APPENDIX E

A Long Time Coming:

THE STATE OF LAW REFORM AFFECTING TRANSGENDERED PEOPLE IN AUSTRALIA
BY CLARE CAHILL

Introduction

Last November, the Standing Committee of Attorneys-General met in Perth, Western Australia. At that meeting it was agreed that Attorneys-General from all seven States and Territories, and the Federal Government would introduce legislation that would outlaw discrimination against transgendered people on the basis of their transgender status.

At around the same time, the Chief Minister of the Northern Territory announced his intention to retire from the Northern Territory legislature. Before doing so, he would be introducing a private member's bill to allow for legalized euthanasia of terminally ill people. True to his word, he successfully shepherded the Bill through the Parliament and then resigned from public office.

Claire Cahill, Graduate student, Melbourne Australia, Delivers a report on law reform affecting transgendered people in Australia

As of July 1996, only one government in Australia will allow the legal recognition of a change in gender identity. The operation of the South Australian Sex Reassignment Act 1988 provides for the amendment of birth certificates for transgendered people, but only if the person can provide medical evidence that a surgical sex reassignment has been completed.

Meanwhile, the "euthanasia bill" has had a relatively smooth passage through the Parliament and came into operation in late June 1996.

This may seem a strange juxtaposition of issues, but it highlights the necessity of having either a powerful patron or a visible public presence in order to influence the pace of legislative change in Australia. The euthanasia bill had a particularly visible, powerful and passionate patron, whose passion was apparently fuelled by the experience of watching a close family member go through a prolonged and painful death. In much the same way, the passage of the South Australian Sexual Reassignment Act in 1988 was made easier by heightened media interest in the issue at the time. For

various reasons, the transgender movement in Australia seems to sadly lack either a powerful patron or significant public interest in issues of concern to transgendered people in order to achieve a faster rate of legislative reform.

There has been some progress towards implementing the in-principle agreement of the Attorneys-General, but it has not even across the various Australian legislatures, and it certainly hasn't been undertaken with any great urgency.

Establishing legal identities for transgendered people

Establishing a legal gender identity is difficult for many transgendered people in Australia, especially for transsexual people who have not completed, or even intended to undergo, sex reassignment surgery. Problems with police, welfare agencies and government administrative agencies have occurred when a person's socially accepted and apparent gender identity differs from the birth-assigned gender which is recorded on the birth certificate. Given that the birth certificate is one of the most common forms of validation of legal identity in Australia (along with driver's licences and passports), the ability to obtain an amended birth certificate is a critical issue for many transgendered people.

It has already been stated that only one State will provide legal recognition for transgendered people by issuing amended birth certificates. However, it is important to note that this Act came into effect in South Australia in 1988 and has not been reviewed or substantially amended since its enactment. Our knowledge and understanding of transgenderism has changed significantly in the last eight years, but the legislation has not.

The Western Australian government announced with great aplomb in February 1996 that it would be establishing a board to deal with gender reassignment issues. As at September 1996, the Bill to establish this board has still not been introduced into the Western Australian Parliament; although it is still "on the agenda". It is likely to follow the criteria set by the South Australian government (in 1988), by requiring that sex reassignment surgery be completed before transsexual people are eligible to apply for amendment of their birth certificates. Also, it may be likely that amended birth certificates will only be issued to unmarried or divorced transsexual people. At a time when more and more social recognition is being given to same-sex relationships, this would seem to be an unnecessarily draconian requirement.

Sadly, no progress towards the introduction of law reform to allow legal recognition of changed gender status has been made in the states of Victoria, Queensland, or Tasmania, or in the Australian Capital Territory or the Northern Territory. However there has been some progress made by the New South Wales and Federal Governments.

The New South Wales Government has, in September 1996, introduced a significant package of legislative reforms which address issues affecting transgendered people from the standpoint of Equal Opportunity/Human Rights legislation. This will outlaw discrimination against transgendered people on the basis of their transgender status and should allow for the amendment of birth certificates, but I have been unable as yet to clarify whether, like the South Australian legislation, this will only apply to transsexual people who have completed sex reassignment surgery.

At the Federal level, the Legal and Constitutional References Committee, a Committee of the Senate (the Upper House of the Parliament of Australia) is currently holding an enquiry into "sexuality discrimination" which includes questions of discrimination on the basis of sexuality or transgender identity. It is likely however, that the ultimate shape of any legislative reform will be in terms of amendments to Equal Opportunity and Human Rights legislation. While this is a start, there are other important issues within the Federal Government's area of legislative responsibility

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which also need to be addressed. The Federal Government is responsible for the issue of passports and travel documents. While a passport will be reissued for a transsexual person who has been able to provide medical certification that they have undergone sex reassignment surgery, the passport is accompanied by a letter which takes great pains to point out that the issue of a passport with an amended gender is no more than "an administrative matter, simply to alleviate unnecessary embarrassment while travelling", and that the Federal Government does not recognize the changed gender status of the person in any other respect. Principally this lack of recognition of gender change applies to the Marriage Act 1960, which the Federal Government also administers. It will be interesting to see how many of these issues are addressed in the Senate Committee's report, let alone those that effect legislative reform.

Other issues affecting transgendered people in Australia

The validation of changed gender status is an issue which is probably more pertinent to transsexual transgendered people. There are a number of other issues that generally impact on the lives of transgendered people, whether they are transsexuals, heterosexual cross-dressers, drag queens, masculine women, effeminate men or any other people who consider themselves, or are considered by others, to be transgendered. Principally, these issues pertain to the safety and civil protections which are due to the transgendered, as much as they are afforded to other citizens of our society.

Many transgendered people face harassment, discrimination and vilification on a daily basis. This can occur both in social situations, but alarmingly also occurs in workplaces, despite Australia's stated commitment to equal employment opportunity and the elimination of sexual harassment at work. For many transgendered people, obtaining and keeping satisfactory employment is problematic once their transgender status is known. Although many transgender issues are about gender identity rather than sexual identity or orientation, it is common for transsexual people to experience harassment, particularly through transition and after they come out. The type of harassment experienced by some transgendered people has included outright hostile and offensive behavior from co-workers and a level of sexual harassment that would be considered intolerable and actionable if the victim was a birth-assigned woman or man rather than a transsexual woman or transsexual man.

Legislation has been introduced, at both State/Territory and Federal levels, which is intended to allow people affordable access to the civil courts to sue for unfair dismissal from employment. Shortly, a case involving the unfair dismissal of a transsexual person in transition will test the effectiveness of this legislation in a State court. Cases of harassment and discrimination can be dealt with by the Federal and State Equal Opportunity/Human Rights Commissions if the relevant legislation specifically includes transgendered people, but for many, this is little more than a symbolic protection. If a matter cannot be resolved by conciliation, the cost involved in defending a hearing may cause complainants to withdraw valid complaints. For others, the delay in processing cases, due to large backlogs of complaints, is a disincentive to pursue a valid claim of harassment or discrimination.

It is believed that many transgendered people may be victims of "hate crime" (there is an ignoble tradition of "poofter bashing" in some sections of Australian society), but the actual rate of victimization is difficult to determine. This is because, as in other jurisdictions, the sex/gender of the victim is recorded in police and court records as either "male" or "female". There is no definite indication whether the categorization of the victim is likely to be based on either the legal identity of the victim (as stated in the birth certificate) or is based on the apparent gender identity of the victim. If the former applies, then it is likely that hate crimes against transgendered people are being hidden within the victimization statistics relating to gay-bashing.

Work in progress...

While the previous section of this paper tends to present a rather bleak picture of some of the legal and employment issues affecting transgendered people in Australia, I am pleased to report that there are positive initiatives being undertaken to address some of these issues. By challenging outdated and anachronistic administrative and bureaucratic policies that affect transgendered people, positive change is occurring at a slow but steady rate. Also, there is a steadily growing number of transgender organizations who are successfully raising the visibility and awareness of transgender issues, and are attempting to forge working relationships with other trans-friendly organizations.

In terms of validating a socially accepted gender identity, driver's licences are often used as a proof of identity. So while it is proving cumbersome and frustrating waiting for legislative change to enable legal recognition of a change in gender, there are manageable issues that are being addressed (generally successfully) by trans-activists in Australia. Driver's licences in the state of Victoria include a photo of the licence holder, but do not record the sex/gender of the licence holder. This is directly due to the activism of trans-activists who challenged the necessity of recording gender on the licence. Their persistent letter-writing campaign eventually convinced the administration to change its policy and practices. A similar gain has been achieved by trans-activists in the Australian Capital Territory. Although gender is for the time being recorded on the licence, two trans-women were able to obtain licences which reflected their change in gender identity. The letter which advised one of the women that her request for her gender to be changed on the licence, to be more consistent with the photograph on the licence was at great pains to point out that the decision to allow this was an administrative decision only, and did not constitute legal recognition of her change in gender status. The change in licence was also dependent on her producing documentation to prove that she had undergone sex reassignment surgery.

Following the conciliation of a complaint about the inclusion of gender on driver's licences in the Australian Capital Territory, it is likely that although gender may continue to be recorded in the official records of the Motor Vehicle Registry, it will no longer be recorded on the face of the licence. This should avert some of the practical day-to-day issues faced by transgendered people trying to affirm a gender identity different to their birth-assigned gender.

There is evidence of a growing awareness of transgender issues generally. For example, in the recent Federal election, Australia's first openly transsexual candidate, Julie Peters, obtained preselection for the seat of Batman in Victoria. What was interesting during her campaign was the generally favorable attention of the media. The way in which Julie Peters' campaign was reported by the media is indicative of a greater interest in transgender issues that has become evident in the Australian media recently. Significantly, there has been a willingness in some sectors of the media to portray transgendered people sympathetically, as real people rather than as stereotyped freaks living in the margins of society.

With the greater level of awareness of transgender issues, there have been some attempts to achieve a level of cohesive activism both within and beyond the sphere of transgender activism. However there are two factors that tend to mitigate against this. The first is that many activists erroneously assume that the transgendered represent a homogenous cohesive community, united by their experience of various forms of gender oppression. In fact, at best the transgendered represent a coalition of smaller communities. There is no one transgender community, and in fact, many transgendered people would not want to be distinguished by their transgender status as being part of a wider transgender community. For many transgendered people, their very security is dependent on their ability to avoid detection of their transgender identity and status.

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The second factor that impedes a greater level of activism is related to the politics of identity. While transgenderism is a gender issue, rather than a sexuality issue per se, many transgender people necessarily confront issues of sexuality. There has generally been a mixed reaction from the gay and lesbian communities in Australia to transgender issues, and this, to some extent, mirrors the difficulties faced by bisexual activists attempting to stake out a place in the queer community. The reactions from the gay and lesbian communities have ranged from a number of organizations becoming actively trans-inclusive (for example, Queer Collaborations), to a regrettable episode in New South Wales last year when a lesbian collective determined that lesbian space should be open only to "women born women", a determination which specifically excluded trans-lesbians from lesbian space (the Lesbian Space Project).

Conclusion:

It would appear therefore that many of the legal and employment issues affecting transgendered people are not so different from those faced by transgendered people in other jurisdictions. In Australia, for the time being at least (and on the basis of anecdotal reports), the public health system, Medicare, seems generally to be able to cope with the demand for medical and paramedical services by transsexual people seeking medical intervention, at least for male-to-female transsexual people. While there is still some cost involved, the situation does not appear to be as problematic as that in the United States is often reported to be.

To end on a positive note, it is pleasing to observe that coalitions are being formed between transactivists and other queer activists in the interest of creating a more broadly-based queer activism which does not take matters of sex, gender or sexuality for granted. An activism based on the intersections between the issues affecting lesbians, gay men, bisexuals, transgendered people and queer-minded heterosexual people has tremendous potential to effect the social and legislative change that we seek in order to protect and celebrate the diversity and richness of human experience.

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Jane Langley: Jane is an "out" transgender and lesbian activist who was instrumental in setting up the "Australasian Good Tranny Guide" on the World Wide Web which has proved to be an invaluable resource for transgendered and non-transgendered people alike. Jane has maintained a number of transgender and lesbian related resources and mailing lists on the internet, and in her "spare" time can sometimes be found strumming a lute.

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