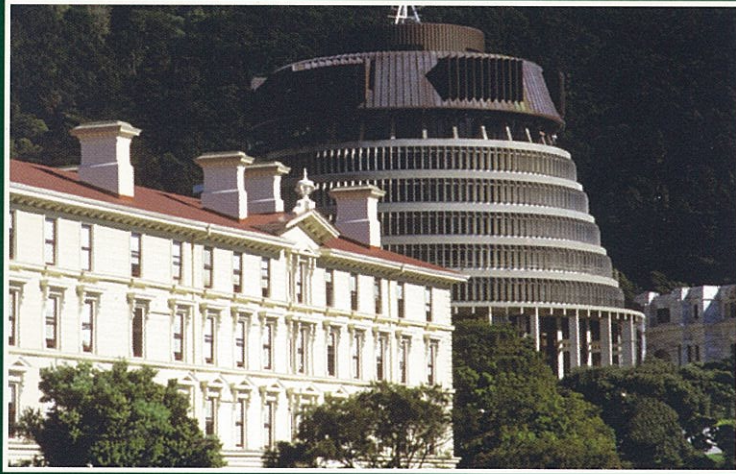


# *New Zealand Journal of Public and International Law*



VOLUME 5 • NUMBER 2 • DECEMBER 2007 • ISSN 1776-3930

---

THIS ISSUE INCLUDES CONTRIBUTIONS BY:

Rt Hon Sir Kenneth Keith

Juliet Philpott

Duncan Webb

Fiona Wright

Elisabeth McDonald

---

VICTORIA UNIVERSITY OF WELLINGTON

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



FACULTY OF LAW  
*Te Kauhanganui Tatai Ture*

© New Zealand Centre for Public Law and contributors

Faculty of Law  
Victoria University of Wellington  
PO Box 600  
Wellington  
New Zealand

December 2007

The mode of citation of this journal is: (2007) 5 NZJPL (page)

The previous issue of this journal is volume 5 number 1, June 2007

ISSN 1176-3930

Printed by Stylex Print, Palmerston North

Cover photo: Robert Cross, VUW ITS Image Services

## CONTENTS

### *Essay*

The ICJ — Some Reflections on my First Year <i>Rt Hon Sir Kenneth Keith</i> .....	201
--	-----

### *Articles*

Damages Under the United Kingdom's Human Rights Act 1998 and the New Zealand Bill of Rights Act 1990 <i>Juliet Philpott</i> .....	211
Keeping the Crown's Conscience: A Theory of Lawyering for Public Sector Counsel <i>Duncan Webb</i> .....	243
Law, Religion and Tikanga Māori <i>Fiona Wright</i> .....	261

### *Legislative Comment*

Discrimination and Trans People: The Abandoned Proposal to Amend the Human Rights Act 1993 <i>Elisabeth McDonald</i> .....	301
---	-----

The **New Zealand Journal of Public and International Law** is a fully refereed journal published by the New Zealand Centre for Public Law at the Faculty of Law, Victoria University of Wellington. The Journal was established in 2003 as a forum for public and international legal scholarship.

The NZJPIL welcomes the submission of articles, short essays and comments on current issues, and book reviews. Manuscripts and books for review should be sent to the address below. Manuscripts must be typed and accompanied by an electronic version in Microsoft Word or rich text format, and should include an abstract and a short statement of the author's current affiliations and any other relevant personal details. Authors should see earlier issues of the NZJPIL for indications as to style; for specific guidance, see the Victoria University of Wellington Law Review Style Guide, copies of which are available on request. Submissions whose content has been or will be published elsewhere will not be considered for publication. The Journal cannot return manuscripts.

Contributions to the NZJPIL express the views of their authors and not the views of the Editorial Committee or the New Zealand Centre for Public Law. All enquiries concerning reproduction of the Journal or its contents should be sent to the Student Editor.

Annual subscription rates are NZ\$100 (New Zealand) and NZ\$130 (overseas). Back issues are available on request. To order in North America contact:

Gaunt Inc  
Gaunt Building  
3011 Gulf Drive  
Holmes Beach  
Florida 34217-2199  
United States of America  
e-mail [info@gaunt.com](mailto:info@gaunt.com)  
ph +1 941 778 5211  
fax +1 941 778 5252

Address for all other communications:

The Student Editor  
New Zealand Journal of Public and International Law  
Faculty of Law  
Victoria University of Wellington  
PO Box 600  
Wellington  
New Zealand  
e-mail [nzjpil-editor@vuw.ac.nz](mailto:nzjpil-editor@vuw.ac.nz)  
fax +64 4 463 6365

# DISCRIMINATION AND TRANS PEOPLE: THE ABANDONED PROPOSAL TO AMEND THE HUMAN RIGHTS ACT 1993

*Elisabeth McDonald\**

---

*The trans community debate concerning the application of section 21 of the Human Rights Act 1993 to trans people became public when the Human Rights (Gender Identity) Amendment Bill 2004 was selected from the legislative ballot. The Bill proposed to amend section 21 to include gender identity as a prohibited ground of discrimination. Before the Bill received its first reading, however, it was withdrawn by its proponent, on the grounds that an opinion from the Crown Law Office concluded that such an amendment was unnecessary as trans people could well be covered by the existing prohibited ground of "sex" in section 21. In this comment, the author questions the conclusion of the Crown Law opinion and argues that an amendment is still required in order to protect the trans community from discrimination.*

---

## **I INTRODUCTION**

On 22 August 2006, the then Member of Parliament, the Hon Georgina Beyer withdrew her Human Rights (Gender Identity) Amendment Bill 2004, after it had been held over prior to the last election and had yet to receive its first reading. The Bill proposed to amend section 21 of the Human Rights Act 1993 (HRA) to include a new prohibited ground of discrimination:

(n) gender identity, which refers to the identification by a person with a gender that is different from the birth gender of that person, or the gender assigned to that person at birth, and may include persons who call themselves transsexual, transvestite, transgender, cross-dresser, or other description.

---

\* Associate Professor, Law Faculty, Victoria University of Wellington. An earlier version of this paper was presented at the Homosexual Law Reform Conference in Wellington, December 2006. My thanks to my colleagues Dean Knight and Petra Butler for their helpful observations during that writing and presentation process, and to Jack Byrne and my colleague Claudia Geiringer for their valuable reviews, and re-wording suggestions, in relation to this piece.

The publicly given reason for the withdrawal of the Bill was that the Crown Law Office (Crown Law) proffered an opinion to the Attorney-General (the Hon Michael Cullen), which concluded that "[t]here is currently no reason to suppose that 'sex discrimination' would be construed narrowly to deprive transgender people of protection under the HRA."<sup>1</sup> The withdrawal of the Bill was welcomed by the trans community who were fearful that, in the absence of a clear political will, debating the issue may have exposed their members "to a barrage of negativity from some politicians" during the campaign for the amendment of section 21 of the HRA.<sup>2</sup> Although it is likely that the potential impact of public debate also influenced Ms Beyer's decision to withdraw the Bill, it is the influence of the Crown Law opinion on the fate of the Bill that will be the focus of this comment.

I do not believe that the withdrawal of the Bill was in the best interests of all those who challenge gender norms through how they dress, live, work and love. This group includes the transgender community, but is not limited to those who identify differently from their gender of birth. In my view, the amendment is still needed. First, I consider that the ground of "sex" in section 21 of the HRA is not wide enough to accommodate all the types of discrimination suffered on the ground of gender identity — specifically, the discrimination currently faced by the transgender community in New Zealand.<sup>3</sup> Secondly, even if "sex" can be interpreted widely, it would require judicial will to do so. This cannot be guaranteed, especially since the grounds of prohibited discrimination in New Zealand have not been usually extended through judicial interpretation, but by legislative amendment. This comment explores these two arguments, following a brief overview of the current prohibited grounds of discrimination in New Zealand under section 21 of the HRA and a discussion of the difference between "sex" and "gender".

## **II CURRENT PROHIBITED GROUNDS OF DISCRIMINATION AND THE MEANING OF "SEX" VERSUS "GENDER"**

Section 21 of the HRA contains most of the prohibited grounds of discrimination that are found in overseas legislation, with the exception of "gender" or "gender identity", "conviction",<sup>4</sup> "language" and "property".<sup>5</sup> However, the list in section 21 is very extensive compared to most

---

1 Crown Law Office, to the Attorney-General "Opinion on the Human Rights (Gender Identity) Bill" (2 August 2006) Opinion, para 30.

2 Claudia McKay, President of Agender (transgender advocacy group) "Agender 'Relieved' at Crown Law Opinion" (24 August 2006) Media Release.

3 This is also the view of Stephen Whittle with regard to Article 14 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (4 November 1950) 213 UNTS 221 [ECHR]. Stephen Whittle *Respect and Equality: Transsexual and Transgender Rights* (Cavendish Publishing Limited, London, 2002) 240-241.

4 See, for example, Canadian Human Rights Act RS C 1985 c H-6, s 3.

5 See International Convention on Civil and Political Rights (16 December 1966) 999 UNTS 171, art 26; Charter of Human Rights and Responsibilities Act 2006 (Vic).

other legislated versions. Some terms that may be thought of as equivalents in everyday parlance have even been separated out for the purpose of anti-discrimination legislation — for example, colour, race and ethnic origin. Such a drafting style makes it more difficult to argue for an expansive interpretation of some terms. Furthermore, a number of grounds are also defined in a way that clarifies their scope. Notably, sex is defined to include pregnancy and childbirth, but not gender.<sup>6</sup>

The issue considered by Crown Law was "whether prohibition of discrimination on grounds of gender identity is already provided for in the HRA."<sup>7</sup> Crown Law's opinion focuses mainly on whether discrimination on the ground of gender identity is included within the prohibition on discrimination on the ground of sex. Another ground sometimes referred to is discrimination on the ground of sexual orientation. However, this is a matter of expression of one's sexuality, not identification with a certain gender or no binary gender — although there may be situations in which both grounds are at issue. Trans people may also claim they are discriminated against on the ground of disability — which may be the basis for discrimination in cases where the complainant is willing to identify as having a psychiatric illness (for example gender dysphoria)<sup>8</sup> or to have their trans identity perceived as a disability,<sup>9</sup> but not in all cases where a person's presentation as a gender different to that assigned to them at birth is at issue.

Before considering the case law discussed in Crown Law's opinion it is useful to consider, as a preliminary linguistic inquiry, whether there is any relevant difference between "sex" and "gender" from the perspective of discrimination. If there is no relevant difference, then it may well be possible that all discrimination on the basis of someone's gender can be caught by the prohibition on discrimination on the ground of sex.

Sex usually refers to a person's physical anatomy at birth (caught by the term "birth gender" in the Bill). A variety of biological factors is used to establish the sex of an individual — a list which invariably appears in the cases dealing with the validity of a transgender person's marriage — and includes examining sex chromosomes, gonads, sex hormones, reproductive organs and external genitalia.

Gender is a more complex socially and politically constructed matter. It relates to those factors traditionally or culturally associated with being male or female. Gender identity can be defined as: one's psychological sex; the sense of self; of being male or female (or neither exclusively); and may

---

6 The distinction between "sex" and "gender" is recognised in section 9(2)(f) and (g) of the Manitoba Human Rights Code CCSM M 1987 c H-175.

7 Crown Law Office, above n 1, para 2.

8 Heike Polster "Gender Identity as a Prohibited Ground of Discrimination" (2003) 1 NZJPIL 157, 182 (a very thorough local piece on the debate, not cited by Crown Law).

9 Not surprisingly, trans people object to having to rely on having their trans status described as a disability. Ibid, 182-183.

not be in conformity with the sex one is assigned at birth.<sup>10</sup> Gender expression relates to how a person is perceived through external presentation and behaviour — socially defined as either masculine or feminine. A person's gender identity and gender expression may also not be congruent: either intentionally as performance or unintentionally as the result of societal judgement. Those with incongruent identity and expression may consider themselves to be "transgender" or "transsexual" or "transvestite". To use the words of the Explanatory Note to the Bill:

The definition to be included in section 21 of the Human Rights Act 1993 provides that gender identity 'may include persons who call themselves transsexual, transvestite, transgender, cross-dresser, or other description.' This is intended to ensure that the labels that individuals may place upon themselves, or that which may be placed upon them by others, do not determine whether that individual comes within the provisions of the Act...Gender identity is defined as more than simply dressing in the clothes of the opposite gender.

Therefore, gender and sex are generally now understood as two different concepts to explain related issues — the extent to which a person is male or female and is perceived and judged as such. Currently, decisions about sex and gender do matter (for example, in which school, prison or sports team individuals are placed) and, consequently, so does the external presentation of sex and gender. The external presentation of one's sex is usually also the expression (and reading) of one's gender. However, when it is not, there is a dissonance that can result in discrimination — which could be on the grounds of sex or gender.

### **III UNEQUAL TREATMENT OF TRANS PEOPLE THAT HAS BEEN IDENTIFIED AS "SEX" DISCRIMINATION**

In *A v Chief Constable of West Yorkshire Police*, the plaintiff was deemed ineligible for employment as a police officer because, as a post-operative<sup>11</sup> male-to-female (MtF),<sup>12</sup> she could not conduct personal searches of "same-sex" prisoners as required by section 54(9) of the Police and Criminal Evidence Act 1984 (UK).<sup>13</sup> This was because, arguably, she could not search women as she was biologically male, but could not search men as she presented as female. Therefore, the plaintiff claimed she had been discriminated on the ground of sex.

---

<sup>10</sup> Ibid, 158.

<sup>11</sup> The terms "pre-operative" and "post-operative" can be misleading, as there is not "one" operation needed in order to transition and legally change sex.

<sup>12</sup> Male-to-female (MtF) is the term used to refer to someone born with a male body who has a female gender identity.

<sup>13</sup> *A v Chief Constable of West Yorkshire Police* [2005] 1 AC 51 (HL).



The House of Lords agreed, in essence because they acknowledged that she had a right to be treated similarly to other women:<sup>14</sup>

For the purposes of discrimination between men and women in the fields covered by [... the equal treatment] directive, a trans person is to be regarded as having the sexual identity of the gender to which he or she has been assigned.

It is, therefore, a straightforward exercise to conceptualise this as a case of sex discrimination — if A was legally a woman, the fact that she was treated as if she was not of that sex was discrimination on the ground of sex.<sup>15</sup>

In their opinion, Crown Law also argued that the Supreme Court of British Columbia in *Vancouver Rape Relief Society v Nixon*<sup>16</sup> held that the prohibition against sex discrimination covers discrimination on the basis of transsexualism. In that case, a post-operative MtF (Ms Nixon) claimed the Vancouver Rape Relief Society discriminated against her, as they would not permit her to be a counsellor as she had not always been a woman. This was held to be discrimination on the ground of sex.<sup>17</sup> A number of points should be made about this decision, however.

First, Canadian jurisprudence has recognised that sex (or sexual identity) is a continuum:<sup>18</sup>

"[S]ex" in s. 41 is not a binary concept limited to "male" and "female" but includes a continuum of personal characteristics that may manifest in individuals. Examples include persons with unambiguous male or female anatomy who identify themselves as members of the sex not consistent with their anatomy, persons with ambiguous sexual anatomy who identify themselves with one or other sex and persons ... who have been surgically "reassigned" by having their anatomy altered to conform to their self-perceptions or sense of their sexual identity.

This "extended" understanding of "sex" appears to merge the two concepts of sex and gender. Furthermore, legislation in a number of provinces in Canada refers to "gender" as one of the

---

14 Ibid, para 56 Lord Rodger of Earlsferry.

15 The other two cases relied on in *A v Chief Constable of West Yorkshire Police*, above n 13, the cases of *Case C-13/94 P v S* [1996] ICR 795 and *KB v National Health Services Pension Agency* [2004] IRLR 240, can also easily be viewed as either sex discrimination or marriage discrimination. Whittle notes that in the case of *P v S* the Court asked would the trans woman "have been dismissed if she had remained a man?" — thereby focussing on whether it was discrimination on the grounds of sex. Whittle, above n 3, 109.

16 *Vancouver Rape Relief Society v Nixon* (2003) BCSC 1936.

17 Ibid, para 166, E R A Edwards J.

18 Ibid, para 25, E R A Edwards J.

grounds of discrimination; others use "sex", so arguably there is a view in Canada that these terms both cover the same ground with regard to the scope of the discrimination legislation.<sup>19</sup>

However, whether or not the terms "sex" and "gender" are interchangeable, it is also my argument that *Vancouver Rape Relief Society v Nixon* can be conceptualised as involving sex discrimination in the more narrow "biological" understanding of the term. The case was one in which the plaintiff's born biological sex was not her legal sex — the Rape Relief Society was dealing with her on the ground of her biological sex and was hence discriminating against her on the ground of her sex.<sup>20</sup> This point is indeed picked up on at the conclusion of the Crown Law opinion where it is acknowledged that Ms Nixon suffered "unfavourable treatment on the grounds of the sex she now identifies with rather than the sex she used to be. Nonetheless, it is still sex discrimination."<sup>21</sup>

After discussion of these cases, and with reference to a decision of the European Court of Justice,<sup>22</sup> Crown Law concluded that "[i]n the UK, Europe and in Canada, it is accepted that discrimination on the grounds of gender identity is covered by the prohibition against sex discrimination."<sup>23</sup>

In my view, this was a bold claim that needed to be limited to the specific facts of the cases. First, I do not think it is the case that *all* types of discrimination faced by transgender people can be considered sex discrimination (a point I pick up on later in the context of some specific examples). Secondly, it may be that the Canadian extended interpretation of "sex" (an interpretation permissible

---

19 The provinces that refer to "gender" as a prohibited ground include Alberta (see the preamble to the Human Rights, Citizenship and Multiculturalism Act RS A 2000 c H-14) and Saskatchewan (s 2(1)(o) of the Human Rights Code S S 1979 c S-24, states that "sex means gender"). In Manitoba, section 9(2) of the Manitoba Human Rights Code CCSM M 1987 c H-175, refers to sex as a prohibited ground as well as "gender-determined characteristics" other than those included under the ground of "sex". In Ontario, section 1 of the Human Rights Code RS O 1990 c H-19, refers only to "sex" but the Ontario Human Rights Commission website states that discrimination against trans persons (on the ground of gender identity) is covered by "sex": Ontario Human Rights Commission <[www.ohrc.on.ca](http://www.ohrc.on.ca)> (last accessed 3 November 2007). The human rights legislation of Yukon, British Columbia and Nova Scotia refer only to "sex".

20 For a discussion of Rape Relief's argument that "sex" does not encompass transsexualism or gender identity, see Ummni Khan "Perpetuating the Cycle of Abuse: Feminist (Mis)use of the Public/Private Dichotomy in the Case of *Nixon v Rape Relief*" [2007] Windsor Rev of Legal and Social Issues 27.

21 Crown Law Office, above n 1, para 24.

22 *P v S*, above n 15, a case which applied the EEC Equal Treatment Directive.

23 Crown Law Office, above n 1, para 5. It is my claim that this conclusion is based just on these three cases (with *P v S*, above n 15, actually being relied on in *A v Chief Constable of West Yorkshire Police*, above n 13) as the Crown Law opinion identifies no relevant South African cases (para 26) and acknowledges that the United States jurisprudence is unclear "on this issue" (para 14). Regarding the other case cited in support, *KB v National Health Services Pensions Agency*, above n 15, Crown Law also acknowledges that the successful claim was founded on a breach of the right to marry under Article 12 of the ECHR, above n 3, (para 9).

by the wording of section 15 of the Canadian Charter of Rights and Freedoms (the Canadian Charter))<sup>24</sup> would cover all types of discrimination against trans people. However, I argue that the Canadian "expansive" interpretation is jurisdiction-specific because of the variation in drafting style of the Canadian Charter compared to section 21 of the HRA. The Crown Law opinion deals with this issue by claiming that the statements of the House of Lords and the European Court of Justice that there is no third sex<sup>25</sup>

[s]hould not be interpreted so as to exclude the kind of continuum identified by the Canadian courts.

That continuum is important to ensure that all those who identify as transgender are protected by the prohibition against sex discrimination.

I agree — but claiming that this is the preferable interpretation does not mean it will be so extended by the New Zealand courts. The conclusion that there can be comfortable reliance on judicial interpretation rather than legislation is a contentious point, to which I shall return. More specifically, although discrimination on the ground of gender identity (defined as gender expression, for example) may be covered by sex discrimination, discrimination on the basis of being trans, including being in transition, is a different inquiry and one that is not clearly recognised as such in the Crown Law opinion.

More recently, in the United States, some jurisdictions have accepted that discrimination against a transgender person can, in limited circumstances, be recognised as sex discrimination – although this was not the historical view.<sup>26</sup> In *Smith v City of Salem* (a 2004 case not discussed in the Crown Law opinion) the United States Court of Appeals for the Sixth Circuit held that a pre-transitioning MtF fire fighter, whose colleagues had complained of his off-putting feminine behaviour,<sup>27</sup> had been discriminated on the ground of sex when his employment was terminated.<sup>28</sup> The Court relied on the United States Supreme Court decision in *Price Waterhouse v Hopkins*,<sup>29</sup> a 1989 case in which the Supreme Court held that a woman employee had been discriminated against on the

---

24 Section 15(1) reads: "[e]very individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, *in particular*, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability". Canadian Charter of Rights and Freedoms, s 15, Part I of the Constitution Act 1982 (Canada Act 1982 (UK) sch B) (emphasis added).

25 Crown Law Office, above n 1, para 25.

26 See for example *Ulane v Eastern Airlines Inc* (1984) 742 F 2d 1081 (7th Cir).

27 Evidently, Smith had not yet changed his first name and considered himself to be pre-transition, so I use the pronoun Smith used at the time. See Anna Kirkland "What's at Stake in Transgender Discrimination as Sex Discrimination?" (2006) 32 Signs: Journal of Women in Culture and Society 83. Elsewhere in this piece, the pronoun used is also based on the self-identification of the trans person – more typically MtFs would consider themselves female once they start living as women, which usually predates being granted access to hormones.

28 *Smith v City of Salem* (2004) 378 F 3d 566 (6th Cir).

29 *Price Waterhouse v Hopkins* (1989) 490 US 228.

ground of sex because she had failed to make partnership as she was macho and insufficiently feminine — that is, her gender expression (masculine) did not conform to her sex (female).

In *Smith*, the Sixth Circuit used the concern about sex stereotyping to find sex discrimination when a person born with a male body acted too much like a woman. Smith was not offered protection as someone "engaged in the different activity of being a transsexual". This was the reason the lower court dismissed Smith's claim: finding that Smith belonged in "a different identity group than the one 'sex' is meant to protect".<sup>30</sup> It is also, of course, possible to view *Smith* as a more traditional sex discrimination case, as women fire fighters who behaved in the same (feminine) way would not have been dismissed.<sup>31</sup>

The Crown Law opinion does not discuss *Smith*, but it does refer to the Ninth Circuit decision in *Schwenk v Hartford*<sup>32</sup> as an example of the "developments in the interpretation of sex discrimination in relation to transsexuals."<sup>33</sup> This was a case where a pre-operative MtF prisoner was sexually assaulted and threatened with rape by a prison guard. She alleged that this was violence prohibited by the Gender Motivated Violence Act.<sup>34</sup> Although in this case the Court of Appeals did note that the approach to sex discrimination had been altered by the Supreme Court's decision in *Price Waterhouse*, this was not primarily a discrimination case but rather a case about legal recognition of the psychological sex of the plaintiff for the purposes of a civil action. In the context of considering whether the attacks were "motivated by gender", the Court held that if the attacks were triggered by the gender expression of the plaintiff then they were so motivated. The Court also stated that "both statutes [the Civil Rights Act 1964 and the Gender Motivated Violence Act] prohibit discrimination based on gender as well as sex. Indeed, for purposes of these two acts, the terms "sex" and "gender" have become interchangeable."<sup>35</sup>

In *Schwenk* also, the identification of the conduct as sex discrimination was both fact- and legislation-specific. It is not the case, as Crown Law accepts, that "sex" has been extended to cover discrimination against trans people in all cases in the United States. In the words of Anna Kirkland: "if sex stereotyping is not the same as antipathy towards trans employees, then *Ulane* is the definitive case that closes off the expansion of sex to 'because of sex change' or 'gender identity'."<sup>36</sup>

---

30 Kirkland, above n 27, 97.

31 Although in the United States, gender-specific work appearance requirements are not actionable as sex discrimination. See Kirkland, above n 27, 99.

32 *Schwenk v Hartford* (2000) 204 F 3d 1187 (9th Cir).

33 Crown Law Office, above n 1, para 17.

34 Gender Motivated Violence Act 42 USC § 13981(d)(1).

35 *Schwenk v Hartford*, above n 32, 1202.

36 Kirkland, above n 27, 93.

Most recently, in a Tenth Circuit decision dealing with the dismissal of a transitioning MtF, the Court of Appeals preferred the approach in *Ulane*<sup>37</sup> and declined to adopt the reasoning of *Smith*.<sup>38</sup>

In the next part, I discuss examples of discrimination ("antipathy") faced by trans people that cannot easily be conceptualised as discrimination on the ground of sex ("sex stereotyping"). In this way, I demonstrate that it is difficult to accept Crown Law's conclusion that "[t]here is currently no reason to suppose that 'sex discrimination' would be construed narrowly to deprive transgender people of protection under the HRA."<sup>39</sup> In fact, most of the examples I discuss have not been interpreted as sex discrimination in any jurisdiction, indicating that even a liberal interpretation of "sex" would not assist the transgender community.

#### IV UNEQUAL TREATMENT WHICH IS NOT "SEX" DISCRIMINATION

Although trans people have successfully argued they were discriminated against on the ground of their gender or gender identity, these successes have been in jurisdictions where this ground is recognised in legislation or by analogy (as in Canada).<sup>40</sup> Of more interest to this local debate is the outcome of cases in which there is no separate ground of discrimination on the ground of gender or transgender status. What type of cases would not amount to discrimination on the ground of sex?

The application of *Price Waterhouse* to trans people indicates a willingness of some courts in the United States to find sex discrimination in non-traditional sex discrimination scenarios. However, is it the case that this will happen in situations that remain of significant concern to trans people?

Trans people are most likely to be discriminated against when their trans status is visible. This usually includes the initial stages of transition, but also extends to situations where someone's trans status is exposed, even years after their gender identity has been legally recognised.

Trans people who have not undertaken all gender reassignment surgeries are vulnerable to exposure in two contexts: first, in situations where they are required to remove all their clothing (for example, changing rooms, hospitals, strip searches, physical examinations); secondly, whenever they are required to show legal confirmation of their sex, as the ability to change the sex on a birth certificate requires that all gender reassignment surgeries have been completed. It is essential to note in this context, therefore, that almost all the cases cited in which transgender people have made a

---

37 *Ulane v Eastern Airlines Inc*, above n 26.

38 *Etsitty v Utah Transit Authority* 2007 US App LEXIS 22989 (20 September 2007): "A man who attempts to change his sex and appearance to be a woman is a drastic action that cannot fairly be characterized as a mere failure to conform to sex stereotypes... This court agrees with *Ulane* and the vast majority of federal courts to have addressed this issue and concludes discrimination against a transsexual based on the person's status as a transsexual is not discrimination because of sex under Title VII."

39 Crown Law Office, above n 1, para 30.

40 See the wording of the Canadian Charter of Rights and Freedoms, above n 24 and accompanying text.

successful (sex) discrimination claim concern *post-operative* MtFs. The one exception in the cases discussed above is that of the pre-operative fire fighter (Smith), whose case was dealt with in the employment context on the basis of sex stereotyping.

The following is a list of issues currently facing trans people and discussion as to whether these matters could be dealt with as matters of sex discrimination based on the overseas case law. In Part V, I will discuss to what extent I believe New Zealand courts will be willing to accept *any* claims made by trans people under the current prohibited grounds of discrimination in the HRA.

#### **A Ability to Change Sex Status (*Birth Certificates and Passports*)**

Currently, only post-operative transsexuals can easily amend their birth certificate and have a passport issued in the sex with which they identify. The key requirement is contained in section 28(3)(c)(i)(B) of the Births, Deaths and Marriages Registration Act 1995 — that the applicant "has undergone such medical treatment as is usually required by medical experts as desirable" to enable someone to have a "physical conformation" that accords with their gender identity. This has been interpreted as requiring gender reassignment surgery.<sup>41</sup> This raises discrimination issues for pre-operative transgender people who cannot access the surgery required for legal recognition. Can this be conceptualised as discrimination on the ground of sex?

Currently FtMs, for whom it is more difficult and expensive to access the required surgery to be legally recognised as male, may be physically recognisable as men in all situations that do not require nudity, yet must travel with a passport that either identifies them as female or contains an X where the sex of the passport holder is recorded.

If the only ground available is "sex", can this be a form of sex discrimination? Does the fact that an FtM who can access surgery and obtain legal recognition is treated differently by the law compared to one that cannot amount to discrimination on the ground of sex?

The pre-operative FtM wishes to be recognised legally as a man, but can only be recognised as a female. Most FtMs who have not undergone all gender reassignment surgeries can only become legally recognised as male by going through a process that is usually unavailable to them because of the cost involved. This could be conceptualised as sex discrimination, as it is easier for MtFs to gain access to the necessary surgery than for FtMs and the difference has an impact because of the

---

41 For FtMs, this means a range of surgeries to their chest, reproductive organs and genitalia before having a "full male body". Given the costs (currently in excess of \$100,000), the medical risks involved and the unavailability of most of this surgery in New Zealand, the Family Court appears to have followed international practice and accepted medical advice that full gender reassignment surgery may not always be required (for example, if the use of hormones have resulted in effective sterility or the surgery undertaken is irreversible). Human Rights Commission *Transgender Inquiry Summary of Submissions* (Wellington, 2007) 23. Not all jurisdictions require that the trans person undergo a particular type of sex reassignment surgery. See Sonia Katyal "*The Intellectual Commons of Gender*" (Research Paper No 976648, Fordham Law School, 2007).

transgender status of those seeking to legally change their sex. What the law requires of a trans man to be legally recognised as a man, as opposed to what is required of men born in male bodies, is not, however, sex discrimination — it is discrimination on the grounds of (trans)gender identity, or transgender status, or discrimination "because of sex change".<sup>42</sup>

### **B Transgender Prisoners**

In prison too, pre-operative and post-operative transsexuals are treated differently.<sup>43</sup> Pre-operative transsexuals are assigned to prisons for inmates of the opposite sex to the prisoner's gender identity. Is this discrimination on the ground of sex? All biological men must be in male prisons, all biological women must be in female prisons. A pre-operative prisoner goes to the prison that equates to their biological sex. This is not discrimination on the ground of sex — because of how sex is legally defined. It may be that there is a demonstrably justifiable reason for treating pre-operative MtFs in this way, but that does not mean it is not discriminatory. Moreover, it cannot easily be conceptualised as discrimination on the ground of sex as the trans prisoners are being treated as others of the same legal sex are. It is, rather, discrimination on the ground of transgender status.

### **C Marriage**

Post-operative transgender persons can marry a person of the opposite sex to the sex they identify with. Pre-operative transgender persons cannot. They are treated as asking to marry a same-sex partner, which is contrary to the Marriage Act 1955. This does not mean it is not discriminatory — but on what grounds is it discriminatory? The Court of Appeal case of *Quilter v Attorney-General* did not recognise the bar on same-sex marriage as discrimination on the ground of sex (nor, more contentiously, did the majority view it as discrimination on the ground of sexual orientation).<sup>44</sup> Is a pre-operative FtM who wishes to marry a woman making the same claim?

A pre-operative FtM (or trans man) wishing to marry a woman will identify as heterosexual, so would not be wishing to allege discrimination on the ground of sexual orientation. As Tipping J acknowledged in *Quilter*, although no person has the right to marry a person of the same sex, such a restriction impacts on, and is significant for, "people with a same-sex orientation", not for those with a heterosexual orientation.<sup>45</sup> Therefore, a claim of discrimination on the ground of sexual orientation would be irrelevant for a trans man who is wishing to marry a woman.

---

<sup>42</sup> Kirkland, above n 27, 93.

<sup>43</sup> For a discussion of the impact of prison policy on trans persons, see generally Whittle, above n 3, ch 12.

<sup>44</sup> *Quilter v Attorney-General* [1998] 1 NZLR 523.

<sup>45</sup> *Ibid*, 575 Tipping J.

The only other relevant ground in section 21 of the HRA would be sex, which was not accepted by the Court in *Quilter*.<sup>46</sup> Thomas J (in the minority on this point) did state that he saw no "sound reason why a couple, united in their intention to form an enduring relationship in the nature of marriage, cannot as a couple claim that they are being discriminated against on the ground of their sex or gender."<sup>47</sup> However, he went on to say that whatever "hesitation may exist to basing the discrimination on the ground of sex, one cannot seriously resist the proposition that gays and lesbians are discriminated against on the ground of sexual orientation."<sup>48</sup> Therefore, only one out of the five judges in *Quilter* was willing to accept that the restriction against same-sex marriages amounts to discrimination on the ground of sex.

#### **D Employment**

Whether a claim can be framed as sex discrimination in the employment context will depend on the nature of the claim. A claim relating to gender expression or sex stereotyping may well be. What of the pre-operative transsexual who wants to undertake a sex-specific job? Again, the issue here is that legally they are not considered to be the sex with which they identify. It may amount to sex discrimination in some cases, but claims in the employment context do not always involve a plaintiff who is biologically male wanting to do a women-only job.<sup>49</sup>

Trans people who are not recognised as either gender will be excluded from jobs that include a same-sex or sex-segregated component (such as conducting strip searches). Although the plaintiff in the case of *A v Chief Constable of West Yorkshire Police* was successful in arguing that it was sex discrimination not to allow her to conduct strip searches of women, A was a post-operative MtF and, therefore, legally a woman, not a pre-operative trans woman.

#### **E Exposure to Violence and Prejudice**

Legal remedies are often based on judgements about the credibility of the parties to a dispute — or in the context of the criminal law, the credibility of the victim or the accused. Assessment of credibility creates problems for trans people, who are often perceived as trying to deceive, lie or create a fraudulent identity.<sup>50</sup> This can also lead to their being victims of abuse and violence. Often, this prejudicial judgement occurs with no understanding of the importance of having a gender self-identity (for trans people their desire to become themselves, that is, have a sexual identity which

---

<sup>46</sup> See Part V for further discussion.

<sup>47</sup> *Quilter v Attorney-General*, above n 44, 536 Thomas J dissenting.

<sup>48</sup> Ibid.

<sup>49</sup> According to Stephen Whittle, "discrimination in the field of employment is probably the issue of greatest concern to trans people." Whittle, above n 3, 99.

<sup>50</sup> Human Rights Commission, above n 41, 22: "[o]ne police officer explained that police may be suspicious if a person's stated name does not match their legal name or sex".



conforms with their gender identity, is often downplayed as a lifestyle choice).<sup>51</sup> There is also a lack of understanding that living in one's gender role (referred to as "the real life experience") is required *before* someone is able to get access to hormones, which will have the effect of altering body shape and facial hair. There may well be, therefore, prior to the use of hormones, an incongruence between the trans person's physical appearance and the gender he or she identifies with, an incongruity which exposes trans people to ridicule, contempt, discrimination and sometimes violence.<sup>52</sup>

As an example of where decisions about credibility impact on prosecutorial discretion, in 2001, a 47-year-old man was arrested and charged with various sexual offences against someone who the police believed to be a 16-year-old boy. As reported in the *New Zealand Herald*, the police dropped charges against the man "after discovering that the victim was not in fact a 16-year-old boy, but a 30-year-old woman."<sup>53</sup> The article also stated that "[t]he complainant's credibility was completely demolished when it was discovered that he was a woman."<sup>54</sup>

It is likely that "in fact" the victim was a transitioning FtM, whose credibility was suddenly at issue on the basis that (s)he was seemingly dishonest in how (s)he physically presented. If the sex was non-consensual, why did the police not prosecute? If they would have prosecuted had the victim been a young male, but would not have prosecuted had the victim been a woman, this would amount to sex discrimination. Here, however, it may well be that the decision not to prosecute was based not on sex, but on the fact that the victim was transgender. Where the police choose not to prosecute someone who allegedly sexually abuses a transitioning FtM on the ground that the victim is a transitioning FtM, that is discrimination, but it is not discrimination on the ground of sex.

## **V WILL THE NEW ZEALAND COURTS EXTEND THE MEANING OF SEX?**

I have argued that the above examples are not easy to conceptualise as sex discrimination. If they are accepted as examples of discrimination on the ground of sex, it will be as a result of favourable judicial interpretation — that is, in the words of Crown Law, that the courts will not narrowly construe "sex discrimination". However, my second main argument is that it is premature to rely on there being an expansive interpretation of "sex" favoured by the courts.

---

51 In the poignant words of a submitter to the Human Rights Commission, above n 41, 3: "[b]eing 'trans' isn't a lifestyle and it isn't a choice. It's part of who I am. It doesn't define who I am – it only defines the process I have to go through to get the world to see who I am. What I want is just to be able to be myself."

52 Human Rights Commission, above n 41, 12.

53 Tony Stickley "Teen Boy Sex Victim Found to be a Woman" (27 July 2001) *New Zealand Herald* Auckland.

54 Ibid.

My reasons for claiming that the better way to ensure remedy for trans people who are discriminated against is by an amendment to the HRA, rather than by reliance on judicial discretion, arise from the historical approach to claims of substantive discrimination in New Zealand.

First, section 21 contains a closed list of prohibited grounds that have been traditionally extended by legislative amendment, not by judicial interpretation. In the words of Keith J in *Quilter*: "[i]t is Parliament which has widened the prohibition on invidiously discriminatory action" and it has done that by "adding to the prohibited grounds".<sup>55</sup> Such amendments have assumed significant political meaning and symbolic status. For example, the addition of the ground of sexual orientation in the HRA, which was not a prohibited ground in the Human Rights Commission Act 1977, had real meaning for the affected communities.

It is also the case that the New Zealand anti-discrimination legislation is not accompanied by a general principle of equal treatment, as found in the Canadian Charter and in the European Charter on Human Rights.<sup>56</sup> This means that New Zealand courts have less ability to interpret each prohibited ground of discrimination with reference to a stated legislative goal of equal treatment, regardless of the type of claim. Claimants must state the prohibited ground on which they are relying, which is why the addition of sexual orientation was of importance.

Secondly, the limited case law indicates that the courts are reluctant to adopt an expansive interpretation and, in fact, will limit the scope of the grounds of discrimination in a fact- and context-specific way. In *Quilter v Attorney-General*, a majority of the Court found that the ineligibility of same-sex couples to marry did not constitute discrimination — even on the ground of sexual orientation.<sup>57</sup> Of the two judges who did find the Marriage Act 1955 was discriminatory, both relied on the prohibited ground of sexual orientation and Thomas J considered it was harder to "bas[e] the discrimination on the ground of sex".<sup>58</sup> Keith J stated that the refusals to grant the applicants marriage licences might also be said to involve "no breach of the right to freedom from discrimination on the grounds of the sex of each applicant, since *each and every* individual seeking the right to marry someone of the same sex would be *equally* refused."<sup>59</sup>

Some statements in *Quilter* may support a more expansive interpretation of the prohibited grounds. Tipping J (one of the minority judges on the discrimination point) stated that: "[New Zealand's human rights] legislation is to be afforded a liberal and purposive interpretation, rather

---

55 *Quilter v Attorney-General*, above n 44, 564 Keith J.

56 See the wording of the Canadian Charter of Rights and Freedoms, above n 24 and Article 14 of the ECHR, above n 3: "[t]he enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion...".

57 *Quilter v Attorney-General*, above n 44.

58 Ibid, 536 Thomas J dissenting.

59 Ibid, 557 Keith J (emphasis in original).

than an interpretation of a technical kind".<sup>60</sup> It is unclear, however, whether even a "purposive" interpretation would allow the kind of interpretation of "sex" which would be required to cover all the types of discrimination suffered by trans people.

Notably, both Tipping J and Thomas J stated that "sex" also means "gender"<sup>61</sup> — although, as I have argued earlier, even if that is accepted, an extension to include gender will not cover all examples of discrimination, especially if "gender" as a term is also narrowly construed to cover only gender expression or sex stereotyping rather than transgender identity.

My third argument, which indicates that "sex" will not be so extended as a matter of statutory interpretation, relies on the existence of a reference to "gender identity" in section 9(1)(h) of the Sentencing Act 2002. "Gender identity" is included in a list of aggravating features in sentencing, on the basis that accuseds will be more culpable if they have committed the crime because of hostility towards the victims on the basis of their "gender identity". Section 9(1)(h) also refers to sexual orientation, race, colour, nationality, religion, age or disability — that is, most of the other relevant grounds in section 21 of the HRA, with the puzzling omission of "sex".<sup>62</sup>

The addition of "gender identity" in this provision gives rise to the interpretation argument that where Parliament intends to include consideration of issues relating to gender identity, it specifically does so. However, if "sex" was intentionally omitted on the basis that "gender identity" covers sex as well, a counter argument could be made. The inconsistency of language is clearly something that needs to be addressed — in my view by legislation, not by waiting for the courts to consider a relevant case.

## VII CONCLUSION

Although there have been a number of cases in overseas jurisdictions in which discrimination against trans people has been conceptualised as sex discrimination claims, there are other examples of unequal treatment of trans people that cannot be argued so readily as discrimination on the ground of "sex". The point here is that discrimination claims are fact-specific and it is not the case that all examples of discrimination against trans people can logically be viewed as covered or not covered by the prohibited grounds. Unfortunately, judicial discussion of these issues is not always helpful as there is a tendency to fail to identify distinctions between the types of claims and to categorise all "transgender" discrimination as being the same.

In my view, a number of ways in which trans people are discriminated against in New Zealand today cannot be easily categorised as discrimination on the ground of sex. This would leave such

---

<sup>60</sup> Ibid, 577 Tipping J.

<sup>61</sup> See *ibid*, 536 Thomas J dissenting and 573 Tipping J.

<sup>62</sup> Charlotte Brown "Legislating Against Hate Crime in New Zealand: The Need to Recognise Gender-Based Violence" (2004) 35 VUWLR 591, 594.

claimants without a remedy under the HRA, unless the courts are willing to interpret "sex" in an expansive way, so as to include claims of discrimination on the grounds of gender or trans status. Currently, there is no case law at the appellate level that demonstrates such willingness.

Following the release of the Crown Law opinion, Human Rights Commissioner Joy Liddicoat announced her pleasure that the trans community could rely on the HRA as currently drafted.<sup>63</sup> However, the Commission, after an extensive consultation process, is likely also to recommend an amendment to section 21,<sup>64</sup> notwithstanding the view taken by Crown Law that no amendment is necessary. Of course, the adoption of any amendment also depends on political will, seen to be lacking on 22 August 2006.

---

63 Human Rights Commission "Human Rights Commission Welcomes Transgender Announcement" (22 August 2006) Press Release.

64 Human Rights Commission "Transgender Inquiry Stage 3 Consultation" (Wellington, April 2004) A2 (presentation slides on file with author).