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**TIME FOR REFORM: PROTECTING GENDER IDENTITY
UNDER THE HUMAN RIGHTS ACT 1993**

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Abstract

The Human Rights Act is New Zealand's primary anti-discrimination statute, preventing differential treatment on the basis of a closed list of prohibited grounds. This essay analyses the need to recognise gender identity as a prohibited ground under the Act, and to reform the structure of the Act's anti-discrimination provisions to become an open-ended list. The essay outlines various forms of discrimination suffered by transgender people, and their status at New Zealand, overseas, and international law. It explores the history of human rights reform in New Zealand through homosexual law reform and the Human Rights (Gender Identity) Amendment Bill 2004. I critique the incorporation of gender identity discrimination into sex discrimination, and argue that a separate ground would serve both remedial and educative functions. Further, reforming the list would provide long-term and inclusive reform for groups beyond transgender people. I conclude that successful reform is both timely and possible.

Key words

Law reform, transgender, gender identity, Human Rights Act 1993, discrimination.

The text of this paper, excluding title page, abstract, contents, footnotes, and bibliography, is exactly 14,742 words.

I Introduction

People who do not identify as the sex assigned to them at birth have existed throughout human history. In modern-day New Zealand, we call these people transgender. Yet the Māori terms *wakawahine*, *hinehi*, and *hinehua* all refer to someone in a male body who identifies as female, and *tangata ira tane* refers to someone in a female body who identifies as male. Similarly, terms like *fa-afine*, *fakaleiti*, *akava-ine*, *mahu*, *vaka sa lewa*, *rae*, and *fafafine* are used in Pasifika cultures to reflect the disjunction of sex and gender identity in individuals. In 2010, the World Professional Association for Transgender Health stated that the expression of gender identities “that are not stereotypically associated with one’s assigned sex at birth is a common and culturally-diverse human phenomenon [that] should not be judged as inherently pathological or negative.”¹ Despite the existence of these people across cultures, there has been little legal recognition of their human rights.

In New Zealand, transgender people face multiple forms of discrimination. They may be subject to unfair treatment on the basis of race, sex, or other factors that are prohibited grounds of discrimination under the Human Rights Act 1993. However, some forms of discrimination occur only on the basis of an individual’s gender identity. For people whose gender identities are the same as their sex (“cisgender” people), there is no sense of incongruity between their sex and their gender, so this area of their lives causes little discomfort. In contrast, transgender people experience significant discomfort and both mental and physical health issues associated with managing their incongruent gender identity in a gendered world.² These issues are in addition to the discrimination they face across the contexts of family, employment, safety, education, citizenship, and health.³

The prevalence of transgender people in the general population is difficult to determine, due to a lack of data analysis and flawed collection methods. For example, data collected at hormone or surgical centres can result in significant underestimation, as only a small percentage of transgender people may actually present for medical gender transitions. It has been estimated that the actual prevalence of transgender people in the general population may be about 1%.⁴ A 2012 survey of high school students in New Zealand found that of 8,166 students, 1.2%

¹ World Professional Association for Transgender Health Board of Directors “Depsycho-pathologisation statement” (26 May 2010) World Professional Association for Transgender Health <www.wpath.org>.

² Heike Polster “Gender Identity as a New Prohibited Ground of Discrimination” (2003) 1 *New Zealand Journal of Public and International Law* 157 at 162.

³ Human Rights Commission *To Be Who I Am: Report of the Inquiry into Discrimination Experienced by Transgender People* (Human Rights Commission, 2007) at 10-11.

⁴ Femmke Olyslager and Lynne Conway *On the calculation of the prevalence of transsexualism* (Paper presented at World Professional Association for Transgender Health 20th International Symposium, Chicago, Illinois, September 2007) at 92.

reported being transgender, while a further 2.5% reported being “not sure about their gender”.⁵ Transgender people appear to make up a small yet increasingly salient proportion of the general population. While estimates of prevalence are irrelevant to arguments for human rights,⁶ it is valuable to know that reform in this area would positively affect a significant number of people. Until the 2000s, transgender rights were almost universally ignored in the legal sphere. The concept of transgenderism as a lifestyle choice, a phase, or a predilection for cross-dressing has until very recently meant the near erasure of transgender rights discussion. The movement towards recognition of gay and lesbian rights has often subsumed the transgender rights movement, although the two sections of society face multiple and distinct forms of discrimination. While sexual orientation is recognised as a prohibited ground of discrimination under the Human Rights Act 1993,⁷ gender identity is not.

A Member’s Bill was introduced in 2006 that would introduce gender identity into the Human Rights Act.⁸ In an opinion issued in response to the Bill, the Crown Law Office found that transgender rights receive adequate protection by the prohibition of discrimination on the ground of sex in the Human Rights Act.⁹ The Bill was subsequently withdrawn. The Encyclopaedia of New Zealand now asserts that transgender people are protected under the Human Rights Act.¹⁰ However, in a summary of human rights in New Zealand published in 2010, the Human Rights Commission stated that amending the Human Rights Act to explicitly recognise transgender people is a priority area, particularly for those who have not fully physically transitioned to their preferred sex.¹¹

This essay argues that the current law provides insufficient certainty that transgender people are fully protected under the Human Rights Act, as gender identity brings a raft of discriminatory issues quite separate from sex discrimination. The Human Rights Act should be reformed to include gender identity as a prohibited ground of discrimination. This essay examines two ways this reform could occur: either through inserting an explicit and separate prohibited ground of gender identity, or going a step further and also reforming s 21 of the Human Rights Act to become an open-ended list of prohibited grounds.

⁵ Terryann Clark, Mathijs Lucassen, Pat Bullen, Simon Denny, Theresa Fleming, Elizabeth Robinson and Fiona Rossen “The health and well-being of transgender high school students: Results from the New Zealand Adolescent Health Survey (Youth’12)” (2014) 55 *Journal of Adolescent Health* 93 at 93.

⁶ Human Rights Commission, above n 3, at 25.

⁷ Human Rights Act 1993, s 21(1)(m).

⁸ Human Rights (Gender Identity) Amendment Bill 2004 (255-1).

⁹ Crown Law Office *Opinion on the Human Rights (Gender Identity) Bill* (2 August 2006).

¹⁰ Johanna Schmidt “Gender diversity – Human rights and discrimination” (5 May 2011) *Te Ara: the Encyclopaedia of New Zealand* <www.teara.govt.nz> at 6.

¹¹ Human Rights Commission *Human Rights in New Zealand 2010* (2010) at 69 and 71.

Part II of this essay defines some key terms surrounding transgenderism and gender concepts generally, as well as exploring the concept of discrimination from a theoretical perspective. Part III explores discrimination suffered by transgender people across legal, medical, and social spheres, and their consequences for individuals. It examines transgender prisoners as a group that faces particular disadvantage from multiple forms of discrimination, to highlight the unique rights abuses that transgender people face. Part IV explores the current position of transgender rights at New Zealand law through the limited discussion and development of law reform in this area. Part V examines the Human Rights Act as the vehicle for reform, and the influence of international and overseas law on the interpretation and reform of the Act. It also compares the two reform options of including the ground of gender identity under s 21 of the Human Rights Act, or re-wording the anti-discrimination provisions to both explicitly include gender identity and create an open-ended list of grounds. It concludes that an open-ended list of prohibited grounds would best meet the aims of reform.

Part VI explores other pathways of protection, including complementary reform to amending the Human Rights Act, using the Act in its current form to protect transgender people under other grounds, and relying on the courts to take a purposive approach to interpreting the Act. Part VII examines the likelihood of successfully reforming the Human Rights Act. It looks at homosexual law reform as a comparable reform process. It also critiques the rights framework and explores practical effects of reform. The essay concludes that creating an open-ended list of grounds of discrimination with explicit reference to gender identity is the most desirable method of reform.

II Defining Gender and Discrimination

Given that this essay is dominated by reference to some specific terms, it is important to explain some terminology around transgenderism. These terms are not exhaustive, and do not aim to encompass or fully explain the diverse groups that may fall under each definition. As this essay argues for reform of New Zealand's anti-discrimination statute, this Part will also examine the concept of discrimination and the aims and meanings of discrimination law.

A Gender-Related Terminology

This essay will refer to several terms which are important to define, as some terms have differing legal, social, and medical definitions. This essay avoids using the term "transsexual". This term traditionally refers to people who sought to change their sex through surgery. It was developed to distinguish people who altered their sexual morphology through surgery and those who merely altered their superficial appearance through clothes and makeup ("transvestites") or other transgender people who did not seek surgery.¹² However, gender reassignment surgery

¹² Susan Stryker *Transgender History* (Seal Press, 2009) at 30.

is both expensive and extremely hard to access in New Zealand, with potential waitlists currently stretching to 47 years for male-to-female surgery.¹³ Thus the position of transgender people who have not undergone surgery can be recognised as often one of necessity, rather than a choice to forgo surgery. This essay defines transgender people on the basis of gender identity, rather than physical or surgical status.

“Transgender” is used as an umbrella term throughout this essay. While the concept of sex is proving increasingly variable and raises its own myriad concerns, transgender people’s concerns, and often the discrimination they face, arise from gender identity. Transgender people feel that they are in the wrong physical body and sex. They will often seek or desire surgery to make their body better reflect their inner selves. This feeling is “constant, inflexible, and ultimately immutable”.¹⁴ Not all people who fall within this essay’s definition of transgender would personally identify as such. Some scholars expand their definitions to include homosexual people and transvestites, as their appearance or behaviour may markedly differ from stereotypical gender norms.¹⁵ However, as discussed above, this essay seeks to focus on gender identity, rather than appearance. Thus the word “transgender” in this essay refers to someone whose perceived or presented identity does not conform to the identity typically associated with the sex assigned to that person at birth.¹⁶ This definition encompasses transgender people who have undergone surgery (post-operative) as well as those who have not (pre-operative) or who will not undergo surgery, whether through personal preference or inaccessibility. It also includes some people who may identify as intersex or non-gender conforming, who do not identify as their assigned sex.¹⁷

Where the term “gender” is used, it refers to the social or cultural manifestations of male and female, which are created through both expectations and actual behaviour.¹⁸ “Sex” refers to the biological genitalia, chromosomes, and sex cells which are usually defined as of the male or

¹³ Tess McClure “Waiting in vain? Trans surgery waitlists stretch to almost 50 years” (1 September 2016) The Wireless <www.thewireless.co.nz>.

¹⁴ Anita Barnes “The Sexual Continuum: Transsexual Prisoners” (1998) 24 *New England Journal of Criminal and Civil Confinement* 599 at 608.

¹⁵ See Taylor Flynn “‘Transforming’ the Debate: Why We Need to Include Transgender Rights in the Struggles for Sex and Sexual Orientation Equality” (2005) 101 *Columbia Law Review* 392 at 392.

¹⁶ Franklin Romeo “Beyond a Medical Model: Advocating for a New Conception of Gender Identity in the Law” (2005) 36 *Colum Hum Rts L Rev* 713 at 713; Stephen Whittle *Respect and Equality: Transsexual and Transgender Rights* (Cavendish Publishing Limited, London, 2002) at xxii. It is recognised that gender identity is culturally specific, and any failure to correctly identify a person’s identity is solely the responsibility of the author.

¹⁷ Polster, above n 2, at 162.

¹⁸ Human Rights Commission, above n 3, at 12.

female, but which may be indeterminate.¹⁹ “Sex” does not include gender identity, as it is limited to the physical rather than psychological manifestations of either male or female.²⁰

“Genderqueer” is a term used to refer to people whose identity is not within the gender binary of male and female. These people may identify as being of a third gender or having no gender, or as being on a continuum between male and female identities.²¹ These people may call themselves genderqueer or may self-identify as androgynous, third gender, bi-gendered, or non-gendered.²²

“Intersex” refers to those people who have indeterminate biological anatomy which does not conform to the typical phenotype of either sex.²³ Intersex infants who are born with indeterminate genitalia have historically been subject to “normalisation” surgery, where their genitalia are surgically altered to more closely conform to the male or female sex.²⁴ Intersex people may identify with the gender that they are assigned at birth, or they may identify as the other gender, or as neither male nor female. Those who do not identify with their birth gender are brought within the umbrella definition of “transgender” in this essay, while those whose gender identity is congruent with their assigned sex are not. The nature of the reform suggested by this essay would change the structure of the closed list under s 21 of the Human Rights Act to become open-ended, creating room for intersex and genderqueer people to be protected against discrimination. As will be discussed in Part V, this reform would resolve issues of inclusion that currently exist under the closed list construction.

“Gender identity” refers to a person’s innate identity as male or female, or as “somewhere in between”, which may not correspond to their biological sex.²⁵ This can also differ from “gender expression”, which is the way a person expresses their gender identity in a cultural context.²⁶ For example, the two can differ where a person’s gender expression may be more limited than their gender identity due to social or workplace constraints. “Sexual orientation” refers to the orientation of one’s sexual attraction to others, which can be on the basis of others’ sex but is

¹⁹ At 12.

²⁰ See s 2 of the Marriage Act 1955, which refers to marriage as “the union of two people, regardless of their sex, sexual orientation, or gender identity”.

²¹ Fleur Mulligan “Gender Identity: Developing a Statistical Standard” (2014) Statistics New Zealand, Wellington <www.stats.govt.nz> at 41.

²² Jack Harrison, Jaime Grant, and Jody Herman “A Gender Not Listed Here: Genderqueers, Gender Rebels, and OtherWise in the National Transgender Discrimination Survey” (2012) 2 LGBTQ Public Policy Journal at the Harvard Kennedy School 13 at 20.

²³ Emily Blincoe “Sex Markers on Birth Certificates: Replacing the Medical Model with Self-Identification” (2016) 46 VUWLR 57 at 60.

²⁴ Stryker, above n 12, at 20.

²⁵ Human Rights Commission, above n 3, at 12.

²⁶ Mollie Aleshire “Sexual Orientation, Gender Identity, and Gender Expression: What Are They?” (2016) 12 Journal for Nurse Practitioners 329 at 329.

not limited by sex or gender.²⁷ Transgender people have a range of sexual orientations, much as cisgender people (people whose gender identities match their sex) do.²⁸

B Medical Definitions of Transgenderism

The Diagnostic and Statistical Manual of Mental Disorders (DSM) is produced by the American Psychiatric Association, and used by clinical psychologists and other medical practitioners to diagnose and treat mental disorders. If a mental condition is not in either the DSM or the International Statistical Classification of Diseases and Related Health Problems (its equivalent produced by the World Health Organisation), it is not considered a disorder. Homosexuality was removed from the DSM in 1974, although medical practitioners became concerned that its exclusion would slow future scientific progress in the area of sexuality studies.²⁹ The diagnosis of “transsexualism” first appeared in the DSM-III in 1980,³⁰ and became “gender identity disorder” in the DSM-IV in 1994 before becoming “gender dysphoria” under the current DSM-V.³¹

Gender identity disorder under the DSM-IV was a psychiatric diagnosis implying a temporary mental state, and conflating sexual orientation with gender identity.³² While the availability of a diagnosis can facilitate medical intervention and developments, it can also be stigmatising and problematic in furthering skewed public perceptions of transgender people.³³ The Workgroup for Sexual and Gender Identity Disorders was employed by the American Psychiatric Association to review the diagnosis of gender identity disorder, and update it with current knowledge.³⁴ The Workgroup emphasised that it was anxious to begin the destigmatisation of transgender people through a new diagnosis, while preserving it as part of the DSM for insurance payment purposes.³⁵ The diagnosis was revised to “gender dysphoria”

²⁷ At 329.

²⁸ Polster, above n 2, at 161.

²⁹ Zowie Davy “The DSM-5 and the Politics of Diagnosing Transpeople” (2015) 44 *Archives of Sexual Behaviour* 1165 at 1167.

³⁰ American Psychiatric Association *Diagnostic and statistical manual of mental disorders* (3rd ed, American Psychiatric Association, Washington, D.C., 1980).

³¹ Davy, above n 29, at 1166.

³² Lin Fraser, Daniel Karasic, Walter Meyer III and Kevan Wylie “Recommendations for Revision of the DSM Diagnosis of Gender Identity Disorder in Adults” (2010) 12 *International Journal of Transgenderism* 80 at 80.

³³ Anna Kirkland “What’s at Stake in Transgender Discrimination as Sex Discrimination?” (2006) 32 *Signs: Journal of Women in Culture and Society* 83 at 106.

³⁴ Davy, above n 29, at 1165.

³⁵ At 1165.

in the latest edition of the DSM, which was published in 2013.³⁶ The definition describes that people with gender dysphoria:³⁷

have a marked incongruence between the gender they have been assigned to ... and their experienced/expressed gender. This discrepancy is the core component of the diagnosis. There must also be evidence of distress about the incongruence.

This definition focusses on gender identity, rather than physical sex or other biological factors. Importantly, it also recognises that distress about the incongruence, rather than distress about gender identity alone, creates the threshold for a diagnosis.³⁸ Identification with a different gender does not need to be distressing in itself. The recency of this definitional shift is telling. Knowledge and research about transgender people are still in their infancy, which may be an obstacle to effective reform. Pathologisation of transgenderism is also the prevailing medical norm. However, this also highlights the need for public education and awareness about the nature of transgenderism, which explicit human rights reform could facilitate.

C The Aims and Theories of Discrimination Law

Discrimination law stems from the idea that governments can dictate when differential treatment has a wrongful basis. This idea can come from two broad theories: the equality-based view and the liberty-based view of discrimination. The equality-based view holds that discriminatory behaviour is impermissible where it does not treat those whom it affects as equals.³⁹ The liberty-based view approaches discrimination from the perspective of whether it intrudes on universal liberties; the content and scope of these liberties is left to the court to determine.⁴⁰ The equality-based view is inherently comparative, as it asks whether equal concern and respect is afforded to different people. This does not mean that they must receive the same treatment,⁴¹ as long as they receive comparable respect.

The liberty view removes a comparator group from the equation, by simply asking whether a person is being denied any rights that they are objectively entitled to.⁴² Using a comparator group under such an analysis would only be useful to illustrate that other people receive this

³⁶ American Psychiatric Association *Diagnostic and statistical manual of mental disorders* (5th ed, American Psychiatric Association, Arlington, VA, 2013) at 453.

³⁷ At 453.

³⁸ Fraser, Karasic, Meyer and Wylie, above n 32, at 80.

³⁹ Deborah Hellman "Equality and Unconstitutional Discrimination" in Deborah Hellman and Sophia Moreau (eds) *Philosophical Foundations of Discrimination Law* (Oxford University Press, 2013) 51 at 52.

⁴⁰ Sophia Moreau "In Defense of a Liberty-based Account of Discrimination" in Deborah Hellman and Sophia Moreau (eds) *Philosophical Foundations of Discrimination Law* (Oxford University Press, 2013) 71 at 71.

⁴¹ Hellman, above n 39, at 54.

⁴² At 55.

universal right. This view, however, runs into trouble where it attempts to frame privileges as rights. For example, it would clearly be discriminatory to restrict admission to medical school to white people only. However, there is no universal right to attend medical school. Thus the liberty view must frame discrimination as removing the right for people to freely live their lives “insulated from pressures stemming from extraneous traits of ours”.⁴³

Transgender people can exist in an unusual legal space regarding discrimination law. Because their gender identity usually differs from their biological sex (unless they have undergone full surgical reassignment), they may be treated the same way as other members of their sex. For example, a transgender woman who is biologically male being refused entry to a female bathroom is being treated the same way as other biological males. Thus a comparative approach may not always be helpful when applied to these contexts. However, from a respect and concern perspective, the transgender woman may be treated with comparative disrespect when contrasted with other biological males, as there is no accommodation for her incongruent gender identity.

A liberty-based view may be more appropriate; in the gendered bathroom example, the transgender woman has the right to use the bathroom that she identifies as appropriate for her gender. Her claim to the right is not on the basis of equal treatment to other biological males, but on the objective strength of her claim.⁴⁴ However, as opposed to strongly constitutional countries such as the United States, it is unclear exactly what rights would be recognised as universal in New Zealand and who we would trust to enunciate these.

New Zealand, with its unwritten and subordinated constitution, may best suit the equality-based view of discrimination. An equality perspective based on equivalent respect and concern for all people would best fit with our international obligations and domestic goals. The only constitutional principle underlying this approach would be the aim of affording equal respect and concern for people of all gender identities.⁴⁵ Thus the reform proposed by this essay will conform to the equality view of discrimination. This necessitates that the comparator group may be different for transgender people at different stages of transition. In an analysis of sex discrimination, pre-operative transgender people may be compared to people of their incongruent sex, whereas post-operative transgender people may be compared to people of their preferred sex. Equally, pre- and post-operative transgender people may be compared to each other in an analysis of gender identity discrimination, where one person’s gender identity may be treated as legitimate while another’s is not treated with the same respect and concern.

III Public, Private and Legal Discrimination Against Transgender People

⁴³ Sophia Moreau “What is Discrimination?” (2010) 38 *Phil and Pub Affairs* 143 at 147.

⁴⁴ Hellman, above n 39, at 55.

⁴⁵ At 60.

Transgender people face a multitude of discriminatory practices in both public and private life. This essay will focus more on discrimination on the basis of gender identity, as this is the proposed path of reform. As will be discussed, post-operative transgender people are more likely to face a host of discriminatory behaviours that may be better conceptualised as discrimination on the grounds of sex. In contrast, pre-operative transgender people are discriminated against in contexts where gender is an important consideration, particularly regarding employment, legal documents, and incarceration. The ambiguous status of gender identity at human rights law has left a legal gap in government policy, and a lack of social understanding and acceptance of transgender people. The rights issues faced by transgender people expose them to violence, ridicule, and an inability to participate fully in public life.⁴⁶

A Categories of Discrimination

The primary discriminatory behaviours that this essay will discuss occur on the basis of transgender people's sex or their gender identity. Sex discrimination is prohibited under s 21 of the Human Rights Act; gender identity discrimination is not. Sex discrimination has been defined as differential treatment on the basis of one's sex, and can include biological factors (such as pregnancy) as well as stereotypes about how members of a certain sex should behave.⁴⁷ Transgender people can face sex discrimination where they behave in a gender non-conforming way, "irrespective of the cause of that behaviour".⁴⁸ A pre-operative transgender woman who is biologically male could be denied a career opportunity for presenting in a feminine way, and this could be quantified as sex discrimination because she is not conforming to how other biologically male people "should" act. She is being treated differently on the basis of her sex, albeit through social expectations of how sex should present.

In contrast, gender identity discrimination can occur when transgender people are treated similarly to others of their biological sex, but differently from others with their same gender identity. For example, a male transgender prisoner who has not undergone surgical transition is treated with the same respect and concern as others of his female biological sex by being housed in a female prison. However, he is being treated differently from post-operative transgender men and cisgender men who would be housed in a male prison. The differential treatment is on the basis of his gender identity, rather than his sex.

B Discrimination in Family Life

Before the Marriage (Definition of Marriage) Amendment Act passed in 2013, a transgender person would need to have undergone surgery to physically conform to the characteristics of

⁴⁶ Human Rights Commission, above n 3, at 12.

⁴⁷ See *Price Waterhouse v Hopkins* 490 US 228 (1989).

⁴⁸ *Smith v Salem* 378 F 3d 566 (6th Cir 2004) at 575.

the opposite sex in order to get legally married.⁴⁹ Essentially, marriage was legitimised only when it was possible for spouses to engage in traditional heterosexual sex.⁵⁰ The connection between heteronormative sex and social norms underlies a considerable amount of prejudice surrounding transgender issues, which will be explored throughout this essay. In New Zealand, marriage can now be between a man and a woman, two women, or two men.⁵¹ Thus transgender people who identify as the opposite sex are no longer precluded from marriage. The reform aimed at legalising marriage for homosexual people had flow-on effects for other marginalised groups.

However, transgender people have reported instances of discrimination on the basis of gender identity in the Family Court, where legal and social workers have assumed that a transgender person's gender identity has a negative impact on their children's wellbeing, and can focus on this factor over other issues such as domestic violence.⁵² Further, transgender people can face difficulties with access to reproductive technologies if they are unable to change the sex marker on their birth certificates.⁵³

C Discrimination in Legal Documents

Transgender people face discrimination beyond their personal lives. The discrimination experienced by transgender people is often unique. For example, transgender people face citizenship issues regarding birth certificates. The sex marker on New Zealand passports can now be changed by applying for a new passport and declaring which gender one would prefer to go by. The new gender can be unspecified, signalled by an X rather than an M or an F.⁵⁴ In contrast, the process for amending the sex marker on one's birth certificate is extremely difficult for transgender people.

Section 28 of the Births, Deaths, Marriages, and Relationships Registration Act 1995 proscribes the process for changing the sex marker on a birth certificate. The Family Court will issue a declaration that the certificate should be changed if the applicant has assumed and intends to maintain the gender of the nominated sex.⁵⁵ The applicant must also have undergone medical treatment that enables him or her to physically conform to the gender identity of a person of the nominated sex.⁵⁶ While case law suggests that full gender reassignment surgery

⁴⁹ *Attorney General v Otahuhu Family Court* [1995] 1 NZLR 603 at 607-608.

⁵⁰ Dan Irving "Against the grain: Teaching Transgender Human Rights" 16 *Sexualities* 319 at 326.

⁵¹ Marriage Act 1955, s 2(1).

⁵² Human Rights Commission, above n 3, at 37.

⁵³ At 37.

⁵⁴ Department of Internal Affairs "Information about Changing Sex/Gender Identity" (2016) <www.passports.govt.nz>.

⁵⁵ Births, Deaths, Marriages, and Relationships Registration Act 1995, s 28(3)(c)(i)(A).

⁵⁶ Section 28(3)(c)(i)(B).

is not always required to meet this threshold,⁵⁷ it is unclear what level of physical conformation would be required in any particular case.⁵⁸ A full discussion of the “medical model” of sex markers is beyond the scope of this essay, but it gives rise to human rights issues of its own, as it essentially forces transgender people to obtain an unspecified degree of surgery if they seek legal recognition of their gender identity.⁵⁹

D Discrimination in Medical Care, Housing, and Employment

Gender reassignment surgery is not fully funded in New Zealand;⁶⁰ most transgender people need to pay most or all of the cost of their surgeries, although a limited amount of funding comes from the special high cost treatment pool provided by the Ministry of Health.⁶¹ This funding is provided for three male-to-female surgeries and one female-to-male surgery every two years.⁶² Surgery can consist of genital reassignment as well as more cosmetic changes, such as mastectomies for female-to-male transgender people or plastic surgery. Hormones can also bring about physical change. As transgender people can struggle to find stable and supportive employment, the cost of surgery is beyond the reach of most people. The process is still often seen as elective surgery, but the pervasive feeling of living in the wrong body and the associated levels of discrimination can bring about significant distress and mental health issues.

General healthcare can also be a source of discrimination for transgender people, as some general practitioners refuse to use their correct pronouns or assume that medical problems stem from transgender people’s incongruent gender identity, rather than other causes.⁶³ Many doctors are also ill-informed about transgender issues and options, requiring transgender people to look online for specific help.⁶⁴ One transgender person in a Human Rights Commission inquiry into discrimination described access to mental health services as “incredibly poor if not non-existent”.⁶⁵

⁵⁷ See *‘Michael’ v Registrar-General of Births, Deaths and Marriages* (2008) 27 FRNZ 58.

⁵⁸ At [113].

⁵⁹ For an in-depth discussion of the alternative approaches to sex markers on birth certificates in the transgender context, see Blincoe, above n 23.

⁶⁰ Peter Day *Transgender Reassignment Surgery* (New Zealand Health Technology Assessment Tech Brief Series, 2002) at ii.

⁶¹ Ministry of Health “High Cost Treatment Pool” (3 February 2014) <www.health.govt.nz>.

⁶² Counties Manukau District Health Board *Gender Reassignment Health Services for Trans People within New Zealand* (Ministry of Health, Wellington, 2012) at 28.

⁶³ Human Rights Commission, above n 3, at 51.

⁶⁴ At 52.

⁶⁵ At 53.

Transgender people in New Zealand have reported feeling unsafe in public or shared housing, and can struggle to find accommodation if they are “outed” as transgender.⁶⁶ Their participation in public life is severely curtailed through multiple forms of discrimination. For example, to gain access to hormone therapy, a transgender person will usually need to evidence the extent to which they have been living as their desired gender. Thus transgender people are expected to be openly transgender in both their public and private lives, during a time where they often do not conform to societal expectations of what each gender should look like.⁶⁷ This can subject them to ridicule, violence, and exclusion from public places such as restaurants, nightclubs, and bathrooms.⁶⁸

Transgender people also face issues in regards to employment. They may be unfairly dismissed or prejudiced because an employer or co-worker directly discriminates against them in the workplace, but they may also be precluded from employment in the first place, particularly in traditionally gendered areas of employment. The Commission’s inquiry interviewed a transgender woman who had received 147 rejection letters before gaining employment.⁶⁹ Others experienced proceeding through the selection process until their “secret” was discovered, and feeling that the only visible area of employment for transgender people was sex work.⁷⁰

E The “Bathroom Debate” and Transgender Rights

The “bathroom debate” has brought transgender rights to the fore of social and media discourse in the United States. North Carolina's "bathroom bill" passed in March 2016, and has been called the most extreme piece of anti-transgender law in the country.⁷¹ It removes the legal rights of transgender people to use public facilities designated for the gender they identify with. The law also prohibits state law from being developed further in protection of transgender rights. In October 2016, it was announced that the United States Supreme Court will consider whether banning transgender children from using the bathroom that corresponds to their gender identity is sex discrimination.⁷²

In New Zealand, some schools have initiated the provision of gender-neutral bathrooms to recognise the distress of transgender students in gendered contexts. In response to this, the

⁶⁶ Human Rights Commission, above n 3, at 38.

⁶⁷ At 38.

⁶⁸ At 38.

⁶⁹ At 40.

⁷⁰ At 40.

⁷¹ Michael Gordon, Mark Price and Katie Peralta "Understanding HB2: North Carolina's newest law solidifies state's role in defining discrimination" (26 March 2016) The Charlotte Observer <www.charlotteobserver.com>.

⁷² Jorge Amaro “Supreme Court to Decide on School Restroom Ban for Transgender Students” (28 October 2016) National LGBTQ Task Force <www.thetaskforce.org>.

conservative organisation Family First sought a legal opinion on whether schools were obliged to allow transgender students to access facilities and sports teams that were not intended for their biological sex.⁷³ The opinion identified that the law in New Zealand is uncertain as to the scope of rights granted to transgender people, and explored whether the limits placed on rights by schools were demonstrably justified under the Bill of Rights Act 1990.⁷⁴ The opinion referred to the Human Rights Commission's guidelines on supporting transgender students, as well as a guidance publication from the Ministry of Education.⁷⁵ These documents both emphasise the importance of providing safe spaces and facilities for transgender students.

However, the opinion concluded that schools have discretion as to their policies on gendered spaces. It noted that "if discrimination on grounds of gender identity is prohibited under the HRA, there is still a range of possible forms that school policies can take to address this issue".⁷⁶ If this opinion is correct, schools which do not wish to provide transgender students with gender-neutral bathrooms, and which do not encourage them to use the bathroom that corresponds with their gender identity, will be able to continue to discriminate against transgender students' rights to feel safe and supported in a school environment. The law on transgender rights remains ambiguous, and this ambiguous status is giving rise to discriminatory interpretations of the law.

F Discrimination in Prisons

The example of transgender prisoners effectively illustrates the need for reform, as transgender rights issues are particularly salient in the prison context. Transgender prisoners face significant rights breaches and are often exposed to unusually severe consequences when these breaches occur. It is habitually considered acceptable to place limits on prisoners' rights, in the interests of punishment and the safety of others, but this must always be balanced against the risks to the individual. For example, as discussed in the introduction to this Part, transgender prisoners are usually placed in a prison that corresponds to their sex, but not their gender. They may also be forced to stop, or unable to begin, medical treatment, and thus undergo considerable risk of physical and mental harm.

Transgender people behind bars have suffered similar erasure to those in society, although prisoners are at far higher risk of being victims of sexual and physical violence, as well as being deprived of medical care. Despite these risks, little has been done to address the presence of

⁷³ Kris Morrison "School policies and transgender students" (7 March 2016) Family First New Zealand <www.familyfirst.org.nz>.

⁷⁴ Bill of Right Act 1990, s 5.

⁷⁵ Human Rights Commission "Supporting trans students" <www.hrc.co.nz>; Ministry of Education "Sexuality Education Guide" (2015) <www.health.tki.org.nz> at 4.

⁷⁶ Morrison, above n 73, at 13.3.

transgender prisoners. An international survey in 1996 found that 20% of correctional facilities had formal transgender prisoner policies in place.⁷⁷

In 2007 the Human Rights Commission inquired into health, youth, social, employment, and citizenship issues for transgender people, as well as touching on intersex issues.⁷⁸ It received submissions from transgender women who had been through the male prison system, who highlighted instances of enforced masculinity and confiscation of any items that violated male gender norms. The Commission did not receive any submissions from transgender men on their prison experience, although concerns were also raised about physical safety.⁷⁹

The Commission sought a response to these concerns from the Department of Corrections. The Department stated it believed there are ten to twenty transgender people in prison at any one time in New Zealand.⁸⁰ The Department also discussed its policy document for transgender prisoners, and that it required them to be housed in the prison of their sex (rather than gender) unless they have had full gender reassignment surgery.⁸¹ Regarding medical treatment, the Department did not refer to any process for determining whether hormonal treatment is advisable for transgender prisoners.⁸²

1 The prison context

To assess how best to protect transgender prisoners and minimise the abuse of their human rights, it is important to deconstruct the distinctive context of prisons. Prison culture is overtly masculine.⁸³ In male prisons, rape is a targeted process focussed on vulnerable and often young and “feminine” prisoners.⁸⁴ Thus the need to protect transgender prisoners is empirically clear. The threat of further violence from perpetrators, as well as apathy from management, mean that transgender prisoners may be hesitant to report abuse.⁸⁵ Even when reported, the prison context results in inadequate prevention mechanisms. Transgender prisoners are often isolated

⁷⁷ Maxine Petersen, Judith Stephens, Robert Dickey and Wendy Lewis “Transsexuals within the Prison System: An International Survey of Correctional Services Policies” (1996) 14 Behavioral Sciences and the Law 219 at 221.

⁷⁸ Intersex issues were beyond the terms of reference for the Human Rights Commission, above n 3, although it noted that it received several submissions on the topic “that raised significant human rights issues” and merited “urgent consideration” at 4.

⁷⁹ Human Rights Commission, above n 3, at 44.

⁸⁰ At 46.

⁸¹ At 46.

⁸² At 47.

⁸³ Richard Edney “To Keep Me Safe From Harm? Transgender Prisoners And The Experience Of Imprisonment” (2004) 9 Deakin Law Review 327 at 331.

⁸⁴ Human Rights Watch “No Escape: Male Rape in United States Prisons” (2001) <www.hrw.org>.

⁸⁵ Drake Hagner “Fighting for Our Lives: the D.C. Trans Coalition's Campaign for Humane Treatment of Transgender Inmates in District of Columbia Correctional Facilities” (2010) 11 Geo J Gender and L 837 at 849.

in order to “protect” them from other prisoners, but this method can psychologically harm the isolated individuals. Protective custody can have punitive effect and compound the rights abuses of transgender prisoners.⁸⁶

2 Healthcare issues for transgender people in prison

Transgender prisoners face a lack of access to medical care as they are not allowed to commence treatment for transgender issues while in prison, although they can continue treatment if they commenced it outside prison.⁸⁷ This must be funded by the prisoner. This policy is at odds with the Corrections Act 2004, which states that prisoners must have access to healthcare reasonably equivalent to any they could expect in the community.⁸⁸ Given the substantial mental health impact that transgender people can suffer from having a gender identity incongruent with their physical sex, depriving transgender prisoners’ access to healthcare even more so than those outside prison amounts to considerable discrimination.

3 The gendered prison system

Currently, transgender prisoners will be placed in a prison that corresponds to their gender identity if they have had their sex changed on their birth certificate. Those who have not changed their birth certificate are placed in a prison that corresponds to their biological sex. An application process is available to these prisoners where they wish to be housed in their preferred prison, although this occurs at the discretion of the Chief Executive of the Department of Corrections.⁸⁹ Prisoners are ineligible to apply for review of their placement if their sentence or charge relates to serious sexual offending.⁹⁰ Given the difficulty of changing a sex marker on a New Zealand birth certificate, very few transgender prisoners are assured a position in their preferred prison. The vast majority who have not changed their birth certificates are left vulnerable to the Chief Executive’s discretion. Thus pre-operative transgender people are discriminated against on the basis of their gender identity, as their transgender status means they are treated differently from cisgender prisoners.⁹¹

G Health Repercussions for Transgender People

The above examples of discriminatory acts are a sample of the inequities transgender people face in New Zealand. Beyond depriving transgender people of opportunities and rights that are afforded to cisgender people, these acts also have significant impact on their mental health.

⁸⁶ Barnes, above n 14, at 644.

⁸⁷ Department of Corrections “Prison Service Operation Manual” <www.corrections.govt.nz>, r M.03.05.02(h).

⁸⁸ Corrections Act 2004, s 75; the Human Rights Commission, above n 3, argued that this deprived transgender prisoners of their fundamental right to healthcare at 46.

⁸⁹ Department of Corrections, above n 87, r M 03.05.05.

⁹⁰ Rule M 03.05.02.

⁹¹ Elisabeth McDonald “Discrimination and Trans People: The Abandoned Proposal to Amend the Human Rights Act 1993” (2007) 5 NZJPIL 301 at 311.

Depression, anxiety, and substance abuse are all experienced at a higher rate among transgender people than the general population.⁹² A survey of New Zealand secondary school students in 2008 found that 11% of non-transgender students had significant depressive symptoms, 23.4% had self-harmed in the last twelve months, and 4.1% had attempted suicide in the last twelve months.⁹³ Comparatively, nearly 40% of transgender students suffered from significant depression. Almost 50% had self-harmed in the last twelve months, and 20% had attempted suicide in the last twelve months.⁹⁴

Transgender people are an at-risk group. Reforming the Human Rights Act would provide this group with an avenue to address complaints about discrimination, as well as recognising their humanity which is currently not recognised at New Zealand law.

IV The Position of Transgender Rights at New Zealand Human Rights Law

Gender identity has been the subject of reform debate in New Zealand for more than a decade. Since entering the political consciousness proper in 2004, discussion around the need for reform in this area has arisen and fallen away. Knowledge about and engagement with transgender issues has significantly increased since 2004. The conflation of sex and gender is sometimes less readily accepted, as the pervasive image of transgender people as just “men in dresses” is replaced with a more educated view.⁹⁵ Further, mainstream media is increasingly starting to portray transgender people, bringing them into the centre of public discourse where they have traditionally been marginalised or pigeonholed.⁹⁶ However, these steps forward come with misinformation and confusion from the cis population. Heightened visibility may put transgender people at more risk of violence and discrimination without corresponding legal protection. The developments in New Zealand demonstrate how social views of transgender people may have allowed the gap in human rights law to remain. Further, they highlight potential obstacles for future reform.

A The Human Rights (Gender Identity) Amendment Bill 2004

In 2004, Member of Parliament Georgina Beyer sought to introduce the Human Rights (Gender Identity) Amendment Bill 2004 that would amend the Human Rights Act to include gender identity as a prohibited ground of discrimination. The need for the Bill arose from ongoing

⁹² Jeffrey Adams, Pauline Dickinson and Lanuola Asiasiga “Mental health promotion for gay, lesbian, bisexual, transgender and intersex New Zealanders” (2013) 5 *Journal of Primary Health Care* 105 at 106.

⁹³ At 98.

⁹⁴ Clark, Lucassen, Bullen, Denny, Fleming, Robinson and Rossen, above n 5, at 94.

⁹⁵ Kirkland, above n 33, at 98.

⁹⁶ Rachel Matlow “Transgender issues: Public awareness is on the rise” (7 May 2014) CBC News <www.cbc.ca>.

doubt over whether gender identity came within the ambit of the Act, as well as lack of clarification from the courts.⁹⁷ The Bill defines gender identity as:⁹⁸

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

Thus the proposed definition in the Bill would include some intersex people, who may be assigned a gender at birth that they do not identify with. The definition's reference to "a gender that is different" rather than "the opposite gender" meant that it could also include genderqueer people who may identify outside the gender binary of male and female. Further, its explicit reference to other subjective labels such as "cross-dresser" would serve an educative function. Public knowledge of these terms may be inaccurate, as people may not be aware that people within these labels have incongruent gender identities rather than simply enjoying dressing up as the opposite sex. If the Human Rights Act were amended to include gender identity, including such a definition would clarify the scope and intention of the amendment regardless of what labels people may use to describe themselves.

The explanatory note to the Bill makes the useful, yet potentially ambitious, point that providing transgender people with a specific provision that prohibits discrimination will "increas[e] the chances of preventing such discrimination from ever taking place".⁹⁹ This type of reform is not necessarily preventive, as discrimination is not likely to stop because of a change in the law. However, if the Bill had been successful in reforming the Human Rights Act, it would certainly have triggered at least public awareness of gender identity discrimination, and protected transgender and other people in the event of discrimination. Despite these potential benefits, the Bill was withdrawn before its first reading, in response to a Crown Law opinion provided to the Attorney-General.

B The 2006 Crown Law Opinion on the Bill

The Solicitor-General requested an opinion on the Bill from the Crown Law Office in 2006. The opinion concluded that the Human Rights Act did not need to be reformed to explicitly prohibit discrimination on the basis of gender identity.¹⁰⁰ It found that gender identity was covered by the "sex" ground of discrimination, contrary to the Bill's conclusions.¹⁰¹ This conclusion was largely justified with reference to other jurisdictions, where the prohibition on

⁹⁷ See Human Rights (Gender Identity) Amendment Bill 2004 (explanatory note) at 1 and 2.

⁹⁸ Human Rights (Gender Identity) Amendment Bill 2004.

⁹⁹ At 2.

¹⁰⁰ Crown Law Office, above n 9.

¹⁰¹ At 1.

sex discrimination has been invoked to address transgender people's grievances. The opinion cited cases from Canada, Europe, and the United Kingdom where gender identity claims had been successfully brought under the sex discrimination ground. The opinion also suggested that discrimination on the basis of gender identity may be covered by the "disability" ground, which includes psychological disabilities.¹⁰²

The Bill's withdrawal in 2006, in response to the opinion, marked the end of the attempt at reform. In 2006, there was insufficient political support for amending the Act. However, the Human Rights Commission was dissatisfied with this result.

C The 2008 Human Rights Commission Inquiry

Under the Human Rights Act, the Human Rights Commission (the Commission) may enquire into any matter if it appears "that the matter involves, or may involve, the infringement of human rights".¹⁰³ In 2008, the Commission launched New Zealand's first inquiry into discrimination experienced by transgender people.¹⁰⁴ The Commission interviewed over 200 transgender people on their experiences in education, employment, prison, and relationships, many of which have been discussed in this essay's examination of discrimination in Part III. The Commission found that transgender people experience human rights to a lesser extent than other New Zealanders.¹⁰⁵ Its investigation of discrimination found several manifest policy gaps regarding transgender people, largely due to lack of consultation and engagement with the transgender community.¹⁰⁶ The Commission's conclusions have been influential to some extent in various policy areas since 2008. Its inquiry was an important exposure of New Zealand's neglect of transgender rights.

The Commission made several recommendations. Pertinently, it considered that to avoid doubt, the Human Rights Act should be amended to explicitly include gender identity as part of sex discrimination.¹⁰⁷ The Commission raised that the Crown Law opinion was not widely known or understood,¹⁰⁸ and felt that current policies and practices to prevent discrimination were insufficiently inclusive of transgender people.¹⁰⁹

D The Current Position of Transgender Rights in New Zealand

¹⁰² Human Rights Act 1993, s 21(1)(h)(iv).

¹⁰³ Section 5(2)(h).

¹⁰⁴ Human Rights Commission, above n 3.

¹⁰⁵ At 3.

¹⁰⁶ At 4.

¹⁰⁷ At 100.

¹⁰⁸ At 90.

¹⁰⁹ At 100.

In response to the Commission's report, the Commission has hosted hui between transgender people and government agencies.¹¹⁰ Otago University has produced a brochure of information for transgender students.¹¹¹ A good practice guideline for health professionals was published in 2012, providing information about access to surgery and care.¹¹² The Department of Internal Affairs has changed the process for sex markers on passports, allowing people to choose their sex marker without any further requirements.¹¹³ These changes are all practical and educative steps towards recognizing transgender rights in New Zealand. However, these are targeted policy developments for specific areas of society. They are ancillary to a prohibition on discrimination on the basis of gender identity, which has not been implemented.

Transgender rights have been left in an unsatisfactory and ambiguous state at New Zealand law. While there has been support for the idea of protecting gender identity discrimination under the sex ground, this has not been made certain. Further, this essay argues that it should not be; protecting gender identity under a separate ground would serve an educative purpose, and gender identity is not the same as sex. Explicit amendment of the Human Rights Act would provide for those contexts of discrimination where transgender people are not being treated differently to those of the same sex.

V Reform Options Under the Human Rights Act 1993

Along with the Bill of Rights Act 1990, the Human Rights Act is New Zealand's primary statute articulating recognised human rights in New Zealand. The Act's long title, which sheds light on its purpose, reads:¹¹⁴

An Act to consolidate and amend the Race Relations Act 1971 and the Human Rights Commission Act 1977 and to provide better protection of human rights in New Zealand in general accordance with United Nations Covenants or Conventions on Human Rights.

The Human Rights Act protects human rights by prohibiting discrimination on the basis of sex (including pregnancy and childbirth), marital status, religious belief, ethical belief, colour, race, ethnic or national origins, disability (including both physical and psychological), age, political opinion, employment status, family status, and sexual orientation (which is defined as a heterosexual, homosexual, lesbian, or bisexual orientation).¹¹⁵ Rather than high-level human

¹¹⁰ Human Rights Commission "Action on the Transgender Inquiry: Participation" <www.hrc.co.nz>.

¹¹¹ Otago University Students Association "Transgender Student Information" <www.ousa.org.nz>.

¹¹² Counties Manukau District Health Board, above n 62.

¹¹³ Department of Internal Affairs, above n 54.

¹¹⁴ Long Title to Human Rights Act 1993.

¹¹⁵ Section 21.

rights legislation, the Act is more an anti-discrimination statute.¹¹⁶ While it does not prohibit discrimination per se, it prohibits different treatment on the basis of select prohibited grounds in the areas of employment, access to public places and facilities, the provision of goods and services, the provision of accommodation and access to education.¹¹⁷

The Human Rights Act is the appropriate vehicle for human rights reform. The Bill of Rights Act applies only to acts done by the three branches of government, or people serving a public duty or function.¹¹⁸ The rights expressed in the Bill of Rights Act are abstract, leaving their meaning to be ascertained by the courts.¹¹⁹ Further, its anti-discrimination section prohibits discrimination “on the grounds of discrimination in the Human Rights Act 1993”, so reform under the Human Rights Act would automatically update the Bill of Rights prohibited grounds.¹²⁰ In contrast, the Human Rights Act applies to the private sector and individuals acting in unofficial capacities. It is designed to protect citizens from each other. The relationship between these two Acts is often unclear, as the Human Rights Act may be well equipped to address government behavior when it is behaving as a private body, but less so in a governmental capacity.¹²¹

However, the Human Rights Act has considerable symbolic power, in that each ground of discrimination recognises that people subject to discrimination on that ground have the same human rights as those not subject to discrimination. Human rights are “universal, indivisible and interdependent and interrelated”.¹²² Protecting the rights to be free from discrimination on the grounds of gender identity would be an explicit step towards the humanisation of transgender people. Further, responding to discrimination under the Bill of Rights Act requires the complainant to enter into litigation in the High Court. The mechanisms under the Human Rights Act may be more accessible to transgender people and other marginalised groups as they are often funded for the complainant, and provide alternative dispute resolution processes such as mediation.¹²³

¹¹⁶ Ministry of Justice *Discussion Paper: Re-Evaluation of the Human Rights Protections in New Zealand* (Ministry of Justice, Wellington, October 2000) at [24].

¹¹⁷ Human Rights Act 1993, Part 2.

¹¹⁸ Bill of Rights Act 1990, s 3.

¹¹⁹ Ministry of Justice, above n 116, at [25].

¹²⁰ Bill of Rights Act 1990, s 19(1).

¹²¹ Ministry of Justice, above n 116, at [31].

¹²² *Vienna Declaration and Programme of Action* A/Conf/157/23 (1993) at [5].

¹²³ Human Rights Commission “Human Rights Legislation – New Zealand” <www.hrc.co.nz>.

Human rights law in New Zealand is recognized as a “constantly evolving process”.¹²⁴ An illustration of this was the repeal of the Race Relations Act 1971 by the Human Rights Act.¹²⁵ The term “race relations” failed to encapsulate the rights interferences and complexities between cultural communities in modern New Zealand.¹²⁶ The wider grounds of discrimination under the Human Rights Act suggest that, compared to previous anti-discrimination statutes, it is open to amendment and expansion.

This Part will first explore relevant international law instruments that the Act’s purpose may reference. It will examine the two reform options in relation to gender identity under the Human Rights Act, as well as alternative methods of reform.

A International Law and Gender Identity

The international instruments New Zealand seeks to uphold provide support for the inclusion of gender identity as a prohibited ground of discrimination. New Zealand has ratified all of the United Nations’ core human rights treaties, signifying its commitment to full recognition of human rights across civil, political, economic, social and cultural spheres through the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the International Covenant on Civil and Political Rights (ICCPR). It also specifically recognises the importance of eliminating racial and gender discrimination through the International Convention on the Elimination of All Forms of Racial Discrimination (CERD) and the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW). The reference to “women” in CEDAW has been argued to include transgender women, based on both the ordinary use of the word and the purpose of the Convention.¹²⁷ New Zealand’s explicit acceptance of global accountability opens the door to human rights reform.

The Universal Declaration of Human Rights (UNDHR), the ICESCR, and the ICCPR all prohibit discrimination on the basis of “race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status”.¹²⁸ The Committee on Economic, Social, and Cultural Rights released a General Comment in 2009 stating that “other status” under the ICESCR included gender identity.¹²⁹ The ICCPR list was drafted as open-

¹²⁴ Ministry of Justice, above n 116, at [4].

¹²⁵ See Human Rights Act 1993, section 146 (now repealed by s 40 of the Human Rights Amendment Act 2001).

¹²⁶ Ministry of Justice, above n 116, at [4].

¹²⁷ Elise Meyer “Designing Women: The Definition of “Woman” in the Convention on the Elimination of All Forms of Discrimination Against Women” (2016) 16 Chicago Journal of International Law 553 at 556.

¹²⁸ International Covenant on Civil and Political Rights 999 UNTS 171 (opened for signature 16 December 1966, entered into force 23 March 1976), art 26.

¹²⁹ International Covenant on Economic, Social and Cultural Rights 999 UNTS 3 (opened for signature 16 December 1966, entered into force 3 January 1976), General Comment 20: Non-Discrimination in Economic, Social and Cultural Rights, E/C12/GC/20, 25 May 2009.

ended to include other grounds of discrimination,¹³⁰ and the reference to “other status” has been interpreted to include sexual orientation;¹³¹ there is room for gender identity to be another “status” giving rise to civil and political rights. The UNDHR takes a universal approach to human rights. However, it appears not all rights were created equal; at the state level, civil and political rights are emphasised and upheld to a greater degree than cultural, social, and economic rights.¹³²

Further, there has been no major international treaty that explicitly protects transgender people.¹³³ The Yogyakarta Principles are the predominant source of transgender inclusion at international human rights law. The Principles were outlined by a panel of human rights experts in 2006. They provide a set of codes on gender identity and sexual orientation to guide the development of domestic law, and to bind states at international law. There are 29 Principles in total, affirming rights ranging from the right to recognition before the law to rights of economic, cultural, and social rights.¹³⁴ Gender identity is defined widely by the Principles to include any non-conforming expression of gender:¹³⁵

each person's deeply felt internal and individual experience of gender, which may or may not correspond with the sex assigned at birth, including the personal sense of the body (which may involve, if freely chosen, modification of bodily appearance or function by medical, surgical or other means) and other expressions of gender, including dress, speech and mannerisms.

The Principles outline that states’ obligations include protection mechanisms. They have been referenced in United Nations reports and national courts,¹³⁶ and are furthering the progress of international human rights norms. While the Principles are not specifically mentioned in the Act’s purpose, they can provide guidance as to international law’s future developments. Gender identity is becoming a central focus in international law. However, there is still a tendency to ground gender identity in an individual’s biological sex.¹³⁷ Problematically, international

¹³⁰ *Discriminatory laws and practices and acts of violence against individuals based on their sexual orientation and gender identity: Report of the United Nations High Commissioner for Human Rights A/HRC/19/41* (2011) at 4.

¹³¹ *Toonen v. Australia*, communication No. 488/1992 (CCPR/C/50/D/488/1992).

¹³² Ministry of Justice, above n 116, at [11].

¹³³ Meyer, above n 127, at 561.

¹³⁴ Michael O’Flaherty “The Yogyakarta Principle at Ten” (2015) 33 *Nordic Journal of Human Rights* 280 at 281.

¹³⁵ “The Yogyakarta Principles: Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity” (March 2007) Yogyakarta Principles <www.yogyakartaprinciples.org> preamble.

¹³⁶ See, inter alia, *Ang Ladlad LGBT Party v Commission on Elections* (2008) Philippines Supreme Court GR No 190582.

¹³⁷ Philip Tahmindjis “Sexuality and International Human Rights Law” (2005) 48 *Journal of Homosexuality* 9 at 19.

courts and tribunals that have recognised transgender rights do so with an attitude of pathologisation.¹³⁸ Even as extending rights to transgender people, they view them as suffering a medical condition and abnormality.¹³⁹ It is hoped that the Yogyakarta Principles will bring a more enlightened approach at international law.

Further, international human rights law can only exert pressure on domestic legal systems where local political and social conditions prevail.¹⁴⁰ In practice, domestic law and attitudes drive the construction of human rights norms.¹⁴¹ New Zealand's failure to explicitly provide for freedom from discrimination based on gender identity allows these norms to stagnate. Domestic decisions regarding discrimination are actively made on the basis of gender identity, with little legal repercussions. For example, as outlined in Part III, the current Department of Corrections Regulations directly discriminate against transgender prisoners due to their gender identity, rather than their sex. The Regulations treat transgender prisoners the same way as others of their biological sex, such as by placing transgender men in women's prisons, but they treat transgender people with the same gender identity differently based on the sex marker on their birth certificate.¹⁴² Domestic reform recognising gender identity as a ground of discrimination could progress national policy development, as well as influencing international law. The Human Rights Act is an appropriate vehicle for this reform.

B Anti-Discrimination Law in Overseas Jurisdictions

Overseas jurisdictions have taken varying approaches to recognising gender identity at domestic human rights law. Some states subsume gender identity into the ground of sex, expanding the prohibition on sex widely to include sex stereotyping and presentation. Others, such as the United Kingdom, have explicitly legislated to protect gender identity as a separate ground.

1 United States of America

In the United States, transgender people's cases have been recognised as within the scope of sex discrimination. The landmark case of *Smith v City of Salem* found that a male-to-female transgender firefighter had been discriminated against on the basis of sex. The federal court held that the prohibition on sex discrimination under Title VII of the Civil Rights Act 1964

¹³⁸ Jens Theilen "Depathologisation of Transgenderism and International Human Rights Law" (2014) 14 Human Rights Law Review 327 at 329.

¹³⁹ See *Christine Goodwin v United Kingdom* 2002-VI; 35 EHRR 18 at [21].

¹⁴⁰ Tahmindjis, above n 137, at 14; see the government of Tasmania's response to the ruling in *Toonen* discussed at 13.

¹⁴¹ At 20.

¹⁴² See Department of Corrections, above n 87, r M.03.05.02(h).

extended to gender identity, as it encompassed “gender non-conforming behaviour and appearance”.¹⁴³

This was supported by a federal district court decision in the District of Columbia, where a transgender woman who had been offered a job informed her prospective employers of her transgender status.¹⁴⁴ The offer was subsequently withdrawn, as the interviewer was concerned that Schroer did not look sufficiently feminine.¹⁴⁵ The Court found that Schroer was discriminated against on the basis of sex stereotyping, and also general sex discrimination because she was converting from one sex to the other.¹⁴⁶ The Court raised the analogy that if an employer fired an employee for converting from Christianity to Islam, although their differential treatment was based on conversion, it would qualify as discrimination on the basis of religion.¹⁴⁷

The Supreme Court of the United States announced in October 2016 that it would determine the issue of whether sex discrimination includes gender identity following the discriminatory “bathroom bill” in North Carolina.¹⁴⁸ At the state level, discrimination laws have been interpreted to cover gender identity discrimination, although this is sometimes covered on disability grounds.¹⁴⁹

The ground of sex seems to be readily expanded to include non-traditional gendered behaviour and appearance in the United States. While this is a useful development of the law, it is unclear whether the same judicial interpretation would occur in New Zealand. Further, as will be discussed in Part VI, including gender identity as a separate ground is a more desirable path of reform.

2 Australia

The New South Wales Anti Discrimination Act 1977 has a provision prohibiting discrimination on the basis of gender identity.¹⁵⁰ However, this only applies to recognised transgender people, who are defined as people who have changed their sex marker on their birth certificate

¹⁴³ *Smith v City of Salem*, above n 48.

¹⁴⁴ *Schroer v Billington* 424 F Supp 2d 203 (DDC 2006) at 208.

¹⁴⁵ Joanna Grossman *Nine to Five: How Gender, Sex, and Sexuality Continue to Define the American Workplace* (Cambridge University Press, 2016) at 37.

¹⁴⁶ At 37.

¹⁴⁷ At 38.

¹⁴⁸ S. M. “What is at stake in the first Supreme Court case on transgender rights” (1 November 2016) *The Economist* <www.economist.com>.

¹⁴⁹ Richard Trotter “Transgender Discrimination And The Law” (2010) 3 *Contemporary Issues in Education Research* 55 at 56.

¹⁵⁰ Part 3A, s 38B.

following surgery.¹⁵¹ Thus pre-operative transgender people are left unprotected from discrimination under the Act. However, in 2013 the federal Sex Discrimination Act 1984 was amended to prohibit discrimination on the basis of sexual orientation, gender identity, and intersex status. Gender identity is defined under the Act as:¹⁵²

the gender-related identity, appearance or mannerisms or other gender-related characteristics of a person (whether by way of medical intervention or not), with or without regard to the person's designated sex at birth.

3 *United Kingdom*

The Equality Act 2010 prevents discrimination on the basis of “gender reassignment”. A person will have the protected characteristic of gender reassignment when he or she is undergoing “a process (or part of a process) for the purpose of reassigning the person's sex by changing physiological or other attributes of sex”.¹⁵³ Surgery is not necessarily required under this definition, as physiological change could be supplanted by hormonal or other conformations to the person's desired sex. The Equality Act also specifically protects transgender people in the event of absence from work that is related to their gender reassignment, prohibiting less favourable treatment on this basis than if the transgender person was sick or injured for other reasons.¹⁵⁴

C Adding Gender Identity to the Closed List Under Section 21

The addition of gender identity to the prohibited grounds of discrimination in the Human Rights Act would provide remedies and protections to a vulnerable sector of society, as well as serving a valuable educative function. There is overseas and international support for express inclusion. Further, explicitly inserting and defining gender identity into our primary human rights statute would increase social understanding of an often poorly represented and misunderstood concept.

A central characteristic of discrimination reform is the consideration of whether the proposed additional ground is sufficiently similar to existing prohibited grounds to be prohibited itself.¹⁵⁵ For example, a prohibition on discrimination on the basis of someone's looks has been argued to be of a different character to prohibiting discrimination on the basis of race and sex. The latter factors can be disentangled, at least in principle, from factors that affect selection processes such as gaining others' attention and effective communication.¹⁵⁶ Arguably,

¹⁵¹ Anti Discrimination Act 1977, s 4.

¹⁵² Sex Discrimination Act 1984, s 5B.

¹⁵³ Equality Act 2010, s 7.

¹⁵⁴ Section 16.

¹⁵⁵ George Rutherglen “Concrete or Abstract Conceptions of Discrimination?” in Deborah Hellman and Sophia Moreau (eds) *Philosophical Foundations of Discrimination Law* (Oxford University Press, 2013) at 129.

¹⁵⁶ At 131.

appearance cannot be so easily distinguished from these factors in selection processes, and it is extraordinarily difficult to police people discriminating on the basis of looks or appearance.¹⁵⁷ This attitude may change, and should, as all of these grounds should (subject to exceptions) be practically irrelevant to one's skill or suitability for a position. Yet the law must give priority to reform that can be effectively implemented, rather than debating whether different forms of discrimination are better or worse than each other.¹⁵⁸

People discriminate constantly, in all walks of life, but gender identity is in the camp of grounds such as sexual orientation, race, and sex; it can be effectively condemned as a ground for decisions in public life.¹⁵⁹ It is sufficiently similar to the existing grounds to be comparably prohibited as it can be effectively separated from selection processes decisions. For example, it is accepted that we should allow gay and lesbian people to be in intimate workplace or institutional situations with people of the same sex. It is accepted that there is no difference between allowing gay and lesbian people and allowing straight people to be in these situations. The same logic should apply to transgender people, as having an incongruent gender identity to one's sex is similarly irrelevant as having a homosexual sexual orientation. As Parts III and IV make clear, gender identity should be recognised under the Human Rights Act.

It may be appropriate to retain the prescriptive nature of the Human Rights Act, and keep the list of prohibited grounds closed. Given that it does not prohibit discrimination per se, but rather differential treatment on the basis of specific prohibited grounds, the demarcation of legally acceptable discrimination and prohibited behaviour may need to remain clear in the statute in order to adequately guide decision-makers. However, reform that only adds gender identity to a closed list of prohibited grounds could raise issues around inclusion of some non-binary, intersex, and genderqueer people. People whose identity shifts between genders would fit under the definition of transgender used in this essay, as their identities do not conform to the identities typically associated with the male or female sex assigned to them at birth. Yet this reform may not capture the discrimination faced by these diverse groups of people.

It is unclear how best to encapsulate these identities within a human rights framework that operates around a closed list. While there seems to be academic consensus about "transgender" being an umbrella term, there does not appear to be the same consensus about its practical impact.¹⁶⁰ Problematically, people with these identities can also experience higher rates of

¹⁵⁷ At 131.

¹⁵⁸ At 132.

¹⁵⁹ At 131.

¹⁶⁰ Megan Davidson "Seeking refuge under the umbrella: Inclusion, exclusion, and organizing within the category transgender" (2007) 4 *Sexuality Research and Social Policy* 60 at 61.

discrimination than male-to-female and female-to-male transgender people with more fixed gender identities.¹⁶¹

D Creating an Open-Ended List of Prohibited Grounds of Discrimination

The preferred reform argued by this essay proposes framing the grounds of discrimination in an open-ended list. The wording of the New Zealand Human Rights Act states that, “For the purposes of this Act, the prohibited grounds of discrimination are ...” and provides a closed list of the thirteen recognised grounds. In contrast, the Canadian Charter of Rights and Freedoms describes that:¹⁶²

Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

The grounds of discrimination under the Charter are listed as examples, rather than forming a closed or exclusive list. There is room under the Canadian model for more grounds to be recognised, and the structure of the Charter lends itself to more generous judicial interpretation than may be found in the prescriptive New Zealand context. The proposed amendment would amend s 21 of the Human Rights Act to read that:

21(1) For the purposes of this Act, the prohibited grounds of discrimination include, but are not limited to:

(a) sex, which includes pregnancy and childbirth;

...

(n) gender identity, which means identification by a person with a gender that is different from the birth gender of that person, or the gender assigned to that person at birth.

Such an amendment would go some way towards resolving the problem of inclusion, as an open-ended list leaves room for the development and recognition of further grounds that should be condemned as the reasons for decisions in public life. When the Human Rights Act was amended in 2001, the Select Committee received several requests for the inclusion of gender identity, but also for other potential grounds of discrimination such as intersexuality.¹⁶³ There are multiple and diverse communities of people who face discrimination beyond sex discrimination, and some of these groups’ concerns are not adequately captured under gender identity discrimination.

¹⁶¹ Jack Harrison, Jaime Grant, and Jody Herman “A Gender Not Listed Here: Genderqueers, Gender Rebels, and OtherWise in the National Transgender Discrimination Survey” (2012) 2 LGBTQ Public Policy Journal at the Harvard Kennedy School 13 At 23.

¹⁶² Canadian Charter of Rights and Freedoms 1982, s 15(1).

¹⁶³ Polster, above n 2, at 193.

Further, this amendment would define gender identity, much as sexual orientation is defined as meaning “a heterosexual, homosexual, lesbian, or bisexual orientation”.¹⁶⁴ The definition is a truncated version of the one proposed in the Human Rights (Gender Identity) Amendment Bill, excluding the listed examples of “persons who call themselves transsexual, transvestite, transgender, cross-dresser, or other description”. While this more lengthy definition has educative benefits, it does not fit with the scheme of the other discrimination grounds, which seem to focus on the ground’s factual existence rather than any subjective labels (such as “queer” for sexual orientation). However, this construction still provides for recognition of those identities or self-descriptions, through its provision of an open-ended list.

VI Other Pathways to Protecting Transgender People

The addition of gender identity to s 21 is likely to be politically palatable; a paper written on the likelihood of amendment in 2003 found that it was likely the political climate would be suitable for amendment within three years.¹⁶⁵ Further, the creation of an open-ended list could remove the need for the addition of further explicit grounds in the future, which would likely become a source of debate as our knowledge of the diversity of human sexuality increases. However, the reform would also be likely to meet with varying levels of public and political support. This Part explores some other sources of protection for transgender people, including complementary reform, using the Human Rights Act in its current form, and relying on the courts. While this essay argues that Human Rights Act reform is the best path forward, these other reforms are worth assessing for their effectiveness and future potential.

A Complementary Reform

The gap in the law regarding transgender people is illustrative of the legal and social uncertainty around regulating heavily gendered contexts. While Human Rights Act reform would bring one type of remedy, complementary reform could take a more preventive approach to discrimination. A targeted approach to specific transgender groups could give direct help without the need for recourse to human rights tribunals and courts.

An overseas example in relation to transgender prisoners is the District of Columbia Trans Coalition’s 2008 campaign for the humane treatment of transgender inmates. This movement occurred in response to the District of Columbia’s ad hoc policy for transgender prisoners, which usually meant they were housed in prisons according to their biological sex with no provision for consideration of a prisoner’s gender identity.¹⁶⁶ In 2009, a new policy was produced which would permit transgender prisoners to be placed in a prison corresponding to

¹⁶⁴ Human Rights Act 1993, s 21(1)(m).

¹⁶⁵ Polster, above n 2, at 194.

¹⁶⁶ Hagner, above n 85, at 839.

their gender identity, regardless of their biological sex. This has been described as “one of the most progressive in the nation”.¹⁶⁷ The Coalition was previously responsible for the amendment to the DC Human Rights Act, which has included “gender identity and expression” as an illegal ground of discrimination since 2005.¹⁶⁸

Another path of reform could streamline the sex marker change process for birth certificates. In contrast to the New Zealand model, Argentina has introduced a self-identification model for sex markers on birth certificates under its Gender Identity Law.¹⁶⁹ No surgery, treatment, or therapy is required to change a sex marker on one’s birth certificate; the only pre-requisites are to submit a request and a new first name.¹⁷⁰ The model makes the marker change an efficient and relatively inexpensive process, and means that transgender and other people who wish to change their legal sex can more easily access the benefits and rights associated with their new sex.

The Gender Recognition Act was passed in the United Kingdom in 2004.¹⁷¹ It grants transgender people legal recognition in their preferred gender, with the ability to change sex markers on birth certificates, marry, and acquire the benefits from the state in their acquired gender on the same basis as all others of that gender. The reform occurred in response to rulings from the European Court of Human Rights that United Kingdom law failing to let transgender people change the sex marker on their birth certificates was breaching the European Convention on Human Rights. While the law does not require the applicant to have undergone surgical reassignment, it requires that the applicant has gender dysphoria, has been living as their preferred gender for at least two years, and intends to live that way until their death.¹⁷²

Malta introduced a similar law in 2015, which expressly excludes any surgical requirements for the sex marker change process, and includes offences for knowingly exposing people who have changed their birth certificate under the Act as well as for “insult[ing] or revil[ing] them”.¹⁷³ Ireland and Denmark have also introduced self-identification models for birth certificates.¹⁷⁴ This type of reform in New Zealand would complement the developing

¹⁶⁷ At 841.

¹⁶⁸ At 852; see 2 D.C. Code § 1401.01 et seq. (1977) (US).

¹⁶⁹ Ley No 26743 9 May 2012 (AR) (translated ed: Alejandra Sardá (translator) “Argentina’s Gender Identity Law” Global Action for Trans Equality <transactivists.org>.)

¹⁷⁰ Article 4.

¹⁷¹ Gender Recognition Act 2004 (UK).

¹⁷² Section 2.

¹⁷³ Gender Identity, Gender Expression and Sex Characteristics Act 2015 (Malta), ss 3(4) and 11(1).

¹⁷⁴ Department of Social Protection “Legal Recognition for Transgender People” (15 July 2015) <www.welfare.ie>.

recognition of transgender people at human rights law, and provide a pre-emptive rather than responsive approach to discrimination by enabling transgender people to change their sex.

Denmark and France have also undertaken reforms regarding transgender people's pathologisation. The World Health Organisation maintains the International Statistical Classification of Diseases and Related Health Problems, which currently lists transgender people as suffering from gender identity disorder. This is in line with the American Psychiatry Association approach, although the Organisation is currently reassessing its list of disorders. However, it is known for its slow pace of reform. In light of this, from February 2017, Denmark will stop classifying being transgender as a mental disorder.¹⁷⁵ France also removed gender identity disorder from its domestic list of officially recognised disorders in 2010.¹⁷⁶

While these and other reform options are worth considering and implementing into the New Zealand framework, they do not remove the need for human rights reform. Reforming the Human Rights Act would humanise transgender people, as well as bringing other marginalised groups within the ambit of the Act. Further, while preventive reform would provide piecemeal protection to transgender people, reforming the Human Rights Act would give substantial protection over a wide range of contexts.

B Protecting Transgender People Under the Other Discrimination Grounds

The Crown Law opinion on the Human Rights (Gender Identity) Amendment Bill raised that gender identity could be protected under either the sex or disability grounds that already exist under the Act. As discussed above, the conception of transgenderism as a disorder is subject to significant criticism and is unlikely to remain in the future. With depathologisation of transgenderism, the "disability" ground should and likely will become inadequate to encompass gender identity discrimination. However, the ground of sex was clearly envisaged by Crown Law to include gender identity. The Human Rights Commission inquiry also supported the view that gender identity could be subsumed under the sex ground.¹⁷⁷ While gender and sex are separate concepts, there would be no legal need (although there may well be a social one) for a separate ground of discrimination if all manifestations of gender discrimination were caught by the ambit of sex discrimination.

¹⁷⁵ Will Worley "Denmark will become first country to no longer define being transgender as a mental illness" (14 May 2016) *The Independent* <www.independent.co.uk>.

¹⁷⁶ Library of Congress "France: Gender Identity Dropped From List of Mental Illnesses" (17 February 2010) *Global Legal Monitor* <www.loc.gov>.

¹⁷⁷ Human Rights Commission, above n 3, at 100.

Professor Elisabeth McDonald provides a useful critique of the Crown Law opinion, finding that an amendment to the Human Rights Act is still required.¹⁷⁸ She argues that the “sex” ground of discrimination is not wide enough to cover the various types of discrimination that transgender people face.¹⁷⁹ Transgender people suffer sex discrimination where they are not treated the same way as other people of their sex.¹⁸⁰ Post-operative transgender people will often be able to argue this ground where they are treated differently on the basis of their new biological sex. However, transgender people generally, particularly those who have not completed gender reassignment surgery, are also subject to unique forms of discrimination that do not fall so easily under the ground of sex discrimination.

Transgender people are at most risk of discrimination when they have not yet had complete gender reassignment surgery or do not intend to. The risk arises because at this stage, transgender people may visibly differ from the gender binary, making them vulnerable to discrimination in public gendered contexts such as changing rooms. There are also legal ramifications for pre-operative transgender people, due to the requirements for changing sex markers on birth certificates. Discrimination on the basis of gender identity emerges where pre-operative transgender people do not have the same legal recognition as those who can afford and access surgery.¹⁸¹ The example of transgender prisoners illustrates this, as those who have been able to change the sex marker on their birth certificates are afforded protection through being placed in the prison that aligns with their gender identity, whereas those who have not changed their birth certificates are not afforded this right.

Reforming the Human Rights Act would explicitly recognise that transgender people have not always been protected previously in New Zealand. While some transgender people may also be able to argue discrimination on the grounds of sex, this is context- and person-specific, and affording rights to some does not justify denying those rights to others.

Some theorists argue that transgender people often do not have a fixed sex or gender identity, which can make it difficult to argue the basis on which discrimination has occurred.¹⁸² Arguably, the idea of sexual dualism and the gender binary itself is discriminatory and gave rise to the idea of transgenderism as an impairment or condition.¹⁸³ Adding gender identity as a ground of discrimination under the Human Rights Act may not fix the problem if complainants are required to evidence their non-conforming gender identity.¹⁸⁴ Instead, a

¹⁷⁸ McDonald, above n 91, at 301.

¹⁷⁹ At 309.

¹⁸⁰ See, inter alia, *A v Chief Constable of West Yorkshire Police* [2005] 1 AC 51 (HL).

¹⁸¹ McDonald, above n 91, at 310.

¹⁸² Jo Bird “When Sex Means ‘Condition’ or ‘Impairment’”: Evaluating the Human Rights of Transgender and Intersex Peoples” (2001) 5 S Cross U L Rev 1 at 3.

¹⁸³ At 12.

¹⁸⁴ At 12.

recognition that sex can be indeterminate and fluid beyond the traditional binary would expand the grounds for sex discrimination. This would provide room for transgender people who do not identify as or satisfy the criteria for either the male or female sex, and would also protect intersex people. However, current language and definitions around transgenderism seem to treat sex and gender as fixed and fluid respectively. Further, while privacy and safety issues around providing evidence of gender identity are certainly legitimate, these are balanced by the educative and symbolic effects of the proposed reform.

Another argument for including gender identity within sex is that the expansion of sex beyond a biological binary is already occurring in a social context, and some overseas jurisdictions have already decided that gender identity discrimination is subsumed into sex discrimination.¹⁸⁵ However, the multiplicity of meanings that could be attached to the concept of sex discrimination render it an unstable tool that is ill-equipped to provide an adequate remedy.¹⁸⁶ Bringing gender identity under the umbrella of sex discrimination make the ground heavily reliant on stereotypes of what men and women should do and look like.¹⁸⁷ The United States Court of Appeals case of *Smith v City of Salem* has been subject to criticism, as it arguably “reduces the story of gender oppression to a story about stereotypes and makes MTFs [male-to-female transgender people] into men who wear dresses and makeup”.¹⁸⁸ Under a sex discrimination analysis, transgender people do not exist, as they are merely men or women behaving unusually. In reality, they face discrimination because cisgender find the concept of transgender people threatening or deviant. Reform should target the hatred of people who would discriminate if they were not lawfully commanded to stop, rather than the prevention of stereotypes.¹⁸⁹

C Relying on the Courts to Interpret the Human Rights Act Purposively

As outlined previously, the statute does not lend itself to generous judicial interpretation. The courts could be called on to interpret the Human Rights Act in line with its purpose of better protecting human rights, which could lead them to read in gender identity as part of one of the prohibited grounds under the Act. However, reliance on the courts in place of legislative reform may not be effective in this area, which has traditionally been amended by Parliament.¹⁹⁰ Human rights amendments traditionally come from the legislature, due to their political power and symbolism.¹⁹¹ This type of reform is less suited to judicial interpretation.

¹⁸⁵ Kirkland, above n 33, at 88.

¹⁸⁶ At 88.

¹⁸⁷ At 94.

¹⁸⁸ At 94; *Smith v City of Salem*, above n 48.

¹⁸⁹ Kirkland, above n 33, at 108.

¹⁹⁰ McDonald, above n 91, at 307.

¹⁹¹ At 314.

The argument that the “sex” ground includes gender is weakened by the structure of s 21. Other grounds that could overlap, such as colour, race, and ethnic origin, are described as separate grounds of discrimination in the Human Rights Act. Sex itself is clarified to include pregnancy and childbirth.¹⁹² The careful demarcation of the bounds of each ground does not seem to support a wider interpretation of “sex” to include gender identity.¹⁹³

Further, there is likely a lack of judicial will to interpret “sex” widely in New Zealand, even though some overseas courts have exhibited willingness to do so. Even if the “sex” discrimination ground could be interpreted to include situations where transgender people are uniquely discriminated against, the courts may be reluctant to take the expansive interpretation adopted in other jurisdictions.¹⁹⁴ Current domestic legislative provisions that reference gender identity suggest opposing ideas of what the “sex” ground should or could encompass under the Human Rights Act.

The Sentencing Act 2002 lists motivation by gender identity as an aggravating factor relevant to sentencing. A judge must consider whether the offence occurred “because of hostility towards a group of persons who have an enduring common characteristic such as race, colour, nationality, religion, gender identity, sexual orientation, age, or disability”.¹⁹⁵ The reference to gender identity, and the absence of a reference to sex, could mean that gender identity includes sex.¹⁹⁶ It would be unusual for legislators to exclude sex from a list of “enduring common characteristics” that motivate targeted hate crime. However, this does not mean that a reference to sex in legislation will necessarily include gender identity, as it may be a subset of the umbrella concept of gender identity. Gender identity and sex also seemed to be treated as associated concepts in the Corrections Regulations 2005 (now revoked), where applications for review of a prisoner’s determined sex must consider whether the prisoner has undergone medical treatment “to acquire a physical conformation that accords with the gender identity of a person of the nominated sex”.¹⁹⁷

Alternatively, the reference to gender identity in other legislation could show that when legislators intend to consider gender identity, they will explicitly refer to it.¹⁹⁸ This is supported by the interpretation section of the Marriage (Definition of Marriage) Amendment Act 2013, which inserted the definition of marriage as “the union of two people, regardless of their sex, sexual orientation, or gender identity” into the Marriage Act 1955.¹⁹⁹ The two concepts were

¹⁹² Section 21(1)(a).

¹⁹³ McDonald, above n 91, at 303.

¹⁹⁴ McDonald, above n 91, at 302.

¹⁹⁵ Sentencing Act 2002, s 9(1)(h).

¹⁹⁶ McDonald, above n 91, at 315.

¹⁹⁷ Corrections Regulations 2005, s 65C(3)(f).

¹⁹⁸ McDonald, above n 91, at 315.

¹⁹⁹ Marriage Act 1955, s 2(1).

clearly conceived as separate in 2013, where they may have been conflated in 2002 and 2005. The argument that the courts will read gender identity into the ground of sex may conflict with the current trend of interpreting the two concepts as separate.

Regardless of the intended meaning of the words, inconsistent language used throughout statutes has created legislative ambiguity. This ambiguity may be addressed through the courts, but this is by no means certain. Given that this reform is about human rights, it has a sense of urgency that should not be left to judicial whim.

VII The Likelihood of Successful Reform

Reforming the Human Rights Act is likely to meet with public interest as well as backlash. The Act's introduction in 1993 was received with considerable conservative debate, particularly around the proposed inclusion of sexual orientation as a prohibited ground of discrimination. This Part will explore that reform, as well as discussing the theoretical problems with a rights-based approach and the practical effects of the proposed reform as relevant factors in the likelihood of its success. This success would be measured by both achieving legislative change, and that change having demonstrable effect for transgender people.

A Homosexual Law Reform in New Zealand

Homosexual law reform in New Zealand began with the introduction of a bill in 1985 that would decriminalise homosexual behaviour and protect sexual orientation as a prohibited ground of discrimination in New Zealand.²⁰⁰ This led to the development of the anti-gay rights group Coalition of Concerned Citizens (CCC), which was ultimately unsuccessful but provided a significant amount of anti-reform discourse.²⁰¹ The CCC's rights rhetoric at the time expressed what may be a similar obstacle in rights reform for gender identity. It rejected the concept of rights as "egotistical and overly optimistic", seeing homosexual people not as citizens but as rebels against God.²⁰² It seems that a conservative and religious conception of rights may be that these are privileges that are earned, rather than inherently granted to all people regardless of individual characteristics.

The submissions to the Select Committee at the time of reform are similarly revealing. 88% of submissions by those against reform described homosexuality as an unnatural way of life.²⁰³ The conservative Christian movement heavily endorsed the patriarchal family model of

²⁰⁰ Homosexual Law Reform Act 1986.

²⁰¹ Dolores Janiewski "Moral politics and human rights : exploring the opposition to gay rights and children's rights in New Zealand 1984-2007" (2007) 5 Human Rights Research (Online) 1 at 4.

²⁰² At 5.

²⁰³ At 6.

heterosexual partners, arguably in order to control both male and female sexuality.²⁰⁴ Such a model necessarily precludes the existence of universal rights, as children and women are subordinate to men.²⁰⁵ Arguments against the recognition of rights seemed to avoid a rights discourse, as human rights were viewed as inapplicable to the people facing discrimination. Rather, arguments stemmed from an acceptance of patriarchal religious control of society.

Ultimately, the Homosexual Law Reform Act passed by five votes and sex between consenting male adults was decriminalised. However, the second part of the Bill relating to discrimination was rejected and did not form part of the Act. It was not until 1993 that sexual orientation became a prohibited ground of discrimination under the new Human Rights Act.²⁰⁶ The later Act passed with a two thirds majority in Parliament, a significant change from the narrow success of the decriminalisation reform in 1986. The decriminalisation of homosexual behaviour may have contributed to the relatively easy path of the later reform, by bringing acceptance of homosexuality to the fore of public and political discourse.

However, inserting sexual orientation into the Human Rights Act was not a straightforward process, as it was not a ground in the original Human Rights Bill. The Select Committee analysed its potential inclusion and concluded that there was no justification for excluding sexual orientation from the grounds of discrimination.²⁰⁷ However, the Committee did not recommend its inclusion, due to a prior understanding that a conscience vote would be held on the issue.²⁰⁸ The additional ground was added by way of supplementary order paper, and made it through as the final prohibited ground of discrimination under the Human Rights Act. The prevailing Parliamentary view in 1993 seemed to reflect, or at least envisage, a shift in the majority of public opinion that now found it was unacceptable to oppress homosexual people.²⁰⁹ However, a vocal minority continued to voice an attitude of hatred and disgust towards homosexual behaviour and people.

B Gender Identity: A Similar Backlash?

Gender identity may face similar hurdles to sexual orientation. Both concepts challenge the traditional heterosexual family model and represent a move away from strict gender and sex roles. The Society for the Promotion of Community Standards (SPCS) demonstrates the conflation of fears surrounding gender identity and sexual orientation. The SPCS voiced concerns about extending human rights to homosexual people on the grounds that gay men

²⁰⁴ At 6.

²⁰⁵ At 7.

²⁰⁶ Human Rights Act 1993, s 21(1)(m).

²⁰⁷ (27 July 1993) 537 NZPD 16914.

²⁰⁸ (27 July 1993) 537 NZPD 16914.

²⁰⁹ (27 July 1993) 537 NZPD 16916.

would dress up as women and go into women's bathrooms, which is a common argument raised in protest against transgender rights.²¹⁰ The debate around the Human Rights Act's introduction reveals that the difference between sexual orientation and sexual behaviour was often confused, as people viewed homosexual people as predatory and often paedophilic.²¹¹

Similar rhetoric may also arise around the idea of whether sexual orientation and gender identity have genetic origins or are learned behaviours. It was argued about the insertion of sexual orientation that there are very few "real" homosexual people, and children should be shielded from a homosexual climate at an impressionable age.²¹² However, it was pointed out that the Human Rights Act prohibits discrimination on the basis of religion, which is a learned belief.²¹³

This essay does not discuss in-depth the biological basis for the existence of a person's incongruent gender identity and sex. Gender dysphoria is recognised in the DSM-V as a disorder, and research shows signs of either feminisation or masculinisation in the brain structures of transgender individuals, suggesting a biological basis.²¹⁴ However, the focus in the Human Rights Act is on individual states of being that can give rise to differential treatment. Marriage, political views, and religion do not have biological bases. Thus an analysis of whether gender identity should be included in the Human Rights Act should be limited to whether it creates a basis for differential treatment. As evidenced in Part III, gender identity can give rise to a wide range of discriminatory behaviours, much as religion can. It is therefore in need of protection.

Other arguments around extending human rights to transgender people can stem from concerns about physical and sexual violence from transgender people directed at members of the cisgender population. Again, this view seems to confuse gender or sex with behaviour. However, it may be argued that some contexts are gendered for a reason, usually in order to protect women from men. Concerns about transgender women who are biologically male behaving violently towards cisgender women if placed in the same prison, as well as cisgender men behaving violently towards transgender men, have been raised in Parliamentary questions.²¹⁵

²¹⁰ At 10.

²¹¹ (27 July 1993) 537 NZPD 16916.

²¹² (27 July 1993) 537 NZPD 16917.

²¹³ (27 July 1993) 537 NZPD 16916.

²¹⁴ Elke Stefanie Smith, Jessica Jungera, Birgit Derntl and Ute Habel "The transsexual brain – A review of findings on the neural basis of transsexualism" (2015) 59 *Neuroscience and Biobehavioural Reviews* 251 at 251.

²¹⁵ Jan Logie "Jan Logie asks the Corrections Minister about transgender prisoners" (29 February 2012) Green Party of Aotearoa New Zealand <www.home.greens.org.nz>.

In reality, transgender people suffer proportionately more physical and sexual violence than the general population, with this violence often being perpetrated on the basis of gender identity.²¹⁶ Given this concerning statistic, it makes sense to protect transgender people from dangerous situations as much as possible. Transgender people are most at risk where their status is salient, such as in gendered prisons. They are statistically more unsafe than cisgender people, so arguments about the existence of a threat to cisgender people are likely to stem more from a misconception of what transgender people are than any actual harm that has occurred.

Similar arguments may arise that transgender people should not be in jobs that are traditionally gendered, such as caring for disabled people of the same sex. However, these arguments are usually based on the idea that it would be inappropriate for someone who is or was biologically male or female to be in intimate situations with the opposite sex. This argument again seems to stem from the confusion of sexual orientation and gender with sexual behaviour, where it is assumed that, for example, a transgender man would be dangerous to women in intimate contexts. This assumption is heteronormative, as transgender people have the same range of sexual orientations as cisgender people. Further, having a transgender status does not equate to undertaking harmful behaviour.

Overall, the public backlash that could be expected from reform is largely baseless when it comes to legitimate public concerns. However, the arguments raised during the homosexual law reform process make it clear that the educative function served by reforming the Human Rights Act is sorely needed. Defining gender identity and increasing its visibility through prohibiting discrimination would increase public awareness about the true nature of transgenderism. It is also important to note that the exceptions in the Human Rights Act that already regulate gendered contexts and apply to cisgender people can equally apply to transgender people, such as the exceptions related to privacy where sex discrimination is legitimate.²¹⁷

C The Problem of Rights

The idea of rights themselves have been subject to criticism by transgender theorists. Transgender identities only make sense in the binary system perpetuated by Western liberal democracy.²¹⁸ So, too, the idea of transphobia shapes transgender identities as rooted in violence and fear.²¹⁹ Further, the transgender rights movement is embedded in whiteness and

²¹⁶ Rylan Testa, Laura Sciacca, Florence Wang, Michael Hendricks, Peter Goldblum, Judith Bradford and Bruce Bongar “Effects of violence on transgender people” (2012) 43 *Professional Psychology: Research and Practice* 452 at 455.

²¹⁷ Human Rights Act 1993, s 27.

²¹⁸ Irving, above n 50, at 323.

²¹⁹ At 324.

the idea that once transgender rights are recognised, transgender people will be able to move and live freely. For transgender people of colour, this entitlement does not exist even in the absence of transphobia.²²⁰

Further, transgender people already have human rights recognised at New Zealand law. Their sex, ethnicity, employment status, and disabilities are all prohibited grounds of discrimination. Thus some arguments for adding the protection of gender identity to the list can be seen as driven by a need to grant transgender people humanity.²²¹ While the inclusion of gender identity in the Human Rights Act would bring the recognition and remedies for the unique discrimination that transgender people face, it would also have considerable symbolic power. This change, of course, could have powerful positive effects for transgender people personally and in the community. However, this construction necessarily implies that transgender people only exist in opposition to cisgender people. It requires transgender people to identify as transgender, rather than fighting for “the right not to be transgendered” and live in a world free of such identities.²²² A human rights focus could reflect pre-existing power structures more than it would dismantle them.²²³

While these concerns should not be denied, the proposed reform is constrained by the legal system it operates in and New Zealand’s rights framework. Despite this, the creation of an open-ended list could facilitate moving away from the gender binary to recognise that people do not exist only in opposition to the majority.

D Practical Effects of Reform

Explicitly prohibiting discrimination on the basis of gender identity will provide transgender people with an avenue for complaints. If an act of discrimination was covered by the Human Rights Act, the person would be able to contact the Human Rights Commission and enter into mediation.²²⁴ If mediation was not successful, the person could take their complaint to the Human Rights Review Tribunal and be heard in court.²²⁵ They could receive damages for pecuniary loss, loss of benefit, and humiliation, loss of dignity, and injury to feelings.²²⁶ Further, the Court could make orders and declarations requiring the defendant to

²²⁰ At 325.

²²¹ At 327.

²²² Patrick McCreery and Kitty Krupat “Conversations with a genderqueer: Talking with Riki Anne Wilchins” in Patrick McCreery and Kitty Krupat (eds) *Out At Work: Building a Gay–Labour Alliance* (Minneapolis: University of Minnesota Press, 2001) 92 at 94.

²²³ At 332.

²²⁴ Human Rights Act 1993, s 77.

²²⁵ Section 92B.

²²⁶ Section 92M.

apologise, enter into training, or provide personal redress.²²⁷ While reform would not prevent discrimination from occurring, it would create an accessible and low-cost avenue to address its effects.

As has been discussed throughout this essay, this reform would also have the practical effect of increasing the visibility of transgender people. People who may not have been aware that they were protected by the Act would be guaranteed further protections, and knowledge of those protections, by the inclusion of gender identity. People who discriminate on the basis of gender identity will also have it made explicitly clear that both sex and gender identity discrimination are prohibited. Further, reform would communicate Parliament's intention to the courts, and clarify the difference between gender and sex for the judiciary and alternative dispute resolution services.

Given that this essay has proposed reforming the structure of the anti-discrimination provisions of the Human Rights Act, the above consequences of reform would also apply to groups that may fall outside the definition of gender identity in the proposed reform. Increasing visibility of genderqueer and other groups, and providing help to these groups in the event of discrimination, will advance New Zealand's movement towards universal human rights.

VIII Conclusion

This essay has outlined the need for growth towards recognising transgender rights in New Zealand. The lack of available data on transgender people in New Zealand, compounded with a lack of legal support and recognition, frustrate the need for visibility of these issues.²²⁸ As this group becomes more salient and understood socially, political initiative should recognise the significant need for reform. Reforming the Human Rights Act will not stop discrimination against transgender people. However, in conjunction with other reform, it would have symbolic power as well as providing practical legal recourse for a vulnerable group. Consultation is vital, and would need to occur with both the transgender community and other affected communities. The intersex and genderqueer communities in particular would need to be consulted as to the expression of their rights under a reformed Act.

Transgender people face unique discrimination on the basis of their incongruent gender identity and sex. The importance of recognising discrimination on the basis of gender identity as quite separate from sex discrimination is clear when examining contexts such as prisons. Encompassing gender identity discrimination under the sex discrimination ground would not encapsulate certain discriminations, and it could mean that the social view of transgender people as just "men in dresses" continues.²²⁹ Rather than construing transgender people as a

²²⁷ Section 92I.

²²⁸ Mulligan, above n 21, at 7.

²²⁹ Kirkland, above n 33, at 98.

minority with a proclivity for breaking gender norms, the most effective reform would recognise gender identity as a separate concept from a person's sex. Further, this could educate vulnerable groups who are not aware that sex discrimination can include some aspects of discrimination against transgender people.²³⁰

Inserting gender identity into the Human Rights Act is a viable reform option, and explicit reference to gender identity would have both symbolic and educational effect. However, it is not enough, as this type of reform would add one more ground to a closed list that remains closed until further amendment occurs. As outlined in Part V, creating an open-ended list of grounds would leave room for judicial recognition of other grounds, such as gender expression. Such reform would have more permanent impact, rather than serving as a quick fix. It could future-proof the Human Rights Act for future claimants, allowing law to develop flexibly and purposively in its recognition of human rights.

Other avenues of reform are important considerations. Although they go beyond the scope of this essay, proactive reforms would complement the recognition of transgender people at human rights law. Reforming the sex marker change process for birth certificates has been undertaken in several countries, and is an effective way to facilitate the recognition of gender identity in the legal sphere.²³¹ A move towards depathologisation of transgender people would see New Zealand reject the World Health Organisation and American Psychiatric Association diagnoses of gender identity disorder. While these reforms would bring complementary acknowledgement of transgender people, reforming the Human Rights Act is a practical and necessary step forward. Discrimination precludes opportunities in every sphere, and express prohibition would make it clear that gender identity is an unacceptable ground for decisions in public life.²³²

An agenda-setting approach is appropriate in a human rights context. Transgender rights have been made salient in the New Zealand legal context before; the government's ongoing lack of response risks being interpreted as opposition to the recognition of these rights.²³³ Legislative recognition of gender identity would set the agenda for future legislation and social behaviour, as well as bring New Zealand to the fore of comparative human rights law. We need only look to homosexual law reform to see how much relief legal change can bring, even when faced with considerable public backlash.

²³⁰ Human Rights Commission, above n 11.

²³¹ See Blincoe, above n 23, at 33.

²³² Rutherglen, above n 155, at 131.

²³³ See Laurence Helfer and Erik Voeten "International courts as agents of legal change: Evidence from LGBT rights in Europe" (2014) 68 *International Organization* 77 at 82.

Georgina Beyer's attempt at reform was withdrawn in 2006. Ten years later, New Zealand has undergone a significant social shift. While opposition may be inevitable, law reform is essential to initiate both education about transgender people and opportunity for redress in the event of discrimination. Human rights are only ever a legal construction, but they are a legal construction that we view as applicable to all humans.²³⁴ It is time for that construction to apply to transgender people.

²³⁴ Tahmindjis, above n 137, at 12.

IX Bibliography

A Cases

1 New Zealand

Attorney General v Otahuhu Family Court [1995] 1 NZLR 603.

'Michael' v Registrar-General of Births, Deaths and Marriages (2008) 27 FRNZ 58.

2 Philippines

Ang Ladlad LGBT Party v Commission on Elections (2008) Philippines Supreme Court GR No 190582.

3 United Kingdom

A v Chief Constable of West Yorkshire Police [2005] 1 AC 51 (HL).

4 United States

Price Waterhouse v Hopkins 490 US 228 (1989).

Schroer v Billington 424 F Supp 2d 203 (DDC 2006).

Smith v Salem 378 F 3d 566 (6th Cir 2004).

B Legislation

1 New Zealand

Bill of Rights Act 1990.

Births, Deaths, Marriages, and Relationships Registration Act 1995.

Corrections Act 2004.

Homosexual Law Reform Act 1986.

Human Rights Act 1993.

Marriage Act 1955.

Sentencing Act 2002.

Corrections Regulations 2005.

Human Rights (Gender Identity) Amendment Bill 2004 (255-1).

2 Argentina

Ley No 26743 9 May 2012 (AR) (translated ed: Alejandra Sardá (translator) “Argentina’s Gender Identity Law” Global Action for Trans Equality <transactivists.org>.)

3 Australia

Anti Discrimination Act 1977 (NSW).

Sex Discrimination Act 1984 (AU).

4 Canada

Canadian Charter of Rights and Freedoms 1982 (CA).

5 Ireland

Gender Recognition Act 2015 (Ireland).

6 Malta

Gender Identity, Gender Expression and Sex Characteristics Act 2015 (Malta).

7 United Kingdom

Equality Act 2010 (UK).

Gender Recognition Act 2004 (UK).

8 United States

Human Rights Act 2 D.C. Code § 1401.01 et seq. (1977) (US).

C Treaties and International Materials

Christine Goodwin v United Kingdom 2002-VI; 35 EHRR 18.

Discriminatory laws and practices and acts of violence against individuals based on their sexual orientation and gender identity: Report of the United Nations High Commissioner for Human Rights A/HRC/19/41 (2011).

International Covenant on Civil and Political Rights 999 UNTS 171 (opened for signature 16 December 1966, entered into force 23 March 1976).

International Covenant on Economic, Social and Cultural Rights 999 UNTS 3 (opened for signature 16 December 1966, entered into force 3 January 1976).

Toonen v. Australia communication No. 488/1992 (CCPR/C/50/D/488/1992).

Vienna Declaration and Programme of Action A/Conf/157/23 (1993).

D Books and Chapters in Books

American Psychiatric Association *Diagnostic and statistical manual of mental disorders* (3rd ed, American Psychiatric Association, Washington, D.C., 1980).

American Psychiatric Association *Diagnostic and statistical manual of mental disorders* (5th ed, American Psychiatric Association, Arlington, VA, 2013).

Deborah Hellman "Equality and Unconstitutional Discrimination" in Deborah Hellman and Sophia Moreau (eds) *Philosophical Foundations of Discrimination Law* (Oxford University Press, 2013) 51.

Joanna Grossman *Nine to Five: How Gender, Sex, and Sexuality Continue to Define the American Workplace* (Cambridge University Press, 2016).

Patrick McCreery and Kitty Krupat "Conversations with a genderqueer: Talking with Riki Anne Wilchins" in Patrick McCreery and Kitty Krupat (eds) *Out At Work: Building a Gay-Labour Alliance* (Minneapolis: University of Minnesota Press, 2001) 92.

Sophia Moreau "In Defense of a Liberty-based Account of Discrimination" in Deborah Hellman and Sophia Moreau (eds) *Philosophical Foundations of Discrimination Law* (Oxford University Press, 2013) 71.

George Rutherglen "Concrete or Abstract Conceptions of Discrimination?" in Deborah Hellman and Sophia Moreau (eds) *Philosophical Foundations of Discrimination Law* (Oxford University Press, 2013) 93.

Susan Stryker *Transgender History* (Seal Press, 2009).

Stephen Whittle *Respect and Equality: Transsexual and Transgender Rights* (Cavendish Publishing Limited, London, 2002).

E Journal Articles

Jeffrey Adams, Pauline Dickinson and Lanuola Asiasiga "Mental health promotion for gay, lesbian, bisexual, transgender and intersex New Zealanders" (2013) 5 *Journal of Primary Health Care* 105.

Mollie Aleshire "Sexual Orientation, Gender Identity, and Gender Expression: What Are They?" (2016) 12 *Journal for Nurse Practitioners* 329.

Anita Barnes "The Sexual Continuum: Transsexual Prisoners" (1998) 24 *New England Journal of Criminal and Civil Confinement* 599.

Jo Bird "When Sex Means 'Condition' or 'Impairment': Evaluating the Human Rights of Transgender and Intersex Peoples" (2001) 5 *S Cross U L Rev* 1.

Emily Blincoe "Sex Markers on Birth Certificates: Replacing the Medical Model with Self-Identification" (2016) 46 VUWLR 57.

Terryann Clark, Mathijs Lucassen, Pat Bullen, Simon Denny, Theresa Fleming, Elizabeth Robinson and Fiona Rossen "The health and well-being of transgender high school students: Results from the New Zealand Adolescent Health Survey (Youth'12)" (2014) 55 Journal of Adolescent Health 93.

Megan Davidson "Seeking refuge under the umbrella: Inclusion, exclusion, and organizing within the category transgender" (2007) 4 Sexuality Research and Social Policy 60.

Zowie Davy "The DSM-5 and the Politics of Diagnosing Transpeople" (2015) 44 Archives of Sexual Behaviour 1165.

Richard Edney "To Keep Me Safe From Harm? Transgender Prisoners And The Experience Of Imprisonment" (2004) 9 Deakin Law Review 327.

Taylor Flynn "'Transforming' the Debate: Why We Need to Include Transgender Rights in the Struggles for Sex and Sexual Orientation Equality" (2005) 101 Columbia Law Review 392.

Lin Fraser, Daniel Karasic, Walter Meyer III and Kevan Wylie "Recommendations for Revision of the DSM Diagnosis of Gender Identity Disorder in Adults" (2010) 12 International Journal of Transgenderism 80.

Drake Hagner "Fighting for Our Lives: the D.C. Trans Coalition's Campaign for Humane Treatment of Transgender Inmates in District of Columbia Correctional Facilities" (2010) 11 Geo J Gender and L 837.

Jack Harrison, Jaime Grant, and Jody Herman "A Gender Not Listed Here: Genderqueers, Gender Rebels, and OtherWise in the National Transgender Discrimination Survey" (2012) 2 LGBTQ Public Policy Journal at the Harvard Kennedy School 13.

Laurence Helfer and Erik Voeten "International courts as agents of legal change: Evidence from LGBT rights in Europe" (2014) 68 International Organization 77.

Dan Irving "Against the grain: Teaching Transgender Human Rights" 16 Sexualities 319.

Dolores Janiewski "Moral politics and human rights : exploring the opposition to gay rights and children's rights in New Zealand 1984-2007" (2007) 5 Human Rights Research (Online) 1.

Anna Kirkland "What's at Stake in Transgender Discrimination as Sex Discrimination?" (2006) 32 Signs: Journal of Women in Culture and Society 83.

Elise Meyer “Designing Women: The Definition of “Woman” in the Convention on the Elimination of All Forms of Discrimination Against Women” (2016) 16 *Chicago Journal of International Law* 553.

Sophia Moreau “What is Discrimination?” (2010) 38 *Phil and Pub Affairs* 143.

Michael O’Flaherty “The Yogyakarta Principle at Ten” (2015) 33 *Nordic Journal of Human Rights* 280 at 281.

Maxine Petersen, Judith Stephens, Robert Dickey and Wendy Lewis “Transsexuals within the Prison System: An International Survey of Correctional Services Policies” (1996) 14 *Behavioral Sciences and the Law* 219.

Heike Polster “Gender Identity as a New Prohibited Ground of Discrimination” (2003) 1 *New Zealand Journal of Public and International Law* 157.

Franklin Romeo “Beyond a Medical Model: Advocating for a New Conception of Gender Identity in the Law” (2005) 36 *Colum Hum Rts L Rev* 713.

Elke Stefanie Smith, Jessica Jungera, Birgit Derntl and Ute Habel “The transsexual brain – A review of findings on the neural basis of transsexualism” (2015) 59 *Neuroscience and Biobehavioural Reviews* 251.

Philip Tahmindjis “Sexuality and International Human Rights Law” (2005) 48 *Journal of Homosexuality* 9.

Rylan Testa, Laura Sciacca, Florence Wang, Michael Hendricks, Peter Goldblum, Judith Bradford and Bruce Bongar “Effects of violence on transgender people” (2012) 43 *Professional Psychology: Research and Practice* 452.

Jens Theilen “Depathologisation of Transgenderism and International Human Rights Law” (2014) 14 *Human Rights Law Review* 327.

Richard Trotter “Transgender Discrimination And The Law” (2010) 3 *Contemporary Issues in Education Research* 55.

F Parliamentary and Government Materials

(27 July 1993) 537 *NZPD* 16914.

(27 July 1993) 537 *NZPD* 16916.

G Papers and Reports

Counties Manukau District Health Board *Gender Reassignment Health Services for Trans People within New Zealand* (Ministry of Health, Wellington, 2012).

Crown Law Office *Opinion on the Human Rights (Gender Identity) Bill* (Crown Law Office, 2 August 2006).

Peter Day *Transgender Reassignment Surgery* (New Zealand Health Technology Assessment Tech Brief Series, 2002).

Human Rights Commission *Human Rights in New Zealand 2010* (Human Rights Commission, 2010).

Human Rights Commission *To Be Who I Am: Report of the Inquiry into Discrimination Experienced by Transgender People* (Human Rights Commission, 2007).

Ministry of Justice *Discussion Paper: Re-Evaluation of the Human Rights Protections in New Zealand* (Ministry of Justice, Wellington, October 2000).

Femmke Olyslager and Lynne Conway *On the calculation of the prevalence of transsexualism* (Paper presented at World Professional Association for Transgender Health 20th International Symposium, Chicago, Illinois, September 2007).

H Internet Resources

Jorge Amaro "Supreme Court to Decide on School Restroom Ban for Transgender Students" (28 October 2016) National LGBTQ Task Force <www.thetaskforce.org>.

Department of Corrections "Prison Service Operation Manual" <www.corrections.govt.nz>. Department of Internal Affairs "Information about Changing Sex/Gender Identity" (2016) <www.passports.govt.nz>.

Department of Social Protection "Legal Recognition for Transgender People" (15 July 2015) <www.welfare.ie>.

Michael Gordon, Mark Price and Katie Peralta "Understanding HB2: North Carolina's newest law solidifies state's role in defining discrimination" (26 March 2016) The Charlotte Observer <www.charlotteobserver.com>.

Human Rights Commission "Action on the Transgender Inquiry: Participation" <www.hrc.co.nz>.

Human Rights Commission "Human Rights Legislation – New Zealand" <www.hrc.co.nz>.

Human Rights Commission "Supporting trans students" <www.hrc.co.nz>.

Human Rights Watch "No Escape: Male Rape in United States Prisons" (2001) <www.hrw.org>.

Library of Congress "France: Gender Identity Dropped From List of Mental Illnesses" (17 February 2010) Global Legal Monitor <www.loc.gov>.

Jan Logie “Jan Logie asks the Corrections Minister about transgender prisoners” (29 February 2012) Green Party of Aotearoa New Zealand <www.home.greens.org.nz>.

Rachel Matlow “Transgender issues: Public awareness is on the rise” (7 May 2014) CBC News <www.cbc.ca>.

Tess McClure “Waiting in vain? Trans surgery waitlists stretch to almost 50 years” (1 September 2016) The Wireless <www.thewireless.co.nz>.

Ministry of Education “Sexuality Education Guide” (2015) <www.health.tki.org.nz>.

Ministry of Health “High Cost Treatment Pool” (3 February 2014) <www.health.govt.nz>.

Kris Morrison “School policies and transgender students” (7 March 2016) Family First New Zealand <www.familyfirst.org.nz>.

Fleur Mulligan “Gender Identity: Developing a Statistical Standard” (2014) Statistics New Zealand, Wellington <www.stats.govt.nz>.

Otago University Students Association “Transgender Student Information” <www.ousa.org.nz>.

S. M. “What is at stake in the first Supreme Court case on transgender rights” (1 November 2016) The Economist <www.economist.com>.

Johanna Schmidt “Gender diversity – Human rights and discrimination” (5 May 2011) Te Ara: the Encyclopaedia of New Zealand <www.teara.govt.nz>.

Will Worley “Denmark will become first country to no longer define being transgender as a mental illness” (14 May 2016) The Independent <www.independent.co.uk>.

World Professional Association for Transgender Health Board of Directors “Depsycho-pathologisation statement” (26 May 2010) World Professional Association for Transgender Health <www.wpath.org>.

“The Yogyakarta Principles: Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity” (March 2007) Yogyakarta Principles <www.yogyakartaprinciples.org>.