

**National Association of
Women and the Law**



**Association nationale
de la femme et du droit**

1066 Somerset West/Ouest, Ottawa, ON, K1Y 4T3 Tel/Tél 613-241-7570 Fax/Télécopieur 613-241-4657 info@nawl.ca

Transgender and Women's Substantive Equality

**Discussion Paper, Consultation Paper
Bibliography, Case Law Summaries**

September 2003

Prepared by Margaret Denike, Sal Renshaw & cj Rowe

ISBN# 0-895996-80-5

Acknowledgments

We are grateful for the financial assistance granted to us by the Court Challenges Program of Canada and from the Status of Women Canada for this project. These grants enabled us to conduct extensive research, including the preparation of an annotated bibliography, a discussion paper, and a final report. They also enabled us to bring over 40 participants from across Canada to the consultation.

We are also very grateful to Margaret Denike and Sal Renshaw for the huge amount of work dedicated to this project, and to the other working group members: Andrée Côté, Diana Majury, Kim Brooks and c.j. Rowe.

The Discussion Paper was prepared and edited by Margaret Denike and Sal Renshaw, with contributions from Andrée Côté, Diana Majury and cj Rowe.

The Consultation Report was drafted by Margaret Denike and cj Rowe.

The Bibliography and Case Law Summaries were prepared by cj Rowe

Table of Contents

Transgender and Women’s Substantive Equality: Discussion Paper

Introduction	3
Part 1: An Egalitarian Approach.....	6
1.1 Women's Substantive Equality	6
1.2 Transgender Human Rights	8
1.3 Intersectional Analysis.....	11
Part 2: Human Rights Protections.....	12
2.1. Disability	13
2.2. Sex.....	14
2.3. Sexual Orientation	16
2.4. Gender Identity	17
Part 3: The Politics of Gender Identity and Sexual Difference	18
3.1. The Need for “Women-Only” Space	18
3.2. Reasonable Limits and Undue Hardship?.....	22
3.3. Feminist Resistance to Medicalization	25
Questions for National Consultation.....	31
National Consultation on Transgender and Women’s Substantive Equality Rights: Final Report:	32
Forward	32
Introduction	32
Understanding Anti-Trans Discrimination	33
Seeking Human Rights Protections	35
Self-identification and its Implications	37
Binary Constructs, Gender Variance, and Gendered Spaces	39
Emerging Issues and Recommendations	40
Conclusion	42
Bibliography	43
Internet Sites and Resources.....	49
Case Law Summaries	
- Canada	54
- United States	60
- Australia	65
- United Kingdom	67

Transgender and Women's Substantive Equality: Discussion Paper

Introduction

The aim of this discussion paper is to engage equality advocates on specific questions of relevance to law reform initiatives pertaining to the relation between transgender and women's substantive equality rights. It proposes a framework for the discussions that will be held at the national consultation organized by the National Association with Women and the Law (NAWL) in Ottawa on February 22 and 23, 2003.

NAWL has decided to consult broadly and to work collaboratively to develop an understanding of the issues and concerns relevant to policy development that arise from the rights and needs of transgendered persons and, in particular, to explore the implications of self-identification in different contexts, such as 'women-only' spaces and feminist services.

This paper is the result of a collaborative initiative of members of the NAWL Working Group on Transgender issues. It reflects the different opinions and approaches we each have to these issues, and it draws on the suggestions and comments provided by those who reviewed previous drafts of this work. In draft form, this paper was made available for the March, 2002 Biennial Conference and Annual General Meeting of NAWL, and it has been circulated to trans and women's groups and NGOs, equality advocates and policy analysts, and members of academic communities. We are grateful to everyone who participated in the preliminary workshop and who have offered comments and suggestions along the way.

In recent years, we have seen the increased visibility and activism of transgender support groups and equality advocacy. Working from a recognition of the pervasive discrimination faced by transgendered persons—their exposure to violent behavior and unchecked hate crimes; the uncertainty they face in the labour market in light of discriminatory practices and attitudes; and

the denial of access to public services, accommodation, and medical care—advocates for transgender rights have been seeking basic human rights protections through policy development and legislative reform. Through a number of successful cases, specifically involving male-to-female transsexuals, provincial courts and human rights tribunals have acknowledged discrimination against trans people, although, with the recent exception of Nunavut, specific protections have not yet been encoded in law.¹ Developing appropriate strategies for advancing the human rights and securing such protections remains a critical question engaging equality-seeking groups.

Litigation and law reform initiatives favoring the extension of statutory human rights protections to trans people have raised a number of equality issues pertaining to access to gendered spaces and services. Various members of women's groups and support services have urged consideration that the extension of protections on the basis of 'gender identity', such as would require the acceptance and inclusion of male-to-female transsexual women in 'woman-only' spaces, has a bearing on women's ability to create and maintain 'safe spaces'. Such concerns are captured, for example, in a brief submitted by NAWL to the Canadian Human Rights Review Panel in its 1999-2000 review of federal legislation, in addressing the question of adding 'gender identity' as a prohibited ground of discrimination to human rights codes. The submission called for consideration that such protections not operate "in such a way as to undermine the fragile and important efforts that women have made to create spaces for their political and social development, individually and as a group, and for providing support to each other as victims of pervasive male violence and male dominance."² It also recommended that women's groups be consulted to more fully understand the implications of such law reform initiatives, with attention to their bearing on the substantive equality rights of women.

It is clear that current and on-going litigation in the *Nixon* case, and related discussions within and between women's groups and services, has polarized some individuals around otherwise

¹ In October 2002, Nunavut Territories became the first jurisdiction in Canada to incorporate gender identity into its new Human Rights Code.

² Rachel Cox, *Brief to the Canadian Human Rights Act Review Panel* (December 1999), 41-42.

basic questions such as how to best advance the rights of trans persons, and/or what could or should be required to (legally) adopt a chosen gender. In our preliminary inquiries and discussions, most women's organizations acknowledged the oppression and discrimination faced by transgendered individuals, and they supported the extension of human rights protections to them. In some circles, however, women may speak as though extending rights to transsexual women could pose a 'threat' to the integrity of 'women-only' spaces—or as the rights and needs of these groups are antagonistic or mutually exclusive. Of particular concern is the question of whether self-identification can be definitive of gender identity, and whether, for example, women's groups, spaces and services should be fully accessible to anyone who identifies themselves as female; and more generally, when a change of gender must be legally recognized, and how that recognition should be sanctioned in law.

We recognize that within the legal and policy development context, as well as in gendered groups and communities, there are many different notions and stereotypes about what constitutes or determines one's 'gender' or defines one's 'sex' with respect to civil status. Some individuals have posited that one's self-identification should suffice, although there may be limits to that approach to identity more generally, depending on the social and political context. In law, there is a considerable deference to, and reliance on, the medical profession's biological and anatomical definitions of reproductive 'sex', despite widespread acknowledgement of the problems in doing so. Many equality activists and feminist theorists have expressed concern about the medical professions' ability to define and circumscribe sexual difference, and to require surgical intervention for one to be legally recognized as their chosen gender. Such concerns are reminiscent of those expressed against governments, which have imposed identities—and the conditions of membership in identity-based groups—for Aboriginal men and women whose native status has historically been defined for them in ways that are not necessarily in their own interests. Because of these colonialist practices, Aboriginal communities are still struggling to define the boundaries of their identities, and many amongst them would oppose self-identification as the only criteria for membership or status.

With attention to questions about how gender identity is defined, and particularly about the implications and potential limits of self-identification, we aim to develop an inclusive and responsible feminist approach that respects the human dignity of all individuals, within and across our differences, and that promotes and advances the substantive equality rights of all women. We urge consideration of how our law reform initiatives could relate questions of gender identity to the challenges posed by systemic gender-based violence, and to the patriarchal, institutional—judicial and medical—control of sexual identity, and the judicial deference to, and reinforcement of, surgical intervention.

For the purpose of this paper, we focus primarily on the subject of transsexual women, that is, on biologically-born males whose deeply felt and chosen identity is female. We have chosen this focus in part, because the rights of these individuals are the subject of ongoing litigation involving women's groups. However, we hope not to limit the consultation to this subject, and we encourage attention to, and discussion of, the breadth and wealth of experiences of gender diversity.

Part 1: An Egalitarian Approach

1.1 Women's Substantive Equality

In *Law. v. Canada*, the Supreme Court clarified the general purpose of *Charter* equality guarantees:

...to prevent the violation of essential human dignity and freedom through the imposition of disadvantage, stereotyping, or political or social prejudice and to promote a society in which all persons enjoy equal recognition at law as human beings or as members of Canadian society, equally capable and equally deserving of concern, respect and consideration.³

³*Law v. Canada* [1999] 1 S.C.R. 497, at par. 51.

Contemporary feminist legal theorists and equality advocates in Canada have elaborated historically sensitive and contextual theories and strategies based on the notion of substantive equality. Such approaches begin with an appreciation of the *differences* between us, recognizing that for laws and social policies to have real equality as their outcome, they must take into consideration the real differences between and among the social groups as well as the contexts in which these differences arise. As Elizabeth Sheehy explains, feminist approaches to the law need to attend to the "historical origins of laws and practices, the interests and values furthered and submerged by the law or practice, the specific context of women's lives, economically, politically, and socially, and the impact upon women, both quantitatively and qualitatively."⁴ The Supreme Court has recognized that this includes taking into account specific historical and existing disadvantage and attending to the differential impact that laws, regulations and practices have upon them.⁵ For example, in *Eldridge*,⁶ the Supreme Court ruled that treating deaf patients 'the same' as other patients is discriminatory, and their specific needs must be taken into account in the provision of sign language and/or interpreters. If they don't do this, hospitals are not providing equal health benefits.

As applied to social policy and feminist praxis, a contextually sensitive understanding of women's vulnerability to sexual violence by men, for example, has led to the mobilization of initiatives, such as establishing safe spaces in the form of crisis centres and support services restricted to women. Taking into account the ways in which women—and particularly racially marginalized women—are systematically exploited and specifically oppressed, many women have worked to create the spaces necessary to empower members from different groups to speak openly, to mobilize against racist and sexist coercion, control, and violence that typify their experience within patriarchal and colonial contexts.

⁴Elizabeth Sheehy, "Equality Without Democratic Values?" *Canadian Woman Studies Journal* (Summer 1999): 1&2, 6.

⁵Claire L'Heureux-Dubé, "The Changing Face of Equality" *Canadian Woman Studies Journal* (Summer 1999): 1&2, 30-32.; Melina Buckley, ed. *Transforming Women's Future: A Guide to Equality Rights Theory and Action*, (Vancouver: West Coast Women's Legal Education and Action Fund, 2001).

⁶*Eldridge v. British Columbia (Attorney General)* [1997] 3 S.C. R.624.

Throughout the women's movement such initiatives have entailed talking about women as *women*, naming and defining our common and general experiences, while also recognizing that there are important and concrete differences that must also be considered. However, many Aboriginal women and women of colour, among others, have voiced concerns about the racism and essentialism of such 'naming' by predominately white feminists, and they have remained critical of the racial, ethnic and socio-economic homogeneity of the category of 'woman'. Of particular concern are the ways some feminists have generalized about women's experiences while ignoring the specificity of those who suffer compound forms of marginalization. Such productive and self-reflexive critiques that appreciate the substantive differences between women have lent themselves to a fuller appreciation of the systemic nature of patriarchal, capitalist and colonial regimes of power, and of how individuals and groups are very differently positioned in relations of compounded and intersecting oppressions. Only by accommodating differences within a substantive equality analysis can we address the specificity of a group or an individual's needs.

The task for us is to identify if and when these differences matter and to develop contextual analyses that can grasp their implications in relation to varying social, political, and institutional settings. For example, a person's ability to self-identify with respect to gender may have different implications in different contexts, be it a rape crisis service, a women's prison, a place of employment, a sports team, a health facility, or a marriage ceremony. In respecting the human dignity of all persons, and in ensuring that our equality litigation and lobbying initiatives are directed to this end, our theories of substantive equality must continue to be sensitive to context and affirmative of substantive differences, and this includes being cognizant of the specific effects of intersecting systems of oppression.

1.2 Transgender Human Rights

Colonial, patriarchal laws and practices have historically deployed arbitrary distinctions, and reinforced dangerous and degrading stereotypes that have worked to disenfranchise sexual

minorities and trans people, to strip them of their dignity and legal capacity, and to reinforce a culture of violence and systemic discrimination against them. The social and legal atmosphere of patriarchal hetero-normativity, which cultivates and institutionally reinforces traditional notions of appropriate gender roles and sexual choices and practices, fuels systemic sex discrimination and the intolerance and stigmatization of all those who do not conform. Members and allies of trans groups and equality advocates have been increasingly vocal about the tragic circumstances of human rights abuses suffered by transsexual men and women in particular, and transgendered persons in general. Of particular concern has been the lack of protections and services available to trans individuals that are afforded other members of society. As clearly elaborated in reports written by barb findlay and other trans equality activists,⁷ some of the specific and urgent issues include, but are not limited to: access to social services such as homeless shelters, rape crisis centres, medical clinics; access to education, and to public and private health benefits; freedom from hate violence, including sexual assault; fear of repercussion or reprisal in retaliation for asserting one's ordinary rights, such as speaking out in public; chronic unemployment or under-employment; abusive treatment by law enforcement personnel; public humiliation, derision, ridicule, marginalization and exclusion; and denial of access to public accommodations such as shops, restaurants, and public transportation.

Consider the heightened exposure of trans women to violent hate crimes and the lack of protections currently available to them. Based on limited data from 1995-1999, the Annual Report (2000) on Anti-Lesbian, Gay, Bisexual, and Transgender Violence in the United States, estimates that anti-transgender violence accounts for about 2-4% of all reported incidents, though those incidents accounted for approximately 20% of all reported anti-GLBT murders.⁸ Furthermore, as noted in a San Francisco study by Susan Stryker,⁹ one can hardly begin to

⁷barb findlay, *An Introduction to Transgender Women* (LEAF Forum, November 1999). "Transgendered Women and Canadian Prisons," Conference Proceedings, Lavender Law National Conference, Seattle, 1999; barb findlay, Sandra Laframboise, Deborah Brady, Christine Burnham, Septima Skolney-Elverson, *Finding Our Place: Transgendered Law Reform Project*. Vancouver: High Risk Project Society, 1996.

⁸See Jamison Green's "Introduction" to Paisley Currah and Shannon Minter, *Transgender Equality: A Handbook for Activists and Policymakers*. The Policy Institute of the National Gay and Lesbian Task Force (2000), p. 10-11. www.nglftf.org/downloads/transeq.pdf.

⁹Susan Stryker, "Anti-Transgender Violence and Discrimination: Historical and Theoretical Observations Drawn from San Francisco Experience," presented at "Beyond Homophobia," an international conference held April

conflate the vastly different experiences among transgender groups, considering, for example, that compared to only 2% of transmen (female-to-male transsexuals) who report incidents of violence, transwomen (male-to-female) reports account for 98%. As trans equality advocates have noted, compared to gays, lesbians and bisexuals, trans people have little if any recourse to legal protection against discrimination in these areas. So too is their access to support services and shelters limited, compared to non-trans women, as has been documented by Viviane Namaste (2000), Julie Darke and Allison Cope (2002), and Caroline White (2002),¹⁰ through their interviews, surveys of shelters and hostels, and reviews of their policies respecting transphobia and trans inclusion.

During its 1999-2000 review of the federal legislation, the Canadian Human Rights Act Review Panel accepted submissions on how specific protections for transgendered persons could be explicitly inscribed and entrenched in law. Different groups discussed the extent to which the systemic discrimination experienced by trans people (which may include individuals and groups as diverse as pre-operative, post-operative and non-operative transsexuals; drag queens and kings; cross-dressers; butch lesbians; and pangendered people, for example) could best be captured under existing grounds such as sex, disability, and sexual orientation, or whether Canada should follow various municipalities in the United States and seek protection under a new category of ‘gender identity.’

Since trans people are subjected to systemic discrimination, and they continue to be denied the basic human rights supposedly granted to ‘all individuals,’ the possibility of achieving full personhood or full benefit of the law—the possibility of social equality—requires substantial social and legal reform. The question is not *whether* they should be granted rights and freedoms—be they to social services, employment and medical care—but *how* they should be?

6-9, 1999, San Francisco State University. San Francisco, CA. Cited in Paisley Currah and Shannon Minter, *Transgender Equality: A Handbook for Activists and Policymakers*, p. 10-11.

¹⁰ See Viviane K. Namaste, *Invisible Lives: The Erasure of Transsexual and Transgendered People*. Chicago: University of Chicago Press, 2000; Julie Darke and Allison Cope, *Trans Inclusion Policy Manual For Women's Organizations*. Vancouver: Trans Alliance Society, 2002; and Caroline White, *Re/defining Gender and Sex: Educating for Trans, Transsexual, and Intersex Access and Inclusion to Sexual Assault Centres and Transition*

1.3 Intersectional Analysis

As a starting point to thinking about different legal grounds for protection against discrimination, and the relation between them, we urge the importance of adopting an intersectional approach—an approach that recognizes the complexity of how people experience discrimination; that looks at the lived realities of individuals, their experiences of multiple discrimination and the context of society's response to them; that acknowledges that categories of discrimination overlap; and that attends to the systemic and historically pervasive inequalities between social groups.¹¹ Such an approach considers, for example, that discrimination based on sexual orientation may be experienced differently by trans men and women, compounded by racial marginalization, or perhaps exacerbated by jurisdictional issues, such as living in rural areas without access to services or clinics.

Seeking legal protection for socially marginalized groups has always posed unique challenges. Consider how the existing categories have been interpreted by courts and tribunals to date. As Kathleen Lahey notes, “the very forces that have necessitated the creation of special legal mechanisms to protect minimal rights—racism, sexism, heterosexism, and other forms of prejudice—have also exerted pressure on governments, administrators, and courts to construe and apply those rights as narrowly as possible.”¹² Such pressure, together with the historical tendency of claimants and courts to focus on a single ground in equality cases—such as race *or* sex *or* sexual orientation, for example—and to treat such grounds of discrimination as if they are mutually exclusive, have had the specific effect, as Carol Aylward and others have argued, of “obscuring the way that discrimination is experienced by women of colour and women with

Houses, a Master's thesis submitted to the Faculty of Graduate Studies, Department of Educational Studies, University of British Columbia.

¹¹ See Ontario Human Rights Commission, “An Intersectional Approach to Discrimination: Addressing Multiple Grounds in Human Rights Claims: Discussion Paper”. October 9, 2001. <<http://www.ohrc.on.ca>>; C.A. Aylward, “Intersectionality: Crossing the Theoretical and Praxis Divide.” (Paper distributed at Transforming Women's Future: Equality Rights in the New Century: A National Forum on Equality Rights presented by West Coast LEAF, 4 November 1999) [unpublished].

¹² Kathleen A. Lahey, *Are We Persons Yet?: Law and Sexuality in Canada*. Toronto: University of Toronto Press, 1999, 92-3.

disabilities."¹³ As is clearly elucidated in the Ontario Human Rights Commission Discussion Paper, *An Intersectional Approach to Discrimination*, we have witnessed the limitations of a single ground approach, and of a simplistic understanding of the experience and social context of discrimination in various cases.¹⁴ Madame Justice Claire L'Heureux-Dubé, in her dissenting remarks in the *Mossop* case, notes that "it is increasingly recognized that categories of discrimination may overlap, and that individuals may suffer historical exclusion on the basis of race and gender, age and physical handicap or some other combination." To describe and categorize these as primarily racially oriented, or primarily gender-oriented, "misconceives the reality of discrimination as it is experienced by individuals. Discrimination may be experienced on many grounds, and where this is the case, it is not really meaningful to assert it is one or the other."¹⁵ More recently courts have accepted claimants' assertions of multiple grounds of discrimination; however, the multiple grounds are each dealt with separately. As of yet, there is no judicial recognition of the intersectionality of grounds, as claims continue to be treated as a series of related, but severable, forms of discrimination.

Part 2: Human Rights Protections

Given that the enumerated and analogous grounds continue to function as the basic mechanism through which to assert human rights claims, it is important to assess the grounds that are presently available for a transgender complaint and to ask what additional grounds might be necessary to address the range and diversity of discrimination experienced by trans people.

¹³ C.A. Aylward, cited in *Transforming Women's Future*; see also Nitya Duclos [Iyer]. "Disappearing Women: Racial Minority Women in Human Rights Cases." *Canadian Journal of Women and the Law*, vol. 6, no. 1 (1993), pp. 25-51; Diane Pothier, "Connecting Grounds of Discrimination to Real People's Real Experiences," *Canadian Journal of Women and the Law*, vol. 13, no.1 (2001) 37-73.

¹⁴ Consider, for example, *Canada (A.G.) v. Mossop* [1993] 1 S.C.R. 554. In this case, Mr. Mossop brought a discrimination claim on the basis of sexual orientation and on the basis of family status for being denied bereavement leave to attend the funeral of his same-sex partner's father. In its approach, the majority presumed that the grounds of 'family status' and 'sexual orientation' were mutually exclusive and characterized the claim as one based on sexual orientation. Since sexual orientation was not, at that time, a prohibited ground of discrimination in the *Canadian Human Rights Act*, Mr. Mossop's claim failed, despite the clear differential treatment he had experienced. The court's approach did not comprehend the complexity of the claimant's experience, much less address stereotypes that arise from particular combinations of grounds such as these.

¹⁵ *Canada (A.G.) v. Mossop* [1993] 1 S.C.R. 554; for a review and summary of this point, see Ontario Human Rights Commission, *An Intersectional Approach to Discrimination*, 16-18.

Depending on the nature of the discrimination and the claimant's understanding of that discrimination, a claim of transgender discrimination might be made on the following grounds, individually or in combination. Flexibility with respect to the range of potential grounds is a prerequisite for an intersectional analysis in the context of a grounds-based system.

Recent cases brought before human rights tribunals in provincial and federal jurisdictions generally indicate that there is a pressing need to clarify human rights legislation as it pertains to the protection of trans equality rights. Existing grounds that have been invoked include sex, sexual orientation and disability. Considering the limitations of using existing categories, some advocates have suggested that the addition of 'gender identity' would specifically and more accurately address the rights of trans people. Recent litigation and on-going discussion has raised a number of important questions concerning both the existing grounds that have successfully been used and the possibilities for new grounds. The following points address certain questions related to each of the existing grounds in the context of trans human rights claims.

2.1 Disability

In the medico-legal context, transgender experience has been narrowly focused on transsexualism, which has typically been approached as an illness that is treatable through sex reassignment surgery and hormone therapies. For example, transsexualism has been described as a 'disability' by Ontario and Québec courts,¹⁶ as well as by different human rights tribunals.¹⁷ Transsexualism also figures in the psychiatric manual, *Diagnostic and Statistical Manual IV* (DSM IV), under "gender identity disorder," thus constituting it as both a physical and psychological disorder. In the medico-legal context sex reassignment surgery has been framed as a 'treatment' for a gender disorder, rather than as a *right* to change sex, and the court's tendency to accept disability as a ground for protection further supports this interpretation. One difficulty in moving away from this model is that if surgery is considered elective, most lower income

¹⁶For example, in *Re. Reid*, [1986] 56 O.R. (2d) 61 (Ont. Court District); and *Stephens v. Services de santé du Québec*, [1994] R.R.A. 211 (C.A.).

¹⁷For example, in *Sheridan v. Sanctuary Investments Ltd.* [1999] B.C.H.R.T.D. No. 43 (B.C. Trib.); and *Kavanagh v. Attorney General of Canada* (CHRT) T.D. 11/01 (2001/08/31).

transsexuals would not be able to afford it. Yet another factor that perpetuates the view that gender variance is a disability needing treatment or correction is that for transsexuals to receive health insurance coverage for sex reassignment surgery, the treatment must be deemed "medically necessary." Notwithstanding the benefits for some transsexuals, the ableist and disempowering ways in which transgender has been characterized in the disability context tend to reinforce the idea that gender variation is a pathology.

We need to de-pathologize gender diversity, and recognize that most trans men and women do not experience their gender variance as a form 'gender dysphoria' or disability. Nonetheless, and in part *because* of discriminatory heterosexist and sexist stereotypes, there are specific issues faced by those who do suffer from disabling gender dysphoria or any other type of disability directly related to being trans. As one respondent to this paper has noted, "Many trans people experience disabling depression as a result of intense social marginalization and isolation.... We need to recognize that gender dysphoria/depression from discrimination can be disabling."

2.2 Sex

In Canada, several recent human rights decisions have recognized discrimination faced specifically by transsexual women as discrimination based on 'sex';¹⁸ that the ground of 'sex' includes prohibition against discrimination on the basis of transsexualism; and that transsexuals should be able to benefit from the provision against discrimination based on 'sex.'¹⁹ The Ontario Human Rights Commission, for example, has ruled that "refusal to provide facilities and services based on gender identity is a *prima facie* case of discrimination based on sex."

Exclusionary treatment stemming from transgender experience has been understood to be "sex discrimination" according to the principle that human rights legislation is intended to preclude

¹⁸ For example, *Sheridan*, see note 17; *Mamela v. Vancouver Lesbian Connection* [1999] B.C.H.R.T.D. No. 51 (B.C.H.R.T.); *Ferris v. Office and Technical Employees Union, Local 15* [1999] B.C.H.R.T.D. No. 55; *M.L. and Commission des droits de la personne et des droits de la jeunesse du Québec v. Maison des jeunes* [1998] J.T.D.P.Q. no. 31 JEL/1998-0489, No 500-53-000078-970 (Trib. Que.); *Vancouver Rape Relief Society v. B.C. Human Rights Tribunal* (2000 BCSC 889) at 42, 42 and 56; and *Kavanagh*.

the wrongful oppression of the weak by the strong and the disadvantaged by the advantaged.²⁰ This interpretation differs significantly from the way sex discrimination has typically been understood in equality law. In that context, the focus has been on recognizing the economic, social and sexual subordination of women in the context of a sexist and patriarchal society. Because no other ground of discrimination effectively covers discrimination based on gender transition, perhaps 'sex' is being employed as a default category.

In cases where gender identity itself has been contested, courts have applied different tests, often deferring to genetic and chromosomal factors, but in some cases acknowledging the surgical and hormonal reconstruction of the body as well as psycho-social gender transformation. While there have been examples of the courts recognizing that a person's 'sex' is their chosen gender identity, whether or not sex reassignment has been completed (as in *Sheridan* and *Maison des jeunes*), "the law, in its enforcement and administration, allows for only a minimal capacity to self-declare as transgendered."²¹ In *Kavanagh*, a Canadian Human Rights Tribunal found that, despite the complainant's subjective identification as female, hormonal therapy and feminine social presentation, Corrections Canada was justified in refusing her access to women's prisons because she was still "anatomically a male."²² However, in *Vancouver Rape Relief*, Davies held that the prohibition against discrimination on the basis of sex is broader than the binary notions of female and male, but includes protection from discrimination against an individual who is not readily identifiable as either male or female.²³

Regardless of how any trans man or woman identifies, for their gender variance alone, they may be subjected to discriminatory myths and stereotypes, and degrading treatment, based on the kinds of misogynist assumptions (about appropriate sex roles, expressions and behaviors; sexual objectification; and assumptions about availability) that are widely known to have historically subordinated women.

¹⁹*Maison des jeunes*, at 113.

²⁰*Vancouver Rape Relief*, at 56.

²¹Ontario Human Rights Commission, "Towards a Commission Policy on Gender Identity: Discussion Paper," 1999: 21.

²²*Kavanagh*, , at 155-160.

2.3 Sexual Orientation

Contrary to popular assumptions, trans men and women have the same range of sexual orientations as non-trans individuals, invariably identifying as heterosexual, bisexual, non-sexual, etc. While transgenderism and sexual orientation cannot be conflated with each other, it may well be the case that the expression of fear and hatred against a trans person is at once the expression of homophobia, just as it may be of sexism. Not uncommon are stereotypical assumptions, for instance, that those who are gender variant in appearance or manner, and/or those who don't conform to patriarchally conscripted heterosexual and reproductive roles are 'really gay'. It is widely accepted that protection on the basis of prohibited grounds of discrimination includes protection on the basis of being *perceived* to be a member of a group, whether or not one *actually* is. However, as long as it is difficult to demonstrate the specific perceptions and responses of the discriminator, sexual orientation remains a tenuous ground for protection.²⁴

Regardless of whether or not a transsexual person is gay or lesbian, they may nonetheless be directly impacted by laws that discriminate on the basis of sexual orientation. Consider, for example, the legislated ban on same-sex marriage, and its impact on trans people. In marriage-annulment and related cases the courts have taken the opportunity to define the 'sex' of litigants, irrespective of their chosen gender identity. The courts' definitions typically draw heavily on biologically determinist and essentialist medical models that make no room for gender variance and that see sex strictly in terms of procreativity. Reminiscent of archaic religious myths and doctrine about the respective "duties" of wives and husbands, these nominative impositions are made in such a way as to preserve the heterosexist tradition of marriage as a rite/right reserved strictly for members of the opposite sex, whose sex and civil status was medically assigned at birth. We see this apparently morally – and politically – motivated reasoning at play in cases

²³*Vancouver Rape Relief*, at 57.

²⁴Paisley Currah and Shannon Minter, *Transgender Equality: A Handbook for Activists and Policymakers*. The Policy Institute of the National Gay and Lesbian Task Force (2000), p. 17. <www.nglftf.org/downloads/transeq.pdf>.

where the courts have annulled marriages and granted exemptions from spousal support and insurance claims, because one of the partners had previously transitioned or was planning to transition, and in effect, was found not to be in a heterosexual union.

British, Anglo-American and Canadian case law is replete with examples of transsexual marriages being annulled because the partners are subsequently considered to be of the same sex. Consider the precedent set by the notorious *Corbett* (1970)²⁵ decision in the UK, where the marriage of a transsexual woman to a non-transsexual man was annulled despite the fact that sex change surgery had occurred. And again, consider the 1984 decision in *M v. M*,²⁶ where a P.E.I. court annulled a marriage after the wife informed her husband that she intended to live her life as a man. When nullifying the marriage, the court also referred to the wife's inability to have "natural" sexual intercourse. These examples reflect the lengths to which the courts will go to preserve the tradition of marriage for potentially procreative, heterosexual couples, and the paradoxes they are willing to live with in doing so. Although Canadian law allows for a legal change of 'sex' identity, it's no coincidence that certain provincial legislation specifies that one cannot be married at the time that one applies to change one's 'sex' designation on their birth certificate. In its deference to medical practice, this rule is an important key to understanding how the current laws dictating the terms and conditions of gender identity and civil status (namely, the *Vital Statistics Act*), play out in other contexts to perpetuate heterosexist bias and discrimination against gays and lesbians.

2.4 Gender Identity

Various equality advocates have lobbied for the addition of 'gender identity' as a ground of protection under human rights legislation. In our ongoing research, discussions and consultations thus far, we have become increasingly aware of the importance of pursuing and supporting this legal reform, especially considering the multi-faceted and systemic nature of discrimination born

²⁵*Corbett v. Corbett (otherwise Ashley)*, [1970] 2 All E.R. 33.
<http://www.pfc.org.uk/legal/c-v-c.htm#judgment>

²⁶*M. v. M.* (1984), 42 R.F.L. (2d) 55 (P.E.I.S.C.).

of sexist, ableist and racist stereotypes, myths and norms —and the limitations of the existing and available grounds. ‘Gender identity’ could offer protections to those who ‘fall through the cracks’ of existing grounds. Moreover, this possible ground is not over-determined by previous jurisprudence, as might be the case for sex, sexual orientation, and disability, and it would potentially protect a greater range of gender variant people than do the existing categories.

In its submissions to the *Canadian Human Rights Act Review Panel*, TransAction urged that the amendments be broad enough to capture the greatest range of diverse forms of gender expression, protecting individuals who are differently situated as transgendered, whether or not they identify as trans. In recommending that ‘gender identity’ be added as a prohibited ground of discrimination, it clarified that this means "protection against discrimination for anyone who, temporarily or permanently, is, or is perceived to be, a member of the gender other than his or her assigned gender."²⁷ This echoes the policy analysis and recommendations developed by Paisley Currah and Shannon Minter,²⁸ as it does those implemented in many municipal jurisdictions in the U.S. where ‘gender identity’ or ‘gender expression’ has already been included in anti-discrimination legislation as a basis for protection.

The final report of the *Canadian Human Rights Act Review Panel* supported this position, noting that this category would grant a new “visibility” of transgendered people in law, and would allow for case-by-case development of how this term is to be interpreted.

Part 3: The Politics of Gender Identity and Sexual Difference

3.1 The Need for “Women-Only” Spaces

Many and diverse women’s groups have, for a variety of reasons, insisted upon the importance of women maintaining their own autonomous organizations in which men do not participate or do so only in limited ways. Essential to our struggle to restore dignity to disempowered women

²⁷ TransAction proposed resolution, June 1999.

²⁸ *Supra*, note 24.

is our ability to bring ourselves together and to freely associate on the basis of life-defining characteristics (such as aboriginality, ethnicity); in relation to political objectives (such as reproductive choice); or around a set of commitments (such as creating safe places for rape victims, or eradicating poverty). These are the necessary conditions of self-empowerment in a socio-economic and cultural context where access to, and mobility within, public space is still largely controlled by men, and our roles and opportunities are frequently defined against our interests.

In the early years of the second wave of feminism, many women left progressive and left wing groups to form women-only groups because they felt such groups were not adequately dealing with women's issues, if at all. Women within those groups continued to routinely be assigned traditional "women's work." Even in groups in which women were numerically dominant, men tended to rise to leadership positions and to exercise greater authority and control within the group. As women became more aware of the systemic nature of sexism and the ingrained patterns of patriarchy, many came to believe that these problems could only be addressed by women working together and exclusively with other women.

Consciousness-raising was a key process for many women in the course of identifying as feminist. A major feature of feminist consciousness-raising was the recognition of shared experiences among women and of the shared oppression as women. It seemed to follow from this consciousness-raising and identification as feminists that women would organize and work together to fight sexism and patriarchy. The exclusion of men was seen as crucial to the political goals and understanding as well as to the survival of feminist groups and feminism. Men were excluded in order to retain the autonomy of the group and to focus exclusively on women, women's issues, women's experience, and women's leadership. To some extent, the perceived need for women-only groups has been related to specific issues such as women's health, violence against women, and control over women's sexuality.

Concerns about inclusion and exclusion have preoccupied every oppressed group when some of their members have organized solely on the basis of membership in that group. The argument in

support of such groups has consistently been that it is appropriate and desirable for members of oppressed groups to organize and do political work separately from the dominant group in order to defend their collective interests, to solidify and enhance their understanding of their oppression, to develop a sense of group solidarity and cohesion, to provide a safe space for disclosure, mutual support and healing, to offer a respite from ongoing oppression, to provide members of the group opportunities for leadership often denied them in other contexts, to provide the opportunity to explore and develop alternative ways of thinking and being and acting, and to facilitate strategizing and action for change on behalf of their group. None of these needs and desires is considered unique or exclusive to the group, but, given the systemic nature of discrimination and the optional nature of such groups, identity is considered a legitimate basis for organizing. It is essential to the integrity and autonomy of these groups that they be able to define and control membership in their group.

Generally speaking, within the equality-seeking community and in human rights legislation, establishing restrictive identity-based groups has been considered defensible, as long as dominant groups are not organizing themselves so as to exclude participation from members of subordinated groups. In some circumstances, this approach raises the problem of the hierarchization of oppressions by requiring the ranking of subordinated groups. When members of a dominant group organize as such, this reinforces preexisting privilege and dominance. Exclusion does not have to be deliberate and explicit; some ‘women-only’ groups, for example, have been criticized as being for and about the needs and interests of white, non-disabled, middle class women.

For those who experience social and cultural marginalization, the ability to define and create safe spaces is crucial on both an emotional and a political level. However, without negating this right, it is also important to consider the broader context in which notions of safety come to be necessary and meaningful. For instance, in a woman-only space, a woman of colour may not feel as comfortable as she might in a people of colour-only space. Similarly, a woman of colour with disabilities may not feel safe in a woman of colour-only space if the people with whom she finds the most support are women with disabilities who may not be ‘of colour.’ The experience of

growing up as a white girl differs in fundamental ways from the experience of growing up as a brown girl, as it does for those whose experience of systemic race discrimination is compounded by that of disability or poverty. As these examples demonstrate, it is important to recognize that what is understood by the notion of 'shared experience' means different things in different contexts. While it is critical for women to retain the ability to self-organize we recognize that grouping together on the basis of a shared history of oppression does not necessarily create safe spaces for all of those included, and it may exclude individuals who would be able to contribute to the goals of the organization. Such a system of self-organization, then, is not perfect, but rather, strategically and conditionally necessary in order to secure a degree of safety and political organization. It should be recognized as an act of "strategic essentialism."²⁹

While there has been some criticism of the universalizing claims of mainstream feminists, these criticisms have not generally been manifested through formal challenges to women-only spaces. Rather, they have operated as a discourse within feminism to bring attention to compound forms of oppression and identity. The more public and legal challenges to women-only spaces, usually initiated by men, have tended to rely upon arguments relating to fairness and the language of reverse discrimination, with the typical argument being that if it is discriminatory for men to exclude women, then it must also be considered discriminatory for women to exclude men. While these arguments may have a strong formal equality appeal, they are not supported by a substantive equality analysis and have not been successful in law. The challenges have come from people who dispute the right of autonomous groups to exist rather than from someone who asserts membership in the group. Unlike other oppressed groups relating to race, culture, and disability, women organizing on the basis of sex have not, until now, had to struggle with a definition for membership in the group or to consider excluding those who consider themselves to belong in the group.

²⁹ See Radha Jhapan, "Post-Modern Race and Gender Essentialism or a Post-Mortem of Scholarship" in T. Brettel Dawson, ed. *Women, Law and Social Change: Core Readings and Current Issues*. Third Edition. North York: Captus Press, 1998.

In the course of consulting with trans and non-trans women, we heard that many trans men and women experience compounded forms of explicit discrimination and violence, including that of the transphobia of non-trans women. Such considerations point to the importance of understanding the individual experiences arising from one's unique positioning within relations of intersecting oppression and forms of disadvantage, their concomitant stereotypes, and their bearing on inclusion and exclusion. So too do they point to the urgency of anti-discrimination education, policy development regarding inclusion, and support service provision.³⁰

3.2 Reasonable Limits and Undue Hardship?

The case that probably best exemplifies the current debate on this issue is *Nixon v. Vancouver Rape Relief Society*.³¹ This case involves the exclusion of Kimberley Nixon, a post-operative transsexual woman, from a volunteer training program at the rape crisis centre. Nixon was turned away from this 'woman-only' peer counselling program at the centre after disclosing that she was a transsexual woman. Nixon filed a sex-discrimination complaint with the British Columbia Human Rights Tribunal. In its defence, Rape Relief argued that lifelong experience of being treated as female is a *bona fide* occupational requirement and a justifiable basis to exclude transsexual women from their program. Rape Relief argued that it organized based on common sexual experience as it relates to childhood socialization, life-long experience of being raised as female, social and physical relationships to reproduction, and the experience of a particular type of subordination.³² It also argued that its approach is "integrated and blended with its political belief that women suffer oppression from birth and should resist male violence by working together with others who are peers in their experience of that oppression."³³

The centre claimed that it is not inconsistent with the human dignity of transsexual women for it to assert a *bona fide* occupational requirement for its members and 'peers' in supporting,

³⁰ For specific recommendations derived from an analysis of the diverse social and political context of trans discrimination, and the specific needs of trans persons, see Caroline White, *supra*. note 10, pp. 149-153.

³¹ *Nixon v. Vancouver Rape Relief Society*, 2002, BCHRT 1.

³² *Nixon*, at 215.

sheltering and counselling victims of gender-based crimes of sexual violence. For it to exclude men and transsexual women in counselling rape victims, it submitted, is not to take a position on what a 'woman' *is*, but to recognize the "differences in life experience between persons with a life-long experience of the subordination of women and persons without that experience, in the rare context where life experience matters".³⁴ The centre also argued that it should benefit from the exemption against anti-discrimination rules provided by Section 41 of the *B.C. Human Rights Code*. The exemption provides, in part, that where an organization has the primary purpose of promoting the interests and welfare of an identifiable group characterized by a common sex or political belief, granting preference to members of the identifiable group does not contravene the *Code*.

For her part, the complainant Kimberley Nixon argued that she had "always been a woman," and in believing Nixon to be a man, Rape Relief acted not on an assessment of her experience but on her appearance. She argued that she was fully able to deliver the services offered by Rape Relief, including one-on-one counselling for survivors of male violence, without disruption or harm to any woman who is in a peer support group. Furthermore, she argued that Rape Relief's 'standard' of excluding trans women was "unreasonable and unnecessary; and in fact may do harm to non trans women who themselves would wonder if they were 'woman enough' or might be rejected based on how they looked or on some unacceptable feature of their life history."³⁵ As her lawyer barb findlay noted, "It is the essence of discrimination to privilege the unfounded fears of the excluding group over an individual assessment of the character and abilities of the members of the targeted group."³⁶

The Tribunal ruled that Rape Relief had, in good faith, adopted its exclusive policy for a purpose that is rationally connected to its function of providing a safe and supportive environment for the women who seek their services; however, it had not met the burden of proof of showing that "life

³³See Victoria Gray, "Legal Argument" Part 2, http://www.rapereliefshelter.bc.ca/issues/knixon_vgray_argum.html

³⁴See Christine Boyle, "Summary of Arguments," Part I, www.rapereliefshelter.bc.ca.

³⁵ barb findlay, Oral Arguments.

³⁶ *Ibid.*, p. 40.

experience as a woman or girl” is a reasonably necessary qualification to be of assistance to victims of male violence. It held that Rape Relief had not demonstrated that it would suffer “undue hardship” if obliged to accommodate Kimberly Nixon.

While allowing for the possibility that the presence of transsexual women, or women who are mistaken for men, might silence rape victims, the Tribunal ruled that Rape Relief had not established that a blanket exclusion of all transsexual women was “reasonably necessary” to avoid that problem. It reasoned that this assumes that all the women who access Rape Relief's services, and who provide services, have a homogenous, common life experience. It found that Rape Relief’s primary purpose was the provision of services to all women who are the victims of sexual assault. It found that Rape Relief’s evidence did not support a conclusion that there exists a shared life experience that is common to all non-transsexual women, in light of the significant differences in life experience between heterosexual and bisexual women, women of colour, lesbians, and aboriginal women, to name only a few. In this regard, the Tribunal noted that the women’s movement has dealt with these differences by creating caucuses to allow women with different commonalities to meet together in consciousness-raising groups.³⁷

The Tribunal also considered that Rape Relief had not taken into consideration the complainant’s individual capabilities and skills, nor the possible ways that she could be accommodated. It held that Rape Relief, therefore, had not established a *bona fide* occupational requirement and ordered that they “cease and desist” from discrimination against transsexual women. Rape Relief was also ordered to pay Kimberley Nixon \$7,500.00, the highest award for moral damages ever ordered by a B.C. Human Rights Tribunal. Vancouver Rape Relief has appealed the decision of the B.C. Human Rights Tribunal, and is arguing that the Tribunal erred in its interpretation by failing to include a threat to the integrity of Rape Relief as a form of undue hardship, and that it erred in holding that Rape Relief did not have a primary purpose of providing services to women in the political sense understood by Rape Relief.

³⁷*Nixon*, at 222.

The question of what counts as "undue hardship" in relation to accommodating trans women is by no means a settled one in human rights claims and/or in the context of certain gendered groups and services. This is particularly true with respect to those who are pre-operative or non-operative. Consider the recent case of Synthia Kavanagh, heard before the Canadian Human Rights Tribunal. Synthia Kavanagh, who was then a pre-operative male-to-female transsexual, federally sentenced to a male prison, applied to be housed in a woman's prison. Although she had not had sex reassignment surgery at the time of her claim, she had dressed and lived as a woman for some twenty years and had legally changed her name. The Tribunal found a limit to accommodating and housing *pre-operative* male-to-female transsexuals in women's prisons.³⁸ It highlighted the need to consider the unique context of the carceral setting and the needs of female inmates in this setting. It acknowledged that many women in such settings "are psychologically damaged as a consequence of the physical, psychological and sexual abuse they have suffered at the hands of men. Like transsexuals, female inmates are a vulnerable group, who are entitled to have their needs recognised and respected."³⁹

This case, when compared to that of *Nixon*, illustrates the different legal standards that are applied, depending on where and how one is positioned in the process of gender transitioning, and whether the transition is deemed 'complete' or 'successful' by the court. It is primarily, if not exclusively, to physical anatomy—surgically reconstructed or not—that the court turns to find the measure of 'gender identity', and effectively to assess the 'undue hardship' entailed by accommodating trans women in settings of female survivors of male violence. A crucial question that remains for feminists and other equality advocates concerns the political implications of relying on these kinds of markers to limit inclusion in such contexts.

3.3 Feminist Resistance to Medicalization

Perhaps the resistance to recognizing and including trans women into gendered spaces reflects a resistance to the medical profession's imposition and control over our bodies and identities.

³⁸*Kavanagh*, at 160.

³⁹*Kavanagh*, at 158.

Generally, the state—and the medical profession to which it so often defers—continue to maintain paternalistic control over women's bodies and health by dictating to whom and under what conditions medical services will be made available. Feminists have long been critical of such control, including the medical profession's tendency to pathologize women's natural body processes and to over-administer psychiatric drugs and surgical interventions. Feminists have recognized that the indicators that differentiate health and disease, ability and disability, derive from the partial vision of primarily white, socially and economically privileged, able-bodied men, who mark the norm against which all else is compared. However partial and skewed, theirs is the measure and standpoint of medico-scientific truth through which standard definitions of sexual identity are constituted.

Even though most inter-disciplinary inquiries over the past four decades have come to recognize that the differences between the sexes are extensively a matter of socialization, it remains a standard practice to invoke bio-medical categories such as reproductive anatomy to distinguish and define sexual difference. Such medical definitions are themselves imbued with cultural assumptions about gender roles. Most medical research and practice demonstrates an inordinate investment in maintaining and reinforcing a binary construction of sexual difference. Suzanne Kessler's research into the medical response to intersexed infants, for example, is a compelling demonstration of the social fears about gender ambiguity and the medical community's implicit reliance upon cultural understandings of a strictly bifurcated and immediate relation between sex and gender. When faced with ambiguous and undifferentiated genital anatomy, or unique and variable chromosomes, the typical response is to homogenize these differences and identify the "one true sex"—being either and only male or female—beneath the ambiguity.⁴⁰ For Kessler the medical community continues to implicitly measure 'true' sex according to the presence or absence of a 'proper' penis or the capacity of the vagina.

⁴⁰Suzanne J. Kessler. "The Medical Construction of Gender: Case Management of Intersexed Infants." *Signs: Journal of Women in Culture and Society*, vol. 22, 1990.

Perhaps *because* of the deep and pervasive social and political investment in sexual norms, roles and stereotypes, or perhaps *because* one's sense of self is made to be deeply implicated in one's singular identity *as a woman* or *as a man*,⁴¹ gender variance and difference is rendered and treated in most Western communities as unintelligible and intolerable. Medical intervention is often used to render invisible or erase the scope of differences at play between the reductive binary categories of male and female.

For various reasons, many transsexuals who consider the dangers or the merits of sex-reassignment have an ambivalent relation to medical and surgical intervention. As is apparent in testimonial discourses, for some transsexuals, reconstructive surgery is essential for their personal security, dignity and autonomy, and/or to enable a deeply felt sense of gender identity to be consistent with sexed embodiment. Others, however, choose not to have surgery, and remain critical of the ways in which transgendered experiences are medicalized and pathologized, as well as the extent to which the determination of gender remains under medical authority.

Even for those for whom surgery is an option, there remain significant constraints and complications. As various reports and studies have indicated the surgery may provide the cosmetic appearance of reconstructed genitals, but many attest to ongoing pain and discomfort, as well as concerns about 'genital functioning.'⁴² Problematically, and as these testimonies generally indicate, what constitutes a 'functioning' penis and vagina is based on the capacity of the reconstructed organs to engage in penetrative heterosexual intercourse. In any case, full surgical intervention cannot, in these circumstances, be considered a reasonable option, however much it may be desired by individuals.

While individuals who identify as transgendered are often deeply critical of the medical professions' control over gender identity, many transsexuals also find themselves heavily reliant

⁴¹ See Patrick Hopkins, "Gender Treachery," in *Gender Reader*. 2nd edition. Eds. Evelyn Ashton-Jones, Gary Olson and Merry G. Perry. Toronto: Allyn and Bacon, 2000.

⁴²Suzanne Kessler, *Lessons from the Intersexed*, New Jersey: Rutgers University Press, 1990, 68.

on the same medical profession for the provision of support services. As noted by Maxine Petersen, Clinical Psychologist at the Toronto Gender Identity Clinic, the delivery of psychological services to gender variant clients is contingent on the listing of gender dysphoria within the *Diagnostic and Statistical Manual* (DMS IV). Petersen makes it clear that for many gender variant individuals, support and service provision for the related stresses that accompany gender variance, such as those resulting from chronic underemployment and a lack of adequate housing, depression and social isolation, would be extremely difficult without the DSM listing. In other words, it is the medicalization and pathologization of gender variance that makes it possible for individuals to receive appropriate health care.

It is not a simple matter to change one's designated 'sex' or gender identity, and it is currently impossible to do so, legally, without extensive medical intervention and documentation. We have not yet managed to shake the medically and judicially reinforced notion that 'sex' is permanent and immutable, and that it corresponds directly to bifurcated gender identity. The precedent for this was set in the United Kingdom case of *Corbett*. Referring to biological and anatomical characteristics of sex, the court held that April Corbett was fundamentally a male because of the presence at birth of male chromosomes, genitals, and gonads. Finding 'sex' to be an "immutable characteristic," Judge Ormrod stated that "the biological constitution of an individual is fixed at birth and cannot be changed, either by the natural development of organs of the opposite sex, or by medical or surgical means."⁴³ To the extent that, since *Corbett*, courts have come to accept a change to one's designated 'sex,' the process still requires, at a minimum, extensive hormonal and surgical reconstruction and medical documentation.

Provincial *Vital Statistics* legislation governs the designation of 'sex' on one's identifying documents, and particularly on one's birth certificate. The *Vital Statistics Acts* of British Columbia, New Brunswick, Nova Scotia, Alberta, Ontario, and Saskatchewan explicitly require sex change surgery and certification by the surgeon and another medical practitioner to change

⁴³*Corbett v. Corbett* (1971) 2 WLR 1306.

the designation of one's sex.⁴⁴ Similarly, the *Civil Code of Quebec* requires that the person "has successfully undergone medical treatments and surgical operations involving a structural modification of the sexual organs intended to change his secondary sexual characteristics." As with British Columbia and New Brunswick, Quebec explicitly specifies that one cannot be married at the time that one applies to legally change their sex designation.

The requirement of costly surgery as a condition of changing one's civil status strips those who do not have access to such services, or who do not wish to go through such procedures, of the ability to feel the security of having completed a full transition, or of being accepted as their chosen sex. In *B. v. A.*, (1990)⁴⁵ an Ontario court refused to grant support payments to a female-to-male transsexual who had been living as the spouse of a woman for more than 20 years because she had not had what the court deemed to be "radical and irreversible surgical intervention with all the fundamental reproductive organs, more than their simple removal, and independent of exterior continuing circumstances." The court was concerned that if B were to cease taking hormones, he could revert to a female gender expression: "Since B's genitalia have not been altered and B would revert to a female appearance without continuing hormone therapy, B is not a 'man' within the meaning of the *Family Law Act*, 1986."⁴⁶ In *Canada v. Owen*,⁴⁷ a transsexual woman was refused a spouse's pension, despite a 40-year relationship because she had not had the surgery required to complete her transition. Under the *Old Age Security Act*, a spouse must be of the "opposite" sex. Again, in *C.(L) v. C.(C)* (1992),⁴⁸ a case involving a transsexual male, despite the significant degree of surgical intervention that had taken place—mastectomy and chest-wall reconstruction, hysterectomy and hormone therapy—the court, nonetheless, granted a declaration of nullity of marriage because reconstructive surgery of male

⁴⁴ British Columbia *Vital Statistics Act*, R.S.B.C. 1996, c. 479; New Brunswick *Vital Statistics Act*, c. V-3; Nova Scotia *Vital Statistics Act*, R.S., c. 494, s. 1.; Alberta *Vital Statistics Act*, R.S.A. 2000, c. V-4; Ontario *Vital Statistics Act*, R.S.O. c. V-4; Saskatchewan *Vital Statistics Act*, R.S.S. 1978, c.V-7. Quebec *Civil Code of Quebec* S.Q., 1991, c. 64. There is no mention of the change of 'sex' on one's birth certificate under *Vital Statistics* acts for the following jurisdictions: Yukon (<http://www.lex-yk.ca/>); Northwest Territories (*Vital Statistics Act*, R.S.N.W.T. 1988, c. V-3); Nunavut (*Vital Statistics Act*, R.S.N.W.T. 1988, c.V-3); Newfoundland (*Vital Statistics Act*, R.S.N.L. 1990 c. V-6); Prince Edward Island (*Vital Statistics Act*, R.S.P.E.I., c. V4).

⁴⁵ *B. v. A.* (1990), 29 R.F.L. (3d) 258 (Ont. Master)

⁴⁶ *Ibid.*

⁴⁷ *Canada v. Owen* (1994), 45 A.C.W.S. (3d) 762 (F.C.T.D.).

⁴⁸ *C.(L.) v. C.(C.)* (1992), 10 O.R. (3d) 254 (Ont. Ct. (Gen. Div.))

genitalia had not taken place, and the marriage was deemed to be between two women. Such judicial reasoning reinforces the sexist and heterosexist presumption that procreative potential—or at least its appearance—is the ultimate marker of the truth or legitimacy of one's gender identity.

More recently, in Canadian human rights tribunals, we see indications of the attempt to shift from such essentialist medical models. In the case of *Sheridan v. Sanctuary Investments*, the court affirmed that for the purposes of human rights legislation, “transsexuals in transition who are living as members of the desired sex should be considered to be members of that sex.”⁴⁹ While this implies that all transsexuals in transition should be recognized and accepted as their desired sex, regardless of whether or not their transition has been surgically completed, the underlying assumption remains that a ‘full’ transition is both a realistic possibility and the end goal of all transsexual individuals. Such assumptions homogenize the contextually varied and diverse experiences of the embodiment and identity of transsexuals, and may have the most adverse impact on female-to-male transsexuals, who not only have the added constraint of more expensive surgery, but who are limited by the (in)ability of medical science to “make” male anatomy.

These assumptions also challenge us to consider the problematic terms and conditions through which gender and identity is currently legally acknowledged, how it could or should be, and how to bring such analyses to bear on human rights law reform initiatives.

⁴⁹*Sheridan*, at 107.

**National Consultation on Transgender and Women's Substantive Equality Rights:
Questions to Consider**

Part 1

1. What does substantive equality mean for trans equality activists, and what considerations would an intersectional approach bring to this analysis?

Part 2

2. What considerations or concerns emerge from using 'disability' as an avenue of protection, particularly in light of the courts' reliance on medical expertise?
3. How do sex discrimination claims against trans persons enhance/detract from our understanding of the experience of discrimination by non-trans women, and *vice versa*?

Part 3

4. Can the ways in which Aboriginal women, women of colour, and women with disabilities have navigated the waters of competing definitions of identity provide some guidance in terms of how to negotiate the borders of the category of 'woman'?
5. How is sexual difference intelligible outside of or beyond reproductive and anatomical difference?
6. How can and should a feminist critique of medical discourse inform the current debates concerning gender identity?
7. How might social policy be devised to enable us to move away from a deference to medical intervention, yet respect the needs of transsexuals whose safety, security and dignity require it?

National Consultation on Transgender and Women's Substantive Equality Rights: Final Report

Foreward

This report provides a summary of the discussions and overview of the National Consultation on Transgender and Women's Substantive Equality Rights, which was hosted by the National Association of Women and the Law (NAWL), in Ottawa on February 22 and 23, 2003. The consultation was co-ordinated by C. J. Rowe and chaired by Margaret Denike, with assistance from other members of the Transgender Issues Working Group of NAWL, including Kim Brooks, Andrée Côté, Diana Majury, and Sal Renshaw. We are grateful to the Court Challenges Program of Canada and to Status of Women Canada for providing the funding needed for this consultation, including support for the preparation of a Discussion Paper (authored by Margaret Denike and Sal Renshaw), an Annotated Bibliography (prepared by C. J. Rowe), this Final Report and assistance with travel costs to bring as many participants as possible to this event.

Introduction

NAWL aimed for inclusion and broad representation at the consultation. A 'call for participants' was drafted by NAWL's working group, and it was issued on November 28, 2002 in English and French through the networks of equality-seeking organizations, women's and trans groups and services, and list-serves. There were some forty respondents to this 'call', all of whom were invited to attend the consultation. Partial funding assistance was provided to defray the cost of travel and accommodation for all who had responded to the call by the stipulated deadline of December 21, 2002.

In addition to NAWL staff and volunteers, participants came from across Canada, and specifically from different regions of the provinces of British Columbia, Alberta, Ontario and Quebec. Approximately half the participants identified as transsexual or transgendered, and others were representatives from a variety of organizations including women's equality-seeking

groups, crisis centres and services, unions, government, as well as students and other interested individuals. To facilitate the process, prior to the consultation, we drafted and circulated a Discussion Paper and a set of questions on various issues related to trans and women's human rights (appended). The consultation featured two panels consisting of short presentations by various participants; large and small group discussions on designated questions and themes; and an open session in which all participants were invited to comment and make suggestions regarding policy development.

As stated in the Discussion Paper, the specific objective for the weekend was to lay a foundation for the development of feminist and egalitarian approaches to law reform, litigation, and social policy on transgender and transsexual rights that respect and promote the substantive equality rights of all women. NAWL chose to consult broadly to develop an understanding of the issues and concerns relevant to policy development that arise from the rights and needs of transgendered persons and, in particular, to explore the implications of self-identification in different contexts, such as 'women-only' spaces and feminist services.

With attention to questions about how gender identity is defined, and particularly to the implications and potential limits of self-identification, we aimed to develop an inclusive and responsible feminist approach that respects the human dignity of all individuals, within and across our differences, and that promotes and advances the substantive equality rights of all women. We urged consideration of how our law reform initiatives could relate questions of gender identity to the challenges posed by systemic gender based violence, and to the patriarchal, institutional – judicial and medical – control of sexual identity, and the judicial deference to, and reinforcement of, surgical intervention.

Understanding Anti-Trans Discrimination

Members and allies of trans groups and equality advocates have been increasingly vocal about the tragic circumstances of human rights abuses suffered by transsexual men and women in particular, and transgendered persons in general. Of particular concern has been the lack of

protections and services available to trans individuals that are afforded to other members of society. As clearly elaborated during the consultation, in written and oral reports by trans equality activists, some of the specific and urgent issues include, but are not limited to: access to social services, such as homeless shelters, rape crisis centres, medical clinics; access to education, and to public and private health benefits; freedom from hate violence, including sexual assault; fear of repercussion or reprisal in retaliation for asserting one's ordinary rights, such as speaking out in public; chronic unemployment or under-employment; abusive treatment by law enforcement personnel; public humiliation, derision, ridicule, marginalization and exclusion; and denial of access to public accommodations such as shops, restaurants, and public transportation.

Throughout the consultation, participants from trans communities expressed their concerns about the lack of basic human rights protections and the inaccessibility of support services and resources. While for some trans women, access to women's groups is an important concern, for many others, there are more pressing and substantive issues. Trans people often struggle to meet their most basic everyday needs of food, clothing, shelter, and employment. Many participants pointed to the importance of addressing such basic issues of safety and survival before examining more complicated issues of identity politics. Such concerns of basic safety are direct effects of systemic discrimination. They touch on one's human dignity, one's ability to fully participate in society and to realize their full potential, as they relate to one's sense of security, autonomy and self-confidence.

In the course of the consultation, we heard that many trans men and women experience compounded forms of explicit discrimination and violence. Such considerations point to the importance of understanding individual experiences arising from one's unique positioning within relations of intersecting oppression and forms of disadvantage, their concomitant stereotypes, and their bearing on questions of inclusion and accommodation. So too do they point to the urgency of anti-discrimination education, policy development, and law reform.

It was clear from discussions among the participants that there are different points of view and debates within transgendered communities relating to questions of identity, visibility and self-identification. One participant suggested that, to dispel degrading and discriminatory stereotypes, trans people should become more visible in their communities. Others noted that many transsexual men and women feel that they are already too visible and they would prefer not to stand out as any different from other members of their chosen gender. Some expressed fear of being ‘outed’ against their will, if and when their voices, appearance, or demeanor differ from social norms for their gender, as anti-trans discrimination and violence is often fueled by heteronormative demands for conformity and an intolerance of difference. Moreover, while many transsexuals may consider surgery necessary for personal and safety reasons, others are critical of the medicalization and pathologization of gender identity. One participant noted that it is wrong to assume that all transsexual people might want to, or be able to afford, costly and invasive procedures to enable them to ‘pass’ as their chosen sex/gender. One’s ability to ‘pass’, and one’s success at ‘passing’ turns largely on the extent to which one can afford expensive treatments such as hormonal therapy, electrolysis and sex reassignment surgery. These are typically not easily accessible treatments for many trans people, particularly youth and those in rural areas.

Despite such differing views about such issues, there was a clear consensus that, since trans people are subjected to systemic discrimination, and they continue to be denied the basic human rights supposedly granted to ‘all individuals,’ the possibility of achieving full personhood or full benefit of the law – the possibility of social equality – requires substantial social and legal reform. The question is not *whether* they should be granted rights and freedoms – be they to social services, employment and medical care – but *how* rights and freedoms for trans people should be framed?

Seeking Human Rights Protections

As noted in the Discussion Paper, developing appropriate strategies for advancing the human rights of trans people, and securing appropriate protections remains a critical question engaging

equality-seeking groups. While there have been a number of successful cases where provincial courts and human rights tribunals have acknowledged discrimination against trans people based on one or more of the existing grounds of sex, sexual orientation or disability, Nunavut is the first and only province or territory to have included ‘gender identity’ in their human rights code.

In smaller discussion groups, as a starting point for debating possible forms of protection against discrimination, participants were asked to consider an intersectionalist approach and substantive equality analysis, recognizing the diversity and complexity of individuals’ experiences of discrimination, and the context of society’s responses to them. This approach acknowledges that forms of discrimination are multiple and compounding in their effect, and that systemic and historically pervasive inequalities exist between social groups.

Discussants noted that *everyone*, and especially minorities, needs human rights protections. To the extent that they are lacking for any group or individual, it is incumbent on equality activists to pursue and/or support them. It was noted that the existing grounds of protection in the *Charter* and human rights codes, such as sex, sexual orientation and disability, do not comprehend the range of gender-related diversity and discrimination. It was suggested that a new ground, ‘gender identity’, would better capture the broadest possible spectrum of gender based discrimination, as it recognizes the idea that gender exists on a continuum of maleness and femaleness. While one participant noted that adding ‘gender identity’ could present new challenges, hurdles and legal arguments for equality claimants and intervenors, others considered that it might provide a new way to capture discrimination against anyone who does not conform to gender norms.

One of the concerns highlighted at the consultation is that there is a lack of language to describe trans issues and experiences of gender variance. Our language and social constructs of gender – that is, the ways we think and speak of gender difference - are constrained by what one participant called a “biocentric” approach. This term captures the stereotype that is daily reinforced in and through social and legal institutions: that there are two and only two sex/genders, that one’s sex corresponds directly to one’s reproductive anatomy.

It was emphasized that, just as gender expression is fluid, so too should be our language and our approaches to human rights claims. It is important to avoid sweeping generalizations and to recognize that different experiences, standpoints and social contexts will entail different needs with respect to forms of protection. Some trans individuals may experience their gender dysphoria as a disability; others may not, but perhaps may be harassed by sexist and homophobic treatment. While human rights laws have been used successfully to date to protect some rights for some transsexual women, they have not been adequate for dealing with all gender variant people and their daily struggle against discrimination.

Self-identification and its Implications

Much of the discussion during the consultation concerned the issue of one's ability to self-identify or define one's own sex/gender, independently of the sex assigned at birth. In the process of drafting our Discussion Paper and consulting with trans and other equality seeking groups, it became clear that there are many different ideas about the terms by which one's gender identity is established, and/or recognized by law and by society. There is clearly little consensus as to when and whether it should suffice for one to simply self-identify as their chosen gender, and under what circumstances, and in what contexts, sex change surgery or hormonal therapy should be required.

Participants challenged others to consider situations where it would not be acceptable for a trans person to self-identify as their chosen gender, whether or not they had undergone surgery. One participant suggested that there be a limit to self-identification in the context of gendered sporting events. A discussion ensued regarding which markers would be determinative of gender, in this and other similar contexts. Would we look only to the presence or absence of a penis? Does having a penis have a bearing on unfair advantage any more than being particularly tall or broad shouldered? In response to such questions another participant welcomed consideration that we begin by accepting self-identification as definitive of one's gender identity. From here we

would be challenged to identify the specific contexts, and to explain and justify setting limits to self-identification, in ways that are consistent with feminist equality principles.

Almost all of the consultation participants who spoke on the issue appeared to be in favor of some form of self-identification, although there was debate on whether it can always be definitive of gender identity, and whether women's groups, spaces and services should be fully accessible to anyone who identifies themselves as female. One consultation participant who works at a rural women's shelter commented on the fact that she and other service providers could not imagine relying on anything other than self-identification-- and on trusting and accepting how clients present themselves. For some, these questions were highly problematic, and they highlighted that some transsexual women can easily access women-only services simply because of their ability to pass as a woman. However, it is often difficult for others to fully 'pass', either because they lack the resources for costly treatments and surgery or because they choose not to go the medical route. Some considered that no 'limit' to self-identification should be imposed, that in the context of crisis services we recognize that trans women are victims of violence, that we understand that few, if any, services are available to them, and that we make these services available to those in need regardless of where they might be in their transition or how they self present. Another participant made the point that, although the medical or surgical designation of one's 'sex' is often construed as the opposite of self-identification, in fact, medical authorities' recognition of one's 'true' gender basically comes down to self-identification, as doctors essentially rely on the expressed feelings of clients in assessing eligibility for sex reassignment. These examples led participants to question the popular assumption that, to allow individuals to simply self-identify as their chosen gender -- whether or not they have had sex change surgery -- would be a departure from current practices of recognition. They urged the re-thinking of the social and political value to having a designated, fixed 'true sex.'

Binary Constructs, Gender Variance, and Gendered Spaces

A recurring theme during the consultation was that binary definitions of gender difference are deeply problematic and inadequate for capturing the spectrum of gender diversity that characterizes the lived realities of individuals. It was noted that the binary distinction between male and female is at the heart of gender-based discriminatory attitudes and practices, through the institutionalization of gender norms, roles and stereotypes. One participant pointed out that perhaps the idea that there are two, and only two sexes -- male and female -- may be seen to underlie the perceived tensions between some 'women-only' and trans groups, which has been given expression by women who feel that transsexual women are essentially men, fundamentally different from others because they were not born female.

One participant presented her findings from her research project on trans accessibility to women's shelters and transition houses in British Columbia. She noted that the majority of respondents had indicated that many services were either already inclusive of trans women, that some centres were planning to develop trans-inclusive policies, and/or that they needed to further educate themselves on the issues. She noted that the presumption that women's groups are transphobic and exclusive derives from the publicity around a very vocal few who oppose trans inclusion and who dominate the debates. While another presenter challenged feminists to consider that, even though we have the legal right, through freedom of association, to exclude certain social groups from our organizations, it is a separate matter whether we have an ethical right to do so. Perhaps this is "not necessarily a question of human rights but of human wrongs."

Another participant urged the importance of moving beyond questions of access. It was noted that one popular misconception is that rights are a 'zero space sum game' – that, in order for transsexual women to gain human rights, others, namely 'women-born women' will have to lose theirs. This notion helps to perpetuate the fear that trans human rights claims are inconsistent with women's rights, and that transsexual women are a threat to the safety and security of 'women-only' space and services. We discussed the importance of shifting the perspective from one that sees trans claims as threatening to one that affirms our common experiences.

Participants expressed the value of recognizing that women and trans people share common sources of oppression by patriarchal institutions and gender ideologies. Some stressed that we must resist the forces that ‘divide and conquer’ marginalized groups, and that we work in solidarity to achieve our common goals on human rights issues. It was suggested that one way to build solidarity is for women’s organization to be proactive in welcoming and including trans women and to make explicit policies that cultivate mutual respect and compromise. Further, it was recommended that a positive starting point for advancing our equality-seeking goals would be to critically question our deference to medicalized, biocentric notions of difference – within and beyond the law – and to promote human dignity and freedom of choice for all women.

Emerging Issues and Recommendations

During the second day of the consultation, participants were asked to make suggestions and recommendations with respect to policy development and law reform initiatives for equality-seeking groups concerning trans and women’s rights. Various suggestions were applauded by many of the participants, although others were debated and discussed at greater length. The following includes a summary of the key issues raised and the possible law reform avenues that could be taken.

- As a few participants pointed out, any equality initiatives involving women’s equality-seeking groups would require them to educate themselves about trans experiences and related issues. With respect to language, a suggestion was made that we refer to, ‘women and trans’ people in our mandate and mission statements. Others noted, however, that this tends to construe trans women as ‘other’ to non-trans women, and that groups may instead refer to ‘all women’. Another recommendation was to incorporate some non-binding language to encourage equality-seeking groups to develop approaches of mutual respect and accommodation.
- Trans people will continue to launch human rights claims. One participant urged that equality-seeking groups provide support and assistance to those who are forced to take

this route to gain human rights protections. In this regard, equality-seeking groups were asked to work towards ensuring easier access for claimants to human rights tribunals.

- Women’s groups were urged to rally along side of trans activists in their struggle to have ‘gender identity,’ ‘gender expression,’ and/or ‘social condition’ included in human rights codes at the provincial, territorial and federal level. Assistance is needed in lobbying all levels of government for these changes. ‘Gender expression’ and ‘social conditions’ may help a wide range of gender-variant individuals, including effeminate men and masculine women, in bringing human rights claims.
- One participant suggested that equality-seeking groups lobby to change existing washroom legislation to provide for single-stall, unisex washrooms in public spaces and in places of employment.
- Equality seeking groups were urged to lobby for more flexibility in the recognition of grounds of discrimination. For example, we may wish to see, added to section 15 of the *Charter* and human rights codes that list grounds of discrimination, the phrase, “and other grounds of discrimination in the mind, the view, or the opinion of the judge.” As well, we may consider exerting political pressure to reverse the burden of proof on claimants for human rights complaints.
- Participants stressed that law reform be recognized as just one among many possible avenues for change. It is particularly important for groups to work toward mutual accommodation and respect, without requiring them to resort to legal contests.
- It was suggested that equality-seeking groups pursue and support the elimination of the requirement that one’s sex be designated on personal identification cards. There are many occasions in everyday life where we use the ‘sex’ assigned at birth – which is included on our identity cards -- as a primary signifier of one’s gender identity. Noting that, in most contexts, one’s designated ‘sex’ should be irrelevant to questions of meeting one’s basic

needs and having access to most services and facilities. Presently, trans people are ‘outed’ when their physical appearance does not match the ‘sex’ specified on their card.

- Participants emphasized that equality-seeking groups need to critically examine their adherence to biocentric assumptions and ideologies; to challenge their own and other’s transphobia; and to develop analyses of the nexus between transphobia and other forms of discrimination. This work needs to be done before feminists can tackle questions of self-identification and whether women-only spaces should be made accessible to anyone who self-identifies themselves as female, and more generally, when a change of gender should be legally recognized and how that recognition should be sanctioned in law.

Conclusion

This consultation was very successful in that it enabled us to learn from each other’s experience and engage in a productive dialogue about the complex relations between women’s and transgendered peoples’ oppression. It also provided an opportunity for feminist and trans activists to discuss the interrelated experiences of discrimination that are born of our cultural adherence to strictly binary distinctions between the sexes and between gender roles.

While there seemed to be a general consensus on some issues – such the need to eradicate discrimination in housing, the workplace and in access to health care services, and the addition of ‘gender identity’ as a prohibited ground of discrimination in federal, provincial and territorial human rights acts – some difficult questions remain unresolved. There is still much work to be done to fully understand these issues and the challenges they pose for law reform and social policy development.

We hope to continue this discussion with feminist, equality-seeking and human rights advocates in the near future. This consultation, and the discussions that we will have with our community partners in the ensuing months, will help NAWL move forward in developing egalitarian law reform options that will respect and promote the substantive equality rights of all women.

Bibliography

- Beger, Nico J. "Queer Readings of Europe: Gender Identity, Sexual Orientation and The (Im)potency of Rights Politics at the European Court of Justice." *Social & Legal Studies* v. 9, n.2 (2000): 249.
- Bern, Sandra Lipsitz. *The Lenses of Gender: Transforming the Debate on Gender Inequality*. London: University Press, c1993.
- Benjamin, Harry. *The Transsexual Phenomenon*. New York: Julian Press, 1966.
- Blackwood, Evelyn and Saskia Wieringa. *Female Desires: Same-sex Relations and Transgender Practices Across Culture*. New York: Columbia University Press, 1999.
- Bolin, Anne. *In Search of Eve: Transsexual Rites of Passage*. Massachusetts: Bergin & Garvey Publishers, Inc., 1988.
- Bornstein, Kate. *Gender Outlaw: On Men, Women, and the Rest of Us*. New York: Routledge, 1994.
- . *My Gender Workbook*. New York: Routledge, 1998.
- Boswell, Holly. "The Transgender Paradigm Shift Toward Free Expression." *Current Concepts in Transgender Identity*. Ed. Dallas Denny. New York: Garland Publishing Inc., 1998. 55 - 61.
- Bower, Lisa C. "Queer Acts and the Politics of 'Direct Address': Rethinking Law, Culture, and Community." *Law & Society*, v. 28, n. 5 (1994): 1009.
- Brown, M. and M.L. Rounsley. *True Selves: Understanding Transsexualism*. (1st ed.) San Francisco: Jossey-Bass Publishers, 1992.
- Bullough, Vern L. and Bonnie Bullough. *Cross Dressing, Sex, and Gender*. Philadelphia: University of Pennsylvania Press, 1993.
- Burnham, C. *Transsexual/transgender needs assessment survey report*. Vancouver, BC: GC Services, 1999.
- Butler, Judith. *Gender Trouble: Feminism and the Subversion of Identity*. New York. Routledge, 1990.
- Cadden, Joan. *Meanings of Sex Difference in the Middle Ages: Medicine, Science, and Culture*. Cambridge: Cambridge University Press, 1993.

- Califia, Pat. *Sex Changes: The Politics of Transgenderism*. San Francisco. Cleis Press Inc., 1997.
- Cameron, Loren. *Body Alchemy: Transsexual Portraits*. San Francisco: Cleis Press, 1996.
- Colloquy on European Law. *Transsexualism, Medicine and Law: Proceedings XXIIIrd Colloquy on European Law, Vrije Universiteit Amsterdam (Netherlands), 14-16 April 1993*. Strasbourg: Council of Europe, 1995.
- Coombs, Mary. "Sexual Dis-orientation: Transgendered People and Same-Sex Marriage." *UCLA Women's Law Journal*. 8 (1998): 219.
- Cope, Allison and Julie Dark. *Trans Accessibility Project: Making Women's Shelters Accessible to Transgendered Women*. 1999.
- Cromwell, Jason. "Fearful Others: Medico-Psychological Constructions of Female-To-Male Transgenderism." *Current Concepts in Transgender Identity*. Ed. Dallas Denny. New York: Garland Publishing Inc., 1998. 117-144.
- . *Transmen and female-to-males: Identities, Bodies, Genders and Sexualities*. Chicago: University of Illinois Press, 1999.
- Cross, Kathleen. *The Trans Biography Project: Stories from the Lives of Eleven Trans People in BC*. Vancouver: The Women/Trans Dialogue Planning Committee and Trans Alliance Society, 2001.
- Daly, Mary. *Gyn/Ecology: The Metaethics of Radical Feminism*. Boston: Beacon Press, 1978.
- Darke, Julie and Allison Cope. *Trans Inclusion Policy Manual for Women's Organizations*. Vancouver: Women/Trans Dialogue Planning Committee and the Trans Alliance Society, 2002.
- Davis, Edward, S. "The Law and Transsexualism: A Faltering Response to a Conceptual Dilemma." *Connecticut Law Review* 7 (1975): 288 - 345.
- Devor, Holly. *Female-To-Male Transsexuals in Society*. Indiana. Indiana University Press, 1997.
- . *Gender Blending: Confronting the Limits of Duality*. Bloomington: Indiana University Press, 1989.
- Elliot, Patricia. "A Psychoanalytic Reading of Transsexual Embodiment." *Studies in Gender and Sexuality* 2 (2001): 295-326.

- Elliot, Patricia and Katrina Roen. "Transgenderism and the Question of Embodiment: Promising Queer Politics?" *GLQ* 4 (1998): 231-261.
- Ekins, Richard. *Male Femaling: A grounded theory approach to cross-dressing and sex-changing*. London: Routledge, 1997.
- Feinberg, Leslie. *Trans Liberation: Beyond Pink or Blue*. Boston. Beacon Press, 1998.
- . *Transgender Warrior* Boston. Beacon Press, 1996.
- findlay, barbara. *An Introduction to Transgender Women*. LEAF Forum, November 1999.
- Finlay, Henry Alan. *Sex Change: The Legal Implications of Sex Reassignment*. Battery Point, Tas: H.A. Finlay, c 1988.
- Garber, Marjorie. *Vested Interests: Cross-Dressing and Cultural Anxiety*. New York: Routledge, 1997.
- Green, James. "FTM – An Emerging Voice." *Current Concepts in Transgender Identity*. Ed. Dallas Denny, New York: Garland Publishers, 1998.
- Greenberg, Julia A., "Defining Male and Female: Intersexuality and the Collision Between Law and Biology." *Arizona Law Review*. 41 (1999): 265.
- Greer, Germaine. *The Whole Woman*. New York: A. A. Knopf., 1999.
- Griggs, Claudine. *S/HE: Changing Sex and Changing Clothes*. New York: Berg, 1998.
- Halberstam, Judith. "F2M: The Making of Female Masculinity." *The Lesbian Postmodern*. Ed. Laura Doan. New York: Columbia University Press, 1994. 210-228.
- . "Transgender Butch: Butch/FTM Border Wars and the Masculine Continuum." *Female Masculinity*. Durham: Duke University Press, 1998, 141-173 and 293-297.
- Hausman, Bernice. "Recent Transgender Theory" (a review). *Feminist Studies*, 27.2(Summer 2001): 465-490.
- Horton, David. *Changing Channels?: A Christian Response to the Transvestite and Transsexual*. Bramcote: Grove Books, 1994.
- Kendel, Monica, Holly Devor, and Nancy Strapko. "Feminist and Lesbian Opinions about Transsexuals." *Gender Blending*. Eds. Bonnie Bullough, Vern L. Bullough, and James Elias. New York: Prometheus Books, 1997. 146-157.

- Kessler, Suzanne J. "The Medical Construction of Gender: Case Management of Intersexed Infants." *Signs: Journal of Women in Culture and Society*, 16:11, 3-26. 1990.
- King, Davie. *The Transvestite and the Transsexual: Public Categories and Private Identities*. Aldershot: Avebury, c1993.
- Kotula, Dean. *The Phalus Palace*. Los Angeles: Alyson Publications, 2002.
- Koyama, Emi. "Whose Feminism is it Anyway?: The Unspoken Racism of the Trans Inclusion Debate". Published on-line @ <http://www.transfeminism.org/pdf/whose-feminism.pdf>
- Lahey, Kathleen A. *Are We Persons Yet?: Law and Sexuality in Canada*. Toronto: University of Toronto Press, 1999.
- Lewins, F. *Transsexualism in Society: A Sociology of Male-to-Female Transsexuals*. South Melbourne: Macmillan, 1995.
- Lorber, Judith. *Paradoxes of Gender*. New Haven; London: Yale University Press, c1994.
- MacDonald, Eleanor. "Critical Identities: Rethinking Feminism Through Transgender Politics." *Atlantis*, 23 (Fall/Winter 1998): 3 – 12.
- Mathieu, Nicole-Claude. *L'anatomie politique: Catégorisations et idéologies du sexe*. Paris: Côté-femmes, 1991.
- Meldrum, Julian. *Our Own Resources: The Hall-Carpenter Archives' Lesbian, Gay and Transsexual Media Collections*. London: Hall-Carpenter Archives, BM Archives, 1982.
- Moi, Toril. *What is a Woman?: and Other Essays*. Oxford: Oxford University Press, 1999.
- Moran, Leslie J., Daniel Monk, and Sarah Beresford. *Legal Queeries: Lesbian, Gay and Transgender Legal Studies*. London: Cassell, 1998.
- Munt, Sally, and Cherry Smyth. *Butch/femme: Inside Lesbian Gender*. London: Cassell, 1998.
- Myers, Kate. *Genderwatch! After the Education Reform Act*. Cambridge: Cambridge University Press, 1992.
- Namaste, Vivian Ki. "'Tragic Misreadings': Queer Theory's Erasure of Transgender Subjectivity." *QueerStudies: A Lesbian, Gay and Bisexual Anthology*. In Brett Beemyn and Mickey Eliason, eds., New York: New York University Press, 1996, 183 – 203.
- Nataf, Zachary I. *Lesbians Talk Transgender*. London: Scarlet, 1996.

- Nestle, Joan, Clare Howell, and Riki Wilchins (eds.). *GenderQueer: Voices from Beyond the Sexual Binary*. Los Angeles; New York: Alyson Publications, 2002.
- Prosser, Jay. *Second Skins: The Body Narratives of Transsexuality*. New York: Columbia University Press, 1998.
- Purnell, Alan. *A Guide to Transsexualism, Transgenderism, and Gender Dysphoria: For those needing guidance, those seeking to understand, and those concerned with their care and treatment*. Third Edition. Longon: Gendys Network, 1998.
- Raymond, Janice. *The Transsexual Empire: The Making of the She-Male*. Boston: Beacon Press, 1979.
- Rees, Mark. *Dear Sir or Madam: The Autobiography of a Female-to-Male Transsexual*. London: Cassell, 1996.
- Report of the Interdepartmental Working Group on Transsexual People. London: Home Office, 2000.
- Ross, Katrina C. "The Transsexual and the Damage Done: The Fourth Court of Appeals Opens PanDORA's Box By Closing the Door on Transsexual's Right to Marry." *Law and Sexuality* 9 (1999-2000): 1-134.
- Shapiro, Judith. "Transsexualism: Reflections on the Persistence of Gender and the Mutability of Sex." *Body Guards: The Cultural Politics of Gender Ambiguity*. Julia Epstein and Kristina Straub (eds.) New York: Routledge, Chapman and Hall, Inc., 1991.
- Siann, Gerda. *Gender, Sex and Sexuality: Contemporary Psychological Perspectives*. London: Taylor & Frances, 1994.
- Simmons, Dawn Langley. *Man into Woman: A Transsexual Autobiography*. London: Icon Books, 1970.
- Stoller, Robert J. *Presentations of Gender*. New Haven; London: Yale University Press, 1985.
- . *Sex and Gender, v. II: The Transsexual Experiment*. New York: J. Aronson, 1975.
- Storkey, Elaine. *Gender Agenda: Talks given to a Social Workers Christian Fellowship Conference London*. Social Workers Christian Fellowship, 1992.
- Talamini, John T. *Boys Will Be Girls: The Hidden World of the Heterosexual Male Transvestite*. Washington: University Press of America, Inc., 1982.
- Talwar, Rajesh. *The Third Sex and Human Rights*. New Delhi: Gyan Pub. House, 1999.

Walters, W. and M. Ross. *Transsexualism and Sex Reassignment*. Oxford: University of Oxford Press, 1986.

White, Caroline. *Re/defining Gender and Sex: Educating for Trans, Transsexual, and Intersex Access and Inclusion to Sexual Assault Centres and Transition Houses*. MA Thesis, Department of Educational Studies of the University of British Columbia, 2002.

Whittle, Stephen and Kate More. *Reclaiming Genders: Transsexual Grammars at the Fin de Siècle*. London: Cassell, 1999.

Wilchins, Riki Anne. *Read My Lips: Sexual Subversion and the End of Gender*. Ithaca, NY: Firebrand Books, 1997.

Internet Sites and Resources

Amnesty International

<http://www.ai-lgbt.org/>

As a grassroots international human rights organisation, Amnesty International sees itself as particularly well positioned to play a role in advocating for lesbian, gay, bi-sexual and transgender rights to be considered as fundamental human rights. This web-site details urgent actions, resources, reports, and country contacts.

BC Human Rights Commission

<http://www.bchumanrights.org/Millennium.asp>

A summary of the 1998 recommended amendments to the *BC Human Rights Code*, including an amendment prohibiting discrimination on the basis of gender identity.

Finding Our Place: Transgendered Law Reform Project 1994

in PDF version

<http://www.yorku.ca/gilbert/tg/bc-report.pdf>

or

<http://www.geocities.com/WestHollywood/9992/lawform.htm>

This paper was written for the Vancouver High Risk Project in Vancouver, BC. This organization develops services for transgendered street workers. They take the position that all transgendered people are entitled to services and human rights protection, whether they are drag queens and kings, transsexuals, cross dressers, two spirited people, butch lesbians, or any other gender bender. This paper explores the inadequacies with the existing human rights and health laws as they apply to transsexuals in Canadian society. They suggest that an amendment to the existing human rights legislation would be to add "Gender Identity" as a protected ground. This will force eventual changes to other legislation which discriminate against transgendered individuals.

GenderPAC

www.gpac.org

GenderPAC is a US national advocacy organization. Through congressional lobbying, education and legal reform, they seek to eliminate all forms of gender discrimination. GenderPAC is particularly concerned with the way discrimination based on gender intersects with other kinds of discrimination, including those of race, class, ethnicity, and age. This site contains 'action alerts,' news stories, as well as multiple links to relevant resources.

International Foundation for Gender Education (IFGE)

<http://www.ifge.org/>

IFGE is an advocacy and educational organization for promoting the self-definition and free expression of individual gender identity. IFGE provides information and acts as a clearinghouse for referrals about a variety of issues which are transgressive of established social gender norms. IFGE maintains/publishes Thread, the IFGE newsletter, and TG Tapestry Magazine.

Investigating into Discrimination Against Transgendered People.

http://www.ci.sf.ca.us/sfhumanrights/lg_info.htm

A report by the San Francisco Human Rights Commission, 1994 that led to the addition of gender identity to the San Francisco human rights law. Linked from this page, PDF format.

“Men in Ewes’ Clothing: The Stealth Politics of the Transgender Movement.” by Karla Mantilla from off our backs, April 2000.

<http://www.rapereliefshelter.bc.ca/issues/menewes.html>

“Minstrel blood: The Emperor’s New Gender” by Alix Dobkin from off our backs April 2000

<http://www.rapereliefshelter.bc.ca/issues/newgender.html>

Dobkin charges the transsexual movement, specifically female-to-male transsexuals, as an 'in vogue' phenomenon, one that is seducing young women into becoming constructed males. Dobkin states, "in the blur of gender, represented as little more than a 'social construct,' injustice might easily be confused with inconvenience. To girls confronting their powerlessness, scant attention paid to 'gender's' political roots and historic consequences leaves 'masculinities' looking good, and personal adjustment through technology even better.”

The National Journal of Sexual Orientation Law, Vol. 3.1

<http://www.ibiblio.org/gaylaw/issue5/>

A 1997 issue of the National Journal of Sexual Orientation Law, including three articles on transsexual discrimination in America, the relationship between transgenderism and sexual orientation, genital surgery and legal change of sex and a brief concerning the International law protecting transsexuals.

The National Transgender Advocacy Coalition

<http://www.ntac.org>

The Coalition is a transgender civil rights organization that works for the advancement of understanding and the attainment of civil rights for all transgendered and intersexed people in every aspect of society. This is a comprehensive web-site with links to legal issues, resources and statistics.

“Notes on Gender Transition: Sexism in the Male to Female Transsexual” by Anne Vitale
<http://www.avitale.com/MTFSexism.html>

Ontario Human Rights Commission - “Towards a Commission Policy on Gender Identity.”
<http://www.ohrc.on.ca/english/publications/gender-identity-policy.shtml>

This site includes a discussion paper on the evolution of the Commission's recognition of the need for *gender* to be included as a specific category in the Ontario Human Rights Code.

“Postmodernism marches on: Women’s space under continued attack.” by Margaret Deirdre O’Hartigan, *off our backs* August-September 1999.
<http://www.casac.ca/womenonly/postmod.htm>

This article takes a critical look at the Survivor Project in Portland, Oregon, the goal of which is to provide male-to-female trans persons with access to battered women’s shelters across the US. The group seeks to extend existing women’s shelters, instead of establishing services to meet the needs of transgendered individuals. They have had some success with Portland’s primary resource for battered women, the Bradley-Angle House, who extended their services to “all individuals who identify as women regardless of their participation in a medically based transition.” O’Hartigan’s argument against the co-opting of existing women’s shelters is that these individuals would be taking services away from women in need. By “examining specific examples of how the application of postmodern deconstructionist theory actually impacts women’s lives [she] reveals the same old sexist expectation that the needs and desires of men take precedence over those of women.”

Press For Change
<http://www.pfc.org.uk>

This is a lobbying and educational organization in the United Kingdom. Their focus is on achieving equal rights and liberties for all transgendered people through legislative and social change.

Representing Transsexual Clients: An Overview Of Selected Legal Issues. By Shannon Minter
<http://www.nclrights.org/publications/tgclients.htm>

This article is a thorough overview of U.S. transsexual cases and legal issues.

Suggested Rules for Non-Transsexuals Writing about Transsexuals, Transsexuality, Transsexualism, or Trans ____. By Jacob Hale
<http://www.transfeminism.org/nontrans-rules.html>

Noting the complexity of 'speaking for and on behalf of the other', Hale offers a number of suggestions to non-trans writers and activists who wish to respectfully engage with trans issues.

Survivor Project

<http://www.survivorproject.org>

The Survivor Project is a non-profit organization dedicated to addressing the needs of intersex and trans survivors of domestic and sexual violence through caring action, education and expanding access to resources and to opportunities for action.

Trans Health

www.trans-health.com

A health and fitness e-zine for trans people.

Transfeminism.Org

www.transfeminism.org

This web site aims to facilitate communication between intersex and trans people who are feminists and their supporters. The site contains links to further resources and a reading database. It is also the contact site for information on an up-coming anthology *Transfeminist Anthology Project*.

Transgender Equality: A Handbook for Activists and Policy Makers by Paisley Currah and Shannon Minter

<http://www.nglftf.org/downloads/transeq.pdf>

This is a comprehensive report with an introduction by James Green, a well known female-to-male activist.

Transgender, Law and Policy

<http://www.transgenderlaw.org/>

This is an up-to-date listing of all laws in the United States that are transgender inclusive. This site has information on legal issues affecting transsexual and gender variant people in the US.

Transsexual Menace, Toronto

<http://www.themenace.net/>

Vancouver Rape Relief's Public Response – "Feminists protect the idea of women only space: one centres fight in response to a Human Right's Complaint"

<http://www.casac.ca/enghome.htm>

“Women’s Organizations and B.C. Human Rights Code: The struggle for women-only space.” from Kinesis March 1998

<http://www.rapereliefshelter.bc.ca/issues/kinesis.html>

In this article, four women involved with B.C. women’s organizations came together to talk about feminist political organizing and the proposed inclusion of 'gender identity' as a prohibited ground of discrimination under the B.C. Human Rights Code. They discuss the possible impact such legislation could have on existing women’s organizations.

Case Law Summaries on Transgender Issues

Canada

B. v. A. (1990), 29 R.F.L. (3d) 258 (Ont. Master)

An Ontario court refused to grant support to a female-to-male transsexual who had been living as the spouse of a woman for more than 20 years. The Court held that only a radical and irreversible change to all of the fundamental reproductive organs constitutes a sex change within the meaning of the *Vital Statistics Act*, R.S.O. 1990, c.V-4. As this fundamental change had not taken place the person was not a man within the meaning of the *Family Law Act*, (1986) S.O. c.4, and did not have the right to any support resulting from the break-up of the union.

Commission des droits de la personne du Québec v. Anglsberger (1982), 3 C.H.R.R. D/892 (C.P.Q.)

In this decision, the Court of Québec recognized that a restaurant owner had discriminated against and publicly humiliated a male-to-female transsexual by refusing to serve her and by throwing her out of the restaurant. The Court of Québec recognized that the discrimination was based on civil status and damages were awarded; however, the judgement did not discuss the components of the ground.

C.(L.) v. C.(C.) (1992), 10 O.R. (3d) 254 (Ont. Ct. (Gen. Div.))

A female-to-male transsexual was denied recognition as a male for the purpose of a spousal relationship because he had not had surgery to construct a likeness of male genitals. The application for a declaration of nullity of the marriage, which was considered to be between two women, was granted.

Canada v. Owen (1994), 45 A.C.W.S. (3d) 762 (F.C.T.D.)

A male-to-female transsexual sought Widow's Spouse Allowance. L. was identified as the spouse of the deceased R, a man. Although L had legally changed "his" name and had lived as a woman for the past 40 years, L had never had the surgery required to complete sexual conversion. Therefore, at law, L was found to still be a male and thus to be ineligible to receive a widow's allowance. Under the *Old Age Security Act*, R.S.C. 1985, C. 0-9, a "spouse" is required to be a person of the "opposite sex."

Gill v. Fairview Chrysler Dodge Ltd., Ont. Court of Justice, Gen. Div., No. 8884/95, December 19, 1996, Cavarzan J.; [1996] O.J. No. 4691 (indexed in Quicklaw)

Gill began hormonal therapy to change his/her sex after eight years of employment by Fairview Chrysler Dodge Ltd. At work, she maintained a male identity even though she was undergoing hormone therapy and was acquiring more female features. As a result, her colleagues harassed her constantly and she resigned from her job. The judge recognized the harassment but considered the resignation to be voluntary. The court found that Gill was unable to face her co-workers with the new identity and sex.

Ferris v. Office and Technical Employees Union, Local 15 [1999] B.C.H.R.T.D. No. 55 (B.C.H.R.T.)

Leslie Ferris filed a complaint under s. 8 of the *Human Rights Act*, S.B.C. 1984, C. 22 (now s.13 of the *Human Rights Code*, R.S.B.C. 1996, c. 210), alleging that Beach Place Ventures Ltd. and the Office and Technical Employees Union, Local 15 had discriminated against her with respect to the terms and conditions of her employment because of her sex and/or disability. The complaint arose out of the Union's actions following a complaint that was made about the Complainant's use of the women's washrooms at work. The Complainant alleged discrimination on the basis of sex and physical disability, and referred to the Tribunal's previous decision in *Sheridan* as establishing that discrimination against a person because they are transsexual is discrimination on the basis of both sex and disability (at para 82). The Tribunal was satisfied on the evidence, and in light of *Sheridan* and *Mamela*, that if the Complainant can establish that she suffered discrimination because she is transsexual, both the grounds of sex and physical disability apply (at para 85). The Tribunal found "that it is more probable than not that the alleged discrimination occurred... that the Complainant has established a *prima facie* case, and that the Union has not led evidence sufficient to rebut the inference of discrimination" (at para 103). The Tribunal found that both the s. 13 complaint and the s. 14 complaint were justified on the ground of physical disability as well as sex.

Ghidoni v. Ghidoni, Doc. Nanaimo 5920/009596, 11 October 1995 (B.C.S.C.)

The court ordered joint custody by consent to the mother and "transvestite or transsexual" father on basis, *inter alia*, of expert evidence that father's "gender disorder" was not detrimental to his having custody. The judge granted residence to the transsexual father.

L.A.C. v. C.C.C. (1986), 6 L.W. 646-003 (QL)

In this case the wife of a transitioning MTF sought an annulment to their marriage on the grounds that the husband was transsexual. The husband had changed his name to a traditional female name, dressed and lived as a woman and was under medical treatment in preparation for a

“sex change” operation. The application was dismissed for insufficiency of evidence. At issue was whether the husband was so afflicted by a genuine condition of transsexualism that he was forever unable to function as a husband should. In which case the marriage would have been voidable and would have been annulled. The application was dismissed with leave to the wife so that she may be able to adduce further evidence about the history of the marriage and the medical condition of the husband.

M. v. M. (1984), 42 R.F.L. (2d) 55 (P.E.I.S.C.)

This case involved the request for annulment of marriage on the grounds that the wife was a transsexual, a fact not known at the time of the marriage. The parties had lived in a common-law relationship and eventually were married. However, the wife was a ‘latent’ transsexual at the time of the marriage. The sexual relationship between the parties broke down, and the wife informed her husband that she intended to live her life henceforth as a man. She changed her name to that of a man, registered in a school as a man, and she was undergoing treatment to facilitate her transition from a female to a male lifestyle. The husband applied for a declaration of nullity of the marriage and for its dissolution. The statutory jurisdiction of the Court to entertain an action for nullity was found in the *Divorce Court Act*, a pre-Confederation statute of the colonial legislature. A marriage otherwise valid on its face could be subject to annulment if there became apparent, subsequent to the marriage, the existence of a condition which, if known prior to the marriage, would have precluded the parties from entering into it. The marriage was annulled because of the wife’s inability to have “natural” sexual intercourse arising from her transsexuality.

Mamela v. Vancouver Lesbian Connection [1999] B.C.H.R.T.D. No. 51 (B.C.H.R.T.)

The Complainant, Susan Amy Mamela, alleged that the Respondent, the Vancouver Lesbian Connection (VLC), discriminated against her regarding employment or any term or condition of employment, because of her sex and/or political belief, contrary to s. 13 or the *Human Rights Code*, R.S.B.C. 1996, c. 210. She further alleged that the VLC discriminated against her regarding a service or facility customarily available to the public, because of her sex, contrary to s. 8 of the *Code*. Mamela is a transsexual who self identifies as a lesbian female. She wanted to become a member of the VLC to be in a ‘woman-only space’ and to be accepted in the lesbian community. Previous case law has extended protections against discrimination in employment to volunteers in organizations that have solicited their services and provided training under a set of guidelines and a structure for accountability. All of these elements were found to be lacking in this case. Therefore, the circumstances for constituting an employment relationship within the meaning of s. 13 of the *Code* did not apply. In regards to her allegation of sex discrimination, the judge agreed with the reasoning in *Sheridan* and found that discrimination against a person who is transsexual is a form of sex discrimination. The judge felt that there was enough evidence to support the Complainant’s case and stated that “it is obvious that, in prohibiting her from attending VLC events or the VLC Centre, and in suspending her membership for one year, the

Respondent treated the Complainant adversely. In my view, it is reasonable to infer that the Complainant's sex was a factor in this treatment" (at para 96).

***M.L. and Commission des droits de la personne et des droits de la jeunesse du Québec v. Maison des jeunes* [1998] J.T.D.P.Q. no. 31 JEL/1998-0489, No 500-53-000078-970 (Trib. Que.) (QL)**

M.L., a preoperative male-to-female transsexual, worked as a streetworker for the Maison des jeunes. When M.L. was to begin hormonal therapy she called the Chairman of the Board of Directors, at his home, to inform him of the situation. A few days later, at a board meeting, Mr. Lemieux gave the streetworkers their pay cheques, including vacation pay, and announced that their employment had been terminated. The Maison des jeunes and the defendants, C.T. and A.T. (the Chairman and Treasurer of the Board of Directors), claimed to have acted in the interest of the youth and for financial reasons. They deny that any discrimination occurred, and maintain that neither the grounds of "sex" nor "civil status" set out in the Quebec Charter of Human Rights and Freedoms include transsexualism, or the process of changing one's sex. The Maison des jeunes claimed subsidiarily that the refusal to employ as a streetworker a person undergoing a sex change, as in the present case, represented a professional requirement that is justified within the meaning of the Charter. The court found that transsexualism, or the process of unification of disparate sexual criteria, is indeed included in the scope of the term "sex" in section 10 of the Québec Charter.

***Nixon v. Vancouver Rape Relief Society* [2000] B.C.H.R.T.D. No. 32, (B.C.H.R.T.)**

At issue was whether the British Columbia Human Rights Tribunal should allow the Complainant, Kimberly Nixon, a post-operative male-to-female transsexual, to amend her existing complaint against the respondent, Vancouver Rape Relief Society. Nixon sought to add an allegation of discrimination regarding the respondent's policy with respect to transgendered women. She alleged that she was subjected to discrimination when the volunteer trainer at the centre told her that they did not allow men or gay men as volunteers in their 'women-only' group of support service providers for victims of sexual assault. The Tribunal found in favour of the Complainant, and she was permitted to amend her complaint to include the following allegation: the Respondent's policy with respect to transgendered women or women who present in a manner which might cause staff or clients to believe that she is or has been a man, in effect when the Complainant sought to volunteer, is discriminatory against transgendered women on the basis of sex.

Nixon v. Vancouver Rape Relief Society (c.o.b. Rape Relief and Women's Shelter) [2002]
B.C.H.R.T.D. No. 1 (QL)

The B.C. Human Rights Tribunal awarded damages to a MTF transsexual, Ms. Nixon, who was denied the opportunity to volunteer at Vancouver Rape Relief Society. One of the main issues raised was whether a denial of an opportunity to volunteer constituted a violation of the discrimination in employment provisions of the Code. The Tribunal found that the relationship between Rape Relief and its volunteers was an employment relationship for the purposes of the Code and found that the term "employment" must be given a broad interpretation which furthers the objects of the Code. Another question in this case was whether Rape Relief discriminated against Ms. Nixon by depriving her of the opportunity to participate in its training program and become a volunteer. It was undisputed that a claim of discrimination under the Code on the basis of sex extended to a prohibition on the basis of transsexualism, and that Ms. Nixon was excluded from the training program solely because she was a transsexual woman. Thus, the Tribunal was satisfied that Ms. Nixon had made out a prima facie case of discrimination. Rape Relief sought to justify its treatment of Ms. Nixon by arguing that the exclusion of MTF transsexuals was a bona fide occupational requirement at Rape Relief. It claimed that, given the gender-based nature of sexual assault, a lifelong experience of being treated as a female was essential to work in a rape crisis centre. It also insisted that the exclusion of transsexual women from front-line work at Rape Relief was necessary to ensure that women felt safe and comfortable with its volunteer service providers. The Tribunal ruled that Rape Relief had not established that its policy of excluding MTF transsexuals was reasonably necessary to its goals, and that it had not met its obligation to accommodate Ms. Nixon to the point of undue hardship. In addition to this, the Tribunal went on to consider whether Rape Relief was exempt from the discrimination provisions of the Code by virtue of section 41 of the Code. The Tribunal rejected Rape Relief's contention that its primary purpose was the promotion of women with a life-long experience of cultural meaning associated with female biology. Instead, it found that Rape Relief's purpose was to provide services to all women who were victims of sexual assault regardless of their political belief or their life experience. The Tribunal ordered Rape Relief to cease its contravention of the Code, to refrain from committing the same or a similar contravention, and to pay Ms. Nixon \$7,500 as compensation for the injury to her dignity, feelings and self-respect.

R. v. Kavanaugh, Ont. Court Appeal, Toronto No. C5985, November 28, 1994, Brooke, Abella and Laskin JJ.; [1994] O.J. No 2697 (QL)

In this case a male-to-female transsexual was convicted of murder and received a life sentence. She asked to serve her sentence in a women's prison. The judge made a recommendation in favour of the Complainant. However, this recommendation could not be considered binding as the court had no jurisdiction in this area.

***Re. Reid*, [1986] 56 O.R. (2d) 61 (Ont. Court District).**

An Ontario court decided that even if the person had not yet undergone a surgical sex change, he could change his name and given names to female given names, considering that the operation involved had been planned, regardless of the potential confusion resulting from the new given names.

***Sheridan v. Sanctuary Investments Ltd.* [1999] B.C.H.R.T.D. No. 43 (B.C. Trib.)**

The Complainant, Tawni Sheridan, a male-to-female transsexual, alleged discrimination on the basis of sex and/or physical or mental disability by Sanctuary Investments Ltd, under s. 8 of the *Human Rights Code*. The complaint arose out of two incidents that took place at B.J.'s Lounge, a night club that catered to the gay and lesbian community. The first incident took place when Sheridan used the women's washroom and was asked to use the men's washroom. The establishment invoked its policy that "men who were anatomically men were to use the men's washroom and individuals who were anatomically women were to use the women's washroom" (at para 59). The second incident took place when the complainant tried to enter the establishment on New Year's Eve. She was asked for ID upon entry to the establishment and because she did not resemble the picture on the ID she was barred from entry. The court was satisfied that discrimination against transsexuals constitutes discrimination on the basis of sex because "transsexuals experience discrimination because of the lack of congruence between the criteria which determine sex" (at para 93), and that in these circumstances discrimination against transsexuals also constitutes discrimination because of "physical or mental disability (at para 97). The Tribunal found that "transsexuals in transition who are living as members of the desired sex should be considered to be members of that sex for the purposes of human rights legislation. Taking this view, the Complainant, on August 25, 1995, was a woman, and, therefore her choice of the women's washroom was appropriate" (at para 107). The Respondent's washroom policy discriminated against the Complainant on both these grounds under s.8 of the *Code*. With respect to the refusal of admittance to the establishment on New Year's Eve, the Tribunal did not find a reasonable basis to substantiate the Complainant's allegations.

***Stephens v. Services de santé du Québec*, [1994] R.R.A. 211 (C.A.)**

In an insurance case, the Québec Court of Appeal refused to grant sickness compensation to a transsexual person, Stephens, under a group insurance policy, as the evidence did not show that Stephens was suffering from a disability resulting from an illness requiring treatment. In this case, the Court did not rule on the question of whether transsexualism constituted an illness.

Vancouver Rape Relief Society v. British Columbia Human Rights Commission [2000]

The petitioner, Vancouver Rape Relief Society, sought a stay of proceedings due to the fact that the case had been delayed for 61 months. The case involves a post-operative male-to-female transsexual, Kimberley Nixon, who alleged discrimination by the Vancouver Rape Relief Society when it refused to allow her to participate in their volunteer training program on the basis that it was available to 'women-only.' The petition was dismissed because the Commission found that the circumstances of this case did not justify an order to stay. There were no quasi-criminal allegations against an individual, nor had the respondent suffered any demonstrable and substantial actual prejudice as a result of the delay. In addition, the Petitioner had applied for an order prohibiting the Commission from hearing Nixon's complaint on the grounds that the Commission had no jurisdiction to do so, as the Petitioner had applied for, and been approved to have, a 'women-only' policy. There was no doubt that the Rape Relief centre had rejected the Claimant as a volunteer because she had not been a woman since birth. The Commission held that Section 27 of the *Vital Statistics Act*, R.S.B.C. 1996, c.479 established that the legislature intended that post-operative transsexuals would be entitled to the same legal status as other members of their post-operative sex. Therefore, the discriminatory conduct alleged in this case could be characterized as discrimination against the complainant as a woman, a complaint over which the Tribunal and Commission do have jurisdiction.

United States

Anonymous v. Anonymous, 325 N.Y.S.2d 499 (N.Y. Sup. Ct. 1971).

The plaintiff sought a marriage annulment after making the discovery, on his wedding night, that his female 'spouse' had normal male sexual organs. The plaintiff claimed he did not know his 'wife' was a preoperative male-to-female transsexual. The court found that annulment was unnecessary as no legal marriage had in fact taken place. Marriage is limited to a contract between a man and a woman.

Davidson v. Aetna Life and Casualty 420 N.Y.S. 2d 450, 101 Misc. 2d 1 (S.C.N.Y., 1979)

Davidson, a male-to-female transsexual, sought treatment for gender dysphoria. The plaintiff visited Dr. Baggish who, in turn, billed the plaintiff's employer, Oxford Chemicals, for a comprehensive consultation and examination. Aetna Life & Casualty Insurance Co., provided the plaintiff with certain medical insurance protection. The insurance policy provides for the following: "Cosmetic Surgery: Any of the listed expenses incurred in connection with cosmetic surgery will be considered Covered Medical Expenses only if the cosmetic surgery is necessary for the repair of a non-occupational injury which occurs while the family member is covered for this benefit". Aetna's Senior Superintendent of the Life and Health Division, John G. McTigue, cited this clause as justification for the defendant's refusal to bear the plaintiff's medical

expenses. He alleged that gender dysphoria is not an injury, that transsexual surgery, as described, is cosmetic in nature, and that they viewed this sort of surgical intervention as unnecessary. Cosmetic surgery is surgery that is deemed optional or elective. The papers submitted on behalf of the plaintiff indicate that in order for the plaintiff to live a normal life, sex-reassignment surgery is imperative and necessary. The court found that the surgery, which is lengthy, requires extensive modification and realignment of the human body, and is requested rarely. It is performed to correct a psychological defect, and not to improve muscle tone or physical appearance. Because of this the Court concluded that the treatment and surgery involved in the sex change operation of the plaintiff was of a medical nature and was feasible and required for the health and well-being of the plaintiff. In turn, the Court found that the defendant, Aetna Life & Casualty Insurance Co., was responsible for all medical expenses incurred by the plaintiff as a result of her undergoing sex reassignment.

***Dee Farmer v. Edward Brennan* 62 U.S.L.W. 4446, (S.C.U.S., 1994)**

A pre-operative male-to-female transsexual, incarcerated in a federal prison for men, claimed to have been beaten and raped by another inmate after being transferred by federal prison officials from a correctional institute to a penitentiary where she was placed in the general population. The petitioner sought damages and an injunction barring future confinement in any penitentiary. She claimed that it was a violation of the Eighth Amendment as the respondent had acted with “deliberate indifference” to the petitioner’s safety because they knew that she would be particularly vulnerable to sexual attacks. The Court of Appeals affirmed the District Court's ruling to deny the petitioner's motion. It concluded that failure to prevent inmate assaults violates the Eighth Amendment only if the prison officials were “reckless in a criminal sense,” that is, if they had “actual knowledge” of a potential danger. In this case it was found the respondents lacked such knowledge because the petitioner never expressed any safety concerns to them.

***Frances B. v. Mark B., Formerly Known as Marsha B.* 355 N.Y.S. 2d 712, 78 Misc. 2d 112 (S.C.N.Y., 1974)**

This case concerned a marriage annulment. The defendant is a female-to-male transsexual who had a mastectomy, a hysterectomy and hormone therapy so that he could conform to the physical attributes of his felt male identity. The judge stated that “assuming, as urged, that the defendant was a male entrapped in the body of a female, the record does not show that the entrapped male successfully escaped to enable the defendant to perform male functions in a marriage. Attempted sex reassignment by mastectomy, hysterectomy, and androgynous hormonal therapy, has not achieved that result” (at para 24). The marriage between the two individuals was annulled due to the fact that Mark B. was not a ‘man’ and could not perform sexually as a man in order to consummate their marriage.

***Holloway v. Andersen*, 566 F.2d 659 (United States Court of Appeals, 9th Circuit 1977)**

Arthur Andersen, an accounting firm, dismissed the plaintiff after he informed his superior that he was undergoing treatment in preparation for sex change surgery. The Plaintiff sought protection under Title VII of the *Civil Rights Act*. The Federal Court held that sex discrimination under the *Act* was not intended to include transsexualism. The case was dismissed.

***Jane Doe v. The Boeing Company* 846 P 2d 531, 121 Wash. 2d 8 (Washington Supreme Court, 1993)**

Jane Doe, a biological male who was planning to have sex reassignment surgery, sought damages for employment discrimination, alleging an unaccommodated handicap under RCW 49.60.180, Washington's law against discrimination. She was discharged by the Boeing Company for wearing "excessively" feminine attire in violation of company directives, which required her to dress in either a male or unisex manor until after sex reassignment surgery. Doe arrived at work one day wearing a pink strand of pearls, which she refused to take off. Because of this her employment was terminated. The definition of "handicap" for enforcement purposes under RCW 49.60.180 requires factual findings of both (1) the presence of an abnormal condition, and (2) employer discrimination against the employee plaintiff because of that condition. The court held "that under this definition Doe was not 'handicapped' for purposes of RCW 49.60.180 because Boeing did not discriminate against her because of her condition" (at para 48). The court further concluded that "Boeing's actions were reasonable, and that no affirmative accommodation of Doe's condition was required because the scope of an employer's duty to accommodate an employee's condition is limited to those steps reasonably necessary to enable the employee to perform his or her job" (at para 48). The Court granted Boeing's petition for review and reversed the Court of Appeal's judgement in favour of Doe.

***Jane Doe v. State of Minnesota*, 257 N.W. 2d 816 (S.C. Minnesota, 1977)**

The court ruled that the total exclusion of transsexual surgery from eligibility for medical assistance benefits is void. Further applications should be considered on a case by case basis involving a complete and unbiased medical evaluation to determine the medical necessity of the requested operation.

***Littleton v. Prange*, Tex. App. Dist. 4 10/27/1999 (Texas 4th Court of Appeals)**

Christie married Jonathon Littleton in Kentucky in 1989, and they lived together until his death in 1996. Christie filed a medical malpractice suit under the *Texas Wrongful Death and Survival Statute* as Jonathon Littleton's surviving spouse. The sued doctor, the appellee here, filed a motion for summary judgement. The motion challenged Christie's status as a proper wrongful death beneficiary, asserting that Christie was a man and could not be the surviving spouse of

another man. This case relied heavily on the United Kingdom case *Corbett* and its four criteria for assessing the sexual identity of an individual. These include: (1) Chromosomal factors; (2) Gonadal factors (i.e., presence or absence of testes or ovaries); (3) Genital factors (including internal sex organs); and (4) Psychological factors (at para 44). The court then reasoned that since marriage is essentially a relationship between man and woman, the validity of the marriage depends on whether Christie is, or is not, a woman. In accordance with the *Corbett* case, and because the Court lacked statutory guidance, they concluded that they must be guided by biological factors such as chromosomes, gonads, and genitalia at birth. At the time of birth, Christie was a male, both anatomically and genetically. The facts contained in the original birth certificate were true and accurate, and the words contained in the amended certificate were not binding on the Court. The Court held that Christie Littleton is a male, and as a male, he cannot be married to another male; ‘his’ marriage to Jonathon was thus invalid, and ‘he’ could not bring a cause of action as his surviving spouse.

***Maffei v. Kolaeton Industry*, 626 N.Y.S. 2d 391, 164 Misc. 2d 547 (Supreme Court, New York County, 1995)**

At issue in this case were the legal protections of transsexuals against employer harassment. The plaintiff was born a woman and began working at Kolaeton Industry as a woman. S/he decided to undergo sex reassignment surgery to change her/his sex from female to male. The plaintiff claims that after the surgery the president of the company began harassing him. This harassment resulted in a hostile work environment from which he is entitled to damages. The judge found that “our New York City law is intended to bar all forms of discrimination in the workplace and to be broadly applied. Accordingly, I find that the creation of a hostile work environment as a result of derogatory comments relating to the fact that as a result of an operation an employee changed his or her sexual status, creates discrimination based on ‘sex’, just as would comments based on the secondary sexual characteristics of a person” (at para 40). The judge also pointed out that being a transsexual male may be considered part of a subgroup of men.

***M.T. v. J.T.* 355 A.2d 204, 140 N.J. Super. 77 (N.J.S.C., Appellate Div., 1976)**

This case presents the difficulty of defining the sex of a person for marital purposes. The case arose when M.T., the plaintiff, filed for support and maintenance. J.T. imposed the defence that M.T. was a male and their marriage was void. M.T. is a male-to-female transsexual who identifies as a woman. At issue is whether a marriage between a man and a postoperative transsexual is regarded as a lawful marriage. The judge held that “in this case the transsexual’s gender and genitalia are no longer discordant; they have been harmonized through medical treatment. The plaintiff has become physically and psychologically unified and fully capable of sexual activity consistent with her reconciled sexual attributes of gender and anatomy” (at para 29). Therefore, M.T. has the capacity to enter into a valid marriage with someone of the opposite sex.

***Renee Richards v. United States Tennis*, 400 N.Y.S. 2d 267, 93 Misc. 2d 713 (Supreme Court, Special term, New York County, 1977)**

The Plaintiff, Renee Richards, is a postoperative male-to-female transsexual. She sought a preliminary injunction against the Defendants, the U.S. Tennis Association, U.S. Open Committee, and the Women's Tennis Association so that she would be allowed to qualify and/or participate in the U.S. Open Tennis Tournament as a woman in the Women's Division. She claimed that the respective defendants had violated the New York State Human Rights Law (*Executive Law*, [s] 297, subd 9) and the Fourteenth Amendment to the United States Constitution. Richards had been prevented from qualifying and/or participating in the U.S. Open in the women's division as she was required to take a sex-chromatin test, known as the Barr Body Test, to determine whether she was female or male. This test prevented the plaintiff from being ranked as a woman tennis professional. The U.S. Tennis Association believed that the Barr Body Test is a reasonable way to assure fairness and equality when dealing with competitors from around the world. The plaintiff brought a number of medical experts to the stand to substantiate the claim that Richards is female, both socially and physically and that "Dr. Richards will have no unfair advantage when competing against other women. He said that her muscle development, weight, height and physique fit within the female norm" (at para 36). The court found that the misconceptions of the defendants must give way to the overwhelming medical evidence that the defendant is now female. The requirement of U.S. Tennis Association that the plaintiff pass the Barr Body Test was deemed unfair, discriminatory and a violation of her rights under the Human Rights Law of the State, pursuant to subdivision 9 of s. 297. Therefore, the plaintiff's application for a preliminary injunction was granted.

***Sommers v. Budget Marketing Inc.*, 667 F.2d 748 (8th Cir.1982)**

In this case, Budget Marketing fired a male-to-female transsexual, once they discovered that she was anatomically male and that she had 'misrepresented' herself as female when she applied for the job. Sommers sought protection under Title VII of the *Civil Rights Act* of 1964. The Court held that transsexualism was not covered under the term "sex" and that the use of "sex" under Title VII was not designed to mean more than a biological male or biological female. The court further held that any "new" definition of "sex" must come from Congress and not from the courts. The case was dismissed.

***Ulane v. Eastern Airlines Inc.*, 742 F.2d 1081 (United States Court of Appeals, 7th Circuit, 1984)**

The Court overturned two lower court rulings that determined that Ulane was discharged by Eastern Airlines Inc. because she was a transsexual, and that Title VII of the *Civil Rights Act* of 1964, prohibits discrimination on this basis. The Court contended that Title VII does not protect transsexuals, and that the District Court's order on this count must be reversed for lack of

jurisdiction. When Congress enacted the *Civil Rights Act* of 1964, its primary concern was with race discrimination and the category of 'sex' was added to the Act without any debate or prior hearing (at para 16). The phrase in Title VII prohibiting discrimination based on sex, in its plain meaning, implies that it is unlawful to discriminate against women because they are women and against men because they are men, a traditional concept of sex. Congress has subsequently rejected attempts to broaden the scope of its original interpretation (at para 19). In the Court's view, to include transsexuals within the reach of Title VII exceeds statutory interpretation, and to rule in favour of Ulane would take the Court into the realm of legislating. It was clear that Eastern did discriminate against Ulane because she is a transsexual and not because she is female. Since Title VII does not prohibit discrimination against transsexuals, the orders of the lower courts were reversed.

Australia

***R. v. Cogley* (1989) VR 799, (1989) 41 A Crim R 198, the Court of Criminal Appeal of Victoria.**

The accused, Cogley, appealed to the Court of Criminal Appeal of Victoria in regards to the conclusions arrived at by the Supreme Court of Victoria. Cogley was charged with a number of offences, including assault with intent to commit rape with aggravating circumstances, upon the complainant, a post-operative male-to-female transsexual (count 4), and with indecent assault with aggravating circumstances (count 5). Before the jury was empanelled, counsel for the defence submitted on the *voir dire* that counts 4 and 5 could not be sustained because, following *Corbett*, the complainant was a male and not a female. The trial judge, Cummins J, heard expert evidence, and in June 1988 gave a ruling in which he declined to follow *Corbett* and held that the complainant was a woman. The judge chose to regard as a woman, a male-to-female transsexual whose psychological identity was established and whose sex reassignment surgery had taken place. The trial followed and the accused was convicted on a number of counts, including charges 4 and 5. The appeal was dismissed, and in so doing the court found that Cummins J had erred in finding that the complainant was a woman because sexual identity is a matter of fact which should have been decided by the jury and not by the judge.

***R. v. Harris and McGuinness* (1988) 17 N.S.W.L.R. 158, the New South Wales Court of Criminal Appeal.**

The two accused were transsexuals. Harris was a post-operative male-to-female transsexual; McGuinness was a male-to-female transsexual who had not undergone sex reassignment procedures but who considered herself to be female. The accused were charged with having contravened s. 81A of the *Crimes Act* 1900 (NSW) which provided that when "a male person commits, or is a party to the commission of, or procures, or attempts to procure, the commission by any male person to any act of indecency with another male person shall be liable to

imprisonment for two years". Thus the offence could only be committed by male persons. The primary question before the Court of Criminal Appeal was the sexual identity of each of the accused. The majority rejected the argument that the Ormrod biological test was the only test to be applied in determining the question of sex and that other relevant criteria included whether the person had assumed the external genital features of the opposite sex, thereby bringing them into conformity with the person's psychological sex. The Court held that the post-operative male-to-female transsexual was not a "male person" within the meaning of the *Crimes Act 1900* (NSW), but that the pre-operative male-to-female transsexual was a "male person." Although the judge expressed sympathy for transsexuals and the situations in which they find themselves, he took the view that it was for Parliament to correct any such problem.

Re Secretary, Department of Social Security and HH (1991) 13 AAR 314

This case involved an appeal to the Social Securities Appeal Tribunal by SRA, a male-to-female transsexual who was denied a wife's pension on the basis that she was a 'man'. The Social Security Appeals Tribunal struggled with the distinction between pre-operative and post-operative transsexuals and saw difficulty in interpreting social legislation in such a way as to make surgery the determinant of entitlement. In its reasons for decision the Tribunal held that "in the area of social policy the requirement that a person undergo expensive surgery before being eligible to receive benefits is unduly onerous and is not in accord with the aims and purposes of the legislation". The Tribunal recognized that there may be a number of reasons why a person is unable to undergo such surgery, "the most obvious being lack of the necessary financial resources or perhaps a particular medical condition which makes surgery inappropriate". SRA stated at the hearing that if she had \$10,000 she would spend it on reassignment surgery for which she has been approved" (at para 31).The appeal was upheld.

Secretary, Department of Social Security v. "SRA" (1993) 118 ALR 467, (1993) 43 FCR 299, (1993) 18 AAR 498, (1993) 31 ALD 1.

This was an application of an appeal to the Federal Court of Australia, from a decision of the Administrative Appeals Tribunal affirming a decision of the Social Security Appeals Tribunal that the respondent, SRA, was eligible under s. 37(1)(a) of the *Social Security Act 1947* (the *Act*) to receive a wife's pension as the wife of an invalid pensioner. SRA is a male-to-female transsexual who has not undergone sex reassignment surgery. She had satisfied the criteria for approval for reassignment surgery but had not undergone it because she could not afford the cost. The Social Security Appeals Tribunal had considered that since the respondent had the psychological sex and social and cultural identity of a woman, she was qualified as a woman to receive a wife's pension as the *de facto* spouse of B, her partner. In this matter, the Federal Court considered the relevant words in the *Social Security Act*, such as "woman," "female," and "opposite sex", which were not defined. The Court found that, by departing from the ordinary meaning of the words used in the *Act*, the Tribunal had gone well beyond the ordinary meaning of the words to conclude that a pre-operative male-to-female transsexual was a "woman." In so

doing, the Court found that in reaching its conclusions, the Tribunal erred in law. However, the Court recognized that while a pre-operative male-to-female transsexual cannot come within the category of eligibility for a wife's pension under the *Act*, the respondent in this case would have come within that category had she successfully undergone the surgery that has been recommended for her. The Court acknowledged that “it seems very hard in an individual case to draw a distinction based upon the fact that a person has not had an operation that she cannot afford, particularly when the person is seeking legal recognition of an identity in which she has a deep belief” (at para 26). The appeal was allowed.

United Kingdom

***Corbett v. Corbett* (1971), 2 W.L.R. 1306, E.R. 33 (P.D.A.)**

<http://www.pfc.org.uk/legal/c-v-c.htm>

This is the first UK case to deal with the determination of a transsexual's sex/gender status. The marriage of a biological male to a post-operative male-to-female transsexual was annulled on the basis of the judge's determination that Mrs. Corbett was biologically male and that two males could not be married. The Court held that marriage is a relationship which depends on sex and not on gender. Judge Ormond ruled that there are four criteria for assessing the sexual condition of an individual: 1) chromosomal factors; 2) gonadal factors (i.e. presence or absence of testes or ovaries); 3) genital factors (including internal sex organs); and 4) psychological factors. With these criteria in mind, Ormond J. found the respondent to have “XY chromosomes and, therefore, to be of male chromosomal sex; to have had testicles prior to the operation and, therefore, to be of male gonadal sex; to have had male external genitalia without any evidence of internal or external female sex organs and, therefore, to be of male genital sex; and psychologically to be transsexual.” He further went on to say that the common ground established by medical witnesses was that “the biological sexual constitution of an individual is fixed at birth, and cannot be changed, either by the natural development of organs of the opposite sex, or by medical or surgical means.” Since marriage is essentially a relationship between a man and a woman, and since biology had been established as the key determinant of gender, the respondent was not considered a woman for the purposes of marriage but was a biological male and had been so since birth; therefore the marriage was void. Ormond J. went on to contend that a marriage between a male-to-female transsexual and a man was also voided on the basis that the transsexual was incapable of consummating the marriage in the context of ordinary and complete sexual intercourse.

J. v. S.T. (1996) E.W.J No. 692 F.A.F.M.I. 96/0245/F (England and Wales Court of Appeals (Civil Div.))

In this case, the plaintiff, J, challenged the right of the defendant, S.T. to apply for ancillary relief after the breakdown of their marriage. S.T. was a male-to-female transsexual, a fact unknown to J at the time of their marriage. The marriage was annulled on the basis that, at the time of marriage ceremony, the parties were not respectively male and female and thus S.T. committed an offence under section 3 of the *Perjury Act* 1991 when he made a ‘false declaration’ that there was no hindrance to the marriage. The court reasoned that he deceived the registrar as well as the plaintiff as to his true gender. The principal forms of ancillary relief available on the grant of decree of divorce or nullity are those set out in sections 22, 23 and 24 of the 1973 *Act*. In each of those sections it was made clear that the power of the Court to grant relief was discretionary. In this case the judge decided that the defendant was barred from pursuing his application. In reaching this conclusion, the judge took account of the fact that the defendant had committed a serious crime against the plaintiff, and in those circumstances the principle of public policy prevented the defendant’s application from proceeding.

P. v. S. and Cornwall County Council (1996) N.L.O.R. No 3413, N.L.C. 296046902 (Court of Justice of the European Communities Luxembourg)

The applicant, P, was employed as the General Manager of an educational establishment operated by the County Council. The respondent, S, was the head of the establishment. The applicant informed the respondent of her medical condition and explained that she was to undergo gender reassignment from male to female. After being dismissed at the end of 1992, P brought an action against S and the Cornwall County Council before the Industrial Tribunal. P claimed that she suffered discrimination on the grounds of “sex” under the *UK Sex Discrimination Act*. The Industrial Tribunal took the view that the *Act* did not apply to this circumstance. It held that the reason for dismissal was P’s proposed gender reassignment, but that “sex” did not cover this circumstance. That is, within the provisions of the domestic legislation “woman” means a female, and “man” means a male. However, the Tribunal considered that the wording of the *Equal Treatment Directive* could be wider on this point than the *Sex Discrimination Act*. Accordingly, it referred the following questions to the European Court of Justice for ruling. Here the Court ruled as follows: “In view of the objective pursued by Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions, Article 5(1) of the *Directive* precludes dismissal of a transsexual for a reason related to a gender reassignment.”

***Rees v. United Kingdom* ECHR 1986, Case No. 2/1985/88/135**

<http://www.pfc.org.uk/legal/rees.htm>

At birth, the applicant, Rees, possessed all of the physical attributes associated with a child of the female sex and was registered as a female on her/his birth certificate. Rees sought gender reassignment treatment in 1970. The applicant legally changed his name and had all of his official documents, with the exception of his birth certificate, amended to refer to him by his new name and with the prefix “Mr.” when applicable. In his complaint, Rees contended that the UK law did not confer on him legal status corresponding to his actual condition under Articles 3, 8 and 12 of the Convention. Under Article 8, the applicant claimed to be the victim of national legislation and practices contrary to his right to respect for his private life. The applicant’s primary complaint concerned the constraints placed upon his full integration into social life which resulted from the Government’s refusal to provide measures that would legally constitute him as male, namely the fact that his birth certificate recorded his sex as “female.” This caused him embarrassment and humiliation whenever social practices required its production. The Court found that “in the absence of any error or omission at the time of birth, the making of an alteration to the register as to the sex of the individual would constitute a falsification of the facts contained therein and would be misleading to other persons with a legitimate interest in being informed of the true situation” (42). Therefore, the demands of the public interest weighed strongly against any such alteration. The birth certificate is a record of the facts at time of birth. Thus, in the UK, the birth certificate is a document that reveals historical facts and not the current identity. Therefore, there is not breach of Article 8. With reference to the violation of Article 12, the applicant complained of the undisputed fact that, according to the current laws in the UK, he cannot marry a woman. It was the Court’s opinion that “the right to marry guaranteed by Article 12 refers to the traditional marriage between persons of opposite biological sex. This appears also from the wording of the Article which makes it clear that Article 12 is mainly concerned to protect marriage as the basis of the family” (49). They further reasoned that “the legal impediment in the UK on the marriage of persons who are not of the opposite biological sex cannot be said to have an effect of this kind” (50). Therefore there is no violation of Article 12.

***Sheffield and Horshman v. United Kingdom* [1998] T.N.L.R. No. 611 (European Court of Human Rights)**

<http://www.pfc.org.uk/legal/sh-judg2.htm>

The essence of the applicants’ complaint concerned the authorities’ continued reliance on biological criteria as the determinant of gender and their refusal to update information inscribed on individual’s birth certificates after they have undergone sex reassignment surgery. Both Sheffield and Horshman alleged that the refusal of the respondent State to give legal recognition to their status as women following gender re-assignment surgery

gave rise to violations of Articles 8, 12 and 14 of the Convention. Under Article 8, the applicants claimed that the failure of the respondent State to recognize in law that they were of the female sex constituted an interference with their rights to respect for their private lives. Under English law they continue to be regarded as being of the male sex and to suffer prejudice as a consequence. The Court found that there was no violation of the provision under Article 8 because the situations in which the applicants may be required to disclose their pre-operative gender does not occur with a degree of frequency which could be said to impinge on their right to respect for their private lives. The Court observed that “the respondent State has endeavoured to some extent to minimise intrusive inquiries as to their gender status by allowing transsexuals to be issued with driving licences, passports and other types of official documents in their new name and gender, and that the use of birth certificates as a means of identification is officially discouraged” (59). The applicants further contended that under Article 12 of the Convention, any marriage in which a male-to-female transsexual contracted with a biological man would be void under English law because, for legal purposes, the male-to-female transsexual is still considered to be a male. The Court referred to the fact that the right to marry guaranteed by Article 12 refers to the traditional marriage between persons of the opposite biological sex and is mainly concerned with protecting marriage as the basis of the family. Therefore, in the UK, the legal impediment to the marriage of persons of the same biological sex cannot be said to have a discriminatory effect. Therefore there is no violation of Article 12 of the Convention. Under Article 14 of the Convention, the applicants contended that given the fact that “the law continues to treat them as being of the male sex, they argued that they are victims of sex discrimination having regard to the detriment which they, unlike men, suffer through having to disclose their pre-operative gender” (72). They maintained that their disadvantaged position in law impinges on intimate aspects of their private lives. The Court, in considering the alleged violation of Article 14, stated that the section “affords protection against discrimination in the enjoyment of the rights and freedoms safeguarded by the other substantive provisions of the Convention. However, not every difference in treatment will amount to a violation of this Article. Instead, it must be established that other persons in an analogous or relevantly similar situation enjoy preferential treatment, and that there is no reasonable or objective justification for this distinction” (75). The Court concluded that the State did not overstep its boundaries by not legally recognizing a transsexual's post-operative gender. It was satisfied that the State struck a fair balance between the need to safeguard the interests of transsexuals and the interests of the community in general, and that the situations in which the applicants may be required to disclose their pre-operative gender do not occur with a degree of frequency. Therefore, there was no violation of Article 14.

X, Y and Z v. The United Kingdom ECHR 1997, Case No. 75/1995/581/667
<http://www.pfc.org.uk/legal/xyzjudg2.htm>

The European Court of Human Rights refused to allow a female-to-male transsexual to be registered as the father on the birth certificate of a child born to his female partner by donor artificial insemination. The Court found that it was not a violation of the rights to respect family life. The applicants complained that, contrary to Article 8 of the

Convention, they were denied respect for their family and private life as a result of the lack of recognition of the first applicant's role as father to the third applicant and that the situation that resulted from this was discriminatory. X was told before Z's birth that the Registrar General was of the opinion that, for the purposes of registration, only a biological man could be regarded as a father. Z could, however, lawfully bear X's surname. The ECHR found that article 8 was applicable because *de facto* family ties linked the three applicants. The Court considered that the State might justifiably be cautious about changing the law, since an amendment might have undesirable or unforeseen ramifications for children such as Z, and implications in other areas of family law. The law might be open to criticism on the ground of inconsistency if a transsexual could legally be a "father" while still being treated as female for other legal purposes, such as marriage to a man. The disadvantages suffered by the applicants because of the refusal to recognise X as Z's legal "father" had to be balanced against those general interests. In conclusion the Court stated, "given that transsexuality raises complex scientific, legal, moral and social issues, in respect of which there is no generally shared approach among the contracting States, the Court is of the opinion that Article 8 cannot, in this context, be taken to imply an obligation for the respondent State to formally recognise as the father of a child a person who is not the biological father. That being so, the fact that the law of the United Kingdom does not allow special legal recognition of the relationship between X and Y does not amount to a failure to respect family life within the meaning of that provision" (52). Therefore, there was no violation of Article 8 of the Convention.