

HIV In gaol

Simon Lake

The bleak picture of HIV/AIDS management in Australian corrective systems

The problem

There is a deafening and disturbing silence amongst policy makers and the media about the health management issues surrounding HIV/AIDS in prison. This may be due in part to the relatively low number of people testing HIV-positive in prison with a total of only 48 prisoners or 0.6% of new prison arrivals testing positive in New South Wales prisons by 30 June 1991. Apart from this relatively low body count, the silence on these issues can be attributed in part to the unhealthy precedent of the first Commonwealth White Paper on AIDS in 1988¹ which established the trend that if the community was going to accept a public education campaign on sexual practices and intravenous drug use, some sacrificial lambs were needed to satisfy conservative forces.

These lambs have been prisons and immigration, where it has been accepted from day one that compulsory testing was both desirable and necessary despite medical evidence providing no support for such a position. The message given by such a stance was clear. HIV/AIDS management practices which were used in the community were not considered to be relevant or desirable for prisoners and immigrants. So from such a dubious policy-making start what sort of policies and practices have been introduced to both control and manage the HIV/AIDS pandemic in the prison environment?

Without trying to sound like the grim reaper, the picture is one of gloom with the occasional ray of light provided by the vigorous and often brave efforts of those involved in prison education. On reception, all prisoners in Australia are compulsorily tested except in Victoria, where compliance rates are around 99% and Western Australia, where prisoners are compulsorily tested if they are considered to be 'at risk'. In the community the purpose of encouraging voluntary testing is to ensure that early intervention, by way of life-prolonging drugs and lifestyle skills, slows the development of HIV into AIDS. In prison there is no such purpose because of the scarcity of medical services available to prisoners. Testing thus appears to be done for its own sake.

In figures supplied by the co-ordinator of the New South Wales Corrective Services Department's HIV/AIDS Project, Sue Jefferies, at a seminar on AIDS in prison held by the Institute of Criminology, on 6 November 1991, it was stated that of the 17 000 people

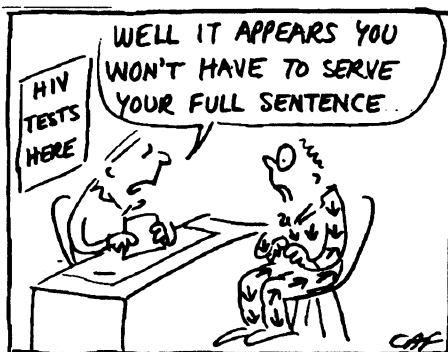
who were in the prison system, 3520 people were tested. Of those, 48 were positive. Forty-four people refused to be tested and what happened as a result of their refusal is a mystery. If they were refusing to be tested because they feared the consequences which would flow from being branded HIV-positive, it is hard to blame them. The Corrective Services Department has simply failed to provide any benefits from their testing regimen in terms of having a comprehensive up-to-date management program for those who do test HIV-positive.

Condoms and syringes

While the encouragement of safe sexual practices via the use of condoms and clean syringes has been the cornerstone of AIDS prevention and control in the general community, in gaols in every jurisdiction in Australia condoms and clean syringes have been prohibited. This is in spite of the fact that male-to-male sex is not illegal in the community nor is the use of many types of intravenous drugs. The 'moral' objections have been maintained in the closed environment of prisons. This is in spite of attempts in New South Wales to distribute \$47 000 worth of condoms in that State's gaols in 1989. The then President of the Prison Officers Vocation Branch, Pat Armstrong, ordered that the condoms were not to be distributed in Bathurst in case 'Bathurst became known as the homo gaol of NSW'. The distribution of condoms allegedly had the support of Cabinet but Michael Yabsley, the Corrective Services Minister at the time, appeared to have ignored its opinion.² The Prison Officers Vocation Branch's Dick Palmer showed a similar lack of insight into HIV/AIDS prevention by declaring at a conference in November 1991 that 'fear was still a good prevention measure'. Corrective services departments, however, in most jurisdictions have at least not fallen into the trap of segregating prisoners as a method of prevention.

New South Wales, Tasmania and South Australia do not compulsorily segregate those with HIV or AIDS. In Victoria and Queensland, prisoners who are HIV-positive are placed in cells with known intravenous drug users. Other States such as Western Australia have a declared policy of segregation, as does the Northern Territory.

On the positive front, the establishment of AIDS Committees, which encourage peer education and the increasing awareness of prison officers



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The human rights of transsexuals

Isis Dunderdale

What is the legal status of transsexuals particularly in the issues of marriage and human rights?

The law recognises only two sexes' — male or female — and requires the decision assigning sex to be made when the infant's sex, determined by genital anatomy, is entered on the birth certificate. Yet the designation of sex, decided in a split second, may have a profound effect on the individual's future development. Despite changes in society's attitudes towards the roles of men and women over the last 30 years, both the law and society treat the sexes differently.

You cannot choose not to be classified sexually as either male or female; the 'choice' made for you at birth operates in all areas, for all purposes, for all time, and you cannot change that sex. Or can you?

Transsexuals

A transsexual is a person whose psychological sex or gender identity is the opposite of their biological sex: while physically of one sex they psychologically identify as the other.

Transsexuals are sometimes confused with both homosexuals and transvestites: transsexuals are attracted to persons of the same biological sex as are homosexuals, and they cross-dress, as do transvestites. However, neither homosexuals, nor transvestites *per se*, have a gender identity problem. A transvestite is someone who dresses in clothing usually associated with the opposite sex. While a lot of transsexuals are transvestites, not all transvestites are transsexuals. Some heterosexual men cross-dress for sexual thrills. Female impersonators cross-dress for entertainment. Gay men and women may cross-dress as a subversive act intended to break down traditional sex roles. Transsexuals, however, cross-dress specifically in order to conform with traditional sex roles, and dressing and behaving as a member of the psychological sex for anything up to two years, is usually a prerequisite for sex reassignment surgery: the transsexual has to prove that they can 'pass' in the com-

munity as a member of the intended sex.

A distinction must also be made between transsexuals and hermaphrodites or other 'intersexes'. At birth, a transsexual's chromosomes, gonads and genitals are all consistent with the one sex, while a true hermaphrodite has a combination of male and female gonads and genitalia. Even apart from hermaphrodites, sex is not always easy to accurately establish at birth: 'testicular feminisation syndrome' affects genetic males, causing a complete insensitivity to the male hormone testosterone. At birth, testes are hidden in the abdomen and the child has the external appearance of a girl. The situation usually comes to light after puberty, when menstruation does not commence, and pubic hair does not grow. There are also instances of children born with the appearance of females, and brought up as females, who are actually genetically male but lack a particular enzyme to process testosterone. At puberty, however, androgen secretion increases sufficiently to overcome this, and they then develop into full males, both physically and psychologically.²

Transsexualism, or gender dysphoria, is a fairly rare psychological disorder, occurring mainly in males. The transsexual's belief that they are 'trapped in the wrong body' generally manifests itself at an early age (5-7 years) and psychotherapy cannot change that belief: medical intervention, by way of hormone treatment and sex reassignment surgery, however, can at least bring their bodies more into conformity with their psychological sex. While the appropriate genitalia can be surgically fashioned for both, the results are better for male-to-females than for female-to-males. In many cases, the skin of the penis can be used to make a vagina, thus allowing for 'normal' sexual intercourse, and in fact orgasm. However, although a phalloplasty is possible for female-to-male transsexuals, the penis only becomes erect by means of implanted plastic tubes leading to a reservoir of fluid buried under the skin in the groin area, and operated by means of a bulb inside the scrotum. A sexually reassigned transsexual of either sex can neither beget nor conceive children.

Transsexuals are faced by problems in many areas: medical treatment, employment discrimination,³ inheritance, parental rights, social security benefits, marriage, and crime. In many of these

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areas, the sex of the transexual will be the determining factor; yet the legal status of transexuals in Australia is currently unclear.

Legal status

Various European countries have legislatively acknowledged the reassigned sex of transexuals. In the United States at least 25 States have allowed changes to be made to the sex noted on birth registers, although not all of them expressly provide for it by statute. Quebec allows it by statute.

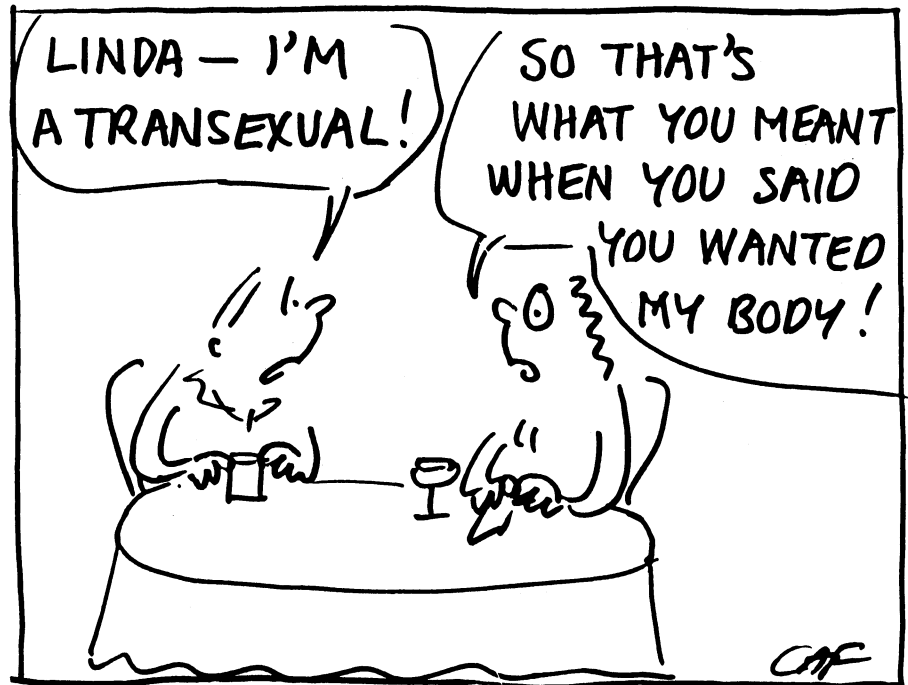
In Australia there is no federal legislation on transexuality, although there have been discussions on the issue. Birth registries, and the issuing of birth certificates, are State matters. Corrections to entries on the register are only possible if an error was made at the time of the original entry, i.e. if the sex was wrongly determined at that time; and transexualism has not been accepted as meaning the sex was wrongly determined at birth. Annotation to reflect a change of sex pursuant to sex reassignment surgery has not generally been allowed.

In 1988, however, South Australia enacted the *Sex Reassignment Act*,⁴ which regulates the performance of sex reassignment surgery⁵ and provides legal recognition of the reassigned sex of the person by means of the issue of a sex recognition certificate.⁶ This certificate is conclusive evidence that the person is of the sex stated (s.8). Although the Registrar in South Australia must then register the reassignment of sex, if requested (s.9(1)), and make any necessary alterations to the register or index, the Registrar is under no duty to then provide a birth certificate (s.9(4)) showing only the new sex. Thus, although for the purposes of South Australian law, transexuals have achieved legal recognition of their 'true' sex, it is quite likely that the fact that sex reassignment has taken place will be apparent from the documentation.

The New South Wales Law Reform Commission recommended in December 1988 that the Registrar of Births permit an amendment to be made to show a change of sex following surgery, but not a complete alteration or rectification of the original entry, and that an extract showing either no sex or the reassigned sex be able to be issued.⁷ Unfortunately, the Commission's recommendations have not been taken up.

Marriage

The United Kingdom case of *Corbett v*



Corbett [1970] 2 All ER 33, was the first case concerning marriage of post-operative transexuals. The husband of a male-to-female transexual filed for an annulment, inter alia, on the grounds that his wife was male. The judge, Ormerod J (as he then was), decided that of the various factors relevant to determining a person's sex, the biological ones were decisive: chromosomal, gonadal and genital. If these three were congruent at birth, sex was to be determined accordingly, and gender identity and any later surgery or medical treatment were to be disregarded. This decision, which was followed in a criminal law decision,⁸ appeared to have settled the matter definitively in most of the common law countries.

In the only Australian case involving marriage, *Corbett v Corbett* was purportedly followed by a single judge of the Family Court who held that a hermaphrodite was in law neither male nor female and thus the marriage was void: *In the Marriage of C and D* (1979) 35 FLC 340.⁹ This resulted despite the fact that the Ormerod test required congruence of biological criteria at birth, which was not the case here, and that Ormerod J had in fact expressly left open the issue in such a situation. This decision has been strongly criticised, both on reasoning and result since it left the person unable to marry anyone of either sex.¹⁰

In *MT v JT*, 355 A 2d 204 (1976), however, an American court rejected the *Corbett v Corbett* test, holding that where a person's gender and genitalia

had been harmonised and the person was 'by virtue of medical treatment thereby possessed of the full capacity to function sexually as a male or female' there was no legal barrier nor any reason of public policy to prevent their identification as a member of that sex for the purposes of marriage.

Human rights?

Three cases concerning sexually reassigned transexuals have come before the European Commission on Human Rights and the European Court of Human Rights, alleging that the refusal of the government concerned to recognise their new sex on birth registers constituted a breach of Article 8 of the European Convention on Human Rights, which states:

1. Everyone has the right to respect for his private and family life, his home and his correspondence.
2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

They alleged Article 8 was breached because in certain circumstances they were forced to produce documents showing a sex inconsistent with their appearance. They also argued that such refusal breached Article 12: