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TRANSSEXUALS AND THE LAW

BY WILLIAM SHRUBB

I. A COMPARISON BETWEEN ENGLAND AND AUSTRALIA

'Male and female he created them,'[1] wrote the author of the Book of Genesis. It is such an easy sexual dualism that touches so many aspects of our lives. When you walk into the UNSW Law building, seeking a bathroom, and are confronted with a choice – male or female – the same dualism is lurking. It is not a problem for most people. Sometimes, however, a person may have the physical characteristics of one sex, yet feel deeply that they are in fact a member of the other sex. This is known as transsexualism, or gender dysphoria. It is different from homosexuality. Women who have sex with women are still women; they have the physical characteristics of women, and identify as women. It is different from transvestism, or cross-dressing: men who dress as women still have the physical characteristics of men, and still identify as men. It is also different from being an intersex person, or a hermaphrodite. Transsexual people only have the physical characteristics of one sex.

However, over twenty thousand Australians who experience transsexualism, feel like they are stuck with the wrong physical characteristics.[2] Over the last four decades, the law has had to grapple with questions where this previously simple sexual dualism has broken down. Courts have had to answer questions like:

- What criteria should be used to determine a person's sex?
- When should transsexual people be recognised as a member of a particular sex?
- Under what circumstances should new birth certificates and identity documents be issued to transsexual people?
- And crucially, who is a transsexual person allowed to marry?

Answering these questions has been difficult, and the results have often been tragic, but the general trend has been towards a greater understanding and tolerance of those people who do not fit so easily into our constructed sexual dualism.

II. THE LAW IN ENGLAND: THE RESTRICTIVE BIOLOGICAL TEST

The first major case to deal with this issue was *Corbett v Corbett (orse. Ashley)*.[3] The applicant was Arthur Corbett, later Baron Rowallan, the cross-dressing son of Thomas

Corbett, an English aristocrat who was Governor of Tasmania from 1959 to 1963. The respondent was April Ashley, a former model. Their marriage had broken up, and Ashley was seeking some share of Corbett's property. Ormrod LJ was asked to determine if the marriage between the two parties was valid. It was, all in all, the standard kind of fodder for the society pages of the British tabloids. Except for one thing: April Ashley had been outed as a male-to-female transsexual ten years earlier.

Born in Liverpool in 1935 as George Jamieson, April was raised as a boy, and joined the Merchant Navy at the age of fourteen. But despite being biologically male from birth, April felt trapped in the wrong body. After a deliberate drug overdose, and time in a psychiatric hospital, he moved to France, and became friendly with a troupe of female impersonators. He joined the troupe, began taking female hormones, and, in 1960, underwent surgery. His testes and scrotum were amputated, and a vagina was constructed from the inverted skin of his penis. No womb or ovaries could be constructed, nor could his chromosomes be altered. Only six months later, post-operative George, who adopted the name April Ashley, met Arthur Corbett for the first time. Arthur was aware at all times that April was a male-to-female transsexual. The pair fell in love, and married in 1963. In the meantime, Ashley had changed her name by deed poll, and had received a woman's insurance card from the Ministry for National Insurance. All was not well in the relationship, however, and the pair separated not long after the marriage. The question for Ormrod LJ was whether Ashley was considered by English marriage law to be a man, and thus whether the marriage was void.

First, His Honour considered the criteria by which a person's sex might be determined. On the evidence of the medical experts before him, His Honour listed four possible criteria:

> (i) chromosomal factors,
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> (ii) gonadal factors (i.e., presence or absence of testes or ovaries),
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> (iii) genital factors (including internal sex organs), and
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> (iv) psychological factors.[4]

Secondly, His Honour found that physical characteristics of a person were, by reason of their chromosomes, 'fixed at birth (at the latest), and cannot be changed, either by natural development of organs of the opposite sex, or by medical or surgical means.'[5] Having found this, the question for His Honour became whether a person's sex for the purposes of marriage ought to be determined by reference to physical characteristics as apparent at birth, psychological criteria, or some combination thereof.

His Honour found that only physical characteristics as apparent at birth ought to be determinative in the case of marriage. Bearing in mind that Ashley was accepted as a woman for the purposes of national insurance, His Honour nevertheless found that marriage was a special kind of relationship, because 'it is the institution on which the family is built, and in which the capacity for natural heterosexual intercourse is an essential element.'[6] His Honour helpfully conceded that "[marriage] has, of course, many other characteristics, of which companionship and mutual support is an important one,"[7] but maintained that 'the characteristics which distinguish it from all other relationships can only be met by two persons of opposite sex.'[8]

Nor was Ashley's operation or hormone treatment sufficient for Ormrod LJ. In a breathtakingly outspoken – some might say

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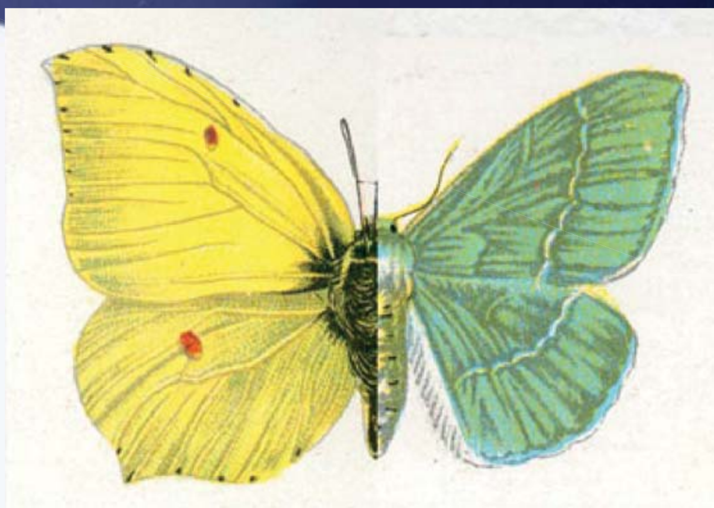

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boorish – judgment, His Honour claimed that ‘the pastiche of femininity’[9] exhibited by Ashley had nearly fooled him, but under ‘closer and longer examination in the witness box…the voice, manner, gestures and attitudes became increasingly reminiscent of the accomplished female impersonator.’’[10] Despite her operation and hormone treatment, Ashley was deemed not ‘naturally capable of performing the essential role of a woman in marriage’,[11] whatever that might be, and the marriage was held to be void. For the purposes of marriage, a person’s sex was to be determined by the physical characteristics that they exhibited at birth, and no subsequent changes could affect that determination.

Later, in *R v Tan,*[12] this restrictive biological test was extended to determining a person’s sex for the purposes of criminal liability too, in the interests of “certainty and consistency.”[13] Ormrod LJ’s test, founded on the supposed special nature of marriage, came to be the sole test for determining a person’s sex across all fields of law in the United Kingdom. The publicly available register of births recorded a person’s sex at birth, based on the restrictive biological test, and changes were only possible if there had been a clerical error, a process that could cause grave embarrassment to a transsexual person if their birth sex became known to those around them.[14] New birth certificates, required for passport applications, pension insurance, university enrolment and public service employment, were not issued to post-operative transsexuals, like April Ashley.[15] It was a low point in the history of the common law.

III. THE LAW IN AUSTRALIA: TOWARDS A BROADER TEST

Corbett v Corbett was a marriage case, and the heightened tension around that institution arguably coloured the judgment of Ormrod LJ, leading English jurisprudence

down the path of the restrictive biological test in the interests of 'certainty and consistency.' In contrast, the first Australian case to deal with the issue of determining a person's sex was a criminal case. In *R v Harris and McGuiness*[16] the New South Wales Court of Criminal Appeal attempted to define a 'male person' for the purposes of s 81A of the *Crimes Act 1900* (NSW), which used to criminalise a male person attempting to procure an 'act of indecency' with another male person. Lee Harris was a post-operative male-to-female transsexual, while Phillis McGuiness was a pre-operative male-to-female transsexual. They were both charged with offering to engage in oral intercourse with two male undercover police officers in Darlinghurst. Both Street CJ and Mathews J were anxious to point out that *Corbett* was not a binding authority on them, and in any event it was not a criminal case.[17] Although *R v Tan* was a criminal case, Mathews J dealt it short shrift, saying it was just an application of the rule in *Corbett*, and there was 'little, if any, independent consideration of the issues relating to transsexuals.'[18]

In *Harris*, Her Honour (with whom Street CJ agreed) found that, in determining criminal liability, the court ought to have regard to 'the relevant circumstances at the time of the behaviour.'[19] Two conclusions followed from this: first, a person's chromosomes were never 'relevant circumstances'; and secondly, in sexual offences, the state of a person's external genitalia ought to be considered at the time of the alleged offence, regardless of whether 'they were artificially created or were not the same as at birth.'[20] Consequently, the Court overturned Lee Harris' conviction on the grounds that, as a post-operative transsexual, she was not a 'male person' for the purposes of s 81A. Phillis McGuiness was not so lucky. While accepting that psychological factors contributed to a person's sexual identity,[21] Mathews J regretfully rejected the argument that "where a person's gender identification differs from his or her biological sex, the former should in all cases prevail."[22] Pre-operative Phillis McGuiness remained a 'male person' for the purposes of the Act.

Harris has shaped the way transsexual people have been treated by Australian law ever since. In *Secretary of Department of Social Security v SRA,*[23] the Harris test was imported from criminal law into social security law. In SRA, some kind of surgery was considered necessary in order for a transsexual person to be considered a member of their acquired sex. Black CJ acknowledged that there were problems with this, but held that 'a line has

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to be drawn somewhere.'[24] Lockhart J also regretfully adopted this line, noting:

> A transsexual who genuinely regards himself or herself as having achieved the new sex must find life extremely difficult. Judicial opinions in this area of the law must be liberal and understanding, guided by the signposts of what is in the best interests of society and the transsexual. They do not conflict in the case of the post-operative transsexual, but in my opinion the conflict still exists in the case of the pre-operative transsexual.[25]

Secondly, the Court made clear, as in *Harris*, that it was not determining anything with regard to marriage.[26] That bridge was finally crossed in *Re Kevin*.[27] In that case, Chisholm J definitively demolished Ormrod LJ's restrictive biological test. At the heart of Chisholm J's judgment was the question of whether marriage was special in the sense that a different test from that in *Harris* and *SRA* ought to be adopted.

His Honour considered two arguments for having a special test for marriage: '(i) that marriage is a social institution having its origins in ancient Christian law, and (ii) that it is intrinsically connected with procreation.'[28]

His Honour conclusively rejected both propositions. With regard to the first, His Honour said while he accepted its truth, nevertheless 'ancient Christian law' provided no guidance on how to determine a person's sex for the purposes of marriage. With regard to the second proposition, His Honour also rejected the necessary connection between marriage and procreation, citing examples of infertile couples with valid marriages.[29]

Instead, His Honour found that 'man' and 'woman' ought to be given their ordinary contemporary meanings, and so the list of criteria to take into account when determining a person's sex was not limited to physical criteria, even for the purposes of marriage.[30] His Honour said:

> 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

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> person's self-perception as a man or a 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.[31]

Chisholm J's judgment was upheld by the Full Court of the Family Court of Australia.[32]

IV. THE CURRENT STATE OF THE LAW

The situation in the United Kingdom has finally changed as a result of several appeals to the European Court of Human Rights based on the European Convention on Human Rights.[33] In 2004 the UK Parliament passed the *Gender Recognition Act*. Under the Act, transsexual people can apply to a Gender Recognition Panel for a Gender Recognition Certificate.[34] They must provide evidence they that have been diagnosed with gender dysphoria, have been living in their acquired sex for two years or more, and intend to continue living in that sex until death.[35] Evidence of surgery is not required. If satisfied, the Panel can then issue a Gender Recognition Certificate, with which the applicant can get a new birth certificate, which can be used in all the ways discussed above. As a result, transsexuals in the United Kingdom can finally be accepted as members of the sex to which they always felt they belonged.

Yet it is worth comparing Australian law's tolerance and understanding with the narrow-mindedness of *Corbett*, and noting that human rights legislation is not always necessary for the law to protect all who come before it from injustice. Unlike the European Court of Human Rights, the NSW Court of Criminal Appeal did not base its objections to *Corbett* on human rights legislation, nor did the Family Court of Australia. To its credit, the common law in Australia has largely managed to recognise and protect the rights of transsexual people even without human rights legislation.

As Street CJ said back in 1988, 'the time has finally come when the beacon of *Corbett* will have to give place to more modern navigational guides to voyages on the seas of problems thrown up by human sexuality.'[36]

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