

# DIFFERENCE ON TRIAL - TRANSSEXUALISM IN FAMILY LAW AND PROPERTY RELATIONSHIPS LITIGATION

EXPLORE FAMILY LAW IN 2004

11<sup>th</sup> National Family Law Conference; Beyond the Horizon; 26<sup>th</sup>-30<sup>th</sup> September 2004  
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## TRANSSEXUALISM - A CULTURAL RESPONSE

Transsexualism is a form of human diversity in sexual formation, reported since antiquity, in which an individual has a compelling need to alter the individual's sexually differentiated body in order to bring it into sexual harmony with the individual's innate sexual identity; an individual's neurological 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 animal brain, the human brain differentiates as to sex (female or male) in the same way as the other sexually differentiated features of the human body.<sup>1</sup> (**Appendix A** is a diagrammatic representation of the process) 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 more contemporary 'natural', non-western or tribal cultures.<sup>2</sup>

To seek to appreciate transsexualism, and the journey of the relationship with our culture that people with transsexualism are undertaking, is to witness an 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 destroy, 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

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<sup>1</sup> 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 12.

<sup>2</sup> 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 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.

(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 the phenomena of transgender expression, mental illness/Gender Identity Disorder (“GID”)/Gender Dysphoria and transsexualism<sup>3</sup>.

While there might be no more than about 5,000 to 10,000 people with transsexualism in Australia<sup>4</sup>, they generally 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”.<sup>5</sup> 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 21<sup>st</sup> century ‘western’ culture deserves discreet treatment. Thankfully, for most of us, 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. Nevertheless, it is the same act of desperate demeaning ‘passing’ undertaken by an Aboriginal Australian of ‘mixed’ blood, who can ‘pass’ as ‘white’, who refrains from revealing her/his Aboriginal background in anticipation of the loss of safety, relationship, society or employment.

For a variety of reasons, including culturally cultivated shame, ignorance, the desire to procreate and good intentions, many people with transsexualism only affirm their innate sex (or brain sex)<sup>6</sup> 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 are given.

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<sup>3</sup> 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 such as Miriam 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.

<sup>4</sup> *How Frequently Does Transsexualism Occur?* by Lynn Conway [lynn@ieec.org](mailto:lynn@ieec.org) <http://www.lynnconway.com/>

<sup>5</sup> See **Appendix B** 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.

<sup>6</sup> 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”.

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<sup>7</sup> (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 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 have anachronistic 'disorder' concepts of transsexualism if at all.

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. Before *Re Alex* such treatment was previously available with parental consent upon diagnosis by medical practitioners<sup>8</sup>.

Once such treatment is commenced, it is typically focused upon the individual with transsexualism 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 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 has now transitioned public sex or gender) with school and other social networks will be left to chance. This situation encourages families to move away from established social

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<sup>7</sup> 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.

<sup>8</sup> 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.

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 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.<sup>9</sup> 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.

NSW Health is aware of problems concerning the lack of general medical awareness and professional stigma concerning 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. 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<sup>10</sup>.

Increasingly, in Australia and elsewhere, 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

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<sup>9</sup> 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. Last month the GMC announced that Dr Reid will face a charge of serious professional misconduct over allegations that he has put his patients' health at risk.

<sup>10</sup> The author is a member of NSW Health's Expert and Consultative Committee on Diversity in Sexual Formation and Expression.

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.

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 mental illness model of transsexualism and have consequently failed to deliver true justice and an equality of human rights and/or have placed unreasonable and inhumane conditions upon the exercise of that right; such as the ending of a successful and 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.<sup>11</sup> The recent legislation in the United Kingdom, *The Gender Recognition Act 2004*, is firmly based upon a 'disorder' model of transsexualism and, while failing to enable applicants to actually effect a comprehensive re-assignment of their legal sex (only their *gender*) so as to attain unconditional equal rights in their affirmed sex, requires such people to actually medically evidence the diagnosis of the disorder of *Gender Dysphoria* or *Gender identity Disorder* in order to do so.

A lawyer providing advice to any person with an intersexual condition, including transsexualism, should be able to identify and distinguish between an individual's *predominant biological sex*, *legal sex* (the sex evidenced by the birth certificate) and *common law sex* (the sex declared/declarable by a court for certain purposes).

That is no easy task in a world where 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, while an individual's legal sex can be different from his or her biological and/or common law sex, the law and the culture only recognise male and female citizens. By 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. Greece is the first Olympics to permit people with transsexualism who have undergone sex affirmation surgery to compete in their affirmed sex. The use of the term 'same sex couples' by the Commonwealth Government in proposed (at the time of writing) legislation to prohibit certain adoptions by such people becomes problematic in respect of interpretation and application. Is the term intended to refer to legal, predominant biological or common law sex. In the absence of a definition within the legislation, one would be entitled to presume the later.

The role of the lawyer becomes more subtle still as one begins 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

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<sup>11</sup> 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.

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, the lawyer must remain aware that the test for the determination of an individual's *legal* and *common law* sex (and whether an individual's legal sex can be re-assigned) are each different again from those concerning an individual's biological sex and are as much a cultural as they are a biological consideration. 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<sup>12</sup>: "...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."<sup>13</sup>

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

A lawyer who seeks to act for a person who has experienced an intersexual formation (including transsexualism) will need to become familiar with difference.

## 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.

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 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 the advancement of their own causes.

For a striking example of cultural denial or conscious ignorance hard at work see **Appendix C** which contains a 2002 BBC news report of the discovery of the beautifully attired remains of a Roman priestess who had undergone the 4<sup>th</sup> century AD equivalent of sex affirmation treatment but who is determinedly denied both

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<sup>12</sup> 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*")

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

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 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 (7<sup>th</sup> June 2004) [www.cch.com.au](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.<sup>14</sup> Susan Borg knows without a doubt what Alex's problem really is, and it does not have to do with Alex's assertion of his being male. Oh no! 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.

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

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<sup>14</sup> LIJ: Volume 78: No 7 (July 2004).

colonise and dominate the law in respect of transsexualism as epitomised by the English decision of *Corbett –v- Corbett (or se Ashley)* [1971] P83 (“*Corbett*”).

I say ‘a special genitocentrism’,<sup>15</sup> because the genitocentric determination of the ‘biological sex’<sup>16</sup> 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<sup>17</sup>. 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.<sup>18</sup> The UK *Gender Recognition Act 2004* makes such a marriage suddenly and automatically voidable on the application of either party.

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...”<sup>19</sup>; where ‘opposite sex’ is used to denote a presumed pervasive biological truth

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<sup>15</sup> 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 pathological) see Andrew N Sharpe, *Transgender Jurisprudence, Dysphoric Bodies of Law*, Cavendish Publishing Limited, 2002, London, UK, at page 39.

<sup>16</sup> ‘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.

<sup>17</sup> 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.

<sup>18</sup> See for example Sections 32A–I of the NSW Act in **Appendix D**.

<sup>19</sup> Ibid. Note the mistaken use of the term “transgender” therein instead of transsexualism.

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'<sup>20</sup>. 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<sup>21</sup>.

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 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 *Gender Identity Disorder* ("*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

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<sup>20</sup> 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.

<sup>21</sup> 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*").

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.

The answer to the challenge of language, as for so many 'liberation/rights' movements, has been to seek to create new language and terminology which better reflect the experience of people with transsexualism and its causation. The result is a new language concerning transsexualism which is in the process of being developed and adopted domestically and internationally in a similar manner to the legal and human rights findings of the *Re Kevin* decision itself.<sup>22</sup> 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 human brain differentiates as to sex ("*brain sex*", "*mental sex*" or "*innate sex*") in the same basic way as the other sexually differentiated features of the body; such as the gonads and external genitalia<sup>23</sup> as demonstrated in scientific examination of animal, and human, brains.<sup>24</sup> The brain sex of an individual develops as a biological process independently of the individual's other sexually differentiated features. Such innate knowing of one's sex was commonly referred to as "psychological sex" and sometimes differentiated from "biological sex";

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<sup>22</sup> 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](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*

<sup>23</sup> 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](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.

<sup>24</sup> 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.

- 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.<sup>25</sup>
- 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;<sup>26</sup> The Macquarie Dictionary defines **intersex** as "an individual displaying characteristics of both the male and female sexes of the species."<sup>27</sup> 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).<sup>28</sup>
- 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

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<sup>25</sup> Ibid.

<sup>26</sup> 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 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.";

<sup>27</sup> 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

<sup>28</sup> See expert evidence in *Re Kevin*.

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;<sup>29</sup>

- 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.<sup>30</sup>
- **Sex affirmation treatment**, 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 school yard to general practitioner to the general public) 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 genitocentrally 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;<sup>31</sup> Some aspects of hormone treatment alone can cause irreversible changes to the body.<sup>32</sup>

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<sup>29</sup> See the expert evidence adduced in *Re Kevin*

<sup>30</sup> op cit The Macquarie Dictionary, 2nd ed, at page 1858

<sup>31</sup> 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).

<sup>32</sup> Cohen-Kettenis P. T. & Friedemann P., "Transgenderism and Intersexuality in Childhood and Adolescence – Making Choices" Sage Publications Inc, California 2003

- 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.<sup>33</sup> 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 married heterosexual cross-dresser Charles (Virginia) Prince in the United States of America to 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.<sup>34</sup> 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*).<sup>35</sup> 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

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<sup>33</sup>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](mailto:Diamond@hawaii.edu). Also see the discussion by Leslie Feinberg in the Preface to her book "Transgender Warriors" 1996, Beacon Press, Boston Massachusetts, USA.

<sup>34</sup> 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 to 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.

<sup>35</sup> Op cit "Sex and Gender are Different: Sexual Identity and Gender Identity are Different", Milton Diamond, PhD

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.<sup>36</sup> 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.<sup>37</sup> People who experience transsexualism undergo such treatment, with all its difficulty, for its own sake in order to sustain their lives. As a matter of human rights this essential medical treatment should be, but is not, funded by the state in Australia through Medicare. (currently approximately AUSS\$40,000.00 to \$50,000.00) as a result.
- 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

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<sup>36</sup> Ibid

<sup>37</sup> 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.

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:<sup>38</sup>

- *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 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 America 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.<sup>39</sup> The DSM-IV (See **Appendix E**) 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.<sup>40</sup>

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

<sup>39</sup> Ibid.

<sup>40</sup> Ibid.

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.<sup>41</sup> 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.<sup>42</sup> 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; while still identifying, diagnosing and treating transsexualism in children and adolescence.

The best of these practitioners will admit, as they did in *Re Kevin*, that in practice transsexualism is self-diagnosed and medically confirmed by ruling out other phenomena such as mental illness or delusional disorders 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 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*’<sup>43</sup>, 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 real diagnostic process applied by psychiatry and psychology in the diagnosis of transsexualism, in both adults and children, is to rule out 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

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<sup>41</sup> Ibid.

<sup>42</sup> The actual formulation of the DSM IV is quoted (uncritically) in *Re Alex* at paragraph 101 within the evidence of mysterious English psychiatrist, “DR C”. Dr C appears to be an advocate for the generally discredited conflictual pathological view of transsexualism.

<sup>43</sup> *Re Alex* at paragraph 2.

the face of the evidence to the contrary was *not* as a result of mental ill health, confusion or delusion.<sup>44</sup>

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 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*<sup>45</sup>. For convenience I set out his Honour’s primary conclusions in respect of that expert evidence in **Appendix F** 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. In the meantime, I find it curious that a sane person’s own consistent ‘say so’ as to whether they are male or female backed by a consistent need and willingness to undergo sex affirmation treatment in order to live and physically affirm that sexual identity should not be more than adequate to confirm the biological nature of transsexualism for all practical and legal purposes.

## CONFLICTING AUSTRALIAN CASE LAW

*Re Kevin* was both a turning point, and a culmination, in the history of the development of the human rights of people with transsexualism, their families and

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<sup>44</sup> 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.”

<sup>45</sup> *Re Kevin*, Chisholm J, particularly paragraphs 239 to 264.

loved ones; both domestically and internationally. I said publicly at the time that the decision demonstrated the significant capacity of the Australian justice system to manage difference. In *Re Kevin*, the Applicant husband and wife successfully contended that, notwithstanding the husband's transsexual background, the husband was entitled to be married as a man because he was a man within the meaning of that expression in section 46(1) of the *Marriage Act* and section 43 of the *Family Law Act* at the time of his marriage. Justice Chisholm's original decision, granting a Declaration of Validity of Marriage was delivered on 12<sup>th</sup> October 2001. The appeal before the Full Court of the Family Court of Australia was heard on 18<sup>th</sup> and 19<sup>th</sup> February 2002. The Full Court consisted of their Honours Chief Justice Nicholson and Justices Ellis and Brown. The Full Court of the Family Court of Australia delivered its decision on 21<sup>st</sup> February 2003. In its judgment, the Full Court dismissed the appeal by the Attorney General for the Commonwealth of Australian, thoroughly reviewed the applicable evidence and legal issues and strongly affirmed the original decision.

*Re Kevin* declared the law of Australia to the effect that the question of whether a person is a man or a woman for the purpose of the marriage law of Australia is to be determined as at the date of the marriage, that there is no rule or presumption of Australian law that the question of whether a person is a man or a woman is to be determined by reference (only) to circumstances at the time of the person's birth and that the answer to the question of whether an individual is a man or a woman for the purposes of the marriage law of Australia involves a subtle determination taking into account all the relevant sex differentiating facts and circumstances of the individual's life. Anything to the contrary in the English decision of *Corbett –v- Corbett (or* *Ashley) [1971] P83* ("*Corbett*") was declared not to represent Australian law. It was the primary contention of the Attorney General for the Commonwealth in the case that the question of whether a person is a man or a woman for the purposes of the marriage law of Australia should be determined pursuant to the reasoning and the test of the congruence of an individual's gonads, genitalia and chromosomal features (alone) as assessed at birth (only) as espoused by the judgment of His Honour Mr Justice Ormrod in *Corbett*. The *Corbett* decision also established the unfortunate legal precedent for treating people with transsexualism differently from those who experienced other types of intersexual conditions; even where the same or similar life/human rights issues, such as the need for a declaration of the legal sex of an individual or the right of an individual to marry, was involved.<sup>46</sup>

As was noted by the Full Court in *Re Kevin-Full Court*, not only did the expert evidence in that case, and all the recent cases dealing with the issue world-wide, contradict the *mental illness/psychological* explanation for transsexualism, support the biological explanation and thus contradict the *Corbett* distinction between so called 'physical intersex' and 'brain-body intersex', but the 2001 English decision of *W v W* demonstrated the logical and ludicrous result of the continued legal application of the that distinction where aged shady memories of minor irregularities of infant genital formation, such as a temporarily undescended testis or the comparative size of genitalia, could determine whether or not an individual was to be diagnosed as experiencing either a genital/bodily intersex condition or transsexualism and, hence,

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<sup>46</sup>See *W v W* [2001] 2 WLR 673 ("*W v W*") and *Bellinger v Bellinger* [2001] 2 FLR 1048 and the discussion of these judgements in the *Re Kevin* decisions.

whether or not an individual could marry in her or his affirmed sex. In *W v W* the successful litigant was able to have her marriage declared valid in the United Kingdom as not coming within the *Corbett* regime, notwithstanding her genitalia were unambiguously male at birth and she possessed a ‘Y’ chromosome, because her male genitalia could be said to have been smaller than ‘the norm’ at birth and a medical expert was able to retrospectively (she had undergone SAS) hypothesise that she could have experienced a degree of Androgen Insensitivity Syndrome; and could thus be described as ‘intersex’ rather than experiencing transsexualism. I recall a news report at the time commented that in the case of *W v W* “...size really did matter”.

*Re Kevin* has been relied upon in several landmark international decisions<sup>47</sup>; including the decisions of *I –v- The United Kingdom* and *Christine Goodwin –v- The United Kingdom*, decided 11<sup>th</sup> July 2002 by the European Court of Human Rights. These decisions, which quote Justice Chisholm’s decision in *Re Kevin* at length and with approval, finally determined that there had been violations of articles 8, 12, 13 and 14 of the Convention for the Protection of Human Rights and Fundamental Freedoms in respect of the legal status of people who had experienced transsexualism in the United Kingdom and, in particular, such people’s treatment in the spheres of employment, social security, pensions and marriage. As a result of these decisions the government of the United Kingdom instigated the Gender Recognition Act 2004 which purports, though in my view fails, to honour the word and spirit of those decisions with the introduction of a program of law reform to remove such violations of human rights.

*Re Alex* dealt quite narrowly with the critical issue of the right of children and adolescents with transsexualism and/or their parents or guardians to obtain treatment for transsexualism in childhood and adolescence.

Alex is a young person asserting and affirming his male sex notwithstanding a female anatomy. Given the evidence that Alex is sane and doesn’t experience a disorder (other than transsexualism as characterised), his consistent male sex affirmation is, and should be, the best evidence of his unalterable life-long brain sex and hence transsexualism. Most surprisingly, in one of only two cursory references to *Re Kevin* in the decision, his Honour represents *Re Kevin* as authority for the proposition that the causation of transsexualism is uncertain<sup>48</sup>; although upon a reading of much of the decision one could be forgiven for thinking that the two cases dealt with different phenomena altogether.

Regrettably, and surprisingly, given the expert evidence in and findings of *Re Kevin*, the expert evidence in respect transsexualism in *Re Alex* was dominated by psychiatric opinion which adhered to the disorder/pathological explanation of transsexualism. That perception of transsexualism dominates *Re Alex* from the very title of the case to the misconceived public policy pronouncements concerning the re-assignment of legal sex as determined by birth certificate legislation with which it ends.

I realise how critical that must sound to those involved in the case. Yet a clear perception of *Re Alex*, free from the constraint of the limited evidence available in

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<sup>47</sup> See the cases cited at footnote 57

<sup>48</sup> *Re Alex* at paragraph 192

that case, demands such comment. Balance demands that I simultaneously acknowledge that for Alex, former Chief Justice Nicholson's decision represents the best chance yet Alex has had since his life with his father to live a healthy and peaceful life. I commend Alex for his extraordinary courage and determination in pursuing his truth and his human rights and I commend those who sought to assist him to do so.

The reasoning of the *Re Alex* decision, its legal and public policy ramifications and its treatment outcome for Alex gives rise to considerable concern. *Re Alex* is a useful reminder for those dealing with issues of difference in legal proceedings. The biological/intersexual model of transsexualism, and the clarification of the fallibility of the method we use to allocate legal sex status in our culture, are perspectives which, though previously individually touched upon, only really crystallised through legal proceedings like *Re Kevin* which had the benefit of expert evidence of extraordinary breadth, quality and interdisciplinary character as well as people with experience of transsexualism being advised and represented by people with transsexualism; especially given the evolutionary nature of our culture's perception of difference and the stage that transsexualism has reached in that evolutionary process. A person with transsexualism, for example, is better able to advocate the experience of transsexualism with clarity and conviction in the face of mixed or contrary expert theory.

The difference in the use of expert evidence concerning transsexualism seen in *Re Kevin* and *Re Alex* is crucial from a human rights and law reform perspective as denying equal human rights to people with transsexualism is, regrettably, easier if they can be perceived as people who experience disorder or pathology.

In *Re Alex*, the court reached the view that Alex should receive only *some* of the medical treatment he requested for his transsexualism because, as he suffered from "Gender Dysphoria/GID" as described by "Dr C", there was a reasonable chance that he would not go on to experience transsexualism as an adult. Alex was ultimately permitted to transition public sex and live his life as a young adolescent male denied the treatment necessary to do so with anything other than a neo-pubertal female appearance. One only has to review Kevin's evidence in *Re Kevin* to wonder what unnecessary difficulties and pain the tentative approach to treatment which the court approved must bring to Alex's adolescent life. In so doing the court laid the foundation for the next step of conceiving treatment for transsexualism in children and adolescents as a "*special medical procedure*" to which a parent or guardian cannot consent. Thus, the court assigned such treatment to the same category as sterilisation for the mentally ill child and other procedures which have no therapeutic benefit for the child or young person and thus where a possible parent/child conflict of interest is evidenced.

If the court had perceived Alex as requesting treatment for a regularly diagnosed biological phenomena (transsexualism) which is regularly reported upon and reviewed by specialist medical practitioners which required prompt non-surgical treatment for Alex's physical and psychological health which was not novel but routine in other respected medical jurisdictions, rather than a pathological mental illness possibly amenable to treatment and subject to diagnostic variability, then I think it unlikely that the court would have invoked its child welfare jurisdiction to

take the decision for treatment in this matter out of the hands of the child's parents/guardians and treating doctors; especially where that decision accorded with the informed decision of the child or young person.

As it is, I have already received instructions (and I understand they are but the first) from parents of a child with transsexualism in New South Wales who, as a result of the decision in *Re Alex*, are required to obtain the Family Court's approval for the treatment of their child when, prior to that decision, no such approval was necessary and treatment had been medically approved. Alex is not the first young person treated for transsexualism in Australia and he will not be the last. As the affects of shame and cultural prejudice subside, it is likely more young people with transsexualism will be able to access help and medical treatment with the assistance, approval and support of their families. I submit that it is neither good medical practice, humane (to the child and her or his family) or good public policy that the medical treatment of each such child or young person be subject to the delay and cost of obtaining the approval of the Family Court of Australia. The additional financial and other impositions are likely to result in further professional reluctance to diagnose and further parental resistance to both diagnosis and treatment.

It is of some concern that, although a pre-eminent treatment centre for children with transsexualism has existed in the Netherlands for some years where such treatment is part of an established and monitored program, no evidence from that treatment centre was obtained for *Re Alex*. If such evidence and the evidence of the routine non-surgical treatment of other children with intersexual conditions had been before the court in *Re Alex*, there must be doubt that the court would have found either Alex's request for treatment for transsexualism, or the treatment itself, 'novel'.<sup>49</sup>

In *Re Kevin* and *Re Alex* it could be said that the Family Court of Australia has now apparently accepted two conflicting explanations for transsexualism. On another view, *Re Alex* demonstrates the misconceived differentiation between transsexualism in childhood/adolescence and in adults that is evidenced in the DSM. In my view *Re Alex* should be distinguished, and the explanation of transsexualism in *Re Kevin* preferred, for all who experience it, due to the narrow range and quality of the expert evidence relied upon in *Re Alex* and the fact that such expert evidence does not appear to have been able to be adequately challenged or tested in the particular circumstances, and management, of that case. There also appears to have been a failure of adequate submissions dealing with a number of issues as commented upon by his Honour in the judgement or as otherwise implied.

My contentions in respect of the decision in *Re Alex* can be summarised as follows:

1. The decision was given *per incuriam* in that, in circumstances where there is apparently a significant/fundamental difference of expert opinion in respect of the nature of transsexualism in childhood/adolescence (as to whether it is a natural intersexual variation in human sexual formation as found in *Re Kevin*<sup>50</sup> in respect of transsexualism generally or whether it is a mental illness, disorder or psychological disturbance or state of confusion, his Honour only had the

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<sup>49</sup> *Re Alex* at paragraphs 174 to 200 and particularly paragraph 180.

<sup>50</sup> *Re Kevin* at paragraphs 270 to 273

benefit of expert evidence of a limited psychiatric nature which merely informed the court of the one such opinion in circumstances where:

- 1.1 Such expert opinion was crucial to the court's categorisation of the phenomenon of transsexualism in childhood/adolescence and the categorisation of its medical treatment and hence the court's decision as whether such treatment had, or had not, a therapeutic purpose as well as whether such medical treatment was, or was not, intended for the benefit of the child/adolescent;
- 1.2 The expert evidence before the court in *Re Alex* in respect of the nature and (certainty of) diagnosis of transsexualism in childhood/adolescence was essentially in conflict with the extensive expert evidence and the findings of Chisholm J (as he then was) and the Full Court of the Family Court of Australia in *Re Kevin*. This circumstance is clearly unsatisfactory from a legal, human rights and public policy perspective.
- 1.3 The limited and arguably inadequate nature of the expert evidence as to the phenomenon of transsexualism in childhood and adolescence, its diagnosis and its medical treatment upon which the court relied in *Re Alex* brings into question the courts determination of its jurisdiction in the case.
2. The Court's significant jurisdiction to usurp the power of a child's parents/guardian in respect of the authorisation of the medical treatment is not exercised or invoked lightly or for every medical treatment or procedure that has irreversible and possibly dire consequences. The principles, which the court in *Re Alex* purports to follow, were established and set out by the High Court concerning the Family Court's child welfare/*parens patriae* powers in *Secretary, Department of Health and Community Services v JWB and SWB* (1992) FLC 92-293 ("*Marion's Case*"). That case involved the sterilisation of an intellectually disabled child/adolescent where the sole or predominant purpose of the medical procedure in question was the young person's sterilisation.
3. In *Marion's Case* the High Court went to some length to stress that its decision did not mean that the power of a parent or guardian to authorise medical treatment for a child was usurped by the court where sterilisation (or other 'invasive, permanent and irreversible medical treatment') was a likely or possible by-product of medical treatment carried out for a therapeutic purpose;
4. At paragraph 152 and following of the judgement in *Re Alex* his Honour confirmed that if the Family Court was to have jurisdiction in respect of the medical procedures proposed for Alex, the court first had to determine whether Alex had capacity to consent to such procedure (as per the *Gillick Test*<sup>51</sup>) and, in

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<sup>51</sup> The principle, approved by the High Court in *Marion's case*, expressed in the House of Lords decision in *Gillick v West Norfolk and Wisbech Area Health Authority* 1986 AC 112 ("*Gillick's case*") that determined the competency of a child or young person to give informed consent to a medical procedure where there was otherwise no legislative determination of the question.

*the event that Alex did not have that capacity, that the proposed procedure was a Special Medical Procedure. If Alex had capacity to consent and/or the proposed procedure was not a Special Medical Procedure, then the court had no jurisdiction.*

5. At paragraph 153 of the *Re Alex* decision his Honour extracted the *gravamen* of *Marion's Case* in respect of the determination of when a medical procedure is *special* in so far as normal parental consent is ineffective or insufficient consent as being when the proposed medical procedure:

- 5.1 Is invasive, permanent and irreversible; and
- 5.2 Is not for the purpose of curing a malfunction or disease.

6. With the respect due to his Honour, I contend there was error in applying the principles referred to in respect of the determination of Alex's capacity to consent (particularly at paragraphs 157 to 173) when he finds that although Alex passes the *Gillick test* of personal understanding/appreciation and/or capacity, the nature of the 'sex change' procedure is such that *no child/adolescent* could have the requisite capacity to consent to receiving such treatment. While it is contended that his Honour's judgment on this issue must have been influenced by the erroneous/misleading expert evidence which dominated *Re Alex* concerning transsexualism in childhood, its diagnosis and treatment, it is wrong to apply the principles espoused both in *Re Marion* and the *Gillick test* to the determination of the question of Alex's personal capacity to consent by transforming the personal nature of that assessment to one applicable to any and all children/adolescents in respect of the medical treatment of transsexualism.
7. I also question the finding of his Honour at paragraphs 174 through to 200 where, with some difficulty and clearly labouring both in the absence of effective or detailed submissions and with the confused and inadequate evidence, that the treatment for Alex's transsexualism (referred to misleadingly and anachronistically as 'sex change') was not for the purpose of curing a malfunction or disease (ie was not therapeutic). Thus, his Honour characterised treatment for transsexualism in childhood/adolescence as legally the same as treatment intended to sterilise a child and where the consent of a parent was insufficient due to a possible conflict of interest between parent and child.
8. Another example of the misconception of the phenomenon of transsexualism in childhood/adolescence to be found in his Honour's judgement, no doubt founded upon the failure of expert evidence, can be observed at paragraph 180 of the judgement when his honour observes that "The application before me would seem a novel one..." when there is ample evidence that transsexualism in childhood/adolescence is diagnosed and treated on a regular basis both in Australia and elsewhere.
9. The literature on the subject is clear that the earlier people (especially children/adolescents with transsexualism) receive treatment the better the chances of the success of such treatment and the better the overall quality of their lives. Evidence of the existence of an urgent need for Alex to receive treatment was before his Honour. Thus, I believe it was wrong to fail to take

account of the financial and emotional burden of his decision on the parents of children/adolescents with transsexualism; and hence the adverse affect of the decision upon children/adolescence with transsexualism themselves in likely limiting and delaying their opportunity and access to treatment. These were considerations clearly present in the decision of the High Court in *Marion's case* which led that court to so limit the medical treatment that could be classified or categorised as a *Special Medical Procedure* and which should have led his Honour in *Re Alex* to find that the treatment of transsexualism in childhood/adolescence was not.

At the same time, I do not consider that the hearing process utilised in *Re Alex*, described as based upon an 'inquisitorial' rather than 'adversarial' model (and similar to the hearing process of a model program now being conducted on a voluntary basis in children's issues cases), was itself necessarily responsible for the failure and/or error I have contended are present in the hearing and determination of *Re Alex*. In fact, one could argue that an inquisitorial hearing process, properly funded and administered, should have been better able to deal fully with difficult expert evidentiary issues concerning difference. The satisfactory and just result of the process, however, is still dependent on the parties and the judicial officer having a basic awareness of the nature of the issues at trial. When difference is on trial, as in *Re Kevin* and *Re Alex*, there is a significant risk that no such awareness will be present. Ideally, our judiciary should be especially supported with educational programs to enhance their knowledge and awareness concerning minority groups and issues concerning human difference, such as transsexualism, and perhaps the introduction of specialised *amicus curiae* so that judicial officers are empowered to question expertise and to call upon experts in addition to those introduced by parties when dealing with matters that reach beyond ordinary understanding and awareness.

It is a central proposition of this paper that special considerations are required when having difference on trail if we are to do justice to minorities within our culture. It is therefore important to emphasise that my criticism of the evidence, hearing and the decision of the Family Court of Australia in *Re Alex* neither makes or implies a criticism of the medical experts, health professionals and lawyers who participated in those proceedings. Indeed, the goodwill, earnest intent and efforts of those people to seek and obtain a result in the case that honoured Alex and was in his best interests is abundantly clear. There was no conscious or individual prejudice at work in *Re Alex* that could be held responsible for the error I allege to have occurred in that case. The responsibility for that error lies with us all, is cultural, and is the product of the process of our efforts to seek to rehabilitate an aspect of ourselves that we have long sought out of fear to deny; in this case transsexualism.

There is prejudice in *Re Alex*, but being *cultural prejudice* it is so deep-rooted, reinforcing, almost 'natural' and pervasive that its presence is all but impossible to see; except through the eyes of Difference. Nevertheless, it is all about 'Seeing' and now that we have our 'Sight' we can venture to the next level of our appreciation of the sometimes subtle dynamics of dealing with difference in the legal process and of our diversity and capacity for cultural evolution and maturity.

## DETERMINING COMMON LAW SEX

Justice Richard Chisholm concluded *Re Kevin* with a discussion of the characteristics of a person that should be assessed in ascertaining the person's common law sex<sup>52</sup>. Although his Honour cautioned that no list could be definitive, he highlighted 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, 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, as being the primary factors to be taken into account.

At the same time his Honour acknowledged that people with transsexualism who had undergone sex affirmation surgery will normally be considered as members of their affirmed sex at common law; whether or not their legal sex had been reassigned under State law.

But whereas Australian and New Zealand common law prior to *Re Kevin* had judged that sex affirmation surgery had taken place if the person's genital appearance and function sufficiently imitated the normal genitalia of the sex which the person had affirmed, *Re Kevin* by implication accepted the medical evidence that the purpose of sex affirmation surgery was rehabilitative and did not depend upon critical appearance or function benchmarks to be considered to be complete. The surgical 'bottom line' or benchmark for completeness of sex affirmation treatment established by the expert evidence in *re Kevin* is stated (in the negative) as being that the person is no longer able to function in the person's first assigned or pre-affirmed sex for the purpose of sexual intercourse and reproduction.

For all practical purposes, I think it is safe to now presume that a person who has undergone sex affirmation surgery at the time of the commencement of a relationship (marital or de facto) will be considered of the person's affirmed sex for the purposes of that relationship by Australian common law. I do not anticipate a court rejecting that simple proposition on the basis that the person does not otherwise strictly conform to cultural norms in respect of gender expression or the balance of the considerations set out by his Honour or is not of a particular legal sex.

## DETERMINING LEGAL SEX (BIRTH CERTIFICATES)

Except in cases of obvious physical intersexual genital formation, a medical practitioner's visual inspection of an infant's external genitalia is relied upon for the purpose of determining "the sex...of the child" and "the child's sex" as reported to the Registrar of birth, deaths and marriages for all Australian State and Territory birth, deaths and marriages legislation. It is this reportage that provides the record of the

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<sup>52</sup> See **Appendix G** for the full extract of paragraphs 326 to 330 of the judgement in *Re Kevin* headed "Conclusion".

individual's sex that is included amongst the particulars of the individual kept by the state that constitute the individual's legal identity; including his or her legal sex.

While it is not specified, the common sense presumption can be inferred that this regime for the first assignment of a child's legal sex, based upon a casual inspection of the child's external genitalia alone, has developed because it is accurate and works well for the great majority of people whose external genitalia accurately indicate their innate or brain sex.

Where there is an indication of a physical/genital intersexual condition, it is best medical practice that the assignment of the child's legal sex (and any genital surgery) is postponed until the child, by word or action, reliably indicates his or her innate or brain sex.

It has now become clear that this standard regime for the first assignment of legal sex utterly fails those people who experience transsexualism and some others who experience certain types of traditionally recognised intersexual conditions not physically observable at birth because the external genitalia of those individuals as infants do not correctly indicate their innate or brain sex.

While it can be argued that in these circumstances the resulting assignment of legal sex is an error to be corrected pursuant to the provisions for the correction of errors provided for in all births, deaths and marriages legislation, as is the case for at least childhood intersexual conditions other than transsexualism,<sup>53</sup> the approach adopted thus far by the States has been to create special legislation with which to deal with the reassignment of legal sex for people with transsexualism and adults with intersexual conditions.

One can only hypothesise that the legislature has been concerned to ensure that people with transsexualism and other adult intersexual conditions only qualify to have their legal sex reassigned once they have undergone sex affirmation surgery. This at least preserves the cultural expectation of male and female bodies, especially given the ongoing improvement in the results of phalloplasty, while ensuring that people other than those who experience intersexual conditions (including transsexualism) do not change their legal sex.

The losers in the present legislative regime are those with transsexualism who are medically prohibited from undertaking sex affirmation surgery for reasons of infirmity or age, those who are married and want to stay that way, those with intersexual conditions other than transsexualism in States and Territories that provide no specific legislative right for the assignment of such a person's legal sex and those born in other countries where people with transsexualism are unable to have their legal sex re-assigned.

**Appendix H** sets out my redrafting of sections 32A to 32I of the NSW Births, Deaths And Marriages Registration Act 1995 to provide for the re-assignment of legal sex for all people (be they young or old and no matter what variation of human sexual

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<sup>53</sup> For NSW see section 45 of the Births, Deaths And Marriages Registration Act 1995.

formation) and which provides for a compassionate approach to the reassignment of a person's legal sex.

## **DETERMINING JURISDICTION**

*Re Kevin* made it clear that the validity of a marriage, and the sex of the parties to a marriage, is to be determined at the date of the marriage. This makes inherent sense given the contractual nature of marriage. Justice Richard Chisholm also examined the application of this principle to the marriage of a person with transsexualism who, subsequent to the marriage ceremony (and the birth of any children of the marriage) affirmed their innate sex and underwent complete sex affirmation treatment. The Commonwealth had expressed concern that in these circumstances the marriage could be said to be somehow 'converted' to a 'same-sex marriage'. His Honour did not share such concerns.

Properly perceived, as such a marriage is clearly between parties of different legal sex at the time of its inception, there is no concept in Australian law of a 'voidable marriage' and as the treatment the party undertook for transsexualism was for medical/health reasons, and was not 'optional', the scenario opened no 'back door to homosexual marriage'. There is no evidence that the rights and welfare of children in such a scenario are necessarily adversely affected. The marriage itself is never made into anything other than a heterosexual one given that the only reliable and knowable guide to the sex of the parties at the time of the marriage is their legal sex; which is independent of, and can be different from, their (often unknown and unknowable) biological sex. Nothing of this reasoning or principle is disturbed if human rights law reform enabled people with transsexualism who are married to have their legal sex reassigned so as to bring it into harmony with their contemporaneous physically affirmed sexual identity.

One can fairly safely assume that the same principle would be applied to determining whether a de facto relationship involving a person with transsexualism, and any other intersexual condition, was between a heterosexual or same-sex couple; although there could well be conjecture as to the appropriate time for the assessment of the sex of a party who had affirmed a different sex from that assigned to or affirmed by the party at the commencement of the relationship. In assessing this question in terms of the NSW Property Relationships Act, I submit that if the appropriate time is not the commencement of the relationship then it may be two years prior to the end of the relationship rather than the date of the hearing to preserve certainty and so as to allow at least the minimum period of a relationship in respect of property division.

## **TRANSSEXUALISM AND PROPERTY DIVISION**

Transsexualism is properly pleaded as a natural phenomena with predictable health and treatment consequences in which treatment is not an optional matter but a medical necessity. Appropriate evidence is presented from treating doctors confirming the party's transsexualism and the costs of sex affirmation treatment as well as the economic consequences of that treatment, including time off work and the specific impact of sex affirmation upon the party in respect of future earning capacity, there is

no reason why a party's transsexualism should not be a significant financial consideration to which a court would have regard in respect of property division under the provisions of the Family Law Act. Detailed evidence of the cost of each proposed medical procedure and treatment should be obtained and related by the treating doctor/s specifically to the party. Evidence should be available in respect of the impact of the party's sex affirmation upon loss of income and the employment prospects of the party from a person qualified to give that opinion.

While the whole idea of a financial adjustment being made in the favour of a party with transsexualism in Family Law Act proceedings can come as a surprise to the other party, who may well blame their spouse's transsexualism for the end of the marriage, the concept is generally accepted with reluctance and can, and should, result in a significant financial adjustment in favour of the party with transsexualism. **Appendix I** is a simple example list of liabilities dealing with sex affirmation treatment and its immediate economic consequence for a high income earner and an example of a short submission in a Conciliation Conference Document of an affirmed, but pre-operative, female.

The same cannot be said of the impact of this evidence in de facto relationship proceedings due to the limited scope given with regard to adjustments or allowances for future need or any obligation of one party to maintain the other in State legislation such as the NSW Property Relationships Act. One can only presume that the jurisdiction concerning de facto couples will only be referred to the Commonwealth to be administered under the Family law Act if all relationships are so dealt with.

There is the very real possibility, however, that in a relationship involving a person with transsexualism, who is either yet to affirm the person's innate sex or who is yet to undergo all or any part of the person's sex affirmation treatment, the couple have discussed and made plans for that affirmation and treatment, its funding and its other short and long term economic implications. If this is the case then such evidence should be adduced to strengthen the financial claim of the one party who will now bear all that financial expense/loss. In proceedings in respect of de facto relationships such a discussion and commitment may amount to an estoppel/equitable claim of the kind that has been found in respect of child maintenance; especially if any decisive step has been taken, or financial/employment affairs have been arranged, by the person with transsexualism on the basis that the person would receive the financial support of the de facto partner for the person's sex affirmation, medical treatment and the short and long term economic consequences thereof.

## **TRANSEXUALISM AND PARENTING ORDERS**

It has been interesting to observe how Difference has been dealt with over my time of practice in the Family Court of Australia and elsewhere; both by opponents and judicial officers through the various stages of the case management process. I can recall the days when the Family Court would almost automatically concede the need for a Family Report or a 30A Expert Report in a Contact or Residence case which concerned a gay or lesbian parent.

I can recall one particular case in which I acted in which much was made of the evidence that the children had been present at a party held at the residence of their openly homosexual father at which they witnessed alcohol being modestly consumed and the occasional, and again modest, kissing and/or embracing between same-sex couples. I was surprised, even 15 years ago, when the judge hearing the case seemed to give some weight to that evidence adverse to the father; even though the evidence was that the children, boys 10 and 13 years of age, had lived with their openly gay father for substantial periods with the mother's informed consent and there was no evidence that either of the children experienced any shock or adverse reaction as a result of witnessing same-sex couples drinking alcohol, kissing and/or embracing.

Although there was no expert or other evidence to the effect, a presumption of some kind existed that the observation of homosexuality (or Difference) by children was actually or potentially dangerous to them or their development. This is merely an example of what can be called *cultural prejudice* at work. The power of cultural prejudice seems directly related to the proportion of the population of the society or community in which it exists who believe in its precepts. It is also very much an "Animal Farm" thing, along the 'four legs good, too legs bad!' model, in that the particular prejudice involved can be sustained by the work of particular groups, such as medical or religious institutions, within the culture. The primary allies of cultural prejudice are fear and ignorance. Its primary enemies are clarification, education, compassion and a true sense of the spirit existing in all human beings.

Cultural prejudice is certainly still very much alive and persuasive in respect of transsexualism; although its power is certainly on the wane given the fundamental change in the culture's appreciation of transsexualism signified by the *Re Kevin* judgement and the shift in understanding from the 'mental illness'/'disorder' to the 'biological/intersex' explanation of the phenomenon.

When applied to the issues of Residence and Contact, such cultural prejudice depends upon the unproved presumption that otherwise mentally healthy children can be made ill, imbalanced or be otherwise harmed by associating (either publicly or privately) with a parent or other person with transsexualism; whether or not that parent or person is in the process of affirming, or has affirmed, their innate sex. It is certainly an 'up hill' battle if the Child Representative holds, but never openly expresses, such views.

In the course of representing a number of affirmed females with transsexualism in the Family Court, both before and after such women had completed sex affirmation treatment, I have observed the struggle and the tension experienced as Court staff, judicial officers, Child Representatives and opponents are confronted both with the fact that in such a case the conflict before the Court is between two females, one the biological mother and the other the biological father, and that both relate to their children with the minds of females; though such minds have been affected by different life experiences. In the same way, a male with transsexualism would experience any child he had conceived with his female body through the means of his male mind. Female fathers and male mothers challenge our 'Father Knows Best' upbringing and defy our clinging to the comfort of normality.

The intensity of this predicament is increased when the evidence before the Court is that the female father fulfilled the role of principal caregiver to the children during the

marriage or relationship and was fulfilling her own maternal instincts in relation to her children prior to her either identifying her transsexualism or formally affirming her female sex. This reality can be as threatening to the biological mother as her own homophobic questioning of her own sexuality; no matter how long she has been aware of, or seemed to have accepted, the father's femaleness. My own inexperienced observation, taking account of the happy outcomes of sex affirmation within families as well as the conflicted, is that the spouse or partner's reaction seems to be influenced by, or related to, his or her own self-confidence and comfort in and with her or his own sex identity, sexuality and parenting.

Notwithstanding colloquial Australian evidence that children have and do manage the difference of parents, including transsexualism, in a healthy manner and without lasting ill affect, the fear of children being harmed by associated peer and/or community rejection and ridicule is also commonly raised. In this regard it can be ventured by 'experts' and Child Representatives that a cessation of all Contact, or only rigidly limited 'house arrest' style Contact, should take place (perhaps until an appropriate Single Expert can assess the matter) in the interests of the children. As such experts can be hard to find, the only way to test this opinion is to defy it and to allow the children to publicly live with their parent's difference, rather than to live with it as a secret, one is left with the situation where the interests of the children can be bitterly contested and can become a vehicle for un-associated conflict between their parents conveniently expressed through the issue of transsexualism. Children can be delivered the harm of shame mistaken for care.

Expert evidence on the issue is hard to come by. The United Kingdom psychiatrist, Richard Green has researched and published specifically on this issue to the effect that a parent's transsexualism need have no discernable adverse impact upon children.<sup>54</sup> His paper, which discusses longitudinal studies, entitled *Transsexual's Children* is worth quoting at length here. He concludes that paper by saying:

*"Available evidence does not support concerns that a parent's transsexualism directly adversely impacts on the children. By contrast, there is extensive clinical experience showing the detriment to children in consequence of terminated contact with a parent after divorce."<sup>55</sup> And "The cases described here and twenty years earlier demonstrate that transsexual parents can remain effective parents and that children can understand and empathise with their transsexual parent. The cases demonstrate that gender identity confusion does not occur and that any teasing is no more a problem than the teasing children get for a myriad of reasons. Children's best interests are not served by the bullying tactic of implacable parental opposition by one parent to continuing contact with both parents. Divorce may be inevitable between parent and parent, but divorce need not be inevitable between parent and child."<sup>56</sup>*

The same kind of educational schemes for enhancing the awareness of judicial officers, court staff and lawyers that have occurred in respect of the issue of cultural diversity and discrimination should also be undertaken in respect of other marginalised people; including people who experience transsexualism. The issue is one of awareness, of 'Seeing', and not of political correctness.

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<sup>54</sup> Green R., *Transsexuals' Children*. IJT 2,4, <http://www.symposion.com/ijt/ijtc0601.htm>

<sup>55</sup> Ibid.

<sup>56</sup> Ibid.

At the same time, the fundamental reality is that a person with transsexualism's sex affirmation will not make a poor parent into a good one or otherwise affect a person's parenting skills; although the person with transsexualism will usually attain a significantly enhanced state of inner peace as a result of her or his sex affirmation and subsequent treatment. Further, allowance must always be made for the individual personal and social capacities and well-being of each affected child as well as the parents in an environment that may be subject to multiple factors of personal and relationship challenge and change; not least of which is the usual grief and anger arising as a result of the ending of the marriage. The help of an independent treating psychologist (or parent/children team) appointed by the court and immune from reportage can be of valuable assistance where problems and/or conflict seem entrenched. The sooner a qualified Single Expert Witness can be appointed the better as interim hearings are not the ideal circumstances in which to reliably explore such issues and unqualified expert evidence can find its way before the court. Informal or formal expedition should also be an early consideration as should judge management in order that an interim hearing can be used as an accumulative educative process. Taking every opportunity for education and the demonstration of polite pedantic intolerance of even casual prejudice or flippancy concerning the person with transsexualism seems to work.

In this context my own role in such litigation is interesting. My history of transsexualism means I occupy the apparently conflicting contextual positions of both 'i/us' (as legal practitioner) and 'other/them' (as a person of transsexual background).

Dealing with difference in legal proceedings requires a significantly higher quality of expert evidence and information no matter what side of the case you are on and you will never regret the effort in obtaining the very best of such evidence in any case concerning transsexualism; even if that means seeking out appropriate experts internationally.

## 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 intersex 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 rights for people living with transsexualism. The considerable lay evidence of 'Kevin's' acceptance as a man in Australian culture and the overwhelmingly positive acceptance of the decision is a welcome reminder of the intrinsic compassion of Australians and our desire and capacity to give the 'underdog' a go.

It seems that as a culture Australians 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 external 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. Our society has now begun to understand transsexualism and some other traditionally known intersex 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". We can also begin to better understand the essential need of an individual who experiences transsexualism to affirm his or her innate sex by undergoing conclusive sex affirmation procedures and then to have his or her legal sex reassigned to secure the issue of an appropriate Birth Certificate to secure the right of accurate non-discriminatory identity and full uncompromised legal rights in the individual's reassigned legal sex in congruity with the affirmed sex and sexually rehabilitated/harmonised body. The need for uniform State and Territory legislation guaranteeing these fundamental human rights is now clear and yet no such legislation exists.

As people with transsexualism have been increasingly 'reading themselves aloud' over the past decade, and as transsexualism has increasingly been recognised in Australia and elsewhere<sup>57</sup> as a biologically derived intersexual condition with an established diagnosis and treatment regime, the demands upon both State and federal governments have intensified for the full recognition of the fundamental human rights of people who experience transsexualism such as the right:

- to be diagnosed as experiencing transsexualism without being diagnosed as suffering a mental illness or disorder such as *Gender Dysphoria* and *Gender Identity Disorder*;
- to be accorded equality of legal rights and medical treatment with others who experience intersexual conditions; such as in respect of the re-assignment or correction of an individual's legal sex;
- of children and adolescents with transsexualism (and their parents) to receive personal, medical and legal support for the affirmation of their innate sex so as to be able upon diagnosis to promptly (without court approval) undergo various non-surgical aspects of sex affirmation treatment so as to forestall the

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<sup>57</sup> 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 11<sup>th</sup> 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>.

development of inappropriate and harmful secondary sexual characteristics and to enable such children to acquire physical characteristics appropriate to their affirmed sex;

- of a person diagnosed with transsexualism to receive medical treatment for the condition funded by Medicare;
- of a person of transsexual background (one who has undergone irreversible sex affirmation treatment so as to physically affirm her or his sex) to have that person's birth certificate (or legal sex) altered so as to accurately reflect that person's physically affirmed sex and sexual identity without the precondition of having to end an existing marriage or be judged by a panel of 'experts', and so as to provide for full and unconditionally equal rights in the individual's affirmed sex;
- of a person of transsexual background to participate in competitive sport in the person's affirmed sex; and
- of a person of transsexual background to otherwise live a full and fulfilling life in the person's physically affirmed sex on the same terms as others of that sex in respect of such issues as superannuation and other forms of insurance without discrimination.

I trust that this discussion of transsexualism, as Difference on Trial, focused for family lawyers, helps to provide a starting point in terms of both thought and language which will enable you who are willing to better assist in this particular struggle for human rights where you may. I am a believer in the maxim that the degradation of the least of us degrades us all. I also believe that the opposite applies in that our potential for love is limited only by our fear. Seen in this way, we can each have meaningful and proactive lives in our everyday dealings with each other by showing the kind of understanding and acceptance of difference and imperfection in the people we meet that will help create a world in which we can be comfortable with our own.

**Rachael Wallbank**

9<sup>th</sup> August, 2004.

**APPENDIX A      CONTEMPORARY HUMAN RIGHTS ISSUES  
FOR PEOPLE WITH TRANSEXUALISM**

**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 intertextuality, 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 TRANSEXUALISM**

**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.

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.

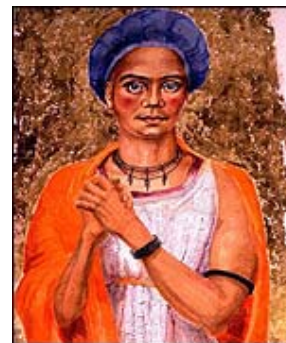
Dr Pete Wilson, Senior Archaeologist at English Heritage who has edited a book on the subject, said the man's jewellery was significant.

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"



A gallus wore women's clothes and jewellery

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.

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."



The priest would have worn special masks

Most of the finds from the excavations are held by the Yorkshire Museum.<sup>58</sup>

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<sup>58</sup> 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 TRANSEXUALISM**

### **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.<sup>59</sup>

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<sup>59</sup> From website "*E-Medicine*" at <http://www.emedicine.com/med/topic3439.htm>

## **APPENDIX E**

## **CONTEMPORARY HUMAN RIGHTS ISSUES FOR PEOPLE WITH TRANSEXUALISM**

### **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 TRANSEXUALISM**

### **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;

**APPENDIX F**

**CONTEMPORARY HUMAN RIGHTS ISSUES FOR  
PEOPLE WITH TRANSSEXUALISM (Continued)**

- (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.

**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;

**APPENDIX G**

**DIFFERENCE ON TRIAL – TRANSEXUALISM IN FAMILY LAW  
AND PROPERTY RELATIONSHIPS LITIGATION (continued)**

(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.

DRAFT MODEL LEGISLATION FOR THE RE-ASSIGNMENT OF A PERSON'S LEGAL  
SEX - by Rachael Wallbank**Part X – Change of Assigned Sex****XA Definitions**

In this Part:

**birth certificate** means a certificate issued under section XE or (*here insert other relevant section/s*) certifying particulars of a person's birth contained in an entry in the Register.

**assigned sex** means the particulars of a person's sex contained in an entry in the Register.

**affirmed sex** means the sex that a person affirms the person to be in contradiction to the person's then assigned sex for the purpose of an application under this Part

**sex affirmation surgery** means one or more surgical procedures involving the alteration of a person's reproductive organs carried out for the purpose of assisting the person to be considered to be a member of the person's affirmed sex and/or to correct or eliminate ambiguity relating to the sex of the person for the same purpose

**resident recognition certificate** means a certificate issued under section XE certifying those particulars ordinarily contained in a person's birth certificate except to indicate that the person was not born in New South Wales

**XB Application to alter register to record change of assigned sex or for the issue of a resident recognition certificate**

(1) A person who is 18 years of age:

- (a) whose birth is registered in New South Wales; or
- (b) whose birth is not registered in New South Wales but who is ordinarily resident in New South Wales, and
- (c) who has undergone, or is medically prohibited from undergoing, sex affirmation surgery,

may apply to the Registrar, in a form approved by the Registrar, for the alteration of the record of the person's assigned sex to that of their affirmed sex in the case of a person to whom subparagraph (a) of this section applies or for the creation of a resident recognition certificate entry in the case of a person to whom subparagraph (b) of this section applies.

(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, or
- (b) whose birth is not registered in New South Wales but who is ordinarily resident in New South Wales, and
- (c) who has undergone, or is medically prohibited from undergoing, sex affirmation surgery,

may apply to the Registrar, in a form approved by the Registrar, for the alteration of the record of the child's assigned sex to that of the child's affirmed sex in the case of a child to whom sub paragraph (a) of this section applies or for the issue of a resident recognition certificate in the case of a child to whom sub-paragraph (b) of this section applies.

**XC Application must be accompanied by declarations by doctors**

An application under section XB must be accompanied by:

- (a) statutory declarations by 2 medical practitioners, registered in Australia, verifying that the person the subject of the application has undergone, or is medically prohibited from undergoing, sex affirmation surgery and
- (b) such other complimentary evidence and information as may be prescribed by the regulations.

**XD Alteration of register**

- (1) The Registrar is to determine an application under sub-sections XB (1) (a) or (2) (a) by making the alteration, or by refusing to make the alteration .
- (2) The Registrar is to determine an application under sub-sections XB (1) (b) or (2) (b) by creating a new entry in the register showing the same details that are contained in the person's birth certificate or other identifying documentation except that the assigned sex of the person shall be recorded as the person's affirmed sex, or by refusing to make the alteration.

**XE Issuing of new birth certificate or resident recognition certificate**

- (1) After the record of a person's assigned sex is altered under section XD(1), a birth certificate issued by the Registrar for the person must show the person's assigned sex in accordance with the record as altered.
- (2) After the creation of a new entry under section XD(2) a resident recognition certificate issued by the Registrar must show the person's sex in accordance with the entry.
- (3) Any such birth certificate or resident recognition certificate must not include a statement or indication that the person's assigned sex has been altered.

**XF Issuing of old birth certificate**

- (1) The child of a person the record of whose assigned sex is altered, or other person prescribed by the regulations, may apply to the Registrar for a birth certificate for the person or other historic evidence that shows the person's assigned sex before the record was so altered.
- (2) Despite section XE, the Registrar may issue such a birth certificate to the child or prescribed person.

**XI Effect of alteration of register or creation of resident recognition certificate**

- (1) A person the record of whose assigned sex is altered under this Part is, for the purposes of any law of New South Wales, a person of the sex as so altered.
- (2) A person to whom a resident recognition certificate relates is, for the purposes of any law of New South Wales, a person of the sex stated in the certificate.

**APPENDIX I DIFFERENCE ON TRIAL – TRANSSEXUALISM IN FAMILY LAW AND PROPERTY RELATIONSHIPS LITIGATION**

**Example of Conciliation Conference Document Material**

**Liabilites**

Hormonal treatment	E\$2,500,
Electrolysis	E\$5,000,
Surgical and hospital costs of sex affirmation surgery	E\$15,000,
breast augmentation	E\$11,000
Tracheotomy	E\$3,000
loss of income for surgery and recovery (E8 -10 weeks)	<u>E\$40,000</u>
Total	E\$76,500

**S79(4)(e) and s 75(2)**

1. The Respondent has been diagnosed as experiencing the medical condition called transsexualism. Treatment for transsexualism requires that the sufferer undergo certain rehabilitative medical procedures (sex affirmation treatment) including hormonal, surgical and associated treatment to bring the sexually differentiated features of the individual's body into harmony with the individual's brain sex differentiation. The current costs of such sex affirmation treatment are as set out in the Liabilities section of Part A of this Conciliation Conference Document. Such procedures and treatment are not elective but essential to the individual's ongoing health and life. The ability of the Respondent to live a productive life as a female is essentially dependant upon her receipt of sex affirmation treatment including surgery. As a result of this treatment the Respondent will within the next 24 months be required to incur by way of medical costs and loss of income the total sum of approximately \$116,000.00.