



Home Office

BUILDING A SAFE, JUST
AND TOLERANT SOCIETY

REPORT OF THE INTERDEPARTMENTAL WORKING GROUP ON TRANSSEXUAL PEOPLE

April 2000

The Working Group was set up by the Home Secretary in April 1999 with the following terms of reference:

to consider, with particular reference to birth certificates, the need for appropriate legal measures to address the problems experienced by transsexual people, having due regard to scientific and societal developments, and measures undertaken in other countries to deal with this issue.

We were asked to report to Ministers by Easter 2000.

Our membership was as follows:

Home Office (Chair)
Department for Education & Employment
Foreign & Commonwealth Office
General Register Office for Northern Ireland
General Register Office for Scotland
Department of Health
Office of Law Reform, Northern Ireland
Lord Chancellor's Department
Office for National Statistics
Scottish Executive
Department of Social Security
National Assembly for Wales

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1. INTRODUCTION

Transsexualism

The Medical Condition

1.1 People with gender dysphoria or gender identity disorder live with a conviction that their physical anatomy is incompatible with their true gender role. They have an overwhelming desire to live and function in the opposite biological sex. Some people become aware of their transsexualism as children while others discover their feelings later in life. Once experienced these feelings are unlikely to disappear.

1.2 The cause of the condition remains obscure. Many transsexual people benefit from counselling and others live happier lives following hormone treatment and gender reassignment surgery.

Incidence

1.3 Studies carried out in the Netherlands suggest that the prevalence of transsexualism is between 1:11,900 and 1:17,000 in men over 15 years of age. The number of female-to-male transsexual people is far smaller, possibly in the region of one to every five male-to-female transsexual people. These estimates are supported by a recent study carried out in primary care units in Scotland which estimated the prevalence in men over 15 years at 1:12,400, with an approximate sex ratio of one to four in favour of male to female patients. These studies suggest that in this country there are between 1,300 and 2,000 male to female and between 250 and 400 female to male transsexual people. Press for Change, however, estimate the figures at around 5,000 post-operative transsexual people.

1.4 The main NHS centre providing specialist care for adults in England is at Charing Cross Hospital in London. There are smaller services in Leeds, Leicester, Newcastle and Bristol. The Gender Identity Clinic at Charing Cross Hospital saw almost 470 new cases last year and have

roughly 1,000 active patients. Data on the number of gender reassignment operations performed in the NHS is collected as part of the Hospital Episode Statistics. In 1997/8 (the latest data available) there were 44 male-to-female operations and 4 female-to-male operations. A study of private-public mix of acute hospital care published by the Association of British Insurers recorded 104 gender reassignment operations in the private sector in 1997/8.

Gender Reassignment

1.5 Gender reassignment is commonly termed a sex change, but in reality it is an alteration only in a person's physical characteristics. The biological sex of an individual is determined by their chromosomes, which cannot be changed. What can be achieved through the transsexual person's own efforts, and with counselling, drugs and surgery is social, hormonal and surgical reassignment.

1.6 Further information about the medical process is at Annex 1.

1.7 At present, in certain circumstances, a transsexual person's acquired gender is recognised where the issue is one of identifying the individual rather than determining their legal status. Thus, on the production of evidence that a person is living as a member of the opposite sex (eg a letter from the medical practitioner) documents such as a driving licence, passport, car registration document, National Insurance and medical card may be issued in the new identity. This has eased some of the difficulties faced by transsexual people.

Transsexual People's Concerns

1.8 The most frequently mentioned concerns of transsexual people are the wish to have a birth certificate showing their new gender, to marry in that gender and, most importantly, the grant of

legal recognition of their acquired gender for all purposes.

1.9 The following comments in recent submissions to the Working Group are typical of the correspondence received from and on behalf of the transsexual community in recent years:

- “[...] all trans people should have the right to marry, including those undergoing or having undergone gender reassignment confirmation” (Liberty)
- “After treatment [...] there can be no valid reason why an amended birth certificate should not be issued and a marriage ceremony take place. [...] gender reassignment has nothing to do with sexual preference but, if you have the brain of a woman, think like a woman, now have the body of a woman and live your life as a woman, the law should not be capable of turning this on its head and depriving you of a fundamental human right - happiness with the partner of your choice” (The Northern Concord)
- “[Transsexual people should] have the right to marry a member of the opposite gender, and to have all the benefits that accrue with marriage for ourselves and our partners. [They should also] have the right to retain a marriage celebrated before gender reassignment was undertaken”. (Press for Change)

European Court of Human Rights

1.10 The United Kingdom’s treatment of transsexual people has been challenged several times before the European Court of Human Rights (ECHR) under Article 8 (the right to respect for private and family life) and Article 12 (the right to marry and found a family). In none of these cases has the majority of the Court found against the UK but there has on a number of occasions been a significant minority for the applicant.

1.11 The most recent case, in which judgement was given in July 1998, was brought by two male-to-female transsexuals. They complained, under Article 8, that failure to grant legal recognition of

their acquired gender constituted an interference with their rights to respect for their private lives and, under Article 12, that this prevented them from contracting a valid marriage with a man. They also claimed a breach of Article 14 in conjunction with Article 8, contending that transsexual people alone were compelled to describe themselves frequently and in public by a gender which did not accord with their external appearance.

1.12 The Court found in favour of the UK by a margin of 11 to 9 (Article 8) and 18 to 2 (Article 12), and that there was no case to answer in respect of Article 14. It recognised that although both applicants had experienced incidents which had been a source of embarrassment and distress, there were occasions when justification of proof of gender might be necessary, and that these did not occur so frequently as to infringe disproportionately on the right to respect for private life. As in earlier cases, it noted that Article 12 referred to traditional marriage between persons of opposite biological sex and was concerned to protect marriage as the basis of the family. The UK’s prohibition on marriage between people of the same biological sex therefore did not constitute a violation of Article 12.

1.13 However, the Court also said that :

“despite its statements in the Rees and Cossey cases on the importance of keeping the need for appropriate legal measure in this area under review, having regard in particular to scientific and legal developments, it would appear that the responding State has not taken any steps to do so [...] the Court reiterates that this area needs to be kept under review by contracting States.”

Representations

1.14 The Working Group invited written comments from organisations representing transsexual people and others with an interest in this issue. Submissions were received from the following organisations:

Beaumont Society
British Medical Association
Gender Identity Research & Education

Society (GIREs)
Liberty
Northern Concord
Press for Change
Change

1.15 The Working Group received comments from 99 individuals, almost all from transsexual people and their friends and families, and from Members of Parliament. The Group also met representatives of seven transsexual organisations (Press for Change, Change, the FTM Network, the Gender & Sexuality Alliance, GIREs, Liberty and the Gender Trust). Copies of their presentation and subsequent submission are attached at Annexes 2 and 3.

Options for Change

1.16 We have identified three options:

- to retain the status quo and leave the law unchanged;
- to issue birth certificates showing a transsexual person's new name and, possibly sex; and
- to grant full legal recognition of the acquired gender.

1.17 We looked in particular at the following areas:

- birth registration
- marriage
- family law
- the Criminal Justice System
- pensions and benefits
- insurance
- employment
- sport.

Practice in Other Countries

1.18 The Working Group is grateful to British diplomatic missions in a number of European and Commonwealth countries for information about the treatment there of transsexual people. This material shows that there is no common approach to the transsexual condition and the issues to which it gives rise. Although there is a growing

tendency to recognise a transsexual person's acquired gender, the pre-conditions for and extent of such recognition vary considerably. Some countries have not yet addressed all the issues affected by the change. Full details are set out at Annex 4.

Devolution

1.19 The work of the Inter-Departmental Working Group covers some matters which have been devolved to the Scottish Parliament, the Northern Ireland Assembly and the National Assembly for Wales. It will be for these administrations, as appropriate, to consider the Working Group's report and decide whether, how and when these matters will be taken forward in their jurisdictions.

2. THE PRESENT POSITION

2.1 In this section of our report we set out the current legal position in relation to transsexual people.

Birth registration law and practice

Registering a birth

2.2 The law requires every birth to be registered by the district registrar. The details to be registered are set out in regulations and include the child's sex. There is no definition of sex in the relevant legislation.

2.3 Information for the registration, including sex, is almost always provided by a parent of the child. Registrars are also notified of births by the health service which means that registrars are supplied with details of the sex of the baby independently.

2.4 If the sex of a child is not evident at birth, parents are advised to delay the registration until medical investigations have been completed to determine the sex.

Correcting a birth registration

2.5 The law provides for an entry in a birth register to be corrected at any time if it can be shown that an error was made at the time of registration. This includes the circumstances where the newborn baby was not in fact of the sex recorded in the register.

2.6 The criteria used for determining sex are the biological criteria: chromosomal, gonadal and genital congruity. Only in cases of clerical error, or where the apparent sex of the child was wrongly identified, or where the biological criteria were not congruent at birth, will a change to the birth record be considered. Medical evidence is required to show that the birth registration was incorrect when it was made.

Re-registration of births

2.7 Births may be re-registered by a local registrar to record an unmarried father's details or to record the child's status where parents marry after the birth.

2.8 Registrars General in Scotland, Northern Ireland and England and Wales maintain adopted children's registers and parental order registers. Births are registered afresh in these registers to show the legal parentage of children as determined by relevant court orders.

2.9 Where a birth is re-registered a note is made against the original record to show that the birth has been re-registered, but the record itself cannot be searched (searchers have access only to the index, which does not show that the birth has been re-registered).

Access to records and certificates

2.10 Alphabetical indexes to birth, death and marriage records are required to be kept centrally by Registrars General. In England, Wales and Scotland this is also a requirement at local register offices. The public have a right to search the indexes and to buy a certificate from any registration they identify from the indexes. The only provision for privacy of any information is that governing the link between original registrations and entries in the adopted children's register or parental order register.

2.11 Certificates are copies of entries made in the registers and can therefore reflect only the information registered. There are two types of birth certificate: a standard (full) certificate which is a complete copy of all the details in the register entry, and a short certificate which gives only the names, sex and date and place of birth recorded in the register.

2.12 Since the early 1990s certificates have contained a warning to the effect that the certificate is not evidence of the identity of the person presenting it.

Marriage

2.13 England and Wales, Scotland and Northern Ireland each have their own marriage legislation which, with a few exceptions, makes broadly the same provision.

2.14 The issue of direct concern to transsexual people is that, in all parts of the United Kingdom, marriage may only take place between a man and a woman. Marriage is defined as the voluntary union for life of one man and one woman to the exclusion of all others (Hyde v Hyde (1866)), and the Matrimonial Causes Act 1973 gives statutory effect in England and Wales to the common law position that a marriage is void *ab initio* if the parties are not respectively male and female. The 1973 Act also provides that a marriage which has not been consummated owing to the incapacity of either party to do so shall be voidable. The Matrimonial Causes (NI) Order 1978 give effect to these provisions in respect of marriage in Northern Ireland. In Scotland, the common law regards marriage as a union between a man and a woman and the Marriage (Scotland) Act 1977 lists as an impediment to marriage both parties being of the same sex.

Recognition of foreign marriages under English law

2.15 A marriage will be held to be formally valid under English law if it is valid under the law of the country in which it was contracted. There are several limited exceptions to this rule but none are relevant in the context of transsexuality. But a foreign marriage will not be valid under English law unless, under the law of the domicile of the contracting parties at the time of the marriage, both of them had the legal capacity to contract that marriage.

2.16 It is doubtful whether a partnership of two persons of the same sex would be regarded under English law as a valid marriage even where it was regarded as having some sort of legal validity under the law of the country where it had been registered or formally entered into. However a case of this kind has yet to come before an English court.

2.17 Similarly in Scotland a marriage celebrated abroad is recognised as formally valid if it is celebrated in accordance with the formal requirements of the law of the country concerned.

It is however possible that the Scottish Courts would decline to recognise a foreign marriage where the foreign law was repugnant to Scots law notions of morality and public policy.

Transsexual marriage: case law

2.18 The legal position on transsexual marriage in England and Wales was established in the High Court case of Corbett v Corbett (1970). This concerned a male-to-female transsexual who had undergone a marriage ceremony in Gibraltar. Her husband, who knew of her true biological sex at the time of the marriage, later petitioned in England for nullity of the marriage.

2.19 The judge in the case stated that “since marriage is essentially a relationship between man and woman, the validity of the marriage in this case depends...upon whether the respondent is or is not a woman”. He decided that the criteria for determining this question “must...be biological” and that, “the law should adopt in the first place the chromosomal, gonadal and genital tests and, if all three are congruent, determine the sex for the purpose of marriage accordingly, and ignore any operative intervention”.

2.20 These three biological criteria for determining sex have been followed for most legal purposes since that time. Thus, under current marriage law a transsexual person may legally marry a person of their acquired gender (ie as a biological woman, a female to male transsexual may marry another man). What are, to all appearances, same sex marriages may therefore take place. Alternatively, two transsexual people of opposite birth gender may marry, but must take their vows in their birth genders, so that a transsexual man would be the “wife” and the transsexual woman the “husband”. On marriage the entry in the birth register is seen as *prima facie* evidence of a person’s gender.

Legal rights and responsibilities of marriage

2.21 There is no single comprehensive statement of the rights and duties that attach to marriage. But in brief the principal legal consequences of marriage are:

- rights to economic support;
- rights to property (principally in the case of divorce or intestacy);

- miscellaneous economic consequences eg taxation and pension
- certain legal provisions:
 - (a) criminal law - spouses cannot be convicted of the criminal offence of conspiracy with one another
 - (b) witness - the capacity of a person to act as a witness may be affected where a case involves their spouse
 - (c) contract and tort (*delict* in Scotland) - a spouse's rights of occupation of the matrimonial home has some statutory protection
 - (d) limitation of actions eg in relation to contract between spouses and to certain actions in respect of trust property
- citizenship and the right to live in the United Kingdom may be affected by marriage or other relationship.
- automatic parental responsibilities for any children of the marriage.

Citizenship and the right to live in the United Kingdom

2.22 Transsexual people are not treated differently from anyone else under immigration and nationality law. But because they cannot marry someone who is of their birth sex, they and their partners cannot take advantage of the provisions governing the entry into or settlement in the United Kingdom of the spouses of British citizens or other people entitled to reside in this country. Thus a transsexual person can enter the country as the unmarried partner of a person entitled to reside here if they can demonstrate that they have been living together in a relationship (whether same sex or heterosexual) akin to marriage which has subsisted for at least two years. But they will have to satisfy this length of relationship condition, which does not apply to spouses or fiancé(e)s.

2.23 Similarly in relation to the acquisition of citizenship by naturalisation, the requirements

for spouses of British citizens are fewer than for other applicants. Such spouses do not have to meet the requirements relating to knowledge of English (or Welsh or Scottish Gaelic), the requirement to intend to live in the UK if naturalised, the requirement to have been free of immigration time restrictions at the date of application or the requirement to have lived in the UK throughout the 5 year period ending with the date of the application (only 3 years' residence is required). The application fee for these spouses is also lower than for other applicants - £120 against £150. If a married couple, neither of whom is a British citizen, applies together for naturalisation they pay a joint fee of £150 whilst an unmarried couple applying together have to pay £150 each.

Family Law

Parental responsibilities and rights

2.24 In England, Wales and Northern Ireland parental responsibility is defined as "all the rights, duties, powers, responsibilities and authority which by law a parent of a child has in relation to the child and his property".

2.25 In Scotland the parental responsibilities are:-

- to safeguard and promote the child's health, development and welfare;
- to provide, in a manner appropriate to the stage of development of the child, direction and welfare;
- if the child is not living with the parent, to maintain personal relations and direct contact with the child on a regular basis;
- to act as the child's legal representative.

There are corresponding parental rights to enable parents to fulfil their responsibilities. Once the child has reached the age of 16, the parents only have a responsibility and a right to provide guidance.

2.26 Where a child's father and mother are married to each other at the time of its birth, they each have parental responsibility (in

Scotland, rights and responsibilities) for the child. Where they are not married at the time of the child's conception in Scotland, the mother alone has parental responsibility automatically. However, the father may acquire it in a number of ways:

- by subsequently marrying the child's mother
- by entering into a parental responsibility agreement with the child's mother.
- if the court makes a residence order specifying that the child should live with him (or any other particular person) he/or that person acquires parental responsibility by virtue of the order.

2.27 If an unmarried father exercises his parental responsibility in an inappropriate way, the child's mother (or, with leave of the court, the child himself) may ask the court to bring the agreement or order to an end.

2.28 In England, Wales and Northern Ireland the possession of parental responsibility by a non-resident parent does not give them a right to contact; nor does it mean that the resident parent has a duty to consult the other parent on a day-to-day basis about the child's upbringing. Equally, neither has a right of veto against the other. The parent caring for the child is able to respond to circumstances as they arise in order to meet her (or his) parental responsibility.

2.29 In Scotland, however, the possession of parental responsibilities and rights by an absent parent does give a right to maintain contact and direct relations with the child. This applies unless a court has regulated the position in some way. While parents are allowed to exercise their parental responsibilities and rights independently of each other, they have a duty to consult each other on major decisions about the child's upbringing. They also have a duty to take into account the views of the child.

2.30 In England, Wales and Northern Ireland a person with parental responsibility does not lose parental responsibility following divorce or separation unless the child is freed for adoption.

2.31 In Scotland both parents retain full parental responsibilities and rights even after separation or divorce (or nullity) unless a court regulates the position in some way. If a married couple decided to separate or divorce because one of them was a transsexual, the court would only adjust the position of their responsibilities and rights if to do so were in the best interests of any children to the marriage. Thus a parent who was a transsexual would retain parental responsibilities and rights in relation to his or her children unless and until a court removed some or all of them.

2.32 The fact that a person has, or does not have, parental responsibility does not affect any obligation which they may have in relation to the child (such as a duty to maintain the child), or any rights which, in the event of the child's death, they may have in relation to the child's property.

2.33 Where a person who does not have parental responsibility nevertheless has care of a child, they may do what is reasonable to safeguard or promote the child's welfare.

2.34 Where a residence order is in force, no person may change the child's surname, or remove the child from the UK without the consent of all those with parental responsibility or with leave of the court. But in England, Wales and Northern Ireland this does not prevent the removal of a child, for a period of less than one month, by the person in whose favour the residence order is made.

2.35 In England, Wales and Northern Ireland any person with whom a child has lived for a period of at least three years, including a grandparent, may apply to the court for an order granting that person residence or contact with the child. Anyone else may apply to the court for a residence or contact order provided that the permission of the court is first obtained. Anyone in whose favour a residence order is made automatically acquires parental responsibility for that child.

2.36 In Scotland any person who has an interest in a child may apply to a court for an order to grant or deprive a person of parental responsibilities (and rights). For instance, in the event of a child's parents being involved in separation, divorce, or death, a grandparent, other relative or friend could apply to be granted parental responsibilities. Thus it would be

possible for a transsexual to apply to the court for parental responsibilities in relation to the child of a partner, even though according to the birth certificates both persons were of the same sex.

Human fertilisation and embryology

2.37 Legislation on human fertilisation and embryology was introduced in the Human Fertilisation and Embryology Act 1990, which applies throughout the UK.

2.38 Under the current law, if a person undergoes gender reassignment their position as “father” or “mother” would continue to depend on their birth sex. A female-to-male transsexual cannot therefore be legally recognised as the father of children born to his partner by AID or through a surrogacy arrangement, though he can acquire parental responsibility for them in other ways (see paragraphs 2.25). Similarly a male-to-female transsexual cannot be recognised as the mother of her partner’s children but can acquire parental responsibility for them.

Inheritance

2.39 The legislative provisions in England, Wales and Scotland which set out how an estate would be distributed if there were no will do not specify the sex of any children. Thus, where a person died intestate and there was no spouse the estate would be distributed equally amongst any children. This rule applies equally to other relatives such as brothers/sisters or nephews/nieces.

2.40 In Northern Ireland, relevant legislation is largely gender-neutral, referring only to parents rather than husband and wife. It does not specify the sex of any children of the intestate.

Wills

2.41 Concerns have been expressed that there could be problems for transsexual people where a bequest is made to daughter(s)/son(s), or other unnamed categories of relative. In practice the law should be flexible enough to cope with this problem. The basic rule is that the court will construe the expressed intentions (i.e. the words) of the testator at the time the will was made. If a

person is identifiable from those words that is sufficient. References to a son who was biologically a daughter could be explained by extrinsic evidence¹ (e.g. the parents always referred to “her” as “son”).

The Criminal Justice System

2.42 Since most offences do not identify the gender of the offender or of the victim, a transsexual person ought to be in exactly the same position as any other person who commits or is a victim of crime in the substantive criminal law. As an offender he or she will be liable to prosecution in the same way as anyone else, and as the victim of such a crime a transsexual person should be treated with the same fairness as anyone else.

(i) The Present Law

Gender specific offences

2.43 The law on sexual offences has traditionally been framed in terms of males and females and there are a number of criminal offences where the gender of the offender or the victim is specified. These offences include rape, indecent assault, unlawful sexual intercourse with children, incest etc. and some offences related to prostitution.

2.44 It is for the courts to determine the facts of any case including, if it is an issue, the gender of one of the parties. In determining such an issue, the courts will have regard to case law. The courts have tended to rely on *Corbett v Corbett* (1970) which rested on the medical evidence of the biological position at birth rather than evidence as to psychological issues and gender reassignment surgery. In relation to non-gender specific offences *Corbett v Corbett* is not relevant but it may well have application in other cases.

2.45 The offence of rape can only be perpetrated by a man but applies, in England and Wales, to non-consensual intercourse with either a man or a woman, whether anal or vaginal, in circumstances where the perpetrator either knows the other person does not consent or is reckless as to whether they consent. A recent case suggests that a male-to-female transsexual can be vaginally

¹ In Scotland, this might require legislative change arising from the Scottish Law Commission *Report on Interpretation in Private Law* (Scot Law Com No. 160 1997)

raped although, as a decision of the Crown Court, rather than the Court of Appeal or House of Lords, it is not technically a binding precedent.

2.46 In Scotland, there are offences both in statute and common law where the gender of either or both the offender or victim is critical - for example rape can only be committed by a man against a woman; sodomy may only be committed between men and incest is only between a man and a woman.

2.47 Where an offence can only be committed by someone the court determines is a man, a person who the court decides is a woman cannot commit the offence, even if they have undergone gender reassignment surgery to become a man. A woman may however be charged with indecent assault for sexual violence (including penetration) against another. This is a serious offence which can carry a penalty of 10 years imprisonment in England and Wales. In Scotland, the penalty for common law offences is limited only by the court in which the case is heard.

2.48 Although individual offences may specify the gender of the victim, in most cases the law provides the same protection for men as for women. For instance, there are separate offences of indecent assault on a man and indecent assault on a woman and either can be used as appropriate. Indecent assault is an offence which can be used to prosecute a wide range of sexual violence and the maximum sentence for both offences is the same: 10 years imprisonment. In Scottish common law the maximum penalty in the High Court is life imprisonment.

Other offences

2.49 Concern has been expressed in the transsexual community that a transsexual person might, in theory, be charged with a common law offence, such as outraging public decency, breach of the peace or (in Scotland) shameless indecency if he or she used a single sex public lavatory or changing room. In fact it is doubtful whether using the lavatory or changing room for its proper purpose would be an offence. We know of no instances where this has proved a problem.

(ii) The Sex Offences Review

2.50 The Home Office has set up a Review of Sex Offences to look at the law in England and

Wales. It will report to Ministers in the spring and the report will be published for consultation in the summer. It has been asked to make recommendations which would:

- provide coherent and clear sex offences which protect individuals, particularly children and the more vulnerable, from abuse and exploitation;
- enable abusers to be appropriately punished; and
- be fair and non-discriminatory in accordance with the European Convention of Human Rights and the Human Rights Act 1998

2.51 The review has taken very seriously the need to provide the protection of the law for all people regardless of gender, sexual identity, or orientation and has adopted a general principle of having gender neutral offences unless there are very good reasons not to do so. It has looked at the problems in the present law and has considered the issue of transsexual people both as potential victims and as potential offenders.

2.52 While the review is not looking at the law in Scotland the Scottish Executive will consider closely the findings of the Home Office review and their implications for Scotland.

2.53 Northern Ireland is similarly drafting a Criminal Justice Order which, inter alia, will make amendments to the law on sexual offences. These will mirror many of the changes taking place in England and Wales.

(iii) Crown Prosecution Service

England and Wales

2.54 The Crown Prosecution Service's (CPS) policy on the treatment of victims and witnesses does not differentiate between men and women, nor does its policy statement include special provisions for transsexual victims. The manner in which the issue of transsexuality is handled will be determined on a case by case basis, but the broader interests of justice, encompassing those of the victim, the offender and society at large must always take precedence over those of a particular individual who may be transsexual.

2.55 Each case which the police send to the CPS is reviewed by a Crown Prosecutor to make sure that it meets the tests set out in the Code for Crown Prosecutors (the evidential test and the public interest test). Crown Prosecutors may decide to continue with the original charges, to change the charges or sometimes to stop the proceedings. It may be a relevant factor if the crime was motivated by any form of discrimination in respect of a person's transsexuality; the Code for Crown Prosecutors lists as a common public interest factor in favour of prosecution that "the offence was motivated by any form of discrimination against the victim's ethnic or national origin, sex, religious beliefs, political views or sexual preference".

2.56 CPS records show the name of the victim as provided by the police. The papers may include details of any previous name or gender if this information is relevant to the case. In some cases the CPS is asked to advise the police before they charge an offender eg in relation to the appropriate charge or the sufficiency of evidence. If the police were uncertain as to what name or gender should appear on the charge sheet they would be able to ask the CPS for advice, although this does not appear to have happened in practice.

2.57 If a defendant was charged under their previous name and gender, any request to change the name under which they had been charged would be considered in accordance with the nature of the charge and the facts of the case. If a defendant was charged with a gender specific offence which applied only to males, the CPS would probably be reluctant to change the name specified in the charge from a male to a female name, as that might be held to invalidate the charge. Similarly, if a female-to-male transsexual person was indecently assaulted as a female, then the charge would have to refer to the victim as female.

2.58 The disclosure of a transsexual person's previous gender in court is a matter for the court concerned. However, where a gender specific offence is at issue, it may be inevitable, as discussed above. It may also be necessary to disclose the previous gender to dispel any confusion on the facts of a case. For example if a male-to-female transsexual person committed a burglary when presenting as a male, some explanation would have to be given to the jury as to why there is a female defendant in the dock.

The same issue might arise if a witness in a case changed gender after the alleged incident. But the CPS take the view that there is no reason to disclose the previous gender of a defendant if gender reassignment surgery predated the incident alleged, and had no bearing on the case. The same would apply if the transsexual person was a witness, either for the prosecution or the defence.

Scotland

2.59 In Scotland, if the evidence brought out at trial differs from the charge, it may be possible to amend the charge, or for the jury to return a verdict amending the charge, so as to reflect the evidence. If the prosecution proceeds on the basis of a statutory offence and an evidential difficulty is encountered, the prosecutor can in some circumstances move to amend the charge to a common law offence to reflect the evidence. In the event that a victim named in a charge of rape was found not to be female, the charge could be amended to describe what is otherwise a very serious sexual assault. There would probably be no reason to disclose the previous gender of an accused if gender re-assignment surgery pre-dated the alleged incident and had no bearing on the case, or if the transsexual person was a witness.

(iv) Courts

2.60 In Northern Ireland the Director of Public Prosecutions (DPP) ensures that all criminal cases are directed and prosecuted properly. Other agencies such as the police currently carry out the majority of all minor criminal prosecutions in accordance with the Director's prosecution policy, and the Director is responsible for observing the general fairness and effect of these prosecutions. Although at present the DPP has not set out a specific policy in relation to the treatment of transsexuals, policy requires all staff to take into account the proper interests of victims and witnesses at every stage of the criminal process.

2.61 Every person is treated equally in a court of law, irrespective of their sex, age, religion, ethnic origin, or any other distinguishing factor. There have been very few court cases involving a transsexual person where the fact of their transsexuality has become publicly known.

2.62 An individual will be identified on the basis of the information provided to the court by the prosecution. It is essential to confirm the identity

of a person who is the defendant but, for the purposes of his or her trial, whether or not the defendant has previously been of a different gender is likely to be immaterial and will not be disclosed in evidence. This also applies to a witness, whether a victim or otherwise.

2.63 In the event that the sex of an individual is relevant to the charge preferred, it will be for the prosecution to satisfy the magistrates or the jury in the same way that every other element of the offence is made out, by the adducing of evidence (unless the fact is admitted by the defence). Strict reporting restrictions are imposed in cases of rape and other serious sexual offences. Where an allegation is made that a serious sexual offence has been committed, it is an offence to publish or broadcast the name and address or any picture to identify the complainant. Reports of court proceedings in such cases refer to “Miss A” or “the victim” to protect the complainant’s real identity.

2.64 Men and women are subject to the same range of sentences and the defendant’s gender history is likely to be irrelevant to the sentencing process, unless the defence raise the issue in mitigation for any reason.

2.65 The police are required to submit the defendant’s antecedent history to the court in connection with the sentencing process, and the fact that someone has lived as a member of the opposite sex earlier in life may well be disclosed in the written report. However, if the judge is sympathetic to a defence request not to make a reference to that fact in court, there is little risk of it being made public. The report may disclose other names by which the defendant has been known if he or she has a criminal history but, again, these need not be read out in court.

2.66 In the case of witnesses called in court proceedings, ordinarily there is absolutely no reason to refer to the fact that someone is living as a member of the opposite sex from that shown on their birth certificate. Where the sex of the witness at the time of the offence was critical to proving the case against the defendant, there might be public disclosure of the fact that the witness was at that stage living as a member of the opposite sex, if this was the case. But this situation is likely to be extremely rare.

Training for Judges

2.67 The Judicial Studies Board is producing an Equal Treatment Bench Book with the aim of providing practical guidance to judges in all categories of proceedings about the needs and expectations of those litigants who may consider themselves to be at a potential disadvantage in their dealings with the legal system. The first section (on Race Issues) was published in September 1999. A further section on Gender is currently in preparation and this will include guidance on issues relevant to transsexual people.

2.68 The Scottish Judicial Studies Committee is to consider shortly what advice might be suitable for the Scottish judiciary. The Northern Ireland Judicial Studies Board is considering applying the Equal Treatment Bench Book in Northern Ireland.

(v) Police

2.69 The Association of Chief Police Officers (ACPO) has adopted “Best Practice” guidelines (initially drawn up by the British Transport Police) on dealing with transvestite and transsexual people which it has circulated to all forces in England, Wales and Northern Ireland.

2.70 The main points arising from these guidelines are:

- the actions of officers must be shown to be fair and respecting of the person’s dignity
- where there is no doubt as to the gender of a person, or reason to suspect that a person is not of the gender that they appear, they should be dealt with as that gender
- in cases of doubt about someone’s gender, the person concerned should be asked what gender they consider themselves to be and what gender they would prefer to be treated as, and to sign a written record of their preference
- if a person is unwilling to express a preferred gender, the officer should try and determine the predominant lifestyle of the person and treat them accordingly

- if there is still doubt, the person should be treated according to their birth gender
- transsexual people must always be accommodated in a cell or detention room on their own

Searches

2.71 The Police and Criminal Evidence Act 1984 (PACE) requires a police officer carrying out a strip search to be of the same gender as the person searched. However, the ACPO guidelines recognise the difficulties that this can cause in the case of transsexual people and suggest that a breach of this rule may sometimes be justified, taking into account the sensitivity and risk of embarrassment to the offender. Thus, a male to female transsexual offender who consents to be searched as a woman may be searched by a woman police officer and vice versa.

2.72 PACE does not apply in Scotland. Under common law the police are empowered to search any person who has been legally arrested but particularly in relation to strip searches, that is only usually done in extreme cases where there is danger of evidence being destroyed.

2.73 Customs officers have not had to address the issues raised by searching a transsexual person, but would follow the same practices as the police.

(vi) Prison service

2.74 The Prison Service in England and Wales is currently drawing up guidelines for dealing with transsexual prisoners, based on the practices described below.

Accommodation of Transsexual Prisoners

2.75 A pre-operative transsexual prisoner will usually be placed initially in a prison appropriate to their birth gender. However, decisions about the location of such prisoners will normally be reached in the light of all circumstances, including the most obvious physical characteristics and the anticipated reaction of other prisoners. In practice some transsexual prisoners may be best placed in a vulnerable prisoner unit. A prison health care centre may also be used as a temporary location or, exceptionally, as a longer-term place of residence.

Post-operative transsexual prisoners are, where possible, allocated to an establishment for prisoners of their new gender. Difficulties may arise where a pre-operative transsexual person wants to be allocated to a prison for the opposite gender. There may also be problems in placing a male-to-female transsexual person in a female establishment, where she may not be accepted by other prisoners, many of whom may have suffered violent or sexual abuse from men.

Searches

2.76 The Prison Service recognises that transsexual prisoners will often wish to be treated for the purposes of searching as belonging to the gender of their choice and may in particular find it distressing to be strip searched by people of their gender of birth. It is considering guidelines along the following lines which are designed to make the searching of transsexual prisoners as simple as possible, while causing as little distress as possible to both the prisoner concerned and staff. Post operative male to female transsexual prisoners would be treated as women for the purposes of searching and searched only by women, irrespective of where they are located. Pre operative male to female transsexual prisoners would be treated according to their gender of birth for searching purposes unless a prison doctor or a doctor specialising in the treatment of gender dysphoria had stated in writing that it would be in the prisoner's best interests to be treated differently. In such circumstances rub and pat down searches would be carried out only by women. Detailed guidelines on the searching of female to male transsexuals and on all aspects of strip searching transsexual prisoners are still being developed.

2.77 Decisions in respect of gender-dysphoria related applications for treatment are currently taken on a case by case basis.

2.78 The Scottish Prison Service has a similar policy to that operating in England and Wales. Under the Scottish Prison Rules, which like those in England and Wales are legally binding, male and female prisoners cannot share rooms or cells. This could mean that in certain circumstances there could be a legal bar to placing a pre-operative transsexual prisoner in an establishment for the opposite gender.

(vii) **Probation Service**

2.79 The majority of the Probation Service's schemes are not gender specific. There are no Service guidelines on the treatment of transsexual people - the general policy is to deal with each person as an individual taking into account, as necessary, the views of other members of the group concerned. Such matters therefore have been regarded traditionally as local issues for which it is appropriate to adopt local solutions.

2.80 Although the treatment of transsexual people might be expected to raise more difficulties for probation and bail hostels, they form a very small number of hostel residents and no serious difficulties are known to have arisen. The Home Office Probation Unit is currently considering the introduction of Service guidelines for dealing with transsexual people in Approved Hostels. These will be incorporated into the next revision of the Hostels Handbook.

(viii) **Transsexual Victims**

Victim Support

2.81 Victim Support and Victim Support (Scotland), which are the main vehicles for the delivery of emotional help and practical support to victims of crime, have no specific policies in respect of transsexual people. The National Office of Victim Support has a policy of equal access to their services by all sectors of the community, and that this would apply to any transsexual victims. Consultation with the National Office's schemes and witness services has not shown up any particular problems in this area.

Criminal Injuries Compensation Scheme

2.82 The Criminal Injuries Compensation Scheme, which applies in Scotland, England and Wales, provides payments at taxpayers' expense to blameless victims of crimes of violence and those injured in trying to apprehend criminals or prevent crime. The current statutory scheme provides for payment on the basis of a tariff (or scale) of awards that groups together injuries of comparable severity and allocates a financial value to them.

2.83 Under the Scheme payments are made on the basis of a transsexual person's birth gender. Thus, if a male-to-female transsexual lived with a

man in a common law established relationship this would, for the purposes of the Scheme, be regarded as a same sex relationship. Under current arrangements this would have the effect that, if either of them were killed in a violent crime, no fatal award would be payable to the surviving partner. However, the question of payments to a transsexual partner in these circumstances has not so far arisen.

2.84 The Government is reviewing a number of aspects of the Scheme (including the eligibility rules for fatal awards as they apply to same-sex couples) as part of a wide ranging public consultation exercise. The results of the exercise are still under consideration but Ministers hope shortly to be in a position to say how they intend to take matters forward.

2.85 The Criminal Compensation Scheme in Northern Ireland differs in some respects from that in the rest of the UK, but these differences do not affect transsexuals.

Employment

2.86 The aim of the Sex Discrimination Act 1975 is that men and women should be treated equally favourably. There are a few exceptions where different treatment is allowed, but for most work it does not matter what sex an employee is. Given this, it should not matter whether someone has undergone gender reassignment, and they should not be treated less favourably for having done so.

2.87 The Sex Discrimination Act (Gender Reassignment) Regulations, which came into force on 1 May 1999, clarified the law relating to gender reassignment. The Regulations make it contrary to the Sex Discrimination Act to treat a transsexual man or woman less favourably in recruitment, employment, pay, working terms and conditions, and dismissal, either before, during or after treatment. Supplementing the Regulations is a DfEE Guide which gives detailed information and advice to individuals and their employers, and suggests some aspects of good practice. The Equal Opportunities Commission is able to advise and support individuals who believe they have suffered discrimination or victimisation on grounds of gender reassignment. Similar regulations are in force in Northern Ireland.

2.88 The Regulations work not by comparing a man with a woman but by comparing the treatment of a transsexual person with that of a non-transsexual person, so they do not define any moment when a person changes sex.

Social Security

2.89 There is nothing in Social Security legislation which deals directly with the treatment of transsexual people. Policy is led by the fact that details of sex on a birth certificate cannot be changed.

2.90 Where sex is a relevant factor, entitlement to benefit is decided by reference to the sex recorded on a person's birth certificate. However, officials of the Department for Social Security and its agencies will address a person in the sex they feel they are, regardless of appearance or the sex recorded at birth, and they will use any name a person chooses to use. For the purpose of correspondence, order books etc. a transsexual person can use the name by which they are commonly known. However, internal records will still show both the original sex as registered at birth, the current legal names and any names a person has used previously. National Insurance number cards and payment cards only show a person's requested name and National Insurance number.

Special Section D

2.91 To ensure that the claimant's privacy is protected, all DSS offices are advised to refer any claims from transsexual people to Special Section D (a part of Inland Revenue which supports the work on Nationally Sensitive cases for the Benefits Agency, the Department of Social Security and the Department for Social Development (NI)). Access to papers and computer records relating to claims is tightly controlled. Following notification, the necessary amendments are made to the various computer systems and a letter is issued to the person advising them that despite adopting a different role their entitlement and liabilities remain the same. A revised NI number card is issued, although the number itself will not change, and the person is advised that a private interview can be arranged locally if they need to discuss any problem or concerns.

2.92 The NI account is marked as Nationally Sensitive both for security reasons and to prevent

the various systems amending the original gender. This prevents casual viewing and alerts Special Section D to any office trying to amend the personal details. This gives the opportunity to verify any amendment and so to prevent correspondence being issued under an incorrect style of address. This restriction can be removed at the request of the transsexual person.

Retirement Pension

2.93 Currently, the age at which a Retirement Pension becomes payable, and the age at which liability to pay National Insurance contributions ceases, is 60 for women and 65 for men. This is determined in accordance with a person's sex as recorded on their birth certificate.

2.94 A male-to-female transsexual person will have to wait until 65 to become entitled to Retirement Pension. A female-to-male transsexual person will be able to claim Retirement Pension from their 60th birthday. The process of equalising State pension age will begin in April 2010, ending in 2020, after which the question will no longer be an issue.

2.95 In January of each year Special Section D identify all male-to-female transsexual people they know are approaching pension age within the next contribution year. A form is sent to the appropriate local office which, in turn, will advise the person of their pension entitlement. If the person is in employment and the employer is unaware of the situation the person will be offered the chance to pay any outstanding contributions directly to the Department. A certificate of exemption can also be issued authorising the employer to cease deducting full rate NI contributions. A female to male transsexual person may not opt to continue paying NI contributions as liability ends at age 60 for women. However, where the person continues to work and their employer is unaware of the situation, NI contributions may continue to be deducted from pay and paid to the Contributions Agency in the normal way until age 65. Where the case is marked Nationally Sensitive, the fact that excess contributions have been paid will be notified to Special Section D who will make arrangements for the payment of refunds direct to the transsexual person.

Widows'/Bereavement Benefits

2.96 The current Widow's Benefit scheme is available to women only and entitlement to the benefit is always dependent on there being a valid marriage on the date of death. This scheme will be replaced with Bereavement Benefits which will be available to men and women equally and entitlement will remain dependent on there being a valid marriage.

2.97 Although there are no particular benefits or disadvantages as entitlement is linked to a valid marriage rather than gender, this has implications for a transsexual person who cannot marry a person of their birth sex.

Adult Dependency Increases (ADIs) and Income Related Benefits (IRBs)

2.98 Generally, a person cannot claim benefit for a partner of the same sex. Despite the fact that their partner may, in every way, be living as a member of the opposite sex, they cannot be legally treated as a partner for benefit purposes. For ADIs, where one of the couple has care of the other person's child a dependency increase may be paid. Where there are no children, ADIs are based on a legal marriage so treatment of a transsexual person is no different from other unmarried couples. For IRBs, even though for all intents and purposes two people are living as a couple they are treated as two single people.

Child Benefit and Guardian's Allowance

2.99 Child Benefit is paid to the parent or carer of a child. Guardian's Allowance is paid to the carer of a child who has, in effect, been orphaned and an award is dependent on also having entitlement to Child Benefit.

2.100 One of the main criteria for entitlement to Child Benefit is that the claimant must be responsible for a child who is living with them or financially supported by them. Generally the mother is encouraged to be the claimant but there is nothing in law that prevents a husband or male partner claiming. Only one person can be the biological mother and the fact that one of the adults had changed sex, to become female, would not give that person a stronger claim as a mother.

Child Support

2.101 The scheme is concerned not with gender but rather with who has care of the child and who is the non-resident parent. Difficulties could arise if there was a need to establish that a person who had later changed sex was the mother or father of a child. However, the provisions virtually all use the term "parentage", rather than "paternity" (with one exception in the Child Support Act where there is reference to a finding being made that X is the father).

Occupational Pension Schemes

2.102 The main issue for consideration is survivors' benefits. A person who undergoes gender reassignment, will be treated as the acquired sex when reassignment is complete (although still the birth sex for legal purposes). Payments will depend on the terms of the schemes but survivors' benefits would probably not be payable if the gender reassignment was incomplete at the date of the member's death. If, following reassignment, a transsexual person was living with a person of their birth sex, a survivor's benefit would be payable only if the scheme in question paid survivors' benefits to recorded same sex partners. Payment of survivors' benefits to same sex couples is frequently at trustees' discretion, whereas payment to opposite sex couples, even if unmarried, is pretty frequent.

Insurance

2.103 Issues of specific concern to transsexual people, such as to whom a company should offer a policy and on what terms, are commercial matters for the industry itself. Insurers may discriminate between one applicant and another provided that they do not do so unfairly. Any such discrimination must be justified by reference to information on which it is reasonable to rely (if, for example, there was evidence that the long term use of hormones such as those relied on by transsexual people had an adverse effect on life expectancy etc.). It would not be appropriate for the Government to seek to regulate these matters.

Sport

2.104 The Sex Discrimination Act 1975 provides that discrimination on the grounds of

gender is permitted where, in any sport, game or other activity of a competitive nature, the physical strength, stamina or physique of the average woman puts her at a disadvantage as compared with the average man. This allows for same-sex competitions.

2.105 The question of transsexual people in sport does not appear to have been addressed by most sporting organisations, either in the UK or abroad. The International Olympic Committee used to carry out formal gender verification procedures. These tests were regarded with disfavour by many in the sporting world and have now been dropped. It is therefore likely that any issues arising from the involvement of a transsexual person in sport have been dealt with as a local matter in the light of the individual circumstances.

3. NEW BIRTH CERTIFICATES

3.1 One of the concerns most frequently raised by transsexual people is that, although they can be issued with driving licences and passports in their new name and gender, it is not possible for a revised birth certificate to be issued. This can lead to embarrassment when they are required to produce a birth certificate, for example before taking up employment.

3.2 The group considered two possible options for change:

- to allow registrars to issue a short birth certificate showing a person's new name, with no indication of their sex
- to offer transsexual people new short certificates showing both their new name and their new sex

In both cases the birth register would be noted to show change of name but would also continue to record the facts as at birth. Any full certificate would show the original details, together with the note in the margin of the registration.

3.3 It is already possible to record a change of name on the birth register in Scotland and Northern Ireland, but the law in England and Wales would need to be amended to make this possible.

3.4 Legislation would also be needed to allow a new form of short certificate to be prescribed which did not show the holder's sex. If this change were made it would make sense for it to apply to all short certificates, so that those issued to transsexual people did not stand out from the others.

3.5 The ability to acquire a new certificate of this sort would ease a transsexual person's position in certain (fairly limited) circumstances. But, as at present, it would not constitute evidence of a person's identity and they would still for all legal purposes be of their birth sex as recorded on the full certificate.

3.6 Transsexual people could, alternatively, be issued with a new short birth certificate which showed not only their new name but also their new gender. This would require primary legislation in all parts of the United Kingdom. The procedures currently followed by say the Passport Office could be adopted (they require a letter from the applicant's doctor saying that they are living permanently in the new sex together with evidence such as deed poll of a change of name).

3.7 The issue of certificates might, in some circumstances, save transsexual people some embarrassment. But unless this carried with it recognition for some or all legal purposes it would not do much to relieve their underlying concerns.

3.8 We also considered whether, following the issue of a short certificate showing the holder's new name and gender, a transsexual person might be formally recognised as a member of their new sex for certain specific purposes but not in all respects. But we have not been able to identify any areas in which recognition could be given without leading to confusion and uncertainty. We were very doubtful whether there could be a half-way house between the present position and full legal recognition for all purposes. We go on to consider this in the next chapter.

4. FULL LEGAL RECOGNITION

4.1 With full legal recognition, after fulfilling certain conditions, a transsexual person would be entitled to be treated as belonging to their acquired gender for all purposes. In this section we discuss the implications and mechanisms of such a change.

4.2 Any legislative change would also need to take account of those cases where a child is born with an intersex condition which required surgical intervention to determine its sex. At present it is often difficult to determine the sex of such children.

4.3 We think that there needs to be a formal stage when the change of gender is recognised so that the legal position is clear, even though the stage at which a transsexual person may apply for the order may not be fixed. Full legal recognition could be given by means of a Court Order which defined the date and process from which the applicant acquired the new gender. Legislation would be needed to define the grounds on which such an Order could be made. The Registrar General would re-register the birth on the basis of the information provided by the Court, as happens now where a person is adopted.

4.4 After that point the transsexual person would be treated as of their acquired gender for all purposes. But there would be no rewriting of history and the legislation would have to make it clear that in certain circumstances access could be given to records held in the person's previous identity, for example in connection with criminal investigations or medical treatment.

Key stages for Recognition of Change of Gender

4.5 Changing gender is a gradual process, usually lasting over a period of years. There is no common point of change for transsexual people, who will undertake differing amounts of treatment depending on their personal circumstances.

4.6 There are three main stages, each of which might be considered as the point at which full recognition could be given.

(i) Living in the role of the new gender

4.7 This is the point at which transsexual people can at present be issued with passports, driving licences etc. in their new identity. But at this stage there is a significant chance that some people will revert to their birth gender; and the person concerned will still bear most of the physical characteristics of their birth sex.

(ii) Hormonal Treatment

4.8 At this stage the person concerned will have sought medical intervention. Their body will have at least some physical characteristics of the opposite gender; and although they will still have many physical characteristics of their birth sex they are unlikely to be able to have children. There is however still a chance of reversion to the birth gender.

(iii) After Surgery

4.9 Not all transsexuals, particularly female to male transsexuals, can undergo full reassignment surgery. For most the process is complete (apart from continuing hormonal treatment) after surgery which may not cover the gonads or the genitals.

4.10 A transsexual person who has had, for example, breast implantations or a double mastectomy, combined with hormone treatment, will have clear physical attributes of the opposite gender. There is a reasonable expectation that the change of gender will be permanent, although the possibility of a reversion to the birth sex cannot be ruled out. They would probably not be able to consummate a marriage with someone of their birth sex: but it would almost certainly be impossible for them to father or bear a child.

Transsexual people who do not meet the criteria

4.11 It might be argued that the present arrangements for providing transsexual people with new driving licences, passports and National Insurance cards should be discontinued if provision were made for full legal recognition of the acquired gender. However, this would remove an existing entitlement from people who, although living as members of the opposite gender, were unable for health or other reasons to meet the criteria for legal recognition. This could be difficult to justify. There are no compelling reasons to withdraw the provision of these documents in the acquired gender provided that they could not be used to obtain other legal rights to which the person was not entitled.

Possible pre-conditions

(i) Sterility

4.12 Several countries which recognise a change of gender require a transsexual person to be sterile before recognition can be given (see, for example, Sweden and the Netherlands). The transsexual community however is opposed to such a provision. Their view is that it is unnecessary because, after a few years, the hormone treatment undertaken by transsexual people will have rendered them infertile. They also suggest that the requirement is discriminatory as some transsexual people, for health reasons, cannot take the high hormone levels normally prescribed, nor can they necessarily undergo extensive surgery.

4.13 It is certainly the case that not all transsexual women are medically in a position to undergo sufficient treatment (whether surgery or high doses of hormones) for fertility to cease. And surgical options for transsexual men will not irretrievably remove the option of fertility at some later date - the substantial medical risks involved in hysterectomy, phalloplasty and the surgical closing of the vaginal opening are such that many or most transsexual men choose to forgo these surgical procedures

4.14 The transsexual community's concern about discrimination has, however, to be set against the great concern which would be felt by the general public if someone who was legally a man gave birth to a child or someone who was legally a woman became the father of one. Those

countries which impose a sterility requirement before allowing a change of sex to be legally recognised clearly believe such a requirement is justified.

4.15 There is a related issue raised by artificial fertilisation. Where a woman undergoes treatment with her husband or partner's consent, he is treated for all purposes as the father of the child. Thus a female-to-male transsexual whose new sex had been legally recognised could become the father of a child born to his partner as a result of AID. This, in the context of full legal recognition, seems logical.

4.16 But there could be problems over surrogacy arrangements. Under the current law the Court may make an order that a child born as a result of such an arrangement is to be treated in law as the child of a married couple provided, inter alia, that the gametes of the husband or wife, or both, were used to bring about the creation of the embryo. Thus a male-to-female transsexual could become the mother of a child born as the result of the artificial insemination of another woman with her husband's sperm. This again is logical in the context of full legal recognition. But it would also be possible in theory to use the transsexual woman's own sperm if that had been preserved, and for her to become biologically the father but legally the mother of the same child. To guard against this it would be necessary either to amend the law on human fertilisation and embryology, or to require the destruction of any preserved gametes before a change of sex could be legally recognised.

(ii) Marriage

4.17 Legal recognition of a change of sex would have implications for pre-existing marriages. If a subsisting marriage continued after one of the partners had changed sex, this would conflict with the current legal position that a person can be married only to someone of the opposite (legal) sex. It might therefore be necessary to require, as in most countries which allow marriage after a change of sex, that any previous marriage should be dissolved before a change of sex could be legally recognised.

4.18 Some countries require that a person should be single or divorced even before they undergo gender reassignment surgery. This is not a legal requirement in the United Kingdom and there

seems no reason to introduce such a restriction. But legislation providing for the grant of recognition of a transsexual person's new gender for all legal purposes could include a requirement that any subsisting marriage must have been ended or will be treated as ended from the date of the grant of official recognition.

4.19 In their submission to the Working Group, Press for Change argued that care should be taken "not to disadvantage those (few) whose marriages, conducted in their former gender role, have survived". They argued that no purpose would be served by insisting that a couple should divorce in order for the transsexual partner's acquired gender to be recognised, and suggested that the rights and interests of the non-transsexual partner should be borne in mind since divorce "inevitably involves a loss of security and financial benefits for at least one person". However, it would be very difficult to allow same-sex marriages in this context but no other, and that it seems reasonable to expect the transsexual partner in a subsisting marriage to take into account the effects on the other partner before seeking legal recognition of a change of sex.

Family Law

4.20 If gender reassignment were to be recognised legally, a transsexual person who had previously had parental responsibilities and rights for one or more children would retain all those responsibilities and rights after changing gender unless a court ruled otherwise. The records of the child's or children's birth would not be changed. The person concerned could also acquire parental responsibilities and rights in their new gender.

4.21 The intestacy rules allow for parents to inherit and a person would not cease to be a parent because of a subsequent gender reassignment.

Criminal Justice System

4.22 Following formal legal recognition of a change of gender a transsexual person would be entitled to be treated as a man or a woman as the case might be for all legal purposes, including treatment within and by the legal system. Any legislation providing for such recognition would therefore need to ensure that the efficacy and

fairness of the criminal justice system was not adversely affected. For example, there would continue to be occasions when it would be necessary to refer to a transsexual person's previous identity in court, such as when the crime had been committed before the change of sex or, for example, to check a criminal record. This would be consistent with the principle that any change should not have retrospective effect and would not involve rewriting history.

Employment

4.23 The existing regulations would continue to serve their protective purpose, but they contain some exceptions which would be affected if transsexual people were granted legal recognition of change of gender following gender reassignment. Provision might need to be made for the continuation of certain exceptions eg in respect of the period of transition, and intimate searches.

4.24 The Regulations allow for differential treatment in a very few cases during the process of gender reassignment, for example where employees share living accommodation, or where a worker is providing personal welfare services to someone who is vulnerable (such as a mentally ill person). Legal recognition of change of gender would mark the point where this exception ceased to apply. However, where an individual was in the early stages of gender-reassignment, before legal recognition of change of gender, some form of temporary exception would probably need to remain in the Regulations.

4.25 Prison Service Regulations and PACE require that intimate searches are conducted by someone of the same sex as the prisoner. After legal recognition of change of gender however, the logical position would be that male-to-female transsexual police and prison officers could search female prisoners and female-to-male transsexual officers could search male prisoners, although some might think that in such a sensitive area this could be a step too far.

4.26 The SDA allows for certain women-only or men-only posts, for example in single-sex medical treatment. The Regulations make it lawful to require a man undergoing gender reassignment to leave a male-only post, if the employer can show there is a single-sex Genuine Occupational

Qualification and that other treatment is not possible, eg re-deployment to another part of the organisation. With legal recognition of change of gender where a single-sex GOQ applied, the worker would have to be accepted in the new gender role.

4.27 The Regulations also contain exceptions for work in a private home and for the purposes of an organised religion, matching SDA exceptions. As currently phrased they would need amending if legal recognition of change of gender made it definite that the worker must be accepted in the new gender role. Some may consider that an exception should be retained, for example to allow an employer to refuse to employ a transsexual woman as a live-in nanny (as, under the SDA's single sex Genuine Occupational Qualification they can refuse a man).

Social Security

State Retirement Pension

4.28 The age at which a retirement pension becomes payable, and liability to NI contributions ceases, would be decided by the acquired gender. Thus, until 2010, a man who had become a woman would have a pension age of 60 instead of 65. As there are more male to female transsexual people, this would involve a small additional cost to the National Insurance fund. From 2010 the equalisation of pension ages begins and by 2020 this would no longer be an issue.

4.29 Full legal recognition might well result in some women being disadvantaged in certain circumstances in relation to pension entitlement based on the NI contribution record of a spouse. Entitlement to Category B retirement pension, inheritance for widows over state pension age and, for divorced people, the provision to substitute the ex-spouse's National Insurance (NI) contribution record for the duration of the marriage has always been based on a legal marriage having taken place.

4.30 A married woman can claim a basic pension (category B pension) on her husband's NI contribution record when both husband and wife reach state pension age and a legal marriage exists at the time of the claim. If they divorce she can continue to rely on her husband's contribution record for the period of the marriage provided

that she has paid contributions in her own right outside the period of the marriage. A woman whose marriage had ended because her former husband had, or was about to be, legally recognised as a woman would be in this position - that is, she would be able to rely on her former husband's contributions for the period of the marriage, but only if she had paid some of her own contributions.

4.31 A widow who is over state pension age can inherit the whole of her husband's accrued entitlement if she has no contribution record of her own. If the marriage had ended because the husband had been legally recognised as a woman she would be unable to do so unless she had paid NI contributions outside the period of the marriage.

Income Related Benefits

4.32 Legal recognition of transsexual people in their new gender, and their ability to marry in that gender, would mean that these couples, even if unmarried, would be regarded as married couples for Income Related Benefit (IRB) purposes. IRBs define an unmarried couple as a man and a woman who are "Living Together as Husband and Wife" (LTAHAW), and legal recognition would mean that transsexual people who form part of an unmarried couple would be treated as such in the IRBs. Benefit would be paid at the couple rate to people who would currently each be receiving the single rate.

Insurance

4.33 The acceptance of a client for an insurance policy, and the terms on which it is offered are commercial decisions for the insurance company concerned. It would therefore be for the industry itself to decide how to respond if transsexual people were granted full legal recognition in their acquired gender. It would remain open to the insurance company to ask any questions justified by the nature of the policy and the client's individual circumstances.

Sport

4.34 Following legal recognition of their acquired gender, a transsexual person would be entitled to participate in sporting activities as a member of

that sex. This raises a number of practical issues, at both amateur and professional levels. A key concern is that of ensuring fairness to other competitors, especially in cases involving a male-to-female transsexual where, despite reassignment treatment, they are likely to retain a physical advantage over other women.

4.35 This is not a purely domestic issue, since some sports are ruled by international governing bodies. In the circumstances, it would not be practical, or desirable for the Government to try to legislate in this area. It would have to be for the governing bodies of individual sports to decide how to address the difficulties raised by the participation of transsexual people.

5. CONCLUSION

5.1 Transsexual people deal with their condition in different ways. Some live in the opposite sex without any treatment to acquire its physical attributes. Others take hormones so as to obtain some of the secondary characteristics of their chosen sex. A smaller number will undergo surgical procedures to make their bodies resemble, so far as possible, those of their acquired gender. The extent of treatment may be determined by individual choice, or by other factors such as health or financial resources. Many people revert to their biological sex after living for some time in the opposite sex, and some alternate between the two sexes throughout their lives. Consideration of the way forward must therefore take into account the needs of people at these different stages of change.

5.2 Measures have already been taken in a number of areas to assist transsexual people. For example, discrimination in employment against people on the basis of their transsexuality has been prohibited by the Sex Discrimination (Gender Reassignment) Regulations 1999 which, with few exceptions, provide that a transsexual person (whether pre- or post-operative) should not be treated less favourably because they are transsexual. The criminal justice system (ie the police, prisons, courts etc) try to accommodate the needs of transsexual people so far as is possible within operational constraints. A transsexual offender will normally be charged in their acquired gender, and a post-operative prisoner will usually be sent to a prison appropriate to their new status. Transsexual victims and witnesses will, in most circumstances, similarly be treated as belonging to their acquired gender.

5.3 In addition, official documents will often be issued in the acquired gender where the issue is identifying the individual rather than legal status. Thus, a transsexual person may obtain a passport, driving licence, medical card etc in their new gender. We understand that many non-governmental bodies, such as examination authorities, will often re-issue examination certificates etc. (or otherwise provide evidence of

qualifications) showing the acquired gender. We also found that at least one insurance company will issue policies to transsexual people in their acquired gender.

5.4 Notwithstanding such provisions, transsexual people are conscious of certain problems which do not have to be faced by the majority of the population. Submissions to the Group suggested that the principal areas where the transsexual community is seeking change are birth certificates, the right to marry and full recognition of their new gender for all legal purposes.

5.5 We have identified three options for the future:

- to leave the current situation unchanged;
- to issue birth certificates showing the new name and, possibly, gender; and
- to grant full legal recognition of the new gender subject to certain criteria and procedures.

We suggest that before taking a view on these options the Government may wish to put the issues out to public consultation.

6. SUMMARY OF FINDINGS

Introduction

- There are no definitive data on the number of transsexual people in the UK. Estimates vary from around 2,000 to 5,000, with roughly five male-to-female transsexual people to each female-to-male (para 1.3)
- Gender reassignment is a change in the person's physical characteristics (para 1.5)
- At present, a change of gender will be recognised where the issue is one of civil not legal status. Thus a passport, driving licence, medical card, National Insurance will, for example, in certain circumstances be issued in the acquired gender (para 1.7)
- The most frequent requests from the transsexual community are to have a birth certificate showing their new gender, the right to marry in that gender, and full legal recognition of the acquired gender (para 1.8)
- The Working Group has identified three options for consideration:
 - to leave the current situation unchanged
 - to issue birth certificates showing the new name and, possibly, sex; and
 - to grant full legal recognition of the acquired sex subject to certain criteria and procedures (para 1.16)
- Despite an increasing willingness to recognise a change of gender, at least for limited purposes, there is no common approach in other countries to the transsexual condition and the complex issues which it raises (para 1.18)
- The report covers some matters which have been devolved to the Scottish Parliament, the National Assembly for Wales and the Northern Ireland Assembly. It will be for each administration to decide the way forward on these issues in their respective jurisdictions (para 1.19)

The Present Position

- The birth certificate and birth register are a record of the facts at the time of birth, based on the biological criteria ie chromosomes, gonads and genitals. Amendments can be made only where an error can be shown to have happened at the time of registration (paras 2.2 - 2.6)
- There are two types of birth certificate: a standard (full) certificate which is a complete copy of all the details in the birth register, and a short certificate which gives only the name, sex and date and place of birth recorded in the register (para 2.11)
- Current marriage law only permits marriage between one biological male and one biological female. The case of Corbett v Corbett (1970) established that the three biological criteria were relevant in determining sex (paras 2.14 and 2.19)
- A transsexual person may legally marry only a person of their acquired gender creating what is, to all appearances, a same sex marriage. Alternatively, two transsexual people may marry, but they must take their vows in their birth genders (para 2.20)
- Under current law a female-to-male transsexual person cannot be legally recognised as the father of children born to his partner (or a male-to-female transsexual person cannot be recognised as the mother), although they can acquire parental responsibility for them (para 2.38)
- The criminal justice system accommodates the needs of transsexual people so far as is possible within operational constraints (para 2.42 ff.)
- The Sex Discrimination (Gender Reassignment) Regulations 1999 provide a measure to prevent discrimination against transsexual people in employment, whether before, during or after reassignment surgery (para 2.87)

- Social security benefits legislation provides that where sex is relevant this must be the sex on the birth certificate. Other benefits may be dependent on a valid marriage. These can disadvantage transsexual people who are unable to claim or marry in their acquired gender (para 2.89 & 2.94 ff)
- The terms and conditions of insurance policies are a commercial matter for the insurance industry. It would not be appropriate for the Government to try to regulate these (para 2.103)
- Very little is known about transsexual people in sport; this matter does not appear to have been addressed by the sporting authorities (para 2.105)

New Birth Certificates

- Procedures could be put in place for the issue of short birth certificates showing either a person's new name, with no indication of their gender, or showing both their new name and new gender (para 3.2)
- Such amended certificates would ease transsexuals' position in certain limited circumstances; but they could not be used as evidence of a person's identity and the transsexual person would remain of their birth sex (as recorded on the full certificate) for all legal purposes (para 3.5)
- The Group identified no areas where a transsexual person might be granted recognition in their acquired gender, in the absence of full legal recognition, without leading to confusion and uncertainty (para 3.8)

Full Legal Recognition

- There are three stages at which legal recognition for all purposes of a transsexual's new gender might be granted:
 - Living in the role of the new gender;
 - hormonal treatment; and
 - after surgery (paras 4.6 - 4.9)
- Consideration would need to be given to imposing a sterility requirement before allowing a change of sex to be legally recognised (para 4.16)

- If a pre-existing marriage continued after one of the partners had changed sex it would, in effect, become a same sex marriage. It might therefore be necessary to require that any previous marriage be dissolved before legal recognition could be given to a change of sex (para 4.17)
- A transsexual person would keep all pre-existing parental rights and responsibilities after changing gender, subject to intervention of the courts. The birth certificates of children born before the change of gender would not be altered. The person concerned could also acquire parental responsibilities and rights in their new gender (para 4.20)
- It might still be necessary in certain circumstances for a transsexual's former identity to be disclosed, for example to allow criminal record checks to be made (para 4.22)
- Provision might need to be made in the current employment regulations for the continuation of certain exceptions, for example in respect of the period of transition and intimate searches (para 4.23 ff.)
- It would be for the governing bodies of individual sports to address to decide how to address the issues raised by transsexual athletes (para 4.35)

Annex 1. **THE GENDER REASSIGNMENT PROCESS IN THE NATIONAL HEALTH SERVICE**

The gender reassignment process can be divided into three main stages:

- Social gender role change - when patients change their name, and inform their family and friends of their plans to live full time in their chosen gender role.
- Hormonal gender reassignment - when patients, who after psychiatric assessment are thought to be suitable, are offered cross gender hormone prescriptions.
- Surgical reassignment - after completion of the two years 'real life' test when primary surgery is undertaken.

2. There is no single moment when a transsexual person joins the opposite sex. Although the irreversible nature of surgery provides an important marker in determining reassignment, many transsexual people can achieve social and hormonal reassignment without surgery. For those who do not have surgery, there is always the possibility that they will revert back to their original sex.

3. Patients will normally have diagnosed themselves and enter the NHS through a referral from their general practitioner to the local psychiatric service for assessment and confirmation of the diagnosis.

Psychiatric Counselling

4. Not all psychiatrists are expert in this area and not all are prepared to refer patients on for surgery. There is anecdotal evidence to suggest that some patients wait for several years before being referred to a psychiatrist with experience in gender reassignment. Where a transsexual person is involved in drug abuse or deliberate self-harm surgical intervention would not normally be proposed.

5. No psychiatrist will advise a transsexual person to pursue gender reassignment surgery. That decision must rest with the patient. Patients are treated according to international protocols

laid down by the Harry Benjamin International Gender Dysphoria Association, a professional organisation devoted to the understanding and treatment of gender identity disorders. They will receive psychiatric counselling and be required to live in the role of the sex they wish to become for a period of at least two years, including a period of at least one year in work or full time study. This is commonly referred to as the real life test. Patients who do not complete the test are not considered to be sufficiently well motivated to be given surgery.

Hormones

6. Patients will usually be prescribed hormones, either by their GP or by their psychiatrist. Male-to-female transsexuals will be prescribed oestrogens (steroids), and female-to-male transsexuals will be given various testosterone, (known as androgens). These suppress the patient's natural hormone dependent characteristics.

Surgery

7. Transsexual people who reach the surgical stage will have been carefully selected. No NHS surgeon working in this field would be prepared to operate without the written assessments of at least two psychiatrists. Criteria for surgery include being at least 18 years old and single; having lived in the role for at least two years; and being successful in the role of their preferred sex. Patients need to have a realistic understanding of what surgery can achieve, although plastic surgery can continue to be undertaken to modify a person's appearance.

8. For male-to-female transsexual people, surgery will usually involve the removal of the testes, the dissection of the penis and the creation of a pseudo-vagina. In addition other procedures such as breast implants, electrolysis for the removal of facial or bodily hair, reshaping the nose and speech therapy to alter voice pitch can be provided on the basis of clinical need.

9. Surgery for female-to-male transsexual people is more complex. It will involve the construction of male external genitalia, a mastectomy to reduce the breasts and to construct a man's chest and a hysterectomy to remove the uterus and the ovaries.

NHS Activity in England

10. The main NHS centre providing specialist care for adults in England is at Charing Cross Hospital in London. There are smaller services in Leeds, Leicester, Newcastle and Bristol. In addition, specialist psychiatric and endocrinology services for children are provided at the Portman and Tavistock Clinic in London.

11. The Gender Identity Clinic at Charing Cross Hospital saw almost 470 new cases last year and has roughly 1,000 active patients. Data on the number of gender reassignment operations performed in the NHS are collected as part of the Hospital Episode Statistics. In 1997/98 (the latest data available) there were 44 male-to-female operations and 4 female-to-male operations. A study of private-public mix of acute hospital care published by the Association of British Insurers recorded 104 gender reassignment operations in the private sector in 1997/98.

Costs

12. The cost of male-to-female surgery is around £10,000. No figures are available for the cost of female-to-male surgery which tends to be far more complex and is completed in several stages.

Annex 2. **MEETING THE NEEDS OF TRANSEXUAL PEOPLE**

The Interdepartmental Working Group on Transsexual People's Issues

A Presentation by: Change, The FTM Network, G&SA, The Gender Trust, GIRES, Liberty and Press for Change

January 19th 2000

1. Introduction

1.1 We are grateful for this opportunity to address you. It would have been helpful if you had felt able to provide us with some guidelines as to areas which you might want extra help with. But time is short, and so we hope you will feel able to use the time at the end of this presentation for discussion with us, or questions which might allow us to help you clarify any areas we haven't touched upon here.

1.2 This presentation has been jointly prepared by the representatives of the different groups in this room. The combined membership of these groups includes half, if not more, of the UK's transsexual population. We wish to go beyond the submissions of our organisations and not simply explain what we need, but why now is the time to be considering the changes we have sought, and the ways in which they could be afforded. We will also clear up some of the issues which might appear most difficult. Today's presentation can be said to supersede parts of our previous submissions, in that time and careful thought has allowed us to crystallise the spirit of those.

1.3 We also feel that it is important to stress the significant work that the trans community does in providing social and emotional support to its members, particularly its younger members (who are particularly subject to social exclusion, and vulnerable to the deficiencies in access and quality of much NHS provision). Much of this work is a matter of informal networks of support,

much of it is carried out by or through the various groups represented here. The community has a long history of providing a voluntary sector contribution; any discussion of the very limited cost implications of our proposals should, we believe, recognise this.

2. What Transsexual People Want

2.1 It is often thought that what transsexual people seek in terms of change is the right to have their birth certificates re-issued and the right to marry in their new gender role, but this is only partly true.

2.2 Gender Recognition

2.2.1 Firstly, birth certificate re-issue is not of itself what is sought. Rather we seek changes in the civil registration system so that the 'public' and administrative record of who we are reflects the gender in which we identify. As recent Parliamentary Questions have shown, there are still many circumstances in which birth certificates are used to prove a person's identity. Choice as to whether or not to reveal having undergone any medical treatment, in circumstances where it is irrelevant, is a civil right available to other citizens. It is a civil right we seek for ourselves.

2.2.2 Why we are unhappy about our birth certificates is because they deny us:

- Privacy, about a medical condition often long since resolved, when it has no bearing on the matter in hand; such as in employment and vocational training situations, or a visa application for a short holiday.
- Control over when, how and to whom we tell our medical history, when it is relevant such as in making a life insurance claim, or claiming a state pension.

2.2.3 Privacy in these matters will not in itself provide protection from the abuse, discrimination or physical violence that many of us have suffered. But it would provide a clear message that we are valued as who we are, by the government we elect. Undoubtedly any changes in this area would also have an educational effect similar to that of the Race Relations Act, and ensure that institutional discrimination in both public and private sectors was addressed. Just as the decision of the European Court of Justice in the P v S case has been instrumental in ensuring that employers think twice before failing to support their transsexual workers.

2.3 Legal Marriage

2.3.1 Marriage in the new gender role is indeed sought by many transsexual people. Like others, we want the opportunity publicly to declare our commitment to and love of our partners. But marriage is not just a religious or spiritual ceremony, it is also a civil contract under which its parties acquire various responsibilities, rights and social benefits.

2.3.2 What we want is to be able to provide economic and emotional protection for our families, but at the moment we are uniquely placed in being unable to contract a legally secure marriage with a partner of either sex.

2.3.3 In many cases, transsexual people have already been economically disadvantaged due to lengthy periods of time in which career aspirations had to be put on hold as medical treatment was sought and undergone. For many of us, social pressures will have meant our education has suffered. Job insecurity, or failure to get a job due to prejudice, will mean that we will have spent time being unemployed. Finally as we achieve some sort of social acceptance we then discover that without the right to contract a marriage many of the financial benefits that accrue on marriage such as through compulsory pension schemes or the rules on intestacy are almost valueless. Consider a transsexual person's membership of almost any public service pension scheme. We will have had a limited period of steady employment and so will have been unable to build up sufficient benefits for our own old age. But then to add injury to insult we discover that we cannot provide security for our partners and the children of our families, because only

spouses and legally related children can benefit if we are unfortunate enough to die before retirement age. We find ourselves having to buy extra financial security for our families, and yet we are invariably already financially worse off than our peers for all of the other reasons, such as entering a career late, or having missed out on formal education.

2.3.4 Without an opportunity to contract a valid marriage we - transsexual people - cannot jointly adopt the children of our family. They may well not be biologically related to us, but they will certainly have been wanted children. Our children are not allowed an opportunity to benefit from their position within a family. It must be remembered that the European Court of Human Rights made it quite clear in a unanimous decision in the case of X, Y and Z that the family of a transsexual man is indeed a family. I am sure that one day the children in such a family will seek their right to a family life through the Courts.

2.3.5 Marriage confers an enhanced form of citizenship, and whilst it still has those benefits - which exist within our modern welfare state primarily to ensure that children and spouses are not left seeking welfare benefits - it is a shocking anomaly that people who want to provide for their families are excluded from doing so.

3. Why Now is The Time for Change

3.1 For many years the common social medical and scientific viewpoint on transsexual people was that we sought to 'disappear'. The last few years have seen that idea overturned as transsexual people used both the media and the courtroom to demand their inclusion in society. The process of obtaining public acknowledgement has meant that many of us are now reconciled to being seen as transsexual men and women and have gained a happy understanding of and pride in ourselves through that process. But seeking public acknowledgement does not mean that we have given up the fight to seek our place in society. The success of our campaign has meant that for many of us, in our workplaces, in our families and amongst our friends and neighbours our transsexuality is no longer a matter for derision, and has simply become a rather interesting aspect of our lives. As a result of our

campaigning many of us are now happy to be out as trans people in society - but we are seeking for that to be a choice we make - at the moment that choice is not an option.

3.2 It is important to remember that many transsexual people *want* to be open about their trans status. All the groups represented here include many who are proud to be transsexual. What we seek is the right of transsexual people to *choose* whether to be identified as trans, and to be able to make that choice freely and without fear of discrimination or danger if we choose to be “out”. A society in which people are free and safe only if their individuality is hidden is no more a free nor a safe society than one in which such privacy is unavailable. We are primarily seeking an administrative system which will allow us, after undertaking the difficult road of gender transition to take our place in society, whether or not openly as transsexual people.

3.3 Increased Recognition of the Condition

3.3.1 Being transsexual is not a lifestyle choice, it is a condition or syndrome wherein the drive for reassignment is overwhelming. Increasingly, scientific medicine includes transsexuality as one of the many intersex conditions that exist. Medical intervention is now legally recognised (by the Court of Appeal) as an entitlement to facilitate gender role reassignment. Indeed, treatment to facilitate gender reassignment has long been available through the National Health Service. It is acknowledged as being not only successful but also essential to many people’s well being and social participation. The administrative concessions on passport changes, or public documents such as driving licences and tax records have all made tremendous differences to the quality of our lives, and importantly have not incurred any notable political or economic cost to government. Yet the continued inaction of government in the areas of civil registration and marriage, has meant that even after the completion of treatments, social acceptance and participation often persist in being very difficult.

3.4 The Promotion of Equal Rights

3.4.1 Continuing failure to recognise our new

status in law, will condemn us to remain victims of social prejudice. The lack of substantive government recognition of the problems our contradictory legal status brings, allows others to victimise and persecute us, both at an individual level and at an institutional level. That victimisation ranges from the apparently minor - an official letter wrongly addressed - to the very severe: individuals have lost their jobs, lost their homes and in some cases have lost their lives. In one recent case in London, a transsexual woman who was assaulted and raped by a boyfriend she had told her history to, was laughed at by junior police officers. The detective in charge only agreed to proceed with a charge of rape, rather than assault, after Press For Change sought out, and paid for, the transcript of an unreported court case in which it was held that a transsexual woman could be raped vaginally.

3.4.2 This is the reality of our lives and we can never escape it as things are. We know we are transsexual men and women, and many of us take deep pride in that, but we become victims of transphobia whilst we are not afforded, at the very least legal acknowledgement, to ensure that our choices regarding privacy can be freely made. We are excluded from having the same right to privacy that other members of society have. The Human Rights Act has already received Royal Assent, yet the principle that liberties and rights can only be restricted where a person is *doli incapax* or otherwise by the courts, does not apply to us.

3.5 The Effect of the Current Obstacles

3.5.1 Prior to the campaigns of recent years, most transsexual people faced a level of prejudice and stigmatisation that led to their prospects and ambitions being thwarted at almost every step. Keeping a job, home, even just friends was a rarity after a person’s transsexual status became known. Privacy is almost impossible to maintain. The administrative systems that govern lives through sex and gender designations were, and still are, such that a person’s transsexual status becomes known through the most simple of things - a driving licence check, a national insurance agency enquiry, a superannuation scheme that requires a birth certificate to be shown.

3.5.2 These mechanisms have meant that where ill-informed prejudices have been held by others, they have not only been able to survive but also to flourish.

3.6 The Continuation of an Evolutionary Process

3.6.1 Yet despite the prejudice, transsexual people have become an almost common place part of modern Britain. We have seen huge changes over the last 10 years, particularly in the ways in which transsexual people are represented by the media. Many members of the British public have very much accepted that we are much like everyone else - most of us wish to have jobs, homes and families. We want to be able to go out to the theatre, we need to travel on trains and buses, we go to school and college, we shop in the supermarket, we serve our communities and we vote in our democratic society. It is increasingly understood that we are not a minority subculture with a separate version to everyone else's of a civilised society, but we are very much part of a new tolerant and inclusive society.

3.6.2 The very existence of this working group supports the principle that a great deal of social acceptance has been achieved already. Government has over the years made concessions in areas such as the re-issue of passports and driving licences. However the majority of the changes that have taken place over the last 20 years, have not occurred through the actions of government. They have come about because transsexual people, themselves, have taken up the challenge to show that all we ever sought, with or without the help of medical intervention, was inclusion, our own places within, and as part of, our society.

3.6.3 As regards civil registration, government has for many years accepted the need for flexibility in difficult circumstances. The issue of a birth certificate for an intersex child can be delayed, at a later stage it can be amended. The birth certificates of adopted children are re-issued - and in neither case have we seen the walls of the OPCS crumble. We simply want an extension of that flexibility.

3.7 The Promotion of Social Acceptance

3.7.1 We want to use this opportunity to say that having come this far, the remaining steps to enhance our social inclusion are, we believe, not only necessary, but can be done easily, without attracting unwelcome publicity. They would make a massive difference in the quality of life not just for the many transsexual people who are citizens of these islands, but also for the friends, family and colleagues with whom we share our lives and who also suffer through our lack of recognition.

3.7.2 Social inclusion is the backbone of this government's social policies - all we want is social inclusion. Any nation which legitimises, even unintentionally, the social exclusion of any of its citizens simply because of a condition, increasingly recognised in scientific medicine as one of the many possible intersex conditions that exist, and which has no bearing at all on their ability to participate fully in society cannot be a nation worthy of the name.

3.7.3 Whether it is one person, or as in this case, maybe 5000 people, this social exclusion must not continue. Many other nations have successfully responded to the needs of the transsexual people in their societies. You will all I am sure have seen Liberty's amicus brief to the European Court of Human Rights in the Sheffield and Horsham case. We are certain that this government does not want to retain Britain's position along with Albania and Ireland, as the only signatories to the European Convention on Human Rights to fail to accord recognition to the change in gender role of the transsexual person. Further, as European economic harmonisation grows and global mobility increases, British citizens who are transsexual will increasingly become exiles in a world where every other transsexual person will be afforded recognition, social responsibilities and rights in their new gender role - recognition they will not only have abroad but also when they step onto our shores. Continued restrictions on our social mobility within the European Union may well have implications for the UK's obligations under the Single European Act.

3.7.4 Finally in this section, we want to comment on the increasing effect of modern technologies in our lives. There are now many

ways in which records of civil status can be updated, amended or in other ways altered without any significant risk of the original records being lost to those who might need them. As our knowledge of all sorts of intersex conditions grows, as medicine increasingly admits to there being a significant number of births in which it is impossible to guarantee that the sex designation given is unquestionable, and as our society increasingly removes the barriers to equality between the sexes, it may be that 'sex' is no longer something that we should record about the individual.

3.7.5 However if government chooses to continue its documentation, then we must be aware that we do so, nowadays, for little other reason than to provide demographic data. Transsexual people are such an insignificant number in our society, that their transfer between categories cannot possibly affect the overall collection of statistics. In fact modern computerisation would allow any change of categorisation to be taken into account in the collection of statistical data. And such mechanisms might actually do us a favour, we would be able to count up exactly how many transsexual people there are in Britain. Once and for all we would be able to prove how little cost we are to the National Health Service, and how much we benefit the country in the payment of taxes and other social contributions.

4. What You Can Do

4.1 We believe that the things we are seeking can only be provided by government action. As a community we have done more than our bit, in re-educating the wider British public to accept us as valid members of a diverse society. However the final thrust must come from government.

4.2 The simplest and most secure route to affording this would be through primary legislation such as the Alex Carlisle Bill in 1996. However that may well put government at risk of adverse and sensationalist attacks from the tabloid press, and may initially afford a basis for a backlash against some transsexual people. There are, however, we believe ways in which changes to the civil registration system can be made, and the right to marry can be recognised without having to resort to primary legislation.

4.3 Changes to Civil Registration

4.3.1 Many aspects of our lives are already made easier by government departments accepting what has become as almost universally accepted procedure. The transsexual person on transitioning from one gender role to the other provides the public body with a statutory declaration of their name change and a letter from the doctor verifying that they are undergoing gender reassignment and that their change of gender role is intended to be permanent. Through this mechanism driving licences, passports, medical cards and tax records are changed. National insurance records can also be flagged up as requiring discrete access, if the transsexual person so requires. Most private, local authority and educational sector bodies have also accepted this procedure as the necessary proof required to alter their records. The procedure is simple, very low cost and because it requires a doctor's verification is not open to abuse, yet it is also sufficiently comprehensive in its criteria to include ALL transsexual people.

4.3.2 The problem with the current system is that it is concessionary, and in some cases does not run as smoothly as it should. A good example of the failure of a concessionary system, has been the example of death certificates. Since the early 1970s most relatives reporting the death of a transsexual person have been dismayed to receive a death certificate indicating the sex of the deceased as that in which they were registered at birth. Recently a transsexual man reported the death of his father, and was shocked to receive a certificate indicating him as the informant in his male name, but qualifying him as the daughter of the deceased. Press For Change along with the OPCS has looked for the regulations which might govern these issues. There are none. In fact there appears to be no reason, regulation or guidance that would prevent a registrar registering the death to indicate the new gender on the death certificate. The OPCS felt that what had happened was that local registrars, at a loss for any guidance, had felt obliged to deal with death registrations of transsexual people under the same set of rules they might use if a transsexual person requested marriage, or if a transsexual person had asked for their birth certificate to be amended. Concession can only work if universal in its effect, and in order to be universal it must be clearly regulated - and then it is no longer a concessionary practice.

4.3.3 We believe that the route to take, initially, is that of a regulation such as:

The Registrar General will issue a new statement of public record in the form of a 'gender confirmation'¹ birth certificate, where a person is undergoing gender reassignment and this change is intended to be permanent.

4.3.4 This would afford the choice of privacy and control to the transsexual person, but which would not have retrospective value. We have written extensively about this in our submissions, and so we will not repeat ourselves. But we submit that such a mechanism would not destroy the historical accuracy of the birth registration system, rather it would enhance the social inclusion of a group of citizens who have worked hard to overcome difficult circumstances in their lives.

4.3.5 In this way change could be discrete, and yet a system could be developed that could be adaptable in the future, if circumstances showed the need, and primary legislation could be considered later if required to codify those changes.

4.4 Enabling Valid Marriage

4.4.1 As regards marriage, we all here believe that the civil registration with its attendant benefits, of all loving and committed couples, whatever the perceived or actual sex of the partners, should be possible. We believe that many heterosexual people share our belief that for marriage to remain morally tenable in a pluralist society, it should not be a special privilege reserved for the majority. Its pride and glory will have been to have created a vocabulary for the recognition of relationships that other groups find attractive enough to wish to share. The important thing for the future of sexuality and the acceptance of difference is for different groups within society to be able to choose to learn from each other - many heterosexual partnerships could usefully learn from lesbian and gay relationships respect for each other's autonomy, for example. The work done in society by long-term partnerships within all sexualities, whether in caring for subsequent or previous generations, or facilitating each other's careers and the socially

valuable work those careers entail, is so important that the commitment of all sorts of couples should be equally valued and recognised.

4.4.2 Modern marriage has moved far beyond the dictum in Hyde and Hyde: that marriage should be a voluntary agreement, entered into for life, to the exclusion of all others, between a man and a woman. In our multi-cultural society many arranged marriages now take place which are not voluntary in the sense many might understand it to have been meant. Figures published last week show that nearly 2 out of 3 marriages end in divorce, and adultery is no longer a sure fire route to divorce. Marriage has also long moved beyond the point of being little more than consummation, procreation and property transfer. As a society we would not dare to consider refusing the right to marry to a person with a disability that meant they could not consummate the marriage through penetrative sexual intercourse. The courts nevertheless might make voidable such a marriage if the other spouse had not been made aware of the difficulty prior to the marriage ceremony. As a society we would never refuse an infertile person the right to marry, and in those circumstances it is highly unlikely the courts would make such a marriage voidable even if one spouse had known and not disclosed this material fact prior to the ceremony. All that is left of the traditional (yet modern) marriage is the requirement that the parties should be a man and a woman.

4.4.3 We believe that the administrative decision made in the Joella Farmer case was correct. Just as the courts would not dissolve the marriage of an androgen insensitive woman born with vagina and brought up as a girl, who discovers that she has XY chromosomes and gonads. Yet under Ormrod's criteria, that apparently governs these matters, she would only be 33% woman. The reality is that it is easy enough to determine the sex of a transsexual person, simply by allowing them to live in the gender role that they choose. Sex cannot be determined by percentages.

4.4.4 We believe that transsexual people should be allowed to take part in marriages in their new gender role, as long as any previous marriages have been dissolved. We also believe that such marriages should not be automatically void using

¹ Similar to the 'adoption' style birth certificate

the Ormrod criteria, rather that they should be voidable in the same way as other marriages are. We believe that to protect spouses, failure to consummate could lead to the dissolution of a marriage, just as it can in other marriages where there has been prior deceit as to the ability to consummate. As the law stands failure to give material information to a spouse, such as implying that procreation is possible, is a material fact that can lead to the dissolution of any marriage.

4.4.5 All of this would be achieved for transsexual people without amending primary legislation. A simple regulation could be made;

That for the purposes of the Matrimonial Causes Act 1973, where a person has been issued a 'gender confirmation' birth certificate, there will be no lawful impediment to the person marrying as a person of the recognised sex.

4.4.6 Marriage is a sacred institution, it is about love and commitment, and it is for that reason that we see many churches, and other religious groups affording transsexual people the nearest ceremony they are able to give - a blessing. Our experience and information is such that we firmly believe that there are very few people within any of the major religious groups who would not welcome allowing transsexual people the right to marry.

4.4.7 However that is in no way to ignore the importance to many of our community of the pressing need for legal recognition of same-sex partnerships. A significant proportion of trans people, probably more than in the rest of society, is homosexual or lesbian. We will continue to work with other groups to achieve legal recognition of their partnerships.

4.5 Monitoring Transphobic Crime

4.5.1 Thirdly we would ask that transphobic violence and hate crimes are specifically and separately monitored, when police services are taking action to monitor homophobic violence. This will cost very little, but will at least prove the reality of our case.

4.6 Protection from Intrusive Media Attention

4.6.1 The final thing we would ask is that the working group recommends to government, when considering privacy legislation, that a person's trans status be one of the protected areas, at the very least for those who are not involved in public life.

5. The Requirements for Civil Status Recognition

5.1 One of the final points we want to bring to your attention arises out of our comments above. Ormrod made chromosomes, gonads and genitals the defining factors in sex. There is no doubt that his test is no longer scientifically viable. One problem that has arisen in a few jurisdictions has been the requirement of genital surgery before a legal change of status is recognised, or the failure to recognise a marriage where genital surgery has not been undergone.

5.2 The transsexual people who suffer most from these distinctions are those whose health problems preclude them from major surgical interventions, and transsexual men - female to male transsexuals - for whom genital surgery is rarely an expedient option. Phalloplastic surgery is very expensive, can involve multiple major surgical procedures, and is very variable in its results with little guarantee of success. Rather than enhancing life quality it is far more likely to result in extreme social isolation, loss of health and can even endanger the life of the person undergoing it.

5.3 Many jurisdictions, most noticeably Germany, Italy, most of the states of the USA and recently several Canadian states have successfully been able to afford civil status recognition, and legal marriage, to transsexual men without requiring genital surgery. Transsexual men, after a short period of time of hormone therapy are in effect sterile in their new gender role, and any fear of the 'pregnant' man is unfounded and far-fetched.

5.4 Whilst genital surgery is more likely to be a viable option for transsexual women, it is vital to remember that such major surgery is not an option for all, whether for medical or financial reasons - access to such surgery through the NHS

can be slow and difficult. A requirement to undergo such surgery before recognition of civil status would therefore lead to the continued social and legal exclusion of a significant number of transsexual people of both sexes.

6. In Conclusion

6.1 We hope you have found our presentation useful in addressing some of the more contentious issues that you will be called upon to discuss, and to find solutions for. We would like to conclude by re-iterating that we, as a community, have already done much of your work for you. We have created social change, and we have created an unprecedented level of acceptance in British society.

6.2 However if nothing is done, transsexual people will continue to be socially excluded and bigots will have good excuse and support for their continued prejudice and discrimination, and families and children who are dearly loved and carefully provided for will be the secondary victims of the prejudice that is allowed to thrive.

6.3 You have an opportunity, probably the last for the next 30 years or so, to make a difference to our lives. We do not believe that this working group was created to do nothing, rather that it is a sincere effort by government to find solutions to the problems we face. Between us, we have considerable legal expertise in the different mechanisms available, and through our extensive contacts with transsexual people, of their impact on those who they seek to help. As your work comes to a conclusion, we hope to be able to discuss with you in further detail how the solutions you are considering may be implemented: we look forward to continuing the dialogue started today.

6.4 In addition to help you with your deliberations we have included a short appendix containing 2 documents. The first is a recent expert witness statement to the High Court in the Bellinger case which addresses the question of whether transsexuality is an intersex condition. The second is a comment from Dr Z-J Playdon of the Post Graduate Medical Centre of the University of London, which discusses the nature of medical 'proof' as regards intersex conditions.

6.5 Finally, we would also recommend that the working group, or a similar group continues after the initial remit to report by Easter 2000 to ensure that any changes that come into being are regularly reviewed. Campaigning will continue in the meantime on both the political and legal level to ensure that action is taken.

Appendix A

EXPERT WITNESS STATEMENT

1. This affidavit is provided by **Professor Louis Gooren of the University Hospital of the Vrije Universiteit** of Amsterdam, the Netherlands.
2. Born in 1943, I am a medical doctor specialising in the field of endocrinology. Within this field, diseases related to disorders of sexual differentiation and the biological process of becoming man or woman are the focus of my work. In 1988 I was appointed Professor and assigned to the treatment of patients who present with gender identity problems as well as other patients with sexual differentiation (intersex) disorders who need hormonal and surgical medical interventions. Over the past 24 years I have worked at the Gender Clinic of the University Hospital, which receives about 150 new patients per year. Approximately 80-90 of them receive actual hormone and surgical therapy. I have published extensively on these subjects and enjoy wide and international professional recognition. I have, by invitation, contributed to text books of medicine on these subjects. In recent years Institutions of the Council of Europe have called upon me to provide expertise in the area of gender problems.
3. Gender Identity Disorder (transsexualism) is a medical condition and from my work and other research in this area I now believe that transsexualism is a disorder of sexual differentiation: the process of becoming man or woman as we conventionally understand it.
4. Traditionally it is assumed that sexual differentiation, the process of becoming man or woman is completed with the formation of the external genitalia, the criterion used to assign a new-born child to the male or female sex. From the beginning of this century it became clear in laboratory animals that this is not the endpoint of the sexual differentiation process but that also the brain undergoes a sexual differentiation into male and female, largely predicting/correlating with future sexual and non-sexual behaviour.
5. The process of sexual differentiation takes place in distinct steps, first the chromosomal configuration is established, next gonadal differentiation, next differentiation of the internal and external genitalia and finally the differentiation of the brain into male or female.
6. Normally all steps in the process of sexual differentiation are concordant (in men, an XY chromosomal pattern, testis, male internal and external genitalia and a male brain differentiation being the substrate of male type behaviour; in women, an XX chromosomal pattern, ovary, female internal and external genitalia and a female brain differentiation being the substrate of female-type behaviour).
7. It is remarkable that in some mammalian species this process of brain sexual differentiation takes place after birth. Swaab and Hofman have shown that one brain structure, that is different between men and women, becomes only sex-dimorphic between the ages of two and four years, well after birth and long after assignment to the male or female sex has taken place. Nature is not free of errors and the process of sexual differentiation is no exception. There are human beings in whom not all traditional criteria of sex are concordant. They may have some biological characteristics of one sex and some of the others, a condition known as intersexed.
8. The human condition requires that new-borns are assigned to one sex or the other. The social and the legal system has left no room for intersexed subjects. If a new-born child presents with an intersexed condition a medical decision must be made to assign this baby to the male or female sex. It is now a generally accepted medical practice to assign an intersexed new-born to that sex in which the unlucky child, on the basis of medical expertise and reasonable expectation, will function best. It is of note that biological characteristics are not imperative in this decision process. The decision is based on prognosticated future sexual and nonsexual functioning. The legal system registers these new-born children in

accordance with the medical decision. Thus, it is no longer tenable to claim that the genetic or gonadal criterion determines one's status as male or female.

9. Some intersex conditions are such that they can not even be determined at birth and are only discovered much later at puberty. As such some of our fellow human beings live (unbeknown to all but their medical practitioner) their lives as women but with a male-type XY chromosomal pattern or testis and vice versa.

10. Sexual and nonsexual brain differentiation is now accepted as part of the process of becoming male or female in the mammalian species to which humans belong. In animal experimentation it is easily possible to induce a female type of sexual and nonsexual behaviour in animals that have, up to that final stage of sexual differentiation, a completely male pattern and vice versa. Depending on the type of manipulation applied in the animal experiment, in-between types of behaviour can also be observed. On the basis of the findings of these experiments it has been hypothesised that in human subjects with gender identity problems the sexual differentiation of their brains has not followed the pattern predicted by their earlier steps in the sexual differentiation process (such as chromosomes, gonad, genitalia) but has followed a pattern typical of the opposite sex in the final stage of that differentiation process; as indicated above, a situation that can be induced in laboratory animals by experimental manipulation.

11. Generalisations of biological principles between the different members of the mammalian species must be done with caution, but they cannot be totally dismissed. Medicine has progressed enormously by animal experimentation using this extrapolation from other mammalian species to the human. The validity of extrapolation of the sexual differentiation process of the brain in other mammals to the human has been corroborated by findings of anatomical and functional brain differences between males and females, including the human species. The collection of data in the human has been, and is, still slow due to obvious ethical restrictions on collecting brain material for research.

12. Interestingly, Zhou, Swaab, Gooren & Hofman, published in 1995 a scientific report that could demonstrate that in one of the human

brain structures that is different between men and women, a totally female pattern was encountered in six male-to-female transsexuals. They were able to show that this was not due to the transsexuals' previous cross-sex hormone treatment. These findings showed that a biological structure in the brain distinguishes male-to-female transsexuals from men. The findings were published in the leading scientific journal (Nature) with a rigorous scientific review process which would not have overlooked essential scientific biases in the design and interpretation of the experiment.

13. **In conclusion:** Since there is evidence that the sexual differentiation of the brain in the human occurs (also) after birth it is unavoidable that in subjects with errors of the sexual differentiation of the brain, sex assignment takes place after birth, sometimes much later in their lives since it requires a large amount of life experience to discover the predicament of being born in the wrong sex: in other words having sexual and nonsexual brain patterns that are in contradiction with the other sex characteristics. Like other people afflicted with disorders in this process of sex differentiation, transsexual people need to be medically rehabilitated so that they can live acceptable lives as men or women. This decision is not essentially different from the one made in cases of intersexed children where assignment takes place to the sex in which they in all likelihood will function best. In the case of a intersexed child it is often possible to tell at birth that the sexual differentiation process has not taken place in a conventional way and so it is possible to make that decision to assign a sex through medical intervention shortly after birth... The decision to recommend hormonal and surgical treatment for a transsexual person takes place much later in life and is based on the conclusion of a thorough psycho-diagnostic process that concludes that a disorder has occurred in the process of sexual differentiation and that the person will benefit from hormonal and surgical sex assignment. There is never any disagreement that the expenses of sex assignment at that stage are to be borne by the relevant health insurance.

This expert witness affidavit has been provided to the High Court in the Case of Elizabeth Bellinger (see page 39, Appendix 4 of "Recognising the Identity and Rights of Transsexual and Transgender People in the United Kingdom", Press For Change 1999).

Appendix B

TRANSSEXUALISM AS AN INTERSEX CONDITION

Dear Dr Whittle

Further to your query about the arguments for and against understanding transsexualism as an intersex condition, may I advise as follows.

I would advise government to treat transsexualism “as if it were” an intersex condition. I advise this because, as they will know, there are two kinds of evidence used in scientific work: one is verification and the other is falsification. To cover familiar ground in order to illustrate this point, at the start of medical enquiry into transsexualism, two possible theories were advanced, that it was somatic and that it was psychiatric [we have to say psychiatric, of course, rather than psychological, since psychologists aren't doctors: that is, they aren't registered medical practitioners with all the legal status that carries], with its progenitor, Harry Benjamin, in 1954, holding to the first.

Evidence was sought to verify either of these theories but no conclusive evidence was found. However, it became clear that transsexualism was a different condition to transvestism or other paraphilias and in 1969 it received its own classification in Index Medicus, to separate it from that. Differential diagnosis continued to be carried out by psychiatrists, to verify that the individual wasn't suffering from a paraphilia, and in 1984 the American Psychiatric Association gave diagnostic criteria. At that point, the circumstance might be described as a physiological condition which was subject to verification by psychiatric analysis - the analysis verified, or proved, that the individual was not mentally ill.

Since then, it has not been possible to falsify Benjamin's original theory, that transsexualism is somatic. Thus, the theory of somatic origin continues to hold, and has held over almost fifty years. As Popper points out, until a theory is falsified, it must be held to be true, and rather than falsification, the long-term evidence is that trans people are perfectly mentally stable, unless they have another mental disorder as well as being transsexual, as, for example, a diabetic might be acutely

depressed. Indeed, the growth of liaison psychiatry in recent years - the practice whereby psychiatrists deal with the mental effects of physical problems [such as mastectomy, for example, which many women find deeply distressing] - supports the notion that the psychiatric intervention is to support the patient in dealing with a physiological problem. Further, the recent Department of Health document, A Healthier Nation, allows evidence from sociological spheres to be brought into play in dealing with medicine - indeed, it requires that they are - and that work, such as surveys by Dave King of Liverpool University, or individual biography by Mark Rees, clearly demonstrates that trans people are not mentally ill. Finally, psychiatrists specialising in this field have noted that their patients do much better since the P v S case meant that they can go through transition without losing their livelihoods, homes etc - which clearly suggests that mental stability is the norm.

Thus, I am obliged to advise that if a legal action were taken by the transsexual community, to assert their right to transsexualism being considered to be an intersex condition, then it would undoubtedly win. There is zero evidence that psychiatric intervention can ‘cure’ transsexualism, just as there is zero evidence that psychiatry can ‘cure’ homosexuality. Such a legal action might, at present, be taken against, for example, the American Psychiatric Association, or the Royal College of Psychiatry, or, if government should be seen not to treat transsexualism as if it were an intersex condition, against the UK government. Hence my advice, which I am content should be passed to the Working Party either informally or formally.

I hope that this clarifies what has undoubtedly been rather a confused picture in the past.

Yours sincerely

Dr Zoe-Jane Playdon
University of London

14 January 2000

Annex 3. **THE PROBLEMS OF GENDER RE-REGISTRATION**

A Consultation Paper To the Interdepartmental Working Group on Transsexual People's Issues.

Produced by:

Change, The FTM Network, G&SA, The Gender Trust, GIRES, Liberty and Press For Change by:

Christine Burns, Tracey Dean, Roz Kaveney, Mark James, Susan Marshall, Claire McNab, Kathleen Redding, Alexander Whinnom, Stephen Whittle.

16 February 2000

1. GENDER RE-REGISTRATION: A RECOMMENDED TWO-STAGE PROCEDURE

1.1 Introduction

1.1.1 A problem often highlighted in any discussion of legal recognition of gender reassignment is the problem of people who 'revert' to their original gender role, after a period in their new gender role.

1.1.2 This arises, on rare occasions, for several reasons:

- Social stigmatisation, prejudice and discrimination against transsexual people is still a significant feature of a minority of British people, and some people who wish to undergo gender reassignment will find that they cannot face the added pressures these things bring to their gender role transition.
- Some transsexual people will develop health complications either as a result of

gender reassignment treatment, especially hormone therapies, or for some other reason and so they will not be able to complete the path to surgical reassignment and they will prefer, without that, to revert to their original gender role.

- A few people with gender identity problems will discover during the 'real life test'¹ that they are unhappy with the decision they have made, and that gender reassignment is not for them.

1.1.3 All of these people will all have had to change their name and some public documentation in order to commence the real life test, and they will need to change these back at the time of their decision not to continue in their new gender role. The problem lies in providing a method whereby these people, along with others who continue to permanent gender reassignment, are enabled an effective means of undergoing the real life test. In order to do this they will require appropriate documentation recording their 'new' sex. However this documentation must not commit *all* third parties (ie those who have a valid interest) to full legal recognition of the 'new' sex prior to a time when any risk of the change of sex not being permanent is minimal.

1.1.4 To resolve this problem we propose a two-stage procedure. The first stage would ensure that trans people could effectively start the real life test. The second stage would further allow those for whom the experience of the real life test is successful, and hence will lead to their permanent adoption of their 'new' sex (gender role), full legal recognition for all purposes, including the validity of a new marriage, in their 'new' sex.

1.1.5 We propose the first stage be in many respects similar to the procedures currently

¹ The 'real life test' is a compulsory part of the medical procedures leading to permanent gender reassignment. It is a one or two year period wherein the trans person lives in the 'new' sex (gender role) in order to decide whether gender reassignment is possible desirable and appropriate for them. It is also an opportunity for the medical professionals involved in gender reassignment to make certain that their patient is aware of the social and practical difficulties a trans person will face. Further, it hopefully ensures that there are very few people who switch 'legal sex status' 'permanently' more than once.

followed by transsexual people, but that it further formalises and records the process and provides protection for the transsexual person. We then propose a second stage allowing those who wish to proceed, with all due precautions, to full re-registration.

1.2 Stage One: A Statement of Intention

1.2.1 People who wish to commence the route towards gender re-registration would first undergo a change of social gender.

1.2.2 This would require:

- a 'statutory declaration' to the Registrar General that they intend from a certain date to live as a member of the sex opposite to that recorded on their current birth certificate;
- a supporting letter from a medical practitioner stating that the person was undergoing appropriate medical treatment and that they believe the change is intended to be permanent; and
- a statutory declaration of change of name or deed poll witnessed by a legal professional (where the first name(s) recorded on the birth certificate is inappropriate).

[It might be possible, indeed preferable, to conflate the 'declaration of intent' and the declaration of change of name.] On receipt of this documentation, the Registrar General would issue a Receipt of the Statement of Intention (ROTSI).

1.2.3 Given that transsexuality can be manifested very early in life, and can cause enormous distress in children so affected, a Receipt of the Statement of Intention (ROTSI) would be granted to a child under the age of 16 on the additional condition that the legal parents or guardians of the child support the application with a statutory declaration to that effect. This would enable the child to live in the sex in which s/he felt appropriate.

1.3 The Effect of the Receipt of the Statement of Intention

1.3.1 A ROTSI would have a marginally wider application than the declaration of change of name currently used by most transsexual people. A person in possession of a ROTSI would have the right to obtain the alteration and re-issue of many official and civic documents and records in the 'new' name and sex, including:

- passport;
- driving licence;
- NHS records;
- Benefit Agency and DSS records;
- certificates previously issued by exam boards, universities, colleges, professional bodies and similar;
- new pension and insurance schemes, including those managed by their employer; and
- other documents on which retaining the previous name and/or sex could lead to embarrassment.

NHS and DSS records would retain a reference to the previous name and sex (which would remain confidential on a 'need to know' basis) but other records should not do so.

1.3.2 Many of these documents are at present changed on presentation of a declaration of change of name, and a doctor's letter. However, as it is only a concessionary procedure, success is often dependent on the good will of individuals. A few official bodies, at present, (such as exam boards and insurance companies) refuse to recognise transsexual people in their 'new' sex. This at present leads to some discrimination and/or a lack of privacy.

1.3.3 Any of the newly issued relevant documents (eg a passport) could then be used to provide confirmation of status should the transsexual person be challenged (for example, in public changing rooms), thus preventing discrimination and providing reassurance for other members of the public.

1.3.4 Two exceptions would be made to the rights of the transsexual person in possession of a ROTSI to be treated for all purposes as a member of their 'new' sex: marriage in the 'new' sex; or recording parental status in the 'new' sex on a birth certificate or adoption certificate would not be permitted.

1.3.5 With the exception of the exclusions mentioned above, a person who had undergone a change of social gender would then be treated for all purposes as belonging to the 'new' sex. It is already the case that in law, transsexual people must be so treated for the purposes of employment and vocational training. However, there remain at present some grey areas (for example, discrimination in the provision of goods and services) caused by the ambiguous legal status of transsexual people. A ROTSI would remove any ambiguity by declaring the transsexual person to be unequivocally of the 'new' sex for all civil purposes except those explicitly excluded (see above).

1.4 Stage Two: The Issue of a 'Gender Confirmation' Certificate

1.4.1 People who wished to undergo full gender re-registration would be permitted to make an application no less than two years after the date of issue of a ROTSI. Such a delay would eliminate the vast majority of the small minority of people whom, for whatever reason, decide not to continue living permanently in their 'new' sex.

1.4.2 An application for full re-registration would require:

- that the person seeking the Gender Confirmation Certificate had reached the age of 18;
- a ROTSI at least two years old (unless they adduce further evidence that they had been living in their 'new sex' for a period of time prior to legislation in this area, and this period of time would then be deducted from this requirement²);
- a 'statutory declaration' that the person had lived for a period of at least two years as a member of the sex opposite to that recorded on their birth certificate, and that they intended to continue to do so; and
- a supporting letter from a medical

practitioner stating that the person had undergone or was undergoing appropriate medical treatment and that they believed the change to be permanent.

On receipt of this documentation the person undergoing gender re-registration would then be issued with a Replacement 'Birth Certificate' (a Gender Confirmation Certificate) in their 'new' name and sex. This would be an 'adoption style' certificate, looking to the general enquirer as if a copy of an ordinary birth certificate, and it would not retain any reference to the originally recorded name and sex. It could be traced to the original birth record by the Registrar General as the Registrar General would keep a 'Gender Confirmation Certificate Register', similar to the Adoption Register already maintained.

1.4.3 A Gender Confirmation Certificate would not normally be issued below the age of 18, though it may be issued when a person is 16 or over with their parent's consent. This is because not all transsexual children will necessarily wish as adults to live permanently in the 'new' sex - it is acknowledged that some do 'grow out of' their feelings.

1.5 The Effect of the New 'Gender Confirmation' Certificate

1.5.1 The Gender Confirmation Certificate would give the transsexual person full legal and civic recognition as a member of the 'new' sex from the date of issue. This would include: the ability to contract a legal marriage in the 'new' sex and the ability to record parental status as if of the 'new' sex on a birth certificate or adoption certificate.

1.5.2 A ROTSI together with the Gender Confirmation Certificate could also be used to obtain alteration and re-issue of any remaining official and civic documents and records in the 'new' name and sex, with the exception of:

- marriage certificates issued in the previous name and sex; and

² As such any person who could show they had been living in their new gender role for over two years prior to legislation in this area, would make a combined application for a ROTSI and Gender Confirmation Certificate to be issued at the same point in time. Additional proof may be required of this fact, such as a statutory declaration by someone who has known them for over two years, or an additional letter from their General Practitioner confirming this fact. Those people who had been living in their new role prior to legislation in this area, but for less than two years, could on the production of such additional proof have that period of time deducted from the time required for a ROTSI to have been in existence.

- records of any unspent criminal convictions in the previous name and sex, although these may be annotated to also record the new name and sex.

1.5.3 These exceptions protect, in the first instance, the rights of the other party in an earlier marriage. In the second instance, they ensure the veracity of the historical record of previous convictions. It would be a necessary requirement that those people with unspent convictions in the previous name and sex disclose them where legally obligated to do so.

1.5.4 Birth or adoption certificates for children under the age of 16 which record parental status in the previous name and sex would be altered at the request of the person undergoing re-registration providing this did not result in a new record which recorded two parents of the same sex.

1.5.5 Birth or adoption certificates for children under the age of 16 on which the name of the father was omitted at the time of registration because he was not eligible to be recorded on account of his (at that time) birth certificate showing the female sex would be altered to include the father's details after his re-registration, if jointly requested by the person undergoing re-registration, and the mother of the children, as recorded on the birth certificate.

1.5.6 Birth or adoption certificates for children of 16 and over would similarly be altered but only on the joint application of the transsexual parent and the person whose certificate it is, providing this did not result in a new record which recorded two parents of the same sex.

1.5.7 The confidential details of the Gender Confirmation Register which would indicate the record of the previous identity of the person undergoing re-registration would be kept by the Registrar General, and would be made available to third parties only if they could show they had a genuine need. All other records of the previous name and sex, including those in NHS and DSS records, would be removed, or in cases where this is clearly impossible (for example a patient's medical notes) access to them would be available to third parties only if they can show they have a genuine need to know. This would assist in protecting the privacy of the transsexual person.

1.5.8 Commitments undertaken in the previous name and sex will remain regardless of the issue of a Gender Confirmation Certificate. A marriage undertaken in the previous name and sex would remain in existence even after the issue of a Gender Confirmation Certificate if both parties wished it³. However, if either party to the marriage wishes, they should be granted a divorce at the point at which the Gender Confirmation Certificate is issued.

1.5.9 Even where a marriage is ended as a result of re-registration, the parties to the marriage would remain obligated in exactly the same way as would pertain in a divorce under ordinary circumstances: for example, for maintenance payments or a share in a pension.

1.5.10 Existing parental status would also remain, regardless of whether the name and sex is altered on the birth or adoption certificate of another person (see above). That is, a person recorded as a parent or adoptive parent will retain all the obligations of parental status: for example, for supporting a child financially. Thus the children of the re-registered person may make the usual claims on a parent, for example, to inherit the financial obligations of the parent whether an estate is intestate or not.

1.5.11 Any other legally binding contract would also remain binding, although any documentation relating to it would normally be altered to reflect the 'new' name and sex.

1.6 Conclusion

1.6.1 In the event that despite having completed the two-stage process, a person changes their mind about proceeding towards gender re-registration, it would be necessary to go through a similar process as that outlined above. This would ensure that any obligations or commitments made, during the period when the person was living as a member of the opposite sex, remain. In our view it is highly unlikely, that there will be many instances of errors outside the two-year period: ie those who decide they do not wish to proceed are highly unlikely to have incurred new marital or parental responsibilities.

³The question of pre-existing marriages has been addressed in more detail in part 3 of this submission: **Protecting Stable Families**

2 GENDER RE-REGISTRATION: THE REQUIREMENT OF STERILITY?

2.1 Introduction

2.1.1 This paper addresses any proposal for transsexual people to comply with a requirement that they are permanently, and/or surgically, rendered infertile before receiving a 'Gender Confirmation' form of birth certificate or other legal recognition of their new gender status.

2.2 A History of Compulsory Sterilisation

2.2.1 In the past there have been various attempts to impose compulsory sterilisation on groups within society. These are seen, nowadays, as a thing of the past. On occasion they were seen to result from public policy mistakes, as in the consequences of the United States Supreme Court decision in *Buck v Bell* (1925)⁴ in which it was held that 'three generations of imbeciles are enough'. Alternatively they were seen as being the practical embodiment of extreme racism as in the Nazi sterilisation and killing programmes of the 1930s and 1940s.

2.2.2 In all of these cases, what was being proposed was overtly intended as negative eugenics, an attempt to cleanse the gene pool of degenerate elements and an attempt to save money in the next generation. A common reaction to an alleged crisis of over-fertility among 'problem elements' was that 'we are going to be eaten out of house and home by lunatics and mental deficient.' (Lord Ridell, newspaper proprietor and hospitals board member).

2.2.3 These ideas were discredited, partly by the more overtly inhumane and racist negative eugenics being practised in Nazi Germany and large parts of the USA, and partly by the realisation that the massive genetic drift being

postulated was bad science⁵. The Labour Party and the Churches allied against any attempt to bring enabling legislation based on the pro-eugenics Brock Report of 1937⁶. The Brock Committee was seen as overly biased towards the Eugenics Society line, and indeed many of its members were members of the Eugenics Society⁷.

2.2.4 For a variety of reasons, the Scandinavian countries, parts of Canada and the USA continued to practice negative eugenics on a large scale well into the mid 1970s. Sterilisation of the poor, particularly of the racially different poor, has continued to be advocated in various jurisdictions of the US. However it has come to be generally accepted in the United Kingdom that the compulsory restriction of other people's fertility was an attack on their human rights.

2.2.5 Historically, in the United Kingdom, state authorised sterilisation was allowed on those women with mental handicap or mental illness. In many early cases, though, the definition of both was extended, via the idea of moral deficiency, to cover any woman, usually any working-class woman, of whose sexual morals there was sanctioned disapproval. The heyday of such proposals was the first four decades of the present century, but they have been overtly and covertly reconsidered from time to time. Generally English and European Human Rights law might now be said to prevent interference in the right of the individual to become a parent, unless for the clear beneficial and therapeutic reasons of that person⁸. In the English case of *Re D (a minor) (wardship: sterilisation)* (1976) it was held, on interpretation, that any sterilisation performed in the absence of consent **and** for non-therapeutic reasons involves a deprivation of that right⁹.

2.3 Modern Examples of Sterility Requirements for Legal Recognition of Gender Change

2.3.1 In considering legal recognition of the

⁴ *Buck v Bell* 274 UL 200 (1927)

⁵ Lancelot Hogben's 1931 book *Genetic Principles in Medicine and Social Science* did crucial educational work here

⁶ Report (Brock Report) of the Departmental Committee on Sterilisation 1937

⁷ Now known as the Galton Institute

⁸ Only very recently the official solicitor has sought an application to the court of appeal to veto a hysterectomy for a 28-year old mentally handicapped woman after a high court judge ruled that it would be in her best interests for the operation to go ahead. The official solicitor argues that a far less invasive procedure should be used, as the hysterectomy is in the interests of the woman's mother and any residential accommodation rather than the woman herself. If all that is required is the prevention of pregnancy a less radical, and less permanent, alternative could be used such as the contraceptive coil. (C Dyer: Ruling on Sterilisation Questioned, *The Guardian*, 27/1/2000)

⁹ Lee and Morgan, 1989: 136

change of gender status of transsexual people, enabling them to contract legal marriages in their new gender role, a few nation states have required, along with a commitment to permanent change of social gender presentation, medical confirmation that the transsexual person has undergone a sterilisation procedure.

2.3.2 The legislation from several jurisdictions including Germany, Sweden, Holland and a very few North American states requires this to be certified as a matter of course before a legal change of 'sex' or 'gender' will be allowed. For example the German legislation (TSG) requires that the transsexual person is 'continuously non-reproductive'¹⁰. Similarly Swedish law requires that an applicant for a legal recognition to effect a change of sex must have been sterilised or at least incapable of procreating¹¹.

2.3.3 Technically, what these legislative examples call for, for transsexual people, is not compulsory sterilisation but sterilisation as a *quid pro quo* for a desired benefit. The best historical analogy is with the proposals made by some elements within the Eugenics Society during the 1930 to make permanent sterilisation a condition for the receipt of unemployment and social security payments. This proposal was instrumental in building opposition both to compulsory sterilisation and sterilisation 'through the back door' - that of making offers that people cannot refuse.

2.3.4 The adoption of sterilisation as a precondition for gender reassignment has never been explicitly linked to negative eugenics. Indeed, when proposed, it has been treated as a priority good sense that needs no specific justification¹². It seems likely, however, that negative eugenics is a significant part of the complex of ideas involved. Those states in which there are sterility requirements for the transsexual person in exchange for legal recognition are generally those where, in the past, negative eugenics (the forced sterilisation of unfit, asocial, groups of people) was accepted medical practice. It is of interest here that they are requirement of the juridical systems of these countries rather than of states which might be seen to have a far worse human rights record such as Turkey and South

Africa. Undoubtedly the discourses which led to the 'hygienic' practices of the past, in those countries, are still just bubbling under the surface.

2.4 To What Extent is Confirmed Sterility a Necessary Requirement in Considering Legal Recognition of Gender Change?

2.4.1 The lifelong hormone treatment that transsexual people will undergo will, of itself, after a short time period, in most cases render infertility in both transsexual women and transsexual men. In such cases, any specific requirement for sterilisation procedures is both redundant and irrelevant. The genital reassignment option available to transsexual women at the present time automatically makes further reproductive ability impossible.

2.4.2 However, it is acknowledged, that not all transsexual women are medically in a position to choose such surgery because of other health problems and sometimes health problems can make it difficult for some individuals to take a large enough dose of hormones for fertility to cease. Waiting lists under the NHS, and, in some cases, personal or ideological objections to genital surgery as the inevitable corollary of transgender or transsexual identification, may delay or prevent surgery for several years.

2.4.3 Similarly it is not inevitably the case that surgical options for transsexual men will remove the option of fertility at some later date. Indeed, the substantial medical risks involved in hysterectomy, phalloplasty and the surgical closing of the vaginal opening are such that many or most transsexual men choose to forgo these surgical procedures.

2.4.4 To refuse these people access to legal recognition of their gender role will create a further, but smaller, group of people who will face legally sanctioned discrimination based purely upon medical conditions.

2.4.5 Further though, even where medical or surgical procedures have permanently ruled out future reproductive capacity, modern techniques

¹⁰ TSG (1980) Second Section, Subsection 8.1, 9 (iii)

¹¹ Lag om ändring i lagen (1972: 119) Section 2

¹² Whittle, S: *Gemeinschaftsfremden - Or How To Be Shafted By Your Friends: Sterilisation Requirements and Legal Status Recognition For The Transsexual*, in Beresford, S., Monk, D., Moran, L: *Legal Queries*, 1998, London: Cassell

such as the freezing of sperm or ova are available to transsexual people just as they are to anyone else. The same will presumably apply to possible (and probable) future developments such as cloning of human organs or the rewriting of genetic code.

2.5 The Right to Found A Family

2.5.1 The right to found family is embodied in the United Nations Declaration of Human Rights, and the European Convention on Human Rights which will be embodied in English law by the Human Rights Act.

2.5.2 Government and the medical profession have had, in their dealings with transsexual people, a long history of misunderstanding and ill-judged attempts at social policing¹³. An area of misunderstanding has been the unexamined assumptions that gender dysphoria automatically rules out a desire for reproduction and family life. Many transsexual people are not interested in bringing up children, and many are; a normal human range of variation applies here.

2.5.3 One interpretation of this failure to consider fully the issues, and the possible options¹⁴ in this area with patients is that by 'policing' this area of transsexual people's lives, the range of options for varieties of family life available to all of society is automatically reduced. Any discussion about protecting the family often means this in practice.

2.5.4 Another possible interpretation is that transsexual people are held automatically to be likely to be bad parents because they offer bad gender roles, or they are more prone to perpetrate certain sorts of abuse or neglect. These fallacies are rarely challenged, however research with the children of transsexual parents has shown them to be as likely to be well balanced and heterosexually orientated as any group of children¹⁵.

2.5.5 It is accordingly hard to see why sterilisation and restriction of transsexual people's fertility should be proposed as a positive good, unless as a piece of negative eugenics. Just as in

the history of negative eugenics it becomes illogical to discuss the 'best interests' of the child, if the child can never be born. If the claim is made that transsexual people are not suitable for parenthood, then they are refused access to parenthood, and this supports the claim because there is no evidence to the contrary.

2.5.6 However neither government nor the medical and other caring professions have ever made any particular attempt to restrict the participation of transsexual people in family life, though many jurisdictions, including the UK, have made adoption difficult because of the intrinsic 'marriage' requirements contained in their adoption laws. But many transsexual women and men will have already become parents prior to transition to their new gender role and most of them are diligent in helping care for those children. This continues even when the parents have separated due to the gender role transition, if the transsexual person is permitted access. Furthermore, after transition, many more transsexual people become involved in the rearing of children which their partner will have within their relationship with the transsexual person, by whatever means, or children whom their partner has had in the past.

2.5.7 Any proposed restriction on fertility will achieve little if anything. Without these restrictions, transsexual people are already generally infertile shortly after commencing reassignment treatment. Yet despite this infertility many of them already participate in the raising of children. Any such restriction will fail, as medically induced infertility already fails, to ensure that children do not have an experience of being raised by a transsexual person, and it is undoubtedly the case, anyway, that children who are cared for by transsexual people do not suffer from that care¹⁶.

2.6 Conclusion

2.6.1 There are clear questions that those who wish to demand sterilisation as a part of the standard transsexual trajectory must consider.

¹³ Examples of this are the long-standing attempts by psychiatrists to impose outmoded models of femininity or masculinity on their transsexual clients, and specifically the long-standing refusal to deal with the distinction between gender identification and sexual object choice.

¹⁴ Such as the freezing of sperm or ova (see above).

¹⁵ The most recently published work in this area is: Green, R; Transsexuals' Children", *The International Journal of Transgenderism*, 1998, Vol 2, Oct-Dec, pages 1-7.

¹⁶ op cit

They are:

- **How can the requirement for compulsory sterility be applied equitably?**

It cannot. To do so in some cases would mean that the individuals concerned will be forced to undergo medical or surgical procedures that will endanger their health, and in some cases risk their life, in order to avoid the discrimination and social stigma they would reap as a result of being excluded from a legal recognition that others would be able to obtain.

- **Can the requirement for compulsory sterility be consistent with human dignity and human rights?**

It cannot. To require it is nothing more than the practice of negative eugenics - the presumption that some people are less worthy of raising children. The only way to oppose eugenics is to ensure that human rights come first. The idea of excluding from parenthood a set of people because they have certain characteristics which have no relevance to their ability to be a good parent must be outlawed because it runs counter to the dignity of human beings, who are unique, free and responsible for their actions.

- **Could the requirement for compulsory sterility be policed in practice?**

It could not be. The reality is that transsexual people will, and always have, found a way to live in their social gender role. Those transsexual people who wish to do so will, as they always have done, find ways of participating fully in their society and that includes the raising of children.

3. PROTECTING STABLE FAMILIES: ISSUES REGARDING A CHANGE IN CIVIL STATUS FOR TRANS PEOPLE WHO ARE ALREADY MARRIED

3.1 Introduction

3.1.1 A problem often highlighted in any discussion of legal recognition of gender reassignment is the problem of people who have contracted a legal marriage in their former gender role, and who, with their spouse, do not wish to end that marriage prior to or at the time of gender reassignment, or the legal recognition of their new 'sex'.

3.1.2 In our experience, most marriages involving transsexual people which are already in existence at the point when gender transition begins ("transsexual marriages"), will break down as a result of the transition, whether because of the change in the nature of the relationship or as a result of the intense stress experienced by both parties during the process.

3.1.3 As gender transition becomes more socially acceptable and access to medical treatment improves, there has been a reduction in the age at which people start the process and a consequent decline in the number of "transsexual marriages". We expect this trend to continue.

3.1.4 Nonetheless, there remains a significant minority of "transsexual marriages" which both parties wish to preserve.

3.2 The Issues

3.2.1 Many jurisdictions which have adopted procedures for changing the civil status of a transsexual person to reflect their true gender have required that an existing marriage be dissolved before such a change can be made. We believe that such a requirement is not legally necessary, and that it severely disadvantages not only the transsexual people to whom it is applied, but also their partners and their families.

3.2.2 It has been the policy of successive UK governments to protect and support families, and to recognise the importance of mutual family dependency as a force for social cohesion and

stability and as an important economic unit, especially for children. Marriage is not just a mechanism by which people attain important rights in society, it is also the means by which they assume and exercise responsibilities to others. Without families, children are less likely to thrive: without families, adults suffer poorer physical and mental health and lack support in times of difficulty. Without families, people of any age are more likely to require the support of social services. Without families, those individuals require increasing amounts of government funded resources and financial support. To require couples involved in a "transsexual marriage" to divorce against their will would therefore undermine many other areas of social policy.

3.3 Protecting Families

3.3.1 There is currently no situation in English law where parties to a marriage which was valid at the time when it was conducted, who both wish that marriage to continue, can be required to dissolve that marriage, or to choose between the continuation of that marriage and the recognition of other legal rights.

3.3.2 If the government were to provide that the change of gender status of a transsexual person could not be recognised without the prior dissolution of an existing marriage, this would place such a person in the invidious position of being forced to choose between on the one hand recognition of their core identity (with all its consequences for preservation of privacy and protection from discrimination), and on the other the preservation of their family. We believe that in the circumstances of being faced with such an invidious choice, transsexual persons, their partners, and quite possibly their children would have grounds for action under the Human Rights Act to assert their rights under Article 8 of the European Convention of Human Rights: "everyone has the right to respect for his private and family life..."

3.3.3 Whether or not such a challenge would succeed at the present time, there can be no doubt that if such a situation were brought about, the government would have created a new class of disadvantaged people, at least half of whom would not even be transsexual. Arguably, this class would also include members of the couple's extended family.

3.3.4 Though only a small proportion of marriages survive the stresses of gender transition, in those which do, the bond between the couple and their family continues to provide an important mechanism for social stability and for the well-being of the members of that family.

3.3.5 It has been the policy of successive governments to recognise the importance of the family as the best environment in which to raise children. We support this policy, and hope that the government will not require that the children of “transsexual marriages” should be deprived by law from the benefits of this protective and supportive environment.

3.3.6 In our experience, a significant proportion of the marriages which do survive beyond gender transition are those involving older persons, where it is less likely that there will be dependent children. On the other hand, it is likely that matters such as pension, inheritance and taxation rights will be regarded as of crucial importance when one or both parties to a marriage is/are approaching retirement. The difference marital status can make in these areas for a cohabiting couple is very considerable.

3.3.7 Compulsory divorce may also prove the final straw for a relationship which has otherwise survived the vicissitudes of transition. If that were so, and the couple separated, it has to be recognised that older persons are less likely to form new partnerships, so even the legal ability to conduct a new marriage would, for many, remain a theoretical right rather than one which they were in a position to exercise. Realistically they would be likely to remain single, with all the extra burdens on social services this could involve, such as the lack of a carer for those who became ill or disabled, and difficulties in obtaining consent for medical procedures or for the management of financial affairs if a person were no longer capable of making any necessary decisions.

3.4 Religious Sensitivities

3.4.1 The definition of marriage as the union of a man and a woman is common to all the great religions, although it may be argued that in the case of Christianity, which adopted marriage as a sacrament only after several centuries, it is not a central tenet of that religion. Nonetheless, we accept that in practice all the major Christian

denominations in the UK, in common with other major faiths such as Judaism and Islam, continue to place a high value on marriage, though not all define it as an exclusive partnership between a man and a woman.

3.4.2 Nevertheless, it is notable that the Roman Catholic Church, which of the major Christian denominations is the most strict in its definitions of marriage and in its requirement for priestly celibacy, has managed to accommodate the paradoxes raised by the ordination within its rites of married persons who were formerly priests in the Anglican rite. It has simply required that whilst the existing marriages of such priests will be recognised as an ongoing commitment in the eyes of God which should be upheld, they will not be permitted to remarry on the death of their partner or the break-up of the marriage. We would suggest that a useful analogy could be drawn between this pragmatic solution to a doctrinal problem and recognition of the continued validity and sanctity of the marriage vows made by the parties to a “transsexual marriage”. The Catholic church’s successful reconciliation of apparently conflicting principles may also provide a helpful pointer to a way in which difficulties posed for the concept of civil marriage might be resolved.

3.4.3 In our pluralist society there is increasing divergence between the provisions of secular law with regard to marriage, and the generally stricter provisions of the religions to which many people adhere. For example, even though the major Christian denominations do not recognise divorce, the state provides the legal mechanisms to facilitate the dissolution of marriage for those who wish it; nor does the state replicate in law the severe penalties which some religions impose for adultery.

3.4.4 In this instance, as in others, we contend that it is not for the state to impose on individuals the doctrines of a church, but to provide a mechanism by which social realities may be accommodated. It remains a matter for each individual and their faith community to reconcile any conflict inherent in their own situation.

3.5 Legal Issues

3.5.1 Marriage was defined in *Hyde v Hyde* (1868) as “a voluntary union for life of one man and one woman to the exclusion of all others”.

The Matrimonial Causes Act 1973 gives statutory effect to the common-law provision that a marriage is void ab initio if the parties to it are not respectively male and female.

3.5.2 This creates an obvious anomaly if a transsexual person is legally recognised in the gender in which s/he identifies: a marriage which previously fulfilled *Hyde's* criteria as being between a man and a woman would, after legal recognition of the change of gender status of the transsexual partner, become a marriage between two persons of the same sex.

3.5.3 We note, however, that English law has in many respects moved far beyond the constraints of the decision in *Hyde*:

- the concept of marriage as a union for life has been downgraded to the status of an aspiration rather than of an irrevocable commitment (two out of three marriages now end in legally-sanctioned divorce);
- marriage is no longer required in all circumstances to be “to the exclusion of all others”: divorce is no longer granted automatically in cases of adultery, and there are circumstances in which polygamous marriages validated outside the UK are recognised in UK law (for example, for the purposes of some welfare benefits).

3.5.4 To respect the wishes of a couple who wanted to remain married after the transsexual partner had been recognised in their new social gender, it would not be necessary to make any extension to current law, nor further to dilute the *Hyde* decision. We submit that it is possible within existing frameworks for such marriages to be recognised as an accepted anomaly, without undermining existing provisions or creating a precedent for further change to the basis of marriage. After all, the outward appearance of the anomaly already exists and seems not to cause any significant problem.

3.5.5 Allowing such marriages to continue would not create any precedent for a marriage ceremony to be contracted between persons of the same sex. That would remain a separate issue, which we hope that the law will one day accommodate, but it is not what we are seeking here.

3.6. Conclusion

3.6.1 A marriage which was valid at the time it was contracted, but which, following recognition of the changed gender status of one partner, became a marriage between a man and a man or a woman and a woman, would still be dissoluble by an action of either party on grounds of separation or irretrievable breakdown. Up to now, the courts have also accepted gender transition as a ground for divorce under the category of “unreasonable behaviour”.

3.6.2 Without change to the existing law, it would therefore be possible for a “transsexual marriage” to continue as long as both parties wished, and there would still be a mechanism by which either party could dissolve the marriage.

3.6.3 The arrangements for the equitable division of property and for access to and custody of children laid down under divorce legislation provide a better mechanism for the dissolution of a family than the harsher process of annulment. We would therefore recommend that the Matrimonial Causes Act 1973 be amended to clarify the situation, by explicitly providing that, whilst the gender transition of one partner would continue to constitute grounds for divorce, it would be not of itself render such a marriage voidable. This would also protect such a family from the possibility of a third-party challenge to the validity of any ongoing marriage, such as that made successfully in Texas in the case of *Littleton v. Prang* (Texas Appeals Court, October 1999), and remove the possibility of complications arising under inheritance law.

3.6.4 In any case, for a “transsexual marriage” to be deemed voidable on the grounds that it was no longer between persons of the opposite sex would be in effect to create a new and ill-defined category of nullity. Existing provisions allow for nullity only on grounds of non-consummation or of the partners not being of the opposite sex. Yet in a marriage which had produced children, neither circumstance could be deemed to apply: the children of such a marriage would have good grounds to challenge the breach of their right to a family. This would effectively be a form of retrospective nullity, breaching the general principle that legislation cannot have retrospective effect.

3.6.5 It could also be argued (as it has been successfully in the past) even where there are no

children of a marriage that the marriage has indeed been consummated. It cannot be good law to create a situation in which persons whose marriage has previously been legitimate can find themselves involved in litigation over such intimate matters.

3.6.6 We therefore believe that to allow or require nullity proceedings in the case of “transsexual marriages” would be likely to lead to uncertainty and prolonged litigation both for the individuals involved and for the state, as those involved sought to protect their rights. Permitting “transsexual marriages” to continue would require the addressing of some minor administrative issues relating to other areas of law which distinguish between married and unmarried persons, such as tax and social security provisions. However, we note that where such marriages survive at present, government departments have succeeded in accommodating the changed situation. We see no reason why they should not continue to do so, though some adjustment of administrative procedures might be useful to clarify the situation for all concerned and to preserve privacy.

GENDER CONFIRMATION CERTIFICATES: THE IMPLICATIONS FOR SPORT AND THE PROVISION OF CHANGING FACILITIES

4.1 Introduction

4.1.1 We have recommended to the Interdepartmental Working Group that a Gender Confirmation Certificate (GCC) be issued after a waiting period of two years. This paper considers the implications of the issuance of such a GCC on sport and the provision of changing facilities. It explores the impact that such would have on the ability of transsexual people to compete without discrimination alongside others of their reassigned gender and the impact that participants and administrators feel that it would have on sporting fairness. The following questions have been specifically addressed:

- should the issuing of a GCC, which replaced but did not nullify the original birth certificate, allow a transsexual person to compete in single sex competitive sports and would any changes in the law be required to make that possible?
- in what ways would the issuing of a GCC affect the operator of sporting, leisure and other public or private venues, specifically regarding the provision of adequate changing and washing facilities, and what changes in the law would be necessary to deal with any resultant problems?

4.2 Participation Problems

4.2.1 Several problems have been encountered whilst researching these points. Firstly, the near total lack of information on and understanding of this subject. The bodies consulted for this paper had not considered these points to be live issues. This was either because the position of transsexual persons had not been thought of, or because it was assumed that were a problem to arise, the matter would be settled by production of the person's birth certificate. As such, the governing bodies' rules and in some cases the law, are totally silent on how transsexual persons should be treated in their sports.

4.2.2 Secondly, where the issue has been considered, the procedure has been somewhat discredited. For example, the IOC has had specific procedures in place for gender verification for sporting purposes. Such tests have been compulsory at the higher levels of sports competition. However, they have proved to be controversial over the years since their introduction. As an experiment, the IOC has suspended such general tests for the 2000 Games in Sydney. Nonetheless, the IOC still feels that some tests are essential to ensure fairness amongst competitors where possible and will have a team of medical experts in Sydney to target individual athletes if they are deemed suspicious.

4.2.3 Finally, there is an alternative viewpoint: that the issue would never be a problem at the higher levels of sport. A person who had undergone female-to-male reassignment would, in the normal course of events, fail a doping test on the grounds of having excessive amounts of testosterone in their system. A participant who had undergone male-to-female reassignment would create more problems as oestrogen is not considered to be performance enhancing. Nonetheless, it is recognised that such medication will generally reduce the strength of the person receiving it. In disputed cases, the governing body would be likely to require production of the participant's birth certificate, bringing the problem full circle.

4.2.4 From a pragmatic perspective the point must be made that, at the lower levels of sport, the transsexual person may never be noticed as being anything other than a person of their reassigned gender. However, some transsexual persons are subjected to discrimination and there are currently no apparently lawful means by which they can obtain redress, when that discrimination relates to the provision of goods and services.

4.2.5 There are three main concerns regarding the participation of transsexual persons in competitive sport:

- firstly, the most accepted method of gender verification appears to be the person's birth certificate;
- secondly, regarding female to male reassignment, is the problem of the necessary use of testosterone, which is a banned substance;

- thirdly, regarding male to female reassignment, the potential problem of an over-powerful physique of the reassigned person.

The positions of various bodies are outlined below.

4.2.6 International Olympic Committee: the IOC is the only body that formally acknowledges any procedure for gender verification. First introduced for the 1968 Games in Mexico City, the procedures have been refined and developed over the years. The tests are only carried out on female participants.

4.2.7 The main test performed on the female athlete is the Buccal Smear Test. A smear is taken from the inside of the potential participant's cheek and tested for the 'SRY' gene, which indicates maleness. If this test proves to be inconclusive, further gene testing may be carried out if necessary. During the past two Olympiads, there has been growing resentment and controversy amongst the athletes regarding having to submit to these tests. Despite their controversial nature, the tests are, we believe, still to be used selectively at the Sydney 2000 Games. It is not yet known what the precise nature of these tests will be.

4.2.8 However, regardless of this point, there is potential for discretion to be exercised in favour of transsexual persons. Within the mission statement of the recently created World Anti-Doping Agency (WADA), an independent body initiated by the IOC, there is room for the proposal of policy initiatives regarding the use of substances on the banned list. In article 4.3 of its Draft Mission Statement, WADA states that it will draw up guidelines for the:

'legitimate use for therapeutic purposes of substances or methods which could be in conflict with the list'.

4.2.9 This section could be used by transsexual persons legitimately to justify the use of what would otherwise be considered to be performance enhancing substances. This would enable participation whilst on a course of testosterone, if it could be shown that the amount taken would not enhance sporting performance, but would only allow the transsexual person to maintain the medically recommended and appropriate testosterone level necessary for their reassignment.

4.2.10 British Olympic Association/British Olympic Medical Commission: the British Olympic Medical Commission is the official medical arm of the British Olympic Association. Together with Sport England, they are responsible for doping provisions for Olympic competitors in England and the UK. As regards gender verification, they apply the provisions of the IOC's Medical Code discussed above.

4.2.11 International Amateur Athletic Federation: the IAAF Handbook is silent on gender verification testing. It is the only international Federation that is affiliated to the IOC that does not follow the IOC's gender verification procedures. Again, however, there is a similar provision about the taking of banned substances. Rule 55(5) states that:

'An athlete may request the Doping Commission to grant prior exemption allowing him to take a substance normally prohibited under IAAF rules. Such an exemption will only be granted in cases of clear and compelling clinical need'.

This again could be utilised to nullify the problem of taking prescription testosterone.

4.2.12 Other governing bodies UK Athletics, the Rugby Football League: to get a cross-section of opinion, two further British governing bodies were contacted to establish whether they had in place any rules or procedures that could be of benefit for transsexual persons. In both cases, the issue had not been considered by the bodies. Both considered that appearance in the first instance, and the production of a birth certificate where there was any doubt, would be sufficient.

4.3 Sport - The Legal Position

4.3.1 Under the Sex Discrimination Act 1975 (SDA) section 44, discrimination on the grounds of gender is permitted where, in any sport, game or other activity of a competitive nature, the physical strength, stamina or physique of the average woman puts her at a disadvantage to the average man. This allows for single sex sports competitions.

4.3.2 If reliance for gender confirmation in sports is placed upon the original birth certificate,

then a transsexual person would be unable to participate alongside others of their reassigned gender. Also, if section 44 SDA is to remain in force, then, as the new Sex Discrimination (Gender Reassignment) Regulations 1999 (Regulations) do not apply to this part of the SDA, it will be possible to discriminate against a transsexual person, in the sporting arena, on the grounds of their undergoing or having undergone reassignment.

4.3.3 To avoid this problem, section 44 would either have to be substantially rewritten, or repealed. The Equal Opportunities Commission is currently exploring whether section 44 should be repealed for all levels of sport. Alternatively the Sex Discrimination (Gender Reassignment) Regulations would have to be extended to include recreation and the receiving of services if section 44 remains in some form.

4.3.4 Section 44 uses the term “average” to justify discrimination. Thus any sport where the average woman is at a disadvantage to the average man is allowed to have “women only” events. If an individual trans woman then wished to compete in a “woman only” event, the key question is whether that person is a woman for the purposes of the SDA 1975, section 44, not whether that particular person is stronger or taller or heavier than the average woman. Obviously, women vary greatly in physical makeup. Weight may be used to place women in various categories of competition but that would not discriminate unfairly against a trans woman.

4.3.5 SDA section 44 is only discriminatory to the extent that a trans woman is not accepted as a woman and is thereby excluded from “women only” events. Our view is that section 44 should not be repealed. It does serve a useful purpose for the vast majority of sportswomen who wish to be able to participate in fair competitions.

4.3.6 The question that follows is what action the government should take to prevent discrimination against trans women who wish to participate in competitive sports. We have to consider the rights of sportswomen generally who may justifiably wish to avoid having to compete against trans women. The relevant science is unclear. We recommend to the Home Office Working Group that no action be taken at this time in respect of section 44.

4.3.7 A further possible basis for discrimination against female-to-male transsexual persons is that they must take testosterone as an essential part of their gender confirming medical treatment. We see no legislation which would help the sporting bodies to grapple with this issue which forms a part of the highly complex and contentious problem of controlling the improper use of performance enhancing substances.

4.4 Facilities Provision - The Legal Position

4.4.1 The Sex Discrimination (Gender Reassignment) Regulations apply only to employment and vocational training situations. Discrimination on the basis of being a transsexual person would therefore appear to be lawful where the receiving of services is at issue. This would mean that providers of sports and other facilities would not be under an obligation to make special provision for transsexual persons. In the extreme interpretation of these provisions, the provider would not be legally required to provide any access to transsexual persons, as direct discrimination is not unlawful as regards access to services.

4.4.2 The only protection that the Regulations would give to transsexual persons would be where the facilities were provided as part of the person’s employment or vocational training. This could lead to some bizarre inconsistencies. For example, if it was discovered that a transsexual person was playing in a junior side at a professional football club, a matter of recreation or the provision of services, the player could be lawfully discriminated against and either not provided with special facilities or denied access to them altogether. If, however, the same transsexual person went through the youth system unnoticed and was offered a playing contract or an apprenticeship, he would then appear to be covered by the SDA and the Regulations. The club would then, prima facie, be lawfully bound to provide the player with the relevant facilities and training opportunities. Of note is that section 44 is primarily to provide protection to women in sport, and this situation would involve men’s sport. However, as the regulations are subsidiary to the SDA, it is possible that section 44 SDA would disapply them. If such a scenario was to come about, then discrimination against the transsexual person would remain lawful. Such a situation must be avoided.

4.4.3 The alternative would be that the Regulations would have to be varied to include recreation and the receipt of services. At this point it must be mentioned that there is some belief that the SDA must be interpreted and read as a whole. Therefore, as the SDA already provides protection from discrimination on the grounds of gender in the provision of goods and services, then together with the Regulations the same protection should also be extended to transsexual persons. This would have the effect of removing the above mentioned inconsistency.

4.4.4 It is recommended elsewhere in this submission to the Working Group that the statutory declaration re change of name should also contain a statement of intent to live permanently in a new gender role. That document would serve as notice to the Registrar General. This would save people having to prepare two separate documents. The two year count down to issue of the GCC could start from the date that the Registrar General received the statutory declaration. The Registrar General would be required to issue a formal written acknowledgement of receipt but that would have no other purpose (eg it would not be used for identification purposes in changing rooms). For that, the passport or driving licence should suffice. However, there is currently no lawful basis for forcing an operator of changing rooms to accept those documents as adequate proof of being entitled to use them. Not even the GCC could be used to that effect in current law.

4.4.5 To avoid discrimination against transsexual persons in the provision of changing facilities, the government could issue fresh Regulations that clearly extend the protection afforded by the Sex Discrimination Act 1975 to include goods and services. It is considered likely that if the civil courts considered the question they would determine that the SDA should be read as a whole, and that transsexual people are therefore afforded protection in the provision of goods and services.

4.5 Conclusion

4.5.1 The present situation regarding participation by transsexual persons in sport appears to be precarious. Direct discrimination is lawful in almost all situations. Whether or not such discrimination is overtly practised, the

reliance on birth certificates as proof of gender would effectively prevent normal sports participation. However, in general, there appears to be little or no formal policy regarding the participation in sports by transsexual persons, leaving the field open to policy developments.

4.5.2 There has been very little consideration of the status of transsexual people in the sporting world. At this stage, there is no need for legislation. Testing of athletes is a controversial and uncertain process given the necessarily intrusive testing which is required and the great difficulties in then objectively determining maleness or femaleness. There is no reason to suppose that government intervention will be at all helpful to the sporting bodies whose role it is to deal with these problems. The most that the government might wish to do is issue general policy guidance in connection with the GCC scheme. The groups involved in the preparation of this paper, perhaps together with the Equal Opportunities Commission, would be pleased to assist in the preparation of such guidance.

4.5.3 If GCCs were to be allowed as proof of gender for all social purposes, such as sports participation, the following proposals could then be presented.

- In association with both national and international governing bodies, there should be formulated policies which would allow for participation at the recreational level on the production of a valid GCC. This would allow the transsexual person to compete alongside those of their reassigned gender.
- At the elite, or professional, levels of sport, attention must be paid to the possibility of any potential competitive advantage that the transsexual person might have as a result of their gender reassignment.
- Thus, following a female-to-male reassignment, for example, a greater testosterone/epitestosterone ratio could be accurately calculated and allowed on the basis of a 'legitimate therapeutic purpose' or 'compelling clinical need'. The medical and doping codes of the relevant governing bodies and federations could then be amended such that on

production of a valid GCC, the higher testosterone ratio would be permitted.

- The male-to-female reassignments may, potentially, prove more difficult where the transsexual person retains an advantageously strong physique. In these situations, production of a GCC would allow participation at a recreational level. In conjunction with the governing bodies and federations, a limit may be proposed that where the transsexual person has unfair competitive advantage because of their physique, there may be an upper limit to the levels at which they can compete professionally. Although this is not ideal, it would confront the concerns of the governing bodies whilst allowing the vast majority of non-professional participants to compete freely in the sport of their choice.
- However it should be a requirement that the governing bodies have considered the individual case and have been reasonable in their decision to exclude participation. This would, for example, include an assessment of the likely advantage that the particular transsexual person would obtain over other women in that particular sport, and at that level of competition.
- Alternatively the Regulations could be amended to include both recreation and the receipt of services. This would make it unlawful to discriminate against transsexual persons who wished to make use of sports facilities or join sports clubs or leagues.

4.5.4 The above measures would allow most transsexual persons to compete at almost all levels of all sports. Discrimination would be made unlawful and the integrity of the sports would also be maintained. The extension of protection into the provision of goods and services would enable transsexual people to obtain protection against discrimination in their use of changing facilities whether operated in connection with sports and more generally.

Annex 4. PRACTICE IN SOME OTHER COUNTRIES

The following information has been provided by diplomatic missions, in consultation with the State authorities. It is not intended to offer a comprehensive review of the treatment of transsexual people in these countries but, rather, a snapshot of different practices. For this reason the information does not follow a common format.

COMMON LAW COUNTRIES

Australia

There is no national (Commonwealth or Federal) legislation governing transsexual people - this is a matter for individual States and Territories. Only three have so far made any statutory provisions for transsexual people.

Legislation in the Australian Capital Territory (ACT) and South Australia (the Sexual Reassignment Acts 1988) provides that where a person has undergone reassignment procedures (within the State or elsewhere) application may be made to a magistrate for the issue of a recognition certificate. A magistrate may issue such a certificate where:

- (a) the reassignment procedure was carried out in the State; or
the birth of the person to whom the application relates is registered in the State;

and

- (b) the magistrate is satisfied that the person:
 - (i) believes that his or her true sex is the sex to which the person has been reassigned;
 - (ii) has adopted the life style and has the sexual characteristics of a person of the sex to which the person has been reassigned; and
 - (iii) has received proper counselling in relation to his or her sexual identity.

In New South Wales (NSW) a person will qualify as a “Recognised Transgender Person” if:

- their birth was originally registered in NSW;

- they are over 18 years of age;
- single;
- have had gender reassignment surgery; and
- they have either a new birth certificate in their acquired gender issued by the NSW Births, Deaths and Marriages Registry or a “Recognition Certificate” issued by a South Australian magistrate or a similar official document issued by another Australian State or territory (none known at this time)

However, the new gender acquired by gender reassignment surgery is not recognised by Federal law.

Marriage: Uncertain

Although a recognised transgendered person will be treated in the ACT, South Australia and New South Wales as of their acquired gender for legal purposes, it is unclear whether this extends to marriage.

Criminal Justice System

Criminal law and practice vary according to the state or territory, although there are common strands running through the Australian legal system. The trend is to treat victims in general on a gender-neutral basis. However, there are issues that arise concerning the age of consent; since there is a difference between the age of consent for homosexual activity (18) and heterosexual activity (16), some confusion is possible when a victim is a (say) 17-year old transsexual person. Efforts are being made to address problems such as these and it is common practice that a person who identifies as a woman (or man) should be treated as a woman (or man). The trend in Australian criminal law is also to treat offenders on a gender-neutral basis.

The New South Wales case of R v Harris and McGuiness concerned two male-to-female transsexuals who were each charged with the gender specific crime of attempting, as a male, to procure the commission of an act of indecency

with another male person. Both claimed in their defence that they were not males, and this was the sole issue in the case. Although both were living as women, Harris had undergone full gender reassignment surgery but McGuinness had not. The Magistrates Court held that they were both males and both were convicted. However, the Court of Criminal Appeal held by a majority that, in the context of the criminal offence, Harris was not a male and her conviction could not stand, but that McGuinness was a male and had been properly convicted.

The Corrective Services of Australia have a variable policy on transsexual prisoners dependent on physical characteristics. In the first instance the relevant factor is what gender the prisoner most closely resembles, followed by the external genitals. These factors are subject to risk assessment for transsexual inmates carried out by the Corrective Services. For example, two transsexual inmates were transferred from a male to a female prison after being raped. In all instances a transsexual person is considered as an inmate with special requirements.

Canada

A change of gender is recognised in Canada. A number of provinces have vital statistics legislation governing the procedures for having the sex designation changed on the person's birth certificate (although the law in this area is unsettled as these cases may be appealed and/or reversed), and transsexual people may apply to have their birth certificates amended. The requirements of several provinces are set out below:

Alberta

Where a person has had his/her anatomical sex structure changed to a sex other than that which appears on his/her birth certificate the Director, on production of:

- (a) affidavits of 2 physicians, each affidavit deposing that the anatomical sex of the person has changed, and
- (b) evidence satisfactory to him as to the identity of the person, shall:
 - (i) if the sex of the person is registered in Alberta, cause a notation of the change to

- (ii) be made to the registration thereof; or
- (ii) if the sex of the person is registered outside Alberta, transmit to the office in charge of the registration of births and marriages in the jurisdiction in which the person is registered, a copy of the proof of the change of sex produced to the Director.

The client is normally identified by the information they give about their birth, confirmed by a copy of their birth registration and the subsequent physicians' declarations. If further evidence were required copies of a passport or driver's licence would be acceptable. Evidence of change of name is not usually necessary. If the person had their name changed legally, evidence is usually provided with the birth registration. If they had a legal name change in another jurisdiction, a certified copy of the change of name registration document would be required to amend the name on the original birth registration.

Once the sex has been legally changed on a birth certificate, that person is legally deemed to be of that sex. Every birth or marriage certificate issued after the making of a notation under this section is issued as if the registration had been made with the sex as changed.

Alberta Registries records are of a confidential nature and only available to eligible applicants eg the person themselves, any person with the birth registrant's permission, the parents of the person whose birth was registered, a legal representative of an eligible client. Should a person want to keep their records confidential from any person, this could be done with a court order directing the Registry to seal the record.

Quebec

The Civil Code recognises the legal status of transsexual people by granting them the right to change their given name and the designation of their sex on the act of birth provided they meet the following criteria:

- have undergone medical treatments and surgical operations involving a structural modification of the sexual organs intended to change his/her secondary characteristics
- unmarried
- domiciled in Quebec for at least one year
- Canadian citizen

Ontario

Similarly requires the transsexual person to undergo some radical and irreversible surgical intervention with all the fundamental reproductive organs ie more than their simple removal, before the grant of legal recognition of the acquired gender.

Marriage - No

A transsexual person is not allowed to marry in their acquired gender. However, Registrars are not required to ask about gender and it is possible that they could be misled. If a person changes gender after marriage, the government would not interfere.

Criminal Law

Previous case law suggests that a man who had undergone gender reassignment surgery should be sent to a women's prison as "the subculture of a Federal Penitentiary would constitute punishment well beyond imprisonment".

Employment Law

In employment law it is broadly prohibited to discriminate on the basis of gender. A potential employer is not normally allowed to ask for a person's gender. Forms used by an employer include F/M boxes but the information can only be used for statistical purposes. Several Provinces are considering whether to prohibit discrimination on the basis of gender identity. Employment is one of the areas covered under the Canadian Human Rights Act, and the Canadian Human Rights Commission's working position has been that the legal structure of the Act includes the rights of transsexual people on the ground of "sex". Complaints have also proceeded on the ground of physical and mental disability. At least two provincial human rights decisions have applied the ground of "sex" to protect the rights of transsexual people. However, it is possible that an employer could prove a "need to know" on the basis of whether knowledge of gender would be justified. A bona fide justification is one that is essential to the safe, efficient and reliable performance of the essential functions of a job or is a justified requirement for receiving programs or services.

New Zealand

A change of gender will be recognised in New Zealand; re-registration of a transsexual person's acquired gender was made possible by the Births, Deaths and Marriages Registration Act 1995. Section 28 of the 1995 Act enables a person who is 18 years of age or over to apply to a Family Court for a declaration as to the appropriate sex to be shown on birth certificates issued for the applicant. The Court will issue such a declaration (pursuant to s28(3)(c)(i)) where satisfied, on the basis of expert medical evidence, that the applicant:

- has assumed (or has always had) the gender identity of a person of the nominated sex; and
- has undergone such medical treatment as is usually regarded by medical experts as desirable to enable persons of the genetic and physical conformation of the applicant at birth to acquire a physical conformation that accords with the gender identity of a person of the nominated sex; and
- will, as a result of the medical treatment undertaken, maintain a gender identity of a person of the nominated sex.

Documents presented to the Family Court will include affidavits by the applicant describing their personal background and their intention to continue to function as a person of their nominated sex, supported by statements by medical professionals which state that the applicant has had irreversible gender re-assignment surgery, and is undertaking on-going/has completed hormone treatment etc., and any other relevant documentation. (The Court may also make a declaration if satisfied that the applicant's sexual assignment or reassignment as a person of the nominated sex has been recorded or recognised in accordance with the laws of a state for the time being recognised for the purposes of this section by the Minister of Internal Affairs by notice in the Gazette. However, as yet no state has been recognised in this formal manner). In the case of a child under the age of 18 years, who has never married, the child's guardian may make an application to the Family Court.

Section 30(2) of the Act prohibits a new registration containing the applicant's acquired gender if the applicant is lawfully married to a person of the same sex as their new sex, since this

would create a same-sex marriage on paper. Such applicants therefore face a choice of not having their new gender registered or having to dissolve their marriage.

Section 31 of the Act also allows the Registrar-General to cancel a sex change re-registration where, despite the matter having been proven to the Family Court, expert medical evidence is presented to the Registrar-General to the effect that the person has not undergone sufficient gender assignment/re-assignment procedures. Where the issue of marriage is not involved, and no contrary medical evidence has been presented, the effect of a successful sex change re-registration is that applicants create for themselves a new identity. The process is therefore analogous to that for adoption. However, notwithstanding all the above provisions, section 33 of the 1995 Act states that "...the sex of every person shall continue to be determined by reference to the general law of New Zealand". Although the expectation is that registration of the new gender will be recognised for all legal purposes this has, with the exception of marriage, largely been untested.

Marriage: Yes

The High Court judgement in the case of The Attorney-General v The Family Court at Otahuhu (1995) 12 FRNZ 643 declared that:

"...where a person has undergone surgical and medical procedures that have effectively given that person the physical conformation of a person of a specified sex, there is no lawful impediment to that person marrying as a person of that sex." (Ellis J., p10).

This judgement was preceded by MvM (1991) 8 FRNZ 208, a test case in the Family Court, brought by a post-operative transsexual arguing that, for the purposes of the marriage she had entered into 12 years earlier, she was a man and therefore the marriage was invalid. In that case the judge held that, for the purpose of marriage, the transsexual was a woman as that was her core identity, and therefore the marriage was and remained valid.

Submissions made by the amicus curiae were incorporated as part of the (High Court) judgement of Ellis J. and comments included:

- "A valid marriage in New Zealand does not

require the capacity to procreate or achieve penetrative sexual intercourse"

- The possibility that a marriage partner may be deceived about the other's transsexual history is not a ground for not allowing marriage, as there are many other frauds and deceptions possible which do not invalidate a marriage at law"
- "A marriage does not become void where one partner undergoes a sex change after marriage. The marriage subsists until a dissolution is obtained"
- "Permitting a transsexual to enter a marriage relationship is unlikely to change the factual situation for children who are already present in the community and whose rights are already safeguarded by the legislation in place"
- "It may be that for other legal purposes, a transsexual who has not had reconstructive surgery or only minimal surgical intervention (such as removal of the testes) could be classified in his or her chosen sex for certain purposes such as the employment law, criminal law and the law of inheritance"
- "It is not appropriate to take a purist view - either that transsexualism is an aberration which should not be colluded with, or that in a different society sex roles would be less defined and the law relating to marriage less important. The current law needs to respond to the situation as it exists. Transsexuals do exist. Society is very much divided along sex lines"
- "Many will not undergo surgery. Even fewer will ever want to marry. Allowing those few who qualify to marry will not impact greatly on society, but it will provide relief and recognition for the few individuals affected"

A person may give notice to marry without first obtaining a declaration of sex from the Family Court, by relying on the judgement of Ellis J. In such a case, written confirmation of the person's sexual reassignment is sought from the applicant's medical practitioner(s) prior to the taking of the statutory declaration for the marriage. (The transsexual person could subsequently seek a Family Court declaration that their birth registration show they are of the new gender, and in such circumstances their marriage would not have to be dissolved before the re-registration).

Criminal Justice System

New Zealand criminal law is codified and statutes in New Zealand are comparatively gender neutral. The only crimes where gender is strictly relevant are certain sexual offences. However, sexual violation is widely defined to include not only traditional rape but also unlawful sexual connection. A person could be held to be a victim or an offender under this offence regardless of gender status. Indecent assault is more problematic; there is no crime of indecent assault by a woman on a man. However, in terms of a transsexual person being a victim an alternative offence could be used carrying the same penalty.

The question of a change of gender has not so far been addressed in the criminal law. In the case of AG v Otahuhu (see above), Ellis J. stated “it may be that for other [non-marriage] legal purposes, a transsexual who has not had reconstructive surgery or only minimal surgical intervention (such as removal of the testes) could be classified in his or her chosen sex for certain purposes such as the employment law, criminal law and law of inheritance”. However, there is doubt whether a court, particularly the Court of Appeal would follow this approach and determine that the transsexual was for legal purposes a member of the sex opposite to that of their birth.

A post-operative transsexual would be sent to a prison appropriate to their acquired gender. Transsexual inmates are permitted normal mixing. However, those [pre-operative] transsexual inmates who are not transferred to an institution appropriate to the gender which they perceive themselves to be, are entitled to single cell accommodation or to share cells with other transsexual inmates. Transsexual prisoners can continue, at their own cost, any medical or hormonal treatment commenced prior to imprisonment.

EUROPEAN COUNTRIES

Austria

Austria provides for the formal recognition of a change of gender. In order to gain recognition of the acquired gender the person in question must be diagnosed as transsexual and must then undergo psychotherapy treatment for a year (at least 50 hours). They must also have started

hormone treatment at that time and take a “real life test” which considers the social aspects of living in their newly acquired gender. This is followed by a psychotherapeutic assessment which, if positive, leads to a decision by the Vienna Medical Examiner as to whether this treatment can be suspended and gender reassignment surgery performed. After surgery it is necessary to obtain the expert opinion of the Medical Examiner in order to apply for recognition of the change of gender. The Examiner must be satisfied that:

- the applicant has lived for a long time with the compulsive idea of belonging to the opposite sex, and that it has caused him/her to undergo measures of sex reassignment
- these measures have led to a visible approach to the appearance of the opposite sex
- it is probable that his/her feeling of belonging to the opposite sex will not change
- any pre-existing marriage has been dissolved.

A transsexual person will be issued with an amended birth certificate in their acquired gender.

Marriage: Yes

Following formal recognition of a change of gender, a transsexual person may marry in their acquired gender. The registry officer has to obtain an expert medical opinion before the marriage.

Criminal Justice System

In criminal law the gender of the person in question at the time of the offence is seen as the relevant gender.

A transsexual prisoner whose change of gender has been officially recognised will be sent to a prison appropriate to their acquired gender, otherwise they will be sent to a prison for their birth gender.

Belgium

Although there is no legislation providing for a change of sex this will, in practice, be recognised following a decision of the Courts. Applications

are dealt with on a case by case basis. The criteria are “a regular, durable and irreversible possession of the new state following medical treatment (hormonal, surgical, psychological) prescribed for therapeutic means, preferably after a multi-disciplinary diagnosis”. The applicant must demonstrate that the comments on their birth certificate no longer correspond to the real sex under which he/she presents him/herself and has integrated in society, and that the change of sex is not the result of an arbitrary decision or a whim. In principle, any pre-existing marriage must be dissolved (by annulment or divorce) before the change of sex will be recognised. A note of the legal decision modifying the sex and, if need be, a change of the first names of the person concerned, is written in the margin of his/her birth certificate.

Marriage: Yes

Following the legal decision to recognise the change of sex, the transsexual person belongs to the recognised sex.

Criminal Justice System

Penal law, with a few exceptions that have fallen into desuetude, does not refer to the gender of either the offender or victim of a crime. Once a change of gender has been officially recognised, this is applicable for all purposes.

Denmark

A change of gender will be recognised in Denmark. Anyone seeking to undergo gender reassignment surgery must notify the Civil Law Division (CLD) of the Ministry of Justice prior to the operation. The CLD will “authorise” the operation to take place and will also inform the Civil Registry who will amend the birth certificate. The original entry in the Registry will be struck out and will refer to the new entry giving the new gender. The fact that this was the result of gender reassignment surgery will be noted in the observations. The CLD also gives the individual the right to apply for a new CPR (civil register) number. This number is normally assigned to each citizen at birth (or on taking up residence in Denmark) and is used as a single ID number for all dealings with the authorities (educational, social, accommodation, tax, etc.). The last number identifies the gender.

Citizens or residents who undergo gender reassignment overseas can apply retrospectively for the same recognition on application to the CLD, on provision of relevant medical documentation.

A person is deemed to have acquired the new gender after gender reassignment surgery.

Marriage: Yes

Following amendment of the birth certificate and the assignment of a new CPR number, the transsexual person is fully recognised in their new gender and is equal before the law.

Criminal Justice System

The Ministry of Justice is not aware of any special or discriminatory treatment in criminal legislation.

Finland

Treatment of the transsexual condition or a change of legal gender is not dealt with by legislation, but by established interpretations and different established practices. Current practice is based on a 1988 ruling by the Supreme Administrative Court under which the Population Register Centre will change the PIN number designating the gender of a transsexual person.

A transsexual person may apply to a Local Register Office (LRO) to change his/her first name and PIN number (which shows a person’s gender and is widely used for identification purposes). They must produce a statement from a psychiatrist treating the person; the psychiatrist may issue a statement once examinations have produced a diagnosis testifying to the person’s transsexual condition. Before changing the PIN number the LRO requires the transsexual person to have undergone hormonal treatment for about one year - surgery is not a pre-requirement for changing a person’s legal gender. The LRO also requires a transsexual person to be single, or to have filed for divorce. However, this might change as the Finnish government is currently considering the possible introduction of legislation providing for same-sex marriages. If such a law is passed a couple will, where one partner obtains a change of PIN number, be able to change their marriage to be designated as a same-gendered registered couple.

Marriage: Yes

Following the change of the transsexual person's PIN number, they have the same legal status as others of their acquired gender.

Criminal Justice System

Gender is not referred to in the Penal Code, even in legislation on sexual crime.

There are no precedents for dealing with transsexual prisoners. However, they would be placed in a prison according to their PIN which can be changed to reflect a change of gender. (Between 1988-98, there were a total of 87 PIN changes for transsexual people in Finland). "Partly for this reason, the Department of Prison Administration has taken the position that a male prisoner cannot be denied possession of female clothing".

France

There are no legislative or regulatory provisions in France concerning a change of sex. The French approach is based entirely on case law which has been codified by two rulings delivered by the Cour de Cassation (equivalent of the British High Court) on 11 December 1992. These provide that when an individual with a transsexual syndrome has undergone suitable medical treatment, no longer possesses all of the characteristics of their original sex and has taken on the physical appearance and social behaviour of the other sex, the individual's civil status should henceforth correspond to the sex of his/her appearance. This is in accordance with the principle of respect for private life.

Legal recognition of a change of gender depends upon medically verified evidence of a transsexual syndrome and treatment (hormone therapy and a surgical operation leading to an artificial change of appearance of sexual attributes) modifying the physical appearance to the assumed sex.

Transsexual people may alter their civil status by amending their birth certificate on application to the county court where their birth was originally registered. Where such applications are accepted the change of sex is noted in the margins of the original birth certificate. The legal decision to alter an individual's sex, and eventually the change

of name which this implies, are recorded in the margin of the individual's birth certificate. The standard wording is usually:

"By judgement of the [tribunal/court] at [place], this person will be henceforth designated as being of the [M/F] sex and his/her name will be [new name] instead of [former name]."

It is up to the individual concerned to request such an amendment, having provided a copy of the legal instrument confirming the change of sex.

Marriage - Yes

Without prejudice to the authority of the courts, a transsexual person may marry in their acquired gender. An official change of sex does not call into question previous sexual identity ie a previous marriage is not retrospectively annulled upon a change of sex. However, the question of maintaining a married relationship also arises in such cases. Although divorce proceedings only apply to married partners if they choose to separate, a valid marriage can only exist between two people of opposite sexes. A number of courts have granted annulments on this basis as a consequence of sex changes.

Germany

The Federal Republic introduced legislation in 1981 providing for the recognition of an acquired gender. A court can decide that a person should belong to the other sex where:

- (i) a person has lived for 3 years as belonging to the sex the person feels he or she belong to;
- (ii) the person is unmarried;
- (iii) of age;
- (iv) permanently sterile;
- (v) has undergone operation by which clear resemblance to the other sex has been achieved.

A note is made in the margin of the birth record and the civil status record is noted with details of the Courts decision. If a new birth certificate is issued following legal recognition, this will show only the acquired gender. The former gender will have to be disclosed on certain occasions eg in court or to obtain an insurance policy.

Problems can arise for a transsexual person between taking the decision to change their first names and to undergo full reassignment surgery, and gaining a court decision on legal recognition. In this interval the individual would continue to be of their birth gender for the purpose of public laws, notwithstanding the fact that their external appearance was now of the opposite sex.

Marriage: Yes

Full legal recognition is achieved for all purposes including marriage.

Criminal Law

Most sections of the Penal Code are gender-neutral. Transsexual offenders will usually be sent to a prison appropriate to their acquired gender.

Greece

There is no law in Greece covering a change of sex. However, transsexual people can change their name and identity papers (an annotation is made in the original birth certificate).

The legal consequences of this are not clear - there are no legal provisions relating to marriage or other areas of life such as birth certificates, rights over children, criminal and employment law. However, a transsexual prisoner would be sent to a prison appropriate to their acquired gender.

Irish Republic

A change of gender is not recognised in Irish law. However, the Irish Passport Office will issue a transsexual Irish national (who has undergone a full course of medical treatment including full and irreversible gender reassignment) with a full passport reflecting the person's new name and acquired gender.

Marriage: No

However, there is currently a court case pending from a transsexual person who has applied to marry in their acquired gender.

Italy

A change of sex is recognised in Italy after due legal process. Legislation was introduced in 1982 stipulating an operation had to be authorised by a court, which also authorises the register of population to rectify the birth certificate. The law does not distinguish between hormonal treatment or surgery - it considers the sexual-psychological characteristics to be most significant, and provides for the court to authorise the medical-surgical treatment which will bring the individual anatomically into line with these characteristics. The amendment of the individual's civil status is subordinated to subsequent verification that the treatment has been carried out. The introduction of authorisation by the courts for sex-change treatment was intended to legalise the medical treatment required (such treatment was previously a criminal offence). The law does not clarify the nature or extent of the reassignment required for recognition of the acquired gender - in practice it is considered sufficient for the individual's physical appearance to correspond overall with that of the new sex.

Once the birth record has been altered as a result of the court's authorisation of the change of sexual status, all civil status certificates will bear the new name and sex, including the birth certificate. The Constitutional Court has set out the rationale behind the law as follows: "the legislator, in recognising the concept of (a new) sexual identity, must take into account not only the external sexual characteristics as ascertained at birth, or as they have since developed either naturally or with the help of appropriate medical-surgical treatment, but also elements of a psychological and social nature. Since transsexual people are not making a free choice when opting for gender reassignment, but are forced to do so by their very nature, the legislator's role is to guarantee that the case is examined properly, to ensure that appropriate treatment is provided and the individual's records changed accordingly. Another purpose of the law, which is inspired by the values of the freedom and dignity of the individual, is to overcome the isolation, hostility and humiliation to which these "diverse" individuals are often subjected".

Marriage - Yes

Full legal recognition is given for all purposes, including marriage.

A change of sex legally can be recognised even if the individual concerned is married at the time of the change. Under the terms of the Civil Code, his/her spouse can have the marriage impugned if they had been misled over the “identity or essential personal qualities”, provided that action is taken within 12 months of discovering the “error”. A change of gender is also grounds for divorce under Italian law.

Luxembourg

There is no legal framework for the recognition of a change of gender. However, this matter has been addressed in case law. An application for recognition of a change of gender must be submitted to the public prosecutor. The court only rules in favour of a person if he/she “is deeply convinced to be a victim of an error of nature which he/she demands to be corrected”. The judgement recognising the change of sex allows the applicant to obtain an amended birth certificate with the new gender. (Case law on the question of birth certificates is not consistent: according to some judgements the acquired gender is to be added to the birth certificates with mention that the birth gender is replaced by the new gender, whilst other case law states that a new birth certificate has to be provided with the acquired gender).

Marriage: Uncertain

The right of a transsexual person to marry in their acquired gender has not been tested.

Criminal Justice System

The recognition of a change of gender has not, so far, had to be addressed by the Criminal Justice System.

Netherlands

A change of sex has been recognised in Dutch law since 1985. To acquire the new gender a person must be:

- single (but see below)
- sterile ie permanently physically unable to procreate or give birth to children
- have undergone full gender reassignment surgery or at least partial reassignment surgery if the person concerned is

convinced, to the satisfaction of a team of medical and psychiatric experts, that the wish to change sex is permanent.

If the Court orders a change of gender on the basis of the above information, the registrar makes an entry on the birth certificate record the order making the change. Any change to the sex stated on the birth certificate does not affect family law relationships. (NB The Dutch Government has tabled draft legislation to legalise same-sex marriages. This Bill has the support of the three coalition parties and is expected to receive Royal Assent in late 2000/early 2001. If and when this bill is enacted, the requirements for transsexual people to be single in order to qualify for legal recognition of their new gender will be abolished).

Marriage: Yes

There are no restrictions on the right of a transsexual person to marry in his/her new gender.

Criminal Justice System

A change of gender is recognised for all legal purposes from the moment it has been registered on a person’s birth certificate. It follows that a transsexual prisoner would be sent to a prison appropriate to their acquired gender.

Portugal

Because there is no legislation concerning transsexual people in Portugal, legal opinions are divided on whether a change of sex is legally recognised. However, the general view seems to be that it can be recognised following a court decision and that identity card details and the birth certificate can be amended accordingly.

Marriage: Yes

If a transsexual person who legally changes gender is already married, the previous marriage will be declared null and void since the Portuguese legal system does not recognise same-sex marriages. This would be a matter for the courts.

Criminal Justice System

There are no precedents for dealing with transsexual prisoners. However, if the change of gender has been recognised by the courts they

would be sent to a prison appropriate to their acquired gender.

Spain

Following a court order documents can be issued in the new name and gender. However, transsexual people legally keep the sex they had at birth.

Sweden

Legal provisions are contained in the Act on the Determination of Gender in Certain Cases (1972:119) last amendment 1995:23. Application for recognition of a change of gender is made to the Legal Council of the National Board of Health and Welfare. The Council will, in practice, recognise a change of gender after completion of the “one year life test” (the actual time is not laid down in law) but the person must also have been in contact with a psychiatrist and Legal Council evaluation team for at least two years before lodging an application for a change of gender. Hormonal treatment can start after nine months of consultation (but in practice is not normally allowed before one year has passed). Applications for gender reassignment surgery are only allowed after the Legal Council has presented its ruling at the end of the two-year period. This requires the applicant to be:

- 18 years of age
- sterile
- a Swedish citizen
- “a person who since their youth feels that he is of a gender other than that which is recorded in the Population Register and who for long has lived in this situation and who can be expected to continue to do so for the foreseeable future” (1972:119, chap. Par 1)
- have fulfilled the one-year life test and two-year consultation period

Legally the change of gender is recognised only after the new national identity number is obtained following the ruling of the Legal Council.

Marriage: Yes

Following the Legal Council ruling a transsexual person has legal recognition in their new gender for all purposes.

Criminal Justice System

A change of gender will be recognised for legal purposes. A transsexual person would be required to disclose their previous gender in court if this were relevant eg if the events in question had occurred prior to the change of gender.

A post-operative transsexual prisoner would be sent to a prison for their acquired gender. Problems might arise during the change process but no such cases have actually occurred. Although these potential difficulties have been discussed, it was decided that no “special treatment” should be in place.