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**Subject: “Conditions of the recognition of the civil status of transsexual  
and transgender people”**

**Aotearoa New Zealand National Report**

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1. *Legal framework*

Aotearoa New Zealand is a common law jurisdiction, with a Parliament and legal system based on the British Westminster system of government, following colonisation in the 19<sup>th</sup> century. Māori are the indigenous people of Aotearoa and signatories to the Treaty of Waitangi, which Maori consider allows them to retain self-governance rights and, in particular, Maori customary law.<sup>1</sup>

English common law forms the basis of much New Zealand legal doctrine, particularly in areas with little legislative intervention, and New Zealand judges view relevant English precedent (and precedent from other Commonwealth jurisdictions, most notably Australia and Canada) as persuasive, but not binding. However, the law is increasingly developing in a uniquely New Zealand direction, particularly through the proliferation of statute law.

New Zealand has a hierarchical court structure, with a comprehensive system of appeals, and applies the doctrine of precedent. For the most part, the legal system is adversarial rather than inquisitorial and espouses principles of equal access to justice (although barriers to access are recognised)<sup>2</sup> and open justice. Subject to some limited exceptions, the public may access court hearings, litigants have the right to hearings in public and there are rights to publish and to access records of court proceedings. Although the structure has changed over time, New Zealand currently has four courts of general jurisdiction – the Supreme Court of New Zealand,<sup>3</sup> the Court of Appeal,<sup>4</sup> the High Court and the District Court – and a variety of

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<sup>1</sup> See further M. S. R. PALMER, *The Treaty of Waitangi in New Zealand’s Law and Constitution*, Victoria University Press, Wellington, 2008; HUMAN RIGHTS COMMISSION, *Human Rights in New Zealand 2010*, Wellington, New Zealand, 2010, p. 39.

<sup>2</sup> New Zealand Law Commission, *Delivering Justice for All: A Vision for New Zealand Courts and Tribunals* (Wellington, NZLC R85, 2004); New Zealand Law Commission, *Justice: The Experiences of Maori Women* (Wellington, NZLC R53, 1999); New Zealand Law Commission, *Women’s Access to Legal Services* (Wellington, NZLC SP1, 1999) and other papers that formed part of the Women’s Access to Justice Project: [www.lawcom.govt.nz/our-projects/women-and-access-justice](http://www.lawcom.govt.nz/our-projects/women-and-access-justice).

<sup>3</sup> Supreme Court Act 2003 (NZ).

<sup>4</sup> Judicature Act 1907 (NZ).

specialist courts established by statute, including the Māori Land Court,<sup>5</sup> the Employment Court,<sup>6</sup> and the Human Rights Review Tribunal.<sup>7</sup>

2. *Regulation of the civil status:*

[**Note for editor:** I am not sure how to respond to this section as New Zealand does not use the concept of “civil status”. I am presuming anything that might be seen as relevant for this section will be included in other parts of this Report]

3. *Particular regulations for trans persons:*

Pre-colonial Māori communities were ‘inclusive of whakawahine’<sup>8</sup> (a Maori term describing someone born with a male body who has a female gender identity).<sup>9</sup> More recently takatāpui has been reclaimed as a term to describe gay, lesbian, bisexual, trans and other genderqueer Māori.

Today Māori whakawāhine and tangata ira tane (Māori trans men) remain visible within takatāpui communities. A support network for Māori trans people (Tapatoru), based on the traditional concept of whānau or family, now exists. There are many predominantly Pākehā (European) or Tauīwi (non-Maori) networks.<sup>10</sup>

New Zealand also has a large Pacific Island population, many of whom acknowledge males who take on traditional female social roles (such as fa’afafine in Samoa and fakaleiti in Tonga). It is therefore not surprising that the people who made submissions to the New Zealand Human Rights Commission’s Transgender Inquiry (see further at 2.1 below) referred to themselves as transgender, Male-to-Female (MtF) and Female-to-Male (FtM) transsexuals, cross-dressers, queens, intersex, androgynous, genderqueer, takatāpui, fa’afafine, fakaleiti, whakawahine and tangata ira tane (someone born with a female body who has a male gender identity).

In *To Be Who I Am: Report of the Inquiry into Discrimination Experienced by Transgender People* (the Report of the Transgender Inquiry), the term ‘trans’ was used when necessary to use a generic term to describe all of the identities listed above.<sup>11</sup> That is, to describe all those ‘who identify their gender in some way in opposition or outside the gender role which they are meant to fulfill as a result of their sex designation at birth.’<sup>12</sup>

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<sup>5</sup> Te Ture Whenua Maori (Maori Land Act) 1993 (NZ).

<sup>6</sup> Employment Relations Act 2000 (NZ).

<sup>7</sup> Human Rights Act 1993 (NZ).

<sup>8</sup> HUMAN RIGHTS COMMISSION, *To Be Who I Am: Report of the Inquiry into Discrimination Experienced by Transgender People*, Wellington, New Zealand, 2008, para. 2.1. See also <[www.hrc.co.nz/human-rights-environment/action-on-the-transgender-inquiry](http://www.hrc.co.nz/human-rights-environment/action-on-the-transgender-inquiry)>.

<sup>9</sup> Gender identity can be defined as a person’s internal or deeply felt sense of being male or female, or something other. A person’s gender identity may or may not correspond with their sex.

<sup>10</sup> <[www.hrc.co.nz/wp-content/uploads/2011/11/TGI-Fact-Sheet-C.html](http://www.hrc.co.nz/wp-content/uploads/2011/11/TGI-Fact-Sheet-C.html)>.

<sup>11</sup> HUMAN RIGHTS COMMISSION, above n. 8, para.13. 8

<sup>12</sup> S. WHITTLE, *Respect and Equality: transsexual and transgender rights*, Cavendish Publishing, London 2002, p. xxiii.

New Zealand pieces of primary legislation (statutes) do not use the terms ‘trans’ or ‘transgender’ or ‘transsexual’. In secondary legislation (rules and regulations) the term ‘transgender’ is used but not defined in the Corrections Regulations 2005. There are a few references to ‘gender identity’ (see section 9(1)(h) of the Sentencing Act 2002, for example. Surgically altered genitals are included in the relevant definitions in section 2 of the Crimes Act 1961 for the purposes of sexual offences:

**genitalia** includes a surgically constructed or reconstructed organ analogous to naturally occurring male or female genitalia (whether the person concerned is male, female, or of indeterminate sex)

**penis** includes a surgically constructed or reconstructed organ analogous to a naturally occurring penis (whether the person concerned is male, female, or of indeterminate sex)

However, despite the reference to “indeterminate sex” there is no legal status attached to that identity in New Zealand (see also the discussion of drivers licences and birth certificates).

Until the early 1990s, little recognition or accommodation was accorded in post-colonial New Zealand society to those whose legal sex did not accord with their self-identified gender. However, not all trans people wish to identify as either male or female, yet for most purposes only these two options are available and have legal and social implications. The law in New Zealand, as elsewhere, does not adequately accommodate those who wish to live outside the male/female binary.

[Add discussion of “sex” in HR Act\*\*\*]

#### 4. *Regulation of the name:*

A person’s name may be changed on their birth certificate by application to the Registrar-General, although in practice this is done by presenting the declaration at the local Department of Internal Affairs office (section 21A of the Births, Deaths, Marriages and Relationships Registration Act 1995: ‘BDMRRA’). This can be done by a person 18 and older, or by the person’s guardian. The ‘eligible person’ or the guardian must make a statutory declaration declaring their intention to abandon the name in their certificate, and after payment of the relevant fee, the Registrar-General must register the name change ‘as soon as practicable’ (section 21B of the BDMRPA).

Following amendments to the definition of ‘eligible person’ in section 21A, which took effect from 24 January 2009,<sup>13</sup> people born overseas but residing indefinitely in New Zealand may take advantage of this administrative process which has the effect of the Registrar-General including the new name ‘in the person’s name change information’ (section 21B(2)(b)). Access to information about a person’s change of name is governed by sections 74 – 75G

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<sup>13</sup> These changes were made in response to the recommendation of the Transgender Inquiry: ‘allow the Family Court to make a declaration as to sex for overseas-born NZ citizens’: HUMAN RIGHTS COMMISSION, above n. 2, para. 9.50.

and section 78 – 78I,<sup>14</sup> which allow public access in most cases (section 74), however when a change of name accompanies a change of sex classification different rules apply.

The Transgender Inquiry was told that many trans people over 18 years of age had changed their name and '[a]lmost without exception this proved to be a simple and straightforward exercise for them.'<sup>15</sup> For a very small number of people, the fee involved had meant they had not made an application.

## Passports

In response to concerns expressed to the Transgender Inquiry and the recommendations made in the final report,<sup>16</sup> as of 1 December 2012 a passport may now be issued in a person's nominated sex without the need for a change to their birth certificate. This is an administrative process undertaken after the person has made a relevant statutory declaration. Those under the age of 18 must provide additional information, namely a declaration from a parent or legal guardian and from a registered counsellor / medical professional supporting this change. The choices for the sex recorded are 'M', 'F' or 'X' (meaning indeterminate or unspecified). The latter option may be preferred by trans people or are either early on in their transition or who do not wish to identify as either male or female. It may also be a preferred option for some intersex people.

Prior to this policy change, trans people who had not had the details on their birth certificate changed could only request an 'X' (or a '–' prior to 2005) as the sex data on their passport, in line with the International Civil Aviation Organisation (ICAO) specifications for a symbol for unspecified sex.<sup>17</sup> This was also done by a statutory declaration stating how long the person had 'lived as a member of the opposite sex' and they must have changed their name to a name 'more suitable to a member of the opposite sex, or have a unisex name'.<sup>18</sup> In 2007 the Department of Internal Affairs advised the HRC that approximately 400 New Zealand passport holders had an 'X' or '–' (dash) in the sex details field.<sup>19</sup> The Department of Internal Affairs stated to the Inquiry that they did not have information as to how many people with an X or a dash have changed to M or F. However, subsequent research by Jaimie Veale in 2008 revealed that 11 passport holders had changed from X to M, and 65 had changed from X to F.<sup>20</sup> The Transgender Inquiry was told that although access to the X (or dash) option was a progressive step for those transitioning or wanting to identify as androgynous or gender neutral, it was not always a safe option for travel into some countries:<sup>21</sup>

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<sup>14</sup> These provisions were due for review in 2013 as required under s 78J of the BDMRPA.

<sup>15</sup> HUMAN RIGHTS COMMISSION, above n. 2, para. 6.18.

<sup>16</sup> HUMAN RIGHTS COMMISSION, above n. 2, para. 9.50: 'Simplify the requirements for changing sex details on a birth certificate, a passport or other documents to ensure consistency with the Human Rights Act'.

<sup>17</sup> HUMAN RIGHTS COMMISSION, above n. 2, para. 6.12.

<sup>18</sup> J.F. VEALE, 'Prevalence of transsexualism among New Zealand passport holders', (2008) 42 Aust NZ L Psychiatry 887, 888.

<sup>19</sup> HUMAN RIGHTS COMMISSION, above n. 2, para. 6.13.

<sup>20</sup> VEALE, above n 47, p. 888.

<sup>21</sup> HUMAN RIGHTS COMMISSION, above n. 2, para. 6.16. The main ongoing issue seems to be at the checking-in stage for those travelling on X passports – as airlines' computer systems often only accept an M or F option – and not all countries are members of the IACO. See however the more recent unexceptional

‘I believe the dash on the passport or a gender that does not represent what you appear to be leaves you vulnerable and open to all kinds of violations at borders. I have travelled extensively since having gender reassignment with female on my passport and have not encountered the scrutiny that I experienced when I had a dash on my passport.’

### **Driver licences**

On 13 June 2013, the New Zealand Transport Agency (NZTA) announced its new policy with regard to sex or gender identity records for driver licences. Although New Zealand licences do not include sex details, this information has always been held on the national Driver Licence Register (DLR), which can be accessed by police officers when requested. This information has historically matched what is on the person’s birth certificate. As a consequence, a person stopped by the police who has a male name and appearance may be recorded as female on the register.<sup>22</sup> Once the officer finds this out, it may well be that they are concerned about the validity of the licence or the identification of the person presenting it:<sup>23</sup>

‘If a person is stopped and they say one name and the check shows another legal name or gender, the initial reaction is “they lied to me”. Strike one and it becomes an interrogation.’

Although the requirement for sex or gender information to be collected and recorded on the DLR is authorised by legislation, there is no statutorily mandated way of gathering this information. The NZTA was aware that inconsistency of processes to changing sex or gender details might expose the Agency to challenges under the Human Rights Act 1993 (NZ). The NZTA also ‘looked to the Yogyakarta Principles which show that human rights approaches internationally are now steering toward individuals self declaring their gender identity’.<sup>24</sup> As a consequence, changes to the sex or gender details on the DLR are now possible without needing to provide an amended birth certificate. The options are ‘male’, ‘female’ or ‘indeterminate’. This is an administrative process that can be undertaken at any NZTA agency (available in all cities and major towns in New Zealand). There is no charge for changing sex details on the DLR at any time. If this is done when a person is renewing their licence, the usual renewal fee applies.

### **Citizenship and evidentiary certificates**

Citizenship certificates, issued when a person has been granted citizenship, may be issued with the sex classification different from the sex on the applicant’s birth certificate in two situations. First, if the applicant has a Family Court declaration (under section 28 of the

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experience of Joey Macdonald (reported in S. COLLINS, ‘X marks the spot on passport for transgender travellers’ *The New Zealand Herald*, Auckland, 5 December 2012).

<sup>22</sup> HUMAN RIGHTS COMMISSION, above n. 2, para. 6.10.

<sup>23</sup> HUMAN RIGHTS COMMISSION, above n. 2, para. 6.10.

<sup>24</sup> Email from Charmaine Berry, NZTA, 30 July 2013, on file with the authors.

BDMRRA) or second, if ‘the applicant has provided a court order or other official documentation from another country recognising the gender identity they are currently maintaining, which is assessed as being suitable’.<sup>25</sup> This process is therefore similar to the requirements for changing sex details on a birth certificate.

Following the 2009 amendment to the BDMRRA,<sup>26</sup> those who are citizens or have the right to remain in New Zealand indefinitely (a permanent resident, for example) may apply for a declaration that, if granted, will allow for the citizenship certificate to reflect their nominated sex. However, if the granting of citizenship precedes the application of a declaration, a person may apply for an *evidentiary* certificate that will record their nominated sex, but their citizenship certificate cannot be changed retrospectively. Regulation 15 of the Citizenship Regulations 2002 provides that access to the details about a person held on the citizenship register is limited to the person themselves, or for public interest reasons (see regulation 15(2)).

The position is somewhat different with regard to those who wish to have no indication of sex on their citizenship certificate. In such a case, prior to the granting of citizenship, a person who is of indeterminate sex or intersex may apply to have no sex recorded on the certificate. A person who has changed their name to one suitable to a member of their nominated sex, or has a unisex name, and produces a statutory declaration that they live as a member of the nominated sex, may also have a citizenship certificate issued with no indication of sex. However, such certificates may not necessarily be accepted by the NZTA as the basis for changing details on the driver licence register – their publicised policy regarding acceptable evidence of identity notes that ‘[citizenship or evidentiary] certificates that do not confirm your name, date of birth, *gender* and effective date of citizenship will not be accepted’ (emphasis added).

A citizenship or evidentiary certificate may also be issued showing indeterminate or intersexed in the sex field if that appears on the person’s birth certificate, or ‘if the applicant has provided both a statutory declaration and a medical certificate or records confirming that the applicant is of indeterminate sex or intersex’.

Pursuant to regulation 15, any statutory declaration will be kept on the person’s file, along with their application for citizenship, and may only be accessed by the person themselves or by state officials (such as border control agents) in limited circumstances.

##### 5. *Regulation of the sexual identity:*

The decision in the English case of *Corbett v Corbett*,<sup>27</sup> in which it was held that sex is defined at birth, was influential throughout the common law world, including New Zealand.

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<sup>25</sup><[www.dia.govt.nz/diawebsite.nsf/Files/Citpol15Transgendercitapp/\\$file/Citpol15Transgenderandintersexcitapp.pdf](http://www.dia.govt.nz/diawebsite.nsf/Files/Citpol15Transgendercitapp/$file/Citpol15Transgenderandintersexcitapp.pdf)> accessed 18.12.2013.

<sup>26</sup> Section 27A, which extended the definition of eligible adult for the purposes of section 28, was inserted, as from 24 January 2009, by [section 15](#) of the Births, Deaths, Marriages, and Relationships Registration Amendment Act 2008.

<sup>27</sup> [1970] 2 All ER 33.

This decision was widely criticised and five years later, in *Re T*,<sup>28</sup> the notion that legal sex could not be changed was challenged in a New Zealand court. T, who was born male but had lived as a female for at least 16 years, sought a declaratory judgment from the High Court to require the Registrar-General to change her recorded sex from male to female. She had undergone ‘sex conversion’ surgery some years’ prior and, according to medical evidence, could be regarded as female in all respects except for genetic sex and lack of female reproductive organs.<sup>29</sup> While the Judge expressed sympathy with T’s position, he found that there was no jurisdiction to do so under the Declaratory Judgments Act 1908, nor was there any statute that could be invoked in the applicant’s favour.<sup>30</sup> There was no legal procedure in New Zealand by which an applicant could obtain a declaration as to their sex.

Although T’s application was not successful, the case did provide a starting point for public and judicial consideration of the status of trans people in New Zealand. The early 1990s saw a number of related cases before the courts. These cases reflected changing attitudes towards the place of trans people in New Zealand. *M v M*<sup>31</sup> and *Attorney-General v Family Court at Otahuhu*<sup>32</sup> concerned the position of trans people in relation to marriage. These cases established that where a person had undergone full gender reassignment surgery they could enter a marriage as a person of their acquired sex, suggesting that legal change of sex was possible. However, emphasis was placed on the appearance of a person’s genitals as a significant determinant of sex,<sup>33</sup> which necessarily excluded the overwhelming majority of trans people who have not had those medical interventions.

The Births, Deaths and Marriages Registration Act,<sup>34</sup> first introduced in 1989 and passed in 1995, made statutory provision for trans people who wished to change their legal sex. This provision was arguably the most controversial in the Bill, and went through several iterations. Much debate in Parliament focused on its operation and effects.<sup>35</sup> Overwhelmingly, however, the response to the proposed provision was positive and the significance of the reform to the lives of trans people in New Zealand was widely recognised.

### **Birth certificate**

Changing the sex or gender details on a birth certificate of an adult (aged 18 and over) requires an application to the Family Court, pursuant to section 28 of the BDMRRA,<sup>36</sup> which provides:

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<sup>28</sup> [1975] 2 NZLR 449 (HC).

<sup>29</sup> *Re T*, Above n. 11, p. 450.

<sup>30</sup> *Re T*, Above n. 11, p. 453.

<sup>31</sup> [1991] NZFLR 337. See also R. MACKENZIE, ‘Transsexuals’ Legal Status and Same Sex Marriage in New Zealand: *M v M*’ (1992) 7 Otago LR 556.

<sup>32</sup> [1995] 1 NZLR 603, [1995] NZFLR 57 (HC). See also A. ALSTON ‘Transgender Rights as Legal Rights’ (1999) 7 *Canterbury Law Review* 329.

<sup>33</sup> *Attorney-General v Family Court at Otahuhu*, above n. 15, p. 607 and 631.

<sup>34</sup> The name of the Act was changed to the Births, Deaths, Marriages and Relationship Registration Act 1995, as from 24 January 2009. See further 3.1.2.1 below.

<sup>35</sup> (5 December 1989) 503 NZPD 14017 - 1408; (15 May 1990) 507 NZPD 1537 - 1540.

<sup>36</sup> The relevant provision for those under 18 is section 29 of the BDMRRA.

(1) Subject to subsection (3) of this section, a Family Court may, on the application of [an eligible adult (the **applicant**)], declare that it is appropriate that birth certificates issued in respect of the applicant should contain the information that the applicant is a person of a sex specified in the application (in subsection (3) of this section referred to as the nominated sex).

[(2) The Court must cause a copy of the application to be served on—

(a) the Registrar-General, if the applicant's birth is registered or is registrable under this Act but is not yet registered; and

(b) any other person who, in the Court's opinion, is interested in it or might be affected by the granting of the declaration.]

(3) The Court shall issue the declaration if, and only if,—

(a) It is satisfied [either that the applicant's birth is registrable under this Act but is not yet registered, or that there is included in the record] of the applicant's birth—

(i) Information that the applicant is a person of the sex opposite to the nominated sex; or

(ii) Information that the applicant is a person of indeterminate sex; or

(iii) No information at all as to the applicant's sex; and

(b) It is satisfied that the applicant is not a person of the nominated sex, but—

(i) Has assumed and intends to maintain, or has always had and intends to maintain, the gender identity of a person of the nominated sex; and

(ii) Wishes the nominated sex to appear on birth certificates issued in respect of the applicant; and

(c) Either—

(i) It is satisfied, on the basis of expert medical evidence, that the applicant—

(A) Has assumed (or has always had) the gender identity of a person of the nominated sex; and

(B) Has undergone such medical treatment as is usually regarded by medical experts as desirable to enable persons of the genetic and physical conformation of the applicant at birth to acquire a physical conformation that accords with the gender identity of a person of the nominated sex; and

(C) Will, as a result of the medical treatment undertaken, maintain a gender identity of a person of the nominated sex; or

(ii) It is satisfied that the applicant's sexual assignment or reassignment as a person of the nominated sex has been recorded or recognised in accordance with the laws of a state for the time being recognised for the purposes of this section by the Minister by notice in the *Gazette*.

The leading authority regarding the application of section 28 is *'Michael' v Registrar-General of Births, Deaths and Marriages*.<sup>37</sup> In this case, Judge Fitzgerald in the Auckland Family Court held that the following requirements must be satisfied in order for the applicant to be successful:<sup>38</sup>

- (a) that the applicant must be 18 years of age or older (s 28(1) and s 27A);
- (b) that the application has been served on the Registrar-General (s 28(2));
- (c) that the Court is satisfied that the applicant's birth registration includes information that the applicant is a person of the sex opposite to the nominated sex (being the gender which the applicant wishes to adopt) (s 28(3)(a));
- (d) that medical evidence is necessary to establish that:
  - (i) the applicant has assumed the gender identity of the nominated sex;
  - (ii) the applicant has undergone medical treatment, both psychological and surgical, of a type regarded by medical experts as desirable to obtain a physical confirmation with the gender identity of the nominated sex. It is not necessary that every possible medical intervention has been undertaken but, on a cases by case basis, sufficient treatment as in the opinion of medical experts is desirable to achieve a physical change of identity;
  - (iii) that as a result of the medical treatment undertaken, the new gender identity will be maintained by the applicant (s 28(3)(c)).
- (e) that the applicant has assumed and intends to maintain, or has always has and intends to maintain, the gender identity of the nominated sex and wishes that to appear on their birth certificate (s 28(3)(b)).

It is the inquiry in section 28(3)(c)(i)(B), that the applicant 'has undergone such medical treatment as is usually regarded by medical experts as desirable to enable persons of the genetic and physical conformation of the applicant at birth to acquire a physical conformation that accords with the gender identity of a person of the nominated sex', which has caused the most concern for trans people. Many of those who made submissions to the Transgender Inquiry thought this part of the test meant that they needed to have undergone 'full gender reassignment surgery'.<sup>39</sup> This was also the view of the Department of Internal Affairs who told the Inquiry that their understanding was that 'full gender reassignment surgery is required.'<sup>40</sup> If that was the case, this would be an impossible test for most trans people to

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<sup>37</sup> (2008) 27 FRNZ 58. See commentary of the case in N. SEUFFERT, 'Case Comment: *'Michael' v Registrar-General of Births, Deaths and Marriages*' (2009) 17 Waikato Law Review 115 and P.R.H.WEBB, 'Case Note: Getting a new birth certificate' (2008) 6 NZFLR (*New Zealand Family Law Review*) 110.

<sup>38</sup> As set out and applied in *KRM v Registrar-General of Births, Deaths and Marriages of Wellington* FAM New Plymouth, FAM 2009-043-82, 1 April 2009, para. 4.

<sup>39</sup> HUMAN RIGHTS COMMISSION, above n. 2, para. 6.21.

<sup>40</sup> HUMAN RIGHTS COMMISSION, above n. 2, para. 6.54.

meet. Most surgeries are not available in New Zealand, or are too costly, medically unnecessary or undesirable.<sup>41</sup>

‘I can’t change [my birth certificate] legally until I have had all surgeries deemed necessary, which for transguys is no mean feat if it includes “lower” surgery. We can’t get that done in New Zealand, most of us don’t have [the] \$50 - \$100k needed to do it overseas, it can involve as many as five risky operations with very variable outcomes, and many of us will never choose to have it. In short, I’m convinced that this criteria was set only with reference to MtFs. No one else is legally defined by surgery.’

‘*Michael*’ was decided six months after the report of the Transgender Inquiry was published. Judge Fitzgerald, after considering the legislative history of the section (which included the deletion of the original reference to ‘surgical’ procedures), concluded that ‘Parliament did not intend an applicant should necessarily have to undergo all available surgical procedures, including full genital surgery, to satisfy the test under the section.’ All that is required is ‘some degree of permanent physical change as a result of the treatment ... received.’<sup>42</sup> The Judge also noted that during the Third Reading of the Bill, Richard Northey MP stated:<sup>43</sup>

‘The select committee ... recognised that it was principally a psychological, rather than a surgical, matter of identification, and to require people to go through the full gamut of very expensive surgery in order simply to have themselves recorded on their birth certificate as being the sex with which they identify was inappropriate.’

Since ‘*Michael*’ there have been a number of cases in which trans people who have not undergone any surgery, or no genital surgery,<sup>44</sup> have been successful in obtaining a declaration under section 28. In May 2012 Judge Hikaka noted that ‘the applicant cannot afford full genital surgery but such surgery is not a mandatory requirement’.<sup>45</sup> He accepted the endocrinologist’s evidence that the effects of long-term hormone treatment were irreversible and had ‘brought her measurements completely into the normal female range.’<sup>46</sup> The Family Court has also acknowledged that the ‘surgical procedure for the artificial construction of a penis, known as phalloplasty, is still quite imperfect, and is unlikely to have a suitable result’.<sup>47</sup> Although sometimes the applicant is due to have surgery in the future, either in New Zealand or overseas, the fact that this is yet to occur has not deterred the judge from making the declaration.<sup>48</sup>

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<sup>41</sup> HUMAN RIGHTS COMMISSION, above n. 2, para. 6.22.

<sup>42</sup> ‘*Michael*’, above n.64, para. 50.

<sup>43</sup> (28 March 1995) 547 NZPD 6465.

<sup>44</sup> See *KRM v Registrar-General of Births, Deaths and Marriages of Wellington*, above n.65 (FtM); *H v Registrar-General of Births, Deaths and Marriages* FAM Waitakere, FAM 2009-090-2000, 21 September 2010 (MtF); *MMT v Registrar-General of Births, Deaths and Marriages* [2012] NZFC 3533, 15 May 2012 (MtF); *DAC v Registrar-General of Births, Deaths and Marriages* [2013] NZFC 1998, 13 March 2013 (MtF).

<sup>45</sup> *MMT v Registrar-General of Births, Deaths and Marriages*, above n.71, para. 7.

<sup>46</sup> *MMT v Registrar-General of Births, Deaths and Marriages*, above n.71, para. 4.

<sup>47</sup> *KRM v Registrar-General of Births, Deaths and Marriages of Wellington*, above n.65, para. 9.

<sup>48</sup> *H v Registrar-General of Births, Deaths and Marriages*, above n.71, para. 28.

In the most recent publicly accessible case, decided 13 March 2013, Judge Russell made the declaration sought and held:<sup>49</sup>

‘The Court needs to be satisfied that the person has lived their life in this way for a sufficient period of time that it can be confident that there is no sudden urge about making the application which may be later regretted or that an applicant is likely to change his/her mind. *Evidence of gender re-assignment surgery having been undertaken, while helpful, is not an essential pre-requisite for such an application being granted.*’

## Passports

In response to concerns expressed to the Transgender Inquiry and the recommendations made in the final report,<sup>50</sup> as of 1 December 2012 a passport may now be issued in a person’s nominated sex without the need for a change to their birth certificate. This is an administrative process undertaken after the person has made a relevant statutory declaration. This must include which sex or gender identity is preferred for inclusion in the passport and how long the current sex or gender identity has been maintained. As with a driver’s licence there is nothing stated in the publicly available information regarding a minimum time for a person to have ‘maintained’ their nominated sex or gender.

Those under the age of 18 must provide additional information, namely a declaration from a parent or legal guardian and from a registered counsellor / medical professional supporting this change. The choices for the sex recorded are ‘M’, ‘F’ or ‘X’ (meaning indeterminate or unspecified). The latter option may be preferred by trans people or are either early on in their transition or who do not wish to identify as either male or female. It may also be a preferred option for some intersex people.

Prior to this policy change, trans people who had not had the details on their birth certificate changed could only request an ‘X’ (or a ‘ – ‘ prior to 2005) as the sex data on their passport, in line with the International Civil Aviation Organisation (ICAO) specifications for a symbol for unspecified sex.<sup>51</sup> This was also done by a statutory declaration stating how long the person had ‘lived as a member of the opposite sex’ and they must have changed their name to a name ‘more suitable to a member of the opposite sex, or have a unisex name’.<sup>52</sup> The Transgender Inquiry was told that although access to the X (or dash) option was a progressive step for those transitioning or wanting to identify as androgynous or gender neutral, it was not always a safe option for travel into some countries:<sup>53</sup>

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<sup>49</sup> *DAC v Registrar-General of Births, Death and Marriages*, above n.71, para.12 (emphasis added).

<sup>50</sup> HUMAN RIGHTS COMMISSION, above n. 2, para. 9.50: ‘Simplify the requirements for changing sex details on a birth certificate, a passport or other documents to ensure consistency with the Human Rights Act’.

<sup>51</sup> HUMAN RIGHTS COMMISSION, above n. 2, para. 6.12.

<sup>52</sup> J.F. VEALE, ‘Prevalence of transsexualism among New Zealand passport holders’, (2008) 42 Aust NZ L Psychiatry 887, 888.

<sup>53</sup> HUMAN RIGHTS COMMISSION, above n. 2, para. 6.16. The main ongoing issue seems to be at the checking-in stage for those travelling on X passports – as airlines’ computer systems often only accept an M or F option – and not all countries are members of the IACO. See however the more recent unexceptional experience of Joey Macdonald (reported in S. COLLINS, ‘X marks the spot on passport for transgender travellers’ *The New Zealand Herald*, Auckland, 5 December 2012).

These administrative changes must be seen in the wider context of technological advances regarding facial recognition programmes and the use of fingerprinting at borders. In such a context, identifying people by their sex or gender is less significant. In fact, New Zealand departure and arrival information documentation no longer requires a person to fill out either their name or their sex details – only their passport number.

## **Driver licences**

On 13 June 2013, the New Zealand Transport Agency (NZTA) announced its new policy with regard to sex or gender identity records for driver licences. Although New Zealand licences do not include sex details, this information has always been held on the national Driver Licence Register (DLR), which can be accessed by police officers when requested. This information has historically matched what is on the person's birth certificate. As a consequence, a person stopped by the police who has a male name and appearance may be recorded as female on the register.<sup>54</sup> Once the officer finds this out, it may well be that they are concerned about the validity of the licence or the identification of the person presenting it:<sup>55</sup>

‘If a person is stopped and they say one name and the check shows another legal name or gender, the initial reaction is “they lied to me”. Strike one and it becomes an interrogation.’

Although the requirement for sex or gender information to be collected and recorded on the DLR is authorised by legislation, there is no statutorily mandated way of gathering this information. The NZTA was aware that inconsistency of processes to changing sex or gender details might expose the Agency to challenges under the Human Rights Act 1993 (NZ). The NZTA also ‘looked to the Yogyakarta Principles which show that human rights approaches internationally are now steering toward individuals self declaring their gender identity’.<sup>56</sup> As a consequence, changes to the sex or gender details on the DLR are now possible without needing to provide an amended birth certificate. The options are ‘male’, ‘female’ or ‘indeterminate’. This is an administrative process that can be undertaken at any NZTA agency (available in all cities and major towns in New Zealand). There is no charge for changing sex details on the DLR at any time. If this is done when a person is renewing their licence, the usual renewal fee applies.

In order to change the sex or gender details on the driver licence register (DLR) a person can either provide confirmation of the gender they wish to have recorded by presentation of an original ‘evidence of identity’ document, which states that gender.<sup>57</sup> Evidence of identity includes a birth certificate, passport or certificate of citizenship. If the gender on the document does not match the one the person wishes to appear on the DLR then they must also provide an original statutory declaration, in the form provided on the website (Form

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<sup>54</sup> HUMAN RIGHTS COMMISSION, above n. 2, para. 6.10.

<sup>55</sup> HUMAN RIGHTS COMMISSION, above n. 2, para. 6.10.

<sup>56</sup> Email from Charmaine Berry, NZTA, 30 July 2013, on file with the authors.

<sup>57</sup> <[www.nzta.govt.nz/licence/renewing-replacing/replacing-changing.html](http://www.nzta.govt.nz/licence/renewing-replacing/replacing-changing.html)> accessed 18.12.2013.

DLR25). The declaration must state the gender the person wishes to have recorded on the DLR and the period of time they have maintained their gender – however none of the policy documents publicly available indicate a particular period of time is required for the change in gender to be recorded.<sup>58</sup> The declaration also allows amendment of the sex or gender information on the motor vehicle register. The making of the declaration must be witnessed in the usual way by a Justice of the Peace, Member of Parliament, lawyer, a registered legal executive or any Government officer authorised to take statutory declarations.

Applicants under the age of 18 must also provide two further statutory declarations. One from their parent or guardian which documents their support of the applicants change of gender identity on the DLR, and one from a registered counsellor or medical professional in support of the change.

### **Citizenship and evidentiary certificates**

Citizenship certificates, issued when a person has been granted citizenship, may be issued with the sex classification different from the sex on the applicant's birth certificate in two situations. First, if the applicant has a Family Court declaration (under section 28 of the BDMRRA) or second, if 'the applicant has provided a court order or other official documentation from another country recognising the gender identity they are currently maintaining, which is assessed as being suitable'.<sup>59</sup> This process is therefore similar to the requirements for changing sex details on a birth certificate.

Following the 2009 amendment to the BDMRRA,<sup>60</sup> those who are citizens or have the right to remain in New Zealand indefinitely (a permanent resident, for example) may apply for a declaration that, if granted, will allow for the citizenship certificate to reflect their nominated sex. However, if the granting of citizenship precedes the application of a declaration, a person may apply for an *evidentiary* certificate that will record their nominated sex, but their citizenship certificate cannot be changed retrospectively. Regulation 15 of the Citizenship Regulations 2002 provides that access to the details about a person held on the citizenship register is limited to the person themselves, or for public interest reasons (see regulation 15(2)).

The position is somewhat different with regard to those who wish to have no indication of sex on their citizenship certificate. In such a case, prior to the granting of citizenship, a person who is of indeterminate sex or intersex may apply to have no sex recorded on the certificate. A person who has changed their name to one suitable to a member of their nominated sex, or has a unisex name, and produces a statutory declaration that they live as a member of the nominated sex, may also have a citizenship certificate issued with no indication of sex. However, such certificates may not necessarily be accepted by the NZTA as the basis for

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<sup>58</sup> Representatives of New Zealand Transport Agency and the Department of Internal Affairs have both stated there is no minimum time period – although if this is the case, the requirement that it is specified is otiose.

<sup>59</sup> <[www.dia.govt.nz/diawebsite.nsf/Files/Citpol15Transgendercitapp/\\$file/Citpol15Transgenderandintersexcitapp.pdf](http://www.dia.govt.nz/diawebsite.nsf/Files/Citpol15Transgendercitapp/$file/Citpol15Transgenderandintersexcitapp.pdf)> accessed 18.12.2013.

<sup>60</sup> Section 27A, which extended the definition of eligible adult for the purposes of section 28, was inserted, as from 24 January 2009, by section 15 of the Births, Deaths, Marriages, and Relationships Registration Amendment Act 2008.

changing details on the driver licence register – their publicised policy regarding acceptable evidence of identity notes that ‘[citizenship or evidentiary] certificates that do not confirm your name, date of birth, *gender* and effective date of citizenship will not be accepted’ (emphasis added).

A citizenship or evidentiary certificate may also be issued showing indeterminate or intersexed in the sex field if that appears on the person’s birth certificate, or ‘if the applicant has provided both a statutory declaration and a medical certificate or records confirming that the applicant is of indeterminate sex or intersex’.

6. *Gender-neutral and/or “third-sex”:*

[**Note to editor:** Already discussed above where relevant.]

7. *Access to treatments:*

The Report of the Transgender Inquiry summarised trans people’s experience of health services, including those related to gender reassignment in the following words:

‘Trans people and health professionals consistently raised the difficulties trans people have in obtaining general health services and being treated with dignity and respect when they did use them. The Inquiry has identified major gaps in availability, accessibility, acceptability and quality of medical services required by a trans person seeking to transition. The provision of public health services is patchy and inconsistent. Trans people and health professionals need to work together to address these issues.’

The Reports’ health recommendations focused on providing clear information about gender reassignment health services available regionally through the public health system, developing treatment pathways and agreed standards of care, and looking into absence of health insurance coverage for trans people. In response to the concerns expressed by trans people and clinicians, in 2009 Counties Manukau District Health Board was funded to manage a national project looking at gender reassignment health services for trans people in New Zealand.<sup>61</sup> The project’s work, *Good Practice Guide for Health Professionals* (‘the Guide’) was available online on 2 August 2011,<sup>62</sup> and a slightly revised version was published in May 2012 by the Ministry of Health.<sup>63</sup> The Guide, although now considered to be out of date as primarily based on the World Professional Association of Transgender Health Standards (WPATH) which existed at the time, does provide a readily accessible

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<sup>61</sup> See further background and information about the consultation process at: <[www.hrc.co.nz/human-rights-environment/action-on-the-transgender-inquiry/health-of-trans-people](http://www.hrc.co.nz/human-rights-environment/action-on-the-transgender-inquiry/health-of-trans-people)> accessed 19.12.2013.

<sup>62</sup> <[www.health.govt.nz/publication/gender-reassignment-health-services-trans-people-within-new-zealand](http://www.health.govt.nz/publication/gender-reassignment-health-services-trans-people-within-new-zealand)> accessed 19.12.13. This publication is due for revision in two years’ time.

<sup>63</sup> <[www.health.govt.nz/system/files/documents/publications/gender-reassignment-health-services-for-trans-people-nz-2012-v2.pdf](http://www.health.govt.nz/system/files/documents/publications/gender-reassignment-health-services-for-trans-people-nz-2012-v2.pdf)> accessed 19.12.2013.

resource for trans people and medical professionals regardless of which Health Board area of the country they live in.

The Guide confirms that four types of hormone interventions are publicly funded, while the initial diagnosis to allow hormones to be prescribed may involve referral to a mental health practitioner, which is typically not funded.<sup>64</sup> This initial assessment is likely to be expensive and is therefore a significant barrier to many trans people. In New Zealand, as elsewhere, there is also concern that a diagnosis of Gender Identity Disorder is routinely required in order for hormone treatment to be available.<sup>65</sup>

With regard to surgeries, only some are regularly performed in public hospitals within New Zealand – such as chest reconstruction, hysterectomy and orchidectomy. However, trans people often struggle to be prioritised on waiting lists. In September 2013 the only surgeon currently providing chest reconstruction to trans men through the public health system announced this procedure would no longer be available in Auckland, New Zealand’s largest city.<sup>66</sup>

There is limited state funding available for genital surgeries through the Special High-Cost Treatment Pool,<sup>67</sup> which is public funding for treatments not available through the public health system. Every two years it provides for up to three surgeries for trans women and one for a trans man. The historical backlog of people requiring such surgeries, and the growing size of the trans community, mean people face years on a waiting list with no guarantee their surgery will ever be funded. A large proportion of trans people who want to have genital surgery therefore choose to travel overseas, which is an expensive option.<sup>68</sup> Virtually no gender affirming health services required by trans people are covered by health insurers in New Zealand.<sup>69</sup>

## 8. *Current discussions:*

[**Note to editor:** See also the discussion of the HRA at part 3 above]

The Report of the Transgender Inquiry recommended that the ‘physical conformity’ threshold in section 28 of the BDMRRA be replaced with the requirement that a person has ‘taken decisive steps to live fully and permanently in the gender identity of the[ir] nominated sex’.<sup>70</sup> This recommendation did not stipulate any specific medical interventions but would still have been dependent on the evidence of expert medical witnesses as that is the

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<sup>64</sup> HUMAN RIGHTS COMMISSION, above n. 2, para. 5.23. Nor are other important procedures, such as hair removal, publicly funded: para. 5.28.

<sup>65</sup> HUMAN RIGHTS COMMISSION, above n. 2, para. 5.21.

<sup>66</sup> <[www.gayexpress.co.nz/2013/09/top-surgery-no-longer-offered-by-auckland-surgeon](http://www.gayexpress.co.nz/2013/09/top-surgery-no-longer-offered-by-auckland-surgeon)> accessed 19.12.2013.

<sup>67</sup> HUMAN RIGHTS COMMISSION, above n. 2, paras. 5.88 – 5.95; <[www.health.govt.nz/our-work/hospitals-and-specialist-care/high-cost-treatment-pool](http://www.health.govt.nz/our-work/hospitals-and-specialist-care/high-cost-treatment-pool)> accessed 19.12.2013.

<sup>68</sup> HUMAN RIGHTS COMMISSION, above n. 2, paras. 5.44-5.45.

<sup>69</sup> HUMAN RIGHTS COMMISSION, above n. 2, para. 5.55.

<sup>70</sup> HUMAN RIGHTS COMMISSION, above n. 2, para. 9.50.

framework of the BDMRRA. Since the Transgender Inquiry there has been considerable debate internationally by courts, governments, human rights experts, health professionals and trans people about trans people's right to define their gender identity, the medical pathologisation of gender diversity and legal gender recognition. In New Zealand this has seen trans people increasingly arguing that sex details on birth certificates should be able to be changed in the same way that passports are: that is, by self-identification and without the need for medical or surgical intervention. The NZ Human Rights Commission facilitated the Passports Office's consultation with trans communities about this proposed policy change and welcomed this new focus on self-defined gender identity.

Recently the Aotearoa New Zealand's Sexual Orientation, Gender Identity and Intersex (SOGII) UPR Coalition 2013 made a submission to the United Nations' 2014 Universal Periodic Review (UPR) of New Zealand's human rights record.<sup>71</sup> Both that submission and one made by a coalition member, GenderBridge,<sup>72</sup> highlighted the importance of 'depathologising' gender diversity, drawing on the international context, particularly the Yogyakarta Principles.

The SOGII Coalition's concerns have been included in the Office of the High Commissioner for Human Rights (OHCHR) compilation documents for New Zealand's second UPR. These are the two documents that, together with the government's report, will be taken into account when the government's human rights performance is considered during the 18th Session of the UPR Working Group in Geneva in January 2014:<sup>73</sup>

'GenderBridge (GB) reported on New Zealand's health system failing to respond to the needs of gender diverse populations. *GB made recommendations to remove any requirement to undergo medical procedures to acquire legal recognition of gender identity ... ANZSOGII/JS3 recommended prioritising improving data collection about sex, gender and sexually diverse people's use of health services and their health outcomes.*'

The SOGII Coalitions comments on the NZ government's draft UPR report resulted in the final submitted report including the following acknowledgment: 'The Ministry of Health changed its guidelines on the availability of gender reassignment surgery in 2011 but work still remains to ensure equitable access to health services and outcomes for transgender people.'<sup>74</sup>

ITANZ (the Intersex Trust Aotearoa New Zealand) has also called on the government, in its submission on New Zealand's draft periodic report on the Convention Against Torture, to 'remove any requirement to undergo or intend to undergo medical or surgical procedures,

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<sup>71</sup> <[www.hrc.co.nz/wp-content/uploads/2013/08/SOGII-Coalition\\_joint-UPR-submission\\_New-Zealand\\_Jan-Feb-2014-with-appendices.doc](http://www.hrc.co.nz/wp-content/uploads/2013/08/SOGII-Coalition_joint-UPR-submission_New-Zealand_Jan-Feb-2014-with-appendices.doc)> accessed 18.12.2013.

<sup>72</sup> <[www.hrc.co.nz/wp-content/uploads/2013/08/Submission-on-Depathologising-Gender-Diversity-in-New-Zealand.docx](http://www.hrc.co.nz/wp-content/uploads/2013/08/Submission-on-Depathologising-Gender-Diversity-in-New-Zealand.docx)> accessed 18.12.2013.

<sup>73</sup> <[www.converge.org.nz/pma/A-HRC-WG.6-18-NZL-3-PMA.pdf](http://www.converge.org.nz/pma/A-HRC-WG.6-18-NZL-3-PMA.pdf)> accessed 18.12.2013.

<sup>74</sup> <[www.mfat.govt.nz/downloads/humanrights/New%20Zealand%20UPR%20national%20report%20-%20submitted%20version%20\(3\).pdf](http://www.mfat.govt.nz/downloads/humanrights/New%20Zealand%20UPR%20national%20report%20-%20submitted%20version%20(3).pdf)> para.65, accessed 18.12.2013.

including those that may result in sterilisation, as a prerequisite for changing sex details on a birth certificate or other official document.’<sup>75</sup>

Given that the amendment to the Marriage Act 1955 has removed the requirement to either change a birth certificate in order for a trans person to marry as their nominated sex, or to seek dissolution of their existing marriage as a condition of changing their birth certificate, the way is clear for less stringency in the section 28 (or section 29) process. This point has been recently made in the Australian context:

‘Removing the perceived obstacle of same-sex marriage may enable Parliament and courts to facilitate a more genuinely transformative approach to gender regulation whereby, for example, gender could be self-determined without any medical intervention or treatment.’<sup>76</sup>

There are also calls to repeal section 33 of the BDMRRA, which would ensure that a change to sex details on a birth certificate would have effect for all legal purposes.

At present, however, no legislative reform has been proposed, although a number of opposition Members of Parliament are interested in considering an alternative process. Currently section 28 is flexible enough to accommodate a declaration made in the absence of any requirement to undertake treatment. The concern for the trans community is that interpretation of the section turns on judicial discretion, which may not be consistent or transparent. The Human Rights Commission’s report *Human Rights in NZ 2010* stated these outstanding concerns:<sup>77</sup>

‘New Zealand law does not clearly state that trans people do not need to undergo medical or surgical steps that result in sterilisation in order to change sex details on official documents. Currently, under New Zealand law, a trans person may or may not be required to undergo sterilisation in order to change the sex on their birth certificate. In the *Re Michael* decision, the applicant was able to obtain a male birth certificate without having undergone a hysterectomy. However, the Commission has been informed of other decisions where trans women have been required to show evidence of full sex-reassignment surgery.’

One possibility to ensure consistency of judicial decision-making is for a Practice Note to be issued by the Principal Family Court Judge. These and other advocacy strategies are being actively considered.

A trans woman, born in England, who has obtained a declaration under section 28 of the BDMRRA, has been campaigning for changes to the law that would allow a citizenship certificate to be re-issued to reflect changes to a person’s sex after the certificate was issued. The most recent response from the Minister of Internal Affairs is that this will require an amendment to the Citizenship Act 1977 and that he is unable to indicate ‘when a bill to amend

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<sup>75</sup> Copy on file with the authors, p. 3.

<sup>76</sup> L.GRENFELL and A.HEWITT, ‘Gender Regulation: Restrictive, Facilitative or Transformative Laws?’ (2012) 34 Sydney Law Review 761, 783.

<sup>77</sup> HUMAN RIGHTS COMMISSION, above n.1, p. 319.

the Act will next be on the legislative programme'.<sup>78</sup> However, it should be possible to allow trans people to request an evidentiary certificate to reflect their nominated sex without requiring them to obtain a court order. If this is an available procedure for those who wish to have no sex details recorded, it is unclear why it should not also be possible for those who wish to have sex details changed.

9. *Gays & lesbians and trans:*

[**Note to editor:** Regarding marriage see the next section. As to anti-discrimination legislation see part 3 above.]

10. *Stakes in sex:*

The change focussed on will be the change to the sex details recorded on a person's birth certificate, as this is the change with the most wide-ranging impact. Other changes, to passports or the driver licence register, for example, have significance only in that specific context. The important statutory provision is section 33 of the BDMRRA which provides that '[n]otwithstanding this Part of this Act, the sex of every person shall continue to be determined by the general law of New Zealand'. The effect of this section is that 'the registration of information that the person in question is of the nominated sex does not, per se, determine that person's sex in the eyes of the law in all respects.'<sup>79</sup>

This limitation had particular significance with regard to the ability to marry as a person of the nominated sex.<sup>80</sup> This example was discussed in '*Michael*',<sup>81</sup> where Judge Fitzgerald noted the comments of Ellis J in *Attorney-General v Family Court at Otahuhu*.<sup>82</sup> Ellis J drew a distinction between the recognition of a change of sex on a birth certificate and whether a trans man was a male for the purposes of marriage, although holding that there would be no social advantage in the law not recognising the validity of a marriage 'of a transsexual in a reassignment case'.<sup>83</sup> In '*Michael*' the amicus submitted that 'if the test in [section 28] can be met by a lower threshold than the test for marriage, transsexuals with amended birth certificates' may not be able to marry, only enter into a civil union. She pointed out that 'a [FtM] may live as a male, be socially perceived as a male, and be legally recognised as a male in official identity documents, but only be able to marry as a female.'<sup>84</sup> This was the rather unpalatable effect of the combination of section 28 and section 33.<sup>85</sup>

## **Marriage and civil partnerships**

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<sup>78</sup> Letter to Allyson Hamblett from the Hon Chris Tremain, 23 October 2013, on file with the authors. See also HUMAN RIGHTS COMMISSION, above n. 2, p. 17.

<sup>79</sup> P.R.H.WEBB, above n. 64, p.114.

<sup>80</sup> In fact, it has been the only meaningful example ever provided by the DIA of where section 33 might be a relevant limitation. There is no discussion concerning the scope of the section in the Parliamentary debates.

<sup>81</sup> '*Michael*', above n. 64, para.104.

<sup>82</sup> *Attorney-General v Family Court at Otahuhu*, above n. 15.

<sup>83</sup> *Attorney-General v Family Court at Otahuhu*, above n. 15, p. 607.

<sup>84</sup> '*Michael*', above n 63, para.106.

<sup>85</sup> P.R.H.WEBB, above n. 64, p.115.

On 19 August 2013 section 2 of the Marriage Act 1955 (NZ) came into force which defines marriage as ‘the union of 2 people, regardless of their sex, sexual orientation, or gender identity’. Although much of the public debate focussed on the impact of the change on same-sex couples, the definition in the Act, unlike reforms in many other jurisdictions, also had significance for those who do not identify as male or female, or choose not to do so for the purpose of the legal recognition of their intimate relationship.<sup>86</sup>

This definition is significant as it allows the marriage of any two people, without the need for either person to define themselves as either the same or different sex as their partner, or to be legally recognised as either male or female. The definition therefore allows, for example, a trans man to legally marry a cis woman without having to first establish his legal sex. The definition also allows a person who identifies as intersex and whose birth certificate records their sex as indeterminate to marry any other person. What this reform means is that a change to the sex details on a birth certificate is no longer required before a trans man may marry a cis woman, and even if this step is taken, section 33 of the BDMRRA can no longer prevent the marriage occurring. These couples are no longer limited to the option of a civil union as a marker of their commitment.

With the repeal of section 30(2) of the BDMRRA by section 9 of the Marriage (Definition of Marriage) Amendment Act 2013, trans people who are married no longer need to have their marriages dissolved before changing the sex classification on their birth certificate. Section 30(2) had operated to prevent married people from doing so.<sup>87</sup> There was no similar limitation in place with regard to people in civil unions (which have been permitted for same-sex couples in New Zealand since 26 April 2005).<sup>88</sup>

### **Parental status and responsibilities**

Once a person has changed their sex details on their birth certificate there is no reason they cannot be treated as a mother or father with regard to any children born *after* that process (including their status as such on the child’s birth certificate). However New Zealand law (including rules of succession and testamentary rights) generally draws no material distinction between men and women (or mothers and fathers).

Trans parents report difficulties enforcing their rights as parents, at all stages of their transition, including after changes to legal documents.<sup>89</sup> Anecdotal information suggests that trans men who had their children before transitioning seem to be judged particularly harshly when considering the rights of the child, as they are seen as having denied their child a mother. This particular judgement may well be part of a conservative concern that a child should not have two (gay) male parents. In New Zealand however there are very limited gender-specific rights or obligations attaching to parents on the basis as their status as mother or father.

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<sup>86</sup> See <[jurist.org/forum/2013/05/elisabeth-mcdonald-samesex-marriage.php](http://jurist.org/forum/2013/05/elisabeth-mcdonald-samesex-marriage.php)> accessed 18.12.2013.

<sup>87</sup> This provided: ‘The Registrar-General shall not at any time act under subsection (1) of this section if the person concerned is then lawfully married to a person of the nominated sex’.

<sup>88</sup> HUMAN RIGHTS COMMISSION, above n. 2, para. 6.86.

<sup>89</sup> HUMAN RIGHTS COMMISSION, above n. 2, para. 4.8.

One exception is provided in section 5 of the Status of Children Act 1969 which creates a rebuttable presumption of parenthood. It provides that a child born to a woman during her marriage, or within 10 months after her marriage has been dissolved, shall be presumed to be the child of her husband. If the husband now identifies as a woman, and has completed the section 28 process, she is no longer a ‘husband’ and therefore arguably no longer a ‘father’ for the purposes of section 17 of the Care of Children Act 2004. It is unlikely that guardianship responsibility could be avoided in this way, and section 33 of the BDMRA may have a role to play in this regard.

An unresolved issue for those who have transitioned after the birth of their child, and changed the sex details on their birth certificate, is the inability currently to change their status (from father to mother or vice versa) on their child’s birth certificates.

For those who have chosen not to change their birth certificate, but live in their nominated sex, parental status on the child’s birth certificate may be more problematic, although this issue has yet to arise in New Zealand. For example, if a trans man wishes to be recognised as a parent of a child born while married to the mother of the child it is not clear he could be named as father on the child’s birth certificate. In this situation he may be treated similarly to a non-biological lesbian mother and listed as another parent, not as the father (see section 14 of the Status of Children Act 1969). Guardianship rights and responsibilities would still flow from this recognition however (see Part 2 of the Care of Children Act 2004).

### **Participation in sport**

The sporting exception in the Human Rights Act 1993 that permits sex-segregated sports activity is limited. Section 49(1) of the Human Rights Act, which permits limited discrimination, does not apply if the young person is under 12 (section 49(2)(d)) – therefore the prohibition of discrimination under section 44 applies to young children. The exception also only applies if the sport is a *competitive* sporting activity and one where ‘strength, stamina or physique of competitors’ is relevant.

That competitive advantage would only apply to a trans woman, fa’afafine or whakawahine who has reached puberty *and* is not taking any form of hormone blockers or hormones to counteract the effect of male sex hormones. This is because gender affirming surgeries and/or hormone treatment would reduce her strength and muscle tone.<sup>90</sup>

The Human Rights Commission was involved in resolving an issue that concerned a trans woman who played in a woman’s cricket team:<sup>91</sup>

‘After a game of women’s club cricket, the losing team complained to the local cricket association that the winning team had included a trans woman. It asked that the club’s winning points be taken away. The player’s club supported Anne’s right

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<sup>90</sup> These principles were used in the 2nd Regional Asia Pacific OutGames held in Wellington, New Zealand in March 2011 (Participation Policy, 11 June 2010, on file with the authors).

<sup>91</sup> HUMAN RIGHTS COMMISSION, above n. 1, p. 317.

to play. It asked her to provide information about her gender identity and history playing for another association so it could report back to the local association. Anne contacted the Commission for information about her rights under the Human Rights Act so she could pass this on to her club...

The Commission told Anne the view of the Commission and the Crown Law Office is that trans women are covered under the HRA, as outlined in the Transgender Inquiry report. A trans woman who had taken decisive steps to live as a woman should be recognised as such and should be free from discrimination under the ground of sex. However, the HRA also includes a sport exception, which allows women-only and male-only sports where strength, stamina or physique are relevant. This meant it was necessary to also consider whether other female competitors would be disadvantaged by competing against a trans woman. The Commission told Anne that overseas sporting organisations are increasingly taking into account the impact that taking female hormones for a number of years would have in reducing any competitive advantage a trans woman might have over other women...

The information was passed on to the cricket association, which ruled that Anne was eligible to play and supported her right to do so.'

In those instances where a trans woman or girl wants to play competitive sport and has a physical competitive advantage over other girls because of male hormone levels, mixed netball may be a good option. Ideally a trans girl or woman in that situation would be able to play as a female (wearing a female uniform if the team has different uniforms for girls and boys) but she would be counted as one of the 'male' team members.<sup>92</sup>

### **Criminal liability, bodily searches and imprisonment**

Aside from some competitive sporting contexts and schooling, interaction with the criminal justice process is one of the few areas in New Zealand where sex matters – that is, it is essential to identify as male or female and particular consequences flow from that identification. In some contexts, self-identification is sufficient, but in others it is sex details of the person's birth certificate that will dictate how they will be classified and treated.

With very few exceptions, New Zealand's criminal law is gender neutral. This is arguably the flow-on effect of the Human Rights Commission Consistency 2000 Project, which has resulted in, for example, specific reforms to the sexual offence provisions. The project was set up to discover any conflicts between the Human Rights Act 1993 ('HRA') and Acts and regulations in force in New Zealand, government policies or administrative practices, as required by section 5(1)(i) to (k) of the HRA. The exemption for the Government for non-compliance with the 1993 Act was originally planned to end on 1 January 2000. In May 1998 however the Government announced that rather than introducing permanent exemptions for the government, its policies would be required to comply with the HRA, unless expressly exempted.<sup>93</sup> Legislation and regulations would be considered for any inconsistencies as they

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<sup>92</sup> See also: <[www.hrc.co.nz/wp-content/uploads/2011/11/TGI-Fact-Sheet-A.html](http://www.hrc.co.nz/wp-content/uploads/2011/11/TGI-Fact-Sheet-A.html)> accessed 18.12.2013.

<sup>93</sup> HUMAN RIGHTS COMMISSION, above n.1, p. 311.

came up for review. In 1998 the Cabinet introduced an Amendment Bill to the HRA to give effect to these changes. The Commission however, in line with its statutory obligation, did publish its report in December 1998, commencing with the line, ‘This is the report that the government did not want’.<sup>94</sup>

One of the notable exceptions to gender neutrality is the ‘male assaults female’ assault provision in section 194 of the Crimes Act 1961. This carries a higher penalty than so-called ‘common’ assault (two years imprisonment as opposed to six months).<sup>95</sup> Periodic review and discussion of this section has not resulted in its repeal, with police indicating it is a very valuable charging option in cases of family violence.

Although the specific offence of ‘rape’ was retained as part of the 2005 amendments, as a form of the crime of sexual violation (section 128 of the Crimes Act 1961), the *actus reus* was re-defined as being the ‘penetration of person B’s genitalia by person A’s penis’ (that is, without reference to the sex or gender of the offender or victim).<sup>96</sup> As previously noted, section 2 of the Act defines genitalia as including ‘a surgically constructed or reconstructed organ analogous to naturally occurring male or female genitalia (whether the person concerned is male, female, or of indeterminate sex)’, and ‘penis’ as including ‘a surgically constructed or reconstructed organ analogous to a naturally occurring penis (whether the person concerned is male, female, or of indeterminate sex)’. Prior to these amendments, rape could only occur between a biologically male offender and a biologically female victim.

### *Bodily or strip searches*

Current police policy is that anyone can nominate their gender identity and that will govern who searches them, and will apply where practicable (e.g. if there is a police officer of that sex on duty and it is not an emergency such as when police suspect someone has a weapon). That is, someone of the same sex as the person has identified as will undertake the search. As reported in the Transgender Inquiry: ‘In short, the [various governing police] instructions state that a trans person should be asked which gender they identify with and that due accord be given to their answer where practicable.’<sup>97</sup>

The Inquiry noted that the recently completed Law Commission report, *Search and Surveillance Powers*,<sup>98</sup> did not ‘consider the practical issues for trans people who are searched’.<sup>99</sup> However, following the enactment of the Search and Surveillance Act 2012, the Police Manual on search and surveillance contains internal guidelines, which are applicable in such cases. The guidelines in this context relate to section 126(4) of the Search and Surveillance Act 2012 which provides that a ‘strip search may be carried out only by a person of the same sex as the person to be searched, and no strip search may be carried out in view of any person who is not of the same sex as the person to be searched.’ The Act does not

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<sup>94</sup> HUMAN RIGHTS COMMISSION, *Consistency 2000: Report to the Minister of Justice pursuant to Section 5(1)(k) of the Human Rights Act 1993*, Wellington, New Zealand, 1998, p. 6.

<sup>95</sup> Section 9 of the Summary Offences Act 1981.

<sup>96</sup> Cis women have been convicted of rape under this provision: see *L v R* [2006] 3 NZLR 291 (SC).

<sup>97</sup> HUMAN RIGHTS COMMISSION, above n. 2, para. 4.78.

<sup>98</sup> LAW COMMISSION, *Search and Surveillance Powers*, NZLC, R97, Wellington, 2007.

<sup>99</sup> HUMAN RIGHTS COMMISSION, above n. 2, para. 4.76.

define ‘same sex’, which may ‘cause difficulty when the sex is unclear’.<sup>100</sup> The guidelines state:<sup>101</sup>

‘[T]he search should be undertaken by a person of the same sex as the preferred sex stated by the person to be searched. If a transgender person refuses to state a preference, the sex should be determined on the basis of gender presentation, such as name and clothing. If an intersex person refuses to state a preference, the search should be undertaken by two persons, one of each sex.’

### *Imprisonment*

The Transgender Inquiry highlighted some significant areas of concern for trans prisoners, with a number of trans women reporting that they had been held in a male prison, as consistent with the information on their birth certificate.<sup>102</sup> They told of having to follow male dress codes, as well as being subject to physical and sexual harassment and abuse. Inmates who had not been prescribed hormones prior to sentencing were unable to obtain or continue hormone treatment while in prison. Although the Inquiry did not receive submissions from trans men inmates, trans men did raise concerns ‘about their potential vulnerability within prisons particularly their physical safety within a male prison, but also the extent to which their male gender identity would be recognised if they were sent to a male prison.’<sup>103</sup>

The Department of Corrections advised the Inquiry that at any one time ‘there might be 10 to 20 inmates who were identified as ‘transgender’. All were trans women who were held in men’s prisons.’<sup>104</sup> This number did not include trans women who had changed their sex details on their birth certificate, as they were considered by the Department to be female rather than trans.

In early 2012 the New Zealand Office of the Ombudsman also raised concerns about the treatment of trans women in male prisons.<sup>105</sup> This investigation noted a Health Centre Manager’s comment that ‘abuse [of transgender prisoners] goes unrecorded in male prisons’.<sup>106</sup> Risk of abuse may be managed by voluntary segregation but that can reduce the inmate’s access to prison activities, including rehabilitation programmes. The Office recommended that the Department of Corrections should review ‘its policy regarding the placement of transgender prisoners. For transgender prisoners who have not completed full sexual reassignment, consideration should be given to their placement in a women’s prison,

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<sup>100</sup> W. YOUNG, N. TRENDLE and R. MAHONEY, *Search and Surveillance Act and Analysis*, Brookers, Wellington, 2012, para. SS126.03.

<sup>101</sup> W. YOUNG, N. TRENDLE and R. MAHONEY, above n 102, para. SS126.03.

<sup>102</sup> HUMAN RIGHTS COMMISSION, above n. 2, para. 4.64.

<sup>103</sup> HUMAN RIGHTS COMMISSION, above n. 2, para. 4.67.

<sup>104</sup> HUMAN RIGHTS COMMISSION, above n. 2, para. 8.36.

<sup>105</sup> <[www.ombudsman.parliament.nz/system/paperclip/document\\_files/document\\_files/456/original/own\\_moti\\_on\\_prisoner\\_health.pdf?1349735789](http://www.ombudsman.parliament.nz/system/paperclip/document_files/document_files/456/original/own_moti_on_prisoner_health.pdf?1349735789)> accessed 18.12.2013.

<sup>106</sup> OFFICE OF THE OMBUDSMAN, above n. 107, p. 105.

if it is their wish to do so.’<sup>107</sup> The Department initially did not accept this recommendation.<sup>108</sup> Despite public concern and pressure from the opposition Members of Parliament, the Minister of Corrections remained unwilling to review the policy regarding the treatment of trans prisoners and stated in Parliament on 29 February 2012 that there ‘is no evidence of widespread sexual abuse.’<sup>109</sup> However in December 2012 a trans woman was given a reduction in sentence in recognition of the difficulties she would face in a men’s prison.<sup>110</sup>

On 10 June 2013 the Equal Justice Project, a youth run pro-bono organisation led by students from the Faculty of Law at the University of Auckland, published their report on the treatment of trans prisoners under the Department of Corrections policies, entitled *Transgender Prisoners’ Rights Ignored*.<sup>111</sup> The report argued that the policies were in breach of both domestic and international human rights obligations, including sections 9, 19 and 23 of the New Zealand Bill of Rights Act 1990 and section 21 of the Human Rights Act 1993 (NZ).<sup>112</sup> The report recommended that prisoners should not need to have initiated medical treatment to ‘receive protection and recognition of their gender identity.’<sup>113</sup> Trans prisoners should also be free from harassment and discrimination and should receive ‘the same quality of care as they would expect to receive through the public health service, including counselling, pre-operative and post-operative care, and continued access to hormone treatment.’<sup>114</sup>

On 25 September 2013 the Minister of Corrections, the Hon Anne Tolley, announced a more flexible system would be introduced for trans prisoners, ‘in line with international practice’ and in response to the report of the Office of the Ombudsman. However the only proposed reform is that transgender prisoners whose sex on their birth certificates has not been changed may apply to the Chief Executive to be moved into a prison with their ‘identified gender’.<sup>115</sup> This process does not apply to those serving or facing charges for serious sexual offending. Regulations have yet to be drafted or implemented in accordance with this change of policy, but further indication of the scope was contained in a letter to Jan Logie, a Green MP:<sup>116</sup>

‘In considering ... applications, the Chief Executive will consider a range of factors relating to the prisoner’s commitment to living as a member of their nominated gender, and the safety of that prisoner and other prisoners. Prisoners whose detention relates to a serious sexual offence against a person of their nominated gender ... will not be eligible to apply to the Chief Executive.’

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<sup>107</sup> OFFICE OF THE OMBUDSMAN, above n. 107, Recommendation 27.

<sup>108</sup> OFFICE OF THE OMBUDSMAN *Annual Report of the Ombudsman 2011- 2012* (Wellington, 2012).

<sup>109</sup> (29 February 2012) 677 NZPD 667.

<sup>110</sup> ‘Transgender woman to serve time in male jail’, 19 December 2012, *New Zealand Herald*.

<sup>111</sup> <<http://equaljusticeproject.files.wordpress.com/2013/03/equal-justice-project-transgender-prisoners-rights-ignored-report.pdf>> accessed 18.12.2013.

<sup>112</sup> See also S.F. DEWING, *Women Among Men; Human Rights Jurisprudence and Pre-Operative Male-to-Female Transgender Imprisonment*, MA Thesis, University of Auckland, completed July 2013. On file with the authors.

<sup>113</sup> EQUAL JUSTIC PROJECT, above n.113, p. 22.

<sup>114</sup> EQUAL JUSTIC PROJECT, above n.113, p. 22.

<sup>115</sup> <[www.beehive.govt.nz/release/prison-changes-increase-rehab-and-safety](http://www.beehive.govt.nz/release/prison-changes-increase-rehab-and-safety)> accessed 18.12.2013.

<sup>116</sup> Letter to Jan Logie from Hon Anne Tolley, 25 September 2013, on file with the authors.

This change has been welcomed, but also criticised as not going far enough to address the health and safety issues faced by trans prisoners, including those put in a prison that corresponds to their nominated gender.<sup>117</sup> The Equal Justice Project team also note that cisgender prisoners (those whose gender identity matches the sex they were assigned at birth) convicted of sexual assault ‘do not face secondary punishment by being housed in a prison where their chances of facing assault are disproportionately high’.

There have also been ongoing calls for appropriate diversity training and education for Corrections staff and prison officers. The following information received by the Inquiry is apposite:<sup>118</sup>

‘The Inquiry was approached by a trans woman who had applied to work as a Corrections officer, fully disclosing her gender identity. After passing all stages of the assessment process, her application was declined. She recounted being told that the prison environment would not be safe for a trans officer and that she would not be able to perform strip searches, which were considered an essential part of the role.’

### **Ceremonial titles and practices and gender specific honours**

The highest honour awarded to New Zealand citizens is the title of ‘Sir’ (for men) and ‘Dame’ (for women). No other honours are gender specific. They also vary in that the wife of a Sir may choose to be known as ‘Lady’, whereas there is no equivalent for the husband of a Dame. There is no available information as to whether any person in New Zealand holding this honour changed their nominated sex after receiving the award. Although the title should follow the nominated sex in principle, as this is a bestowed honour it is unclear whether a change to a birth certificate would have this effect of itself.

### **Participation in powhiri: the ability to karanga**

In accordance with tikanga Maori (Maori culture or custom) there is a gender specific role for women as part of a powhiri (the welcoming of visitors onto a marae, which is the meeting place of a tribe or iwi). Karanga is the first stage of the powhiri, which is an exchange of calls that takes place when the visiting group moves onto the marae. Carried out virtually exclusively by women and in te reo (the Maori language), karanga are initiated by the hosts, which is then responded to. It is usual for both kaikaranga (women who carry out the karanga) to address and greet each other and the people they are representing, as well as pay tribute to the dead known by each other and refer to the reason the groups are meeting. There is no restriction on how long the exchange lasts or the number of women involved. However, not all women are skilled in karanga so only a few women may karanga on any one occasion. The exchange usually continues until the visitors have made their way to stand outside the meetinghouse. At this point a final karanga may be given by a host kuia (female elder) to indicate the visitors should be seated.

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<sup>117</sup> See EQUAL JUSTICE PROJECT, ‘Policy changes on transgender prisoners: a step forward’, *LawTalk: Magazine of the New Zealand Law Society*, 22 November 2013, p. 30.

<sup>118</sup> HUMAN RIGHTS COMMISSION, above n. 2, para. 4.71.

The issue as to whether whakawahine are able to karanga was considered by the Human Rights Commission. The following is some background information the Commission has collated on this issue after consultation with its kaiwhakarite (senior Māori staff) and with whakawāhine:<sup>119</sup>

- Some whakawāhine have been taught to karanga by their kuia.
- Kawa (protocol on the marae) varies. Sometimes a whakawahine is able to karanga on a marae in one tribal area but not in another (even if she is linked by whakapapa, or family relationships, to both).
- Purpose is important. A group of whakawahine were able to karanga on a marae because they were bringing someone back from overseas to be buried at home. They were given the blessing of a kuia from that marae to karanga, and that practice continues today.
- Roles are important – a whakawahine who has learnt to karanga is not always the most appropriate person to do so in any given instance – and this may or may not be because of her gender identity.
- In some instances a whakawahine can karanga only if there is another whakawahine on the other side to balance her call.
- Tikanga evolves. Traditionally only widows were able to karanga. Similarly, the requirement to have menstruated and given birth (in order to be able to karanga) is relatively traditional, and often young women do karanga within a school environment.
- There is no ‘right to karanga’. It is about role, purpose, context and competence.
- It is important to create a safe environment where people are aware of tikanga and the dignity and rights of everyone are respected.

### **Gender or sex-specific employment**

The Human Rights Commission have pre-employment guidelines that concern situations where sex is a genuine occupational qualification and how that applies to trans people. This includes advice as to whether a person should disclose that they are transgender in a job interview:<sup>120</sup>

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<sup>119</sup> Provided by the Human Rights Commission, correspondence on file with the author.

<sup>120</sup> HUMAN RIGHTS COMMISSION, *Getting a job: An A to Z for employers and employees*, p. 32. <[www.hrc.co.nz/hrc\\_new/hrc/cms/files/documents/08-Sep-2010\\_11-55-33\\_AtoZPre-emplGuidelines.pdf](http://www.hrc.co.nz/hrc_new/hrc/cms/files/documents/08-Sep-2010_11-55-33_AtoZPre-emplGuidelines.pdf)> accessed 18.12.2013.

‘In most cases it is solely your decision whether you wish to disclose that you are transgender, as your sex or gender identity has no bearing on your ability to do the job. There are some very limited circumstances where it is legal to employ only a woman or a man for a particular position, i.e. being female or male is a genuine occupational qualification. In these limited situations, some transgender people may need to provide evidence about their sex.’

Section 27 of the Human Rights Act 1993 allows discrimination in employment because of the sex of a job applicant or employee:

- . where for reasons of authenticity, being of a particular sex is a genuine occupational qualification or
- . the position is one of domestic employment, or needs to be held by one sex to preserve reasonable standards of privacy or
- . the position is that of a counsellor on highly personal matters such as sexual matters or the prevention of violence.<sup>121</sup>

The Human Rights Commission advises employers that a trans woman, who has legally changed the sex details on her birth certificate to female, is able to apply for jobs that are legally advertised for women only. Similarly, a trans man with a male birth certificate may apply for jobs where being male is a genuine occupational qualification.

In addition, the Human Rights Commission’s policy is that some trans people who have not changed the sex details on their birth certificate may also be able to apply for such jobs. This is possible where the trans woman (or man) can show evidence that they have taken decisive steps to live fully and permanently as a woman (or as a man).

The language ‘taken decisive steps to live fully and permanently’ as a woman or as a man was based on international case law in 2007 when the Report of the Transgender Inquiry was finalised. The pre-employment guidelines are due to be redrafted by the Human Rights Commission.

### **Education (schooling)**

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### **Health and life insurance**

Anecdotal evidence suggests that most trans people are able to assert their affirmed sex, whether or not they have had their birth certificate changed, for the purposes of health and life insurance (and car insurance, which also varies on the basis of sex).<sup>122</sup> This has a

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<sup>121</sup> See further DEPARTMENT OF LABOUR, *Transgender People at Work* <[www.dol.govt.nz/er/minimumrights/transgender/transgenderpeople.pdf](http://www.dol.govt.nz/er/minimumrights/transgender/transgenderpeople.pdf)> accessed 18.12.2013.

<sup>122</sup> One trans woman did report difficulties based on being a perceived higher risk due to having had gender affirming surgery: <[www.hrc.co.nz/hrc\\_new/hrc/cms/files/documents/28-Nov-2008\\_10-45-06\\_TeRitoNov08web.pdf](http://www.hrc.co.nz/hrc_new/hrc/cms/files/documents/28-Nov-2008_10-45-06_TeRitoNov08web.pdf)> accessed 19.12.2013.

tendency to raise premiums across all categories for trans men and lower them for trans women.

11. *Intersex persons:*

[**Note to editor:** Already discussed where relevant/applicable. See also Elisabeth McDonald  
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