

**What are the Implications of Gender Reassignment Surgery in Regards to  
Marriage in Australia?**

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## INTRODUCTION

Gender reassignment surgery became a reality in Australia in the early 1950s,<sup>1</sup> surfacing as a ‘treatment’ for those who had been medically diagnosed with ‘gender dysphoria’, known today as ‘gender identity disorder’. In the absence of legislation, common law has since struggled with the concept of attributing gender to those who identify themselves as belonging to the opposite sex. Such people alter their bodies and physical appearance through surgical and other procedures, and in doing so attain gender characteristics of the sex which reflects their perception of their gender. Surgical intervention is sought ‘as a means to bring their bodies in sync with their minds’.<sup>2</sup> Self-perception is, however, only one difficulty transsexual persons must face. They also encounter legal and social difficulties, which often arise as a result of the inconsistency existing between the official record of their gender at birth and their new gender identity.<sup>3</sup> The issue of legal recognition of transgendered persons has been the subject of recent inquiries in Australian states and territories,<sup>4</sup> and has become a topic for national debate.<sup>5</sup>

In order to recognise a change of sex, a common requirement amongst Australian jurisdictions is gender reassignment surgery.<sup>6</sup> Common law reflects the same notion.<sup>7</sup> Human rights groups,

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<sup>1</sup> FM Collyer and C Heal, ‘Patient Satisfaction with sex reassignment surgery in New South Wales, Australia’ (2002) 8 *Australian Journal of Primary Health* 9, 19.

<sup>2</sup> Murray Couch et al, ‘Tranznation : a report on the health and wellbeing of transgender people in Australia and New Zealand’ (Monograph Series No. 65, Australian Research Centre in Sex, Health & Society, LaTrobe University, 2007) 40 <[http://www.glhv.org.au/files/Tranznation\\_Report.pdf](http://www.glhv.org.au/files/Tranznation_Report.pdf)>.

<sup>3</sup> *AB v Western Australia* [2011] HCA 42 (6 October 2011) [1].

<sup>4</sup> In 2003 the ACT Government produced a report in the Legislative Assembly titled ‘Discrimination and Gay, Lesbian, Bisexual, Transgender and Intersex People in the ACT’ (2003 ACT report), and most recently in 2010 the ACT Attorney-General heard advice from the ACT Human Rights Commissioner, Dr Helen Watchirs, regarding human rights issues arising from the current ACT laws about legal recognition of people within the LGBT community (Dr Watchirs’ advice).

<sup>5</sup> The Australian Human Rights Commission in 2009 put forward recommendations to the Commonwealth Government after extensive research and public consultations around Australia lead to the publication of the *Sex files: the legal recognition of sex in documents and government records* report (Sex Files Report).

<sup>6</sup> *Births, Deaths and Marriages Registration Act 1995* (NSW) s 32B; *Gender Reassignment Act 2000* (WA) s 17; *Births, Deaths and Marriages Registration Act 1996* (Vic) s 30A; *Sexual Reassignment Act 1988* (SA) s 7; *Births, Deaths and Marriages Registration Act 1999* (Tas) s 28A; *Births, Deaths and Marriages Registration Act 1996*

however, are currently campaigning that the requirement for surgery is discriminatory. They argue that many transgendered people choose not to, or are unable to undergo surgery due to many reasons, including high financial expense and great risks to personal health.<sup>8</sup> While much consideration in Australia has been given to the definition of gender, and what constitutes gender where it applies to legislation pertaining to marriage,<sup>9</sup> criminal law,<sup>10</sup> foreign affairs<sup>11</sup> and social security,<sup>12</sup> the test for defining gender for those wishing to transition has been legally established as reassignment surgery. It has been legislated in each state and territory that this will involve genital reconstruction and surgery which will alter the reproductive organs.<sup>13</sup> Legislation governing the reassignment of gender, however, does not deal with issues arising out of this situation specifically in regards to marriage.

Legislation governing marriage in Australia revolves around the definition as contained within the *Marriage Act 1961* (Cth) (“*Marriage Act*”). It defines marriage as ‘the union of a man and a woman to the exclusion of all others, voluntarily entered into for life’.<sup>14</sup> This definition was inserted into the Marriage Act in 2004,<sup>15</sup> with the Howard Government’s aim being to provide a clear understanding of the scope of marriage for the future amidst intense debate over the legalisation of same-sex marriage.<sup>16</sup> Currently the debate surrounding same-sex marriage relates to the ability to alter marriage’s traditional definition, a debate which is relevant to considering whether the institution of marriage in Australia can accommodate transgendered persons. While

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(NT) s 28B; *Births, Deaths and Marriages Registration Act 1997* (ACT) s 24; *Births, Deaths and Marriages Registration Act 2003* (Qld) s 23.

<sup>7</sup> See *Western Australia v AH* [2010] WASCA 172 (2 September 2010); *R v Harris and McGuinness* (1988) 35 A Crim R 146; *Secretary, Department of Social Security v SRA* (1993) 118 ALR 467.

<sup>8</sup> Gabrielle McKinnon, *Gender Identity Law Reform in the ACT* (3 September 2011) ACT Human Rights Commission <<http://www.hrc.act.gov.au/content.php/content.view/id/295>>.

<sup>9</sup> *Re Kevin – validity of marriage of transsexual* [2001] FamCA 1074 (12 October 2001).

<sup>10</sup> *R v Harris* (1988) 17 NSWLR 158.

<sup>11</sup> *Abrams and Minister for Foreign Affairs and Trade* [2007] AATA 1816 (28 September 2007).

<sup>12</sup> *Secretary, Department of Social Security v “SRA”* (1993) 43 FCR 299.

<sup>13</sup> WA and SA are less strict in this approach. See *Sexual Reassignment Act 1988* (SA) ss3, 7; *Gender Reassignment Act 2000* (WA) s15.

<sup>14</sup> *Marriage Act 1961* (Cth) s5.

<sup>15</sup> Before 2004 marriage was not expressly required to be a heterosexual union, except at a common law.

<sup>16</sup> See also s88EA which was amended at the same time to prohibit the recognition of foreign homosexual marriages in Australia.

the above 2004 definition was altered to specifically provide guidance in relation to, and to effectively prohibit, same-sex marriages, the *Marriage Act* does not provide any directives which deal with the implications of gender reassignment surgery on marriage in Australia. This is problematic as issues arise, for instance, when a post-operative transgendered male wishes to marry a female,<sup>17</sup> or when one party to a marriage decides to undergo gender reassignment during their marriage.<sup>18</sup> Without clear legislation, persons who have undergone gender reassignment surgery are left in a conflict between social reality and the law,<sup>19</sup> and are left uncertain as to their legal status and rights.

In the absence of legislation, common law currently dictates the meaning of gender for the purposes of the *Marriage Act*. While there is much literature and precedent discussing the implications of gender reassignment surgery before marriage,<sup>20</sup> there is very little information available in regards to the validity of marriage after one party opts to change gender.

Currently, each Australian State and Territory expressly prohibits the issuing of a ‘gender recognition certificate’<sup>21</sup> should the applicant be married.<sup>22</sup> However no legislation or precedent exists to force the dissolution of marriage in such circumstances. The requirement of being unmarried for the purposes of gaining a gender recognition certificate appears to be intended to maintain consistency with the Federal definition of marriage contained within the *Marriage Act*. While recognising the change of sex of a person who is married will effectively create a legally recognised same-sex marriage, denying recognition does not alter the reality of a marriage which

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<sup>17</sup> *Re Kevin* [2001] FamCA 1074 (12 October 2001).

<sup>18</sup> *AB v Registrar of Births, Deaths and Marriages* [2007] FCAFC 140 (29 August 2007).

<sup>19</sup> Eithne Mills and James McConvill, ‘The right of transsexual people to marry in Australia confirmed’ (2003) 77(7) *Law Institute Journal* 58.

<sup>20</sup> See *Re Kevin* [2001] FamCA 1074 (12 October 2001); *Goodwin v The United Kingdom* (European Court of Human Rights, application no 28957/95, 11 July 2002); *I v The United Kingdom* (European Court of Human Rights, application no 25680/94, 11 July 2002).

<sup>21</sup> Gender recognition certificates indicate that a person has undergone gender reassignment surgery and are the gender stated in the certificate. These certificates are required in each Australian State and Territory in order to obtain a new birth certificate reflecting an applicant’s new sex. McKinnon, above n 8.

<sup>22</sup> See *Births, Deaths and Marriages Registration Act 1995* (NSW) s 32B; *Births, Deaths and Marriages Registration Act 2005* (NT) s 28B; *Births, Deaths and Marriages Registration Act 2003* (Qld) ss22-23; *Births, Deaths and Marriages Registration Act 1999* (Tas) ss3, 28; *Births, Deaths and Marriages Registration Act 1996* (Vic) s30A.

continues with two individuals who both identify and present as the same sex.<sup>23</sup> This begs the question as to whether it is discriminatory to deny gender recognition certificates based on marital status, which leads to the further question of whether, considering Australian law gives marriage no religious or reproductive significance, marriage legislation should discriminate in terms of sexual orientation, sex or gender identity. In assessing both of these questions, this thesis will conclude that legislation in Australia dealing with the implications of gender reassignment surgery on marriage is currently insufficient and impractical.

### ***A. Structure***

Chapter 1 establishes what gender is for the purposes of Australian law. While Australia may enforce marriage as a union between a man and a woman, it becomes more difficult to assess if a couple fit this strict criteria without first determining the test which differentiates a man from a women.

Chapter 2 discusses the notion of 'transgender', and the medical diagnosis which leads to the adoption of this new way of life. The chapter covers the current State and Territory legislation which relates to transgendered persons and recommends that the implementation of an Australia-wide standard. The chapter further discusses the implications for those transgendered persons who do not qualify for legal recognition, and the effect of this on their human rights.

As the majority of society perceives marriage to be a significant institution,<sup>24</sup> Chapter 3 discusses the meaning and definition of marriage within a modern Australian context. It demonstrates how Australian law in regards to marriage has expanded and evolved since Federation in order to dispel theories that the definition of marriage is rigid and unchangeable, 'frozen in time'.<sup>25</sup>

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<sup>23</sup> McKinnon, above n 8.

<sup>24</sup> Charlotte Frew, 'The social construction of marriage in Australia: implications for same-sex unions' (2011) 28 (1) *Law in Context* 78.

<sup>25</sup> *Attorney-General (Cth) v Kevin and Jennifer* [2003] FamCA 94 (21 February 2003) [87].

Chapter 4 explores the implications of gender reassignment surgery before an individual enters into marriage, and discusses the impact of significant precedents which have arisen both internationally and within Australia.

Chapter 5 explores the implications of gender reassignment surgery for individuals who undertake surgery during marriage. Such individuals are placed in the situation of choosing between their marriage and full legal recognition of their assumed sex. This chapter examines the rights of transsexuals in this situation and concludes that the current legislation within Australia is insufficient in dealing with this issue. It also assesses the relevance of prohibiting same-sex marriage when the reality of such legislation, in the context of gender reassignment during marriage, results in marriages which continue with two individuals who both identify and present as the same sex.

## ***B. Terminology***

Due to there being no set legal, social or medical views about sex and gender diversity,<sup>26</sup> there is inconsistency within Australia, and internationally, as to the definition of terms used to describe gender identity issues. There is much confusion amongst legislators, the general public, and such confusion often extends to the groups affected. As such, the terms most commonly used require definition.

‘Gender characteristics’ are the physical characteristics by which a person is identified as male or female.<sup>27</sup> ‘Gender identity’ however has been referred to as the ‘psychological sense of self’;<sup>28</sup>

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<sup>26</sup> Australian Human Rights Commission (AHRC), ‘Sex Files. The Legal Recognition of Sex in Documents and Government Records’ (Concluding paper of the Sex and Gender Diversity Project, Australian Human Rights Commission, March 2009) 7, <[http://www.humanrights.gov.au/genderdiversity/sex\\_files2009.html](http://www.humanrights.gov.au/genderdiversity/sex_files2009.html)> .

<sup>27</sup> *AB* [2011] HCA 42 (6 October 2011).

<sup>28</sup> Peter Hyndal and Heidi Yates, ‘Legal recognition of the Sex and Gender Diverse Community in the ACT’ (A Joint Submission, Women’s Legal Centre, A Gender Agenda, 22 June 2011) 5, <<http://www.google.com.au/url?sa=t&rct=j&q=&esrc=s&frm=1&source=web&cd=1&ved=0CB8QFjAA&url=http%3A%2F%2Fwww.womenslegalact.org%2F%2Fliterature%2F66760%2FLegal%20Recognition%20of%20the%20Sex%20and%20Gender%20Diverse%20Community%20in%20the%20ACT&ei=3l2UUOuJEamiiAeQuYcAg&usg=AFQjCNEowobTkjIWkXWtKxsP3-vSupXUrg>>.

not necessarily reflective of a person's sex but instead that of the gender in which an individual perceives themselves to be, regardless of whether this corresponds with their gender characteristics.

A 'transvestite' is one who expresses their gender in non-traditional ways, occasionally cross-dressing as the opposite sex to their birth, however is generally accepting their birth sex.<sup>29</sup> In contrast, a person who is 'transgender', also known as 'transsexual',<sup>30</sup> will identify with the opposite sex due to a medically diagnosed disorder. Those suffering from 'gender identity disorder', previously referred to as 'gender dysphoria', often feel 'trapped in the wrong body', and commonly seek hormonal treatment and 'gender reassignment surgery' to permanently alter their gender characteristics to reflect the gender they identify with. Such people may or may not be of homosexual orientation. A common misconception within society is to confuse 'drag queens' with those who identify as transgender, however this dress custom, predominantly associated with gay culture and entertainment, is usually undertaken with comedic purpose.<sup>31</sup>

'Gender reassignment surgery' is the legal term used throughout Australia to describe surgical procedures which permanently alter the sex of an individual. Noting that surgical procedures are also referred to as 'gender correction surgery', 'genital corrective surgery', 'sex affirmation', 'sex change' and 'sexual reassignment surgery', used by members of the transgender community to better reflect the meanings surrounding gender and sexual identity,<sup>32</sup> this paper will refer to

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<sup>29</sup> Justin Healey (ed), *Issues in Society - Sexuality and Discrimination* (Spinney Press, 2002) Vol 162, 2.

<sup>30</sup> State and territory based legislation differs in the distinction between those who are 'transgender' and 'transsexual'. For instance in the Australian Capital Territory section 23 of the *Births, Deaths & Marriages Registration Act 1997* defines a transgendered person as transsexual only after gender reassignment surgery. In New South Wales the *Births, Deaths and Marriages Registration Regulation 2006* defines the term 'transgender person' as a 'person who has undergone sexual reassignment surgery', while the Western Australian *Gender Reassignment Act 2000* does not use a specific term, using instead the phrase 'a person who has undergone a reassignment procedure'. Additionally, there are culturally specific terms, such as sistergirl and brotherboy, used by some Aboriginal and Torres Strait Islander people. AHRC, above n 26, 16.

<sup>31</sup> Marjorie Garber, *Vested Interests: Cross-Dressing and Cultural Anxiety* (Routledge, 1992).

<sup>32</sup> Couch et al, above n 2, 45.

such procedures as ‘gender reassignment’, which is reflective of Australian legislation.<sup>33</sup> ‘Sex affirmation treatment’ will be the term used to describe treatment which is not surgery.

‘Intersex’ is descriptive of a person who, due to a genetic condition, was born with intermediate sexual characteristics,<sup>34</sup> meaning ‘reproductive organs or sex chromosomes that are not exclusively male or female’.<sup>35</sup> Those who fall within this group have previously been referred to as hermaphrodites, and are vulnerable to both discrimination and a range of medical conditions. Those born with intermediate sexual characteristics often undergo surgery as an infant in order to become aligned with one sex or the other, depending on medical advice and parental choice, and are raised accordingly.<sup>36</sup> At least 4% of the Australian population are born intersex.<sup>37</sup>

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<sup>33</sup> See *Births, Deaths and Marriages Registration Act 1995* (NSW) s 32B; *Gender Reassignment Act 2000* (WA) s 17; *Births, Deaths and Marriages Registration Act 1996* (Vic) s 30A; *Sexual Reassignment Act 1988* (SA) s 7; *Births, Deaths and Marriages Registration Act 1999* (Tas) s 28A; *Births, Deaths and Marriages Registration Act 1996* (NT) s 28B; *Births, Deaths and Marriages Registration Act 1997* (ACT) s 24; *Births, Deaths and Marriages Act 2003* (Qld) s 23.

<sup>34</sup> Healey, above n 29, 2.

<sup>35</sup> *Legislation Act 2001* (ACT) s 169B.

<sup>36</sup> Hyndal and Yates, above n 28, 22.

<sup>37</sup> *Ibid*, 4.

## CHAPTER 1: GENDER IN AUSTRALIA

In order to land at a conclusion as to the implications of gender reassignment surgery on marriage in Australia, it is first prudent to understand the concept of gender, and what constitutes gender in Australia. Sex and gender are presently contested concepts, and there are different legal, social, medical and scientific opinions as to the definition of the terms.<sup>38</sup> While opinions regarding the definitions of ‘sex’ and ‘gender’ differ, ‘sex’ has commonly become known to be unchanging, based on anatomical and physiological factors such as chromosomes, physical attributes and genitals. ‘Gender’ on the other hand has become a social construct, having evolved into a fluid term which is not always identical to an individual’s sex.<sup>39</sup> ‘Gender’ is rapidly becoming socially determined based on the way a person dresses, behaves, is identified and/or perceived.<sup>40</sup> Sex and/or gender forms an important part of an individual’s personal identity, defining their sense of self, and placing them within a social and political context.<sup>41</sup>

Gender in Australia is a binary construct, allowing individuals to be categorised by law as either male or female.<sup>42</sup> Australian law, continually evolving, currently recognises that the terms ‘male’ and ‘female’ include post-operative transsexuals according to their sexual reassignment.<sup>43</sup>

### A. What is ‘Man’ and ‘Woman’?

While ‘man’ is defined within various state and territory legislation<sup>44</sup> as a member of ‘the male sex’ irrespective of age, ‘the male sex’ is not defined. As such, case law is the only indicator of

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<sup>38</sup> AHRC, above n 26, 15.

<sup>39</sup> ACT Law Reform Advisory Council (LRAC), *Legal Recognition of the Sex and Gender Diverse Community in the ACT*, Issues Paper No 2 (2011), 2, <<http://www.justice.act.gov.au/page/view/2188>>.

<sup>40</sup> Ibid.

<sup>41</sup> AHRC, above n 26, 15-16.

<sup>42</sup> Some individuals are beginning to vocalise a strong preference for establishing a legal category which would allow an individual to identify as intersex. Such people do not identify within the gender binary. Hyndal and Yates, above n 28, 17.

<sup>43</sup> *Kevin and Jennifer* [2003] FamCA 94 (21 February 2003) [374].

<sup>44</sup> See especially *Discrimination Act 1991* (ACT); *Equal Opportunity Act 1984* (WA); *Anti Discrimination Act 1991* (Qld).

the defining characters of ‘the male sex’. Equally, ‘woman’ is defined within various state and territory legislation<sup>45</sup> as a member of ‘the female sex’ irrespective of age; however ‘the female sex’ is not defined by statute. It is likely that this further definition was overlooked by those framing the relevant legislation at the time.

*R v Harris and McGuinness*<sup>46</sup> is the original leading case which dictated what will constitute a member of the male sex for the purpose of Australian legislation. The main issue of the case was whether Harris and McGuinness were ‘male persons’ as charged, for attempting to perform ‘indecent acts’ with another male (a sex-specific criminal offence at the time).<sup>47</sup> Harris and McGuinness were both male to female transsexuals; however Harris was post-operative while McGuinness was pre-operative. Both were originally convicted, however on appeal the Court found that Harris, having undergone gender reassignment surgery, was female and overturned her conviction. Due to McGuinness’ pre-operative state however, her conviction stood. Matthews J expressed the ‘greatest sympathy for her and others in her predicament’, however ruled that surgery must be necessary,<sup>48</sup> as a test which did not require surgery would ‘create enormous difficulties of proof, and would be vulnerable to abuse by people who were not true transsexuals at all. To this extent it could lead to a trivialisation of the difficulties genuinely faced by people with gender identification disharmony’.<sup>49</sup>

The reasoning in *R v Harris and McGuinness* was relied on in the more recent landmark case of *Western Australia v AH*,<sup>50</sup> where two female to male transsexuals had undergone hormonal therapy and a mastectomy, however neither had undergone a hysterectomy or phalloplasty.<sup>51</sup> The case was decided on the fact that the applicants retained working female reproductive organs, which was considered to be inconsistent with the notion of being male, despite the

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<sup>45</sup> See especially *Discrimination Act 1991 (ACT)*; *Equal Opportunity Act*; *Anti Discrimination Act 1991 (Qld)*.

<sup>46</sup> (1988) 35 A Crim R 146.

<sup>47</sup> Fiona David and Jake Blight, ‘Understanding Australia’s Human Rights Obligations in relation to Transsexuals: Privacy and Marriage in the Australian Context’ (2004) 9(2) *Deakin Law Review* 309, 322.

<sup>48</sup> *Ibid.*

<sup>49</sup> *Harris and McGuinness* (1988) 35 A Crim R 146, 181-182. See also *Secretary, Department of Social Security v “SRA”* (1993) 118 ALR 467 which saw the Federal Court decline to accept a pre operative male transsexual was a female for the purpose of social security legislation.

<sup>50</sup> [2010] WASCA 172 (2 September 2010). Appealing the decision in *AB and AH and Gender Reassignment Board (WA)* [2009] WASAT 152 (14 August 2009).

<sup>51</sup> The surgical creation of a penis. AHRC, above n 26, 32.

Courts acceptance that both applicant's continued to take testosterone and would be infertile while submitting such treatment.<sup>52</sup> Medical evidence was heard by the Court that after three years of testosterone treatment the ability to bear children would be less than 5% within the first year of stopping, and less than 25% in following years. Regardless, the majority ruled that permanent sterilisation was the test required in order to obtain a gender recognition certificate,<sup>53</sup> and the applicants had failed to meet this standard by not having undergone a hysterectomy.<sup>54</sup> It was held that as the applicants

Possess[ed] none of the genital and reproductive characteristics of a male, and retain[ed] virtually all of the external genital characteristics and internal reproductive organs of a female...they would not be identified, according to accepted community standards and expectations, as members of the male gender.<sup>55</sup>

It was as such agreed that 'a reassignment procedure has to alter both the genitals and other gender characteristics...a procedure which only alters non-genital characteristics, such as breast removal, cannot, of itself, fall within the scope of the definition'.<sup>56</sup>

Genital surgery for males transitioning to females as such requires the removal of female reproductive organs by way of a hysterectomy procedure, and some men may further choose to undergo a phalloplasty – the surgical creation of a penis.<sup>57</sup> The genital surgery undertaken before a person is legally recognised as female includes a penectomy and orchidectomy – medical procedures which remove the penis and testes.<sup>58</sup> The surgical creation of a vagina and

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<sup>52</sup> Thomas Faunce, 'What makes a real man? Gender Norms and Western Australia v AH [2010] WASCA 172' (2011) 18 *Medical Law Reporter* 478, 478.

<sup>53</sup> A gender recognition certificate will be conclusive proof that an individual is a member of their affirmed sex. AHRC, above n 26, 44.

<sup>54</sup> In a recent high-profile case in the United States Thomas Beatie, a transgender man became pregnant. He had successfully gained legal recognition as a male without the removal or alteration of his ovaries, uterus or vagina, and upon marrying a woman who could not bear children he stopped hormonal therapy and was artificially inseminated with donor sperm. Faunce, above n 52, 495.

<sup>55</sup> AH [2010] WASCA 172 (2 September 2010) [115].

<sup>56</sup> AH [2010] WASCA 172 (2 September 2010) [91].

<sup>57</sup> AHRC, above n 26, 24.

<sup>58</sup> *Ibid.*

clitoris through procedures known as vaginoplasty and clitoroplasty are further procedures which bring a woman's external genitals in line with the social perception of the 'female sex'.

Therefore, the underlying standard within Australia for defining a man or woman as a member of the male or female sex, revolves around internal reproductive organs and external genitalia. A male will not be legally recognised to be a male while he maintains female reproductive capacity and vice versa. Retaining the capacity to bear children is 'incompatible with the gender characteristics of a male'.<sup>59</sup> This compulsory requirement for permanent sterilisation has been criticised by many who believe that such a requirement violates an individual's human rights.<sup>60</sup>

Despite this general overarching national standard, the ACT is beginning to adopt self-identification models for defining gender where it applies to criminal law and corrections management. Defining gender for the purposes of the *Crimes Act 1900* (ACT) was amended in the *Legislation (Gay, Lesbian and Transgender) Amendment Act 2003* (ACT) to allow for transgender and intersex persons being searched to select whether they are searched by a male or female officer.<sup>61</sup> The sex of the officer (male or female) chosen will reflect the sex that the transgender or intersex person continues to be recognised as for the purposes of the *Crimes Act*.<sup>62</sup> Similarly, the *Corrections Management Act 2007* (ACT) allows for transgender and intersex detainees to 'tell the chief executive the sex the detainee chooses to be identified with' for the purposes of imprisonment.<sup>63</sup> While no other similar self-identification model exists in other Australian jurisdictions, it would appear such a model is one more compliant with human rights.<sup>64</sup>

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<sup>59</sup> *AB and AH and Gender Reassignment Board* (WA) [2009] WASAT 152 (14 August 2009) [89].

<sup>60</sup> See, eg, Mandy Bryan, *Defining Gender: Medical and Legal Challenges* (9 April 2010) Medical Observer <<http://www.medicalobserver.com.au/news/defining-gender-medical-and-legal-challenges>>.

<sup>61</sup> Section 185 A.

<sup>62</sup> LRAC, above n 39, 4.

<sup>63</sup> Section 79.

<sup>64</sup> McKinnon, above n 8.

## CHAPTER 2: TRANSGENDER

Australia first began legally recognising transsexuals in 1987, when the NSW Department of Births, Deaths and Marriages issued Estelle Asmodelle with an amended birth certificate reflecting her change in sex.<sup>65</sup> Transsexualism is therefore not a relatively new concept for society, and has been a reality within the Australian legal landscape for over 25 years. Despite this, ‘changing sex at times brings out the worst society has to offer’<sup>66</sup> in terms of stigma and discrimination. The lack of awareness within society in regards to gender identity issues has allowed for negative attitudes towards the transgender community to form, and many feel they are perceived by society as perverts or sex offenders,<sup>67</sup> child predator(s), prostitutes and/or junkies.<sup>68</sup> Transgender people often encounter harassment and stigmatisation, as well as violence due to their gender identity.<sup>69</sup> There is currently no protection under the federal *Sex Discrimination Act 1984* (Cth) or any other Commonwealth legislation which expressly prohibits discrimination on the grounds of sex or gender identity,<sup>70</sup> regardless of states beginning to legislate specifically for this. For instance under the Western Australia *Equal Opportunity Act 1984* it is unlawful to discriminate against a person on the grounds of their gender history; the Queensland *Anti Discrimination Act 1991* prohibits discrimination on the grounds of gender identity,<sup>71</sup> and in 2004 the ACT enacted the *Human Rights Act* which protects the human rights of all individuals regardless of their ‘sex, gender, gender identity, sexual orientation or any other point in difference’.<sup>72</sup>

Studies within the United States in 2001 found from a sample of 402 transgender people, that 59.5% had encountered harassment or violence, 25% had been victims of violence based on their

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<sup>65</sup> Estelle Asmodelle, *Anaesthetic Dream: A Book About Australia’s First Legal Transsexual* <<http://www.anaestheticdream.com/>>.

<sup>66</sup> Couch et al, above n 2, 61.

<sup>67</sup> It is interesting to note that people taking Androcur (a form of hormonal treatment) cannot claim the drugs on the Pharmaceutical Benefits Scheme without being listed as a ‘sexual deviant’. AHRC, above n 26, 42.

<sup>68</sup> Couch et al, above n 2, 65.

<sup>69</sup> Judith Butler, *Undoing Gender* (Routledge 2004) 6.

<sup>70</sup> AHRC, above n 26, 42.

<sup>71</sup> *Anti Discrimination Act 1991* (Qld) s 7(m).

<sup>72</sup> *Human Rights Act 2004* (ACT).

gender identity,<sup>73</sup> and 40% were faced with discrimination in the workplace.<sup>74</sup> Of respondents in a similar Australian study,<sup>75</sup> 87.4% reported experiencing stigma or discrimination of some form, which generally presented in social settings, and included verbal abuse, social exclusion or vicious rumours. Over a third had been threatened with violence.<sup>76</sup> This is consistent with the Australian findings of Beyond Blue, which report that 90% of those who are transgender experience discrimination.<sup>77</sup> Reported violence directed at transsexuals included physical attacks, and sexual assault.<sup>78</sup> Refusal of bank finance as well as housing, damage to personal property, and in some cases the revoking of child custody, is occurring unlawfully within Australia due to transgender identity.<sup>79</sup> In many situations, discrimination occurs directly from family members, and situations where family members become the target of discrimination are just as prevalent.<sup>80</sup> Those who had not experienced discrimination attributed this to successfully passing as the gender in which they were presenting.<sup>81</sup>

Employment and workplace discrimination remains the largest hurdle for the transgender community to overcome. According to the NSW Gender Centre, 95% of transsexuals who reveal they are undertaking gender reassignment surgery lose their jobs, and 60% of those who

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<sup>73</sup> It is estimated that one transgender person is killed per month in the US. Gwendolyn Ann Smith, 9<sup>th</sup> *Annual Transgender Day of Remembrance* (2005) <<http://www.gender.org/remember/day/index.html>>. See also Ethan St. Pierre, *International Transgender Day of Remembrance* (2012) <<http://www.transgenderdor.org/>>.

<sup>74</sup> EL Lombardi et al, 'Gender Violence: Transgender Experiences with Violence and Discrimination' (2001) 42(1) *Journal of Homosexuality* 89, 101.

<sup>75</sup> 253 transgendered participants across all states and territories in Australia and from both islands in New Zealand took part in a national survey, the results of which were published in *Tranznation – a report on the health and wellbeing of transgender people in Australia and New Zealand*. Couch et al, above n 2.

<sup>76</sup> Of those 'trans women' living in QLD, 46% have been physically assaulted, and an additional 38% have been assaulted with a weapon. Hyndal and Yates, above n 28, 38.

<sup>77</sup> Beyond Blue, *Depression and anxiety in gay, lesbian, bisexual, transgender and intersex people (GLBTI) Fact Sheet 40* (30 May 2011) 3, <[http://www.beyondblue.org.au/index.aspx?link\\_id=4.1167&tmp=FileDownload&fid=1425](http://www.beyondblue.org.au/index.aspx?link_id=4.1167&tmp=FileDownload&fid=1425)>.

<sup>78</sup> The reason regularly cited for the rape of female to male transsexuals was to 'show her' she was female. Michael O'Flaherty and John Fisher, 'Sexual Orientation, Gender Identity and International Human Rights Law: Contextualizing the Yogyakarta Principles' (2008) 8(2) *Human Rights Law Review* 207, 210.

<sup>79</sup> Couch et al, above n 2, 61.

<sup>80</sup> Western Australia has recognised this as an issue common enough for relatives and associates to require legislative protection under the *Equal Opportunity Act 1984*. As such discrimination of a relative or associate of a transgendered person is unlawful in Western Australia under the Act.

<sup>81</sup> Couch et al, above n 2, 62.

are post-operative remain underemployed or unemployed.<sup>82</sup> Recently the *Tranznation* report on the health and wellbeing of transgender people reported disproportionately low income levels within their group of respondents despite being highly educated (35% boasted university degrees as opposed to 18% of Australia's general population).<sup>83</sup> Only 15% of respondents were paid over \$60,000 per annum, with 35% earning less than \$20,000. The report understood 59% of the transgender community within Australia earn less than \$40,000 per annum.<sup>84</sup>

Sex as assigned at birth is easily discoverable via security checks, and is often difficult to avoid disclosing through job applications which require extensive detail as to personal and employment history, especially when an individual has been unable to alter documentation to reflect their transition.<sup>85</sup> Additionally, a number of jurisdictions list an individual's previous name on a change of name certificate,<sup>86</sup> and as many names are gender specific this automatically offers information regarding a person's previous legal identity.<sup>87</sup> Furthermore, some jurisdictions list previous names on a re-issued birth certificate as well as the inclusion of a new birth registration date<sup>88</sup> which raises suspicion as to the authenticity of the certificate.<sup>89</sup>

Mental health research and psychological literature within Australia indicates links between discrimination, depression and suicide.<sup>90</sup> Unsurprisingly, the rates for depression and suicide within transgender communities are much higher in comparison to levels within other Australian minorities, and as found in the general Australian population.<sup>91</sup> In 2005 it was reported that 13%

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<sup>82</sup> Healey, above n 29, 5.

<sup>83</sup> Hyndal and Yates, above n 28, 36.

<sup>84</sup> Couch et al, above n 2, 20.

<sup>85</sup> Ibid, 64.

<sup>86</sup> See especially *Births Deaths and Marriages Registration Regulations 1997* (ACT) s5A.

<sup>87</sup> AHRC, above n 26, 36.

<sup>88</sup> For example Tasmania includes a notation on amended birth certificates that the individual was previously registered as a member of the opposite sex. *Births, Deaths & Marriages Registration Act 1999* (Tas) s 28D(1).

<sup>89</sup> AHRC, above n 26, 36.

<sup>90</sup> See, eg, Paul Martin, 'Statistics & Research regarding Lesbian and Gay Mental Health Issues and Same Sex Marriage' (Summary sheet, Centre for Human Potential); J Corboz et al, 'Feeling Queer and Blue: A Review of the Literature on Depression and Related Issues among Gay, Lesbian, Bisexual and Other Homosexually Active People' (The Australian Research Centre in Sex, Health and Society, La Trobe University, 2008).

<sup>91</sup> Anthony D'Augelli and Scott Hershberger, 'Lesbian, Gay, and Bisexual Youth in Community Settings: Personal Challenges and Mental Health Problems' (1993) 21(4) *American Journal of Community Psychology* 421; David Fergusson et al, 'Sexual orientation and mental health in a birth cohort of young adults' (2005) 35(7) *Psychological Medicine* 971, 981.

of those diagnosed with gender identity disorder were depressed,<sup>92</sup> a result similar to the 17% of applicants for gender reassignment surgery diagnosed with depression in 2000.<sup>93</sup> The results of a 2002 community sample of 73 transgendered persons revealed that 37% had admitted to suicidal behaviour at some point in their lives,<sup>94</sup> with 32% of a larger sample of 515 persons in 2006 having attempted suicide at least once.<sup>95</sup> A Suicide Prevention Australia position statement released in 2009 cited various studies which saw attempted suicide rates within the transgendered community range between 16 to 47 per cent,<sup>96</sup> figures with a proven association to experiences of social exclusion and discrimination.<sup>97</sup>

Within Australia it is believed that 8% of the population at some point in their lives identify with a gender different to that of their biological sex. Within this 8%, less than 1% permanently identify as transgender.<sup>98</sup> Estimates in Western Australia quote at least 250 people within the state as identifying as transgender, and of those only 80 have undergone reassignment procedures.<sup>99</sup> Australian studies on the transgender community have indicated equivalent results to international data surfacing from studies conducted in Europe.<sup>100</sup> Recent research from the Netherlands suggests that roughly 1 per 11,900 adult males identify as transsexual as opposed to 1 in 30,400 females.<sup>101</sup> For many reasons, however, many of those who identify as transgender do not undergo gender reassignment surgery and the above statistics therefore are not

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<sup>92</sup> U Hepp et al, 'Psychiatric comorbidity in gender identity disorder' (2005) 58 *Journal of Psychosomatic Research* 259, 260.

<sup>93</sup> Ira Haradlsen and Alv Dahl, 'Symptom profiles of gender dysphoric patients of transsexual type compared to patients with personality disorders and healthy adults' (2000) 102 *Acta Psychiatr Scand* 276, 279.

<sup>94</sup> Robin Mathy, 'A Nonclinical Comparison of Transgender Identity and Sexual Orientation: A Framework for Multicultural Competence' (2001) 13(1) *Journal of Psychology and Human Sexuality*, 31, 45.

<sup>95</sup> Kristen Clements-Nolle, Rani Marx and Mitchell Katz, 'Attempted Suicide among Transgender Persons: The Influence of Genderbased Discrimination and Victimization' (2006) 51(3) *Journal of homosexuality* 53, 54.

<sup>96</sup> Suicide Prevention Australia, 'Suicide and self harm among Gay, Lesbian, Bisexual and Transgender Communities' (Position Statement, Suicide Prevention Australia, 31 August 2009).

<sup>97</sup> Roberta Perkins, 'Transgender Lifestyles and HIV-AIDS Risk' (National Needs Assessment, School of Sociology, University of NSW, 1994) 58.

<sup>98</sup> *Ibid*, 19.

<sup>99</sup> Western Australia, *Parliamentary Debates*, Legislative Council, (25 November 1999)

<<http://www.parliament.wa.gov.au/hansard/hans35.nsf/451a59fb51257dd248256c85002bc738/60fa8a7820c4a2e2482565e9008378b4?OpenDocument>> .

<sup>100</sup> Healey, above n 29, 32.

<sup>101</sup> Faunce, above n 52, 492.

representative of the entire transgender population.<sup>102</sup> Data from the United States shows figures of 0.3% of the population identifying as transgender.<sup>103</sup>

Transgender/transsexual people may form a very small minority within the community; however the consequences such people face as a result of inappropriate legal protection from an intolerant society are severe. While preferable for Commonwealth legislation to rectify such issues and provide a nationally consistent approach to ending discrimination directed towards the transgendered community, all states and territories should act in the interim. As put by the ACT Human Rights Commissioner:

Simply waiting for [a national] approach cannot justify an ongoing breach of the human rights of transgender people [in the ACT] where the Government has the ability to rectify the situation locally.<sup>104</sup>

#### **A. Medical Diagnosis**

Those within the transgender community commonly fall within the medical diagnosis of Gender Identity Disorder (GID) – a recognised psychiatric diagnosis.<sup>105</sup> It is important to note, however, that transgender identity is *not* a mental illness. Rather,

Gender Identity Disorders are categorized by a strong and persistent cross-gender identification accompanied by a persistent discomfort with one's assigned sex. Gender identity refers to an individual's self perception as male or female. The term gender dysphoria denotes strong and persistent feelings of discomfort with ones assigned sex, the

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<sup>102</sup> Healey, above n 29, 32.

<sup>103</sup> Gary J Gates, *How many people are lesbian, gay, bisexual, and transgender?* (April 2011) The Williams Institute <<http://williamsinstitute.law.ucla.edu/wp-content/uploads/Gates-How-Many-People-LGBT-Apr-2011.pdf>>.

<sup>104</sup> Hyndal and Yates, above n 28, 5.

<sup>105</sup> *AB and AH and Gender Reassignment Board* (WA) [2009] WASAT 152 (14 August 2009) [63].

desire to possess the body of the other sex, and the desire to be regarded by others as a member of the other sex.<sup>106</sup>

As such, a person with GID is one who feels like, and identifies as a member of the opposite sex as opposed to actually believe they are so.<sup>107</sup> People suffering from this disorder are as such not held to be delusional as they do not have a false belief, however are recognised as feeling, on a deep psychological level, that they are of the opposite gender to their biological make-up. Due to their condition, surgery allowing for gender reassignment is seen to act as a solution; as a means to bring an individual's body in sync with their mind'.<sup>108</sup> With high suicide rates within the transgendered community, surgery in many cases is viewed to be lifesaving.<sup>109</sup>

This disorder has been acknowledged as significant, with Australian jurisdictions introducing legislation to recognise it through recognition certificates and the issuing of amended birth certificates.

### ***B. State & Territory Legislation and Transgendered Persons***

Surgery is currently a prerequisite within Australian jurisdictions for a legal change in sex. In order to change a birth certificate in the Australian Capital Territory, New South Wales, Queensland, Victoria, Tasmania and the Northern Territory, an individual is required to present a statutory declaration from two registered doctors or medical practitioners, confirming that the individual has undergone gender reassignment surgery, which has been established throughout legislation as requiring the 'alteration of a person's reproductive organs'.<sup>110</sup> This definition calls

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<sup>106</sup> Diagnostic and Statistical Manual of Mental Disorders (American Psychiatric Association, 4<sup>th</sup> revised ed, 2000) 535.

<sup>107</sup> Schizophrenia and severe Gender Identity Disorder have been known to coexist in very rare cases. Nicolas Tonti-Filippini, *Gender Reassignment* (2009) John Paul Institute for Marriage and Family <[http://www.jp2institute.org/Portals/39/Documents/NTF\\_Gender\\_Reassignment.pdf](http://www.jp2institute.org/Portals/39/Documents/NTF_Gender_Reassignment.pdf)>.

<sup>108</sup> Couch et al, above n 2.

<sup>109</sup> Benedict Ashley and Kevin O'Rourke, *Health Care Ethics: A Catholic Theological Analysis* (Georgetown University Press, 5<sup>th</sup> ed, 2007) 111.

<sup>110</sup> See *Births, Deaths and Marriages Registration Act 1997* (ACT) s 24; *Births, Deaths and Marriages Registration Act 1995* (NSW) s 32B, *Births, Deaths and Marriages Registration Act 2005* (NT) s 28B; *Births, Deaths and*

for the sterilisation of the individual in order to guarantee permanent infertility before legal recognition as a member of the opposite sex.<sup>111</sup>

South Australia and Western Australia by contrast employ a slightly more accommodating approach, requiring an applicant for a change of birth certificate to first obtain a recognition certificate.<sup>112</sup> In South Australia applications for such a certificate are made to the Magistrates Court of South Australia. In Western Australia applications are directed to a specifically established Gender Reassignment Board. While other jurisdictions require surgery as a prerequisite, these two jurisdictions specify that a certificate will be issued where the applicant has ‘undergone a medical *or* surgical procedure to alter genitals and other gender characteristics of a person...so that they will be identified as a person of the opposite sex’<sup>113</sup> (emphasis added). There is much more scope for interpretation under this definition for transsexuals to obtain an amended birth certificate without necessarily undergoing surgical procedures to alter their reproductive organs. The phrasing of the definition for instance places more emphasis on external genitalia and gender characteristics;<sup>114</sup> however this is yet to be tested. In South Australia applications must attach sworn evidence of a medical practitioner outlining the reassignment procedure undertaken, as well as any related treatments.<sup>115</sup> Applications must also be accompanied by an affidavit sworn by a psychiatrist or psychologist as evidence of sexual identity counselling.<sup>116</sup> Identical regulations exist in Western Australia.<sup>117</sup>

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*Marriages Registration Act 2003* (Qld) ss22-23; *Births, Deaths and Marriages Registration Act 1999* (Tas) ss3, 28; *Births, Deaths and Marriages Registration Act 1996* (Vic) s30A.

<sup>111</sup> There are provisions in each State and Territory which allow an individual to ‘correct’ the register as opposed to changing it. See *Births, Deaths and Marriages Registration Act 1997* (ACT) s 40; *Births, Deaths and Marriages Registration Act 1995* (NSW) s 45, *Births, Deaths and Marriages Registration Act 2005* (NT) s 40; *Births, Deaths and Marriages Registration Act 2003* (Qld) s42; *Births, Deaths and Marriages Registration Act 1999* (Tas) s42; *Births, Deaths and Marriages Registration Act 1996* (Vic) s43.

<sup>112</sup> AHRC, above n 28, 15-20.

<sup>113</sup> *Sexual Reassignment Act 1988* (SA) ss3, 7; *Gender Reassignment Act 2000* (WA) s15.

<sup>114</sup> Faunce, above n 52, 482.

<sup>115</sup> *Sexual Reassignment Regulation 2000* (SA) r 6 and Sch 1.

<sup>116</sup> *Ibid.*

<sup>117</sup> *Gender Reassignment Regulations 2001* (WA) r 4.

Legislation in each jurisdiction restricts States and Territories from issuing gender recognition certificates to those born inter-state.<sup>118</sup> Western Australia and South Australia will, however, provide recognition certificates to those normally resident in other states where their surgery has been conducted within their jurisdiction.<sup>119</sup> While States and Territories cannot alter the birth records of others, the requirement to be born in the State or Territory in which an individual seeks a certificate does not acknowledge the reality of the many people resident within a jurisdiction but not born there. The ACT Human Rights Commissioner acknowledged the need for reform in this area by recommending:

Where the ACT undertakes law reform to better protect the human rights of transgender people in the Territory it is important that the benefit of this reform is not restricted to those born in the ACT. Under the HR Act, the human rights of all residents of the ACT need to be equally protected by the Government. While the ACT cannot alter the birth records of a person born inter-state, it can provide for the recognition of a change of sex for all purposes in the Territory, and could implement a scheme similar to that already provided for change of name residents not born in the ACT. The Territory could provide an official certificate, similar to that issued in Victoria,<sup>120</sup> acknowledging a person's name and sex, which could be recognised as conclusive for all purposes under Territory law.<sup>121</sup>

While conclusive for all purposes of the specific State or Territory law, such a certificate would need to be recognised by other jurisdictions as well as the Commonwealth to avoid inconsistency arising cross-jurisdictionally (currently only Victoria, under s30G of their Registration Act,<sup>122</sup>

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<sup>118</sup> See *Births, Deaths and Marriages Registration Act 1997* (ACT) s 24; *Births, Deaths and Marriages Registration Act 1995* (NSW) s 32B; *Births, Deaths and Marriages Registration Act 2005* (NT) s 28B; *Births, Deaths and Marriages Registration Act 2003* (Qld) ss22-23; *Births, Deaths and Marriages Registration Act 1999* (Tas) ss3, 28; *Births, Deaths and Marriages Registration Act 1996* (Vic) s30A.

<sup>119</sup> *Sexual Reassignment Act 1988* (SA) ss3, 7; *Gender Reassignment Act 2000* (WA) s15.

<sup>120</sup> Documents 'acknowledging identity' are available to residents within Victoria who meet all Victorian criteria for legal recognition of sex change except for having had their births registered in the state. Such applicants must be resident within Victoria for at least 12 months. *Births Deaths and Marriages Registration Act 1996* (Vic) s30E.

<sup>121</sup> Hyndal and Yates, above n 28, 24, quoting ACT Human Rights Commissioner Helen Watchirs, Submission to the ACT Attorney General Simon Corbell, *Human Rights Advice on the Births, Deaths and Marriages Registration Act 1997 (ACT)*, 2009, 15.

<sup>122</sup> *Births Deaths and Marriages Registration Act 1996* (Vic).

recognises interstate recognition certificates). For instance it is problematic where a person is recognised as female in one state is recognised as male in every other State and Territory, especially in terms of marriage legislation and State/Territory recognition of civil partnerships. Further difficulties are also likely to arise in convincing Government and Commonwealth agencies to recognise an individual's new identity document as evidence of their new sex.

As also recommended by the Australian Human Rights Commission in 2009,<sup>123</sup> Australia should consider developing a nationally consistent approach to legally recognising sex changes. The Commission recommended the best methods for achieving this would be for either; the Federal Government to work cooperatively with State and Territory Governments through the Council of Australian Governments (COAG) in order to bring their legislation and policies in line with an accepted national standard; or the establishment of a national board which would review and determine applications for legal recognition of a change in sex. This second approach would require support from States and Territories in recognising certificates issued.<sup>124</sup>

As previously mentioned, a number of jurisdictions list an individual's previous name on a change of name certificate,<sup>125</sup> and as many names are gender specific this automatically offers information regarding a person's previous legal identity.<sup>126</sup> Revealing past information about the previous identity of a person goes against the point of legal recognition. After legal recognition of a person's new sex identity, this identity should be the only one available to those seeking identification documents.<sup>127</sup> This notion has been accepted within the ACT where the BDMR

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<sup>123</sup> AHRC, above n 26, 2.

<sup>124</sup> Ibid.

<sup>125</sup> Most jurisdictions also include the sex of an individual as well as their original birth name on Change of Name Certificates. See especially *Births Deaths and Marriages Registration Regulations 1997* (ACT) s5A. Queensland and Tasmania are the only Australian jurisdictions which issue Change of Name certificates without any reference to a person's sex. Hyndal and Yates, above n 28, 35.

<sup>126</sup> AHRC, above n 26, 28.

<sup>127</sup> This is consistent with International Human Rights Law which guarantee's an individual's right to privacy. 'The right to privacy ordinarily includes the choice to disclose or not to disclose information relating to one's sexual orientation or gender identity...' The 5<sup>th</sup> Yogyakarta Principle - International Commission of Jurists (ICJ), *Yogyakarta Principles - Principles on the application of international human rights law in relation to sexual orientation and gender identity*, (March 2007) <<http://www.unhcr.org/refworld/docid/48244e602.html>>. See also Universal Declaration of Human Rights (UDHR), Article 12; International Covenant on Civil and Political Rights (ICCPR), Article 17.

Act at s27(3) sets out that ‘a birth certificate issued must not include any word or statement to the effect that the person to whom the certificate relates has changed sex’. The Act recognises that:

in particular, the inclusion of the applicant’s former name and/or the inclusion of their sex as registered at birth may breach their right to privacy or reputation. As such the Human Rights Act requires the decision maker to consider alternative measures to address the request within the legal framework of the BDMA. For example: notation that former names are registered, but no detail is provided on the certificate or provision of a certificate without notation about sex at birth.<sup>128</sup>

As such, in order to achieve an environment where transsexuals are less vulnerable to discrimination and vilification, Australian States and Territories should not reveal information about a person’s past sex and gender identity on re-issued documentation.

### ***C. Implications for those in-between – Requirement for ‘Surgery’***

A recent 2011 study within the ACT found that 85% of the transgendered community wish to alter their legal sex but are currently unable to do so;<sup>129</sup> however Australian legislation is yet to deal with the situation of pre-operative transsexuals. As such, for the purposes of the *Marriage Act*, the sex of these people is uncertain. Many people commit to hormonal treatment, and are living and accepted socially as a member of their identified sex, however are unable to alter their genitals and reproductive organs to satisfy State and Territory legislation. The requirement of surgery in order to obtain legal recognition as a member of the opposite sex proves problematic for such people. Human rights movements are beginning to fight for the legal recognition of those who cannot undertake surgical procedures, however still present as a member of their perceived sex. The reality is that genital reassignment is only one option available for ‘sex affirmation’, and opinions vary as to how, when and if treatment is appropriate for a particular individual. Methods of sex affirmation treatment which do not involve surgery include

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<sup>128</sup> ACT, *Births Deaths and Marriages Practice Manual* <<http://www.ors.act.gov.au>>.

<sup>129</sup> Fiona David et al, ‘Gender Identity in the ACT: A survey of trans experiences’ (A Gender Agenda, May 2011) 18 <[http://www.genderrights.org.au/Downloads/Gender\\_Diversity\\_in\\_the\\_ACT.pdf](http://www.genderrights.org.au/Downloads/Gender_Diversity_in_the_ACT.pdf)>.

psychological counselling concerning sex or gender identity as well as hormonal treatment/therapy;<sup>130</sup> procedures already required by all Australian jurisdictions before gender reassignment may take place.

Those considering gender reassignment surgery are faced with health issues which are multi-faceted. Typically, an individual will complete a two year trial period before obtaining access to genital surgery, which includes hormonal treatment as well as counselling in relation to sexual identity.<sup>131</sup> For many transsexuals, hormonal treatment is the only medical treatment they will ever undertake;<sup>132</sup> the treatment allowing them to assume the physical characteristics of the opposite sex and reducing their reproductive capacity to practically nothing.<sup>133</sup>

Surgical procedures routinely performed within the general population such as mastectomies,<sup>134</sup> chest reconstruction, and the removal of uterus and ovaries through a hysterectomy generally have successful surgical outcomes. However for many people it is not medically advisable to undergo gender reassignment surgery,<sup>135</sup> and all surgery involves risks, physical pain and discomfort.<sup>136</sup> Complications of gender reassignment surgery have been documented as including vaginal fistulas, infections, loss of sensation and scarring, as well as loss of short term memory in rare instances, and sometimes depression.<sup>137</sup> Full genital reconstruction has been argued as unnecessary when society makes a general assessment regarding one's sex based on how they present themselves, and not on their gender as recorded on a birth certificate. For instance a mastectomy alone would allow a female born transsexual to present socially as a male where her physical characteristics have also been altered through hormonal treatment;<sup>138</sup>

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<sup>130</sup> AHCR, above n 26, 31.

<sup>131</sup> A Murray, 'The Psychiatrist and the Transgender Person' (1997) 10(3) *Venereology* 158, 160.

<sup>132</sup> Hormonal treatment involves a substitution of an individual's natural sex hormones with those of the opposite sex. Males transitioning to female will take estrogens as well as anti-androgen, which stops production of male hormones), while female born transsexuals will take testosterone. Couch et al, above n 2, 39.

<sup>133</sup> Faunce, above n 52, 481.

<sup>134</sup> The removal of breasts.

<sup>135</sup> For instance those with hemophilia or heart disease. McKinnon, above n 8.

<sup>136</sup> In *Western Australia v AH* [2010] WASCA 172 (2 September 2010) the Court accepted expert medical evidence that while hysterectomy procedures were common procedures, they carry with them the risk of complications and readmission including haemorrhage and infection.

<sup>137</sup> Couch et al, above n 2, 51.

<sup>138</sup> David and Blight, above n 47, 320.

however breasts are not classified as reproductive organs or genitals, and therefore would not meet the surgical test imposed by jurisdictions.

Surprisingly it is not only those living in remote and rural areas with limited access to appropriately trained medical practitioners.<sup>139</sup> Gender reassignment often requires a number of surgical procedures, which are not all available in every state and territory.<sup>140</sup> In fact, specific procedures such as a phalloplasty are not even offered within Australia due to the associated health risks and ‘limited prospects for success’,<sup>141</sup> forcing individuals to travel overseas. For this reason, such surgery was regarded as unnecessary in *Re Kevin*<sup>142</sup> where the Family Court of Australia assessed whether Kevin could be recognised as a man within the purpose of the *Marriage Act*.

Gender reassignment surgery is highly expensive, and is not covered by Medicare.<sup>143</sup> It is as such unaffordable for many people, especially as the process of fully transitioning often involves interaction with a variety of professionals, including psychiatrists, psychologists,<sup>144</sup> gynaecologists, endocrinologists, plastic surgeons, general practitioners, social workers, speech therapists, urologists, nurses and sex therapists.<sup>145</sup> Furthermore, the requirement in the majority of States and Territories of providing medical evidence from each of two Australian registered doctors confirming surgery results in further medical expenses for those who have undergone genital surgery in the past or overseas. Such people are therefore potentially excluded from obtaining medical evidence due to the cost involved.<sup>146</sup> In *Re Alex*<sup>147</sup> Nicholson J expressed his deep

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<sup>139</sup> A main concern of participants in the Sex Files Report was the lack of knowledge and training of medical practitioners in respect to gender identity issues. AHRC, above n 26, 30-40.

<sup>140</sup> Surgery is predominantly offered in Melbourne and Sydney. Couch et al, above n 2, 45.

<sup>141</sup> See *AH* [2010] WASCA 172 (2 September 2010) [8].

<sup>142</sup> *Re Kevin* [2001] FamCA 1074 (12 October 2001).

<sup>143</sup> AHRC, above n 26, 24.

<sup>144</sup> The most accessed health services by transitioning members of the transgender community are those offered by mental health professionals. Couch et al, above n 2, 31.

<sup>145</sup> W Walters, ‘The transgender phenomenon: An overview from an Australian perspective’ (1997) 10(3) *Venereology* 147, 148.

<sup>146</sup> AHRC, above n 26, 25.

<sup>147</sup> [2004] FamCA 297 (13 April 2004).

regret that a number of Australian jurisdictions require surgery as a prerequisite to the alteration of a transsexual person's birth certificate in order for the record to align a person's sex with his/her chosen gender identity. The requirement of surgery seems to me to be a cruel and unnecessary restriction upon a person's right to be legally recognised in a sex which reflects the chosen gender identity and would appear to have little justification on grounds of principle.<sup>148</sup>

In assessing the implications of the above barriers to gender reassignment, the Australian Human Rights Commission recommended in 2009 that 'surgery should be regarded as a matter of individual choice for the person concerned, and not a prerequisite for the legal recognition of a person's sex identity.'<sup>149</sup> Developments in comparative international jurisdictions are consistent with this assertion, setting a precedent which suggests the removal of requirements for surgery is the only way forward in protecting the human rights of those concerned. The United Kingdom, Spain, Germany and Portugal have all relaxed legislation, allowing for a person who has undergone 'medical treatment' to apply for a legal change in sex.<sup>150</sup> The UK legislation allows a gender recognition certificate in circumstances where those diagnosed with gender dysphoria have lived as their identified gender for a minimum of two years, provided they intend to do so until death.<sup>151</sup> More recently in March 2010 the German Federal Constitutional Court accepted that (when forced) 'gender reassignment surgery constitutes a massive impairment of physical integrity',<sup>152</sup> and as such Germany no longer requires evidence of sexual reassignment and sterilisation in order to legally recognise an individual's assumed gender identity.<sup>153</sup>

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<sup>148</sup> *Re Alex* [2004] FamCA 297 (13 April 2004) [234-237].

<sup>149</sup> AHRC, above n 26, 31.

<sup>150</sup> Gender related counseling satisfies the criteria of 'medical treatment'. See the *Gender Recognition Act 2004* (UK) <[http://www.opsi.gov.uk/acts/acts2004/ukpga\\_20040007\\_en\\_1](http://www.opsi.gov.uk/acts/acts2004/ukpga_20040007_en_1)> or the 2007 Spanish Act amending the change of sex on the civil register <<http://www.pfc.org.uk/files/Spain.pdf>>.

<sup>151</sup> AHRC, above n 26, 47.

<sup>152</sup> Bundesverfassungsgericht [German Constitutional Court] 1 BvR 7/2011, 11 January 2011 <<http://www.bundesverfassungsgericht.de/en/press/bvg11-007en.html>>.

<sup>153</sup> Hyndal and Yates, above n 28, 10.

These amendments came after the *Yogyakarta Principles*<sup>154</sup> came into force, which state that all signatories, Australia included,<sup>155</sup> to the *International Covenant on Civil and Political Rights* (ICCPR) are obligated to interpret the right to legal recognition of gender identity as meaning:<sup>156</sup>

Everyone has the right to recognition everywhere as a person before the law.<sup>157</sup> Persons of diverse and sexual orientations and gender identities shall enjoy legal capacity in all aspects of life. Each person's self-defined sexual orientation and gender identity is integral to their personality and is one of the most basic aspects of self-determination, dignity and freedom. No one shall be forced to undergo medical procedures, including sex reassignment surgery, sterilisation or hormonal therapy as a requirement for legal recognition of their gender identity.<sup>158</sup>

As such, Australian governments have an international and human rights obligation to consider whether it is appropriate for surgery to be the only criteria for a legal sex change. The approaches of Western Australia and South Australia, allowing for interpretation as to the terms 'medical treatment' would appear to be on the right track to achieving this. Many people argue that changing legal sex should be no different to the requirements for a legal name change, which is based on a self-identification model with effectively no restrictions.<sup>159</sup> However until society is able to accept a more evolved view of gender, where for instance an affirmed male could retain

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<sup>154</sup> The Yogyakarta Principles, established in 2007 by a group of international human rights experts, are principles which provide guidance to the international community in terms of how to interpret international human rights laws and treaties in relation to sexual orientation and gender identity. The principles themselves are not binding; however act as interpretation of agreements which are already binding. O'Flaherty and Fisher, above n 78, 210.

<sup>155</sup> In Australia treaties are not considered to be part of domestic law unless incorporated into statute. See *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273.

<sup>156</sup> Hyndal and Yates, above n 28, 9.

<sup>157</sup> UDHR Article 6; ICCPR Article 16.

<sup>158</sup> The 3<sup>rd</sup> Yogyakarta Principle - International Commission of Jurists (ICJ), *Yogyakarta Principles - Principles on the application of international human rights law in relation to sexual orientation and gender identity*, (March 2007) <<http://www.unhcr.org/refworld/docid/48244e602.html>>.

<sup>159</sup> In facilitating a legal name change, state and territory Registrars only need to be satisfied that an applicant: a) was born in the State/Territory in which they are applying or have been resident for a minimum of 3 months; b) can provide proof of their identity and age; c) is not applying for a name change for fraudulent or other improper purposes; and; d) can provide a completed 'change of name' statutory declaration. AHRC, above n 26, 26.

the fertility of a female, such considerations should be made heeding the insight of the majority in *Western Australia v AH* that when defining gender, a line needs to be drawn somewhere.<sup>160</sup>

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<sup>160</sup> Current technologies exist which offer transsexuals the opportunity before surgery to freeze cells which would allow them to have children in the future who are genetically their own. Faunce, above n 52, 496.

### CHAPTER 3: MARRIAGE IN AUSTRALIA

As a legal institution marriage can be categorised as a form of partnership between two persons that is created by a formal act of registration and that results in a number of legal rights and obligations (both between the partners, and between the partners and others including the state). The law sets conditions that must be met by the two persons who want to marry, gives rules for the procedures that need to be followed for starting or ending a marriage, and provides which legal consequences result from a marriage.<sup>161</sup>

Marriage is widely regarded within Australia as socially significant, and has been recognised internationally as a ‘vital social institution’.<sup>162</sup> Under the Australian Constitution the Commonwealth has the power to legislate with respect to marriage (“the marriage power”),<sup>163</sup> and has defined marriage under the *Marriage Act 1961* as ‘the union of a man and a woman to the exclusion of all others, voluntarily entered into for life’.<sup>164</sup> Notwithstanding this definition, Australian law does not force the permanency of marriage ‘for life’, allowing for no-fault divorce,<sup>165</sup> and allows parties to return to their maiden names if so desired. Additionally, after divorce there is no limitation on how many consecutive marriages an individual may engage in.<sup>166</sup>

The above Commonwealth definition was inserted into the *Marriage Act* in 2004,<sup>167</sup> and before such time marriage was not expressly required to be a heterosexual union, except at a common law.<sup>168</sup> Recently the definition of marriage has become the centre of intense debate within

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<sup>161</sup> Jamie Gardiner, ‘Same-Sex Marriage: A Worldwide Trend?’ (2011) 28(1) *Law in Context* 92, 93.

<sup>162</sup> *Ibid*, 92.

<sup>163</sup> See s 51(xxi).

<sup>164</sup> *Marriage Act* s5.

<sup>165</sup> Provided a couple meets a requirement for 12-month separation.

<sup>166</sup> Hyndal and Yates, above n 28, 14.

<sup>167</sup> Since 2006 it has been a requirement in all marriage ceremonies for the definition of marriage to be verbally pronounced. *Ibid*.

<sup>168</sup> See also s88EA which was amended at the same time to prohibit the recognition of foreign homosexual marriages in Australia.

Australia in terms of extending the right to marry to the homosexual community;<sup>169</sup> it is in fact the intensity of such debate which demonstrates that marital status remains significant to many people. Currently the debate surrounding same-sex marriage relates to the ability to alter marriage's traditional definition, a debate which is relevant to considering whether the institution of marriage in Australia can accommodate transgendered persons. While the Marriage Act prohibits same-sex marriages, it does not provide any directives which deal with the implications of gender reassignment surgery on marriage in Australia; problematic, as issues arise for instance, when a post-operative transgendered male wishes to marry a female,<sup>170</sup> or when one party to a marriage decides to undergo gender reassignment during their marriage.<sup>171</sup>

Those who argue against same-sex marriage argue that the notion of marriage as between a man and a woman forms part of a traditional definition with deep historical roots; that the definition of marriage is static and unchangeable. Over time, however, marriage laws in Australia have changed and evolved in meeting the different needs of society, demonstrating that marriage in Australia is a social construction, continually evolving with shifts in societal attitudes. Early British law prohibited marriage between a Catholic and an Anglican;<sup>172</sup> however the colony of New South Wales when formed adopted an approach which allowed for marriage between those with different religious affiliations.<sup>173</sup> A definition of marriage banning inter-denominational unions was deemed too limited, and not suited to the social and religious conditions within colonial Australia at the time, and as such marriage laws were reformed.<sup>174</sup> Similarly, the Australian colonies inherited British legislation which did not legally recognise affinity marriage,<sup>175</sup> a concept which prohibited the marriage between a man and the sister of his deceased wife.<sup>176</sup> Convicts in the late 1800's were required to seek leave to marry, and were only

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<sup>169</sup> Many people see the exclusion of homosexuals to marriage as symbolic of being unequal, devalued, and alienated from society. Frew, above n 24, 78.

<sup>170</sup> *Re Kevin* [2001] FamCA 1074 (12 October 2001).

<sup>171</sup> *AB* [2007] FCAFC 140 (29 August 2007).

<sup>172</sup> *Lord Hardwicke's Act 1753*(UK).

<sup>173</sup> *Marriage Act 1855* (NSW); *Registration of Births, Deaths and Marriages Act 1855* (NSW).

<sup>174</sup> Frew, above n 24, 79.

<sup>175</sup> *Lord Lyndhurst's Act 1835* (UK); *Deceased Wife's Sister Marriage Act 1907* (UK).

<sup>176</sup> It was argued that a sexual relationship between a man and his sister-in-law after his wife's death was physically and psychologically repugnant and unnatural. See New South Wales, *Parliamentary Debates (Committee)*, Legislative Council, 25 February 1874.

granted permission to do so if they conformed to authority.<sup>177</sup> Miscegenation laws prohibiting marriage in the United States between persons of different racial backgrounds were widespread until 1967.<sup>178</sup> Similar Australian legislation prohibiting interracial marriages between Indigenous and ‘white’ Australians<sup>179</sup> remained widely in force until that same year, when an Australian Referendum in 1967 altered the Constitution to provide equal legal rights to Indigenous Australians.<sup>180</sup>

It is important to note that each of these examples which has seen the law previously exclude certain unions from the institution of marriage are examples of the definition of marriage evolving through civil legislation, outside of the influence of religion.<sup>181</sup> Furthermore, each of these developments have occurred without causing harm to society or weakening the role of marriage as a public institution (common arguments made against the legalisation of same-sex marriage).<sup>182</sup>

The most recent development to the institution of marriage in Australia, confirming that marriage evolves in a way reflective of the beliefs and practices of society at the time, is that of *Re Kevin*,<sup>183</sup> which established that post-operative transsexuals has the right to enter into a legally valid marriage in accordance with their reassigned sex. The Full Court of the Family Court held that:

The social and legal institution of marriage as it pertains to Australia has undergone transformations that are referable to the environment and period in which particular

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<sup>177</sup> Rodney Croome, *A History of Marriage in Australia* (1 July 2011) ABC The Drum Opinion <<http://www.abc.net.au/unleashed/2778326.html>>.

<sup>178</sup> *Loving v Virginia*, 388 US 1 (1967).

<sup>179</sup> See *Aboriginals Ordinance 1911* (Cth); *Aboriginals Protection Act 1909* (NSW); *Aboriginals Act 1911* (SA); *Aboriginals Act 1886* (Vic); *Aboriginals Act 1905* (WA); *Northern Territory Aboriginals Act 1910* (SA).

<sup>180</sup> Intense debate was sparked in 1959 after the Darwin ‘protector of Aboriginals’ refused Gladys Namagu permission to marry her white fiancé, Mick Daly. The Menzies government vowed to end such discrimination. Croome, above n 177.

<sup>181</sup> Frew, above n 24, 79.

<sup>182</sup> Legalising marriage between a man and his sister-in-law did not result in the legalisation of marriage between biological siblings as argued, just as no evidence exists to support claims made today that legalising same-sex marriage will result in marriage eventually accommodating relationships with animals, children and objects.

<sup>183</sup> *Re Kevin* [2001] FamCA 1074 (12 October 2001).

changes occurred. The concept of marriage therefore cannot, in our view, be correctly said to be one that is or ever was frozen in time...There is no historical justification to support...the contention that the meaning of marriage should be understood by reference to a particular point in time in the past such as 1961.<sup>184</sup>

and in fact, Australian courts have recognised that a modern interpretation of marriage could see the institution as: ‘a voluntary union for life between *two people* to the exclusion of all others’.<sup>185</sup>

Changing attitudes along with a growing number of diverse relationships and family structures which exist outside of traditional marriage have led to an expansion in the legal rights afforded to Australian same-sex couples at Federal, State and Territory levels.<sup>186</sup> Same-sex couples are now recognised throughout Australia as de-facto couples, and afforded the legal rights and protections which come with such a relationship. After a huge overhaul of Federal legislation in 2002 to remove discrimination based on sexual orientation, homosexual couples now enjoy equal rights in the areas of superannuation, healthcare, workplace regulation and social security. Such developments are rendering the strict definition of marriage as exclusively between a man and a woman outdated. There are currently four bills before the Federal Parliament in an attempt to legalise forms of same-sex marriage,<sup>187</sup> indicative that Australia is ready to embrace a more modern interpretation of the definition of marriage.

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<sup>184</sup> *Kevin and Jennifer* [2003] FamCA 94 (21 February 2003) [87].

<sup>185</sup> See *Re Wakim: Ex parte McNally* (1999) 198 CLR 511.

<sup>186</sup> See, eg, *Miscellaneous Acts Amendment (Relationships) Act 2002* (NSW); *Property (Relationships) Legislation Amendment Act 1999* (NSW); *Relationships Act 2003* (Tas); *Acts Amendment (Lesbian and Gay Reform) Act 2002* (WA); *Property Law Act 1958* (Vic); *Domestic Relationships Act 1994* (ACT); *De Facto Relationships Act 1991* (NT).

<sup>187</sup> The Marriage Amendment Bill 2012, the Marriage Amendment Bill (No. 2) 2012, The Marriage Equality Amendment Bill 2012 and the Marriage Equality Amendment Bill 2010. Looking to states and territories, the Same-Sex Marriage Bill 2012 (Tas) was passed by the Tasmanian House of Assembly on August 30 2012 and is now being considered by the Tasmanian Legislative Council. Both the South Australian Premier and the ACT Government have confirmed their support for marriage equality on a state level. AHRC, ‘Marriage Equality in a changing world’ (Position Paper on Marriage Equality, AHRC) 1

<[http://humanrights.gov.au/pdf/human\\_rights/MarriagePositionPaper2012.pdf](http://humanrights.gov.au/pdf/human_rights/MarriagePositionPaper2012.pdf)>.

## A. *The Role of Religion*

The concept of marriage within Western countries has been influenced by ‘Judeo-Christian theology’, however marriage in Australia has evolved into a civil construct which does not necessarily conform to its religious origins.<sup>188</sup> Regardless, the majority of objections to same-sex marriage are based on religious grounds. Marriage is therefore not only a legal institution, but viewed by many as one with cultural, social and religious significance; and regardless of Australia’s secular standing, religion does continue to dictate societal values in relation to marriage.<sup>189</sup> With same-sex couples now enjoying the same legal entitlements available to married partners through legislation governing civil partnerships, it would appear that social and religious beliefs are the main obstacles in the way of Australian same-sex couples achieving marriage equality.<sup>190</sup> However in recognising that ‘there will always be discord between civil and religious views of marriage in a democratic society which must accommodate people with numerous religious differences’,<sup>191</sup> religious arguments propagating marriage as a static and unchanging institution should be irrelevant in our secular society.

The separation between marriage and religion in Australia dates back as early as 1855, where accommodations were made for those with no religious affiliation wishing to be married in a registry office, and marriage in Australia has since evolved as secular in nature.<sup>192</sup> Church attendance within Australia has decreased dramatically over the past 50 years, with only 9 per cent of Australians in 2010 indicating weekly church attendance,<sup>193</sup> and Christianity is no longer as influential as it once was.<sup>194</sup> Australia celebrates multiculturalism and diversity, and as such

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<sup>188</sup> P Charles and Jr. Kindregan, ‘Same-sex marriage: The Cultural Wars and the Lessons of Legal History’ (2004) 38 *Family Law Q.* 427, 429.

<sup>189</sup> See Matthew Leonard Clements, ‘Modern Marriage and Judgmental Liberalism: A Reply to George, Girgis, and Anderson’ [2012] *Journal of Law and Social Deviance* 1 <[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2134196](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2134196)>.

<sup>190</sup> In August 2011 Galaxy Research polling 1,060 people reported that 53% of Christians surveyed.

<sup>191</sup> Charles and Kindregan, above n 188, 435.

<sup>192</sup> Frew, above n 24, 81.

<sup>193</sup> *Ibid.*

<sup>194</sup> Criminal laws based on religious tradition prohibiting ‘sinful’ conduct such as abortion, contraception and sodomy, as well as blasphemy, adultery and fornication have all been repealed or are no longer enforced. For

many Australian hold diverse religious and secular beliefs. Civil celebrants are performing marriages more commonly than religious ministers,<sup>195</sup> where it was once a common belief that marriage not solemnised in a church was ‘almost as bad as fornication’.<sup>196</sup>

The Christian belief that the purpose of marriage is for the procreation of children has persisted among many within society today, and this notion has been read into how many people understand civil marriage.<sup>197</sup> The right to marry, however, is no longer dependant on the ability to reproduce, a concept which has been strengthened by both Australian and international precedents.<sup>198</sup> The fertility of a couple has never been established as criteria for a valid marriage,<sup>199</sup> and Family Law recognises the legal equality of all children, whether they are born to married parents or not.<sup>200</sup> Same-sex partners are permitted access to adoption and fertility agencies, and family law precedents are beginning to recognise de facto parenthood for those living in same-sex relationships while co-parenting a child with the biological parent.<sup>201</sup> Advances in medical technology have offered both heterosexual and homosexual couples alternative (non-sexual) methods for reproduction in ways not previously available. It is as such clear, that Australia no longer attaches reproductive significance to the institution of marriage.

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instance The Federal Government in 1994 enacted the *Human Rights (Sexual Conduct) Act* which prohibited States and territories from prosecuting sodomy. David and Blight, above n 47, 311.

<sup>195</sup> In 2007 62.9% of marriages were conducted by a civil celebrant. Australian Bureau of Statistics (ABS), *Marriages, Australia, 2007* (14 October 2008) < <http://www.abs.gov.au/ausstats/abs@.nsf/mf/3306.0.55.001>>.

<sup>196</sup> Charles and Kindregan, above n 188, 430.

<sup>197</sup> *Ibid.*, 442.

<sup>198</sup> See *Goodwin v The United Kingdom* (European Court of Human Rights, application no 28957/95, 11 July 2002); *Kevin and Jennifer [2003]* FamCA 94 (21 February 2003).

<sup>199</sup> In *De bono Conjugal* St Augustine of the Roman Catholic Church pronounced that sterile couples were entitled to marriage, as the unitive value of marriage justified such unions within the Christian tradition. William N. Eskridge Jr., ‘Six Myths that Confuse the Marriage Equality Debate’ (2011) 46 *Valparaiso University Law Review* 103, 104.

<sup>200</sup> See the *Family Law Act 1975* (Cth). The Act does not differentiate between children born to married parents and those born into non-traditional families. The Act states that the best interests of a child will be the paramount consideration for a court making parenting orders. S60CA. Anna Kate Visser, *Parental Mental Health and the Australian Family Law System: A consideration of the inconsistency between federal mental health policy and the operation of the Family Law Act 1975 (Cth) in the context of parenting disputes* (Honours Thesis, Australian National University, 2012) 16.

<sup>201</sup> See especially *Re Mark: an Application relating to parental responsibilities* [2003] FamCA 822 (28 August 2003); *Re Patrick* (2002) 168 FLR 6. See also Adiva Sifris and Paula Gerber, ‘Victorian court circumvents prohibition on adoption by same-sex couple’ (2011) 25 *Australian Journal of Family Law* 275.

Since Federation, Australia has seen changes in social attitudes towards marriage.<sup>202</sup> Many couples choose not to conceive and raise children, with marriage instead offering the ‘advantage of commitment in a legally fostered and protected institution’.<sup>203</sup>

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<sup>202</sup> 62% of Australians believe same-sex marriage should be available, 72% of Australians with young children believe the same, 75% of Australians believe reform is inevitable and 78% believe there should be a conscience vote on the issue. Australian Marriage Equality, *Marriage Equality and Public Opinion Fact Sheet* (2011) <[www.australianmarriageequality.com](http://www.australianmarriageequality.com)>.

<sup>203</sup> Charles and Kindregan, above n 188, 448.

## CHAPTER 4: GENDER REASSIGNMENT SURGERY BEFORE MARRIAGE

Despite the availability of surgical procedures for transsexualism in Australia since the 1950's,<sup>204</sup> the law on transsexual marriage remained unlegislated. The implications were as such that post-operative transsexuals were unable to marry a person of the opposite sex to their assigned sex. *Corbett v Corbett (otherwise Ashley)*<sup>205</sup> had been the only (UK) authority since 1971, where Ormrod J declared gender for the purposes of marriage was determined and fixed at birth. This judgment had been extremely influential throughout common law countries and set the precedent for the coming decades.<sup>206</sup> Australia began to move away from the view in *Corbett* in the late 80's and early 90's, where decisions in the first instance in *R v Harris and McGuinness*<sup>207</sup> and *Secretary, Department of Social Security v SRA*<sup>208</sup> determined that a transsexual could be recognised as a member of their assumed sex for the purposes of criminal and social security law. Similarly, in 1995 New Zealand held in *Attorney-General v Otahuhu Family Court*<sup>209</sup> that their law should recognise gender-reassignment if transsexuals have willingly undergone therapy and surgery to alter their genitalia. *Corbett* remained, however, the only authority which dealt with gender reassignment for the purposes of marriage until 2001, when Australia overturned the decision through the ruling in *Re Kevin*,<sup>210</sup> recognising that post-operative transsexuals have the right to enter into a legally valid marriage.

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<sup>204</sup> Collyer and Heal, above n 1.

<sup>205</sup> [1971] P 83 (UK).

<sup>206</sup> Cases within the US and UK had since unsuccessfully attempted to overturn the decision in *Corbett*. See especially *Rees v. United Kingdom* [1986] ECHR 11; *Cossey v United Kingdom* [1990] ECHR 21; *Sheffield and Horsham v United Kingdom* [1998] ECHR 69; *X, Y and Z v UK* [1997] ECHR 20.

<sup>207</sup> (1988) 17 NSWLR 158.

<sup>208</sup> (1993) 118 ALR 467.

<sup>209</sup> [1995] 1 NZLR 603.

<sup>210</sup> [2001] FamCA 1074 (12 October 2001).

### A. *Re Kevin*

Kevin and Jennifer married in August 1999 after Kevin, born a female, had been living legally within Australia as a male for many years following gender reassignment surgery and hormonal treatment which had included a double mastectomy and full hysterectomy. He did not, however, undergo the construction of a phallus. The couple were advised by the Attorney-General for the Commonwealth of Australia that their marriage was not legally valid.<sup>211</sup> On October 18 1999 the couple sought a declaration of the validity of their marriage based on the provisions of s113 of the *Family Law Act 1975* (Cth). It was accepted by all parties that marriage must be between a man and a woman; however the contentious issue was whether, for the purposes of the *Marriage Act*, Kevin was a male.<sup>212</sup>

The determining factors in relation to a person's sex for the purpose of marriage were held to include an individual's biological and physical characteristics at birth (including gonads, genitals and chromosomes), their self-perception as a man or woman, life experiences, including the sex in which a person has been raised and their attitude to it, the degree in which the individual has functioned within society as a male or female, any hormonal, surgical or other medical affirmation treatments undertaken, along with the consequences of such treatment, and the biological, psychological and physical characteristics of an individual at the time of the marriage.<sup>213</sup>

Kevin had

always perceived himself to be male and was perceived by those who knew him to have male characteristics since he was a young child. Prior to the marriage he underwent a full process of gender reassignment which involved hormonal treatment and irreversible surgery conducted by appropriately qualified medical practitioners. At the time of his marriage, in appearance, characteristics and behaviour he was perceived to be a man by

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<sup>211</sup> They were further advised that they (or at least Kevin) were liable to prosecution which could potentially lead to imprisonment. Mills and McConvill, above n 19, 58.

<sup>212</sup> Ibid.

<sup>213</sup> University of NSW Council for Civil Liberties, *Transsexual Marriage in Australia* (2004) <<http://www.nswccl.org.au/unswccl/issues/transsexual.php>>.

his family, friends and work colleagues and had been accepted as a man for a variety of social and legal purposes including in name and admission to an IVF program, and in relation to such events occurring after the marriage, there was evidence was heard that at these relevant times his characteristics were no different than at the time of marriage.<sup>214</sup>

Justice Chisholm stated that it was clear from Australian authorities that a post-operative transsexual will be a member of their affirmed sex. He therefore held a person's gender for the purposes of marriage is determined as at the date of marriage. The decision in *Corbett v Corbett*, he said, was not representative of Australian law, as the notion that a person's 'true sex' is fixed at birth would suggest that a post-operative male to female transsexual remains a female for the purposes of marriage. As Kevin was legally a man at the time of his marriage his marriage was declared valid. The decision was appealed by the Attorney-General and upheld by the Full Court of the Family Court two years later.<sup>215</sup> The Full Court agreed with the trial judge and stated that '...the words man and woman when used in legislation have their ordinary contemporary meaning according to Australian usage. That meaning includes post-operative transsexuals as men and/or women in accordance with their sexual reassignment.'<sup>216</sup>

It is worth noting that the 2004 amendment of the *Marriage Act* came after the decision in *Re Kevin*, and while Parliament specified marriage is between a 'man and a woman', it did not seek to define either of these terms. As such it would appear that it is accepting of the approach taken in *Re Kevin*,<sup>217</sup> and as a considerable amount of time has now lapsed since the appeal, it is unlikely that a further appeal will be held. Amendments to the *Marriage Act* may have therefore affected same-sex marriage; however they have not affected transsexual marriage for post-operatives. More complicated is assessing the amendments of the *Marriage Act* and how they relate to the right to marry for pre-operative transsexuals.

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<sup>214</sup> *Kevin and Jennifer* [2003] FamCA 94 (21 February 2003) [16].

<sup>215</sup> See *Kevin and Jennifer* [2003] FamCA 94 (21 February 2003).

<sup>216</sup> *Kevin and Jennifer* [2003] FamCA 94 (21 February 2003) [374].

<sup>217</sup> David and Blight, above n 47, 322.

## ***B. The implications of Re Kevin for pre-operative transgendered persons***

As surgery is a pre-requisite for legal recognition of gender, pre-operative transsexuals in Australia are not able to marry as a member of their affirmed sex. Case law in Australia has been hesitant to recognise pre-operative transsexuals as belonging to their affirmed gender.<sup>218</sup> *Re Kevin*, however, may have provided some scope for future challenges to removing a strictly surgical test for defining gender for the purposes of Australian legislation, and in particular the *Marriage Act*. The judgement placed a new importance on a number of social and cultural factors, and broadened the range of biological factors which could be considered in determining gender, including the notion of 'brain sex'.<sup>219</sup> This approach opens the door to possible arguments that pre-operative transsexuals may be legally recognised as belonging to their affirmed gender for the purposes of marriage should they meet a range of social and cultural factors in the absence of surgery.

International Courts have already adopted this view and are beginning to consider factors for determining sex outside of biological criteria. The European Court of Human Rights (ECHR) in *Goodwin* recognised that:

There have been major social changes in the institution of marriage since the adoption of the Convention as well as dramatic changes brought about by developments in medicine and science in the field of transsexuality. The Court has found...that a test of congruent biological factors can no longer be decisive in denying legal recognition to the change of gender of a transsexual. There are other important factors – the acceptance of the condition of GID by the medical professions and health authorities...provision of treatment including surgery to assimilate the individual as closely as possible to the gender in which they perceive that they properly belong and the assumption by the transsexual of the social role of the assigned gender.<sup>220</sup>

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<sup>218</sup> See *Harris and McGuiness* (1988) 35 A Crim R 146; *SRA* (1993) 118 ALR 467.

<sup>219</sup> The biological features of a person's brain as associated with a particular sex. An extensive amount of medical evidence relating to 'brain sex' was discussed in *Re Kevin* [2001] 165 FLR 404, 450-463.

<sup>220</sup> *Goodwin* (European Court of Human Rights, application no 28957/95, 11 July 2002) [100].

Australia may find that a similar approach is necessary taking into account changes in society along with the scientific and medical developments in the field of transsexuality.

### ***C. International developments since Re Kevin***

The decision of Chisholm J in *Re Kevin* had a large international impact and was respected world-wide, contributing greatly towards the legal recognition of transsexuals globally.<sup>221</sup> Judge Gerard O'Brien of the Sixth Circuit Court of Florida waited for the decision in Australia to be handed down before making a similar judgement in *Kantaros v Kantaras*.<sup>222</sup> He dedicated 35 pages in his judgement to discussing the decision of Chisholm J, referring to *Re Kevin* as 'one of the most important cases on transsexualism to come on the scene of foreign jurisprudence'. It was ruled that Michael Kantaras, a post-operative transsexual male, was legally a man at the date of his marriage regardless of having been born female. He was therefore entitled to custody as the father of Linda Kantaras' two children, one of whom conceived through artificial insemination and the other through adoption. Judge O'Brien stated that 'the marriage law of Florida clearly provides that marriage shall take place between one man and one woman. It does not provide when such status of being a man or woman shall be determined'.<sup>223</sup>

The ECHR has followed the decision in *Re Kevin*, when in 2002 it overturned decisions of UK and Irish courts.<sup>224</sup> It found that the United Kingdom had violated, inter alia, Articles 8<sup>225</sup> and 12<sup>226</sup> of the European Convention for the Protection of Human Rights and Fundamental Freedoms by denying the legal status of transsexuals within the UK in regards to marriage, social security, employment and pensions.<sup>227</sup> This ruling prompted legislation to be enacted within the

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<sup>221</sup> Mills and McConvill, above n 19, 58.

<sup>222</sup> [2003] Case No 98-5375CA (21 February 2003).

<sup>223</sup> University of NSW Council for Civil Liberties, above n 213.

<sup>224</sup> Ibid.

<sup>225</sup> Right to respect for private life.

<sup>226</sup> Right to marry.

<sup>227</sup> See *Goodwin v The United Kingdom* (European Court of Human Rights, application no 28957/95, 11 July 2002); *I v The United Kingdom* (European Court of Human Rights, application no 25680/94, 11 July 2002).

UK allowing transsexuals to marry as a member of their newly assigned sex, and to allow for birth certificates to be altered to reflect their sex change.<sup>228</sup> The ECHR made a further declaration in February 2008 that sections of the *Civil Registration Act 2004* in Ireland (which prohibited altering birth certificates and other identification documents for post-operative transsexuals) were incompatible with Article 8 of the Convention.<sup>229</sup> The Government of Ireland appealed this decision but has since dropped the appeal and is considering enacting legislation allowing for legal recognition for transsexuals after gender reassignment surgery.<sup>230</sup>

South Africa in 2003 enacted the *Alteration of Sex Description and Sex Status Act* which expressly defines transsexuality as included within the meaning of ‘sexual orientation’ for the purposes of discrimination law, and allows those who have undergone gender reassignment surgery to have their description of sex altered on their birth certificate and other identity documents. Transsexuals are then considered to be of their new sex ‘for all purposes’.<sup>231</sup>

In terms of countries outside of the Commonwealth, South Korea is setting an example for other countries in the Asia Pacific region by taking great steps forward in terms of legally recognising the transgendered community. South Korea allows for transsexuals to change their legal gender, and has done so since 2006. Prior to 2006 a legal change in sex was granted at the discretion of the Supreme Court, however since 1990, changes of gender have been approved in most cases.<sup>232</sup> Since *Re Kevin*, post-operative transsexuals have been afforded the right to marry as a member of their affirmed sex, and interestingly are automatically granted the legal status of their affirmed sex after marriage regardless of having been listed differently previously.<sup>233</sup>

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<sup>228</sup> See *Gender Recognition Act 2004* (UK) <[http://www.opsi.gov.uk/acts/acts2004/ukpga\\_20040007\\_en\\_1](http://www.opsi.gov.uk/acts/acts2004/ukpga_20040007_en_1)>.

<sup>229</sup> See *Foy v An t-Ard Chláraitheoir & Ors* [2007] IEHC 470 (19 October 2007).

<sup>230</sup> Northern Ireland forms part of the United Kingdom, and as such the *Gender Recognition Act 2004* applies.

<sup>231</sup> Pierre De Vos, ‘Christine Give Them Hell!’ on Pierre De Vos *Constitutionally Speaking* (14 July 2010) <<http://constitutionallyspeaking.co.za/christine-give-them-hell/>>.

<sup>232</sup> TransGriot, ‘The Korean Transgender Community’ on *TransGriot* (24 February 2009) <<http://transgriot.blogspot.com.au/2009/02/korean-transgender-community.html>>.

<sup>233</sup> *Ibid.*

German law since 2008 has allowed for the legal recognition of transsexuals for the purposes of marriage.<sup>234</sup> German citizens who identify as transsexuals are further afforded the right to both maintain their marriage and gain legal recognition as a member of their perceived sex should they undergo gender reassignment during their relationship.<sup>235</sup> Australian married couples do not have the same right.<sup>236</sup>

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<sup>234</sup> *Gesetz über die Änderung der Vornamen und die Feststellung der Geschlechtszugehörigkeit in besonderen Fällen* (de: *Transsexuellengesetz – TSG*) (Law about the change of first name and determination of gender identity in special cases (Transsexual Law – TSG)).

<sup>235</sup> The law does however stipulates that first names must be gender specific, and states that a change of name will be revoked should an individual marry and then father or give birth to a child conceived after the name change became valid.

<sup>236</sup> Current Australian law is, however, much less controversial than that in Japan. Civil law requires transsexuals to be both unmarried *and* childless before the law will recognise a change of gender. Satoko Uehara, 'Sex Change Man Says Boy His Own' on *Asahi Shim Bun Japanese Law Blog: Current News and Information about Japanese Law* (13 January 2010) <<http://japaneselaw.blogspot.com.au/2010/01/sex-change-man-says-boy-his-own.html>>.

## CHAPTER 5: IMPLICATIONS FOR GENDER REASSIGNMENT SURGERY AFTER MARRIAGE

The existing process for the legal recognition in Australia of sex reassignment excludes those who are married. Those who are married and also ‘sex and gender diverse’<sup>237</sup> are faced with a choice between the legal recognition of their sex or their marriage. State and territory legislation specifies that for an individual to obtain a change of sex on their birth certificate they must be unmarried,<sup>238</sup> and in order to obtain a birth certificate reflective of their reassigned sex a couple must first obtain a divorce. This requires a false declaration to be made as evidence of an irretrievable breakdown in a marriage where in fact a relationship may be continuing.<sup>239</sup> So far, this issue has come before Australian Courts only once, however the judgement failed to provide guidance on the issue and offer a way forward for Australia as the decision in *Re Kevin* did, offering a limited opinion on the issue only within the scope of Commonwealth legislation as based on the applicant’s argument.

In *AB v Registrar of Births Deaths and Marriages*<sup>240</sup> AB was a transsexual born a male who claimed unlawful discrimination on the grounds of marital status<sup>241</sup> against the Victorian Registrar of Births, Deaths and Marriages, for the refusal to grant an amended birth certificate reflecting her sex as female.<sup>242</sup> In building her case, AB claimed an inconsistency between State

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<sup>237</sup> AHRC, above n 26.

<sup>238</sup> See *Births, Deaths and Marriages Registration Act 1995* (NSW) s 32B, *Births, Deaths and Marriages Registration Act 2005* (NT) s 28B; *Births, Deaths and Marriages Registration Act 2003* (Qld) ss22-23; *Births, Deaths and Marriages Registration Act 1999* (Tas) ss3, 28; *Births, Deaths and Marriages Registration Act 1996* (Vic), s30A. The requirement to be unmarried was removed from section 24 of the *Births Deaths & Marriages Act 1997*(ACT) in 2009 however it remains a requirement on the application form issued by the Registrar-General. See Form 204 at <<http://www.legislation.act.gov.au/af/2008-71/current/pdf/2008-71.pdf>>.

<sup>239</sup> McKinnon, above n 8.

<sup>240</sup> [2007] FCAFC 140 (29 August 2007).

<sup>241</sup> Marital status is defined as the ‘status or condition of being single, married, married but living separately and apart from one’s spouse, divorced, widowed, or the de facto spouse of another person’. *Births, Deaths and Marriages Registration Act 1996* (Victoria) s4(1) .

<sup>242</sup> The Registrar had, in 2000, issued an amended birth certificate reflective of her new female name as opposed to the male name given at birth. This was allowed under Pt 4 of the *Births, Deaths and Marriages Registration Act 1996* (Victoria) s29(3).

legislation and the Commonwealth *Sex Discrimination Act* 1984, specifically s22.<sup>243</sup> In the original Federal Court ruling Kenny J ruled in favour of AB. However this ruling was overturned by the Full Court on appeal. The appeal was allowed as it was determined section 22 of the *Sex Discrimination Act* was not applicable within the circumstances of the case; section 9 of the Act limits its applicability to the extent that the provisions give effect to the *Convention on the Elimination of All Forms of Discrimination Against Women*.<sup>244</sup> The facts therefore needed to show ‘discrimination against women’, and as the requirement to be unmarried, while discriminatory, is gender-neutral, it was held that the *Sex Discrimination Act* did not extend protection in such circumstances.<sup>245</sup>

The argument led by AB restricted her opportunity for success. Focus was placed on protection under the Act, as opposed to the inadequacy in today’s social climate of legislation offering protection for sex discrimination, while framed in such a way to only apply to ‘discrimination against women’ and not discrimination generally. Parliament’s approach, obviously aimed at protecting the rights of women on an equal basis to that of men, is now too narrow when society, and our legal system, face more complex issues relating to gender and sex discrimination than those which may have been prevalent in 1984.

AB, and other married transsexuals in her position are women or men within the meaning of the *Sex Discrimination Act*, *Secretary, Department of Social Security v “SRA”*,<sup>246</sup> *R v Harris and McGuinness*<sup>247</sup> and *Re Kevin*.<sup>248</sup> This was not a contested fact during the trial. What the trial did highlight, however, was the limited nature of the *Sex Discrimination Act*,<sup>249</sup> and the fact that

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<sup>243</sup> **Goods, services and facilities.** (1) *It is unlawful for a person who, whether for payment or not, provides goods or services, or makes facilities available, to discriminate against another person on the ground of the other person’s sex, marital status, pregnancy or potential pregnancy...* The trial judge accepted that in refusing to issue an altered birth certificate, AB had been refused a ‘service’ for the purposes of the Act. See also *IW v City of Perth* [1997] HCA 30 (31 July 1997).

<sup>244</sup> New York, 18 December 1979.

<sup>245</sup> *AB* [2007] FCAFC 140 (29 August 2007).

<sup>246</sup> (1993) 118 ALR 467, 301-306, 325-328.

<sup>247</sup> (1988) 17 NSWLR 158, 159-162, 188-193.

<sup>248</sup> [2001] FamCA 1074 (12 October 2001) [472 – 476].

<sup>249</sup> Legal scholars have criticised the *Sex Discrimination Act* for its limited scope and undue focus on formal equality. See, e.g., Krysti Guest, *The Elusive Promise of Equality: Analysing the Limits of the Sex Discrimination Act* 1984 (Research Paper 16, 1998-99 Law and Bills Digest Group, 30 March 1999).

there is currently insufficient and impractical legislation within Australia dealing with the implications of gender reassignment surgery on marriage. The precedent set was not that married transsexuals are ineligible for an amended birth certificate; however that such people in such circumstances cannot rely on the *Sex Discrimination Act* to challenge State and Territory legislation. As such, Australian courts are still to consider the issue of whether discrimination on the grounds of marital status should be outlawed where it applies to transsexual applicants for an amended birth certificate.

Discrimination on the basis of marital status puts Australia in breach of its obligations under international human rights law. Such law<sup>250</sup> provides discrimination is prohibited when on the basis of a 'protected attribute or characteristic',<sup>251</sup> which includes marital status. Australia's obligations as a signatory to the relevant international bodies require all necessary steps be taken in order to ensure that legislation does not see individuals discriminated against based on marital status. Regardless, under current Australian law, there does not seem to be any legal basis for individuals to challenge the discrimination against married persons in regards to the amendment of birth certificates.<sup>252</sup> The requirement of being unmarried for the purposes of gaining a gender recognition certificate appears to be intended to maintain consistency with the requirement of the *Marriage Act* for marriage to be between a man and a woman.<sup>253</sup> For Australia to allow the amendment of sex on birth certificates of a married person the result would be a form of legalised same-sex marriage. While the law as it current stands may prevent same-sex marriages from occurring on paper, denying recognition does not alter the reality of a marriage which continues with two individuals who both identify and present as the same sex. With the courts yet to consider this issue, the leading precedent within Australia remains that of *Re Kevin*, which established that whether a person is a man or a woman within the meaning of the *Marriage Act*

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<sup>250</sup> See especially ICCPR articles 2(1) and 26; the *International Covenant on Economic Social and Cultural Rights*, article 2; the UDHR article 2.

<sup>251</sup> AHRC, above n 26, 30.

<sup>252</sup> See especially *AB* [2007] FCAFC 140 (29 August 2007).

<sup>253</sup> See, eg, Victoria, *Parliamentary Debates*, Legislative Assembly, 11 May 2004, 1107 (Robert Hulls) quoted in *AB* [2007] FCAFC 140 (29 August 2007) [69].

will be determined at the date of marriage.<sup>254</sup> This would suggest an entitlement to remain married even after having undergone gender reassignment.

While legislation governing the alteration of sex on birth certificates is inflexible, married persons may be able to change other documentation and records to reflect their reassigned sex by providing evidence of having undergone gender reassignment surgery. Medicare and Centrelink both recognise change of sex without the requirement of an altered birth certificate however the process strips an individual of their status as a married person.<sup>255</sup> Due to the various government benefits and entitlements which married couples enjoy, this process results in possible financial detriment to both the transgender person and their spouse.<sup>256</sup> 2008 saw the Australian Government pass legislation amending 84 federal laws<sup>257</sup> removing discrimination against same-sex couples and their families.<sup>258</sup> Same-sex couples are now recognised throughout Australia as de-facto couples, and afforded the legal rights and protections which come with such a relationship; superannuation law amendments mean that same-sex couples and dependants have the same rights as married partners; and the government has amended legislation to offer equal rights to same-sex couples in the areas of healthcare, workers compensation and social security.<sup>259</sup>

It has become apparent that these reforms however do not extend to those who remain married after gender reassignment surgery when they should. Stripping reassigned individuals of their marital status, and by extension marital benefits, appears unreasonable when same-sex de facto couples are legally afforded the same rights. It seems that couples who wish to maintain their marriage after reassignment are falling through the cracks in discrimination legislation which was implemented specifically with the purpose of protecting non-traditional relationships.

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<sup>254</sup> *Re Kevin* [2001] FamCA 1074 (12 October 2001).

<sup>255</sup> AHRC, above n 26, 31-32.

<sup>256</sup> *Ibid.*

<sup>257</sup> Similar anti-discrimination laws have been enacted in state and territory legislation; in 2002 the *Miscellaneous Acts Amendment (Relationships) Act 2002* (NSW) saw 20 laws amended which expanded the legal rights afforded to same-sex couples, including rights in areas of employment benefits and giving evidence in court against a spouse.

<sup>258</sup> AHRC, above n 26, 31-32.

<sup>259</sup> Karina Anthony and Talina Drabsch, 'Legal Recognition of Same-Sex Relationships', (Briefing Paper No 9/2006, Parliamentary Library, NSW, 2009).

In not legislating for the dissolution of marriage<sup>260</sup> where one spouse undergoes gender reassignment, however not legally recognising a change in gender until divorce follows, state and territory governments have fostered an environment where married transsexuals are trapped in a conflict between social reality and the law.<sup>261</sup> They are left uncertain as to their legal status and rights and are vulnerable to discriminatory treatment.

In not legislating either way, Australian governments are avoiding the issue in front of them, and couples who wish to maintain their marriage after reassignment are suffering adverse consequences as a result.<sup>262</sup> While enforcing the dissolution of marriage after reassignment is not the favoured alternative, and would not be reflective of international discrimination law or current Australia precedents, this move would at least have the potential to see a marriage converted to a recognised same-sex de facto relationship. In this sense, couples would have access to government benefits as well as legal recognition of their identified sex. The more ideal approach would be to bring state and territory legislation in line with the everyday reality by allowing transsexuals legal recognition of their sex regardless of marital status. It is wrong to assume that people would undergo gender reassignment as a loophole to achieving same-sex marriage. The portion of society affected by such a change in legislation would be minimal; however as established, the consequences such people face under the current system are substantial.<sup>263</sup>

In recognising the same, the ECHR in *Goodwin* stated that:

The stress and alienation arising from discordance between the position in society assumed by a post-operative transsexual and the status imposed by law which refuses to recognise the change of gender cannot, in the Court's view, be regarded as a minor inconvenience arising from a formality. A conflict between social reality and law arises which placed the transsexual in an anomalous position, in which he or she may experience feelings of vulnerability, humiliation and anxiety...Society may reasonably be

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<sup>260</sup> Change of sex is not listed as a circumstance which renders a marriage void under the *Marriage Act*.

<sup>261</sup> Mills and McConvill, above n 19.

<sup>262</sup> AHRC, above n 26, 29-32.

<sup>263</sup> Ibid.

expected to tolerate a certain inconvenience to enable individuals to live in dignity and worth in accordance with the sexual identity chosen by them at great personal cost.<sup>264</sup>

Furthermore, principle 3 of the Yogyakarta Principles specifically states that ‘no status, such as marriage...may be invoked as such to prevent the legal recognition of a person’s gender identity’.<sup>265</sup> The Australian Human Rights Commission’s sex and gender diversity project<sup>266</sup> mirrored this view, by recommending that marital status should not be a relevant consideration as to whether or not a person can obtain a change in legal sex.<sup>267</sup>

### ***A. The Significance of a ‘Certificate’***

The degree of benefit in legal recognition of post-operative transsexual varies around the world. In Australia there are notable benefits (for both the government and the transsexual) which come with correctly identifying the sex of a person on their birth certificate and other identification records. Governments record information about sex and gender in order to confirm a person’s identity as an Australian citizen or resident. Identity security has become a crucial aspect of Australia’s national security.<sup>268</sup>

A birth certificate is the primary (‘cardinal’) document used within Australia for legally proving the identity of a person born here.<sup>269</sup> All Australian state and territory governments, as well as the Commonwealth use it as a form of identification, which means that a birth certificate which has been re-issued to reflect a person’s change of sex will be recognised across all states and territories, as well as for the Commonwealth. This is of importance as several Commonwealth government functions and agencies take notice of the official record of sex and gender status,

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<sup>264</sup> *Goodwin v The United Kingdom* (European Court of Human Rights, application no 28957/95, 11 July 2002) [77].

<sup>265</sup> ICJ, above n 158.

<sup>266</sup> AHRC, above n 26.

<sup>267</sup> *Ibid*, 31.

<sup>268</sup> The Australian government in 2005 announced the National Identity Security Strategy, a strategy which aimed at preventing the theft or misuse of the identities of Australian citizens. Under this strategy, determining an individual’s identity relies on determining their sex/gender, and as such many government departments make record of sex and gender. *Ibid*, 14.

<sup>269</sup> LRAC, above n 39, 3.

including those dealing with marriage, family law, social security, Centrelink payments and taxation.<sup>270</sup> An amended birth certificate is often required in order to align most other documentation with the individual's gender, including drivers licence,<sup>271</sup> passport, mortgage documents, educational certificates, and information held by institutions and government bodies including banks, educational institutions, Medicare, private health insurance<sup>272</sup> and Centrelink. Often the ability to make such changes on documentation in the absence of an amended birth certificate is dependent on sympathetic individuals within institutions who are willing to break the rules. One respondent in a study concerning the health and wellbeing of Australian transsexuals noted:

I had to fight Centrelink to accept my gender because I do not have a birth certificate that represents my identified gender. It took lots of pleading and bursting into tears (literally) until someone sympathetic finally took my side, broke the rules and just made the change.<sup>273</sup>

The barriers transsexuals face in order to change documents and records after they have transitioned appears to be inconsistent under federal privacy and freedom of information legislation. The *Freedom of Information Act 1982* (Cth) part V, along with the *Privacy Act 1988* (Cth)<sup>274</sup> affords Australians the right to request alterations to records which contain their personal information in circumstances where the information is inaccurate.<sup>275</sup> For the purpose of gaining a birth certificate, marital status is a barrier imposed by state and territory legislation. Section 109 of the Australian Constitution provides that where state and territory legislation conflicts with that of the Commonwealth '*the latter shall prevail, and the former shall, to the*

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<sup>270</sup> Ibid, 8.

<sup>271</sup> Queensland is the only jurisdiction which notes a person's sex on their driver's license, however all Road Authorities keep records of sex and gender on a license register, which is also accessed by police departments. Road Authorities will enable changes to the register based on the production of an altered birth certificate; changes may be facilitated in Queensland, New South Wales and Victoria with a letter from a medical practitioner evidencing gender reassignment. AHRC, above n 26, 19.

<sup>272</sup> 51.3% of respondents in the TranZnation survey indicated the use of private health insurance for a gender related matter. Couch et al, above n 2, 8.

<sup>273</sup> Ibid, 58.

<sup>274</sup> Information privacy principle 7; National privacy principle 6.

<sup>275</sup> AHRC, above n 26, 29.

*extent of the inconsistency, be invalid*.<sup>276</sup> As such, there would appear to be considerable grounds for transsexuals to challenge the State and Territory regulations which discriminate based on marital status. The problem arises however when considering the definition of marriage as in the *Marriage Act*, noting that the Federal Government has before used the same section of the Constitution to invalidate Territory legislation which contravened this definition.<sup>277</sup> If State and Territory legislation allowed amended birth certificates for married transsexuals it may be open to a legal challenge on the basis of such inconsistency. The problem is therefore conflicting Commonwealth legislation, and the Federal Government needs to assess which of the conflicting legislation is more pertinent to society in order to rectify the confusion and discrimination fostered by such a conflict.

Regardless of the legal and/or security implications associated with documentation not reflective of an individual's affirmed gender, correct documentation is essential to a sense of personal recognition,<sup>278</sup> and is preventive of unnecessary discrimination. The inability to change documentation and the disparity between an individual's documentation and their presented gender has been found in many cases to incite discrimination, especially in the areas of employment and international travel. As mentioned in chapter 2, 95% of transsexuals who reveal they are undertaking gender reassignment surgery lose their jobs, and 60% of those who are post-operative remain underemployed or unemployed.<sup>279</sup> Often, after a certificate has been altered it will be noted that they have 'previously been registered in another name',<sup>280</sup> which when presented for employment purposes exposes the individual's history. Incongruent

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<sup>276</sup> See *Stock Motor Ploughs Ltd v Forsyth* [1932] HCA 40 (15 August 1932) [136-137]; *Victoria v The Commonwealth* [1937] HCA 82 (17 December 1937) [630].

<sup>277</sup> The preamble of the *Civil Unions Act 2006* (ACT) stated that 'this Act continues the process of rationalisation by allowing 2 people who choose not to be married, or would not be entitled to be married, to enter into a legally recognised relationship that is to be treated under territory law in the same way as marriage'. The Federal Government, using their power under s109 of the Constitution, invalidated this Act stating it was inconsistent with the Commonwealth definition of marriage. Anthony and Drabsch, above n 260, 31.

<sup>278</sup> Couch et al, above n 2.

<sup>279</sup> Healey, above n 29, 5.

<sup>280</sup> Couch et al, above n 2, 60.

passports cause difficulty when crossing international borders, and have led to questioning, searches and harassment that the individual would not have otherwise been subjected to.<sup>281</sup>

## **B. Passports**

Passports, as legislated under the *Passports Act 2005* (Cth), are secondary identity documents which are used for the purpose of proving identity in addition to a primary document,<sup>282</sup> and are issued in Australia in accordance with the International Civil Aviation Organisation (ICAO) requirements.<sup>283</sup> In many instances however, passports may also serve as a primary document.<sup>284</sup> The name and sex recorded on a passport will, on the whole, reflect the name and sex recorded on a person's birth certificate or change of name certificate. Passports may be issued to a transgender person should their application meet the relevant requirements, which include (for applicants born in Australia) a birth certificate from their State/Territory Registrar of Births Deaths and Marriages reflecting their gender reassignment.<sup>285</sup> This poses an issue for those unable to obtain an altered birth certificate due to their marital status, an issue which was dealt with by the Administrative Appeals Tribunal (AAT) in *Abrams and Minister for Foreign Affairs and Trade*.<sup>286</sup>

Grace Abrams was born a male and completed her transition to the female gender after legally marrying a female. She did not seek to dissolve her marriage and had no intention to doing so. She applied for an Australian passport in 2006 to be issued noting her gender as female, however due to being unable to provide an altered birth certificate based on her marital status, the

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<sup>281</sup> Ibid.

<sup>282</sup> AHRC, above n 26, 27.

<sup>283</sup> Hyndal and Yates, above n 28, 28.

<sup>284</sup> For example, Australian Passports are listed as primary documents on the Australian Government's Australian Taxation Office website for individuals applying for a tax file number. See <[www.ato.gov.au](http://www.ato.gov.au)>.

<sup>285</sup> See the *Australian Passports Act 2005* (Cth) s7,8, 43.

<sup>286</sup> [2007] AATA 1816 (28 September 2007).

Minister for Foreign Affairs and Trade, Alexander Downer, refused the issue of her passport. The Minister submitted that in applying s43(2) of the *Passports Act*:<sup>287</sup>

When considering a passport application from a person who has undergone gender reassignment surgery, the Department's policy is to request the provision of an amended birth certificate from the relevant Registrar of Births, Deaths and marriages (RBDM) recording the applicant's reassigned gender...The Department's policy is informed by the Marriage Act 1961 (Cth) which does not recognise marriage between two people of the same gender. A decision to not apply the policy in circumstances where an applicant for a passport was unable to obtain an amended birth certificate in his or her assigned gender because the person was married would be contrary to the Australian Government's legislated position which only recognises marriage between a man and a woman.<sup>288</sup>

Regardless, the AAT directed the Department to issue a passport reflecting Ms Abrams' identify as female and did not require a matching birth certificate.<sup>289</sup> The Tribunal stated that Ms Abrams could provide enough documentation to validate her identity as a female and as such a failure to present an amended birth certificate due to state legislation could not be seen to be valid grounds for rejection of her application.

In a statement issued by the Department of Foreign Affairs and Trade (DFAT) in 2007 it was said that 'the department has an obligation to ensure that the national passport reflects the official identity of the bearer and it would be inconsistent...to continue to issue passports, albeit limited in validity, to persons in a sex other than that shown in the records held by the...births deaths and marriages registrar',<sup>290</sup> however it would stand to reason that passports would issue to married transsexuals for the purpose of ensuring that the identity of an applicant for a passport is clearly recognised for security and other reasons. DFAT has as such since amended its *Manual of*

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<sup>287</sup> *Australian Passports Act 2005* (Cth).

<sup>288</sup> *Abrams* [2007] AATA 1816 (28 September 2007).

<sup>289</sup> Megan Smith, 'Trans Woman Wins Landmark Passport Case', *Out in Perth* (online) 5 November 2007 <<http://www.outinperth.com/trans-woman-wins-landmark-passport-case/>>.

<sup>290</sup> Maxine Frith, 'Natalie Imbruglia's Sex Change Cousin in Passport Row', *Sydney Morning Herald* (online) 19 August 2007 <<http://www.smh.com.au/news/national/natalie-imbruglias-cousin-in-passport-row/2007/08/18/1186857833242.html>>.

*Australian Passport Issue Policy*,<sup>291</sup> and now allows for a passport to be issued in a sex different to that of an applicant's birth certificate where the applicant cannot obtain an altered certificate due to their marital status, as well as for a person travelling in order to undergo gender reassignment overseas.<sup>292</sup> An application in such instances must be accompanied by medical evidence supporting their sex identity, evidence of living socially as their perceived gender, or a testimony from a State or Territory Birth Registrar stating that the applicant has met all other requirements for legal recognition of their post-operative sex except for being unmarried.

While this is not meant to be interpreted as indicative of the Commonwealth Government's view of an individual's legal status generally, when passports are issued in such circumstances, female applicants like Ms Abrams are in a position of having identification which recognises them as a legal woman, in a legally recognised marriage, with another legal woman. It would appear that State and Territory legislation refusing to amend birth certificates on the basis of marital status is now inconsistent with more evolved areas of Australian law which afford such people legal recognition regardless. Equally, it would appear that the definition as contained within the *Marriage Act* is becoming inconsistent with recent legal developments and with the social reality that such a definition no longer suits all Australian couples.

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<sup>291</sup> The Manual of Australian Passport Issue Policy is not accessible online however can be inspected at passport offices.

<sup>292</sup> These passports are valid for 12 months only.

## CONCLUSION

Discussion in Australia regarding the transgender community has taken many forms. Over the last two decades Australia has seen high profile national court cases, debates on law reform, and discussion on access and quality of health services. Regardless of its form, each time debate surfaces it revolves around legal recognition. In the absence of legislation, common law has, in the past, struggled with the notion of attributing gender to those who identify themselves as belonging to the opposite sex. However modern-day legal developments have cultivated ‘wide-spread legislative recognition’ of transgender persons as ‘man’ or ‘woman’ for the purposes of many areas of law, areas which include criminal law, corrections management, social security, foreign affairs and marriage.<sup>293</sup>

Despite such ‘wide-spread legislative recognition’, the lack of awareness within society in regards to gender issues has allowed for negative attitudes towards the transgender community to form. As a result transgender people often encounter harassment and stigmatisation, as well as violence due to their gender identity. Unsurprisingly, the rates for depression and suicide within transgender communities are much higher in comparison to levels found within the general Australian population.<sup>294</sup> However regardless of being a small minority within the community, the consequences such people face as a result of inappropriate legal protection from an intolerant society are severe. There is currently no protection under the federal *Sex Discrimination Act 1984* (Cth) or any other Commonwealth legislation which expressly prohibits discrimination on the grounds of sex or gender identity. While State and Territory Governments are beginning to enact anti discrimination legislation in an attempt rectify the situation locally, Australia is in desperate need of a nationally consistent approach to ending discrimination directed towards the transgendered community.

Gender reassignment surgery is currently a prerequisite within Australian jurisdictions for a legal change in sex. It has been legally established that such surgery will involve genital reconstruction surgery which will alter the reproductive organs. In many instances, however due to high financial expense and risk to personal health, individuals are either unable, or choose not

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<sup>293</sup> Mills and McConvill, above n 19, 58

<sup>294</sup> D’Augelli and Hershberger, above n 91, 981.

to undergo surgery while still presenting as a member of their perceived sex. In fact 85% of the transgendered community wish to alter their legal sex but are currently unable to do so.<sup>295</sup> The requirement for a person to become sterile and permanently infertile before obtaining legal recognition has human rights groups campaigning that the requirement for surgery is discriminatory. The decisions of Australian courts and tribunals as well as those precedents being set internationally are demonstrating an increasingly compassionate approach towards those who identify as transgender, suggesting that ‘surgery should be regarded as an individual choice for the person concerned, and not a prerequisite for the legal recognition of a person’s sex identity’.<sup>296</sup> This concept has been identified in a number of principles which have been incorporated into international treaties of which Australia is a signatory. As such, Australian governments have an international and human rights obligation to consider whether it is appropriate for surgery to be the only criteria for a legal sex change.

Further legal reform should address the restrictions placed on legal recognition so that marital status is not a relevant consideration. Marital status is currently viewed as relevant consideration as it avoids conflict with a particular definition of the institution as contained within the *Marriage Act*. However in moving past this ‘particular definition’, Australia has accepted that the concept of marriage is not one that is, or ever was, ‘frozen in time’, and nor should the institution be ‘understood by reference to a particular point in time in the past such as 1961’.<sup>297</sup> Changing attitudes along with a growing number of diverse relationships and family structures which exist outside of traditional marriage have led to an expansion in the legal rights afforded to Australian same-sex couples. This strongly suggests that Australian society has become accepting of legal recognition for same-sex unions.

While recognising the change of sex of a person who is married will effectively create a form of same-sex marriage, denying recognition does not alter the reality of a marriage which continues with two individuals who both identify and present as the same-sex. In fact, in refusing to amend birth certificates on the basis of marital status, state and territory legislation is now inconsistent with more evolved areas of Australian law which afford transsexuals legal recognition regardless; with specific reference being made to recent amendments to the

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<sup>295</sup> David et al, above n 129.

<sup>296</sup> AHRC, above n 26, 31.

<sup>297</sup> *Kevin and Jennifer* [2003] FamCA 94 (21 February 2003) [87].

Commonwealth *Passports Act*. It would appear that the definition as contained within the *Marriage Act* is becoming inconsistent with recent legal developments and with the social reality that such a definition no longer suits all Australian couples. As such it is discriminatory to deny gender recognition certificates based on marital status, and Australian legislation should be amended to remove this restriction.

Contemporaneously with the removal of marital status as a consideration for legal change of sex, the *Sex Discrimination Act*<sup>298</sup> should be amended to guarantee its application in the context of married people seeking amended birth certificates. As it currently stands, the Act is too limited in its application and has been extensively criticised by legal scholars as such. Until such legal reform occurs, legislation in Australia dealing with the implications of gender reassignment surgery on marriage will remain insufficient and impractical.

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<sup>298</sup> 1984 (Cth).

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