The legal challenges posed by individuals who do not easily fit into accepted legal categories but who, nonetheless, may be recognised as a social category or distinct group of people by the society in which they live is the issue that informs this article. More specifically, I am concerned with people who do not readily fit into the usual binary divide of male or female with reference to the law of marriage, and the ways in which the law has developed to respond to this challenge. In this discussion, two broad categories of people usually referred to as transsexual and transgendered must be distinguished. Transsexuality is recognised primarily, but not exclusively, in more developed countries and has been the subject of a number of case decisions in common law countries, including Australia and New Zealand. Transgender is recognised in the Pacific region. Here I focus on the Polynesian transgendered categories of fa’afafine (‘effeminate man or youth’, see Milner 1976) in Samoa and of fakaleiti (lit. ‘like a lady’) in Tonga, neither of which have been given much legal attention, despite having been paid considerable anthropological and sociological attention. The article looks at some of the jurisprudence that has emerged in relation to transsexuals and considers whether, and to what extent, it could be applied to fa’afafine and fakaleiti and with what consequences. Thus, the specific topics I address are three: (i) the legal perception of transsexual and transgendered persons, (ii) the legal developments beyond and within the Australasian region relating to transsexuals and marriage, and (iii) the extent to which the law may be relevant to Pacific Island states in the region now and in the future, especially with respect to fa’afafine and fakaleiti.

Transsexual Persons

Transsexual refers to persons born with the physical characteristics of one sex who emotionally and psychologically feel they belong to the opposite sex, a phenomenon known medically as “gender dysphoria”. Such persons are distinguishable from transvestites—persons (usually men) who derive pleasure from dressing in clothes considered appropriate to the opposite
Transsexuals may be men who feel themselves to be and who wish to be women or women who wish to be men. In order to achieve their objectives they may take a number of measures including dressing and acting as a person of their chosen sex, hormone treatment, or surgery—either to remove certain organs such as testes or breasts, or to construct artificial organs such as a vagina or a penis. The term “post-operative transsexual” is a term used to describe those transsexuals who have not only undergone hormone treatment and cosmetic plastic surgery but who have also undergone realignment surgery regarding their sexual organs. Whatever treatment or surgery is carried out, one thing cannot be medically changed: the chromosome composition of a male or female, which is determined at birth. Males have the chromosomes XY and females have XX. In most legal systems the sex of a person is determined at birth and entered on a birth register. Alterations to the register are only permitted in very limited circumstances, and sex of choice is not usually one of these.

Transgendered Persons: Fa'afafine and Fakaleiti.

Known as fa'afafine in Samoa, fakaleiti in Tonga and mahu or rae rae in French Polynesia, this category of men are not just cross-dressers but often males who have been reared as females and see themselves as females. This may happen where there is a shortage of girls to help a mother or where a boy expresses a wish to undertake traditional female tasks. Today as in the past, they are valued for their skills and strength. Although they may be subject to some teasing and harassment from more “macho” men, fa'afafine, fakaleiti and mahu are tolerated and accepted as part of society in Polynesia.1 Biologically such transgendered persons are men, but psychologically they may be women, perceiving themselves as women and carrying out women’s work in the home or the community (Miles 2003:46). They have traditionally been valued for their ability to carry out tasks of both genders. Today they are frequently engaged in work involving support and care in the community, hospitals and other organisations, such as youth and church groups (Besnier 1994:296), and are also in demand as employees in the tourism and hotel industry. In their own island countries and in New Zealand, they have developed their own niche in the modern entertainment industry, working in drag shows, fashion parades and cabarets, not only staged for tourists but also for entertaining local audiences (Pierce 2003). They also find employment in the sex industry, although whether this is as pseudo-females or female impersonators or as males in homosexual encounters is unclear. In some respects, transgendered men are less constrained by society than either men
or women. In Tonga, for example, fakaleiti can cross the divide between men and women by making fun of male stereotypes and female stereotypes. They are able to behave far more outrageously than women because they are not women, who are expected to be reserved and dignified. They are able to act less inhibited than men, who are constrained to act with the seriousness and formality demanded by ideals of Tongan masculinity.

The presence of such groups in Polynesian society is not simply a modern development. There is some evidence that early visiting mariners consorted with faʻafafine and encountered men behaving as women (Besnier 1994:288-92, James 1994:39-40). Today it is difficult to strictly define these socially recognised transgender groups across Polynesia. Further, there may be considerable differences between, for example, faʻafafine or fakaleiti in Samoa or Tonga and those in New Zealand, or between urban and rural faʻafafine or fakaleiti, or younger and older members of these groups.

SEX DETERMINATION AND THE LAW

In law, whether a person is male or female can be significant for a number of reasons. For example, the determination of pension and social security rights, employment benefits and liability for certain criminal offences depends on a person’s sex. The categorisation of a person’s sex is also very important where there are prohibitions on discrimination based on sex, such as are found in the Constitutions of most Pacific Island states. In daily life, a person’s sex may determine what amenities they can use, what sports teams they can play for, how they are addressed and what tasks they are expected to perform. Perceived sex may also influence how others react or relate to individuals.

Until very recently the right to marry—and therefore to benefit from the various consequences of marriage—has been limited to persons of the opposite sex. Several cases involving transsexuals have arisen in contexts such as their right to marry or challenges to marriages that they had already entered into, especially cases challenging the validity of such marriages. The law, through the decisions of the courts, has had to establish certain criteria whereby it can decide whether a person is male or female for the purposes of marriage and therefore of the opposite sex to the person he or she wishes to marry or claims to be married to. Strange as it may seem, in law it is no easy task to say “this is a man” and “this is a woman” when confronted with individuals who, despite the sex determined at their birth, claim to be something different. Through decisions made in a series of cases, the courts in English common law have adopted the following criteria: the chromosome composition of male/female, reproductive organs or gonads—testes in males and ovaries in females, and visible genitalia.
These determining criteria in defining sex for the law of marriage were established in a 1971 English court decision of the case of *Corbett-v-Corbett*.2 This case involved a male-to-female transsexual who challenged a claim that her marriage was null and void on the grounds that she was a male married to a male, and sought instead to have the marriage annulled on the ground of non-consummation. Annulment would have entitled her to claim certain property rights. A marriage according to English law could only be validly contracted between a man and a woman and if the parties were not respectively male and female the marriage would be void.3 In reaching a decision the court had to decide what these terms, “male” and “female” or “man” and “woman” meant. The court found that the respondent transsexual had been born and registered as male and therefore remained male. Whatever she felt herself to be, she had male chromosomes, had been born with male gonads and male genitalia. Her sex was fixed at birth. She could not now choose to be something different.

The principles established in *Corbett* have been applied to subsequent cases involving transsexuals, not just in English law but also in those countries that have common law systems derived from English law, including, in the Pacific region, Australia and New Zealand.

Recently, however, courts have rejected the *Corbett* approach and begun to accept that other factors are also relevant in determining whether a person is male or female in the law and that these may not just be sexual characteristics. Included among these are considerations of upbringing and self-perception, and of the role an individual plays in society and how society perceives that person. Medically and, more recently, legally there is now greater recognition of “brain sex”, that is, the psychological sexual identity of a person. The change has been brought about because of better medical understanding of transsexualism, greater awareness of individual rights and changing perceptions about marriage, i.e., its purpose and the roles of individuals within it. In particular, the focus has shifted from procreation to the elements of mutual support, companionship and commitment, all of which may not depend on marriage partners being of the opposite sex. Consequently, from a legal perspective, the distinction between transsexuality and transgenderism is becoming less marked so that legal developments relating to the former may reach the stage where they are also applicable to the latter.

This broadened approach is of interest in the Pacific region. The blurring of boundaries between men and women is not unknown in traditional and modern societies, especially in Polynesia where the fa‘afafine in Samoa and the fakaleiti in Tonga challenge the notion of a clear demarcation between male and female. However, the law of the region is largely constructed along Western lines, which raises the question of where fa‘afafine or fakaleiti fit in
terms of legal status. Before this can be answered however, it is necessary to understand how the legal systems of Pacific Island states and those elsewhere in the common law world are connected and, consequently, how developments that take place outside the region may have an impact upon people in the Pacific.

THE LAW IN SAMOA AND TONGA

In Pacific Island states, family law is a mixture of customary and introduced law. However, in neither Tonga nor Samoa, whose legal systems are discussed in detail here, is customary law an official or formally recognised source of law compared with Melanesian states such as Solomon Islands, Vanuatu or Papua New Guinea. Nevertheless, important customary forms of social organisation are preserved in the law. In Samoa, for example, the powers of local village councils appear in the Village Fono Act 1990 and the status of matai ‘customary title holders’ is confirmed in the Electoral Act 1963. For Tonga, the status of nobles and males is defined in the Constitution 1875 (as amended) and the Land Act Cap 132 (Powles 1997:61). The formal law of marriage, however, is largely governed by introduced law brought in from England or New Zealand before Independence and its subsequent modification through national legislation.

Samoa

Samoa became independent in 1962. Under the Samoa Act 1921, English legislation in force in England on 14 January 1840 and also in New Zealand on 7 December 1921 applied, provided this legislation was not inconsistent with the Samoa Act or any Ordinance or Regulation in force in Western Samoa and was not inappropriate to the circumstances of Western Samoa. Custom was restricted, applying only to customary land and titles, and to marriages contracted before 1921. New Zealand legislation passed specifically for Samoa also applied at Independence. Since Independence, however, almost all introduced legislation has been abolished under the Repeal of Statutes Act 1972 and replaced by national laws. Under the Samoa Act 1921 (Section 349) and the Constitution (Articles 111 and 114), the principles of common law and equity drawn from English court decisions remain in force, except in so far as such principles may be inconsistent with the Constitution, legislation or subsidiary legislation in force in Samoa, or inappropriate to the circumstances of the country (Paterson 1995: 661). It also remains open to the courts in Samoa to consider case law from elsewhere as a persuasive although not binding authority, especially where novel situations arise and where there are no Samoan precedents to follow. Although the application of customary
law is limited, customs and traditions remain strongly influential in Samoan society and may influence the way in which written law is interpreted and applied. Social custom certainly may influence how judges view matters brought to their attention. Within the area of family law, custom and tradition may also be very influential in regulating the social relationships between individuals.

Tonga
In contrast to Samoa, Tonga has no “cut-off date” for applicable colonial law. Therefore, modern English law remains applicable and Tongan courts are permitted to apply the most recent English court decisions and legislation if they wish to do so. Introduced law was originally made applicable to Tonga by a Pacific Order in Council in 1893; now, under the Civil Law Act 1966, any English statute of general application applies in Tonga unless it has been replaced by national legislation or its application is “incompatible with the circumstances of the Kingdom of Tonga and its inhabitants” (Corrin Care 1997:33). There is no specific reference to customary law in the legal system of Tonga. However, the “circumstances of the Kingdom of Tonga” may be taken to include the social and traditional context in which the law operates.

Discrimination
Both Samoa and Tonga have constitutional provisions against discrimination: those of Tonga do not prohibit discrimination on the grounds of sex; those of Samoa do, while permitting discrimination where the Constitution so provides. In neither country is the right to marry, or the right to a family or family life, stated as a fundamental constitutional right. None of the current law in the region refers specifically to fa‘afafine or fakaleiti and I am not aware of any reported cases where discrimination against fa‘afafine or fakaleiti has been raised, suggesting that these groups are not perceived as having any particular legal status and that they have not brought claims of discrimination before the courts. Lack of reported cases does not mean, of course, that there is no discrimination against such people or no disadvantages suffered.

Marriage
The law of marriage is that introduced into the region and is strongly influenced by Christian concepts. In Tonga there is no national legislation governing marriage and so, in line with the Civil Law Act 1966, English law will apply. The Divorce Act, Cap 29 of Tonga makes no reference to void or voidable marriages so it is presumed that English law would apply. In
Samoa, the Marriage Ordinance 1961 does not stipulate that the parties to a marriage must be of the opposite sex, nor does the Divorce and Matrimonial Causes Ordinance 1961 indicate that a marriage will be void if the parties are of the same sex.\textsuperscript{4}

In both countries a Christian view of marriage is likely to be highly influential in any case. The Constitutions of both countries refer to God and to Christian principles. In both countries the majority of the population are practising or baptised Christians.\textsuperscript{5} This is significant, because the starting point for English law relating to transsexuals and marriage is a reference to a case from 1866 in which the judge stated, “I conceive that marriage, as understood in Christendom may be defined as the voluntary union for life of one man and one woman, to the exclusion of all others”.\textsuperscript{6} While recent developments in the law have tended to move away from a Christian approach to a more secular approach, strong religious convictions in Pacific Island societies may mean that secular approaches to the institution of marriage are not appropriate or acceptable. Even if not expressly stated, the wider public generally accepts that the law of marriage refers to the marriage of a man and a woman.

However, large numbers of Samoans and Tongans, along with other Polynesians, are now living and working, visiting and schooling outside their homelands. They are experiencing other cultures and other notions of marriage, and these are transmitted back to their homelands. Even in the homelands, people are being exposed to new ways of acting and doing and living through the global media. The winds of social and legal change are rising in the Pacific Islands.

\textit{Challenges to Traditional Notions of Family and Marriage}

In countries outside the region there is growing social and legal recognition of same sex relationships and different types of families in several ways. Rapid advances in embryology, \textit{in vitro} fertilisation and a whole gamut of reproductive technologies, as well as changes in legal regulations relating to pension entitlements, work benefits, succession to tenancies, property rights, etc., have all served to undermine the notion that family rights and obligations only apply to opposite sex partners joined by formal marriage. It is widely accepted that the notion of “family” is changing, as are the definitions of rights relating to family. At the same time social changes have changed perceptions and expectations of marriage. While most countries have not yet embraced the idea of same sex marriages, claims to family rights or relationship rights are increasingly being recognised regardless of the actual sex of the parties. Inevitably, legal change lags behind social change, largely because those who frame law changes are torn between the desire for consistency and certainty, and the need to provide for new challenges and developments.
The pace of change in the Pacific may be rather more conservative. The central place of the family in the organisation of society and in determining the conferral of rights remains important, and gender stereotyping of roles within marriage and within society remains quite rigid. Nevertheless, changes are occurring and influences from elsewhere can be registered. For example, gender equity is being advocated, nuclear rather than extended families are emerging, communalism is being challenged by individualism, role stereotyping is being questioned and sexual taboos are being broken.7

The Terms “Sex” and “Gender”

The terms “gender” or “sex” are often used interchangeably in everyday English, but their distinct meanings gained legal significance in the English case of Bellinger v Bellinger (discussed below), when the Court of Appeal (Family Division) accepted arguments by counsel that “sex” and “gender” were different. “Gender” relates to culturally and socially specific expectations of behaviour and attitude assumed by a society and includes self-definition. “Sex” is a narrower concept and may be limited to characteristics of medical sex in whatever way these may be defined in a particular context. Discrimination on the grounds of gender may therefore be broader than discrimination on the grounds of sex. This distinction is significant in the Samoan and Tongan contexts because the terms faʻafafine or fakaleiti respectively are used to refer to people who may be sexually categorised as male (especially if the criteria of Corbett, outlined above, is used) but in terms of gender orientation are “effeminate” or “lady-like”. If the law moves towards categorising people in terms of gender rather than sex, then such legal developments may be of relevance to faʻafafine and fakaleiti, especially if societal notions concerning the family and marriage are changing. Indeed, there are legal precedents for Pacific Island states such as Tonga and Samoa to follow if they wish to modify their law to meet such social changes. At the same time it should be pointed out that while a transsexual is a person who desires to live in the sex other than the one he or she was born with—and may take extreme steps to achieve this, the transgendered person accepts the sex he or she is born with but wishes to adopt the behaviour, of the opposite gender category. In the case of faʻafafine and fakaleiti, as will be indicted, there is insufficient evidence to support the view that the term transsexual is widely applicable, while the term transgender should be used with caution as it is not clear if, or to what extent, this category wishes to “cross” genders.
The English law decision of Corbett v Corbett, referred to above, established a precedent that is applicable in both Tonga and Samoa, unless it is found to be incompatible with local circumstances. Given that the case supports the idea of marriage being between a man and a woman and that the court did not accept that the marriage of a transsexual was a valid marriage, no incompatibility is likely. In the case of Corbett, the court refused to take into account hormonal factors, secondary sexual characteristics or psychological factors in the determination of sex. Emphasis was placed by the court on biological sex at birth. Changes thereafter, for example, by hormone treatment, surgery or psychological development, and questions of choice of sex were excluded from the relevant criteria.

In English law, despite considerable criticism over the years, Corbett remains the law and has recently been upheld by the Court of Appeal and the House of Lords, which is the highest court in the United Kingdom and which heard the case of Bellinger-v-Bellinger. In this case, the petitioner, Mrs Bellinger, who was a male-to-female transsexual, sought a declaration that her marriage was valid with the support of her husband. The Appeal Court had to decide whether the words of the relevant legislation (Section 11 of the Matrimonial Causes Act) and in particular the word “female” could be interpreted so as to encompass a transsexual. Both at first hearing and on appeal the declaration had been opposed on the grounds that Mrs Bellinger was a biological male. Before the Court of Appeal the argument was raised that the determinants of legal sex as applied in Corbett should no longer be regarded as exclusive, or as valid or appropriate. Instead, the Court, relying on expert evidence, should take into account “brain sex”, meaning the development in the brain that leads to sexual differentiation and occurs during the early years of a human life and is not fixed at birth. It was also argued that greater emphasis should be placed on the psychological aspects of sex and gender, which cannot be considered at birth because they are not yet manifest. Despite these arguments and others relating to the infringement of basic human rights, both the Court of Appeal and the House of Lords held that the Corbett criteria remained valid for determining the sex of a child at birth and that the gender status of a person is determined by registration of sex at birth. Whether that status can be changed subsequently was, the Court held, a matter for Parliament, not a matter that could be decided by a court of law. Mrs Bellinger’s marriage could not therefore be declared to be valid.
The law in England is, however, about to change. Decisions made by the European Court of Human Rights in two other cases against the United Kingdom, which were decided before the House of Lords decision in Bellinger, indicated that the European Court was no longer prepared to accept the United Kingdom’s stand on the rights of transsexuals. Previously the Court had allowed the United Kingdom a “margin of appreciation” that had resulted in the failure of applications by transsexuals claiming breaches of Articles 8, 12 and 14 of the Convention. These are the Articles relating to rights to private and family life, the right to marry and freedom to enjoy rights free from discrimination. The notion of a state’s “margin of appreciation” allows a defendant country to claim a degree of sovereignty or national interest, especially in areas of law that may vary from one country to another owing to differing public interests, moral values or cultural perceptions. Such differences tend to be of particular relevance in the case of family law. In allowing a country to shelter behind this “margin of appreciation”, the European Commission and the Court have always held that a balance must be struck between the rights of the individual safeguarded in the Convention and its Protocols, and the general interest of the community of the country defending the claim. The right to marry gives rise to social, personal and legal consequences and is subject to the national laws of a state. However, national laws must not impose limitations that restrict or reduce the right in such a way as to impair the very essence of that right. In the cases of Goodwin-v-UK and I-v-UK, the European Court finally ruled that the unsatisfactory situation of post-operative transsexuals in English law was no longer permissible. Under the law as it stood, they were condemned to live in an “intermediate zone” as neither male nor female. The Court ruled that there had been a breach of the right to family life and the right to marry, the latter on the grounds that “the allocation of sex in a national law to that registered at birth was a limitation impairing the very essence of the right to marry contained in Article 12”.

The Court further held that the term “man” and “woman” did not have to refer to the determination of gender by purely biological criteria. Other important factors to consider were whether gender identity disorder was a condition accepted by the medical profession, the provision of treatment for this medical condition by a state, and the assumption of a particular gender identity and social role on the part of the individual. In coming to its conclusion, the Court held that the respondent state had a positive obligation to ensure the right of the applicant to have her Convention rights respected. In particular, with reference to the right to marry, the Court looked at the major social changes taking place in the institution of marriage in recent times and at the medical and scientific developments in the field of transsexuality. The Court allowed that a state might determine within its “margin of
appreciation” certain conditions under which a transsexual must establish
gender reassignment or change, but did not accept that a state could bar a
transsexual from enjoying the right to marry entirely.

These decisions by the European Court of Human Rights did not bind the
House of Lords when it considered the Bellinger case because the facts of
Bellinger preceded the European decisions. Consequently, as indicated above,
following the old law the House of Lords rejected the claim that the marriage
of Mrs Bellinger was valid. It did, however, find that the law as it stood was
indeed incompatible with the United Kingdom’s obligations both under the
European Convention on Human Rights and under its own Human Rights
Act 1998. Consequently, a Gender Recognition Bill is tabled for Parliament
this year, i.e., 2004. It will set out criteria for determining when a person may
apply for an official change of gender. Once a change of gender is granted
then it would follow that that person may marry a person of the opposite sex
to that granted to the applicant.

The significance of these developments for the Pacific region is that those
countries which are free to follow recent decisions from the United Kingdom,
such as Tonga, could potentially depart from Corbett, while those jurisdictions
lacking that freedom may find themselves bound by Corbett. Of course, it
might be argued that because the principles of common law and equity should
only be followed in so far as they are not inconsistent with domestic law or
inapplicable to the circumstances of the country, regional courts would not in
any case choose to depart from Corbett. Even if they were free to do so, they
would not, taking into account public policy, religious influences, customary
concepts of marriage and the family. Consequently, later developments in the
law that recognised the right of transsexuals to marry in certain circumstances
might well be ignored.

Australasian Law

Alternatively, Pacific Island countries may choose to turn to their nearer
neighbours for legal inspiration. What will they find there? In both Australia
and New Zealand there has been a break with the Corbett line of reasoning
and recent decisions nearer to home may be of more relevance to faʻafafine
or fakaleiti.

In 2001 the case of Re Kevin raised for the first time in Australia the
question of the legal status of a post-operative transsexual in the context
of marriage.10 This case involved a female-to-male transsexual who from
early childhood had considered himself to be male. He had hormone and
surgical treatment to the extent that under the Births, Deaths and Marriages
Registration Act 1995 (NSW) he was deemed to have undergone sexual
reassignment surgery. He entered into a heterosexual relationship with a
woman who was fully aware of his transsexual predicament and they applied for IVF (in vitro fertilisation) treatment to start a family. The treatment was granted on the grounds that Kevin was regarded as male biologically and culturally, and his wife Jennifer successfully conceived a child. Kevin changed his name and was issued a new birth certificate indicating his sex as male. The couple married with full disclosure of their medical history and a marriage certificate was issued. An application to the Family Court for a declaration of the validity of the marriage resulted in a court case. The application was opposed by the Attorney General who argued that the word “man” should be given the meaning intended under the Australian Marriage Act 1961 and following Corbett—in other words sex should be determined by chromosomes, genitalia and gonads at birth. The applicants urged consideration of psychological aspects of “brain sex”, the applicant’s role in society and the consequences of medical reassignment. Judge Chisholm held that the question in law was whether the husband (Kevin) was a man at the date of the marriage. For a marriage to be valid under the Marriage Act 1961, it had to be between a man and a woman. The judge made it clear at the outset that the English law was at most only persuasive and that the Corbett case needed to be weighed in the context of modern medical developments and knowledge about sexuality. The challenge for the court was to identify legal criteria for assigning people to one sex or the other, having regard for justice and the interests of the individual and society.

In reaching his decision the judge held that words such as “man” and “woman” should be given their ordinary meaning and in the case of post-operative transsexuals would refer to their reassigned sex. The law had to be consistent with the way in which transsexuals were considered in the community. The judge could find no peculiar considerations in regard to marriage that compelled the court to define “man” in such a way as to exclude a post-operative transsexual. Indeed there were no practical or public interest reasons to do so and if the rights of the individual were to be respected, including society’s acceptance of people who were different, it would be best if the law relating to marriage was in conformity with other areas of the law. The decision in Kevin was appealed to the full bench of the Family Court. This Court upheld the decision, approving in particular the lower court’s recognition of the shift away from the purely sexual aspects of marriage towards greater emphasis on companionship.  

In New Zealand, two cases have departed from Corbett: M-v-M in 1991 and Attorney General-v-Otahuhu Family Court in 1995. In the second case the court upheld the validity of the marriage of a post-operative transsexual, the judge stating: “there is no social advantage in the law not recognising the validity of the marriage of a transsexual in the sex of reassignment”. The court
reacted positively to the criticism that had been raised against *Corbett* in the years since that decision. Judge Ellis suggested that in New Zealand the law relating to marriage had shifted away from a focus on sexual activity, placing more emphasis on the psychological and social aspects of sex, sometimes referred to as gender issues. The Judge argued that a major factor in marriage is the ability of each partner of the marriage to socially hold him or herself out as a person married to a member of the opposite sex. Consequently, if some people have a compelling desire to be recognised as and are able to behave as persons of the opposite sex, and society allows them to undergo surgery and therapy, then society ought to allow them to function as fully as possible in their reassigned sex, including their capacity to marry.

This New Zealand decision not only marks an important development in the law relevant to the large Pacific Islands population resident in New Zealand, but also contributes some interesting reflections on marriage and the essential roles of men and women in marriage. Among these is, firstly, the clear statement that under New Zealand law the ability to procreate or to have sexual intercourse is not essential for a valid marriage. Indeed, the court clearly indicated that the essential role of a man and woman in marriage was not the ability to have sexual intercourse, and that the capacity for nurturing, support and companionship is not dependent on the sex or gender of a person.

Secondly, it would seem from the decision that the adoption of a sex opposite to that of the other party of the proposed marriage through sexual reassignment may be by means of surgery or hormone administration or both, or by any other medical means. This would suggest that full genital realignment surgery would not necessarily be required.

Thirdly, similar to the law in much of the South Pacific region, the Marriage Act 1955 of New Zealand does not expressly refer to man or woman, but it is deemed to be implicit in the Act that marriage is the union of one man and one woman.

Fourthly, the marriage of a transsexual to a person of the opposite sex to that chosen by the transsexual is not a homosexual marriage. A transsexual, once having undergone sexual reassignment, is unable and does not want to marry a person of his or her chosen sex, but one of the opposite sex. So a male to female transsexual would not want to marry another female. Thus, allowing transsexuals to marry is not an avenue to allowing homosexual marriages.

Finally, the court held that it was inappropriate in New Zealand today to allow the Christian concept of marriage to have an overriding hold on the legal situation. In New Zealand, as in most countries, there is separation between church and state. Moreover, there is no official state religion and there are many faiths, the ceremony of marriage may be secular, divorce is
permitted and adultery is no longer a crime. It can be argued that the criteria claimed in the English case of *Hyde v Hyde and Woodmansee*,\(^\text{13}\) which were the bases for rejecting the notion of a transsexual having the right to marry, are no longer determinative of marriage, except in so far as marriage is a contract between a man and a woman—at least in the jurisdictions under consideration. For the courts, the questions “what is a woman?” and “what is a woman’s role in marriage?”, as indicated by Judge Ellis in New Zealand, are both social and policy issues and need not be immutable.

**Placing Legal Developments in Context**

The theme of this paper is somewhat hypothetical in so far as the legal status of transsexuals in the Pacific, including their right to marry, does not appear to be an issue which has attracted much, if any, legal attention. Also, as has been indicated, it might be argued that even if the common law outside the region is beginning to converge in its approach to marriage and transsexuals, the local context is such that the application of legal principles developed elsewhere may be inappropriate on cultural and contextual grounds.

The social and legal context for specific decisions is important. For example, in the *Kevin* case in Australia, the court was able to refer to other legal developments that supported consideration of the status and rights of transsexuals. In a 1988 case, *R v Harris and McGuiness*,\(^\text{14}\) a post-operative male to female transsexual had been held not to be a male for the purposes of the criminal offence of performing an act of indecency with another male, while in 1993, in the case of *Secretary, Department of Social Security v SRA*,\(^\text{15}\) a pre-operative male to female transsexual was held not to be female for the purposes of the relevant legislation despite her preferred psychological sex and therefore not eligible for a woman’s pension. Certain legislation and administrative approaches were also of assistance to the judge in the *Kevin* case, such as that Kevin had had no problem in changing his name, his passport or his birth certificate. Legislation in the form of the Anti-Discrimination Act 1977 (NSW) had also been amended to protect transsexual persons, and the Crimes Act 1914 had been amended so that criminal behaviour relating to females included transsexuals. The medical authorities had accepted Kevin as a man for the IVF programme, regarding him as an impotent male. He was treated as a man by his employer, the health insurance company, the tax office, his bank and clubs.

Similarly it was pointed out in *Goodwin* (see above), that in English law transsexuals were allowed to reflect their new status on official documents, such as driving licences, medical cards and passports, so that allowing the applicant to effect such a change to her birth certificate, which would also change her pension status, caused no injustice to others nor would it be detrimental to the public interest.
In the Pacific region there have not been these or equivalent legal developments relating to fa'afafine or fakaleiti, nor have there been any cases brought on the grounds of discrimination owing to gender status. If fa'afafine or fakaleiti are accommodated at all within administrative or regulatory systems, it apparently is done informally rather than formally, for example by letting them participate in female sports tournaments. Nevertheless, if account is taken of the social reaction to fa'afafine or fakaleiti and their integration into that society, then some parallels can be drawn between their situation and those considered in Kevin and Otahuhu. However, even if recent case law involving transsexuals suggests that there are some legal principles which might be applied to other transgender cases, there are a number of difficulties evident in doing this in relation to fa'afafine and fakaleiti.

DIFFICULTIES AND DISTINCTIONS

Even if it were accepted that fa'afafine or fakaleiti constituted a separate and identifiable legal category, there would still be two major obstacles to overcome in advocating their right to marry. The first is the strong role of the churches, religion and Christian-based moral creeds that manifest themselves in every aspect of life in Samoa and Tonga. The other is the question of whether current Western, transsexual jurisprudence can accommodate fa'afafine and fakaleiti.

Christianity and the Church

The influence of Christianity on the definition of marriage has already been mentioned. It remains a relevant consideration because of the cross-references to Christian belief and values in much of the case law concerning this topic. Whatever changes have taken place elsewhere, religion and the role of the church within society remain important forces in many Pacific societies. A glance at the preambles of Constitutions of the region will confirm this. In the Cook Islands and Tuvalu, the missionarises played a central role in drawing up rules and regulations to promote or sanction certain forms of behaviour and institutions of social and family organisation. In Tonga, the King’s closest political adviser was the Reverend Shirley Baker. Regarding family law and sexual mores, missionary influence and the role of the church had two effects. They reinforced the ecclesiastical background that had moulded much of the introduced common law in relation to family matters, and they strengthened certain cultural taboos, for example, against adultery and sex before marriage.

Introduced religion did not in general uphold cultural practices, of course. Polygamy, public ceremonies witnessing a bride’s virginity, arranged marriages of young people, institutionalised homosexuality and marriage
of close relatives were all frowned upon and virtually eliminated under the influence of the church. Other practices appear to have been tolerated or, at least in some societies, not eradicated, including the recognition of fa'afafine and fakaleiti. Indeed, there is some suggestion that the church may have had a positive influence on the development of the role of the fa'afafine. Jeannette Mageo (2003) has written about the exchange of puns and witticisms (ula), which had sexual overtones and were part of traditional Samoan entertainment, noting that:

before missionary times, the exchange of  ula was hosted and sponsored by the village girls as a form of public entertainment for visiting groups. Christianity changed the roles of girls, making this type of behaviour no longer acceptable for them. Because “she” belongs in a category that is neither boy nor girl,  ula is acceptable behavior for the male transvestite, or fa’afafine (Mageo 2003: para. 2).

The continuing influence of the church and religion in everyday life is evident in church membership numbers, the frequency of prayers at formal and informal occasions, the important social and educational role of church groups and the participation of church representatives in consultative processes, including law reform. Religious faith is important in directing not only the views of ordinary citizens but also, and more importantly, the views of members of Parliament, who consider changes to existing legislation (Matzner 2001:9, Schmidt 2001). Recent evidence of this can be found in the responses to the Fiji Reform Commission’s Proposals regarding family law. Twenty-seven church groups were consulted during the consultation process. There was strong criticism as well as confusion regarding proposals to allow artificial insemination, especially by the Fijian Methodist Church. Because the Constitution of Fiji prohibits discrimination on the grounds of sexual orientation, church groups voiced their concerns over the reforms proposed by the Bill, some suggesting that this would open the door to homosexual marriage and parenting. Although advocates of the reform strongly denied this, the proposal has been shelved for the time being. Childless Fijian couples seeking assisted reproduction will have to go outside Fiji (Jalal 2002a, 2002b). Church groups were also concerned about the proposed abolition of non-consummation, i.e., sexual inability or impotence, as grounds for declaring a marriage null, again fearing that this would open the way for same sex marriages. This was despite reassurance from the Fiji Law Reform Commissioner that this was not the intention (E.C.R.E.A. 2002). Despite these objections the Act, which was passed in November 2003, and came into effect this year (2004) has abolished non-consummation as a ground for nullity.
The case law permitting transsexuals to marry has emphasised the point that this does not also permit same sex marriage. If, however, state supported artificial insemination or fertility treatment is interpreted as enabling same sex parenting, as indicated above, there may well be the fear that permitting transsexuals to marry would result in homosexual marriage. This perception would be a formidable obstacle to recognising the right of fa’afafine or fakaleiti to marry. The stand of established churches against homosexuality is a very real concern in the Pacific, as indicated by the Fiji Council of Churches Research Group which commissioned a research project on the matter a few years ago (McIntosh 1999). The difficulty is that much of the case law regarding transsexuals has focused on the sexual functioning of post-operative transsexuals and the procreative function of marriage. Also, some people have advocated that transsexuals should be considered alongside or with other inter-sex groups, or with homosexuals or bisexuals. At the same time, there is a growing tendency for Western media to depict fa’afafine and fakaleiti either as deviant—usually as homosexuals or transvestites or both (Schmidt 2001)—or as erotically exotic in some way. While there may be some justification for these arguments, these lines of advocacy may be counter-productive in the Pacific context. There is the danger that too much focus on the erotic/exotic myths of fa’afafine and fakaleiti and speculative voyeurism on their sexuality will detract from the multi-faceted role of Polynesian transgender groups (Matzner 2001; Schmidt 2001).

QUESTIONS OF SEXUALITY AND SEXUAL RELATIONS

One of the principles of Corbett challenged by Judge Chisholm in Re Kevin was that of “true sex”. Justice Ormrod in Corbett seemed to suggest that this was an absolute. A person was either male or female except for those rare situations where a person was born inter-sex. Medical science today suggests that this is not the case. Changing approaches in the courts indicates that the law also accepts this. Considering fa’afafine and fakaleiti it could be argued that Pacific societies have long recognised this, but have not had to consider the legal significance of where a line is drawn.

The question of the sexuality of fa’afafine and fakaleiti is complex and cannot be generalised. Traditional or conservative fa’afafine and fakaleiti may both perceive themselves and be perceived by others as different from their urban or more modern counterparts. Apparently, traditionally fakaleiti in Tonga did not sleep in the boys’ houses and were not kept as apart from the girls as other boys were (James 1994:54). Unlike girls, however, they had freedom of movement and could act as useful go-betweens, not only because of their freedom of movement but also because they could speak out in a way...
that would not be appropriate for Tongan women. Sexually they were often protected from predatory men by their families and kept apart from same-sex adolescent activities. Both in the past and today, however, it seems that adult fakaleiti may be used for sexual gratification by men (Besnier 1994:299-302). The reasons for this are apparently complex: men’s restricted access to women, social acceptance of male promiscuity and abhorrence of homosexuality on the part of Tongan men, and the preference of fakaleiti for sexual encounters with straight men rather than women. There is also some evidence to suggest that traditional forms of homosexuality were viewed somewhat differently from Western “modern” constructions of homosexuality (McIntosh 1999) and that in some cases fa‘afafine or fakaleiti were associated with barrenness (Schmidt 2001) and thus viewed more as women than as men. Also, while women in some roles, notably as sisters and virgins, were highly respected, women in general were regarded in many respects as inferior to men—so that fa‘afafine and fakaleiti, like other women, were subject to various forms of abuse or disrespect. (To some extent, this general inferiority ascribed to women, and to fa‘afafine and fakaleiti, continues.) Even today these sexual encounters are not necessarily viewed by either side as homosexual or adulterous. From the straight male perspective, sex with a fa‘afafine or fakaleiti does not count because “she” is neither a woman nor a homosexual man.

Today, Western influences on sexual identity and gender roles, and the increasing breakdown in clear distinctions between men’s work and women’s work in paid employment means that fa‘afafine and fakaleiti may seek new identities, especially in urban areas. These may be with the gay community—although this community is still fairly closeted in much of the Pacific—or with women. Identifying with women would entail an increasing emphasis on feminisation in dress, makeup, mannerisms, and social and sports activity. At the same time, women’s rights movements are gaining ground especially in education and employment, so that the gender gap between modern women and effeminate men is narrowing (although in Tonga these developments have not reached far yet). Modern women are more likely to “speak out”, may be more sexually active and more outrageous in their dress. At the same time, fa‘afafine or fakaleiti may be more extrovert in their mannerisms, appearance and conduct. In urban areas and among the migrant Polynesian population of New Zealand, there is a general social shift away from community and communal roles towards greater individualism. With greater focus on individual achievement, wage-earning capacity, education and the expression of personal choices and identity, both men and women are redefining themselves. Taboos, especially sexual and social taboos are being broken and what is regarded as acceptable or unacceptable both subjectively and objectively is changing.
Nevertheless, it can be argued that despite these changes faʻafafine and fakaleiti do not neatly fit into Western categories of male, female, heterosexual, homosexual or transsexual (Schmidt 2001), but are unique to the Pacific region. The sexual identity of faʻafafine and fakaleiti is male by Corbett standards, but objectively may share many of the relevant characteristics recognised by the court in Kevin. Whether faʻafafine or fakaleiti would regard themselves as transsexual as opposed to transgendered is more difficult to ascertain for several reasons.

**Sexual Orientation**

It would appear that sexuality has not traditionally been a key aspect of faʻafafine or fakaleiti definition—either self-definition or definition of others. The distinguishing characteristics of faʻafafine or fakaleiti appear, at least until recently, to have been directed at gender rather than sex, at roles rather than sexual identity. While sexual exploitation seems to have occurred, sexual preferences, as opposed to romantic preferences, seem to have been largely unexplored, perhaps because there was no choice.

The difficulty for faʻafafine or fakaleiti is that if they wish to have sexual encounters with men rather than with women this may be seen by others as having homosexual or same-sex relations, while they themselves may see sexual encounters with women as having same-sex or lesbian relations. Despite the prevailing homophobia of many Pacific Island states, faʻafafine or fakaleiti may seek to identify increasingly with gay groups, especially in countries such as New Zealand and Australia, where these groups are beginning to acquire greater legal recognition. As sexual identity becomes more important to individuals, the sexual limbo that confronts faʻafafine and fakaleiti may compel some to lose their unique identity and merge with groups that already “fit” Western constructions of sex and gender, such as transvestites, homosexuals or bi-sexuals. At the same time, it may become increasingly difficult for those who wish to preserve a separate and unique Pacific identity to ward off the negative consequences of Western labels. Nevertheless, there may also be some who seek to reassert or reinvent the distinct identity of faʻafafine or fakaleiti as part of their national cultural identity and as an integral aspect of Tongan or Samoan ways of life. To some extent this may require asserting an identity that is “sexless” but gender orientated. The challenge is to fight off assumptions of sexual preferences or conduct by observers and those who cannot operate without familiar labels, whoever they may be. There is also the challenge of creating a group identity broad enough to encompass many individual differences but still sufficiently unique to be able to say “this is a faʻafafine” or “this is a fakaleiti”.

Sue Farran
Feminine Gender Identity

There is some limited evidence to suggest that at least some fa’afafine or fakaleiti see themselves as women. For example, one of the informants interviewed by Schmidt states: “I was born like this. Right from when I was young, I was like this. When I grow up, I just... my brain, I think my brain works as a woman’s brain, you know, not a man’s” (Schmidt 2001). However, there is insufficient evidence to support the view that fa’afafine or fakaleiti suffer from gender dysphoria. Silence on this matter could be attributed to the previous lack of any practical possibility of aligning their biological sex with their “brain” sex. But it should be remembered that in the transsexual case law “gender dysphoria” is seen as an illness or medical condition that deserves sympathy, recognition and, in many countries now, state-funded treatment. It is by no means clear whether fa’afafine or fakaleiti are uncomfortable with their bodies or traumatised by the disparity between their sex and their gender. Surgical treatment is a phenomenon of modern science. Although it is expensive, it may now be available to those seeking to align their physical bodies with their gender identity either in New Zealand or elsewhere outside the region. Many fa’afafine or fakaleiti may not see this as necessary, however, as long as their identity is gender-based rather than sex-based. It may also be the case that the gender of fa’afafine and fakaleiti should be distinguished from whatever sexual activities they may or may not participate in. (Again, the term “transgender” should perhaps be used with some caution in the case of fa’afafine or fakaleiti). While they may cross and challenge traditional gender boundaries, they may not want to change to be a person of the “opposite sex”, to become transsexuals, but rather be free to assume either feminine or specific fa’afafine or fakaleiti gender identity.

Marriage

The possibility of fa’afafine or fakaleiti establishing their own families has not traditionally been an option. If they wish to marry and have children they must marry women and some do. The possibility of having children—other than by adoption—has not been available. Today modern science and the judgment in Re Kevin show that transsexuals may now have children. Even within the region, changes are occurring. Although the provision was dropped, as indicated above, the Fiji Family Law Bill did propose that artificial insemination should be permitted and that a husband and wife who agreed to such treatment should be deemed to be the parents of the offspring born as a result of the treatment. Given the feminine gender characteristics of fa’afafine or fakaleiti it may be the case that increasingly they will want to have their own families and children, especially in societies in which the family plays such an important role. Could the changing construction of the family and
its perception in law be conceived broadly enough to encompass a faʻafafine and partner with their adopted or step-children, or even artificially conceived children born of a surrogate mother, or perhaps a single parent fakaleiti family? It could be argued that in Samoa and Tonga such a development would be unnecessary on the grounds that the extended family and communal life offer the faʻafafine or fakaleiti a much stronger family environment than the more nuclear Western family. There is therefore less need for them to establish their own family unit. Provided the individual is not marginalised by the family and society there may be no need to advocate greater family rights for faʻafafine or fakaleiti. However, faʻafafine or fakaleiti who wish to do so should not be denied the right to create their own family units and enjoy the legal protection and recognition of the law.

If there was support for change, would the courts of the region be able to accommodate faʻafafine or fakaleiti within the law of marriage? In principle the answer is yes. If the legislation does not specify that marriage must be between a biological male and biological female, then it is open to the courts to allow persons who are not born to the opposite sexes to marry. If the mechanics of sexual procreation are de-emphasised as a feature of marriage, but roles within the relationship emphasised, then biological criteria become increasingly less important. It is after all a feature of society, and this is being recognised in the law, that individuals seek a variety of relationships that may be distinct from or not primarily driven by sexual relations. The law in other areas—such as pension entitlement, inheritance and succession to housing—is increasingly recognising a variety of intimate relationships (using intimate in a non-sexual sense). In many of these any sexual dimension is secondary to issues such as dependency, pooling of resources, cohabitation, mutual support or companionship. At the very least it may be argued that faʻafafine or fakaleiti should be able to benefit from this enlarged understanding of the law as regards relationships and the rights and obligations that flow from these.

Alternatively the courts of the region could interpret the terms “man” and “woman” in their contemporary context—including the cultural context of Pacific society—so as to encompass faʻafafine or fakaleiti. There are now precedents in the common law elsewhere for adopting contemporary and presumably culturally relevant interpretations. In particular the courts of the region could move away from an emphasis on physical reassignment-focused surgery to the other criteria emerging in the case law, such as self-perception, society’s perception and the issue of whether any great harm would be done to allow marriage in such cases. In practice, however, the courts may be reluctant to set off on a path that is bound to attract social and moral condemnation, especially from church groups. It would also be questionable whether judges could distance themselves from their own moral and religious beliefs. There
is also the very basic problem of whether judges can direct their attention sufficiently away from sexual identity to other non-sexual constructions of identity.

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While Pacific Island sentiments may shy away from even considering same-sex marriages or the possibility of gay couples becoming parents, society and the church do accept and value fa‘afafine or fakaleiti. If sexual identity is something that is not an absolute and that may emerge sometime after birth, should fa‘afafine or fakaleiti be denied the right to marry? It could be argued that to allow them to do so would be in harmony with social and community arrangements and values. If the terms “man” and “woman” are to be given their ordinary meanings, are there any compelling reasons—to use Judge Chisholm’s line of reasoning—to exclude fa‘afafine or fakaleiti from being regarded as women for the law of marriage?

Of course it can be argued that there is still a quantum leap from professing to be woman and dressing and acting as woman to having that gender assigned to the claimant. The law, however, is not suggesting that men become women or visa versa. What it is doing is trying to interpret legal rules to fit real and changing social circumstances and provide a just solution to individual needs while balancing these with the norms and legitimate expectations of the societies in which these individuals live. Recent Western approaches to transsexual marriages may be condemned by Pacific Island communities as being totally contrary to Pacific Island traditions and cultures and therefore of no relevance. Yet, it should be recognised that in some respects the place of fa‘afafine and fakaleiti in these Polynesian societies already indicates the acceptance of a continuum of the ascription of sex and gender, rather than a dichotomy. There are times when it may not be that simple to say that “this is a man” and “this is a woman”.

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NOTES

1. The Tonga Leiti’s Association, for example, has Royal patronage.
4. Compare, for example, the Marriage Act of Fiji, in which section 15 states, “[M]arriage in Fiji shall be the voluntary union of one man to one woman to the exclusion of all others”.
5. The Encyclopedia Britannica online indicates that 47 percent belong to the Free Wesleyan Church, 16 percent are Roman Catholics, 14 percent belong to the Free Church of Tonga, 9 percent are Mormon and the remainder belong to smaller denominations.
7. For example, most countries in the Pacific region have now ratified the United Nations Convention on the Elimination of Discrimination against Women. Also, in some countries, e.g., Tonga and Samoa, there has been a notable decrease in family size over the past decade.
15. Secretary, Department of Social Security v SRA (1993) 43 FCR 229.

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