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Protecting Transgender Rights under Queensland's Discrimination Law Amendment Act 2002

According to the Australian Civil Liberties Union, transsexuals who announce that they are undertaking gender reassignment surgery lose their jobs in 95% of cases and according to the NSW Gender Centre, 60% remain underemployed or unemployed after transition. The suicide rate for transgenders is high and they experience significantly more assault and harassment in public places than other individuals. There is a greater likelihood of transgenders experiencing discrimination or ill treatment in relation to the provision of goods and services than other groups, and transgenders also encounter difficulties with designations regarding sex on passports, educational qualifications, drivers' licences and birth certificates etc. which are out of keeping with their gender role. Until very recently, Queensland was the only Australian State which did not provide any specific protection for transgender people. This situation changed, however, with passage of the Discrimination Law Amendment Act 2002 (Qld) on 29 November, 2002. This Act amended the Anti-Discrimination Act 1991 (Qld), introducing a new attribute of "gender identity" to protect people of transgender identity and intersex people from discrimination and to bring Queensland into line with the other States and Territories which prohibit discrimination against transgenders. It introduced new anti-vilification laws to prohibit vilification on the basis of sexuality and gender identity. The Amendment Act also amended the Registration of Births, Deaths and Marriages Act 1962 (Qld) to allow post-operative transgenders to obtain new birth certificates in their reassigned sex.

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1 INTRODUCTION

The Australian Civil Liberties Union, in its publication *Your Rights 2001*, gives an overview of the law in Australia as it relates to discrimination on the basis of gender identity.¹ That publication defines 'transgender' as 'a non-medical term adopted by people with gender identity issues which are not a matter of sexual orientation or preference, but a subjective conviction as to the gender they feel themselves to be, regardless of their chromosomal or birth sex'. They identify the main divisions within this group as being:

- people formerly known as 'transvestites' who feel the need to dress as the sex opposite to their birth sex occasionally, but who accept their birth sex most of the time. The current, preferred designation is 'cross-dresser';
- transgender people formerly known as 'transsexuals' who also cross-dress, but are medically designated as having 'gender identity disorder' - formerly known as 'gender dysphoria'. These men and women feel that they are 'trapped in the wrong body', and often seek hormonal and 'gender reassignment surgery' to bring their external appearance into line with the gender they feel themselves to be;
- intersex people (formerly known as 'hermaphrodites') are born with indeterminate sexual characteristics. There are a large range of medical conditions associated with this group, the most common of which is 'androgen insensitivity syndrome', either complete or partial. Many intersex people feel that they have unique problems which warrant their being known as a separate 'intersex' group rather than 'transgender'.

The Australian Civil Liberties Union publication notes the following in relation to transgender discrimination in Australia:

Transsexuals who announce that they are undertaking gender reassignment surgery lose their jobs in 95% of cases and according to the NSW Gender Centre, 60% remain underemployed or unemployed after transition. Since, in a democratic society all individuals are considered to be of value, and many transsexuals are highly skilled, this is a great loss to the emotional and intellectual life of the general community.

The suicide rate for transgenders is appalling, and they are significantly more disadvantaged than other groups in relation to assault and harassment in public places, with more explicit threats of violence and experience of assault than other men and women... . There is a greater likelihood of transgenders experiencing

¹ Australian Civil Liberties Union, 'Chapter 18 – Gay, Lesbian, Bisexual, Transgender and Intersex Rights', *Your Rights 2001*, at <http://www.angelfire.com/folk/aclu/gaylesbianrights.htm>
Downloaded on 15 January 2003.

discrimination or ill treatment in relation to the provision of goods and services than other groups, including rudeness and disrespect from a variety of service providers when failing to 'pass' adequately as their chosen gender. Transgenders also encounter difficulties with designations regarding sex on passports, educational qualifications, driver's licences and birth certificates etc. which are out of keeping with their gender role.²

2 QUEENSLAND

Until very recently, Queensland was the only state in Australia which did not provide any specific protection for transgender people. The *Anti-Discrimination Act 1991* (Qld) has always prohibited discrimination on the ground of lawful sexual activity, or association with, or relation to, a person identified on the basis of his or her lawful sexual activity (ss 7(1)(l)). A literal interpretation of the term 'activity' may perhaps have precluded a celibate who identified as a transgender or transsexual person. Before the latest reforms the Act did not specifically prohibit discrimination against people who identify themselves as being transgender or transsexual, or who have undergone sexual reassignment procedures. The Queensland Anti-Discrimination Commission's 2001-2002 Annual Report stated that:

Last year we urged immediate reform in the gay/lesbian/bi-sexual/transgender areas. Although some positive discussions have occurred between the community, government and the Commission, legislative reform in this area remains unaddressed.³

This situation has changed, however, with passage of the *Discrimination Law Amendment Act 2002* (Qld) (2002 Amending Act) on 29 November, 2002. This Act amended the *Anti-Discrimination Act 1991* (Qld) to introduce a new attribute of 'gender identity' to protect people of transgender identity and intersex people from discrimination and to bring Queensland into line with the other Australian states and territories which prohibit discrimination against transgenders. It also introduced new anti-vilification laws to prohibit vilification on the basis of sexuality and gender identity.⁴

² 'Gay, Lesbian, Bisexual, Transgender and Intersex Rights', *Your Rights*.

³ Queensland Anti-Discrimination Commission, *Annual Report 2000-2001*, p 12.

⁴ Discrimination Law Amendment Bill 2002 (Qld), Explanatory Notes, p 5.

2.1 PROTECTION OF PERSONS OF TRANSGENDER IDENTITY

Section 12 of the 2002 Amending Act inserted a new definition of 'gender identity' into section 4 of the *Anti-Discrimination Act 1991* –

gender identity, in relation to a person, means that the person—

(a) identifies, or has identified, as a member of the opposite sex by living or seeking to live as a member of that sex; or

(b) is of indeterminate sex and seeks to live as a member of a particular sex.

Section 14 amended s 7 of the *Anti-Discrimination Act 1991* to prohibit discrimination on the basis of gender identity (s 7(1)(m)). Section 24 of the 1991 Act does, however, allow for discrimination in work or a work-related area if an exemption in ss 25-36 or Part 5 applies. Of those sections, s 28 permits discrimination against a person on the basis of their lawful sexual activity and now also on the basis of their gender identity (since the 2002 reforms) if the work involves the care or instruction of minors and, if (whether before or after the commencement of this provision) the person has been convicted in Queensland or elsewhere of an offence of a sexual nature involving a child, or is or has been disqualified from working with children under an Act of a State or the Commonwealth.⁵

Section 111 of the *Anti-Discrimination Act 1991* was also amended by the 2002 Amending Act to provide an exemption in relation to competitive sporting activity for discrimination on the basis of gender identity if the restriction is reasonable having regard to the strength, stamina, or physique requirements of the activity.⁶

2.2 ANTI-VILIFICATION PROVISIONS

The stated purpose of the new anti-vilification laws is to 'protect people from vilification that promotes hatred on the basis of a person's sexuality or gender identity and creates social disharmony in the wider community.'⁷

Section 22 of the 2002 Amending Act introduced new prohibitions regarding vilification on the basis of sexuality or gender identity into s 124A(1) of the *Anti-Discrimination Act 1991*, which was previously confined to prohibiting vilification on racial or religious grounds. The amended s 124A(1) now states –

⁵ See *Discrimination Law Amendment Act 2002* (Qld), s 16.

⁶ *Discrimination Law Amendment Bill 2002* (Qld), Explanatory Notes, p 15 and see *Discrimination Law Amendment Act 2002* (Qld), s 21.

⁷ *Discrimination Law Amendment Bill 2002* (Qld), Explanatory Notes, p 10.

A person must not, by a public act, incite hatred towards, serious contempt for, or severe ridicule of, a person or group of persons on the ground of the race, religion, sexuality or gender identity of the person or members of the group.

These prohibitions are subject to a range of exemptions given in s 124A(2).

Section 24 of the 2002 Amending Act amended s 131A which (previously) made serious racial or religious vilification an offence, to create a new offence of serious vilification on the ground of race, religion, sexuality or gender identity. The amendment now means that a person who by a public act knowingly or recklessly incites hatred towards, serious contempt for, or severe ridicule of, a person or group of persons on the ground of the race, religion, sexuality or gender identity of the person or members of the group by threats of physical harm or inciting others to threaten physical harm, will commit an offence. The maximum penalty is 70 penalty units (\$5,250) or six months imprisonment (for an individual) or 350 penalty units (\$26,250) for a corporation.

3 OTHER AUSTRALIAN STATE AND TERRITORY LEGISLATIVE PROTECTIONS FOR TRANSGENDERS

3.1 NEW SOUTH WALES

Part 3A of the *Anti-Discrimination Act 1977* (NSW) prohibits discrimination on 'transgender grounds'. Section 38A of Part 3A states that a reference in that Part to a **transgender person** is a reference to a person (whether or not the person is a recognised transgender person) who –

- (a) identifies as a member of the opposite sex by living, or seeking to live, as a member of the opposite sex; or
- (b) has identified as a member of the opposite sex by living as a member of the opposite sex; or
- (c) being of indeterminate sex, identifies as a member of a particular sex, by living as a member of that sex;

and includes a person being thought of as transgender, whether the person is, or was, in fact a transgender person.

Section 38B details the types of actions and treatment that constitute discrimination on transgender grounds. A person discriminates on transgender grounds if he or she –

- treats a transgender person less favourably than he or she would treat a person who was not thought to be transgender; or

- requires a transgender person to comply with a requirement or condition that is unreasonable, and with which he or she cannot comply, while a substantial number of people who are not transgender are able to comply; or
- requires a transgender person to comply with a requirement or condition that is unreasonable, and with which he or she cannot comply, while a substantial number of people of the transgender person's former sex are able to comply.

Discrimination on transgender grounds is prohibited in the following areas:

- job applicants and employees;
- commission agents;
- contract workers;
- partnerships;
- local government;
- industrial organisations;
- qualifying bodies;
- employment agencies;
- education;
- provision of goods and services;
- accommodation; and
- registered clubs.

Part 3A Division 2 covers transgender discrimination in work/employment (ss 38C-J). Sections 38K-O cover discrimination in other areas of life such as education, the provision of goods and services, accommodation and in registered clubs. Sections 38P and 38Q make an exception for participation in sporting activities and for superannuation matters.

3.1.1 Transgender Vilification

Transgender vilification became unlawful in New South Wales with the commencement of the *Transgender (Anti-Discrimination and Other Acts Amendment) Act 1996* on 1 October 1996. Division 5 of Part 3A deals with transgender vilification. Section 38R defines those 'public acts' that may amount to transgender vilification, which is made unlawful under s 38S. Under Division 5 it is unlawful, by a public act, to express hatred towards, serious contempt for, or severe ridicule of a person or group of persons on the ground of their transgender.

A **public act** includes –

- any form of communication to the public (including speaking, writing, printing or displaying notices, broadcasting, telecasting, screening or playing of recorded information);
- any conduct observable by the public (including gestures, actions, the wearing or display of clothing, signs, flags etc); or
- the distribution or dissemination of any matter which promotes or expresses hatred towards, serious contempt for, or severe ridicule of a person or group of persons on the ground of their transgender.

Section 38T creates an offence of **serious transgender vilification**. Such an act is making a threat of physical harm to, or inciting others to physically harm, a person or their property on the ground of their transgender. The maximum penalty under the Act is 10 penalty units (currently \$1,100) or imprisonment for six months or both for an individual, or 100 penalty units (currently \$11,000) for a corporation.⁸

3.2 SOUTH AUSTRALIA

Subsection 5(1) of the *Equal Opportunity Act 1984* (SA) defines ‘sexuality’ to mean heterosexuality, homosexuality, bisexuality or transsexuality. A transsexual is defined as a person of one sex who assumes characteristics of the other sex. Part 3 prohibits discrimination on the ground of sexuality (s 29(1)(b)). Subsection 29(3) covers those actions and/or behaviours that amount to discrimination on the ground of sexuality. Sections 35 and 35A cover discrimination by associations, trade unions and employers.

3.3 VICTORIA

The *Equal Opportunity (Gender Identity and Sexual Orientation) Act 2000* amended the *Equal Opportunity Act 1995* (Vic) to prohibit discrimination on the basis of gender identity. Under s 6(ac) of the *Equal Opportunity Act*, discrimination on the basis of gender identity is prohibited. There is, however, an exception in s 27B whereby an employer may discriminate against a person on the basis of gender identity if the criteria in that section are met.

Gender identity is defined under the Act to mean –

- (a) the identification on a bona fide basis by a person of one sex as a member of the other sex (whether or not the person is recognised as such) –

⁸ s 17 *Crimes (Sentencing Procedure) Act 1999* (NSW)

- (i) by assuming characteristics of the other sex, whether by means of medical intervention, style of dressing or otherwise; or
 - (ii) by living, or seeking to live, as a member of the other sex; or
- (b) the identification on a bona fide basis by a person of indeterminate sex as a member of a particular sex (whether or not the person is recognised as such)–
- (i) by assuming characteristics of that sex, whether by means of medical intervention, style of dressing, or otherwise; or
 - (ii) by living, or seeking to live, as a member of that sex.

The Act prohibits discrimination on the basis of an actual, imputed or presumed characteristic attributed to persons who have a particular gender identity. It also includes discrimination based on the gender identity that a person had, or was presumed to have, at any time, so it includes past as well as present sexual orientation.

Discrimination on the ground of gender identity is prohibited in the following areas–

- employment – including contract workers, partnerships, industrial, trade, professional, business or employment organisations, qualifying bodies;
- education;
- provision of goods and services;
- disposal of land;
- accommodation;
- clubs (including club membership);
- sport; and
- local government.

The criteria for establishing that there has been discrimination against a person on the grounds of their gender identity are the same as those for establishing discrimination on any other ground under the Act. There will be discrimination on the ground of gender identity if the discriminator treats the aggrieved person less favourably than a person who is not of a particular gender identity, in circumstances that are the same or not materially different. Discrimination will also occur if the different treatment is based on a characteristic (actual or imputed) that is attributed to persons who are of a particular gender identity, a presumption that a person is of a particular gender identity, or the fact that they were in the past.

There will also be indirect discrimination if a person who is of a particular gender identity cannot comply with an unreasonable requirement or condition with which substantially more people who are not of that gender identity can comply.

3.4 TASMANIA

Part 4, s 16(c) of the *Anti-Discrimination Act 1998* states that a person must not discriminate against another person on the ground of their **sexual orientation**, which is defined to include heterosexuality, homosexuality, bisexuality or transsexuality. '**Transsexuality**' is defined in the Act as the condition of being a transsexual. '**Transsexual**' is then defined as a person of one sex who –

- assumes the bodily characteristics of the other sex by medical or other means; or
- identifies himself or herself as a member of the other sex; or
- lives or seeks to live as a member of the other sex.

Discrimination on the ground of sexual orientation is prohibited in the following areas –

- employment;
- education and training;
- provision of facilities, goods and services;
- accommodation; and
- membership and activities of clubs.

3.5 WESTERN AUSTRALIA

Part IIAA (s 35AB) of the *Equal Opportunity Act 1984* (WA) prohibits discrimination on **gender history** grounds in certain cases and outlines the behaviours that may constitute discrimination on gender history grounds. For the purposes of Part IIAA, a person has a gender history if the person identifies as a member of the opposite sex by living, or seeking to live, as a member of the opposite sex (defined as a sex of which the person was not a member at birth: s 35AA). Division 2 (ss 35AC-35AI) prohibits discrimination in employment/work situations and Division 3 (ss 35AJ-35AR) covers discrimination in areas such as education, provision of goods, services and accommodation, club membership, sport, superannuation etc.

3.6 AUSTRALIAN CAPITAL TERRITORY

Section 4 of the *Discrimination Act 1991* (ACT) defines a **transsexual** as a person of one sex who –

- (a) assumes the bodily characteristics of the other sex, whether by means of medical intervention or otherwise; or
- (b) identifies himself or herself as a member of the other sex or lives, or seeks to live, as a member of that other sex.

Discriminating against a person because of their transsexuality is prohibited by s7(1)(c) of the Act.

3.7 NORTHERN TERRITORY

Subsection 19(1)(c) of the *Anti-Discrimination Act 1992* (NT) prohibits discrimination against a person on the ground of their sexuality. **Sexuality** is defined under the Act to mean 'the sexual characteristics or imputed sexual characteristics of heterosexuality, homosexuality, bisexuality or transsexuality'. Section 20 details the actions/behaviours which constitute discrimination for purposes of the Act.

Section 37 allows a person to discriminate against another on the grounds of sexuality in the areas of work where the work involves the care, instruction or supervision of children and the discrimination is reasonably necessary to protect the physical, psychological or emotional well-being of children having regard to all the relevant circumstances of the case, including the person's actions.

4 REGISTERING A CHANGE OF SEX ON A BIRTH CERTIFICATE AFTER SEXUAL REASSIGNMENT SURGERY

4.1 QUEENSLAND

One of the stated objectives of the Discrimination Law Amendment Bill 2002 (Qld) (now enacted) was to amend the *Registration of Births, Deaths and Marriages Act 1962* (Qld) to allow post-operative transgenders to obtain new birth certificates in their reassigned sex.⁹

⁹ Discrimination Law Amendment Bill 2002 (Qld), Explanatory Notes, p 1.

The Explanatory Notes for this Bill state –

The transgender community has lobbied for many years for Queensland to introduce legislation allowing people of transgender identity to obtain new birth certificates in their reassigned sex. All other Australian States and Territories except Victoria currently have such legislation. Transgenders experience prejudice and discrimination in many areas of daily life, including forms of identification. For people who have undergone sexual reassignment surgery, there is a certain irrevocability and finality in relation to the gender transfer process. It is appropriate that such people be recognised in law as being of their reassigned sex.

The Bill will address this by amending the Registration of Births Deaths and Marriages Act 1962 to allow post-operative transgenders who currently have their births registered under Queensland law to obtain new birth certificates in their reassigned sex. The legislative scheme will be modelled on provisions in the New South Wales Births, Deaths and Marriages Registration Act 1995.¹⁰

Accordingly, s 68 of the *Discrimination Law Amendment Act 2002* inserted the following new definitions into s 5 of the *Registration of Births, Deaths and Marriages Act 1962* (‘the Act’) –

- ‘**recognition certificate**’ means a certificate issued under the law of another State that identifies a person who is the subject of the certificate as having undergone sexual reassignment surgery and as being the sex stated in the certificate;
- ‘**sexual reassignment surgery**’ means a surgical procedure involving the alteration of a person’s reproductive organs carried out –
 - to help the person to be considered to be a member of the opposite sex;
 - or
 - to correct or eliminate ambiguities about the sex of the person.

4.1.1 Application for Reregistration

Section 72 of the 2002 amending Act inserted a new s 28B into the *Anti-Discrimination Act 1991*. This new s 28B sets out the procedural steps to be followed by an applicant wishing to record a change of sex in either the register of births or the adopted children register. A person whose birth has been registered under the *Registration of Births Deaths and Marriages Act 1962*, or whose adoption has been registered under the *Adoption of Children Act 1964*, may apply to the registrar-general to enter a change of the person’s sex in the register of births or the adopted children register and to reregister the person’s birth or adoption. A person may make an application to have the change of sex recorded if the person is 18 years or more, has undergone sexual reassignment surgery, and is not married.

¹⁰ Discrimination Law Amendment Bill 2002 (Qld), Explanatory Notes, pp 6-7.

Also, the parents or guardian of a child whose birth or adoption have been registered under either Act, may apply to the registrar-general to have the change of the child's sex entered into the appropriate register, and for reregistration of the birth or adoption. An application may be made by one parent only if this is justified in the circumstances.

The s 28B application must be accompanied by either statutory declarations by two doctors verifying that the person has undergone sexual reassignment surgery, or a recognition certificate for the person, and any other documents or information if prescribed by a regulation (s 28C).

4.1.2 Entering a Change of Sex

New s 28D provides that the registrar-general must decide a s 28B application by entering the change of sex in the register of births or the adopted children register and reregistering the birth or adoption, or by refusing to enter the change. The registrar-general must refuse to enter a change of sex if the person who is the subject of the application is married.

Section 73 of the 2002 Act amended s 29B by providing a procedure for entering a change of sex in either the register of births or the adopted children register. After the registrar-general enters a change of sex in the appropriate register, the registrar-general must note the change by making a margin note in the relevant entry. The entry must then be closed and the birth or adoption reregistered.

According to the Explanatory Notes for the Discrimination Law Amendment Bill 2002, after the record of a person's sex is altered, the newly issued birth certificate will show the person's sex in accordance with the altered record and will not include a statement that the person has changed sex. The birth will be reregistered with a new number and a notation referencing the former registration number. This will indicate that reregistration has taken place, but will not highlight that it is as the result of a change of sex.¹¹

Section 69 of the 2002 Amending Act amended s 22 of the Act. Section 22 now provides that after the reregistration of the birth of a person under s 29B(4), a certificate or extract obtained from the registrar-general under subsection (1) must show the relevant person's sex in accordance with the reregistration, and must not include a statement or other clear indication to the effect that a change of the relevant person's sex has been entered into the register of births.

A person may ask the registrar-general for a certificate from the entry that was closed on the reregistration if the applicant is the reassigned person, their child,

¹¹ Discrimination Law Amendment Bill 2002 (Qld), Explanatory Notes, p 7.

their parent (if the reassigned person is a child), or is a person prescribed by regulation.

4.1.3 Use of New Certificate

A new s 43A provides for the **use** of a certificate or extract if a birth has been reregistered under s 29B(4). If a person's birth has been reregistered as the result of a change of sex, a person, whether or not the person is the reregistered person, must not knowingly produce to another person, for a purpose of a law of another State or the Commonwealth, a birth certificate or extract showing the changed sex, unless the laws of the other State or the Commonwealth expressly allow it to be produced or the person, when producing the certificate, informs the person to whom it is produced about reregistration of the change of sex. In addition, the reregistered person must not, with intent to deceive, produce to another person a certificate or extract showing the sex as it was originally recorded in the register of births before the reregistration. The maximum penalty for breaching this section is 100 penalty units (\$7,500) or 2 years imprisonment.

4.1.4 Effect of Reregistration

Section 77 also inserted a new s 43B which provides for the **effect** of reregistration of change of sex. When a person's birth or adoption has been reregistered under s 29B(4), the person is taken to be, for the purposes of the law of Queensland, the sex as recorded in the register of births or the adopted children register after the reregistration. A person who, under the law of another State, has had a change of sex recorded in a corresponding register of births or adoptions, is taken, for the purposes of the law of Queensland, to be the sex as recorded in the corresponding register after the entry is changed.

New s 43C provides that a person who is the subject of a recognition certificate is taken to be, for the purposes of the law of Queensland, a person of the sex as stated in the certificate. Despite this, the requirements of ss 28B-28D must be complied with if a recognised person wishes to have the sex as stated in the recognition certificate registered in either the births or adopted children's registers.

4.2 AUSTRALIAN CAPITAL TERRITORY

Part 4, s 24 of the *Births, Deaths and Marriages Registration Act 1997* allows for a transsexual person whose birth is registered in the ACT who has undergone sexual reassignment surgery, and who is at least 18 years of age and not married, to apply to alter the record of that person's sex in the registration of the person's birth. The parent(s) or guardian of a child whose birth is registered in the ACT and who has

had sexual reassignment surgery may also apply for alteration of the record of the child's sex in the registration of the child's birth.

'**Sexual reassignment surgery**' is defined in s 23 to mean a surgical procedure involving the alteration of a person's reproductive organs that is carried out for the purpose of assisting a person to be considered to be a member of the opposite sex, or to correct or eliminate an ambiguity relating to the sex of the person. A '**transsexual person**' is defined as a person whose record of registration of birth has been altered under s 26.

A s 24 application to alter the register to record a change of sex must be accompanied by a statutory declaration from each of two doctors verifying that the person in respect of whom the application is made has undergone sexual reassignment surgery (s 25).

The decision to alter or refuse to alter the birth register is made by the registrar-general under s 26.

A birth certificate issued in respect of a transsexual shall show the person's sex in accordance with the altered record, although a certificate may be issued showing the transsexual's original sex if application for such a certificate is made by the person, a child of the person, or by a person specified in the regulations. Otherwise, a reissued birth certificate shall not include any word or statement to the effect that the person to whom the certificate relates has changed sex (s 27).

It is an offence to produce a birth certificate (or extract) of a transsexual person that shows his/her sex before the record was altered (ie. an original certificate showing their sex at birth), where this is done with intention to deceive (s 28). The maximum penalty is 50 penalty units, six months imprisonment, or both.

A birth certificate issued in respect of a transsexual is conclusive evidence of the person's sex as stated in it (s 29).

4.3 NEW SOUTH WALES

Part 5A of the *Births, Deaths and Marriages Registration Act 1995* (NSW) allows for the alteration of birth registers and the issuing of new birth certificates to record a change of sex. The provisions in the NSW Act are substantively the same as those given above for the ACT. One key difference is that the penalties for offences of deception regarding old birth certificates are much higher in NSW (100

penalty units (\$11,000)¹² or 2 years imprisonment or both) than for the ACT (50 penalty units (\$5,000)¹³ or 6 months imprisonment or both).

The NSW Act also has an additional provision regarding the use of a ‘new’ birth certificate. Section 32G states –

s 32G. A person who knows that the record of the sex of a person, being that person or another person (the transgender person), has been altered under this Part must not produce to another person, for the purposes of a law of another jurisdiction, a birth certificate issued for the transgender person (or a copy of or extract from such a birth certificate) that shows the transgender person’s sex after the record was so altered unless:

- (a) the laws of that other jurisdiction expressly allow such a certificate (or copy or extract) to be so produced, or*
- (b) the person, when producing the certificate (or copy or extract) informs the person to whom it is produced that the record of the transgender person’s sex has been altered to the sex shown in the certificate (or copy or extract).*

Maximum penalty: 100 penalty units or 2 years imprisonment, or both.

4.4 SOUTH AUSTRALIA

South Australia has passed a *Sexual Reassignment Act 1988* to ‘allow the reassignment of sexual identity, to regulate the performance of reassignment procedures, and for other purposes.’

Key definitions under the SA Act are –

- **‘reassignment procedure’** means a medical or surgical procedure (or a combination of such procedures) to alter the genitals and other sexual characteristics of a person, identified by birth certificate as male or female, so that the person will be identified as a person of the opposite sex and includes, in relation to a child, any such procedure (or combination of procedures) to correct or eliminate ambiguities in the child’s sexual characteristics (s 3);
- **‘recognition certificate’** means a certificate, issued under this Act, that identifies a person who has undergone a reassignment procedure as being of the sex to which the person has been reassigned (s 4).

Part 2 of the Act looks at reassignment procedures and the approvals required before a procedure can be performed.

¹² *Crimes (Sentencing Procedure) Act 1999* (NSW), s 17.

¹³ *Interpretation Act 1967* (ACT), s 33AA.

Part 3 covers recognition certificates. Section 7 covers applications for recognition certificates. Where a person has had a reassignment procedure, application may be made by the person (or their guardian, if the person is a child) to an authorised magistrate for the issue of a recognition certificate.

A magistrate may issue a certificate for an adult under s 7(8) if either the person was born in, or had a reassignment procedure carried out in, South Australia, and the magistrate is satisfied the person believes that his or her true sex is the sex to which the person has been reassigned and has adopted the lifestyle and has the sexual characteristics of a person of the sex to which the person has been reassigned, and has received proper counselling in relation to his/her sexual identity.

A magistrate may issue a recognition certificate in respect of a child if the child was born in, or had a reassignment procedure done in, South Australia, and the magistrate is satisfied it is in the best interests of the child that a certificate be issued (s 7(9)).

A recognition certificate cannot be issued to a person who is married (s 7(10)).

An appeal lies to the Supreme Court against a decision of a magistrate on an application for the issue of a recognition certificate (s 11(1)(d)), if the appeal is commenced within one month (unless the Court orders otherwise) of the day the applicant receives notice of the decision. On an appeal, the Court may issue or cancel a recognition certificate as it sees fit (s 11(3)).

A recognition certificate is conclusive evidence that the person to whom it refers has undergone a reassignment procedure and is of the sex stated in the certificate (s 8(1)). However, although the registrar can issue a copy from the register showing the new sex, it cannot be used for legal purposes in another place, unless the laws of that place expressly allow a copy showing the reassigned sex to be used and the relevant parties are informed of the reassignment of sex (s 9(4)).

If a registration certificate is produced to the Registrar of Births, Deaths and Marriages (a minimum one month after it has been issued), the Registrar must register the reassignment of sex on the original record (s 9).

4.5 VICTORIA

There is no provision in the *Births, Deaths and Marriages Registration Act 1996* which allows for a change of sex to be registered on a Victorian birth certificate.

4.6 TASMANIA

Part 4A of the *Births, Deaths and Marriages Registration Act 1999* permits registration of a change of sex.

Section 28A in Part 4A allows an unmarried adult born in Tasmania who has undergone sexual reassignment surgery to apply to the Registrar of Births, Deaths and Marriages to register a change of the person's sex. The parent(s) of a child born in Tasmania may also apply for registration of a change of the child's sex. Applications made under s 28A must be accompanied by statutory declarations from two doctors verifying the person who is the subject of the application has undergone sexual reassignment surgery (s 28B).

Under s 28C, after receiving an application, the Registrar must register the change of sex in the Register or refuse to do so. In considering whether or not to note the change of sex the Registrar may request further and better particulars from the applicant, or make his/her own inquiries whether the person has undergone sexual reassignment surgery. The Registrar must not note a change of sex in the Register if the person is married (ss 28C(3)).

If a change of sex is registered, a birth certificate issued by the Registrar for that person is to show the person's sex as registered *with* a notation that the person was previously registered as of the other sex (s 28D(1)), unless the person requests issue of an extract from the Register which does not include the notation (ss 28D(2)). This provision is in sharp contrast to those in other States which typically state that no notation or marking indicating the person has had a sex change is permitted on a (new) birth certificate issued to a person who has had a change of sex registered.

Section 28E allows the child of a person whose change of sex is registered, or a prescribed person, to apply to the Registrar for a birth certificate of the person showing the person's original sex before he/she changed sex. The Registrar may issue such a certificate showing the person's sex as previously registered with a notation that the person has been subsequently registered as the other sex.

A person who has had a sex change registered must not, with intent to deceive, produce to another person a birth certificate or birth register extract issued for the person, showing their sex *before* the change was registered – maximum penalty - 100 penalty units, two years imprisonment, or both (s 28F).

4.7 WESTERN AUSTRALIA

The *Gender Reassignment Act 2000* (WA) legislated for the reassignment of gender, established a Gender Reassignment Board with power to issue recognition

certificates, and amended the *Equal Opportunity Act 1984* to provide remedies in respect of discrimination on gender history grounds.

Part 2 of the Act establishes a Gender Reassignment Board. Part 3 allows for applications for, and issuing of, recognition certificates and the issuing of new birth certificates.

Key definitions in the Act are –

- **'reassignment procedure'** means a medical or surgical procedure (or a combination of such procedures) to alter the genitals and other gender characteristics of a person, identified by a birth certificate as male or female, so that the person will be identified as a person of the opposite sex and includes, in relation to a child, any such procedure (or combination of procedures) to correct or eliminate ambiguities in the child's gender characteristics;
- **'recognition certificate'** means a certificate issued under this Act that identifies a person who has undergone a reassignment procedure as being of the sex to which the person has been reassigned.

Applications can be made to the Gender Reassignment Board for a recognition certificate, by a person who has undergone a reassignment procedure or by the parent(s)/guardian of a child who has undergone reassignment (s 14). The Board must determine every application by giving a written decision with reasons (s 14(8)).

The Board may issue a recognition certificate under s 15(1) for an unmarried adult applicant if the reassignment was carried out in Western Australia; or the person was born in or has been resident in Western Australia for at least 12 months; and if the Board is satisfied the person –

- believes that his or her true gender is the gender to which the person has been reassigned;
- has adopted the lifestyle and has the gender characteristics of a person of the gender to which the person has been reassigned; and
- has received proper counselling in relation to his or her gender identity.

In the case of a child, the Board may issue a certificate when the child was born in Western Australia or the child has been resident in the State for at least 12 months; or the reassignment was done in Western Australia; and the Board is satisfied that it is in the best interests of the child that the certificate be issued (s 15(2)).

A recognition certificate is conclusive evidence that the person to whom it refers has undergone a reassignment procedure and is of the sex stated in the certificate (s 16).

If a recognition certificate relating to a person born in Western Australia is produced to the Registrar-General (a minimum 1 month after it is issued), the

Registrar-General must register the reassignment of gender under s 17. After the reassignment of gender is registered by the Registrar-General and the register altered accordingly, a birth certificate issued by the Registrar-General for the person must, unless otherwise requested by the person, show the person's sex in accordance with the register as altered. Any such birth certificate must not include a statement that the person has changed sex (s 18).

4.8 NORTHERN TERRITORY

Part 4A of the *Births, Deaths and Marriages Registration Act 1996* (NT) allows for the registration of a change of sex. The provisions in Part 4A are substantially the same as those noted above for the ACT and NSW.

A '**recognition certificate**' is defined in s 28A to mean 'a certificate that is issued under a law that recognises that a person who has undergone sexual reassignment surgery may have changed sex; and is issued in respect of a person, who, having undergone sexual reassignment surgery, has changed sex; and states the sex of that person as so changed'. Section 28J states that a person in respect of whom there is a certificate is, for the purposes of (but subject to) any law of the Territory, a person of the sex as so changed and as stated in the recognition certificate.

A recognition certificate is approved under s 4A of the *Births, Deaths and Marriages Registration Regulations 1996* as an alternative form of evidence verifying that the adult or child the subject of an application has undergone sexual reassignment surgery. Alternate acceptable evidence to support the application (where a recognition certificate has not been issued) comprises two statutory declarations from medical practitioners declaring that the person has undergone sexual reassignment surgery and changed sex.

Persons prescribed in the Regulations as able to apply for a transsexual's (original) birth certificate that shows the person's sex before he/she had a sex change are:

- the person;
- if the person is deceased, the executor or administrator of their estate;
- if the person is a child, a parent or guardian of the person;
- the person's spouse or a former spouse;
- a police officer carrying out his/her official duties;
- anyone authorised by law.

APPENDIX A – MINISTERIAL MEDIA STATEMENTS

Hon Rod Welford MP, Attorney-General and Minister for Justice

29 November 2002

Parliament Approves New Discrimination Laws

State Parliament today passed new discrimination laws legally recognising the rights of people living in de facto relationships and outlawing vilification based on sexuality.

Attorney General and Minister for Justice, Rod Welford, said the historic new laws reflected modern community attitudes and expectations about Queensland society.

"We are making the sort of changes necessary to ensure Queensland remains a fair and inclusive place to live," Mr Welford said.

"Our laws protect the fundamental human rights of all Queenslanders no matter who they are, and reject any actions which deal out ill-treatment and offensive harm.

"It is a fact of our society - borne out by Census figures - that many Queenslanders are now living in de facto relationships. To reflect this social change, we have changed the legal definition of 'spouse' to include all de facto couples, regardless of their sexual orientation.

"People living together in loving and committed de facto relationships will now have the same legal rights as married couples in regard to issues such as property transfers, organ donation, guardianship, superannuation and wills.

"We have also extended our vilification laws to include sexuality. No one should have to tolerate vitriolic abuse or threats of violence because of who they are - the sexuality of a person is simply not a reason for them to be harassed or assaulted."

Mr Welford said the Government had given certainty to religious educational institutions about enforcing appropriate codes of behaviour.

"These institutions no longer have a blanket exemption from discrimination laws that apply to all other sections of our society," he said.

"However, the legislation acknowledges there is a need for religious employers to have control over the behaviour of staff in schools and in roles where they are required to adhere to and communicate religious beliefs.

"All of the changes we have made will help build the type of communities where there is greater acceptance and respect. That can only lead to a better quality of life and more security for our children."

Contact: Greg Milne on 3239 3478 or 0417 791 336

Hon Rod Welford MP, Attorney-General and Minister for Justice

6 November 2002

Government Updates Discrimination Laws

Breastfeeding mums and people who take time off work to care for sick children or elderly parents will be protected against discrimination under new laws introduced by the Beattie Government into State Parliament today.

Attorney General and Minister for Justice, Rod Welford, said the Discrimination Law Amendment Bill 2002 would also extend vilification laws.

"Respecting our neighbours and tolerating people's differences contributes to a better quality of life for all of us," Mr Welford said.

"The Anti Discrimination Act was ground-breaking legislation when it was introduced in 1991 and it is now time to modernise those laws.

"These amendments ensure a person who has to take time off work to care for an elderly parent or a sick child cannot be penalised by their employer on that basis.

"Most public servants already have these rights - we're ensuring private sector employers follow the same rules.

"We are also protecting breastfeeding mothers against discrimination in public places such as shopping centres or in the workplace.

"The racial and religious vilification laws we introduced last year are being extended to include sexuality.

"No one should have to tolerate abuse of any form because of who they are - the sexuality of a person is simply not a reason for them to be harassed or assaulted."

Mr Welford said the new laws would also give Queenslanders living in de facto relationships the same legal rights as married couples.

"The new laws will remove discrimination and give de facto partners rights and obligations consistent with those of married spouses," he said.

"The definition of 'spouse' is being changed to include all de facto couples regardless of their sexual orientation. Over 50 pieces of legislation will be amended to bring the definition up to date."

Contact: Greg Milne on 32393478 or 0417 791336

APPENDIX B – ARTICLE

Blair Government To Change Law After Transsexual Wins Landmark Ruling

PA News for Gay.com UK

11 July, 2002

Downloaded from <http://uk.gay.com>

The Blair government will have to change legislation as early as this autumn after transsexual Miss Christine Goodwin won a landmark battle for the right to be recognised as a woman and marry under British law.

Miss Goodwin, a former bus driver, took her fight to the European Court of Human Rights in Strasbourg and today a panel of judges found in her favour.

The judgment unanimously held that the UK's failure to recognise her new identity in law breached her rights to respect for private life and her right to marry under the European Convention on Human Rights.

Miss Goodwin, 65, who has lived full time as a woman since 1984 and had irreversible gender reassignment surgery in 1990, was awarded almost £25,000 costs and expenses.

Lawyers acting for Miss Goodwin claimed that the failure of British law to recognise her sex change meant she was denied the right to claim a pension at the age 60 like other women.

She was also unable to bring proceedings against an employer for the sexual harassment she said she suffered during the early 1990s because the law treated her as a man.

Miss Goodwin's solicitor, Robin Lewis, said: "The court has said that the Government's stance falls far short of the standards for human dignity and human freedom in the 21st Century. Christine Goodwin's victory will be seen as a milestone on the road to change."

The Government has already set up a working group of officials from various Whitehall departments to draw up proposals to give transsexuals the right to change their birth certificates and to marry in their adopted sex.

The group was set up after a series of UK court cases in which judges expressed sympathy for the plight of transsexuals, but said reform was ultimately a matter for Parliament. The Strasbourg ruling is likely to add impetus to the reform process.

The court ruled that there had been a violation of Article 8 (right to respect for private and family life), and article 12 (right to marry and found a family) of the European Court of Human Rights.

In their ruling, the judges said: "Although the applicant had undergone gender re-assignment surgery provided by the National Health Service and lived in society as a female, she remained for legal purposes a male."

The ruling continued: "The court was not convinced that the inability of the transsexual to acquire all the biological characteristics took on decisive importance. There was clear and uncontested evidence of a continuing international trend in favour of not only increased social acceptance of transsexuals but also of legal recognition of the new sexual identity of post-operative transsexuals."

It added: "Despite the court's re-iteration since 1986 and most recently in 1998 of the importance of keeping the need for appropriate legal measures under review having regard to scientific and societal developments, nothing has effectively been done by the respondent Government."

The court said: "While it was true that Article 12 referred in express terms to the right of a man and woman to marry, the court was not persuaded that at the date of this case these terms restricted the determination of gender to purely biological criteria. There had been major social changes in the institution of marriage since the adoption of the convention as well as dramatic changes brought about by developments in medicine and science in the field of transsexuality."

The judges added: "The court found no justification for barring the transsexual from enjoying the right to marry under any circumstances."

The ruling was warmly welcomed by campaign groups. Janett Scott, president of the Beaumont Society - a self-help group for transsexuals and their families - said: "We are over the moon about this decision. This will affect so many of our people in a positive way. We will have civil recognition once and for all".

"On driving licences, passports, and medical cards we can be registered as a woman but not on birth certificates. The Government pays for us to have a sex change operation and allows us to change all these documents but not our birth certificate.

"The Government has said it has been looking into the issue actively since April 2000 but has been dragging its feet. Christine Goodwin comes at the end of a long line of people fighting for recognition."

Labour MP Dr Lynne Jones, who has long campaigned for changes in the law on transsexuals, said today's decision would lead to legislation in the autumn or early next year.

She told BBC Radio 4's World at One: "It will mean that the Government will have to change the law to remove the discrimination that is suffered by the transsexual community".

"I think the Government knew they were going to lose this case, because they have reconvened an inter-departmental working group which was set up some years ago to advise on this. I think it is likely that we will have secondary

legislation in the autumn or early next year which will implement this decision."

Transsexuals will be entitled to one legal status while living as a member of the opposite sex prior to their operation and another when they have taken on their post-operative gender, she predicted.

At the moment, post-operative transsexuals are able to change the gender recorded on all documentation except for their birth certificate, but those awaiting the op must keep their original gender on papers such as their passport.

"It's envisaged that there would be two stages," said Dr Jones. "The first would be that people would be accepted for living in their correct gender role and in that case they would be able to get certain types of documentation which would allow them to go about their day-to-day business without too much embarrassment. Once it was decided that their medical treatment was completed then they would have the full legal rights of their reassigned gender."

Mr Lewis, said: "This judgment will require the government to change the law as it has in the past. The law will have to be changed to allow a transsexual to marry a partner of the gender they were previously".

"Any government practice which could lead to the history of a transsexual being identified will also have to be changed so as to respect the individual's right to privacy."

He said Miss Goodwin was still in France and was "euphoric" about the decision. He refused to reveal where she was from or any more details about her.

A spokeswoman for the Lord Chancellor's Department said the judgment would be taken seriously. "The Interdepartmental Working Group on Transsexual People is being reconvened and will take into account the judgment as part of their discussions".

"We take the judgment very seriously. This judgment does not override UK law but it means it will have to be taken into account by judges in future," she said.

The Government decided to reconvene the Interdepartmental Working Group on Transsexual People after a series of court cases in which judges have expressed sympathy for the plight of transsexuals, but said reform was ultimately a matter for parliament.

Last July the court of appeal rejected a bid by Elizabeth Bellinger, who started life as a male, to have her 20 year marriage to a man declared valid.

One of the three judges ruled in her favour, but the other two reluctantly dismissed her appeal, while admonishing the government for failing to change the law.

The working group previously sat from April 1999 to July 2000 when it produced a report setting out three options: Retaining the status quo and leaving the law unchanged; issuing birth certificates showing a transsexual person's new name and, possibly, sex; or granting full legal recognition of the acquired sex, but making no firm recommendations.

The other three countries in the Council of Europe which do not recognise a sex change as legally valid are Ireland, Albania and Andorra.

Visit this article online at <http://uk.gay.com/article/money/law/1253>

APPENDIX C – NEWSPAPER ARTICLE

Title Schoolboy pursues sex change
Author Amanda Watt
Source The Courier-Mail
Date Issue 11 January 2003
Page 3

A Brisbane boy is determined to become the first Australian school student to go through a sex change.

The Year 11 teenager has finally admitted to himself and his family that he wants to become a woman.

In what is believed to be an Australian first, the student last year began going to school partially dressed as a woman - wearing make-up and growing his hair long.

This year he is taking the transformation further- he has begun a course of hormones that will stop facial hair growth and eventually develop breasts.

With the support of his parents, he has adopted a female Christian name and now leaves the house every morning looking like a woman.

In two to three years, provided he passes the required testing for mental or physical problems, he hopes to undergo surgery to make the transition complete - removing his male genitalia and replacing it with a female organ.

While his parents, extended family and friends are standing steadfastly behind him, many of his school peers have not accepted the decision.

He has suffered months of verbal taunts, abuse and assault.

The campaign of vilification - condemned by the school's administration and some students - has made him leave the school.

He is now investigating other education options for this year - such as completing Year 12 via a TAFE course.

The 17-year-old, who does not want to be identified, said he was a victim of the widespread ignorance and fear.

Too many people saw it as a choice rather than understanding he had been born in the wrong body, he said.

A transgender is also frequently confused with a transvestite - who dresses as a woman for sexual gratification or emotional release.

"It's not like I have chosen this for myself.

I have lived my whole life feeling that something is not right and all I want is to live a normal life," he said.

"The entire process has been painful and difficult ...

I wouldn't want to put anyone through what I'm going through.

"Life would be so much easier if I didn't have to do this."

Transgenders generally have to see psychiatrists for at least one year and they need to live as their new identity for two years before getting a sex change operation.

His mother, who has attended several of her son's medical appointments in a bid to understand more about the changes, said while it took a while to process her son's announcement she had always known there was something "different" about her only child.

"We love our child and we want to do what's right.

We want her to have a happy life," she said.

"The suicide rate amongst transgenders is so high (43 per cent of transgenders in Australia have committed suicide or have made an attempt) and I don't want a dead child."

The family has found understanding and support from the group Parents and Friends of Lesbians and Gays.

Convener Shelley Argent said about one in 20,000 Australians had gender identity issues.

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