

HUMAN RIGHTS COMMISSION POLICY ON THE APPLICATION OF THE HUMAN RIGHTS ACT 1993 TO TRANSGENDER PEOPLE

1. At a meeting of the Human Rights Commission on 24 February 2005 the Commission passed the following resolutions:

That the Commission:

- [i] Adopt a policy that discrimination against transgender people falls within the grounds of sex discrimination in the Human Rights Act 1993 (HRA).
 - [ii] Endorse a policy that the distinction as to whether a transgender person is pre or post-operative should not be determinative of the gender the law should regard the person as having.
 - [iii] Endorse a policy that the provisions of the HRA apply to a transgender person who has commenced, or is somewhere through the process of taking decisive steps to live fully and permanently in the sex opposite to that assigned to them at birth.
2. The resolutions were passed following consideration of a paper prepared by the Commission's Legal Counsel. The paper is reproduced below.

Purposes of the paper

3. The purposes of the paper are:
 - i. To report on research undertaken on the issue of whether the prohibition on sex discrimination in the HRA includes discrimination based on gender dysphoria or transsexualism. [Discrimination against a transgender person is covered by the disability ground. Disability in the HRA is defined to include "psychiatric illness or ... psychological disability ... or any other ... abnormality of psychological, physiological, or anatomical structure or function." The etiology of gender dysphoria or transsexualism is complex and controversial. It is clear that whatever the origins of gender dysphoria or transsexualism are, the definition of disability in the HRA is broad enough to include it. Given that some transgender people object to being labelled as disabled there is a need to consider whether the ground of sex discrimination is applicable.]
 - ii. To recommend that the Commission adopt a policy that discrimination against transgender people falls within the grounds of sex discrimination in the HRA.

- iii. To recommend the HRC endorse a policy that the distinction as to whether a transgender person is pre or post-operative should not be determinative of the gender the law should regard the person as having.
- iv. To recommend the HRC endorse a policy that the provisions of the HRA apply to a transgender person who has commenced, or is somewhere through the process, of taking decisive steps to live fully and permanently in the sex opposite to that assigned to them at birth

Definition of the etiology of adult gender identity disorder & transsexualism

4. In 2002 a UK NGO, the Gender Identity Research and Education Society, and the BCC Transgender Group, a small UK group of transgender people, ran a symposium for medical professionals and leading scientific experts in the field of gender identity disorder and transsexualism who were from the UK, the Netherlands, Belgium, and the USA. The symposium led to the publication of a very short document on the definition and synopsis of the etiology of adult Gender Identity Disorder & transgender. Set out below are 2 very informative extracts:

“Gender Identity Disorder is defined as an incongruence between the physical phenotype and the gender identity, that is, the self-identification as male or female. The experience of this incongruence is termed Gender Dysphoria. The most extreme form, in which individuals need to adapt their phenotype with hormones and surgery to make it congruent with their gender identity, is called transsexualism.”

“In conclusion, transsexualism is strongly associated with the neurodevelopment of the brain. The condition has not been found to be overcome by contrary socialisation, nor by psychological or psychiatric treatments alone. Individuals may benefit from an approach that includes a programme of hormones and corrective surgery to achieve realignment of the phenotype with the gender identity, accompanied by well-integrated psychosocial interventions to support the individual and to assist in the adaptation to the appropriate social role. Treatments may vary, and should be commensurate with each individual’s particular needs and circumstances.”

Research on sex discrimination under the HRA and transgender people

5. I have considered case law from:
 - New Zealand
 - the UK

- Canada
 - Australia
 - the USA
 - the European Court of Justice
 - the European Court of Human Rights along with some statute law.
6. For the sake of brevity I have not reproduced my research paper, 62 pages. That paper is available upon request. I have however set out below my conclusions.

Conclusions in research paper

7. The question addressed in the research paper was:
- “Does the prohibition on sex discrimination in the HRA include discrimination based on gender dysphoria or transsexualism?”
8. The conclusions I reached are set out below.

A post-operative transgender person

9. The answer to the question, does sex discrimination under the HRA include discrimination based on gender identity or transsexualism must be unequivocally yes if the transgender person has successfully undergone gender reassignment surgery. Authority for the answer can be found in the following decisions:
- *M v. M* - Family Court of NZ: 1991
 - *A-G v. Otahuhu Family District Court* - High Court of NZ: 1994
 - *Vancouver Rape Relief Society* - Supreme Court of British Columbia: 2000
 - *Quebec (CDPDJ) C. Maison* - Quebec Human Rights Tribunal: 1998
 - *MT v. JT* - Superior Court of New Jersey: 1976
 - *I v. UK & Goodwin v. UK* - European Court of Human Rights: 2002
 - *Harris* - NSW Court of Criminal Appeal: 1988
 - *SRA* - Full Federal Court of Australia: 1993
 - *Re Kevin* - Family Court of Australia: 2001 & Full Family Court of Australia: 2003

- *KB v. National Health Services Pension Agency* - European Court of Justice: 2004
 - *Chief Constable of West Yorkshire Police v. A* – House of Lords: 2004
 - *Smith v. City of Salem, Ohio* – 6th US Circuit Court of Appeals: 2004.
10. There is a line of authority mainly from the UK and State courts in the USA, which suggests that to discriminate against a post-operative transgender person because they are a member of their assumed sex would not be sex discrimination, see:
- *Kantaras* – 2nd District Court of Appeal of Florida: 2004
 - *Littleton* -Texas Court of Appeals: 1999
 - *Gardiner* -Supreme Court of Kansas: 2002
 - *Menzies* - Victorian Civil and Administrative Tribunal: 2001
 - *Corbett* - Divorce and Admiralty Division of the Probate Court, UK: 1970
 - *Bellinger* - Court of Appeal England & Wales: 2001 & House of Lords: 2003.
11. I am sure that neither the Human Rights Review Tribunal (HRRT) nor the High Court would choose to follow this line of authority, given the NZ decisions to the contrary.

A pre-operative transgender person

12. Should the transgender person not have undertaken gender reassignment surgery the answer to the question is not so unequivocal. There are conflicting lines of authority and judicial remarks on this question.
13. In considering whether the HRRT or the High Court would recognize a pre-operative transgender person regard needs to be had to the policy issue i.e. should it be a Tribunal or a Court granting such recognition or should it be Parliament?
14. In its decision in *Bellinger* the majority of the Court of Appeal of England and Wales recognised that the point at which a change of gender should be recognised is not easily to be ascertained. The majority decision noted:
- “The point at which transsexuals feel they have achieved their change of gender varies enormously.”

15. The majority considered that it was proper for Parliament and not the courts to determine at what point it would be consistent with public policy to recognise that a person should be treated for all purposes, as a person of the opposite sex to that to which they were correctly assigned at birth. In deciding the subsequent appeal the House of Lords was also of the view that it was a matter for Parliament.
16. Courts in Australia in *Harris* and *SRA* grappled with where the line should be drawn on the recognition issue. In both instances the courts ruled that a pre-operative transgender person was not a member of the sex opposite to that correctly assigned to them at birth. The need for a measure of certainty in ascertaining an individual's sex was attractive to Chief Justice Black in *SRA*. In the same case Justice Lockhart considered that there needed to be a harmony between the individual's anatomical sex and social sex. A requirement of reassignment surgery allowed society to acknowledge that an irreversible medical decision has been made confirming the individual's psychological attitude.
17. The Quebec Human Rights Tribunal would recognise a pre-operative transgender person as a member of their adopted sex: see *Quebec (CDPDJ)*.
18. There are comments in more recent Australian decisions which take a different approach to those expressed in *Harris*, *SRA* and *Bellinger*. In its decision in *Re Kevin* the Full Family Court of Australia noted:

"In all of the decided cases to which we have referred their position [the position of pre-operative transsexual persons] has been distinguished from post-operative transsexual persons and comments have been made to the effect that this is a matter for Parliament to determine."

"A question arises as to whether the Courts can logically maintain that the position of post-operative transsexual persons is a matter for them but that of pre-operative transsexual persons is one for Parliament. This has the effect of leaving such persons as the only persons in the community who are prevented from marrying a person who they legitimately regard as a person of the opposite sex, while remaining free to marry a person of their own sex."

"[The] oral submissions [of counsel for HREOC] were relevant to this issue. He said:

"... we would say that the actual nature of the surgical intervention and its achievements may be a factor that could be taken into account - we don't suggest it's irrelevant - but it is not a factor which will be determinative in all cases and may not be of great importance, at all, in some cases."

“He then highlighted that the direction of transition (male to female in contrast with female to male) may give rise to different considerations:

‘...in the circumstances of this case, it is worth accepting that surgical intervention in relation to the removal of gonads maybe relatively straight forward, surgical intervention for a male to female transsexual person in relation to the construction of a vagina may be common place, surgical intervention which requires the construction of a penis is much more problematic and even where it takes place may or may not give rise to something which would be readily accepted as a penis of a sexual kind which has a particular sexual function’.”

19. In his decision of April 2004 in *Re Alex*, which approved a 13YO girl beginning the process of making the transition to being legally recognised as a male, the then Chief Justice of the Family Court of Australia (who was also one of the judges in the Full Family Court decision in *Re Kevin*) commented:

- a) “I consider it is a matter of regret that a number of Australian jurisdictions require surgery as a pre-requisite to the alteration of a transsexual person's birth certificate in order for the record to align a person's sex with his/her chosen gender identity. This is of little help to someone who is unable to undertake such surgery. The reasons may differ but for example in the present case, a young person such as Alex, on the evidence, would not be eligible for surgical intervention until at least the age of 18 years.”
- b) “A requirement of surgery seems to me to be a cruel and unnecessary restriction upon a person's right to be legally recognised in a sex which reflects the chosen gender identity and would appear to have little justification on grounds of principle.”
- c) “The requirement of prior surgery in order to establish the fact that a person is a man for the purposes of a valid marriage was questioned in *Re Kevin*. The Full Court there also noted the submission of [HREOC] that the efficacy of surgical intervention is more problematic where the transition is from female to male.” The relevant part of the submission is set out in para 18 above.
- d) “If one accepts such a submission, a requirement of surgery is not only generally inconsistent with human rights. The requirement is more disadvantageous and burdensome for people seeking legal recognition of their transition from female to male than male to female. Expressed in this way, there is an additional objection to surgery as a pre-requisite;

the requirement of surgery is a form of indirect discrimination.”

20. The weight of authority is not evenly balanced on the question of whether a pre-operative transgender person can be recognized as a member of the opposite sex to that correctly assigned to them at birth. By that I mean the views expressed by the House of Lords in *Bellinger*, the Court of Appeal for England and Wales in *Bellinger*, the Full Federal Court of Australia in *SRA*, and the Court of Criminal Appeal of NSW in *Harris* may well be more persuasive than those of the Full Family Court of Australia in *Re Kevin* and *Re Alex* and the Quebec Human Rights Tribunal in *Quebec (CDPDJ)*. That is not however to say they will be determinative.
21. The special nature of the HRA and NZBORA has been recognized by the Courts:
- The NZBORA is to be interpreted “generously” and “purposively”: *Ministry of Transport v. Noort* – 1992.
 - “The proper construction of both sections requires an appropriate regard for ... the special character of human rights legislation and the need to accord it a fair, large and liberal interpretation, rather than a literal or technical one”: *Coburn v. HRC* – 1994.
 - “... particularly where Parliament intended that the legislation have a special status, like the [HRA]. Further, given the importance of the [HRA], as can be seen from s. 19 of the [NZBORA] and from the fact that it gives effect to New Zealand’s obligations under international human rights covenants ...”: *Director of Human Rights Proceedings v. NZ Thoroughbred Racing Inc.* - 2002.
22. It is clearly arguable that discrimination against pre-operative transgender person by reason of the gender they identify as belonging to, is sex discrimination.

Recommendation #1: The ground of sex discrimination in the HRA applies to transgender people

23. I recommend that the HRC adopt a policy that the ground of sex discrimination is applicable to transgender people. My recommendation is based on my research paper.

Recommendation #2: The distinction as to whether a transgender person is pre or post-operative should not be determinative of the gender the law should regard the person as having.

24. I recommend that the HRC adopt a policy that the distinction as to whether a transgender person is pre or post-operative should not be

determinative of the gender the law should regard the person as having. The recommendation is based on paras 18, 19 & 21 above.

When should recognition of a transgender person being of a different gender to that on their birth certificate take place?

25. Adoption of recommendations #1 & #2 leads to the question of when should recognition of a transgender person being of a different gender to that on their birth certificate take place?
26. In its decisions in *Re Kevin* and *Re Alex* the Family Court of Australia set out a compelling case for granting legal recognition of the rights of pre-operative transgender people.
27. At para 15 above I outlined that in *Bellinger* the House of Lords considered that point of recognition of when a person was of a sex opposite to that assigned to them at birth was a matter for Parliament. In his reasons for decision Lord Nicholls made a very interesting observation:

“It is questionable whether the successful completion of some sort of surgical intervention should be an essential prerequisite to the recognition of gender reassignment. If it were, individuals may find themselves coerced into major surgical operations they otherwise would not have. But the aim of the surgery is to make the individual feel more comfortable with his or her body, not to 'turn a man into a woman' or vice versa. As one medical report has expressed it, a male to female transsexual person is no less a woman for not having had surgery, or any more a woman for having had it: see *Secretary, Department of Social Security v SRA*.”

28. The position in the UK, as set out in the Gender Recognition Act 2004, is that transgender people who have taken decisive steps to live fully and permanently in their acquired gender will gain legal recognition in that gender. Gender Recognition Panels certify that the statutory conditions have been complied with and issue interim and final certificates to mark official recognition. A person is able to apply for a gender recognition certificate on the basis of either:
 - i. Living in the other gender; or
 - ii. Being recognised under the law of another country as having changed gender.

The Gender Recognition Panel has to grant a certificate under i. if satisfied that the applicant:

- a) Has or has had gender dysphoria;
- b) Has lived in the acquired gender throughout the period of 2 years ending with the date on which the application is made (a

requirement which is at present usually a precondition for surgical treatment in the National Health Service);

- c) Intends to continue to live in the acquired gender until death; and
- d) Complies with the evidential requirements imposed by the Act.

Births, Deaths and Marriages Registration Act 1995

29. The *Births, Deaths and Marriages Registration Act 1995* establishes a scheme which authorizes the Family Court to alter the sex originally recorded on a birth certificate. Section 28 of the Act sets out the criteria the Family Court must have regard to:

- (1) Subject to subsection (3) of this section, a Family Court may, on the application of a person who has attained the age of 18 years, 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) ...
- (3) The Court shall issue the declaration if, and only if, -
 - (a) It is satisfied that there is included in the registration 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.
30. It is important however to note s. 33 of the Act which states:
- “Notwithstanding this Part of this Act, the sex of every person shall continue to be determined by reference to the general law of New Zealand.”
31. The case law in New Zealand suggests that there may well be some circumstances in which despite the transgender person having undertaken surgery recognition in the sex opposite to that registered at birth would not be appropriate.
32. Problems arise when recognition is accorded in some circumstances but not others; see the 2003 decision of the Supreme Court of British Columbia in *Vancouver Rape Relief Society v. Nixon*. The court decided that a rape relief society did not discriminate against a post-operative male-to-female transsexual woman, Kimberly Nixon, when it denied her work as a volunteer counsellor. The decision turned on a section of the British Columbia Human Rights Code which permits a non-profit organization which has as a primary purpose the promotion of the interests or welfare of an identifiable group to grant a preference to members of that group. The Court decided that in differentiating between women who have undergone transsexual surgery and women Rape Relief was making a kind of distinction regarding membership that permitted by the exception in the Code. In an earlier case in 2000 the court decided that Kimberly Nixon was a woman. That decision was based on British Columbia legislation which permitted a person who had undergone gender re-assignment surgery to obtain an amended birth certificate.

Recommendation #3: Point of recognition of a transgender person being of a different gender to that on their birth certificate

33. I recommend that the HRC endorse a policy that the provisions of the HRA apply to a transgender person who has commenced, or is somewhere through the process, of taking decisive steps to live fully and permanently in the sex opposite to that assigned to them at birth. This will involve a consideration of:
- a) Subjective factors, such as: how the person self-identifies; and
 - b) Objective factors, such as:
 - have they consulted a doctor; or
 - acceptance by family or friends or colleagues or others; or
 - association with transgender support groups; or
 - acceptance by the transgender community.