http://www.justice.govt.nz/pubs/reports/2000/hr\\_reevaluation/part\\_2.html](http://www.justice.govt.nz/pubs/reports/2000/hr_reevaluation/part_2.html)> (last accessed 25 September 2003).

Tribunal if an enactment is in breach of the right to freedom from discrimination.<sup>158</sup> According to section 4, the BORA is not supreme law however. While it can affect, limit, and sometimes supplement statutes and regulations, statutes have to be read consistently with the BORA protections if possible. In the case of an insoluble discrepancy the conflicting statute prevails.<sup>159</sup>

Section 19(1) provides that:

Everyone has the right to freedom from discrimination on the grounds of discrimination in the Human Rights Act 1993.

The BORA also contains a clause that limits the rights and freedoms under the Act by balancing them with competing interests.<sup>160</sup> Section 5 prescribes that:

Subject to section 4 of this Bill of Rights, the rights and freedoms contained in this Bill of Rights may be subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

## 2 *The Human Rights Act 1993*

The second important anti-discrimination instrument in New Zealand is the HRA, which replaced the Race Relations Act 1971 and the Human Rights Commission Act 1977. According to its long title, it provides protection of human rights in New Zealand in accordance with the United Nations Human Rights Covenants and Conventions on human rights. The Act applies to the private sector and, to a certain degree, the Government, and provides that discrimination against specific groups of individuals is unlawful in some areas of public life.<sup>161</sup> Unlike the BORA, the HRA aims at protecting citizens from discrimination carried out by fellow citizens and primarily applies to the private sector, where it affirms the principle of non-discrimination as it is set out in section 19 of the

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158 Human Rights Act 1993, s 92J.

159 Ministry of Justice *Re-Evaluation*, above, para 47.

160 Ministry of Justice *The Non-Discrimination Standards for Government and the Public Sector* (Ministry of Justice, Wellington, 2002) 22 <<http://www.justice.govt.nz/pubs/reports/2002/discrimination-standards/guidelines.pdf>> (last accessed 25 September 2003).

161 Legislation Advisory Committee *Guidelines on Process and Content of Legislation 2001 edition* (Ministry of Justice, Wellington, 2001) ch 4 <[http://www.justice.govt.nz/lac/pubs/2001/legislative\\_guide\\_2000/chapter\\_4.html](http://www.justice.govt.nz/lac/pubs/2001/legislative_guide_2000/chapter_4.html)> (last accessed 25 September 2003).

BORA.<sup>162</sup> In addition, the HRA regulates the public sector when the Government is acting as an ordinary person.<sup>163</sup>

Since the Human Rights Amendment Act 2001 came into effect on 1 January 2002, the Government is liable for discrimination in the public sector. While the existing human rights standard still applies in the areas of employment and sexual and racial harassment, the touchstone for all other Government activity is now the anti-discrimination standard in the BORA.<sup>164</sup> This means that the Government may only discriminate if authorised by law and the action is "demonstrably justified in a free and democratic society".<sup>165</sup>

Section 21 of the HRA contains 13 prohibited grounds of discrimination and seven areas in which discrimination is unlawful. The grounds are: sex, marital status, religious belief, ethical belief, colour, race, ethnic or national origins, disability, age, political opinion, employment status, family status, and sexual orientation. The Act also contains some exceptions to these grounds. The areas in which discrimination on these grounds is unlawful are: employment; partnerships; industrial and professional associations, and qualifying and vocational training bodies; access to places, vehicles, and facilities; provision of goods and services; land, housing, and other accommodation; and access to educational establishments.

The HRA prohibits both direct and indirect discrimination. Although it does not define direct discrimination, it has been established that direct discrimination under the Act occurs when a policy or legislation treats someone less favourably than others in the same or a similar situation, and this happens based on a personal characteristic that is a ground of discrimination under the Act in an area covered by it.<sup>166</sup> This distinction must lead to an actual or assumed disadvantage,<sup>167</sup> and if it is not covered by an exception or justification under the Act, it is unlawful discrimination.<sup>168</sup> According to section 65 of the Act, indirect

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162 Ministry of Justice *Re-Evaluation*, above, para 26. It is noted however that the test of discrimination under the two Acts varies because of the balancing test under s 5 of the BORA.

163 Ministry of Justice *Re-Evaluation*, above, para 28.

164 Human Rights Act 1993, Part 1A.

165 Section 5. For more information on the different non-discrimination standards see: Ministry of Justice *The Non-Discrimination Standards for Government and the Public Sector* (Ministry of Justice, Wellington, 2002) 8 <<http://www.justice.govt.nz/pubs/reports/2002/discrimination-standards/guidelines.pdf>> (last accessed 25 September 2003).

166 Ministry of Justice *The Human Rights Act 1993: Guidelines for Government Policy Advisers* (Ministry of Justice, Wellington, 2000) <[http://www.justice.govt.nz/pubs/reports/2000/hr\\_act/discrimination.html](http://www.justice.govt.nz/pubs/reports/2000/hr_act/discrimination.html)> (last accessed 25 September 2003).

167 Ministry of Justice *The Human Rights Act*, above.

168 Ministry of Justice *The Human Rights Act*, above.

discrimination occurs when an action, conduct, practice, requirement, or condition is not obviously discriminatory on any of the grounds in the Act, but has a discriminatory effect that would be unlawful under the legislation on a group of people.

### **B Protection under the Current Law?**

While there is no explicit reference to transgender people or gender identity in the HRA, the matter could nevertheless already be implicitly covered under existing grounds, although this has never been tested.<sup>169</sup> If the issue were already (sufficiently) covered, an amendment<sup>170</sup> would be unnecessary. This section therefore goes on to examine the existing grounds of sex, disability, and sexual orientation and discuss the extent to which any of these grounds are sufficient to address discrimination against transgendered people.

#### *1 Sex*

It could be argued that transgender people are already covered under the ground of sex in section 21(1)(a) of the HRA.<sup>171</sup> For post-operative transsexuals the matter indeed seems relatively unproblematic, given their legal recognition. Discriminating against such an individual because of being born in the other sex would not be any different from discriminating against someone who belonged to that sex from birth onwards.<sup>172</sup> Overseas case law also suggests that transgender people are already covered by the definition of "sex" in anti-discrimination legislation.<sup>173</sup>

In a Canadian case that dealt with the termination of a post-operative transsexual street worker,<sup>174</sup> the Quebec Human Rights Tribunal held that discrimination based on transsexualism is discrimination based on sex. The Tribunal argued that "sex" had "much

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169 Chris Lawrence (Proceedings Commissioner Human Rights Commission), personal communication, 28 March 2002.

170 Due to the reference to the anti-discrimination provisions in the HRA in s 19 of the BORA, an amendment of the HRA with a new ground will automatically affect the BORA anti-discrimination standard as well. When the paper uses the term "HRA amendment" it also refers to the implied change of the BORA anti-discrimination standard.

171 Human Rights Commission "Submission to the Justice and Electoral Committee on the Human Rights Amendment Bill 2001" app 1, para 1.4.

172 New Zealand Transsexualwomen.com <<http://www.nztranssexualwomen.com/bdm.htm>> (last accessed 25 September 2003).

173 "Submission to the Justice and Electoral Committee on the Human Rights Amendment Bill 2001" Appendix 1, para 1.3.

174 *Commission des droits de la personne et des droits de la jeunesse v Maison des jeunes* (1998) 33 CHRR D/263 (Trib Qué).

more than a taxonomic value", as seen with the inclusion of pregnancy.<sup>175</sup> Discrimination on the basis of transsexualism could hardly be anything other than discrimination based on sex.<sup>176</sup>

The European Court of Justice adopted this approach in *P v S and Cornwall County Council*,<sup>177</sup> where it held that the dismissal of a transsexual on the basis of gender reassignment surgery violated the European Union's Equal Treatment Directive<sup>178</sup> and was discrimination on the grounds of sex.<sup>179</sup>

Contrary to this jurisprudence, however, is the significant amount of case law in the United States which indicates that discriminatory treatment of transgender individuals does not fall under "sex" discrimination.<sup>180</sup> Opposing the view that the ground of sex covers gender identity matters is also the argument that the issue is about a "change of sex" or the individual's gender identity or both, rather than sex itself.<sup>181</sup> Considering this lack of consistency in overseas case law, the outcome of any proceedings before a New Zealand court seems uncertain, although the European approach is likely to be more persuasive.

The fact that the case law which recognises the complained-of treatment as discrimination only deals with post-operative transsexuals means that the legal situation for pre-operative transsexuals is unclear. It is these individuals that are most at risk of discrimination, whether it be during transition or because they cannot undergo surgery due to health or financial circumstances.<sup>182</sup> In these cases it could be reasoned that

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175 *Commission v Maison des jeunes*, above, paras 103–110.

176 *Commission v Maison des jeunes*, above, para 115.

177 Case C-13/94 *P v S and Cornwall County Council* [1996] ECR I-2143, I-2165, paras 21–22.

178 Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions OJ L 283 (28 October 1980).

179 Andrea C Loux "Is He Our Sister?" (1997) 3 Web JCLI <<http://webjcli.ncl.ac.uk/1997/issue3/loux3.html#bk2>> (last accessed 25 September 2003).

180 See for example *Ulane v Eastern Airlines Inc* (1984) 742 F 2d 1081 (7th Cir); *James v Ranch Mart Hardware Inc* (1995) 881 F Supp 478 (D Kan).

181 Auckland Central Rainbow Branch of the New Zealand Labour Party "Submission to the Justice and Electoral Committee on the Human Rights Amendment Bill 2001".

182 Genderbridge Inc "Submission to the Justice and Electoral Committee on the Human Rights Amendment Bill 2001" para 5.

discrimination does not occur because the individual is biologically male or female (that is, on the grounds of "sex") but rather because they are transsexual.<sup>183</sup>

In conclusion, it is arguable that post-operative transsexuals are already protected under the ground of "sex" in the current HRA. Pre-operative transsexuals and other transgender individuals arguably have no such protection.

## 2 *Psychological and physiological disability*

Discrimination against transgender people may also be covered under the ground of disability under section 21(1)(h)(v) of the HRA,<sup>184</sup> which includes "any other loss or abnormality of psychological, physiological, or anatomical structure or function".

In support of this view is the fact that the "trapped in the wrong body" model easily falls within this definition,<sup>185</sup> as does gender dysphoria—regardless of whether it is qualified as a mental disorder or not.<sup>186</sup> Since complicated surgery is a form of treatment, common sense would suggest that it is a disability.<sup>187</sup>

However, opposing the opinion that gender dysphoria falls within the definition of disability under the Act is the argument that despite the possible result of significant emotional distress, this state is not permanent if treated; in other words there may be a question whether coverage under the ground of disability could exist in the long term.<sup>188</sup> Another aspect is that being transsexual—or having another form of gender identity disorder such as transvestism<sup>189</sup>—is not in itself a "psychological disability" preventing anyone from fully participating in society. In fact, to qualify for hormone treatment and gender re-assignment surgery, transsexuals must undergo a detailed psychological

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183 New Zealand Transsexualwomen.com <<http://www.nztranssexualwomen.com/bdm.htm>> (last accessed 25 September 2003).

184 Chris Lawrence, personal communication 28 March 2002.

185 Lawrence, above.

186 Lawrence, above.

187 Lawrence, above.

188 New Zealand Transsexualwomen.com <<http://www.nztranssexualwomen.com/bdm.htm>> (last accessed 25 September 2003).

189 Kevin J Barrie "Submission to the Justice and Electoral Committee on the Human Rights Amendment Bill 2001" para 3.

assessment of their mental and emotional stability.<sup>190</sup> In addition, many transsexuals do not suffer any distress at all.<sup>191</sup>

Much overseas case law does not recognise discrimination of transsexuals as discrimination on the ground of disability.<sup>192</sup> It is also not desirable to include transgender people under this ground of the Act anyway, since it further stigmatises them rather than reducing discrimination.<sup>193</sup>

### 3 *Sexual orientation*

Transgender people may also be covered by the ground of sexual orientation under section 21(1)(m) of the HRA.

The Constitutional Court of South Africa took this approach in *National Coalition for Gay and Lesbian Equality v Minister of Justice*, where it held that the constitutional prohibition of discrimination based on "sexual orientation" covered transsexual individuals too.<sup>194</sup> However, case law in the United States is inconsistent with this approach.<sup>195</sup> These different approaches show that the matter is uncertain.

Gender identity and sexual orientation are unrelated so it is inappropriate that this ground should include transgender people in New Zealand. It is also the case, as with the other existing possibilities, that this ground by itself would not cover the consequences of gender stereotyping and other gender identity issues.

### 4 *Conclusion*

As demonstrated, the HRA in its current form is not conclusive regarding the concerns of transgender people.<sup>196</sup> Even if it could be argued that transgender people were covered

190 Vicki Harvey "Submission to the Justice and Electoral Committee on the Human Rights Amendment Bill 2001" para 4.

191 Katherine K Wilson and Barbara E Hammond "Myth, Stereotype, and Cross-Gender Identity in the DSM-IV" (21st Annual Feminist Psychology Conference, Portland, 1996) <<http://www.transgender.org/tg/gidr/kwawp96.html>> (last accessed 25 September 2003).

192 See for example: *Somers v Iowa Civil Rights Commission* (1983) 337 NW 2d 470 (Iowa); *Holt v Northwest Pennsylvania Training Partnership Consortium Inc* (1997) 694 A 2d 1134 (Pa Commw).

193 New Zealand Transsexualwomen.com <<http://www.nztranssexualwomen.com/bdm.htm>> (last accessed 25 September 2003).

194 *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 (1) SA 6, para 21 (CC) Ackermann J.

195 See for example *Maffei v Kolaeton Industry Inc* (1995) 626 NYS 2d 391 (NY Sup Ct).

196 Rainbow Sector Council of the New Zealand Labour Party "Submission to the Justice and Electoral Committee on the Human Rights Amendment Bill 2001".

under the ground "sex" or "disability", the whole issue is very uncertain, especially for pre-operative transsexuals and in other gender identity matters such as gender stereotyping. The next section of the paper will address the question of whether an amendment is desirable to fill this gap.

## V THE ARGUMENTS CONCERNING AN AMENDMENT OF THE HRA

### A Education versus Legislation

The first question that has to be addressed is whether legal means are necessary and desirable to change the current situation.

One argument against an amendment is that legal means cannot change attitudes, and that education rather than legislation is needed to eliminate discrimination.<sup>197</sup> Since discrimination is mainly a social issue, a social remedy could be seen as preferable.

While it is true that society is often quite unaware of transgender issues, and confusion and misconceptions are not uncommon,<sup>198</sup> social and legal remedies do not necessarily exclude each other. Legislation can support education and accelerate social changes by creating an atmosphere that makes it easier to eliminate prejudices.<sup>199</sup> It offers the means to educate the population<sup>200</sup> and to promote a greater understanding for these concerns in society as well.<sup>201</sup> An amendment would also have the supplementary symbolic effect of signalling that discrimination in New Zealand is wrong and unacceptable.<sup>202</sup> Law and education could therefore be used together to strengthen awareness and increase the level of sensitivity within the population.

In addition, an amendment would provide legal means and remedies for victims of discrimination. While some might argue that common sense is sufficient to fight bigotry, legal means are more powerful and do not need to be persuasive to those who do not agree.<sup>203</sup> After all, it is very likely that a few people will still not act with reason.

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197 (27 July 1993) 537 NZPD 16920-16921.

198 (6 September 2000) 2 Parl Deb Vic 285.

199 (27 July 1993) 537 NZPD 16962.

200 Rainbow Sector Council of the New Zealand Labour Party "Submission to the Justice and Electoral Committee on the Human Rights Amendment Bill 2001".

201 (29 August 2000) 2 Parl Deb Vic 272.

202 (27 July 1993) 537 NZPD 16945-16946.

203 (27 July 1993) 537 NZPD 16914.

Legislation would also make it easier for the victims of discrimination to go to the courts<sup>204</sup> and help them feel more protected.<sup>205</sup>

### ***B A Matter of Discrimination?***

#### *1 Existence and extent of discrimination*

It has been argued that the extent of discrimination in New Zealand in general is exaggerated.<sup>206</sup> Indeed, the lack of case law and the small number of complaints by transgender people to the Human Rights Commission<sup>207</sup> supports the argument that there is limited discrimination against transgender people.

However it is questionable whether there is a need to prove the existence of discrimination before amending the law, since it is desirable that protection from discrimination be pro-active rather than reactive.<sup>208</sup> The fact that anti-discrimination legislation would not interfere with anyone else's rights<sup>209</sup> means an amendment would make sense on preventative grounds, even if there were no apparent manifestations of discrimination at all.

Nor does the lack of sufficient statistical material on discrimination against transgender people mean an amendment is unnecessary. It actually supports an amendment because this situation is caused by the widespread view in the transgender community that they are not covered by the HRA,<sup>210</sup> and by their fear of discrimination and harassment, rather than by the absence of discrimination.

As indicated by the examples in the previous section, discrimination against transgender people is not just a theoretical issue but a reality in New Zealand that needs to be addressed. These arguments all favour an amendment.

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204 (27 July 1993) 537 NZPD 16951.

205 Rainbow Sector Council of the New Zealand Labour Party "Submission to the Justice and Electoral Committee on the Human Rights Amendment Bill 2001".

206 (27 July 1993) 537 NZPD 16930.

207 Chris Lawrence, personal communication, 28 March 2002.

208 Nigel Christie "Supplementary Submission to the Justice and Electoral Select Committee on the Human Rights Amendment Bill 2001".

209 Christie, above.

210 Lawrence, above.

## 2 *Special rights or equality?*

It could be argued that an amendment would lead to special rights for a group of the population rather than to equality since the rights of a minority would be placed above those of the majority.<sup>211</sup>

In response to this concern, it can be said that anti-discrimination legislation does not take anything away from the majority.<sup>212</sup> It is not about "special rights" because it aims to ensure that all persons, regardless of whether they comply with traditional gender roles or not, have the right to express their gender identity.<sup>213</sup>

An amendment would promote and implement equal treatment and freedom from discrimination.<sup>214</sup>

## 3 *Minority issue*

Another argument against the need for an amendment is the relatively small number of transgender people.

However, though transgender people may be a minority, the scope of people eventually covered by an amendment would be much wider since it would also encompass, for example, gender stereotypes.

The fact that transgender people only exist in small numbers makes them particularly sensitive and vulnerable,<sup>215</sup> and makes it correspondingly more difficult for them to be legally protected against discrimination.<sup>216</sup> The smaller a group and the more exceptional their characteristics, then the bigger the danger of their being discriminated against.<sup>217</sup> The fact that they are a minority is an argument in favour of, and not against, an HRA amendment.<sup>218</sup>

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211 For the ground of "sexual orientation" under the HRA see (27 July 1993) 537 NZPD 16974.

212 (22 July 1993) 536 NZPD 16748.

213 Illinois Gender Advocates <<http://genderadvocates.org>> (last accessed 25 September 2003).

214 (6 September 2000) 2 Parl Deb Vic 274.

215 (29 August 2000) 2 Parl Deb Vic 243.

216 Press for Change "Broadening Article 14" <<http://www.pfc.org.uk/legal/ilga-a14.htm>> (last accessed 25 September 2003).

217 (6 September 2000) 2 Parl Deb Vic 264.

218 Press for Change "Broadening Article 14" <<http://www.pfc.org.uk/legal/ilga-a14.htm>> (last accessed 25 September 2003).

#### 4 *Immutability*

Opposing an amendment is the argument that if the criterion on which discrimination is based is a choice or a "lifestyle", rather than an immutable status, then an alternative means, such as medical treatment, should be sought to avoid discrimination.<sup>219</sup>

As seen in the example of transsexualism however, the causes for this condition are not yet clearly determined, though the medical evidence is rather against the assumption of a "choice". But even given the uncertainties surrounding the causes of this condition, to remain inactive and ignore existing problems seems inappropriate. As the example of religion demonstrates, the Act does recognise and protect grounds that consist of a "learned" behaviour. A biological cause is not a requirement for a status to be protected under the Act,<sup>220</sup> nor does the personal characteristic have to be immutable. It is sufficient that it is not consciously changeable, or only changeable at "unacceptable cost".<sup>221</sup> In consequence, the reference to the medical classification of transsexualism does not justify discrimination either,<sup>222</sup> since medical treatment neither eliminates discrimination, nor interferes with legal provisions against it.

Finally, regardless of the immutability or causes of transsexualism, to live in accordance with one's gender identity is basic and vital to one's happiness, and therefore a fundamental choice that is worthy of protection.<sup>223</sup> The classification or reasons for this status should not matter when it comes to the justification of anti-discrimination legislation,<sup>224</sup> especially since medical treatment is not an option for many.

### C *International Aspects*

#### 1 *International obligations*

In addition to domestic aspects, a further argument supporting a HRA amendment lies in New Zealand's international human rights obligations. New Zealand is party to both the

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219 With a similar reasoning in the context of homosexuality: (27 July 1993) 537 NZPD 16931.

220 (27 July 1993) 537 NZPD 16912-16913.

221 *The Laws of New Zealand*, (Butterworths, Wellington, 1996) Discrimination, para 1, 1.

222 Russell Reid, Domenico de Ceglie and others *Transsexualism: The Current Medical Viewpoint* (2 ed, Press For Change, London, 1996) <<http://www.pfc.org.uk/medical/mediview.htm>> (last accessed 25 September 2003).

223 As was argued for "sexual orientation". See Robert Wintemute *Sexual Orientation and Human Rights* (Clarendon Press, Oxford, 1997) 17.

224 (6 September 2000) 2 Parl Deb Vic 274.

International Convention on Civil and Political Rights (ICCPR)<sup>225</sup> and the International Convention on Economic Social and Cultural Rights (ICESCR),<sup>226</sup> both important human rights treaties.

The ICCPR contains several provisions dealing with equality and the elimination of discrimination. For example, Article 2(1) states that states parties undertake to ensure the rights and freedoms guaranteed in the treaty without "distinction of any kind". Rights guaranteed in the treaty include human dignity and privacy. Article 26 further states – independently of the guarantees in the treaty – that all persons are equal before the law and are entitled to equal protection before the law. This view is further supported by the existing jurisprudence of the Human Rights Committee, which interprets the ground of "sex" widely,<sup>227</sup> though there is not yet any case law under the ICCPR dealing directly with this issue in regard to transsexuals.<sup>228</sup> In addition, as seen above, there is the positive case law under European human rights legislation.

Article 2(2) of the ICESCR also expresses that states parties must guarantee the rights of the treaty without any discrimination of any kind. The subject matter of the treaty includes employment and housing.

It could be argued that the anti-discrimination provisions in the ICCPR and ICESCR imply that states parties are obliged to guarantee freedom from discrimination on any grounds,<sup>229</sup> although neither treaty explicitly contains a right to gender identity or transgender status, and the United Nations Human Rights Committee has not dealt with this question.<sup>230</sup>

Adding transgender people to the grounds of the HRA and the BORA – New Zealand's domestic instruments for human rights implementation – would arguably help New Zealand to fulfil its international obligations, promote the human rights of transgender

225 International Covenant on Civil and Political Rights (19 December 1966) 999 UNTS 171. New Zealand signed the ICCPR on 12 November 1968, and ratified it on 28 December 1978.

226 International Convention on Economic Social and Cultural Rights (19 December 1966) 993 UNTS 3. New Zealand signed the ICESCR on 12 November 1968, and ratified it on 28 December 1978.

227 See for example *Nicholas Toonen v Australia* (1994) CCPR/C/50/D/488/1992.

228 Human Rights and Equal Opportunity Commission "Human Rights for Australia's Gays and Lesbians" (Human Rights and Equal Opportunity Commission, Sydney, 1997) <[http://www.hreoc.gov.au/word/human\\_rights/hr\\_for\\_gay\\_lesbian.doc](http://www.hreoc.gov.au/word/human_rights/hr_for_gay_lesbian.doc)> (last accessed 25 September 2003).

229 Human Rights and Equal Opportunity Commission, above.

230 *Commission des droits de la personne et des droits de la jeunesse v Maison des jeunes* (1998) 33 CHRR D/263 (Trib Qué) para 69.

people, and set a higher standard of human rights protections in New Zealand in compliance with international law.

## 2 *International trend*

Another point in favour of an amendment is the fact that there are several jurisdictions that have already successfully introduced, or are on the verge of introducing, anti-discrimination legislation addressing transgender people. For example, in the United States there are two states, several counties, and at least 35 cities that include protection for transgender people, or protection based on the ground of gender identity, in their anti-discrimination legislation.<sup>231</sup> In addition, there is recent positive case law in the United States, which grants transgender people protection on sex and disability grounds.<sup>232</sup> Most Australian<sup>233</sup> and some Canadian jurisdictions,<sup>234</sup> as well as a growing number of European countries,<sup>235</sup> have amended their anti-discrimination legislation in a similar manner.

Another positive precedent is Recommendation 1117 on the Condition of Transsexuals, adopted by the Parliamentary Assembly of the Council of Europe, which called on member states to introduce legislation whereby "all discrimination in the enjoyment of fundamental rights and freedoms is prohibited in accordance with Article 14 of the European Convention of Human Rights".<sup>236</sup> The European Court of Justice has moved gradually to acknowledging that transsexual individuals suffer from human rights violations too.<sup>237</sup>

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231 Transgender Law and Policy Institute "Non-Discrimination Laws that Include Transgender People" <<http://www.transgenderlaw.org/ndlaws/index.htm>> (last accessed 25 September 2003).

232 Transgender Law and Policy Institute, above.

233 See for Australia and other jurisdictions Robert Wintemute (ed) *Legal Recognition of Same-Sex Partnerships* (Hart Publishing, Oxford, 2001) 789-790.

234 Canadian Human Rights Commission "Prohibited Grounds Of Discrimination" <<http://www.chrc-ccdp.ca/publications/prohibit-motifs.asp>> (last accessed 25 September 2003).

235 Human Rights and Equal Opportunity Commission "Human Rights for Australia's Gays and Lesbians" (Human Rights and Equal Opportunity Commission, Sydney, 1997) <[http://www.hreoc.gov.au/word/human\\_rights/hr\\_for\\_gay\\_lesbian.doc](http://www.hreoc.gov.au/word/human_rights/hr_for_gay_lesbian.doc)> (last accessed 25 September 2003).

236 Parliamentary Assembly of the Council of Europe Recommendation 1117 of 26 September 1989 on the Condition of Transsexuals, Art 11(d).

237 Press for Change "Broadening Article 14" <<http://www.pfc.org.uk/legal/ilga-a14.htm>> (last accessed 25 September 2003).

In 1993, transgender people from all over the world came together to promote the individual's right to gender identity in the International Bill of Gender Rights.<sup>238</sup> Despite its purely proclaiming character, it nevertheless gives some indication of how the affected individuals think about the issue.

Given these circumstances, it can be seen that an amendment would follow an international trend, which again is an argument in favour of amending the HRA<sup>239</sup> because it would give New Zealand the opportunity to join a progressive development towards a higher human rights protections standard. Additionally, New Zealand would have the chance to benefit from the experiences of other jurisdictions.

#### *D Consistency*

An amendment would also be a matter of consistency. New Zealand's move towards a more liberal approach regarding sexual minorities can be traced from the homosexual law reform in 1985, the inclusion of the ground of "sexual orientation" in the HRA, and the provisions in the BDMA dealing with a change of name and birth certificates, through to decisions regarding transsexual marriage. Given this development of New Zealand's legal framework, particularly in regard to sexual minorities, an amendment would be simply the next step. After all, the law has to stay up to date and extend rights to groups in society that are discriminated against.<sup>240</sup>

Also, if society allows transsexuals to change their sex, then these individuals should be put in a position where they can function as fully as possible in society as their acquired sex.<sup>241</sup> An amendment would accelerate this process.

Another aspect of consistency is that since gender identity is equally, if not more closely, linked to the inner self than sexual orientation, it would further be inconsistent to have a ground of "sexual orientation" but then not allow for a ground of "gender identity" under the HRA as well.

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238 Adopted by the Second International Conference on Transgender Law and Employment Policy, 1993. See Transgender Law and Policy Institute "The International Bill of Gender Rights" <<http://www.transgenderlegal.com/ibgr.htm>> (last accessed 25 September 2003).

239 Human Rights Commission "Submission to the Justice and Electoral Committee on the Human Rights Amendment Bill 2001" Appendix 1, para 1.3.

240 (22 July 1993) 536 NZPD 16746.

241 *Attorney-General v Otahuhu Family Court* [1995] 1 NZLR 603, 607 (HC).

### *E Conclusion*

As seen above, there are various arguments both for and against an amendment. Having analysed them, it can be said that the arguments against an amendment are not substantial and are mostly based upon misconceptions and prejudices, while those in favour of an amendment are more logically persuasive.

## **VI PRACTICAL WAYS TO REALISE THE AMENDMENT**

This section of the paper will examine the practical issues surrounding an amendment of the HRA. It will address the questions of wording and where the anti-discrimination provision should be placed.<sup>242</sup> While it is beyond the scope of the paper to deal with all possible solutions, it will address the most important ones. Finally, it will give a brief overview of some recent developments regarding the issue of gender identity.

### *A Wording of the Amendment*

There are several alternative terms that could be used to describe the desired characteristic for non-discrimination, such as "gender realisation" and "gender identification". The term "gender identity" is the most common one in international jurisdictions.<sup>243</sup> In addition, the term is wide enough to cover not only transgender concerns but also gender stereotyping. As the most accurate expression for this contentious matter, it seems sensible to use it, with an appropriate definition, for an amendment of the HRA.<sup>244</sup>

### *B Location of the Anti-Discrimination Provision*

Another practical question is where to place the term (and possibly definition) in the Act. While there are again several ways to do this, the most important alternatives are considered here.

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242 Approach adopted from Paisley Currah and Shannon Minter *Transgender Equality* (Policy Institute of the National Gay and Lesbian Task Force, Washington, 2000) 38 <<http://www.nglhf.org/downloads/transeq.pdf>> (last accessed 25 September 2003).

243 Used for example in several jurisdictions in the United States. For an overview see Currah and Minter, above, 45–47.

244 It is outside the scope of this paper to deal with the advantages and disadvantages of possible definitions. For suggestions and recommended elements of a definition see Currah and Minter, above, 40. It is further noted, that to use a definition could lead to difficulties too since any definition potentially limits the interpretation of a term.

### 1 *Inclusion as part of the "sexual orientation" ground*

One possibility would be to include discrimination based on gender identity in the HRA under the ground of "sexual orientation" (section 21(1)(m))—an approach that has been taken by several jurisdictions in the United States.<sup>245</sup>

However, the disadvantage of this method is that it would make it more difficult to educate the public—particularly about transgender issues and discrimination against transgender people.<sup>246</sup> Since most people do not read statutes in detail,<sup>247</sup> they might not even come across the issue of gender identity, if it were "hidden" within the definition of sexual orientation. While this might not be an issue if both grounds already co-existed, it becomes more problematic if an existing Act is simply being amended since it could draw less attention to the change. Another concern is that including the issue under the ground of "sexual orientation" could lead to confusion by linking the unrelated issues of gender identity and sexual orientation. This approach is not desirable.

### 2 *Related to the grounds "sex" or "gender"*

A second possibility would be to include gender identity in the definition of the ground of "sex" (section 21(1)(a)).<sup>248</sup> The advantage of this solution is that it would again be easier to use an existing ground by widening a definition instead of introducing a new ground altogether.<sup>249</sup>

Alternatively, a ground of "gender" could be used to bring gender identity issues within the Act. This could be achieved by either adding a new "gender" ground with a wide definition into the Act, or simply by changing the "sex" ground to "gender".<sup>250</sup>

As already discussed in relation to "sexual orientation", to include transgender people in the meaning of pre-existing terms does have the disadvantage that a more meaningful educational message might be lost.<sup>251</sup> In addition, as negative case law—especially in the United States—indicates, the grounds "sex" or "gender" often lead to interpretation

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245 See for example Toledo, Ohio, Ordinance 1183-98 (8 December 1998); York, Pa, Ordinance 9-98 (15 September 1998).

246 Currah and Minter, above, 41.

247 Currah and Minter, above, 41.

248 Currah and Minter, above, 42.

249 Currah and Minter, above, 43.

250 Auckland Central Rainbow Branch of the New Zealand Labour Party "Submission to the Justice and Electoral Committee on the Human Rights Amendment Bill 2001".

251 Currah and Minter, above, 68.

problems and are therefore not sufficiently clear.<sup>252</sup> They also leave out those who do not comply with gender stereotypes. These suggestions are therefore unsatisfactory.

### 3 A new ground – "gender identity"

Finally, a new ground of "gender identity" could be added to the HRA, for example in the form of a new clause 21(1)(n).

This approach has a higher symbolic value – particularly for transgender people – than including these matters under an existing ground.<sup>253</sup> After all, a separate ground would clearly establish what makes transgender people different from the rest of society, and also emphasise what all transgender people have in common.<sup>254</sup> It would also have the side effect of strengthening awareness in the public by pointing out that gender identity is different from characteristics such as sexual orientation and is therefore deserving of individual attention.<sup>255</sup>

The introduction of a new ground of "gender identity" into the HRA is the preferable solution.

### C Recent Developments

Two recent legislative developments regarding the issue of gender identity are worthy of attention. The first is the discussion of the Sentencing and Parole Reform Bill 2001, which was amended in Select Committee to add "hate crimes" to the list of aggravating factors.<sup>256</sup> Section 9(g) lists gender identity as one of the relevant characteristics that might induce hatred in others.<sup>257</sup>

The other important development is the Committee's consideration of the Human Rights Amendment Bill in 2001.<sup>258</sup> Out of the 75 submissions received by the Committee, at least 12 asked for the inclusion of gender identity, transgender status, or transsexuals/intersex people within the scope of the Act. It is also significant that the

252 Currah and Minter, above, 61.

253 Press for Change "Broadening Article 14" <<http://www.pfc.org.uk/legal/ilga-a14.htm>> (last accessed 25 September 2003).

254 Rainbow Sector Council of the New Zealand Labour Party "Submission to the Justice and Electoral Committee on the Human Rights Amendment Bill 2001".

255 Currah and Minter, above, 41.

256 The Bill was passed as two Acts on 1 May 2002: the Sentencing Act 2002 and the Parole Act 2002. The former contains the "hate crime" provision.

257 Sentencing and Parole Reform Bill 2001, no 148-2 (the commentary) 11.

258 Tim Barnett, MP, personal communication, 20 March 2002.

submissions did not only come from transgender individuals, but also from the general public and the Human Rights Commission.<sup>259</sup> The amendment did not relate to additional grounds or the effectiveness of the Act. Nevertheless, submissions were made on these matters demonstrating significant support and demand for inclusion. Accordingly the Select Committee recommended that the Government follow up on this issue in the next HRA amendment.<sup>260</sup>

## VII CONCLUSION

Discrimination is a common occurrence, not only in a legal, but also in a social context. There exist several obstacles for transgender people in everyday life, as indicated by the example of transsexuals.

New Zealand's anti-discrimination legislation—the BORA and the HRA—has been amended over the years to achieve a high standard of human rights protections in this country, and generally serves as a good basis to start from. However, the concerns of transgender people and other groups that are affected by discrimination based on gender identity have not yet been addressed in this context. As demonstrated, the current legal framework is unclear and therefore unsatisfactory in this regard since none of the grounds of "sex", "disability", or "sexual orientation" cover the matter sufficiently.

Persuasive arguments have been seen in favour of a HRA amendment. The main ones are that legislation offers additional benefits compared to education alone, that discrimination is a reality, and that measures against it are both desirable and consistent with New Zealand's international obligations. In addition, it would be a development that would follow an international trend. The political aspects of an amendment further show that it is a matter of consistency to add a new ground to the HRA.

This paper has suggested introducing an additional prohibited ground of discrimination, "gender identity", which, through the operation of section 19 of the BORA, would amend the anti-discrimination provisions of both statutes.

What remains is the question of the chances of an amendment in New Zealand's current political climate. In this respect, a positive outlook is indicated by the development of New Zealand's legal framework in the past, the progress in recent times, and aspects such as the prospective support for an amendment from several sides.<sup>261</sup>

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259 Human Rights Commission "Submission to the Justice and Electoral Committee on the Human Rights Amendment Bill 2001" Appendix 1, para 1.1.

260 Barnett, above.

261 According to Tim Barnett, MP, an amendment is likely within the next three years in the current political environment. Personal communication, 26 March 2002.

Having said that, there are also indications that there could be strong opposition at first. Despite the prejudicial nature of arguments against an amendment, such views still have the capacity to cause delay. Given that the issue has not yet been discussed in public, it seems quite possible that to broach it will, at least initially, meet resistance from conservative parts of society.

In conclusion, an amendment is not only necessary, but desirable in light of New Zealand's anti-discrimination standards and human rights protections. New Zealand would additionally benefit from more research into the concerns of transgender people and gender identity issues, since it would help to highlight the problems and bring these matters to the attention of the public—something that has happened very rarely to date.

