Te Tari Ture o te Karauna
Crown Law

SOLICITOR-GENERAL

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Attorney-General

Human Rights (Gender Identity) Amendment Bill
Our Ref: ATT395/9

1. The Human Rights (Gender Identity) Amendment Bill seeks to include "gender identity" as one of the prohibited grounds of discrimination in s 21 of the Human Rights Act 1993 (HRA). Gender identity is defined in the Bill as identification with a different gender from the birth gender or the gender assigned to a person at birth. The Bill states it may include persons who call themselves transsexual, transvestite, transgender or cross-dresser. This opinion refers to this group as transgender people.[1]

2. You have asked whether prohibition of discrimination on grounds of gender identity is already provided for in the HRA. In my view it is.

The Human Rights Act 1993

3. Currently the HRA prohibits discrimination on a number of grounds.[2] The New Zealand Bill of Rights Act piggy-backs on these grounds by stating in s 19 that everyone has the right to be free from discrimination on the grounds set out in the HRA.

4. The prohibited grounds in the HRA include discrimination on grounds of sex, sexual orientation and disability. Sex discrimination is not defined, other than to say that it includes pregnancy and childbirth.[3] Sexual orientation is defined. It means "a heterosexual, homosexual, lesbian or bi-sexual orientation".[4] In some circumstances disability may be relevant to gender identity discrimination as some transgender people are diagnosed as suffering from gender dysphoria. The definition of disability discrimination is probably wide enough to cover this as it includes a "psychological disability".[5]

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1 The cases referred to in this opinion use a variety of terms. In discussing those cases I have used the same term as the judge or court used in that case.

2 s 21.

3 s 21(1)(a).

4 s 21(1)(m).

5 s 21(1)(h)(iv).

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Sex discrimination includes transgender discrimination

5. In the UK, Europe and in Canada, it is accepted that discrimination on the ground of gender identity is covered by the prohibition against sex discrimination.

6. Gender identity and sex discrimination were before the House of Lords in the recent case *Chief Constable of West Yorkshire Police v A.*[6] A's application to become a police officer had been turned down by the Chief Constable because, as a transsexual, she would not be able to search a person. She argued she had been discriminated against in breach of the European Community Equal Treatment Directive, which prohibits discrimination on the ground of sex, and the Sex Discrimination Act 1975 (UK). The Chief Constable accepted his refusal to hire a transsexual was sex discrimination. However, he argued that the legal requirement for personal searches to be carried out by a police officer of the same sex constituted a bona fide occupational qualification exception. The House of Lords disagreed.

7. Underpinning the House of Lords decision were two earlier decisions of the European Court of Justice (ECJ) that interpreted the Directive as prohibiting unfavourable treatment on ground of gender reassignment. The first of these was *P v S*[7] which concerned the dismissal of an employee who decided to undergo gender reassignment. In *A*, Lord Bingham described the significance of *P v S* decision as twofold:[8]

> "First, it held in very clear and simple terms that the Directive prohibited discrimination on grounds of gender reassignment. Secondly, it held that prohibition was based not on a semantic analysis of the provisions of the Directive but on 'the principle of equality, which is one of the fundamental principles of Community law' ... and on the court's duty to safeguard the dignity and freedom to which an individual is entitled."

8. The reasoning behind the decision in *A* is spelt out by Hale LJ. Referring to the opinion of the Advocate General in *P v S* that transsexuals do not constitute a third sex, Baroness Hale held that:[9]

> "the 'right to a sexual identity' is clearly the right to the identity of a man or a woman rather than of some 'third sex'. Equally clearly [it] is a right to the identity of the sex into which the transperson has changed or is changing."

9. The second case influencing the House of Lords in *A* was *KB v National Health Service Pensions Agency.*[10] The issue in *KB* was whether a person could nominate her

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6 [2005] 1 AC 51.

7 C-13/94 [1996] All ER (EC) 397; [1996] ICR 795. As a result of this decision the Sex Discrimination Act was amended by the Sex Discrimination (Gender Reassignment) Regulations 1999. However, it was accepted that A's case was to be determined without reference to those regulations.

8 Above n 6, at paragraph 10.

9 Above n 6, at paragraph 56.

10 C-117/01 [2004] IRLR 240.

transsexual partner to be the recipient of a pension survivor's benefit. Earlier the ECJ had held that it was not a breach of the Equal Pay Directive (which covers pensions as part of pay) to withhold survivor benefits from gay and lesbian partners who are denied the right to marriage. However, the European Court of Human Rights had shortly before held that a failure to permit a transsexual to marry in their new identity was a breach of the right to marry under article 12 of the European Convention on Human Rights.[11] Because of this, the ECJ held that the fact that KB and her partner were not married did not preclude the operation of the survivor's benefit, since the impossibility of marriage for an otherwise heterosexual couple was discriminatory.[12]

Canada

10. It is accepted in Canada that the prohibition against discrimination on the ground of sex in both federal and provincial human rights legislation also protects against discrimination on grounds of gender identity.[13]

11. In *Vancouver Rape Relief Society v British Columbia Human Rights Commission and British Columbia Human Rights Tribunal*[14] the British Columbia Supreme Court expressly held that the prohibition against sex discrimination in the Human Rights Act 1984 and 1973 Code covered transexualism. The fact that the legislature had failed to act on a recommendation of the Law Commission to include "gender identity" as a new ground of discrimination made no different to this conclusion. The Court held that "legislative inaction cannot be read as an intention to deny that protection exists."[15]

12. The *Vancouver Rape Relief Society* case concerned a claim by a woman, who had undergone gender reassignment surgery, that she was discriminated against by the Rape Relief Society who would not permit her to be a counsellor because she had not always been a woman. The Court of Appeal held that the Society's actions did constitute discrimination but held the Society was protected by the exemption it had under the Code.[16]

13. The protections under Canadian sex discrimination law extend to people who identify as transgender but who have no intention of undergoing sex reassignment surgery.[17] Rather than being viewed as only as a binary concept, "sex" is seen as a

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11 *Goodwin v UK* (2002) 35 EHRR 447. Following on from *Goodwin*, the House of Lords in *Bellinger v Bellinger* [2003] 2 All ER 593 declared that the Matrimonial Causes Act 1973 was incompatible with articles 8 and 12 of the ECHR. It stopped short of giving that Act an interpretation that would have permitted transsexuals to marry in their new identity. The Court held that was properly a matter for Parliament. This issue does not arise in New Zealand as transsexuals have the right to marry in their new identity – see *AG v Family Court at Otahuhu* [1995] NZLFR 57; Birth Deaths and Marriages Act 1995 ss 28, 30 and 64.

12 Above n 10, at paragraphs 30-36.

13 See for example *Montreuil v National Bank of Canada* (2003) CHRT 27, 27 CCEL (3d) 292 where the Canadian Human Rights Tribunal held (at paragraph 7)"[t]here is a significant body of human rights jurisprudence that has found that discrimination on the basis of transexualism constitutes sex discrimination." See also *Waters v British Columbia Ministry of Health* (2003) BCHRT 13, 46 CHRR D/139 at paragraphs 133-135.

14 (2000) 23 Admin LR (3d) 91, 37 CHRR 390.

15 Above n 14, at paragraph 55.

16 s 41.

17 *Montreuil* above n 13, at paragraphs 4 and 8.

continuum. It includes people of ambiguous sexual anatomy who define themselves as one or other sex, persons who have been surgically reassigned to conform to their sense of gender identity, as well as those whose anatomy is unambiguously male or female but who identify as members of the sex not consistent with that anatomy.[18]

United States: an inconsistent approach

14. It is difficult to get a clear picture of United States jurisprudence on this issue. Under Title VII of the Civil Rights Act 1964 (a federal law prohibiting discrimination in employment), cases by transgender people have been brought in federal courts. Individual states and cities also have anti-discrimination statutes and codes that provide a right of recourse to state courts. Federal decisions are not binding on state courts and vice versa. Nor are decisions of state courts binding on other states.

15. Early decisions under Title VII of the Civil Rights Act 1964 held that transsexuals were not covered by the prohibition against sex discrimination. One of the first cases to be brought alleging discrimination in a transgender context was *Holloway v Arthur Anderson & Co.*[19] Ramona Holloway was fired when she asked that her employee records be changed to reflect her present identity. She argued that "sex" was synonymous with "gender" and that "gender" should be understood to include transsexual. The Ninth Circuit Court of Appeals disagreed, finding that Congress had intended to restrict "sex" to its traditional meaning.[20]

16. A similar approach was taken by the Seventh Circuit Court of Appeals in *Ulane v Eastern Airlines Inc*, overturning the reinstatement by the district court of a male to female transsexual flying officer who had been fired.[21] The Seventh Circuit held that Title VII outlawed discrimination against men because they were men and women because they were women. It did not outlaw discrimination based on gender identity. To find otherwise was said to judicially expand the meaning of sex beyond its common and traditional interpretation.[22]

17. In recent years, however, there have been developments in the interpretation of sex discrimination in relation to transsexuals. The Ninth Circuit decision in *Schwenk v Hartford*[23] is an example. Crystal Schwenk was a pre-operative male to female transsexual and was a prison inmate. She alleged that a prison guard had subjected her to sexual assault and threats of rape and that this constituted cruel and unusual punishment in breach of the Eight Amendment and gender motivated violence prohibited by the Gender Motivated Violence Act.

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18 *Vancouver Rape Relief Society v Nixon* (2003) 22 BCLR (4th) 254, 48 CHRR D/123 at paragraph 25

19 *Holloway v Arthur Anderson* & co 566 F 2d 659 (9th cir 1977)

20 Above n 19, at pp 661-663.

21 *Ulane v Eastern Airlines* 742 F.2d 1081 (7th cir 1984).

22 Above n 21, at p 1085-1086.

23 204 F.3d 1187 (9th cir 2000).

18. In determining whether the actions of the prison guard constituted gender motivated violence the Ninth Circuit looked to jurisprudence under Title VII. The Court held that although early decisions under Title VII had taken the approach that sex was distinct from gender, that that line of authority had been overruled "by the language and logic of *Price Waterhouse.*"[24] The Court further held that following the Supreme Court decision in *Oncale v Sudowner Offshore Services Inc*[25] same-sex discrimination was "cognisable under certain circumstances".[26]

19. *Price Waterhouse v Hopkins*[27] is a decision of the United States Supreme Court under Title VII of the Civil Rights Act 1964. Ms Hopkins was unsuccessful in her application for partnership because, in part, she was seen as macho and insufficiently feminine. Finding that Ms Hopkins was a victim of gender stereotypes the Court said "in forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes." [28]

20. Under the *Price Waterhouse* analysis what mattered, the Ninth Circuit said in *Schwenk*, was whether what was in the mind of perpetrator was related to sex; whether the perpetrator's actions stem from the fact that the victim was a man who 'failed to act like one'. Because in *Schwenk* the alleged demands for sex only began after the prison guard discovered that Schwenk considered herself female and because his actions were in part occasioned by her assumption of a typically feminine demeanour, the Ninth Circuit accepted the actions could be gender motivated.[29]

21. State Courts have started to refuse to follow the *Holloway/Ulane* line of authority of the Federal Courts, holding instead that discrimination against transsexuals constitutes discrimination on the ground of sex. In *Maffei v Koleaton Industry*, [30] federal case law was held to be "unduly restrictive" and the Court declined to follow that precedent which was not binding on it. Instead, the Court said that as anti-discrimination statutes are remedial they should be interpreted liberally so as to achieve their intended purpose. The Court refused to strike out the hostile environment sexual harassment claim adding that comments based on the sexual characteristics of a transsexual was discrimination based on sex.

22. The *Maffei* decision has subsequently been followed in other cases including by the New York Court of Appeals.[31] Nonetheless, given the range and independence of

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24 Above n 23, at paragraph 16.

25 523 US 75.

26 Above n 24. In *Oncale* the Supreme Court held that Title VII prohibited same-sex "hostile environment" sexual harassment claims. Mr Oncale alleged he had been forcibly subjected to sex-related, humiliating actions, had been physically assaulted in a sexual manner, and had threatened with rape by other male employees. The Supreme Court refused to strike out his claim.

27 490 US 228 (1989).

28 Above n 27, at page 251.

29 Above n 24 at paragraphs 16-17.

30 626 NYS 2d 391 (1995).

31 *McGrath v Toys "R" Us* 3 NY 3d 421 (2003).

the different US jurisdictions, it is difficult to discern, as yet, how significant the departure from the *Holloway/Ulane* authority is.

Who is the comparator? - apparent differences in approach

23. The Canadian and UK/European jurisprudence raises one apparent point of difference that might impact on the scope of the protection for transgender people under sex discrimination laws. In *A*, Baroness Hale held that for the purposes of discrimination between men and women, the treatment of a transperson is to be compared with a member of the sex to which he or she used to belong.[32] On that reasoning, Ms Nixon in the *Vancouver Rape Crisis Relief* case would have lost on the discrimination question, as she was not discriminated against in comparison with a man (the sex to which she used to belong), but to other women. In fact she was treated comparably with a man.

24. Baroness Hale's finding should be seen in the factual context of that case. The dignity and equality analysis referred to by Lord Bingham supports a wider interpretation of the protection offered by sex discrimination laws. Ms Nixon's treatment is the converse of the situation in *A*; unfavourable treatment on the grounds of the sex she now identifies with rather than the sex she used to be. Nonetheless, it is still sex discrimination. This view is supported by the decision of the United States Supreme Court in *Price Waterhouse v Hopkins*[33] that unfavourable treatment based on non-conformity to gender stereotypes is sex discrimination.

25. Further, while the House of Lords and ECJ have each said there is no third sex, this finding should not be interpreted so as to exclude the kind of continuum identified by the Canadian courts. That continuum is important to ensure that all those who identify as transgender are protected by the prohibition against sex discrimination. Again the underlying equality reasoning in *P v S* and *A* is consistent with that approach.

South Africa: discrimination on grounds of sexual orientation

26. The Constitutional Court of South Africa has also recently dealt with the issue of discrimination against transsexuals but not as sex discrimination. In a case challenging the criminalisation of sodomy as unconstitutional because it discriminates on ground of sexual orientation, the Court held that the concept of sexual orientation "applied equally to the orientation of persons who are bi-sexual or transsexual".[34] However, this case engaged arguments around sexual preference and not gender identity and the statement must be viewed in that context.

27. Given the exhaustive definition of sexual orientation in the HRA, it is unlikely that sexual orientation could be used to generally challenge gender identity discrimination in New Zealand. Further, many of the cases referred to in this opinion explicitly reject sexual orientation as a relevant basis for analysing the discrimination question,

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32 Above n 9.

33 (1989) 490 US 228.

34 *National Coalition for Gay and Lesbian Equality v Minister of Justice* (1999) 1 SA 6 at paragraph 21.

as gender identity rather than sexual preference is the basis for the unfavourable treatment.

Disability discrimination

28. The last head under which discrimination issues are sometime brought is discrimination on ground of disability. These often relate to the lack of resourcing by the state for gender dysphoria,[35] by failing to sufficiently provide publicly funded gender reassignment surgery.[36] While appropriate for these kinds of claims, it is unlikely that disability can provide a basis for challenging gender identity discrimination outside the health or medical field.

Conclusion

29. An analysis of the jurisprudence of other countries shows that in the UK/Europe and in Canada gender identity discrimination claims are successfully brought as sex discrimination cases. The US jurisprudence is less conclusive, but it is also less influential on New Zealand courts.

30. The decisions and reasoning of the Canadian, UK and European courts suggest it is unnecessary to amend the HRA in order to ensure protection from discrimination on grounds of gender identity in New Zealand. Those decisions will be influential on New Zealand courts. There is currently no reason to suppose that "sex discrimination" would be construed narrowly to deprive transgender people of protection under the HRA.

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35 The medical term given to those who identify with the gender of the other sex to which they were born.

36 See for example *Waters v British Columbia Ministry of Health* above n 13. There has also been a complaint made under the NZ Human Rights Act 1993 on this same point.