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Human Rights Committee

Views adopted by the Committee under article 5 (4) of the Optional Protocol, concerning communication No. 2172/2012*, **

<i>Communication submitted by:</i>	G. (represented by counsel, DLA Piper Australia)
<i>Alleged victim:</i>	The author
<i>State party:</i>	Australia
<i>Date of communication:</i>	2 December 2011 (initial submission)
<i>Document references:</i>	Decision taken pursuant to rule 97 of the Committee's rules of procedure, transmitted to the State party on 11 July 2012 (not issued in document form)
<i>Date of adoption of Views:</i>	17 March 2017
<i>Subject matter:</i>	Refusal to have the sex changed on the birth certificate of a married transgender person
<i>Procedural issues:</i>	Lack of "victim" status; insufficient substantiation
<i>Substantive issues:</i>	Right to privacy and family; right to non-discrimination; right to an effective remedy
<i>Articles of the Covenant:</i>	2 (1), 2 (3), 17 and 26
<i>Articles of the Optional Protocol:</i>	1, 2

1. The author of the communication is G., a national of Australia born in 1974. She claims that the State party has violated her rights under articles 2 (3), 17, and 26 together with 2 (1) of the Covenant. The Optional Protocol entered into force for the State party on 25 December 1991. The author is represented by counsel.

The facts as submitted by the author

2.1 The author is male-to-female transgender. She was born in New South Wales, Australia, and was registered as male at birth. In 2000, the author began hormone treatment,

* Adopted by the Committee at its 119th session (6-29 March 2017).

** The following members of the Committee participated in the examination of the present communication: Tania María Abdo Rocholl, Yadh Ben Achour, Ilze Brands Kehris, Sarah Cleveland, Olivier de Frouville, Ahmed Amin Fathalla, Christof Heyns, Yuji Iwasawa, Bamarian Koita, Marcia V.J. Kran, Duncan Laki Muhumuza, Mauro Politi, José Manuel Santos Pais, Anja Seibert-Fohr, Yuval Shany and Margo Waterval.



because she identified as female. On 11 April 2002, she had her name on her birth certificate changed to G. Shortly thereafter, the author also had her name changed on her driver's licence, Medicare card and bank and credit cards. In 2005, the author applied to the State party's authorities for an interim passport for the purpose of travelling abroad to undergo gender reassignment surgery. On 7 July 2005, she was issued with a passport valid until 7 July 2006, listing her as female. On 3 September 2005, she married her current partner, who is female. In October 2005, the author underwent sex affirmation surgery.¹

2.2 As a matter of law, in Australia sex is no longer considered on a purely biological basis or fixed at birth but rather is a question of fact to be determined by looking at all the relevant circumstances, including both psychological and physical characteristics, as well as the purpose for which the determination is to be made.² Gender reassignment is lawful in Australia and post-operative transgender individuals are provided with the opportunity to be legally recognized as their reassigned sex and are protected from discrimination on transgender grounds.

2.3 In Australia, state and territory Governments administer legislation in relation to the registration of births, deaths and marriages. All states and territories have legislation that allows a transgender individual to alter their passport or obtain an identity document that reflects their reassigned sex. In New South Wales, the legislation that enables this is the New South Wales Births, Deaths and Marriages Registration Act 1995. Under the Act, the New South Wales Registry of Births, Deaths and Marriages (hereinafter referred to as the New South Wales Registry) maintains a register of all recordable events, such as births, name changes, changes in sex and so on. Certificates, such as a change of name certificate or a birth certificate, are a reflection of the information recorded in the register. The New South Wales Government amended the Births, Deaths and Marriages Registration Act 1995 by the New South Wales Transgender (Anti-Discrimination and Other Acts) Amendment Act 1996, which allows an individual over the age of 18 who has undergone a sex affirmation procedure and who is not married to apply to New South Wales Registry to have their sex changed in the register and have a new birth certificate issued.³ The new certificate does not reveal that the person is transgender.

2.4 The Federal Government has implemented anti-discrimination legislation that prohibits discrimination on the basis of disability, race, age and sex. The federal Sex Discrimination Act 1984 prohibits discrimination on the basis of marital status but it does not prohibit discrimination against persons who are sex and gender diverse. Section 40 (5) of the federal Sex Discrimination Act 1984 specifically permits state and territory Governments to "refuse to make, issue or alter an official record of a person's sex if a law of a State or Territory requires the refusal because the person is married".

2.5 The New South Wales Anti-Discrimination Act 1977 prohibits discrimination on transgender grounds in work, education, and the provision of goods, services and accommodation. The Act distinguishes between persons who have changed their birth certificate, either in New South Wales or elsewhere, known as recognized transgender persons, and those who have not changed their birth certificate.⁴ Persons who have not changed their birth certificate are protected from discrimination on the basis of being

¹ According to a post-operative medical certificate issued by Phuket International Hospital, Thailand, on 20 October 2005, the author underwent irreversible two-stage male-to-female sex reassignment surgery on 5 and 14 October 2005. The surgery was successfully completed.

² *Attorney-General for the Commonwealth v. "Kevin and Jennifer"*, [2003] FamCA 94 (21 February 2003).

³ Section 32B (1) of the Births, Deaths and Marriages Registration Act 1995 provides that: "A person who is 18 or above ... whose birth is registered in New South Wales ... who has undergone a sex affirmation procedure, and ... who is not married, may apply to the Registrar, in a form approved by the Registrar, for alteration of the record of the person's sex in the registration of the person's birth." Section 32D (3) of the Births, Deaths and Marriages Registration Act 1995 provides that "an alteration of the record of a person's sex must not be made if the person is married". Section 32I of the same act provides that a person who changes the record of their sex under section 32B (1) is considered to be that sex for all other laws of New South Wales and an individual has a right to be treated under the law as their reassigned sex.

⁴ See sections 38A and 38B of the New South Wales Anti-Discrimination Act 1977.

transgender persons, however they do not have a legal right to be treated as their reassigned sex.

2.6 On 10 January 2006, the author applied to the New South Wales Registry to have her sex changed on her birth certificate, from male to female. Her application was rejected on 12 January 2006. In 2007, the author applied for and received her passport in which it was stated that she was female. On 27 October 2008 and 27 July 2010, the author again applied to have her sex changed on the birth certificate, but was refused on 21 November 2008 and 30 July 2010 respectively. In a letter dated 30 July 2010, the New South Wales Registry stated that under section 32B (1) (c) of the Births, Deaths and Marriages Registration Act 1995, a person must be unmarried at the time of their application to register a change of sex. In this context, the author submits that she is in a loving relationship with her spouse and does not intend to apply for a divorce.

2.7 Under the State party's identification systems, the most important identity documents are the so-called cardinal documents, and a birth certificate is the primary cardinal document for persons born in Australia. Secondary documents, such as passports and driving licences, are not considered the source data of a person's identity but rather as trusted evidence of the person's identity. For the purpose of the majority of laws in Australia, an individual will be treated as being of the sex recorded on their birth certificate. However, since 2007, an individual is able to obtain a passport denoting their reassigned sex even without changing their birth certificate. This can lead to a confusing situation where a person will have conflicting identity documents.

2.8 An individual is often required by various organizations and service providers to produce their birth certificate to prove their identity, including when applying for some employment positions. It is stated on the author's birth certificate that she was born male but presents and identifies as female, which is evidence to persons viewing her birth certificate that she is transgender. This is not only an invasion of privacy but can expose an individual concerned to vilification, harassment and discrimination. In the author's case, it can and does lead to negative treatment, such as questioning and suspicion of fraud. She has also found it hard to obtain employment. For the reasons explained in paragraph 2.5 above, the author will not receive protection from discrimination against women under the New South Wales Anti-Discrimination Act 1977, and she can be refused employment where the jobs are only available to women and can be refused access to women-only spaces such as women-only gyms.

2.9 All domestic remedies have been exhausted. There are no avenues available within New South Wales to appeal the decision of the New South Wales Registry. First, the Administrative Decisions Tribunal may interpret and construe the legislation but it does not have the power to alter the legislation or to examine legislation to ensure that it conforms with the country's human rights obligations. An application to the Tribunal would therefore be futile.

2.10 Second, since the New South Wales Registry's decision to refuse the author's application was made in order to comply with the requirement under section 32B (1) (c) of the Births, Deaths and Marriages Registration Act 1995, that decision was lawful pursuant to section 54 of the New South Wales Anti-Discrimination Act 1977 and thus a complaint to the Anti-Discrimination Board would also be futile. Furthermore, the Anti-Discrimination Board's recommendations are not binding and the New South Wales Government is not required to act upon them. Indeed, in 2001 the Board reviewed the Births, Deaths and Marriages Registration Act 1995 with regard to transgender discrimination. It found that the requirement that an individual not be married was unnecessarily restrictive and constituted discrimination on the basis of marital status. The Board recommended that the marital status requirement be removed from the Births, Deaths and Marriages Registration Act 1995.⁵ This recommendation has not been implemented by the New South Wales Government.

⁵ See the Anti-Discrimination Board's review of the Births, Deaths and Marriages Registration Act 1995 (New South Wales), 2001.

2.11 An application to the Federal Court of Australia seeking a declaration that section 32B (1) (c) of the Births, Deaths and Marriages Registration Act 1995 is invalid, as inconsistent with the Sex Discrimination Act 1984, would not provide an effective remedy to the author. She refers to a similar case in which the Federal Court held in 2006 that there was no inconsistency between section 32B (1) (c) of the Births, Deaths and Marriages Registration Act 1995 and section 22 of the Sex Discrimination Act 1984.⁶ The Federal Court established that the Sex Discrimination Act 1984 only applies to state and territory legislation to the extent that it gives effect to the obligations of Australia under the Convention on the Elimination of All Forms of Discrimination against Women. Since the Births, Deaths and Marriages Registration Act 1995 discriminates against women and men equally, the Sex Discrimination Act 1984 did not, at that time, apply. The Full Court of the Federal Court upheld the original decision.⁷ Since the Full Court's decision, the Sex Discrimination Act 1984 has been amended to include section 40 (5) (see para. 2.4 above).

2.12 In October 2010, the author filed a complaint with the Australian Human Rights Commission, alleging discrimination on the ground of sex and marital status under section 22 of the Sex Discrimination Act 1984. On 14 April 2011, the complaint was terminated by the Commission as misconceived, on the basis that section 22 did not apply to the conduct of the New South Wales Registry and that, as such, the conduct was outside the Commission's jurisdiction.⁸ The author argues that, in the light of section 40 (5) of the Sex Discrimination Act 1984, an appeal of the Commission's decision to the Federal Court or to the Federal Magistrates Court would be futile.

2.13 The Commission can examine enactments, and proposed enactments, for the purpose of ascertaining their consistency with human rights.⁹ Under these powers, the Commission has made the following comments with regard to sex recognition on birth certificates for married persons:

(a) The Commission recommends that marital status should not be a relevant consideration as to whether or not a person can request a change in legal sex. It is the Commission's view that a person should not be forced to end their marriage in order to have a change in sex legally recognized.

(b) Under international human rights law, discrimination on the basis of a protected attribute or characteristic, including marital status, is prohibited. As a party to the relevant international instruments, Australia is obliged to ensure that it takes all necessary steps to ensure that legislation does not impermissibly discriminate against a person based on their marital status.

(c) As the law currently stands, there does not appear to be any legal basis upon which a person can challenge the discrimination against married persons inherent in relevant state and territory legislation dealing with amendments to birth certificates. In the Commission's view, this puts Australia in breach of its international obligations in relation to marital status discrimination. Legislative change is therefore required to remedy this situation.

(d) [...] Recommendation: Marital status should not be a relevant consideration as to whether or not a person can request a change in legal sex.¹⁰

2.14 The Commission's report and recommendations were provided to the federal and state Governments for consideration, but have not been implemented. As they are non-binding, the federal and state Governments are not required to act upon them. The author concludes that no effective remedy is available to her under the Australian Human Rights Commission Act 1986.

⁶ *AB v. Registrar of Births, Deaths and Marriages*, [2006] FCA 1071.

⁷ *AB v. Registrar of Births, Deaths and Marriages*, [2007] FCAFC 140.

⁸ In reaching its decision on the author's complaint, the Commission applied the findings of the Full Court of the Federal Court (see the footnote immediately above).

⁹ Australian Human Rights Commission Act 1986, section 11.

¹⁰ Australian Human Rights Commission, *Sex Files: The Legal Recognition of Sex in Documents and Government Records* (2009).

The complaint

3.1 The author claims that the refusal to change her sex on her birth certificate, unless she divorces from her spouse, constitutes direct arbitrary interference with her right to privacy under article 17 of the Covenant. While it is lawful for organizations and individuals to require a person to provide a copy of their birth certificate as proof of identity, there is no reasonable basis and no legitimate justification for the requirement that an individual be unmarried in order to change their sex on their birth certificate. The author claims, therefore, that the marital status requirement constitutes an interference which is not reasonable and which does not comply with the provisions, aims and objectives of the Covenant. Furthermore, the State party has failed to take appropriate legislative measures to prevent such interference, by virtue of section 40 (5) of the Sex Discrimination Act 1984.

3.2 The author argues that the invasion of privacy stems from the fact that her current sex is different from that recorded on the birth certificate.¹¹ The birth certificate therefore reveals private information about the fact that she is transgender. The author submits that her privacy includes the right to control information about the fact that she is transgender and about her medical history. The interference with the right arises when information is revealed to the public by a requirement of law or without the individual's consent. The author also claims that the concept of privacy includes the right of an individual to protection of personal autonomy and to have freedom to establish the details of their identity, including their sex.

3.3 Requiring her to divorce from her spouse in order to obtain a birth certificate that correctly identifies her sex is an arbitrary interference with the author's right to family under article 17. While the State party has a broad understanding of the term "family", which includes families where the couples are of the same sex, providing them with the same social and legal rights as de facto heterosexual couples, the author cannot change her birth certificate because she is married. This constitutes an interference with the author's right to family which is not reasonable and does not comply with the provisions, aims and objectives of the Covenant.

3.4 By failing to implement legislation that prohibits discrimination on the basis of marital and transgender status and that guarantees to all persons equal and effective protection against such discrimination, the State party violated the author's rights under articles 2 (1) and 26 of the Covenant.

3.5 Furthermore, in violation of article 2 (3) of the Covenant, the State party failed to provide the author with an effective remedy in relation to the above-mentioned violations.

3.6 In the light of the above, the author requests the Committee to make a finding that: (a) section 32B (1) (c) of the Births, Deaths and Marriages Registration Act 1995 violates articles 2 (1), 17 and 26; (b) section 40 (5) of the Sex Discrimination Act 1984 violates articles 2 (1), 17 and 26; and (c) part 3A of the New South Wales Anti-Discrimination Act 1977 violates articles 2 (1) and 26. She also requests that she be allowed to change her sex on her birth certificate to female, and that the State party be directed to take appropriate legislative measures to ensure that these violations do not continue.

State party's observations on admissibility and the merits

4.1 On 8 July 2013, the State party provided its observations on the admissibility and the merits. On the facts, the State party notes that, on 20 April 2006, the author applied for an Australian passport, stating in the application that her gender was female. Her initial passport application was unsuccessful, as she was unable to obtain an alteration of the sex recorded on her birth certificate due to section 32B (1) (c) of the Births, Deaths and Marriages Registration Act 1995. However, on appeal, the Administrative Appeals Tribunal referred the passport application back to the Minister for Foreign Affairs and Trade with a

¹¹ The Committee previously has indicated that States should "recognize the right of transgender persons to a change of gender by permitting the issuance of new birth certificates" under, inter alia, article 17 (see CCPR/C/IRL/CO/3, para. 8).

direction that a passport should be issued to the author noting her female gender. The sex on the author's passport was subsequently changed.

4.2 The State party does not contest that the author has exhausted domestic remedies, but submits that she has not sufficiently substantiated her claims and that they should be declared inadmissible. The author has not demonstrated how she has suffered specific and direct harm from not being able to change the sex on her birth certificate, except to state in general terms that she suffers "negative treatment" and "has found it hard to obtain employment". The State party submits that there is no evidence that it has interfered with the author's privacy or family in any way.

4.3 The State party notes that the author has obtained a passport with her new sex, and that although birth certificates are considered cardinal documents in Australia, in practice there are very limited circumstances where she would be required to show her birth certificate as the primary means of identification. For example, in New South Wales, driving licences do not specify gender, and under the Financial Transaction Reports Act 1988, passports are given the same "point value" as birth certificates.

4.4 Should the Committee find the claims to be admissible, they should be declared without merit. Regarding the claims under article 17, the State party does not dispute that privacy under this provision includes protection of a person's identity, for example of their gender identity. However, this article does not create a "right to privacy" but a right to freedom from arbitrary or unlawful interference with privacy. The term "unlawful" means that no interference can occur, except in cases provided for by law. With respect to whether there is unlawful interference with the author's privacy, the Births, Deaths and Marriages Registration Act 1995 does not constitute unlawful interference with privacy.

4.5 The *travaux préparatoires* indicate that the term "arbitrary" in article 17 was intended to cover interferences that are unreasonable.¹² The term "arbitrary" also contains elements of injustice and unpredictability. The State party interprets "reasonable" interferences with privacy as measures that are based on reasonable and objective criteria and are proportional to their purpose.¹³

4.6 It is unclear from the author's claims whether she is referring to interference with privacy in circumstances where individuals or organizations request her birth certificate or interference with privacy with respect to the operation of sections 32B (1) (c) and 32D (3) of the Births, Deaths and Marriages Registration Act 1995. In this respect, the author has failed to provide clear examples of where she has experienced any actual interference with her privacy, as noted. Furthermore, interference with privacy is not arbitrary when based on objective and reasonable criteria that are proportionate to the aim.

4.7 Section 32B (1) (c) was inserted into the Births, Deaths and Marriages Registration Act 1995 by the New South Wales Transgender (Anti-Discrimination and Other Acts) Amendment Act 1996 to ensure that amendments granting certain transgender persons the right to apply for new birth certificates showing their new sex would operate consistently with section 5 (1) of the Marriage Act 1961, which defines marriage as being between a man and a woman. As noted in the second reading speech for the New South Wales Transgender (Anti-Discrimination and Other Acts) Amendment Act 1996, "the legislation is not intended to overturn the provisions of the Commonwealth Marriage Act. Thus, a new certificate will not be issued where the applicant is married".¹⁴

4.8 The State party reiterates that any perceived interference with the author's privacy has not been sufficiently substantiated. Even if the Committee considers that there has been interference, such interference is not disproportionate. Sections 32B (1) (c) and 32D (3) of the Births, Deaths and Marriages Registration Act 1995 are based on a legitimate aim under

¹² See also the Committee's general comment No. 16 (1988) on the right to respect of privacy, family, home and correspondence, and protection of honour and reputation, para. 4.

¹³ See communication No. 488/1992, *Toonen v. Australia*, Views adopted on 31 March 1994, para. 6.4.

¹⁴ Parliament of New South Wales, Parliamentary debates, Legislative Assembly, 1 May 1996, p. 644.

the Covenant¹⁵ and are reasonable and proportionate to the aim of ensuring consistency with the definition of marriage in the Marriage Act 1961.

4.9 Likewise, should the Committee find the author's claims regarding interference with her family under article 17 to be admissible, no such interference has taken place. Australia has not compelled the author to change her family circumstances and there has not been any interference with her family by reason of the Births, Deaths and Marriages Registration Act 1995. Even if the Committee considers that interference with the author's family has arisen, such interference is not arbitrary, because the exemption in sections 32B (1) (c) and 32D (3) of the Births, Deaths and Marriages Registration Act 1995 is reasonable and proportionate to the legitimate aim of ensuring consistency with the definition of marriage. Accordingly, the author's arguments regarding arbitrary interference with the family lack merit.

4.10 With respect to the author's claims under article 2 of the Covenant, the State party submits that those claims can only be considered in conjunction with article 17 and that the author failed to articulate the claims of discrimination under those articles. Therefore, should the Committee find the author's claims under article 17 inadmissible and/or without merit, then her claims under article 2 would also be inadmissible *ratione materiae*.

4.11 The State party recognizes that the obligation to protect individuals from discrimination on the basis of sexual orientation extends to ensuring that unmarried same-sex couples are treated in the same way and entitled to the same benefits as unmarried heterosexual couples and that any distinction in treatment must fulfil the criteria for legitimate differential treatment under international law.¹⁶ However, any distinction in the enjoyment of the author's rights under article 17 is based on legitimate differential treatment.

4.12 The State party submits that the right to marry under article 23 of the Covenant only applies to heterosexual marriages.¹⁷ The European Court of Human Rights has also adopted this approach, holding that no obligation is imposed upon States under the Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights) to recognize same-sex marriage.¹⁸ Sections 32B (1) (c) and 32D (3) of the Births, Deaths and Marriages Registration Act 1995 were introduced to ensure consistency with the Marriage Act 1961, which constitutes a legitimate aim under the Covenant. Furthermore, the distinction under these sections is based on reasonable and objective criteria, namely that a person must be unmarried in order to change the sex on their birth certificate should they have undergone a sex affirmation procedure. These criteria are not arbitrary, as they are predictable in their operation and sufficiently precise. The State party submits, therefore, that these provisions are a reasonable, necessary and appropriate means of achieving their aim of enabling transgender persons to change their birth certificate, while ensuring consistency with the Marriage Act 1961.

4.13 The distinction between married and unmarried persons who have undergone a sex affirmation procedure and request to amend their sex on their birth certificate is a proportionate measure to ensure consistency with the definition of marriage under the Marriage Act 1961 and to avoid the uncertainty about the status of marriages that would have arisen if the exemption in the Births, Deaths and Marriages Registration Act 1995 had not been enacted. Sections 32B (1) (c) and 32D (3) of the said act go no further than is necessary to achieve their objective and are therefore not disproportionate means of achieving that aim.

4.14 With respect to the author's claims under article 26 of the Covenant, the State party submits that the term "other status" under articles 2 and 26 of the Covenant includes

¹⁵ See communication No. 902/1999, *Joslin et al. v. New Zealand*, Views adopted on 17 July 2002, para. 8.3.

¹⁶ See communication No. 941/2000, *Young v. Australia*, Views adopted on 6 August 2003, para. 10.4.

¹⁷ See *Joslin et al. v. New Zealand*, para. 8.2.

¹⁸ See *Schalk and Kopf v. Austria* (application No. 30141/04, 24 June 2010) and *Gas and Dubois v. France* (application No. 25951/07, judgment of 15 June 2012).

“marital status” as well as “gender identity”.¹⁹ In contrast to article 2, article 26 is a stand-alone right that will be breached if the author does not enjoy equality before the law or equal protection of the law with others, on the basis of discrimination on a prohibited ground.²⁰ Article 26 encompasses two complementary rights to equality. The first relates to equality before the law, which is a procedural requirement that is not directed at legislation but rather exclusively at its enforcement. The second right, to equal protection of the law, relates to the substance of the laws imposed by public authorities. The State party understands that the author’s claims of discrimination under article 26 with respect to domestic anti-discrimination legislation and the Births, Deaths and Marriages Registration Act 1995 concern the latter aspect of article 26.

4.15 The right to equality of the law imposes two distinct obligations on States parties: namely, that national legislatures must take positive measures to enact laws specifically prohibiting discrimination and must refrain from discrimination when enacting legislation. The State party recalls that the author has claimed that section 32B (1) (c) of the Births, Deaths and Marriages Registration Act 1995 is discriminatory on the basis of “marital status” and “gender identity”, and that there are no available domestic remedies with respect to domestic anti-discrimination legislation. The State party reiterates its argument that any alleged distinction in treatment under sections 32B (1) (c) and 32D (3) of the Births, Deaths and Marriages Registration Act 1995 on the basis of “other status” is reasonable, proportionate and objective, and that the aim of the treatment is to achieve a purpose which is legitimate under the Covenant.

4.16 The author has not demonstrated how the New South Wales Anti-Discrimination Act 1977 discriminates against her on the basis of “other status”. It recalls the author’s claim that under the said act, a transgender person who has undergone sex affirmation surgery and changed the sex on their birth certificate is considered to be a recognized transgender person and can legally require others to treat them as their reassigned sex, whereas a person who is not a recognized transgender person can only insist on being treated as their reassigned sex when reasonable with regard to all the circumstances (see paras. 2.4, 2.5 and 2.8 above).

4.17 In this context, the State party acknowledges that section 4 of the New South Wales Anti-Discrimination Act 1977 defines a recognized transgender person as a person whose record of their sex has been altered on their birth certificate, under part 5A of the Births, Deaths and Marriages Registration Act 1995. It notes, however, that under section 38A of the New South Wales Anti-Discrimination Act 1977, a transgender person is defined as a person, whether or not the person is a recognized transgender person: (a) who identifies as a member of the opposite sex by living, or seeking to live, as a member of the opposite sex; or (b) who has identified as a member of the opposite sex by living as a member of the opposite sex; or (c) who, being of indeterminate sex, identifies as a member of a particular sex by living as a member of that sex, and includes a reference to the person being thought of as a transgender person, whether the person is, or was, in fact a transgender person.

4.18 Part 38C of the New South Wales Anti-Discrimination Act 1977 provides that it is unlawful for an employer to discriminate against a person on transgender grounds in employment. Section 54 of the New South Wales Anti-Discrimination Act 1977 also provides that nothing in the legislation renders unlawful anything done by a person if it was necessary for the person to do it in order to comply with the requirement of another Act.

4.19 With respect to the author’s claims summarized in paragraph 2.8 above, in circumstances where a relevant job is only available to women, refusal of employment may constitute discrimination on transgender grounds under section 38B (1) (a) of the New South Wales Anti-Discrimination Act 1977 and would therefore breach section 38C of the said act. The same provisions apply with regard to refusal of access to female-only gyms. The State party reiterates that the author has not provided any evidence of specific instances

¹⁹ The State party emphasizes that in *Toonen v. Australia*, para. 6.9, it recognized that the language of these provisions supports an inclusive interpretation, and that the language, negotiating history and Committee’s jurisprudence regarding these articles establish a strong argument that they should not be read restrictively.

²⁰ See the Committee’s general comment No. 18 on non-discrimination (1989), para. 12.

where she has suffered detriment or harm. Even if the Committee considers such claims to be substantiated, the State party submits that the author's claims under article 26 with respect to the New South Wales Anti-Discrimination Act 1977 lack merit.

4.20 Should the Committee consider that there has been a distinction in treatment on the basis of marital status ("other status") with respect to the operation of the New South Wales Anti-Discrimination Act 1977, the State party reiterates that the legislation has a legitimate aim of ensuring consistency with the Marriage Act 1961.

4.21 As to the author's claims regarding article 2 (3) of the Covenant, the State party submits that there is no obligation to provide a remedy, as there has been no breach of articles 2, 17 and 26.

Author's comments on the State party's observations

5.1 In her comments of 12 November 2014, the author states that consistency between birth registrations and the Marriage Act 1961 is not a legitimate aim consistent with the objectives and aims of the Covenant. Nor is the State party's refusal to provide legal recognition of the author's sex on her birth certificate reasonable or proportionate to achieving such an aim.

5.2 The author states that in July 2013, the Sex Discrimination Act 1984 was amended to include protection against discrimination on the basis of sexual orientation, gender identity and intersex status. As a result, the Act now protects against discrimination in the provision of services. Section 40 (5) of the Act, however, remained unchanged to exempt state and local laws requiring refusal to alter an official record of a person's sex because the person is married. The State party had the opportunity to amend the legislation to provide protection to persons in the author's position, but failed to do so.

5.3 In July 2013, the Attorney-General's Department, of the Federal Government, released the "Australian Government guidelines on the recognition of sex and gender", to be applied by all federal government departments and agencies that maintain personal records and/or collect sex and/or gender information. The guidelines specify that the Government of Australia will recognize as sufficient evidence of a person's sex and/or gender either: (a) a statement from a registered medical practitioner or registered psychologist; (b) a valid travel document of the Government of Australia, such as a passport; or (c) an amended birth certificate or gender recognition certificate. However, the guidelines do not apply to state government departments or to private entities. It is also up to each agency to determine whether a birth certificate is necessary. Thus, there is no guarantee that a birth certificate will not be requested, nor an indication of whether or when it would be valid to request one.

5.4 It is noted in the guidelines that where there is conflicting information in official documents, the department or agency may seek further information and supporting evidence to corroborate a person's identity. Thus, where a person's passport may state one sex but their birth certificate states another, the department or agency is empowered to ask for further information to establish their identity.

5.5 The author refers to a recent judgment of the European Court of Human Rights.²¹ The case concerned a married transgender woman in Finland who wished to obtain a new female identity number. At present, the laws in Finland do not allow a person to change their legal sex by obtaining a new identity number if they are married. They can, however, choose to have their marriage converted to a civil union. The Court found that, while there had been a breach of privacy under article 8 of the European Convention on Human Rights, it was reasonable and proportionate given that same-sex marriage was not recognized. In considering whether the interference with privacy was within the margin of appreciation allowed to States within the European system, however, the Court placed considerable weight on the fact that the applicant could obtain recognition of her marriage as a civil union. The author submits that this is not an option available to her or in Australia

²¹ See *Hämäläinen v. Finland* (application No. 37359/09), judgment of 16 July 2014.

generally.²² In addition, the case can be distinguished because article 14 of the European Convention on Human Rights requires equality only in enjoyment of Convention rights, while article 26 of the Covenant is a stand-alone provision regarding equality before the law.

5.6 With respect to admissibility, the author states that the refusal to allow a change of sex on her birth certificate, a document that prima facie establishes her legal identity for all other laws, is sufficient to establish an interference with her privacy and her status as a victim under article 17. The Committee has long recognized that identity is an important aspect of privacy, and that privacy “refers to the sphere of a person’s life in which he or she can freely express his or her identity, be it by entering into relationships with others or alone”.²³ Restricting or prohibiting a person from establishing even small details of their identity, such as the spelling of a surname,²⁴ is an interference with the right to privacy. The European Court of Human Rights has also reiterated that “a post-operative transsexual may claim to be a victim of a breach of his or her right to respect for private life ... on account of the lack of legal recognition of his or her change of gender”, citing numerous cases.²⁵ The State party has not indicated why a failure to legally recognize her sex by way of a change on her birth certificate does not amount to such an interference.

5.7 With regard to the State party’s argument that there is a limited number of circumstances in which the author would be required to show her birth certificate as the sole means of identification and that she has failed to give any such example, the author maintains that the failure to amend her birth certificate is sufficient to establish victim status and a breach of article 17. However, should the Committee require further argument, the author submits that: (a) examples of actual requests are not required, as the threat of potential future requests is sufficient; and (b) whether a birth certificate is requested as the primary means of identification, or as one of a number of means, is immaterial. By producing her birth certificate, the author would be forced to reveal the fact that she is transgender.

5.8 The author contends that the possibility of being asked for a birth certificate is itself a “harm” establishing a violation. The Committee has held that domestic legislation may be incompatible with the Covenant even where it has not been directly implemented in regard to the particular author.²⁶ As such, it is not necessary for the author to show a particular case where her birth certificate has had to be shown. It is sufficient for her to demonstrate the uncertainty and stress associated with knowing that it may need to be shown for employment, insurance, wills or estate purposes. Furthermore, the Committee has found cases to be admissible where a particular discriminatory law allows for the possible performance of other discriminatory acts. Thus, the Committee has found that a law creating the possibility that men might be deported on a discriminatory basis, and the resulting stress they suffered, was sufficient.²⁷ The uncertainty around when and where the author may be asked for a birth certificate itself has been a cause of great stress and anxiety for her. The stigma and stress associated with the potential for her transgender identity to be revealed by showing a birth certificate has also influenced the author’s choice of career and study. She has avoided applying for roles where a birth certificate may be requested, and she has withdrawn from processes where a birth certificate was requested, such as university applications. The author adds that her concerns are justified given that

²² The author indicates that she wants to preserve her marriage rather than to have it converted to a civil union.

²³ See communication No. 453/1991, *Coeriel and Aurik v. Netherlands*, Views adopted on 31 October 1994, para. 10.2.

²⁴ See communication No. 1621/2007, *Raihman v. Latvia*, Views adopted on 28 October 2010, para. 8.3.

²⁵ See *Hämäläinen v. Finland*, para. 59. See also *Goodwin v. United Kingdom* (application No. 28957/95), judgment of 11 July 2002, para. 77.

²⁶ See, for example, communication No. 35/1978, *Aumeeruddy-Cziffra et al. v. Mauritius*, Views adopted on 9 April 1981, para. 9.2; and *Toonen v. Australia*, para. 5.1.

²⁷ See *Aumeeruddy-Cziffra et al. v. Mauritius*.

discrimination and stigma around transgender persons is still high in Australia, including in New South Wales.²⁸

5.9 Moreover, although the author maintains that she does not need to establish actual requests, she was recently asked to present a birth certificate to the administrators of her father's will in order to prove her relationship to her father, given that a birth certificate is, among other things, recognition of a change of name and of paternity.

5.10 As to the State party's argument that no interference with the author's family has occurred as it has not "compelled" her to obtain a divorce, she submits that this approach is incorrect. She has a right to be recognized as female on her birth certificate and she also has a right to be free from arbitrary interference with her family. Her enjoyment of one right cannot be made contingent on declining to exercise another right.²⁹

5.11 The author submits that discrimination on the basis of sexual orientation is not relevant here. However, should the State party's arguments be found relevant by the Committee, the State party's characterization of its obligations is incorrect. The Committee has previously held that distinctions between married and unmarried heterosexual couples were reasonable and objective because "the couples in question had the choice to marry or not, with all the ensuing consequences".³⁰ However, same-sex couples do not have the opportunity to choose to marry in Australia. Thus, the obligation to treat unmarried same-sex and unmarried heterosexual couples equally is not a suitable comparison.

5.12 The author disagrees with the State party's observations regarding article 26 of the Covenant. She claims that under the current legislation in Australia, she is not afforded equal protection compared with a non-transgender woman or compared with an unmarried transgender woman. She is thus discriminated against on the basis of her marital status, her transgender identity and/or a combination of both. Both fall within the concept of "other status" in article 26. She also disputes that consistency with the Marriage Act 1961 is a legitimate aim. Although in *Joslin v. New Zealand* the Committee could not find that "by mere refusal to provide for marriage between homosexual couples" the State had breached Covenant rights,³¹ that does not mean that preventing same-sex couples from being married is a legitimate aim.

5.13 The author states that both the United Nations High Commissioner for Human Rights and the Yogyakarta Principles have called for legal recognition of gender identity regardless of marital status,³² and that this view has been widely supported. Given the view that legal recognition of sex can and should occur regardless of marital status, there is little support for the claim that consistency with the Marriage Act 1961 can be a legitimate aim. Furthermore, the nature of any interference must also be in accordance with the provisions, aims and objectives of the Covenant.³³ As such, the interference cannot be based on discriminatory grounds, as outlined in articles 2 and 26 of the Covenant. Given that the interference in the author's case constitutes discrimination on the basis of marital status and gender identity or a combination of both, it is not consistent with the provisions, aims and objectives of the Covenant.

²⁸ See, for example, the Australian Human Rights Commission report entitled "Violence, harassment and bullying and the LGBTI communities", p. 5 (quoting a study that showed that over 85 per cent of lesbian, gay, bisexual, transgender and intersex persons in New South Wales had experienced homophobic abuse, harassment or violence), available from https://bullying.humanrights.gov.au/sites/default/files/content/pdf/bullying/VHB_LGBTI.pdf.

²⁹ See, for example, *Aumeeruddy-Cziffra et al. v. Mauritius*.

³⁰ See communication No. 1361/2005, *X v. Colombia*, Views adopted on 30 March 2007, para. 7.2.

³¹ Communication No. 902/1999, Views adopted on 17 July 2002, para. 8.3.

³² See principle No. 3 of the Yogyakarta Principles on the Application of International Human Rights Law in relation to Sexual Orientation and Gender Identity; and A/HRC/19/41, in which the High Commissioner noted that "some States ... require that those seeking legal recognition of a change in gender be unmarried, implying mandatory divorce in cases where the individual is married" (para. 72) and recommended that States "facilitate legal recognition of the preferred gender of transgender persons and ... permit relevant identity documents to be reissued reflecting preferred gender and name, without infringements of other human rights" (para. 84).

³³ See the Committee's general comment No. 16, para. 4.

5.14 However, should the Committee accept the State party's arguments about consistency with the Marriage Act 1961 being a legitimate aim, the author argues that the State party's refusal to allow a change of sex on her birth certificate is not reasonable or proportionate in the particular circumstances. Given the importance afforded to a person's gender identity in terms of privacy by the Committee, the European Court of Human Rights and the Office of the United Nations High Commissioner for Human Rights, and in the Yogyakarta Principles, the test for proportionality is high. The State party's approach to sex and gender recognition and marital recognition is flexible. It does not require a person to have consistent gender information across all official documentation. According to the State party's own submissions, a person may have "male" on their passport but "female" on their birth certificate.

5.15 Recognition of foreign marriages in Australia also is not consistent. Part VA of the Marriage Act 1961 provides that, except in certain circumstances, a foreign marriage that was valid in the local country at the time when it was solemnized will be recognized in Australia (see sect. 88C). For the purpose of determining whether an existing marriage is valid under Australian law, the relevant time is the moment at which the marriage was solemnized, not any subsequent date. Section 88EA of the Marriage Act 1961 provides that any union solemnized between two persons of the same sex must not be recognized as a marriage in Australia. However, should a then-heterosexual couple marry overseas and one person subsequently change their sex, including with the relevant change to their official documentation, the marriage would continue to be valid under Australian legislation.

5.16 In the light of the inconsistencies in the approach to gender identity on documentation and to recognition of marriages in Australia, the author argues that the State party has failed to demonstrate why a change in sex on a birth certificate would result in irreconcilable and unacceptable conflict with the Marriage Act 1961. As such, the laws preventing married persons from changing their sex on a birth certificate are neither reasonable nor proportionate. The author also submits that marital status should not be a barrier to legal recognition of gender identity. It is possible to allow legal recognition of a change of sex without requiring a pre-existing marriage to end. Austria, Germany and Switzerland all allow for this.

5.17 With regard to the State party's claim that any discrimination that may exist under article 26 of the Covenant is nevertheless for a legitimate aim and is reasonable and proportionate, the author argues that those submissions should not be accepted for the reasons outlined above.

Issues and proceedings before the Committee

Consideration of admissibility

6.1 Before considering any claim contained in a communication, the Committee must decide, in accordance with rule 93 of its rules of procedure, whether the claim is admissible under the Optional Protocol.

6.2 The Committee has ascertained, as required under article 5 (2) (a) of the Optional Protocol, that the same matter is not being examined under another procedure of international investigation or settlement.

6.3 The Committee notes the author's claim that all available domestic remedies have been exhausted. In the absence of any objection by the State party in this connection, the Committee considers that the requirement of article 5 (2) (b) of the Optional Protocol has been met.

6.4 The Committee notes the State party's argument that the author has not demonstrated that she has suffered specific and direct harm from not being able to change the sex on her birth certificate, thus failing to sufficiently substantiate her claims under article 17 of the Covenant. The Committee recalls that a person can only claim to be a victim in the sense of article 1 of the Optional Protocol if he or she is actually affected, and while it is a matter of degree how concretely this requirement should be taken, no

individual can in the abstract, by way of an *actio popularis*, challenge a law or practice claimed to be contrary to the Covenant.³⁴ If the law or practice has not already been concretely applied to the detriment of that individual, it must be applicable in such a way that the alleged victim's risk of being affected is more than a theoretical possibility.³⁵

6.5 The Committee notes that in the present case, the legal regime challenged has already been enforced directly against the author. She has applied three times for a birth certificate consistent with her sex, and those requests have been rejected under domestic law. The Committee also notes that a birth certificate is a vital official identification document that is commonly required for the purposes of official personal identification. In Australia, it is a cardinal form of identification that can be required under national, state and territorial law. Birth certificates also are official forms of identification frequently required by private entities and foreign governments. The Committee therefore considers that the author has demonstrated that the possession of a government-issued birth certificate that identifies her as male, and the prospect of having to produce her birth certificate to fulfil various identification requirements, thus revealing the fact that she is transgender, satisfies the victim requirement within the meaning of article 1 of the Optional Protocol. The Committee notes, in addition, that the author states that she has suffered negative treatment such as questioning and suspicion of fraud, has found it hard to obtain employment, and has altered her behaviour to avoid revealing her birth certificate. She also cites a specific incident where she was requested to present a birth certificate to the administrators of her father's will in order to prove her relationship to her father. Consequently, the Committee considers that there are no obstacles to the admissibility of the communication under article 1 of the Optional Protocol, as far as the author's claims regarding article 17 of the Covenant are concerned.

6.6 The Committee notes the State party's argument that the author's claims under article 2 (1) together with article 26 of the Covenant should be declared inadmissible for insufficient substantiation. The author claims in this respect that, by not allowing her to obtain a birth certificate that correctly identifies her sex, she is not afforded equal protection before the law, compared with a non-transgender woman or compared with an unmarried transgender woman, and that she is thus discriminated against on the basis of her marital status, her transgender identity and/or a combination of both. In view of the information provided, the Committee considers that the author has sufficiently substantiated her claims under article 26 for the purposes of admissibility.

6.7 The author has raised her claim under article 26 together with article 2 (1). While recalling its jurisprudence that article 2 can be invoked by individuals only in conjunction with other substantive articles of the Covenant, the Committee does not consider examination of whether the State party violated its non-discrimination obligations under article 2 (1), when read in conjunction with article 26, to be distinct from examination of the violation of the author's rights under article 26.³⁶ The Committee therefore considers it unnecessary to review the author's claims under article 2 (1) of the Covenant.

6.8 The author also contends that, in violation of article 2 (3) of the Covenant, the State party failed to implement legislation that prohibits discrimination on the basis of marital and/or transgender status and that guarantees to all persons equal and effective protection against such discrimination, thus failing to afford her an effective remedy. The Committee recalls its jurisprudence that article 2 (3) can be invoked by individuals only in conjunction with other substantive articles of the Covenant, and therefore considers that the author's claims under article 2 (3) are inadmissible under article 3 of the Optional Protocol.

6.9 In view of the foregoing, the Committee declares the communication admissible, insofar as it appears to raise issues under articles 17 and 26 of the Covenant, and proceeds with its consideration of the merits.

³⁴ See *Aumeeruddy-Cziffra et al. v. Mauritius*, para. 9.2.

³⁵ *Ibid.*, and *Toonen v. Australia*, paras. 2.5, 2.6 and 5.1.

³⁶ See communication No. 2030/2011, *Poliakov v. Belarus*, Views adopted on 17 July 2014, para. 7.4.

Consideration of the merits

7.1 The Committee has considered the present communication in the light of all the information submitted to it by the parties, in accordance with article 5 (1) of the Optional Protocol.

7.2 The author contends that the State party's refusal to change her sex on her birth certificate, unless she divorces from her spouse, constitutes arbitrary or unlawful interference with her privacy and family within the meaning of article 17 of the Covenant. In this regard, the Committee recalls its jurisprudence that "privacy" under article 17 "refers to the sphere of a person's life in which he or she can freely express his or her identity, be it by entering into relationships with others or alone".³⁷ It is the established jurisprudence of the Committee, and undisputed by the parties, that this includes protection of a person's identity, such as their gender identity.³⁸ The Committee notes the author's argument that the invasion of privacy stems from the fact that her sex is different from that recorded on the birth certificate; that her birth certificate thus reveals private information about the fact that she is transgender, as well as her medical history; and that under the current legislation in Australia, the only way to obtain a birth certificate that correctly reflects her sex is to divorce from her spouse, thus interfering with her family. In this context, the author asserts that she is in a loving relationship with her spouse and does not intend to apply for a divorce.

7.3 The Committee also notes that sections 32B (1) (c) and 32D (3) of the Births, Deaths and Marriages Registration Act 1995 explicitly require that a person be unmarried at the time of their application to register a change of sex and to have a new birth certificate issued, and that the wording of the said sections does not allow for any exceptions from this requirement. Furthermore, section 40 (5) of the Sex Discrimination Act 1984 specifically permits state and territory Governments to "refuse to make, issue or alter an official record of a person's sex if a law of a State or Territory requires the refusal because the person is married". In the circumstances, the Committee considers that the operation of these provisions to deny the author a birth certificate consistent with her sex unless she gets a divorce interferes with her privacy and family.

7.4 An interference with privacy or family under article 17 must not be arbitrary or unlawful. The requirement for a person to be unmarried at the time of their application to register a change of sex and to have a new birth certificate issued is provided for by domestic law. The Committee should thus consider whether the interference is arbitrary. The Committee recalls its jurisprudence that the concept of arbitrariness is intended to guarantee that any interference should be in accordance with the provisions, aims and objectives of the Covenant and should be, in any event, reasonable in the particular circumstances.³⁹ Any interference with privacy and family accordingly must be proportionate to the legitimate end sought and necessary in the circumstances of any given case.⁴⁰

7.5 The Committee notes the State party's contention that any perceived interference with the author's privacy and family is not arbitrary, since the exemption in sections 32B (1) (c) and 32D (3) is reasonable and proportionate to the legitimate aim of ensuring consistency with section 5 (1) of the Marriage Act 1961, which defines marriage as being between a man and a woman. The State party argues that these provisions go no further than necessary to achieve this legitimate objective, and therefore are not disproportionate.

7.6 The Committee observes that the author and the State party disagree over whether consistency with the Marriage Act 1961 constitutes a legitimate aim under the Covenant. The State party submits that the right to marry under article 23 of the Covenant only applies to heterosexual marriages. The author in turn argues that, while failure to provide for marriage between same-sex couples itself may not breach Covenant rights under the Committee's jurisprudence, consistency between birth registrations and the Marriage Act

³⁷ See *Coeriel and Aurik v. Netherlands*, para. 10.2.

³⁸ See, for example, *Raihman v. Latvia*, para. 8.3; and *Toonen v. Australia*, para. 8.2.

³⁹ See the Committee's general comment No. 16, para. 4.

⁴⁰ See *Toonen v. Australia*, para. 8.3.

1961 is not a legitimate aim consistent with the objectives and aims of the Covenant, and nor is the refusal to provide legal recognition of the author's sex on her birth certificate reasonable or proportionate to achieving such an aim.

7.7 Irrespective of this issue, the Committee questions the necessity and proportionality of the interference with the stated aim. First, the Committee notes that a change in sex on another kind of official identification — a passport — is allowed. The State party has already issued the author first with an interim passport and then with a regular passport, indicating her sex as female. The State party has not provided any explanation why a change in sex on a birth certificate would result in irreconcilable and unacceptable conflict with the Marriage Act 1961 if the author remains married, whereas a change in sex on her passport in identical circumstances is allowed. Nor has the State party explained why it is in the State party's interest to issue documents with conflicting identity markers, or documents containing identity information that is not consistent with the actual personal situation, since such documents would mislead a government office, passport control etc. as to the true identity of the bearer. Second, the State party's legal regime leaves to individual state and territorial Governments the decision whether to refuse or allow changes to a married transgender person's sex on a birth certificate. The State party has not explained why denying altered birth certificates to married transgender persons is necessary to ensure consistency with the Marriage Act 1961, when federal law allows state and territorial Governments to issue precisely such birth certificates.

7.8 The Committee notes the author's contention that there are further inconsistencies in the State party's approach to gender identity on issues regarding documentation and recognition of marriages. Namely, section 88EA of the Marriage Act 1961 provides that any union solemnized in a foreign country between two persons of the same sex must not be recognized as a marriage in Australia. However, should a then-heterosexual couple marry overseas and one person subsequently change their sex, including changing their official documentation in the foreign State, the marriage would continue to be valid in Australia. Thus, it is unrefuted that had these same facts occurred overseas — had the author married her current spouse, completed gender reassignment surgery and changed the sex on her birth certificate, before returning to Australia — her marriage would be recognized in Australia. The State party has not explained, inter alia, why recognition of foreign marriages based on the official documentation at the time the marriage was solemnized is consistent with the Marriage Act 1961, but equivalent treatment of marriages solemnized in Australia is not.

7.9 Moreover, the author contends, and the State party does not dispute, that gender reassignment is lawful in Australia and post-operative transgender individuals are provided with the opportunity to be legally recognized as their reassigned sex and are protected from discrimination on transgender grounds. The author was validly married in Australia. Following her gender reassignment, she was lawfully issued with passports designating her as female, and changed her name on, inter alia, her birth certificate, passport, driver's licence and Medicare card. It is also uncontested that as a result of her gender reassignment, the author has lived on a day-to-day basis in a loving, married relationship with a female spouse, which the State party has recognized in all respects as valid. There is no apparent reason for refusing to conform the author's birth certificate to this lawful reality.

7.10 *In Toonen v. Australia*, the Committee pointed to, inter alia, the inconsistency of the State party's legal regime and to the lack of consensus and enforcement regarding the provisions at issue which implied that they were not deemed essential to the State's stated aim.⁴¹ Likewise in the present case, in light of the above-mentioned considerations and in the absence of convincing explanations from the State party, the Committee is of the view that the interference with the author's privacy and family is not necessary and proportionate to a legitimate interest, and is therefore arbitrary within the meaning of article 17 of the Covenant.

7.11 The Committee notes the author's claim that she is being discriminated against on the basis of her marital and/or transgender status, in violation of article 26 of the Covenant,

⁴¹ Ibid., para. 8.6.

because the State party does not allow her to obtain a birth certificate that correctly identifies her sex as long as she remains married to her spouse. It also notes the State party's contention that the distinction between married and unmarried persons who have undergone a sex affirmation procedure and request to amend their sex on their birth certificate is proportionate to the aim of ensuring consistency with the definition of marriage under the Marriage Act 1961.

7.12 The Committee recalls its general comment No. 18 (1989) on non-discrimination (para. 1), in which it is stated that article 26 entitles all persons to equality before the law and equal protection of the law, prohibits any discrimination under the law and guarantees to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. In this context, the Committee observes that the prohibition against discrimination under article 26 encompasses discrimination on the basis of marital status and gender identity, including transgender status. The Committee also recalls that not every differentiation based on the grounds listed in article 26 amounts to discrimination, as long as it is based on reasonable and objective criteria,⁴² in pursuit of an aim that is legitimate under the Covenant.⁴³ The test for the Committee therefore is whether, in the circumstances of the present communication, the differential treatment between married and unmarried persons who have undergone a sex affirmation procedure and request to amend their sex on their birth certificate meets the criteria of reasonableness, objectivity and legitimacy of aim.

7.13 The Committee notes that both the Anti-Discrimination Board (in 2001) and the Australian Human Rights Commission (in 2009) found that the requirement that an individual be unmarried was unnecessarily restrictive and constituted discrimination on the basis of marital status. Consequently, they recommended that marital status should not be a relevant consideration as to whether or not a person can request a change in legal sex.

7.14 The Committee considers that by legally recognizing gender reassignment and prohibiting discrimination against transgender persons, the State party is providing protection against discrimination. However, by denying transgender persons who are married a birth certificate that correctly identifies their sex, in contrast to unmarried transgender and non-transgender persons, the Government is failing to afford the author, and similarly situated individuals, equal protection under the law as a married transgender person. In this regard, the Committee reiterates the considerations discussed in paragraphs 7.5-7.9 above, that the distinction being drawn by the State party is not necessary and proportionate to a legitimate interest, and therefore is unreasonable.

7.15 In the above-mentioned circumstances and in the absence of convincing explanations from the State party, the Committee considers that the differential treatment between married and unmarried persons who have undergone a sex affirmation procedure and who request to amend their sex on their birth certificate is not based on reasonable and objective criteria, and therefore constitutes discrimination on the basis of marital and transgender status, under article 26 of the Covenant.

8. The Committee, acting under article 5 (4) of the Optional Protocol, is of the view that the facts before it disclose a violation by the State party of articles 17 and 26 of the Covenant.

9. In accordance with article 2 (3) (a) of the Covenant, the State party is under an obligation to provide the author with an effective remedy. This requires it to make full reparation to individuals whose Covenant rights have been violated. Accordingly, the State party is obligated, inter alia, to provide the author with a birth certificate consistent with her sex. The State party is also under an obligation to prevent similar violations in the future. In

⁴² See, for example, communication No. 172/1984, *Broeks v. Netherlands*, Views adopted on 9 April 1987, para. 13; and communication No. 182/1984, *Zwaan-de Vries v. Netherlands*, Views adopted on 9 April 1987, para. 13.

⁴³ See, for example, communication No. 1314/2004, *O'Neill and Quinn v. Ireland*, Views adopted on 24 July 2006, para. 8.3.

this regard, consistent with its obligations under article 2 (2) of the Covenant, the State party should revise its legislation to ensure compliance with the Covenant.

10. Bearing in mind that, by becoming a party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory or subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy when it has been determined that a violation has occurred, the Committee wishes to receive from the State party, within 180 days, information about the measures taken to give effect to the Committee's Views. The State party is also requested to publish the present Views and to have them widely disseminated.
