

# REFLECTIONS ON TRANSGENDER IMMIGRATION

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Recently, the Human Rights Commission of New Zealand has conducted an inquiry that has officially documented 'the obstacles to dignity, equality and security for trans people'. The Australian Human Rights Commission has also recently conducted a sex and gender diversity project, and in 2006 the Equalities Review in the United Kingdom commissioned the largest research project ever undertaken globally on trans people's lives, reported in *Engendered Penalties: Transgender and Transsexual People's Experiences of Inequality and Discrimination*. This article reflects on the implications of the issues raised by these recent reports and research for transgendered people immigrating to and from New Zealand. It also raises some parallel issues for Australia.

## Introduction

Relatively little research, or scholarly analysis, has been conducted into the issues presented for transgender people<sup>1</sup> in relation to immigration to or from New Zealand.<sup>2</sup> However, recently the Human Rights Commission of New Zealand (New Zealand HRC)<sup>3</sup> has conducted, *for the first time*, an inquiry that officially documents 'the obstacles to dignity, equality and security for trans people'.<sup>4</sup> The Australian Human Rights Commission<sup>5</sup> has also recently conducted a sex and

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<sup>1</sup> The term 'trans people' is discussed below.

<sup>2</sup> There is some recent research in the United States: see Francoeur (2007), pp 366–70; Human Rights Watch and Immigration Equality (2006); Lorenz (2005); Vade (2005); Fisher (2004). However, academic work more generally on trans people, gender identity and the law has recently blossomed. See, for example, Sharpe (2002); Monro (2004); Davis (2008); Millbank (2004); Walker (2000); Vade (2005); Fisher (2004); David (2004); Mills (2004); Laviolette (2007); Benson (2008); Neilson (2005).

<sup>3</sup> Liddicoat (2008).

<sup>4</sup> Liddicoat (2008), p 1.

<sup>5</sup> Australian Human Rights Commission (2009).

gender diversity project, and in 2006 the Equalities Review in the United Kingdom<sup>6</sup> commissioned the largest research project ever undertaken globally on trans people's lives, reported in *Engendered Penalties: Transgender and Transsexual People's Experiences of Inequality and Discrimination (Engendered Penalties)*.<sup>7</sup> These reports, as well as other recent research in the United States,<sup>8</sup> are based on extensive consultation with trans people, and note that trans people are often not provided for in law and policy; that where they are provided for, the law and policy may be inconsistent or discriminatory; and that government agencies and courts are often inconsistent in responding to the issues raised as a result. This recent research therefore provides rare and important insights into the lives of transgendered people and their treatment by government agencies and courts that are not available elsewhere. However, none of the research projects explicitly addresses immigration of transgendered people.

This article reflects on the implications of the issues raised by these recent reports and research for transgendered people immigrating to and from New Zealand. It also raises some parallel issues for Australia. It first provides some background to the discussion of immigration by considering queer theory and gender identity, and then briefly discusses discrimination, harassment and violence faced by trans people in areas relevant to immigration criteria. Drawing on the recent research, it identifies issues that may arise for trans people immigrating. In particular, it focuses on the threshold issue of consistent documentation indicating the correct gender for trans people. Government-issued documents are widely and routinely used as proof of identity and nationality for the purposes of immigration. The research indicates serious problems for trans people in obtaining consistent documentation indicating their appropriate gender. This article considers some of the issues presented for trans people in relation to immigration in light of these problems. It then considers how the broader context of discrimination, harassment and violence faced by trans people may raise issues in relation to immigration procedure and criteria. The intention here is to begin to fill the gap in research in this area by highlighting potential issues and areas for further research.

### Queer Theory and Gender Identity

Queer theory emerged in recent decades from critiques of 'heteronormativity',<sup>9</sup> or the assumption that humans are divided into the categories of 'man' and 'woman', that these two categories represent opposite sexes that are natural and biological, that certain masculine and feminine traits, characteristics and actions flow from the fact of each biological sex, and that it is normal for the two sexes to enter into heterosexual intimate relationships. Central to queer theory has been challenging assumptions about the categories of 'sex' and 'gender', including the assumption

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<sup>6</sup> On 25 February 2005, the British Government announced the Equalities Review, 'a root and branch review to investigate the causes of persistent discrimination and inequality in British society'. See <http://archive.cabinetoffice.gov.uk/equalitiesreview/about.html>.

<sup>7</sup> Whittle (2007).

<sup>8</sup> Amnesty International (2006); Transgender Law Center (2009).

<sup>9</sup> Warner (1991).

that 'sex' refers to a biological or scientific 'truth', while 'gender' is socially constructed.<sup>10</sup> Disrupting and displacing heteronormativity has required recognising the biological diversity of bodies and the existence of culturally marginal sexual identifications, including lesbian, gay, transgender, transsexual, bisexual, intersex, genderqueer, cross-dresser and others. Queer theory and the lived experiences of trans people highlight the diversity of biological configurations and the arbitrariness of assigning some bodies to the category of 'male' and others to 'female'.

The terms 'transgender' and 'trans people' have arisen in attempts to recognise sexual and gender diversity. They are contested terms that have varied meanings, both historically and culturally.<sup>11</sup> 'Gender identity' has been defined as '[a] person's internal, deeply felt sense of being male or female (or something other or in between)', which may not correspond to their 'sex'.<sup>12</sup> The term 'trans person' may be used as a broad umbrella term to refer to those whose gender identity is different from their physical sex at birth, or 'the widest imaginable range of gender-variant practices and identities'.<sup>13</sup> It may also be used to include transsexuals and cross dressers.<sup>14</sup> The term 'transgender' was 'initially used to refer to people who transgress gender binaries but do not have surgery',<sup>15</sup> but more recently may also be used as an umbrella term to describe people who 'do not conform to the gender role expectations of their biological sex'.<sup>16</sup> *Takatapui* is a Maori term for an intimate companion of the same sex, now including gay, lesbian, bisexual and trans people.<sup>17</sup> In Australia, 'sistergirl' and 'brotherboy' may be used by Aboriginal people to refer to people who are sex and gender diverse.<sup>18</sup> 'Transsexual' may be defined as a person who identifies as a member of the opposite sex from a very early age,<sup>19</sup> or a person who has changed, or is in the process of changing, their physical sex to conform to their gender identity: 'MtF' or 'trans woman' generally refers to someone born with a male body who has a female gender identity, and 'FtM' refers to someone born with a female body who has a male gender identity. 'Genderqueer' may be used broadly to refer to people who express a non-standard gender identity and 'cross-dresser' usually refers to a person who wears the clothing and/or accessories that are considered by society to correspond to the opposite gender.<sup>20</sup> It has been noted that trans people have complex gender identities, sometimes moving from one 'trans' category to another over time — for example, in the United

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<sup>10</sup> Butler (1990).

<sup>11</sup> Stryker (2008), p 19; Australian Human Rights Commission (2009), p 7; Liddicoat (2008), pp 10–13; Whittle (2007), pp 6–7, 85–88; Amnesty International (2006), pp 9–10.

<sup>12</sup> Whittle (2007), p 86; Liddicoat (2008), p 12.

<sup>13</sup> Stryker (2008), p 19.

<sup>14</sup> Whittle (2007), p 85.

<sup>15</sup> Monro (2004), p 346.

<sup>16</sup> Amnesty International (2006), p 9.

<sup>17</sup> Liddicoat (2008), p 13.

<sup>18</sup> Australian Human Rights Commission (2009), p 8.

<sup>19</sup> Whittle (2007), p 85.

<sup>20</sup> Liddicoat (2008), p 13.

Kingdom it was found that 44 per cent of transvestites or cross-dressers intended to live permanently in their preferred gender in the future.<sup>21</sup> This article therefore uses ‘trans person’ or ‘trans people’ and ‘transgender’ as umbrella terms to refer to all of these sexual identifications.

Much of the research and analysis on trans people also refers to ‘transitioning’, which has been defined as ‘the process of beginning to live as the opposite sex and changing the body, through hormones and surgery’,<sup>22</sup> or ‘steps taken by people to live in their gender identity ... [including] medical treatment to change one’s sex through hormone therapy and ... gender reassignment surgeries’.<sup>23</sup> These treatments may also be called ‘sex affirmation treatment’.<sup>24</sup> As will be discussed below, although many trans people may prefer to have their sex or gender changed through medical treatment, for some this is not a priority and for many a legal requirement of ‘full’ or ‘complete’ surgery may be onerous and unachievable.

Partly in resistance to the historically fixed and entrenched categories of sex and sexuality, the identifications of sexual minorities may be more fluid; some people identify only as ‘queer’, while others refuse any specific identification, and some change identifications over time or in response to specific situations. Further, an array of gender identifications may accompany different body configurations:

Transgender people have all genders ... there are feminine women, masculine women, androgynous women, feminine men, androgynous men, masculine men, and many more. Some FtMs [female-to-male transgender people] do drag in slinky dresses, wear sparkly clothes while hiking in the woods, and host nail polish parties. Some MtFs [male-to-female trans people] identify as butch dykes, play soccer, and cringe at having to wear a skirt.<sup>25</sup>

Trans people, like the general population, are also represented across sexualities: ‘some transgender people are straight, some are gay, some are bisexual, some are queer’.<sup>26</sup> These terms are, of course, deeply entrenched in heteronormative assumptions. The terms ‘straight’ and ‘heterosexual’ assume two opposite sexes and a natural attraction between the two.<sup>27</sup> Trans people and others may therefore ‘genderbend’ terms, transgressing dominant or expected gender norms.

It is important to note that some scholars have cautioned against easy assumptions that gender identity is ‘fluid’ and that trans people embrace fluid gender identity.<sup>28</sup> The binary approach to sex and gender is historically entrenched in powerful systems of institutional, cultural and social domination buttressed by

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<sup>21</sup> Whittle (2007), p 14.

<sup>22</sup> Whittle (2007), p 88.

<sup>23</sup> Liddicoat (2008), p 12.

<sup>24</sup> Wallbank (2004), p 469.

<sup>25</sup> Vade (2005), p 265.

<sup>26</sup> Vade (2005), pp 260–61.

<sup>27</sup> Stryker (2008), p 16.

<sup>28</sup> Davis (2008), pp 98–100.

physical domination and violence. It is not as easily displaced as the term 'fluid' may suggest.<sup>29</sup> Some trans people may wish to create stable gender identities:

in managing their public image as socially credible men and women, some transsexed individuals are engaged in constructing stable identities ... neither ... stability nor the postmodern framing of fluidity can completely account for the ongoing, everyday practices and experiences of (trans) gender identity construction.<sup>30</sup>

Trans people may not 'perceive their gender or trans identity as a personal choice or an expression of fluidity'.<sup>31</sup> Further, without being 'dishonest' in their gender presentation, they may 'pass' (which may be similar to gays and lesbians passing as heterosexual) as non-transgendered in situations that are not safe for trans people, or where identifying as trans would be complicated or uncomfortable.<sup>32</sup>

### Trans People and Discrimination

Recent research clearly documents pervasive discrimination against trans people in the United Kingdom, United States, Australia and New Zealand. Trans people face discrimination in employment, accessing health services, housing and exercising basic rights of citizenship, among other areas. They are also far more likely than the general population to be victims of violence, and to be subjected to police abuse. Discrimination is relevant to immigration in a number of ways. First, as will be discussed below, it may impact on the immigration process. Second, discrimination in employment, housing and family life, as well as the high rates of harassment and abuse, resulting in lower-paying jobs, less-secure careers and less-secure housing, may impact on the options for trans people in immigrating, such as through a skilled migrant category, and may also impact on the ability to prove genuine and stable relationships in New Zealand's partnership category. Further, as discussed below, a lack of opportunities may result in marginal employment, such as in the sex work industry, which may also impact on the immigration process.

Discrimination against trans people in employment is widespread and may result in unemployment or under-employment, undermining the ability to build a career.<sup>33</sup> In the United Kingdom, employment was found to be the most problematic area for trans people; many had successful careers until they started to live in their acquired gender.<sup>34</sup> In the United States,<sup>35</sup> it has been noted that 'the current patchwork of local and state laws is inadequate to remedy the pervasive gender

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<sup>29</sup> Davies (2000), p 283.

<sup>30</sup> Davis (2008), p 99.

<sup>31</sup> Davis (2008), p 110.

<sup>32</sup> Davis (2008).

<sup>33</sup> Liddicoat (2008), pp 39–42. The majority of submissions on the inquiry described some form of discrimination in employment.

<sup>34</sup> Whittle (2007), p 31.

<sup>35</sup> Housing Works AIDS Issues Update (2008).

identity discrimination taking place across the country', and that during transitioning many transgender people 'face some of the most blatant and severe workplace discrimination imaginable, to a degree that is truly shocking'.<sup>36</sup> Rates of unemployment and under-employment of transgender people in the United States are extremely high.<sup>37</sup> Discrimination against trans people at work was also identified in Australia.<sup>38</sup> In New Zealand, it was found that some trans people have run successful businesses or successfully transitioned in a supportive environment while maintaining the same job. However, it is not uncommon for favourable responses to job applications to turn negative when trans people meet prospective employers.<sup>39</sup> The result is that trans people may have to apply for a staggering number of jobs to obtain one, or settle for a job for which they are over-qualified.<sup>40</sup>

Discrimination against trans people may also impinge on a secure family life, the ability to find housing and participation in community life.<sup>41</sup> In the United States a significant proportion of the transgender community is homeless; one study found that nearly half of young LGBT people have to leave their homes due to reactions to their gender identity or sexual orientation.<sup>42</sup> In the United Kingdom, it was found that housing is particularly problematic due to the aggression of neighbours and others, and the break-up of families upon the discovery that a member is transgender;<sup>43</sup> 45 per cent of respondents in the UK study reported family breakdown due to their cross-gender identity.<sup>44</sup> A disproportionate number of trans people live in the least protected types of housing and tenancies.<sup>45</sup> In New Zealand, the HRC Report also indicates that trans people may lose the support of their families and friends, and marriages may end once they acknowledge their gender identity or begin the process of transitioning.<sup>46</sup> While this will not be uniformly true,

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<sup>36</sup> Minter (2008), pp 2, 4–5; Sabrina Marcus Taraboletti, a former NASA engineer, was summarily fired six weeks after announcing that she was changing her sex from male to female: 'After assigning security personnel to follow my every move, charges were drummed up, and I was suspended without pay pending a board hearing for dismissal.' She noted that she was the fourth person to attempt to transition at NASA; two others were pushed out of their jobs and the other took her own life, 'an all too common occurrence': Taraboletti (2008), p 2.

<sup>37</sup> Amnesty International (2006), p 16. One US study found only 58 per cent of trans people in paid employment. Xavier (2000), pp 1–2.

<sup>38</sup> Human Rights and Equal Opportunity Commission (2008), pp 12–13.

<sup>39</sup> Liddicoat (2008), p 40

<sup>40</sup> Liddicoat (2008), p 40; Stone (2008), p 27. In a Hamilton, New Zealand study of trans women, it was noted that three out four of the women were not in paid work, that most trans women they knew in New Zealand and overseas were in similar situations, and that their low socioeconomic status restricted how often and where they were able to move in public.

<sup>41</sup> Liddicoat (2008), pp 38–39.

<sup>42</sup> Amnesty International (2006), pp 16, 48.

<sup>43</sup> Whittle (2007), p 58.

<sup>44</sup> Whittle (2007), p 17.

<sup>45</sup> Whittle (2007), p 58.

<sup>46</sup> Liddicoat (2008), p 37.

and some families will be very supportive, other research also finds that the 'process of gender transition might initiate irreconcilable shifts in partnering roles, leading to relationship break-up'.<sup>47</sup>

Discrimination in employment, combined with an insecure family life and discrimination in housing, may result in a disproportionate number of trans people working in the sex industry. The New Zealand HRC Report found that a disproportionate number of trans people may end up working in the sex industry, due in part to the limited choices for employment elsewhere.<sup>48</sup> In the United States, studies have found that young LGBT people who are homeless may engage in non-violent offences, such as sex work and theft, in order to support themselves.<sup>49</sup> Young LGBT sex workers reported that police officers ask for sexual favours, and physical abuse of particularly transgender women by police officers was reported in a number of US cities;<sup>50</sup> it has been noted that some of the worst incidents of police misconduct in San Francisco are targeted at immigrant transgender women.<sup>51</sup> Once arrested, trans people may plead guilty to offences they did not commit in order to avoid abuse in police detention.<sup>52</sup> There are also reports of police harassing immigrant transgender women who are witnesses to crime.<sup>53</sup>

The UN High Commissioner for Human Rights has recognised that violence and harassment against lesbian, gay, bisexual and trans people is widespread internationally, that it includes abuse, attacks, torture and killings, that it is frequently unreported and undocumented, and that it ultimately goes unpunished, failing to provoke public debate and outrage.<sup>54</sup> It has been found in the United States that trans people constitute one of the most targeted groups for violence, rape and harassment; one to two trans people are estimated to die as a result of violence each month, and approximately 35 per cent experience suicide ideation.<sup>55</sup> In the United States and the United Kingdom, it has been found that LGBT people who do not conform to traditional gender norms are more likely to be singled out for verbal, physical and sexual abuse, and transgender people are disproportionately targeted by law enforcement officials.<sup>56</sup>

The New Zealand HRC Report stated that discrimination ranged from low-level violence (avoidance and insults) to violent physical and sexual assaults with pervasive and debilitating effects.<sup>57</sup> The report found that repeated harassment and vicious assaults threaten the personal security of trans people,<sup>58</sup> and that violence

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<sup>47</sup> Hines (2006), p 360.

<sup>48</sup> Liddicoat (2008), pp 40–41;

<sup>49</sup> Amnesty International (2006), p 17.

<sup>50</sup> Amnesty International (2006), p 23.

<sup>51</sup> Amnesty International (2006), p 27.

<sup>52</sup> Amnesty International (2006), pp 32–33.

<sup>53</sup> Amnesty International (2006), p 40.

<sup>54</sup> Arbor (2006).

<sup>55</sup> Doon (2007), p 61.

<sup>56</sup> Amnesty International (2006), p 22; Whittle (2007), pp 8, 18, 53.

<sup>57</sup> Liddicoat (2008), p 43.

<sup>58</sup> Liddicoat (2008), pp 36, 42–43.

against trans people may result in reasonable apprehension and anxiety associated with everyday events such as shopping, eating out or buying clothes.<sup>59</sup> In the United Kingdom, 73 per cent of respondents reported experiencing comments, threatening behaviour, physical abuse, verbal abuse or sexual abuse while in public spaces.<sup>60</sup> The HRC Report notes that although trans people experience high levels of violence, they are invisible as victims in the crime statistics and crime surveys.<sup>61</sup> Trans people in all of these countries are likely to underreport violence, or attribute it to factors other than their trans status. Further, fear for their safety may result in trans people staying away from public places: they may 'have learned to navigate away from areas of hostility and conflict such as public bars, the main street at night and large gatherings such as rugby matches and field days'.<sup>62</sup>

The level of discrimination, harassment and violence directed at trans people may mean that they are less likely to be in any intimate relationship due to reduced levels of socialising due to fear of public places. It has also been noted that trans people are more likely to be asexual or autosexual 'because many transgender people don't fit into other people's sexual orientation categories (or because they don't have a clear sense themselves of where they might fit in)'.<sup>63</sup>

It has been suggested that discrimination and violence against trans people may be due to the perception that they 'transgress' heteronormative assumptions about gendered behaviour that conforms to biological sex. Further, it has been argued that public spaces are gendered male and heterosexual, domains that belong to heterosexual men; 'transgendered people who walk alone pose a fundamental challenge to public space and how it is defined and secured through gender'.<sup>64</sup> It has also been suggested that violence against trans people may be connected to assumptions about 'deception' perpetrated by their 'transgression'. Transgendered behaviour consistent with the 'opposite sex' may be seen as deceptive, and therefore fraudulent, or a sign of a dishonest person.<sup>65</sup> Discrimination and violence against trans people involve society 'policing' the boundaries of appropriate gender behaviour in both public and private spaces.<sup>66</sup>

## Trans People and Immigration: Documents

Entry into New Zealand, Australia, the United Kingdom and the United States requires specified documentation as proof of identity, usually including a birth certificate and a passport. While, for most people, presenting passports and copies

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<sup>59</sup> Liddicoat (2008), pp 42–43.

<sup>60</sup> Whittle (2007), p 53.

<sup>61</sup> Liddicoat (2008), p 43.

<sup>62</sup> Whittle (2007), p 16; Stone (2008), p 39.

<sup>63</sup> Stryker (2008), p 16.

<sup>64</sup> Namaste (2006), p 589.

<sup>65</sup> Vade (2005), pp 263, 288–89.

<sup>66</sup> Namaste (2006), p 585: 'perceived transgression of normative sex/gender relations motivates much of the violence against sexual minorities ... an assault on these "transgressive" bodies is fundamentally concerned with policing gender presentation through public and private space'.

of birth certificates will be a routine matter, for trans people these threshold immigration requirements can be problematic for a number of reasons. Passports and birth certificates uniformly require the identification of the category of 'sex' on the document. A trans person may be living in a gender different to the gender stated on their birth certificate and passport, he or she may have a passport and birth certificate with different genders, or the person may be using a name different from the name on their birth certificate. Obtaining these two documents with names and genders that are consistent with the name and gender under which the trans person is living may be difficult in each country for different reasons, and obtaining official information on the process for change may also be difficult. As discussed above, presenting as a person of a gender different to that stated on the birth certificate or passport may trigger assumptions of deception, which in the immigration context may trigger suspicion of identity fraud, or fraud involving documents.

In New Zealand, the mandatory requirements for lodging an application for residency include 'an original or certified copy of the applicant's full birth certificate' and a valid passport or travel document — or, if these latter are unavailable, a birth certificate or other identity document.<sup>67</sup> Therefore, if a person has a passport and a birth certificate, both must be provided. Australia has similar provisions, requiring a passport and birth certificate where they are available.<sup>68</sup> This section discusses issues relating to birth certificates and passports.

### *Birth Certificates*

The sex of every child is generally entered on a birth certificate at birth. Trans people often regard the sex on their birth certificate as incorrect: 'My birth certificate is fixed as the world judged me when I couldn't speak for myself.' (Trans man)<sup>69</sup> Birth certificates with an appropriate indication of sex are therefore important both for affirming the gender identity of the trans person and for facilitating immigration. Nevertheless, even where this situation is recognised and has ostensibly been responded to, it can be difficult for trans people to change the 'sex' indicated on their birth certificate. The issues in New Zealand, carefully detailed by the HRC Report, are illustrative.

In New Zealand, under section 28 of the *Births, Deaths and Marriages Registration Act 1995* (BDMRA), it is possible to change the sex on a birth certificate. However, sub-section 28(3)(c)(i)(B) requires expert medical evidence that the applicant has 'undergone such medical treatment as is usually regarded by medical experts as desirable to enable persons ... to acquire a physical conformation that accords with the gender identity of a person of the nominated sex'. The legislative intention behind the subsection is apparently that the court must be satisfied the trans person has had appropriate medical treatment to acquire

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<sup>67</sup> Immigration New Zealand (2009), R2.40(a)(ii), (b), p 14.

<sup>68</sup> See Australia Government Department of Immigration and Citizenship, Application for Migration to Australia by a partner, Form 47SP: Commonwealth of Australia (2009).

<sup>69</sup> Liddicoat (2008), p 69.

the physical conformation of the new sex.<sup>70</sup> According to the Department of Internal Affairs (DIA), this may be interpreted to mean that ‘substantive, but not complete, surgery has taken place’.<sup>71</sup> However, the New Zealand HRC Report found that many trans people are under the impression that the sub-section requires full gender reassignment surgery; some have been given this advice by the DIA or their local family court. While many of the court cases are unreported, the DIA admits that family courts often interpret the section contrary to the DIA’s interpretation and consistent with the interpretation of many trans people: ‘our understanding is that the Family Court to date has often interpreted this [subsection (3)(c)(i)(B)] to mean that full gender reassignment surgery is required’,<sup>72</sup> However, some trans men who have not had full gender reassignment surgery reported that they had received declarations from the Family Court enabling them to change their birth certificates.<sup>73</sup> The conclusion is therefore that, while the intention of the section may have been to recognise the difficulties with full gender reassignment surgery for many trans people, the application of the section is inconsistent.

In Australia, the process for changing the ‘sex’ noted on a birth certificate is determined at the state or territory level. In most states and territories, an application is made directly to the Registrar of Births, Deaths and Marriages, and the applicants must be unmarried and have a statutory declaration from two doctors or medical practitioners verifying that the person has undergone surgery to alter reproductive organs.<sup>74</sup> In two states, an application for a gender recognition certificate is required; such a certificate will only be granted where the applicant is unmarried and there is evidence of a medical or surgical procedure to alter genital or other sexual characteristics.<sup>75</sup> The Australian HRC Report found that the existing processes for the recognition of sex generally exclude married people and those who have not undergone genital or other sex reaffirmation surgery.<sup>76</sup>

In the United Kingdom, the *Gender Recognition Act 2004* (GRA) provides for legal recognition of the appropriate gender for trans people who have or have had gender dysphoria, have been living in their acquired gender for two years prior to making an application, and intend to continue living in the acquired gender indefinitely.<sup>77</sup> The Gender Recognition Panel that considers the application may determine the evidence that is required,<sup>78</sup> but generally some proof of living in the acquired gender, such as proof of name change and receipt of bills under the new name, is relevant.<sup>79</sup> Recent research suggests that misunderstandings of the GRA may have complicated the process for some trans people; it seems that organisations

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<sup>70</sup> Liddicoat (2008), p 73.

<sup>71</sup> Liddicoat (2008), p 73.

<sup>72</sup> Liddicoat (2008), p 73.

<sup>73</sup> Liddicoat (2008), pp 73–74.

<sup>74</sup> Australian Human Rights Commission (2009), pp 15–16, 25.

<sup>75</sup> Australian Human Rights Commission (2009), pp 16–17.

<sup>76</sup> Australian Human Rights Commission (2009), p 23.

<sup>77</sup> *Gender Recognition Act 2004* (UK) ss 1, 2.

<sup>78</sup> *Gender Recognition Act 2004* (UK), s 3(6)(c).

<sup>79</sup> Whittle (2007), p 41.

and institutions such as universities, banks and even the driver and vehicle licensing agency are requiring a gender recognition certificate prior to changing names, so it is difficult for trans people to obtain the evidence that they are living in the acquired gender necessary to obtain the gender recognition certificate.<sup>80</sup> If an applicant for a gender recognition certificate is married or in a civil partnership, an interim certificate will be issued and the marriage or civil partnership must be annulled or dissolved within six months before a full gender recognition certificate can be issued.<sup>81</sup> The Gender Recognition Certificate is a prerequisite to issuance of a new birth certificate,<sup>82</sup> which is important in the immigration process.

In the United States, the process for amending the gender on a birth certificate varies widely by state, with the majority of states allowing changes after sex-reassignment surgery, although a few states do not allow changes to birth certificates at all.<sup>83</sup> However, the extent and evidence of surgery required varies greatly; in some states, discretion to make the change lies with a government agency, judicial or administrative body, and court rulings have been inconsistent.<sup>84</sup>

The problematic aspects of requirements for full gender reassignment surgery, or genital surgery, surface across all of the countries under consideration here. Such surgery may not be available to many, may be very costly and may present significant health risks to some people. The HRC Report notes that in New Zealand, the result of the test in section 28 is a catch 22 for many trans people: they are unable to comply with the test, which results in a difference between the gender in which they present themselves and the designation on their birth certificates, which can then result in suspicion and discrimination, leaving the trans person in an invidious and vulnerable position.<sup>85</sup> This participant in the New Zealand HRC research reflects both an understanding of trans people regarding the requirements, and the difficulty they face in meeting the requirements as understood:

I can't change [my birth certificate] legally until I have had all surgeries deemed necessary, which for trans guys is no mean feat if that includes 'lower' surgery. We can't get that done in New Zealand, most of us don't have the \$50-\$100K needed to do it overseas, it can involve as many as five risky operations with a very variable outcome, and many of us will never choose to have it.<sup>86</sup>

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<sup>80</sup> Whittle (2007), pp 15, 41–42.

<sup>81</sup> *Gender Recognition Act 2004* (UK), ss 4, 5, Schedule 2; *Gender Recognition Act 2004* (UK), ss 3, 5, Schedule Two; Tribunal Service (April 2007), p 4; see Tirohl (2006), p 85; Whittle (2006), p 270: 'A couple can annul their relationship (whether a marriage or a civil partnership) in the morning, the Trans person can immediately obtain their legal gender recognition, and the same couple can trot along to the registry office after lunch and re-register the relationship.'

<sup>82</sup> *Gender Recognition Act 2004* (UK), s 10.

<sup>83</sup> Lorenz (2005), pp 530–32; Fisher (2004), pp 260–61; Lambda Legal (2007, 2002).

<sup>84</sup> Lorenz (2005), pp 529–33.

<sup>85</sup> Liddicoat (2008), p 69.

<sup>86</sup> Liddicoat (2008), p 69.

Many trans people will choose not to have full surgery — or even any surgery — for various reasons, including cultural and religious ones.<sup>87</sup> Some trans people believe it is inappropriate for the medical profession to make determinations regarding their gender identity.<sup>88</sup>

In Australia, the usual requirement is for genital surgery, and similar problems have been identified, including risks of surgery, costs of surgery which are not covered by Medicare, the shape and functionality of genitals being only one aspect of how people are identified as a member of a particular gender, and not one usually available to the public, and the fact that presenting as a person of one sex without official identification documents in that sex can result in discrimination and violence.<sup>89</sup> Many of the participants in the research argued that self-identification as a particular sex should be sufficient for a change to legal sex.<sup>90</sup> Indeed, the City of San Francisco has Compliance Guidelines to Prohibit Gender Identity Discrimination that state: ‘An individual determines their own gender identity and the sole proof of a person’s gender identity is that person’s statement or expression of their self identification.’<sup>91</sup>

Recent research indicates a lack of a clear and consistent interpretation of the requirements for changing the designated sex on a birth certificate across a number of countries. Combined with the difficulties inherent in, and barriers to, full gender reassignment surgery or genital surgery, these inconsistencies present barriers to trans people obtaining consistent identification documentation in their appropriate gender, and therefore barriers to immigration.

## Passports

Passports are also official documents; they are issued to citizens and establish the holder’s identity and nationality for the purposes of international travel and immigration. Travelling with a passport with an inappropriate or incorrect gender identification can produce anxiety, be unsafe and result in discrimination. Nevertheless, obtaining information on changing the ‘sex’ indicator on a passport is difficult. Unlike information on name changes, information on changing ‘sex’ is not readily available, or not available at all, on government websites. Further, recent research suggests that policies and practices are inconsistent.

The New Zealand HRC Report provides the most comprehensive treatment of changes to passports. The New Zealand Department of Internal Affairs has noted that a trans person who has had ‘full gender reassignment surgery’ and has had their birth certificate changed to reflect their chosen gender can be issued a passport in their ‘new’ sex.<sup>92</sup> The position of the DIA is that, prior to full gender reassignment surgery, trans people can use an X on their passport, and that this is safer than

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<sup>87</sup> Liddicoat (2008), pp 20, 69, 96.

<sup>88</sup> Liddicoat (2008), pp 39, 91–92, 93–94.

<sup>89</sup> Australian Human Rights Commission (2009), p 25.

<sup>90</sup> Australian Human Rights Commission (2009), p 26.

<sup>91</sup> City and County of San Francisco (2003).

<sup>92</sup> Liddicoat (2008), p 75.

having a passport recording their sex as different to their body configuration.<sup>93</sup> However, the HRC inquiry found that trans people feel safer with a passport that reflects their gender identity and presentation.<sup>94</sup> Further, officials and computer systems in some countries may not recognise the X.<sup>95</sup> The HRC Report noted that the emphasis of the DIA on ‘full gender reassignment surgery’ prior to changing the sex on a passport is out of step with other areas of the law, and may involve a higher standard than that being used by the Family Court for changes to birth certificates, concluding that the DIA should not require a higher standard than the Family Court.<sup>96</sup> The current inconsistent application of section 28 of the BDMRA means that a trans person *may* be able to have their birth certificate changed without full gender reassignment surgery to reflect the appropriate gender identity but may be unable to change their passport, which will result in official documents containing inconsistent gender identifications.

In Australia, the ‘sex’ indicator can be changed on a passport with a changed birth certificate, or where a married person has undergone the surgery required for a change in sex on a birth certificate but cannot change the birth certificate because they are married.<sup>97</sup> This is intended to alleviate the problems for married trans people who cannot change their birth certificates (discussed below), but it still requires that the surgery test be met, and the result can be inconsistent documentation. In the United States, it appears that a court order documenting a name change (or proof of use of new name for five years)<sup>98</sup> and proof of sex reassignment surgery — generally a notarised surgeon’s letter — is required to change the ‘sex’ indicator on a passport, and failure to prove that sex reassignment surgery is complete may result in rejection of the request.<sup>99</sup> In the United Kingdom, it appears that suitable evidence from a psychiatrist or psychologist that the move to

<sup>93</sup> Liddicoat (2008), p 75. The HRC report notes that the UN agency called the International Civil Aviation Organisation (ICAO) sets out the specifications for international travel documents, including passports. ICAO standards specify how the sex of the passport holder should be indicated in the passport; where sex is unspecified an ‘X’ may be used. In New Zealand prior to 2005, the ‘X’ was indicated with a dash. Liddicoat (2008), p 67.

<sup>94</sup> Liddicoat (2008), p 75.

<sup>95</sup> Liddicoat (2008), p 76.

<sup>96</sup> Liddicoat (2008), p 75.

<sup>97</sup> *Manual of Australian Passport Issue* (November 2006), para 3.3.7 Change of Sex; *Grace Abrams v Minister of Foreign Affairs and Trade* [2007] AATA 1816; Australian Human Rights Commission (2009), p 19.

<sup>98</sup> See US Department of State, ‘Change Your Name in Your US Passport’, [http://travel.state.gov/passport/fri/ChangeName/ChangeName\\_851.html](http://travel.state.gov/passport/fri/ChangeName/ChangeName_851.html); US Department of State, ‘Passport Amendment/Validation Application’ Form DSP-19 (9-94), available at [www.clerk.co.montgomery.oh.us/autotitle/forms/Passport\\_Form\\_dsp19.pdf](http://www.clerk.co.montgomery.oh.us/autotitle/forms/Passport_Form_dsp19.pdf).

<sup>99</sup> Neilson (2008), para 3.4.2; see Greenberg (1999), p 315. A temporary one-year passport in an appropriate gender can be issued for those travelling overseas for transition surgery. In the past, multiple extensions of the temporary passport were sometimes, inconsistently, available. More recently, requests to extend the temporary passport have been refused.

the preferred gender is permanent, combined with either a deed poll or statutory declaration of a name change, will be sufficient to change the gender on a passport.<sup>100</sup>

The New Zealand HRC Report concludes with respect to official documents that ‘the effect of current law and policy is that many, if not most, trans people do not have, and cannot obtain, a set of state-issued documents that contain consistent information about their appropriate gender identity and sex’.<sup>101</sup> The recent research considered here suggests that difficulty with obtaining consistent documentation reflecting a trans person’s appropriate gender identity and sex may also exist in Australia, the United States and the United Kingdom. This may be likely to result at best in the requirement for further explanation, and at worst in suspicion of identity fraud. Both of these responses represent barriers to immigration.

### Trans People and Recognition of Marriage

The law related to the recognition of marriages of trans people is complex and rapidly evolving in all of the jurisdictions discussed here.<sup>102</sup> It is complicated by each jurisdiction’s approach to same-sex marriage. For example, the United States passed the *Defense of Marriage Act* (DOMA), which defines ‘marriage’ for purposes of federal law as a union between a man and a woman, defines ‘spouse’ as a person of the opposite sex and permits states to withhold legal recognition of same-sex marriages that take place in other states.<sup>103</sup> DOMA, however, does not define ‘man’ or ‘woman’ and is silent on the treatment of trans people’s marriages, which has raised a range of issues, including how trans marriages should be treated for immigration purposes. The focus on same-sex marriage, and the anxiety by courts and legislatures as well as others in the legal system concerning whether trans people’s marriages constitute same-sex marriages, have been analysed as aspects of the homophobia of law.<sup>104</sup> The complexity and evolution of this area of law mean that it is often difficult to determine the legal status of trans people, particularly in relation to marriage. Further, trans people who are married may have difficulties obtaining documents consistent with their appropriate gender, and may have to divorce, or convert from a marriage to a civil union or civil partnership, in order to obtain consistent documents. This section briefly introduces some of the issues with recognition of marriage.

In New Zealand, *Attorney General v Otahuhu Family Court*<sup>105</sup> ruled in 1995 that a post-operative trans person may marry a person of the same genetic sex, but that ‘in order to be capable of marriage two persons must present themselves as

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<sup>100</sup> The Identity and Passport Service (UK) confirmed by telephone that information on changing the gender on a passport is not available on the IPS website. However, the IPS provided advice to the Gender Trust in May of 2008 which is available at [www.gendertrust.org.uk/n2/p20.php?id=1](http://www.gendertrust.org.uk/n2/p20.php?id=1).

<sup>101</sup> Liddicoat (2008), p 4.

<sup>102</sup> Lorenz (2005), p 533; Immigration Equality (2008), section 4.0.

<sup>103</sup> 1 USC, s 7 (2000); 28 USC, s 1738C (2000)

<sup>104</sup> Sharpe (2002), pp 5, 7, 9, 10–14.

<sup>105</sup> [1995] 1 NZLR 603.

having what appear to be the genitals of a man and a woman'; however, they are not required to prove that each person can function sexually.<sup>106</sup> The decision requires that the trans person have reconstructive surgery as well as the social and psychological disposition of the chosen sex.<sup>107</sup> Where the trans person does not have full surgery, it would seem that a marriage would not be valid. This suggests the possibility that where a couple is married and one partner has reconstructive surgery with the result of an appearance of the same sex as the other partner, then that marriage would be interpreted as a same-sex marriage, which is not permitted in New Zealand.<sup>108</sup>

Consistent with this approach, in both Australia and New Zealand it appears that trans people cannot change the sex on their birth certificates if they are married, even if they meet all of the other criteria.<sup>109</sup> In Australia, the only way a married person can change their birth certificate is by first obtaining a divorce.<sup>110</sup> In New Zealand, the HRC Report states that it is not possible to have birth certificates amended to a new sex while one is still married, presumably due to the prohibition on same-sex marriage, although no legal authority is cited.<sup>111</sup> The couple can convert the marriage to a civil union.<sup>112</sup> However, some trans people have indicated opposition to civil unions on the basis that they are second class.<sup>113</sup>

Treatment of transgender marriage also varies widely by state in the United States. State courts have addressed the question of whether an originally heterosexual marriage is valid after one of the partners has reconstructive surgery (for the purposes of determining judicial remedies available to spouses). Courts have also considered whether a trans person may marry a person of the same genetic sex (or original birth certificate sex); at least until recently, the majority of jurisdictions have refused to validate either of these types of marriage.<sup>114</sup>

For purposes of immigration to the United States, the 2005 decision in *In re Jose Mauricio Lovo-Lara* is significant because it is a published final precedential decision, and it will be helpful to some trans people.<sup>115</sup> *Lovo-Lara* involved a very straightforward fact scenario in which the petitioner was a US citizen who had completed sex reassignment surgery and had had her birth certificate amended from

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<sup>106</sup> *Attorney General v Otahuhu Family Court* [1995] 1 NZLR 603 at 612.

<sup>107</sup> *Attorney General v Otahuhu Family Court* [1995] 1 NZLR 603 at 607, 614–15.

<sup>108</sup> *Attorney General v Otahuhu Family Court* [1995] 1 NZLR 603 at 607; *Quilter v Attorney-General* [1998] 1 NZLR 523 (CA)

<sup>109</sup> Australian Human Rights Commission (2009), p 23.

<sup>110</sup> Australian Human Rights Commission (2009), p 23.

<sup>111</sup> Liddicoat (2008), pp 69, 77.

<sup>112</sup> Liddicoat (2008), p 77. This does not require the marriage to be formally dissolved, with a two-year requirement to live apart, as some trans people have assumed. *Family Proceedings Act 1980*, s 39(2). It does require completing a notice of Intended Civil Union Change of Relationship from Marriage, appearing before a Registrar of Civil Unions, and making a statutory declaration and paying a fee. Liddicoat (2008), p 77.

<sup>113</sup> Liddicoat (2008), p 70.

<sup>114</sup> Haines (2005), pp 221–22.

<sup>115</sup> 23 I & N Dec 746 (BIA 2005).

male to female according to the laws of her birth state, North Carolina.<sup>116</sup> Lovo-Lara applied to sponsor her El Salvadorian husband, who she had married in North Carolina, to immigrate to the United States as an immediate relative.<sup>117</sup> The issue was whether the marriage could be the basis for immigration benefits.<sup>118</sup> The Bureau of Internal Affairs first considered whether the marriage was valid in the state in which it was entered into, and the first step in this determination was whether a sex change had been recognised by the state where the transgender person was born.<sup>119</sup> As Lovo-Lara had undergone sex reassignment surgery and had been issued a new birth certificate in North Carolina listing her sex as female, and since that state had recorded her married as the bride, the BIA concluded that the marriage was valid in the state in which it was entered into.<sup>120</sup>

This leading decision in the United States is important to transgender people seeking to immigrate there from New Zealand. First, in this fact scenario, the marriage took place in the United States. If the marriage takes place outside of the United States, it appears that the rule that the marriage will be recognised for immigration purposes if it is valid in the jurisdiction in which it was performed will apply.<sup>121</sup> However, if there is a US citizen petitioner who is living in the United States, as in *Lovo-Lara*, the question will be whether the state in which the US citizen, or the couple, resides considers the marriage valid. This will also depend on state law and the validity of the marriage where it was performed.<sup>122</sup> Therefore, in those instances where a transgender marriage is not recognised in the jurisdiction in which it is performed, such as where the medical or surgical requirements have not been met, or where one partner to a marriage transitions after the marriage and the marriage is considered a same-sex marriage and therefore not valid, the marriage is unlikely to be recognised in the United States for immigration purposes.

### Immigration and Gender Identity More Broadly

An important concern for trans people is discrimination on the basis of gender identity. As discussed above, this discrimination is widespread. This section considers some of the possible implications of discrimination against trans people in the process of immigrating to New Zealand.

Immigration officers wield significant amounts of discretion.<sup>123</sup> It has been argued in Canada that a policy that conferred significant discretion on immigration

<sup>116</sup> 23 I & N Dec 746, 747 (BIA 2005).

<sup>117</sup> 23 I & N Dec 746, 746–47 (BIA 2005).

<sup>118</sup> 23 I & N Dec 746, 747–48 (BIA 2005).

<sup>119</sup> 23 I & N Dec 746, 747–48 (BIA 2005).

<sup>120</sup> 23 I & N Dec 746, 748, 753 (BIA 2005). Although this case appears to provide a definitive rule, at least where these favourable facts exist, it has been noted that the holding is still frequently not followed by the immigration service.

<sup>121</sup> See *Adams v Howerton*, 673 F 2d 1036, 1038–39 (9<sup>th</sup> Cir 1982).

<sup>122</sup> See, for example, *Martinez v County of Monroe* 850 NYS 2d 740; 50 AD 3<sup>d</sup> 189 (Supreme Court 2008), holding that a same-sex marriage valid in the Province of Ontario, Canada is entitled to recognition in New York in the absence of legislation to the contrary.

<sup>123</sup> Seuffert (2009).

officials in relation to gay and lesbian immigration posed the danger of the homophobia of particular officials resulting in unfair assessments of applications requiring an assessment of gay and lesbian relationships.<sup>124</sup> Similarly, in a society with widespread ‘transphobia’, the danger of discrimination where significant discretion exists may be great.

Despite the danger of discrimination, it is not clear that discrimination on the basis of gender identity is prohibited in the immigration process in New Zealand. The immigration procedure provides that all visa and immigration officers must act on the principles of fairness and natural justice when deciding an application.<sup>125</sup> This means that applicants must be given a fair hearing and that bias must be avoided.<sup>126</sup> Fairness includes giving the application proper consideration, giving the applicant reasonable opportunity to respond to harmful information, making a decision on the application that is consistent with other decisions, whether appropriate reasons are given for declining an application and whether all and only relevant information is considered.<sup>127</sup> Bias occurs when ‘the officer is personally prejudiced against the applicant on grounds *such as* sex, race, religion, socio-economic status, sexuality, *etc*’.<sup>128</sup> It might be argued that this provision includes the requirement to avoid bias on the part of immigration officers on the basis of gender identity because gender identity would be included in the non-exhaustive list with sex and sexuality, as another similar category. In addition, in New Zealand the Crown Law Office has issued an opinion stating that, under the *New Zealand Bill of Rights Act 1990* (BoRA) and the *Human Rights Act 1993* (HRA), which prohibit discrimination on the basis of ‘sex’ but not ‘gender identity’, there is ‘no reason to suppose that “sex discrimination” would be construed narrowly to deprive transgender people of protection’.<sup>129</sup> This interpretation might be used to strengthen the argument that trans people are protected against bias based on their gender identity — here the argument would be that gender identity is included in the enumerated category of ‘sex’. However, it should be noted that this argument would be made by analogy, as the Crown Law Opinion concerns the BoRA and the HRA, which may not apply to immigration or to the implementation of immigration policies.<sup>130</sup> Further, of course, the Crown Law opinion is not determinative; it is an opinion on the law, and presumably represents the stance that the Crown Law Office would take on the issue, but it is not an authoritative statement of law.

Even without discrimination as a result of bias on the part of the immigration officer, it may be that the specific criteria for immigration will present barriers for trans people. Barriers may result in part from the effect of the sex/gender distinction, and the male/female, man/woman dichotomies that have been discussed above. The post-9/11 climate of fear of terrorism, and increasingly rigid identity-

<sup>124</sup> LaViolette (2004), p 977.

<sup>125</sup> Immigration New Zealand (2008), A1.1c

<sup>126</sup> Immigration New Zealand (2008), A1.1b

<sup>127</sup> Immigration New Zealand (2008), A1.5

<sup>128</sup> Immigration New Zealand (2008), A1.10, emphasis added.

<sup>129</sup> Gwen (2006).

<sup>130</sup> Chauvel (1994).

fraud procedures, combined with suspicion and discrimination resulting from inconsistencies in a trans person's presentation and their birth certificate and/or passport, may result in difficulties for trans people wanting to immigrate.<sup>131</sup> For example, in the United States a trans person held in immigration detention reported that an immigration officer, linking her gender identity to suspicion of terrorism, stated: 'These are scary times, what with terrorism, we need to know who we are letting into the country. When things don't add up [me transitioning] that's a problem.'<sup>132</sup> It has been argued that 'the complicated process of changing one's gender, coupled with the often difficult process of having one's sex officially changed on identification documents, increases the likelihood that transgender people will be red-flagged' by Homeland Security in the United States, and that transgender immigrants will receive even more scrutiny.<sup>133</sup>

Other problems may arise due to the general discrimination that trans people face identified in the research. As discussed above, as a result of employment discrimination, many trans people are unemployed or under-employed. The largest percentage of immigrants to New Zealand, 60 per cent in the year to June 2007, are admitted through the skilled migrant category.<sup>134</sup> The aim of the skilled migrant category is to contribute to New Zealand's economic growth, innovation and global connectedness; migrants must have skills, qualifications and experience to contribute to New Zealand economically and socially.<sup>135</sup> Current skilled employment in New Zealand or an offer of skilled employment is heavily weighted, and points are also provided for partner employment or offer of employment.<sup>136</sup> Given the widespread discrimination in employment against trans people, these criteria may be difficult to meet. Combined with the possibility of inconsistent proof of identity, these obstacles may be prohibitive.

Immigration as a partner of a principal applicant or as a partner of a New Zealand citizen or permanent resident requires applicants to have been living together in a genuine and stable partnership for twelve months or more at the time they apply.<sup>137</sup> In light of the documentation of discrimination against trans people and the lack of research on the treatment of trans people in relation to immigration, it is difficult predict how the relationships into which trans people enter would be interpreted by immigration officials, and in particular whether they would be interpreted as 'genuine and stable'. I have argued with respect to gay and lesbian immigration that the premises underlying the immigration criteria suggest that the:

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<sup>131</sup> Francoeur (2007), p 368, writes that in the United States, 'the complicated process of changing one's gender, coupled with often difficult process of having one's sex officially changed on identification documents, increases the likelihood that transgender people will be red-flagged' on systems designed post-September 11 to detect identity fraud.

<sup>132</sup> Human Rights Watch and Immigration Equality (2006), p 87.

<sup>133</sup> Francoeur (2007), p 368.

<sup>134</sup> Merwood (2008), p 50.

<sup>135</sup> Merwood (2008), p 51.

<sup>136</sup> Merwood (2008), p 51.

<sup>137</sup> Immigration New Zealand (2009), R2.1.15, p 7; F2.5, p 108.

assumption is that same sex couples set up house, own property together, participate in child raising and family gatherings, jointly communicate, socialise with their families and friends and generally live their lives just like heterosexuals. The reality that they are doing so in heteronormative, homophobic societies that may not recognise and validate their relationships, or that may treat them as second class, in the context of family reactions that may vary from persecution to disassociation to mild disapproval, and that they may be struggling with their own sexual identities, is all rendered invisible by the criteria and determinations to be made.<sup>138</sup>

Application of the same mainstream criteria to trans people and trans relationships as are applied to heterosexual relationships means that trans people will have to prove that they and their relationships are just like mainstream heterosexuals. The circumstances in which they live their lives and relationships, including discrimination, harassment and violence, that their families and friends may desert them, that they may have difficulty forming relationships, making friends and getting jobs and housing, or lose their jobs and housing, and that as a result simple everyday tasks that others take for granted, such as shopping, may require courage and determination, are all likely to be ignored in the immigration process. Indeed, in Canada it has been argued that the one-year cohabitation requirement for partnership immigration may be difficult for lesbian and gay couples to meet due to the reality of persecution, discrimination, harassment and violence that are part of everyday lives for these couples in many countries.<sup>139</sup> The same is likely to be true for many transgender people, particularly during the period of transition.

Problems with official documents may also arise in relation to married trans people immigrating under the partnership policy. Evidence of a genuine and stable partnership may include a marriage certificate.<sup>140</sup> As discussed above, a couple where one partner is a trans person may have a marriage certificate that is not considered valid — for example, where the trans partner has had medical treatments to convert to the same sex as the other partner. The responsibilities of the immigrating couple in relation to the production of the marriage certificate, or disclosure regarding the trans person's status, are not clear. For example, all persons included in a residence application must be of good character.<sup>141</sup> The provisions provide that applicants will normally be ineligible for a residence permit unless granted a character waiver where, in the course of applying, the applicant 'has made any statement or provided any information, evidence or submission that was false, misleading or forged, or withheld material information'.<sup>142</sup> Is one's gender identity 'material information'? Would production of a marriage certificate as evidence of a genuine and stable relationship be considered false or misleading evidence if the marriage were no longer valid in the jurisdiction in which it was entered into?

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<sup>138</sup> Seuffert (2009).

<sup>139</sup> LaViolette (2004), pp 981–82.

<sup>140</sup> Immigration New Zealand (2009), R2.1.20, F2.20.15.

<sup>141</sup> Immigration New Zealand (2009), R4.5, p. 20.

<sup>142</sup> Immigration New Zealand (2008), A5.25i.

Would failure to produce the certificate be considered withholding material information? The law in relation to trans marriages and marriages where one partner has transitioned is complex and varies by jurisdiction. What level of responsibility for knowledge of the law and disclosure rests on trans people? Analysis of this section in relation to the non-production of a marriage certificate, or indeed to the gender identity of an applicant, or the applicant's status as a trans person, has to take into account the discussion above that trans people may be construed as 'deceptive' with respect to their sex. In the light of this context, will the lack of clarity of the law in the home jurisdiction, and the lack of guidance in New Zealand immigration procedure, be unfairly held against the trans person?

The criteria for proof of 'living together in a genuine and stable partnership' are focused on economic indicia and ownership of property.<sup>143</sup> Immigration policy provides that factors that have a bearing on whether the two people are living together in a partnership that is genuine and stable include the duration of the relationship, the existence, nature and extent of the partners' common residence, the degree of financial dependence or interdependence, the common ownership, use and acquisition of property, the degree of commitment of the partners to a shared life, children, the performance of common household duties by the partners, and the reputation and public aspects of the relationship.<sup>144</sup> The focus on common ownership, use and acquisition of property, and on the nature and extent of a common residence, may disadvantage trans people, who may have difficulty meeting these criteria due to discrimination in employment, and resulting barriers to building a career.

Further, due to the lack of other employment opportunities and other factors, trans people may be disproportionately represented in the sex industry internationally.<sup>145</sup> In countries where prostitution is criminalised, this may result in criminal records, which may present barriers to the good character requirements of immigration.<sup>146</sup> In New Zealand, section 7 of the *Immigration Act 1987* provides for instances where people are not eligible for residence, including where a person has been convicted of an offence and sentenced to prison for five years or more, or where in the previous 10 years the person has been convicted of an offence and sentenced to imprisonment for 12 months or more.<sup>147</sup> Further, applicants will not normally be issued with a residence visa or permit unless they receive a character waiver where they were convicted at any time of an offence for which they were sentenced to a term of imprisonment, whether or not the sentence was deferred or suspended in whole or in part.<sup>148</sup> Participation in the sex industry in many countries

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<sup>143</sup> Seuffert (2009).

<sup>144</sup> Immigration New Zealand (2009), F2.20.

<sup>145</sup> Prostitution Law Reform Committee (2005), pp 32–33; Jordan (2005), pp 35, 46–47; Beyer (1999), pp 61–74; Carmen (1988). This has also been true historically. See Stryker (2008), pp 66–69. It should be noted that although trans people may be represented disproportionately among sex workers, this does not mean that all trans people are sex workers. See Amnesty International (2006), p 55.

<sup>146</sup> Immigration New Zealand (2008), A5; Immigration New Zealand (2009), R4.5.

<sup>147</sup> Immigration New Zealand (2008), A5.20.

<sup>148</sup> Immigration New Zealand (2008), A5.25e.

might result in a term of imprisonment or a deferred or suspended sentence. In this context, the likelihood of trans people pleading guilty to crimes they have not committed in order to avoid harassment and abuse in police detention discussed above is relevant, as resulting convictions may impact on immigration.

Work in the sex industry prior to immigration may impact negatively on the application, even without convictions. In New Zealand, the *Prostitution Reform Act 2003* legalised and regulated prostitution in some instances. However, section 19 of that Act and immigration policy specifically provide that no residence visa or permit may be granted to a person on the basis that they have provided or intend to provide commercial sexual services, and it is a condition of every temporary permit or limited permit that the holder may not provide commercial sexual services while in New Zealand.<sup>149</sup> If previous work in the sex industry is interpreted as intending to provide commercial sexual services, then anyone who has previously worked in the sex industry may find it more difficult to immigrate. Further, anyone granted a temporary or limited permit, even if it is a work permit or a permit that allows working, may not work in the sex industry while in New Zealand, even though such work is legal.<sup>150</sup> The Prostitutes Collective national coordinator has noted that people who are working in the sex industry on a temporary permit are more vulnerable and more likely to be exploited because they are not protected under the *Prostitution Reform Act 2003*.<sup>151</sup> Revocation of such a permit may be appealed against on one ground only, which is that there are 'exceptional circumstances of a humanitarian nature that would make it unjust or unduly harsh for the person to be removed from New Zealand'.<sup>152</sup> The only other avenue to challenge the revocation of the permit is judicial review.<sup>153</sup> In a case where the Immigration Service found the appellant at an escort agency, and as a result of finding her at the agency issued a Notice of Revocation of her permit without any evidence that she was actually working as a prostitute, the only grounds for appeal were the humanitarian grounds under section 47(3).<sup>154</sup> The Immigration Service therefore has wide discretion in revoking temporary or limited permits. This discretion, combined with the fact that in New Zealand trans people are more likely to be street workers (as they are less likely to get jobs in massage parlours),<sup>155</sup> and street workers are more likely to be the focus of law enforcement efforts generally,<sup>156</sup> means that trans people who are sex workers are more likely to come within the sights of police and immigration

<sup>149</sup> *Prostitution Reform Act 2003* (NZ), s 19; Immigration New Zealand (2009), R5.18.

<sup>150</sup> *L v The Removal Review Authority*, High Court Wellington, CIV 2005 485 1601, 3 March 2006, Ronald Young J.

<sup>151</sup> McKenzie-McLean (2006).

<sup>152</sup> *Immigration Act 1987*, s 47(3).

<sup>153</sup> *L v The Removal Review Authority*, High Court Wellington, CIV 2005 485 1601, 3 March 2006, Ronald Young J, p 4.

<sup>154</sup> *L v The Removal Review Authority*, High Court Wellington, CIV 2005 485 1601, 3 March 2006, Ronald Young J, pp 6-7. Subsequent to the decision in this case, the minister intervened, granting the appellant's request to stay in New Zealand for a longer period. Case Note (2006), p 21.

<sup>155</sup> Prostitution Law Reform Committee (2005), pp 11, 14, 32-33, 49, 54.

<sup>156</sup> Jordan (2005), p 33.

services. In addition, trans people who are not sex workers may be more likely to work in businesses supporting the sex industry, or in neighbourhoods where sex workers are concentrated, and therefore may be open to abuse of discretion.<sup>157</sup>

## Conclusion

The purpose of this article has been to highlight some potential issues for trans people immigrating to and from New Zealand, based on recent research projects that have consulted trans people. Obtaining consistent documentation in indicating the appropriate gender is a major issue for trans people internationally, and raises a number of potential issues for immigration, including the possibility of suspicion of fraud or withholding of material information. The complex and evolving law on the validity of trans marriages raises issues for trans people wanting to immigrate on the basis of family connections or partnership policies. Further, difficulties in immigrating may arise for trans people due to past discrimination in employment and housing. All of these areas would benefit from further research, preferably involving direct consultation with trans people who have immigrated.

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