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From: Rachael Wallbank [Wallbanks@bigpond.com]
Sent: Thursday, 24 April 2003 4:45 PM
To: Legal and Constitutional, Committee (SEN)
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I represented Kevin and Jennifer in the proceedings *Re Kevin* before the Full Court of the Family Court of Australia which declared the common law of Australia in respect of the right to marry of Australians who have experienced the variation in human sexual formation called 'transsexualism'.

Re Kevin is undoubtedly an example of the Australian Legal System working at its best in that my clients, average people residing in the western suburbs of Sydney, were able to successfully conduct proceedings against the Attorney General for the Commonwealth of Australia and win. In so doing my clients were also able to affect the fundamental human rights of people who have experienced transsexualism in the United Kingdom and Ireland through the European Court of Human Rights and the law of the United States of America through decisions relying upon *Re Kevin*. (For further information see attached Paper presented by me at the recent NSW Neglected Communities Forum).

The intervention of the Human Rights and Equal Opportunities Commission in the appeal proceedings before the Full Court was of critical assistance in the successful conduct of the proceedings as was recognised by the Full Court in its decision delivered 21st February 2003. Simply put, the unique resources and expertise of the Human Rights and Equal Opportunities Commission enabled the Court to be efficiently informed of international and other human rights and Australian constitutional and historic facts, issues and considerations that would have been beyond the practical capability of my clients otherwise.

It is my understanding that the proposed legislation would make such intervention of the Human Rights and Equal Opportunities Commission subject to the approval of the Executive Government of the day and/or to limit or restrict such intervention. In my opinion, to so restrict and limit the independent power of the Human Rights and Equal Opportunities Commission would be to diminish the protection now afforded human rights in Australia and the fair working of the Australian justice system.

Certainly, *Re Kevin* is an example of a situation arising in the Australian justice system involving the need for the intervention of the Human Rights and Equal Opportunities Commission in proceedings against the Executive Government of the day where the proposed legislation would create at best a conflict of administrative interest if such intervention were made subject to the approval of the Executive Government and at worst a failure of the Australian justice system if such legislation effectively limited or precluded such intervention.

Yours faithfully,
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24/04/2003

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**The Legal Environment Following *Re Kevin*: New Perceptions And Strategies
For Effective Law Reform In Respect Of The Legal Rights Of People
Who Experience Variation In Human Sexual Formation And Expression**

**A DISCUSSION PAPER
PRODUCED FOR THE NEGLECTED COMMUNITIES FORUM
25TH FEBRUARY 2003 NSW PARLIAMENT HOUSE, MACQUARRIE
STREET, SYDNEY, AUSTRALIA**

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Introduction

1. We now begin to be able to perceive and explore the more subtle aspects of human sexual formation. We can now appreciate that biological sex is multi-dimensional and is ultimately determined by the sexual differentiation of the human brain; rather than that of body parts such as external genitalia¹. We now know 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') and their common law sex as determined by a court. Our society has now begun to understand transsexualism and some other traditionally known intersex conditions and to appreciate the life experience of the people who live with these conditions, whose brain sex differentiation is at odds, or incongruous, with the sexual differentiation of some or all of their body parts and assigned legal sex and that such conditions are nothing more or less than natural variations in human sexual formation. Thus, our culture can also begin to better understand the essential need of an individual who experiences transsexualism to affirm his or her innate sex by undergoing conclusive sex affirmation procedures and then to have his or her legal sex reassigned to secure the issue of an appropriate Birth Certificate in respect of identity and full uncompromised legal rights in the individual's reassigned sex. It is now clear that the need for uniform State and Territory legislative mechanisms guaranteeing individuals the right to reassign their legal sex in the circumstances of transsexualism and certain other traditionally recognised intersex conditions so as to gain uncompromised legal rights in that reassigned legal sex is an issue of fundamental human rights as well as a personal imperative;
2. We are now also able to perceive and explore the more subtle aspects of human gender expression and see that gender expression, rather than being a social constraint, is more naturally a rich aspect of human expression reaching across the whole range of gender possibilities; including those contrary to an individual's sex (or sexual identity) and including those expressions of gender outside or beyond the traditional male/female dichotomy. We now begin to be able to properly distinguish an individual's gender expression (or gender identity)

¹ 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 respected 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*").

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from the individual's sex (or sexual identity) and that both are different again from an individual's sexuality as indicated by the terms "homosexual", "bisexual" and "heterosexual";

3. I represented and appeared on behalf of Kevin and Jennifer² in the Family Court of Australia proceedings **Kevin and Jennifer –v- The Attorney General for the Commonwealth of Australia (2001)**; now cited as *Re Kevin : Validity of Marriage of Transsexual (2001) FamCA 1074 and (2001) FLC 93-087* ("*Re Kevin*") and in the subsequent appeal proceedings instituted by the Attorney General for the Commonwealth of Australia before the Full Court of the Family Court of Australia. Justice Chisholm's landmark decision, granting a Declaration of Validity of Marriage in respect of the marriage of a man of transsexual background, was delivered on 12th October 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, thoroughly reviewed the applicable evidence and legal issues and strongly affirmed the original decision of His Honour Justice Chisholm. In these proceedings my clients 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;
4. The human rights and legal impact of *Re Kevin* is not limited to Australia. On 11th July 2002, in the landmark decisions of **I –v- The United Kingdom** and **Christine Goodwin –v- The United Kingdom**, the European Court of Human Rights, quoting Justice Chisholm's decision in *Re Kevin* at length and with approval, determined that there had been violations of articles 8, 12, 13 and 14 of the Convention for the Protection of Human Rights and Fundamental Freedoms in respect of the legal status of people who had experienced transsexualism in the United Kingdom and, in particular, such people's treatment in the spheres of employment, social security, pensions and marriage. As a result of these decisions the United Kingdom is now preparing to introduce a program of legal reform, including the introduction of the right of people who experience transsexualism to have their legal sex reassigned, in order to remove such violations of human rights. On 22nd February 2003, only hours after the delivery of the decision of the Full Court of the Family Court of Australia in *Re Kevin*, Justice Gerard J. O'Brien in the Circuit Court of the Sixth Judicial Circuit In And For Pasco County, Florida in the United States of America in **The Marriage of Kantaras case number 98-5375CA 511998DR00537xxxxWS**, the marriage of Michael Kantaras, a man of transsexual background like Kevin, was declared valid for the first time in a court of the United States of America and Michael Kantaras was awarded the custody of his children who had been born to Mr Kantaras and his wife, Linda. Justice

² pseudonyms provided by his Honour Justice Chisholm to preserve my clients' anonymity

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O'Brien approved of, relied upon and quoted extensively from, Justice Chisholm's decision in *Re Kevin*. At page 673 of his decision Justice O'Brien says: "it is essential that *Kevin* not be given a mere "citation" but studied for what it represents in the law. It is one of the most important cases on transsexualism to come on the scene of foreign jurisprudence." The full texts of both decisions in *Re Kevin* can be accessed at the web site of the Family Court of Australia or at my website <http://www.wallbanks.com/> where you may also access my clients' pleadings in the case (made anonymous as required by the protections afforded by the Family Law Act) and links to the site of the European Court of Human Rights and the text of the decision in *Kantaros* as well as other related source material;

5. Thus, the judgements of Chisholm J and the Full Court referred to above in the case *Re Kevin* declare 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 and 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. Anything to the contrary in the English decision of *Corbett -v- Corbett (or se Ashley)* [1971] P83 ("*Corbett*") does not represent Australian law. It was the Commonwealth's contention in these proceedings 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*;
6. Of significance to both the judgments of Justice Chisholm and of the Full Court 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. Both Family Court decisions also found that an individual's sex was not to be solely determined by any one or only some of a person's sexually differentiated features such as gonadal, genital or chromosomal characteristics to the exclusion of a person's brain sex or psych and a person's lived or cultural sex. Of further significance 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". At the same time Justice Chisholm found, and the Full Court has affirmed, that like marriage, a person's sex is not a private matter alone to be subject only to individual assertion and that there is a cultural element to the legal assessment or determination of an individual's sex. I was determined in my presentation of the my clients' case in *Re Kevin* to put my clients' claim to be entitled to be legally married, and the husband's claim to be a male and a man, as justifiable and understandable demands for the fulfilment of fundamental human rights, rather than a request for socio/legal compassion or charity;

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7. Of chief concern now is that future legislative reform after *Re Kevin* results in people who experience variation in human sexual formation being accorded the reasonably exercised legal right to have their legal sex reassigned with full and unconditional equality of legal and civil rights in that reassigned sex. Of equal importance is that the same process of legal reform should ensure that all people, including transgender people, are legally able to express gender along the whole of the possible gender continuum, including contrary to their sex or sexual identity, free from fear and harm. People should not be obliged to identify as a member of a particular category of human being in order to access such fundamental rights and protections.
8. It is this more subtle but clear perception and recognition of the fundamental differences of legal interests and needs existing between different but associated minority peoples within our culture, in this Forum called Transsexuals, Transgender and Intersex, which will allow for the fashioning of clear, non-discriminatory and effective law reform that will serve rather than hinder the rights and liberty of the members of these neglected communities;
9. In taking this brief introductory look at the case *Re Kevin* and the future of law reform in respect of these neglected communities, one must be careful not to forget perhaps the most neglected community of all: the loved ones and families of the people who populate these neglected communities. It is ironic but instructive that, although without Jennifer the case of *Re Kevin* would have been impossible (and not just for her presence, but her insightful and enthusiastic involvement and support), her pseudonym is omitted in the formal short form citation of that case. Perhaps the most fair and accurate way to reflect the true associated shame, neglect, suffering and joint struggle experienced by these loved ones and families is to consciously include them as part of us when we refer to our neglected communities. The number of Australian people affected by the issues discussed in this paper is considerably more than the unaffected population would imagine;
10. It is also easy to overlook the very real fact that the legislative law reform that is the focus of this Paper, namely law reform in New South Wales and uniform State legislation throughout Australia, deals with two quite different aspects of legal rights:
 - 10.1 The right to have one's legal sex reassigned and thereby obtain full and unconditional equality of legal and social rights in society as a member of that reassigned sex; and
 - 10.2 The right to express gender contrary to one's legal sex and otherwise without suffering discrimination and persecution.
- 11 Further essential consequential issues of these two heads of legislative legal reform arise: the conditions to be placed upon the right of have one's legal sex reassigned, the right of people who experience transsexualism and other

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conditions arising from natural variation in human sexual formation to undergo the medical treatment consequent upon such conditions funded by the state and to be recognised and appropriately accommodated and protected when detained in institutional systems such as hospitals and prisons. As a result of the internal personal and external social conflict which it creates, transsexualism is a life threatening condition. Thus, sex affirmation treatment (being those hormonal and surgical procedures also described as sex reassignment treatment) should not be withheld from people diagnosed as experiencing transsexualism merely because they are being detained in prison or in other state institutions or because they do not have the money to fund such medical treatment for themselves. Again, I trust that we are now attaining the depth of appreciation of the predicament of people who experience natural variation in human sexual formation such as transsexualism sufficient to see that to guarantee people who experience these conditions access to medical treatment and protection is a matter of fundamental human rights upon which their lives depend; rather than merely issues of social justice or compassion.

- 12 Law reform affecting the determination and differentiation of person's legal sex fundamentally affects and concerns the whole society. Such law reform, addressed with the particular interests of a minority community or communities in mind, must be able to be generally accepted and trusted by the greater community in which it takes place in order to be unconditional and effective law. The fact is that the determination of an individual's legal sex is the concern of the whole society and must provide for a certainty and clarity of identification in one sex or the other. After all, it is the society's acceptance of an individual's legal sex that provides for the security and certainty of sexual identity that is the goal of the reassignment of legal sex. It is for these reasons that I believe the statement of the law as per *Re Kevin*, to the effect that a recognition of an individual's right to effect a reassignment of the individual's legal sex is dependent upon the individual first undergoing conclusive sex affirmation treatment (also called "sex reassignment") in order to bring the individual's body into harmony with the individual's innate or brain sex, is the correct approach. I submit that it is the only approach that can result in the acquisition of unconditional equality of civil and legal rights in the reassigned legal sex.
- 13 Anti-discrimination legislation is another matter. While the aim of such legislation is protection, such legislation can easily be misconceived and serve to create and/or perpetuate confusion which detracts from the ability of such legislation to ease or eliminate discrimination and promote human rights. Even a casual acquaintance with the issues associated with the anti-discrimination and births, deaths and marriages legislation affecting these neglected communities in New South Wales, and other States and Territories in Australia, and a quick perusal of the papers presented at this Forum (including the Anti-Discrimination Board of NSW's own background paper) demonstrate the considerable conflict and confusion of language, legislative intent and effect experienced by the various communities and people the subject of that legislation. If I were to identify the central difficulty and disaffection evidenced by the papers, and my own

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experience of such legislation both as a woman of transsexual background and as a lawyer, it would be the requirement that people identify with clumsy and inaccurate classifications in order to gain the limited protections and legal rights sought to be afforded by the legislation. The fact is that the births, deaths and marriages legislation in New South Wales places unreasonable conditions upon an individual seeking to effect a reassignment of the individual's legal sex and fails to deliver unconditional equal civil and legal rights to people who have their sex legally reassigned. The fact is that both the anti-discrimination and births, deaths and marriages legislation in New South Wales call me transgender when I am not; incorporating a monolithic usage of the word "transgender" that robs the words "transsexual/transsexualism" and "transgender" of their distinct and useful meanings. I certainly mean no criticism of any of the parties to the creation or maintenance of the current legislation by these comments. There is no doubt that our understanding of the aspects of humanity under discussion, and their legal implications, have experienced wonderful and dramatic evolution since the New South Wales births, deaths and marriages and anti-discrimination legislation affecting transsexualism and transgender were introduced. It is not too surprising that at the time the very different aspects of humanity, called transsexualism and transgender, were confused. But we have experienced that evolution and we now have the benefit of the evidence adduced in, and the careful consideration of the legal and social implications of transsexualism, in particular, and variation in human sexual formation and our systems for the assignment of legal sex, more generally, as contained in the decisions in *Re Kevin*. It is now time, in the interests of fundamental human rights, to introduce fresh legislation in this State to deliver the quality of legal rights and protections commensurate with our new depth of appreciation and capacity.

- 14 The decisions of Justice Chisholm's and Chief Justice Nicholson and Justices Ellis and Brown in *Re Kevin* powerfully, and I submit conclusively, evidence and establish the benchmark of Australian legal and community understanding and acceptance of Australians who have experienced the natural variations in human sexual formation called transsexualism and related intersex conditions as being as humane and as well-informed as any other culture on the planet. It is now time to see such humane Australian common law recognition of the fundamental legal rights of people who experience transsexualism and related intersex conditions reflected in clear and unconditional statute throughout Australia. It is correspondingly appropriate to see similarly clear and unconditional statute throughout Australia dealing with the rights of citizens to free gender expression. Such law reform, to be clear, accepted and effective will, of necessity, cease to characterise people and their legal rights using problematic terminology and labels, but will rather seek to recognise and establish the human rights of people who experience difference or variation in human sexual formation and gender expression based upon faithful appreciation of their actual and distinct attributes, needs and legal rights.

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Terminology

15 This Paper deals with biological, cultural and legal matters which are the subject of a number of recent developments in the wisdom of medical science and law which have challenged accepted notions and enhanced our appreciation of variation in human sexual formation, the assignment of legal sex (“**legal sex**”) as well as the confirmation of predominant biological sex or brain sex in the circumstances of incongruent legal sex (“**sex affirmation**”) and the confirmation of the Full Court of the Family Court of Australia as to how an individual’s sex is determined for the purposes of the *Marriage Act*, the *Family Law Act* and the Common Law (“**common law sex**”). In the circumstances it is helpful at this point to include a number of definitions and explanations of the terminology used throughout this Paper in order to clarify meaning³:

15.1 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 body⁴; such as gonads and external genitalia. 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 terminology and characterisation enabled or permitted mere physical characteristics of bodily formation, such as genital formation, to be given greater weight in determining an individual’s legal and common law sex than the individual’s brain sex;

15.2 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);

³ Some of the same or similar terminology is used in other Papers prepared for the Forum, and in particular the Paper of Mr Anthony Briffa, but are given significantly different definitions and meanings. In particular, I take issue with the definitions of transsexualism contained in Anthony’s Paper. It seems to me that such definitions of transsexualism are prone to confuse and result from an attempt to distinguish the condition of transsexualism from what are now called Intersex conditions. With the respect due to Anthony as an undoubtedly effective and enthusiastic advocate on behalf of his community, to the extent that the definitions of transsexualism contained in Anthony’s Paper could be perceived to describe transsexualism as a psychiatric or psychological malady or predicament in the *Corbett* tradition (rather than the biological predicament it has been so clearly shown to be by medical science and as has been so clearly recognised for the purposes of the law of Australia in *Re Kevin*), they are wrong and/or misleading. At the same time I acknowledge Anthony’s subsequent oral assurance generously provided to me that it was not his intention when drafting his Paper to say that transsexualism was anything other than a biological predicament and a natural variation in human sexual formation.

⁴ Sometimes called “phenotype”. Also see “Definition and Synopsis of the Etiology of Adult Gender Identity Disorder and Transsexualism” and the expert medical evidence in *Re Kevin* referred to in footnote 1.

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- 15.3 Australian society generally perceives and requires its members to be either male or female (“*cultural sex*”, “*gender expression*” or “*gender*”). An individual’s **gender** is that sex, male or female, to which that individual is generally perceived to belong by the other members of his or her society;
- 15.4 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 that is not the case. In fact, for people who experience transsexualism, this system for the first assignment of legal sex guarantees that they will be assigned to the wrong legal sex;
- 15.5 In Australia and elsewhere, when the sexually differentiated features of an individual’s body (and in particular the genitalia) are incongruous, or fail to provide a clear indication of the individual’s sex the individual is said to be (“*intersex*”, “*intersexual*” or “*intersexed*”). It is now accepted ‘best medical practice’ that where this condition is detected at or near birth then the assignment of that individual’s legal sex should be postponed until, or such assignment take 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;⁵
- 15.6 *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.⁶ For people who experience transsexualism the remedy for this predicament is rehabilitative sex affirmation treatment to 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. It is sometimes forgotten by those who confuse transsexualism with transgender, and consequently advocate that there should be no precondition of bodily reformation by sex affirmation treatment associated with the reassignment of legal sex or the recognition of

⁵ See the expert evidence adduced in *Re Kevin*

⁶ *Ibid.* and op cit “*Definition and Synopsis of the Etiology of Adult Gender Identity Disorder and Transsexualism*”

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common law sex, that people who experience transsexualism will undergo, and historically have undergone, 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. The Macquarie Dictionary defines **transsexual** as "one who has undergone a sex change operation".⁷ Medical science now recognises that transsexualism is a form of intersex;⁸ The Macquarie Dictionary defines **intersex** as "an individual displaying characteristics of both the male and female sexes of the species."⁹ 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. Clearly, 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 also important to note, in the context of the foundation of the fundamental human rights claims of people who experience transsexualism, that in all the many recent cases no expert evidence to the contrary to explain transsexualism has been able to be even put in evidence to Courts (let alone proved or accepted) by the well resourced Respondent governments in both Australia and the United Kingdom when opposing the human rights applications of people who have experienced transsexualism. Reading between the lines, one could suggest that the descriptive problem causing offence to the Intersex community when transsexualism has been described as a form of intersex or type of intersex condition has arisen with the adoption by the Intersex community of the more general term "intersex" in preference to the more specific term "hermaphrodite" in the very successful public relations and education campaign conducted by that community. **Hermaphrodite** is defined by The

⁷ 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 1858

⁸ *op cit Re Kevin* as per footnote 4. 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.";

⁹ *op cit* The Macquarie Dictionary, 2nd ed, at page 920

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Macquarie Dictionary as "a person with male and female sexual organs or characteristics."¹⁰ A much more precise term. It would be impossible to describe transsexualism as a form of hermaphroditism. At the same time, one can also discern the understandable reluctance of the Intersex community to risk sacrificing a hard-won positive and distinct public image by association and possible confusion with transsexuals and transsexualism; especially as the transsexual community (as it is) has been strikingly less successful in rehabilitating the terms "transsexual" and "transsexualism" and clearly communicating the meaning of those terms to the public mind while adequately distinguishing such terms from transgender;

15.7 When an individual who has experienced transsexualism undergoes the medical program of hormonal and/or surgical treatment undertaken so as to conclusively alter the sexually differentiated features of the body so as to bring it into better harmony with the individual's brain sex then the individual has undergone "*sex assignment/re-assignment surgery*", "*a sex change*" or "*sex affirmation treatment*" ("**sex affirmation**"). 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;¹¹

15.8 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).¹² Transsexualism is readily distinguished from "*transgenderism*" or "**transgender**".¹³ Transgender is a behavioural or psychological phenomenon where an individual's gender expression (gender identity) is at odds with their brain sex (sexual identity). For transgender people no or little incongruity or

¹⁰ Ibid. at page 825

¹¹ 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).

¹² See expert evidence in *Re Kevin*.

¹³ 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 was never useful or accurate. The word "transgender" was, in fact, coined by cross-dresser Virginia Prince to distinguish between someone who had no desire to change or alter either body or legal sex but wished to live out a gender expression contrary to their sex from a person who experienced transsexualism. 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.

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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. Consequently the transgender individual does not need or require the legal right to reassign his or her legal sex. Transgender individuals express gender contrary to their sex without a desire to change their sex.¹⁴ Many people do the same thing on an occasional basis.

15.9 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 the communities of people who 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 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. Given the increasing emergence of publicly identifiable individuals who are prepared to publicly own their transsexualism and the rehabilitation of that identity through the deeper appreciation and understanding that now begins to exist, I am optimistic that in the foreseeable future a true community of people who experience transsexualism capable of a clear and distinct community voice will emerge. Of course, an essential factor in facilitating this process is law reform; both in its common law aspect as per *Re Kevin* and in its legislative aspect as per State and Territory anti-discrimination and births, deaths and marriages legislation adequately recognising the distinct legal interests of each of the transsexual, Intersex and transgender communities;

15.10 In the meantime, in respect of the terms "transsexualism" and "transgender", there is now no longer any justifiable reason or excuse to fail to do justice to either the transsexual or the transgender communities

¹⁴ For 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.

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by continuing to fail to distinguish between these two significantly different aspects of human experience.

15.11 There seems also to be no justifiable reason for the transsexual community not to respect the sensitivity and understandable goals of the Intersex community so as to refrain from the unnecessary use of the term intersex in relation to transsexualism without seeking to distinguish the two distinct communities or in the absence of the need to identify transsexualism as a form of intersex condition in order to clarify its own meaning. At the same time I am conscious that in many aspects of legislative reform the interests of people who experience transsexualism and people who experience intersex conditions requiring the reassignment of legal sex are identical. I am, of course, open to suggestion as to other and better ways of seeking to honour both communities;

Transsexualism, Australian Common Law and *Re Kevin*

- 16 *Re Kevin* established a method for the subtle determination of a person's common law sex having regard to aspects of biological sex, including evidence of the sexual differentiation of the human brain, whether a person had undergone sex affirmation treatment - being conclusive hormonal and/or surgical treatment to harmonise the sexually differentiated features of the person's body with the person's brain (confirmation of transsexualism and decision to affirm brain sex), as well as a person's lived, cultural sex or gender (perception by others);
- 17 In paragraph 3 of his decision Justice Chisholm acknowledged that "...the court has had the advantage of extremely detailed and scholarly presentations on each side, as well as evidence from some of the most distinguished medical experts in the world in this field. I am very grateful." This observation was affirmed by the Full Court.
- 18 *Re Kevin* also determined that the words 'man' and 'woman' when used in legislation unless otherwise indicated have their ordinary everyday meaning according to Australian usage and that such meaning includes so called "*post-operative transsexuals*". Specifically, *Re Kevin* established that there are circumstances in which a person who at birth had gonads, chromosomes and genitalia indicative of one sex, could nevertheless be legally of the other sex. Justice Chisholm also found, and the Full Court affirmed, that on the balance of probability, the overwhelming scientific evidence as to the physiological basis for a person's core sex identity, or brain sex, was to be accepted. In paragraph 13 of his Judgement Justice Chisholm notes that there have traditionally been problems in respect of word usage and understanding concerning people who have experienced transsexualism in that for some the word "transsexual" may suggest a sexual *transition* or a passing from one sex to other. His Honour noted that while that word may reflect the physical changes to the individual's body

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associated with surgery and/or hormonal treatment, it does not convey the fact that transsexuals say that they have always experienced themselves as belonging to the other sex before, as well as after, sex affirmation treatment. The Full Court also specifically affirmed this passage of Justice Chisholm's decision.

- 19 Notwithstanding the European Court of Human Right's decisions in *I -v- The United Kingdom* and *Christine Goodwin -v- The United Kingdom*, there is some concern that confusion between transsexualism and transgender and their respective legal needs in the United Kingdom may well result in legislation that, while making it possible for people to have their legal sex reassigned without the requirement of undergoing conclusive sex affirmation treatment (and thus permitting people who have not experienced either transsexualism or Intersex to effect a reassignment of their legal sex), will require such people's applications for legal sex reassignment to be approved by a board or boards of presumably 'wise persons'. At the same time, it is already apparent that the price of such misconceived reform of the system for the determination of legal sex in the United Kingdom will be the loss of equality of legal and social rights, and conditions or restrictions on the legal status of the persons whose sex has been legally reassigned pursuant to such legislation. I understand such proposed restrictions to include even restrictions on the type of employment such people can undertake in their reassigned legal sex. I trust that such misconceived and inequitable legislative reform will never be contemplated in Australia. In my opinion an individual's personal affirmation of sexual identity from time to time (be it a month, a year or otherwise) confirmed only by the assessment of a board of 'wise persons' while the individual continues to retain a body fully able to function in the individual's originally, or first, assigned legal sex, will never fulfil the purpose or ends, or attain the acceptance and recognition, necessary to obtain the acceptance of the vast majority of the culture sufficient to deliver true equal legal and social rights for people who have their legal sex reassigned. As I say otherwise in this Paper, it is my submission that the proposal for legal sex reassignment, based on assertion of sex identity and lived sex alone, is only of peripheral relevance, in any case, to the predicament of people who experience transsexualism. The only academic criticism I have heard of *Re Kevin*, is the proposition that it is a retrograde step in "transgender jurisprudence" to link a person's right to have their legal and/or common law sex reassigned to biological considerations such as brain sex or to cultural considerations, such as whether or not a person is perceived to be of one sex or the other. For the reasons referred to above, and otherwise in this Paper, I confirm my view that this criticism is fundamentally misconceived upon the bases that the judgment in *Re Kevin* concerns transgender people or that for people who experience transsexualism conclusive sex affirmation treatment is only undergone in order to effect a reassignment of common law and/or legal sex and is a burden that should not otherwise be imposed by the law. As I discuss otherwise in this Paper, people who experience transsexualism undergo conclusive sex affirmation treatment, if medically and financially able, for its own sake and the sexual harmony of mind and body that it brings. It is a personal imperative. At the same time, and also as I discuss otherwise in this Paper, a reassignment of legal sex does not take place

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in isolation from the rest of the culture but has implications for the determination of sexual identity for the whole of the culture. Any system for the determination, and reassignment, of legal sex that defies the understanding of the culture as a whole will not gain the acceptance of that culture essential for the fulfilment of the its purpose.

- 20 *Re Kevin* is of direct relevance to a consideration of the current operation of various statutes concerned with transsexualism, either expressly or by implication, throughout Australia and the reform of that legislation so as to better serve the needs of people who have experienced transsexualism and other forms of natural variation in human sexual formation who require a reassignment of legal sex. The extensive expert and lay evidence in the case and the Courts' discussion of that evidence, both in the first instance and an appeal, together with the resultant findings of fact and law, illuminate both the predicament of transsexualism itself as a natural variation in human sexual formation and the fallible regime whereby sex is first determined and assigned for the purposes of birth certificates as a record of legal sex and identity.
- 21 By way of example, I refer to the following passages in Justice Chisholm's judgement all of which have been specifically affirmed by the judgment of the Full Court of the Family Court of Australia:
- 21.1 **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 nay contrary evidence called".
- 21.2 **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."
- 21.3 **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".
- 21.4 **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".

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- 21.5 **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".
- 21.6 **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".
- 21.7 **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)".
- 21.8 **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".
- 21.9 **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. "

The Assignment And Reassignment Of Legal Sex And Registers Of Identity (Birth Certificates And State Births, Deaths And Marriages Legislation)

- 22 The statutory provisions introduced sometime ago in both South Australia and New South Wales were conceived without the benefit of the consideration of *Re*

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Kevin. Subsequent legislation in other States, developing from and/or reproducing that legislation is now similarly outdated by *Re Kevin*. It is submitted that *Re Kevin* is a decision which comes to grips with the most recent, relevant and persuasive medical science and law affecting the issues before the States in respect of the provision for the right of an individual to have their legal sex reassigned; particularly in respect of the relevance of the birth event with regard to the determination of a person's sex. It is submitted that *Re Kevin* demonstrates a deep appreciation of the subtlety of, and variation, in human sexual formation and of the limitations of external genitalia as an indicator of the sex of a human being and hence the fallibility of our use of external genitalia as the determinant of an individual's sex at or near the birth event in respect of people who experience transsexualism as well as some of the Intersex community.

- 23 Professor Milton Diamond and eminent Australian Pediatric Endocrinologist, Dr. Jan Lesley Walker, gave evidence in *Re Kevin* that transsexualism was properly considered to be a form of intersex and that, like some other conditions derived from variations in human sexual formation, the condition of transsexualism is not able to be diagnosed at or near the birth event, but is only able to be detected and subsequently diagnosed later in life once the individual concerned can provide an indication of her or his innate or brain sex as being incongruent with her or his other sexually differentiated bodily characteristics (including external genitalia) and consequently the legal sex first assigned to the individual.¹⁵
- 24 The clear and uncontested evidence is that an individual's innate or brain sex or core sex identity cannot be altered.¹⁶
- 25 Paediatric endocrinologist Dr. Jan Lesley Walker concludes that where incongruity of sexually differentiated bodily features (phenotype) is detected prior to a child's sex being first legally assigned, it is now considered best practice to refrain from carrying out any surgical or hormonal intervention in respect of the child, or assigning a legal sex to the child, prior to the child being able to directly or indirectly indicate their core sex identity or brain sex. Thus, from a scientific and medical viewpoint, it is an individual's core sex identity or brain sex, inalterable or "hard-wired", which ultimately determines an individual's sex in all circumstances where it is found that any variation or incongruity in human sexual formation has occurred.
- 26 It is the sex indicated by a child's external genitalia alone that are relied upon for the purpose of determining "*the sex...of the child*" and "*the child's sex*" for the purposes of all State birth, deaths and marriages legislation in the first instance (or at or near the birth event). While it is not specified, the common sense presumption can be inferred that this regime for the assignment of a child's legal sex, based upon a casual inspection of the child's external genitalia alone, has

¹⁵ see reference to expert evidence cited in *Re Kevin* at footnote 8.

¹⁶ *Ibid.*

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developed because it is accurate and works well for the great majority of people whose external genitalia accurately indicate their core sexual identity or brain sex.

- 27 It has now become clear that this standard regime for the assignment of legal sex by the recording of that sex by the Registrar at or near the birth event based upon an inspection of the external genitalia of an individual utterly fails those people who experience transsexualism and others who experience certain types of traditionally recognised intersex conditions.
- 28 As the individuals concerned are infants at the time of the birth event, given the very nature of the predicament they experience, it is presently simply impossible to detect or prevent this error in the first assignment of their legal sex taking place; such error being only discoverable at such time when they are old enough to express and then independently affirm their brain sex as their predominant sex.
- 29 Thus, for a number of Australians the standard regime for the assignment of legal sex based upon the appearance of external genitalia at or near the birth event fails because the external genitalia of those individuals as infants do not correctly indicate their innate or brain sex resulting in an error in the particulars of the individual's sex as first reported to the appropriate Registrar of birth, deaths and marriages for the State and the consequent mistake in the first assignment of the individual's legal sex as recorded in the relevant Register.
- 30 While representing a small number of Australians, the individuals concerned, namely people who experience transsexualism and several other classically or traditionally termed intersex conditions, suffer severe, and often critical, life predicaments and experience family, cultural, medical and legal hardship in the process of their assertion of their sex arising simply because of the failure of their external genitalia to indicate that sex at or near the time of their birth event and the failure of the system which determines legal sex to take that difference into account.
- 31 In these circumstances, it is an entirely proper and consistent application of the powers granted pursuant to the various births, deaths and marriages legislation and in accordance with the principles for the determination of an individual's common law sex in Australia as established by *Re Kevin*, to actually facilitate the correction of the record of an individual's sex where the medical evidence available to the Registrar confirms that an individual has chosen to affirm the individual's innate or brain sex by undergoing conclusive sex affirmation treatment so as to bring the individual's sexually differentiated body into better harmony with their innate or brain sex. There should be no distinction between the legislative process for the reassignment of an individual's legal sex applicable to people who have experienced transsexualism and people who have experienced other traditionally recognised intersex conditions.
- 32 Similarly, it can now be seen that the right of an individual to effect a reassignment of their legal sex in these circumstances is a fundamental human

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right. The States of Australia should also recognise that as Australia proudly stands at the forefront of the legal recognition of the predicament and rights of people who experience transsexualism and Intersex, there are Australians and residents of Australia or experience transsexualism and Intersex, born in other countries which do not provide for a reassignment of an individual's legal sex, for whom the right to have their legal sex reassigned is no less a matter of fundamental human rights.

Proposals For Legislative Reform In Respect Of The Correction/Reassignment Of Legal Sex

- 33 Given the fresh appreciation of the predicament of people who experience the condition of transsexualism enabled by the advances in medical science which have occurred over the last ten years, and which are now incorporated in the Common Law of Australia by the decision of *Re Kevin*, it is incumbent upon the Federal and all State Governments of Australia to administer the legislation that exists in such a way as to facilitate the human rights of such people and others who similarly experience natural variation in the sexual formation as human beings so as to minimise the suffering, embarrassment and harm that such people experience as a result of their difference. Our State and Federal Governments should also promptly act to introduce uniform legislative reform to achieve the same ends.
- 34 Such legislative reform in respect of the correction or reassignment of an individual's legal sex need not include any classification or quasi medical description of the individual concerned. Such legislation need only confirm the right of an individual who has undergone conclusive sex affirmation treatment to have that individual's legal sex reassigned and the consequent issue of a new birth certificate showing the individuals reassigned sex with no indication of amendment. The fact of an individual having undergone conclusive sex affirmation treatment should be simply proven by medical evidence to that effect. The legislative requirements in respect of such medical evidence should permit a broad and compassionate discretion for the medical practitioner in certifying that an individual has undergone conclusive sex affirmation treatment in special circumstances where the medical practitioner is satisfied that the life of the individual concerned would be threatened if the individual underwent regular conclusive sex affirmation treatment. Such legislation should confirm that an individual who has had his or her legal sex reassigned is entitled to the unconditional legal status of the reassigned sex. Such omnibus style legislation should also make provision for the issue of a form of certificate of identity, containing the same particulars as appear on a birth certificate, so that people who cannot effect a reassignment of their legal sex in their country of birth may still be granted the fundamental human right in Australia of a State or formal record of their identity which accurately reflects the current state of their legal sex as it would have been determined had they been born in Australia.

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- 35 The adoption by New South Wales and the other States and Territories of the Commonwealth of Australia of uniform legislation incorporating the principles of practice and procedure in respect of the rights of people to effect a correction or reassignment of their legal sex as suggested in the preceding paragraph would enable the Registrars of each State and Territory to properly honour both the purpose of the various births, deaths and marriages legislation and the proper function of the respective Registers in providing a record of identity of individuals that is in conformity with the most reliable information available to each Registrar of the registrable events and the particulars which it seeks to record and evidence.
- 36 Not only does this approach to the interpretation of the Registrar's legislative powers and obligations in respect of people who experience the predicament of transsexualism and of the births, deaths and marriages legislation make sense, both legally and humanely, but it brings the Registrars' practise and the performance of the legislation into conformity with the Common Law of Australia. It also removes possible inconsistency between the Registrars' response to requests to correct the record of the Register from people who have experienced transsexualism and traditionally recognised Intersex conditions.
- 37 Such an approach would also serve to avoid the possible loss of apparent authority, control and certainty of the Registers and legal and human rights embarrassment for the various State and Territory Governments that a series of Court imposed corrections to the Registers could bring. Such legal proceedings may well arise in the event that the Registrars were obliged to continue imposing unreasonable conditions upon the rights of people to have the record of their legal sex reassigned so as to accurately represent the truth of their identity.
- 38 Individuals who experience transsexualism and other similar traditionally recognised Intersex conditions are entitled to be treated with the respect and appreciation due to them as the female and male citizens they know themselves to be and are. In that recognition is the consequential recognition of their entitlement to have their needs in respect of the correction of their particulars as to their sex as recorded and maintained by the State (and hence re-assignment of legal sex) met throughout Australia.

Anti-Discrimination Legislation

- 39 My proposal in respect of law reform affecting anti-discrimination legislation in relation to the communities of people who experience transsexualism, Intersex and transgender and their loved ones and families involves a simplification of the current legislative regime. Simply put, such legislation should prohibit and appropriately punish discrimination and vilification against a person, or a partner or spouse or member of the family of a person, who may express gender contrary to their legal sex, who is undertaking sex affirmation treatment or who is a person

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who has had his or her legal sex reassigned for the sake, or in respect of, any such actions.

Other Matters Requiring Urgent Reform

- 40 Another matter of reform requiring urgent attention is the complimentary essential right of people who experience variation in human sexual formation to have sex affirmation treatment funded by the State. The health and life of people who experience transsexualism and some other traditionally recognised intersex conditions is absolutely dependent upon such people being able to undergo sex affirmation treatment. A determination of such an individual's Common Law sex and right to marry in the individual's reassigned sex is fundamentally dependent upon the individual having undergone sex affirmation treatment. The fundamental human right to effect the correction or reassignment of an individual's sex is also fundamentally dependent upon the individual having undergone sex affirmation treatment. It is my submission that it must also be a fundamental human right for people who experience variation in human sexual formation, such as people who experience transsexualism and other traditionally recognised intersex conditions, to be able to rely upon public funding in respect of the medical costs associated with sex affirmation treatment. While the numbers of people involved are comparatively small, the medical costs of such treatment to the individual can be prohibitive. Such prohibition can and does lead to social and physical deprivation and death. There is no reasonable argument that I can conceive of to deny such healthcare and medical funding given the evidence and findings of *Re Kevin*.
- 41 The ready granting of recognition of the condition of transsexualism amongst prisoners and other persons resident in various State institutions and the creation of clear guidelines and rights enabling such people to be able to access medical treatment, including sex affirmation treatment, in respect of the condition of transsexualism must surely be another fundamental human right to be immediately recognised as a result of *Re Kevin*. The consequent fundamental human right in respect of such people is that they should be accommodated in such institutions in accordance with their own safety and their affirmed sex. The difficulty in such situations arises as a result of the forced confinement of such persons in the context of the population of the institution. In such circumstances it is my submission that upon an individual being diagnosed as experiencing the condition of transsexualism, and other similar intersex condition requiring similar recognition, and agreeing to undertake sex affirmation treatment, the individual should be accommodated in accordance with their own safety and their affirmed sex. I do not pretend that the formulation of the detailed policy in respect of this issue is easy or 'black and white'. For example, while it would be appropriate to house a female experiencing transsexualism (less appropriately or humanely called a male-to-female transsexual) in a female prison during the course of her sex affirmation treatment, would it be inappropriate to house a male experiencing transsexualism in a male prison during the course of his sex affirmation treatment? At the same time one must be reluctant to encourage isolating

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segregation of people in institutions because of their transsexualism. This area of reform, in particular, requires further careful consideration in order to balance human rights and personal safety considerations. What is undoubted is that people die and/or suffer unconscionable harm and wrong in such institutions as a result of their transsexualism notwithstanding the genuine efforts of many people to institute and manage the issue of transsexualism in prison and other institutions. It seems to me nevertheless to be a fundamental human right of people who are undergoing sex affirmation treatment and people who have undertaken sex affirmation treatment to be housed in the institution or prison consistent with their affirmed sex. Once so accommodated, the issue of the individual's safety can be dealt with. It seems to me that this approach is consistent with *Re Kevin*, the Common Law of Australia and proposed State and Territory legislation for the reassignment or correction of legal sex and anti-discrimination.

Conclusion

- 42 Much of the confusion and uncertainty associated with the efforts of legislators in New South Wales and elsewhere to grant sex correction/re-assignment rights and anti-discrimination protection to people who experience variation in human sexual formation and expression has been caused by the intrinsic difficulty of facing that task for legislators, and the interest group representatives upon which such legislators have relied, given the absence of a clarified and unified statement of medical science and the law in respect of this human condition. This predicament has resulted in legislation that seeks to perform the virtually impossible legislative act of granting human rights and providing anti-discrimination protection and remedies based on a clumsy quasi-scientific classification of human beings. This attempt has never been successful and continues to frustrate, disappoint and deny human rights to the neglected communities it seeks to serve and assist. Such legislation can now be clearly seen to be misconceived in its failure to distinguish between the legislative needs of people who experience transsexualism (and Intersex) and those described as transgender. In respect of transsexualism (and Intersex) there is the fundamental need for the legal recognition of the right of the affected person to be able to have a reassignment of their legal sex in order to correct the error of initial assignment of sex caused by the nature of their biological predicament. Transgender expression, on the other hand, demands the recognition of the fundamental human right to express gender along the whole of the possible gender continuum; including an expression at odds, or incongruous with, an individual's legal sex. These interests and needs are factually different and legally distinct.
- 43 The opportunity now exists for New South Wales to take advantage of the new more subtle perceptions of transsexualism, Intersex and transgender so as to readily consider and introduce 'model' legislative and to take a leading role in establishing uniform legislation in respect of transsexualism, Intersex and

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transgender rights throughout Australia based directly upon the clear legislative needs of individuals rather than their classification.

- 44 The propositions and proposals which I have propounded and discussed in this Paper in respect of people who have experienced natural variation in human sexual formation and gender expression are now well founded in medical science and the law of Australia as well as common humanity. Democratic government at its best protects, empowers and facilitates those members of its constituency least able to do so themselves so as to be able to live full and useful lives within that democracy on the most equal terms possible with the rest of the constituency. It would be an act of democratic government at its very best to assist the members, families and loved ones who comprise the neglected communities of the people who experience transsexualism, Intersex and transgender to live whole and worthwhile lives less encumbered by their difference than they have been but for the legislative reforms now sought and appropriately included as the human beings of the sex they know themselves to be and free to express gender without fear in our society. In the great mystery of things, of course, such actions by government, expressing the best of the people they serve, enhance and make whole the existence of us all.

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