Family Court of Australia

In Re Kevin (Validity of Marriage of Transsexual) [2001] FamCA 1074 (12 October 2001)

Last Updated: 5 February 2007

[2001] FamCA 1074

FAMILY LAW ACT 1975

FAMILY COURT OF AUSTRALIA
AT SYDNEY FILE NO: SY8136 OF 1999

BETWEEN	**KEVIN AND JENNIFER** (Applicants)
AND	**ATTORNEY GENERAL FOR THE COMMONWEALTH** (Respondent)

Date of Hearing:	*30th April, 1st & 2nd May 2001*
Date of Judgment:	*12th October 2001*

JUDGMENT OF THE HONOURABLE JUSTICE CHISHOLM

APPEARANCES: Ms Rachael Wallbank of Wallbanks Solicitors [1 Marion St, Strathfield Sydney NSW 2135, PO Box S423, Homebush South NSW, 2140] appeared on behalf of the applicants.

Mr Henry Burmester QC and Ms Kate Eastman of counsel [instructed by Ms Sonja Marsic, Principal Solicitor, 133 Castlereagh St, Sydney, DX 444 Sydney], appeared on behalf of the Attorney-General for the Commonwealth.

IN RE KEVIN (VALIDITY OF MARRIAGE OF TRANSSEXUAL)

HEADNOTE

File Number: Sy 8136 of 1999

Date of Judgment: 12 October 2001

Coram: Chisholm J

MARRIAGE - Validity - Application for declaration of validity of marriage between a woman and a female to male post operative transsexual - Whether the person's sex must be determined solely by reference to genitals, chromosomes, and gonads at time of birth - Whether other matters may be taken into account - Whether *Corbett v Corbett (otherwise Ashley)* [1971] P. 83 represented Australian law.

The applicants, who went through a ceremony of marriage on 21 August 1999 applied for a declaration of the validity of that marriage. The issue involved was whether the husband was a man at the date of the marriage. The question arose because he was a post-operative female to male transsexual.

The applicants submitted that the husband was a man for the purpose of the marriage law, and that Court should declare that the marriage is valid. The Attorney-General intervened and submitted that the husband was not a man for the purpose of the law of marriage, and that the application should therefore be dismissed. He relied on *Corbett v Corbett (otherwise Ashley)* [1971] P. 83.

Facts

The husband was identified as a girl at birth and named Kimberley (not the real name). His genitalia and gonads were female, and he had and continues to have female (XX) chromosomes. However for as long as he could remember, he perceived himself to be male. Despite pressure to dress and behave as a girl, he wore boys' clothes whenever he could, refused to play with girls' toys, had many attributes of a boy, and saw himself as a boy, while growing up. He described 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. During his adolescence and early adult years he kept most of his thoughts to himself and felt extremely alienated from people.

From 1994 he generally presented as a male, wearing trousers and shirts to work. In mid 1995 he saw an article about sex reassignment treatment, and he had feelings of relief and

excitement upon learning of other people like him, and of how they had "discovered the medical means to express their true sex as men." He embarked on hormone treatment in October 1995. This led to coarse hair growth on his face, chest, legs and stomach, and a deeper voice. In November 1997 he had surgery to reduce his breasts to male size. In September 1998 he had further surgery: a total hysterectomy with bilateral oophorectomy. The surgery constituted "sexual reassignment surgery" within the meaning of Section 32A of the Birth Deaths and Marriages Registration Act 1995 (NSW). As a result, his body was no longer able to function as that of a female, particularly for the purposes of reproduction and sexual intercourse.

The parties met in 1996, and Kevin told Jennifer of his transsexual predicament. She perceived him as a man, and supported his desire "to bring his body into harmony with his mind". They started living together in February 1997 and agreed to marry. In May 1997, Kevin changed his given name from Kimberley to Kevin. In September 1997 the couple applied successfully to an IVF program and Jennifer became pregnant by an anonymous sperm donor. The expert team concluded that Kevin "should be considered male biologically and culturally" and that the parties should "be considered a heterosexual couple with infertility consequent to absent sperm production".

In March 1998 Jennifer changed her family name to Kevin's. In October 1998 Kevin obtained a new Birth Certificate on which his sex was shown as male. Jennifer gave birth to a male child in November 1999. In August, having disclosed the relevant medical history to the marriage celebrant, they were married and a marriage certificate was issued.

At the date of the marriage Kevin's male secondary sexual characteristics were such that he would have been subject to ridicule if he had attempted to appear in public dressed as a woman; he could not have entered a women's toilet; and he was eligible to receive an Australian passport showing his changed name and stating his sex as male. He has been treated as a man for a variety of legal and social purposes, including his employer, Medicare, the Tax Office and other public authorities, banks, and clubs. Evidence from numerous family, friends and work colleagues testified to his acceptance as a man and to the acceptance of him as a husband and father.

Psychiatric examination of Kevin revealed, in summary, that there was no evidence of psychosis or delusional disorder; that Kevin "presented as an intelligent, emotionally warm man who would be accepted socially as completely masculine"; that his "brain sex or mental sex" was male; and that he "is psychologically male and that this has been the situation all his life".

Issues and arguments

The applicants tendered expert medical evidence from a number of specialists about the nature of transsexualism and related matters. They submitted that this evidence indicated that "brain sex" was an important or even defining aspect of a person's sexual identity. The Attorney-General submitted that the evidence did not permit such conclusions to be drawn.

For the applicants, it was submitted that the word "man" should be given its ordinary contemporary meaning. For the Attorney-General, it was submitted that the word "man" should be given its meaning as at the date of the Marriage Act 1961, and that meaning was as formulated in *Corbett v Corbett (otherwise Ashley)* [1971] P. 83.

For the Attorney-General, it was submitted that the decision in *Corbett v Corbett* was correct and represented Australian law. Accordingly, since the husband at birth had female chromosomes, genitalia and gonads, for the purpose of the law of marriage he must be treated as a woman, notwithstanding any facts relating to his psychology or role in society, and notwithstanding that he had undergone sex reassignment measures, including hormone treatment and surgery.

For the applicants, it was submitted that *Corbett* does not represent Australian law. Regard could properly be had to other matters than those indicated in *Corbett*, including psychological aspects or "brain sex", the person's role in society, and the consequences of medical reassignment. Having regard to those matters, and to the ordinary contemporary meaning of "man", Kevin should be held to have been a man at the date of the marriage.

The Court welcomed the Attorney-General's intervention and acknowledged the assistance it received from the thoughtful and helpful submissions by Mr Burmester QC on his behalf, and from the Attorney-General's assistance to the applicants in the presentation of their case. In the result, the Court had the advantage of extremely detailed and scholarly presentations on each side, as well as evidence from some of the most distinguished medical experts in the world in this field.

The judgment discusses medical evidence relating to transsexualism and related matters, and considers legal developments in a number of countries.

Held, granting a declaration that the marriage was valid:-

1. For the purpose of ascertaining the validity of a marriage under Australian law, the question whether a person is a man or a woman is to be determined as of the date of the marriage.
2. There is no rule or presumption that the question whether a person is a man or a woman for the purpose of marriage law is to be determined by reference to circumstances at the time of birth. Anything to the contrary in *Corbett v Corbett (otherwise Ashley)* [1971] P. 83 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 or women in accordance with their sexual reassignment.

R v Harris and McGuiness (1988) 17 NSWLR 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 gonads, chromosomes and genitals, may nevertheless be a man at the date of his marriage. In this respect, the decision in *Corbett v Corbett (otherwise Ashley)* [1971] P. 83 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.

7. For these reasons, the application succeeds, and there will be a declaration of the validity of the applicants' marriage.

PART ONE: INTRODUCTION

1. The applicants went through a ceremony of marriage on 21 August 1999. They now apply for a declaration of the validity of that marriage. The issue involved is whether the husband was a man at the date of the marriage. The question arises because he is, to use the phrase in the Attorney-General's submissions, a "post-operative female to male transsexual". The applicants say that the husband is a man for the purpose of the marriage law, and that Court should declare that the marriage is valid. The Attorney-General submits that the husband is not a man for the purpose of the law of marriage, and that the application should therefore be dismissed.

2. 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. That is the issue I need to determine. Although it is a matter of first impression in Australian law, the problem is a familiar one. It has been addressed by courts in many countries, and given different answers. It will be necessary to consider those decisions, and also medical evidence relating to transsexualism and related matters, before reaching a conclusion.

3. The Attorney-General has intervened in the application and has made submissions contrary to it. I welcome his intervention. The thoughtful and helpful submissions by Mr Burmester QC on his behalf have been of enormous assistance to the Court in marshalling the relevant material and understanding the issues. As I understand it, the Attorney-General has also provided some funding to assist the applicants in the presentation of their case. In the result, the Court has had the advantage of extremely detailed and scholarly presentations on each side, as well as evidence from some of the most distinguished medical experts in the world in this field. I am

very grateful.

4. The Attorney-General relies on submissions of law, founded to a considerable extent on the 1971 English decision in *Corbett*, which will need close consideration. He tendered no evidence, and elected not to cross-examine the applicants or their witnesses. Apart from some issues of admissiblity that I will consider in due course, the applicants' evidence is therefore unchallenged.
5. I will refer to the husband as "he". By doing so, I extend to him the same courtesy that has normally been extended to litigants in similar cases, and which has been extended to him in argument in this case. Use of this language does not indicate that I have pre-judged the issue. To preserve the anonymity of individuals, I have used fictional names for the applicants and the witnesses.

The legal framework

6. Both parties accept that a valid marriage for the purpose of the *Marriage Act* 1961 (Cth) must be between a man and woman.[1] The origins of the definition of marriage are traditionally traced to the following statement by Lord Penzance in *Hyde v Hyde* (1866):[2]

I conceive that marriage, as understood in Christendom, may ... be defined as the voluntary union for life of one man and one woman, to the exclusion of all others'.

7. While marriage is not expressly defined, both the Marriage Act and the Family Law Act 1975 contain sections that confirm the above proposition. Section 43(a) of the Family Law Act refers 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". And under the Marriage Act, the words to be said by a celebrant when solemnising a marriage include the same language.[3] That definition has been adopted for the purpose of Australian law in many cases.[4]
8. The present application is for a declaration as to the validity of the marriage. The Act provides for such declarations. The Court has jurisdiction over matrimonial causes. "Matrimonial cause" includes proceedings for a declaration of the validity of a marriage.[5] Section 113 provides that in such proceedings, the Court may make such declaration as is justified. There is a clear constitutional basis for these provisions: the Parliament has power to make laws in relation to marriage.[6]
9. This case does not involve any application for a decree of nullity, and thus does not raise the technical issue whether such a decree could be granted on the ground that the parties are not respectively a man and a woman.
10. Finally, there is no suggestion that the issue in this case depends on the exercise of any discretion. If the applicants are correct and Kevin was a man at the time of the marriage, they will have their declaration. If the Attorney-General is correct, their application will be dismissed.

Some basic matters

11. In this section I deal with some matters that are significant in understanding this judgment.

12. Kevin is a person of a kind often referred to in the literature as a transsexual. It is useful to distinguish this term from other concepts with which it is sometimes confused. In this judgment I will generally use "transsexual" to mean 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.

13. The word poses some problems. The word "transsexual" may suggest a sexual *transition*,[7] a passing from one sex to the other. While that may reflect the physical changes associated with surgery or hormone treatment, it does not convey the fact that transsexuals say that they have always experienced themselves as belonging to the other sex, before as well as after the hormone or surgical procedures. The word suggests a particular answer to some of the issues that I need to address in this case, and I mention this mainly to explain that I do not intend to pre-judge any of the issues by the use of this term.

14. Further, I am conscious that using the word "transsexual" as a noun may tend to have a dehumanising effect. In recent years we attempt to remove such effects by a more careful use of language, for example by referring to "people with handicaps" rather than "the handicapped". Such usages are sometimes mocked as "political correctness", but I think they represent an honourable and civilised attempt to use language that reflects the essential humanity of the people being described. However no suitable alternative is evident, and the word is used in the applicants' submissions, so I will adopt it, although I will attempt to minimise its use.

15. A transsexual is not the same as a homosexual.[8] A homosexual is one who is attracted sexually to members of the same sex. Similarly a transsexual is not the same as a transvestite. A transvestite is someone who dresses in the clothes of the other sex. A transsexual might or might not be a homosexual.[9]

16. Next, I should say something about the use of the terms "sex" and "gender". The words are used in various ways. Their usage depends in part of what the speaker understands to be the nature of sexual identification. Thus, as will be seen, Ormrod J in *Corbett* drew a sharp distinction between the two. However this distinction presupposed that there was a fundamental difference between a person's sense of self, which he treated as a matter of psychology, and the person's "true sex" which he treated as equivalent to three biological characteristics, namely chromosomes, genitals and gonads (where they are concordant). As will be seen, today medical experts think it likely that a transsexual's sense of self derives from a (biological) characteristic of the brain. In this judgment I will use "sex" as a way of referring to a person as a man or a woman: a man's sex is male and a woman's is female. I will also treat the adjectives "male" and "female" in the same way,[10] although of course these adjectives can refer to children (a boy is a male child, though not a man) and to other animals (a dog may be male, but not a man).[11] In the present context, "gender" is often used to refer to such matters as the person's self image and role in society. For the purpose of this judgment, I would prefer not to use such terms in a highly defined way, since doing so can lead to the begging of questions. For

simplicity, I will generally avoid the word “gender”, and will consider in due course the extent to which non-biological matters might be taken into account in determining whether a person is a man or a woman for the purpose of the law of marriage in Australia.

17. I should say something about issues that do *not* arise in this case. In the common law tradition, courts decide the issues that arise from the evidence and argument. In this case, the issue is whether Kevin, a post-operative female to male transsexual person, is a man. Each party made submissions on the basis that Kevin is either a man or a woman. Some writers point out that in some ways at least, this dichotomy is socially constructed, and can be regarded as part of the problem. Thus one writer refers to “the inadequacy of our society’s two-sex, two-gender system of organising and regulating sexual identity”.[12] From this point of view, it could be argued that the problem of assigning one sex or other to transsexuals is caused in part by social arrangements that require them to be assigned to one category or the other.[13] Thus one writer proposes that we "make one of the fundamental human rights not the answer to the question “Am I a man or a woman”, but the right not to have the question asked at all”.[14] Others would argue that a departure from the two-sex approach is unlikely. As Douglas Smith put it in a seminal article:-[15]

The cultural, religious and moral assumptions that man can be divided into two clearly identifiable and distinct sexes quite naturally became embedded in the law despite its inaccuracy... The modern approach considers human sex to be a continuum ranging from the nonexistent "pure" female to "pure" male...

It is probably impractical for the law to abandon the two-sex assumption. The law must deal with social practicalities, not medical niceties, and most people are clearly male or clearly female...

18. I mention this only to indicate that these issues were not raised in argument and, as will be seen, I do not need to deal with them to resolve this case. There was no submission that any intermediate position is open to me in these proceedings.[16] In these proceedings, I must determine that Kevin is either a man or a woman for the purpose of the marriage law.

19. Next, I do not need to consider the situation of a *pre-operative* transsexual in the context of marriage, and I do not intend to make any ruling on such cases. I will refer later to Australian authorities in areas other than marriage, recognising post-operative but not pre-operative transsexualism, but I do not intend to engage in the discussion of whether it is appropriate to draw the line in this way, in the context of marriage or any other area of law.

20. Next, the case does not raise any issue about homosexual relationships and marriage.[17] As I have said, transsexualism is different from sexual orientation. It happens that Kevin is heterosexual,[18] but this has nothing to do with this case: the validity of a marriage between a man and a woman is not affected by either party’s sexual orientation or preferences.

21. Finally, the case requires me to make a decision about one individual. Much of the discussion in the cases and the literature is about transsexuals in general terms,

and it is necessary to speak in this way in this judgment. There was no evidence or argument about whether there are degrees of transsexualism, or whether people whose characteristics are different from Kevin's should be categorised as men for the purpose of marriage law. For this reason, I will make specific findings about the evidence relating to Kevin. As is inevitable in the common law system, questions relating to people who have different characteristics will have to be determined if and when they arise. It would not be appropriate for me to attempt to formulate the decision in a form that would be appropriate for the legislature, although I will try to identify the relevant legal principles to the extent that is necessary to resolve this case.

PART TWO: THE FACTS

Introduction

22. In this Part I deal with the facts of this case, including the medical evidence relating to Kevin. After stating the basic story, I will deal in more detail with certain evidence, namely evidence from friends, colleagues and relatives and what I might call the "specific" medical evidence. That evidence deals with the process of Kevin's sex-reassignments procedures, with the artificial insemination treatment, and with examinations by psychiatrists of Kevin's mental state. I deal much later with what I might call the "general" medical evidence, relating to the nature of transsexualism and other matters. Of course, there is a degree of overlap between the specific and the general medical evidence.

23. Kevin was born in 1965 and given the name Kimberley. His birth certificate recorded his sex as "female". No doubt he looked like a girl baby when he was born. There is no direct evidence about the state of his body after birth, but on the available evidence I find that at birth his genitalia and gonads were female, and he had and continues to have female (XX) chromosomes.[19]

24. But 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 photgraph 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.[20] The Attorney-General has not sought to argue that the sex-reassignment surgery was in any way incomplete or unsuccessful.

31. Kevin met his wife Jennifer in October 1996. He told her of his transsexual predicament. Jennifer considered that he looked, sounded and acted like a man. She perceived him as a man, although he told her he had been born with a female body. Jennifer interacted with Kevin as a man and observed that others did the same. She supported him in his desire "to bring his body into harmony with his mind". It was "obvious" to her that he was a man. They started living together in February 1997 and agreed to marry.

32. In May 1997, Kevin changed his given name from Kimberley to Kevin. In September 1997 the couple made a written request to Sydney IVF Pty Limited for the semen of an anonymous donor to be used in order to enable Jennifer to become pregnant. The request was approved, and the treatment was successful. I will refer to some evidence about this matter later. Jennifer duly became pregnant, and gave birth to a male child in November 1999. The child's birth certificate shows the applicant husband as the father of the child and the applicant wife as the mother. They have since made a second successful application to Sydney IVF Pty Limited.

33. The couple understood from their initial inquiries that they could not legally marry. They became a de facto couple, and held a “Commitment Ceremony" in December 1997. In March 1998 Jennifer changed her family name to Kevin’s.

34. Kevin applied to the Registrar of the New South Wales Registry of Births Deaths and Marriages for a new birth certificate showing him to be a male, supplying statutory declarations by two appropriately qualified medical practitioners to the effect that he had undergone the surgery. In October 1998 the Registrar issued Kevin a new Birth Certificate on which his sex is shown as male.[21]

35. In mid 1999 the couple took the formal steps to get married. They gave the necessary notice to an authorised marriage celebrant, and each made a statutory declaration under the *Marriage Act 1961* stating that they believed that there was no legal impediment to the proposed marriage. On 21 August 1999, the celebrant issued a Certificate of Marriage stating, among other things, that she had on that day duly solemnized marriage in accordance with the provisions of the *Marriage Act 1961* between the applicant husband and the applicant wife. The validity of this Certificate is disputed by the Attorney-General.

36. Kevin says, and I accept, that as of the date of the marriage his male secondary sexual characteristics were such that he would have been subject to ridicule if he had attempted to appear in public dressed as a woman, that he could not have entered a women’s toilet, and that he was eligible to receive an Australian passport showing his changed name and stating his sex as male. He was in fact issued with such a passport on 15 March 2000. Since 21 August 1999, Medicare has issued a family card showing the names of the applicant husband, the applicant wife and the child Quentin.

37. There is a great deal of evidence from family, friends and work colleagues about Kevin’s acceptance as a man, and it is summarised later. In addition, he has tendered evidence that he is referred to and treated as a man by a number of people and organisations. They include his employer, Medicare, the Tax Office and other public authorities, banks, and clubs. He has also shown that various bodies treat him and Jennifer as husband and wife.

38. Kevin regards his relationship with Jennifer as that of a man and a woman; and since the marriage, as husband and wife. He regards himself as the father of their son. So far as Kevin is concerned, the three of them "are a ‘family’ in every sense of the word”.

Evidence relating to the in-vitro fertilisation procedures in 1998

39. There is evidence relating to the successful artificial insemination procedures in 1998. Kerry McGowan is the senior social worker at the Dept. of Reproductive Endocrinology and Infertility at the Royal Prince Alfred Hospital, and is highly qualified. She first met Kevin when the parties approached the unit in September 1997 requesting treatment for Jennifer with anonymously donated sperm so that she could become pregnant and give birth to a child that the parties would raise together as the child’s parents. She interviewed the parties for the purpose of assessing their application and taking consent. She formed the opinion that they were a committed and loving couple who had “a supportive circle of relative and friends.” She noticed that their respective families were fully aware of Kevin’s transsexual history and that Kevin at some future time intended to discuss his

transsexual history with his child.

40. Ms McGowan says that the application was considered at a meeting of the Fertility and Andrology team on the 6 April 1998. This team meeting was attended by medical, nursing, counselling and scientific clinicians. It was headed by Professor Robert Jansen, who was then responsible for the decisions of the team as Head of the Department at the hospital. After considering the issue of Kevin's transsexual history, the team's decision was that they were a heterosexual couple and that Jennifer be approved for treatment in that context using donor semen. Ms. McGowan says that in her opinion, Kevin's transsexual history "should not prevent him being considered a man for the purpose of marriage or disentitle [the parties] from being legally married as man and wife."

41. Professor Jansen is the Head of the Department of Reproductive Endocrinology and Infertility at the Royal Prince Alfred and King George the V hospitals in Sydney. He is a clinical professor at the University of Sydney, and the Medical and Managing Director of Sydney IVF Pty. Ltd. He has many publications and has a distinguished career in the field. Professor Jansen confirms the matters stated by Ms McGowan. He comments that the Fertility and Andrology Team then consisted of a number of specialist gynecologists and physicians as well as specialist nursing staff and specialist biologists. He says that for the purpose of determining the application, the team considered a report from the gynecologist who had interviewed the couple and who had recommended that they be regarded as a couple for infertility treatment employing donated semen. The team also considered the report of Ms McGown. Professor Jansen continues:

in taking into account the biology of sexual differentiation and gender determination, the Fertility and Andrology Team formed the opinion, with which I concurred completely, that Kevin should be considered male biologically and culturally and that, accordingly, it was decided that Kevin and Jennifer be considered a heterosexual couple with infertility consequent to absent sperm production.

42. He goes on to say that in his opinion Kevin's transsexual history should not prevent him being considered a man for the purpose of marriage or disentitle the couple from being legally married as man and wife.

Examination and reports by psychiatrists

43. The next area of specific medical evidence consists of psychiatric reports on Kevin. Professor McConaghy is a highly qualified psychiatrist whose publications include a book on sexual behaviour, problems and management. He interviewed Kevin on 16 May 2000. He said that Kevin "presented as an intelligent, emotionally warm man who would be accepted socially as completely masculine." In the interview, Kevin "presented as an intelligent and honest person, and his story was so typical as to convince me of his honesty".

44. Professor McConaghy answered a number of specific questions. He said that he believed that Kevin's "psychological sex is male" and was so on 21st August 1999 (the date of the marriage). He said that he relates to the significant people in his life and society generally as a male and did so on the 21st August 1999. He said

that he experienced the significant people in his life and society generally as treating him as a man now, as they did on 21st August 1999.

45. Professor McConaghy wrote that he believed Kevin's "brain sex or mental sex is male". He then refers to Professor Milton Diamond, and writes "I agree with his 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".

46. Kevin was also examined by Dr. Cornelis Greenway, who is a consultant psychiatrist of considerable experience and a Fellow of the Royal Australian and New Zealand College of Psychiatrists since 1981. He has had a good deal of experience of patients with gender identity difficulties and this interest and involvement has been present through much of his clinical work. He saw Kevin on the 9th May 2000. Dr. Greenway said that on examination, "there was no evidence of psychosis or any evidence of organic deficit". He noted that Kevin presented his history "in a very matter-of-fact way and does not come across as histrionic". Under the heading "Opinion", Dr. Greenway wrote:-

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 the 21st 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.

The non-medical evidence

47. In this section I deal with the evidence of 39 witnesses, 23 who are family and friends of the husband and 16 others who are work colleagues or acquaintances. It is not necessary to quote them all, but I wish to provide enough detail to convey the vividness and concreteness of the evidence.

48. Some witnesses are from Kevin's family of origin. Cliff is an uncle who has known Kevin all his life. It was no surprise when Kevin decided to "change his gender publicly to that of a male". He had "always known" that Kevin was not really a female:

From the time he was little Kevin had always, walked, talked, dressed, behaved and had the attitude of a male. Kevin always enjoyed playing sports such as soccer and played male childhood games. I cannot recall ever seeing Kevin playing girls games or behave as a girl

49. Selena, who is a cousin aged 23, has known Kevin all her life. She is married and a mother of three children. She says:

I cannot recall Kevin showing any interest in the type of games or the toys that girls preferred. Kevin always seemed to play with my brother.... rather than to play girls' games

with me. As we grew older it became clear to me that Kevin was uncomfortable whenever he was asked to behave or dress as a female. At formal functions Kevin would wear pants and a shirt even when these occasions were "black tie".

50. Selena goes on to say that over the last three years she has spent a lot of time with Kevin, and in her opinion "he is and always has been a male rather than a female". She speaks of his courage in successfully dealing with his predicament. Selena speaks highly of the parties as parents and says "they are just another married couple living their lives with their son." She writes:-

Now if you didn't know Kevin's history you would take him to be a man, just like any other man and would never be aware of his background.

51. Darcy, aged 29, is another cousin of Kevin. He has stayed in touch with him since childhood. He wrote:-

When I was young Kevin and I used to play footy, soccer and cricket and ride BMX bikes on family outings. Kevin never played with the girls. Instead, he would join with me in teasing them. Kevin has always behaved like a male as long as I have known him. I was pleased for Kevin when he realised his public male identity and married Jen and as far as I am concerned he is a fine husband and father to Quentin.

52. Regina, an aunt by marriage to Kevin who has known him since he was born and has had regular contact with him through family visits and outings, writes:

As a very small child Kevin showed masculine behaviour. His basic instincts and actions were male. He preferred to play with boys' toys and preferred to dress as a boy. Over the years Kevin's discomfort when being obliged to appear as a female became more and more obvious as did his naturalness in expressing his maleness.

53. Regina goes on to express her admiration for Kevin's courage. She writes that the applicants appear to her and, she thinks, to the general community, "to be your average mum and dad with a much loved little boy."

54. Another group of witnesses met Kevin in 1990 or thereabouts. At that stage Kevin was known as Kimberley.

55. Deirdre is a friend who met the parties in 1990 and saw them regularly as neighbours and friends. She describes Kevin as always being "very masculine in his behaviour and outlook". Similar evidence is given by Phillip, married to a cousin of Kevin. Phillip says that he and Kevin have played various sports together, including rugby league, soccer and cricket as well as going on fishing trips together. He says as far as he is concerned "Kevin is one of the boys and always has been since I have first met him."

56. Mary met Kevin in 1990. Mary says that they played golf, baseball and went out socially. Since 1994 she has been a fellow employee with Kevin. Mary says that prior to Kevin's transition of public genders in 1997, his personality and his actions were very masculine; including his dancing and the way he played sport as

well as the way he conducted himself socially. She wrote that he is a well-liked and respected member of her team at work. She says that Kevin "is happier now that he can more fully express the man he has always been".

57. Charles is another close family friend, having met Kevin in 1990. Kevin told Charles and his wife that he intended to live exclusively as a man and go through the medical procedures of sex reassignment. Charles says that he was not shocked when he had heard the news as he had "always had an inkling of the sort". He says Kevin had always taken the male role and had always done the traditional male type of things ("typically male work around his house") and had always behaved that way. If he had not known of Kevin's past, he would have

absolutely no reason to believe he was not born with a male body. Kevin's appearance, physique, mannerisms, speech, attitude and interests all demonstrate his maleness.

58. Similar evidence is given by Anthea, a close friend since 1990. When Kevin told her about his plans in 1997 she was not shocked; she thought she was going to have that conversation with him one day; it was "only a matter of time". She says Kevin had never been a "girlfriend" and Anthea never took him as being feminine at all. She always knew he was very different from her even before he publicly identified himself as being male. Consequently, it was easy for her to accept him as a man:

He hadn't changed. He was now only fully being the male person he'd always been.

59. Another group of witnesses are members of Jennifer's family and circle of friends. The wife's mother, Kevin's mother-in-law Sylvia, is a retired schoolteacher in her sixties. She met Kevin at Christmas 1996 when her daughter introduced him. She says that Kevin has always been clearly male in his behaviour and as has always dressed, spoken and moved like a man. She says his interests and activities have always been those of a man:

I recall when I first started visiting his home my impression was that although he had expertly landscaped the garden and the surrounds of his home, the inside of his home revealed a bachelor-like Spartan appearance.

60. Sylvia readily accepted her daughter's advice that Kevin was undergoing sex re-assignment. Her friends and acquaintances all freely accepted Kevin as a man and as her son-in-law, knowing of his transsexual background. Sylvia wrote of her pride in Kevin and Jennifer "as a man and wife", and as father and mother to her grandson. Kevin helped her in practical ways, and did most of the repairs for her around her home.[22] She wrote, movingly, "There is no other man anywhere who I would prefer to have as my daughter's husband".

61. Matthew is Kevin's father-in-law. He first met him in 1997. He states:

Since meeting him my singular impression of him has been that he is definitely masculine in his thinking and manner. This opinion was formed particularly by my observations of Kevin

in his interaction with Jennifer, his interests, his aptitude in respect of home maintenance and building work and the manner in which he has fulfilled his role as husband and father in his family life.

62. Other friends and relatives on Jennifer's side of the family give similar evidence. They use phrases such as "a fine young man and a fine citizen who I am happy to support", "just another man like me", and "the typical Aussie bloke". They speak of their support for the couple and for Kevin "as a man, as a husband to Jennifer and as a father to his son." One friend notes that she has never observed people treating Kevin as anything other than a man.

63. Other witnesses represent friends and work colleagues who have met Kevin in recent years. The evidence given by these 16 work colleagues and acquaintances has a consistent theme. The witnesses have had no difficulty accepting Kevin as a man at work and socially, and they support his application to have his marriage as a man recognised as valid. Another theme is that people who knew Kevin and Jennifer saw their relationship as one between a man and a woman. I will mention some particular examples.

64. Some of these witnesses knew Kevin at the time of the re-assignment surgery. An example is Hassan, who says that Kevin spoke to his work mates in 1997 announcing his intention to undergo sex re-assignment procedures. This came as no surprise to Hassan, as Kevin's "male behaviours and traits" were noticeable and quite obvious.

65. Others met Kevin after the surgery. For example, Edward first met Kevin in early 1998, unaware of his transsexual history. He says that he considers him to be "nothing other than a man", and that had he not been informed of Kevin's transsexual history he would "never had had cause to question Kevin's manhood at all". The same point is made several other witnesses, including a bank loans consultant, and the secretary working at the bakery where Kevin is employed. A nurse who interviewed the couple as part of the ante-natal program described them as "a normal happy young family" and learned of Kevin's sexual history only when preparing her affidavit.

66. Finally, there is the evidence of the bakery manager himself. He had met Kevin in October 1997, and they worked in the same office since that time. He had heard a rumour that one of the staff who worked at the bakery had undergone a sex change operation. But he was surprised to be told, six months later, that it was Kevin. This is a striking example: the manager, having heard that a member of his staff had been through a sex change operation, for six months did not suspect that it was Kevin, a man working with him in the same office.

Summary and conclusions

67. All of these witnesses conclude their affidavits with a statement to the effect that they support the parties' application to be recognised as a legally married man and wife. Mr. Burmester raised the admissibility of such statements. In my view the statements are admissible for a limited purpose, namely to show that these witnesses perceive the parties as man and wife. They see no inconsistency in the law recognising the validity of the marriage. This is by no means decisive. But it

is a part of the picture.

68. The cumulative impact of the evidence of these 39 witnesses is striking. It shows the husband as perceived by those involved with him in 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.

69. These witnesses' evidence is consistent, impressive, and unchallenged. They notice different things, and express themselves in different ways. A list of the things they noticed might suggest a stereotypical view of being a man. Perhaps it is, for example, a heterosexual model. Not all men might fit that stereotype. There are no doubt different ways of being a man. But these witnesses are not constructing models or trying to formulate criteria. They are describing what they see in Kevin. And what they see is a man.

PART THREE: THE CORBETT DECISION

70. According to the decision in *Corbett*, whether Kevin is a man depends on whether he was a male at the time of birth, this being determined by a three-point biological test, involving his gonads, genitals and chromosomes. On this test, Kevin would be legally a woman for the purpose of marriage law, having been born with female gonads, genitals and chromosomes. Nothing that happened since his birth would be taken into account, and thus all the evidence just set out would be completely irrelevant. If *Corbett* represents the present law in Australia, the Attorney-General is right and the application must fail.

71. The decision of Ormrod J in *Corbett* has been treated as the starting point for analysis in many later decisions. However since at least 1982 the common law of Australia had developed to the stage where English decisions were no more than a guide to the common law in Australia, and thus the decision in *Corbett* is useful only to the degree of the persuasiveness of its reasoning.[23]

72. I have come to the conclusion that its reasoning is not persuasive. Because of the complexity of the reasoning and because the decision is the lynch-pin of the respondent's case, I will need to explain my conclusions with some care. I have benefited greatly from the voluminous literature on the case. The commentators are commonly critical about the consequences of the decision.[24] There has also been “sustained criticism” of certain passages, especially one referring to the “essential role” of a woman in marriage.[25] A more recent theme is that the decision, even if correct or defensible at the time, needs reconsideration in the light of medical knowledge, and legal and social changes, since 1970.[26] These are important matters, and will be considered. However I will mainly focus on the reasoning itself, which I consider to be flawed.

73. It will be necessary to identify whether particular propositions in the reasoning are statements of fact or of law. 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.[27]

74. April Ashley was a male to female post-operative transsexual. She married a man, and thus the question was whether she was a woman, as she contended, and therefore her marriage was valid. There were also issues relating to a separate ground for nullity, namely incapacity to consummate the marriage. No such issue arises in this case, since there is no equivalent provision in Australian law. So I will omit those parts of the judgment.

75. Ormrod J reviewed the evidence in detail. He concluded[28] that the respondent had XY chromosomes and was therefore "of male chromosomal sex". She had had testicles prior to the operation and was therefore shown to be "of male gonadal sex". She had male external genitalia without any evidence of internal or external female sex organs and was therefore "of male genital sex". Psychologically, she was "a transsexual".

76. Socially, Ormrod J said, by which he meant the manner in which she was living in the community, "she is living as, and passing as a woman, more or less successfully". However on closer examination, he said, the feminine appearance became less convincing. Ormrod J then continued:

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.

77. In my view this is a key passage. Earlier, Ormrod J had stated that the validity of the marriage depended on the "true sex" of the respondent.[29] Taking the passage in context, I believe the argument is 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 on Ms Ashley's "true sex".
6. Therefore, the other party being a man, the marriage is invalid.

78. As suggested by the words in brackets, the first three statements have an impeccable classical logic. But the only basis for Step 4 appears to be that Ms Ashley's "biological sexual constitution" is treated as equivalent to her "true sex". This apparently subtle shift in terminology is significant. The key issue was whether social and psychological matters were relevant in determining whether April Ashley was a man or a woman. To treat biological sexual constitution as equivalent to true sex excludes these matters, but does so by way of definition: no reason is given for excluding them.

79. Step 5, apparently a statement of law, involves a similar problem. Elsewhere in the judgment, Ormrod J said, correctly, that the most accurate statement of the question was whether Ms Ashley was a woman.[30] The asserted legal proposition, that "true sex" is the test for the validity of marriage, is true only if "true sex" is the sole criterion of determining whether a person is a man or a woman. The

judgment thus again exploits a subtle shift in terminology which gives the impression that an argument has been made, when in fact the proposition to be established is merely *assumed*.

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 Ormord J’s understanding of the evidence.[31] 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.[32]

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. What kind of proposition is it? It purports to be a statement of law, setting out the criteria to be applied in determining whether a person is a man or a woman.

84. What is remarkable about this proposition is that nothing has been said to support it. No relevant principle or policy is advanced. No authorities are cited to show, for example, that it is consistent with other legal principles. This lack of any supporting argument has been obscured by a definitional sleight of hand, using the term "true sex". The use of this language creates the false impression that social and psychological matters have been *shown* to be irrelevant. In truth, they have simply been *assumed* to be irrelevant. To this point in the judgment, therefore, the assertion that the legal criteria for determining whether a person is a man or a woman for the purpose of marriage is the person's "biological sexual constitution" is quite unsupported.

85. Ormrod J then referred to counsel’s submissions, and commented on reasons why this case might have been the first occasion in which a court in England was called upon to decide “the sex of an individual”. He said that the question must be treated as one of principle.

86. Ormrod J then set out an elegant and powerful analysis of the relevance of sex in the law. In this well-known passage he said that for the purposes of the case legal

relations can be classified into three categories: those in which the sex of individuals is respectively *irrelevant*, *relevant*, and the *essential determinant*. It is irrelevant, he said, in much of the law. It is relevant in some contractual relationships such as life assurance schemes, in which it is relevant in determining the rate of premium or contributions. It is also relevant in laws regulating, for example, national insurance:[33]

It is not an essential determinant of the relationship in these cases because there is nothing to prevent the parties to a contract of insurance or a pension scheme from agreeing that the person concerned should be treated as a man or as a woman, as the case may be. Similarly, the authorities, if they think fit, can agree with the individual that he shall be treated as a woman for national insurance purposes, as in this case.

87. On the other hand, Ormord J said,

sex is clearly an essential determinant in the relationship called marriage because it is and always has been recognised as the union of man and woman.

88. There are two propositions here. The first is that marriage is the union of man and woman. This is so. The second is that sex is an essential determinant in that relationship. This is true, however, only if "sex" refers simply to a person's identity as a man or a woman. Ormrod J, however, uses it to mean biological sex. Here again, in my view, the judgment treats a person's (biological) sex as equivalent to the person's status as a man or a woman, without any reasons having yet been advanced for disregarding psychological and social factors.

89. To this point in the reasoning, then, "true sex", "sex", and "biological sexual constitution" are treated by Ormrod J as equivalent to each other; and each is treated as the sole criterion for being a man or a woman. The key issue was whether matters other than biology should be taken into account in determining if a person is a man or a woman. Ormrod J says no. But he does so not by providing reasons, but by *defining the issues in terms that exclude matters other than biology*. The issue has been side-stepped.[34]

90. The judgment does at last address the issue, however, in a passage on p 106. The passage begins:

Having regard to the essentially hetero-sexual character of the relationship which is called marriage, the criteria must, in my judgment be biological...

91. Pausing there, it is not clear whether the phrase "hetero-sexual character" means more than the requirement that one party must be a man and the other a woman. If it includes a reference to capacity or inclination for heterosexual sexual activities, it begs the question. The passage continues with this key sentence:

...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.

92. The last few words are critical to Ormrod J's conclusion. They constitute the *only* reason yet given for excluding non-biological matters.[35] However the words are problematical. Firstly, in this as in many other contexts, the word "natural" is open to many interpretations. Is a man who can achieve an erection only with Viagra "naturally" capable of performing sexual acts? Is a person with a constructed vagina "naturally" capable of intercourse?[36] Is it relevant whether the person experiences pleasure, or an orgasm? There is no clear answer to these and other such questions. Further, a law that required these matters to be put under the microscope to determine the validity of a marriage would neither be sensible nor respectful of people's dignity.

93. Secondly, what is "the essential role of a woman in marriage"? Does it require a capacity for sexual activities? If so, precisely which activities? Is a woman who is unable to have genital intercourse because of illness or disability unable to perform her "essential role"? Further, why should it be assumed that the "essential role of a woman" in marriage is concerned merely with matters of sex and biological sexual constitution? As Gordon Samuels succinctly wrote:-[37]

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 principal end of marriage. Hence the female spouse's ability or willingness to produce children is not a necessary incident of a valid marriage.

94. The case exhibits a remarkable focus on the mechanics of genital sexual activity. Perhaps the tone was set by the way the case was presented. Counsel for the petitioner argued in the following terms:-[38]

The petitioner's case is that the respondent was and is a castrated male who has a passage in the form of an artificial vagina constructed for him but who has not and never has had ovaries or a uterus. It is not a case of a woman with a rudimentary vagina where the passage can be enlarged so as to permit full penetration as envisaged in SY v SY (orse. W) *[1963] P 37, because the vagina of the respondent in the present case is not even in the natural position and it is arguable whether it resembles a natural vagina...*

95. Given that marriage is a social and legal institution which includes people who are infertile or by reason of illness or otherwise are unable to engage in genital penetrative intercourse, it seems to me odd, rather than self-evident, to treat capacity for genital intercourse as "the essential" role of a woman (or a man) in marriage.[39] Academic commentary has been severely critical of this passage, described by Margaret Otlowski as "fraught with difficulty".[40] Professor Henry Finlay, for example, wrote that the decision "results in a narrowly restricted view which limits women to the role of physical objects and ignores other aspects of female personality".[41]

96. No doubt aware of these criticisms, Mr Burmester sought to distance himself from these statements. The difficulty with this, however, is that as I have attempted to demonstrate, these statements provide the *only* basis yet advanced in the judgment for the central proposition in *Corbett*, that a person's biological sexual constitution

is the sole criterion for determining whether the person is a man or a woman.

97. Ormrod J then discussed the situation he referred to as "inter-sex", where the three biological indicators are not congruent, a matter which need not be considered at this point. He then dealt with some submissions of counsel in the following terms:

If the law were to recognise the "assignment" of the respondent to the female sex, the question would have to be answered is, what was the respondent's sex immediately before the operation? If the answer is that it depends on "assignment" then if the decision at that time was female, the respondent would be a female with male sex organs and no female ones. If the "assignment" to the female sex is made after the operation, then the operation has changed the sex. From this it would follow that if a 50 year old male transsexual, married and the father of children, underwent the operation, he would then have to be regarded in law as a female and capable of "marrying" a man. The results would be nothing if not bizarre..."

98. Here, the argument is that to recognise the gender reassignment would produce "bizarre" results in a particular situation. Again, the judgment relies on skilful rhetoric. The position that the results would be bizarre depends on adopting exclusively the point of view of *others.* From the point of view of the individual involved, *failing* to recognise the reassignment would probably seem bizarre. Yet Ormrod J gives no reason why the law should be indifferent to the feelings of the person involved. As we will see, other approaches to the problem seek to have regard to the feelings and perceptions of the individual concerned as well as those of other people.

99. Further, Ormrod J appears to assume that his reaction is universal. However his perception appears to derive from his view that having male or female organs is determinative, and it is clear that some people, for example Mathews J, do not react in the same way.[42] The evidence of all the relevant lay and medical witnesses in the present case suggests that they would not share Ormrod J's reaction. I will consider the issues arising from Ormrod J's hypothetical example later in the judgment.

100. The judgment continues:-

I have dealt, by implication, with the submission that because the respondent is treated by society for many purposes as a woman, it is illogical to refuse to treat her as a woman for the purposes of marriage. The illogicality would only arise if marriage were substantially similar in character to national insurance and other social situations (sic), but the differences are obviously fundamental. These submissions, in effect, confuse sex with gender. Marriage is a relationship which depends on sex and not on gender.

101. Ormrod J is clearly correct is saying, in effect, that even if the respondent were a woman for some legal purposes, he might nevertheless be a man for the purpose of the law of marriage. It is obvious that a term *can* mean different things in different contexts, and this may apply to the words "man" and "woman". (Whether it is *desirable* for such words to have different meanings in different legal contexts is another matter, to which I will return.)

102. However Ormrod J appears to be advancing a more precise point, that biological

sex is necessarily the sole test in those areas of law in which whether a person is a man or woman is an essential determinant, as distinct from those areas in which it is merely relevant. It is not clear, however, why biological sex should be the sole determinant in all those parts of the law forming the first area. It may be, for example, that the law should have one definition of whether a person is a woman for the purpose of the criminal law of sexual offences and another for the purpose of marriage. Yet being a woman might be an essential determinant of the law in each case. As it happens, the Attorney-General seeks to make precisely this argument in the present case.

103. Thus, while the definition can in theory vary from one context to another, there is no evident reason to assume that sex should be the sole criterion in areas where being a man or a woman is an essential determinant. It would be necessary to examine the specific legal context before arriving at a definition. It is accurate to say that Ormrod J determined that sex, rather than gender, was the test for being a man or a woman for the purpose of the law of marriage. But I see no basis for saying that the respondent's submission, which Ormrod J rejected, *confused* sex with gender.

104. In the end, therefore, in my view *Corbett* does not provide persuasive reasons for accepting that the question whether a person is a man or a woman for the purpose of marriage involves only the person's "biological sexual constitution". Nor does it provide any persuasive reasons for holding that for the purpose of determining the validity of a marriage the court should assume that if a person is a male (or female) at birth, the person must be a male (or female) at the date of the marriage.[43]

An underlying assumption in *Corbett*

105. It is surprising that on a close analysis the judgment in *Corbett* has so little in the way of substantive argument for its conclusion,[44] and yet on the other hand the judge seemed so sure of the necessity of the result. To some extent, perhaps, practical matters may have influenced the decision. Making the sex of a transsexual depend on the basis of congruent "biological" features at birth might have been seen as giving the law certainty and avoiding legal difficulties, and avoiding situations that Ormrod J thought bizarre.

106. It is possible, however, that *Corbett* and cases that follow it depend to some extent on what I can only call, adopting Kennedy's term,[45] an "essentialist" view of sexual identity. Although no argument was addressed to me in such terms, in my view this possibility may help to explain some aspects of the way the law has developed.

107. By the "essentialist" view of sexual identity I refer to the view or assumption that individuals have some basic essential quality that makes them male or female. If such a view does underlie *Corbett*, in the case of transsexuals this view would be that congruent gonads, genitals and chromosomes at birth reveal the existence of this basic quality.

108. I do not think that the evidence supports such an assumption. In the majority of newborns, there is congruence between all relevant matters, and the baby is unproblematically male or female. It does not follow that there is some further entity beyond or underlying these matters that is the person's underlying sex. In a

minority of people, various incongruities arise: sometimes within the chromosomes, gonads or genitals, sometimes among them; sometimes between the self-image and some or more of these factors. Where there are incongruities, by definition the person has some characteristics normally associated with each sex.

109. The situation presents a question to the individual, and to various social systems, as well as to the law, namely how that person's identity should be defined and managed. In other words, the task of the law is not to search for some mysterious entity, the person's "true sex", but to give an answer to a practical human problem; as one of the witnesses in *Corbett* put it, "to determine the sex in which it is best for the individual to live".[46]

110. There are a number of reasons for thinking that the essentialist view underlies *Corbett*. Firstly, it fits neatly with the idea that a person's sex is determined at birth. Apart from the essentialist view, this seems a remarkably unattractive proposition.[47] It would mean, in the present case, that in deciding whether Kevin was a man at the time of his marriage, the law would completely disregard everything about him - all the evidence set out above - and consider only his genitals, chromosomes and gonads at the moment of birth. Secondly, it could explain the lack of reasons of principle or policy. Such reasons would be necessary if the law was to explain a decision about how to manage an individual's sexual identity, but would be inappropriate if the task were seen as the identification of an entity, the "true sex". Thirdly, the essentialist view is consistent with Ormrod J's use of such language as "true sex", and "biological sexual constitution",[48] and with the absolute nature of the conclusions, which are presented as the only possible outcome.[49]

Other "starting points"

111. A theme of Mr Burmester's submissions was (to use my own words) that *Corbett* represents a starting point and that the court should depart from it only cautiously, and that such a departure would be in danger of constituting impermissible law reform. I have not been able to accept this. As I have said, I do not find the reasoning persuasive, and indeed the decision may depend on what I have suggested is a mistaken assumption, that in some ultimate sense each person has a "true sex" which it is the law's task to identify.

112. To illustrate and clarify this, it is convenient to consider some examples of approaches to the problem that do *not* exhibit the essentialist fallacy. Firstly, I take a decision of a Swiss cantonal court, *In Re Leber*, decided a quarter of a century before *Corbett.* It illustrates that there is nothing self-evident about the approach taken in *Corbett*, and that a very different starting point might have been taken.[50] The applicant was a male to female post operative transsexual. Her application was, in substance, to change her sex as recorded on the birth register from male to female. The Court apparently had no power to deal with issues of marriage,[51] but the general approach of the case is instructive. Some of the language is outdated, although on some matters it is remarkably modern.[52]

113. In a decision of conspicuous humanity, the Court granted the application. It wrote:-

This inclines us to attribute to the psychic element, in the determination of sex, an importance at least equal to that of the physical element... It is not only the body which determines the sex of the individual, it is also the mind. When there is a discord between body and mind, one must see which of these two elements predominates. Leber, being neither a perfect man or a perfect woman, must be placed in the category of human beings which he most resembles.. In the unanimous opinion of doctors and experts he is nearest, as a whole, to a woman...

114. The sentence I have underlined stands in stark contrast to the essentialist approach that seems to underlie *Corbett*. The Court went on to consider the consequences of the decision both for the applicant and society:-[53]

In granting him the civil status of a woman we are satisfying the most profound desire of his being while consolidating his psychic and moral equilibrium; at the same time we are facilitating his social adaptation by permitting him to lead a more normal type of life than heretofore. The personal interest which urges him to ask for a change of civic status is thus not opposed to the interests of public order and morality - quite the contrary.

115. Considering the question whether the Court was correcting an original error in the birth certificate or "adapting a correct original to a change of status", the Court said:

An evolution has taken place in him, in part natural and in part artificially provoked, on account of which his essential feminine character can no longer be seriously questioned. In Law, if not in Medicine, it is really a change of sex which has taken place in him...

116. This case is of particular interest because it shows that a different view can be taken from that in *Corbett* without reference to the more recent medical evidence. The same is true of the next case, an American case decided shortly before *Corbett*, in which a post-operative transsexual sought to change his name.[54] After referring to the facts, Judge Pecora said:-[55]

The Court is cognisant of the fact that the transsexual, anatomically, does not present the same problem as that of the pseudo-hermaphrodite. His social sex is determined by his anatomical sex. But again, by definition, his psychological sex, as distinguished from his anatomical sex, is that of the opposite sex. Absent surgical intervention, there is no question that his social sex must conform with his anatomical sex, his mental attitude notwithstanding. But once surgical intervention has taken place, whereby his anatomical sex is made to conform with his psychological sex, is not his position identical to that of the pseudo-hermaphrodite who has been surgically repaired? Should not society afford some measure of recognition to the altered situation and afford this individual the same relief as it does the pseudo-hermaphrodite?

It has been suggested that there is some middle ground between the sexes, a "no-man's land" for those individuals who are neither truly "male" nor truly "female." Yet the standard is much too fixed for such far-out theories. Rather the application of a simple formula could and should be the test of gender, and the formula is as follows: Where there is disharmony between the psychological sex and the anatomical sex, the social sex or gender of the

individual will be determined by the anatomical sex. Where, however, with or without medical intervention, the psychological sex and the anatomical sex are harmonised, then the social sex or gender of the individual should be made to conform to the harmonised status of the individual and, if such conformity requires changes of a statistical nature, then such changes should be made. Of course, such changes should be made only in those cases where physiological orientation is complete.

117. After referring to another case,[56] the judge continued:-

It has further been stated... that 'male to female transsexuals are still chromosomally males while ostensibly females.' Nevertheless, should the question of a person's identity be limited by the results of mere histological section or biochemical analysis, with a complete disregard for the human brain, the organ responsible for most functions and reactions, many so exquisite in nature, including sex orientation? I think not.

118. A third example is that in two recent decisions, discussed below, Australian courts have drawn the line at post-operative transsexuals, declining to treat pre-operative transsexuals as members of the sex with which they identify.[57] The judges give reasons for drawing the line in the same way as in the Swiss and the American cases, for example because to include pre-operative transsexuals would "create enormous difficulties of proof".

119. Whatever view one takes about the merits of the arguments, it is clear that in these cases the courts are responding to what I think is the real challenge. It is the difficult task of identifying legal criteria for assigning people to one sex or the other, having regard to justice and the interests of the individual and society, rather than seeking to discover some entity that is the person's "true sex", a task which seems to have preoccupied Ormrod J .

Conclusions

120. I have concluded that the reasoning in *Corbett* is not persuasive. That is, leaving aside any questions about the desirability of the result, or later medical legal or social developments, I have not found in *Corbett* any reason of substance to justify the conclusion in that case. If, as I suspect, the decision depends in part on an assumption about the existence of an entity that is a person's "true sex", with respect I think the decision takes an approach that is not helpful. Other decisions, including some before *Corbett*, illustrate what in my view is a more constructive approach, and one that is based on a correct appreciation of the task the law must undertake.

121. For these reasons, I do not consider that *Corbett* represents a position that should be departed from only if there is some overwhelming reason to do so. Instead, I will attempt to consider the matter as one of principle, to be decided in the light of the evidence and the guidance of relevant authorities, particularly decisions of Australian courts.

PART FOUR: ISSUES OF STATUTORY CONSTRUCTION

122. The Attorney-General argues that the meaning of the word "man" in the Marriage Act should be taken to be the meaning that would have been given to the word when the legislation was passed in 1961,[58] and that this meaning is the one stated in *Corbett*.

Past or contemporary meaning?

123. The first step in the argument is that the word "man" should be given the meaning it had when the legislation was passed, in 1961, rather than its contemporary meaning. Mr Burmester cited a number of authorities in support of his submission, in particular *NSW Associated Blue-Metal Quarries Ltd v FCT* (1956)[59] and *Corporate Affairs Commission of NSW v Yuill* (1991).[60] Ms Wallbank submitted that the word should bear its contemporary meaning, and that the meaning of the word is a question of fact to be determined in accordance with common sense and experience of the world.[61]

124. In my view the strongest case for Mr Burmester's argument is *Yuill*. In that case, the Companies Code (NSW) provided that in certain circumstances an officer of a corporation was required to produce books of the corporation to an inspector; it was an offence to fail to do so "without reasonable excuse".[62] The respondent Yuill claimed that the documents were protected by legal professional privilege. The question was whether this was a proper reason for non-production having regard to the legislation. An earlier decision of the High Court, *O'Reilly* (1983),[63] had held that legal professional privilege was limited to judicial and quasi-judicial proceedings, and did not qualify the obligation to comply with a notice under tax legislation to produce books relating to income. This decision was overturned, however, by *Baker v Campbell* (1989),[64] holding that legal professional privilege was not so limited, and that a statute should be construed as preserving a right to legal professional privilege unless the statue abrogated it by express words or necessary intendment. The law was as stated in *O'Reilly* when the Code came into force, on 1 July 1982.

125. By a majority of three to two, the High Court held that the obligation to produce the books was not subject to legal professional privilege. Brennan J considered that the issue involved the rule of construction that the legislature does not intend to abrogate a common law right or privilege unless such an intention is clearly expressed or implied in the statute.[65] He said that the matter evoked an application of the rule that the best and surest mode of construing an instrument is to read it in the sense which would have been applied when it was drawn up. Thus the Code should be construed in the light of the law as it was under *O'Reilly* unless there was something in the Code inconsistent with that reading. Imputing to the legislature at the time the Code was enacted an understanding of the law as set out in *O'Reilly*, it must be taken to have intended that legal professional privilege would not be available. His Honour then embarked on a detailed consideration of the legislation, and concluded that there was no inconsistent provision in the Code. He thus concluded that legal professional privilege was not available. Dawson J reached the same conclusion after a detailed examination of the legislation, and Toohey J agreed with Dawson J. Applying various principles of construction, and again on a detailed examination of various provisions of the legislation, Gaudron and McHugh JJ reached the

opposite conclusion.

126. The subject matter in *Yuill* was very different from the present case. The relevant matter was a legal rule, and one that had been determined by the High Court: the legislature was taken to have intended to adopt it. The present case is about the meaning of the word "man", a word that both sides accept is an ordinary, everyday word. The case of *Yuill* would be more relevant if *Corbett* had been decided before the Marriage Act: then, it could be argued that the legislature should be taken to have wished to incorporate that meaning. But *Corbett* came a decade later. *Yuill* supports Mr Burmester's submission only to the limited extent of showing that there are circumstances in which the Court will conclude that terms used in a statute should be given the meaning they had at the time it was enacted.

127. I do not think that the authorities show that there is any general rule of construction that ordinary words should be given the meaning they had at the time of the legislation. Indeed there is support for the contrary view, that ordinary words are generally to be given their ordinary contemporary meaning.[66] To take a familiar example, if the word "vehicle" were found in legislation that pre-dated the motor car, it might nevertheless be sensible to interpret it as including a motor car.[67] Similarly, a reference in a statute to an "error of law" has been treated as a reference to what is an error of law, by reference to the state of the law at the time the statute is being interpreted.[68]

128. There are many examples of such problems in the cases.[69] Perhaps more precise or technical terms are more likely to be given their original meaning: thus a video cassette did not fall within "motion picture films".[70] But as I think Mr Burmester agreed, ultimately everything depends on the context.

129. Thus I do not think the authorities relied on by Mr Burmester indicate that it is appropriate to give the word other than its contemporary meaning. In my view the question whether "man" should be given a contemporary meaning or an older meaning depends essentially on the context. I proceed to deal with the relevant matters.

What past meaning?

130. A difficulty with Mr Burmester's argument, in my view, is that I do 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. There is no contemporaneous evidence about whether in 1961 or at any earlier times a person in the husband's position would have been identified as a man or not. In *Corbett* itself, the argument was advanced that April Ashley was a case of intersex, and that matters other than the strictly biological should be taken into account in determining if she was a woman. There is no obvious reason why this view might not have prevailed had the matter come before an Australian court in 1961, as it has in some decisions before and after *Corbett*.

131. If the legislature is taken to have wished to incorporate the traditional definition of marriage as between a man and a woman, then it would seem, on Mr Burmester's approach, that "man" would have the meaning it had in 1866 (when

Hyde v Hyde was decided), or arguably even earlier.[71] But the biological principles governing the development of male and female gonads became elucidated only from the middle of the nineteenth century,[72] and it would be surprising if Lord Penzance was at the cutting edge of this medical research. And the discovery of chromosomes, and clinical tests for them, seems to have come much later, in the 1950s.[73] In my view the nineteenth century pronouncements could not have been made with the *Corbett* approach in mind, and it is very unlikely that the legislature in 1961 had in mind the definitions later formulated by Ormrod J in *Corbett*, on the basis of the then-current medical knowledge. It seems extremely unlikely that the legislature in 1961 would have thought about transsexuals at all, and in my view it would be highly artificial to proceed on the basis that not only did they think about it, but that they wished to incorporate a specific definition invented for the first time some ten years later.

Authorities on “man” and “woman”

132. A further difficulty with Mr Burmester’s argument, I think, is that it appears inconsistent with all or almost all of the authorities on the meaning of “man” and “woman”. As will be seen, there is a considerable volume of authority in various jurisdictions on the meaning of "man" and "woman" in the context of the validity of marriage. None of these cases, as far as I can see, provide any support for the submission. There is no suggestion in the authorities that the right approach is to ignore current medical knowledge and base the decision on what the legislature might have thought the words meant at the time of the relevant legislation.[74] Indeed, *Corbett* itself seems to be authority against the submission. In that case, the Court drew on the available medical evidence in reaching its conclusion, rather than adopting the meaning of the word at some earlier date.

133. Further, so far as I am aware all the authorities cited in argument on the meaning of the words in various contexts approached the matter by reference to the contemporary meaning of the words, typically attending to whatever medical evidence was available. This is quite explicit in the Australian authorities on the meaning of “man” and “woman”. Thus in *SRA*, in particular, where the issue arose in connection with social security law, the majority of the Full Court of the Federal Court held that the meaning of woman and female was to be determined according to their ordinary meaning, and relied on contemporary dictionaries and medical evidence.[75]

134. The Attorney-General submitted that the Marriage Act is a code. Perhaps so. But it is no more of a code than the social security legislation, in which the Federal Court in *SRA* found that the words were ordinary English words and gave them their contemporary meanings. I see no reason why in this respect the Marriage Act should be approached differently, nor was any persuasive argument advanced on this point.

Conclusion

135. For the above reasons, I am not able to accept Mr Burmester’s submission that I should treat the word “man” as having its meaning when the legislation was

passed in 1961, and that this meaning is the one stated in *Corbett*. I do not think it has been established that it had any particular meaning when the Marriage Act was passed in 1961, or when *Hyde* was decided, or that it would be appropriate to pretend that in 1961 the legislature had thought about the question and intended to incorporate a definition formulated in England years later.

136. I agree with Ms Wallbank that in the present context the word "man" should be given its ordinary contemporary meaning. In determining that meaning, it is relevant to have regard to many things that were the subject of evidence and submissions. They include the context of the legislation, the body of case law on the meaning of "man" and similar words, the purpose of the legislation, and the current legal, social and medical environment. These matters are considered in the course of the judgment. I believe that this approach is in accordance with common sense, principles of statutory interpretation, and with all or virtually all of the authorities in which the issue of sexual identity has arisen. As Professor Gooren and a colleague put it:-[76]

There should be no escape for medical and legal authorities that these definitions ought to be corrected and updated when new information becomes available, particularly when our outdated definitions bring suffering to some of our fellow human beings.

PART FIVE: THE AUSTRALIAN LEGAL AND SOCIAL ENVIRONMENT

Case law

137. Decisions in Australia dealing with the sex of transsexual people all recognise the change of sex where the person has gone through the complete medical procedures. They have involved criminal law,[77] social security law,[78] and anti-discrimination law.[79] There are two leading decisions, *Harris and McGuinness* (1988)[80] and *Department of Social Security* v *SRA* (1993).[81]

Harris and McGuinness (1988)

138. In *Harris*, the two accused were both male-to female transsexuals. Harris, but not McGuiness, had undergone sex reassignment surgery. Each accused was charged with an offence that, being a male person, he committed an act of indecency with another male.[82] Thus the offence could only by committed by male persons. Each argued that she was not a male person.

139. The decision came to the Court by way of a stated case. The relevant question was:

...Is the test laid out in Corbett v Corbett (orse Ashley) (1971) P 83 and R v Tan (1983) QB 1053 the only test to be applied in determining the question of sex in New South Wales, and if not, what other criteria should be considered.

140. The Court's answer, by a majority,[83] was:

No. The other criterion should be whether through medical intervention or otherwise, the person has assumed the external genital features of the opposite sex, thereby bringing those genital features into conformity with the person's psychological sex.

141. In the result the Court held in *Harris* that a post-operative male-to-female transsexual was not a "male" person within the meaning of the Crimes Act 1914 (NSW). Mathews J reviewed the authorities very fully. She concluded:

The fundamental purpose of the law, as Ormrod J himself said, is the regulation of the relations between persons, and between persons and the State or community: Corbett (at 105). Within this context, the criminal law is concerned with the regulation of behaviour. It is the relevant circumstances at the time of the behaviour to which we must have regard. And I cannot see that the state of a person's chromosomes can or should be a relevant circumstance in the determination of his or her criminal liability. It is equally unrealistic, in my view, to treat as relevant the fact that the person has acquired his or her external attributes as a result of operative procedure. After all, sexual offences - with which we are particularly concerned here - frequently involve the use of the external genitalia. How can the law sensibly ignore the state of those genitalia at the time of the alleged offence, simply because they were artificially created or not the same as at birth?

The time, then, has come when we must, for the purposes of the criminal law, give proper legal effect to successful reassignment surgery undertaken by transsexuals.

142. Street CJ delivered a concurring opinion. In declining to follow *Corbett*, he said:

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.

143. Street CJ quoted Sir Ronald Wilson,[84] to the effect that *Corbett* "signals the need for greater flexibility in the law to enable it to come to grips with current reality freed from bondage to displaced historical circumstances".

144. Accordingly, the majority found that Harris, the post-operative transsexual, was not a man.

145. However the majority reached a different conclusion in relation to McGuiness. Mathews J said:[85]

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 extend 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.

146. Mr Burmester is right to point out that the judgments in this case do not purport to overrule *Corbett* in the context of marriage law. Thus Mathews J said:[86]

Marriage involves special considerations, and it is obvious that the determination of these appeals will have no direct application to the law of marriage. Accordingly it would be inappropriate to enter into any detailed discussion of Ormrod J's judgment in so far as it refers to the institution of marriage...

147. Nevertheless, there is no mistaking the fact that the majority were very critical of the reasoning in *Corbett*.

***Secretary of Department of Social Security v SRA* (1993)**

148. The issues are further considered in *Secretary of Department of Social Security v SRA* (1993),[87] a unanimous decision of the Full Court of the Federal Court. The Full Court's judgments contain a very extensive and comprehensive discussion of the issues and the authorities. The case involved the interpretation of the social security legislation. It was an appeal from a decision of the Administrative Appeals Tribunal that the respondent was qualified under the Social Security Act 1947 to receive a wife's pension as being a woman who is the wife of an invalid pensioner. The respondent was "a male-to-female transsexual who had not undergone sex reassignment surgery". In that respect, her situation was similar to that of McGuiness, not Harris, in the previous case. It is clear from the reasoning quoted below that the Full Court would have held that a *post-operative* male to female would be a woman for the purpose of the legislation.[88]

149. The Tribunal had determined that despite the fact that she had not had the surgery, the respondent had the psychological sex and social and cultural identity of a woman, and was qualified as a woman to receive a wife's pension as the de facto spouse of her partner. The Tribunal treated the Social Security Act as beneficial legislation, and referred to its particular characteristics and purposes. It distinguished *Harris* on the ground that the area of social policy could be distinguished from the criminal law, and concluded that "psychological sex is the most important factor in determining sex for the purposes of the Social Security Act." In addition, in the area of social policy a person's social and cultural identity was a relevant factor. In determining the issue of gender for the purposes of the Social Security Act, "emphasis should be given to a person's psychological sex and the social and cultural aspects of how that person lives and is accepted by their local community."

150. The Full Court, however, allowed the appeal. It followed the decision in *Harris*, and concluded that the respondent, not having had the surgery, could not be regarded as a woman.

151. Black CJ said that the relevant words were "of course ordinary English words", and referred to dictionary definitions:-

9. In ordinary English usage words such a "male" and "female", "man" and "woman" and the word "sex" relate to anatomical and physiological differences rather than to psychological ones. "Female" is defined by the Oxford English Dictionary 2nd edn (1989) as "Belonging to the sex which bears offspring" and by the Macquarie Dictionary as "belonging to the sex which brings forth young, or any group of division corresponding to it. . ." A similar approach will be found in other dictionaries. Woman is defined by the characteristic of being female: "an adult female human being" or "the female human being; an adult female person".
10. The Oxford English Dictionary gives the following relevant meanings for the word "sex": "1. a. Either of the two divisions of organic beings distinguished as male and female respectively; the males or the females (of a species, etc., esp. of the human race) viewed collectively." "3. a. The distinction between male and female in general. In recent use often with more explicit notion: The sum of those differences in the structure and function of the reproductive organs on the ground of which beings are distinguished as male and female, and of the other physiological differences consequent on these; the class of phenomena with which these differences are concerned."
11. The Macquarie Dictionary definitions of "sex" include: "1. the character of being either male or female: persons of different sexes. 2. the sum of the anatomical and physiological differences with reference to which the male and the female are distinguished, or the phenomena depending on these differences."

152. Black CJ did not agree with the Tribunal's approach to the interpretation of the legislation. He said:-

14. Although the Social Security Act is concerned with social policy, and being remedial legislation should not receive a narrow or pedantic construction (see Rose v. Secretary, Department of Social Security (1990) 21 FCR 241 at 244), the settled rules of construction apply and ordinary words used in the Act should receive their ordinary and natural meaning unless, in accordance with the accepted rules of statutory construction, there is good reason to prefer some other meaning.
15. There is no occasion to depart in this case from the ordinary meaning of the words used in the Act and it would be going well beyond the ordinary meaning of the words in question to conclude that a pre-operative male to female transsexual, having male external genitalia, is a "woman" for the purposes of the Social Security Act and may be a "wife" as that expression is defined in the Act. I do not consider that the language used in the relevant parts of the Act allows primacy to be given to psychological factors and certainly not to the virtual exclusion of anatomical factors. Accordingly, I consider that it was not open to the Tribunal to reach the conclusions that it did about the respondent's eligibility for a wife's pension under s. 37(1) of the Act and that it erred in law in doing so.

153. Black CJ noted that this conclusion was in conformity with the decision in

Harris, and expressly agreed that *Corbett* should not be applied:-

20. My conclusion that it was not open to the Tribunal to hold that the respondent was eligible for a wife's pension does not mean that I would accept, for the purposes of interpreting the Social Security Act, the approach adopted in Corbett v. Corbett and applied to the criminal law in England in R v. Tan. On the contrary, the judgments of the majority in R v. Harris and McGuiness and the ruling of Cummins J in R v. Cogley (unreported, 20 February, 1989, Supreme Court of Victoria) provide in my view convincing reasons for rejecting the concept that when the law speaks of male or female persons it necessarily speaks on the footing that sex is unchangeable...
21. 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.
22 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... 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.
23. 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 catergories, neither of which is qualified - a choice between describing a person as, simply, either male or female.
24. Accordingly, I consider that whilst a pre-operative male-to-female transsexual cannot come within the category of eligibility for a wife's pension under the Act, the respondent in this case would have come within that category had she successfully undergone the surgery that has been recommended for her.

154. Black CJ referred to evidence before the Tribunal by a psychiatrist to the effect that the respondent was no less a woman for not having had surgery, nor would she be any more a woman for having had the surgery. He said:-

27. Nevertheless a line has to be drawn somewhere. Drawing the line by reference to what in popular usage is called a "sex change operation" or a "sex change" in circumstances that bring external genital features into general conformity with a person's psychological sex is appropriate as a matter of statutory interpretation, and it is in desirable conformity with the decision reached by a majority of the New South Wales Court of Criminal Appeal after a comprehensive review of cases in many jurisdictions in R v. Harris and McGuinness. A line drawn where the usage of the English of today would place it also has the merit, in situations of this nature, of providing a measure of certainty in an area where certainty is obviously desirable.[89]

155. Like Mathews J in *Harris*, Black CJ left open the position for the law of marriage, saying:-

The determination of sex for the purposes of the law relating to marriage involves special aspects: see Anthony Dickey, "Sexual identity of transsexuals" (1989) 63 ALJ 485 at 486; Margaret Otlowski, "The Legal Status of a Sexually Reassigned Transsexual: R v. Harris and McGuiness and Beyond", (1990) 64 ALJ 67 especially at 74; cf Samuels, ibid at 63 and M v. M (1991) NZFLR 337.

156. Lockhart J delivered a judgment that includes a very detailed review of the authorities and a great deal of the literature. I am indebted to it. Lockhart J expressed his conclusions as to *post-operative* transsexuals in the following terms:

93. My review of the principal cases, papers, articles and the facts of the present case reflect the difficult medical and legal questions that arise from transsexualism. 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.
94. Sex is not merely a matter of chromosomes, although chromosomes are a very relevant consideration. Sex is also partly a psychological question (a question of self perception) and partly a social question (how society perceives the individual).
95. The words "woman" and "female" are substantially synonymous. A woman is an adult female human being. In my opinion a woman or a female, as those terms are generally understood in Australia today, includes a person who, following surgery, has harmonized psychological and anatomical sex. A male-to-female transsexual, following reassignment surgery, is a woman and a

female. A female-to-male transsexual, following such surgery, is a man and a male. A male-to-female transsexual is no longer capable of procreation, but she is no longer of her original sex. Functionally she is a member of her new sex and capable of sexual intercourse. She does not have the gonadal factor of the presence of ovaries; but she does have, albeit artificially implanted, a vagina. Likewise her secondary sex characteristics are those of her new female sex. She is psychologically a woman, a person who is convinced that she is a woman. A transsexual who has undergone successful sex reassignment has an apparently normal female anatomy and she will feel convinced that she belongs to her new sex and that she has achieved an integrated identity by adopting the physical characteristics of the female to her psychological nature.
96. After surgery, a male-to-female transsexual is no longer a functional male. Indeed, her psychological sex accords with her new anatomical sex. Her male biological sex characteristics can be discerned usually only by medical examination. The female-to-male transsexual is probably in a rather different situation because even successful surgery cannot cause him to be a fully functional male, although he can be given the appearance of male genitals.
97. Post-operative transsexuals should not be denied by society the inner peace of life which is their right. As R Green said in "Transsexualism and Marriage" (1970) 120 New LJ 210: "What does it comfort any of us to insist that an individual shall be a man, when for all the purposes of ordinary life that individual can only be, and be recognized, as a woman? What pride can there be for a law which vetos the attitudes dictated by ordinary humanity?"

157. In relation to pre-operative transsexuals, Lockart J reached the same conclusion as Black CJ. He explained his reasons in some detail, and concluded:-

100. In my opinion, in Australia today, the ordinary understanding of a woman or a female does not include a transsexual who has not adopted the anatomical features of the sex which he or she seeks to achieve and thinks has been achieved...
101. I agree with the Tribunal that psychological sex is a critical consideration, but it is not the only consideration. The other criteria to which I referred earlier are also relevant and it is a balancing exercise to determine the sex of the individual concerned. Where the anatomical sex and the psychological sex have not harmonized I cannot accept that such a person falls within the ordinary meaning of the words "woman" or "female".
102. I reach this conclusion with regret. A transsexual who genuinely regards himself or herself as having achieved the new sex must find life extremely difficult. Judicial opinions in this area of the law must be liberal and understanding, guided by the signposts of what is in the best interests of society and the transsexual. They do not conflict in the case of the post-operative transsexual, but in my opinion the conflict still exists in the case of the pre-operative transsexual...

158. I respectfully agree with the views of Chief Justice Street, Chief Justice Black, and Justices Mathews and Lockhart as to post-operative transsexuals. The decisions specifically determine questions of construction in particular legislation. But in *SRA* the Full Court expressed its conclusions not on the basis

of any particular feature of the social security legislation but in terms of the ordinary meaning of the words. In my view it is clear from the judgments, especially in *SRA*, that under Australian law unless the context indicates reasons for a different approach, words like "man" and "woman" in legislation will be treated as ordinary words, and will normally be taken to refer to the reassigned sex of post-operative transsexuals.

159. It is important, however, as Mr Burmester correctly points out, to consider the specific context of the Marriage Act, and whether there is some reason that would justify a departure from the ordinary meaning of the words. I return to this subject later. I accept that the Court deliberately left open the position in relation to marriage. I do not think that Mr Burmester went further than this: he did not submit that the Court expressed the view that *Corbett* was correct in relation to marriage. I do not think any such submission could have been sustained, and I do not agree with the suggestion by one commentator that the "subtext" indicates that in relation to marriage the test is by reference to biological sex.[90] On the contrary, as Professor Finlay has said, the observations in *SRA* "constitute a reasoned, considered position which quite deliberately departs from the reasoning in *Corbett*".[91]

C and D (1979)

160. Before leaving the Australian case law, I should refer briefly to *C and D*.[92] In that case, Bell J treated *Corbett* as correct. However the decision is not in point: the case did not involve a transsexual, but a person found to be a "true hermaphrodite"; and the decision was largely based on grounds of no present relevance. Further, Bell J did not have the advantage of medical evidence and as the proceedings were undefended his Honour did not have the advantage of detailed argument. It does not seem that the correctness of *Corbett* was challenged, and the reasoning is not of assistance on this subject. In relation to his Honour's conclusion that the individual was in law neither a man nor a woman, it is enough to say that I cannot imagine any circumstances in which I would be persuaded to accept such a conclusion. However since neither party really sought to rely on the decision, I see no purpose in adding to the criticism that the case has received.[93]

Other Australian developments

161. I have been referred to a number of legal and administrative provisions relating to transsexuals. Although not directly relevant, it is submitted that these form part of the background that I should take into account. I do not attempt to be comprehensive.

Birth registration

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".[94] 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.[95] The application is to be accompanied by statutory declarations by two medical practitioners.[96] A new birth certificate issues which shows the person's altered sex and must not include a statement that the person has changed sex.[97] 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.[98] 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.[99]

163. In South Australia, transsexuals have been recognised under the Sexual Reassignment Act 1988 by the grant of a recognition certificate. Such a certificate is conclusive evidence that the person has undergone a sex reassignment procedure and is of the sex stated in the certificate.[100] Similar legislation exists in the Northern Territory.[101]

Anti-discrimination

164. The Anti-Discrimination Act 1977 (NSW) was amended in 1996 to protect  **transgender**  persons against discrimination.[102]

Commonwealth Crimes Act

165. The Crimes Act 1914 was amended by the Crimes Amendment (Forensic procedures) Act 2001. Certain provisions relating to females are extended to include "a  **transgender**  person who identifies as a female".[103]

Passports

166. The position of transsexuals is considered in the Manual of Information and Instruction relating to Passports.[104] Passports issued to transsexuals may show the reassigned sex of the person, subject to the production of medical evidence showing "that successful reassignment surgery has been performed", and evidence of change of name and usage of that name. The applicant is to be advised that such a passport does not indicate the Government's view about the person's general legal status, but is an administrative step to alleviate any unnecessary embarrassment while travelling. The manual goes on to state the law in terms consistent with *Corbett*:

As the law now stands, where the sex of a person is an essential ingredient of a legal relationship, status or rule, the relevant sex is that determined at birth. This is so, for example, in the case of marriage...

Conclusions

167. 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.[105]

168. There is no evidence about any relevant aspects of Australian society. But I have already referred to two important events in Kevin's life, namely his medical treatment and his success in the artificial insemination program. These events illustrate that the medical authorities have no difficulty accepting him as a man. The latter is of particular importance because the decision involved approval of Kevin taking the role of a husband and father. Those involved saw no particular difficulties or impediments in this respect. Similarly, in other ways, Kevin's sexual reassignment has been recognised in social arrangements.

169. I regard this as of real importance. As Thorpe LJ recently put it:-[106]

Is there not inconsistency in the state which through its health services provides full treatment for gender identity disorder but by its legal system denies the desired recognition?

170. I have by no means read everything that has been written about *Corbett*, but I have read all the articles referred to in argument, and a number of others. The decision has attracted what Mathews J in *Harris* rightly called "immediate and continuing criticism". Overseas commentators are generally critical of *Corbett* and decisions that follow it.[107] Typically, they express some dismay at the outcome. For example, David Green wrote in 1970:-[108]

The identification in recent years of the genuine agony of these people in total conflict with themselves has led to many agencies seeking to help them to endure what approaches the unendurable. But not apparently the law...

What does it comfort any of us to insist that an individual shall be a man, when for all the purposes of ordinary life that individual can only be, and be recognised, as a woman? What pride can there be for a law which vetoes the attitudes dictated by ordinary humanity?

171. A South African commentator wrote:-[109]

If the plaintiff is not a woman, what is she? It is inhuman and impracticable to consider her merely as a castrated male. Had the court in W v W recognised the plaintiff as a female, and if future recognition is limited to cases of the same nature, it is difficult to see how the principles of our institution of marriage will be subverted. Certainly there will not be numerous "chancers" prepared to take the irreversible step of sex reassignment surgery...

172. Finally, a number of Australians distinguished in law and medicine have indicated that the law as set out in *Corbett* does not sit well with Australian values. I have already referred to the views of a number of judges, and those of Gordon Samuels and Sir Ronald Wilson. In addition, Kirby J has referred to the "unsatisfactory features of the common law as illustrated in *Corbett* and *C and D*", and commented:[110]

...as the sophistication of "sex change" operations and transplantation techniques improve, and as social attitudes to homosexuals change it may well be more appropriate (and certainly more benign) to have regard to physical and psychological considerations at the time of marriage or after surgical, hormonal and psychological intervention.

173. Australian experts on family law, too, including Professor Dewar and Henry Finlay, are severely critical.[111] Margaret Otlowski, for example, says that the *Corbett* approach is "widely believed to a legalistic, inflexible and unsatisfactory response to a very real social problem". She writes:-[112]

Society clearly has a valid interest in the preservation of marriage. There are, however, strong arguments in favour of giving legal recognition to a surgically reassigned transsexual for the purposes of marriage. Legal commentators have generally argued in favour of full recognition...

Available medical evidence indicates that in most cases, the gender disharmony suffered by transsexuals is so pervasive that psychotherapy is of no assistance and reassignment surgery is believed to be the only effective form of treatment. Given the serious and irreversible nature of reassignment surgery, a powerful argument can be made out that the effects of such surgery should be recognised on humanitarian grounds. There is also the argument that a society which allows reassignment operations to proceed has a moral obligation to give full recognition to the effects of such surgery. By recognising the new sex of the reassigned transsexuals, the transsexual's interest are promoted and society suffers no detriment, since the individual's interests and the interests of society are not in conflict.

174. While these matters are by no means conclusive, they do suggest that for the law to recognise sex reassignment would be harmonious with social and community arrangements and values. Present day values are manifest in the evidence relating to Kevin and the way he has been accepted by the medical profession and society generally. They are also evident in the decisions of *Harris* and *SRA*. Indeed, if the law of marriage were to insist on treating Kevin as a woman, it would be taking a course that would seem to be inconsistent with virtually every other indicator of the way transsexuals are considered in our community.

PART SIX: INTERNATIONAL LEGAL DEVELOPMENTS

Introduction

175. There are many authorities in various parts of the world that provide guidance, and they require consideration. Apart from some very recent decisions, the authorities have been comprehensively reviewed in other Australian decisions, notably *Secretary of Department of Social Security v SRA*[113] and *R v Harris and McGuiness*.[114] It would be tiresome to repeat this material in detail, but a brisk overview is appropriate. The decisions most in point are those dealing with the validity of a marriage involving a transsexual, but it is also necessary to refer to some decisions about other areas of law. It happens that most of the decisions involve male to female transsexuals, but in accordance with the submissions and my own views I will treat the relevant principles as equally applicable to the present case, involving a female to male transsexual.

176. For ease of expression only, I will speak about whether the decisions recognise or refuse to recognise the *change* of sex. I will also largely disregard decisions relating to people whose chromosmal, genital and gonadal characteristics are not congruent. That is, to adopt the traditional terminology,[115] I will focus on people who are transsexual, not inter-sex. Unless otherwise specified, I will refer to post-operative transsexuals.

The United Kingdom

177. In England, the decision in *Corbett* has been the dominant influence. Although only a first instance decision, it has been said to have "much persuasive authority",[116] and has been seen for thirty years as representing the law in England.[117] It was applied and treated as correct in recent times in matrimonial cases.[118] Most recently, it was followed by a majority of the Court of Appeal in *Bellinger*.[119]

178. In England, *Corbett* has been applied to areas other than marriage law.[120] In *R v Tan* (1983)[121] it was treated as stating the law for the purpose of applying certain provisions of the criminal law on sexual offenders. Parker J said in *Tan* that "both common sense and the desirability of certainty and consistency" demanded that it should apply for the purpose not only of marriage, but also those provisions of the criminal law.[122] Thus, in summary, in England *Corbett* defined the common law, informed the subsequent statutory codification of nullity law, and was followed in allied fields.[123]

179. There is a further reason why *Corbett* has been regarded as part of English law. The Nullity of Marriage Act 1971, section 1(c), provided that a marriage could be void on the ground that "the parties are not respectively male and female". A majority of the English Court of Appeal in *Bellinger* considered that this put the conclusions in *Corbett* on a statutory basis.[124]

180. Given these judicial and legislative developments, in England there is obviously a strong argument that any change should come from the legislature.[125] Despite this, in recent cases English judges have raised the question whether *Corbett* requires re-examination.[126]

181. The Court of Appeal "reconsidered the whole issue" in *Bellinger*.[127] The majority (Butler-Sloss, P and Robert Walker LJ), adhered to *Corbett*, in substance taking the view that it was for the Parliament to consider whether to change the law. The majority said that the gender assignment at birth of a transsexual in accordance with the *Corbett* criteria could not be challenged. There were no other criteria that could be applied to a new born child.[128] They then posed the question whether the assignment made at birth was immutable or whether there was a point "at which it can be said that the gender (sic) which was correct at birth is no longer applicable".[129] The majority then reviewed the medical evidence, the case law, and the Inter-departmental Working Group Report.[130] They referred to recent changes in this way:-

The medical evidence in this case show (sic) the enormously increased recognition of, and reliance upon, the psychological factor in the assessment of a person diagnosed as suffering from gender disorder. 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 inter-sexed. The current approach recognises changes in social attitudes as well as advances in medical research. Those social changes are well exemplified in the recent judgments of the Court at Strasbourg and in the lecture given by Lord Reed (above). They cannot be ignored.

182. The majority then discussed how the changes were to be given recognition. They considered that the point at which a change of gender should be recognised was not easily ascertained. They rejected a submission that the last stage, the completion of surgery, was an appropriate time to choose, finding it "arbitrary", and referring to a person who had started but failed to complete the surgery. They said that some certainty would be required and it would be necessary to lay down some pre-conditions which would inevitably be arbitrary. They said that the question of determining the point at which public policy should recognise that a person should be treated for all purposes as a person of the opposite sex was one which "could not be properly decided by the court". They urged the government to take action. In a powerful dissent, Thorpe LJ held that while *Corbett* was right when it was decided, later medical and social developments "render it wrong in 2001".

183. I will return later to some of the arguments advanced in this case. It is important that in England the law had been established, and the essential question was whether to change it. It is not surprising that the majority thought it appropriate to leave it to parliament. The position is different in the present case, since, as Ms Wallbank put it, the common law in Australia on this matter has not yet been determined.

United States

184. There are a number of relevant decisions in the United States. Some deny recognition to the change of sex, following *Corbett* or independently reaching the same conclusion.[131] Others depart from *Corbett* and recognise the change of sex.[132] There are also United States decisions relating to other matters such as the correction of birth certificates,[133] and eligibility for sex-specific sporting

activities.[134]

185. Most of the United States authorities are extensively discussed in the Australian cases and it would be unproductive to go over them again. I should however say something about the most recent decision, by the Court of Appeals of the State of Kansas, in *Estate of Gardiner* (2001).[135] The wife was a male-to-female transsexual who had undergone surgery and hormone treatment and the issue was the validity of a marriage. The Court considered a number of authorities including the decision of the Texas Court of Appeals in *Littleton v. Prange* (2000).[136] In *Littleton*, the Court had held, following *Corbett*, that a marriage between a man and a male to female transsexual was invalid. In that case the Court had held (as summarised in *Gardiner*):

Thus, the court found that even though surgery and hormones can make a transsexual male look like a woman, including female genitalia, and in Christie's case, even breasts, transsexual medicine does not create the internal sex organs of a woman (except for a man-made vaginal canal). There is no womb, cervix, or ovaries in the post-operative transsexual female. The chromosomes do not change. Biologically, the post-operative female is still a male. 9 S.W.3d at 230. Even though some doctors would consider Christie a female and some a male, the court concluded: "Her female anatomy, however, is all man-made. The body that Christie inhabits is a male body in all aspects other than what the physicians have supplied." 9 S.W.3d at 231.

186. In *Gardiner*, the Court rejected this reasoning "as a rigid and simplistic approach to issues that are far more complex than addressed in that opinion".[137] It held that the court should not refer to chromosomes as the exclusive factor:

Aside from chromosomes, we adopt the criteria set forth by Professor Greenberg. On remand, the trial court is directed to consider factors in addition to chromosome makeup, including: gonadal sex, internal morphologic sex, external morphologic sex, hormonal sex, phenotypic sex, assigned sex and gender of rearing, and sexual identity. The listed criteria we adopt as significant in resolving the case before us should not preclude the consideration of other criteria as science advances.

Other common law jurisdictions

187. *Corbett* has been followed in South Africa[138] and Canada.[139] In New Zealand, it has been held in carefully reasoned decisions that *Corbett* does not represent the law: a transsexual's change of sex is recognised for the purpose of the validity of a marriage.[140]

Developments in other countries

188. In many European (non-common law) countries the law recognises a transsexual's sex reassignment for legal purposes, including marriage. It is not possible or sensible to attempt a comprehensive survey of laws in other countries, but I will mention some legal approaches in some non-common law

countries, and some legislation in common law countries.

189. Developments in Europe have been referred to in some of the decisions of the European Court of Human Rights, and in the Report of the UK Interdepartmental Working Group in the year 2000 (the UK Report).[141] Although there is no common approach, and the preconditions vary, in Europe "there is a growing tendency to recognise a transsexual person's acquired gender".[142] **Austria** provides for formal recognition of a change of gender, and allows the person to marry in the acquired gender.[143] There is a similar scheme in **Denmark**. In **Belgium** a similar result has been achieved through judicial decisions. In **Finland** practice and court rulings have led to a process whereby gender reassignment can be recognised for various purposes including marriage. Surgery is not necessarily required.

190. Several other countries allow a transsexual to marry in the reassigned sex: **France**, **Germany** (since 1981), **Italy** (since 1982), the **Netherlands** (since 1985), **Portugal**, and **Sweden** (since 1972). The Constitutional Court in Italy set out the rationale in the following terms:-[144]

The legislator, in recognising the concept of (a new) sexual identity, must take into account not only the external sexual characteristics as ascertained at birth, or as they have since developed either naturally or with the help of appropriate medical-surgical treatment, but also elements of a psychological and social nature. Since transsexual people are not making a free choice when opting for gender reassignment, but are forced to do so by their very nature, the legislator's role is to guarantee that the case is examined properly, to ensure that appropriate treatment is provided and the individual's records changed accordingly. Another purpose of the law, which is inspired by the values of the freedom and dignity of the individual, is to overcome the isolation, hostility and humiliation to which these "diverse" individuals are often subjected.

191. It seems that developments in Europe have tended to isolate the United Kingdom. Judge Van Diijk said in his dissenting judgment in *Sheffield and Horsham v United Kingdom*:-[145]

Among the member states of the Council of Europe which allow the surgical re-assignment of sex to be performed on their territories, the United Kingdom appears to be the only state that does not recognise the legal implications of the result to which the treatment leads.

192. In **Canada**,[146] there are provisions recognising sex reassignment in a number of provinces. In **Alberta**, once the birth certificate has been changed the person is legally deemed to be of the reassigned sex, and this appears to extend to marriage certificates. In **Ontario**, however, a transsexual person cannot marry in the reassigned sex.

193. In 1997 **Singapore** passed legislation to the effect that for the purpose of marriage a person who has undergone a sex-reassignment procedure shall be identified as being of the sex to which the person has been re-assigned.[147]

Decisions of the European Court of Human Rights

194. There are a number of relevant decisions of the European Court of Human Rights.[148] They mainly concern two Articles. Article 8 relevantly protects person's right to "respect for his family life". Article 12 provides that men and women "have the right to marry and to found a family, according to the national laws governing the exercise of this right".

195. In *Van Oosterwijck v Belgium* (1981) the applicant was a female to male transsexual. The Belgian law did not allow the applicant to obtain rectification of his birth certificate, and under Belgian law any marriage between him and a woman would be void because according to the civil status records it would be between persons of the same sex. The Commission upheld the claim. It said that although marriage and family were associated, there was nothing to support the conclusion that the capacity to procreate was essential. The Belgian government had "failed in the instant case to recognise the applicant's right to marry and found a family within the meaning of Article 12 of the Convention".[149] In the Court, however, the applicant failed because of a failure to exhaust domestic remedies, and there is no significant discussion of the substantive issues.

196. In *Rees v United Kingdom* (1986),[150] a female to male transsexual was refused permission to alter his birth certificate, and claimed a breach of Articles 8 and 12. The Commission found a breach of the former but not of the latter. The Court, however, dismissed the claim. It is not apparent to what extent the argument about Article 12 was fully developed. Certainly the Court dealt with it very briefly. The right to marry in Article 12 referred to "the traditional marriage between persons of opposite biological sex". It was mainly concerned to protect marriage as the basis of the family. The legal impediment on the marriage of persons not of the opposite sex could not be said to have the effect prohibited by Article 12, namely to restrict or reduce the right in such a way or to such an extent that the "very essence of the right is impaired". The Court thus unanimously dismissed the claim under Article 12.

197. *Cossey v United Kingdom* (1990)[151] was essentially an attempt to persuade the Court to reverse *Rees*. The applicant was a male to female transsexual, and wished to marry a man. The majority said that the case was not materially distinguishable on its facts from the *Rees* case, and refused to reverse it. The majority referred to developments since 1986 in the law of some of the member States, but found a continuing diversity of practice. The area was one in which States enjoyed "a wide margin of appreciation", and it could not be said that a departure from *Rees* was warranted. They added:-

The Court would, however, reiterate the observations it made in the Rees judgment (p. 19, para. 47). It is conscious of the seriousness of the problems facing transsexuals and the distress they suffer. Since the Convention always has to be interpreted and applied in the light of current circumstances, it is important that the need for appropriate legal measures in this area should be kept under review.

198. In a forceful and well-known dissent, Judge Martens said:-

If a transsexual is to achieve any degree of well-being, two conditions must be fulfilled:

1. by means of hormone treatment and gender reassignment surgery his (outward) physical sex must be brought into harmony with his psychological sex;

2. the new sexual identity which he has thus acquired must be recognised not only socially but also legally...

This urge for full legal recognition is part of the transsexual's plight. That explains why so many transsexuals, after having suffered the medical ordeals they have to endure, still muster the courage to start and keep up the often long and humiliating fight for a new legal identity.

199. Judge Martens had some hard words for the United Kingdom and the *Corbett* decision:-

...the judgment of the High Court in the case of Corbett v. Corbett, well illustrates this tendency: using terms which scarcely veil his distaste [4] and basing himself on a reasoning which has been severely criticised by various legal writers,[152] *the learned Judge simply refused to attach any legal relevance to reassignment surgery.*

200. Judge Martens grounded his conclusion on a view of human rights:

The principle which is basic in human rights and which underlies the various specific rights spelled out in the Convention is respect for human dignity and human freedom. Human dignity and human freedom imply that a man should be free to shape himself and his fate in the way that he deems best fits his personality. A transsexual does use those very fundamental rights. He 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. After these ordeals, as a post-operative transsexual, he turns to the law and asks it to recognise the fait accompli he has created. He demands to be recognised and to be treated by the law as a member of the sex he has won; he demands to be treated without discrimination, on the same footing as all other females or, as the case may be, males. This is a request which the law should refuse to grant only if it truly has compelling reasons, for in the light of what has been said in paragraphs 2.2 and 2.4 above such a refusal can only be qualified as cruel. But there are no such reasons.

My position may be summarised by a quotation which I borrow from a critic of the Corbett doctrine [14]:

> *"Refusal to reclassify the sex of a post-operative transsexual seems inconsistent with the principles of a society which expresses concern for the privacy and dignity of its citizens."*

201. He spoke of the plight of transsexuals under UK law:-

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. To be condemned to live, as far as that identity is concerned, in opposition to and thus "outlawed" by their country's legal system must therefore cause permanent and acute personal distress to post-operative transsexuals in the United Kingdom.

202. Martens J referred to developments in other countries:-

In addition to the Netherlands, ... one may today identify as States which make provision for the full legal recognition of the new sexual identity of post-operative transsexuals [45]: Denmark, Finland, Luxemburg, Spain and Turkey; moreover the case-law in some other States (Belgium, France [46] and Portugal) has nearly achieved the same result. Today therefore legal recognition of gender reassignment is somehow made possible in fourteen member States [47].

This shows, I think, an important "societal development", viz. a marked increase in public acceptance of transsexualism and a clearly wider sharing of the convictions set forth in section 2 of this opinion. This conclusion is strongly reinforced by the fact that both the Parliamentary Assembly of the Council of Europe and the European Parliament have recently adopted resolutions recommending that reclassification of the sex of a post-operative transsexual be made legally possible [48].

203. In *X Y and Z v United Kingdom* (1997),[153] the applicant, a female to male transsexual, had lived in a permanent relationship with Y since 1979. After AID treatment, Y gave birth to a child, Z. X was not permitted to register as Z's father. He claimed violation of Article 8. The complaint was that the English law did not give legal recognition to the de facto relationship and this violated their right to respect for family life. The applicants mentioned such consequences as vesting of parental rights, the child's right to support, and to succeed on intestacy. They relied in part on expert evidence[154] to the effect that

The law has a powerful symbolic as well as legal function in affirming an individual's status and value in society. The failure to give a transsexual legal recognition of his change in gender and role in the family has the effect of stigmatising him or her and those related to them are obliged to share the stigma and discredit.

204. The government pointed out that the law did not prevent the applicants from living together, and referred to the "wide margin of appreciation" to be accorded to contracting States under the Convention.

205. The Commission upheld the claim by a majority of 13 votes to 5. It noted "a clear trend in Contracting States towards the legal acknowledgment of gender re-assignment". It found that in the case of a post-operative transsexual who lived with a partner and a child "there must be a presumption in favour of legal recognition of that relationship, the denial of which requires specific justification". The government had not put forward any countervailing public concern that outweighed the applicants' interest.

206. The Court accepted that Article 8 applied, as "de facto family ties link the three applicants".[155] After a detailed review of the consequences, however, and taking

into account the "margin of appreciation", the Court found (by 14 votes to 6) that there had been no breach of Article 8.

207. These decisions are not directly relevant to the present case. No specific argument was addressed to me in relation to human rights principles contained in international instruments to which Australia is a party. In these circumstances, I will not pursue this aspect. Nevertheless, the cases provide useful glimpses of developments and trends in thinking in Europe. There is a great deal of common ground among the various international human rights instruments. 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.

Conclusions

208. This brief survey shows considerable diversity and difference both within and between countries. However I think it is reasonably clear that especially in recent times the overall trend, reflected in judicial decisions and other legal and administrative arrangements, is toward increased understanding of transsexuals and others whose sexual identity is problematical. This increased understanding is reflected in a general tendency to accept that for legal purposes, including marriage, post-operative transsexuals should be treated as members of the sex to which they have been assigned. When seen against this international context, the approach in *Corbett* is increasingly out of step with developments in other countries.

PART SEVEN: THE MEDICAL EVIDENCE

209. In this section I deal with expert evidence on relevant matters relating to identification as a man or woman, as distinct from evidence specifically about the husband. There is a great deal of such evidence before me. Much of it is of a technical nature. Some of it, in particular the work of Professor Gooren, combines what might be seen as purely medical statements with statements about policy, practice and law reform. Much of the material has been dealt with in other recent cases. In these circumstances, I do not think it would be useful to try to summarise the whole of the evidence. Instead, I will focus on the matters of particular relevance.

The experts

210. I have already referred to the experts who have treated or interviewed Kevin. I also have the benefit of expert commentary and analysis from some of the most distinguished international and Australian experts in the field.[156]

211. Professor Louis Gooren MD, PhD, is a specialist in Endocrinology. His work is

internationally known and he has given evidence in a number of the cases on sex assignment. The focus of his work has been diseases related to "disorders of sexual differentiation and the biological process of becoming man or woman". He was appointed a full professor in 1988 and assigned to the treatment of patients with gender identity problems. He has worked at the Gender Clinic of the University Hospital of the Vrije University of Amsterdam in the Netherlands. The Clinic has about 150 new patients a year of whom 80 to 90 receive hormone and surgical treatment. Professor Gooren has published extensively on these subjects and has wide international professional recognition. He has been called upon in recent years by various institutions of the Council of Europe to provide expertise in the area of gender problems.

212. Professor Gooren has filed material which contains a number of sections. The first section is a 5 page statement. This appears to have been written for the purpose of this case and thus represents his present view. He also encloses a number of published discussions. The first is a presentation that he made at the XXIII Colloquy on European Law at Amsterdam in April 1993. The topic was "Transsexualism, medicine and the law: biological aspects of transsexualism and their relevance to its legal aspects". He also attaches a chapter of a book published in 1996 and written with Cornelis Doorn entitled *Who determines manhood or womanhood? The biomedical and legal definitions of man and woman in relation to transsexualism*. I have found his evidence very illuminating and helpful.

213. **Professor Milton Diamond** PhD is the Professor of Anatomy and Reproductive Biology at the School of Medicine, University of Hawaii. He has been involved in teaching and clinical and research work in areas of sexual behaviour and reproduction and sexual development throughout his professional life and has over 100 publications including eight books. His affidavit provides commentary on Kevin's situation and attaches a number of publications, which I have found very helpful.

214. **Professor William Walters**, MB, BS, MRCOG, PhD (London) FRCOG, FRACOG, FACSHP, is the Head of the Discipline of Reproductive Medicine at the University of Newcastle, NSW, and the Chairman, Division of Obstretrics and Gynaecology at the John Hunter Hospital Newcastle. He has extensive experience in the care of people with gender identity disturbances over 25 years. He has written extensively on transsexualism and its management in addition to many other matters, including a book, *Transsexualism and Sex Reassignment* published by Oxford University Press in 1986, and publications with Professor Henry Finlay, a leading family law scholar, on medico-legal aspects of sex change and transsexualism.[157] He has written a brief but succinct comment.

215. **Dr Jan Walker** MB BS, FRACP is staff specialist at the Department of Endocrinology at Sydney Children's Hospital and lecturer in Paediatrics at the University of New South Wales. She has 15 years experience in paediatric endocrinology and has had an active interest in problems of ambiguous genitalia and gender assignment for many years, although she has no clinical experience with transsexuals. Her affidavit contains a lucid discussion which was of considerable assistance.

Normal processes of sexual development and identification

216. I will briefly describe the normal processes of development before birth. I draw on the lucid and helpful account by Professor Greenberg, which was adopted by the Kansas Court of Appeals.[158] As I see it, this general description is not controversial.[159] It does not refer to "brain sex" and to that extent would be regarded by many of the experts in this case as incomplete. But I will deal separately with this issue, which needs careful consideration.

217. During the first seven weeks all human embryos are sexually undifferentiated. At seven weeks, the embryonic reproductive system exists: it consists of a pair of gonads that can grow into either female ovaries or male testes. Similarly, there is a genital ridge that can develop into either a female clitoris or a male penis and scrotum. There are also primordial ducts systems. The female ducts are called Mullerian ducts and develop into the uterus, fallopian tubes and the upper part of the vagina. The male ducts, called Wolffian ducts, are the precursors of the seminal vesicles, vas deferens and epididymis.

218. At eight weeks, the foetus follows one or other sex path. If the foetus has one X and one Y chromosome it will normally follow the male path. A factor associated with the Y chromosome - the "master switch" - triggers the gonads to develop into testes. The testes then produce male hormones. These prompt the gonads and genitalia to develop male features. The testes also produce a substance that causes the female ducts to atrophy and be absorbed in the body, so that a female reproductive system is not created.

219. If the foetus has two X chromosomes, it will normally follow the female path. There is no "master switch", and the process that would have led to the development of male organs is not activated. By the thirteenth week the gonads start to transform into ovaries, and, in the absence of testes producing male hormones, the rest of the sexual system develops along a female path. The male ducts shrivel up.

220. Newborns are routinely identified as girls or boys shortly after birth, on the basis of inspection of their genitals. The assignment of sex to a baby is essentially a decision usually made by the parents, no doubt often reflecting the initial description by the doctor, nurse or midwife, and duly reflected in the child's designation as male or female on the birth certificate. Only when there is some abnormality or doubt does the matter receive detailed concern at this stage. Similarly, in the majority of cases the child develops as a boy or a girl in accordance with the initial assignment. Again, only where some problem emerges later in life is there any detailed consideration of the individual's sex or gender.

221. It is clear, I think, that in the case of transsexuals, there is at birth no doubt about the baby's sex, and the identification of sex would be made on the basis of inspection of the genitals, and the birth registered accordingly. The issue would come to the attention of the medical profession only years later, when the individual's wishes or behaviour might lead to some request for medical advice or intervention. Thus there is no medical evidence about the clinical treatment of transsexuals *at birth*: the problem is not known at that time.

222. Except in the case of sexual ambiguities that are apparent at birth, therefore, the child is identified as a boy or girl at birth, and it is easy to see why people would therefore assume that every child's sex has been determined by the time of birth. However as will be seen there is now evidence to the effect that the process may

not be completed at birth, since relevant developments in the brain occur during a period following birth.

223. Professor Gooren explains the situation of transsexuals very clearly. He says that in most transsexuals it requires a large amount of life experience to discover the predicament of being born in the wrong sex. He writes:

"Like other people afflicted with disorders in this process of sex differentiation, transsexual people need to be medically rehabilitated so that they can live acceptable lives as men or women. This decision is not essentially different from the one made in cases of intersexed children where assignment takes place to the sex in which they in all likelihood will function best. In the case of an intersexed child it is often possible to tell at birth, or shortly after birth, that the sexual differentiation process has not taken place in a conventional way and so it is possible to make that decision to (re)assign a sex through medical intervention shortly after birth. The decision to recommend hormonal and surgical treatment for a transsexual person takes place much later in life and is based on the conclusion of a thorough psychodiagnostic process that concludes that a disorder has occurred in the process of sexual differentiation and that the person will benefit from hormonal and surgical sex reassignment.

"Paths less followed" - cases of intersex

224. It is necessary to say something about the processes whereby individuals are not unambiguously male or female from what is traditionally seen as a biological point of view. At this point I will not refer to brain development.

225. In a minority of cases, the process departs from the norm, in what Professor Greenberg gracefully calls the "paths less followed". These cases include chromosomal variations from the norm, ambiguities in the gonads or genitalia, and variations in the production of hormones. There can be incongruities among the various factors, or within them. In short, people falling into these categories have incongruent features in terms of their genitals, chromosomes and gonads: not all of their characteristics are uniformly male, or uniformly female. Resulting conditions include the Klinefelter Syndrome, hermaphrodism, and androgen insensitivity syndrome.[160]

226. There is considerable evidence about the present and past approaches of the medical profession to these cases, and its understanding of the nature of sex development. The material gives some glimpses of the history of medical understanding of sex identification.[161] In the 19th century the doctrine was that the ultimate criterion was gonadal - the presence of ova or testes.[162] When clinical tests became available in the early 1950s to determine "genetic sex", this chromosomal information tended to take precedence over the gonadal criterion as the key to "nature's real intentions".[163] The argument was that the genetic "determination" of sex preceded the differentiation of the gonads. Professor Gooren speaks of the "inhuman" consequences of treating this criterion as decisive when the person's genitalia and self-image were inconsistent with their chromosomes. Similarly, the case of David Reimer, discussed below, may be seen as a tragically mistaken reliance on genital sex and the capacity of social conditioning to govern sexual development.

227. The present approach, in brief, is to defer any irreversible surgery, until a time when the decision can be based on more information than is available

immediately on birth: the child's later physical and behavioural development, and wishes. The decision is made in consultation with the parents and takes into account a wide variety of matters. It is not based on any single criterion, such as genitals, chromosomes, or gonads. In the case of ambiguous genitalia, a full evaluation should be performed, and the child should be raised "in the sex it can best be predicted he or she will most satisfactorily claim as an adult".[164] However the topic is complex and there are difficult clinical and ethical choices involved.[165]

228. None of this, I think, is now controversial, although no doubt there is always more to be learned about the processes involved. The problems involved are readily characterised as biological. The individuals involved are usually called "inter-sex". Their biological characteristics are not unambiguously either male or female.

229. Transsexuals, however, do not have any of the incongruities or ambiguities of these kinds. According to the traditional approach, manifested in *Corbett*, what distinguishes them is a discontinuity between their mental state - psychology - and their physical state - biology. All the biological factors harmoniously indicate that they are one sex. Yet they experience themselves as being members of the opposite sex, and feel trapped in their bodies. Thus in *Corbett*, Ormrod J said that "psychologically" April Ashley was a transsexual.

Chromosomes not decisive

230. At one time, the medical view was that chromosomes were the decisive factor in sexual development. This view is not tenable today.[166] This is most easily illustrated by people with androgen insensitivity syndrome. These individuals have XY (male) chromosomes and normally-functioning testes. However they are unable to process the androgens produced by the testes, and the foetus therefore follows a female development. External female genitalia form (though they may be incomplete), but not internal reproductive organs. These individuals are often identified as female at birth and their situation will not become apparent until puberty. There are degrees of this condition, since there may be a greater or lesser ability to process the male hormone. It seems that where the androgen insensitivity is total, the individuals perceive themselves as women, although it may be that some individuals perceive themselves as men where the insensitivity is partial.[167] Thus, while sex normally corresponds with chromosome type, it does not necessarily do so. Chromosomes play a part in the process, but other variables can produce different results. As Dr Walker puts it, "the karyotype serves as a marker for a person's sex rather than the unique determinant of it".[168]

Social conditioning not decisive: the David Reimer case[169]

231. David Reimer was one of identical male twin boys. He had XY (male) chromosomes and there is no suggestion that he had any female characteristics. Unfortunately, when he was eight months old, his penis was accidentally destroyed. A decision was made, on medical advice, to raise him as a girl. The

case was promoted by Dr John Money, a psychologist at the John Hopkins Medical Centre in Baltimore, as proof that gender identity was plastic and could be influenced by post-natal conditioning.[170] At the age of 17 months, surgery was performed: orchidectomy and the construction of a vulva. He was raised as a girl and everything was done to reinforce this perception. Early reports on his development were to the effect that the experiment was very successful, and he was growing up satisfactorily as a girl. The case was seen as a triumph of nurture over nature. *Time* magazine wrote in 1973:[171]

This dramatic case... provides strong support... that conventional patterns of masculine and feminine behaviour can be altered. It also casts doubt on the theory that major sex differences, psychological as well as anatomical, are immutably set by the genes at conception.

232. It has since become clear that the experiment was a tragic failure, and that the conclusion is essentially the opposite of that summarised in the *Time* article. In fact, David never accepted being a girl, and consistently strived to behave as a boy. At age 12 he was put on hormone treatment, but revolted against it. He was very unhappy and had suicidal thoughts. At age 14, he decided to switch to living as a male. It seems that he was only told about his circumstances at about this time. His reaction was that "All of a sudden everything clicked. For the first time things made sense and I understood who and what I was". He requested and received hormone treatment and surgery, namely a mastectomy and the construction of a penis. He adjusted well to life as a male, and at age 25 married a woman and adopted her children.

233. Professor Diamond had interviewed David Reimer extensively. He did not interview Kevin, but had access to his evidence and reports about him. He points to many "common historic and contemporary psychological and behavioural characteristics" the two have in common. They include the following:

- Both have childhood images of feeling more like a boy than the girls they were expected to be.
- Both avoided female clothing when they could.
- Both preferred to play with boys, at "boy games" than with girls at girl games.
- Neither was aware, as youngsters, of the professional services that were available to help them.
- Both were "hampered by professional and social structures that should instead have been mustered to help them".
- Neither had ever had sexual relations with men, and their sexual fantasies, prior to any experience, were directed towards women.
- Both married women who knew their medical and social histories.
- Both received medical surgery and hormone treatment to masculinise their bodies to conform to their psychological gender.
- Both remain the sole breadwinners in their families while their wives remain at home tending to children and home affairs.
- Both live "with genitalia that are less than fully functional and as sensitive as are normal male genitals".

- Neither had any psychosis and both "seemed quite stable and mature in their lives compared with the stresses one might expect to encounter under such conditions".

234. Professor Diamond expresses the following views:-

It is quite likely that [Kevin's] brain-sex and associated mental state is male and was male at the time of marriage on 21 August 1999.

I am convinced that "brain-sex" or "mental-sex" is a biological reality that explains many aspects of sexual identity. I have published that this inner sense of sexual identity is the factor that alerts an individual as to whether or not the social conditions imposed by society are or are not appropriate (Diamond 1995; Diamond 1997). It is just that aspect of mentation that alerted David Reimer to his situation. I believe it is similar for transsexuals.

235. Mr Burmester submitted, however, that the David Reimer case has little if anything to do with the present case. In one sense, this is true. Kevin is a transsexual: his self-perception has always been that he is a male, though at birth his "biological" features - chromosomes, gonads and genitals - were female. David Reimer, however, was not a transsexual or in any way unusual at birth. He was simply a boy whose penis was removed when he was eight months old. Despite this tragic event, all his characteristics, physical and psychological, were always unequivocally male. The two cases are fundamentally different.

236. Dr Walker writes:-

The relatively recent exposure of the truth of David's case, that his behaviour was always categorically male, has lent further weight to the literature supporting the contention that "nature" and by implication, brain development in utero, has a critical role in determining post-natal patterns of behaviour.

237. With respect to Dr Walker, I do not quite agree with the words I have underlined. Because David Reimer was unambiguously male, I do not think his case shows that brain development is decisive when it is inconsistent with other biological characteristics, as it is in Kevin's situation. I would not go further than saying that David Reimer's case is *consistent with* the brain-sex theory. I think that the last sentence in the above quotation from Professor Diamond indicates that he would take the same view.

238. In my view the evidence about David Reimer has limited relevance. But it has some. First, I agree with the experts, such as Professor Diamond,[172] who believe that it shows that no amount of social conditioning, even accompanied by hormone treatment and surgery, can change a person who is unambiguously male into a person who perceives herself and a woman and functions as one. This is important in understanding the general issues, although not directly relevant to the situation of a transsexual. Secondly, Professor Diamond's evidence about the similarities between Kevin and David Reimer is relevant as illustrating how clearly Kevin's self-perception and behaviour are unequivocally male. In that respect, however, his evidence is not essentially different from a comparison between Kevin and any man. It is consistent with the voluminous evidence,

previously set out, from Kevin himself and those who know him.

The case for "brain sex"

239. The argument advanced by the applicant in the present case is that recent discoveries show that the traditional understanding, by which transsexuals as seen as *biologically* of one sex but *psychologically* of another, is mistaken. The argument is that transsexuals are as much biologically inter-sex as cases of the kind I have mentioned. This is because the traditional accounts omit an important component of sexual identity, namely a development in the brain. As Professor Gooren puts it, the view is that:-

in human subjects with gender identity problems the sexual differentiation of their brains has not followed the pattern predicted by their earlier steps in the sexual differentiation process (such as chromosomes, gonad, genitalia) but has followed a pattern typical of the opposite sex in the final stage of that differentiation process...

240. This brain development cannot yet be precisely identified in living persons. However according to this view it is responsible for the person's self-perception. Thus, the self-perception is the best available guide to a person's sex. As Dr Walker puts it:-

Our inability to be certain of the gender of the baby with ambiguous genitalia springs from our rudimentary understanding of the influences on brain development that lead to self-perception as a boy or a girl. Ultimately therefore, I would submit that the most important determinants of whether a person is a male or female is their self-perception and the perception of others.

The experts' views

241. I will first set out the views of the expert witnesses on the subject. Dr Gooren's view, based on the statement he prepared for this case, is that the process of sexual differentiation takes place in four distinct steps. First, the chromosomal configurations are established. Next, there is gonadal differentiation; that is, differentiation between the testes and ovaries. Next, there is the differentiation of the internal and external genitalia. Finally, there is the differentiation of the brain into male or female.

242. Professor Diamond, as already indicated, is "convinced that `brain-sex' or `mental-sex' is a biological reality that explains many aspects of sexual identity". He writes that there is

emerging evidence... that transsexualism is related to some known biological factors. However, at this stage science can not say so with certainty. It is likely that as science progresses, however, we will learn the nature of brain and sex determination in transsexuals, as we now know for many other human intersex conditions.

243. Dr Walker says that we have a rudimentary knowledge of the influences on brain development, but appears to have no doubt that brain development is a relevant matter, indeed, the most important determinant of a person's sex.

244. Dr McConaghy believes Kevin's brain sex or mental sex is male, and agrees with Professor Diamond "that further research will confirm the present evidence that brain sex or mental sex is a reality which will explain the persistence of a gender identity in the face of or contrary to external influences".

245. Professor Walters' view was briefly expressed in a one-sentence report: evidence, Ms Wallbank said in submissions, that "he is a man that gets to the point". Having read the various reports, including those of Professors Diamond, McConaghy and Gooren, he said that he had no hesitation in concluding that Kevin is "inherently male". While this is not explicit confirmation of the brain sex view, it is difficult to imagine that Professor Walters would have so expressed himself if he had a different view to those of the experts whose reports he cites and with whose conclusions he obviously agrees.

246. I note in passing that the evidence before me is similar to, but perhaps stronger than, the evidence that was before the Court of Appeal in *Bellinger*.[173] In that case, Professor Gooren gave essentially the same evidence as in the present case. Professor Green wrote that there was "growing acceptance of findings of sexual differences in the brain that are determined prenatally. They are seen as influencing sex-typed and sexual behaviours. I do not know how much of an international consensus there is on this or just what a reasonable body of medical opinion would constitute here. However, there is a growing momentum in that direction". The third expert, Mr Terry, who like Professor Green drew attention to the limitations of the Zhou studies (discussed below), said that the paper "lent credence to the view that the sexual differentiation of the brain may be more important than the formation of external genitalia in predicting or correlating future sexual and non sexual behaviour..." He also said that while the current scientific literature arguing for a biological causation is not irrefutable, "it is certainly compelling to my mind".[174]

247. In my view, the expert evidence in this case affirms that brain development is (at least) an important determinant of a person's sense of being a man or a woman. No contrary opinion is expressed. All the experts are very well qualified. None was required for cross-examination, nor was any contrary evidence called.

248. Of course, the experts do not claim certainty for the proposition. They draw attention to the limitations of the research and refer to what further research might reveal. This is appropriate: science proceeds on the basis of constantly testing and developing hypotheses and theories in the light of emerging evidence. My task as a judge is different: I must make a determination on the balance of probabilities having regard to the evidence. In my view the evidence is, in essence, that the experts believe that the brain development view is likely to be true, and they explain the bases for their beliefs. In these circumstances, I see no reason why I should not accept the proposition, on the balance of probabilities, for the purpose of this case.

249. Before leaving this topic, however, I should deal as briefly as I can with the evidence on which this view is based. It is important both to show the basis for the experts' views and to explain more fully the nature of the situations of Kevin and people like him.

Brain research: animals

250. Animal studies of rats, mice and other lower mammals show that their sexual differentiation is not completed with the formation of external genitalia. Their brains undergo a process of sexual differentiation. The differentiation depends on the presence of hormones called androgens, normally produced in the testis of the foetus. With androgen, a male differentiation develops; without it, a female. The experiments show that by supplying or withholding androgen, sexually inappropriate behaviour can be produced in the animals. The behaviour includes sex-dimorphic sexual behaviour (such as copulating positions) and non-sexual behaviour (such as aggression and defence of territory). Such experiments on human beings do not exist, and the experts agree that it would be wrong to assume that human development follows the same pattern. But as I understand the research, the evidence strongly suggests that the human brain also goes through a process of sexual differentiation, although we do not yet fully understand all the processes involved.

Human brains

251. I have received copies of two well-known scientific papers by Zhou and others. These papers are not easy reading for a non-specialist, but I will attempt to reflect their substance, avoiding technical language as far as possible.

252. The first was published in *Nature* in 1995.[175] The authors begin by noting that investigation of the genetics, gonads, genitalia or hormone levels of transsexuals have not so far produced results that explain their status. I think this is important. So far as I know, apart from the theory of brain sex differentiation, there is no available explanation of transsexuals like Kevin. The traditional analysis that they are "psychologically" transsexual does not explain how this state came about. There seems no evident explanation. For example, there seems to be no suggestion in the evidence that their psychological state can be explained by reference to circumstances of their upbringing. In that sense, the brain sex theory does not seem to be competing with other explanations, but rather is providing a possible explanation of what is otherwise inexplicable.

253. The authors then note that in animal experiments the hormones that determine the development of the genitalia also influence the development and function of the brain in a sexually dimorphic (differentiated) fashion. So the authors considered the hypothesis that in transsexuals "sexual differentiation of the brain might not have followed the line of sexual differentiation of the body as a whole". In other words (as I understand it) the brain of an individual may in some sense be male, for example, though the rest of the person's body is female.

254. The authors then searched for a brain structure that might enable this proposition to be tested. They wanted something that would be sexually dimorphic, but would not be influenced by sexual orientation. They used a part of the brain which can be abbreviated to BST.[176] They give reasons for this choice, too technical to reproduce here. The authors say that although there is no direct evidence in relation to humans, animal analogies and other matters suggest that this part of the brain may be involved in human sexual or reproductive functions.

255. One part of the BST - BSTc - is significantly larger in men than in women. The authors examined the brains of six male-to-female transsexuals. They found that it was significantly smaller than in men, and about the same size as in women. Obviously, this could suggest that the brains of these transsexuals have some similarity to those of women, and that this could be associated with the origins of transsexualism.

256. The authors then consider whether the difference might be attributable to other things. They show that the difference was not attributable to the age of the individuals compared. They consider whether the effects of sex hormones during development and adulthood might have caused the difference. (This was important because all the transsexuals had been treated with oestrogens, and the authors wanted to deal with the possibility that this could have affected the size of the BSTc). However three women who had different hormone experiences had normal sized BSTcs. Further, two transsexuals had stopped taking hormones, 15 months and 3 months respectively before their deaths, and their brains were the same size. Also a man who suffered from a tumour that produced high blood levels of oestrogen had a male-size BSTc.

257. Next, the authors consider whether the difference might have been due to the fact that the transsexuals had (with one exception) been orchidectomised. However two other men, who had been orchidectomised one and three months before death, were at the high end of the normal male range. And the transsexual who had not been orchidectomised was in the middle of the transsexual scores.

258. Next, no differences were found between the two transsexuals who had ceased using an anti-androgen compound (for the past 10 years, and 2 years) and the rest, who had continued to use it. The authors conclude:-[177]

In summary, our observations suggest that the small size of the BSTc in male-to-female transsexuals cannot be explained by differences in adults sex hormone levels, but is established during development by an organising action of sex hormones... our study supports the hypothesis that gender identity alterations may develop as a result of an altered interaction between the development of the brain and sex hormones.

259. Professor Gooren writes that "these findings showed that a biological structure in the brain distinguishes male-to-female transsexuals from men."

260. In the second paper,[178] the authors examined the brains of 42 individuals. Their object was to see whether the BSTc itself has a neuronal organisation that is opposite to that of the genetic and genital characteristics of transsexuals. They examined the number of somatostatin ("SOM")-expressing neurons in the BSTc. They found that the number of these neurons in male to female transsexuals was similar to that of females. It was 40% lower than found in heterosexual males and 44% lower than in the homosexual males. They found no difference between transsexuals whose condition became apparent earlier and those whose condition became apparent later, suggesting that the phenomenon is related to gender identity *per se* rather than to the age at which it becomes apparent.

261. As in the first study, they identified and found reasons for excluding a number of other possible causes, such as hormones. They concluded that oestrogen treatment, orchidectomy, CPA treatment, or hormonal changes in adulthood did not show any clear relationship with the BSTc SOM neuron number. Of

particular interest, they studied one 84 year old man who has “very strong cross-gender identity feelings, but had never had any surgical or hormone treatment”. His numbers were also fully in the female range.

262. The authors summarise their conclusion as follows: -[179]

Regardless of sexual orientation, men had almost twice as many somatostatin neurons as women. The number of neurons in . . . male-to-female transsexuals was similar to that of the females . . . . In contrast, the neuron number of female-to-male transsexuals was found to be in the male range. . . . The present findings of somatostatin neuronal sex differences in the BSTc (a part of the brain) and its sex reversal in the transsexual brain clearly support the paradigm that in transsexuals sexual differentiation of the brain and genitals may go into opposite directions and point to a neurobiological basis of gender identity disorder.

263. Professor Gooren says that this can be considered as "substantiating the concept that transsexuals have a sexual brain development contrary to their other sex characteristics such as the nature of their chromosomes, gonads, and genitalia".

264. Mr Burmester quite rightly drew my attention to the limitations of this research and the appropriately cautious language of scientists in the literature. I have taken this into account. However I do not think that the experts’ views about “brain sex” derive entirely from the two studies I have mentioned. I believe that they also reflect a wealth of other information about transsexualism.

Experience of transsexuals

265. In my view the argument in favour of the “brain sex” view is also based on evidence about the development and experiences of transsexuals and others with atypical sex-related characteristics. There is a vast literature on this, some of which is in evidence, and I can do no more than mention briefly some of the main points.

266. Professor Diamond provides an illuminating account of the processes by which children come to perceive themselves as male or female. He suggests that while young children might be aware of their genitals, their self identification derives more from other things than genitals, such as preferring to be with and engage in the activities of one sex, or such physical markers as clothes, hair style and height. Only as they grow older and more sophisticated do they come to see their genitals as sex markers, and, for atypical individuals, “the discordance is cause for serious reflection and introspection”. While for other children the various aspects are concordant, for these children their anatomy "does not provide the feedback offered to typical individuals”.

267. The subjective experience of transsexuals is described movingly in the literature.[180] The authors suggest that other people could gain some sense of the experience by imagining, in the case of a man, developing breasts; or, in the case of a woman, a deep voice and a heavy beard. But this must fall far short of the experience of transsexuals. They speak of being "trapped" in their bodies. One transsexual is reported as saying, after sex reassignment: "Before this treatment I had/was no-body; now I am somebody".

268. It seems quite wrong to think of these people as merely wishing or preferring to

be of the opposite sex, or having the opinion that they are. As the authors put it, "Given the fact that transsexuals frankly and ingenuously view their gender identity/role as correct and their body as totally wrong, psychotherapy to reconcile their gender identity to their body is doomed to fail". In their reflections, transsexuals have no options: "there is only one way out of their deadlock: the 'body' must follow the 'mind'".

269. In my view, the evidence about the experience of transsexuals, and the strength and persistence of their feelings, fits well with the view that "transsexuals have a sexual brain development contrary to their other sex characteristics such as the nature of their chromosomes, gonads, and genitalia".[181] Although this was not the subject of explicit evidence or submission, it seems to me also that the evidence suggests that inter-sex individuals and transsexuals generally feel a strong need to perceive and identify themselves as either male or female. Many cases, including that of Kevin, illustrate the point.[182]

Conclusions on the medical evidence

270. I have by no means quoted from or summarised the whole of the evidence before me. However in my view is does, in the end, support the applicants' argument that it leads to a different view of transsexuality from the view that was manifested in *Corbett*. For Ormrod J and for many of the experts at the time, transsexuals suffered from a discontinuity between their biology and their psychology, whereas intersexed people experienced inconsistencies within or among their biological qualities. But I am satisfied that the evidence now is inconsistent with the distinction formerly drawn between biological factors, meaning genitals, chromosomes and gonads, and merely "psychological factors", and on this basis distinguishing between cases of intersex (incongruities among biological factors) and transsexualism (incongruities between biology and psychology).

271. I note that Professor Gooren's view is that the brain development takes place, or continues, during the early period after birth. Other experts sometimes refer to pre-natal brain developments. I have already explained that I do not accept the view in *Corbett* that the state of the individual at the moment of birth is somehow decisive, and I therefore do not think anything in this case turns on whether the brain developments occur before or after birth.

272. There is still doubt about precisely what characteristics of the brain are involved, how the development takes place, and the extent to which the development extends beyond the time of birth. However, whatever the answers to these questions might prove to be, in my view the evidence demonstrates (at least on the balance of probabilities), that the characteristics of transsexuals are as much "biological" as those of people thought of as inter-sex. The difference is essentially that we can readily observe or identify the 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 transsexuals.

273. To some extent, the discussion and the submissions by the applicants suggest that it can now be said that brain sex, manifested in the person's self-image, is ultimately the *sole or true indicator* of the person's true sex: as Ms Wallbank

succinctly put it, what is between the ears is more important than what is between the legs. I agree that the medical evidence shows that there is a biological difference, associated with the brain, between transsexuals and other people. It also seems possible, or even likely, that this feature of the brain determines whether individuals think of themselves as men or women, *whatever their other biological characteristics*, although the medical evidence does not expressly assert this. But attributing some kind of primacy to this aspect of the person is not a medical conclusion. It is a social or legal one. Even if it were established that people's perceptions of their sex is exclusively determined by a characteristic in their brain, there may be policy reasons to be considered before concluding that the brain characteristic should be the basis for the legal definition of "man" or "woman".[183] I will discuss these matters later. As will be seen, I do not base this decision on the view that "brain sex" is in law the decisive factor in determining whether a person is a man or a woman.

PART EIGHT: ISSUES SPECIFIC TO MARRIAGE LAW

274. In this part I will consider some specific issues and arguments relating to marriage law, to the extent that they have not already been dealt with.

The context of marriage: are there "special considerations"?

275. In this section I consider whether notwithstanding the meaning of "man" in the contexts of criminal law and social security law, and the conformity between those definitions and the contexts I have described above, there might be special reasons for taking a different view in the context of the rule that requires that a marriage be between a man and a woman.

276. The issue is well posed in a paper by Lord Reed, quoted by Thorpe LJ in *Bellinger*:-[184]

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.

277. I start with *Corbett*. For reasons already given, I do not regard that decision as compelling. Indeed, as I attempted to demonstrate, on a careful analysis the judgment identifies only two real matters of principle or policy. They are the reference to the essential role of women in marriage, and the argument that to recognise sexual reassignment would be "bizarre". I have given my reasons for not accepting the first argument. I will say a little more about the second shortly. Those matters aside, there seems no basis for the decision, other than what I have called the "essentialist" view.

278. Thorpe LJ has stated the objectives of the law on marriage in a very positive way, in terms with which I completely agree:-[185]

The present claim lies most evidently in the territory of the family justice system. That system must always be sufficiently flexible to accommodate social change. It must also be humane and swift to recognise the right to human dignity and to freedom of choice in the individual's private life. One of the objectives of statute law reform in this field must be to ensure that the law reacts to and reflects social change. That must also be an objective of the judges in this field in the construction of existing statutory provisions. I am strongly of the opinion that there are not sufficiently compelling reasons, having regard to the interests of others affected or, more relevantly, the interests of society as a whole, to deny this appellant legal recognition of her marriage.

279. I should, however deal with some aspects of the law of marriage, referred to in those authorities that reach the same conclusion as *Corbett*. The majority in *Bellinger* wrote:-[186]

We are however concerned with legal recognition of marriage which, like divorce, is a matter of status and 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.

280. I accept that marriage involves questions of status, and that this is a matter of public interest. For that reason it is fair to say that it should be distinguished from some other areas of law, for example areas based on contract, in which there may be no public issue involved in how the parties characterise themselves. On the face of it, for example, there is no problem about parties agreeing that an insurance policy relating to a man should apply terms normally applied to women, or even, I suppose, that a contract could deem a man to be a woman, or vice versa. Thus, I have no difficulty with the propositions derived from *Corbett* and cases like it, that sex or gender is an essential ingredient of the marriage relationship, and that public issues are involved. This analysis shows, I think, that it may not be a legitimate solution to the problem to say, in effect, that the law should simply recognise at any given time whatever sex a person chooses. It is appropriate to consider public issues relating to marriage and examine whether they suggest a different answer.

281. I think the key submission by Mr Burmester on this topic is the following:-

As the Australian courts have observed, the law's and society's acceptance of a person's sex in the context of marriage involves special considerations. These considerations are different to those relevant to determining a person's gender identity in other contexts such as social security and criminal law. Marriage in Australia is a social institution having its origins in ancient Christian law and is intrinsically connected with procreation. These origins cannot be ignored in interpreting the Marriage Act. Given these origins, the genotype of the person, and the genital and gonadal features of the parties to a marriage are legally significant.

282. The "special considerations" identified in this passage are two: (i) that marriage is a social institution having its origins in ancient Christian law and (ii) that it is intrinsically connected with procreation.

283. As to the first, the proposition is true. However there was no evidence or submission about how ancient Christian law might have regarded people like Kevin. The question is somewhat unreal, since chromosomes were unknown, as was the treatment that Kevin has undergone. Nor were there any submissions about the relevance of any particular theological or doctrinal Christian positions that might have supported the argument.

284. There is another problem with the argument. If, as I have held, the question is to find the current meaning of an ordinary word, "man", I do not see any reason why resort should be had to ancient law rather than contemporary understandings. There is a separation of church and state in this country, and there is no basis for determining the legal question by reference to any particular set of religious beliefs.[187] No doubt the definition of marriage has its origin in Christian beliefs, and this may have been part of the history that resulted in marriage being defined as between a man and a woman. But I do not see how resort to ancient Christian law or beliefs can assist in determining the meaning of the word "man" for the purpose of the law of marriage in the year 2001.

285. The second special consideration suggested by Mr Burmester is that marriage is "intrinsically connected with procreation". The meaning of this phrase was not developed in argument. If it means that the validity of marriage depends on some physical capacity for procreation, it is wrong. Marriages are perfectly valid where one or both parties are infertile, but the couple bring up children born through some form of artificial insemination, or acquired by adoption. Thus the fact that Kevin is infertile is irrelevant. Similarly, in Australian law there is 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 the parties.

286. The proposition is more acceptable if it means that in some general sense the role of marriage is closely connected to the generation and care of children. By providing a legal and social framework for these tasks, marriage is regarded as forming a key institutional role in society.[188] No doubt there is much to be said about such a proposition. Some might question it, referring to a variety of legal and social arrangements that recognise in one way or another families outside marriage. However I will not pause to consider these matters. Even accepting the proposition, I do not see that it supports the view that Kevin's marriage is invalid. There is no evident reason why he and his wife cannot bring up children. As it happens, they have chosen to do so. Having been accepted as a suitable couple for the artificial insemination program, they are now proud parents. There is much evidence to the effect that they are socially accepted in this conventional role they have chosen, and no evidence at all that they are in any way seen to be

ill-equipped for it. Nor was there any submission to that effect. The Attorney-General conceded that the applicants and their son constitute a family.[189]

287. Are there other "special considerations" associated with marriage that would lead to a definition of "man" that would exclude Kevin? I have considered whether the authorities identify any such special considerations, and can find none. The decisions that follow *Corbett* do not identify any, so far as I can see. The decisions on marriage law that depart from *Corbett* indicate that those judges did not see any problems in this regard. In the most recent English decision, *Bellinger*, the question seems to have been whether to depart from the established law represented by *Corbett*, and no new reasons to justify the *Corbett* approach in marriage law emerge.

288. I have also considered academic commentary on this topic. I was not directed to any publication that identified any special considerations that would exclude Kevin and those like him. While the idea that marriage might involve "special considerations" has been referred to,[190] I have not found any discussion that identifies any considerations that might compel the result that marriage law should resist the humane and practical trend to accept the reality of gender reassignment. On the contrary, it is my impression that specialist family law scholars are generally critical of the result in *Corbett*.

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;...*

Are there practical difficulties?

290. I think I should consider, however, whether practical difficulties would arise by treating Kevin as a man for the purpose of marriage.

291. The legislation about marriage makes no express provision for people who change from one sex or gender to another. Although in some senses it can be said that a person like Kevin has always been a man, in practice including him in the

definition might confront the law with a problem not expressly dealt with, namely accommodating a change of sex. To what extent might this be a problem requiring departure from the ordinary meaning of "man" or "woman"?

292. For most people, being a man or a woman has nothing to do with any election or choice by themselves: they just *are* one or the other, and will be male or female for their whole lives. Because of this, and because marriage is a matter of status with legal consequences, there may be much to be said for the view that it would be wrong for marriage law to embrace a definition that would make one's sex a matter of personal preference or choice. One of the reasons that the three-point biological criterion in *Corbett* has found favour is, I think, that it provides a permanent and clear answer to the question whether a transsexual is a man or a woman, and avoids any risk that the law might enable a person to change from a man to a woman at will. This is also, I think, why some judges have been reluctant to incorporate "psychological" criteria, lest the person's sex vary according to his or her feelings or beliefs at particular times.

293. In the course of his submissions, Mr Burmester said that to grant the application would involve a "giant leap" and a "radical step". He urged that to grant the application would be, in effect, to engage in a task of law reform more suited to a law reform commission, or to the legislature. He cited authorities to the effect that the courts should not engage in such activity.[191] Similar themes emerge from the majority judgment in *Bellinger*.

294. Whether granting the present application is a radical step, or an impermissible exercise in law reform, depends, I think, on the legal basis for doing so. It might well be radical to state the law purely in terms of an individual's right to choose, or, perhaps, in terms of characteristics of the brain that cannot yet be measured. But it seems to me quite orthodox, rather than radical, to apply to marriage the ordinary meaning of the terms "man" and "woman", as set out in the Australian authorities and thereby ensure that the law of marriage is not out of alignment with other laws and social practices, and the most informed medical practice. That ordinary meaning would not include a woman who simply announced that she was a man, or anything of the sort. It includes only individuals who are post-operative transsexuals. Whatever might be said about wider statements, I see nothing radical in saying that the words "man" and "woman" should be given their ordinary contemporary meaning in the context of the law of marriage, and that contemporary meaning should be taken to incorporate transsexual people who have successfully completed the personal, social, medical and surgical processes of gender reassignment.

295. I should however deal with some judicial statements to the effect that difficulties might be created by applying the ordinary meaning of the words in the context of marriage.

296. It seems that the majority in *Bellinger* were troubled by what they saw as practical difficulties:-[192]

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?

The point at which a change of gender should be recognised is not easily to be ascertained... The line could be drawn at a number of different points from the initial diagnosis of gender disorder to the completion of reconstructive surgery. It is clear from the Report of the Working Party that the point at which people feel they have achieved their change of gender varies enormously. From the research it can be seen how much more difficult it is to undergo successful female to male reconstructive surgery than the male to female but the self-identification in the preferred male gender can be as strong as in a post-operative male to female transsexual.

297. The majority referred to a submission by Ms Cox that since the surgery at the fourth stage was irreversible unlike the previous stages, it would be correct to recognise the appellant as reassigned to the opposite sex once she became a post-operative male to female transsexual, or presumably vice versa. The majority, however, thought this lacked the necessary certainty:-[193]

To choose, however, to recognise a change of gender as a change of status would require some certainty and it would be necessary to lay down some pre-conditions which would inevitably be arbitrary. So, on Miss Cox`s hypothesis, for instance, if a patient started but failed to complete such surgery for whatever reason, he/she would remain in the birth registered gender, whereas further surgery would permit him/her to be recognised for the purposes of section 11(c) as having changed his/her gender.

Annex 3 of the Report of the Working Party sets out with clarity the problems of gender re-registration. The German approach, for example, in its legislation provides for recognition by a court of acquired gender under certain conditions. The requirements are

> *(i) a person has lived for three years as belonging to the sex the person feels he or she belongs to;*
> *(ii) the person is unmarried;*
> *(iii) of age;*
> *(iv) permanently sterile;*
> *(v) has undergone an operation by which clear resemblance to the other sex has been achieved.*

The propriety of requiring pre-conditions, such as these, are matters for public policy and, no doubt, public consultation, not for imposition by the courts on the public. The absence of pre-conditions would leave the applicability of the law to an individual diagnosed as suffering from gender disorder in complete confusion.

298. With respect, I regard the phrase “complete confusion” as overstating the difficulty. I accept that there are always lines to be drawn, and that in some cases issues could arise about whether surgery had been completed. There are unavoidable difficulties in cases of what is traditionally seen as inter-sex, where there are incongruities within or among the biological factors; but when the line has to be drawn, it can be, for example in an application for a declaration of validity of marriage.[194]

299. I agree with Thorpe LJ, who was not impressed with the argument that a decision in favour of the applicant would “produce enormous practical and legal

difficulties":-[195]

All we consider is whether the recognition of marriage should be denied to a post-operative male to female transsexual applying the decision in Corbett v Corbett. In that context difficulties are much reduced. We need concern ourselves only with those that arise from recognising marriages already celebrated and permitting the future celebration of marriages between parties one of whom is a transsexual seeking to satisfy the requirements of section 11(c) in his or her post-operative gender. The principal difficulty seems to me to stem from the emphasis that such a person will inevitably place on his or her psychological gender. If that, the fourth factor in the Corbett classification, is admitted to the decision making process, does it immediately become the trump factor? If so, why does it not operate immediately and without the reinforcement of medical treatment? Whilst conceding that any line can be said to be arbitrarily drawn and to lack logic, I would contend that spectral difficulties are manageable and acceptable if the right is confined by a construction of section 11(c) to cases of fully achieved post-operative transsexuals such as the present appellant.

300. Thorpe LJ drew comfort in this respect from the experience elsewhere:

In assessing how formidable are the difficulties..., we can surely take some comfort from the knowledge that within wider Europe many states have recognised the transsexual's right to marry in the acquired gender. Although different jurisdictions have adopted a widely differing range of responses (as to which see Lord Reed's paper at 18-20) there seems to be no evidence that they have encountered undue difficulty in applying liberalised provisions. Furthermore we have the example of a common law jurisdiction, New Zealand, which has often legislated innovatively in the family law field. In his judgment in AG v Otahuhu Family Court, Ellis J confined the right of marriage in the acquired gender to a transsexual who 'has undergone surgical and medical procedures that have effectively given that person the physical conformation of a person of a specified sex'. He continued:

> *"Submissions were directed to the practical aspects of any declaration, when the registrar may be in doubt. In such cases a medical examination can be arranged and opinions obtained to enable the registrar to reach his own conclusion."*

In our family justice system declarations as to existing marriages would be the subject of the existing statutory procedures provided by sections 55 and 59 of the Family Law Act 1986. In the case of an intended marriage, if the registrar were not satisfied on the medical evidence submitted by the parties, then an application would have to be issued in the Family Division in advance of the ceremony for a declaration that the transition had been fully achieved by all available medical treatments.

301. For completeness, I should also refer to the comment of Carruthers J in his dissenting judgment in *Harris*. In relation to post-operative transsexuals, Carruthers J quoted from a number of decisions to the effect that the surgery did not transform the person into a male, or a female.[196] He quoted the statement that "imitation cannot be equated with transformation", and said, "The fact that a

biological male divests himself of his external genitalia cannot mean that he thereby becomes a female or vice versa". These comments go no further than showing, I think, that there will inevitably be differences between people who are transsexuals and those who are not. I do not think that they can stand with the medical evidence available to me in this case. They do not indicate any particular reasons why the law should not include post-operative transsexuals in their reassigned sex.[197] Carruthers J also referred to the question of sex being important in other areas, such as succession, as where a person left an estate to his "heirs female". As I have said, the meaning of words depends on context, and there is no need to deal with this issue.

Sex reassignment of a married person

302. In order to be as thorough as possible, I now consider the situation where a person who is *already married* completes gender reassignment. This might be thought rather unlikely, but it is precisely the hypothetical situation envisaged by Ormrod J (in a passage quoted earlier) to show that it would be "bizarre" if the reassignment were to be recognised. For ease of discussion, I make it specific:

Jane, a female to male transsexual, had married Bill, and they adopted a child. Jane later successfully went through the gender reassignment process at age 50, changed his name to John, and then wished to separate and marry a woman.

303. What would be the position if the marriage law were to recognise the re-assignment? The marriage would I think still be valid: its validity would be determined as at the date of the marriage, and I would not think it would become invalid by reason of the reassignment.[198] After a year's separation, either party would be able to apply for a divorce. The Family Law Act would apply in the usual way to deal with any questions of property division or spousal maintenance. John's obligations to his adopted child would be no different to those of any other divorcing parent. Consistently with virtually all other aspects of his life, except chromosomes, John would now be treated as a man for marriage as well as other legal purposes, and could remarry, to a woman.[199] No obvious difficulties would appear to flow from this, and none were suggested in argument. Nor have I been advised of any difficulties that have arisen in other jurisdictions, such as New Zealand or many European countries, where the re-assignment is recognised for the purpose of marriage law.

304. I now consider the position if *Corbett* is correct, and the marriage law continues to regard John as a woman. His marriage to Bill would of course be valid. The law would not however prevent John from going through the gender reassignment process, separating, and then obtaining a divorce. John would have the usual legal obligations to his adopted child. He would be free to live his life as a man. He would be free to form a de facto relationship with a woman. He would now perceive himself to be a man, look like a man, and be accepted as a man by family, friends and work colleagues. He would treated as a man for a variety of legal and social purposes: his birth certificate, passport and other documents would all show him to be a man. He would have no female physical

characteristics other than chromosomes, and would be physically incapable of functioning as a woman. Under the law of marriage, if *Corbett* is right, John would be entitled to marry a man, but not a woman. Ironically, to the outside world such an event would appear to involve a legal marriage of a same-sex couple.[200]

305. If a word such as “bizarre" is to be used, it would seem more apt to describe the consequences of the *Corbett* approach than the consequences of recognising the reassignment.[201] However I do not think such language is helpful. The fact is that the assignment of transsexuals to one category or the other will inevitably mean that some of the person’s characteristics will be those of the “other” sex. The law’s task, in this area through the definition it gives to the everyday words “man” and “woman”, is to reach a conclusion that is just, compassionate and sensible. I am satisfied that if *Corbett* were to be followed, this aspect of Australian law would have none of these characteristics.

Consistency

306. Finally, there is a strong argument that while it is possible for words to mean different things in different areas of law, it is highly desirable that the law be consistent in relation to the meaning of "man" and "woman".[202] In this respect I gratefully adopt the treatment of this aspect by Lockhart J in *SRA*:-

104. As my review of the authorities has shown, questions relating to transsexualism arise in a variety of contexts and different answers may be required. For example, the law relating to marriage may require different tests. I express no view on this question; but the law of marriage may involve special considerations with many factors to be considered by the Court and carefully weighed. There is however a need to apply the law consistently. If a post-operative transsexual is to be regarded for the purposes of the criminal law and social welfare legislation as a person with the new sex then the same conclusion should follow wherever possible in other areas of law to achieve consistency and certainty. It was this consideration which led the Court of Appeal in Tan to extend the reasoning of Ormrod J in Corbett to the criminal law. Consistency will avoid anomalous results and unnecessary confusion. Street CJ in his judgment in Harris stressed the need for consistency. As Samuels said in his paper at 61: "Such schizophrenic legal treatment would be calculated to have a detrimental effect on the already troubled state of the transsexual. Moreover, the possible proliferation of legal requirements would be likely to increase the chance of conflicting curial decisions, and would generate problems of no little complexity."

PART NINE: REVIEW AND CONCLUSIONS

307. In this concluding section the discussion draws together the main themes of what has already been said.

The essential issue

308. The essential issue is whether Kevin was a man on the date of the marriage. Determining this issue requires me to make findings about Kevin, and to identify the contemporary everyday meaning of the word "man" in the context of marriage law. I have not been able to accept the argument that as a matter of construction the word "man" should be given the meaning it had in 1961 or at some earlier time.

Kevin's situation

309. As to Kevin's particular situation, I have set out the facts in detail. Whether or not there are degrees of transsexualism, no issues of this kind arise here. On every matter, he exemplifies a transsexual person of the kind referred to in the literature. It is difficult to imagine how there could be a stronger case, on the facts, for a person with female chromosomes, born with female genitalia and chromosomes to be treated as a man. I refer to the extensive evidence relating to his self-perception, appearance, medical history, and functioning in society.

The starting point

310. There is no existing Australian authority on the question of determining the sex of a transsexual person for the purpose of the law of marriage. I have not accepted Mr Burmester's submission that *Corbett* represents a persuasive decision or an appropriate starting point. Instead, the orthodox approach, I think, is to start with the ordinary meaning of "man" and "woman" and to then to consider whether there are reasons for giving those terms some special meaning in the context of the law of marriage.

Australian authorities on the meaning of "man" and "woman"

311. Australian authorities hold that the ordinary contemporary meaning of the word "man" includes a post-operative transsexual such as Kevin. In particular, in *SRA*, Lockhart stated the law in unequivocal terms:-[203]

In my opinion a woman or a female, as those terms are generally understood in Australia today, includes a person who, following surgery, has harmonized psychological and anatomical sex. A male-to-female transsexual, following reassignment surgery, is a woman and a female. A female-to-male transsexual, following such surgery, is a man and a male.

The medical evidence

312. I have found on the balance of probabilities that Kevin's sense of being a man is based on some biological characteristics of his brain. My conclusion in this case does not depend on this factual finding. However the finding, and more generally the understanding that the medical evidence provides, tend to reinforce the conclusion that the law, like medicine, should treat words such as "man" and

"woman" as referring to the re-assigned sex of post-operative transsexuals.

The legal and social context

313. I have already referred to the response of many countries to the issues posed by transsexualism. I have also referred to the approach taken by medical authorities to the treatment of people with gender identification issues. It is obvious that current medical theory and practice is to support people like Kevin in assigning, or re-assigning their sex in accordance with their deeply-felt sense of themselves as men or women. I have quoted the long line of distinguished medical practitioners whose evidence makes it quite clear that if the law were to insist on Kevin being treated as a woman, it would be contrary to the most informed and authoritative medical practice.

Matters of principle

314. In my view, a survey of legal responses to the situation of transsexuals shows a number of clear themes.

315. Those courts that have followed *Corbett* or otherwise reached similar conclusions generally exhibit what I have called an "essentialist" view: they are unable to accept the sex reassignment because they take the view that there is some essential and unalterable quality that is maleness or femaleness. This view is characterised by absolute and unsupported assertions that a person's sex is fixed unalterably at birth, that no amount of surgery or other medical intervention can make any difference, and that the person's self perception and role in society are equally irrelevant. In my view however this is not a helpful approach. The evidence does not support the existence of such an essence or entity, and this approach distracts attention from the fundamental task of the law. That task, in a legal and social context that divides all human beings into male and female, is to assign individuals to one category or the other, including individuals whose characteristics are not uniformly those of one or other sex.

316. If one considers those courts and legal institutions that have correctly identified that task, there is a remarkable consensus, namely that the law should treat post-operative transsexuals as members of their re-assigned sex. This conclusion has been reached by the vast majority of expert and distinguished commentators. It has been the basis of many social arrangements. It has been systematically embraced and acted upon by the medical profession.

317. Most importantly, this conclusion has been reached by numerous courts from as early as 1945. At least in general, those decisions that do not reach this conclusion tend to fall into one of three categories: (i) cases based on the essentialist approach; (ii) cases holding that the decision in *Corbett* settled the law and any change is now for the legislature; and (iii) the European human rights cases holding that respect for States' "margin of appreciation" prevented non-recognition from violating human rights standards.

318. The reasons for the law to recognise sex-reassignment of post-operative transsexuals have been expressed in different ways. Some of these have been

quoted in this judgment. Although some matters relate to specific legal contexts only, these decisions generally embody a number of common themes. No brief summary can do justice to the force and eloquence of many of the statements, but I would indicate the main themes in the following way.

319. Firstly, acknowledging the sex-reassignment respects the rights of the individual concerned. Sometimes, this is expressed in terms of human rights. Sometimes, it is expressed in terms of avoiding further suffering for individuals who have usually had more than their share. Sometimes it is expressed in terms of compassion, or a desire to mark acceptance of people who are different.

320. Secondly, acknowledging the sex-reassignment assists the individuals to integrate into society. In their re-assigned sex, they are more likely to live comfortably in society and to contribute to it.

321. Thirdly, whatever might be the position with pre-operative transsexuals, the irreversible surgery that completes the sex-reassignment process provides a convenient and workable line for the law to draw. No significant difficulties are posed by including post-operative transsexuals in their re-assigned sex.

The context of marriage

322. The Australian decisions that accepted the re-assignment of transsexuals in other legal contexts, quite properly, left open the situation of marriage, so that any special considerations relating to it can be considered when the need arose. That need has arisen in this case. An examination of the factors relating to marriage reveals the following.

323. Firstly, the general themes I have identified above apply equally, or indeed with particular force. In terms of the human rights and situation of the individual, his or her integration into society, and the practicality of the outcome, there are overwhelming reasons to recognise the sex reassignment.

324. Secondly, an examination of the submissions and the literature does not identify any reasons why the law of marriage should diverge from the general law. Indeed, there are good reasons specific to marriage for recognising the re-assignment. Doing so would be likely to promote the interests of others, in particular the spouses and children involved. Failing to do so would lead to the odd result that a person who appears to be a man, who functions in society as a man, and whose body can never function as a woman's body and has most of the characteristics of a man, would be entitled to marry a man.

325. Thirdly, to recognise the sex-reassignment would bring marriage law into conformity with other areas of law. Refusing to recognise it would mean that the words "man" and "woman" have a special technical meaning in marriage law, different to their general meaning. That result, while logically possible, is highly undesirable.

Conclusion

326. Although the extensive evidence and argument required this judgment to be of considerable length, in my view there are overwhelming reasons why the

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

327. I do not agree with Mr Burmester that a decision in favour of the applicants is ground-breaking, or anything of that sort. It is true that this judgment canvasses some interesting new medical evidence, and that the discussion of legal principle has been wide-ranging. While I have made findings about the medical evidence and offered a view about the underlying basis for such decisions as *Corbett*, the end result does not depend on acceptance of either of these matters. Ultimately, the basis for this judgment is very simple and mundane. It is that no good reasons have been shown why the ordinary legal meaning of the word "man", which includes post-operative female to male transsexuals, should not also apply to marriage.

328. Because the words "man and "woman" have their ordinary contemporary meaning, there is no formulaic solution to determining the sex of an individual for the purpose of the law of marriage.[204] That is, it cannot be said as a matter of law that the question in a particular case will be determined by applying a single criterion, or limited list of criteria. Thus it is wrong to say that a person's sex depends on any single factor, such as chromosomes or genital sex; or some limited range of factors, such as the state of the person's gonads, chromosomes or genitals (whether at birth or at some other time). Similarly, it would be wrong in law to say that the question can be resolved by reference solely to the person's psychological state, or by identifying the person's "brain sex".

329. To determine a person's sex for the purpose of the law of marriage, all relevant matters need to be considered. I do not seek to state a complete list, or suggest that any factors necessarily have more importance than others. However the relevant matters include, in my opinion, the person's biological and physical characteristics at birth (including gonads, genitals and chromosomes); the person's life experiences, including the sex in which he or she is brought up and the person's attitude to it; the person's self-perception as a man or woman; the extent to which the person has functioned in society as a man or a woman; any hormonal, surgical or other medical sex reassignment treatments the person has undergone, and the consequences of such treatment; and the person's biological, psychological and physical characteristics at the time of the marriage, including (if they can be identified) any biological features of the person's brain that are associated with a particular sex. It is clear from the Australian authorities that post-operative transsexuals will normally be members of their reassigned sex.

330. I state my conclusions in this case as follows:-

8. For the purpose of ascertaining the validity of a marriage under Australian law, the question whether a person is a man or a woman is to be determined as of the date of the marriage.
9. There is no rule or presumption that the question whether a person is a man or a woman for the purpose of marriage law is to be determined by reference

to circumstances at the time of birth. Anything to the contrary in *Corbett* does not represent Australian law.

10. In the context of the rule that the parties to a valid marriage must be a man and a woman, the word "man" has its ordinary current meaning according to Australian usage.

11. There may be circumstances in which a person who at birth had female gonads, chromosomes and genitals, may nevertheless be a man at the date of his marriage. Anything to the contrary in *Corbett* does not represent Australian law.

12. 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:-

> (g) He had always perceived himself to be a male;
>
> (h) He was perceived by those who knew him to have had male characteristics since he was a young child;
>
> (i) 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;
>
> (j) 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;
>
> (k) He was accepted as a man for a variety of social and legal purposes, including name, and admission to an artificial insemination program, and in relation to such events occurring after the marriage, there was evidence that his characteristics at the relevant times were no different from his characteristics at the time of the marriage;
>
> (l) His marriage as a man was accepted, in full knowledge of his circumstances, by his family, friends and work colleagues.

13. For these reasons, the application succeeds, and there will be a declaration of the validity of the applicants' marriage.

I certify that the preceding 330 paragraphs are a true copy of the reason for judgment herein of the Honourable Justice Chisholm

Associate

[1] Paragraph 3 of the Applicant's submissions.
[2] *Hyde* v *Hyde and Woodmansee* (1866) LR 1 P&D 130 at 133; cf *Lindo v Belisario* [1795] 1 Hag Con 216 at 213.
[3] Section 46(1).
[4] *Khan* v *Khan* (1962) 3 FLR 496 at 497; *In the Marriage of C and D (falsely called C)* (1979) 35 FLR 340 at 345; *In the Marriage of S* (1980) 42 FLR 94 at 192; *Calverley* v *Green* (1984) 155 CLR 242 at 259-60; *R* v *L* (1991) 174 CLR 379 at 392, *Commonwealth of Australia v Human Rights & Equal Opportunity Commission and Muller* [1998] 138 FCA (27 February 1998) (1998) EOC ¶92-931 and *Brown v Commissioner for Superannuation* (1995) 38 ALD 444.
[5] Section 4, "matrimonial cause", paragraph (b).
[6] Constitution, s 51(xxi).
[7] Gordon Samuels, "Transsexualism" (1983) *Aust J Forensic Sciences* 57-64, 57.
[8] These distinctions are drawn in many of the cases, including *Corbett v Corbett (otherwise Ashley)* [1971] P. 83. For a slightly more detailed account, see *Secretary, Department of Social Security* v *SRA* (1993) 118 ALR 467, at para 48, per Lockhart J.
[9] I do not in this paragraph mean to exclude the idea that these matters might not be bipolar, but a continuum with individuals placed at different points on it: see Samuels, "Transsexualism", above, 57.
[10] I do not use them in the way indicated by Professor Diamond, namely that men and woman are social terms and male and female biological ones: Diamond, "Sexuality: Orientation and Identity" in Raymond Corsini, ed, *Encyclopaedia of Psychology* (2nd ed, 1994) Vol 3, 398ff.
[11] See the discussion in *Bellinger* (unreported, Court of Appeal, [2001] EWCA Civ 1140, 17/7/01) of whether there was any significance in the legislative use of "male" and "female" rather than "man" or "woman": paragraphs 16-23.
[12] Vivienne Muller, "`Trapped in the body' - Transsexualism, the law, sexual identity" (1994) 3 *Australian Feminist Law Journal* 103, 104. Compare the discussion of male-to-female transsexuals in Myanmar, known as acaults, who have a special cultural and religious status in the community, but who are said to have elected to undergo sex reassignment surgery and hormone treatment when it became available: Coleman, Colgan & Gooren, 1992, quoted in Loius Gooren and Cornelis Doorn, "Who determines manhood or womanhood? The biomedical and legal definitions of man and woman in relation to transsexualism" in Frank Fleerackers et al, ed, *Law, Life and the Images of Man: modes of thought in modern legal theory* (Berlin, 1996) 267- 282, at 274 ("Gooren and Doorn").
[13] See eg Janice Raymond, *The Transsexual Empire* (Boston, Beacon Press, 1979), quoted in Muller at p 110.
[14] Isis Dunderdale, "The human rights of transsexuals" (1992) *Australian Law Journal* 26, quoted in Muller, above, at 116. For somewhat similar approaches see, eg, the work of Sharpe and Mountbatten, in, eg, John Mountbatten, "Priscilla's Revenge: or the strange case of transsexual law reform in Victoria" (1996) 20 *Melbourne University Law Review* 871 (quoting Foucault's question, "Do we truly need a true sex?"); Andrew Sharpe, "Judicial Uses of transsexuality: a site for political contestation" (1996) 21

Alternate Law Journal 153.
[15] Douglas K Smith, "Transsexualism, Sex Reassignment Surgery and the Law" (1971) 56 *Cornell LR* 963, at 694, 695 (the quotation incorporates part of the author's note 9 but otherwise omits citations).
[16] I note in passing that whatever might be thought about social reorganisation, the medical evidence indicates that intermediate positions have little appeal for transsexuals. Referring to such intermediate or fluid solutions, Gooren wrote: "Those who treat transsexuals know this is not the case. The transsexual's real problem is the physical body that is experienced as alien, not as a part of the self, an unimaginable problem to the non-transsexual. To put it technically: transsexualism is not sex role dysphoria, it is physical/body sex dysphoria": Gooren and Doorn, above, 274. Professor Diamond similarly writes that transsexuals "can be seen as conservative members of society since they endeavour to maintain the traditional man-woman gender roles...": his affidavit, p 7. See also Mathews J's comment that she saw no place in law for a "third sex": *R v Harris and McGuiness* (1988) 17 NSWLR 158, 194.
[17] Like Professor Dewar, I do not think that homosexuality is "the real issue lurking in *Corbett*": see John Dewar, "Transsexualism and marriage" (1985) 15 *Kingston Law Rev* 58-76, note 6, citing I. McColl Kennedy, "Transsexualism and single sex marriage (1973) *Anglo-American Law Review* 112, at 130, 132-136.
[18] This term can be obscure when used of a transsexual, since it assumes that the reader knows whether the writer is treating the person under consideration as a man or a woman. I mean that Kevin, seeing himself as a man, is sexually attracted to women, or to adopt Professor Diamond's terms, is gynecophilic rather than androphilic: Diamond, "Sexual Identity and Sexual Orientation in Children with Traumatised or Ambiguous Genitalia" (1997) 34 (2) *Journal of Sex Research* 199, 207.
[19] I accept the submission by Mr Burmester QC that this is the correct inference to draw from the evidence, including the fact that the applicants elected not to lead evidence on this topic. I do not think this conclusion was seriously resisted.
[20] See the affidavit by Dr Haertsch.
[21] See *Births, Deaths and Marriages Registration Act 1995* (NSW) Part 5A.
[22] Kevin's skills in this regard also impressed a neighbour who was a plumber. He spoke of Kevin "single-handedly tackling construction work which most men would avoid".
[23] Applicants' submission, citing *Rochfort v Trade Practices Commission* (1982) 153 CLR 134 per Mason J at 147; *Cook v Cook* (1986) 162 CLR 376 at 390.
[24] See eg the quotations in *Harris* at 190, per Mathews J.
[25] *Harris*, per Mathews J, 189.
[26] This is the view of Thorpe LJ in *Bellinger*, above.
[27] 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.
[28] *Corbett*, p 104.

[29] *Corbett*, p 89.
[30] As recognised by Ormrod J in *Corbett*, at 106.
[31] It is not necessary to discuss whether the evidence in *Corbett* justified this conclusion.
[32] This is consistent with the approach of members of the Court of Appeal in *Bellinger* (unreported, Court of Appeal, [2001] EWCA Civ 1140, 17/7/01).
[33] April Ashley had been accepted as a woman for the purpose of National Insurance: see *Corbett* at p 85.
[34] See also the comment of Mathews J, that the conclusion followed not so much from the medial evidence as from Ormrod J's finding that certain biological features should be determinant of a person's sex: *Harris*, 191.
[35] The passage is correctly identified by Otlowski as "the very basis of the decision": Margaret Otlowski, "The Legal Status of a Sexually Reassigned Transsexual: R v. Harris and McGuiness and Beyond", (1990) 64 *ALJ* 67, 72.
[36] It becomes apparent from a later part of the judgment that opinions can differ on this matter: see *Corbett* at 107-108.
[37] Samuels, above, 58.
[38] *Corbett*, pages 86-87.
[39] It is possible that this focus was suggested because under English legislation at the time of *Corbett*, incapacity for sexual intercourse was legally relevant to the validity of a marriage, and was an alternative ground relied on in *Corbett*).
[40] Margaret Otlowski, "The Legal Status of a Sexually Reassigned Transsexual: R v. Harris and McGuiness and Beyond", (1990) 64 *ALJ* 67, 72.
[41] In "Transsexual Recognition in Australia" (1997) 10 (3) *Venerology*, 188-192, at 188.
[42] See eg Mathews J In *Harris*, at 191 ("I cannot share his Lordship's view as to the `bizarre' nature of the scenario he paints").
[43] This analysis is consistent with Judge Marten's comment that Ormrod J "simply refused to attach any legal relevance to reassignment surgery": *Cossey v United Kingdom* [1990] 13 EHRR 622.
[44] As noted by various critics. Thus Professor Dewar, for example, wrote that the arguments for adopting purely biological criteria were "unconvincing and incoherent": John Dewar, "Transsexualism and marriage" (1985) 15 *Kingston Law Rev* 58-76, at 61.
[45] Kennedy, "Transsexualism and single sex marriage (1973) *Anglo-American Law Review* 112.
[46] Professor Dewhurst, *Corbett* at p 100.
[47] Thus Dewar points to the strangeness of Ormrod J's disregarding the person's (post-operative) genital sex at the time of marriage, yet regarding the baby's genitals at the time of birth as the most important factor: Dewar, above, at 61.
[48] See especially *Corbett* at 104.
[49] See, eg "...the biological sexual constitution cannot be changed...The respondent's operation therefore, cannot affect her true sex..."
[50] The most accessible account of this case is the summary in D K Smith, "Transsexualism, Sex Reassignment Surgery and the Law" (1971) 56 *Cornell LR* 963, at 971-2, quoted by Lockhart J in *Secretary, Department of Social Security* v *SRA* (1993) 118 ALR 467. The whole case is however reproduced in Eugene de Savitsch, *Homosexuality, Transvestism and Change of Sex*

(1958, London, Heinemann), Appendix A (pp 96-107), from which the quoted extract is taken.
[51] See p 106.
[52] At p 99: "...there is an absolute contradiction between the anatomical sex and the cerebral sex, "a difference which it will perhaps be possible in the future to establish anatomically because we already know there are differences between male and female brains..."
[53] At 105.
[54] *Re Anonymous* 293 NYS 2d 834 (1968)(Civil Court of City of N.Y.).
[55] At 837, 838.
[56] *Anonymous v Weiner* (1966) 270 NYS 2d 319.
[57] *R v Harris and McGuiness* (1988) 17 NSWLR 158; *Secretary, Department of Social Security* v *SRA* (1993) 118 ALR 467.
[58] The Marriage Act 1961 came into force on 6 May 1961.
[59] *NSW Associated Blue-Metal Quarries Ltd v FCT* (1956) 94 CLR 509.
[60] *Corporate Affairs Commission of NSW v Yuill* (1991) 100 ALR 609.
[61] She relied on *Brutus v Cozens* (1973) AC 854 at 863; *Seay v Eastwood* (1976) 1 WLR 1117 at 1121 and *Rochfort v Trade Practices Commission* (1982) 134 CLR 134.
[62] Section 295(1).
[63] *O'Reilly v State Bank of Victoria Commissioners* (1983) 153 CLR 1.
[64] *Baker v Campbell* (1989) 153 CLR 52.
[65] *Corporate Affairs Commission of NSW v Yuill* (1991) 100 ALR 609, 611.
[66] See eg *NSW Associated Blue-Metal Quarries Ltd v FCT* (1956) 94 CLR 509, 514, per Kitto J: "in the end the conclusion must depend upon one's own understanding of the sense in which words are currently used".
[67] *Chappell and Co Ltd v Assoc Radio Co of Australia Ltd* [1925] VR 350, per Cussen J; quoted in Pearce and Geddes, *Statutory Interpretation in Australia*, 4th ed, 1996, [4.6].
[68] *Szelagowicz v Stocker* (1994) 35 ALD 16.
[69] *Lake Macquarie Shire Council v Aberdare County Council* (1970) 123 CLR 327 (Whether a reference to the powers of a council to supply "gas" included a reference only to coal gas – the only relevant known gas at the time of the statute – or also to the supply of liquefied petroleum gas, a later development); *Imperial Chemical Industries of Australia and New Zealand* (1972) 46 ALJR 35, per Walsh J (mining).
[70] *Wilson v Commissioner of Stamp Duties* (1988) 13 NSWLR 77.
[71] In *Lindo v Belisario* [1795] 1 Hag Con 216 at 213, Sir William Charles gave a defnition of marriage that referred to "two persons of different sexes".
[72] Gooren and Doorn, 269.
[73] Gooren and Doorn, 269.
[74] The recent decision in *Bellinger* may be seen as a partial exception to this, in that one of the arguments of the majority was that recent legislation could be taken to have incorporated the *Corbett* analysis. Bellinger is discussed in some detail later. Its essential basis was that the law had been settled by *Corbett*, and that it was now a matter for the legislature whether to change it.
[75] Black CJ, at paragraph 15; Lockhart, paragraph 33.
[76] Gooren and Doorn, above, 281.
[77] *R v Harris and McGuiness* (1988) 17 NSWLR 158; *R* v *Cogley* (1989) VR 799.

[78] *Secretary, Department of Social Security* v *SRA* (1993) 118 ALR 467; *Secretary, Department of Social Security* v *HH* (1991) 13 AAR 314; *SRDD and Department of Social Security* [1999] AATA 626.
[79] *E* v *Minister for Health and Family Services and Commonwealth of Australia* (HREOC 97/219, 8 October 1998 per Commissioner Elizabeth Evatt).
[80] *R v. Harris and McGuinness* (1988) 17 NSWLR 158 (NSW Court of Criminal Appeal).
[81] *Secretary, Department of Social Security* v *SRA* (1993) 118 ALR 467 (Full Court of Federal Court of Australia).
[82] s. 81A of the Crimes Act 1900 (NSW).
[83] Carruthers J dissented, and followed *Corbett* and *Tan*.
[84] Sir Ronald Wilson, above, at 80.
[85] *Harris*, at 193.
[86] *Harris*, at 189.
[87] *Secretary of Department of Social Security v SRA* (1993) 118 ALR 467.
[88] As has since been held: *DSS v "HH"* (1991) 23 ALD 58 (Administrative Appeals Tribunal).
[89] Black CJ cited Robin Mackenzie, "Transsexuals' Legal Sexual Status and Same Sex Marriage in New Zealand: M v M", (1992) 7 *Otago Law Review* 556 esp at 576-577; The Hon Gordon Samuels, "Transsexualism", (1983) 16 *Australian Journal of Forensic Sciences* 57, at 63.
[90] Andrew Sharpe, "The Transsexual Marriage: Law's Contradictory Desires" (1997) 7 *Australasian Gay and Lesbian Law J* 1, at 11.
[91] Henry Finlay, "Transsexual Recognition in Australia" (1997) 10 (3) *Venerology*, 188-192, at 192.
[92] *In the Marriage of C and D (falsely called C)* (1979) 5 Fam LR 636.
[93] As pointed out in *Harris*, the decision has been strongly criticised, eg by Rebecca Bailey, "Recent Cases" (1979) 53 *ALJ* 659, 660.
[94] Section 32A.
[95] Section 32B.
[96] Section 32C.
[97] Section 32D.
[98] Sections 32G, 32H.
[99] Section 32I.
[100] Sex Reassignment Act 1988, s 8(1).
[101] Births Death and Marriages Registration Amendment Act 1997 (NT).
[102]  **Transgender**  (Anti-Discrimination and Other Acts Amendment) Act 1996.
[103] Section 23WA.
[104] Department of Foreign Affairs and Trade, Canberra, *Manual of Information and Instruction: Vol 19, Manual of Australian Passport Issue* (1996) paragraphs 722-728.
[105] 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.
[106] *Bellinger*, above, paragraph 158.

[107] Apart from publications cited elsewhere, see also the typically succinct and acute comment by Alec Samuels, "Once a Man, Always a Man; Once a Woman Always a Woman - Sex Change and the Law" (1984) 24 *Med, Sci and Law* 163-166; and also, "Note, 'Transsexuals in Limbo'" (1971) 31 *Maryland Law Rev* 236, especially at 244-247 ("refusal to reclassify the sex of a post-operative transsexual seems inconsistent with the principles of a society which expresses concern for the privacy and dignity of its citizens"); H R Hahlo, "Sex Change Operations and the Law" (1970) *South African Law J* 239-245; David Green "Transsexualism and Marriage (1970) 120 *New Law Journal* 210.
[108] David Green, "Transsexualism and Marriage" (1970) 120 *New Law Journal* 210.
[109] M L Lupton "The Validity of Post-operative Transsexual Marriage" (1976) 93 *South African Law J* 385398 (criticising *W v W* 1976 (2) SA 308 (W)).
[110] Justice M. Kirby, "Medical technology and new frontiers of family law" (1987) 1 *AJFL* 267, at 200.
[111] See eg John Dewar, "Transsexualism and marriage" (1985) 15 *Kingston Law Rev* 58-76 (Professor Dewar is currently Chairman of the Family Law Council); Henry Finlay's writings on the subject; Margaret Otlowski, "The Legal Status of a Sexually Reassigned Transsexual: R v. Harris and McGuiness and Beyond", (1990) 64 ALJ 67.
[112] See eg Margaret Otlowski, "The Legal Status of a Sexually Reassigned Transsexual: R v. Harris and McGuiness and Beyond", (1990) 64 *ALJ* 67, 72-3.
[113] *Secretary of Department of Social Security v SRA* (1993) 118 ALR 467.
[114] *R v Harris and McGuiness* (1988) 17 NSWLR 158.
[115] I consider later medical evidence that is inconsistent with this analysis.
[116] *Bellinger*, above, paragraph 57.
[117] See also British Home Office, *Report of the Interdepartmental Working Group on Transsexual People*, April 2000.
[118] *S-T v J* [1997] 3 WLR 1287; *W v W (physical inter-sex)* [2001] Fam. 111.
[119] *Bellinger* (unreported, Court of Appeal, [2001] EWCA Civ 1140, 17/7/01).
[120] See also *Re P & G (Transsexuals)* [1996] 2 FLR 90 (UK). The Industrial Tribunal took a similar approach, without citing *Corbett*, in *White v British Sugar Corp Ltd* (1977) 1 IRLR 121.
[121] *R v Tan* [1983] QB 1053.
[122] *R v Tan* [1983] QB 1053, 1064.
[123] *Bellinger*, above, paragraph 118, per Thorpe LJ.
[124] *Bellinger*, above, paragraph 16. Compare the contrary argument by Thorpe LJ at paragraphs 140-143.
[125] Paragraphs 105-107.
[126] See *S-T (formerly J)* (1998) Fam 103.
[127] Paragraph 61.
[128] Paragraphs 43, 97.
[129] The majority had earlier made the point that it is impossible to identify the gender of a child at birth: para 23.
[130] The majority did not refer to the Australian case law or to the recent Kansas decision.

[131] *Re Ladrach* 32 Ohio Misc 2d 6, 513 NE 2d 828 (1987) (Ohio Probate Court); *Littleton v. Prange*, 9 S.W.3d 223 (Tex. Civ. App. 1999), *cert. denied* 148 L. Ed. 2d 119, 121 S. Ct. 174 (2000); *Frances B v Mark B* (1974) 325 NYS 2d, 499 (a female to male transsexual). Of these, I found the reasoning in *Littleton* the most impressive. *Anonymous* v *Anonymous* 325 NYS 2d 499 (1971) (New York Supreme Court) is not in point: it involved a pre-operative transsexual, whose surgery occurred only after the marriage.
[132] *In the Estate of Gardiner* (Unreported, No 85,030, 11 May 2001, Court of Appeals of the State of Kansas; Gernon, Knudson and Beier JJ); *MT* v *JT* 140 NJ Super 77, 355 A 2d 204, 205 (1976) (New Jersey).
[133] *Anonymous v Weiner* (1966) 270 NYS 2d 319; *Re Anonymous* 293 NYS 2d 834 (1968).
[134] *Richards v US Tennis Assoc* 400 NYS 2d 267 (1977).
[135] *In the Estate of Gardiner* (Unreported, No 85,030, 11 May 2001, Court of Appeals of the State of Kansas; Gernon, Knudson and Beier JJ).
[136] *Littleton v. Prange*, 9 S.W.3d 223 (Tex. Civ. App. 1999), *cert. denied* 148 L. Ed. 2d 119, 121 S. Ct. 174 (2000). This was the latest United States decision available to the Court of Appeal in *Bellinger*.
[137] Instead, it "looked with favour on the reasoning and the language of *M.T. v. J.T.*, 140 N.J. Super. 77, 355 A.2d 204, *cert. denied* 71 N.J. 345 (1976)".
[138] *W* v *W* (1976) (2) SALR 308 (South Africa).
[139] *M* v *M (A)* (1984) 42 RFL (2d) 267.
[140] *M v M* [1991] NZFLR 337 (Family Court, Otahuhu, Aubin J); *Attorney-General v Otahuhu Family Court* (1994) 1 NZLR 603 (High Court, Ellis J). The earlier decision in *Re T* (1975) 2 NZLR 449 was decided on the basis of the court's lack of jurisdiction to make a "declaration in rem", although McMullin J did refer to *Corbett*.
[141] *Report of the UK Interdepartmental Working Group on Transsexual People*, Home Office, April 2000.
[142] UK Report, paragraph 1.18.
[143] UK Report, page 62.
[144] UK Report, page 65.
[145] Quoted by Thorpe LJ in *Bellinger*, at paragraph 158.
[146] This paragraph is based on the summary contained in Annexure 4 to the UK Report.
[147] Debbie Ong, "The Test for Marriage in Singapore", (1998) 12 *International J Law Policy and the Family*, 167-8.
[148] *Van Oosterwijck v Belgium* [1981] 3 EHRR 557; *Rees v United Kingdom* [1986] 9 EHRR 56; *Cossey v United Kingdom* [1990] 13 EHRR 622; *X, Y, Z v United Kingdom* (1997) 24 EHRR 143; *Sheffield & Horsham v United Kingdom* [1998] 27 EHRR 163. The decision *B. v France* (1992) 16 EHRR 1 involved similar issues, but the Court did not rule on Article 12, and the case does not advance the argument in ways relevant to the present case.
[149] *Van Oosterwijck v Belgium* [1981] 3 EHRR 557, 586.
[150] *Rees v United Kingdom* [1986] 9 EHRR 56.
[151] *Cossey v United Kingdom* [1990] 13 EHRR 622.
[152] Martens J's note is: "See, amongst others: D.A.R. Green, New Law Journal 1970, p 210; B.v.D. van Niekerk, South African Law Journal, Vol. 87 (1970), p. 239; D.K. Smith, Cornell Law Review, Vol. 56 (1970/1971), pp. 1005 et seq.; I. McColl Kennedy, Anglo-American Law Review, Vol. 2

(1973), pp. 114 et seq.; M.L. Lupton, South African Law Journal, Vol. 93 (1976), p. 385 (with reference to a South African decision following *Corbett*); R.J. Bailey, Australian Law Journal, Vol. 53 (1979), pp. 659 et seq. (with reference to an Australian decision following *Corbett*)."

[153] *X, Y, Z v United Kingdom* (1997) 24 EHRR 143.

[154] Paragraph 45.

[155] Page 166.

[156] I have also read the affidavit by Mr Briffa, who is co-ordinator of the Intersex Society of Australia and a person who was born with atypical genitalia. However, while I intend no disrespect, I do not think his affidavit adds anything that is not otherwise covered by the expert evidence.

[157] H A Finlay and W A W Walters, *Medico-Legal Implications of Sex Reassignment Procedures*, Monash University, Melbourne, 1986; H A Finlay and W A W Walters, *Sex Change: Medical and Legal Aspects of Sex Reassignment*, 1988.

[158] *Estate of Gardiner*, above.

[159] It is essentially similar to the account in Gooren's 1993 paper, 16-17, and Gooren and Doorn, at 269ff.

[160] Others include Congenital Adrenal Hyperplasia, Cloacal Exstrophy.

[161] Gooren and Doorn, 279.

[162] The microscopic examination of the gonads was the basis of Klebs' classification of hermaphroditism. Klebs and his contemporaries assumed that the gonadal tissue would determine the person's "true sexual nature": Gooren and Doorn, 269.

[163] Gooren and Doorn, 269.

[164] Diamond, "Sexual Identity and Sexual Orientation in Children with Traumatised or Ambiguous Genitalia" (1997) 34 (2) *Journal of Sex Research* 199, 208.

[165] See eg the discussion in Diamond, above, 209-210.

[166] See also the case mentioned by Dr Walker at numbered paragraph 5: an individual, aged 50, who was brought up as a girl, had a uterus and apparently a normal vagina, who married and reportedly enjoyed a "normal" sex life, and never doubted that she was a woman. She had a streak gonad on one side and a dysgenic gonad on the other, and had the normal male XY chromosomes.

[167] See the evidence of Dr Jan Walker, at numbered paragraph 3.

[168] Page 4. Similarly, Professor Diamond writes in his affidavit that chromosomal sex is in the majority of cases a "reliable indicator" of the person's gender, but that often this does not hold true: paragraph 8.

[169] This account is based on the affidavit by Professor Diamond, which includes extensive citations and attaches a number of papers. David Reimer is not the only such case, though it is the best known. See eg the case reported by Khupisco of a mutilated boy in South Africa, discussed by Professor Diamond, "Sexual Identity and Sexual Orientation in Children with Traumatised or Ambiguous Genitalia" (1997) 34 (2) *Journal of Sex Research* 199, 204.

[170] Dr Walker's affidavit, page 5.

[171] Quoted in Diamond, "Sex Reassignment at Birth", *Arch Pediatr Adolesc Med* Vol 151, March 1997, 299.

[172] There are many other cases that illustrate the point. See eg Diamond, "Sexual Identity and Sexual Orientation in Children with Traumatised or

Ambiguous Genitalia" (1997) 34 (2) *Journal of Sex Research* 199, 200ff.
[173] The majority concluded only that there was "a possibility" that transsexualism was "a medical condition with a biological basis by reason of sexual differentiation of the brain after birth". With respect, I think the evidence would have justified a stronger finding. The evidence before me certainly does so.
[174] Quoted by Thorpe LJ in *Bellinger*, at paragraph 116 (iii).
[175] Zhou and others, "A Sex Difference in the human brain and its relation to transsexuality" (1995) vol 378 *Nature* 68-70.
[176] The bed nucleus of the stria terminalis.
[177] The authors found no relation between BSTc size and sexual *orientation*.
[178] Kruijver, Zhou, Pool, Hofman, Gooren, and Swaab, "Male-to-Female Transsexuals Have Female Neuron Numbers in a Limbic Nucleus", 85 *The Journal of Clinical Endocrinology & Metabolism* 2034 (2000).
[179] Abstract, p 2034.
[180] 273-4.
[181] Professor Gooren.
[182] See for example, the cases discussed in Diamond, "Sexual Identity and Sexual Orientation in Children with Traumatised or Ambiguous Genitalia" (1997) 34 (2) *Journal of Sex Research* 199, such as "Samantha" at 200-202. The case of "Bill" related by Professor Diamond at 202-203, might to a limited extent be seen as a counter-example. I suppose it is possible, too, that the literature might reflect the experiences of those who identify themselves and seek help from the medical profession, and that there may be others who do not come to notice and whose experiences might differ.
[183] Thus the majority in *Bellinger* relied more on the fact that the brain sex could not be readily perceived than doubts about whether it existed: this practical difficulty, they thought, made it inappropriate as a legal criterion: paragraph 55.
[184] Paragraph 159.
[185] Paragraph 160.
[186] Paragraph 99.
[187] Applicants' written submissions, paragraph 41.
[188] This is reflected in the Family Law Act 1975, s 43(a).
[189] Written submissions, paragraph 53.
[190] Anthony Dickey, "Sexual identity of transsexuals" (1989) 63 *ALJ* 485 at 486.
[191] For example, *State Government Insurance Commission (SA) v Trigwell* (1979) 142 CLR 617, 633-4 (Mason J).
[192] Paragraphs 99, 100.
[193] Paragraphs 102-4.
[194] Of which *W v W (physical inter-sex)* [2001] Fam. 111 is a good example.
[195] Paragraphs 152-3.
[196] *Corbett; MT and JT*, at 209, 211; *W v W*, at 314; *Re Anonymous* 293 NYS 2d 834 (1968), at 838.
[197] They represent, I think, considerable reliance on what I have called the "essentialist" view.
[198] I express no final view on this, because the matter has not been argued. This possibility could be readily tested, if it were a matter of concern, by an application for a declaration of validity of the marriage.

[199] If the court took the view that the marriage was not valid, it would refuse the application for divorce, but could make a declaration that the marriage was not valid.
[200] A point made by the applicants: submissions, paragraphs 6, 24.
[201] To similar effect see Sir Ronald Wilson, above, referring to the need for the law to "come to grips with current reality", and Street CJ's comment that Mr Bumble "would give chromosomes short shrift": *Harris*, 161.
[202] Applicants' submissions, paragraph 26.
[203] *SRA*, above, at paragraph 95. See Black CJ to the same effect in paragraph 21, quoted earlier.
[204] In his early article, Douglas Smith showed convincingly that the no single factor was a reliable indicator, nor any formula such as one requiring that all or a percentage of characteristics are in conformity: Douglas K Smith, "Transsexualism, Sex Reassignment Surgery and the Law" (1971) 56 *Cornell LR* 963, at 966ff.
