FAMILY LAW ACT

IN THE FULL COURT OF
THE FAMILY COURT OF AUSTRALIA
AT SYDNEY

Appeal No. EA 97/2001
File No. SY 8136/1999

BETWEEN

THE ATTORNEY-GENERAL FOR THE COMMONWEALTH

Appellant

and

"KEVIN AND JENNIFER"

Respondents

and

HUMAN RIGHTS AND EQUAL OPPORTUNITY COMMISSION

Intervener

REASONS FOR JUDGMENT OF THE FULL COURT

Coram:	**Nicholson CJ, Ellis and Brown JJ**
Dates of Hearing:	**18 and 19 February 2002**
Date of Judgment:	**21 February 2003**

APPEARANCES:

Mr Burmester QC with Ms Eastman of counsel instructed by the Australian Government Solicitor, 133 Castlereagh Street, Sydney NSW 2000, appeared on behalf of the Appellant.

Ms Rachel Wallbank, Solicitor of Wallbanks, Solicitors, 1 Marion Street, Strathfield NSW 2135, appeared on behalf of the Respondents.

Mr Basten QC instructed by the Human Rights and Equal Opportunity Commission, 133 Castlereagh Street, Sydney NSW 2000, appeared on behalf of the Intervener.

INTRODUCTION

1. This is an appeal by the Attorney-General for the Commonwealth against a declaration made by Chisholm J. on 12 October 2001 that the marriage between Kevin and Jennifer (pseudonyms used for the reasons of anonymity) ("the Respondents") solemnised on 21 August 1999 be declared a valid marriage.

2. In 1998, the Respondents made enquiries of the Attorney-General as to the validity of a proposed marriage between them. The reply that they received was inconclusive. They went through a ceremony of marriage on 21 August 1999 and thereafter have resided together as a married couple. At the date of the marriage, Kevin was a post-operative transsexual person who, at the time of his birth, was registered as a female.

3. On 18 October 1999, the Respondents filed an application seeking a declaration of the validity of the marriage pursuant to the provisions of s.113 of the *Family Law Act* 1975 (Cth) ("the *Family Law Act*"). The Attorney-General intervened in those proceedings which came on for hearing before Chisholm J. At the hearing, both the Respondents and the Attorney-General accepted that a valid marriage, for the purpose of the *Marriage Act* 1961 (Cth) ("the *Marriage Act*"), must be between a man and a woman. The Respondents submitted that, at the relevant time, namely the date of the marriage, Kevin was a man for the purpose of the marriage law of Australia and that the Court should thus declare that their marriage was valid. The Attorney-General submitted that Kevin was not a man for the purpose of the marriage law and that accordingly, the Respondents' application for a declaration should be dismissed.

4. The Respondents did not assert, either before the trial Judge or on appeal, that Australian law recognises marriage between same sex couples. Their contention was and is that, at the date of the marriage, Kevin was a man and accordingly their marriage is valid.

5. The trial Judge concluded that, for the purpose of ascertaining the validity of a marriage under Australian law, the question of whether a person is a man or a woman is to be determined as at the date of the marriage and that in the context of the rule that the parties to a valid marriage must be a man or a woman, the word 'man' has its ordinary current meaning according to Australian usage. The trial Judge further concluded in the light of the evidence that Kevin was a man for the purpose of the law of marriage at the date of the marriage.

BACKGROUND INFORMATION

6. At trial, a considerable volume of evidence was adduced as to Kevin's childhood experiences and the processes through which he transitioned from the appearance as female at birth to presenting as male at the date of his marriage.

7. We note that the trial Judge recorded that prior to the marriage, Kevin had undergone several medical procedures to remove both primary and secondary female sexual characteristics and to substitute male sexual characteristics. Expert evidence before the trial Judge concurred that the procedures and processes referred to in the evidence are the means through which gender reassignment is achieved. In Kevin's instance, this involved hormone treatment and irreversible surgery conducted by appropriately qualified medical practitioners.

8. Following surgery, Kevin applied to the Registrar of Births, Deaths and Marriages to have his reassigned sex from female to male noted on the Register of Births pursuant to the provisions of s.32B of the *Births, Deaths and Marriages Registration Act* 1995 (NSW). Subsequent to the medical procedures and processes, Kevin is recognised, under both Commonwealth law and the law of New South Wales where he resides, as a man for various purposes.

9. It was common ground before the trial Judge that Kevin had female chromosomes, gonads and genitals at birth. He deposed that for as long as he could remember, he had perceived himself to be male, that for years he has been living as a male and that he is treated as a male in his family, work and social life.

10. The path by which Kevin came to adopt the physical characteristics and social role of a male was set out by the trial Judge as follows:

> *"24. ... for as long as he could remember, Kevin has perceived himself to be male. When he was a very young child his mother tried to persuade him that he was a girl and that he should behave as a girl. She forced him to dress as a girl on special occasions. She had Kevin and his father stand naked in front of each other to demonstrate that they had different anatomies. None of this worked: he continued to believe he was a boy. He wore boys' clothes whenever he could. He refused to play with girls' toys.*
>
> *25. Kevin was the oldest of four children: he had three sisters. He saw his relationship with them as being that of an older brother. He would physically defend them, at school and elsewhere, after his father had left the family home. He did some of the physical tasks his father had done, such as mowing the lawns and doing household repairs. His mother gave him "boys' presents" such as footballs and cars, and made boy's clothing for him. Some family photographs are striking: at age 3, with pistols; at age 8, with a soccer ball and trophy. Most remarkable is a photograph of Kevin aged about 15 or 16, with his sisters. They are wearing pastel coloured dresses and sandals. He is wearing dark trousers and shoes, and what looks like a boy's shirt. To my eye, despite the shoulder length hair, he looks as much like a boy as a girl.*
>
> *26. Kevin describes his adolescence, and the feminisation of his body, as a "time of pain and dread". He was harassed at times at school because of his male attitude and appearance. He wore a jacket of the type worn by boys, and students mocked him, saying he was a girl, and asking why he dressed like that. Arguments would sometimes develop into fighting, at which he was adept. He says that during his adolescence and early adult years he kept most of his thoughts to himself and felt extremely alienated from people.*
>
> *27. In late 1994 he commenced work with his present employer. Throughout his employment there he generally presented as a male, wearing trousers and shirts to work. In mid 1995 someone showed him an article about sex reassignment treatment, and he can still recall his "feelings of relief and excitement upon learning of other people like me and of how they had discovered the medical means to express their true sex as men."*
>
> *28. Kevin embarked on hormone treatment in October 1995. This led to coarse hair growth on his face, chest, legs and stomach, and a deeper voice. His body was already muscular from sport and lifting weights, but it became more so. He later saw Dr. Anne Conway, an andrologist at the Concord Repatriation General Hospital. Dr. Conway reports that it is likely that he has had a testosterone level in the adult male range since 1995 and certainly since 1997 when he started treatment at her Department.*

29. *In November 1997 Dr. Laurence Ho, a plastic surgeon, carried out breast surgery as part of Kevin's gender reassignment program, reducing them to "suitable male size" by liposuction. Dr. Ho says that Kevin was "very pleased with the result". In September 1998 he had further surgery: Dr Anne Pike, whose report is also in evidence, performed a total hysterectomy with bilateral oophorectomy.*

30. *As a result, Kevin's body was no longer able to function as that of a female, particularly for the purposes of reproduction and sexual intercourse. Dr Haertsch, a plastic surgeon, has provided evidence that the surgery Kevin has undergone "is sexual reassignment surgery" within the meaning of Section 32A of the Birth Deaths and Marriages Registration Act 1995 (NSW). He has elected not to have further surgery involving the construction of a penis or testes. Such surgery is complex and expensive, and has risks of complications and failure. The Attorney-General has not sought to argue that the sex-reassignment surgery was in any way incomplete or unsuccessful."* (footnote omitted)

11. An affidavit of Professor Milton Diamond, Professor of Anatomy and Reproductive Biology at the School of Medicine, University of Hawaii, was put before Chisholm J. In his affidavit, Professor Diamond commented upon the reports of two expert psychiatric witnesses Professor Nathaniel McConaghy and Professor Cornelius Greenway, whose affidavits were also before Chisholm J. The factual contents of the affidavit evidence of these witnesses was not challenged at the hearing.

12. Professor Diamond deposed:

"[Kevin] is typical in choice of surgeries. Most often the female to male transsexual will adopt a male name and dress, and work, live and play as expected of a male in society. For the female to male (FtM) transsexual the most desired surgery is hysterectomy to stop menses, removal of ovaries to stop estrogen production and mastectomy to remove the breasts. His taking of male hormones produces hirsutism and a desired deepening of the voice. Phalloplasty, the construction of a penis to improve a male body image or to facilitate sexual activity is not uncommon but is less often requested. Many FtM transsexuals forgo this penile construction surgery due to its difficulty, lack of insurance that the penis will function adequately when surgery is complete and expense. Further, for many transsexuals, living as a male is done for mental reasons less associated with eroticism. Other behaviours can substitute for penile-vaginal intercourse. Following the actual sex reassignment surgery, female to male transsexuals generally "pass" quite well and are easily accepted in society.

Indeed, conditions are such that [Kevin] cannot probably live in any manner other than as a man in society. Aside from his inner feelings of male-ness, his appearance and demeanour would make it difficult for him to be accepted as a woman. To force such a condition would be cruel to him, to his wife and all social contacts. Society would most greatly lose thereby."

13. The rigours of undergoing the gender re-assignment process that would appear to have been experienced by Kevin are not unique. The general experience was eloquently described by Judge Martens in his dissenting opinion in the European Court of Human Rights in *Cossey v The United Kingdom* [1990] 13 EHRR 622, cited by Chisholm J, and referred to in submissions before us by counsel appearing on behalf of the Human Rights and Equal Opportunity Commission (at pars 3.16 and 3.17). Judge Martens commented:

"[A transsexual person] is prepared to shape himself and his fate. In doing so he goes through long, dangerous and painful medical treatment to have his sexual organs, as far as is humanly feasible, adapted to the sex he is convinced he belongs to. ...

Sexual identity is not only a fundamental aspect of everyone's personality but, through the ubiquity of the sexual dichotomy, also an important societal fact. For post-operative transsexuals sexual identity has, understandably, a very special and sensitive importance because they acquired theirs deliberately, at a high cost in mental and bodily suffering."

14. This case clearly illustrates the serious difficulties facing an individual such as Kevin, who has undertaken gender re-assignment.

THE REASONS FOR JUDGMENT OF THE TRIAL JUDGE

15. We feel it is helpful in the context of this case to summarise in some detail the judgment of the trial Judge, although it has been reported at (2001) FLC 93-087; (2001) 28 Fam LR 158.

16. A summary of his Honour's conclusions is as follows:

1. For the purpose of ascertaining the validity of the marriage under Australian law, the question whether a person is a man or a woman is to be determined as at the date of the marriage.

2. There is no rule or presumption that the question whether a person is a man or a woman for the purpose of marriage law is to be determined by reference to circumstances at the time of birth. Anything to the contrary in *Corbett v Corbett (otherwise Ashley)* [1971] P83 does not represent Australian law.

3. Unless the context requires a different interpretation, 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, *R v Harris & McGuiness* (1988)] 17 NSW LR 158; *Secretary, Department of Social Security v SRA* (1993) 118 ALR 467 followed.

4. The context of marriage law, and in particular the rule that the parties to a valid marriage must be a man and a woman, does not require any departure from ordinary current meaning according to Australian usage of the word 'man'.

5. There may be circumstances in which a person, who at birth had female chromosomes, gonads, and genitals, may nevertheless be a man at the date of a marriage. In this respect, the decision in *Corbett* does not represent Australian law.

6. In the present case, the husband at birth had female chromosomes, gonads and genitals but was a man for the purpose of the law of marriage at the time of his marriage, having regard to all the circumstances and in particular the following:

   (a) He had always perceived himself to be a male;
   (b) He was perceived by those who knew him to have had male characteristics since he was a young child;
   (c) Prior to the marriage he went through a full process of transsexual re-assignment, involving hormone treatment and irreversible surgery, conducted by appropriately qualified medical practitioners;
   (d) At the time of the marriage, in appearance, characteristics and behaviour he was perceived as a man, and accepted as a man, by his family, friends and work colleagues;
   (e) He was accepted as a man for a variety of social and legal purposes, including name, and admission to an IVF program, and in relation to such events occurring after the marriage, there was evidence that his characteristics at the relevant times were no different from his characteristics at the time of the marriage;
   (f) His marriage as a man was accepted, in full knowledge of his circumstances, by his family, friends and work colleagues.

17. His Honour's judgment contains an important discussion about the meaning of the term 'transsexual' as describing a person. He concluded that a 'transsexual'

means a person who has some or all of the physical or biological characteristics of one sex, but who experiences himself or herself as being of the opposite sex, and has undergone hormonal and surgical treatments to change some of the physical characteristics in order to conform more closely to the opposite sex.

18. His Honour pointed to the problem arising from the fact that the word 'transsexual' suggested a sexual transition, passing from one sex to the other, but he said that this did not convey the fact that transsexual people normally experience themselves as belonging to the other sex from birth and therefore before, as well as after, the hormonal or surgical procedures.

19. In a passage in his sensitive judgment, his Honour expressed concern that the use of the word 'transsexual' as a noun, might tend to have a dehumanising effect, but he felt that in the absence of any suitable alternative, he would have to adopt it. Although we share his Honour's concerns, we note that subsequent to Chisholm J's judgment the Lord Chancellor's Department has published a paper entitled *Government Policy concerning Transsexual People* (see: www.lcd.gov.uk.constitution/transsex/policy.htm) in which it is said:

> *"Government policy is to use the terms transsexual people or transsexual person, transsexualism and gender reassignment – and not the respective expressions transsexuals, transsexuality and sex change which some transsexual people find unacceptable."*

20. We respectfully agree with this suggested nomenclature and we propose to adopt it in this judgment.

21. It is important to remember that there is usually a distinction between a transsexual person and a homosexual person, as his Honour correctly pointed out. He noted that a transsexual person might or might not be of a homosexual orientation. Similarly, as his Honour pointed out, a transsexual person should not be confused with a person who is termed a 'transvestite', in that the latter is someone who dresses in the clothes of the other sex but often does not regard themself as a member of the opposite sex.

22. In coming to his conclusions, his Honour relied upon the evidence of specialist witnesses, including Professor Gooren, Professor McConoghy, Professor Diamond and Dr Cornelis Greenway. He recorded the observation of Professor McConoghy that Kevin presented as an intelligent, emotionally warm man, who would be accepted socially as completely masculine. Professor McConoghy also expressed the view that Kevin's *"brain sex or mental sex is male"*. His Honour noted that Professor McConoghy, in referring to the evidence of Professor Diamond, deposed that he agreed with Professor Diamond's opinion *"that further research will confirm the present evidence that brain sex or mental sex is a reality which would explain the persistence of a gender identity in the face of or contrary to external influences"*.

23. His Honour also referred to the following view expressed by Dr Greenway:

> *"After considering the history as given by Kevin and Kevin's presentation on interview, there is no doubt in my mind that Kevin is psychologically male and that this has been the situation all his life. There is also no doubt that as far as Kevin is concerned, he is a male and has always been a male. From the history provided by him, there is little doubt that people that know him consider him as a male and relate to him as a male. This certainly appears to have been the case on 21 August 1999 when he got married.*
>
> *I do not believe that Kevin's perception of himself as a male is a result of a psychosis nor of a delusional disorder. I do not believe that he is suffering from a body dysmorphic syndrome."*

24. His Honour also referred to the extensive non-medical evidence from some 39 witnesses, 23 of whom were family and friends of Kevin and 16 of whom were work colleagues and acquaintances. That evidence was to the effect that Kevin had always regarded himself as a male and had always been treated as such.

25. His Honour commented (at par 68):

> *"The cumulative impact of the evidence of these 39 witnesses is striking. It shows the husband as perceived by those involved with him and his family, at work, and in the community. It shows him as a person: not an object of anatomical curiosity but a human being living a life, as we do, among others, as a part of society. It shows him living a life that those around him perceive as a man's life. They see him and think of him as a man, doing what men do.*

They do not see him as a woman pretending to be a man. They do not pretend that he is a man, while believing he is not."

26. Thereafter, his Honour discussed *Corbett and Corbett* (Otherwise Ashley) (1971) P 83, in particular, Ormrod J's conclusion that an individual's sex is determined at birth by reference to an examination of three biological factors, namely chromosomes, gonads and genitals.

27. Chisholm J noted (at par 2) that *"Australian law has not yet determined the basis for ascertaining whether a person is a man or a woman for the purpose of marriage law"*. As the Attorney-General had largely relied upon the analysis presented by Ormrod J in *Corbett,* his Honour concluded that it was therefore necessary to closely examine the reasoning contained therein in order to determine whether *Corbett* represented the present law in Australia. If it were the case, it would then follow that the application must fail (at par 70). His Honour noted that English decisions such as *Corbett* *"... are no more than a guide to the common law in Australia"* (at par 71) and that the decision in *Corbett* was useful *"... only to the degree of the persuasiveness of its reasoning"*.

28. His Honour went on to say:

> *"73. ... I take it to be a question of law what criteria should be applied in determining whether a person is a man or a woman for the purpose of the law of marriage, and a question of fact whether the criteria exist in a particular case."* (footnote omitted)

29. His Honour identified the following as a key passage in the reasons of Ormrod J:

> *"It is common ground between all the medical witnesses that the biological sexual constitution of an individual is fixed at birth (at the latest), and cannot be changed, either by the natural development of organs of the opposite sex, or by medical or surgical means. The respondent's operation, therefore, cannot affect her true sex."*

30. Thereafter, his Honour summarised his understanding of the argument advanced by Ormrod J as follows:

1. *The biological sexual constitution of all individuals is fixed at birth and cannot be changed (major premise).*
2. *Ms Ashley's biological sexual constitution at birth was male (minor premise).*
3. *Therefore Ms Ashley's biological sexual constitution remains male (conclusion).*
4. *Therefore Ms Ashley's true sex is male.*
5. *The validity of the marriage depends upon Ms Ashley's true sex.*
6. *Therefore, the other party being a man, the marriage is invalid."*

31. His Honour said that while the first three steps appeared to be logical, the only basis for step four appeared to be that Ms Ashley's then biological sexual constitution was to be treated as equivalent to her true sex. He said that the key issue was whether social and psychological matters were relevant in determining whether April Ashley was a man or a woman, and that Ormrod J had excluded these matters by way of definition but gave no reason for doing so. His Honour then said that step five - which was apparently a statement of law - involved a similar problem because the asserted legal proposition that 'true sex' is the test for the validity of marriage is correct only if 'true sex' is the sole criterion of determining whether a person is a man or woman.

32. His Honour went on to say:

> *"80. The reasoning becomes more transparent if the term "true sex" is omitted and the legal principle is stated more accurately in terms of whether a person is a man or a woman. Thus clarified, the argument to this point in the judgment is this:-*
>
> 1. *The biological sexual constitution of all individuals is fixed at birth and cannot be changed (major premise)*
>
> 2. *Ms Ashley's biological sexual constitution at birth was male (minor premise).*
>
> 3. *Therefore Ms Ashley's biological sexual constitution remained male (conclusion).*
>
> 4. ***Whether a person is a man or a woman depends solely on the person's biological sexual constitution.***
>
> 5. *Since Ms Ashley's biological sexual constitution was male, she was a man.*
>
> 6. *Therefore, the other party being a man, the marriage is invalid.*

> *81. It is now possible to distinguish statements of fact from statements of law. Step 1 is a statement of fact, based on Ormrod J's understanding of the evidence. Such statements are general rather than specific, but I do not think such statements can properly be treated as equivalent to propositions of law. It may be appropriate for judges in later cases to assume they are true in the absence of any specific reason to dissent from them. However where evidence is given on the general factual issue, in my view the court must consider the evidence and determine the issue as one of fact.*
>
> *82. Step 2 is of course a finding of fact about the individual April Ashley on the evidence in Corbett, and has no wider significance. Step 3 is the logical conclusion of Step 1 and Step 2, as steps 5 and 6 are a logical application of the definition of marriage to the conclusions reached in steps 1-4.*
>
> *83. It is now clear that Step 4, which I have highlighted, is the critical step. It is the kernel of the judgment, the fundamental conclusion that congruent biological factors exclusively determine whether a person is a man or a woman."* (emphasis in original; footnotes omitted).

33. We agree with his Honour's conclusion but would qualify it by adding the words *"as apparent at birth"*. We qualify it because that was the effect of the judgment of Ormrod J and because, on the basis of the evidence accepted by his Honour, there may be aspects of a person's biological make-up and certainly his or her psyche that are not apparent at birth which were not taken into consideration by Ormrod J.

34. His Honour identified this proposition as the kernel of the *Corbett* judgment. He said it purported to be a statement of law setting out the criteria to be applied in determining whether a person is a man or a woman. However, he also noted that no relevant principle or policy was advanced to support the proposition and no authorities cited to show that it was consistent with other legal principles. The use of the term 'true sex' created the false impression that social and psychological matters had been shown to be irrelevant, whereas in truth, they had simply been assumed to be irrelevant.

35. His Honour's analysis and criticism of Ormrod J's judgment was that he had adopted an *"essentialist view"* of sexual identity that excluded matters other than biology. We agree with this view. It is the essence of Ormrod J's judgment.

Whatever the state of medical knowledge was as at 1970, it is apparent that 30 years later, Ormrod J's test is far too limited and we do not think that it represents the law in this country

36. We also note his Honour's criticism of Ormrod J's apparent focus upon the mechanics of genital sexual activity. He referred (at par 91) to what he described as a key sentence in Ormrod J's judgment, namely:

> *"The criteria must, in my judgment, be biological, for even the most extreme degree of transsexualism in a male or the most severe hormonal imbalance which can exist in a person with male chromosomes, male gonads and male genitalia cannot reproduce a person who is naturally capable of performing the essential role of a woman in marriage."*

37. His Honour said that the last few words in the passage quoted constituted the only reason given by Ormrod J for excluding non-biological matters. His Honour first queried the use of the word *"natural"* by his Lordship, and secondly his reference to the *"essential role of a woman in marriage"*. His Honour in this context referred (at par 93) to the following passage of Gordon Samuels' extra judicial comment in an article "Transsexualism" (1983) *Aust J Forensic Sciences* 57-64:

> *"There is no reason to suppose that she could not provide the companionship and support which one spouse ordinarily renders to the other. She could not conceive and bear children, but it is not the law that marriage is not consummated unless children are procreated or that procreation of children is the principle end of marriage. Hence the female spouse's ability or willingness to produce children is not a necessary incident of a valid marriage."*

38. We think that this statement has considerable force and represents what we consider to be a considerable shift in our community away from the purely sexual aspects of marriage in the direction of defining it in terms of companionship.

39. His Honour similarly criticised, and we believe correctly, the proposition that the capacity for genital intercourse is the essential role of the woman or the man in marriage. He rejected what he called an essentialist view of sexual identity that individuals have some basic essential quality that makes them male or female. His Honour expressed the view (at par 109) that the task of the law was not to

search for some mysterious entity, the person's 'true sex', but to give an answer to a practical human problem, that is, *"to determine the sex in which it is best for the individual to live"*.

40. His Honour therefore concluded in relation to *Corbett*, leaving aside any questions about the desirability of the result or of later medical, legal or social developments, that the reasoning of Ormrod J was not persuasive.

41. His Honour next dealt with the argument advanced on behalf of the Attorney-General that the meaning of the word 'man' in the *Marriage Act* should be taken to have the meaning that would have been attributed to the word when the legislation was passed in 1961.

42. His Honour rejected the proposition that there was any general rule of construction that ordinary words should be given the meaning that they had at the time of the passage of the relevant legislation and said that in fact there was support for the contrary view. His Honour said that he did not see any convincing reason to conclude that the legislature in 1961 would have had in mind, or should be deemed to have had in mind, a definition of 'man' that incorporated the *Corbett* approach, that case having been decided ten years later.

43. His Honour then discussed the Australian legal and social environment and the decisions of *R v Harris and McGuiness* (supra) and *Secretary, Department of Social Security v SRA* (supra). In both of those cases, the courts did not follow the reasoning in *Corbett*, although his Honour agreed that the judgments did not purport to overrule *Corbett* in the context of marriage law. Counsel for the Attorney-General criticised what he said was his Honour's failure to take into account the fact that the relevant courts in these cases distinguished *Corbett*, but we consider that he clearly did so.

44. His Honour then dealt with issues such as the recognition by the *Births, Deaths and Registration Act* 1995 (NSW) of transsexual persons and the recognition in the Commonwealth *Crimes Act*, following the *Crimes Amendment Forensic*

Procedures Act 2001, of the extension of provisions relating to females to include "*a trans gender person who identifies as a female*".

45. His Honour took the view that this type of legislation was of limited relevance, but that it did support the view that there was no insuperable objection to the law recognising the changed sex of a person who has undergone a sex reassignment procedure.

46. His Honour also commented that in the social sense the involvement of the Respondents in the artificial insemination program indicated that medical authorities have no difficulty in accepting Kevin as a man. His Honour considered that this was of particular importance, because the decision involved the approval of Kevin taking the role of husband and father, and that those involved saw no particular difficulties or impediments in this respect.

47. His Honour also referred to international legal developments and, in particular, the decision of the majority of the Court of Appeal in *Bellinger v Bellinger* [2001] 2 FLR 1048, which followed the decision in *Corbett*. He distinguished the English situation to that in Australia, where *Corbett* had never represented the law, and also distinguished the evidentiary situation in *Bellinger*. His Honour preferred what he described as the powerful dissent in *Bellinger* of Thorpe LJ, who held that whilst *Corbett* was right at the time that it was decided, later medical and social developments had rendered it wrong in 2001.

48. His Honour's judgment contains a useful and comprehensive survey of decisions in other common law jurisdictions and in Europe up to the date of his judgment. In particular, it points out that developments in Europe have tended to isolate the approach that has been taken by the United Kingdom courts in line with the judgment in *Corbett*.

49. After referring to European legislation and decisions, his Honour said (at par 207):

> *"Overall I think that these decisions indicate that failure to recognise the sex of post-operative transsexuals raises serious issues of human rights, such that*

> *the question arises whether the failure can be permitted on the basis of the margin of appreciation allowed to States under the Convention. It is clear that a decision in favour of the applicants would be more in accord with international thinking on human rights than a refusal of the application."*

50. His Honour referred to what he said was an increased understanding within the international community that was reflected in a general tendency to accept that, for legal purposes, including marriage, post-operative transsexual people should be treated as members of the sex to which they have been assigned.

51. His Honour's judgment contains a comprehensive discussion of the expert evidence that was given before him and its effect.

52. His Honour recorded (at par 247) *"The expert evidence affirmed that brain development is (at least) an important determinate of the person's sense of being a man or a woman"*. He noted that all of the experts who had sworn affidavits were well qualified and that none was required for cross-examination, nor was any contrary evidence called.

53. His Honour pointed out (at par 270) that it was the perception of Ormrod J, and of many medical experts at the time, that transsexual people *"suffered from a discontinuity between their biology and their psychology, whereas intersex people experienced inconsistencies within or among their biological qualities"*. His Honour was satisfied that the evidence now is inconsistent with this distinction.

54. His Honour said that in his view, the evidence demonstrated, at least on the balance of probabilities, that the characteristics of transsexual people were as much biological as those people thought of as intersex. He said that the difference was essentially that we can readily observe or identify genitals, chromosomes and gonads, but at present we are unable to detect or precisely identify the equally biological characteristics of the brain that are present in transsexual people.

55. However, having accepted this, his Honour said that he did not base his decision on the view that 'brain sex' is in law the decisive factor in determining whether a person is a man or a woman, but rather one of them.

56. We comment in passing that 'brain sex' is a somewhat unsatisfactory and ambiguous term that was used both before his Honour and ourselves. It is really a shorthand expression that refers to what is understood as being the final stage of sexual differentiation in a developing child's brain, following chromosomal configuration, gonadal differentiation, and genital differentiation. This theory was advanced in evidence by Professor Gooren, Professor Diamond, Professor Walters and Dr. Walker, and also discussed in detail in an article by Zhou (and others) ["A Sex Difference in the Human Brain and its relation to Transexuality" (1995) 378 *Nature* 68-70]. The relevance of this theory in relation to transsexual persons is that the weight of medical opinion generally agrees that in the instance of a transsexual person, that individual is born with a brain that recognises him or herself as a member of the sex opposite to that whose physiological indicia he or she bears. The expert evidence before his Honour, which he accepted, was that this was probably of biological origin within the brain. We consider that it was open to his Honour to make this finding. We shall continue to use the term 'brain sex' for want of a better one.

57. His Honour considered an argument advanced on behalf of the Attorney-General that marriage is a social institution having its origins in ancient Christian law and that it is intrinsically connected with procreation. It was submitted that there were therefore special considerations attached to marriage.

58. His Honour agreed that ancient Christian law does form the historical basis for marriage, but he was unable to form a conclusion as to how ancient Christian law might have regarded people like Kevin. He took the view that this question was somewhat unreal, since chromosomes were unknown at that time, as was the treatment that Kevin had undergone.

59. His Honour saw no reason why resort should be had to ancient law rather than contemporary understanding.

60. He rejected the proposition that marriage is intrinsically connected with procreation, pointing out that marriages are perfectly valid where one or both

parties are infertile. He also referred to the fact that since 1975, the law in Australia has provided no basis for invalidating a marriage on the ground of incapacity to consummate the marriage or indeed on any ground relating to the sexual conduct of parties.

61. His Honour was prepared to accept that in some general sense the role of marriage was closely connected to the generation and care of children. He said, however, that even if this proposition were accepted, it did not support the view that Kevin's marriage was invalid, because there was no evident reason why he and his wife could not bring up children, and in fact they were doing so. His Honour rejected an argument that a decision in favour of the application would produce enormous practical and legal difficulties.

62. His Honour's final conclusion in respect of *Corbett* (at par 326) was:

> *"Although the extensive evidence and argument require this judgment to be of considerable length, in my view there are overwhelming reasons why the application should be granted. I see no basis in legal principle or policy why Australian law should follow the decision in Corbett. To do so would, I think, create indefensible inconsistencies between Australian marriage law and other Australian laws. It would take the law in a direction that is generally contrary to developments in other countries. It would perpetuate a view that flies in the face of current medical understanding and practice. Most of all, it would impose indefensible suffering on people who have already had more than their share of difficulty, with no benefit to society."*

THE APPEAL

63. The Attorney-General's Notice of Appeal filed on 26 November 2001 was not within the time prescribed by the *Family Law Rules*. This was due to the federal election. No objection was raised in this regard. The Notice specifies the following eight grounds of appeal:

> *"1. The Judge erred in determining that while the Respondent husband at birth had female chromosomes, gonads and genitals, he was a man for the purpose of the Marriage Act at the time of his marriage.*
> *2. The Judge erred in finding that considerations in addition to the congruence of a person's chromosomes, gonads and genitals were*

relevant to determining a person's sex for the purpose of the law of marriage.

3. *The Judge erred in having regard to evidence about brain sex as a relevant consideration in determining whether a person is a man for the purposes of the law of marriage.*
4. *The Judge erred in considering that social acceptance of a person's sex is a relevant consideration in determining whether a person is a man for the purposes of the law of marriage.*
5. *The Judge erred in holding that the ordinary meaning of man for the purpose of the Marriage Act includes a post-operative female to male transsexual.*
6. *The Judge erred in rejecting that there were special considerations applicable to marriage for the purpose of construing the meaning of 'man' and 'woman' in the Marriage Act.*
7. *The Judge erred in rejecting the contention that it is for the Parliament to determine whether a post-operative transsexual may marry as a person of the sex other than their biological sex at birth.*
8. *The Judge should have found that if a person's chromosomes, gonads and genitals are congruently of one sex at birth, that is determinative in deciding whether the person is a man or woman for the purposes of marriage."*

64. On 8 February 2002, the Full Court granted leave, pursuant to s. 92 of the *Family Law Act* to the Human Rights and Equal Opportunity Commission to intervene in this appeal. The Commission appeared by counsel at the hearing and advanced arguments supporting the position of the Respondents as to the validity of their marriage.

65. For reasons we gave *ex tempore* on the first day of the hearing of the appeal, we refused an application by the Respondents for the appeal to be heard in closed court.

THE ISSUES

66. The central question on this appeal is whether it was open to Chisholm J to find that at the relevant time, namely the date of the marriage, Kevin was a man within the meaning of the *Marriage Act* 1961 and that his marriage to Jennifer was thus a valid marriage. As part of this process it is necessary also to consider whether Chisholm J was correct in the meaning he ascribed to marriage as the term is used in the *Marriage Act*.

67. For the purposes of these proceedings it was common ground that marriage is a union between a man and a woman signified by certain formalities and carrying with it a status recognised by the law. The issue of whether a marriage can occur between people of the same sex is not an issue in this case. Similarly, the status of pre-operative transsexual persons is not directly in issue.

68. We are therefore required to consider the following issues:

    1. What is the historical context of marriage in our society? Is it a static or evolving institution?

    2. What is encompassed by the word 'marriage' as used in the Constitution?

    3. What is the nature of the issues before the Court and to what extent are the various matters to be determined in this case questions of law and questions of fact?

    4. Should marriage be given the meaning that it had at the time of the passage of the *Marriage Act* and what was its meaning at that time? A subsidiary question is whether the *Marriage Act* constitutes a code, which would support such an interpretation? Alternatively, should marriage be given its contemporary, ordinary, everyday meaning?

    5. Is the meaning of marriage confined by the fact that it is a social institution having its origins in ancient Christian law? To what extent does it have its origins in ancient Christian law, and in the absence of an established religion in Australia does this has any relevance? Is or should marriage be regarded as intrinsically connected with procreation as asserted by counsel for the Attorney-General?

    6. Should this Court follow the English decisions of *Corbett* and *Bellinger* in determining the issues in this case? Do they represent the law in Australia? In any event was the trial Judge entitled to distinguish those decisions upon the

basis that the evidence before him asserted that brain sex and/or psyche were equally important factors to those factors identified in *Corbett*?

7. Was the trial Judge in error in taking into account issues such as social acceptance, evidence of community attitudes, and the Respondents' acceptance into in-vitro fertilization programmes by the medical profession as evidence of the meaning of 'man', for the purpose of the marriage law, in contemporary society?

8. What other international legal developments have taken place that might assist in the determination of the primary issues in this case?

9. What is the position of transsexual persons in relation to marriage in the context of international human rights law, and what effect does it have in determining the primary issues raised by this case? What is the relevance (if any) of the United Nations Convention on the Rights of the Child?

10. What is the effect of various Australian Federal and State statutes and administrative procedures recognising the position of transsexual persons in relation to issues such as birth certificates and the criminal law in relation to the issues in this case?

11. Do the contemporary everyday meanings of the words 'man' and 'marriage' extend to a transsexual person such as Kevin and his marriage to Jennifer?

The Historical Context of Marriage in our Society

69. It would be neither necessary, nor desirable, to attempt to cover as vast a subject in a judgment such as this. However, since counsel for the Attorney-General has argued that 'marriage', in the context of the *Marriage Act*, should be interpreted from a monogamistic Christian perspective, we think we should touch upon it. He did not advance any detailed historical analysis, nor did he provide us with any references that supported this proposition, despite being invited to do so by us.

70. We think that there is force in the submission of Mr Basten QC on behalf of the Human Rights and Equal Opportunity Commission that the resort by the Attorney-General to terminology describing marriage as a social institution, having its origins in ancient Christian law, can readily disguise stereotypical assumptions and perspectives on the nature of modern marriage relationships.

71. It is common ground that marriage is an important and special social and legal institution, both for the individuals who enter into that commitment, and for the society in which they live. We consider the following remarks by the Law Commission of Canada [(2001) *Beyond Conjugality: Recognising and supporting close personal adult relationships* available at: http://www.lcc.gc.ca/en/themes/pr/cpra/report.asp] equally applicable to the Australian context and thus apposite:

> *"Many people long for stability and certainty in their personal relationships just as they do in other areas of their lives, at work or in business. The state does have a role in providing legal mechanisms for people to be able to achieve such private understandings. It must provide an orderly framework in which people can express their commitment to each other and voluntarily assume a range of legal rights and obligations.*
>
> *In attempting to provide for adequate legal structures or mechanisms that may support the relationships that people develop, the state must respect the values that we outlined earlier: equality, autonomy and choice.*
>
> *For a long time, the state has focused on marriage as the vehicle of choice for adults to express their commitment. Marriage provides parties with the ability to state publicly and officially their intentions toward one another. It is entered voluntarily. It also provides for certainty and stability since the marriage cannot be terminated without legal procedures. Marriage as a legal tool demonstrates characteristics of voluntariness, stability, certainty and publicity that made it attractive as a model to regulate relationships."*

72. Brennan J (as he then was) undertook a review of the history of marriage in *The Queen v L* (1991) 174 CLR 379 in proceedings involving a question of interpretation of the Constitution where a man was facing trial for the alleged rape of his wife. The accused sought to have the Court find that s.73(3) of the *Criminal Law Consolidation Act* 1935 (S.A.) was invalid:

"No person shall, by reason only of the fact that he is married to some other person, be presumed to have consented to sexual intercourse with that other person."

73. The invalidity was argued to arise due to s. 114(2) of the *Family Law Act* which states:

"In exercising its powers under sub-section (1), the court may make an order relieving a party to a marriage from any obligation to perform marital services or render conjugal rights."

74. Section 109 of the Constitution states:

"When a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid."

75. The accused's arguments were summarised (at 384-5) by Mason CJ, Deane and Toohey JJ as follows:

" The respondent submitted that the two provisions are directly inconsistent in that the State Act "eliminates the obligation to perform 'conjugal rights' for every married person in the State of South Australia" while the Commonwealth Act "assumes the existence of the obligation (to render conjugal rights) but gives the Family Court a discretion to relieve a party from it if appropriate". Section 114(2), the respondent argued, preserves the common law notion of "conjugal rights" and that notion, he said, involves the proposition that a wife, by virtue of being married, cannot refuse her consent to sexual intercourse with her husband; that a husband has a "right" to sexual intercourse and that a wife has an obligation to submit to it.

The respondent further submitted that, if the two provisions are not inconsistent, nevertheless the Commonwealth "has intended to 'cover the field' concerning the legal consequences of marriage" and that the State Act seeks to regulate one of those consequences."

76. All five members of the High Court rejected those arguments. Brennan J's judgment (at 391) drew upon historical sources to rebut what he considered an underlying assumption, that:

"a husband has a right to have sexual intercourse with his wife whenever he wishes, irrespective of the circumstances, and, if need be, to take her by force and that a wife has, by virtue of her marriage, consented to any act of sexual intercourse with her by her husband."

77. Explaining that such a proposition *"is not and never has been the law of marriage"*, his Honour said (at 391-2):

> *"The legal nature of the institution of marriage is not to be found in the common law. Holdsworth observes that "(t)he temporal courts had no doctrine of marriage" and he records that jurisdiction in matrimonial causes was vested in the ecclesiastical courts from at least the 12th century until the 19th century. The doctrines of the law of marriage were developed in the ecclesiastical courts, not in the courts of common law. Sir William Scott (later Lord Stowell) in Lindo v. Belisario referred to differing opinions as to the nature of marriage: the early opinion of the Ecclesiastical Court that marriage is "a sacred, religious, and spiritual contract", another opinion that it is merely a civil contract. His Lordship thought that neither of those opinions was completely accurate, holding marriage to be "a contract according to the law of nature, antecedent to civil institution, ... a contract of the greatest importance in civil institutions, ... charged with a vast variety of obligations merely civil". In Hyde v. Hyde and Woodmansee, Lord Penzance defined marriage as "the voluntary union for life of one man and one woman, to the exclusion of all others" and that definition has been followed in this country and by this Court. It is the definition adopted by the Family Law Act, s.43(a) of which requires a court exercising jurisdiction under that Act to have regard to "the need to preserve and protect the institution of marriage as the union of a man and a woman to the exclusion of all others voluntarily entered into for life". Marriage is an institution which not only creates the status of husband and wife but also, without further or specific agreement, creates certain mutual rights and obligations owed to and by the respective spouses."*
> (footnotes omitted)

78. As our subsequent discussion about marriage and the Constitution shows, there has been a divergence of opinion in the High Court about the meaning of marriage in a constitutional sense. Brennan J in a number of cases expressed strong views in favour of a traditional definition of marriage based upon its religious origins. However, he considered that the incidents of marriage had never included a husband's right to sexual intercourse with his wife without consent.

79. For a contrasting view on the modern role and meaning of marriage, see the remarks of Thorpe LJ in his dissenting judgment in *Bellinger* (at pars 126 – 129 of

his Lordship's judgment) and those of the Law Commission of Canada quoted in our reasons.

80. For our part, we would question the views of Brennan J as to the unchanged nature of the institution of marriage and the inability of Parliament to legislate in respect of it. With great respect to his Honour, we feel that it would be potentially highly destructive to the institution of marriage for its definition to be frozen at any point in time.

81. Fogarty J in *W v T* (1998) FLC 92-808 also examined the historical development of marriage with, as was required by the case, particular attention to the issue of solemnisation. His Honour said:

> *"6.12 Since the waning of the influence of Roman civil law by the fifth and sixth centuries in Western Europe, English, and subsequently Australian, law relating to the formation of marriage has been an amalgam of ecclesiastical law and statutory provision. Under the former, and notwithstanding the religious nature of the union, marriage was a formless affair, essentially constituted by the contract of the parties. In the Report of the Committee on One Parent Families (the Finer Report) (1974) vol.2, p.86, it was said that "in order to reduce the chances of exposure to deadly sin through sexual waywardness, the Church maximised the number of ways in which a lawful union could be contracted. In the result, marriage became a formless contract requiring little more than the consent of the parties."*
>
> *6.13 It appears that the requirement of two adult witnesses was introduced into Western Europe (but not England) in the sixteenth century by the Council of Trent and into England by Lord Hardwicke's Act in 1753 (as to both of which see later), but was not a necessary requirement before that time: see, for example, the decision of the House of Lords in Beamish, supra, at 308.*
>
> *6.14 Although marriages were more commonly celebrated in facie ecclesiae, that is, at the church door in the presence of the priest followed by the religious service within the church, canon law recognised marriages privately or even clandestinely contracted. It distinguished between espousals of two kinds - where the couple promised that they would thereafter become husband and wife (per verba de futuro) and where they declared themselves now to be husband and wife (per verba de praesenti). In the latter case, the marriage was created by the exchange of promises whereas the former was essentially a betrothal and marriage was recognised only upon its subsequent consummation. There was no essential need for the presence or intervention of a minister of religion although that was usual, at least amongst the more educated and propertied classes. It was also strongly encouraged by the*

church and, if the matter came before it, the ecclesiastical court may order the parties to go through a church service.

6.15 In The Road to Divorce: England 1530-1987: Stone, (1992) 2 ed. at 53, it was described thus:-

> *"In the Middle Ages there were thus two culturally acceptable forms of marriage in England. There was the official mode practised by the ruling elite, which demanded a public and clerically supervised marriage, in a church, within canonical hours, after either putting up the banns three times or purchasing a licence. And there was also the popular mode of verbal contract or spousals, accompanied by folk rituals."*

6.16 However, that was radically changed by the Tametsi decree of the Council of Trent (1545-1563) which provided that for the future the presence of a priest and two witnesses were essential pre-requisites to a valid marriage. As this decree was post reformation, it did not apply in England, and the ancient ecclesiastical law continued to regulate marriages in England. The only accepted exception to that is that as a result of legislation in 1653 during the Commonwealth period marriages were required to take place before a justice of the peace. However, after the Restoration that legislation was repealed, except that marriages solemnized in that form during that period were declared valid without the need for further solemnization.

6.17 The consequence was that in England, although many marriages were more regularly celebrated in the sense of being celebrated at church, private and at times clandestine marriages continued to be recognised. The general literature of the time is replete with examples of this. A number of legislative attempts were made to remedy what was described in Bromley, Family Law 8 ed. (1992) at 40 as "the social evils which resulted in such a law", including the scandals arising from "Fleet" marriages and other clandestine ceremonies, but without success until Lord Hardwicke's Marriage Act in 1753. That was directed specifically "for the better preventing of clandestine marriages" and made a number of provisions directed to that, including the publication of banns, the consent of the parents or guardians, and the registration of marriages. Its main purpose was to protect property interests: Stone: The Family, Sex and Marriage at 30-35."

82. Harrison's historical review [(1982) *Informal Marriages: Working Paper No. 1*) The Australian Institute of Family Studies] also highlights the close relationship between marriage law and property law, observing (at 1-2) that:

> *"Before the period of industrialisation, status depended upon an alliance of political power and economic wealth. Marriage was an important connecting link in determining status, and this in time was intrinsically tied to the importance of legitimacy, which enabled power and wealth to be passed on to an acceptable group. Conversely, for those groups who were powerless and*

poor marriage was irrelevant as it offered them no material advantage. So legal marriage was basically for the wealthy – a means of preserving property and inheritance rights."

83. Her review further indicates (at 2):

"Civil marriages were not really catered for until 1836 when formalities regarding such marriages were introduced, but this was still only an optional system. Ecclesiastical jurisdiction over marriage formulation and termination can be said to have survived in England until 1857 when the Matrimonial Causes Act conferred jurisdiction to grant divorces in civil courts.

Later, the industrialising world came to accept the 'appropriateness' of state regulation of the formation, organisation and dissolution of marriage. The law became closely involved with social conduct, often in great detail as with the codifications of Prussia (1794) and France (1792). Furthermore, in the eighteenth and nineteenth centuries, the indissolubility of marriage and the emphasis on marriage as performing the 'correct' social function permeated the law. This ideology concealed the property transmitting function of marriage stressing rather its moral and religious attributes."

84. In a related vein, the historical summary found in the Law Commission of Canada Report (supra) states:

"In the late 19th century, the law continued to enforce the Christian understanding of marriage as a lifelong, indissoluble union of one man and one woman to the exclusion of all others. Legal regulation supported a division of labour along gender lines: in urban areas at least, wives were to provide a range of domestic services in exchange for their husbands' economic support. The law worked together with other social practices to place its weight behind the Christian conception of marriage. Intimate relations within marriages were protected from state scrutiny, while sexual activity outside of marriage was heavily discouraged. Unmarried mothers and their children were penalized. Divorce was so difficult and costly to obtain that formal dissolution of marriages was not an option that could be contemplated by Canadians of ordinary means. Limitations on women's civil and political rights were seen as extensions of wives' legal and financial dependency on their husbands. We now see the nineteenth century model of marital regulation as one that was deeply implicated in structures of gender inequality." (footnotes omitted)

85. The Law Commission's observations about contemporary Canadian society which then follow are, we think, analogous to the Australian context, namely:

"The contemporary law of marriage is very different. Women have achieved recognition of their independent legal personalities and equal political rights.

> *Gender-neutral laws have replaced legislation that accorded different legal rights and responsibilities to husbands and wives. Contemporary family laws recognize marriage as a partnership between equals. Sexual assault within marriage and other forms of domestic abuse can give rise to criminal prosecution. Marriages are no longer legally indissoluble: the availability of no-fault divorce makes the continuation of a marital union a matter of mutual consent. The decision whether or not to procreate and raise children is an issue of fundamental personal choice. The heavy legal and social penalties imposed on non-marital cohabitation or children born out of wedlock have been removed. The law has had to recognize that children formerly known as "illegitimate" are part of society – not recognizing their existence does not make them less so and fails to protect their basic interests."* (footnotes omitted)

86. Similarly, we would endorse as apposite to Australia, the following important perspective that the Law Commission of Canada appears to adopt:

> *"Borrowing the term from the history of church and state, Nancy Cott* [(2000) *Public Vows: A History of Marriage and the Nation*, Harvard University Press, Harvard at 212.] *has described the transformation in the relationship between marriage and the state in the United States as "disestablishment". **Just as the state does not recognize a single, officially established church, no longer is any single, official model of adult intimate relationship supported and enforced by the state.**"* (emphasis added, footnote in text)

87. To conclude this necessarily brief survey, we think it plain 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 the particular 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. The relevance of this conclusion for the purposes of these reasons for judgment, is that on the sources we have had to identify for ourselves, there is no historical justification to support Mr Burmester's contention that the meaning of marriage should be understood by reference to a particular point in time in the past, such as 1961. To the contrary, it lends support to the arguments of the Respondents and the Human Rights and Equal Opportunity Commission as to statutory interpretation and the decision of the trial Judge that the meaning of the term should be given its ordinary contemporary meaning in the context of the *Marriage Act*.

Marriage and the Constitution

88. The Commonwealth's power with respect to marriage is derived from s. 51(xxi) of the Constitution. This states:

> *"The Parliament shall ... have power to make laws for the peace, order, and good government of the Commonwealth with respect to: - Marriage."*

89. Marriage is undefined in the Constitution and Mr Burmester was careful to indicate that he was not seeking to advance any argument as to the meaning of the word 'marriage' in the Constitution. He sought to argue as to its meaning in the *Marriage Act*, which he said might be narrower than the word 'marriage' as used in the Constitution.

90. However we think it is important to consider the meaning of marriage in the Constitution as a means of throwing light upon its meaning in the *Marriage Act*.

91. The High Court of Australia has never finally determined the meaning of marriage as used in the Constitution. Higgins J in *Attorney-General for NSW v Brewery Employees Union of NSW* (1908) 6 CLR 469 at 610 said:

> *"Under the power to make laws with respect of marriage, I should say that the parliament could prescribe what unions are to be regarded as marriages."*

92. In *Attorney-General (Vic) v The Commonwealth* (1962) 107 CLR 529 at 549, McTiernan J took the view that marriage bears its own limitations and that Parliament could not enlarge its meaning. He would have confined its meaning to monogamous marriage. However in the same case, Windeyer J (at 576-77) cited the view expressed by Higgins J above and said that he considered it an unwarranted limitation to say that legislative power does not extend to marriages that differ essentially from the monogamous marriage of Christianity.

93. In four subsequent cases, Brennan J took a much narrower view. In *Cormick & Cormick v Salmon* (1984) 156 CLR 170 at 182 he held that the scope of the marriage power conferred by the Constitution was to be determined by reference to what falls within the conception of marriage in the Constitution and not by

reference to what Parliament deems to be, or to be within, that conception. In *Re: F ex parte F* (1986) 161 CLR 376 at 399, his Honour considered that marriage as a subject of legislative power embraced those relationships which the law recognises as the relationships which subsist between husband, wife and the children of the marriage. He took the view that only those relationships which are already embraced within the subject are amenable to regulation by a law and act as an exercise of the marriage power. In the same case, Mason and Deane JJ (at 389) said:

> *"Obviously the parliament cannot extend the ambit of its own legislative powers by purporting to give to marriage an even wider meaning than that which the word bears in its constitutional context."*

94. In *Fisher and Fisher* (1986) 161 CLR 376 at 455-456, Brennan J expressed a similar view, but on this occasion said:

> *"The nature and incidence of the legal institution which the Constitution recognises as marriage… are ascertained not by reference to laws enacted in purported pursuance to the power but by reference to the customs of our society, especially when they are reflected in the common law, which show the content of the power as it was confirmed."*

95. Subsequently, in *The Queen v L* (supra) (at 392), Brennan J quoted the definition in *Hyde's* case as the definition that has been followed in this country *"and by this court"*.

96. On the other hand, in *Re : Wakim; ex parte McNally* (1999) 198 CLR 511 at 553, McHugh J said:

> *"The level of abstraction for some terms of the Constitution is, however, much harder to identify than that of those set out above. Thus in 1901" marriage" was seen as meaning a voluntary union of life between one man and one woman to the exclusion of all others. If that level of abstraction were now accepted, it would deny the parliament of the Commonwealth of power to legislate for same sex marriages, although arguably marriage now means, or in the near future may mean, a voluntary union for life between two people to the exclusion of others."*

97. The views expressed by Brennan J and earlier by McTiernan J would, if they represent the law, appear to lend some support to the Attorney-General's contention as to the narrow meaning of 'marriage' as used in the *Marriage Act*. If the Constitutional definition of marriage is to be regarded as frozen in time to the definition as it was understood in 1901, then the *Marriage Act* could not be construed as having a wider interpretation. Indeed if it purported to do so, it would be rendered unconstitutional or, at best, would have to be read down to that extent.

98. On the other hand, the views of Higgins, Windeyer and McHugh JJ would give it a much wider constitutional meaning. If it does have a wider meaning in the Constitution than the traditional definition, it would, we think, be strongly arguable that its meaning clearly extends to a marriage of the type under consideration in this case.

99. It seems to us that we should not in this case adopt the narrow interpretation of marriage in the Constitution expressed by McTiernan J and Brennan J. Indeed the Attorney-General did not argue that we should do so. With respect to their Honours, it seems to us that such an interpretation might well conceptually exclude Australian marriages as recognised by other religions such as Judaism and Islam from being regulated by the Parliament. In this context, we note the definition of 'minister of religion' in the *Marriage Act* and the reference to 'authorised celebrants' in Divisions 1 and 2 of Part IV of that Act.

100. It seems to be inconsistent with the approach of the High Court to the interpretation of other heads of Commonwealth power to place marriage in a special category, frozen in time to 1901. We therefore approach the matter on the basis that it is within the power of Parliament to regulate marriages within Australia that are outside the monogamistic Christian tradition. Indeed, the contrary was not argued on behalf of the Attorney-General.

The Nature of the Issues before the Court and whether they are Questions of Law or Questions of Fact

101. There was considerable discussion in argument both before us, and the trial Judge, as to which issues were questions of law and which were questions of fact.

102. At par 73 of his reasons, Chisholm J said, when analysing Ormrod J's reasoning in *Corbett*:

> *"I take it to be a question of law what criteria should be applied in determining whether a person is a man or a woman for the purpose of the law of marriage, and a question of fact whether the criteria exist in a particular case."*

103. In the footnote (27) that attached to par 73, his Honour commented:

> *"For a more elaborate but consistent analysis, see Secretary, Department of Social Security v SRA (1993) 118 ALR 467. If the reasoning of the Supreme Court of Victoria in R v Cogley [1989] 799, 803-806, is read as meaning that that it is a question of fact what criteria are to be taken into account in determining sex or gender, then I respectfully disagree, and prefer the analysis in Secretary, Department of Social Security v SRA (1993) 118 ALR 467."*

104. His Honour ultimately held (at par 136) that:

> *"... in the present context the word "man" should be given its ordinary contemporary meaning. In determining that meaning, it is relevant to have regard to many things that were the subject of evidence and submissions. They include the context of the legislation, the body of case law on the meaning of "man" and similar words, the purpose of the legislation, and the current legal, social and medical environment."*

105. As noted by his Honour, comparable arguments would appear to have faced the Full Court of the Federal Court of Australia in *Secretary, Department of Social Security v SRA* (1993) 118 ALR 467 in which it was argued that the words 'woman' and 'female' and the phrase 'opposite sex' are ordinary English words, not technical terms. It was there submitted that since the meaning of ordinary

English words and phrases is a question of fact, no question of law arose. From this footing, it was submitted that the appeal before the Full Court had to fail because an appeal from the Tribunal was only possible on a matter of law. Lockhart J said (at 480):

> *"Whether an Act of Parliament uses words according to their ordinary meaning in the English language or in any other sense, in particular a special scientific or technical sense, is a question of law. If it is decided that a particular word or phrase in a statute is used as an ordinary English word or phrase then it is a question of fact as to the common understanding of the word or phrase. But the crucial question for present purposes is the next question, namely, whether or not the evidence before the court reasonably admits of different conclusions as to whether certain facts or circumstances fall within the ordinary meaning of the relevant word or phrase. That is a question of law. If different conclusions are reasonably possible, it is necessary to decide which is the correct conclusion and that is a question of fact: see FCT v Broken Hill South Ltd (1941) 65 CLR 150; New South Wales Associated Blue-Metal Quarries Ltd v FCT (1956) 94 CLR 509; Hope v Bathurst City Council (1980) 144 CLR 1; 29 ALR 577; FCT v Cooper (1991) 29 FCR 177; 99 ALR 703."*

106. His Honour held that the words in issue were ordinary English words and further that (at 480):

> *"...the question in the present case is whether the evidence before the tribunal reasonably admits of different considerations as to whether the facts and circumstances fall within the ordinary meaning of those words. This is a question of law and it is at the heart of the present case."*

107. On the issue of what were questions of law and what were questions of fact, Ms Wallbank, counsel for the Respondents, argued that the question as to whether the words 'marriage' and 'man' as used in the *Marriage Act* and the Act should be given their contemporary ordinary everyday meaning, was a question of law, citing *Collector of Customs v Pressure Tankers Pty Ltd and Pozzolanic Enterprises Pty Ltd* (1993) 43 FCR 280 at 289. She also referred to the speech of Lord Reid in *Cozens v Brutus* [1973] AC 854 at 861, where his Lordship said:

> *"The meaning of an ordinary word of the English language is not a question of law. The proper construction is a question of law. If the context shows that a word is used in an unusual sense the court will determine in other words*

what that unusual sense is. But here there is in my opinion no question of the word "insulting" being used in any unusual sense. It appears to me for reasons which I shall give later, to be intended to have its ordinary meaning. It is for the tribunal which decides the case to consider, not as law but as fact, whether in the whole circumstances the words of the statute do or do not as a matter of ordinary usage of the English language cover or apply to the facts which have been proved. If it is alleged that the tribunal has reached a wrong decision, then there can be a question of law but only of a limited character. The question would normally be whether their decision was unreasonable in the sense that no tribunal acquainted with the ordinary use of language could reasonably reach that decision."

108. We accept this proposition. We also find Lockhart J's approach to this issue particularly helpful.

109. Looking to the first matter identified in Lockhart J's approach, the presently relevant proposition may be stated as follows: whether the *Marriage Act* uses the words 'man' and 'marriage' in a technical or in an ordinary sense is a question of law. In our view, the trial Judge was correct in characterising this issue as a question of law.

110. The definition of 'marriage' is essentially connected with the term 'man'. In these circumstances, for the reasons stated by the trial Judge as amplified by our reasons that appear subsequently, we take the view that the words 'marriage' and 'man' are not technical terms and should be given their ordinary contemporary meaning in the context of the *Marriage Act*.

111. In our view, it thus becomes a question of fact as to what the contemporary, everyday meanings of the words 'marriage' and 'man' are respectively.

112. It then is a question of law for this court to determine whether, on the facts found by the trial Judge, it was open to him to reach the conclusion that he did, namely that at the relevant time, Kevin was a man and that the marriage was

therefore valid. As it was in *SRA* (supra), so, too, it is that the answer to that question is *"at the heart of the present case"*.

The Meaning of Marriage as used in the *Marriage Act* 1961

(a) The *Marriage Act* as a Code

113. On the issue of interpretation of the *Marriage Act*, Mr Burmester submitted that contrary to the finding of the trial Judge, the *Marriage Act* operates as a code. He said that this has the effect that the words 'marriage' and 'man' and 'woman' should bear the meaning that they had at the time of the Act's passage in 1961.

114. He said that this meaning was that used in the *Hyde* definition, meaning, as we understand it, that marriage as used in the Act should be confined to its 19th century common law meaning.

115. Mr Burmester referred to ss. 46 (1) and 69(2) of the *Marriage Act* and, in particular, to the provisions of those sections that require a marriage celebrant or marriage officer to state that marriage, according to the law of Australia, is *"the union of a man and woman to the exclusion of all others, voluntarily entered into for life"*. In this regard he also referred to s. 43(a) of the *Family Law Act* where the same words are used, and to the well known definition of marriage by Lord Penzance in *Hyde v Hyde and Woodmansee* (1866) LR 1 P&D 130 from which this definition is drawn.

116. He said it followed from this that, as at 1961 and at the time of the passage of the Act, the Parliament was making provision in relation to the traditional union in marriage of a man and woman only, having regard to the long established and understood meaning of those terms in that context.

117. We do not think that ss. 46 (1) and 69(2) of the *Marriage Act* and s. 43(a) of the *Family Law Act* have the effect contended for by Mr Burmester.

118. As pointed out by Butler-Sloss P and Robert Walker LJ in *Bellinger* (supra), the existence of modern divorce laws negates the proposition that marriage is now to be regarded as a union for life. Further, we agree with the submission of Ms Wallbank for the Respondents that there is nothing to suggest that Lord Penzance in *Hyde* (supra), from which the words used in those sections are drawn, intended the words 'marriage' and 'man' to have anything other than their contemporary and ordinary meaning.

119. Finally, the words used in the sections to which we have referred do not have the effect of defining 'marriage' and 'man'. Those words are left undefined. The words of the sections do no more than provide an indication that Parliament may have intended that such a meaning was already encompassed by the legislation.

120. It was submitted on behalf of the Attorney-General that the evidence relied upon by the Respondents confirmed that in 1961 it would not have been contemplated that the definition of 'man' in the *Marriage Act* would have included post-operative transsexual people. Mr Burmester therefore argued that Parliament could not have contemplated that the marriage of a woman to a female-to-male post-operative transsexual person was a marriage of a woman and a man. In our view this submission begs the question. It may be that Parliament would not have had this in contemplation in 1961 (although we are not satisfied as to this), but the question is whether the Parliament intended that the meaning of the words should be confined to their meaning in 1961.

121. We will turn shortly to deal with his argument as to the particular status of marriage, but for this purpose Mr Burmester was relying on the comments of Brennan J (as he then was) in *Corporate Affairs Commission of NSW v Yuill* (1991) 172 CLR 319 at 323 as to codes.

122. On this issue, Mr Basten argued that *Yuill* (supra) was not authority for the general rule of construction for which the Attorney-General contended. He

pointed out that the principle identified by Brennan J in *Yuill* (supra) at 323 was as follows:

> *"And so, the answer to our first question is that the code should be construed in the light of the law as it stood when the code came into force ... unless there be something in the code which is inconsistent with the operation that would thus attribute to the code."*

123. Mr Basten argued that that proposition might be accepted because it reflects one of a number of maxims which might be of assistance in relevant circumstances. However, he commented that no other member of the Court applied that principle in *Yuill's* case, Brennan J being the only member of the Court who did give effect to the code principle in arriving at his decision in that case. We adopt as correct the argument of Mr Basten that that particular case has no application to the present circumstances. In a sense it is a circular argument advanced on behalf of the Attorney-General because if the views advanced by Brennan J were to have application, it would first be necessary to construe the *Marriage Act* as a code.

124. Ms Wallbank for the Respondents argued that the proposition that the *Marriage Act* constituted a code should be rejected in circumstances where Parliament had chosen not to define the words 'man' or 'marriage' in it.

125. Mr Basten supported her submissions, saying that it was necessary to return to the fact that there was no definition of marriage in the *Marriage Act*, and thus there appears to be no basis in that Act for imposing constraints on who may be identified as a man or a woman for the purpose of it.

126. We are unable to accept the argument on behalf of the Attorney-General that the *Marriage Act* constitutes a code. The fact that 'marriage' is undefined, as are the words 'man' and 'woman', in our view negates any such Parliamentary intention. If Parliament had wished to prescribe a code it seems to us to be inconceivable that it would not have defined these terms.

127. We are strengthened in this view by reference to the Parliamentary debates relating to the *Marriage Act* to which Mr Basten, counsel for the Human Rights and Equal Opportunity Commission, referred and, in particular, to the fact that an amendment seeking to define marriage in accordance with the *Hyde* definition was defeated in the Senate. It is of interest to note that the Minister representing the Attorney-General in the Senate commented, in opposing the amendment, that it was for the Courts to define 'marriage': *Senate Hansard,* 18 April 1961, pp 542-555.

(b) Should the meaning of marriage be confined to its 1961 or earlier meaning or should it be given its modern contemporary meaning?

128. Mr Burmester argued that in an area of the law like marriage it is not appropriate for a court to give an interpretation that does not reflect the clear understanding of Parliament at the time of the enactment of the original legislation.

129. He said that as Parliament had intended marriage in the *Marriage Act* to be confined to its traditional meaning, then the principles expressed by Lord Slynn in *Fitzpatrick v Sterling Housing Association Ltd* [2001] AC 27 and the Court in *Joyce v Grimshaw* (2000) 105 FCR 232 at 244-5 were applicable.

130. This submission assumes an intention on the part of Parliament that we do not think counsel for the Attorney-General has been able to demonstrate.

131. Lord Slynn in *Fitzpatrick v Sterling Housing Association Ltd* (supra) (at 33) said:

> *"It has been suggested that for your Lordships to decide this appeal in favour of the appellant would be to usurp the function of Parliament. It is trite that that is something the courts must not do. When considering social issues in particular judges must not substitute their own views to fill gaps. They must consider whether the new facts `fall within the parliamentary intention' (see*

Royal College of Nursing of the UK v Department of Health and Social Security [1981] 1 All E.R. 545 at page 565; [1981] A.C.800 at page 822 per Lord Wilberforce). Thus in the present context if, for example, it was explicit or clear that Parliament intended the word `family' to have a narrow meaning for all time, it would be a court's duty to give effect to it whatever changes in social attitudes a court might think ought to be reflected in the legislation. Similarly, if it were explicit or clear that the word must be given a very wide meaning so as to cover relationships for which a court, conscious of the traditional views of society might disapprove, the court's duty would be to give effect to it. It is, however, for the court in the first place to interpret each phrase in its statutory context. To do so is not to usurp Parliament's function; not to do so would be to abdicate the judicial function. If Parliament takes the view that the result is not what is wanted it will change the legislation."

132. It is of interest to note that Lord Slynn, having said this, held that despite the fact that the Appellant, who was the same sex partner of the deceased, would not have been regarded as a member of the deceased's family in 1920 when the relevant Act was passed, he should be so regarded in 2001. He did so upon the basis that Parliament had not intended to confine the expression 'family' to its 1920 meaning.

133. It seems to us that this passage does no more than make it clear that if it appears from the context that Parliament intended a word to be confined to its meaning, or to have some special or technical meaning at the time that an Act is passed, then the courts must respect that view and not substitute their own views. If the contrary is the case, then the courts must determine the meaning of the word in its contemporary sense. Mr Burmester's argument depends upon an unsubstantiated assertion as to the intention of Parliament.

134. Mr Burmester further argued that where the natural meaning of the words 'man' and 'woman' are clear, the will of the Parliament must be respected, even where the Court may perceive that this would amount to an injustice. This is, of course correct, but it again begs the question before us in this appeal.

135. He further submitted that Chisholm J's approach of construing the meaning of 'man' based on a desire to achieve *"the humane and practical trend to accept the reality of gender reassignment"* (at par 288) departs from the proper approach of construing the *Marriage Act*.

136. Whether it does so or not is dependent, at least in part, upon whether the meaning of 'marriage' and hence 'man' in the *Marriage Act'* is so clear that such an approach would be impermissible. If it extends to its contemporary, normal and everyday meaning we think that this is obviously a relevant consideration.

137. We note that the trial Judge defined marriage in contemporary terms. In doing so, he applied what Bennion (1997) *Statutory Interpretation – A Code* (3rd Ed) (at 686) has described as a *"presumption that updating construction be given"*. His Honour rejected the argument based on *Yuill* (supra) that there was a general rule of construction that ordinary words should be given the meaning that they had at the time the legislation was passed.

138. We agree with his Honour's conclusion for the reasons given by him and the views that we have expressed above.

(c) The Special Status of Marriage as a Social Institution having its Origins in Ancient Christian Law

139. Mr Burmester next argued that marriage is a social institution having its origins in ancient Christian law and is intrinsically connected with procreation.

140. In support of this argument he cited: *Maynard v Hill* 125 U.S. 190 (1888) at 205 and 211; *Egan v Canada* [1995] 2 SCR 513 at 536 per La Forest J (dissenting); *Layland v Ontario (Consumer and Commercial Relations) and others* (1993) 104 DLR (4th) 214 at 222-223 per Greer J; *Miron v Trudel* [1995] 2 SCR 418 at 448 and *Quilter v Attorney-General* [1998] 1 NZLR 523.

141. He argued that because marriage confers a status and is an institution that provides the foundation of the family and society, there are special considerations associated with it to which regard must be had in construing the meaning of the words 'man' and 'woman' in relation to marriage.

142. Mr Basten was critical of the Appellant's reliance upon the judgment of La Forrest J in *Egan v Canada* (supra). He said that on the question of present relevance, La Forrest J was in a minority and that, in any event, the issue in that case was not whether a transsexual post-operative person was a man for the purpose of marriage, but whether the government could distinguish between a relationship with cohabitation involving two men and a heterosexual marriage.

143. He also criticised the Attorney-General's reliance on the concepts of marriage, said to be a reflection of the long standing philosophical and religious condition, pointing out that such terminology can readily disguise assumptions and stereotypical judgments.

144. He said that it was important to note that in all but three Australian States (Queensland, Victoria and Tasmania) legislation is in place which provides for transsexual people to have their record of birth reflect their reassigned sex, which has the effect (for the purposes of the law of the relevant State or Territory) that the person is of the sex as so altered. It was also pointed out that in all but one Australian State (Queensland), anti-discrimination legislation prohibits discrimination and, in some cases, vilification on the basis that a person has a transsexual history. In this regard we note that since the hearing of the appeal, the Queensland Parliament has enacted the *Discrimination Law Amendment Act* 2002 (Act No 74 of 2002 assented to 13 December 2002).

145. Mr Basten said that there had been two developments in the law since 1961 which cast doubt upon the appropriateness of the approach sought to be adopted by the Attorney-General in identifying special considerations relating to marriage.

146. The first of these was the *Sex Discrimination Act* 1984 (Cth), which proscribes discrimination across wide areas of public life, including powers and functions exercised under Commonwealth law or for the purposes of a Commonwealth program, on the grounds of marital status, meaning that marital status is an irrelevant consideration for most public purposes.

147. He submitted that that fact made it unlikely that, as a matter of law, there were special considerations which required any restrictive definition to be given to the term "man" for the purpose of the *Marriage Act*.

148. Secondly, it was put that care should be taken in treating some particular physical characteristic as sufficient to deny a man or woman of the status of a particular sex and cited the *Disability Discrimination Act* 1992 (Cth).

149. In oral argument, Mr Basten also relied upon the decision of the High Court in *The Queen v L* (supra), where the Court held unanimously that it is not a rule of the common law that marriage constitutes an irrevocable consent to sexual intercourse.

150. While it is apparent from the historical survey that we have undertaken that marriage has its origins in ancient law, we should not have thought that these were confined to Christian law. Marriage is a well-recognised institution in many monotheistic and other faiths. It is true that its origins in our society are historically deeply rooted in Christian law.

151. However, we think it strongly arguable that marriage is now a secularised institution in our society. There are no longer any requirements for a religious ceremony associated with marriage, and its occurrence, formalities and registration are purely secular. It is apparent that many non-Christians enter into marriage in our community pursuant to the provisions of the *Marriage Act*. In such circumstances, we agree with the trial Judge that its historical Christian origins are not relevant or helpful in the determination of the present issue.

152. The real point of the Attorney-General's submission was to support an argument that procreation is one of the essential purposes of marriage. It was argued that it follows from this that the biological characteristics of a person are central to determining a person's status as a man or a woman. It was put that the historical importance of the sexual relationship in marriage remains and that it is because of this significance that the law continues to look to the physical attributes, and not the psychological or social attributes, of a person. It is therefore said that because of Kevin's biological inability to procreate, the marriage to Jennifer could not be a valid marriage.

153. Apart from the stated purpose of procreation relied upon by the Attorney-General, we accept, as did the trial Judge, that marriage has a particular status. Like the trial Judge, we reject the argument that one of the principal purposes of marriage is procreation. Many people procreate outside marriage and many people who are married neither procreate, nor contemplate doing so. A significant number of married persons cannot procreate either at the time of the marriage or subsequently - an obvious example being a post - menopausal woman. Similarly, it is inappropriate and incorrect to suggest that consummation is in any way a requirement to the creation of a valid marriage. Subsequent to the passage of the *Marriage Act*, inability to consummate a marriage ceased to be a ground for making a declaration of nullity: see ss. 1 and 51 of the *Family Law Act* and ss. 23, 23A, and 23B of the *Marriage Act*.

154. Once that argument is rejected, it seems to us that the giving of a special status to marriage takes the present issue no further. We therefore find it unnecessary to make findings as to the effect of the *Sex Discrimination Act* 1984 and the *Disability Discrimination Act* 1992.

155. Otherwise we see no reason to differ from the submissions of the Attorney-General as to the special status of marriage. Indeed, the very basis of the Respondents' claim is an entitlement to have their relationship accorded the status of marriage.

The Application of the *Corbett* Test

156. This test was rejected by Chisholm J for the reasons already stated. This test is, in substance, that the sex of a person at birth is determinative if their chromosomes, genitals and gonads are congruent at that time. If they are not and a person falls into the category of being an intersex person, then it would appear that the law permits them to choose their 'true sex'. Whilst Ormrod J was prepared to consider that psychological and hormonal factors or secondary sexual characteristics were possible criteria for determining the sex of a person, he rejected them in favour of the biological factors to which he referred.

(a) Submissions on behalf of the Attorney-General

157. Mr Burmester conceded that the decision of Ormrod J was that of a single judge and was not binding in this country. However, he argued that it was relevant to note that the *Corbett* test had been applied by courts in a number of countries. He placed particular reliance on the decision of the majority of the Court of Appeal in England in *Bellinger* (supra).

158. Mr Burmester submitted that the decision of the majority of the Court of Appeal represented the Australian position and sought to distinguish *R v Harris and McGuiness* (supra) and *Secretary Department of Social Security v SRA* (supra) upon the basis that neither of these decisions addressed the issue of the validity of a marriage or the meaning of 'man' for the purpose of the *Marriage Act*.

159. He said that the latter two cases stood as authority for the proposition that a post operative transsexual person may be treated as a member of his or her adopted sex for certain purposes but that these do not extend to marriage. He stated that in both cases the court was careful to distinguish the issue before them from any issue involving marriage. He criticised Chisholm J, saying that although his Honour had cited these cases, he failed to have any regard to the observations of these judges

as to different considerations relating to marriage other than to note that they were critical of *Corbett*.

160. He submitted that in the absence of clear authority against *Corbett* and any significant legal and administrative developments that would have brought into question the meaning of 'marriage' and the meaning of 'man' for the purpose of marriage, his Honour was in error in rejecting the *Corbett* test.

(b) Submissions of the Respondents

161. Ms Wallbank's submissions commenced from the footing that in the proceedings before Chisholm J, it was never contended by the Respondents that Kevin was born a female. She said that such a proposition could only be correct if, contrary to the respondent's submissions, brain sex was irrelevant in determining a person's sex.

162. She said that the position of the Respondents has always been that the decision in *Corbett* was wrong and that in so far as Kevin's sex at the time of birth was concerned, the only concession made was that his sex was shown as female on his birth certificate. She said that the Respondents had never contended that Kevin should be treated as a man: rather that he was a man. In this regard, her submissions went well beyond relying upon his social and psychological acceptance as a man and the undergoing of surgery.

163. Ms Wallbank further argued that, at the time of the marriage, Kevin should be regarded as a man in that: his secondary sexual characteristics were male; his hormonal balance was that of a male; his body was unable to function as that of a female, including for the purposes of reproduction and sexual intercourse; and he was in no way fit or able to live as a woman or to be perceived as such.

164. She submitted that Kevin was undoubtedly a man for the purposes of the criminal and social security laws and was a recognised trans-gender person as defined in s. 41 of the *Anti Discrimination Act* 1977 (NSW).

165. She also relied upon the issue of a birth certificate in NSW subsequent to the surgery and hormonal treatment in which his sex was shown as male. She said that it was also relevant that he was entitled to have the Commonwealth issue him with a passport identifying him as male.

166. Ms Wallbank said that if and in so far as *Corbett* formed part of the common law of England, it did not form part of the common law of Australia. Further, because it was decided subsequent to the passage of the *Marriage Act*, it could not be said that its reasoning was endorsed by the Commonwealth Parliament when it enacted the *Marriage Act.*

167. She said that the *Corbett* test ignored the biological characteristic of brain sex as well as other factors referred to by the expert evidence in that case, such as hormonal balance. It also ignored the evidence that an individual's sex could be differently determined at different times between the event of birth and the event of marriage.

168. Ms Wallbank also relied upon Chisholm J's acceptance of the importance of brain sex and his finding that the brain of an individual may in some sense be male, although the rest of the person's body is female. She also relied upon Chisholm J's findings that the evidence demonstrated, at least on the balance of probabilities, that the characteristics of transsexual people were as much biological as those of people thought of as intersex.

169. She argued that the approach of counsel for the Attorney-General, that a person could be a man for the purposes of criminal and social security law, but a woman for the purpose of the law of marriage, was totally inconsistent with common sense. She submitted it was highly desirable that the law be consistent in relation to the meaning of man and woman.

170. It was her submission that, with the enactment of the *Family Law Act*, the decision in *Corbett* was easily distinguishable upon the basis that since 1975, Australian law has provided that non-consummation of a marriage does not make the marriage void. Ms Wallbank suggested that a contrary legal situation in England might explain why Ormrod J in *Corbett* exhibited a remarkable focus on the mechanics of genital sexual activity. She therefore submitted that the proposition that procreation was an intrinsic part of marriage should be rejected in circumstances where many married couples choose not have children or are unable to do so, or have children assisted by way of assisted reproductive technology.

171. She said that, as demonstrated by Chisholm J, a review of the history of decisions of various courts around the world in respect of the issue of transsexualism and marriage, indicated that what she described as the exclusive and essentialist approach adopted in *Corbett* is not, in fact, the traditional approach of the issue, but merely represents an extreme, fundamentalist approach to the issue that was a departure from an earlier, more humane legal approach to the variation of human sexual formation.

172. She said that once his Honour had determined the question of law as to whether or not the words 'man' and 'woman' and particularly the word 'man' should be given its ordinary everyday meaning in the affirmative, the next question was the question of fact as to whether Kevin fell within that meaning. She submitted that at that point, the case of *Corbett* becomes irrelevant.

(c) Submissions of the Human Rights and Equal Opportunity Commission

173. Ms Wallbank was supported in these submissions by Mr Basten. In a comment upon the Attorney-General's reliance upon the judgment of Ormrod J in *Corbett*, counsel for the Commission pointed out (at pars 1.5 and 1.6 of written submissions) that the definition proposed by him is as follows:

"X is a man if and only if X was born with – (a) male genitalia; (b) male gonads and (c) male chromosomes. The definition of woman would presumably be the obverse.

This proposition gives rise to three separate questions which illuminate the nature of the approach adopted by the Attorney-General.

(1) Does it follow that a person who fails at birth to satisfy each of the criteria (commonly referred to as an intersex person) is neither man nor woman?
(2) If surgical or other medical intervention is possible, can a person become a man or woman after birth?
(3) Why is each of the characteristics necessary and why are no others included?"

174. Mr Basten pointed out that the answers to these questions were by no means obvious, but that the choice could have significant consequences for human rights and individuals affected.

175. He said, for example, that on one view someone identified as an intersex person at birth could never marry. This would, of course, assume that the decision of Charles J in *W v W* [2001] 2 WLR 673 does not represent the law in Australia. On this issue, as we explain later in these reasons, counsel for the Attorney-General did not argue that this decision was wrong.

176. He submitted that the approach taken by counsel for the Attorney-General had two difficulties at a very basic level of principle. The first was that there is no clear reason why Ormrod J accepted three physiological criteria as the means of definition of who is a man and rejected others. The second was that once one acknowledges the relevance of the physiological criteria, then one is not limited to considerations which are provable scientifically as having a particular cause and effect at the present time and that cruder evidence may need to be looked at. He said that in that sense there was every justification for the approach taken by the trial Judge, which was to look at the perceptions of others who observed the person over a period of time as being relevant to the identification function, which he had to carry out.

177. He put that if one were to deny the Respondents the right to marry each other, that would be to impose upon them precisely the kind of discriminatory effect and

burden which would, as perceived by them, be devaluing of their position as recognised members of Australian society. He asked rhetorically, what is the legislative purpose to be divined from the *Marriage Act*, which requires that step to be taken? He said that this was where the difficulty in identifying legislative purpose became manifest. He submitted that normally one would seek not to adopt an interpretation that would have such a discriminatory effect, given the absence of any clear need to treat the legislation as giving rise to such a distinction.

(d) The Respondents' Submissions in relation to *Bellinger*

178. So far as the decision in *Bellinger* was concerned, Ms Wallbank submitted that the court at first instance and the Court of Appeal did not have the benefit of the extensive expert evidence that was given before Chisholm J. She also pointed out that in *Bellinger*, in the majority judgment, it is clear that at first instance, counsel for Mrs Bellinger agreed that the decision of Charles J in *W v W* (supra) had no relevance. She submitted that this was a concession that counsel should not have made, but it meant that in the proceedings before the Court of Appeal, there was no suggestion that Mrs Bellinger was incorrectly assigned to the male sex at birth or that she fell within the group described as intersex. She said that in this regard the expert evidence submitted before Chisholm J provided overwhelming support for the proposition that the process of human sexual development includes the sexual differentiation of the brain. She said that the same expert evidence provided overwhelming support for the proposition that transsexual people were properly to be characterised as intersex when the sexual differentiation in the human brain was taken into account.

179. She therefore said that the submission that the marriage should be declared invalid, was inconsistent with the submission made by counsel for the Attorney-General, that the biological characteristics of a person are central to determining that person's status as a man or woman.

180. In this regard we note that counsel for the Attorney-General specifically refrained from arguing that the decision of Charles J in *W v W* was wrong or should not be applied in Australia. He was pressed in the course of his argument by the Chief Justice as to what the position of the Attorney-General would be if the Full Court were to accept the argument that brain sex was a **biological** characteristic, and upon this basis, would effectively convert this case into an intersex case, to which the principles adopted in that decision, if correct, would apply. We think it not unkind to counsel to say that he did not commit himself to answer this question, but neither did he argue that the decision was wrong.

181. In her submission Ms Wallbank laid heavy stress upon the correctness of the decision in *W v W* and of Thorpe L J's dissenting judgment in *Bellinger* where his Lordship referred to the striking similarities between Mrs W and Mrs Bellinger. She submitted that there was no justification for treating the two individuals differently, and, in particular, for denying marriage to Mrs Bellinger, while allowing it for Mrs W.

182. She argued that there was no reason for the concern expressed by counsel for the Attorney-General that the denial of the right to marry to one category of intersexed persons, namely transsexual persons, avoided practical problems that were potentially likely to arise if a person's sex, for the purpose of marriage, can change during their life.

183. Ms Wallbank also argued that the clear evidence before Chisholm J was that transsexualism is nothing more nor less than a natural biological variation in the sexual formation of a human being, whereby the brain of a human being differentiates as to sex contrary to the other sexually differentiated features of that human being.

184. She said that Chisholm J had before him some of the most distinguished medical experts in the world in the fields of human sexual formation and function, and therefore it was no surprise the Attorney-General did not adduce evidence to contradict that evidence, nor seek to cross-examine those witnesses.

185. She submitted that the power of each individual opinion expressed by Professors Gooren, Walters, and Diamond, and Dr Walker, is their concurrence on the following issues:

1. That transsexualism is an intersex condition; and

2. That the phenomenon called transsexualism arises because of the once-off sexual differentiation of the human brain that occurs in the formation of a human being.

186. She pointed out that in ***Bellinger***, the court did not have any submissions or evidence before it to the effect that transsexualism was an intersex condition. She relied upon the evidence of Dr Walker that medical practitioners normally refrain from surgically intervening to resolve any incongruity in relation to sexuality, because they prefer to wait until the child himself or herself has had the opportunity to disclose either directly or by way of behaviour what sex their brain has determined them to be.

187. She relied upon the medical evidence that the reason why the medical practitioners who are involved in the day to day issues of this work, give predominance to brain sex out of all of the sexually differentiated features of a human being, is that it cannot be changed. Of all of the relevant factors determining sex, the one thing that has been found is that people cannot live in contradiction with brain sex.

188. She said that the type of incongruity under discussion in this case is not one that gives rise to a preference to perform occasionally in the sex determined by the mind. Further, it is not an instance of desire or predilection, but rather that it is so compelling that the need to bring harmony between the life of sexual experience and the brain sex of the individual means people who experience transsexualism are prepared to risk everything including their livelihood, their family connections, and their health by undergoing surgery in order to bring that

harmony about. She said that Kevin came to the court having done all of those things, involving both hormonal treatment and surgical intervention.

189. She submitted that it was a terrible thing for the Attorney-General to submit that the *Corbett* test should be applied in Australia where that test divides people on the basis of natural variation in human formation. She said that to apply *Corbett* would be to introduce a form of biological apartheid with regard to the law of marriage, which does not exist in any other law, including criminal law and social security law in this country. She said that if the *Corbett* test is to be applied, this means that there will be a group of 'normal' people who have sexual congruity at birth and who are able to marry. Transsexual people are another group, who if they have physical congruity at birth are never permitted to marry a member of what to them is the opposite sex. However, people who experience variation in sexual formation who are not transsexual people can marry.

190. She said that the end result of the application of the *Corbett* test therefore, is that the only group of people who are never permitted to marry a person they perceive to be of the opposite sex are transsexual people.

191. Finally, she pointed out that subsequent research carried out in 1993 and 2000 had taken the matter further than the evidence before Ormrod J in *Corbett.*

Conclusions as to the Application of the *Corbett* test

192. It is significant to note that in considering this matter we do so in the absence of any binding authority as to the major issues before us.

193. Indeed, the only authorities that we must consider on the issue of what constitutes a man for the purpose of the marriage law are, at best, persuasive and to a certain extent conflicting.

194. It is clear that we are not bound by the decision in *Corbett*, which was decided subsequent to the passage of the *Marriage Act* and was the decision of a single judge.

195. Like the trial Judge in the present case, and for the same reasons, we do not think the reasoning in *Corbett* to be persuasive. Further, we agree that the evidence that was before Chisholm J goes considerably further than that that was before Ormrod J in *Corbett*, which is also distinguishable upon that ground. We broadly accept the submissions of Ms Wallbank in respect of *Corbett* as they relate to a person such as Kevin. We believe they have considerable force, and it is for these reasons that we have set them out in some detail.

Australian Authorities

196. We think that before turning to examine the reasoning of the Court of Appeal in *Bellinger*, which is the strongest authority in favour of the submission on behalf of the Attorney-General that we should follow *Corbett*, it is useful to examine the reasoning in the two Australian appellate cases to which we were referred, namely *R v Harris and McGuiness* (supra) and *Secretary Department of Social Security v SRA* (supra) and also that of Charles J in *W v W* (supra).

197. *R v Harris and McGuiness* came before the NSW Court of Criminal Appeal on a case stated from the District Court. The case involved the issue as to whether the accused persons were male within the meaning of a particular statute that made certain conduct, if performed by a male person, an offence. One of those accused was a transsexual person who had undergone a full surgical reassignment from male to female. The other was a pre-operative transsexual person.

198. The Court, by a majority (Street CJ and Mathews J; Carruthers J dissenting), decided that the transsexual person who had undergone surgical gender re-assignment was a female. However, it found that the other accused person remained a male.

199. Mathews J, who delivered the principal majority judgment, engaged in a most extensive discussion of the authorities and legal writings then available throughout the world relating to this issue.

200. Her Honour commented that although the *Corbett* approach had prevailed in Commonwealth jurisdictions at that time, it by no means represented the only solution to the problem and had sparked immediate and continuing criticism from legal commentators. She said that the substantial criticism of *Corbett* related to Ormrod J's failure to accord any legal significance to the reassignment surgery undertaken by the wife in that case.

201. She criticised Ormrod' J's insistence on the determination of 'true sex' by reference to certain biological features and his resulting determination that 'true sex' is fixed at the moment of birth.

202. She referred to Ormrod J's conclusion that the fundamental purpose of the law is the regulation of the relations between persons and the state and the community, and considered that the state of a person's chromosomes had no relation to his or her criminal liability.

203. It is of interest to note her Honour's comments in relation to the other appellant, McGuiness, where she said (at 193):

> *"So far as the appellant McGuiness is concerned, it is urged that we should not only decline to follow Corbett, but that we should also treat biological factors as entirely secondary to psychological ones. In other words, where a person's gender identification differs from his or her biological sex, the former should in all cases prevail. It would follow that all transsexuals would be treated in law according to their sex of identification, regardless of whether they had undertaken any medical treatment to make their bodies conform with that identification.*
>
> *Whilst I have the greatest of sympathy for Ms McGuiness and for others in her predicament, I could not subscribe to this approach. It goes far beyond anything which has so far been suggested by even the most progressive of reviewers. It 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. It follows that Ms McGuiness, being a pre-operative transsexual, is still a "male person" under s. 81A."*

204. While it is unnecessary for us to decide this issue in this case, we think that it requires consideration and is discussed subsequently.

205. Her Honour also referred to the first instance decision of Bell J in this Court in *In the Marriage of C and D (falsely called C)* (1979) FLC 90-636 where his Honour held that a person who was intersex, having both male and female physical sexual characteristics, could not marry. She noted that the decision had been strongly criticised in that his Honour purported to follow *Corbett* although *Corbett* was not such a case. We agree that this decision was clearly wrong, for the reasons set out in her Honour's judgment (at 176-7) and for the reasons that we discuss when we come to consider *W v W*.

206. In relation to *Corbett,* we think that the remarks of Street CJ (at 160) are also apposite:

> *"At the time it was decided Corbett was regarded as a beacon in largely uncharted seas. In the years that have followed, many jurisdictions have voyaged upon those seas but the beacon has by no means been universally regarded as furnishing safe navigational guidance. Moreover, as a more compassionate, tolerant attitude to the problem of human sexuality emerges amongst the civilised nations of the world, the founding of that decision on clinical factors present at birth has come under increasing criticism. Its continuing application, even in the field of marriage and divorce in the United Kingdom, has for some time been at least open to criticism.*
>
> *For my own part, I share the approach developed by Mathews J in her comprehensive survey of authority. I share also the view of Sir Ronald Wilson quoted by Mathews J in which he reflects upon the failure of the law to accommodate a change of the sex in which a person was born. Sir Ronald Wilson observed: see "Life and Law: The Impact of Human Rights on Experimenting with Life" Australian Journal of Forensic Sciences, March 1985, 61 at 80:*
>
> > *"...Medicine has outstripped the law. April Ashley represented as successful a change of sex as can be imagined yet any legal significance attaching to her post-surgery condition was denied. No doubt the Court was bound to come to the decision that it did but nevertheless the decision signals the need for a greater flexibility in the law to enable it to come to grips with current reality freed from bondage to displaced historical circumstances."*

The present case points up both the inappropriateness of applying to a section such as s 81A a birth-related, clinical test, as well as the danger of making conventional assumptions within this convention-ridden field of human behaviour."

207. His Honour also said (at 161-2):

"The time has come when the beacon of Corbett will have to give place to more modern navigational guides to voyages on the seas of problems thrown up by human sexuality."

208. It is true that both judges who constituted the majority were careful to distinguish cases relating to the validity of marriage from the situation with which they were dealing. Counsel for the Attorney-General sought to derive some comfort from this. However, it is also clear that they were highly critical of the decision in *Corbett* and its reasoning in a general sense, as well as in its application to the criminal law. We also note that Mathews J, after saying that the determination of these appeals would have no direct application to the law of marriage, said:

"Accordingly it would be inappropriate to enter into any detailed discussion of Ormrod J's judgment in so far as it relates to the institution of marriage, notwithstanding that there are certain passages which have been singled out for sustained criticism, the most notable being his Lordship's reference to the "essential" role of a woman in marriage."

209. We comment that this was hardly a ringing endorsement of the reasoning in *Corbett*.

210. We would also note that Sir Ronald Wilson commented in the passage quoted by Street CJ that no doubt Ormrod J was bound to come to the decision that he did. By this we take it that Sir Ronald meant that on the evidence before Ormrod J and the limited state of medical knowledge at the time, the decision was inevitable. However, this is no longer the case.

211. We turn now to discuss the decision of the Full Court of the Federal Court of Australia (Black CJ, Lockhart and Heerey JJ) in *Secretary, Department of Social Security v SRA* (supra).

212. That case involved the interpretation of the words 'woman' and 'female' as used in the *Social Security Act* 1947 (Cth) in order to determine a person's entitlement to a wife's pension. It was an appeal from the Administrative Appeals Tribunal that had upheld a decision by the Social Security Appeals Tribunal that the respondent, who was a pre-operative transsexual person, was qualified to receive a wife's pension, as being a woman who was the wife of an invalid pensioner.

213. The Tribunal had concluded that psychological sex was the most important factor in determining sex for the purpose of the Social Security Act upon three bases. First, it concluded that this was the factor that distinguished the 'transsexual' from the 'homosexual', the 'transvestite' and perhaps the 'hermaphrodite' (to use the Tribunal's words). Secondly, it said that in the area of social policy a person's social and cultural identity is a relevant factor and, thirdly, that emphasis should be given to the person's psychological sex and the social and cultural aspects of how that person lives and is accepted by the local community.

214. The Court followed *R v Harris and McGuiness* (supra) in holding that the ordinary meaning of the words 'woman' and 'female' included a post-operative transsexual person who is both anatomically and psychologically female. They distinguished the position of a pre-operative transsexual person along similar lines to those of Mathews J in that case.

215. However, Black CJ said (at 472-3):

“ Whatever may once have been the case, the English language does not now condemn post-operative male-to-female transsexuals to being described as being of the sex they profoundly believe they do not belong to and the external genitalia of which, as a result of irreversible surgery, they no longer have. Where through medical intervention a person born with the external genital features of a male has lost those features and has assumed, speaking generally, the external genital features of a woman and has the psychological sex of a woman, so that the genital features and the psychological sex are in harmony, that person may be said, according to ordinary English usage today, to have undergone a sex change. The operation that brought about the change in external genital features would be referred to as a sex change operation.

The limitations on the capacity of medical science to change the physical characteristics of a person's sex are, in a broad sense, a matter of general knowledge in that it is generally understood that some things cannot be changed and that, for example, a person who has undergone a sex change operation will not be able to conceive and bear children. It is well known too that a person's male chromosomes cannot change to those characteristic of a female. Yet expressions such as "sex change" and "sex change operation" are in common use and their meaning is clearly understood. The expressions appear in modern dictionaries. Thus "sex change" appears in the Australian Concise Oxford Dictionary (1987) where it is defined as meaning: "(esp.) apparent change of sex by surgical means," and in the Oxford English Dictionary 2nd edn (1989) where it is defined as: "A change of sex; spec. an apparent change of sex brought about by surgical means, treatment with hormones, etc.; also attrib". The writings of medical experts and learned legal commentators on the subject of transsexualism reveal the standard use of such expressions, commonly now without qualifying quotation marks. For example, in the published writings of one of the medical experts upon whose report the Tribunal relied there is frequent use of the expressions "sex conversion" and "sex conversion therapy": See Buhrich, N, "Male-to-female Transsexualism", British Journal of Sexual Medicine Feb 1986, 52. In the writings of experts, expressions such as "sex conversion" and "sex reassignment surgery" are ordinarily used, rather than the "sex change" and "sex change operation" of the lay person, but the point is the same.

This usage reflects, in my view, not only the significant incidence of sex reassignment surgery but a growing awareness in the community of the position of transsexuals and, most importantly, a perception that a male-to-female transsexual who has had a "sex change operation" or a "sex change" may appropriately be described in ordinary English as female. That is to say, the person may properly be described by the word appropriate to the person's psychological sex and to external genital features which are now in conformity with the person's psychological sex. This is particularly the case where, as here, a choice has to be made between two categories, neither of which is qualified - a choice between describing a person as, simply, either male or female.”

216. He commented that:

> *"... it seems very hard in an individual case to draw a distinction based upon the fact that a person has not had an operation that she cannot afford, particularly when the person is seeking legal recognition of an identity in which she had a deep belief".*

217. However, he said that a line had to be drawn somewhere and that drawing it by reference to a *"sex change operation"* was appropriate as a matter of statutory interpretation in conformity with *R v Harris and McGuiness* (supra) and in accordance with contemporary English usage.

218. Lockhart and Heerey JJ arrived at similar conclusions.

219. The judgment of Lockhart J is particularly helpful for its extensive review of the authorities and learned commentary that were in existence at that time.

220. In a critical passage of the judgment of Lockhart J, so far as the argument in this case is concerned, his Honour said (at 493):

> *"The growth of increasingly sophisticated surgical procedures and medical techniques in the field of sexual reassignment and the clear, though slowly developing, indications of changing social attitudes towards transsexuals, necessarily lead in my opinion to a rejection of the legal status of transsexuals for which Corbett and Tan are the leading authorities. Harris and Cogley enabled these questions to be considered for the purposes of the criminal law in New South Wales and Victoria, and they reflect a compassionate and humane approach to the sensitivities of human sexuality balanced against the need for reasonable certainty in the criminal law."*

221. He further concluded that a woman or a female, as the terms are understood in Australia today, includes a post-operative transsexual person.

222. As to pre-operative transsexual persons (male to female), he considered that the recognition of them as female would involve such a fundamental change to the law as to require legislation. He thought that society would regard an anatomical male as a male regardless of their appearance or inner beliefs. He also thought that there were dangers in a male capable, or giving the appearance of being capable, of procreation of being classed as a female.

223. It should be said that his Honour arrived at this conclusion with considerable regret and in what we regard as a significant passage said (at 494-5):

> *"Judicial opinions in this area must be liberal and understanding, guided by the signposts of what is in the best interests of society and the transsexual."*

224. His Honour also said (at 495) that he expressed no view as to the law of marriage, which may involve many factors to be considered by the court and carefully weighed. Having said that, he went on to say that there was a need to apply the law consistently and that if a post-operative transsexual person is to be regarded for the purpose of the criminal law and the social security law as a person with a new sex, then the same conclusion should follow in other areas of the law in order to achieve consistency.

The Decision of Charles J in *W v W*

225. We now turn to consider the English decision of Charles J in *W v W* [2001] 2 WLR 674. This was an intersex case involving a person who was born with both male and female physical characteristics, but who had had gender re-assignment surgery. It came before Charles J as an application for a decree of nullity of marriage on the ground that a marriage by a male to such a person was void.

226. The parties did not invite Charles J to reconsider *Corbett* and he did not do so. The argument before him, which he accepted, was based upon what was said to be a distinction between intersex and transsexual persons.

227. Similarly, he placed no weight upon the onus of proof, the presumption of the validity of marriage or the presumption that the entry on a person's birth certificate is prima facie evidence of his or her sex (at 679).

228. No argument was placed before his Lordship as to the issue of brain sex, although the evidence as to its existence was adverted to by him (at 685-6).

229. Most of his judgment is constrained by the need to distinguish the case before him from the principles espoused in *Corbett*. The end result is set out as follows (at 709):

> *"In my judgment, in the respondent's case, and in other cases which can conveniently be described as cases of physical inter-sex for equivalent reasons, the decision as to whether the individuals involved are female (or male) for the purposes of marriage should be made having regard to their development and all of the factors listed in Corbett's case [1971] P 83, namely (in a slightly different form extending them to six factors): (i) chromosomal factors; (ii) gonadal factors (ie presence or absence of testes or ovaries); (iii) genital factors(including internal sex organs); (iv) psychological factors; (v) hormonal factors, and (vi) secondary sexual characteristics (such as the distribution of hair, breast development, physique etc) Dr Conway had regard to all these factors. Another way of putting this is that the decision as to whether the person is male or female for the purposes of marriage can be made with the benefit of hindsight looking back from the date of the marriage or if earlier the date when the decision is made."*

230. He continued (at 709-10):

> *"On the above approach, and thus having regard to (i) the six factors I have listed, (ii) all my findings under the heading "Findings having regard to the respondent's history and the medical evidence", and (iii) my conclusion that the respondent had the capacity to consummate her marriage to the applicant, but having regard in particular to: (a) my acceptance of the diagnosis of partial androgen insensitivity, its cause and effect, (b) the respondent's ambiguous external genitalia, and (c) the respondent's development which led to her making a* ***final*** *choice to live as a woman well before she started taking oestrogen and before she had surgery, in my judgment the respondent was a female for the purposes of her marriage to the applicant."* (emphasis in the original)

231. It seems to us that the important thing about this judgment is that it clearly recognises that intersex persons can, in effect, choose their sex and marry. The reasoning is much to be preferred to that of Bell J in *In the Marriage of C and D (falsely called C)* (supra), which, as we have said, was wrongly decided and should not be regarded as expressing the law in this country. The question immediately arises as to why this principle does not extend to transsexual people; particularly if, as Chisholm J found, brain sex is a relevant factor in determining the issue. If it does not do so, this leaves transsexual people as the only group within the community that can never marry, except to a person who is a member of what they regard as the same sex as themselves. This is, of course, the reality in the case of transsexual people who have had surgical gender re-assignment, who can no longer function as a member of the sex, the physical characteristics of which they formerly had. However, beyond the facts of the present case, it extends to all transsexual people for it effectively limits their opportunities of marriage to a person they regard as being of the same sex as themselves.

232. It is also significant to note that the Attorney-General did not seek to argue that the decision in *W v W* was wrong. This approach tends to greatly weaken the force of the arguments advanced on his behalf that to recognise the marriage of a transsexual person to another who the transsexual person regards as being of the opposite sex in some way usurps the role of Parliament, or is an issue that must be left to Parliament to decide. It seems illogical that the courts can decide that marriage can extend to intersex persons, who can adopt the sex of their choice, but not to post-operative transsexual people.

Bellinger

233. Against this background we now turn to the judgments in *Bellinger*. This came before the Court of Appeal of England and Wales (Butler Sloss P, Walker and Thorpe LJJ) on appeal from a decision of Johnson J.

(a) *Bellinger* At First Instance

234. It is perhaps useful to first consider the decision of Johnson J, who is one of the most experienced judges in the Family Division of the High Court. As one would expect, it is a sensitive judgment in which his Lordship discusses the dilemma that faces courts in cases of this kind in considerable detail.

235. It is of interest to note that Johnson J indicated that it was agreed between counsel that the judgment of Charles J in *W v W* (supra) had no bearing upon his decision because it related to an intersex person. In the case before us, Ms Wallbank criticised this decision by counsel for Mrs Bellinger as one that should not have been made. We are inclined to agree with this criticism in that if there is substance in the view that brain sex is one of the most significant determinants of gender, then the distinction between intersex and transsexual persons becomes meaningless, and the view of Charles J persuasive. This is because an intersex person appears to be defined as someone with at least one sexual incongruity. If brain sex can give rise to such an incongruity then, legally, we think that there may be no difference between an intersex person and a transsexual person.

236. We note from the dissenting judgment of Thorpe LJ in the Court of Appeal (at par 114) that the judgment in *W v W* had *"coincidentally emerged"* when this case was being argued and that this may account for it not having received the attention that it deserved before Johnson J.

237. However, the judgment of Johnson J also makes it clear that the course of events in England in relation to the judicial treatment of the decision in *Corbett* is markedly different to that which has occurred in this country. In particular, his Lordship refers to the decisions of the Court of Appeal in *R v Tan* [1983] QB 1053 and the Divisional Court in *Re P and G (Transsexuals)* [1996] 2 FLR 90. In the first of those cases the Court of Appeal said, in a passage quoted by his Lordship:

"... both common sense and the desirability of certainty and consistency demand that the decision in Corbett v Corbett should apply for the purpose not only of marriage, but also for a charge under Section 30 of the Sexual Offences Act 1956 or Section 5 of the Sexual offences Act 1967"

238. In the second case the Divisional Court upheld a decision of the Registrar General to refuse to alter the entries in registers of births which recorded the sex of two post-operative transsexual persons as 'boy'.

239. Johnson J also referred to the decision of the Court of Appeal in *S-T (formerly J) v J* [1988] Fam 103. In that case, he noted that while Ward LJ had referred to the possibility that advances in medical science might lead to a change in attitude, Potter LJ had said that *"it is plain that, at present, the position is that laid down in Corbett"*.

240. These decisions are very much in contrast with the decisions of the Australian Courts that we have discussed, which have refused to follow *Corbett* in non-marriage cases. Therefore, the argument in favour of consistency, which in England was advanced as a reason for following *Corbett*, has the opposite effect so far as Australia is concerned.

241. Johnson J also referred to the powerful contrary view expressed by Ellis J in *Attorney-General v Otahuhu Family Court* [1995] 1 NZLR 603 and the various cases before the European Court of Human Rights that are canvassed in Chisholm J's judgment.

242. In an interesting passage in his judgment Johnson J said, after referring to a submission made on behalf of Mrs Bellinger as to there having been a marked change in attitude to problems of those like her since *Corbett* in 1970:

"Indeed it seems that what I have described as the plight of the transsexual has been recognised not only in judgments in courts around the world but by legislatures too. In Europe at least the law on this matter in England and Wales, is or is becoming, a minority position. However as a judge I have to accept the law as it is and apply it to the facts as I find them to be."

243. His Lordship went on to say that the marriage in question could only be valid if Mrs Bellinger is a female. He referred to a statement by Thorpe LJ in *Dart v Dart* [1996] 2 FLR 286 at 301, made in a different context, to the effect that if a fundamental change is to be introduced, it is for the legislature and not the judges to introduce it.

244. By way of comment we observe that the difficulty with this proposition is that it was a judge, namely Ormrod J, and not the legislature that laid down the relevant test in *Corbett*.

245. On the factual issue, Johnson J referred to the conflicting evidence of the experts and to the possibility that, if it were possible to do so, the examination of the brain of a living person might give some further indications of gender. He concluded:

"But that is not yet possible and the practical reality is that whatever may ultimately emerge from advances in medical science, the only criteria for determining the gender of an individual remain those identified in Corbett."

(b) *Bellinger* in the Court of Appeal

246. Butler-Sloss P and Robert Walker LJ agreed with the approach of Johnson J; Thorpe LJ dissented. The views of these judges on family law issues are obviously entitled to great weight and for this reason it is necessary to examine the judgments closely.

247. We turn first to the majority judgment.

248. In commenting on the *Hyde v Hyde* definition, the point is made that the definition can no longer be taken as correct in all particulars, since marriages can now be brought to an end during the lifetime of the parties. However, they accepted the view of Ormrod J in *Corbett* that sex was an essential determinant of marriage, because *"It is and always has been recognised as the union of man and woman."*

249. After discussing the judgment of Ormrod J, they refer to the fact that the judgment was not appealed and its conclusions were put on a statutory basis by the *Nullity of Marriage Act* 1971 (UK), of which the relevant portion of s. 1 stated:

> *"A marriage which takes place after the commencement of this Act shall be void on the following grounds only, that is to say-*
> ...
> *(c) That the parties are not respectively male and female."*

250. This section was re-enacted in s. 11(c) of the *Matrimonial Causes Act* 1973 (UK).

251. We note that this provides an obvious distinction from the Australian position where the decision in *Corbett* has never been given legislative recognition.

252. In considering *S-T v J* (supra), they agreed with a submission by counsel for Mrs Bellinger that there may be a distinction between gender and sex. Her suggested definition was that gender related to culturally and socially specific expectations of behaviour and attitude mapped on to men and women by society

and included self definition. They agreed that it would be impossible to identify gender as so defined as at the moment of birth of the child.

253. After discussing the medical evidence they said that the gender assignment at birth of a transsexual person in accordance with the *Corbett* criteria cannot be challenged because at present no other criteria can be applied to a newborn child.

254. With respect, we have some difficulty with this statement. As we understand the medical evidence before the Court of Appeal, and indeed before Chisholm J (although there are some differences as hereafter appears), it is to the rather obvious effect that it is impossible to look at the psyche of a newborn child and that there is no method of conducting a physiological examination of the brain of a living person to determine this issue. This does not in our opinion validate the *Corbett* criteria, but rather highlights their incomplete nature and the dangers of applying that test.

255. The majority then went on to discuss whether the assignment at birth is immutable, other than for those with uncertain sexual characteristics, or whether there is a point at which it can be said that that the gender which was correct at birth is no longer applicable. Again this statement seems to involve a connotation that the gender assigned at birth was correct. In the vast majority of the population this is so but in most of these cases it clearly is not. It seems to us that the fact there are factors that are impossible to take into account in relation to a newborn child provides a strong argument for saying that whatever assignment takes place at birth should not be immutable.

256. They then considered the expert evidence and concluded that the main difference between the experts was that the evidence of Professor Gooren (whose evidence was also before Chisholm J) was that it was clear that transsexualism was a medical condition with an organic basis whereas Professor Green and Mr

Terry placed transsexualism within the category of a psychiatric disorder. They interpreted the latter as taking the view that the research of Zhou et al, upon which Professor Gooren based his opinion both in *Bellinger* and before Chisholm J, was based upon a small sample and, while important, was not so far widely accepted.

257. The majority adopted this view, finding that more research was necessary to demonstrate that the biological factor which causes brain sexual differentiation in men and women is to be found congruent with the transsexual person's preferred gender. They also considered that a much larger obstacle was the present impossibility of recognition of brain differentiation in living people. They considered that the work in this area was at such an early stage that brain sexual differentiation cannot at present be one of the relevant criteria for the purpose of assignment of the sex of a transsexual person by a court.

258. The majority, in discussing the case law, referred to *R v Tan* (supra), *S-T v J* (supra) and distinguished *W v W* (supra) as an intersex case. They also discussed the international authorities, mainly in the European Court of Human Rights and relevant United States and New Zealand decisions. Interestingly enough, no reference was made to the two Australian decisions that we have discussed. They also referred to the *Report of the Inter-Departmental Working Group on Transsexual People*, a report commissioned by the Home Secretary in England, completed in April 2000. The Working Group had recommended that the issues be put out for public consultation. The majority expressed dismay that nothing had been done in this regard.

259. In determining the issue, Butler-Sloss P and Robert Walker LJ essentially adopted the approach of Johnson J, namely that it is for the Parliament and not the courts to determine matters of this nature. They were sympathetic to the position of transsexual people and recognised that there was a growing momentum for recognition of them in the same way as for people who are intersex. However,

they took the view (at par 99) that legal recognition of marriage is a matter of status, that is, not for the spouses alone to decide:

> *"It affects society and is a question of public policy. For that reason, even if for no other reason, marriage is in a special position and is different from the change of gender on a driving licence, social security payments book and so on. Birth, adoption, marriage, divorce or nullity and death have to be registered. Each child born has to be placed into one of two categories for the purpose of registration. Status is not conferred only by a person upon himself; it has to be recognised by society. In the absence of legislation, at what point can the court hold that a person has changed his gender status?"*

260. After adverting to the difficulty of determining the point at which such a change should be recognised, they referred to the comments of Lord Slynn in *Fitzpatrick v Sterling Housing Association* (supra) (at 33) which were to the effect that when considering social issues judges must not substitute their own views to fill gaps. They concluded by referring with approval to the remarks of Balcombe LJ in what they conceded was a different context in *re F (In Utero)* [1998] Fam. 122 as follows:

> *"If the law is to be extended in this manner, so as to impose control over the mother of an unborn child, where such control may be necessary for the benefit of the child, then under our system of parliamentary democracy it is for Parliament to decide whether such controls can be imposed and, if so, subject to what limitations or conditions."*

261. It can be seen that the majority judgment in this case strongly reflects the arguments advanced on behalf of the Attorney-General in this case.

The Dissenting Judgment of Thorpe LJ in *Bellinger*

262. We now turn to examine the dissenting judgment of Thorpe LJ.

263. His Lordship first criticised what he considered to be the erroneous citation by Johnson J of the views of Professor Green in support of his conclusion that he three *Corbett* factors remain the only criteria for determining the gender of an

individual. Thorpe LJ pointed out (at par 112) that Professor Green had said that these factors were *"too reductionistic"*. However his Lordship's view depended not so much upon criticism of the judgment of Johnson J, but upon what he described (at par 113) as:

> *'a fresh appraisal of the extent to which the passage of 30 years requires the revision of the propositions of law, of medical science and of social policy upon which Ormrod J founded his judgment in Corbett and Corbett."*

264. Thorpe LJ interpreted the expert evidence somewhat differently from the majority and Johnson J. He seems to have regarded Professor Green's view about Professor Gooren's evidence as more supportive of it than otherwise and also cited a comment from Mr Terry to the effect that the scientific arguments in favour of a biological causation were not irrefutable but were certainly compelling to his mind.

265. He concluded from this that medical opinion no longer accepts the three *Corbett* factors for the determination of sex.

266. As to the law, his Lordship considered that the decisions of the Strasbourg court only assisted the appellant to the extent that they may demonstrate shifts in social attitudes and values.

267. He went on to criticise four key propositions drawn from the judgment of Ormrod J in *Corbett*.

268. The first of these was:

> *'The biological sexual constitution of an individual is fixed at birth (at latest)'*

269. Thorpe LJ considered that while this proposition had been agreed by the experts in that case, it was rejected by all of the relevant experts thirty years later.

270. The second proposition was:

> *'The relationship called marriage … is and always has been recognised as the union of man and woman.'*

271. After referring to *Lindo v Belisario* [1795] 1 Hag Con 216 at 230 and *Hyde*, Thorpe LJ remarked upon to the enormous social changes that have taken place since those cases were decided, including divorce virtually on demand and illegitimacy without stigma and concluded by saying (at par 128) that he would redefine marriage *"as a contract for which the parties elect but which is regulated by the state, both in its formation and in its termination by divorce, because it affects status upon which depend a variety of entitlements, benefits and obligations."*

272. We comment that while we do not necessarily agree with this definition, the institution of marriage has undergone enormous changes, as is discussed elsewhere in these reasons.

273. The third proposition was:

> *'The law should adopt the first three of the doctor's criteria… and…determine the sex for the purposes of marriage accordingly'*

274. In an important passage, his Lordship said (at par 132):

> *"Perhaps the third proposition has the most direct bearing on the outcome of the appeal. Can the legal definition of what constitutes a female person be determined by only three of the criteria which medical experts apply? Are judges entitled to leave out of account psychological factors? For me the answers do not depend on scientific certainty as to whether or not there are*

areas of brain development differentiating the male from the female. In my opinion the test that is confined to physiological factors, whilst attractive for its simplicity and apparent certainty of outcome, is manifestly incomplete. There is no logic or principle in excluding one vital component of personality, the psyche. That its admission imports the difficulties of application that may lead to less certainty of outcome is an inevitable consequence. But we should prefer complexity to superficiality in that the psychological self is the product of an extremely complex process, although not fully understood. It is self-evident that the process draws on a variety of experiences, environmental factors and influences throughout the individuals development particularly from birth to adolescence, but also beyond."

275. The fourth proposition was:

'Marriage is a relationship which depends on sex and not on gender'.

276. Thorpe LJ considered that the scientific changes to which he had referred had diminished the once vital role of procreative sex. He thought that while sex was a dimension of cardinal importance he nevertheless concluded that in cases such as this one it was sufficiently fulfilled. He also thought that gender was an increasingly important factor in the recognition of the core factor of an individual to a much greater extent than was the case in 1970.

277. He therefore considered that, given that the foundations of Ormrod J's judgment are no longer secure, it should not be followed.

278. Thorpe LJ then turned to examine *W v W* (supra) and to compare the situation of the parties to that case and this one, pointing out that there were so many areas of common ground that it is important to consider the modern approach in intersex cases.

279. On the issue of judges usurping the function of Parliament, Thorpe LJ said that his comment in *Dart* (supra) to this effect was in a different context, as Johnson J

had acknowledged. He pointed out that context is all-important in considering cases of this nature. He said (at par 148):

> *"But here we are asked to construe section 11 (c), not previously construed (and so untrammelled by previous judicial effort) and to be construed in light of moral ethical and societal values as they are now rather than as they were at the date of first enactment or subsequent consolidation. Indeed the case rests on the construction of the single word 'female'. That parliament intended some judicial licence seems clear to me from the absence of any definition within the statute and from the preceding debate, particularly the passage cited at paragraph 33 above."*

280. We are in strong agreement with the views here expressed by his Lordship. In the course of his judgment (at par 141) he referred to the fact that the mover of the amendment which subsequently became s. 11(c) deliberately refrained from proposing any statutory definition. Hansard records that he did so because *"the way that a judge decides the sex of a particular person is and always will remain a question of fact."* The passage quoted, which appears at par 142 of Thorpe LJ's judgment, goes on to make it clear that the mover contemplated the possibility of advances in medical science and surgery altering the sex of an individual.

281. Similarly in Australia, we have already noted that Parliament deliberately took the course of not defining marriage upon the basis that it was a matter for the courts to decide in individual cases (see par 127 of these reasons).

282. Thorpe LJ also rejected the argument that any relaxation of the present clear-cut boundary would produce enormous practical and legal difficulties. He distinguished this situation from one where a transsexual person could acquire, perhaps not irreversibly, his or her psychological gender without undergoing surgical and hormonal procedures. He said that this would be a matter for Parliament. He said that the issue as to whether a post-operative transsexual person had acquired a different gender was a much narrower one. He pointed to the fact that such a recognition had not caused particular problems in other jurisdictions in Europe and elsewhere. In Europe it had been recognised in at least

23 of the member states of the Council of Europe as of 1998, the only member states not doing so being the UK, Ireland, Andorra and Albania.

Decisions in Other Jurisdictions

283. These were extensively canvassed by Chisholm J and we do not find it necessary to repeat that discussion. However there is one case that we regard of particular significance to which we wish to refer, namely the decision of Ellis J in *Attorney-General v Otahuhu Family Court* [1995] 1 NZLR 603. This case concerned the definition of 'a man' and 'a woman' for the purposes of marriage under New Zealand law.

284. In commenting on *Corbett*, Ellis J said (at 606):

> *"The judgment as a whole is a comprehensive analysis of the evidence and the sexual and social significance of the problem. It has been and must be accorded great respect, but as Ms Ullrich's submissions show, it has been the subject of criticisms which in my view are difficult, indeed impossible, to answer satisfactorily. They are directed to the essential role of a man and a woman in marriage. It has to be conceded that the ability to procreate is not essential, nor is the ability to have sexual intercourse. Neither the common law nor ecclesiastical law ever required the first. On the other hand, it used to be the case that a marriage which had not been consummated was voidable. That is no longer the law. In my view the law of New Zealand has changed to recognise a shift away from sexual activity and more emphasis being placed on psychological and social aspects of sex, sometimes referred to as gender issues."*

285. Similarly we consider that the law in Australia has recognised a change in the essential nature of a marriage away from the purely sexual aspects of it.

286. His Honour said (at 607):

> *"Some persons have a compelling desire to be recognised and be able to behave as persons of the opposite sex. If society allows such persons to undergo therapy and surgery in order to fulfil that desire, then it ought also to allow such persons to function as fully as possible in their reassigned sex, and this must include the capacity to marry. Where two persons present themselves*

as having the apparent genitals of a man or a woman, they should not have to establish that each can function sexually.

Once a transsexual has undergone surgery, he or she is no longer able to operate in his or her original sex. A male to female transsexual will have had the penis and testes removed, and have had a vagina-like cavity constructed, and possibly breast implants, and can never appear unclothed as a male, or enter into a sexual relationship as a male, or procreate. A female to male transsexual will have had the uterus and ovaries and breasts removed, have a beard growth, a deeper voice, and possible a constructed penis and can no longer appear unclothed as a woman, or enter into a sexual relationship as a woman, or procreate. There is no social advantage in the law not recognising the validity of the marriage of a transsexual in the sex of reassignment. It would merely confirm the factual reality.

If the law insists that genetic sex is the pre-determinant for entry into a valid marriage, then a male to female transsexual can contract a valid marriage with a woman and a female to male transsexual can contract a valid marriage with a man."

287. Like *Corbett,* this is a judgment at first instance and must be considered upon that basis. It was, however, delivered some 24 years later and in that sense might be thought to reflect more contemporary thinking. It also a judgment delivered in relation to a legal system which, in relation to the law of marriage, is much closer to that in Australia. We would also observe that Ellis J's approach accords with the manner in which the position of transsexual people has been considered in other contexts by the Australian appellate courts in *SRA* (supra) and the majority in *R v Harris and McGuiness* (supra).

Should the Majority View in *Bellinger* be Followed in Australia?

288. While, as we have said, the views of the majority of the Court of Appeal are of substantial persuasive authority in this country, they do not bind us. Further, there are significant issues in respect of which *Bellinger* can be distinguished.

289. First, unlike England, *Corbett* has not been followed in non-marriage cases and its reasoning has been trenchantly criticised in Australian superior courts. In Australia it can be said that it is somewhat incongruous for post-operative

transsexual people to be recognised for the purposes of the criminal and social security laws and not the marriage law. The argument for consistency runs in the opposite direction in England.

290. Secondly, the evidence before Chisholm J went further than did the evidence before Johnson J. In this area we recognise a difficulty in that the evidence as interpreted by Thorpe LJ was closer to the evidence before Chisholm J than as interpreted by Butler-Sloss P, Robert Walker LJ and Johnson J. We do not, of course, have details as to the evidence other than that which can be gleaned from the judgments. For the present purpose of distinguishing the decision, we think that we should adopt the majority interpretation and that of the trial Judge. Upon that basis the evidence for the existence of 'brain sex' was much stronger and was uncontroverted before Chisholm J. We therefore think that on the evidence before him, it was open for Chisholm J to accept, on the balance of probabilities, that transsexualism is biologically caused. Therefore, the doubts expressed by Butler-Sloss P and Robert Walker LJ are not present in this case.

291. Once this is accepted, we think it difficult to distinguish this case from the intersex cases such as *W v W*. One thing that is clear is that all of the members of the Court of Appeal in *Bellinger* thought that that case was correctly decided and no contrary argument was advanced before us. Interestingly too, the majority in *Bellinger* remarked (at par 98):

> *"There is, in informed medical circles, a growing momentum for recognition of transsexuals for every purpose and in a manner similar to those who are intersexed. The current approach recognises changes in social attitudes as well as advances in medical research."*

292. Thirdly, it appears that the decision in *Corbett* received some statutory recognition in England whereas it has never received such recognition in Australia.

293. Fourthly, and most significantly in our view, procreative sex is still relevant to marriage in England. In that country an inability to consummate the marriage still provides a ground for a decree of nullity. In Australia it no longer does so. It is apparent that physical aspects of sexuality played a considerable part in the reasoning of Ormrod J in *Corbett*. Even Thorpe LJ was forced to concede its cardinal importance. This is simply not the case in Australia.

294. In *The Queen v L* (supra) Mason CJ, Deane and Toohey JJ said (at 386):

> *"Whatever the scope of the power of the Parliament to make laws with respect to marriage, it is apparent that the Commonwealth Act does not attempt comprehensively to regulate the rights and obligations of the parties to a marriage and in particular says nothing to express or imply an obligation to consent to sexual intercourse by a party to a marriage. Refusal to consummate a marriage is no longer a ground for dissolution. In one of the early decisions on the Commonwealth Act, the Family Court accepted that sexual intercourse between the parties to a marriage may have ceased without the marriage having "broken down irretrievably""*

295. We are in any event much more attracted by the reasoning of Thorpe LJ. We have difficulty in understanding how the *Corbett* test can continue to be applied in face of the evidence, not only as to brain sex, but also as to the importance of psyche in determining sex and gender. The fact that these issues cannot be physically determined at birth seems to us to present a strong argument: first, that a child's sex cannot be finally determined at birth; and secondly, that any determination at that stage is not and should not be immutable. We agree with the views expressed by Thorpe LJ (at par 155) when he said:

> *"To make the chromosomal factor conclusive, or even dominant, seems to me particularly questionable in the context of marriage. For it is an invisible feature of an individual, incapable of perception or registration other than by scientific test. It makes no contribution to the physiological or psychological self. Indeed in the context of the institution of marriage as it is today it seems to me right as a matter of principle and logic to give predominance to psychological factors just as it seems right to carry out the essential assessment of gender at or shortly before the time of marriage rather than at the time of birth."*

296. We, like Thorpe LJ (at par 159), would also regard the passage from Lord Reed's paper *Splitting the Difference: Transsexuals and Human Rights Law* (at page 50) as correct where he said:

> *"In those societies which do permit it, it seems to me to be difficult to justify a refusal to recognise that successful gender reassignment treatment has had any legal consequences for the patient's sexual identity, although the context in which, and conditions under which, a change of sexual identity should be recognised is a complex question. But for the law to ignore transsexualism, either on the basis that it is an aberration which should be disregarded, or on the basis that sex roles should be regarded as legally irrelevant, is not an option. The law needs to respond to society as it is. Transsexuals exist in our society, and that society is divided on the basis of sex. If a society accepts that transsexualism is a serious and distressing medical problem, and allows those who suffer from it to undergo drastic treatment in order to adopt a new gender and thereby improve their quality of life, then reason and common humanity alike suggest that it should allow such persons to function as fully as possible in their new gender. The key words are `as fully as possible': what is possible has to be decided having regard to the interests of others (so far as they are affected) and of society as a whole (so far as that is engaged), and considering whether there are compelling reasons, in the particular context in question, for setting limits to the legal recognition of the new gender."*

297. We also think that Thorpe LJ's analysis of the similarities between the situation of Mrs W and Mrs Bellinger provides a powerful reason for applying the reasoning in *W v W* to these cases.

New International Caselaw

298. *Goodwin v The United Kingdom* (Application no. 28957/95; judgment delivered 11 July 2002) and *I v The United Kingdom* (Application no. 25680/94; judgment delivered 11 July 2002) also warrant attention. These decisions of the Grand Chamber of the European Court of Human Rights reversed the previous approach of the Court in complaints by transsexual persons which had held that it was open to member States to determine issues of this nature in relation to

marriage by virtue of the principle of according States a "margin of appreciation": see par 73 of *Goodwin*.

299. The Human Rights and Equal Opportunity Commission (at par 2.5) submitted that Australian Courts *"should and do give weight to the views of specialist international courts and bodies such as…the European Court of Human Rights"*. We agree generally with this statement of principle.

300. In both cases, the applicants succeeded in making out their alleged violations of, *inter alia,* articles 8 and 12 of the European Convention on Human Rights in respect of the legal status of transsexuals in the United Kingdom. Notably, the article 12 argument advanced in *Goodwin* was specifically described (at par 95) to be as follows:

> *"… that the Corbett v. Corbett definition of a person's sex for the purpose of marriage had been shown no longer to be sufficient in the recent case of Bellinger v. Bellinger and that even if a reliance on biological criteria remained acceptable, it was a breach of Article 12 to use only some of those criteria for determining a person's sex and excluding those who failed to fulfil those elements."*

301. Article 8 relevantly states:

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

302. Article 12 states:

> *"Men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right."*

303. The applicants' complaints included their treatment in the sphere of marriage. Both cases were heard by the same Grand Chamber and it may be noted that

substantial material about the United Kingdom and its laws, and the reasons for finding the applicants' article 8 and 12 rights had been violated, is identical in both judgments. Unless otherwise indicated, we shall refer to the *Goodwin v The United Kingdom* judgment in the discussion that follows.

304. In the course of its observations on the alleged violation of Article 8, and after referring amongst others to the decisions in *Bellinger*, the trial Judge in this case, and New Zealand and U.S. decisions, the Court indicated (at par 75) that it would *"look at the situation within and outside the Contracting State to assess 'in light of present day conditions' what is now the appropriate interpretation of the Convention*"**.** The Court commented (at par 77):

> *"It must also be recognised that serious interference with private life can arise where the state of domestic law conflicts with an important aspect of personal identity (see, mutatis mutandis, Dudgeon v. the United Kingdom judgment of 22 October 1981, Series A no. 5, § 41). The stress and alienation arising from a 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 places the transsexual in an anomalous position, in which he or she may experience feelings of vulnerability, humiliation and anxiety."*

305. It also commented (at par 78) that gender re-assignment was lawful and carried out in the UK under the auspices of the National Health Service and said:

> *"The Court is struck by the fact that nonetheless the gender re-assignment which is lawfully provided is not met with full recognition in law, which might be regarded as the final and culminating step in the long and difficult process of transformation which the transsexual has undergone."*

306. It remarked upon the illogicality of refusing to recognise the legal implementation of the result to which the treatment leads.

307. Dealing with medical and scientific considerations, it said (at par 81):

"It remains the case that there are no conclusive findings as to the cause of transsexualism and, in particular, whether it is wholly psychological or associated with physical differentiation in the brain. The expert evidence in the domestic case of Bellinger v. Bellinger was found to indicate a growing acceptance of findings of sexual differences in the brain that are determined pre-natally, though scientific proof for the theory was far from complete. The Court considers it more significant however that transsexualism has wide international recognition as a medical condition for which treatment is provided in order to afford relief (for example, the Diagnostic and Statistical Manual fourth edition (DSM-IV) replaced the diagnosis of transsexualism with "gender identity disorder"; see also the International Classification of Diseases, tenth edition (ICD-10)). The United Kingdom national health service, in common with the vast majority of Contracting States, acknowledges the existence of the condition and provides or permits treatment, including irreversible surgery. The medical and surgical acts which in this case rendered the gender re-assignment possible were indeed carried out under the supervision of the national health authorities. Nor, given the numerous and painful interventions involved in such surgery and the level of commitment and conviction required to achieve a change in social gender role, can it be suggested that there is anything arbitrary or capricious in the decision taken by a person to undergo gender re-assignment. In those circumstances, the ongoing scientific and medical debate as to the exact causes of the condition is of diminished relevance."

308. We think there is force in this analysis, particularly the propositions that transsexualism is a medical condition for which treatment is provided in order to afford relief and that the treatment requires a level of commitment and conviction to achieve it. This tends to shift the focus of the debate from what we regard as the somewhat sterile observation of which characteristics can be observed at birth. It also, as the Court points out, (at par 81), negates the proposition that the state of medical science or scientific knowledge provides any determinative argument as regards the legal recognition of transsexual persons.

309. On the issue of practical difficulties arising from recognition, the Court had this to say (at par 91):

"The Court does not underestimate the difficulties posed or the important repercussions which any major change in the system will inevitably have, not only in the field of birth registration, but also in the areas of access to records,

family law, affiliation, inheritance, criminal justice, employment, social security and insurance. However, as is made clear by the report of the Interdepartmental Working Group, these problems are far from insuperable, to the extent that the Working Group felt able to propose as one of the options full legal recognition of the new gender, subject to certain criteria and procedures. As Lord Justice Thorpe observed in the Bellinger case, any "spectral difficulties", particularly in the field of family law, are both manageable and acceptable if confined to the case of fully achieved and post-operative transsexuals. Nor is the Court convinced by arguments that allowing the applicant to fall under the rules applicable to women, which would also change the date of eligibility for her state pension, would cause any injustice to others in the national insurance and state pension systems as alleged by the Government. No concrete or substantial hardship or detriment to the public interest has indeed been demonstrated as likely to flow from any change to the status of transsexuals and, as regards other possible consequences, the Court considers that society may reasonably be 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."

310. The Court gave distinct consideration to the complaint under Article 12 for reasons that appear to be explained by the following paragraphs:

"99. The exercise of the right to marry gives rise to social, personal and legal consequences. It is subject to the national laws of the Contracting States but the limitations thereby introduced must not restrict or reduce the right in such a way or to such an extent that the very essence of the right is impaired (see the Rees judgment, p. 19, § 50; the F. v. Switzerland judgment of 18 December 1987, Series A no. 128, § 32).

100. It is true that the first sentence refers in express terms to the right of a man and woman to marry. The Court is not persuaded that at the date of this case it can still be assumed that these terms must refer to a determination of gender by purely biological criteria (as held by Ormrod J. in the case of Corbett v. Corbett, paragraph 17 above). 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 above, under Article 8 of the Convention, that a test of congruent biological factors can no longer be decisive in denying legal recognition to the change of gender of a post-operative transsexual. There are other important factors – the acceptance of the condition of gender identity disorder by the medical professions and health authorities within Contracting States, the 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. The Court would also note that Article 9 of the recently adopted Charter of Fundamental Rights of

the European Union departs, no doubt deliberately, from the wording of Article 12 of the Convention in removing the reference to men and women…"

311. We would interpose here that Article 9 of the Charter of Fundamental Rights of the European Union is in the following terms:

"The right to marry and the right to found a family shall be guaranteed in accordance with the national laws governing the exercise of these rights."

312. The judgment continued:

"101. The right under Article 8 to respect for private life does not however subsume all the issues under Article 12, where conditions imposed by national laws are accorded a specific mention. The Court has therefore considered whether the allocation of sex in national law to that registered at birth is a limitation impairing the very essence of the right to marry in this case."

313. In both cases, the Grand Chamber found in favour of the applicant notwithstanding that limitation, saying:

"101. ...In that regard, it finds that it is artificial to assert that post-operative transsexuals have not been deprived of the right to marry as, according to law, they remain able to marry a person of their former opposite sex. The applicant in this case lives as a woman, is in a relationship with a man and would only wish to marry a man. She has no possibility of doing so. In the Court's view, she may therefore claim that the very essence of her right to marry has been infringed.

102. The Court has not identified any other reason which would prevent it from reaching this conclusion. The Government have argued that in this sensitive area eligibility for marriage under national law should be left to the domestic courts within the State's margin of appreciation, adverting to the potential impact on already existing marriages in which a transsexual is a partner. It appears however from the opinions of the majority of the Court of Appeal judgment in Bellinger v. Bellinger that the domestic courts tend to the view that the matter is best handled by the legislature, while the Government have no present intention to introduce legislation (see paragraphs 35-36).

103. It may be noted from the materials submitted by Liberty that though there is widespread acceptance of the marriage of transsexuals, fewer countries permit the marriage of transsexuals in their assigned gender than recognise the change of gender itself. The Court is not persuaded however that this supports an argument for leaving the matter entirely to the Contracting States as being within their margin of appreciation. This would

be tantamount to finding that the range of options open to a Contracting State included an effective bar on any exercise of the right to marry. The margin of appreciation cannot extend so far. While it is for the Contracting State to determine inter alia the conditions under which a person claiming legal recognition as a transsexual establishes that gender re-assignment has been properly effected or under which past marriages cease to be valid and the formalities applicable to future marriages (including, for example, the information to be furnished to intended spouses), the Court finds no justification for barring the transsexual from enjoying the right to marry under any circumstances."

314. We appreciate that these are decisions by a Court as to the interpretation of a Convention to which Australia is not a party and must be read with this in mind. Nevertheless, as Johnson J pointed out in *Bellinger*, it provides startling confirmation of the degree of international isolation that this country would adopt if *Corbett* is found to represent the law.

315. In this regard we note the submissions of Mr Basten on behalf of the Human Rights and Equal Opportunity Commission that international human rights principles which bear upon the issues before this Court and to which it ought to have regard include:

(a) guarantees of equality before the law and non discrimination in articles 2.1 and 26 of the International Covenant on Civil and Political Rights ("ICCPR");

(b) the right of men and women to marry and found a family in article 23 of the ICCPR; and

(c) the right not to be subjected to arbitrary or unlawful interference with a person's privacy and family in article 17.1 of the ICCPR.

316. There are obvious similarities between these principles and Articles 8 and 12 of the European Convention on Human Rights.

317. We also would observe that the approach of the European Court of Human Rights appears to accord in some specific respects with the trial Judge in this case. Like Chisholm J, the Strasbourg Court does not seem to accept that the biological criteria held in *Corbett* determine the meaning of 'man' and 'woman' for the purposes of marriage. It also appears to share his Honour's view that the failure to permit a transsexual person to marry in his or her adopted gender role would effectively infringe the person's right to marry.

318. We find these recent decisions of the European Court of Human Rights to be helpful, but not of course determinative, in considering the principal issues before us.

Other Issues

319. Mr Burmester argued that Chisholm J was in error in relying upon what he described as irrelevant considerations in arriving at his decision. These were said to be that Chisholm J had placed undue reliance on the evidence about:

- 'brain sex'
- cultural sex
- social acceptance

The Relevance of Brain Sex

320. He submitted that although Chisholm J had found that it would be wrong in law to say that the question can be resolved by reference solely to the person's psychological state or 'brain sex', his Honour did not address how the various factors should be reconciled and why other factors such as chromosomes or genital sex should not be determinative or the primary consideration. He said that his Honour (at par 329) was in error in failing to find that *"any factors necessarily have more importance than others"*.

321. He strongly criticised any acceptance of 'brain sex' as a criterion upon the basis that medical evidence was inconclusive.

322. The appeal clearly falls to be determined upon the evidence produced in the proceedings before Chisholm J. The Attorney-General made no application that the Full Court receive further evidence upon questions of fact pursuant to s. 93A of the *Family Law Act*.

323. Ms Wallbank submitted that the trial Judge was entitled to accept the evidence, including the expert evidence called on behalf of her clients, as establishing the significance of brain sex to these proceedings.

324. Ms Wallbank pointed to the fact that in the proceedings below, counsel for the Attorney-General did not seek to cross examine the Respondents' witnesses, nor to himself call any expert witnesses. She therefore relied upon the principle in *Jones v Dunkel* (1959) 101 CLR 298 as applying in these circumstances. Whilst we do not necessarily accept that this case is an appropriate one for the application of the *Jones v Dunkel* principle, we think it apparent that his Honour was entitled to accept the evidence including the expert evidence called before him. There was no challenge by way of cross-examination and no additional or contrary evidence was called by the Attorney-General.

325. This fact does not mean that it was not open to the Appellant to argue that the evidence did not establish the propositions upon which the Respondents sought to rely upon.

326. Dealing first with brain sex, we think that it was open to the trial Judge, on the evidence before him, to find as a matter of probability that there was a biological basis for transsexualism. We have already expressed the view that the evidence before him was stronger than that which was called in *Bellinger*, and there was no significant conflict. However, even if this was not so, we agree with Thorpe LJ in *Bellinger* that there is no reason to exclude the psyche as one of the relevant factors in determining sex and gender.

Social and Cultural Factors

327. Mr Burmester submitted that cultural and social factors were irrelevant and should not, in any event, have been determinative. However, we regard them as clearly relevant to the issue of the meaning of 'marriage' and 'man' for the purpose of the marriage law. In this regard we consider that the arguments of Ms Wallbank have considerable substance.

328. Ms Wallbank relied upon the statement of the majority in *Bellinger*, which was also relied upon by the Attorney-General, where it was said that *"marriage is a matter of status and is not for the spouses alone to decide. It affects society and is a question of public policy."*.

329. If this is the case, it appears to us to be clearly relevant to receive evidence as to how Kevin and Jennifer are perceived by the community in which they live.

330. Ms Wallbank further submitted, and we agree, that society's perception of the person's sex provides relevant evidence as to the ordinary, everyday meaning of the words 'man' and 'woman'.

331. In oral argument, Ms Wallbank submitted that one of the most important concessions made by the Attorney-General in the Court below, was that the Respondents and their son, (who was at the time of the hearing of the appeal, some 27 months old) were a family or constituted a family. She referred to Chisholm J's reliance upon this concession in the context of s. 43 of the *Family Law Act*. His Honour said (at par 289):

> *"I cannot see, therefore, that there is any substance in the argument that there are special considerations applicable to marriage that would mean that the word "man" should be given a special definition for the purpose of marriage law. On the contrary, I agree with the applicants' submission that to give the word "man" its ordinary meaning, and thus to uphold the validity of this*

marriage, would be entirely in accord with the provisions of section 43 of the Family Law Act 1975 (Cth), which provides, in part:-

> *The Family Court shall, in the exercise of its jurisdiction under this Act… have regard to:*
>
> *(a the need to preserve and protect the institution of marriage as the union of a man and a woman to the exclusion of all others voluntarily entered into for life;*
>
> *(b) the need to give the widest possible protection and assistance to the family as the natural and fundamental group unit of society, particularly while it is responsible for the care and education of dependent children;*
>
> *(c) the need to protect the rights of children and to promote their welfare;…"*

332. She also pointed out that at the time of the hearing of the appeal, Jennifer was about to give birth to another child. She submitted that a declaration of the validity of the marriage was in the best interests of the children as the status of marriage afforded benefits and protection to the children. She also said that this was a course that would be consistent with the recognition of Australia's obligations under the United Nations Convention on the Rights of the Child ("the Convention").

333. Mr Basten pointed out that the Convention was a declared instrument pursuant to s. 47(1) of the *Human Rights and Equal Opportunity Act* 1986 (Cth) and said it was a relevant consideration in this case. He referred to the fifth paragraph of the Preamble to the Convention. It recites a conviction by the States Parties to the Convention:

> *"… that the family as the fundamental group of society and the natural environment for the growth and well-being of all its members and particularly children, should be afforded the necessary protection and assistance so that it can fully assume its responsibilities within the community."*

334. He pointed to Article 2 which enjoins States Parties to take *"all appropriate measures to ensure that the child is protected from all forms of discrimination or punishment on the basis of the status…of the child's parents, legal guardians or*

family members" and to Article 3(1) which requires the best interests of the child to be *"a primary consideration"*. He said of the applicability of the Convention to the present case (Appeal Transcript, 19 February 2002, page 27):

> *"... once one recognises that one has in this case a child who is recognised on his birth certificate as being the child of Kevin and Jennifer then it would be an extraordinary legal imposition on that child and probably not in his best interests to refuse to recognise that he, together with his recognised parents, constituted a family unit. And, in saying that, we are going one step beyond the general proposition that it is in the best interests of the child to be brought up by a stable family unit and that factor is the recognition of Kevin as his father.*
>
> *...*
>
> *... the child who is a member of a family, both parties of whom are of the same sex, will never be recognised on his birth certificate as having those parties as his parents, so that, again, it is the combination of social and legal circumstances which provides a reason for thinking that the common law would, in this day, put some weight upon the fact that this couple appear to be a family with a child and that the existence of that unit in those circumstances with the recognition of parenthood would be an important factor and which would militate against a suggestion that no such marriage could be recognised under Australian law. So we put it in that way and we do seek to rely upon the convention for that purpose."*

335. Returning to Ms Wallbank's submissions, she also pointed to the fact that legislation exists in every State of Australia recognising that married people do have children and raise children with the assistance of reproductive technology using donated gametes (ie: sperm and eggs) and that the non-biological spouse, who is the parent of those children, is in fact by law, the father or the mother of those children as the case may be.

336. We think that the trial Judge was therefore correct in paying attention to the evidence as to social and cultural factors.

337. So far as the Convention on the Rights of the Child is concerned, we agree that there is force in the submissions made as to its relevance. However, we do not need to rely upon it in arriving at our decision. Nevertheless, in this instance, it broadly supports the view that unless the law otherwise provides, it would be

contrary to the bests interests of the Respondents' children to refuse to afford recognition to their parents' relationship as a marriage.

338. We would add that we agree with Chisholm J under this head as to the relevance of the admission of the Respondents to the in vitro fertilisation program. It provides another example of the incongruity of the application of the *Corbett* test in this country. The effect of its application would be to distinguish between and discriminate against children from a relationship such as the Respondents from children of parents in other relationships who similarly require the assistance of such programmes. It is difficult to understand the necessity of construing the *Marriage Act* to produce a result that creates such a limitation.

Human Rights Issues

339. Mr Burmester argued that Chisholm J was incorrect to consider that his decision was in line with modern human rights developments. He cited a UK Home Office Report *Report of the Interdepartmental Working Group on Transsexual People,* April 2000, para 1.18, Annex 4 as indicating a contrary position.

340. That report was commissioned by the Home Secretary in response to criticisms of the United Kingdom over this issue emanating from the European Court of Human Rights. It was, therefore, not what would normally be regarded as an independent assessment of the issues. In our view, it did not, in any event, arrive at a markedly different conclusion to that of Chisholm J in the sense that it found that one of the options open to the Government was to grant full legal status to transsexual people. Further, as we have discussed above, on 11 July 2002 the European Court of Human Rights sitting as a Grand Chamber delivered judgment in the cases of *Goodwin v The United Kingdom* (supra) and *I v The United Kingdom* (supra). In these cases, the Court said (at par 83 of *Goodwin*; par 63 of *I*):

"The Court is not persuaded therefore that the state of medical science or scientific knowledge provides any determining argument as regards the legal recognition of transsexuals."

341. The United Kingdom government has subsequently reconvened the Interdepartmental Working Group and has committed itself to implement the rulings of the European Court of Human Rights. We think that subsequent events have therefore demonstrated the correctness of Chisholm J's view.

342. In this context we think it appropriate to deal with certain of the submissions of the Human Rights and Equal Opportunity Commission. We should say that we were most indebted to the Commission for its assistance, which proved very helpful to us in considering this matter.

343. Mr Basten, in a lengthy written submission, tested the consistency of the approach taken by the trial Judge with that of the Attorney-General against principles of statutory interpretation informed by international human rights law. He submitted that those principles support the approach adopted by the trial Judge.

344. He referred to:

- the long established presumption that a statute is to be interpreted and applied, as far as its language admits, so as not to be inconsistent with the comity of nations and established rules of international law.
- that the High Court has expressed the presumption as operating in cases of ambiguity. See *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1 at 38 per Brennan, Deane and Dawson JJ.
- that ambiguity was not to be construed narrowly, citing *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273 at 287 per Mason CJ and Deane J and *Kartinyeri v The Commonwealth* (1998) 195 CLR 337 at 384 per Gummow and Hayne JJ.

- that s43 of the *Family Law Act* incorporates the wording of the text found in article 23 of the International Covenant on Civil and Political Rights ("the ICCPR") and article 10.1 of the International Covenant on Economic, Social and Cultural Rights, both of which treaties Australia has ratified.
- that in construing the provisions of the international human rights instrument, Australian courts should and do give weight to the views of specialist international courts and bodies such as the International Court of Justice, the European Court of Human Rights and the Human Rights Treaty bodies established to supervise the implementation by states parties of their obligations under the provisions of particular human rights treaties. In relation to the present case, he referred to the similarity in the wording of articles 2.1 and 26 of the ICCPR and article 14 of the European Convention on Human Rights.
- that the development of the common law of marriage in conformity with Australia's international human rights obligations would both achieve the objective of keeping the law in logical order and form and accord with the contemporary values of the Australian people.
- that the international human rights principles which bear upon the issues before the court, and to which the court ought to have regard in the application of the principles of statutory interpretation, include the following:
    (a) guarantees of equality before the law and non discrimination in articles 2.1 and 26 of the ICCPR;
    (b) the right of men and women to marry and found a family in article 23 of the ICCPR; and
    (c) the right not to be subjected to arbitrary or unlawful interference with a person's privacy and family in article 17.1 of the ICCPR.
- that particular emphasis should be given to the recognition of the inherent dignity and the worth of the human person which underpins each of these rights, and which is referred to in the preamble to the Charter of the United Nations.

345. He said that these principles, while not necessarily expressly referred to, were clearly taken into account by case law both in Australia and internationally, and support a broad definition of the words 'man' and 'woman'. In this regard he referred to the Australian decisions of *R v Harris and McGuiness* (supra) and *Secretary, Department of Social Security v SRA* (supra) to the effect that a *"sex change operation"* can indeed change sex and that considerations other than biology can be taken into account when determining sex. He also referred to the dissenting judgment of Thorpe LJ in *Bellinger* and to what was then the most recent statement of the United States law by the Kansas Court of Appeals in *In the Matter of the Estate of Gardiner* 22 P.3d 1086 (Kan. App 2001). He also referred to various decisions of the European Court of Human Rights.

346. We should mention that the Supreme Court of Kansas (42 P.3d 120) has since reversed the decision of the Court of Appeals, broadly upon the basis that the issue is one for the legislature and not for the Courts. However, as we have pointed out, the European Court of Human Rights has now taken a much stronger position in favour of the decision of the trial Judge in this case.

347. We consider that there is much force in the arguments advanced on behalf of the Commission in this regard. However, we do not find it necessary to rely upon them in arriving at our decision. They nevertheless give us greater confidence that our decision is correct and, in particular, support the argument that the contemporary every day meaning of the words 'man' and 'marriage' extend to Kevin and his marriage to Jennifer.

Statutory Recognition of Gender Re-assignment

348. It was argued before Chisholm J, as it was before us, that statutory recognition by the Commonwealth and the States for the purposes of passports, the criminal law and birth registration of gender re-assignment of transsexual persons provided a basis for applying similar principles to marriage. In this regard we note, as his Honour did, the provisions of the Commonwealth *Crimes Act*, following the *Crimes Amendment Forensic Procedures Act* 2001, extending provisions relating

to females to include "*a trans gender person who identifies as a female*". The trial Judge dealt with these issues in the following way:

> *"162. The Births, Deaths and Marriages Registration Act 1995 (NSW) makes express provision for transsexual persons. The objects of the Act include the registration of "changes of name and recording of changes of sex". Sexual reassignment surgery is defined as a surgical procedure involving the alteration of a person's reproductive organs carried out for the purpose of "assisting a person to be considered to be a member of the opposite sex", or to "correct or eliminate ambiguities relating to the sex of a person". An adult whose birth is registered in New South Wales, who has undergone sexual reassignment surgery and who is not married may apply for alteration in the record of the person's sex in the registration of the person's birth. The application is to be accompanied by statutory declarations by two medical practitioners. A new birth certificate issues which shows the person's altered sex and must not include a statement that the person has changed sex. There are provisions as to the use of the certificates, relating to its use in jurisdictions that do not allow for such certificates, and to prevent fraud. The Act also provides that a person whose sex is altered under this Part is, for the purposes of, but subject to, any law of New South Wales, a person of the sex as so altered. "* (footnotes omitted)

349. His Honour said (at par 167) (footnote reference incorporated into the text):

> *"What is the significance of these legislative and administrative initiatives? They are of course not directly relevant, and I take the point made by Mr Burmester that the legislation does not exist in all jurisdictions. In my view they are of limited relevance. I do not think the passports manual is of assistance. But the legislative provisions certainly support the view that there is no insuperable objection to the law recognising the changed sex of a person who has undergone a sex reassignment procedure. I note the limitation of the legislation to persons who are unmarried, but there was no submission that this should be taken as indicating any adverse view to the recognition of sex reassignment procedures in the case of married persons (f/n The purpose appears to have been to ensure that persons designated to be the same sex are not married: see Andrew Sharpe, "The Transsexual Marriage: Law's Contradictory Desires" (1997) 7 Australasian Gay and Lesbian Law J 1, at 12, quoting the South Australian Attorney-General in the parliamentary debates.)"*

350. Before us, counsel for the Attorney-General argued (at para 49-50 of the written submissions):

"49. As Justice Chisholm was of the view that there was no clear authority which has held that Corbett was the proper test to apply for the purpose of the Marriage Act, this Honour went on to consider other legal and administrative developments: AB 45- 46 para 161 – 166. The Judge accepted that they were of limited relevance as the 'developments' were essentially limited to New South Wales with the passage of the Births, Death and Marriages Registration Act 1995 (NSW) and amendments to the Anti-Discrimination Act. They did not represent uniform and consistent developments throughout Australia.

50. In the absence of any clear authority against Corbett and any significant legal and administrative developments, which would have brought into question the meaning of 'marriage' and the meaning of 'man' for the purpose of marriage, it is submitted that the Judge was in error in rejecting the Corbett test." (footnotes omitted)

351. We note that s. 49 of the *Births, Deaths and Marriages Registration Act* 1995 (NSW) provides that a certificate is evidence of what is contained in it but does not state that it is conclusive evidence.

352. Under the *Marriage Act*, a birth certificate is defined by reg 4 of the *Marriage Regulations* as follows:

""birth certificate", in relation to a person, means an official certificate, or official extract of an entry in an official register, showing the date and place of birth of the person;"

353. There is a requirement in the *Marriage Act* that the birth certificate be produced to the celebrant or marriage officer before a marriage can be solemnized – see ss. 42(1)(b) and 66 (1)(b)(iii). Section 155 of the *Evidence Act* 1995(Cth) makes such a certificate or a certified copy admissible in proceedings such as these. Section 185 of the *Evidence Act* gives State and Territory official documents such faith and credit as is afforded to them in the State or Territory concerned.

354. The scheme of the *Marriage Act* therefore is that it relies upon and recognises State and Territory jurisdiction in the issuance of the birth certificates which are a pre-requisite to solemnisation of marriage. The *Evidence Act* 1995 (Cth) supports the admissibility of and faith and credit to be given to the birth certificate as

evidence, albeit not conclusive evidence, of the facts contained in the certificate. There may accordingly be a question as to the source of the Commonwealth's jurisdiction, power or discretion to refuse to accept the evidence of the State certificate that Kevin is a man for the purpose of the marriage law. However, in our view the answer is that the certificate creates no more than a rebuttable presumption as to its accuracy, so that if the Attorney-General can establish that Kevin is not a man for the purposes of the *Marriage Act*, the presumption created by the certificate is accordingly rebutted.

355. It seems that a similar situation applies in England. In *W v W* (supra), Charles J remarked (at 330) under the heading *"Presumptions - onus of proof"*:

> *"I was referred to two presumptions which conflicted in this case, namely:*
> *(a) the entry on a person's birth certificate is prima facie evidence of that person's sex (see for example The Rees Case [1987] 2 FLR 111, 496, para 27 and The Cossey Case [1991] 2 FLR 492, 499, para 24`), and*
> *(b) the presumption that a marriage is valid where the parties enter into an ostensibly valid marriage and live together as man and wife (see Mahadervan v Mahadervan [1962] 3 All ER 1108, 1116D.*
> *In my judgment correctly neither side placed any real weight on either of these presumptions or the prima facie position arising from them."*

356. Although his Lordship did not elaborate, we conclude that he also took the view that the presumptions were rebuttable.

357. We think that Chisholm J was correct in his view that these legislative and administrative initiatives did not have the effect of creating any irrebuttable presumption that Kevin was a man for the purpose of the *Marriage Act*. We also agree with his view that they support the proposition that there is no insuperable objection to the law recognising the 'changed' sex of a person who has undergone gender re-assignment procedures.

358. We think, however, that their significance goes somewhat further and provides considerable assistance in determining whether the contemporary every day meaning of 'man' and 'marriage' extends to Kevin and his marriage to Jennifer

The Relevance of Section 114(2) *Family Law Act* 1975

359. This provision is set out above (at par 73). Following the conclusion of the hearing of the appeal, we invited the parties to make written submissions on this subject.

360. Referring to *R v McMinn* (1981) 38 ALR 565 at 575, the Attorney-General submitted that s. 114(2) only applies where injunctive relief is sought under s. 114(1) and that these sub-section have no direct relevance to the appeal. The Respondents and the Human Rights and Equal Opportunity Commission were of the same view. We agree with these submissions.

361. The submission of counsel for Attorney-General further contended that if s. 114(2) does have any relevance, it is only to illustrate the special status of marriage when construing the meaning of 'man' for the purposes of marriage. In this regard, reference is made to the judgment of Brennan J in *The Queen v L* (supra) and it is submitted that his Honour spoke of Parliament having enacted the Marriage Act *"having regard to the traditional view of marriage being a social institution having its origins in ancient Christian law and that it is intrinsically connected with procreation."*

362. The Respondents, with whom the Human Rights and Equal Opportunity Commission agreed generally, did not accept the Attorney-General's position. Whilst acknowledging that Brennan J had found that *"the legal institution of marriage is not to be found in the common law"* and that *"the doctrines of the law of marriage were developed in the ecclesiastical courts, not in the courts of common law"*, it was their position that his Honour did not acknowledge that marriage *"is intrinsically connected with procreation"*. The Respondents drew attention to Brennan J's comment (at 395), that:

"Sexual intercourse was realistically treated as an aspect, albeit an important aspect in most cases, of married life the absence of which might, dependent on the total relationship of the parties, be significant to the determination of a charge of desertion." (emphasis added by the respondents).

363. They also made reference to the fact that non-consummation of a marriage does not affect its validity and that refusal to consummate a marriage is no longer a ground for dissolution. Otherwise, the Respondents' submission was that the judgment in *The Queen v L* (supra) supported the view that the words 'man' and 'woman' should be given their ordinary everyday meaning and that there is no special status or special consideration that would result in a construction that would exclude Kevin from being a man for the purposes of the *Marriage Act*. They submitted (at par 10) that the joint judgment of Mason CJ, Deane and Toohey JJ "*impliedly recognises that the rights and obligations of parties to a marriage may evolve pursuant to the common law and the Court would be justified in refusing to accept a notion out of keeping with the view society now takes of the relationship between the parties to a marriage."*

364. At par 11 of the written submissions, the Respondents also contended that their Honours' reference (at 390) to *"the view society now takes"* is *"consistent with giving the words 'man' and 'woman' their ordinary everyday meaning"*. The relevant passage of the judgment is:

"In any event, even if the respondent could, by reference to compelling early authority, support the proposition that is crucial to his case, namely, that by reason of marriage there is an irrevocable consent to sexual intercourse, this Court would be justified in refusing to accept a notion that is so out of keeping with the view society now takes of the relationship between the parties to a marriage."

365. We consider that counsel for the Attorney-General is incorrect in suggesting that s. 114(2) assists his argument as to the construction of the *Marriage Act*. That provision does not more than grant the power to make orders in respect of what may be a specific aspect of a particular marital relationship. It does not go to

the question of definition in our view and, further, we agree with the submissions of the Respondents and the Human Rights and Equal Opportunity in respect of Brennan J's judgment in *The Queen v L*. As for the Respondents' submissions in respect of the joint judgment in that case, it is supportive of our earlier conclusion that the relevant terms should be given their ordinary contemporary meaning.

The Role of Parliament

366. Counsel for the Attorney-General argued that Chisholm J, having accepted that marriage involves questions of status and public interest, should have been slow to interpret the *Marriage Act* in a manner which departed from the understanding of marriage and the meanings of 'man' and 'woman' at the time that the Act was passed.

367. This submission appears to assume the correctness of the submission that the *Marriage Act* should be interpreted as at 1961. It also assumes that if this were to be done then Kevin could not be treated as a man.

368. We have already expressed the view that the Act should be given its contemporary everyday meaning. However, even if the Act were to be construed as at 1961, we are far from satisfied that it follows that the Respondents' marriage would not be recognised as valid. As Mr Basten pointed out, the decision of the Privy Council in *Baxter v Baxter* [1948] AC 274 was published 13 years before the passage of the *Marriage Act*. It clearly recognised that a question of malformation did not render a marriage a nullity unless it completely prevented sexual intercourse. The parties' capacity or otherwise to procreate was not regarded as a bar to the validity of the marriage.

369. Mr Burmester took this point a step further by arguing that it is not appropriate for a court to give an interpretation to a word or concept that does not reflect the

clear understanding of Parliament at the time of the enactment of the original legislation. We do not accept this submission.

370. However, he relied upon similar observations made by the New Zealand Court of Appeal in *Quilter* per Gault J at 526-7, Thomas J at 528 and 547, Keith J at 555, 567-8, 570-71 and Tipping J at 572.

371. We would prefer in this regard the argument advanced by Mr Basten that the Court should be slow to adopt a restrictive interpretation of the *Marriage Act* which has such a discriminatory effect, in circumstances where there is no clear expression of a legislative intention to adopt such a restrictive approach.

372. One of the principal differences between the views in *Bellinger* expressed on the one hand by the trial judge and Butler-Sloss P and Robert Walker LJ, and on the other hand by Thorpe LJ, was whether this issue could be decided by a court or was one properly for Parliament. It is quite clear that had the former felt that it was open to a court to decide it, they would have done so in favour of the appellant. They were very conscious of the awful predicament facing transsexual people and were very sympathetic to it.

373. As we have said, we prefer the approach of Thorpe LJ on this issue for the reasons stated by him and by ourselves earlier in these reasons for judgment. In doing so we hasten to say that we are not seeking to engage in judicial legislation. One of the functions of the judiciary is to interpret the meaning of legislation and we see ourselves as doing no more and no less than this, as did the Full Court of the Federal Court and the NSW Court of Criminal Appeal in the cases already discussed. Parliament did not choose to define marriage in the *Marriage Act*, nor did it define what is meant by the words 'man' and 'woman'. These issues being raised in this case, we feel that it is not only the right but the duty of courts to determine them. The following remarks by Brennan J in *Secretary, Department of*

Health and Community Services v JMB and SMB (1992) 175 CLR 218 at 264 are apposite to the present case:

> *"The questions raised by this case starkly demonstrate the quandary of the law when it is invoked to settle an issue which is a subject of ethical controversy and there are no applicable or analogous cases of binding authority. ... there is no clear community consensus on these issues which the courts or the legislature can translate into law. Nevertheless, concrete and poignant cases ... arise for decision. In such a case a court must try to identify the basic principles of our legal system and to decide the issues in conformity with those principles."*

CONCLUSIONS

Should the Words 'Man' and 'Marriage' as used in the Marriage Act 1961 bear their Contemporary Ordinary Everyday Meaning?

374. As we have said (at par 16 of our reasons) Chisholm J proposed the test as being:

> *"Unless the context requires a different interpretation, 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, R v Harris & McGuiness [1988] 17 NSW LR 158; Secretary, Department of Social Security v SRA [1993] 118 ALR 467 followed.*
>
> *The context of marriage law, and in particular the rule that the parties to a valid marriage must be a man and a woman, does not require any departure from ordinary current meaning according to Australian usage of the word 'man'."*

375. For the reasons already given, it follows that we agree with that approach. In our view, nothing has been shown by the Attorney-General that requires a contrary interpretation.

376. Having found that *Corbett* does not represent the law in Australia, with which we also agree for the reasons given, his Honour found (at par 330):

"In the present case, the husband at birth had female chromosomes, gonads and genitals but was a man for the purpose of the law of marriage at the time of his marriage, having regard to all the circumstances and in particular the following:-

a) He had always perceived himself to be a male;
b) He was perceived by those who knew him to have had male characteristics since he was a young child;
c) Prior to the marriage he went through a full process of sexual re-assignment, involving hormone treatment and irreversible surgery, conducted by appropriately qualified medical practitioners;
d) At the time of the marriage, in appearance, characteristics and behaviour he was perceived as a man, and accepted as a man, by his family, friends and work colleagues;
e) He was accepted as a man for a variety of social and legal purposes, including name, and admission to an IVF program, and in relation to such events occurring after the marriage, there was evidence that his characteristics at the relevant times were no different from his characteristics at the time of the marriage;
f) His marriage as a man was accepted, in full knowledge of his circumstances, by his family, friends and work colleagues."

377. Once it is determined that words in a statute should bear their contemporary ordinary every day meaning, it becomes, as we have said, a question of fact to determine what that meaning is. Chisholm J defined the word 'man' as including a post-operative transsexual person (female to male).

378. It is unnecessary for the purposes of this case for us to further define what those words mean, but rather to determine as a question of law whether it was open to Chisholm J to find, as he did, that Kevin was a man at the time of the marriage for the purposes of the *Marriage Act*.

379. In our view this finding was clearly open to Chisholm J. Indeed, the medical evidence clearly pointed in that direction as did the other evidence of the social acceptance of Kevin as a man. The weight of international legal developments points strongly in a similar direction. There is widespread statutory recognition of transsexual persons as 'man' or 'woman' (as the case may be) for the purposes of criminal and social service law. The laws of a number of Australian States permit the alteration of birth certificates to recognise the position of transsexual persons.

The acceptance of such a position provides consistency, in Australia at least, with case law outside the area of marriage.

380. It is also, in our view, a finding consistent with international law and with humanity. A contrary finding would, in our opinion, result in considerable injustice to transsexual people and their children, for no apparent purpose.

381. Once this issue is determined, the question of whether the marriage between Kevin and Jennifer is a valid marriage was a matter for determination by the trial Judge. No question was raised that the marriage was not valid, once the other issues were determined in their favour.

382. This leaves the more difficult question of the position of pre-operative transsexual persons. As we have said, this case does not require us to determine this question. In all of the decided cases to which we have referred their position has been distinguished from post-operative transsexual persons and comments have been made to the effect that this is a matter for Parliament to determine. In this country at least, there have been no signs that the Federal Parliament has any interest in these questions. The solution is not, of course, solely in the hands of the Federal Parliament. There has been greater interest within most of the States and Territories and for many purposes it is the law of the States and Territories that most affect transsexual persons.

383. A question arises as to whether the Courts can logically maintain that the position of post-operative transsexual persons is a matter for them but that of pre-operative transsexual persons is one for Parliament. This has the effect of leaving such persons as the only persons in the community who are prevented from marrying a person who they legitimately regard as a person of the opposite sex, while remaining free to marry a person of their own sex.

384. The reluctance of Courts to enter this area seems to be based upon something of the same logic as that of *Corbett*, namely an inability to be able to make a physical or scientific examination in order to determine the sex of a person. If one accepts the argument of Ms Wallbank and the evidence given in this case, Kevin

has always perceived himself to be a man. One then asks the rhetorical question as to why he must subject himself to radical and painful surgery to establish this fact.

385. Mr Basten's oral submissions were relevant to this issue. He said (Appeal Transcript, 19 February 2002, page 26):

> *"... we would say that the actual nature of the surgical intervention and its achievements may be a factor that could be taken into account – we don't suggest it's irrelevant – but it is not a factor which will be determinative in all cases and may not be of great importance, at all, in some cases."*

386. He then highlighted that the direction of transition (male to female in contrast with female to male) may give rise to different considerations:

> *"...in the circumstances of this case, it is worth accepting that surgical intervention in relation to the removal of gonads maybe relatively straight forward, surgical intervention for a male to female transsexual person in relation to the construction of a vagina may be common place, surgical intervention which requires the construction of a penis is much more problematic and even where it takes place may or may not give rise to something which would be readily accepted as a penis of a sexual kind which has a particular sexual function.*

387. These are not matters which the present case requires us to comment upon. They are issues that will have to be determined by another Court in an appropriate case.

388. Our decision like that of Chisholm J in this case, is in our view, the correct interpretation of the law. We would add, however, that we believe that the recognition of the position of post-operative transsexual persons is at least a step in the direction of the recognition of the plight of such persons and hopefully a step that will enable them to lead a more normal and fulfilling life.

389. Our decision in this matter is that the appeal should be dismissed.

COSTS OF THE APPEAL

390. At the conclusion of the hearing of this appeal, we did not hear submissions in relation to the costs of the appeal. Accordingly, we propose giving directions for the filing of written submissions in relation to those costs.

ORDERS

391. We therefore order:

1. That the appeal be dismissed.

2. (a) That any party be at liberty to make an application by way of written submissions in respect of costs incurred by that party in relation to the appeal within 21 days of the date hereof.

   (b) That the other parties have a further 14 days in which to make written submissions in answer thereto.

   (c) That the first mentioned party have a further seven (7) days in which to make any written submissions in reply thereto.

   (d) That each submission have endorsed on the cover sheet the date on which a copy of that submission was served on the other parties.

I certify that the preceding 391 paragraphs
are a true copy of the reasons
for judgment delivered by
this Honourable Full Court.

Associate