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THE LEGAL IMPLICATIONS OF SEX REASSIGNMENT

BY H H FINLAY AND W A WALTERS

FOREWORD

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The Hon. Justice M.D. Kirby, CMG*

MALE AND FEMALE CREATED HE THEM

In September 1986 I delivered a paper on sex reassignment and the law to the 8th Commonwealth Law Conference in Jamaica.¹ For an exotic topic, it is only outstripped by an earlier venture into the legal implications of marketing breast milk substitutes.² Despite the beckoning Carribean, about 700 lawyers from all parts of the common law world, paid close attention to my review of the moral, legal and personal problem presented by interssexuality. At a critical moment, half way through my presentation, three lawyers from an Islamic country of the Commonwealth could stand it no further. They left the session muttering (as it was later reported to me) that the topic was "unacceptable". Doubtless they repaired to a competing session on the Rule against Perpetuities. For them, God assigns sexual identity at birth. Operative interventions to alter or modify this Divine plan are an interference in the order of Nature to which the law should lend no support.

This book shows how ill informed and out of date such attitudes now are. It is neatly divided into two parts. The first looks at human sexual differentiation from a medical perspective. The second looks at the legal position of transsexuals. It analyses their problems in the law following surgery - the so called "sex change" procedure. Then the book

proposes a regime for the legal control of sex reassignment in Australia.

This book is one of two published in Australia in 1986 on the general topic of transsexualism. The other, published by Oxford University Press, shares with this one the guiding hand of Professor Walters.³ But whereas the earlier book is largely addressed to the medical and health care professions, containing but one short chapter on the legal aspects of sex reassignment, the focus of this book is different. Here, the medical and anatomical introduction is a preparation for Professor Finlay's analysis of the present legal burdens which transsexuals must add to the emotional, physical and social disadvantages of their condition.

This book is timely, because of the reported proposals for Australian legislation on transsexualism and sex reassignment.⁴ For many years now the Standing Committee of Federal and State Attorneys-General in Australia has been considering a draft bill for model uniform legislation on the topic. According to reports, at least 200 people in Australia have already undergone operative procedures to secure male to female sex reassignment. Anyone having doubt about the success of the operative procedure involved, should examine the photographs of the operative procedure collected in the earlier book on the subject.⁵ By a series of dramatic and radical interventions, external genitalia can be constructed which are cosmetically pleasing and anatomically efficient. A person who has felt unintegrated, not "all of a piece" and not "ordinary"⁶ can, in a majority of cases, secure a degree of internal peace. A person who suffers the stigma of social alienation because of

considerations (whether they be grounded in anatomical, genetic, psychological, sociological or other factors) can suddenly feel release from the causes of stigma and reconciled to society.

Both books call attention to the important differences between transsexuals, homosexuals and transvestites. Transsexuals, above all, seek the internal harmony that comes to them from identifying themselves as proper and accepted members of the opposite sex. The wearing of the clothes of that sex has no separate importance for them, save as it may be symbolically relevant once the sex reassignment is achieved. They are not content to fulfil their sexual fantasies in homosexual activity. Despite recent legal changes in many jurisdictions, such activity remains socially stigmatised and religiously forbidden. In many places it is also legally outlawed. Recent Queensland legislation referring to "deviates" and "perverts"⁷ shows that, in some quarters, these attitudes to homosexuality and homosexual conduct are not a thing of the past. Transsexuals want none of this. They seek integration in society and the peace that comes from social acceptance. They seek to earn this acceptance, bearing the talisman of radical surgical intervention designed to bring their external sexual organs into harmony with their minds.

Of course, for some observers this is nonsense. Some - doubtless like the walkouts in Jamaica - consider that transsexuals, like homosexuals, bisexuals and transvestites should just "pull their socks up" and settle down to a life of normalcy. Others, whilst acknowledging that this may be difficult, urge them to accept their fate. In a number of

religions there is the thesis that suffering is enobling of the human spirit and part of a great Divine plan, however puzzling it may seem to mankind. Still others, whilst not accepting these perspectives question the utility of sex reassignment operations. They refer to the relatively high levels of dissatisfaction with the results.⁸ They question whether transsexuals are not themselves the unwitting subjects of stereotyping forces in society, sharply dividing the world between "real men" and "real women". They question whether psychological counselling and sex therapy might not be more appropriate in many cases than surgery, to reconcile the subject to the body with which he or she feels "out of sorts". Certainly, however skilful the surgeon's knife, and however normal in appearance the resulting genitalia, no surgeon can change the chromosomal pattern established before birth. No surgeon can yet create a natural erection in a female to male transsexuals or child bearing potential in a male to female transsexuals. At best, the operative procedure can allow fairly normal sexual relations. But it cannot permit the "unitive" feature of procreation, which is, at the very least, one of the purposes of sexual activity, and in the opinion of some, still its most important purpose.

ENTER THE LAW

It is against this background of genetic propensities, anatomical difficulties, psychological desires and social forces that the law intervenes to play its part.

This is a relatively new problem for the law because, as in so many bioethical questions appearing nowadays, the surgical procedure which presents the problem in acute form,

was just not possible until recent times. With the advances of surgical techniques (and likely future advances by transplant surgery and artificial conception) the possibility of fulfilling heartfelt desires to change sexual assignment has to a greater extent become realisable. So keenly felt are such desires, so persistent are they and vital to the well being of the patient, that it is not surprising that experiments with sex change surgery should have been ventured.

Many of the early sex change operations were performed in Casablanca: a mysterious and somewhat offbeat venue for a world centre of surgical excellence. It was to Casablanca that April Ashley went to undergo her operation for sex reassignment. It was her case that was to become, in effect, the starting point in the law's consideration of transsexualism. As disclosed in Professor Finlay's analysis, Ormrod, J had to consider the implications of Miss Ashley's operation because Mr. Corbett, with whom she went through a ceremony of marriage, sought to challenge the validity of that "marriage". Since marriage postulates a relationship between a man and a woman, if Miss Ashley was not a woman, the "marriage" was a nullity.⁹

This was one of those comparatively rare moments in the law when a judge was in a key position to guide the future development of the common law. There was no statute governing the case. There was no clearly applicable judicial precedent. The judge was uniquely well qualified, being qualified both in medicine and law. He could have developed a jurisprudence grounded in notions of mistake (to protect persons who entered such relationships by a trick or by deception). He could have assigned primacy to the social and sexual objectives of

marriage. Instead, he preferred, on the basis of evidence, to adopt three criteria to determine April Ashley's sex assignment: chromosomal, gonadal and genital. He allowed that in the event of lack of congruence "greater weight would probably be given to the genital criteria than to the other two".¹⁰

Thus, instead of looking at marriage in a modern context as a social contract, now so easily terminated, between two adults permitting them to live together, have sexual relations and no less a marriage than many others because no children could result, Ormrod, J preferred scientific criteria. In the face of the chromosomal test, all the external social indicia of a human relationship fell away, melted by the discovery of a genetic pattern, marked before birth, but demonstrable only by peering down a microscope.

The Corbett test has profoundly affected the development of the common law in many jurisdictions, including Australia.¹¹ However, it was specifically rejected when it first came before the courts in the United States of America.¹² It has also been criticised, though extra-curially, by one of the Justices of the High Court of Australia.¹³

In Europe, and in other jurisdictions, appeals can be made for relief either to a constitutional bill of rights¹⁴ or to an international human rights covenant, such as the European Convention on Human Rights.¹⁵ As Professor Finlay points out, there is no equivalent human rights rubric in Australia. Although recent constitutional developments make the adoption of human rights legislation in Australia a possibility, recent political events suggest that we will not see such a development in Australia for some time to come.

This conclusion and criticism of Corbett make even more important the development of legislation which will adopt a more realistic and sensitive approach to the predicament of the transsexual, than was afforded by Ormrod, J in Corbett. The special value of this book is that it collects the issues to be addressed: choice of the operation subject; counselling the subject to ensure an informed consent before such drastic surgery is undertaken; provision for the age of the operative subject; change of the birth register; provision for reversal of the procedure; implication for conscription and military service, for insurance where differential premiums obtain; for industrial awards, pension benefits and the whole gamut of legislative and common law rules which apply differentially to men and women.

All of these considerations are mentioned. Any general review of the law as it affects transsexuals will need a painstaking examination of them - and many more.

Yet this book is by no means the last word on the legal implications of sex reassignment. It sketches the landscape. And it is written by authors who have a keen appreciation of the need for the law to keep pace with the changes presented by science and technology, of which sexual reassignment operations are but one instance. It is also written with compassion and a gentle understanding of the dilemmas faced by and the pain caused to a person growing up with a serious disharmony between the personality and its desires and the body and its appearance. If we can reduce that disharmony, freeing a human being from a feeling of life imprisonment in a body which is perceived as a trick of nature, should not a humane and

compassionate legal system facilitate and support the change -
whilst taking all steps necessary to protect others who may be
affected by the change?

The way our society deals with minorities - even
unpopular, stigmatised minorities - provides the hallmark of
its civilisation. This is a book which appeals for our
understanding as citizens and as lawyers. We owe a debt of
gratitude to the authors for writing the book. It can only help
remove a veil of ignorance and prejudice. It is to be hoped
that it will contribute to the process of law reform.

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FOOTNOTES

- * President of the Court of Appeal, Supreme Court of New South Wales; Formerly Judge of the Federal Court of Australia and Chairman of the Australian Law Reform Commission.
1. See M.D. Kirby, "Medical Technology and New Frontiers of Family Law" in [1986] 1 Aust J of Family Law forthcoming.
 2. See (1981) 6 UNSWLJ 67.
 3. W.A.W. Walters and M.W. Ross (eds), Transsexualism and Sex Reassignment, OUP, Melbourne, 1986.
 4. See eg Daily Telegraph 20 September, 1986, 16.
 5. See Walters and Ross, plates facing p 102.
 6. See E. Wells, "The View From Within: What it Feels Like to be a Transsexual" in Walters and Ross, 9.
 7. Liquor Act and other Acts Amendment Act 1985 (Qld), s 23.
 8. Walters and Ross, 109 ff.
 9. Corbett v Corbett [1971] P 83.
 10. In re C & D (1979) FLC 90-636; discussed 53 ALJ 659.
 11. M.T. v J.T. 353 A (2nd) 204 (1976). Discussed Walters and Ross 141 ff.
 12. R. Wilson, "Life and Law: the Impact of Human Rights on Experimenting with Life" (1985) 17 Aust J Forensic Sciences 61, 79.
 13. European Court of Human Rights, Van Oosterwijck, 6 November, 1980, series A number 40. Discussed A Cremona-Barbaro, "Medico Legal Aspects of Transsexualism in Western Europe: A Comparative Review" (1986) 5 Med Law 89.