Re Alex "Through a Looking Glass"

By Rachael Wallbank

Introduction

I am grateful for Danny Sandor's generous invitation to write an article for your journal in response to his own entitled "Sex and Drugs and Media Roll – The Family Court's Decision in *Re Alex*": especially as Danny is aware that I have some significant criticisms of that decision. My title seeks to adopt the same perspective as that of Danny's, though in truth, while the response of media and others, and the court itself for that matter, to Alex's predicament is of significance, the primary issue of importance is the human rights of children, young people and adults with transsexualism I am a woman of transsexual background, a parent and an Accredited Specialist in Family Law. I conducted the ***Re Kevin***[2] case against the Attorney General for the Commonwealth of Australia which arguably resulted in the most authoritative decisions to date on transsexualism in both Australian and international jurisprudence. I told my father of my own female being (and hence my transsexualism) when I was about 5 years of age, but through fear and ignorance I was only to commence to undertake the medical procedures Alex has sought with such determination (sex affirmation treatment – including hormonal treatment and surgery) when I was 38 years of age in early 1994. I transitioned public sexes on 4th July 1994. That delay caused significant suffering to me as well as others.

While my 'looking glass' or perspective is different again from that of Danny's and from those whose opinions he reviews in his article, like Danny I believe that much of the recent debate about transsexualism and sex affirmation treatment in Australia is informed by either self-interest, fundamentalist religious reaction and plain ignorance; founded upon a cultural fear of difference concerning sexual formation and sexuality. As Justice Chisholm found (and as the Full Court of the Family Court of Australia confirmed) in ***Re Kevin,*** after considering the Australian and international expert evidence on the subject present in that case and a number of others, transsexualism is nothing more or less than a natural variation in human sexual formation, a form of intersex, which has a well established treatment regime for those who experience the condition. This treatment regime includes hormonal and other treatment to delay puberty, the administration of hormones to readjust the body's hormonal balance and modify secondary sexual characteristics as well as surgery to modify the sexually differentiated features of the body; including the internal and external genitalia. The treatment is rehabilitative in nature and purpose rather than imitative. The treatment should also include where appropriate, and especially in the young, the preservation of the ability to procreate.

Given the ignorance of the medical profession as a whole in respect of transsexualism and the deep cultural prejudice which exists in respect of people with transsexualism, the omission of this aspect of treatment is no surprise. As a member of NSW Health's Expert Committee dealing with transsexualism, I expect one of our key proposals to government will be an education program for medical practitioners. Except at the highest level of worldwide expertise, transsexualism is still primarily the medical preserve of psychiatrists and psychologists who cling to various discredited and misconceived mental illness explanations for transsexualism. Regrettably, that misconceived perception of transsexualism dominates ***Re Alex*** from the very title of the case to the public policy pronouncements concerning the re-assignment of legal sex as determined by birth certificate legislation with which it ends.

I realise how critical that must sound to those involved in the case. Yet a clear perception of ***Re Alex*** from the human rights perspective of a person who has experienced transsexualism as well as from a jurisprudential perspective, and free from the constraint and limitation of the evidence available to the Family Court of Australia in the case, demands such comment. Balance demands that I simultaneously acknowledge that for Alex, Chief Justice Nicholson's decision represents the best chance yet Alex has had to live a healthy and peaceful life. I commend Alex for his extraordinary courage and determination in pursuing his truth and his human

rights and I commend those who assisted him to obtain them.

Re Kevin

Re Kevin was both a turning point, and a culmination, in the history of the development of the human rights of people with transsexualism, their families and loved ones; both domestically and internationally. I said publicly at the time that the decision demonstrated the significant capacity of the Australian justice system to manage difference. In ***Re Kevin,*** the Applicant husband and wife successfully contended that, notwithstanding the husband's transsexual background, the husband was entitled to be married as a man because he was a man within the meaning of that expression in section 46(1) of the ***Marriage Act*** and section 43 of the ***Family Law Act*** at the time of his marriage. Justice Chisholm's original decision, granting a Declaration of Validity of Marriage was delivered on 12thOctober 2001. The appeal before the Full Court of the Family Court of Australia was heard on 18th and 19th February 2002. The Full Court consisted of their Honours Chief Justice Nicholson and Justices Ellis and Brown. The Full Court of the Family Court of Australia delivered its decision on 21st February 2003. In its judgment, the Full Court dismissed the appeal by the Attorney General for the Commonwealth of Australian, thoroughly reviewed the applicable evidence and legal issues and strongly affirmed the original decision.

Re Kevin declared the law of Australia to the effect that the question of whether a person is a man or a woman for the purpose of the marriage law of Australia is to be determined as at the date of the marriage, that there is no rule or presumption of Australian law that the question of whether a person is a man or a woman is to be determined by reference (only) to circumstances at the time of the person's birth and that the answer to the question of whether an individual was a man or a woman for the purposes of the marriage law of Australia involved a subtle determination taking into account of all the relevant sex differentiating facts and circumstances of the individual; both personal and social. Anything to the contrary in the English decision of **Corbett –v- Corbett (orse Ashley) [1971] P83** ("***Corbett***") was declared not represent Australian law. It was the Attorney General for the Commonwealth's contention in the case that the question of whether a person is a man or a woman for the purposes of the marriage law of Australia should be determined pursuant to the reasoning and the test of the congruence of an individual's gonads, genitalia and chromosomal features (alone) as assessed at birth (only) as espoused by the judgment of His Honour Mr Justice Ormrod in ***Corbett***. The ***Corbett*** decision also established the unfortunate legal precedent for treating people with transsexualism differently from those who experienced other types of intersexual conditions; even where the same or similar life/human rights issues, such as the need for a declaration of the legal sex of an individual or the right of an individual to marry, was involved.[3]

As was noted by the Full Court in ***Re Kevin***, not only did the expert evidence in that case, and all the recent cases dealing with the issue world-wide, contradict the mental illness/psychological explanation for transsexualism, support the biological explanation and thus contradict the ***Corbett***-style distinction between so-called 'physical intersex' and 'brain-body intersex', but the 2001 English decision of ***W v W*** demonstrated the logical and ludicrous result of the continued legal application of the distinction where aged shady memories of minor irregularities of infant genital formation, such as a temporarily undescended testis, could determine whether an individual was or wasn't able to be diagnosed as experiencing intersex or transsexualism and, hence, whether an individual could, or could not, marry in her or his conclusively affirmed sex.

Terminology

There are basically three explanations advanced by medical science and psychiatry for the cause of transsexualism:[4]

1. **The Biological Theory** – whereby observations on the sexual dimorphic character of the brain in animal studies (and lately some human studies) proposes that the human brain differentiates as to either the male or female sex in the same way as the other sexually differentiated aspects of the human body such as the genitalia;

2. **The Non-Conflictual Psychological Theory** - where transsexualism is seen as a pathology (a mental illness, confusion or disturbance of a normal psychological development of sexual or gender identity) where gender identity is precociously fixed and untreatable except by assisting the sufferer to live with the pathology from which he/she suffers; and

3**. The Conflictual Psychological Theory** - where transsexualism is seen as a pathology (a mental

illness, confusion or disturbance of a normal psychological development of sexual or gender identity) where gender identity is not fixed and continues to remain ambiguous throughout development and is thus treatable by psychotherapy;

Transsexualism as a particular category of pathology or mental illness ("gender dysphoria syndrome") was included in the United States of American Psychiatrist's Diagnostic and Statistical Manual of Mental Disorders, edn III (DSM-III) in 1980, but was then removed from the DSM-IV in 1994 when it was assimilated into the more general category of sexual and gender identity disorders. This significant change in the way psychiatry perceived transsexualism coincided with the removal from the DSM (after significant political and medical lobbying) of homosexuality as a pathology or mental illness or disorder.[5] The DSM-IV changed the professional psychoanalytic view that there was a difference between transsexualism and gender dysphoria/gender identity disorder and provided new differential criterion now applying to children and to adults experiencing transsexualism.

As a consequence of this alteration to the DSM, people who experience or exhibit all types of non-normal behaviour in respect of sexual and/or gender expression are now regrouped together in DSM-IV.[6] In particular, this change to the DSM IV enable psychiatry to continue to 'legitimately' treat (try to change to heterosexual) homosexual children whose parents find their behaviour unacceptable; even though adult homosexuality is no longer able to be legitimately treated as a mental illness.

No wonder then that psychiatrists are able to say (as they do in ***Re Alex***) that they do not know how a 'gender dysphoric' child or a child with 'gender identity disorder' will develop and that there is no guarantee that a child with 'gender identity disorder' will turn out to experience transsexualism in adulthood; given that the criteria for the diagnosis of 'gender dysphoria' and 'gender identity disorder' contained in the DSM IV includes children with severe mental disorders, those who merely transgress accepted norms of gender expression such as those who exhibit transgender/cross-dressing behaviour, those children who are homosexual as well as those who experience transsexualism.[7]

As a person with transsexualism, I deplore the inclusion of transsexualism in the DSM IV or its categorisation as a pathology or mental illness. There is a developing campaign supported by diverse human rights groups, people with transsexualism and members of the medical profession to remove transsexualism from the DSM as was achieved with homosexuality. Certainly, people with transsexualism will tell you they have never had gender dysphoria or any confusion or unhappiness with or between their sexual or gender identities. On the contrary the experience of transsexualism is the experience of certainty and congruity as to both one's sexual and gender identities *in spite of* all else; including the efforts of well-meaning misconceived psychological treatment.

It is fundamentally at odds with the way a person with transsexualism sees self and the world, and biology, to assert that genitalia or chromosomes determine a person's sex and that therefore Alex's desire is to be of the 'opposite sex'. Alex is asserting or affirming his male sex, as he knows it to be. If Alex is sane and otherwise suffers from no mental ill health or delusional condition, then his affirmation of his male sex is the best evidence of his unalterable life-long brain-sex that medical science or anyone else is going to be able to find with present technology. This evidence of brain-sex would be enough to medically justify hormonal treatment and genital sex re-assignment surgery if Alex had had some small abnormality to his genitalia or chromosomes and was thus diagnosable as 'physically intersex'.

Phenomena such as transsexualism, which demonstrate human difference and/or diversity and/or disability, generate strong fear/shame/blame responses in people and tend to be first dealt with by the dominant culture with mystification, ridicule and blame. Hence, the once popular media portrayal of drag queens as representative of people with transsexualism and the current confusion between transvestism/transgender expression and transsexualism. Further, while the biological 'brain-sex' explanation for transsexualism has been accepted amongst experts in the field of transsexualism as providing the only cogent explanation for the phenomenon, some members of the mental health community still cling to the outdated and discredited mental illness explanation for transsexualism; usually evidenced by the use of terminology such as 'gender dysphoria' and 'gender identity disorder. The same folk also generally prefer to use the generalised terms 'transgender' and 'gender', rather than 'transsexualism' and 'sex', respectively.

You will notice the difference in language concerning transsexualism between that used in this article and that used in Danny's article and the ***Re Alex*** judgement; including by the medical practitioners who

gave evidence in that case.

In ***Re Kevin*** there was an apparent appreciation by the Family Court of Australia that biological sex is multi-dimensional and is ultimately determined by the sexual differentiation of the human brain; rather than by body parts such as external genitalia and that a person's legal sex (as per their birth certificate) can be different from their predominant biological or innate sex (as per their 'brain sex') as well as their common law sex as determined by a court. Our society has now begun to understand transsexualism and some other traditionally known intersex conditions, to appreciate the life experience of the people who live with these conditions and that such conditions are nothing more or less than natural variations in human sexual formation.

The logical next step is to distinguish an individual's gender expression (or gender identity) from the individual's sex (or sexual identity) and to appreciate that both are different again from an individual's sexuality as indicated by the terms "homosexual", "bisexual" and "heterosexual". These distinctions, present in ***Re Kevin***, are absent in ***Re Alex***.

Also absent from ***Re Alex*** (and absent from the submissions of the Human Rights and Equal Opportunities Commission) is a recognition of the essential need of an individual who experiences transsexualism to affirm his or her innate sex by undergoing conclusive sex affirmation procedures (including surgery). It is often difficult for people without transsexualism to appreciate, but a person with transsexualism requires such genital surgery as an essential medical treatment in order to attain a sexually harmonised mind/body state. Such surgery is not optional for a person with transsexualism. Transsexualism, unlike the conditions 'gender dysphoria' and 'gender identity disorder', does not have degrees of experience. Surgical and other essential medical treatment for transsexualism, as for other corrective surgery for other forms of intersex, should be funded by the state.

Once surgery for transsexualism is put in its proper perspective, then it is easier to appreciate that having legal sex reassignment to secure the issue of an appropriate Birth Certificate and to secure the right of accurate non-discriminatory identity and full uncompromised legal rights in the individual's affirmed sex should sensibly (from medical, legal and social justice perspectives) be dependent upon conclusive sex affirmation surgery having taken place. Such laws need to provide compassionate exception provisions for people with transsexualism who are unable due to medical or legal reasons to undertake such surgery. Such a provision would cater for the current circumstances in which Alex finds himself. Further, given equal rights alone are acceptable from a human rights perspective, such surgery-dependent laws for the reassignment of legal sex are consistent with the demands of people with transsexual backgrounds to compete in competitive sport and participate in all aspects of their lives in their affirmed sex without the kind of discriminatory exceptions as imposed by current Australian State legislation as well as the misconceived United Kingdom 'Gender Recognition Bill'.

In the circumstances, it is helpful at this point to include a number of definitions, explanations and a discussion of the terminology used throughout this article and in ***Re Alex*** in order to clarify meaning[8]:

• The human brain differentiates as to sex ("***brain sex***", "*mental sex*" or "*innate sex*") in the same fundamental way as the other sexually differentiated features of the human body; such as the gonads and external genitalia[9]. The brain sex of an individual develops as a biological process independently of the individual's other sexually differentiated features. Before the process of brain sex differentiation was appreciated, such innate knowledge of one's sex was commonly referred to as "psychological sex". In so doing, and in some circumstances, this ignorance enables or permits mere physical characteristics of bodily formation, such as the genitalia, to be given greater weight in determining an individual's legal sex or common law sex than the individual's brain sex;

• In the absence of mental ill health, an individual's brain sex is the sex which the individual perceives the individual to be (self perception, or knowing, of one's innate sex);

• ***Transsexualism*** is the predicament experienced by an individual when the sex generally indicated by the sexually differentiated features of the individual's body or phenotype (and hence the individual's external genitalia and the legal sex consequently first assigned to that individual) are incongruous or at odds with the individual's innate or brain sex.[10]

• Medical science now recognises that transsexualism is a form of intersex;[11] The Macquarie Dictionary defines **intersex** as "an individual displaying characteristics of both the

male and female sexes of the species.[12] Transsexualism is readily diagnosed by medical practitioners familiar with the predicament and is a biological predicament of human sexual formation (and not a psychological one).[13]

• Thus, it is both factually and scientifically accurate to assert that transsexualism is a form of intersex and that it is now recognised in medical science as such. Transsexualism describes a condition in which an individual experiences the exquisitely difficult predicament of having a brain which has sexually differentiated to one sex while having the balance of his or her body sexually differentiated to the other sex. It is now accepted 'best medical practice' that where an intersex condition is detected at or near birth then the assignment of that individual's legal sex should be postponed until, or such assignment takes place on a provisional basis only to be later affirmed or reversed on the basis of, the disclosure or affirmation by the individual of the individual's innate or brain sex;[14]

• The only successful remedy for the predicament of transsexualism is to medically and surgically harmonise the sexually differentiated features of the individual's body with the individual's innate or brain sex so that the individual can experience sexual unity and peace. The Macquarie Dictionary defines '**transsexual'** as "one who has undergone a sex change operation"; indicating that aspect of transsexualism that distinguishes it from transgender/transvestism/cross-dressing and other such psychological phenomena.[15] In the past, most people with transsexualism did not seek surgery until compelled to later in life or self-destructed without it due to the impact of cultural shame ostracism as well as the general the difficulty and expense of obtaining sex affirmation treatment. This rehabilitative treatment, ***conclusive sex affirmation treatment*** (also somewhat inaccurately called sex re-assignment surgery or SRS), properly undertaken, involves a program of hormone treatment, the optional preservation of reproductive capacity, psychological support and irreversible surgery to one or more of an individual's sexually differentiated bodily features; including the internal and/or external genitalia. Aspects of hormone treatment alone secure irreversible changes to the body.

• The nature and extent of such treatment differs between affirmed females and males with transsexualism. Such conclusive or irreversible treatment is rehabilitative and, therefore, does not require results that are either cosmetically or functionally perfect or complete in order to be considered successful;[16]

• Australian society generally perceives and requires its members to be either male or female. Different cultures associate certain distinctive characteristics of dress and behaviour with each of the two sexes from time to time. **Gender** is a cultural construct of sex. An individual's gender or gender expression is the cultural perception of the individual's expression of sex; be that male, female or otherwise. A person's **Gender Expression,** Gender **Identity** or presentation can signal to others not merely the sex to which that individual belongs, but complex permutations of femininity and masculinity and other reaching across and beyond the culturally conceived gender continuum.[17]

• **Transgender** can be used as a word encompassing anyone with "issues" associated with gender expression; be they gay or straight cross-dresser, drag queen, gender liberationist or people with transsexualism. In this guise the word, though politically correct and safely imprecise, is almost useless. The word "transgender" was, in fact, coined by cross-dresser Virginia Prince in the United States of America to distinguish a transgender person, who had no compelling need or desire to permanently and significantly change or alter their body but who wished to live out a gender expression contrary to their sex, from a person who experienced transsexualism.[18] Transgender is most clearly seen as a behavioural or psychological phenomenon where an individual's gender expression (gender identity**)** is at odds with their brain sex (sexual identity).[19] For transgender people no fundamental incongruity or conflict exists between the sexually differentiated features of the individual's body and the individual's brain sex and legal sex. Hence, even while expressing a contrary gender the transgender individual does not need, require or desire conclusive sex affirmation treatment in order to bring his or her body into sexual harmony with his or her mind. Transgender individuals express gender contrary to their assigned sex without a desire to physically affirm a sex contrary to their assigned sex.[20] Many people do the same thing on an occasional basis. Most people with transsexualism are conservative in their gender

expression, but some people with transsexualism also express gender in a transgendered way.

• It is sometimes forgotten by those who would confuse ***transsexualism*** and ***transgender*** (and consequently advocate that there should be no precondition of bodily reformation by conclusive sex affirmation treatment associated with the reassignment of legal sex or the recognition of common law sex) that people who experience transsexualism will undergo, and historically have undergone, conclusive sex affirmation treatment irrespective of the law or legal consequence. People who experience transsexualism undergo such treatment, with all its difficulty, for its own sake in order to sustain their lives. As a matter of human rights this essential medical treatment should be, but is not, funded by the state in Australia through Medicare. People die or their lives are abused and degraded by the need to find the price of such treatment (currently approximately AUS$40,000.00 to $50,000.00) as a result.

• In Australia, an individual's **legal sex** is the sex to which the individual is assigned pursuant to the record of the particulars of the individual's sex contained in a register or public record of births, deaths and marriages maintained in each State and Territory and published as, or evidenced by, the individual's "Birth Certificate". An individual's **legal sex** is most often first assigned at or near the birth event on the basis (only) of a casual inspection of the individual's external genitalia. For the great majority of Australians the presumption that an individual's brain sex is in accord with the sex indicated by his or her external genital formation is an accurate one. For Australians who experience transsexualism, and some other intersex conditions, that is not the case. In fact, for people who experience transsexualism, and some other intersex conditions, our system for the first assignment of legal sex guarantees that they will be assigned to the wrong legal sex;

• Once a person with transsexualism has undergone conclusive sex affirmation treatment, they have completed their treatment (and all their 'transing'). That is why such people increasingly refer to themselves as a man or a woman **of transsexual background;** a man or woman who has undergone treatment for the intersex condition of transsexualism who can now seek to live a full and fulfilling life.

Perhaps some of the confusion associated with this terminology has resulted from the genuine efforts of some individuals, groups and institutions seeking to simultaneously represent and/or support people of difference, inclusive of both people who do, and have, experienced transsexualism as well as those who experience transgender, for funding, political and other reasons. And perhaps it is the inability of an oppressed, shamed, silenced, disbursed and isolated minority transsexual community, which has permitted, and continues to permit, the meaning of transsexual and transsexualism to be lost in the totalised and monistic identity of transgender. After all, it has been the imperative for most people of transsexual background, having already lost their families in their choice of life over conformity, to 'pass' or disappear into the larger community so as not to further suffer the prejudice and punishment that the ownership of their reality and their histories has almost inevitably delivered.

Regrettably, and perhaps for the reasons referred to above, people with transsexualism and other intersex conditions have been lumped in with Gay, Lesbian and Transgendered people by government under the GLBTI grouping. My experience is that the only aspect of life the diverse members of that grouping (other than the people with transsexualism and intersex) are bound to have in common is the experience of difference.

As Gay and Lesbian people dominate such committees and public debate, and often presume to understand transsexualism but really possess no better intrinsic understanding of transsexualism that anyone else who hasn't experienced it and, in fact, seem to better appreciate transgender behaviours, such GLBTI groupings often result in the human rights of people with transsexualism either being ignored or abused. The Victorian Government's GLBTI community consultation and its result in respect of the introduction of legislation for the re-assignment of legal sex and birth certificate reform in that State, referred to at some length both in the judgement in ***Re Alex***, provide a good example of how badly such a process can go wrong; not in requiring surgery as a precondition for the re-assignment of legal sex. That precondition makes sense. Rather, it has gone wrong in discriminating against people with transsexualism by distinguishing between them and other intersex conditions in the ***Corbett*** tradition and in including the inhuman, unjust (and in my view illegal) requirement of enforced termination of marriage as a pre-condition of the re-assignment of legal sex. This homophobic

and irrelevant requirement does not exist for people with other intersex conditions.

Re Kevin – Significant Findings in respect of Human Rights

Amongst a number of significant findings in both the judgments of Justice Chisholm and of the Full Court in ***Re Kevin*** was the Courts' acceptance that, for a person who experiences the condition of transsexualism, sex affirmation treatment is personally rehabilitative rather than imitative in purpose. Of further significance for the human rights of people with transsexualism and their families is Justice Chisholm's finding, now strongly affirmed by the Full Court, that "...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".

In terms of future human rights law reform, and in the context of the decision in ***Re Alex***, the following passages in Justice Chisholm's judgement, all of which were affirmed by the Full Court of the Family Court of Australia, demand special mention:

- **At paragraph 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".

- **At paragraph 248:** "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 basis for their beliefs. In the circumstances, I see no reason why I should not accept the proposition, on the balance of probabilities, for the purpose of this case."

- **At paragraph 252:** "The traditional analysis that they are "psychologically" transsexual does not explain how this state came about. 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".

- **At paragraph 253:** "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".

- **At paragraph 265:** "In my view the argument in favour of the "brain sex" view is also based on evidence about the development and experience 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".

- **At paragraph 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".

- **At paragraph 270:** "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 inter-sex (incongruities among biological factors) and transsexualism (incongruities between biology and psychology) ".

- **At paragraph 272:** "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".

- **At paragraph 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:-

"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."

Summary And Conclusions About Re Alex

You are still more likely to find either the Psychological/Illness or the Transgender models of transsexualism discussed in published material rather than the Biological/Intersex model espoused in this paper and in decisions like ***Re Kevin*** because most of such published material have been published by psychiatrists, psychologists and other health professionals steeped in, repeating and building upon an established Psychological Pathology/Illness explanation or by Gay/Lesbian academic writers advancing their own causes and view points.

The Biological/Intersex model of transsexualism, and the clarification of the fallibility of the method we use to allocate legal sex status in our culture, are perspectives which, though previously individually touched upon, only really crystallised through legal proceedings like ***Re Kevin*** where the breadth, quality and interdisciplinary nature of the expert medical evidence expressed in the case and the intellectual power and humanity of Justice Richard Chisholm enabled the court to approach the issue of transsexualism free of limiting pre-conceptions. Interestingly, most of the recent English and international cases dealing with transsexualism have seen the Biological/Intersex explanation for transsexualism as convincing and have preferred it to any other explanation.[21]

The difference in approach is crucial from a human rights and law reform perspective as denying equal human rights to those who experience mental illness or pathology is sadly a less difficult political act than to do so to people who experience biological diversity in their formation as human beings.

In ***Re Alex***, the court reached the view that Alex should receive some of the medical treatment he requested for his transsexualism because he suffered from Gender Dysphoria as described by "Dr C" and the other psychiatric evidence upon which the court exclusively relied for an understanding of Alex's medical condition. In so doing the court laid the foundation for the next step of conceiving treatment for transsexualism in children and adolescents as a "special medical procedure" to which a parent or guardian cannot consent. Thus, the court assigned such treatment to the same category as castration for the mentally ill child and other procedures which have no benefit for the child or young person (and thus where parent/guardian and child conflict of interest are evidenced or implied) and are characterised by irreversible surgery.

If the court had perceived Alex as receiving treatment for transsexualism, based upon a diagnosis of a biological phenomena regularly diagnosed in specialist clinics with little likelihood of mistake (rather than a pathological mental illness possibly amenable to treatment and subject to diagnostic variability) and which required non-surgical treatment for Alex's physical and psychological health which was not novel but routine in other respected medical jurisdictions, then I think it unlikely that the court would have invoked its child welfare jurisdiction to take the decision for treatment in this matter out of the hands of the child's parents/guardians and treating doctors where that decision accorded with the informed decision of the child or young person.

As it is, I have already received instructions from parents of a child with transsexualism in New South Wales who, as a result of the decision in ***Re Alex***, are required to obtain the Family Court's approval for the treatment of their 10 year old child when, prior to that decision no such approval was necessary. Alex is not the first child treated for transsexualism in Australia and he will not be the last. Is it good medical practice, humane (to the child and her or his family) and good public policy that the treatment of each such children or young persons be subject to the delay and significant cost involved in obtaining the approved by the Family Court of Australia? I do not think so.

The issue of the nature of that treatment, and whether the treatment suggested for Alex is proper or adequate, requires another article to discuss. It is interesting and of some concern that although a pre-eminent treatment centre for children with transsexualism has existed in Holland for some years, where such treatment is part of an established and monitored program, no evidence was obtained from the medical practitioners who administer treatment at that centre for ***Re Alex***. If such evidence and the evidence of the routine non-surgical treatment of other children with intersex conditions had been before the court, I doubt the court would have found either Alex's request for treatment or the treatment itself 'novel'.

Further, ***Re Alex***, in variously (and somewhat confusingly) giving credence to the Psychological/ Illness explanations for transsexualism and a transgender perspective of law reform, has added further confusion to the issue generally and retarded the efforts of advocates for the human rights of people with transsexualism.

In ***Re Kevin*** and ***Re Alex*** we now have conflicting explanations for transsexualism accepted by the Family Court of Australia. On another view, ***Re Alex*** approves the misconceived differentiation between transsexualism in childhood/adolescence and in adults that is evidenced in the DSM. In my view, ***Re Alex*** should be able to be distinguished, and the explanation of transsexualism in ***Re Kevin*** preferred, due to the narrow range and quality of the expertise relied upon in ***Re Alex*** and the fact that such expert evidence does not appear to have been adequately challenged or tested by any party in the particular circumstances of that case.

I conclude that the Family Court of Australia in ***Re Alex***, while reaching the right result in granting permission for Alex to receive treatment for his transsexualism:

- erred in the range and type of expert opinion upon which it was prepared to rely in respect of the explanation and categorisation of transsexualism and failed to have that expert opinion adequately tested;

- erred in its invoking of its child welfare jurisdiction in respect of the non-surgical treatment of childhood transsexualism; and

- erred in its espousal of a system for the re-assignment of an individual's legal sex (birth certificate legislation) which has no regard to congruity of an individual's mind and body and hence whether or not the individual has affirmed his or her sex by undergoing conclusive sex affirmation treatment/surgery. In this way the important distinction between the concepts of biological and legal sex are lost. At the same time the decision failed to critically evaluate the human rights abuses in respect of transsexualism prevalent in law and society in Australia such as:

    - the failure to publicly fund medical and associated treatment for transsexualism under Medicare;
    - the requirement of being unmarried for the re-assignment of legal sex; and
    - the legislatively approved preclusion of people of transsexual background from a number of competitive sports and in respect of superannuation and other aspects of Australian life

- which fail to deliver to people with transsexualism the same rights possessed by other citizens in their legally assigned sex; including people with other intersex conditions.

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Footnotes

1 Re Alex – Hormonal Treatment for Gender Identity Dysphoria 2004 Fam CA 297 ("Re Alex")

2 Re Kevin (validity of marriage of a transsexual) [2001] Fam CA 1074 and The Attorney General for the Commonwealth & "Kevin and Jennifer" & Human Rights and Equal Opportunity Commission [2003] Fam CA 94 ("Re Kevin")

3 See W v W [2001] 2 WLR 673 ("W v W") and Bellinger v Bellinger [2001] 2 FLR 1048 and the discussion of these judgements in the Re Kevin decisions.

4 A Psycho-Endocrinological overview of transsexualism A Michel, C Mormont1 and J Legros ISSN 0804-4643 European Journal of Endocrinology (2001) 145 365±376.

5 See footnote 4.

6 See footnote 4.

7 The actual formulation of the DSM IV is quoted (uncritically) in Re Alex at paragraph 101 within the evidence of mysterious English psychiatrist, "DR C". If Dr C is who I think he is then he has for many years been a somewhat controversial advocate for the conflictual pathological view of transsexualism.

8 This is necessary as some medical practitioners and psychologists still perceive transsexualism as a psychiatric disorder or psychological malady or predicament in the Corbett tradition rather than the biological predicament it has been shown to be by contemporary medical science as was accepted for the purposes of the law of Australia in Re Kevin. Some people who experience intersex object to those who experience transsexualism adopting that description of their predicament of sexual formation. It is unclear why. The same people are, however, prepared to use their political influence to maintain legal discrimination in respect of the reassignment of legal sex between people with the experience of transsexualism and other intersex conditions. Some seem determined to seek to ignore the principles and findings of Re Kevin in order to continue to deny equal human and legal rights to people who experience the intersex condition called transsexualism. The answer to this nsustainable political use of conscious ignorance is clarification and education.

9 Sometimes called "phenotype". See "Definition and Synopsis of the Etiology of Adult Gender Identity Disorder and Transsexualism " being a paper signed, approved and authorised by 17 of the world's most espected medical and scientific experts in the field as published by the Gay and Lesbian Association of Doctors and Dentists (United Kingdom) 2002 funded by Gender Identity Research & Education Society, the Kings Fund & the BCC Trans Group, and published at http://www.gladd.dircon.co.uk/trans_defn.htm. Note, however, that the

reference to the terms "transman" and "transwoman" is not applicable for Australia where these terms have not been accepted and are not popular. I suggest such terminology tends to confuse and/or dehumanise and detracts from the simple assertion by people who experience transsexualism that they are simply women and men who experience a natural variation in human sexual formation. See also the expert evidence adduced in Re Kevin: Validity of Marriage of Transsexual (2001) 28 Fam LR 158; [2001] FamCA 1074 (referred to particularly in paragraphs 209-273 thereof) and the judgment of the Full Court delivered 21st January 2003 ("Re Kevin").

10 Ibid.

11 Op cit Re Kevin as per footnote 1. In particular, see the evidence of Prof Milton Diamond and Dr Jan Lesley Walker. To quote Diamond: "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…In the transsexual the differences between sexual identity and gender identity manifest themselves early in life and the transsexual individual strives to have the two identities come into concert. The brain/mind being sex differentiated during prenatal and neonatal development sees the discrepancy between inner core sexual identity and external gender. The solution for reconciliation, as seen by the transsexual, is "Change my body, not my mind" (Diamond 1994)…One's sexual identity is how the individual sees self at core; one's gender identity is how the individual sees self in society… I have published (Diamond 1999) that it is my belief that transsexualism is a form of intersex." And to quote Walker: "The literature on transsexuals suggests that there is an early and enduring realisation that they are actually of the opposite sex and that this is concordant with their behaviour from early childhood… I would agree with the contention therefore that transsexuals form part of the spectrum of intersex because there is discordance between their biologically apparent sex and their sociological and psychological sex.";

12 The Macquarie Dictionary, 2nd ed, editors Delbridge, Bernard, Blair, Peters and Butler, 1992, The Macquarie Library Pty Ltd, Macquarie University, NSW 2109 Australia at page 920

13 See expert evidence in Re Kevin.

14 See the expert evidence adduced in Re Kevin

15 op cit The Macquarie Dictionary, 2nd ed, at page 1858

16 Op cit Re Kevin. For a number of reasons set out in expert evidence, and in the husband's evidence, such as medical risk, present efficacy, cost and family obligation, the Husband in Re Kevin, like many males experiencing transsexualism, had not undergone phalloplasty (penile construction) at the time of the hearing. The husband was still considered by the same expert opinion to have successfully undergone sex affirmation treatment sufficient to permit medical certification pursuant to sections 32B and 32C of the Births, Deaths and Marriages Registration Act 1995 (NSW).

17For another interesting discussion of such terminology see "Sex and Gender are Different: Sexual Identity and Gender Identity are Different", Milton Diamond, PhD. Clinical Child Psychology & Psychiatry-Special Issue In Press for July 2002. University of Hawaii, John A Burns School of Medicine Department of Anatomy and Reproductive Biology Pacific Centre for Sex and Society. 1951 East-West Road, Honolulu, Hawaii 96822 USA phone: (808) 956-7400,facsimile: (808) 956-9481 Diamond@hawaii.edu. Also see the discussion by Leslie Feinberg in the Preface to her book "Transgender Warriors"1996, Beacon Press, Boston Massachusetts, USA.

18 Although "transgender" has been used as a inclusive 'catch-all' term to include transgender individuals, people who experience transsexualism as well as other types of people who exhibit nonconformist gender behaviour, such vague and generalised usage, though inclusive, was never useful or accurate. See an interesting discussion by Leslie Feinberg (a person who identifies as transgender) in the Preface to her book "Transgender Warriors"1996, Beacon Press, Boston Massachusetts, USA . It is my opinion that the generalised use of the word "transgender" not only robs that word of its meaning, but needlessly creates confusion; both of expression and understanding. For an example of this confusion and resulting convoluted expression one need only look to the use of the terms "transgender" and "recognised transgender" in the New South Wales Anti-Discrimination Act.

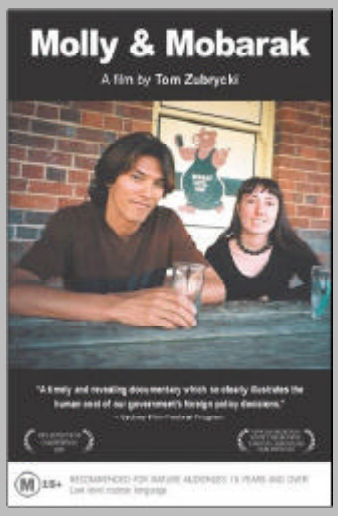
19 Op cit "Sex and Gender are Different: Sexual Identity and Gender Identity are Different", Milton Diamond, PhD

20 Ibid

21 See the historic review of international decisions undertaken by Justice Chisholm and the Full Court of the Family Court of Australia in Re Kevin, W v W and Bellinger v Bellinger [2001] 2 FLR 1048 and see the following decisions: I –v- The United Kingdom (2002) and Christine Goodwin –v- The United Kingdom (2002) in the European Court of Human Rights and The Marriage of Kantaras case no 98-5375CA 11998DR00537WS in the Circuit Court of the Sixth Judicial Circuit In And For Pasco County, Florida, in the United States of America.

MOLLY & MOBARAK

Year: 2003
Classification: M
Runtime: 85 min
Produced In: Australia
Directed By: Tom Zubrycki
Language: English



Molly & Mobarak takes you behind the headlines and hot debates to Young in rural NSW where ordinary Australians share their community with 90 Afghan refugees working at the local abattoir. Against a backdrop of occasional ignorance and hostility, these everyday Australians still believe in 'the lucky country': people like Tony Hewson who recruits the refugees, Anne Bell who organises English classes and social activities, and Lyn Rule who offers them hospitality in her own home.

"A timely and revealing documentary which so clearly illustrates the human cost of our government's foreign policy decisions." - Sydney Film Festival Program.

"Aussie documaker Tom Zubrycki has come up with one of his most accessible and emotional efforts." - David Stratton, Variety,