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**GENDER IDENTITY AS A NEW GROUND FOR
DISCRIMINATION IN THE NEW ZEALAND
LEGAL SYSTEM**

LLM RESEARCH PAPER

MASTERS LEGAL WRITING (LAWS 582)

LAW FACULTY
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THE RESEARCH

DISCRIMINATION IN THE NEW ZEALAND
LEGAL SYSTEM

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ABSTRACT

The purpose of this paper is to examine if it is necessary and desirable to amend New Zealand's anti-discrimination legislation by including a new ground "gender identity". In New Zealand, there are two important human rights instruments containing anti-discrimination provisions instruments in place: The New Zealand Bill of Rights Act 1990 ("BORA") and the Human Rights Act 1990 ("HRA"). Discrimination against transgender people, as well as based on gender stereotyping, has not yet been addressed explicitly in either.

The paper will highlight the background surrounding gender identity issues, and in this context will particularly deal with the terminology. It will then use the example of transsexuals in New Zealand to deal with the situation for transgender people in this country. What follows is an examination of New Zealand's current legislative anti-discrimination standard under the BORA and the HRA, particularly if transgender concerns and the issue "gender identity" are already covered implicitly under existing grounds of discrimination. After presenting the arguments for and against an amendment, I will conclude that the arguments in favour of an amendment are more persuasive. Finally, the paper will address some practical issues, such as the possible wording of an amendment.

The text of this paper (excluding contents page and footnotes) comprises approximately 11,300 words.

I. INTRODUCTION

II. DEFINITIONS AND ISSUES OF GENDER IDENTITY

Anti-discrimination legislation in New Zealand has existed 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 contains grounds on which discrimination is not permissible.

A. Sex versus gender

Over the years, the law has been amended to include 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.

It is important to clearly distinguish between them.

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 - and also discrimination based on gender stereotyping. Internationally however, there is a growing recognition of a need to legislate against discrimination based on "gender identity".

It may be relevant: sex chromosomes, gonads that is the presence or absence of testes or ovaries.

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. In order to analyse the issue appropriately, the paper will first deal with matters of background such as the 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 in favour of and against an amendment (Part V).

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Finally it 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.¹ While both terms describe two related ideas, they are nevertheless different from each other.² 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.³ Society uses an accumulation of biological factors to define "male" and "female"⁴ and to specify one's status as a man or a woman.⁵ In order to establish the sex of an individual, the following characteristics 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.⁶

In contrast, gender is a more complex⁷ and socially constructed⁸ state. It relates to those factors traditionally associated with being male or female⁹ and

¹ Paisley Currah and Shannon Minter *Transgender Equality* (The Policy Institute of the National Gay and Lesbian Task Force, 2000), 2 <<http://www.nglhf.org/downloads/transeq.pdf>> (last accessed 6 June 2002).

² "Statement by Jennifer Levi, Esq Staff Attorney, Gay & Lesbian Advocates & Defenders before the Committee on Health, Education and Welfare concerning An Act Relating to Civil Rights" (22 March 2001) <<http://www.transgenderlaw.org/resources/ritestimony.pdf>> (last accessed 5 June 2002).

³ Levi, above.

⁴ Rachel L Toker "Multiple Masculinities: A New Vision for Same-Sex Harassment Law" (1999) 34 Harv CR-CL L Rev 577, 580-581.

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

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

⁷ Levi, above.

⁸ Greenberg, above, 274.

can be defined as the sum of the characteristics which are traditionally or culturally associated with being male or female.¹⁰

B. Gender Identity, Gender Expression, and Sexual Orientation

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

Gender identity is an aspect of identity¹¹ and can be defined as the psychological sex.¹² 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.¹³ For example, a person biologically born as male can have a female gender identity, and vice versa.¹⁴ 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,¹⁵ or that it is already neurologically established before birth.¹⁶

Since gender identity refers to a person's internal, deeply felt sense of being male or female (or something other or in between) that is invisible to others,¹⁷ it is sometimes called core (gender) identity.¹⁸ Due to its nature, it

⁹ Levi, above

¹⁰ Paisley Currah and Shannon Minter *Transgender Equality* (The Policy Institute of the National Gay and Lesbian Task Force, 2000), 2 <<http://www.nglftf.org/downloads/transeq.pdf>> (last accessed 6 June 2002).

¹¹ Mary Coombs "Transgenderism And Sexual Orientation: More Than A Marriage Of Convenience" (1997) 3 Nat'l J Sex Orient Law, 4, 6 <<http://www.ibiblio.org/gaylaw/issue5/issue5.html>> (last accessed 5 June 2002).

¹² Debra Sherman Tedeschi "The Predicament Of The Transsexual Prisoner" (1995) 5 Temple Pol & Civ Rts L R 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 5 June 2002).

¹⁴ UCLAGLBT <http://www.saonet.ucla.edu/lgbt/findout_gloss.html> (last accessed 5 June 2002).

¹⁵ Infoplease.com <<http://www.infoplease.com/ipd/A0455041.html>> (last accessed 5 June 2002).

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* (The Policy Institute of the National Gay and Lesbian Task Force, 2000), 3 <<http://www.nglftf.org/downloads/transeq.pdf>> (last accessed 6 June 2002).

¹⁸ Infoplease.com, above.

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.¹⁹ An individual's gender identity may conform to society's gender ideals or it may refute it.²⁰ Recently the term "gender identity" has particularly been used in the context of people whose physical characteristics are not traditionally connected to their biological maleness or femaleness.²¹

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, which are socially defined as either masculine or feminine, such as social interactions,²² body styling and clothing.²³ A person's gender identity and gender 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 the person's gender identity nevertheless conforms with his or her anatomical sex.²⁴

It is also important to realise that gender identity and gender expression are not the same as sexual orientation.²⁵ While gender identity deals with who a person is, how they perceive themselves, and which gender they belong to, sexual orientation is concerned with who individuals are attracted to – that is whether they are homosexual, heterosexual or bisexual. Sexual orientation is not

¹⁹ *Crimes of Hate, Conspiracy Of Silence* (Amnesty International, 2001) vii
<http://www.amnestyusa.org/stoptorture/lgbt/lgbt_fullreport.pdf> (last accessed 5 June 2002).

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 Currah and Minter, above, 30.

²² Currah and Minter, above, 3.

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

²⁴ "Statement by Jennifer Levi, Esq Staff Attorney, Gay & Lesbian Advocates & Defenders before the Committee on Health, Education and Welfare concerning An Act Relating to Civil Rights" (22 March 2001) <<http://www.transgenderlaw.org/resources/ritestimony.pdf>> (last accessed 5 June 2002).

²⁵ Currah and Minter, above, 8.

determined by a person's gender identity²⁶ and transgender people have the same range of sexual orientation as non-transgender individuals.²⁷

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.²⁸ They feel uncomfortable with their assigned gender and instead identify with the opposite gender from their birth sex, or they may even find the two-gender system generally too restrictive.²⁹ Most people with gender identity issues have to deal with emotional and 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.³⁰

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,³¹

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 5 June 2002).

²⁷ The International Conference on Transgender Law and Employment Policy "Discrimination Against Transgendered People In America" (1997) 3 Nat'l J Sex Orient Law, 1, 1-3 <<http://www.ibiblio.org/gaylaw/issue5/issue5.html>> (last accessed 5 June 2002).

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

²⁹ UCLAGLBT <http://www.saonet.ucla.edu/lgbt/findout_gloss.html> (last accessed 5 June 2002).

³⁰ UCLAGLBT, above.

³¹ Taylor Flynn "Transforming the Debate: Why We Need To Include Transgender Rights" (2001) 101 Columbia LR 392, 392.

and who do not present features traditionally associated with one's biological sex.³² The "transgender" label includes 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.³³ This last group covers, for example, effeminate men or "butch" women, who wear men's clothes,³⁴ but also those who are in any other way "gender-bending" including people who are androgynous.³⁵

Transgender also encompasses those who are perceived as transgender by others despite not self-identifying as transgender.³⁶ Synonyms for transgender are gender variant, gender different and gender non-conforming.³⁷ Despite the fact that transgender people have been known in every society in recorded human history,³⁸ they may often be seen in our culture as mentally ill.³⁹

2. Transsexuals

³² F M Chester in Paisley Currah and Shannon Minter *Transgender Equality* (The Policy Institute of the National Gay and Lesbian Task Force, 2000) 30
<<http://www.nglhf.org/downloads/transeq.pdf>> (last accessed 6 June 2002).

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 however 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.

³⁸ The International Conference on Transgender Law and Employment Policy "Discrimination Against Transgendered People In America" (1997) 3 Nat'l J Sex Orient Law, 1, 1-3
<<http://www.ibiblio.org/gaylaw/issue5/issue5.html>> (last accessed 5 June 2002).

³⁹ Katherine K Wilson and Barbara E Hammond "Myth, Stereotype, and Cross-Gender Identity in the DSM-IV (21st Annual Feminist Psychology Conference, Portland, OR, 1996)
<<http://www.transgender.org/tg/gidr/kwawp96.html>> (last accessed 5 June 2002).

While transsexualism is not a mental illness, "Gender Identity Disorder" or "Gender Dysphoria" is a recognised mental disorder under the American Psychiatric Association's (APA) Diagnostic and Statistical Manual of Mental Disorders IV (DSM-IV) – a set of diagnostic guidelines that is used worldwide. See: American Psychiatric Association *DSM Diagnostic and Statistical Manual of Mental Disorders* <http://www.psych.org/clin_res/dsm/dsmintro81301.cfm> (last accessed 5 June 2002). Transsexualism, "Gender Identity Disorder" and "Gender Dysphoria" are used as synonyms throughout this paper.

One subset of the group "transgender" are transsexual individuals.⁴⁰ Transsexualism is the "enduring, pervasive, compelling desire to be a person of the opposite sex".⁴¹ The most common way of describing this condition is the mental picture of a transsexual as a woman/man trapped in a man/woman's body.⁴² 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.⁴³ While having the physical characteristics of one gender, psychologically they are members of the opposite gender.⁴⁴ Though the cause for this condition is widely unknown,⁴⁵ present indications are in favour of a multifactorial biological cause.⁴⁶

Medically this state can be defined as a persistent distress with one's physical sex characteristics or the associated social role.⁴⁷ While all transgender people suffer this condition, it is more acute for transsexuals.⁴⁸

Contrary to popular belief, transsexualism occurs in both males and females,⁴⁹ 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).⁵⁰ There are no exact statistics regarding

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

⁴¹ Debra Sherman Tedeschi "The Predicament of the Transsexual Prisoner" (1995) 5 Temple Pol & Civ Rts L R 27, 30.

⁴² Sam Keller "Operations of Legal Rhetoric; Examining Transsexual and Judicial Identity" (1999) 34 Harvard CR-CL LR 329, 353.

⁴³ Paisley Currah and Shannon Minter *Transgender Equality* (The Policy Institute of the National Gay and Lesbian Task Force, 2000) 3 <<http://www.nglftf.org/downloads/transeq.pdf>> (last accessed 6 June 2002).

⁴⁴ Margaret Otlowski "The Legal Status of a Sexually Reassigned Transsexual: R v Harris and McGuinness and Beyond" (1990) 64 The Australian Law Journal 67, 67.

⁴⁵ Jennifer L Nye "The Gender Box" (1998) 13 Berkeley Women's Law Journal, 226, 232.

⁴⁶ R Reid, Domenico de Ceglie and others *Transsexualism: The Current Medical Viewpoint* (2 ed, Press For Change, 1996) <<http://www.pfc.org.uk/medical/mediview.htm>> (last accessed 5 June 2002).

⁴⁷ R Reid, above.

⁴⁸ The International Conference on Transgender Law and Employment Policy "Discrimination Against Transgendered People In America" (1997) 3 Nat'l J Sex Orient Law, 1, 1-3 <<http://www.ibiblio.org/gaylaw/issue5/issue5.html>> (last accessed 5 June 2002).

⁴⁹ Jilian Todd Weiss "The Gender Caste System: Identity, Privacy, and Heteronormativity" (2001) 10 Law & Sex 123, 139.

⁵⁰ Paisley Currah and Shannon Minter *Transgender Equality* (The Policy Institute of the National Gay and Lesbian Task Force, 2000), 3 <<http://www.nglftf.org/downloads/transeq.pdf>> (last accessed 6 June 2002).

the number of transsexuals.⁵¹ Estimations vary from 1:150,000 for female to male transsexuals and 1:37,000 for male to female transsexuals.⁵² However, recent data from the Netherlands suggests that 1 in 11,900 males and 1 in 30,400 females are transsexual.⁵³ For New Zealand it is assumed that there are about 2,000⁵⁴ to 3,000⁵⁵ transsexuals in the country.

Many transsexuals decide that permanent living in their non-birth gender is their only effective solution,⁵⁶ and so undergo medical treatment to change their physical sex by hormone therapy and sex reassignment surgeries.⁵⁷ They aim to bring their physical characteristics into conformity with their gender identity⁵⁸ and to consequently live in, and be recognised as, a different gender from the one attributed to them at birth.⁵⁹ 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.⁶⁰ 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

⁵¹ Genderbridge Inc "Submission to the Justice and Electoral Committee on the Human Rights Amendment Bill 2001" para 4.

⁵² E Peter Walker (Plastic & Reconstructive Surgeon), personal communication, 16 April 2002.

⁵³ *The Harry Benjamin International Gender Dysphoria Association's Standards Of Care For Gender Identity Disorders* (6th version, February, 2001) 2 <<http://www.hbigda.org/socv6sm.pdf>> (last accessed 5 June 2002).

⁵⁴ Vicki Harvey (Genderbridge), personal communication, 19 March 2002.

⁵⁵ Tim Barnett (MP), personal communication, 26 March 2002.

⁵⁶ Genderbridge Inc "Submission to the Justice and Electoral Committee on the Human Rights Amendment Bill 2001" para 4.

⁵⁷ Paisley Currah and Shannon Minter *Transgender Equality* (The Policy Institute of the National Gay and Lesbian Task Force, 2000), 3 <<http://www.nglftf.org/downloads/transeq.pdf>> (last accessed 6 June 2002). 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 5 June 2002). 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.

⁵⁸ *Crimes of Hate, Conspiracy Of Silence* (Amnesty International, 2001) vii <http://www.amnestyusa.org/stoptorture/lgbt/lgbt_fullreport.pdf> (last accessed 5 June 2002).

⁵⁹ Sam Keller "Operations of Legal Rhetoric; Examining Transsexual and Judicial Identity" (1999) 34 *Harvard CR-CL LR* 329, 329.

⁶⁰ Debra Sherman Tedeschi "The Predicament of the Transsexual Prisoner" (1995) 5 *Temple Pol & Civ Rts L R* 27, 32.

to their employers, families and everyone else.⁶¹ During this time, the consequences, such as job termination due to the change of gender, can become apparent. These issues will be addressed in more detail in Part III of the paper.

3. *Intersex people*

Another group of transgender people for whom gender identity can be relevant are intersex individuals. At least 1 out of 2000 babies is born with an intersex condition.⁶²

Intersex is the medical generic term for individuals who are born with an anatomy or physiology that varies from the present cultural ideals of male and female.⁶³ Intersex refers to a whole set of medical conditions that consist of “congenital anomaly of the reproductive and sexual system,” and means that intersex people are born with “sex chromosomes,” external genitalia, or internal reproductive systems that are not considered “standard” for either male or female.⁶⁴ 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 regarded “too large”.⁶⁵ Intersex can also describe a person with a combination of male and female sexual characteristics.⁶⁶ The causes of this condition are hormonal imbalances, chromosomal abnormalities or abnormalities of the tissues that develop into genitals.⁶⁷

⁶¹ The International Conference on Transgender Law and Employment Policy “Discrimination Against Transgendered People In America” (1997) 3 Nat’l J Sex Orient Law, 1, 1-3 <<http://www.ibiblio.org/gaylaw/issue5/issue5.html>> (last accessed 5 June 2002).

⁶² Alice Dreger “Top Ten Myths About Intersex” ISNA News February 2001 3.

⁶³ Intersex Trust Aotearoa New Zealand (ITANZ) Newsletter Whakaari Special Edition 2000 1.

⁶⁴ Intersex Society of North America (ISNA) “Medical Questions About Intersexuality” <<http://www.isna.org/faq/faq-medical.html#what>> (last accessed 5 June 2002).

⁶⁵ Paisley Currah and Shannon Minter *Transgender Equality* (The Policy Institute of the National Gay and Lesbian Task Force, 2000), 5-6 <<http://www.nglftf.org/downloads/transeq.pdf>> (last accessed 6 June 2002).

⁶⁶ 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 Law Review 1113, 1119.

⁶⁷ The International Conference on Transgender Law and Employment Policy, *above*, 1-3.

Many intersex people identify as either a man or as a woman⁶⁸ 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 gender (“third gender”),⁶⁹ or as just not male or female (intergender).⁷⁰

Based on the assumption that any child could be made into a boy or a girl if the genitals looked “right”, “gender correcting” surgeries were standard medical practice until very recently, whenever an intersex condition occurred.⁷¹ 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.⁷² Intersex individuals treated in this manner frequently manifest identities that differ from their assigned sex.⁷³ Others feel in between the recognised genders. This results in serious psychological problems and often results 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.⁷⁴

4. *Cross-dressers*

The largest group of transgender persons are probably cross-dressers, formerly called transvestites.⁷⁵ 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.

⁶⁷ The Gender Centre “Ambiguous Genitalia” <<http://www.gendercentre.org.au/facts/ag.htm>> (last accessed 5 June 2002).

⁶⁸ ISNA, above.

⁶⁹ ISNA, above.

⁷⁰ Kayleen White “Equal Opportunity (Sexual Orientation and Gender Identity) Act, 2000” (6 September 2000) <<http://www.transsexual.org.nz/bdm.htm#103>> (last accessed 5 June 2002).

⁷¹ Alice Dreger “Top Ten Myths About Intersex” ISNA News February 2001 5.

⁷² Australian Civil Liberties Union “Your Rights 2001” <<http://www.angelfire.com/folk/aclu/gaylesbianrights.htm>> (last accessed 5 June 2002).

⁷³ The International Conference on Transgender Law and Employment Policy “Discrimination Against Transgendered People In America” (1997) 3 Nat’l J Sex Orient Law, 1, 1-3 <<http://www.ibiblio.org/gaylaw/issue5/issue5.html>> (last accessed 5 June 2002).

⁷⁴ Paisley Currah and Shannon Minter *Transgender Equality* (The Policy Institute of the National Gay and Lesbian Task Force, 2000), 5-6 <<http://www.nglftf.org/downloads/transeq.pdf>> (last accessed 6 June 2002).

⁷⁵ The International Conference on Transgender Law and Employment Policy, above, 1-3.

Cross-dressing has existed throughout recorded history⁷⁶ and, just as stated in the context of transsexuals, current medical opinion suggests multi-causal factors involving prenatal processes will lead to this condition.⁷⁷ 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 leads to serious emotional distress caused by to society's reaction and therefore creates a gender identity issue for them too.⁷⁸

III. GENDER IDENTITY ISSUES – LAW AND PRACTICE IN NEW ZEALAND

Discriminating means making a distinction based on a criterion that relates to a group, rather than an individual, and belonging to that group is not regarded by society as having any connection to the circumstances in which, or the cause for which, the distinction is made.⁷⁹

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 transgender organisations.

All over the world transgender people face discrimination in several areas of life. Issues include, for example, employment and housing discrimination, denial of public accommodation and transportation,⁸⁰ and discrimination in regard to the provision of goods and services.⁸¹ They may also face problems in the criminal justice system where verbal abuse, for example, by the police is not

⁷⁶ The Gender Centre "Crossdressing" <<http://www.gendercentre.org.au/facts/cd1.htm>> (last accessed 5 June 2002).

⁷⁷ The Gender Centre, above.

⁷⁸ 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 5 June 2002).

⁷⁹ *The Laws of New Zealand* (Butterworths, electronic version, law as stated 10 September 2001) Discrimination, para 1, 1.

⁸⁰ Paisley Currah and Shannon Minter *Transgender Equality* (The Policy Institute of the National Gay and Lesbian Task Force, 2000), 10 <<http://www.nglhf.org/downloads/transeq.pdf>> (last accessed 6 June 2002).

uncommon.⁸² Another sector they are discriminated against are 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.⁸³ Transgender people are also much more likely than general society to become victims of “hate crimes”.⁸⁴ In addition, they suffer social and economic stigmatisation,⁸⁵ which makes them subject to homelessness and poverty.⁸⁶ There are also indications that the suicide rate for transgender people is exceptionally high.⁸⁷

Though, according to the transgender community, the degree of discrimination against transgender people in New Zealand has decreased over the years, discrimination is still common in areas such as employment.⁸⁸ Discrimination based on gender stereotyping still remains a frequent occurrence.⁸⁹

I will now focus 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

⁸¹ Australian Civil Liberties Union “Your Rights 2001”

<<http://www.angelfire.com/folk/aclu/gaylesbianrights.htm>> (last accessed 5 June 2002).

⁸² The Lord Chancellor’s Department *Transsexual People – The Report of the Interdepartmental Working Group on Transsexual People* (2000) 8-18

<<http://www.lcd.gov.uk/constitution/transsex/wgtrans.pdf>> (last accessed 5 June 2002).

⁸³ The Lord Chancellor’s Department, above, 8-18.

⁸⁴ 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.

⁸⁵ TGNNet Arizona “Gender Identity 101: A Transgender Primer”

<<http://www.tgnetarizona.org/gender101.htm>> (last accessed 5 June 2002).

⁸⁶ TGNNet Arizona, above.

⁸⁷ Australian Civil Liberties Union “Your Rights 2001”

<<http://www.angelfire.com/folk/aclu/gaylesbianrights.htm>> (last accessed 5 June 2002).

⁸⁸ New Zealand Transsexualwoman.com <<http://www.nztranssexualwomen.com/bdm.htm>> (last accessed 5 June 2002).

⁸⁹ 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

According to s 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, of indeterminate sex, or if the old birth certificate does not contain any information on the applicant's sex at all.⁹⁰ An application also requires that the applicant is not of the (new) nominated sex, but has assumed the nominated sex and wishes to maintain it⁹¹ after having undergone medical treatment to give the physical appearance of a person of the nominated gender.⁹² The Court issues a declaration requiring the Registrar-General to change the person's birth certificate (s 30). 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 (s 30 (2)).

A transsexual who has not undergone all available surgery cannot apply for a declaration on the other hand.

A change of name by statutory declaration is possible according to s 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 (s 64), although it is theoretically possible to access this information under certain circumstances.⁹³

For pre-operative transsexuals the situation is different. The new birth certificate will list previous names above the new name⁹⁴ as well as the sex

Women(CEDAW) (November 2001) 30 <<http://www.mwa.govt.nz/pub/RPT-final-draft%20CEDAW%20Cabinet-291101.doc>> (last accessed 13 June 2002).

⁹⁰ Births, Deaths and Marriages Registration Act 1995, s 28 (3)(a).

⁹¹ BDMA, s 28 (3)(b).

⁹² BDMA, s 28 (3)(c).

⁹³ New Zealand Transsexualwoman.com, above. 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.

⁹⁴ New Zealand Transsexualwoman.com, above.

designation recorded at birth.⁹⁵ This can cause situations where transsexuals are forced to explain themselves and lead to very intrusive 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 face compromising and embarrassing 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.⁹⁶ However, pre-operative transsexuals can request that no sex be included, which might be possible after a statutory declaration explaining the reasons.⁹⁷ This again is an uncertain matter though, and does not avoid the risk of being in a position where further embarrassing explanations are required when dealing with officials.

Changing the name or sex on other documents such as driver's licenses 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.⁹⁸ Transsexuals report that in practice much depends on the official dealing with the matter.⁹⁹ 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 again 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.¹⁰⁰

⁹⁵ The Benjamin's Syndrome Information Site "Changing Your Legal Name" <<http://cloud.prohosting.com/~benjsynd/nz/name.html>> (last accessed 5 June 2002).

⁹⁶ John Penny, Rochelle Forrester and Truis Ormsby-Martin *Submission On Same Sex Couples and the Law* <<http://www.agender.org.nz/articles/Items/Same%20%Sex%20Marriage.html>> (last accessed 10 June 2002).

⁹⁷ New Zealand Transsexualwoman.com, above.

⁹⁸ Personal communication with several New Zealand banks. There seem to be no official guidelines, so the policies vary slightly from institution to institution.

⁹⁹ New Zealand Transsexualwoman.com, above.

¹⁰⁰ Personal communication with several New Zealand life insurance companies; see also the experiences described at New Zealand Transsexualwoman.com, above.

Hence post-operative transsexuals are in most cases legally regarded as a member of the acquired gender.¹⁰¹ Even 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,¹⁰² although they will nevertheless often be regarded as members of their birth sex.¹⁰³ This different treatment of post- and pre-operative transsexuals is problematic since, due to financial or health reasons, not every transsexual has the option to undergo surgery. Also, in practice transsexuals, regardless of their status, 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 *Corbett v Corbett*¹⁰⁴ the High Court held that the validity of a marriage involving post-operative transsexuals depends on the biological sex of an individual, 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.¹⁰⁵ Over the years this jurisprudence has been confirmed several times in various jurisdictions.¹⁰⁶ However, some Commonwealth courts have taken different approaches.¹⁰⁷

In New Zealand, the Marriage Act 1995 is gender neutral, but the classic interpretation of marriage is the union between "one man and one woman."¹⁰⁸ This has been confirmed in the New Zealand Court of Appeal case *Quilter v*

¹⁰¹ The International Lesbian and Gay Association "World Legal Survey - New Zealand" <http://www.ilga.org/Information/legal_survey/asia_pacific/new_zealand.htm> (last accessed 5 June 2002).

¹⁰² New Zealand Transsexualwoman.com, above.

¹⁰³ *The Laws of New Zealand* (Butterworths, electronic version, law as stated at 10 September 2001) Husband and Wife para 2, 22.

¹⁰⁴ *Corbett v Corbett* [1970] 2 All ER 33

¹⁰⁵ Richard F Storrow "Naming the Grotesque Body in the 'Nascent Jurisprudence of Transsexualism'" (1997) 4 Mich J Gender & Law 275, 285-286.

¹⁰⁶ 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 5 June 2002).

¹⁰⁷ See for example: *MT v JT* 3 (1976) 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 Law Review 556, 563-565.

¹⁰⁸ *Hyde v Hyde* [1866] IR 1 P & D 130.

Attorney General.¹⁰⁹ The terms "man" and "woman" are not defined however.¹¹⁰ 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*¹¹¹ 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.¹¹² The factor "chromosomes" were balanced against a number of other characteristics such as genitals and gender, which outweighed the genetic factor.¹¹³ 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.¹¹⁴

This view was confirmed in *Attorney-General v Otahuhu Family Court*,¹¹⁵ where the High Court held that a transsexual who had undergone gender reassignment surgery could marry someone as a person of that sex.¹¹⁶ 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 acquired sex, which includes the ability to marry.¹¹⁷ It was also reaffirmed that there are psychological and social factors, which strongly influence a person's gender identity, in addition to aspects such as chromosomes.¹¹⁸

Despite this case law some issues remain open. For example, Ellis J stated that even for post-operative transsexuals a sex change on a birth certificate

¹⁰⁹ *Quilter v Attorney General* [1998] 1 NZLR 523 (CA).

¹¹⁰ *The Laws of New Zealand* (Butterworths, electronic version, law as stated at 10 September 2001) Husband and Wife para 2, 22.

¹¹¹ *M v M* [1991] NZFLR 337 (FC) Aubin J.

¹¹² *M v M*, above, 343.

¹¹³ Robin MacKenzie "Transsexuals' Legal Sexual Status and Same Sex Marriage in New Zealand: *M v M* (XXX) 7 Otago Law Review 556, 557-558.

¹¹⁴ *M v M* above, 346.

¹¹⁵ *Attorney-General v Otahuhu Family Court* [1995] 1 NZLR 603 (HC) Ellis J.

¹¹⁶ *Attorney-General v Otahuhu Family Court*, above, 603.

¹¹⁷ *Attorney-General v Otahuhu Family Court*, above, 607.

¹¹⁸ *Attorney-General v Otahuhu Family Court*, above, 610.

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.¹¹⁹ As the Court further emphasised, the question of validity of a transsexual marriage does not resolve questions in other areas of the law such as the criminal law.¹²⁰ Another remaining issue 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 destined gender in areas such as employment law.¹²¹

In practice the situation surrounding transsexuals and marriage – in combination with the regulations regarding the change of birth certificates - can lead to paradoxical situations. For example, a pre-operative transsexual who was born male and lives as woman can only marry a man, irrespective of the sexual orientation.¹²² 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 a transsexual who underwent surgery to become a woman on the other hand, wants to change the birth certificate, then she must divorce her partner. Afterwards, she cannot remarry her because this would create a same-sex marriage.

Despite the progressive approach regarding transsexual marriage in New Zealand there are therefore still several uncertainties left.

3. *Transsexuals in Prisons*

In New Zealand, Public Prisons Service “Operating Instructions” exist in respect of transgender inmates, and there is also a National Policy for transsexual inmates which aims to provide them with an environment that recognises their

¹¹⁹ *Attorney-General v Otahuhu Family Court*, above, 616.

¹²⁰ *Attorney-General v Otahuhu Family Court*, above, 629.

¹²¹ *Attorney-General v Otahuhu Family Court*, above, 615.

¹²² This and the following examples are taken from: John Penny, Rochelle Forrester and Truis Ormsby-Martin *Submission On Same Sex Couples and the Law* <<http://www.agender.org.nz/articles/Items/Same%20%Sex%20Marriage.html>> (last accessed 10 June 2002).

gender identification.¹²³ Post-operative transsexuals are placed in a prison according to their gender identity and are treated consistently with the institution they are located in.¹²⁴ Hormonal treatment that started prior to imprisonment may be continued at their own cost.¹²⁵

Pre-operative transsexual inmates however are placed in a prison opposite to their destined gender, although they are allowed single cells or to mix with other transsexuals.¹²⁶ It is problematic 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.¹²⁷ In Zealand women and men are housed in different prison facilities,¹²⁸ but even if they were housed in the same institution, gender mixing would still be prohibited.¹²⁹ Given the possible negative psychological effects¹³⁰ 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.¹³¹

Other open issues are the frequent occurrence of physical and sexual abuse of transsexuals in prison as described by transsexual inmates, which also affects the success of rehabilitation.¹³² Another yet to be addressed area is the desirability of allowing transsexuals hormone treatment regardless of whether it

¹²³ Department of Corrections *Public Prisons Service Policy & Procedures Manual* (2001) D.07.

¹²⁴ Department of Corrections, above.

¹²⁵ Department of Corrections, above.

¹²⁶ Department of Corrections, above.

¹²⁷ John Penny, Rochelle Forrester and Truis Ormsby-Martin *Submission On Same Sex Couples and the Law* <<http://www.agender.org.nz/articles/Items/Same%20%Sex%20Marriage.html>> (last accessed 10 June 2002).

¹²⁸ 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 13 June 2002).

¹²⁹ Penal Institutions Regulations 2000, reg 8.

¹³⁰ Department of Corrections *Better Corrections Law – Summary of Submissions on Better Corrections Law for New Zealand* (Carprinter, Rogers and Associates, July 2001) 115.

¹³¹ Nigel Christie "Supplementary Submission to the Justice and Electoral Select Committee on the Human Rights Amendment Bill 2001".

¹³² John Penny, Rochelle Forrester and Truis Ormsby-Martin *Submission On Same Sex Couples and the Law* <<http://www.agender.org.nz/articles/Items/Same%20%Sex%20Marriage.html>> (last accessed 10 June 2002).

has been commenced before imprisonment¹³³ 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 Association*.¹³⁴ These guidelines are to determine whether a transsexual is emotionally and psychologically suited for sexual reassignment¹³⁵ and are followed in New Zealand.¹³⁶

Despite this procedure and the status of transsexuals under the DSM-IV, 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.¹³⁷ Insurance companies in New Zealand follow this approach too.¹³⁸ Though the cost of surgery can exceed \$ 20,000¹³⁹ there is also no funding for the procedure from the public health system.¹⁴⁰ 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 as well.

5. Employment and education

¹³³ Department of Corrections *Better Corrections Law*, above, 115.

¹³⁴ *The Harry Benjamin International Gender Dysphoria Association's Standards Of Care For Gender Identity Disorders* (6th version, February, 2001) 3-4
<<http://www.hbigda.org/socv6sm.pdf>> (last accessed 5 June 2002).

¹³⁵ TGNNet Arizona "Gender Identity 101: A Transgender Primer"
<<http://www.tgnetarizona.org/gender101.htm>> (last accessed 5 June 2002).

¹³⁶ E P Walker "The Programme" <<http://www.plasticsurgery.co.nz/grs-programme.asp>> (last accessed 28 March 2002).

¹³⁷ TGNNet, above.

¹³⁸ "Emotional Scars" (8 April 2002) *The Christchurch Press* to be found at:
<<http://www.plasticsurgery.co.nz/pr-main.asp>> (last accessed 5 June 2002).

¹³⁹ E Peter Walker Gender Reassignment Surgery "The Costs"
<<http://www.plasticsurgery.co.nz/grs-costs.asp>> (last accessed 5 June 2002).

¹⁴⁰ Peter Day *Transgender Reassignment Surgery* (Tech Brief Series NZHTA Report 2002; 1 (1)
<<http://nzhta.chmeds.ac.nz/Trans-gender.PDF>> (last accessed 5 June 2002).

Overseas statistics indicate that transsexuals who mention that they are planning to undertake gender reassignment surgery or have undergone surgery, lose their job in up to 95 per cent of the cases, while 60 per cent remain underemployed or unemployed after transition.¹⁴¹ Reports from individuals in New Zealand indicate that transsexuals in this country also suffer discrimination in employment due to their transsexual status.¹⁴² Discrimination is most apparent in the case of pre-operative transsexuals in transition,¹⁴³ 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.¹⁴⁴

A recent survey by the New Zealand University Students' Association (NZUSA) showed that 40 per cent of "queer" students said that they had experienced harassment based on sexual orientation and gender identity while being at university.¹⁴⁵ This shows that the educational sector is no exception to discriminatory treatment either.

6. Parental rights

Another area where transgender people, and transsexuals in particular, are disadvantaged is in child custody and adoption.¹⁴⁶ In New Zealand the well-being of the child is the paramount factor in these situations.¹⁴⁷ The case law so far indicates that a transsexual father, for example, could gain access to his children under certain conditions – such as therapy for the children.¹⁴⁸

¹⁴¹ Australian Civil Liberties Union "Your Rights 2001"

<<http://www.angelfire.com/folk/aclu/gaylesbianrights.htm>> (last accessed 5 June 2002).

¹⁴² Calum Bennachie "Submission to the Justice and Electoral Select Committee on the Human Rights Amendment Bill 2001", para 20.

¹⁴³ New Zealand Transsexualwoman.com <<http://www.nztranssexualwomen.com/bdm.htm>> (last accessed 5 June 2002).

¹⁴⁴ The International Conference on Transgender Law and Employment Policy "Discrimination Against Transgendered People In America" (1997) 3 Nat'l J Sex Orient Law, 1, 1-3
<<http://www.ibiblio.org/gaylaw/issue5/issue5.html>> (last accessed 5 June 2002).

¹⁴⁵ Human Rights Network of Aotearoa New Zealand Bulletin 8th January 2002
<<https://www.amnesty.org.nz/HRNet.nsf>> (last accessed 9 May 2002).

¹⁴⁶ Press For Change *Recognising the Identity and Rights of Transsexual and Transgender People in the United Kingdom* (Press For Change, 1999) 15-16

<<http://www.pfc.org.uk/workgrp/pfcrpt1.pdf>> (last accessed 5 June 2002).

¹⁴⁷ See for example for adoption in New Zealand: Adoption Act 1955, s 11; for custody: Guardianship Act 1968, s 18.

¹⁴⁸ *C v D* (1991) 8 FRNZ 338.

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 was only granted when the parents agreed to hide their status.¹⁴⁹ When it comes to adoptions, adoption agencies and the courts can refuse to make an adoption order based on the assumption that living with a transsexual parent is not in the best interests of the child – the decisive criterion in these cases.¹⁵⁰ Given these circumstances the matter concerning transsexuals and adoption or custody seems rather uncertain.

B. Conclusion

As seen in the example of transsexuals, 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 exemplify 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, while the legal ones will be explored further in the next section. In any case, it seems desirable to gather more statistical data on these issues in order to have more scientific data upon which to base suggestions.

IV. NEW ZEALAND'S CURRENT ANTI-DISCRIMINATION STANDARD

This section of the paper will examine New Zealand's current human rights protections and anti-discrimination legislation in order to establish whether there is a gap that needs to be addressed by an amendment.

A. General

¹⁴⁹ Shannon Minter "Representing Transsexual Clients: An Overview Of Selected Legal Issues" (2000) <<http://www.transgenderlaw.org/resources/translaw.htm>> (last accessed 5 June 2002).

¹⁵⁰ Press For Change, above, 17.

The two important statutory anti-discrimination instruments in New Zealand are the New Zealand Bill of Rights Act 1990 ("BORA") and the Human Rights Act 1993 ("HRA"). Both have been amended over the years to stay up to date with social and legal developments.

1. The New Zealand Bill of Rights Act 1990

According to its long title, the BORA is destined 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. Consequently the Act contains provisions dealing with the protection and promotion of individual human rights, as well as non-discrimination and minority rights protections. S 3 of the Act stipulates that the BORA applies to the legislative, executive, and judicial branches of the Government, and also to bodies performing a public function. Hence the Act regulates and limits the power of the Government and public actors¹⁵¹ - since 1 January 2002 additionally in the form of a declaration of inconsistency by the Human Rights Review Tribunal if an enactment is in breach of the freedom of discrimination.¹⁵² According to s 4, the BORA is not supreme law however. While it can affect, limit and sometimes supplement statutes and regulations, and statutes have to be read consistently with the BORA protections if possible, in the case of an unsolvable discrepancy the conflicting statute prevails.¹⁵³

Section 19 [Freedom from discrimination] provides that:

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

¹⁵¹ Ministry of Justice *Re-Evaluation of the Human Rights Protections in New Zealand Part Two: New Zealand's Human Rights Law* (2000) <http://www.justice.govt.nz/pubs/reports/2000/hr_reevaluation/part_2.html> (last accessed 5 June 2002) para 25.

¹⁵² Human Rights Act 1993, s 92J.

¹⁵³ Ministry of Justice, above, para 47.

The BORA also contains a clause that limits the rights and freedoms under the Act by balancing them with competing interests.¹⁵⁴

Section 5 [Justified limitations] 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 shall provide a better protection of human rights in New Zealand in accordance with 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 prescribes that discrimination against specific groups of individuals is unlawful in some areas of public life.¹⁵⁵ 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 s 19 of the BORA.¹⁵⁶ In addition, the HRA intends to regulate the public sector when the Government is acting as an ordinary person.¹⁵⁷

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

¹⁵⁴ Ministry of Justice *The Non-Discrimination Standards for Government and the Public Sector* (2002), 22 <<http://www.justice.govt.nz/pubs/reports/2002/discrimination-standards/guidelines.pdf>> (last accessed 5 June 2002).

¹⁵⁵ Legislation Advisory Committee *Guidelines on Process & Content of Legislation 2001 edition: Chapter 4: New Zealand Bill of Rights Act 1990 and Human Rights Act 1993* Chapter 4 <http://www.justice.govt.nz/lac/pubs/2001/legislative_guide_2000/chapter_4.html> (last accessed 5 June 2002).

¹⁵⁶ 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.

¹⁵⁷ Ministry of Justice, *Re-Evaluation*, above, para 28.

activity is now the anti-discrimination standard in the BORA.¹⁵⁸ This means that the Government may only discriminate if authorised by law and the action is “demonstrably justified in a free and democratic society” (s 5).¹⁵⁹

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.¹⁶⁰ This distinction must lead to an actual or assumed disadvantage,¹⁶¹ and if it is not covered by an exception or justification under the Act, it is unlawful discrimination.¹⁶² According to s 65 of the Act, indirect 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.

¹⁵⁸ HRA, Part 1A.

¹⁵⁹ For more information on the different non-discrimination standards see: Ministry of Justice *The Non-Discrimination Standards for Government and the Public Sector* (2002), 8 <<http://www.justice.govt.nz/pubs/reports/2002/discrimination-standards/guidelines.pdf>> (last accessed 5 June 2002).

¹⁶⁰ Ministry of Justice *The Human Rights Act 1993: Guidelines for Government Policy Advisers* (2000) <http://www.justice.govt.nz/pubs/reports/2000/hr_act/discrimination.html> (last accessed 5 June 2002).

¹⁶¹ Ministry of Justice, *Human Rights Act*, above.

¹⁶² Ministry of Justice, *Human Rights Act*, above.

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.¹⁶³ If the issue were already (sufficiently) covered, an amendment¹⁶⁴ would be unnecessary. The paper will therefore now examine the existing grounds of sex, disability and sexual orientation, as these are the grounds that could possibly address the matter.

1. Sex

It could be argued that transgender people are already covered under the ground of sex in s 21 (1) (a) of the HRA.¹⁶⁵ 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.¹⁶⁶ Overseas case law also suggests that transgender people are already covered by the definition of "sex" in anti-discrimination legislation.¹⁶⁷

In a Canadian case¹⁶⁸ that dealt with the termination of a post-operative transsexual street worker, the Quebec Human Rights Tribunal held that discrimination based on transsexualism is discrimination based on sex. The Tribunal argued that "sex" had "much more than a taxonomic value," as seen

¹⁶³ Chris Lawrence (Proceedings Commissioner Human Rights Commission), personal communication 28 March 2002.

¹⁶⁴ 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.

¹⁶⁵ Human Rights Commission "Submission to the Justice and Electoral Committee on the Human Rights Amendment Bill 2001" Appendix 1, para 1.4..

¹⁶⁶ New Zealand Transsexualwoman.com <<http://www.nztranssexualwomen.com/bdm.htm>> (last accessed 5 June 2002).

¹⁶⁷ Human Rights Commission, above, para 1.3.

with the inclusion of pregnancy.¹⁶⁹ Discrimination on the basis of transsexualism could hardly be anything other than discrimination based on sex.¹⁷⁰

The European Court of Justice adopted this approach in *P v S & Cornwall County Council*,¹⁷¹ where it held that the dismissal of a transsexual on the basis of gender reassignment surgery violated the European Union's Equal Treatment Directive¹⁷² and was discrimination on the grounds of sex.¹⁷³

Contrary to this jurisprudence however, is the overwhelmingly negative case law in the United States indicating that transgender individuals are not covered by the term "sex".¹⁷⁴ 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.¹⁷⁵ Considered 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.

Furthermore, the fact that the positive precedence only dealt with post-operative transsexuals means that the legal situation for pre-operative transsexuals is even more unclear. It is these individuals that are most at risk of discrimination, be it during transition, or if they cannot undergo surgery due to health or financial circumstances.¹⁷⁶ In these cases it could be reasoned that discrimination does not occur because the individual is biologically male or female but rather because of being transsexual.¹⁷⁷

¹⁶⁸ *Commission Des Droits De La Personne Et Des Droit De La Jeunesse v Maison Des Jeunes A Ma Baie*, (1998) 33 CHHR D/263; original is in French.

¹⁶⁹ *Commission v Maison Des Jeunes*, above, paras 103-110.

¹⁷⁰ *Commission v Maison Des Jeunes*, above, para 115.

¹⁷¹ [1996] European Court Reports, Case C-13/94 I-2143, I-2165, paras 21-22.

¹⁷² No 76/207/EEC, (9 February 1976).

¹⁷³ Andrea C Loux "Is He Our Sister?" (1997)

<<http://webjcli.ncl.ac.uk/1997/issue3/loux3.html#bk2>> (last accessed 5 June 2002).

¹⁷⁴ 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).

¹⁷⁵ Auckland Central Rainbow Branch of the New Zealand Labour Party "Submission to the Justice and Electoral Committee on the Human Rights Amendment Bill 2001".

¹⁷⁶ Genderbridge Inc "Submission to the Justice and Electoral Committee on the Human Rights Amendment Bill 2001" para 5.

¹⁷⁷ New Zealand Transsexualwoman.com <<http://www.nztranssexualwomen.com/bdm.htm>> (last accessed 5 June 2002).

Hence post-operative transsexuals are arguably already protected under the ground "sex" in the current HRA. For pre-operative transsexuals and other transgender individuals this is highly questionable however.

2. Psychological and physiological disability

Discrimination against transgender people may also be covered under the ground of disability according to s 21 (1) (h) (v) of the HRA,¹⁷⁸ which includes "any other loss or abnormality of psychological, physiological, or anatomical structure or function."

In favour of this view is the fact that the "trapped in the wrong body" model easily falls within this definition,¹⁷⁹ as does gender dysphoria – regardless of whether it is qualified as a mental disorder or not.¹⁸⁰ Since complicated surgery is a form of treatment, common sense would suggest that it is a disability.¹⁸¹

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; this does question whether coverage under the ground of disability could exist in the long term.¹⁸² Another aspect is that being transsexual - or having another form of gender identity disorder such as transvestism¹⁸³ - 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 assessment of their mental and emotional

¹⁷⁸ Chris Lawrence, personal communication 28 March 2002.

¹⁷⁹ Lawrence, above.

¹⁸⁰ Lawrence, personal communication 3 April 2002.

¹⁸¹ Lawrence, personal communication 3 April 2002.

¹⁸² New Zealand Transsexualwoman.com <<http://www.nztranssexualwomen.com/bdm.htm>> (last accessed 5 June 2002).

¹⁸³ Kevin J Barrie "Submission to the Justice and Electoral Committee on the Human Rights Amendment Bill 2001" para 3.

stability.¹⁸⁴ In addition, a considerable number of transsexuals are not suffering any distress at all.¹⁸⁵

Also there is a large amount of negative case law in regard to coverage of transsexuals under disability provisions in overseas jurisdictions.¹⁸⁶ Finally, it is not desirable to include transgender people under this ground of the Act anyway, since it further stigmatises rather than eliminates discrimination.¹⁸⁷

In consequence it can be said that inclusion of transgender people under this ground is not certain (nor desirable), while other gender identity issues such as gender stereotyping remain ignored.

3. Sexual orientation

Transgender people could already be covered by the ground of sexual orientation under s 21 (1) (m) of the HRA.

The Constitutional Court of South Africa took this compatible 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.¹⁸⁸ However, case law in the United States is inconsistent with this approach.¹⁸⁹ These different approaches show that the matter is uncertain.

¹⁸⁴ Vicki Harvey "Submission to the Justice and Electoral Committee on the Human Rights Amendment Bill 2001" para 4.

¹⁸⁵ Katherine K Wilson and Barbara E Hammond "Myth, Stereotype, and Cross-Gender Identity in the DSM-IV (21st Annual Feminist Psychology Conference, Portland, OR, 1996) <<http://www.transgender.org/tg/gidr/kwawp96.html>> (last accessed 5 June 2002).

¹⁸⁶ 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).

¹⁸⁷ New Zealand Transsexualwoman.com <<http://www.nztranssexualwomen.com/bdm.htm>> (last accessed 5 June 2002).

¹⁸⁸ *National Coalition for Gay and Lesbian Equality v Minister of Justice* (9 October 1998), Constitutional Court South Africa 1999 (1) SA 6 para 21 Ackermann J, accessible at: <<http://www.concourt.gov.za/date1999.html>> (last accessed 5 June 2002).

¹⁸⁹ See for example: *Maffei v Kolaeton Industry Inc* (1995) 626 NYS 2d 391 (NY Sup Ct).

As further stated earlier, gender identity and sexual orientation are unrelated so it is inappropriate that this ground should include transgender people in New Zealand. Also, as stated for the other grounds, this ground would not cover gender stereotyping and other gender identity issues in any event.

4. Conclusion

As demonstrated, the current HRA is not conclusive regarding the concerns of transgender people.¹⁹⁰ Even if it could be argued that transgender people are covered 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 deal with the question of whether an amendment is desirable to fill this gap, and present and examine the arguments for and against an amendment.

V. THE ARGUMENTS CONCERNING AN AMENDMENT OF THE HRA

A. Education Versus Legislation

The first question that has to be addressed is if *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.¹⁹¹ Since discrimination is mainly a social issue, a social remedy could also be seen as preferable.

While it is true that society is often quite unaware of transgender issues, and confusion and misconceptions are not uncommon,¹⁹² social and legal means do not necessarily exclude each other. Legislation can support educational means

¹⁹⁰ Rainbow Sector Council of the New Zealand Labour Party "Submission to the Justice and Electoral Committee on the Human Rights Amendment Bill 2001".

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

and accelerate social changes by creating an atmosphere that makes it easier to eliminate prejudices.¹⁹³ Furthermore, an amendment offers the means to educate the population¹⁹⁴ and to promote a greater understanding for these concerns in society as well.¹⁹⁵ An amendment would also have the supplementary symbolic effect of setting the signal that discrimination in New Zealand is wrong and unacceptable.¹⁹⁶ 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.¹⁹⁷ After all, it is very likely that a few people will still not act with reason. Legislation would also make it easier for the victims of discrimination to go to the courts¹⁹⁸ and help them feel more protected.¹⁹⁹

Although it is desirable to amend each law in addition specifically where discrimination occurs, for example in the area of employment, the paper will focus on an amendment of the HRA alone, since this would be the first step that could lead to other developments.

B. Discrimination and Anti-Discrimination Legislation

1. Existence and extent of discrimination

It has been argued that the extent of discrimination in New Zealand in general is exaggerated.²⁰⁰ Indeed, the non-existent case law and the small number

¹⁹² (6 September 2000) 2 Parl DebVic 285.

¹⁹³ (27 July 1993) 537 NZPD 16962.

¹⁹⁴ Rainbow Sector Council of the New Zealand Labour Party, above.

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

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

¹⁹⁷ (27 July 1993) 537 NZPD 16914.

¹⁹⁸ (27 July 1993) 537 NZPD 16951.

¹⁹⁹ Rainbow Sector Council of the New Zealand Labour Party "Submission to the Justice and Electoral Committee on the Human Rights Amendment Bill 2001".

²⁰⁰ (27 July 1993) 537 NZPD 16930.

of complaints by transgender people to the Human Rights Commission²⁰¹ supports that this might true for their situation too.

In response however, it is questionable whether there is a need to prove the existence of discrimination in order to amend the law, since it is desirable that protection from discrimination is pro-active rather than reactive.²⁰² The fact that anti-discrimination legislation would not interfere with anyone else's right or harm other people²⁰³ means an amendment would make sense under preventative aspects, even if there were no apparent manifestations of discrimination at all.

Also, the lack of sufficient statistical material on discrimination against transgender people does not 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,²⁰⁴ and by their fear of discrimination and harassment, rather than by the absence of discrimination.

Finally, as seen 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 aspects all favour an amendment.

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 minorities would be placed above those of the majority.²⁰⁵

In response to these concerns however, it can be said that anti-discrimination legislation does not take anything away from the majority.²⁰⁶ It is

²⁰¹ Chris Lawrence, personal communication, 28 March 2002.

²⁰² Nigel Christie "Supplementary Submission to the Justice and Electoral Select Committee on the Human Rights Amendment Bill 2001".

²⁰³ Christie, above.

²⁰⁴ Lawrence, above.

²⁰⁵ For the ground "sexual orientation" under the HRA: (27 July 1993) 537 NZPD 16974.

²⁰⁶ (22 July 1993) 536 NZPD 16748.

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.²⁰⁷

An amendment would therefore promote and implement equal treatment and freedom from discrimination.²⁰⁸

3. *Minority issue*

Another argument that might question the need for an amendment is the considerably small number of transgender people.

However, although 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,²⁰⁹ and therefore more difficult for them to be legally protected against discrimination.²¹⁰ The smaller a group and the more exceptional their characteristic, then the bigger the danger of them being discriminated against.²¹¹ The fact that they are a minority is therefore an argument in favour of, and not against, an HRA amendment.²¹²

4. *Immutability*

Opposing an amendment is the argument that if the criterion on which discrimination is based were a choice or a “lifestyle”, rather than an immutable

²⁰⁷ It's Time Illinois “A Q & A Guide to Transgender Rights” (2002) <http://itstimeil.org/publications/qa_guide.pdf> (last accessed 5 June 2002).

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

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

²¹⁰ Claire McNab “Broadening Article 14” (1999)

<<http://www.pfc.org.uk/cgi/printit.pl?/legal/ilga-a14.htm>> (last accessed 5 June 2002).

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

²¹² McNab, above.

status, then an alternative means, such as medical treatment, should be sought to avoid discrimination.²¹³

As seen in the example of transsexualism however, the causes for this condition are not clearly determined yet, though the medical evidence is rather against the assumption of a "choice". But even given the uncertainties regarding the causes for this condition, to remain inactive and ignore existing problems seems inappropriate. As the example of religion demonstrates, the Act does also recognise and protect grounds that consist of a "learned" behaviour. This shows that a biological cause is not a requirement for a status to be protected under the Act²¹⁴ and that the personal characteristic does not have to be immutable. It is sufficient that it is not consciously changeable, or only changeable at "unacceptable cost".²¹⁵ In consequence, the reference to the medical classification of transsexualism does not justify discrimination either,²¹⁶ since medical treatment does neither eliminate discrimination, nor does it interfere with legal means 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.²¹⁷ Therefore the classification or reasons for this status should not matter when it comes to the justification of anti-discrimination legislation,²¹⁸ especially since medical treatment is not an option for many.

5. Improvement of life situations

²¹³ With a similar reasoning in the context of homosexuality: (27 July 1993) 537 NZPD 16931.

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

²¹⁵ *The Laws of New Zealand*, (Butterworths, electronic version, law as stated 190 September 2001) Discrimination, para 1, 1.

²¹⁶ R Reid, Domenico de Ceglie and others *Transsexualism: The Current Medical Viewpoint* (2 ed, Press For Change, 1996) <<http://www.pfc.org.uk/medical/mediview.htm>> (last accessed 5 June 2002).

²¹⁷ As was argued for "sexual orientation". See: Robert Wintemute *Sexual Orientation and Human Rights* (Clarendon Press, Oxford, 1997) 17.

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

In favour of a HRA amendment is the fact that the personal life situation for transgender individuals would be significantly improved. Research indicates that it is crucial for transgender people to live their lives in a gender that matches their gender identity in order to increase their sense of well-being and help them adopt a positive attitude towards life.²¹⁹ The problems for transsexuals, for example, do not end with reassignment surgery, and life-long hormone treatment and often counselling are necessary. Anti-discrimination legislation would enable transgender individuals to at least live considerably more normal lives.²²⁰ A HRA amendment would assist this integration process by improving their life quality and making their lives easier.

C. International Aspects

1. International obligations

In addition to domestic aspects, a further argument supporting a HRA amendment lies with New Zealand's international human rights obligations. New Zealand is party to both the International Convention on Civil and Political Rights ("ICCPR")²²¹ and to the International Convention on Economic Social and Cultural Rights (ICESCR),²²² which are both important human rights treaties.

The ICCPR contains several provisions dealing with the elimination of discrimination and equality. For example, Article 2 (1) states that the State Parties undertake to ensure the rights and freedoms guaranteed in the treaty without "distinction of any kind". Rights guaranteed in the treaty are, for example, human dignity and privacy. Article 26 further states – independently from 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

²¹⁹ Dr Trudy Kennedy referred to in: (6 September 2000) 2 Parl DebVic 288.

²²⁰ (29 August 2000) 2 Parl DebVic 272.

²²¹ 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.

²²² 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.

the existing jurisprudence of the Human Rights Committee, which interprets the ground "sex" widely,²²³ though there is not yet any case law under the ICCPR dealing directly with this issue in regard to transsexuals.²²⁴ 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 the State Parties must guarantee the rights of the treaty without any discrimination of any kind. Areas of the treaty are, for example, employment and housing.

Given these provisions, it could be argued that the anti-discrimination provisions in the treaties imply that the State Parties are obliged to guarantee freedom from discrimination on any grounds,²²⁵ 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 either.²²⁶

Adding transgender people to the grounds of the HRA and the BORA – New Zealand's national instruments for human rights implementation – would arguably help New Zealand to fulfil international obligations, promote the human rights of transgender people and set a higher standard of human rights protections in New Zealand in compliance with international law.

2. International trend

Another aspect 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

²²³ See for example: *Nicholas Toonen v Australia* (1994) CCPR/C/50/D/488/1992.

²²⁴ Human Rights & Equal Opportunity Commission "Human Rights For Australia's Gay's And Lesbians" (1997) <http://www.hreoc.gov.au/word/human_rights/hr_for_gay_lesbian.doc> (last accessed 5 June 2002).

²²⁵ Human Rights & Equal Opportunity Commission, above.

²²⁶ *Commission Des Droits De La Personne Et Des Droit De La Jeunesse v Maison Des Jeunes A Ma Baie*, (1998) 33 CHHR D/263), para 69.

ground of gender identity, in their anti-discrimination legislation.²²⁷ In addition, there is recent positive case law in the United States, which grants transgender people protection on sex and disability grounds.²²⁸ Most Australian²²⁹ and some Canadian jurisdictions,²³⁰ as well as a growing number of European countries,²³¹ 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."²³² The European Court of Justice moved gradually to acknowledging that transsexual individuals suffer from human rights violations too.²³³

Finally, 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.²³⁴ 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 HRA²³⁵ because it would give New Zealand the opportunity to join a progressive

²²⁷ Transgender Law & Policy Institute "Non-Discrimination Laws that Include Transgender People" <<http://www.transgenderlaw.org/ndlaws/index.htm>> (last accessed 5 May 2002).

²²⁸ Transgender Law & Policy Institute, above.

²²⁹ See for Australia and other jurisdictions: Robert Wintemute (ed) *Legal Recognition of Same-Sex Partnerships* (Hart Publishing, Oxford, 2001) 789-790.

²³⁰ Canadian Human Rights Commission *Prohibited Grounds Of Discrimination* <<http://www.chrc-ccdp.ca/publications/prohibit-motifs.asp>> (last accessed 5 June 2002).

²³¹ Human Rights & Equal Opportunity Commission "Human Rights For Australia's Gay's And Lesbians" (1997) <http://www.hreoc.gov.au/word/human_rights/hr_for_gay_lesbian.doc> (last accessed 5 June 2002).

²³² Recommendation 1117, (1989) Parliamentary Assembly of the Council of Europe, section 11 (d).

²³³ Claire McNab "Broadening Article 14" (1999) <<http://www.pfc.org.uk/cgi/printit.pl?legal/ilga-a14.htm>> (last accessed 5 June 2002).

²³⁴ Adopted by The Second International Conference on Transgender Law and Employment Policy, 1993. See: The International Bill of Gender Rights <<http://www.transgenderlegal.com/ibgr.htm>> (last accessed 5 June 2002).

²³⁵ Human Rights Commission "Submission to the Justice and Electoral Committee on the Human Rights Amendment Bill 2001" Appendix 1, para 1.3.

development towards a higher human rights protections standard. Additionally, New Zealand would have the chance to benefit from the experiences of other jurisdictions.

D. Practical Consequences and Concerns

1. Fraud and fairness

An argument against an amendment is that due to its nature, the issue of gender identity brings several insecurities with it. For example, there are a number of transsexuals who undergo gender reassignment surgery and then go back to live as a member of their birth sex nevertheless.²³⁶ This shows that even surgery does not necessarily lead to an irreversible decision, which in turn makes it questionable if protection under the HRA based on the criterion of gender identity is justified.

In reply to the concerns regarding those transsexuals who change back to live in their former gender role it must be pointed out that this only happens to a very small percentage of individuals.²³⁷ The reason for changing back to the old gender role is hardly ever a change of gender identity either, but rather other factors such as high levels of stress, or negative reactions or consequences because of the original gender change,²³⁸ which again favours an amendment rather than opposes one.

Another practical concern is that someone could change gender just to gain privileges and economic advantages. For example, a transsexual man could change his gender in order to claim earlier retirement, pension or insurance benefits in accordance with the new – female – gender. Since there are different age limits, this would have significant consequences. Also, a male-to-female

²³⁶ Robin MacKenzie "Transsexuals' Legal Sexual Status and Same Sex Marriage in New Zealand: *M v M* (1992) 7 Otago Law Review 556, 567.

²³⁷ Press For Change *Recognising the Identity and Rights of Transsexual and Transgender People in the United Kingdom* (Press For Change, 1999) 28

<<http://www.pfc.org.uk/workgrp/pfcrpt1.pdf>> (last accessed 5 June 2002).

²³⁸ Press For Change, above, 28.

transsexual could gain unfair advantages in competitive sport events due to being physically stronger.²³⁹

Responding to worries of fraud or illegal behaviour, it can be stated that while this possibility exists in theory, it is not very likely that someone would undergo expensive, risky and extensive surgery just to gain financial benefits from it. Moreover, there are criminal law provisions dealing with these possibilities.

Regarding the inevitable consequences for matters such as insurance benefits and fairness in sports events, is the fact that even now there are already women who, for example, do not fit the feminine stereotype and characteristics but are nevertheless allowed to participate in competitive sport events. Furthermore there are other means, such as exceptions, to address these issues beforehand and to deal with them accordingly, so therefore these concerns are not obstacles to an amendment.²⁴⁰ For example, it would be possible to amend the exceptions in ss 48 and 49 of the HRA to apply to transsexuals in the context of insurance policies and competitive sports events if that should be seen as desirable.

2. Cross-dressing in the workplace and bathrooms

A further stated concern is that the introduction of anti-discrimination legislation for transgender people could force employers to hire and to accept men in dresses in the workplace²⁴¹ and that it would encourage cross-dressing in the workplace.²⁴² A similar concern deals with the problems arising from uncertainties regarding bathroom and locker use by transsexuals.²⁴³ Some people

²³⁹ (29 August 2000) 2 Parl DebVic 258.

²⁴⁰ As to how to deal with competitive sports see for example: Boulder (CO) City Council Meeting (1 February 2000) Item 10 IV 3 <<http://www.transgender.org/tg/gic/bouldlaw.html>> (last accessed 5 June 2002).

²⁴¹ Paisley Currah and Shannon Minter *Transgender Equality* (The Policy Institute of the National Gay and Lesbian Task Force, 2000) 54-55 <<http://www.nglftf.org/downloads/transeq.pdf>> (last accessed 6 June 2002).

²⁴² Currah and Minter, above, 62.

²⁴³ Currah and Minter, above, 58-60.

fear problems in cases where, for example, a male-to-female pre-operative transsexual would share bathrooms with women.²⁴⁴

With regard to concerns about cross-dressing in the workplace however, it does not seem logical to assume that such legislation would lead to a high number of cross-dressers in the workplace.²⁴⁵ As seen with the homosexual law reform, as well as with the introduction of the ground "sexual orientation" under the Act, legal change does not operate to "encourage" behaviour, and that the true reason behind this opposition is rather transphobia - the unrealistic, irrational fear of transgender people.²⁴⁶ Transgender people simply want to work in clothes that are appropriate to their gender identity just like everyone else. As the examples of women wearing trousers shows, cross-dressing already exists in the workplace anyway.²⁴⁷ Finally, employers would still be able to introduce and maintain dress codes that require employees to present a neat and professional appearance.²⁴⁸

In response to possible bathroom issues it must be pointed out that to assume transgender people are voyeuristic and predatory beings is a misconception. In practice, problematic situations could easily be avoided by creating single-bathroom facilities or unisex toilets.²⁴⁹ In the case of any illegal behaviour, every employer would remain able to terminate the employment anyway.²⁵⁰

E. Political Aspects

1. Consistency

²⁴⁴ Currah and Minter, above, 62.

²⁴⁵ Transgender Law & Policy Institute "Talking Points" <<http://www.transgenderlaw.org/talkingpoints.htm>> (last accessed 6 June 2002).

²⁴⁶ 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 5 June 2002).

²⁴⁷ Currah and Minter, above, 62.

²⁴⁸ Currah and Minter, above, 54-55.

²⁴⁹ Currah and Minter, above, 58-60.

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 "sexual orientation" in the HRA, the provisions in the BDMA dealing with a change of name and birth certificates, through to the decisions regarding transsexual marriage. Given this development of New Zealand's legal framework, particularly in regard to sexual minorities, an amendment would be just the next step. After all, the law has to stay up to date and extend rights to groups in society that are discriminated against.²⁵¹

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.²⁵² 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.

2. National support?

Another argument in favour of an amendment is the support such a measure could receive. While there are no surveys dealing with transgendered people in particular, surveys of several years clearly indicate that New Zealand's population is in favour of equality and justice.²⁵³ Also, society at large agrees

²⁵⁰ Seattle Commission for Sexual Minorities *Policy And Legislative Recommendations Concerning Transgendered Citizens in Seattle* (1999) 10
<<http://www.cityofseattle.net/scsm/transgender.pdf>> (last accessed 6 June 2002).

²⁵¹ (22 July 1993) 536 NZPD 16746.

²⁵² *Attorney-General v Otahuhu Family Court* [1995] 1 NZLR 603, 607 (HC) Ellis J.

²⁵³ (22 July 1993) 536 NZPD 16750.

that discrimination is unacceptable²⁵⁴ - especially if it is based on stereotypes or prejudices.²⁵⁵

It has further been argued that given that transgender individuals live throughout New Zealand and appear in all areas of life - as seen with the famous example of Georgina Beyer, the member of the New Zealand Parliament and the first transsexual person to hold such a position in the world - an amendment would be largely uncontroversial in our times.²⁵⁶ Some transgender organisations even maintain that to amend the law would produce hardly any opposition.²⁵⁷

This view is supported by two recent significant developments that have shown further legislative progress regarding the issue of "gender identity".²⁵⁸ The first was the discussion of the Sentencing and Parole Reform Bill 2001, which has been amended in the Select Committee to add "hate crimes" to the list of aggravating factors.²⁵⁹ Section 9 (g) lists gender identity as one of the relevant characteristics, which might induce hatred in others.²⁶⁰

The other important development was the Committee's consideration of the Human Rights Amendment Bill in 2001.²⁶¹ Out of the 75 submissions received by the Committee, at least 12 asked for the inclusion of the ground gender identity, transgender status, or transsexuals/intersex people. It is also significant that the submissions did not only come from transgender individuals, but also from the general public and the Human Rights Commission.²⁶² The amendment did not relate to additional grounds or the effectiveness of the Act. Despite this lack of prompting, submissions were made on these matters

²⁵⁴ Nigel Christie "Supplementary Submission to the Justice and Electoral Select Committee on the Human Rights Amendment Bill 2001".

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

²⁵⁶ Auckland Central Rainbow Branch of the New Zealand Labour Party "Submission to the Justice and Electoral Committee on the Human Rights Amendment Bill 2001".

²⁵⁷ Agender New Zealand "Submission to the Justice and Electoral Committee on the Human Rights Amendment Bill 2001".

²⁵⁸ Tim Barnett, personal communication 20 March 2002.

²⁵⁹ The Bill was passed on 1 May 2002, but has been split into two Acts: The Sentencing Act 2002 and the Parole Act 2002. Each Act is intended to come into effect from July 2002. The former contains the "hate crime" provision.

²⁶⁰ Sentencing and Parole Reform Bill 2001, no 148-2 (the commentary) 11.

²⁶¹ Barnett, above.

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.²⁶³

However, contrary to this positive outlook is the fact that the discussion of the Sentencing and Parole Reform Bill 2001 related to a punitive matter and was not about discrimination, which could make a difference politically since anti-discrimination legislation has a different character and different goals. Furthermore, the Select Committee “just” recommended pursuing the issue but did not initiate more action, which rather suggests that matters are not as positive as portrayed.

Another aspect that indicates some negative reaction is the heated discussion that took place when the ground “sexual orientation” was introduced under the HRA. Though the discussion took place almost 10 years ago, it is likely that the introduction of a ground covering transgender people - another sexual minority - would attract similar resistance.

It could, for example, be argued that the introduction of anti-discrimination legislation to protect transgender people might send a “wrong” message and encourage “wrong” behaviour²⁶⁴ or have a destabilising effect on society.²⁶⁵ If, for example, a woman were then able to sue someone for forcing stereotypical behaviour upon her this would be against traditional role-understandings.

During the discussion of the ground “sexual orientation” under the HRA it was further feared that amending the law could endanger the vulnerable parties in society, especially children, by negatively influencing them.²⁶⁶ Similar concerns could be voiced against an amendment of the HRA now.

²⁶² Human Rights Commission “Submission to the Justice and Electoral Committee on the Human Rights Amendment Bill 2001” Appendix 1, para 1.1.

²⁶³ Barnett, above.

²⁶⁴ Argued against the ground “sexual orientation” (27 July 1993) 537 NZPD 16930.

²⁶⁵ Argued against the ground “sexual orientation” (27 July 1993) 537 NZPD 16916-16917.

There are also religious views suggesting, for instance, that – for both transsexuals and intersex people – it is unnatural and against God’s will to follow one’s true gender identity.²⁶⁷

However, what constitutes “natural” is highly arguable. An amendment would not be about the morality of a particular behaviour. In New Zealand, the state and church are separate, so any religious arguments are not persuasive either.

Responding to these concerns, it can also be said that they are based on prejudice and ignorance rather than on the result of reasonable experiences.²⁶⁸ Transgender people are simply individuals who want to be themselves and who want to live productive lives like everybody else.²⁶⁹

In a modern society like New Zealand that promotes values such as equality, tolerance, diversity and freedom from discrimination, every citizen should be treated equally and have the opportunity to gain employment, accommodation or access to public places without being discriminated against.²⁷⁰ Those who ask for the promotion of a “decent” society should therefore be in favour of an amendment that supports values such as tolerance rather than against it, particularly as discrimination not only affects the group being victimised, but also disturbs social harmony and therefore society as a whole.²⁷¹

Any fears of destabilising effects from the loosening of gender stereotypes have to be balanced against the more progressive desire of breaking up the gender roles and stereotypes that restrict individuals in accordance with outdated views of the relation between the genders and their “place” in society.

²⁶⁶ (27 July 1993) 537 NZPD 16916-16917.

²⁶⁷ See for example: Bible Answers “Questions On Sexuality” <<http://www.bible.org.nz/sexuality.htm>> (last accessed 5 June 2002).

²⁶⁸ Genderbridge Inc “Submission to the Justice and Electoral Committee on the Human Rights Amendment Bill 2001” para 6.

²⁶⁹ Vicki Harvey “Submission to the Justice and Electoral Committee on the Human Rights Amendment Bill 2001” para 6.

²⁷⁰ (27 July 1993) 537 NZPD 16913.

²⁷¹ (6 September 2000) 2 Parl Deb Vic 267.

Fears for the well-being of the vulnerable parties in society are based solely on assumptions, such as that transgender people are paedophiles, and without support by any statistical data.²⁷²

While all the abovementioned concerns are misconceptions based on prejudices and do not represent valid arguments against an amendment per se, they nevertheless suggest that an amendment could at least be delayed by conservative sides arguing along these lines.

F. Conclusion

As seen above, there are several arguments both for and against an amendment. As a result of their analysis, 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.²⁷³ While it is beyond the scope of the paper to deal with all possible solutions, it will address the most important ones.

A. Wording of the Amendment

²⁷² Harvey, above, para 6.

²⁷³ Approach adopted from: Paisley Currah and Shannon Minter *Transgender Equality* (The Policy Institute of the National Gay and Lesbian Task Force, 2000), 38
<<http://www.nglhf.org/downloads/transeq.pdf>> (last accessed 6 June 2002).

There are several terminology approaches that could be used to amend the HRA. Adopting specific language, for instance, or using more generalised terms would be two possible options.²⁷⁴

An example of very specific language would be to describe every group of people that should be covered by an amendment. This, however, could lead to problems if terminology changes or loses its meaning over time.²⁷⁵ Since courts further tend to interpret such lists as exhaustive, this method is uncertain²⁷⁶ and therefore undesirable.

Wide, generalised terminology, on the other hand, has the advantage of covering as many people as possible.²⁷⁷ The preference is therefore a wording that is flexible and general enough to cover all the groups that should be covered, but is nevertheless clear and specific enough to avoid interpretation problems.²⁷⁸

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" however is the most common one in international jurisdictions.²⁷⁹ In addition, the term is wide enough to not only cover transgender concerns but also gender stereotyping. Since it is also the most accurate expression for this contentious matter, it seems sensible to use it for an amendment of the HRA as well.

To prevent further insecurities in the process of an amendment, it might be useful to include a definition of the term "gender identity" into the Act as well.²⁸⁰

²⁷⁴ Currah and Minter, above, 38.

²⁷⁵ Currah and Minter, above, 41.

²⁷⁶ Currah and Minter, above, 41.

²⁷⁷ Currah and Minter, above, 40.

²⁷⁸ Currah and Minter, above, 40-41.

²⁷⁹ Used for example in several jurisdictions in the United States. For an overview see: Currah and Minter, above, 45-47.

²⁸⁰ 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,

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 paper will focus on the most important alternatives.

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 "sexual orientation" (s 21 (1) (m)) - an approach that has been taken by several jurisdictions in the United States.²⁸¹

The advantage of this method would be to stress the connection between homophobia and transphobia, and to emphasise that all sexual minorities are covered.²⁸² In addition, it would be relatively simple to just amend an existing ground instead of introducing a new category.²⁸³

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.²⁸⁴ Since most people do not read statutes in detail,²⁸⁵ they might not even come across the issue of gender identity, if it is "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 against this solution is that including the issue under the ground "sexual orientation" could lead to confusion by connecting the unrelated issues of gender identity and sexual orientation. This approach is therefore not desirable.

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.

²⁸¹ See for example: Toledo, OH - Ordinance No 1183-98 (1998); York, PA - Ordinance No 9-98 (1998).

²⁸² Currah and Minter, above, 41-42.

²⁸³ Currah and Minter, above, 43.

²⁸⁴ Currah and Minter, above, 41.

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

A second possibility of amending the HRA would be to include gender identity into the definition of the ground "sex" (s 21 (1) (a)).²⁸⁶ 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.²⁸⁷

Alternatively, a ground "gender" could be used to include gender identity issues in 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 ground "sex" to "gender".²⁸⁸ The benefit of this method is that it emphasises that the matter is one of individual identity²⁸⁹ rather than biology. It also highlights the fact that sex and gender are different from each other.

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.²⁹⁰ In addition, as negative case law - especially in the United States - indicates, the grounds "sex" or "gender" often lead to interpretation problems and are therefore not sufficiently clear.²⁹¹ It also leaves out those who do not comply with gender stereotypes. These suggestions are therefore unsatisfactory.

3. *New ground "gender identity"*

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

²⁸⁵ Currah and Minter, above, 41.

²⁸⁶ Currah and Minter, above, 42.

²⁸⁷ Currah and Minter, above, 43.

²⁸⁸ Auckland Central Rainbow Branch of the New Zealand Labour Party "Submission to the Justice and Electoral Committee on the Human Rights Amendment Bill 2001".

²⁸⁹ Human Rights Commission "Submission to the Justice and Electoral Committee on the Human Rights Amendment Bill 2001" Appendix 1, para 1.2.

²⁹⁰ Currah and Minter, above, 68.

²⁹¹ Currah and Minter, above, 61.

This approach has a higher symbolic value – particularly for transgender people – than including these matters under an existing ground.²⁹² After all, a separate ground “gender identity” would clearly establish what makes transgender people different from the rest of society, and also emphasise what all transgender people have in common.²⁹³ 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 therefore deserving of individual attention.²⁹⁴

The introduction of a new ground “gender identity” under the HRA is therefore the preferable solution.

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 every-day-life, as seen 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 serve 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 neither the grounds “sex”, “disability” or “sexual orientation” cover the matter sufficiently.

Persuasive arguments have been seen in favour of a HRA amendment. The main ones being that legislation offers additional benefits compared to education alone, the fact that discrimination is a reality, and that measures

²⁹² Claire McNab “Broadening Article 14” (1999)

<<http://www.pfc.org.uk/cgi/printit.pl?/legal/ilga-a14.htm>> (last accessed 5 June 2002)..

²⁹³ Rainbow Sector Council of the New Zealand Labour Party “Submission to the Justice and Electoral Committee on the Human Rights Amendment Bill 2001”.

²⁹⁴ Currah and Minter, above, 41.

against it are both desirable and consistent with New Zealand's international obligations. In addition, it would be a development that would meet an international trend. Practical concerns against an amendment such as fear of fraud or fear of "men in dresses" on the other hand are usually based on misconceptions, thereby losing any potential persuasiveness. The few valid concerns can be addressed by measures such as allowing for exceptions under an amendment. The political aspects of an amendment further show that it is a matter of consistency to add a new ground to the HRA.

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.²⁹⁵

Having said that, there are also indications that there will be strong opposition at first. The arguments against an amendment are not convincing and mostly based on misinformation rather than the result of a rational discourse. Despite their prejudicial nature, 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.

The paper finally suggested introducing an additional ground "gender identity", which, through the operation of s 19 of the BORA, would amend the anti-discrimination provisions of both statutes as the preferable way to amend the HRA.

In conclusion, an amendment is not only necessary, but also desirable in the 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 public's attention – something that has happened very rarely to date.

²⁹⁵ According to Tim Barnett, an amendment is likely within the next 3 years should the current political mindset persist. Personal communication, 26 March 2002.

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