

The Precarious Position of the Transsexual Rape Victim

The offence of common law rape is gender specific. Where the victim is a male to female transsexual, this constituent element of the offence is likely to assume prime importance in any trial. That is to say, acquittal or conviction is likely to rest largely upon a determination as to the victim's sexual identity.

During the last decade the law of rape has undergone substantial change in Australia. In New South Wales and Western Australia it has been repealed¹ and replaced with the more encompassing offence of "sexual assault"² or "sexual penetration".³ These new offences have served to treat more seriously, violent sexual behaviour lacking the orifice/object specificity of common law rape. In Victoria, South Australia and Tasmania the term rape has been retained but its definition has been extended to produce substantially the same effect.⁴

These changes are to be welcomed. They treat seriously a variety of sexually violent behaviour including non-consensual fellatio and anal penetration of every kind. However, like common law rape the new more flexible constructs, with the exception of Victoria,⁵ fail to close an important loophole with respect to transsexuals.

Where the facts which constitute the offence describe a common law rape scenario, and where the victim is a male to female transsexual the prospect of conviction is immediately problematised. By way of example consider section 61I of the *Crimes Act 1900* (NSW). It defines "sexual assault" as sexual intercourse without consent. Section 61H(i) defines "sexual intercourse" to mean amongst other things:

- (a) sexual connection occasioned by the penetration to any extent of the genitalia of a female person ... by:
 - (i) any part of the body of another person; or
 - (ii) any object manipulated by another person.

Where the victim is a male to female transsexual however, conviction presupposes the successful negation of assertions that the victim is not a female person and/or that she does not have female genitalia. In Western Australia, depending upon the fact situation, this problem might be overcome as that state's legislation defines "sexual penetration" to include the penetration of "the urethra of any person".⁶ The difficulty could be solved by an amendment along Victorian lines defining "vagina" (or "the genitalia of a female person") to include a "surgically constructed vagina".⁷ Alternatively, legislation might be in-

1 *Crimes (Sexual Assault) Amendment Act 1981* (NSW); *Acts Amendment (Sexual Offences) Act 1992* (WA).

2 Section 61I, *Crimes Act 1900* (NSW).

3 Section 325, *Criminal Code Act 1913* (WA).

4 Section 38, *Crimes Act 1958* (Vic); s48 *Criminal Law Consolidation Act 1935* (SA); s185 *Criminal Code Act 1924* (Tas).

5 Section 39 of the *Crimes Act 1958* (Vic) defines "vagina" to include a "surgically constructed vagina". This definition was added by s3 of the *Crimes (Sexual Offences) Act 1991*.

6 Section 319, *Criminal Code Act* (WA).

7 Section 39, *Crimes Act 1958* (Vic).

roduced affording post-operative transsexuals full legal recognition of their sexual identity. So far within Australia only the South Australian parliament has been willing to take this step.⁸

In the meantime, in those states where a gap in the law exists, the successful prosecution of any offence amounting to common law rape will require a determination as to sexual identity favourable to the transsexual victim. The likely outcome of such a determination is at best unclear given that the few Australian cases to emerge on point have generated both substantive and procedural inconsistencies.

Prior to 1988 there was no decision concerning the sexual identity of transsexuals in Australia. In that year the New South Wales Court of Criminal Appeal decided the case of *R v Harris and McGuiness*.⁹ Harris was a post-operative male to female transsexual while McGuiness was a pre-operative male to female transsexual. They were both charged with having contravened section 81A of the *Crimes Act 1900* (NSW) which provided that "whosoever being a male person, in public or private, commits, or is party to the commission of, or procures or attempts to procure the commission by any male person of, any act of indecency with another male person shall be liable to imprisonment for two years."

In arriving at its decision the court rejected the biological formula (sex is determined at birth) stipulated in the landmark decision of *Corbett v Corbett*¹⁰ and affirmed in *R v Tan*¹¹ preferring instead the approach of the American court in *Re Anonymous*¹² and *MT v JT* (sex is determined by psychological and anatomical harmony).¹³ The court held that a male to female transsexual who has undergone full sex reassignment to align her genital features with her psychological sex is to be regarded as a female for the purposes of the criminal law. Accordingly, Harris fell outside the ambit of the legislation, while McGuiness was convicted. While the majority (Street CJ and Matthews J) were careful to confine their decision to the criminal law the decision purported, to that extent at least, to give full legal recognition to the status of the post-operative transsexual. This recognition however, may prove to be more precarious than it might at first appear given the implications of a Victorian decision of the following year.

In *R v Cogley* (1989) the defendant appealed against his conviction for assault with intent to commit rape of a post-operative male to female transsexual on the grounds that the victim was not a woman.¹⁴ At the trial both defence (relying upon *Corbett*) and prosecuting counsel (relying upon the majority in *Harris and McGuiness*) had accepted that the question for determination was one of law. The trial judge Cummins J declined to follow *Corbett* holding that the complainant was a woman. His direction to the jury included the statement: "Miss A in law is a woman and for the purpose of assault with intent to rape, that count, she is a woman and must be treated by you as such".¹⁵

8 *Sexual Reassignment Act 1988* (SA) assented to on 5 May 1988. For a discussion of its provisions see Otlowski, M, "The Legal Status of a Sexually Reassigned Transsexual: *R v Harris and McGuiness* and Beyond" (1990) 64 *Aust LJ* 67 at 74.

9 17 NSWLR 158; (1989) 35 A Crim R 146.

10 (1971) P 83.

11 (1983) QB 1053. The adoption of the Corbett decision into the criminal law of England in *R v Tan* has the regrettable effect that there can never be a conviction for rape where the victim is a post-operative male to female transsexual. See Pace, P J, "Sexual Identity and the Criminal Law" (1983) *Crim LR* 317 at 320.

12 293 NYS 2d 834 (1968).

13 355 A 2d 204 (1976).

14 41 A Crim R 198; (1989) VR 799.

However, on appeal the Victorian Court of Criminal Appeals (Crockett, Gray and McDonald JJ), while upholding the conviction upon other grounds¹⁶ unanimously held that the determination of the complainant's sex was "a question of fact to be determined by the jury".¹⁷ The court did not however confine itself to stressing that the question was one ultimately for the jury. It went considerably further arguing that no question of law was involved in the determination at all. Thus in response to a request by prosecuting counsel that the court lay down a "test", or at least "guidelines", upon which a jury could be directed it was stated: "This we decline to do. There is, in our view, no legal test that can be applied to the question whether, a person is a man or a woman in a particular context".¹⁸

This view has been criticised.¹⁹ It has been argued that the necessary conditions for membership of a particular sex must surely be a matter of law.²⁰ Certainly, it would appear that all the judges in *Harris and McGuiness*, and Ormrod J in *Corbett*²¹ regarded the formulation of criteria governing sex determination as a question of law (albeit they differed as to those criteria). In view of the fact that *R v Harris and McGuiness* did not involve a jury and that the decision in *R v Cogley* did not ultimately require a determination as to sexual identity it remains open whether sexual identity is to be regarded as a question of law, fact or a combination of both law and fact.

If the reasoning of the appeal court in *R v Cogley* is correct the sexual status of post-operative transsexuals may, for the purposes of gender specific offences, prove to be a contradictory one as juries can be expected to differ as to findings of fact. Alternatively, if the question of sexual identity should prove to be a question of fact to be decided by the jury with reference to some specific legal criteria, potential jury inconsistency may be reduced but it is unlikely to be removed. Thus a jury given a direction on the basis of *Harris and McGuiness* might conclude that genital features and psychological sex have not been brought into conformity. Indeed, Carruthers J in *Harris and McGuiness* expressed doubt as to whether conformity of this type could ever be achieved.²²

Since the decisions of *Cogley* and *Harris and McGuiness*, only one other Australian case concerning a transsexual has emerged which addresses the fact/law issue. In *Secretary, Department of Social Security v SRA* (1993) the Federal Court of Australia (Black CJ, Lockhart and Heerey JJ) held that a pre-operative male to female transsexual was not a "woman" for the purposes of the *Social Security Act 1947* (Cth) and was therefore not entitled to the receipt of a widow's pension.²³ In its deliberations the court considered whether the question whether a person was a "woman", a "female" or a member of the "opposite sex" was one of law or fact and ultimately decided that the question turned on a

15 41 A Crim R 198 at 202.

16 On the particular facts of the case it was unnecessary to quash the conviction and order a new trial because had the jury considered the complainant not to be a woman the defendant could still have been convicted, legal impossibility being no defence to a criminal attempt. (*Britten v Alpoput* (1987) VR 929; (1986) 23 A Crim R 254, applied).

17 41 A Crim R 198 at 198.

18 *Id* at 204.

19 Bailey-Harris, R, "Sex Change in the Criminal Law and Beyond" (1989) 13 *Crim LJ* 364; Dickey, A, "Another Case Concerning the Sexual Identity of Transsexuals" (1990) 64 *Aust LJ* at 86-87.

20 Dickey, *id* at 86.

21 Above n10 at 105.

22 Above n9 at 163.

23 118 ALR 467.

question of law alone.²⁴ This question arose because the Administrative Appeals Tribunal had affirmed a decision of the Social Security Appeals Tribunal that the respondent was a woman for the purposes of the *Social Security Act 1947* (Cth). Counsel for the respondent argued that the words “woman” and “female” and the phrase “opposite sex” are ordinary English words, not technical terms, and therefore their meaning is a question of fact, and that accordingly the appeal must fail as no question of law arose. While accepting that where a particular word or phrase in a statute is used as an ordinary English word or phrase then it is a question of fact as to the common understanding of the word or phrase Lockhart J argued:

[T]he crucial question for present purposes is ... whether or not the evidence before the court *reasonably admits of different conclusions* as to whether certain facts or circumstances fall within the ordinary meaning of the relevant word or phrase. That is a question of law. If different conclusions are reasonably possible, it is necessary to decide which is the correct conclusion and that is a question of fact²⁵

The court took the view that on the facts of the case only one conclusion was reasonably open, namely that a pre-operative male to female transsexual was not a “woman” for the purposes of the *Social Security Act 1947* (Cth) and therefore no question of fact arose for decision. The court also held that the ordinary meaning of the words “woman” and “female” includes a post-operative male to female transsexual who is both anatomically and psychologically female thereby approving of the decision in *Harris and McGuiness*. While leaving aside the claim that different conclusions are not reasonably possible in the case of a pre-operative male to female transsexual, the same claim if made in respect of a post-operative male to female transsexual would not be persuasive. While the reasons given for the decision in *Harris and McGuiness* are compelling, claims that alternative conclusions are precluded are not. Thus the Victorian Court of Criminal Appeals in *R v Cogley* expressed the view:

We certainly do not think that it can be asserted that the arbitrary selection of satisfaction as to the existence of two factual requirements, viz, “core identity” and “sexual re-assignment surgery” thereupon necessarily determines as a matter of law the sex of a transsexual.²⁶

Thus despite the enlightened decision (at least with regard to Harris) by the majority in *Harris and McGuiness* and the approval of that decision in *Secretary, Department of Social Security v SRA* determinations as to transsexual identity may nevertheless encompass alternative factual conclusions. If so, the question of transsexual identity in a criminal trial will in the last analysis be one for the jury with all the potential inconsistency which that entails. This potential for inconsistency is to some extent ameliorated in New South Wales given the defendant’s right in that state to elect trial by judge.²⁷ The right of election may, however, produce the further anomaly that transsexual victims of “sexual assault” (where gender is an element of the offence) are more likely to encounter an unfavourable determination than transsexual defendants such as Harris.

In England it is impossible for a defendant to be convicted of the rape of a post-operative male to female transsexual.²⁸ Despite a more progressive approach in Australia it is

24 Id at 480.

25 Ibid (italics my emphasis).

26 41 A Crim R 198 at 204.

27 Section 32 *Criminal Procedure Act 1986* (NSW).

regrettable that such an outcome is not precluded. In view of continuing judicial uncertainty regarding transsexual identity, procedural and substantive inconsistency of decisions, and the failure of the criminal law to afford transsexual victims adequate protection, remedial legislation, at a minimum, is essential.

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