CONTEMPORARY HUMAN RIGHTS ISSUES FOR PEOPLE WITH TRANSSEXUALISM

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HUMAN RIGHTS

On 10th December 1948, the General Assembly of the United Nations adopted and proclaimed the Universal Declaration of Human Rights. The Preamble to that important declaration says *"…recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world"*.

A universal and inalienable human right is a concept that acknowledges the equality of all human beings and the mutually dependent need each of us has for the respect and honourable regard of the other. It is a concept of the inherent entitlement of a human being that cannot be lost or surrendered. The concept of Human Rights is inherently attractive and resonates as truth; even amidst cultural periods when the individualistic maxims of power, prestige and possessions seem so dominant.

The basis or foundation of mutual regard or respect is understanding. Understanding requires clarity. Cultures, like individuals, mystify aspects of themselves which they fear. The power of sex, and of the genitalia as the functional aspect thereof, is immense in 'Western' culture. It is the external genitalia that are used as the indicator for the first assignment of an individual's sex in infancy. No wonder then that it has been so hard for people with transsexualism to find general understanding for the proposition that they are of a sex different from their genitalia and to express their experience of diversity in sexual formation with clarity.

Increasingly in our world everyday legal and human rights, both fundamental and otherwise, are dependent upon a person's legal identity as assigned and as recognised by the state; including the person's assigned sexual identity or legal sex. Increasingly we are being required to produce formal documentation, such as passports, which evidence our assigned sex, in order to undertake even domestic travel and in order to prove who we are. In Australia and elsewhere, a number of legal rights, remedies and jurisdictional issues are determined by whether the relationships citizens have are between individuals of the same or different sexes and hence whether the citizens concerned are male or female.

TRANSSEXUALISM - A CULTURAL RESPONSE TO DIFFERENCE EXPRESSED THROUGH MEDICINE AND LAW

Transsexualism is a form of human diversity in sexual formation, reported since antiquity, in which an individual seeks to alter the individual's sexually differentiated body in order to bring it into sexual harmony with the individual's innate sexual identity or 'brain sex'. It is now generally accepted amongst experts that further research will confirm the preliminary neurological observations and the hypothesis that, as for the brains of animals, the human brain differentiates as to sex (female or

male) in the same way as the other sexually differentiated features of the human body.[1]

Transsexualism has historically prompted a diverse range of cultural responses; from the fear/shame/blame response typical of recent 'Western' cultures such as our own to acceptance, privilege and even honour in ancient and non-western or tribal cultures.[2]

To seek to appreciate transsexualism, and the journey of the relationship with our culture that people with transsexualism are undertaking, is to witness the experience of difference. As we all seem to be called upon to deal with our own and other's difference in our lives, the appreciation of difference, and its power to both enrich and harm, can be no bad thing.

Our culture, perhaps influenced by its Judeo/Christian heritage, has responded to transsexualism with its most formidable social armoury: mystification, ridicule, ostracism and physical violence. People who experience transsexualism have been thus culturally characterised as curious (almost sub-human) aberrations who are mentally ill and/or simple minded and/or perverted; with either no hope of recovery or (perhaps worse still) with a real chance of being successfully treated/counselled/healed/saved and returned to the safe haven of the particular version of normality on offer from that particular healer. Hence, the media portrayal of drag queens, transvestites and cross-dressers as representative of people with transsexualism and the confusion between transsexualism, cross-dressing, the phenomena of transgender expression and the mental disorder or illness properly described as Gender Identity Disorder ("GID") or Gender Dysphoria.[3]

Although debate exists as to the number of people with transsexualism in any cultural group, it is reasonable to assume that there are about 5,000 to 10,000 people with transsexualism in Australia (or about 2.5% of the population).[4] The affect of shame upon reportage may well make any such estimates conservative. People with

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[1] Transsexualism : The Current Medical Viewpoint by Dr. R Reid, Hillingdon Hospital (Medical Sub-Group Convenor), Dr. Domenico di Ceglie, Tavistock Clinic, Mr. James Dalrymple, London Bridge Hospital, Professor Louis Gooren, University of Amsterdam, Professor Richard Green, Charing Cross Hospital and Professor John Money, Johns Hopkins Hospital, USA produced for the United Kingdom Parliamentary Forum on Transsexualism, Chair, Lynne Jones, MP, second edition, 18th January 1996 as published by Press For Change http://www.pfc.uk/medical/mediview.htm. See the expert evidence as reviewed by Justice Richard Chisholm in ***Re Kevin*** as cited at footnote 13.

[2] Examples are the traditional Polynesian/Pacific Basin cultures and the traditional Indian cultures of North and Central America. As an interesting contemporary comparison with our own culture, note that the Islamic government of Iran has recognized transsexualism, allows its citizens them to undergo sex affirmation treatment with surgery funded by the state and issues new birth certificates in the affirmed sex. Iran's Muslim clerics, who dominate the judiciary, are becoming considerably better informed about transsexualism. Some clerics now even recommend sex affirmation treatment with surgery to those who they consider suffer from transsexualism. The issue was discussed at a conference in Tehran in June 2004 that drew officials from other Persian Gulf countries.

[3] The Australian movie *Pricilla Queen of the Desert* and the recent Channel 10 program *There's Something About Miriam* is a good example of the confusion, exploited by the program, between people who have no desire or need to bring their body (and especially their genitalia) into harmony with their mind who display transgender expression and are, subject to their own confusion, extreme cross-dressers, and do not experience transsexualism yet are labelled as such. People with transsexualism undergo sex affirmation surgery for their own benefit and peace; rathe than choice.

[4] *How Frequently Does Transsexualism Occur?* by Lynn Conway lynn@ieee.org http://www.lynnconway.com/

transsexualism have families and often have children. Many people with transsexualism in the world (together with their family members and loved ones) still live out their lives in secrecy, because of their fear of how society (and their neighbour) will deal with them in the event that they disclose the existence, or the history, of their transsexualism. This predicament, or survival method, is termed 'stealth' and is a version of "passing".[5] The bargain of choosing to live a false existence in order to live free of physical harm and/or prejudice that is the act of 'passing' should be familiar to most as it is something most of us are obliged to do in intermittent and small ways on a daily basis to satisfy our culture's rapacious demand for conformity. The general illness of our 21st Century 'western' culture deserves discreet treatment. Thankfully, for most, the price paid for our 'passing', and the stakes at risk, are not nearly as high as for people with transsexualism; and especially the children.

For a variety of reasons, including culturally cultivated shame, ignorance, the desire to procreate, good intensions and erroneous medical advice that transsexualism is treatable, many people with transsexualism only affirm their innate sex (or brain sex)[6] after they have married, formed de facto relationships and/or borne children in their first assigned sex. While their spouses/partners are likely to have some inkling or knowledge of an individual's transsexualism, her or his sex affirmation may well come as a shock to children, parents, other family members, in-laws, workmates, colleagues and employers. The reaction to the revelation of an individual's sex affirmation can range from appreciation and support to condemnation and rejection in a culture where, at worst, ignorance of transsexualism is rife and, at best, 'mixed messages' as to transsexualism continue to be given out.

Significant parenting and social issues can accompany a parent's sex affirmation. Sex affirmation, often occurring at or near separation, can result in a substantial loss of income, if not gainful employment, for the person with transsexualism. The total medical costs of sex affirmation treatment[7] (still not publicly funded in Australia through Medicare) can amount to approximately AUS$50,000.00. People with transsexualism die or their lives are abused and degraded by their efforts to find the price of such treatment. As normal employment is often lost as a result of an individual's sex affirmation, many younger people with transsexualism turn to prostitution or other crime in their desperation to fund sex affirmation treatment. Many, too old for prostitution, ostracised by family, friends and culture and without the monetary means to attain treatment for their transsexualism, suffer severe depression, self-harm and often take their own lives. Difference can be a health hazard. Shame kills.

Children and adolescents with transsexualism suffer a worse fate still in their dependency. The voices of these young people, from pre-puberty to adulthood, clearly stating their predicament and seeking help, are too often ignored and/or ridiculed; not

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[5] See **Appendix A** for a description of passing contained in an excerpt from the essay by Sandy Stone, "A Post transsexual Manifesto", in *Body Guards*, Julia Epstein and Kristina Straub (Editors) (New York and London: Routledge, Chapman and Hall, Inc. 1991) at pages 298-299.

[6] or "sex affirmation" - to make public one's innate or brain sex or to transition public sexes or the public evidencing by an individual of the sex opposite to their legally assigned sex. See the section headed "Terminology".

[7] This estimate includes the cost of hormonal, counselling, hair removal, voice training and surgery in respect of both genitalia and secondary sexual characteristics such as breasts.

only by their parents and family members (upon whom they rely for approval and a healthy sense of self) but by well-meaning members of the medical, psychiatric, legal and health care professions; many of whom possess anachronistic 'disorder' concepts of transsexualism if at all. Nor do I intend by this to be personally critical of the hard working medical practitioners and others who have sought to treat and otherwise assist people with transsexualism. My contention is that the error of the disorder model of transsexualism, and the continued assignation and/or association of transsexualism with psychological pathology through the use of such terms as Gender Dysphoria and GID, is the result of a cultural, rather than an individual, prejudice; born of a pan-cultural genitocentrism that finds the difference of transsexualism almost too challenging to tolerate. But more of this later.

In order to receive treatment for their transsexualism, such young people (and their parents/guardians) must negotiate their way through the malaise of outdated medical and legal categorisations of childhood and adolescent transsexualism; which both mystify and pathologise their diagnosis and prejudice their treatment.

In Australia, as a result of the recent decision ***Re Alex – Hormonal Treatment for Gender Identity Dysphoria*** 2004 Fam CA 297 ("***Re Alex***"), young people with transsexualism and their parents/guardians are now required to obtain the approval of the Family Court of Australia, exercising its child welfare jurisdiction, before they can receive established nonsurgical and hormonal treatment for the condition pending surgery in adulthood. Alex has been generally perceived in Australia as a breakthrough for the human rights of children with transsexualism. Before ***Re Alex***, however, such treatment was previously simply available with parental consent upon diagnosis by medical practitioners[8].

In ***Re Alex***, law and medicine, working together within a climate of cultural prejudice and ignorance, were able to reinforce the medical myth of transsexualism as an uncertain psychological disorder rather than 'genuine' medical condition. The narrow and unchallenged expert evidence upon which the court relied merely sustained the improper inclusion of transsexualism within the pathologising and diagnostic generalisations of Gender Dysphoria/GID as defined by the DSM. While seeming to support the right of young people with transsexualism to receive the appropriate medical treatment that should be their due, ***Re Alex*** does nothing of the sort. The decision actually further mystifies transsexualism in childhood and adolescence as well as its diagnosis and treatment. The decision even seems to give some credence to the anachronistic concept that young people with transsexualism (and perhaps their parent/s) can be possibly 'helped/cured' with a dose of psychoanalysis.

Even where such treatment does not pathologise child and parent (in seeking to find psychological/developmental explanations), it is typically focused upon the psychological analysis of the individual with transsexualism and her/his family and rarely includes comprehensive ongoing social intervention, guidance and support for the young person, the young person's family and school/social network. Instead, once

[8] The author is in possession of the legal advice NSW Health to that effect, which has been relied upon by NSW Health to deny and suspend the provision of medical treatment for transsexualism in childhood and adolescence in NSW, which had been approved prior to the decision in ***Re Alex***, pending such young people's parents making successful individual applications to obtain the authorisation of the Family Court of Australia.

treatment for transsexualism is approved and undertaken, while the young person and the parents/family *may* receive counselling and support, it is likely that the interaction of the young person (who may now have transitioned public sex or gender) with school and other social networks is often left to chance. This situation encourages families to move away from established social supports and to adopt 'stealth' and 'passing' as a way of life; with all its social and familial disability and harm. Help with social adjustment is of equal importance to medical treatment in order to ensure the child's healthy experience of transsexualism; not to mention the needs of her/his parents, family, school and society.

A young person with transsexualism will not always wait upon the permission of parent/s, guardian, doctor and court to commence to live out or affirm his or her innate sexual identity resulting in a life crisis for the young person with transsexualism and her or his family occurring in the absence of adequate established legal, social and medical structures or support systems.

The net result of medicine's disorder perception of transsexualism, as expressed through law in ***Re Alex***, is to add further delay and doubt, as well as increasing the monetary and personal costs of treatment by making treatment conditional upon the child passing through legal as well as medical gateways; in a predicament where the success of that treatment closely correlates with the promptness of its delivery. The decision turns upon the view that the diagnosis of transsexualism in young people is so unreliable that treatment (and its various stages) should only occur with court approval.

The experience of transsexualism, for children and adults alike, and even in a culture as compassionate as that of Australia, is the experience of an ongoing significant and sometimes life-threatening personal, social, medical and legal crisis; made worse by a lack of public funding for medical treatment, a pervasive ignorance and/or misconception amongst members of the medical professions as to the nature of transsexualism and its treatment and the misconceived imposition of legal impediments to that treatment.

The predicament of medical ignorance in respect of transsexualism is exacerbated by the reality that those few medical practitioners and health care professionals (psychiatrists, psychologists, endocrinologists, surgeons and social workers) who have chosen to apply themselves to this area of practice have suffered professional stigma by association with their patients. There have been several recent media campaigns and medical investigations undertaken which continue to question the medical ethic of practitioners involved in the treatment of transsexualism; both in Australia and in the United Kingdom.[9] These media inspired exposés and medical investigations seem more motivated by the demands of religious and other self-serving extremists who seek to challenge the veracity of sex affirmation treatment (and particularly sex affirmation surgery) per se, than the goal of improving services to patients who experience transsexualism. The result is that expertise in respect of transsexualism is held and reviewed by a comparatively small number of people;

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[9] In Australia – the investigation of the Monash Clinic in April 2004 and, in the United Kingdom – In January 2004 the General Medical Council (GMC) began an inquiry into consultant psychiatrist Dr Russell Reid alleging serious professional misconduct over allegations that he has put his patients' health at risk.

amongst whom individual opinion, reputation and collegiate power retards fresh the emergence of fresh ideas which may challenge present practice and research paths and standards.

The dynamics of 'stealth', 'passing', cultural prejudice, small numbers of expert practitioners as well as the costs of treatment have also retarded serious client/patient critique of classification/diagnosis/treatment treatment theory and practice in respect of transsexualism.

NSW Health is aware of problems concerning the lack of general medical awareness and professional stigma concerning the treatment of transsexualism and, I hope, will shortly receive funding to enable it to establish an independent centre of excellence for the research and treatment of transsexualism in New South Wales. It is hoped to thus facilitate both the spread of information and expertise amongst medical practitioners concerning transsexualism and the de-stigmatisation of medical professionals who work with the phenomenon; while promoting the same approach elsewhere[10].

The legislative results of attempts to facilitate the correction and/or re-assignment of *legal sex*, though well intentioned, have often been misconceived and/or based upon a psychological disorder/mental illness model of transsexualism and have consequently failed to deliver true justice and human rights and/or have placed unreasonable and inhumane conditions upon the exercise of any rights accorded; such as the ending of an enduring marriage.

The Commonwealth of Australia and its States have no uniform legislative approach to intersexual rights (including those of people with transsexualism) and the reassignment or alteration of the legal sex of such individuals; but all States now have legislation that, with and subject to conditions, enables people with transsexualism who have undergone sex affirmation (re-assignment) surgery to effect a full re-assignment of their legal sex.[11] In Australia, once a person's legal sex is reassigned, the person is legally of the re-assigned sex.

Further reform efforts in Australia are now focused upon removing the vague word "transgender" and other 'label words' from legislation and replacing them with descriptions of actions or experiences such as "those who express gender contrary to their legally assigned sex" for "transgender" and "those who experience variation in sexual formation" for those formerly referred to as "intersex" and "transsexual", making the re-assignment of legal sex available for married persons, providing exception provisions permitting people who are medically prohibited from undergoing sex complete affirmation treatment to have their legal sex reassigned and the removal of exception provisions in anti-discrimination legislation affecting sport and superannuation. Unlike the situation in the United Kingdom, in Australia there is no such thing as a voidable marriage; a marriage being either valid or not.

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[10] The author is a member of NSW Health's Expert and Consultative Committee on Diversity in Sexual Formation and Expression.

[11] SCAG (The States Council of Attorney's General) has had this issue on its agenda for many years without result. Victoria, which introduced legislation this year for the re-assignment of legal sex, was the last State to do so.

While it is not the purpose of this paper to critically examine legislation, in this context the recent legislation in the United Kingdom, the ***Gender Recognition Act 2004*** ("**GR Act**"), while clearly a human rights breakthrough in a nation in which reform proved impossible through the legal system, raises concerns in that it appears to be based upon the acceptance of a 'disorder'/medical model of transsexualism that is, and in my view should be, the subject of critical challenge and creates a new legal entity, ***recognised (legal) gender***, rather than dealing with the correction or re-assignment of the individual's ***legal sex*** as evidenced by the birth certificate. Anyone who wishes to utilise the legislation is obliged to medically evidence the questionable disorder diagnoses of ***Gender Dysphoria*** **or** ***GID*** in order to have their gender legally recognised. While the human rights report and parliamentary debate accompanying the legislation were clearly cognisant, as was the UK government presumably, of the real and significantly different legal ramifications of the use of the term 'gender' rather than 'sex' in the legislation, it will be informative to see how the legislation works in practice and is interpreted by Courts. There must be some real concern in that, notwithstanding the best efforts of all those who have worked so hard for reform, the GR Act contains no perception or understanding that people with transsexualism affirm, rather than change, a determinative biological sex not evidenced by the genitalia. The making of an application for the creation of a *legal gender* dependent upon approval by a panel is also of concern in that such systems can become methods of enforcing cultural prejudices, rather than allowing for the reassignment of legal status in exceptional circumstances where sex affirmation surgery is medically prohibited.

While the GR Act may seem strangely out of step with most similar legislation worldwide which secure a reassignment of legal sex on the simple provision of evidence of sex affirmation surgery, in the context of past governmental and judicial attitudes to transsexualism in the United Kingdom, the introduction of the GR Act is a human rights breakthrough and presents significant opportunities for public and governmental education and the sowing of the seeds of future reform.

The current anti-discrimination legislation, legal sex and gender reassignment laws in Australia, the United Kingdom and elsewhere in the world, while being less than perfect, are a solid basis upon which to continue the process of human rights law reform for people who experience variation in sexual formation as well as expression.

We live at a time when biological sex is increasingly being recognised as diverse and multidimensional (making understandable the existence of intersexual human beings), where the assignment of legal sex can be mistaken and corrected and where *legal gender* can be created. By the time of the Sydney Olympic Games chromosomal sex testing had been abandoned, due to the acceptance by the IOC that there were simply too many genuine female athletes who possessed "Y" chromosomes competing. Since then the IOC have moved to permit people with transsexualism who have undergone sex affirmation surgery to compete in their affirmed sex. A mature perception of the contemporary issues of human rights affecting people with transsexualism goes hand-in-hand with an expanding appreciation of the diversity of sexual formation in human beings.

Legally, and in order to consider and confront human rights reform for such people, we need to be able to identify and distinguish between an individual's *predominant*

biological sex, *legal sex* (the sex evidenced by the birth certificate), *common law sex* (the sex declared/declarable by a court for certain purposes) and other legal creations such as the United Kingdom's new *legal gender*.

Thus, one can begin to expand the possibilities of intersexuality in human beings while accepting that the question of whether one is able to live a reasonable life as a male or a female is ultimately determined by one's brain-sex differentiation rather than the appearance of one's genitalia and/or other sexually differentiated body parts. To quote Professor Milton Diamond concerning biologically derived sexual identity: "It's what's between the ears that counts and not what's between the legs".

And while a more subtle appreciation of the biology of sexual determination may assist, it is well to remain aware that the test for the determination of an individual's *legal* and *common law* sex and (and *legal gende*r in the UK), and whether an individual's legal sex can be re-assigned, are each different from each other and are each different again from those concerning an individual's biological sex.

Legal categorisations and classifications are as least as much cultural as they are biological considerations. To quote Justice Richard Chisholm (as he then was) in ***Re Kevin: Validity of Marriage of Transsexual*** (2001) 28 Fam LR 158; [2001] FamCA 1074[12]: "…the fundamental task of the law…, in a legal and social context that divides all human beings into male and female, is to assign individuals to one category or the other, including individuals whose characteristics are not uniformly those of one or other sex."[13]

As we permit transsexualism to be perceived in our culture as a natural aspect of human diversity, rather than a disorder, and clearly distinct from transgender expression, increasing numbers of people with transsexualism of all ages (and their parents/families/loved ones) will seek to pursue their legal and human rights in respect of issues relating to relationships, wills, estates, discrimination and identity.

THE POWER OF LANGUAGE

The ability to find meaning in language and the interdependent ability to be understood by others are essential aspects of a reasonable life as well as being the essential foundation of a human right. The mere acclamation of a human right without acceptance by the culture brings forth no real human right at all. There must be a general acceptance and understanding for an intelligible and real right to exist.

A culture, no less than an individual, confronted with an aspect of itself which it fears, will seek to deny that aspect's existence. Language is one of the most effective ways in which a culture may seek to colonise, trivialise and ultimately obliterate the meaning of a thing. Transsexualism, which challenges our culture's extremely sensitive, insecure and fearful understanding of diversity in sexual formation and

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[12] See also the judgment of the Full Court on appeal ***The Attorney-General for the Commonwealth and "Kevin and Jennifer" and Human Rights and Equal Opportunity Commission*** [2003] FamCA 94 ("***Re Kevin-Full Court***")

[13] ***Re Kevin: Validity of Marriage of Transsexual*** (2001) 28 Fam LR 158; [2001] FamCA *1074* at paragraph 315;

identity, has naturally been a prime target for this treatment and has been traditionally deprived of both sensible language and meaning. Some consciously seek to deny or distort the reality or meaning of transsexualism for the purposes of advancement of their own causes.

For a striking example of cultural denial or conscious ignorance hard at work see **Appendix B** which contains a 2002 BBC news report of the discovery of the beautifully attired remains of a Roman priestess who has undergone the 4th century AD equivalent of sex affirmation treatment but who is determinedly denied both female sex and transsexualism by both senior archaeologist and reporter. For a contemporary Australian example of these phenomena of language one need only review the reportage of the ***Re Alex*** decision where Alex is repeatedly referred to as a 'female/girl' who 'wanted to' be a able to 'live as a male/boy'. There is no legitimacy here for Alex as male/boy or any effort to discuss the implications of the young person's transsexualism that might provide that legitimation. Some academic and other works have evidenced a similar theme. The CCH *Australian Family Law – Family Law News* issue 457 (7th June 2004) http://www.cch.com.au/ reports ***Re Alex*** with the seemingly light-hearted heading "*Girls will be boys*". The possibility that Alex, like Kevin and other males with transsexualism, might simply trust us to hear the truth of their inherent masculinity is utterly foreclosed in the astoundingly confident entreaty called "*According to Merit? When being a girl is not enough*" by Susan Borg, Melbourne barrister and sessional member of the Victorian Civil and Administrative Tribunal, a part-time member of the Migration Review Tribunal and a legal member of the Psychologists registration Board of Victoria, which was published (without comment) by the Journal of the Law Institute of Victoria.[14] Susan Borg knows without a doubt what Alex's problem really is, and that it does not have to do with Alex's assertion of his being male. In her law journal article Borg sets out the predicament, as she sees it, with the question: "So what makes a 13-year-old girl like "Alex" hate her female self to the extent that she actively seeks to begin the process of changing her sex to that of a man?" Borg goes one better than the CCH headline by having "Alex" 'change' from 'girl' to 'man'.

The language traditionally used to describe transsexualism, and the people who experience the phenomenon, firmly grounded in the 'normal', has defied and misrepresented the actual experience of transsexualism which has been made further inaccessible by its being dominated by technical medical discourse.

While people with transsexualism have been hidden and silenced, transgender and Intersex lobby groups have been visible, active and effective. Hence the popular community consultation acronym "GLBTI" for Gay, Lesbian, Bisexual, Transgender, Intersex. While it is important enough to distinguish gay, lesbian and bisexual sexualities here, transsexualism is presumed to get a voice in the generalised "transgender' or the medical construct "Intersex". Given the attitude of some Intersex groups and medical practitioners to people with transsexualism and the distinct and different law reform and societal interests of people who experience transsexualism and those who express gender in a transgender way, the distinct voice of people with transsexualism tends to be lost or confused.

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[14] LIJ: Volume 78: No 7 (July 2004).

While that medical discourse has varied over time (to the extent that it has from time to time sought to truly hear and reflect the stories of people with transsexualism rather than to shape those stories to fit its own purposes and presumptions), it came to be itself dominated until very recently by Freudian inspired psychiatry and psychoanalysis which, while offering no sustainable explanation for the existence of transsexualism and psychiatry's inability to 'treat'/eliminate/fix the phenomenon, objectified, pathologised and infantilised the people who experienced it; in the process projecting a special genitocentrism and biological fundamentalism that proceeded to colonise and dominate the law in respect of transsexualism as epitomised by the English decision of ***Corbett –v- Corbett (orse Ashley)*** [1971] P83 ("***Corbett***").

I say 'a special genitocentrism',[15] because the genitocentric determination of the 'biological sex'[16] of a human being espoused in ***Corbett*** still seems to have the singular ability to attract the fervent support of such apparently disparate folk as the radically religious and the radically feminist long after others have abandoned it. The one uniting factor or opinion at work here, and which was the cornerstone of the ***Corbett*** decision and the subsequent chain of decisions that relied upon the scientific legitimacy of ***Corbett***, is the proposition that the biological 'truth' of an individual human being's sexual identity may be discerned by only one means - the appearance of the person's genitalia at birth - no matter what the individual says of her/his own sexual identity, the evidence for the sexual differentiation of the human brain, what changes occur to the individual's body (including the genitalia) during a lifetime or how that lifetime is lived. Even though the decision in ***Corbett*** espouses a 'biological test involving chromosomes as well as internal and external genitalia, the reliance on genitalia is confirmed in the decision's refusal to deal with the question of the common law sex of people with conditions of genital intersex.

It is ironic to observe the same feminists who would have been presumed to have proclaimed loudly with their sisters "I am not my body!" adhere to anatomical fundamentalism with regard to transsexualism[17]. It is ironic that the same religious people who strongly maintain the sanctimony of marriage, support (or do not condemn) legislation (like that of NSW, Victoria and other Australian States) which compels a couple (whose marriage has been marvellous enough to endure a spouse's transsexualism) to end that marriage with divorce in order for that spouse to have a legal identity consistent with his or her physically affirmed sex.[18] The UK *GR* Act makes such a marriage automatically voidable.

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[15] Meaning centred upon the genitalia as the factor of sexual differentiation that determines an individual's sex. For an interesting analysis of this concept and the history and debate in respect of the causation (natural/organic or pathalogical) see Andrew N Sharpe, *Transgender Jurispudence*, *Dysphoric Bodies of Law*, Cavendish Publishing Limited, 2002, London, UK, at page 39.

[16] 'sexual identity' is either subsumed in or presumed by 'biological sex' or assigned to the distinctly mysterious and unreliable realm of individual 'psychology' as that term is used in *Corbett* and other similar genitocentric traditions.

[17] While these folk give lip service to males with transsexualism as some kind of deluded traitors to femaleness hoodwinked by a male dominated culture, they reserve their most extreme attack for females with transsexualism; utterly denying their femaleness and legitimacy as females so as to so as to preclude the predominance of sexual identity over genitalia and/or chromosomal insignia. Particularly extreme historic examples of this behaviour are Raymond and Greer. A contemporary Australian example is Sheila Jeffreys; Associate professor of Political Science at the University of Melbourne.

[18] See for example Sections 32A–I of the NSW Act in **Appendix C**.

Nevertheless, the presumption that one is the sex indicated by one's genitalia is a subtle and deep-seated one. Even legislation drafted to enable people with transsexualism to re-assign their legal sex to bring it into conformity with their physically affirmed sex commonly define sex affirmation (re-assignment) surgery in terms of "…assisting a person to be considered to be a member of the opposite sex…"[19]; where 'opposite sex' is used to denote a presumed pervasive biological truth evidenced by the original assignment of a person's sex based solely upon the appearance of external genitalia.

The determination of the biological sex of an individual whose external genitalia have an appearance at birth which is sexually inconsistent with the individual's chromosomal formation and/or gonads or which has the characteristics of both male and female genitalia, is problematic under this genitocentric regime and is said to be neither male nor female but rather hermaphroditic; more recently termed 'Intersex'[20]. This limited approach, which is inconsistent with the culture's insistence on people being either male or female, caused problems too for courts charged with the determination of whether such an individual was legally male or female; when at law there is no 'third' or 'other' legal space available in terms of sexual identity[21].

Until recently, this genitocentric vision of biological sex and sexual identity has so dominated our cultural psych, that transsexualism, as an example of intersexual variation in human sexual formation with no gross genital insignia, simply did not exist as a recognised biological, physiological or organic phenomenon and no language, whether medical or cultural, existed with which to describe it thus.

While the discourse of expert medical science was, by the commencement of the ***Re Kevin*** proceedings, clearly speaking of intersexual phenomena in general, and transsexualism in particular, as examples of diversity in human sexual formation rather than aberration or disorder, general medical and legislative language continued to be genitocentric and to distinguish 'psychological' from 'biological' in respect of sexual formation, determination and identity.

Language remains a challenge for those seeking equal human rights for people with transsexualism, their families and loved ones; containing such misleading and misrepresentative terminology as 'sex change' and 'sex change surgery' to describe

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[19] Ibid. Note the mistaken use of the term "transgender" therein instead of transsexualism.

[20] Some people with intersexual conditions, including people with Androgen Sensitivity Syndrome, have claimed the term "Intersex" as their own and, in some cases, as a sexual identity. Such folk object to those who experience transsexualism using the descriptions 'intersex' or 'intersexual' for their predicament of sexual formation. While the reason for some people taking this disturbing, exclusionary and conflicted stance against others 'in the same boat' so to speak is uncertain, it may have something to do with the favourable political treatment such people have been able to achieve which they may feel is threatened by association with people with transsexualism. Such people rely upon the existence of the sexual differentiation in the human brain to advocate against pre-emptive sex assignment surgery and hormonal treatment for infants, but say that the same phenomena (human brain sex differentiation) is yet unproven and cannot be relied upon to place people who experience transsexualism within the meaning of the term intersex. Given the predominant expert evidence as critically examined in ***Re Kevin*** it is hard to conceive of this exclusionary position being sustainable once politicians and the public become better informed.

[21] For vastly different judicial responses to this predicament see the decisions in the (now discredited) Australian decision ***In the Marriage of C and D (falsely called C)*** (1979) 35 FLR 340 ("***C and D***") and the United Kingdom decision ***W v W*** [2001] 2 WLR 673 ("W v W").

one aspect of the medical treatment for transsexualism - but in doing so defining and characterising the phenomenon itself.

People with transsexualism are still burdened with the misconceived, misleading and monistic psychiatric diagnoses of ***Gender Dysphoria*** or ***GID*** derived from the outdated medical presumption that the assertion by an individual of a sexual identity contrary to the sex indicated by their genitalia, gonads and chromosomes accompanied by a sustained and compelling expressed need to alter their bodies to obtain sexual harmony with that identity must indicate disorder and/or illness.

In response to this predicament of language and the mystification of transsexualism, there is a need to adequately distinguish between transsexualism and other phenomena such as transgender expression, transvestism, cross-dressing and sexuality, as well as mental disorders properly described as *Gender Dysphoria/GID,* and to develop a better cultural appreciation of the shared biological continuum occupied by transsexualism and other intersexual variations in human sexual formation. To do so is not to seek to devalue or offend any such group, but to better express the true diversity of humanity in respect of sexuality, gender expression, sexual identity and mental health.

As for any colonised people, the challenge for people with transsexualism is to find and express their own stories and an identity in their own language reflective of their own experience of life; rather than that of the normative or dominant culture. In their painful and seemingly never-ending 'identity debates', people with transsexualism are, in fact, undergoing the painful but necessary process of finding and developing their own meanings and language concerning transsexualism. In Australia, that process was stimulated by the experience, and legal and human rights findings, of the ***Re Kevin*** decision itself which required the intelligible expression of the experience of transsexualism to the Family Court and general public in a demystified and intelligible 'non-trans' way.[22] I have sought to both use and explain this affirmative language in this paper.

TERMINOLOGY

At this point, it is useful to summarise and discuss the terminology used in this paper. (*The terminology I chose to use seeks to make the most of the true difference in meanings of word, particularly where used by legislators and judiciary, and to speak of the meaning of transsexualism as it is experienced, rather than as observed by others. The terms, meanings and opinions I express here are becoming increasingly popular in Australia as part of the development of a fresh language of liberation for people with transsexualism began with* ***Re Kevin****, but are not by any means universally adopted*):

[22] For example, the term "sex affirmation surgery" is now incorporated in the Victorian Births, Deaths and Marriages Registration (Amendment) Act 2004. Find the legislation at http://www.dms.dpc.vic.gov.au/Domino/Web_Notes/LDMS/PubStatbook.nsf?OpenDatabase . The legislation is, in other respects, no more progressive than that of NSW. See also footnote 57 which sets out the significant international decisions which have relied upon ***Re Kevin***

- In ***Re Kevin*** Justice Chisholm (as he then was) found as a matter of fact (on the balance of probabilities) that the human brain differentiates as to sex ("*brain sex*", "*mental sex*" or "*innate sex*") in the fundamentally the same way as the other sexually differentiated features of the body; such as the gonads and external genitalia[23] as demonstrated in scientific examination of animal, and human, brains.[24] The brain sex of an individual develops as a biological process independently of the individual's other sexually differentiated features. An individual's brain sex, or innate knowledge of his or her sex, was more commonly referred to as "psychological sex" and sometimes differentiated from "biological sex" notwithstanding that the sexual differentiation of any part of the person is a biological occurrence;

- In the absence of mental ill health, an individual's **brain sex** is the sex which the individual perceives the individual to be (self perception, or knowing, of one's innate sex);

- **Transsexualism** is the predicament experienced by an individual when the sex generally indicated by the sexually differentiated features of the individual's body or phenotype (and hence the individual's external genitalia and the legal sex consequently first assigned to that individual) are incongruous, or at odds with, the individual's innate or brain sex.[25]

- When an individual with transsexualism publicly reveals or affirms their innate sex, they can be said to have *transitioned* public sexes or to have undertaken the act of ***sex affirmation***.

- Medical science now recognises that transsexualism is a form of intersex;[26] The Macquarie Dictionary defines ***intersex*** as "an individual displaying

[23] Sometimes called "phenotype". See "Definition and Synopsis of the Etiology of Adult Gender Identity Disorder and Transsexualism" being a paper signed, approved and authorised by 17 of the world's most respected medical and scientific experts in the field as published by the Gay and Lesbian Association of Doctors and Dentists (United Kingdom) 2002 funded by Gender Identity Research & Education Society, the Kings Fund & the BCC Trans Group, and published at http://www.gladd.dircon.co.uk/trans_defn.htm. Note, however, that the reference to the terms "transman" and "transwoman" is not applicable for Australia where these terms have not been accepted and are not popular. I suggest such terminology tends to confuse and/or dehumanise and detracts from the simple assertion by people who experience transsexualism that they are simply women and men who experience a natural variation in human sexual formation.

[24] See the discussion of expert evidence in ***Re Kevin*** at paragraphs 209 to 273; and particularly that of Prof Louis Gooren and Zhou and others discussed at paragraphs 239 to 264 thereof.

[25] Ibid.

[26] Ibid. In particular, see the evidence of Prof Milton Diamond and Dr Jan Lesley Walker. To quote Diamond: "I am convinced that "brain-sex" or "mental-sex" is a biological reality that explains many aspects of sexual identity. I have published that this inner sense of sexual identity is the factor that alerts an individual as to whether or not the social conditions imposed by Society are or are not appropriate (Diamond 1995; Diamond 1997). It is just that aspect of mentation that alerted David Reimer to his situation. I believe it is similar for transsexuals…In the transsexual the differences between sexual identity and gender identity manifest themselves early in life and the transsexual individual strives to have the two identities come into concert. The brain/mind being sex differentiated during prenatal and neonatal development sees the discrepancy between inner core sexual identity and external gender. The solution for reconciliation, as seen by the transsexual, is "Change my body, not my mind" (Diamond 1994)…One's sexual identity is how the individual sees self at core; one's gender

characteristics of both the male and female sexes of the species.[27] Transsexualism is readily diagnosed by medical practitioners familiar with the predicament and is a biological predicament of human sexual formation (and not a psychological one).[28]

- Thus, it is both factually and scientifically accurate to assert that transsexualism is a form of intersex and that it is now recognised in medical science as such. Transsexualism describes a condition in which an individual experiences the predicament of having a brain which has sexually differentiated to one sex while having the balance of his or her body sexually differentiated to the other sex. It is now accepted 'best medical practice' that where an intersexual condition is detected at or near birth then the assignment of that individual's legal sex should be postponed until, or such assignment takes place on a provisional basis only to be later affirmed or reversed on the basis of, the disclosure or affirmation by the individual of the individual's innate or brain sex;[29]

- The only successful medical treatment for the predicament of transsexualism is to harmonise the sexually differentiated features of the individual's body with the individual's innate or brain sex so that the individual can experience sexual unity. The Macquarie Dictionary defines '**transsexual'** as "one who has undergone a sex change operation"; indicating that it is this aspect of transsexualism that distinguishes it from transgender/transvestism/cross-dressing and other such phenomena primarily associated with gender expression.[30]

- ***Sex affirmation treatment (SAT)***, properly undertaken, involves both medical and social intervention. The medical treatment of children with transsexualism consists of the administration of chemical 'blockers' to delay puberty with the conservative administration of reversible and, with adolescence, irreversible hormonal treatment to alter the sexual hormonal balance in order to harmonise physical appearance with sexual identity. With the development of medical science consideration should be given to the optional preservation of in vitro reproductive capacity. With adulthood the individual is free to undergo surgical intervention to complete the physically rehabilitative process of sex affirmation treatment with irreversible surgery to the individual's sexually differentiated bodily features. Of almost equal importance is enabling and empowering people with transsexualism and their families etc on the one hand, and their social environment (from schoolyard to general practitioner to the general public)

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identity is how the individual sees self in society… I have published (Diamond 1999) that it is my belief that transsexualism is a form of intersex." And to quote Walker: "The literature on transsexuals suggests that there is an early and enduring realisation that they are actually of the opposite sex and that this is concordant with their behaviour from early childhood… I would agree with the contention therefore that transsexuals form part of the spectrum of intersex because there is discordance between their biologically apparent sex and their sociological and psychological sex.";

[27] The Macquarie Dictionary, 2nd ed, editors Delbridge, Bernard, Blair, Peters and Butler, 1992, The Macquarie Library Pty Ltd, Macquarie University, NSW 2109 Australia at page 920

[28] See expert evidence in ***Re Kevin***.

[29] See the expert evidence adduced in ***Re Kevin***

[30] op cit The Macquarie Dictionary, 2nd ed, at page 1858

on the other, to experience the difference of transsexualism in a healthy manner.

- The aspect of sex affirmation treatment involving surgical intervention is referred to as ***sex affirmation surgery (SAS)***. This surgery has been/is also somewhat genitocentrically referred to as "sex re-assignment surgery" or "SRS")

- The nature and extent of sex affirmation treatment differs between affirmed females and males with transsexualism. Such treatment is rehabilitative in purpose and, therefore, does not require results that are either cosmetically or functionally 'perfect' or complete in order to be considered successful;[31] Some aspects of hormone treatment alone can cause irreversible changes to the body.[32]

- Australian culture, in common with most others, perceives and requires its members to be either male or female. Different cultures associate certain distinctive characteristics of dress and behaviour with each of the two sexes. **Gender** is the cultural construct of sex. An individual's **gender expression** or presentation is the cultural expression of sexual identity, based upon, but not limited to stereotypical representations of masculine and feminine. A person's gender expression or ***gender identity*** can signal to others not merely the sex to which that individual belongs, but complex permutations of femininity, masculinity and *other* reaching across and beyond the culturally conceived gender continuum.[33] Thus, to give either 'sex' or 'gender' the full potential of their meanings it is necessary to distinguish between the two; rather than using the word 'gender' as a euphemism for the word 'sex'.

- **Transgender** has come to be used to encompass anyone whose expression of gender or gender identity is at odds with their legally assigned or genital sex; be they homosexual or straight cross-dresser, drag queen, gender liberationist or intersexual. In this guise the word, though politically correct and safely imprecise, is worse than useless as it is misleading in suggesting that the various people included have something significant in common. The word "transgender" was, in fact, coined by heterosexual cross-dresser, Virginia Prince, in the United States of America to

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[31] Op cit ***Re Kevin***. For a number of reasons set out in expert evidence, and in the husband's evidence, such as medical risk, present efficacy, cost and family obligation, the Husband in ***Re Kevin***, like many males experiencing transsexualism, had not undergone phalloplasty (penile construction) at the time of the hearing. The husband was still considered by the same expert opinion to have successfully undergone sex affirmation treatment sufficient to permit medical certification pursuant to sections 32B and 32C of the Births, Deaths and Marriages Registration Act 1995 (NSW).

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[33]For another interesting discussion of such terminology see "Sex and Gender are Different: Sexual Identity and Gender Identity are Different", Milton Diamond, PhD. Clinical Child Psychology & Psychiatry-Special Issue In Press for July 2002. University of Hawaii, John A Burns School of Medicine Department of Anatomy and Reproductive Biology Pacific Centre for Sex and Society. 1951 East-West Road, Honolulu, Hawaii 96822 USA phone: (808) 956-7400,facsimile: (808) 956-9481 Diamond@hawaii.edu. Also see the discussion by Leslie Feinberg in the Preface to her book "Transgender Warriors"1996, Beacon Press, Boston Massachusetts, USA.

distinguish a transgender person, who had no compelling need or desire to permanently and significantly change or alter their body but who wished to live out a gender expression contrary to their sex, from a person who experienced transsexualism.[34] The word transgender is most clearly utilised as describing a behavioural phenomenon where an individual's gender expression (***gender identity***) is at odds with their innate sex (***sexual identity***).[35] For people who express transgender no fundamental incongruity or conflict exists between the sexually differentiated features of the individual's body and the individual's brain sex and legal sex. Hence, even while expressing a contrary gender, the transgender individual does not require or desire full sex affirmation treatment, and certainly not sex affirmation surgery; even though some will use hormonal and cosmetic treatment to enhance their transgender expression. Transgender individuals express gender contrary to their assigned sex without a desire to physically affirm a sex contrary to their assigned sex.[36] Many people do the same thing on an occasional basis. While many people with transsexualism are conservative in their gender expression, some people with transsexualism also express their gender in a transgendered way.

- It is sometimes forgotten by those who would confuse ***transsexualism*** and ***transgender*** (and consequently advocate that there should be no precondition of bodily reformation by sex affirmation treatment and SAS associated with the reassignment of legal sex or the recognition of common law sex) that people who experience transsexualism will undergo, and throughout human history have undergone, conclusive sex affirmation treatment including SAS irrespective of the law or legal consequence.[37] People who experience transsexualism undergo such treatment when they are medically and financially able, with all its difficulty and expense, for its own sake in order to sustain their lives and not as a matter of choice. This is not to deny the importance of legislation governing the re-assignment of legal sex, or the assignment of legal gender, making provision for those who are not medically able to undergo SAS. As a matter of human right this essential medical treatment should be, but is not, funded by the state in Australia through Medicare. (currently approximately AUS$40,000.00 to $50,000.00) as a result.

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[34] See an interesting discussion by Leslie Feinberg (a female person who identified as transgender) in the Preface to her excellent book "Transgender Warriors"1996, Beacon Press, Boston Massachusetts, USA . For an example of the confusion of terms transgender and transsexualism one need only look to the use of the terms "transgender" and "recognised transgender" in the New South Wales Anti-Discrimination Act and Births, Deaths and Marriages Registration Act 1995 and compare them with the Second reading speech t parliament with which that legislation was proposed to the NSW Parliament. The legislature clearly thought it was providing remedial legislation for people who experienced transsexualism and not people who could be included in any of the other numerous categories of transgender expression.

[35] Op cit "Sex and Gender are Different: Sexual Identity and Gender Identity are Different", Milton Diamond, PhD

[36] Ibid

[37] Lyn Conway's website, http://ai.eecs.umich.edu/people/conway/TS/TS.html contains much useful information including a discussion of the history of transsexualism.

- In Australia, an individual's **legal sex** is the sex to which the individual is assigned pursuant to the record of the particulars of the individual's sex contained in a register or public record of births, deaths and marriages maintained in each State and Territory and published as, or evidenced by, the individual's "Birth Certificate". An individual's **legal sex** is most often first assigned at or near the birth event on the basis (only) of a casual inspection of the individual's external genitalia. For the great majority of Australians the presumption that an individual's brain sex is in accord with the sex indicated by his or her external genital formation is an accurate one. For Australians who experience transsexualism, and some other intersex conditions, that is not the case. In fact, for people who experience transsexualism, and some other intersex conditions, our system for the first assignment of legal sex guarantees that they will be assigned to the 'wrong' legal sex;

- Once people with transsexualism have undergone conclusive sex affirmation treatment (and thus their 'trans-ing'), such people increasingly refer to themselves as a men or a women **of transsexual background;** a man or woman who has undergone treatment for the intersex condition of transsexualism who can now seek to live a full and fulfilling life consistent with their innate sex.

- The medical and legal recognition of the sexual differentiation of the human brain has justified or ratified the experience of transsexualism as natural (if not 'normal') and enabled a human being's affirmation as to their sexual identity as either female or male to be given greater weight than mere physical characteristics of bodily formation, such as the genitalia, in determining an individual's biological, legal and common law sex.

THE CAUSATION DEBATE

Historically there have been three competing 'nature verses nurture' explanations advanced by medical science and psychiatry for the cause of transsexualism:[38]

- *The Non- Conflictual Psychological Theory* - where transsexualism is seen as a pathology (a mental illness, confusion or disturbance of a normal psychological development of sexual identity) where sexual identity is precociously fixed and untreatable except by assisting the sufferer to live as well as possible with the pathology from which he or she suffers; and

- *The Conflictual Psychological Theory* - where transsexualism is seen as a pathology (a mental illness, confusion or disturbance of a normal psychological development of sexual identity) where sexual identity is

[38] A Psycho-Endocrinological overview of transsexualism A Michel, C Mormont1 and J Legros ISSN 0804-4643 European Journal of Endocrinology (2001) 145 365±376.

not fixed and continues to remain ambiguous throughout development and is thus treatable by psychotherapy; and

- *The Biological Theory* – whereby observations on the sexual dimorphic character of the brain in animal studies (and lately some human studies) proposes that a human being's sexual identity derives from the sexual differentiation of human brain as to either the male or the female sex, in the same way as the other sexually differentiated aspects of the human body such as the genitalia, and is fixed and unalterable by the completion of infancy at the latest irrespective of social environment;

Transsexualism as a particular category of pathology or mental illness ("gender dysphoria syndrome") was included in the United States of American Psychiatrist's Diagnostic and Statistical Manual of Mental Disorders, edn III (DSM-III) in 1980, but was then removed from the DSM-IV in 1994 when it was assimilated/subsumed into the more general category of sexual and gender identity disorders. This significant change in the way psychiatry perceived transsexualism coincided with the removal from the DSM (after significant political and medical lobbying) of homosexuality as a pathology or mental illness or disorder.[39] The DSM-IV (See **Appendix D**) changed the professional psychoanalytic view that there was a difference between transsexualism and Gender Dysphoria/GID while at the same time providing a radically new differential diagnostic criteria for children and adults with transsexualism.[40]

As a consequence of this alteration to the DSM, people who experience or exhibit all types of non-normal behaviour in respect of sexual and/or gender expression are now grouped together by psychiatry in the DSM-IV.[41] In particular, this change to the DSM IV enabled psychiatry to continue to 'legitimately' treat (try to change to heterosexual/normal) homosexual children whose parents find their behaviour unacceptable; even though adult homosexuality is no longer able to be legitimately treated as a mental illness.

Thus, the criteria for the diagnosis of *Gender Dysphoria* /GID in childhood contained in the DSM IV includes children with severe mental disorders, those who merely transgress accepted norms of gender expression such as those who exhibit transgender/cross-dressing behaviour/effeminate/tomboyish and those who are homosexual as well as those who experience transsexualism.[42] This consummate vagueness of diagnostic criteria enables psychiatrists to continue to give the contradictory evidence (as they do in ***Re Alex***) of the uncertainty of the diagnosis of *Gender Dysphoria*/*GID* in childhood and adolescence and to express doubt as to whether a child with that diagnosis will develop adult transsexualism and of their

[39] Ibid.
[40] Ibid.
[41] Ibid.
[42] The actual formulation of the DSM IV is quoted (uncritically) in ***Re Alex*** at paragraph 101 within the evidence of English psychiatrist, "DR C". Dr C appears from his evidence to espouse the generally conflictual pathological view of transsexualism as he appears to see treatment to avert a young person's transsexualism as an option.

regular successful identification, diagnosis and treatment of transsexualism in children and adolescence.

The best of these practitioners will admit, as they did in ***Re Kevin***, that in practice transsexualism is identified and diagnosed by *ruling out* other phenomena such as disorders, homosexuality and physical intersex, rather than actually identifying the causation of a person's transsexualism. It is misleading and confusing to maintain a distinction between childhood and adult transsexualism and/or the possibility that there are varying degrees of a conglomerate phenomenon encompassing Gender Dysphoria/GID, transgender expression such as cross-dressing and transsexualism. Hence the creation of such further misleading terms as "extreme GID" and "extreme Gender Dysphoria" by some experts seeking to deal with the inclusion of transsexualism within the diagnostic hotchpotch of *Gender Dysphoria* /*GID*.

In ***Re Alex***, after expressing himself to be uncomfortable with the term 'disorder' as applied by the psychiatric experts to Alex, Chief justice Nicholson (as he then was) created his own new hybrid term for transsexualism in the young, '*Gender Identity Dysphoria*'[43], and used it as part of the title of the case. Any reading of the decision indicates, however, that of all the participants in ***Re Alex***, Alex himself was the least confused (or dysphoric) about his sexual identity.

Psychiatrists and psychologists have come to rely upon the DSM terminology, notwithstanding its difficulties, so as to give legitimacy and professional protection when diagnosing transsexualism; especially in children. The reality is, however, that the truly important role performed by psychiatry and psychology in the diagnosis of transsexualism, in both adults and children, is to rule out disorder or illness as an explanation for the phenomenon. The psychiatric evidence in ***Re Kevin***, for example, confirmed Kevin's transsexualism by satisfying itself that his experience of himself as male in the face of the evidence to the contrary was *not* as a result of mental ill health, confusion or delusion.[44]

The fact is that psychiatry, while 'observing' and interacting with transsexualism over many years, has never been able to either adequately explain or 'cure' it. The dominant role of the endocrinologist, rather than the psychiatrist, in the treatment of transsexualism has long been recognised. Given the serious and sometimes irreversible nature of sex affirmation treatment, it is necessary for psychiatry to play its role in limiting treatment for transsexualism to those who experience it and at the same time to assume more responsibility in the task of enabling all people with transsexualism (children and adults), their families and love ones to experience the difference of transsexualism in a healthy way.

There is a developing campaign supported by diverse human rights groups, people with transsexualism and members of the medical and legal professions to remove transsexualism from the DSM as was achieved with homosexuality. Certainly, people with transsexualism will tell you they have never experienced *Gender Dysphoria* or any confusion about, or unhappiness with, either their gender or sexual identity. On

[43] ***Re Alex*** at paragraph 2.
[44] In ***Re Kevin*** Chisholm J quotes from the report Dr Cornelis Greenway at paragraph 46: "I do not believe that Kevin's perception of himself as a male is a result of a psychosis, nor of a delusional disorder. I do not believe that he is suffering from a body dysmorphic syndrome."

the contrary, the experience of transsexualism (in the absence of any other phenomena or illness) is the experience of certainty and congruity as to both such identities *in spite of* all else. This is not to say that *Gender Dysphoria* and/or *GID* does not exist as a pathology or disorder. It is only to say that it is mistaken to include transsexualism within the same ambit.

It is hard to better the clarity and detail of the discussion of the competing expert explanations for transsexualism, including the phenomena of the sexual differentiation of the human brain, carried out by Justice Richard Chisholm in his reasons and decision in ***Re Kevin***[45]. For convenience I set out his Honour's primary conclusions in respect of that expert evidence in **Appendix E** which confirm and explain the overwhelming dominance of the biological explanation of transsexualism in both medical science and the law.

There will be no conclusive 'scientific proof' of the causation of transsexualism until medical science can identify and ratify the sexual differentiation of the human brain and/or genetic identifiers for transsexualism in living human beings.

What Teresa Anderson and I set out to do (and achieved) as the legal team in ***Re Kevin***, was not to prove the 'biological'/brain sex explanation of transsexualism, but to meet and defeat the 'biological sex'/genitocentric formula for determining the common law sex of an individual as established by ***Corbett***. We did this by showing that the psychological/disorder explanation for transsexualism, sustained more by psychological practice and teaching than fact, was less likely to be true than the 'biological'/brain sex one. Once this proposition was accepted, it could follow quite simply and logically that the most likely explanation for transsexualism is that it is an intersexual condition; taking the human brain into equal account with other body parts so as to establish an incongruent sexual differentiation.

Given the increasing evidence of brain sex differentiation and its dominance in determining the biological and legal sex of people with other intersexual conditions, it followed that if the same legal and medical principles were applied to people with transsexualism, Kevin was legally entitled to affirm his biological and as well as legal status as a male and a man; and not merely as someone claiming the right in terms of social justice to be *treated* as if they were.[46]

I find it curious that folk who otherwise seem to be advocates for the human rights of people with transsexualism, shy away from asserting the 'biological/brain sex' case or human rights law reform or, if fact, seek to disparage that approach while preaching the social justice case. One such case does not need to be sacrificed to sustain the other. Besides the 'biological/brain sex' hypothesis now being generally accepted by medical science as the most likely explanation for transsexualism, the actual experience of transsexualism, evidenced by a sane person's own consistent 'say so' as to their being male or female in contradiction to their genital formation, backed by a consistent need and willingness to undergo sex affirmation treatment in order to live and irrevocably physically affirm that sexual identity, accords with the innate and biological nature of transsexualism and usefully differentiates the phenomena from

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[45] ***Re Kevin***, Chisholm J, particularly paragraphs 239 to 264.

[46] See **Appendix F** for the full extract of paragraphs 326 to 330 headed *Conclusions* of the judgement of Justice Richard Chisholm (as he then was) in ***Re Kevin.***

cross-dressing and other forms of transgender expression with which it continues to be confused.

CONCLUSION

Re Kevin is the clear statement of Australian common law confirming the method of the determination of the sex of an individual who has experienced the intersexual condition of transsexualism for the purpose of marriage. In its expert and detailed exploration of transsexualism as an example of the human condition, it is the foundation of a new era in human rights for people who experience a phenomenon which has been so mystified and misunderstood. ***Re Kevin*** is a credit to the courage and determination of the applicants, 'Kevin' and 'Jennifer' and the workings of Australian justice that enabled them to succeed against a committed Commonwealth government to establish a true 'landmark' in the movement for equal civil and human rights law reform for people living with transsexualism.

It seems that throughout the world people are now able to begin to accept and appreciate diversity or difference in human sexual formation. We can now appreciate that biological sex is multi-dimensional and is ultimately determined by the sexual differentiation of the human brain, rather than by body parts such as genitalia. We now know that a person's legal sex (as per their birth certificate) can be different from their predominant biological or innate sex (as per their 'brain sex') as well as their common law sex as determined by a court. Many cultures have begun to understand transsexualism and some other traditionally known intersexual conditions, to appreciate the life experience of the people who live with these conditions and that such conditions are nothing more or less than natural variations in human sexual formation.

We can now distinguish an individual's gender expression (or gender identity) from the individual's sex (or sexual identity) and appreciate that both are different again from an individual's sexuality as indicated by the terms "homosexual", "bisexual" and "heterosexual".

As people with transsexualism have been becoming increasingly 'visible' and culturally intelligible over the past decade or so, and as transsexualism has increasingly been recognised as a biologically derived intersexual condition with an established diagnosis and treatment regime[47], the demands upon governments have intensified for a full recognition of the fundamental human rights of people who experience transsexualism such as the right:

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[47] see ***Re Kevin*** particularly at paragraphs 209-273 and the judgment of the Full Court. These two judgements contain a useful historic collection and analysis of Australian and international decisions dealing with transsexualism. See also the landmark decisions of the 11th July 2002, European Court of Human Rights in the cases ***I –v- The United Kingdom*** and ***Christine Goodwin –v- The United Kingdom*** and the decision of the Sixth Judicial Circuit In And For Pasco County, Florida, in the United States of America in ***The Marriage of Kantaras*** case number 98-5375CA 511998DR00537WS; which occurred subsequent to, and which relied upon, ***Re Kevin***. See also my firm's website http://www.wallbanks.com/ where there are links to much of this material and other material; such as our client's written submissions in ***Re Kevin*** made anonymous for academic publication. Substantial information, resources and links concerning transsexualism generally can be accessed at the Australian WOMAN Network website http://www.w-o-m-a-n.net/.

- to express gender at odds with their legal sex without suffering persecution and harm;
- to be diagnosed as experiencing transsexualism without being diagnosed as suffering a mental illness or disorder such as *Gender Dysphoria* and *GID*;
- to be accorded equal legal rights with others who experience intersexual conditions;
- of children and adolescents with transsexualism (with their parents) to receive personal, medical and legal support for the affirmation of their innate sex so as to be able, upon proper diagnosis, to promptly (without court approval) undergo various non-surgical aspects of sex affirmation treatment so as to forestall the development of inappropriate and harmful secondary sexual characteristics and to enable such young people to acquire physical characteristics appropriate to their affirmed sex;
- of a person diagnosed with transsexualism to receive medical treatment for the condition fully funded by the state as for any other medical condition of such critical nature;
- of a person of transsexual background (one who has undergone irreversible sex affirmation treatment and surgery so as to physically affirm her or his sex or one certified to be medically unable to do so) to have that person's birth certificate (or legal sex) altered/corrected so as to accurately reflect that person's physically affirmed sex and sexual identity without the precondition of having to end an existing marriage, have it made voidable, or be judged as to intentions by a panel of 'experts', so as to provide for full and unconditionally equal rights in the individual's affirmed sex;
- of a person of transsexual background to enjoy an equality of rights in respect of superannuation and other forms of insurance without discrimination on the basis of the person's intersexual condition;
- of a person of transsexual background to participate in competitive and other sport in the person's affirmed sex as a matter of right; and
- of a person of transsexual background to live a full and fulfilling life, without the need for stealth, in the person's physically affirmed sex.

While these may represent some of the specific human rights goals that people with transsexualism seek at the dawn of this new century, the foundation of all such goals is cultural understanding. If people with transsexualism are to gain their human rights and be treated with dignity and equally with others, it will be because they are individually and collectively able to break through the ignorance and mystification of their predicament of difference and be understood.

To the extent that any of us live out the truth of our difference and affirm the complexity and sexual incongruity of our creation to others, we are weaving the story of the complex truth of our transsexualism into the fabric of our culture and making it easier for the next person to do so without the debilitation of stealth and with more options for the expression of that truth.

Isn't that what Mahatma Ghandi meant when he answered the question "What is your message?" with "My life is my message". Isn't that the same appeal made by Sandy Stone in the early 90's when she challenged each reader with transsexualism "…*to read oneself aloud - and by this troubling and productive reading, to begin to write*

oneself into the discourses by which one has been written - in effect, then, to become a (look out - dare I say it again?) posttranssexual…"?[48]

We are entitled to be optimistic and empowered when we consider the point at which we now stand in the struggle for the human rights of people with the difference of transsexualism at the beginning of this 21st Century. As I heard a United Nations Representative in Sydney say at the time of the handing down of the decision of the Full Court of the Family Court of Australia confirming the ***Re Kevin*** decision:

"…If it can be said that the 20th Century was the century in which the world was made safe for democracy, then let the 21st Century be the one in which we make the world safe for diversity."

Rachael Wallbank[49]
27th August, 2004.
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[48] See **Appendix A**
[49] BA LLB Accredited Specialist (LSNSW) Family Law. See http://www.wallbanks.com/ for further information, articles and contact details.

APPENDIX A CONTEMPORARY HUMAN RIGHTS ISSUES FOR PEOPLE WITH TRANSSEXUALISM

DIFFERENCE AND FOREGOING PASSING - Circa 1991

"*Transsexuals who pass seem to be able to ignore the fact that by creating totalised, monistic identities, foregoing physical and subjective intertex-tuality, they have foreclosed the possibility of authentic relationships. Under the principle of passing, denying the destabilising power of being "read", relationships begin as lies - and passing, of course, is not an activity restricted to transsexuals. This is familiar to the person of color whose skin is light enough to pass as white, or to the closet gay or lesbian ... or to anyone who has chosen invisibility as an imperfect solution to personal dissonance… I could not ask a transsexual for anything more inconceivable than to forego passing, to be consciously "read", to read oneself aloud - and by this troubling and productive reading, to begin to write oneself into the discourses by which one has been written - in effect, then, to become a (look out - dare I say it again?) posttranssexual…*"*

* (an extract from) Sandy Stone, "A Post transsexual Manifesto", in *Body Guards*, Julia Epstein and Kristina Straub (Editors), New York and London: Routledge, Chapman and Hall, Inc. 1991 at pages 298-299.

APPENDIX B **CONTEMPORARY HUMAN RIGHTS ISSUES FOR PEOPLE WITH TRANSSEXUALISM**

BBC NEWS STORY

Tuesday, 21 May, 2002, 20:42 GMT 21:42 UK

Dig reveals Roman transvestite

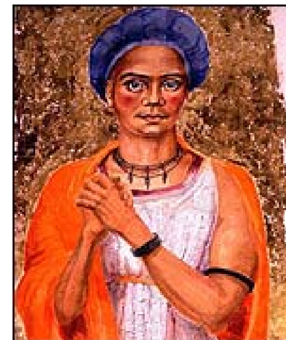
Catterick had a diverse population in Roman times

Archaeologists in North Yorkshire have discovered the skeleton of a cross-dressing eunuch dating back to the 4th Century AD.

The find was made during excavations of a Roman settlement in Catterick, first started in 1958.

The skeleton - found dressed in women's clothes and jewellery - is believed to have once been a castrated priest who worshipped the eastern goddess Cybele.

Archaeologists say it is the only example ever recovered from a late Roman cemetery in Britain.



A gallus wore women's clothes and jewellery

The young man was found buried in a grave at Bainesse, a farm near Catterick, and once an outlying settlement of the Roman town.

He wore a jet necklace, a jet bracelet, a shale armlet and a bronze expanding anklet and had two stones placed in his mouth.

Dr Pete Wilson, Senior Archaeologist at English Heritage who has edited a book on the subject, said the man's jewellery was significant.

Jet was regarded in the ancient world as having magical powers and there is a link between the rise in popularity of jet and the increasing interest in eastern mystery religions at the time.

He said: "He is the only man wearing this array of jewellery who has ever been found from a late Roman cemetery in Britain.

"In life he would have been regarded as a transvestite and was probably a gallus, one of the followers of the goddess Cybele who castrated themselves in her honour.

"The find demonstrates how cosmopolitan the north of England was"

Cybele, a goddess imported from the east in the 3rd century BC, had long been a Roman state deity and was worshipped in noisy, public festivals.

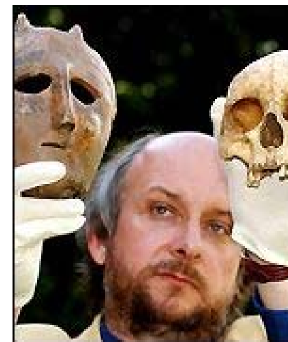
Turbans and tiaras

Her would-be priests, or galli, castrated themselves following the example of Cybele's lover Atys, who had made himself a eunuch in her service out of remorse for his infidelity.

In the castration ceremony the galli used special ornamented clamps, one of which was found in the Thames by London Bridge and is now in the British Museum.

Thereafter Cybele's priests wore jewellery, highly coloured female robes and turbans or tiaras and had female hair-styles.

Inscriptions and statues show that the cult was well established in the north of England - there is an altar dedicated to Cybele at Corbridge on Hadrian's Wall.


The priest would have worn special masks

David Miles, chief archaeologist at English Heritage told BBC Radio 4's Today programme: "Catterick [at the time]... had a very mixed population with people coming from all over the Roman Empire.

"Although this man may well have been local... the jewellery is not normal behaviour for the average Roman or average Yorkshireman of the 4th Century."

Most of the finds from the excavations are held by the Yorkshire Museum.[50]

[50] I came across this story on Lynn Conway's excellent website http://www.lynnconway.com/ . The original publication by the BBC is at http://news.bbc.co.uk/go/em/fr/-/1/hi/england/1999734.stm .

APPENDIX C CONTEMPORARY HUMAN RIGHTS ISSUES FOR PEOPLE WITH TRANSSEXUALISM

NSW - BIRTHS, DEATHS AND MARRIAGES REGISTRATION ACT 1995

SECT 32A
DEFINITIONS
In this Part:
"birth certificate" means a certificate issued under section 32E or 49 certifying particulars contained in an entry in the Register of a person's birth.
"sexual reassignment surgery" means a surgical procedure involving the alteration of a person's reproductive organs carried out:
(a) for the purpose of assisting a person to be considered to be a member of the opposite sex, or
(b) to correct or eliminate ambiguities relating to the sex of the person.

- SECT 32B
Application to alter register to record change of sex
(1) A person who is 18 or above:
(a) whose birth is registered in New South Wales, and
(b) who has undergone sexual reassignment surgery, and
(c) 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.
(2) The parents of a child (or a parent if the applicant is the sole parent), or the guardian of a child:
(a) whose birth is registered in New South Wales, and
(b) who has undergone sexual reassignment surgery, and
(c) who is not married,
may apply to the Registrar, in a form approved by the Registrar, for alteration of the record of the child's sex in the registration of the child's birth.

- SECT 32C
Application must be accompanied by declarations by doctors
An application under section 32B must be accompanied by:
(a) statutory declarations by 2 doctors, or by 2 medical practitioners registered under the law of any other State, verifying that the person the subject of the application has undergone sexual reassignment surgery, and
(b) such other documents and information as may be prescribed by the regulations.

- SECT 32D
Alteration of register
(1) The Registrar is to determine an application under section 32B by making the alteration or by refusing to make the alteration.
(2) Before altering the record of a person's sex in the registration of the person's birth, the Registrar may require the applicant to provide such particulars relating to the change of sex as may be prescribed by the regulations.
(3) An alteration of the record of a person's sex must not be made if the person is married.

- SECT 32E
Issuing of new birth certificate
(1) After the record of a person's sex is altered under this Part, a birth certificate issued by the Registrar for the person must, unless otherwise requested by the person, show the person's sex in accordance with the record as altered.
(2) Any such birth certificate must not include a statement that the person has changed sex.

- SECT 32F
Issuing of old birth certificate
(1) The child of a person the record of whose sex is altered under this Part, or a person prescribed by the regulations, may apply to the Registrar for a birth certificate for the person that shows the person's sex before the record was so altered.
(2) Despite section 32E, the Registrar may issue such a birth certificate to the child or prescribed person.

- SECT 32G

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

(a) the laws of that other jurisdiction expressly allow such a certificate (or copy or extract) to be so produced, or

(b) the person, when producing the certificate (or copy or extract) informs the person to whom it is produced that the record of the transgender person's sex has been altered to the sex shown in the certificate (or copy or extract).

[;Penalty: Â Maximum penalty: 100 penalty units or 2 years imprisonment, or both.]

- SECT 32H
Use of old birth certificate
A person the record of whose sex is altered under this Part must not, with intention to deceive, produce to another person a birth certificate (or a copy of or extract from a birth certificate) issued for the person that shows the person's sex before the record was so altered.
[;Penalty: Â Maximum penalty: 100 penalty units or 2 years imprisonment, or both.]

- SECT 32I
Effect of alteration of register and interstate recognition certificates

(1) A person the record of whose sex is altered under this Part is, for the purposes of, but subject to, any law of New South Wales, a person of the sex as so altered.

(2) A person to whom an interstate recognition certificate relates is, for the purposes of, but subject to, any law of New South Wales, a person of the sex as stated in the certificate.

(3) An "interstate recognition certificate" is a certificate issued under the law of another State that is prescribed by the regulations for the purposes of this section.

- SECT 45
Correction of Register

(1) The Registrar may correct the Register:

(a) to reflect a finding made on inquiry under Division 2, or

(b) to bring an entry about a particular registrable event into conformity with the most reliable information available to the Registrar of the registrable event.

(2) The Registrar must, if required by a court, correct the Register.

(3) The Registrar corrects the Register by adding or cancelling an entry in the Register or by adding, altering or deleting particulars contained in an entry

APPENDIX D CONTEMPORARY HUMAN RIGHTS ISSUES FOR PEOPLE WITH TRANSSEXUALISM

The *DSM-IV* diagnostic criteria for gender identity disorder (transsexualism).

The *DSM-IV* diagnostic criteria for gender identity disorder (transsexualism) include strong and persistent cross-gender identification that extends beyond a desire for a perceived cultural advantage.

In children, gender identity disorder is defined by 4 or more of the following characteristics:

- Desire to be the other sex
- Preference for cross-sex roles in play or preference for cross-dressing
- Persistent fantasies of being the other sex
- An intense desire to participate in stereotypical games and pastimes of the other sex
- Strong preference for playmates of the other sex

Boys have an aversion to their penis or testes, a belief the genitals will disappear, an aversion to rough-and-tumble play, and a rejection of male toys. Girls have a rejection of urinating in the sitting position, an assertion that they will grow a penis, an assertion that they do not want to grow breasts or menstruate, and an aversion toward normative feminine clothing.

Adolescents and adults may experience the following:

- Desire to be the other sex
- Frequent passing as the other sex
- Desire to live or be treated as the other sex
- Conviction that the person has the typical feelings and reactions of the opposite sex
- Persistent discomfort with his or her sex or sense of inappropriateness in the gender role of that sex

Adolescents and adults may have a preoccupation with getting rid of primary and secondary sex characteristics, and they may believe that they were born as the wrong sex.

People with gender identity disorder do not have a concurrent physical intersex condition. Patients report significant distress or impairment in social, occupational, or other important areas of functioning.

For sexually mature patients, the clinician should specify if the patient is sexually attracted to females, males, both, or neither.

Prevalence

No recent epidemiologic studies have determined the prevalence of gender identity disorder. In Europe, 1 per 30,000 adult males and 1 per 100,000 adult females seek sexual reassignment surgery (SRS).

Differentials

The differential diagnosis should include nonconformity to stereotypical sex role behaviors, transvestic fetishism, gender identity disorder not otherwise specified (with a concurrent congenital intersex condition), and schizophrenia.[51]

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[51] From website "***E-Medicine***" at http://www.emedicine.com/med/topic3439.htm

APPENDIX E CONTEMPORARY HUMAN RIGHTS ISSUES FOR PEOPLE WITH TRANSSEXUALISM

Re Kevin – Significant findings of Justice Richard Chisholm respect of the expert medical evidence in that case as to the causation of transsexualism and as strongly affirmed by the Full Court on appeal

At paragraph 247: "In my view the expert evidence in this case affirms that brain development is (at least) an important determinant of a person's sense of being a man or a woman. No contrary opinion is expressed. All the experts are very well qualified. None was required for cross-examination, nor was any contrary evidence called".

At paragraph 248: "In my view the evidence is, in essence, that the experts believe that the brain development view is likely to be true, and they explain the basis for their beliefs. In the circumstances, I see no reason why I should not accept the proposition, on the balance of probabilities, for the purpose of this case."

At paragraph 252: "The traditional analysis that they are "psychologically" transsexual does not explain how this state came about. For example, there seems to be no suggestion in the evidence that their psychological state can be explained by reference to circumstances of their upbringing. In that sense, the brain sex theory does not seem to be competing with other explanations, but rather is providing a possible explanation of what is otherwise inexplicable".

At paragraph 253: "In other words (as I understand it) the brain of an individual may in some sense be male, for example, though the rest of the person's body is female".

At paragraph 265: "In my view the argument in favour of the "brain sex" view is also based on evidence about the development and experience of transsexuals and others with atypical sex-related characteristics. There is a vast literature on this, some of which is in evidence, and I can do no more than mention briefly some of the main points".

At paragraph 268: "It seems quite wrong to think of these people as merely wishing or preferring to be of the opposite sex, or having the opinion that they are".

At paragraph 270: "But I am satisfied that the evidence now is inconsistent with the distinction formerly drawn between biological factors, meaning genitals, chromosomes and gonads, and merely "psychological factors", and on this basis distinguishing between cases of inter-sex (incongruities among biological factors) and transsexualism (incongruities between biology and psychology) ".

At paragraph 272: "In my view the evidence demonstrates (at least on the balance of probabilities) that the characteristics of transsexuals are as much "biological" as those of people thought of as inter-sex".

At paragraph 136: "I agree with Ms Wallbank that in the present context the word "man" should be given its ordinary contemporary meaning. In determining that meaning, it is relevant to have regard to many things that were the subject of evidence and submissions. They include the context of the legislation, the body of case law on the meaning of "man" and similar words, the purpose of the legislation, and the current legal, social and medical environment. These matters are considered in the course of the judgment. I believe that this approach is in accordance with common sense, principles of statutory interpretation, and with all or virtually all of the authorities in which the issue of sexual identity has arisen. As Professor Gooren and a colleague put it:-
"There should be no escape for medical and legal authorities that these definitions ought to be corrected and updated when new information becomes available, particularly when our outdated definitions bring suffering to some of our fellow human beings."

APPENDIX F CONTEMPORARY HUMAN RIGHTS ISSUES FOR PEOPLE WITH TRANSSEXUALISM

The Conclusions of Justice Richard Chisholm in Re Kevin

326. Although the extensive evidence and argument required this judgment to be of considerable length, in my view there are overwhelming reasons why the application should be granted. I see no basis in legal principle or policy why Australian law should follow the decision in Corbett. To do so would, I think, create indefensible inconsistencies between Australian marriage law and other Australian laws. It would take the law in a direction that is generally contrary to developments in other countries. It would perpetuate a view that flies in the face of current medical understanding and practice. Most of all, it would impose indefensible suffering on people who have already had more than their share of difficulty, with no benefit to society.
327. I do not agree with Mr Burmester that a decision in favour of the applicants is ground-breaking, or anything of that sort. It is true that this judgment canvasses some interesting new medical evidence, and that the discussion of legal principle has been wide-ranging. While I have made findings about the medical evidence and offered a view about the underlying basis for such decisions as Corbett, the end result does not depend on acceptance of either of these matters. Ultimately, the basis for this judgment is very simple and mundane. It is that no good reasons have been shown why the ordinary legal meaning of the word "man", which includes post-operative female to male transsexuals, should not also apply to marriage.
328. Because the words "man and "woman" have their ordinary contemporary meaning, there is no formulaic solution to determining the sex of an individual for the purpose of the law of marriage. That is, it cannot be said as a matter of law that the question in a particular case will be determined by applying a single criterion, or limited list of criteria. Thus it is wrong to say that a person's sex depends on any single factor, such as chromosomes or genital sex; or some limited range of factors, such as the state of the person's gonads, chromosomes or genitals (whether at birth or at some other time). Similarly, it would be wrong in law to say that the question can be resolved by reference solely to the person's psychological state, or by identifying the person's "brain sex".
329. To determine a person's sex for the purpose of the law of marriage, all relevant matters need to be considered. I do not seek to state a complete list, or suggest that any factors necessarily have more importance than others. However the relevant matters include, in my opinion, the person's biological and physical characteristics at birth (including gonads, genitals and chromosomes); the person's life experiences, including the sex in which he or she is brought up and the person's attitude to it; the person's self-perception as a man or woman; the extent to which the person has functioned in society as a man or a woman; any hormonal, surgical or other medical sex reassignment treatments the person has undergone, and the consequences of such treatment; and the person's biological, psychological and physical characteristics at the time of the marriage, including (if they can be identified) any biological features of the person's brain that are associated with a particular sex. It is clear from the Australian authorities that post-operative transsexuals will normally be members of their reassigned sex.
330. I state my conclusions in this case as follows:-
1. For the purpose of ascertaining the validity of a marriage under Australian law, the question whether a person is a man or a woman is to be determined as of the date of the marriage.
2. There is no rule or presumption that the question whether a person is a man or a woman for the purpose of marriage law is to be determined by reference to circumstances at the time of birth. Anything to the contrary in Corbett does not represent Australian law.
3. In the context of the rule that the parties to a valid marriage must be a man and a woman, the word "man" has its ordinary current meaning according to Australian usage.
4. There may be circumstances in which a person who at birth had female gonads, chromosomes and genitals, may nevertheless be a man at the date of his marriage. Anything to the contrary in Corbett does not represent Australian law.
5. In the present case, the husband at birth had female chromosomes, gonads and genitals, but was a man for the purpose of the law of marriage at the time of his marriage, having regard to all the circumstances, and in particular the following:-
(a) He had always perceived himself to be a male;
(b) He was perceived by those who knew him to have had male characteristics since he was a young child;
(c) Prior to the marriage he went through a full process of transsexual re-assignment, involving hormone treatment and irreversible surgery, conducted by appropriately qualified medical practitioners;

(d) At the time of the marriage, in appearance, characteristics and behaviour he was perceived as a man, and accepted as a man, by his family, friends and work colleagues;
(e) He was accepted as a man for a variety of social and legal purposes, including name, and admission to an artificial insemination program, and in relation to such events occurring after the marriage, there was evidence that his characteristics at the relevant times were no different from his characteristics at the time of the marriage;
(f) His marriage as a man was accepted, in full knowledge of his circumstances, by his family, friends and work colleagues.
6. For these reasons, the application succeeds, and there will be a declaration of the validity of the applicants' marriage.