Transsexualism — The Legal, Psychological and Medical Consequences of Sex Reassignment Surgery

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1. *Introduction*

Although the concept of transsexualism has long been identified,[1] it is only recently that developments in medical technology have permitted the "treatment" of transsexualism by sex reassignment surgery. Only the minority of those diagnosed as "transsexual" seek sex reassignment surgery[2] — a procedure which involves one or a number of cosmetic operations designed to modify physical appearance so that it more closely resembles that of the opposite sex. This article identifies some of the legal, psychological and medical consequences of this radical surgery.

2. *Definitions and Demographics*

In this article I use the terms "sex" and "anatomical sex" to describe whether an individual is male or female as assigned at birth. I use the term "gender" to designate subjective feelings of masculinity or femininity. "Gender dysphoria" refers to the discomfort an individual feels about their "assigned gender" and sex: assigned gender being the public expectation of behaviour consistent with anatomical sex.

Essentially, the transsexual is of one anatomical sex yet feels an overwhelming belief that they are of the opposite sex. A male transsexual will express his belief in terms of being "a woman trapped in a male body" and a female transsexual will express her belief that she is "a man trapped in a female body". Accordingly, the transsexual is one in whom there is an incongruence between anatomical sex and gender.

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1 Brown, J C, "Transsexualism" (1990) in Bluglass, R and Bowden, P (eds), *Principles and Practice of Forensic Psychiatry* at 705. In the 1600s in Spain it is recorded that a Spanish soldier, who was later discovered to be a nun, enjoyed special status and notoriety as a woman who had renounced traditional forms of female sexuality: Perry, M E, "The Manly Woman, An Historical Case Study" (1987) 431 *Am Beh Sci* 86.

2 Of 106 patients attending a gender-identity clinic, 73 per cent satisfied the Diagnostic and Statistical Manual III (DSM III) criteria; 23 per cent of whom were referred for sex reassignment: Burns, A, Farrell, M and Brown, J C, "Clinical Features Of Patients Attending a Gender Identity Clinic" (1990) 157 *Brit J Psychiat* 265.

Transsexualism is not a psychosis (the transsexual does not suffer from a delusion as to their anatomical sex), although the transsexual may suffer from related disturbances such as anxiety or depression. These disturbances are the product of the transsexual's intense conflict between sex and gender. In rare cases, schizophrenia and transsexualism may co-exist, but generally a schizophrenic does not present with two disorders but with transitory gender dysphoria which is merely a symptom of the schizophrenia.[3] Care must be taken when diagnosing transsexualism as not all patients who suffer from gender dysphoria are transsexuals. Additionally, transsexualism must be distinguished from transvestism (or cross-dressing) and hermaphroditism (the presence of sexual characteristics of both sexes within the one person). Transsexuals cross-dress to express their gender rather than to promote sexual arousal, and have the sexual characteristics of only one sex.

The American Psychiatric Association's Diagnostic and Statistical Manual III-Revised (DSM III-R) identifies three diagnostic criteria for transsexualism:

(i) Persistent discomfort and sense of inappropriateness about one's assigned sex;

(ii) Persistent preoccupation for at least two years with getting rid of one's primary and secondary sex characteristics and acquiring the sex characteristics of the other sex; and

(iii) The person has reached puberty.[4]

A. Prevalence

Transsexualism is a rare disorder occurring in approximately 1 in 40,000 males and 1 in 100,000 females, although estimates may vary.[5] It is generally accepted that in both Eastern and Western countries transsexualism is more prevalent in males than females, the ratio being about 4:1.[6] As already noted, it is the minority of transsexuals who seek sex reassignment surgery. It was estimated that in 1980 in the United States one thousand transsexuals sought surgery[7] and in 1981 in Britain two thousand transsexuals sought surgery.[8]

B. Age of Onset

The DSM III-R identifies that transsexualism often has its onset prior to puberty. Indeed, most transsexuals perceive a difference between their anatomical sex and gender well before puberty and frequently at age four or five. This perception may be manifested in behaviour opposite to that typical of their anatomical sex, for example, taking roles in play

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3 Brown, above n1 at 706. Caldwell, C and Keshavan, M S, "Schizophrenia with Secondary Transsexualism" (1991) 36 *Can J Psychiat* 300. Commander, M and Dean, C, "Symptomatic Transsexualism" (1990) 156 *Brit J Psychiat* 894.

4 American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* (3rd edn, Rev, 1990).There may be alterations to the classification of transsexualism within the next edition of the DSM-IV see Bradley, S J, Blanchard, R, Coates, S, Green. R, Levine, S B, Meyer-Bahlburg, H F L, Pauly, I B and Zucker, K J, "Interim Report of the DSM–IV Sub-Committee on General Identity Disorders" (1991) 20 *Arch Sex Beh* 333. See also Dolan, J D, "Transsexualism: Syndrome or Symptom?" (1987) 32 *Can J Psychiat* 666.

5 Brown, G R, "A Review Of Clinical Approaches To Gender Dysphoria" (1990) 51 *J Clin Psychiat* 57.

6 Although in Poland the situation was reversed with the ratio being 5.5 females to 1 male: Godlewski, J, "Transsexualism and Anatomic Sex Ratio Reversal in Poland" (1988) 17 *Arch Sex Beh* 547.

7 Above n5 at 61.

8 Taitz, J L, "Confronting Transsexualism, Sexual Identity and the Criminal Law" (1991–2) 60 *Med L J* 62.

which are of the opposite sex, and dressing in an opposite-sexed or an androgynous fashion. Whilst transsexuals may later identify that they had a Gender Identity Disorder in Childhood (a nomenclature of the DSM III-R), the onset of the full disorder is often in late adolescence or early adult life and in some cases even later.[9]

C. Sex Differentiation

Transsexualism is a disorder which applies mutatis mutandis in males and females, although there are some minor differences. Male to female transsexuals show more exaggerated (and less convincing) behaviour and dress than female to males, as well as showing a greater degree of interest in sexual activity.[10] Male to female transsexuals more often present for sex reassignment surgery than their female to male counterparts.[11]

D. Sexual Orientation

Transsexuals may be homosexual, heterosexual or asexual. The designation "homosexual" transsexual refers to one who is of the same anatomical sex as their preferred partner, in contrast to a "heterosexual" transsexual whose preferred partner is of the opposite anatomical sex. Asexual orientation denotes a transsexual who expresses a lack of sexual feelings per se, however this may mask a homosexual orientation which is the most common orientation.[12]

E. Culture

Transsexualism has been reported in various countries, including China,[13] Poland,[14] India, Singapore,[15] America, Holland,[16] and Australia. Comparative studies show that the rate of transsexualism is as high in the East as it is in the West.[17] Transsexualism appears to be part of the human condition, although responses to transsexuals vary according to cultural groups.

Western cultures clearly distinguish between feminine and masculine forms of identity and behaviour. The dichotomisation of male and female genders limits the options available to individuals who do not fit within these confines. In the West, the transsexual accepts this dichotomy and chooses an appearance which more closely resembles their gender. It is a measure of the transsexual's compulsion to imitate their gender that they will undergo sex

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9 American Psychiatric Association, id at 75. In an exceptional case a 65 year old single male sought sex reassignment surgery. The male described intrusive thoughts such as "it would be nice to have breasts", as commencing when he was 59 and escalating after his parents' death when he was 61: Hodgkiss, A, Denman, C and Watson, J P, "Gender Dysphoria in Old Age: A Single Case Study" (1991) 6 *Int'l J Geriatr Psychiat* 819.

10 Brown, above n1 at 706. In contrast in Poland female to male transsexuals were found to a higher rate of sexual activity than their male to female counterparts: Dulko, S, "Sexual Activity and Temperament in Polish Transsexuals" (1988) 17 *Arch Sex Beh* 163.

11 Mate-Kole, C, Freschi, M and Robin, A, "A Controlled Study of Psychological and Social Change after Surgical Gender Reassignment in Selected Male Transsexuals" (1990) 157 *Brit J Psychiat* 261.

12 Blanchard, R, Steiner, E L, Clemmensen, L H and Dickey, R, "Prediction of Regrets in Post-Operative Transsexuals" (1989) 34 *Can J Psychiat* 43.

13 Ruan, F, Bullough, V L and Tsai, Y, "Male Transsexualism In Mainland China" (1989) 18 *Arch Sex Beh* 517.

14 Above n6 at 547.

15 Tsoi, W F, "Development Profile of 200 Male and 100 Female Transsexuals in Singapore" (1990) 19 *Arch Sex Beh* 595.

16 Eklund, P L E, Gooren, L G G and Bezemer, P D, "Prevalence of Transsexualism in the Netherlands" (1988) 152 *Brit J Psychiat* 638.

17 Editorials, "Transsexualism" (1991) 338 *LANCA* 603.

reassignment surgery. Most surgery is conducted in the West,[18] however this may be indicative of more advanced medical technology and spending power, rather than an increased desire for surgery.

In some cultures, particularly Polynesian and Burmese, there is an acceptance of individuals who do not fall within the traditional boundaries of masculine and feminine genders. This acceptance is demonstrated by giving them a "special" status.

In Samoa for instance, a male to female transsexual is known as a *Fa'afine*: literally "who is *like* a female". In traditional Polynesian culture a male child was raised as a Fa'afine if there were insufficient females to cope with domestic chores. It has been estimated that in modern Samoa one in five families has at least one Fa'afine member. A Fa'afine is considered to be a female for the purposes of defining appropriate standards of behaviour and sex (hence Samoans perceive that Fa'afine engage in heterosexual sex with partners of the same anatomical sex).[19] The Fa'afine are secure in their acceptance within and outside of the family, a mark of which is their employment in socially responsible positions in the Samoan community: education, health, social welfare and the preservation of traditional Samoan culture. Sex reassignment surgery is not encouraged.

In Burmese culture, a male to female transsexual is known as an *Acault*. An Acault has status as being a person spiritually married to the female spirit Manguedon and therefore possessing spiritual gifts such as those of a shaman or seer. In contrast to the transsexual in Western society, an Acault does not seem to experience intense feelings of incongruence between sex and gender — rather he experiences the consequences of being "female". Firstly, in the Burmese Buddhist religion only a male can reach Nirvana, and an Acault, who is considered female, cannot. Secondly, a tenet of Buddhism is reincarnation, and incarnation as an Acault is seen as evidence of a (previous) disreputable life. Acault are treated as female for the purpose of determining the sex of an appropriate partner. Thus, although homosexuality is illegal in Burmese society, the Acault, who are viewed as neither male nor female (but mainly female), can engage in sexual activity with anatomically sexed males.[20]

In Samoan and Burmese societies the male to female transsexual is feminised by limited cross-dressing and cross-behaviour. The literature is devoid of information as to the number of Polynesian and Burmese transsexuals who seek sex reassignment surgery and as to the prevalence of female to male transsexuals. It may be that a transsexual in these cultures will feel less compulsion to engage in surgery as he or she is not forced to choose between only two forms of gender.

3. *Aetiology*

The development of transsexualism in an individual often follows a well defined path from onset to the adult who presents for hormone therapy and/or sex reassignment surgery. Biological and psychological theorists have (separately) attempted to identify the trigger which might induce transsexualism, although even psychological theorists acknowledge that there may be some (as yet unidentified) predisposing biological factor to

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18 Ibid.

19 Haworth, A, "Samoa: Where Men Think They Are Women" (1993) May *Marie Claire* (UK edition) 50.

20 Coleman, E, Colgan, P C and Gooren, L "Male Cross-Gender Behaviour In Myanmar (Burma): A Description of the Acault" (1992) 21 *Arch Sex Beh* 313.

transsexualism. No theory adequately explains the development of transsexualism, but all accept the use of sex reassignment surgery as an effective "treatment" for transsexualism, thus reflecting a pragmatic approach to relieving the transsexual of their distress.

A. Life History

A typical life history of a male or female transsexual will include cross-dressing beginning in pre-adolescent years and accelerating after puberty.[21] It has been reported that males often attempt to purge their feminine feelings through a brief "flight into hypermasculinity" which manifests itself in the pursuit of risky activities, or enrolment in the army.[22] In adulthood, a transsexual will regularly cross-dress and affect opposite-sexed mannerisms. As a result of an increasing repugnance towards their genitalia, a transsexual will commonly disguise or remove indicia of their anatomical sex (for males this may involve electrolysis to remove body hair and for females this may involve binding or taping of the breasts). This is often coupled with the taking of hormones to promote secondary sex characteristics. In males, hormones promote the development of breasts and a reduction in the size of genitalia. In females, hormones promote the development of coarse body hair, the cessation of the menstrual cycle and a lowering of the voice. It is at this point that the transsexual may present for sex reassignment surgery.

B. Biological Theories

Much attention has been given to the isolation of a biological determinant of transsexualism. Although biological studies have identified physiological factors in the development of transsexualism in individual transsexuals, they have not identified any consistent chromosomal, hormonal or neurophysiological feature which distinguishes the transsexual from the general population, and which can therefore be used to predict the development of transsexualism.[23]

(i) Chromosomal

Individual case studies have shown the development of transsexualism in a small number of males with the abnormal chromosome pattern of 47,XYY,[24] and the development of transsexuality in siblings. A single case study of transsexual sisters found that transsexualism had developed in two sisters in a family but not a brother. The study concluded that the second sister had not modelled herself on the first sister, but postulated that familial factors may be of importance in the development of transsexualism.[25] However, the aetiological

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21 Bradley, S J and Zucker, K J, "Gender Identity Disorder and Psychosexual Problems in Children and Adolescents" (1990) 35 *Can J Psychiat* 477. Cohen has argued that gender identity conflicts during adolescence motivate adolescent suicides: Cohen, Y, "Gender Identity Conflicts in Adolescents as Motivation for Suicide" (1991) 26 *ADOLA* 19.

22 It has been postulated that the higher percentage of transsexuals in the armed forces is as a result of this flight into hyper-masculinity: Brown, G R, "Transsexuals in the Military, Flight Into Hyper-Masculinity" (1988) 17 *Arch Sex Beh* 527.

23 Brown, above n1 at 707.

24 Taneja, N, Ammini, A C, Mohapatra, I, Saxena, S and Kucheria, K, " A Transsexual Male with 47,XYY Karyotype" (1992) 161 *Brit J Psychiat* 698; Gooren, L and Cohen-Kettenis, P T, "Development of Male Gender Identity/Role and a Sexual Orientation Towards Women in a 46,XY Subject with an Incomplete Form of the Androgen Insensitivity Syndrome" (1991) 20 *Arch Sex Beh* 459.

25 Joyce, P R and Ding, L, "Transsexual Sisters" (1985) 19 *ANZ J Psychiat* 118.

significance of individual chromosomal abnormalities cannot be determined given that the majority of transsexuals fall into a normal chromosomal pattern.

(ii) Hormonal

Similarly, whilst it is accepted that in mammals hormones act in intra-uterine life, and at the neonatal stage to later determine gender specific behaviour (for example the development of tomboyish behaviour in girls whose mothers were given progesterone during pregnancy), it has not been established that hormones influence the development of transsexualism.[26]

(iii) Neurophysiological

It has been demonstrated that the human brain shows sexual dimorphism in a number of ways, for example the adult male brain is generally larger than the female by 10 to 15 per cent.[27] Studies are in disagreement as to whether sexual dimorphism is shown in the corpus callosum, the largest fibre tract in the brain. It was suggested that if sexual dimorphism could be shown in the corpus callosum this may reveal sexual differentiation based on gender rather than sex, thus, for example, an anatomical male would show the same features as a transsexual female to male.

Emory et al studied 60 individuals: 20 control males, 20 control females, 10 male to female transsexuals and 10 female to male transsexuals. He concluded that there is no significant difference in the corpus callosum between the sexes, hence transsexualism cannot be identified by reference to the corpus callosum. Emory did not exclude the possibility that improvements in medical technology (which will permit the detection of finer brain differences) may identify a neuroanatomic aetiology for transsexualism.[28]

C. Psychological Theories

Some psychological theories present transsexualism as a disorder in the development of personality: it is said that at a critical stage the child, who has an innate predisposition to transsexualism, is exposed to an influential stimulus or relationship which may then lead to the development of transsexualism. This theory may be contrasted with the case study of "Amy" which shows the influence of parental behaviour at a critical stage, in the development of a Gender Identity Disorder of Childhood (a nomenclature of the DSM III-R), but apparently not the development of transsexualism. Amy presented to the psychiatrist as a pre-pubescent child insisting that she was a boy. She was cross-dressing, exhibiting tomboyish behaviour, associating only with boys, calling herself "Pete" and urinating in a standing position. It was discovered that Amy's parents had a stormy relationship, the husband denigrating the wife and displaying a cold and angry demeanour. The wife's response was one of fear and low self esteem. Amy expressed fear that her mother would be hurt by her father and that she wanted the strength she perceived in boys to protect both herself and her mother (whom she saw as too weak to defend herself). The psychiatrist treated Amy and her parents simultaneously. Once the parents had stabilised their rela-

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26 Brown, above n1 at 707.

27 Gooren, above n24 at 459.

28 Emory, L E, Williams, D H, Cole, C M, Amparo, E G and Meyer, W J, "Anatomic Variation of the Corpus Callosum in Persons with Gender Dysphoria" (1992) 20 *Arch Sex Beh* 409. See also the studies on the Central Nervous System which show sexual dimorphism and that the reactivity of transsexuals is consistent with their gender and not their sex: Dulko, above n10 at 168.

tionship and the mother had increased her self esteem, Amy relinquished her cross-gender behaviour.[29]

Behavioural theorists suggest that socialisation variables are the significant factors in the development of a transsexual identity.[30] Treatment involves the use of behaviour modification techniques (such as the induction of nausea with a previously positive stimulus) to discourage the transsexual's gender identification and to encourage behaviour consistent with the transsexual's anatomical sex.

In contrast, psycho-dynamic theorists emphasise unconscious conflicts within a child. Psycho-dynamic theory differentiates between the development of male and female transsexualism. It has been suggested that the development of male to female transsexualism is a result of the symbiosis between an infant boy and his mother and the absence of a father. As a result of a mother's overprotection and excessive contact, a boy fails to separate from his mother and identify with his father and becomes an effeminate boy.[31] In female to male transsexualism it is suggested that a girl identifies with a depressed and sexually hungry mother and entertains rescue fantasies. Again, the father is absent both physically and psychologically.[32]

The use of psychotherapy in the treatment of transsexualism may be inhibited by a transsexual's perception that the therapist's motivation is to dissuade a transsexual from sex reassignment surgery. Thus the psychiatrist is perceived to be an obstacle to the only viable form of relief available to the transsexual.[33]

Both behavioural and psycho-dynamic theories can be criticised for failing to account for the development of transsexualism in different familial constellations and for providing ineffective and inconsistent methods of treatment. Perhaps the psychiatric perspective of "treating" transsexualism is inappropriate: if transsexualism is just one variety of gender on a continuum between male and female, then a psychological determinant cannot be identified and it is a condition which is not amenable to "treatment". This interpretation of transsexualism was expressed in "Conundrum" by Jan Morris,

> [transsexualism] is not a sexual mode or preference. It is not an act of sex at all. It is the passionate, lifelong, ineradicable conviction, and no true transsexual has ever been disabused of it.[34]

4. *Consequences of Sex Reassignment Surgery*

The consequences of undergoing sex reassignment surgery reach beyond those associated with mere physical transformation. Some transsexuals report an alleviation of their previous distress and an improvement in their quality of life. In others the response is less positive and they may attempt suicide or "re-reassignment".

The significance of the change is also reflected in various areas of the law including criminal, family and social security law.

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29 Marks, J, "We Have a Problem " (1991) May *Parents* 62.

30 Bolin, A, "Transsexualism and the Limits of Traditional Analysis" (1987) 31 *Amer Beh Sci* 41.

31 Stoller, R J, *Sex and Gender: On the Development of Masculinity and Femininity* (1968).

32 Volkan, V D and Masri, A, "The Development of Female Transsexualism" (1989) XLIII *Amer J Psychother* 92.

33 Hodgkiss, above n9 at 820.

34 Morris, J, *Conundrum* (1974) at 15.

A. Physical

To be eligible for sex reassignment surgery, a diagnosed transsexual is required by a psychiatrist to undergo a period of psychosocial assessment. The psychiatrist's goal is to ensure that the transsexual is fully prepared for surgery both physically and mentally: the transsexual must prove that s/he can live and be accepted in their gender for one or two years[35] and that s/he is fully aware that gender dysphoria will still continue post-surgery. Accordingly, the transsexual will present to a surgeon with hormone developed secondary sexual characteristics.

In male to female surgery, the testes and penis are removed and a "neo-vagina" is formed, of approximately 15cm depth, from inverted penile skin or auto-transplanted colon. External female genital structures are formed from scrotal tissue, breasts are augmented and the laryngeal cartilage ("adam's apple") is shaved. Some transsexuals may also require plastic surgery to alter the contours of their abdomen and nose.

In female to male transsexuals the surgeon performs a mastectomy and hysterectomy and sometimes a bilateral oophorectomy (removal of the ovaries) and chest contouring. In a limited number of cases a phallus is created by using tissue from the abdomen. There may also be treatment to alter the vocal characteristics.[36]

Sex reassignment surgery enables the post-operative transsexual to have sexual intercourse in accordance with their newly assigned sex, although orgasm is not assured. Of course surgery does not enable the transsexual to partake in reproduction in accordance with their reassigned sex.

It must be noted that there are inherent dangers in undertaking such a major operation as it has been estimated that the morbidity rate is 10 per cent.[37]

B. Financial

Funding of sex reassignment surgery has been an issue both in the United States and in Australia. In the United States, the entire operation was previously considered to be cosmetic surgery and therefore not covered by Medicard.[38] In Australia, Medicare will fund the necessary surgery to deprive the transsexual of their primary sexual characteristics, but it will not fund what it considers to be additional "cosmetic surgery" — namely the creation of a neo-vagina in male to female transsexuals, and a phallus in female to male transsexuals. Consequently this surgery must be funded by private insurance. In Australia, in 1992, it was estimated that the minimum cost of sex reassignment surgery was $5,000.[39]

C. Psychological

Studies which have evaluated the therapeutic effect of sex reassignment surgery have consistently shown that the majority of post-operative transsexuals are satisfied with the re-

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35 Chong, J M, "Social Assessment of Transsexuals who Apply for Sex Reassignment Surgery" (1990) 14 *Soc Work Health Care* 87.

36 Mount, K H and Salmon, S J, "Changing the Vocal Characteristics of a Post-Operative Transsexual Patient: a Longitudinal Study" (1988) 21 *J Commun Disord* 229.

37 Brown, above n1 at 710.

38 Gordon, E B, "Transsexual Healing: Medicard Funding of Sex Reassignment Surgery" (1991) 20 *Arch Sex Beh* 61.

39 Cummings, K, "Sex Translated" (1993) 4 *Polemic* 62.

sults and perceived improvements in their quality of life and relief from distress.[40] In at least 10-15 per cent of patients the operation could be classified as a failure as indicated by requests for reversal, psychotic episodes, hospitalisation or suicide.[41]

Transsexuals who had undergone sex reassignment surgery have been shown to be less neurotic than those on the waiting list for surgery or those at the assessment stage of clinic attendance.[42] Cole et al concluded that:

> [G]ender reassignment surgery is a cosmetic procedure in some cases allowing alternative sexual practice. The relief achieved with gender reassignment surgery is primarily as far as dysphoria and its consequences are concerned, and is similar to that achieved in other cases of cosmetic surgery ... . In selective cases it may be seen as a valid method of treatment.[43]

Transsexuals who had not undergone surgery (although initially requesting it) indicated that they were experiencing the same degree of difficulty with respect to social adjustment as at the time of diagnosis.[44]

The literature has distinguished a number of features which affect post-operative psychopathology including:

(i) The Adequacy of Surgery

Less than satisfactory operative results such as breast scarring, erectile urethral meatus (spraying of urine), urinary incontinence and the need for extra surgery are contributive factors to a negative post-operative mental state. This may arise from physical discomfort, or because the transsexual is unable to achieve his or her desired goal, namely the ability to pass for the opposite sex.[45]

(ii) Sexual Orientation

Heterosexual male to female transsexuals (that is males who were heterosexual prior to surgery, and "lesbian" after surgery) are more likely to regret sex reassignment surgery than homosexual male to females or homosexual female to males.[46] The effect might be explained in part by the greater availability in the community of heterosexual partners — a male to female transsexual who was "homosexual" (that is whose preferred partner is male) would find less difficulty entering into a relationship after surgery as, at that stage, the relationship would be considered "heterosexual".

(iii) Anatomical Sex

A comparison of female to male and male to female transsexuals shows that female to males are more stable pre and post surgery than their male counterparts. Female to male transsexuals often have closer ties to their parents and siblings, are established in more

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40 Kuiper, B and Cohen-Kettenis, P, "Sex Reassignment Surgery: A Study of 141 Dutch Transsexuals" (1988) 17 *Arch Sex Beh* 439.

41 Above n5 at 62.

42 Mate-Kole, C, Freschi, M and Robin, A, "Aspects of Psychiatric Symptoms at Different Stages in the Treatment of Transsexualism" (1988) 152 *Brit J Psychiat* 550.

43 Above n11 at 264.

44 Kockott, G and Fahrner, E M, "Transsexuals Who Have Not Undergone Surgery: A Follow-Up Study" (1987) 16 *Arch Sex Beh* 511.

45 Ross, M W and Need, J A, "Effects of Adequacy of Gender Reassignment Surgery on Psychological Adjustment: A Follow-Up of 14 Male-to-Female Patients" (1989) 18 *Arch Sex Beh* 145.

46 Above n12 at 44.

stable relationships with partners of the same anatomical sex, and are more satisfied sexually prior to sex reassignment surgery.

Surgery for male to female transsexuals is more successful both anatomically and aesthetically than for female to male transsexuals, for example a neo-vagina has a better aesthetic appearance than a neo-phallus, and males have been assessed as more psychologically stabilised once they have undergone surgery than their female to male counterpart.[47] However, overall post-operative female to male transsexuals are still better socially integrated and more stable than their male to female counterparts.[48] This may partly be explained by the fact that it is more likely that a male to female transsexual will be married with children, in contrast to female to male transsexuals who are more likely to be single and without children. Consequently, surgery on male to female transsexuals can affect a greater number of family members than surgery on female to male transsexuals.

(iv) Age

It has been noted that sex reassignment surgery performed after the age of thirty correlates negatively with psychological well-being.[49]

D. Legal

Most areas of the law place significant weight upon the fact that a transsexual has undergone sex reassignment surgery in determining whether they are male or female. A pre-operative transsexual is accorded very few rights consistent with their gender and is generally held to be sexed as per their anatomical sex.

(i) Family Law

The English courts have held a very restrictive view on the meaning of male and female within the confines of Family Law. In 1970 Corbett sought a declaration that his marriage to April Ashley was null and void. The basis of the application was an argument that marriage is an institution open only to a union of a male and a female and that Corbett's partner, April Ashley, who was a post-operative male to female transsexual, should still be considered male and therefore unable to marry Corbett. Ormrod J regarded the following criteria in determining an individual's sex:

a. chromosomal factors;

b. gonadal factors;

c. genital factors;

d. psychological factors; and possibly

e. hormonal/secondary sexual characteristics.

Ormrod J focussed upon biological factors in determining sex and held that April Ashley could not alter his sex as assigned at birth and was therefore a man for the purposes of the law of marriage. The marriage was annulled.[50]

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47 Verschoor, A M and Poortinga, J, "Psychosocial Differences between Dutch Male and Female Transsexuals" (1988) 17. *Arch Sex Beh* 173. See also above n11 at 262.

48 Kockott, G and Fahrner, E M, "Male to Female and Female to Male Transsexuals: A Comparison" (1988) 17 *Arch Sex Beh* 539.

49 Above n42 at 440 and above n11 at 263.

50 *Corbett v Corbett* [1971] P 83; Applied in *R v Tan* [1983] QB 1053.

(ii) Criminal Law

In 1988, in *R v Harris and McGuiness*[51] the New South Wales Court of Criminal Appeal was required to consider whether a male to female transsexual was a male person within the meaning of (the now repealed) Section 81A *Crimes Act* 1900 (NSW). Section 81A prohibited a male procuring another male to commit an act of indecency. Thus the offence could only be committed by a male. At trial, Harris and McGuiness, two male to female transsexuals, had been convicted under Section 81A, one transsexual was pre-operative and one post-operative.

The Court of Criminal Appeal applied the criteria laid down in *Corbett*, but rejected the biological focus of Ormrod J. The Court held that sex reassignment surgery was critical in determining whether a person, psychologically female, could also be considered physically female. Accordingly, the Court held that for the purposes of Section 81A, the pre-operative transsexual was not female, whilst the post-operative transsexual was female. This decision has been criticised as unfairly discriminatory of transsexuals who are unable or unwilling to undergo reassignment, but who live their lives as a member of the opposite sex.[52] It reflects a pragmatic attitude by the law, focusing on an act which is observable and evinces a transsexual's firm commitment to their gender.

In 1989 the decision of *Harris and McGuiness* was followed in Supreme Court of Victoria in the case of *R v Cogley*.[53] The accused Cogley was a male who had been charged with assault with intent to commit rape upon a post-operative male to female transsexual (with a neo-vagina). The trial judge, Cummins J determined on the voire dire that the victim was a woman (with a vagina) and therefore capable of being raped. This decision again reflects the weight which criminal courts attach to (full) sex reassignment surgery. As a consequence of the Court's analysis, an obvious difficulty may arise where a victim has merely undergone part of the sex reassignment surgery, that is deprivation of primary sexual characteristics but not construction of neo characteristics.

If a transsexual is incarcerated in New South Wales, the Department of Corrective Services must make an administrative decision about whether to place the transsexual in a male or female institution in accordance with their anatomical sex or gender. At present, transsexuals are classified on the basis of their anatomical sex, regardless of whether they have undergone sex reassignment surgery.[54] The Department does not provide a segregated unit for transsexuals, although an individual can request incarceration in the protection wing of the jail. A transsexual's choice to enter the general jail population enables them to have more time out of their cells and to engage in a larger number of activities, however it also exposes them to the risk of sexual harassment and sexual assault.

Although the Department professes to provide psychological services, it has been criticised as failing to provide adequately for the needs of transsexuals. In the 1980s the then

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51 (1988) 35 A Crim R 146.

52 Finlay, H, (1989). "Transsexuals, Sex Change Operations and the Chromosome Test: *Corbett v Corbett* Not Followed" (1989) 19 *WALR* 152; Otlowski, M, "The Legal Status of a Sexually Reassigned Transsexual: *R v Harris and McGuiness* and Beyond" (1990) 64 *ALJ* 67.

53 (1989) 41 A Crim R 198.

54 An undated media release from the Public Relations Branch of the Department of Corrective Services (NSW) states that the Department takes sex reassignment surgery into account when classifying inmates. However, no male to female transsexuals have been successfully held in the female gaol because of the negative reaction of the female inmates.

Corrective Services Commissioner, Tony Vinson, allowed transsexuals to voice their concerns and introduced appropriate reforms: including the provision of female underwear for male to female transsexuals, the wearing of make-up and the supply of hormonal treatment. His attitude to the incarceration of transsexuals was that "punishment should consist only of the deprivation of liberty. In the case of transsexuals it seemed that not only did they lose their freedom but their very identities were at stake".[55] Vinson's limited reforms have since been reversed by the Department, although hormone treatment is still available in most institutions.[56]

(iii) Social Security Law

The Department of Social Security is required to determine whether an individual is male or female in order to assess eligibility for a pension. In *Secretary, Department of Social Security v HH*[57] the Administrative Appeals Tribunal held that a male to female transsexual who had undergone sex reassignment surgery could be classified as being female for the purpose of obtaining an Age Pension as a woman. The Tribunal applied the criteria laid down in *Corbett* and reached a decision which was consistent with that of *Harris and McGuiness*.

An even broader approach was taken by the same Tribunal in the landmark decision of *Secretary, Department of Social Security v SRA*.[58] *SRA* was a pre-operative male to female transsexual who had applied for a Wife's Pension. The Tribunal was required to determine whether SRA was entitled to receive the pension in accordance with gender rather than anatomical sex. In applying the criteria laid down in *Corbett* to determine sexual identity, the Tribunal focussed upon psychological, social and cultural factors rather than biological factors. The Tribunal distinguished the decisions of *Corbett*, and *R v Harris and McGuiness*. It held that the *Social Security Act* 1947 (Cth), being of benevolent intent, should be given a liberal interpretation, in contrast to the more restrictive interpretation of legislation applicable to the proscriptive areas of family and criminal law.

The Tribunal held that in *HH* it had previously placed too much weight upon the fact of sex reassignment surgery and noted that SRA had not undergone surgery because of financial constraints. As a consequence of focussing upon psychological, social and cultural factors in determining sexual identity, the Tribunal held that SRA was a woman and therefore entitled to claim a Wife's pension.

On 1 December 1993, the Department's appeal to the Federal Court was upheld.[59] The Federal Court agreed with the Tribunal that the *Social Security Act* 1947 (Cth) should not be given a narrow or pedantic construction, but held that the ordinary meaning of the word "wife" and "woman" did not encompass a pre-operative male to female transsexual.

(iv) Employment and Discrimination

Some of the most common areas in which a transsexual might encounter difficulties or discrimination are employment, insurance, and the ability to obtain identification documents.[60]

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55 Vincent, T, *Wilful Obstruction* (1982) at 64.
56 Morgan, J, "Transsexuals and the Criminal Justice System" (1987) *LSB* 44.
57 (1991) 13 AAR 314.
58 (1992) 69 SSR 991.
59 Unreported, Federal Court, No NG745 of 1992.
60 Edwards, S S M, " 'No Man's Land': The Transsexual in Law" (1982) 146 *Just P* 510.

The *Anti-Discrimination Act* 1977 (NSW) prohibits discrimination on the basis of an individual's sex, race, marital status, physical/intellectual impairment or homosexuality. It does not specifically provide for transsexuality, although amendments were recommended by the Anti-Discrimination Board in 1989.

In 1984/85 the New South Wales Anti-Discrimination Board's Annual Report noted that,

> legislation in New South Wales giving recognition to the legal status of persons who have undergone gender reassignment is necessary to ensure that transsexuals are legally recognised and treated for all purposes under State law as belonging to the reassigned gender ... A wide definition of "transsexual" for the purpose of the Act including pre-operative as well as post-operative transsexuals would be necessary to ensure adequate protection of all persons subject to this type of discrimination.[61]

In New South Wales such legislation has not been introduced.

Similarly, the package of federal discrimination legislation does not directly prohibit discrimination against transsexuals. It may be that transsexuals are afforded some protection through the *Disability Discrimination Act* 1992 (Cth), which proscribes discrimination on the basis of a disability, in a variety of areas. Section 4(g) of the Act defines "disability" as including a "disorder, illness or disease that affects a person's thought processes, perception of reality, emotions or judgment or that results in disturbed behaviour". It may be that transsexualism is a "disorder" as identified in the DSM III-R, and thus transsexuals, regardless of their operative status, are afforded some protection against discrimination. Of course, alternative diagnostic criteria may be utilised and in any event the DSM III-R classification is not finally determinative of the issue. It is noted that the use of the *Disability Discrimination Act* 1992 (Cth) would require a transsexual complainant to adopt the status "disabled", which may not be politically prudent or personally appropriate.

Another avenue of protection may be the *Sex Discrimination Act* 1984 (Cth), which prohibits discrimination on the basis of sex. A post-operative transsexual who is discriminated against on the basis of their chosen "sex" could fall within the ambit of the legislation, however a pre-operative transsexual may have greater difficulties. A liberal interpretation of this beneficial legislation may permit the protection of a pre-operative transsexual (such as SRA). Once the sex of the complainant has been established however, it would remain to be shown that the complainant was discriminated against on the basis of their sex, rather than on the basis of their transsexuality. At this stage, these avenues of redress are untested as a complaint has not been determined by the Human Rights and Equal Opportunity Commission under either the *Disability Discrimination Act* 1992 (Cth) or the *Sex Discrimination Act* 1984 (Cth).

An illustration of the deficiencies in the protection afforded by the sex discrimination provisions of the American legislation, and the need for specific legislative protection, occurred in 1984 in the case of *Ulane v Eastern Airlines Inc*,[62] Karen Ulane was dismissed from her employment as a pilot with Eastern Airlines Inc after she had undergone sex reassignment surgery. The Court rejected Ulane's argument that she had been dismissed on the basis of her sex and held that the relevant legislation did not proscribe discrimination on the basis of a "sexual identity disorder".

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61 The NSW Anti-Discrimination Board *Annual Report 1984/85*.

62 (1984) 742 F 2d 1081E.

A similar conclusion was reached by the Industrial Tribunal in the 1993 English case of *P v S and Cornwall County Council.*[63] Although the Tribunal found that P had been dismissed from her employment as a result of her proposed and subsequent sex reassignment surgery, the Tribunal held that this did not amount to discrimination on the basis of sex under the English legislation. The Tribunal has since referred the case to the Court of Justice of the European Communities. The argument to be tested is whether the English legislation is in contravention of a European Directive on the equal treatment of men and women in employment. This directive provides a wider proscription of sex discrimination which may include transsexuality. The European Court is yet to hear the case. On a factual level *P v S* highlighted the difficulties which may be experienced by both an employee and an employer when the transsexual, who is going through the life adjustment phase prior to surgery, presents (mid employment) as a person of the opposite sex.

(v) Legal Identification

In countries such as Sweden, Germany, Czechoslovakia, Greece, Italy, Holland, Switzerland and Finland the new "sex" of the post-operative transsexual is legally recognised. A consequence of which is that the transsexual can enter into a heterosexual marriage and can easily complete documents that require details of sex: for example banking, driving and insurance documents.

In New South Wales, under the *Registration of Birth Deaths and Marriages Act* 1973 (NSW), a transsexual is unable to obtain a birth certificate which reflects a different sex from that assigned at birth. In 1990 the New South Wales Law Reform Commission recommended amendments to the registration system to enable the provision of an extract of a birth certificate with a transsexual's reassigned sex.[64] Those recommendations were partly introduced so that although a transsexual's birth certificate will still record their sex as at birth, an extract of a certificate may be obtained which will record a new name and leave blank the portion of the certificate relating to sex. South Australia is the only Australian state to have introduced legislation specifically relating to transsexuality: *Sexual Reassignment Act* 1988 (SA). This legislation regulates sex reassignment surgery and enables a transsexual to obtain a document recognising their reassigned sex. Although the legislation is of limited legal effect, it is of perhaps wider psychological effect through its recognition of the special interests of a marginalised group.

Apart from the South Australian legislation, Australia has generally followed England in its restriction of amendments to birth records. In 1986 in the case of *Rees v The United Kingdom*[65] and in 1990 in the case of *Cossey v The United Kingdom*[66] transsexuals applied to the European Court of Human Rights for a declaration that the United Kingdom had breached International Covenants, which provided for the right to privacy and the right to marry and found a family, by failing to supply a birth certificate indicating the reassigned sex. The Court held that the United Kingdom had not breached any International

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63 Unreported, Industrial Tribunals, No 16132/93.

64 New South Wales Law Reform Commission, *Registration and Certification of Births and Deaths* (1988) at 50–53.

65 (1986) 9 EHRR 56.

66 (1991) 13 EHRR 622. Both *Rees* and *Cossey* are commented upon in JGS, "Human Rights—No Right of Reassigned Male to Female Transsexual to Official Registration as Female and to Contract Traditional Marriage" (1990) 65 *ALJ* 114.

Covenants and implicitly adopted the biological test of Ormrod J in *Corbett* in determining sexual identity.

5. *Conclusion*

Transsexuals fall into a nether world between the accepted female and male identities. The presence of transsexuality in a broad spectrum of cultures suggests that transsexuality is a part of the human condition and not a product of an individual society, although studies have been unable to locate any consistent biological or psychological determinant.

A transsexual's conviction that he or she is of the opposite sex is apparently unshakeable, and leads many to the drastic request for sex reassignment surgery. Whilst the inherent risks in surgery are high and the operation is physically traumatic, transsexuals consistently report that sex reassignment surgery was of therapeutic value.

In law, the transsexual has received a very limited level of recognition, which has largely been afforded only to those who have undergone sex reassignment surgery. Transsexuals have lobbied for legislation to proscribe discrimination and to provide proper recognition of a reassigned sex, but reform has been slow both nationally and internationally.