THINKING CRITICALLY IN MOMENTS OF TRANSGENDER LAW REFORM

Re Kevin and Jennifer v Attorney-General for the Commonwealth

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This article considers a recent decision of the Family Court of Australia which recognises the sex claims of a transsexual man for the purposes of marriage. The decision is to be welcomed not only for extending reform to the arena of marriage, but also — and specifically — because it recognises as male, for the first time, a vaginaed man. However, this moment of reform needs to be treated with some caution. In the first place, the 'radicality' of the decision never fully materialises in the judgment. More significantly, recognition of sex claims proves contingent on factors not previously considered relevant in reform jurisprudence, namely (bio)logic and the social and cultural. The introduction of these factors raises questions concerning the autonomy of transgender people and the future of transgender law reform.

This article considers a recent decision of the Family Court of Australia that recognises the sex claims of a (female to male) transsexual man for the purposes of marriage. The decision in *Re Kevin and Jennifer v Attorney-General for the Commonwealth*[1] is significant in a number of respects. While the sex claims of transgender persons have received judicial recognition from Australian courts in relation to other legal subject matters,[2] the decision is the first to consider, and to recognise, such claims in the marriage context.[3] The decision has been greeted with jubilation within reform circles. Rachael Wallbank, Kevin's lawyer — herself a woman of transsexual background — stated shortly after the landmark judgment:

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1 *Re Kevin and Jennifer v Attorney-General for the Commonwealth* [2001] FamCA 1074. The decision was appealed to the Full Bench of the Family Court of Australia. At the time of writing the decision is still awaited.

2 *R v Harris and McGuiness* [1989] 17 NSWLR 158; *Secretary, Department of Social Security v HH* [1991] 23 ALD 58; *Secretary, Department of Social Security v SRA* [1992] 28 ALD 361.

3 It should be noted that the validity of a marriage involving an intersexed person was considered by in *Re the Marriage of C v D (falsely called C)* [1979] 35 FLR 340. In this much-criticised decision, Bell J held that Mr C was neither a man nor a woman for the purposes of marriage, thereby precluding his ability to marry anyone. For criticism of the decision, see Bailey-Harris (1979); Finday (1996).

> The applicants trust that the understanding and inclusive message contained in this judgment by His Honour Justice Richard Chisholm of the Family Court of Australia confirms that Australians continue to be a people conspicuous for their humanity and sense of justice.[4]

This uncritical view of Chisholm J's judgment is also apparent in prior legal analyses of the case.[5] Of course, the heralding of Chisholm J's judgment as 'inclusive' and 'just' is not without foundation. In recognising Kevin as a man for the purposes of marriage, Chisholm J is to be commended. Moreover, it is understandable that some transgender people would wish to celebrate a story of affirmation. However, the judgment of Chisholm J does not proceed in linear fashion. There is no single story offered. On the contrary, the judgment Chisholm J articulates contains multiple stories. It is the purpose of this article to bring to the fore the tensions that exist between these stories and to direct attention to dangers, always apparent in moments of reform.

It should not be thought that Chisholm J's decision simply extends prior reform analyses to marriage in the Australian context, as Otlowski appears to contend.[6] Rather, his judgment greatly exceeds this issue of legal subject matter. For, while Chisholm J described his decision as 'quite orthodox', he does something that no common law judge has done before. He rearticulates the pre/post-operative distinction, so central to reform jurisprudence, so as to uncouple post-operative status from the genitocentrism of law.[7] Again, it is not my intention to criticise the first superior court judge anywhere in the common law world to take such a step. However, his judgment produces two principal difficulties. First, his legal reasoning contains a certain disingenuous quality. Connected to this point is the fact that the 'radicality' of the decision never fully materialises. Second — and of greater concern — the judgment introduces two elements, the '(bio)logic' and the 'social/cultural', previously absent, or marginalised, within reform jurisprudence. The relationship between these elements and legal recognition in the judgment is troubling for the future of transgender reform jurisprudence. Before turning to these matters, however, it is first necessary, and instructive, to provide the legal background to the decision.

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4 Media release, Wallbanks Solicitors, 11 November 2001.

5 Otlowski (2002); Mills and McConvill (2002)

6 Otlowski (2002) p 28.

7 It should be noted that genitocentric, and indeed anatomical, considerations were abandoned in two earlier tribunal decisions (*Secretary, Department of Social Security v SRA* [1992] 28 ALD 361; *Canada v Owen* [1993] 110 DLR (4th) 339). However, each of these decisions was emphatically overturned on appeal. Moreover, in *SRA* the tribunal placed considerable emphasis on the fact that SRA had been approved for, but due to financial constraints had been unable to undergo genital surgery (see Muller, 1994). In this respect, a story concerning the 'wrongness' of the phallic female body is reproduced precisely in the moment of reform For further analysis of the *SRA* decision, see Bates (1993), Mountbatten (1994); Sharpe (1997)

The Legal Background

In order to appreciate the significance of the decision in *Re Kevin and Jennifer v Attorney-General for the Commonwealth*, it is necessary to situate it in the context of a developing transgender jurisprudence. In particular, it is necessary to pay close attention to the relationship between surgical intervention and legal recognition as articulated in prior reform decisions. The first common law decision to consider the sex claims of a transgender person for purposes of marriage was the landmark English decision of *Corbett v Corbett*.[8] In that decision, Ormrod J held that sex is determined at birth and by a congruence of chromosomes, gonads and genitalia.[9] This particular refusal of transgender sex claims has had, and continues to have, considerable influence throughout the common law world.[10] Reform jurisprudence, in many respects, details a story of 'departure' from *Corbett*, of a limiting of its stranglehold over the lives of transgender people.[11] It has sought to bring the law into conformity with certain realities, and specifically the fact of sex reassignment surgery.

In the common law world, reform can be dated to the New York decision in *Re Anonymous*.[12] In this case, Pecora J expressed the view that the question of a person's sexed identity should not be limited by 'the results of mere histological section or biochemical analysis'.[13] Rather — and in preference to grounding his analysis in (bio)logical considerations — Pecora J articulated a test of *psychological and anatomical harmony*. This approach was extended to

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8 *Corbett v Corbett* [1970] 2 All ER 33.

9 *Corbett v Corbett* [1970] 2 All ER 33 at 48.

10 *Re T* [1975] 2 NZLR 449; *W v W* [1976] 2 SALR 308; *Dec CP* 6/76 National Insurance Commissioner Decisions; *K v Health Division of Human Resources* 560 P 2d 1070 (1977); *Anonymous v Irving Mellon as Director of Bureau of Vital Records, Department of Health of the City of New York* 398 NYS 2d 99 (1977); *EA White v British Sugar Corporation* [1977] IRLR 121; *Social Security Decision Nos R(P)1 and R(P)2* [1980] National Insurance Commissioner Decisions; *R v Tan* [1983] QB 1053; *Peterson v Peterson* (1985) *The Times*, 12 July; *Re Ladrach* 32 Ohio Misc 2d 6 (1987); *Franklin v Franklin* (1990) *The Scotsman*, 9 November; *Lim Ying v Hiok Kian Ming Eric* [1992] 1 SLR 184; *Collins v Wilkin Chapman* [1994] EAT/945/93; *Re P and G* [1996] 2 FLR 90; *S-T (formerly J) v J* [1998] 1 All ER 431; *Littleton v Prange* 9 S.W. 3d 223 (Tx App 1999); *W v W* [2001] Fam. 111; *Bellinger v Bellinger* (unreported, CA [2001] EWCA Civ 1140, 17/7/01). Further, the *Corbett* approach has been upheld on appeal to the European Court of Human Rights (see *Rees v UK* [1986] 9 EHRR 56; *Cossey v UK* [1991] 13 EHRR 622; *X, Y and Z v UK* [1997] EHRR 143; *Sheffield and Horsham v UK* [1998] 2 FLR 928).

11 The *Corbett* decision has been subject to sustained academic criticism. See, for example, Green (1970); David (1975); Samuels (1984); Dewar (1985); Taitz (1986). For a feminist critique of the decision and of transgender jurisprudence more generally, see for example, O'Donovan (1985); Collier (1995); Sharpe (1997, 2002); Coombes (1998).

12 *Re Anonymous* 293 NYS 2d 834 (1968).

13 *Re Anonymous* 293 NYS 2d 834 (1968) at 838.

marriage in the New Jersey decision of *MT v JT*.[14] Thereafter, US transgender jurisprudence has either articulated reform in these terms[15] or has followed *Corbett*.[16] More recently, and with greater consistency, the test of *psychological and anatomical harmony* has been adopted in Australia and New Zealand.[17]

In speaking of the legal test of *psychological and anatomical harmony*, a degree of precision is required. This is especially so, as we will see, because of the way in which Chisholm J constructs his judgment in *Re Kevin and Jennifer*. While the test clearly implies the need for surgical intervention, it is important to detail the nature and extent of the intervention considered necessary in prior decisions. In short, the judiciary have emphasised consistently the need for genital reconstruction. It would seem that the phallic woman and vaginaed man have not hitherto accorded with law's aesthetic sensibility. That is to say, *harmony* in law is predicated on the genitocentric couplings man/penis and woman/vagina. Indeed, this view is underscored by, and finds a partial rationale in, a judicial requirement that post-operative genitalia 'function' sexually. Thus, in *MT v JT*, the court expressed the view that 'it is the [post-operative] capacity of the individual which must be scrutinized',[18] noting that MT had 'a vagina and labia which were adequate for sexual intercourse and could function as any female vagina, that is, for traditional penile/vaginal intercourse'.[19] Here the capacity to be vaginally penetrated assumes particular significance in enabling law to read the male-to-female transgender body as female.

This legal understanding of the content — and, in the main, the purpose — of sex reassignment surgery is replicated in Australian and New Zealand reform decisions. Thus, in *R v Harris and McGuiness*,[20] the refusal of Mathews J to treat as significant Lee Harris's 'temporary inability to have intercourse as a female'[21] caused by a closing-up of her vagina post-surgically, highlights the need for both genital reconstruction and post-operative sexual

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14 *MT v JT* 355 A 2d 204 (1976).

15 *Richards v United States Tennis Association* 400 NYS 2d 267 (1977); *Re the Estate of Marshall G Gardiner* Kan App LEXIS 376 (2001).

16 *Anonymous v Anonymous* 325 NYS 2d 499 (1971); *Anonymous v Irving Mellon as Director of Bureau of Vital Records, Department of Health of the City of New York* 398 NYS 2d 99 (1977); *K v Health Division of Human Resources* 560 P 2d 1070 (1977); *Re Ladrach* 32 Ohio Misc 2d 6 (1987); *Littleton v Prange* 9 S.W. 3d 223 (Tx App 1999).

17 *R v Harris and McGuiness* [1989] 17 NSWLR 158; *Secretary, Department of Social Security v HH* [1991] 23 ALD 58; *Secretary, Department of Social Security v SRA* [1993] 118 ALR 467; *M v M* [1991] NZFLR 337; *Attorney-General v Otahuhu Family Court* [1995] 1 NZLR 603.

18 *MT v JT* 355 A 2d 204 (1976) at 209.

19 *MT v JT* 355 A 2d 204 (1976) at 206.

20 *R v Harris and McGuiness* [1989] NSWLR 158.

21 *R v Harris and McGuiness* [1989] NSWLR 158 at 193.

functioning. Again, in *Secretary, Department of Social Security v HH,*[22] O'Connor J and Muller expressed the view that anatomy must be the overriding factor in sex determination if 'overwhelmingly contrary to the assumed sex role'[23] and that after reassignment surgery the (male-to-female) transgender woman is 'functionally ... a member of her "new" sex'.[24] In *Secretary, Department of Social Security v SRA,*[25] this view of the content and purpose of sex reassignment surgery was endorsed by the Federal Court. In unanimously overturning a decision of the Administrative Appeals Tribunal,[26] which had recognised as female a person who had not undertaken genital surgery — or, indeed, any surgical procedures — the Federal Court noted that, unlike a post-operative (male-to-female) transgender woman, SRA was not '[f]unctionally ... a member of her new sex and capable of sexual intercourse'.[27]

More recently, in the decision of *Re SRDD v Secretary, Department of Family and Community Services,*[28] the Administrative Appeals Tribunal resisted counsel's attempt to reconstitute the pre-/post-operative dyad. It was contended on behalf of SRDD that the case differed from *SRA* because, unlike SRA, SRDD had undergone an orchidectomy (castration). While the tribunal recognised that the procedure undertaken was 'irreversible'[29] and that SRDD 'could never function as a male',[30] it insisted that the decision of the Federal Court in *SRA* was predicated on 'three-step surgery'.[31] According to McMahon, the deputy president of the tribunal, the three steps 'involve the removal of the penis, the removal of the testicles and the construction of an artificial vagina'.[32] Thus, as in previous decisions, law's bodily aesthetics conceive of anatomical *harmony* only in terms of a particular genital configuration. In the New Zealand decision of *Attorney-General v Otahuhu Family Court,*[33] Ellis J departed from these prior analyses, insisting that parties

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22 *Secretary, Department of Social Security v HH* [1991] 23 ALD 58.

23 *Secretary, Department of Social Security v HH* [1991] 23 ALD 58 at 64.

24 *Secretary, Department of Social Security v HH* [1991] 23 ALD 58 at 64.

25 *Secretary, Department of Social Security v SRA* [1993] 118 ALR 467.

26 *Secretary, Department of Social Security v SRA* [1992] 28 ALD 361.

27 *Secretary, Department of Social Security v SRA* [1993] 118 ALR 467 at 493.

28 *Re SRDD v Secretary, Department of Family and Community Services* [1999] 56 ALD 777.

29 *Re SRDD v Secretary, Department of Family and Community Services* [1999] 56 ALD 777 at 777.

30 *Re SRDD v Secretary, Department of Family and Community Services* [1999] 56 ALD 777 at 777.

31 *Re SRDD v Secretary, Department of Family and Community Services* [1999] 56 ALD 777 at 780.

32 *Re SRDD v Secretary, Department of Family and Community Services* [1999] 56 ALD 777 at 780.

33 *Attorney-General v Otahuhu Family Court* [1995] 1 NZLR 603.

to a marriage did not 'have to prove that each can function sexually'[34] for 'there are many forms of sexual expression possible without penetrative sexual intercourse'.[35] However, and while this aspect of his judgment is to be welcomed, he insisted — consistent with prior reform jurisprudence — that, 'in order for a transsexual to be eligible to marry in the sex of [re]assignment', there must have occurred 'complete reconstructive surgery'[36] for, 'in order to be capable of marriage two persons must present themselves as having what appear to be the genitals of a man and a woman'.[37]

Thus, prior to the decision in *Re Kevin and Jennifer*, transgender reform jurisprudence has, irrespective of legal subject-matter, insisted on a genitocentric, and typically a sexually functional, understanding of the requirement of sex reassignment surgery. In this respect, Chisholm J's comment that *Corbett* 'exhibits a remarkable focus on the mechanics of genital sexual activity'[38] belies an important commonality linking reform jurisprudence to *Corbett*. Further — and significantly for the purposes of this article — this body of law, in focusing on *psychological and anatomical harmony*, has ignored, or marginalised, other possible bases for grounding legal sex. First and foremost, and in a reformist desire to move beyond *Corbett*, (bio)logical understandings of sex have been ignored[39] but so too have 'social' and 'cultural' understandings of sex. With an appreciation of these dimensions of transgender reform jurisprudence in mind, the article turns first to the facts of *Re Kevin and Jennifer* and then to the legal reasoning adopted by Chisholm J.

The Factual Background

The applicant Kevin was born in 1965. His birth certificate recorded his sex as female. While there was no direct evidence put before the court about the state of Kevin's body after birth, Chisholm J found, on the evidence that was available, that 'his genitalia and gonads were female, and he had and continues to have female (XX) chromosomes'.[40] From an early age, Kevin perceived himself as male, and in other respects — including childhood play, adolescent behaviour and growing alienation from others — he provides a classic

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34 *Attorney-General v Otahuhu Family Court* [1995] 1 NZLR 603 at 612. The judgment of Lockhart J also provides some support for the view that sexually functioning genitalia, at least in the case of the (female to male) transgender man, is not an essential requirement for legal recognition of sex claims (*Secretary, Department of Social Security v SRA* [1993] 118 ALR 467 at 493).

35 *Attorney-General v Otahuhu Family Court* [1995] 1 NZLR 603 at 615.

36 *Attorney-General v Otahuhu Family Court* [1995] 1 NZLR 603 at 614–15.

37 *Attorney-General v Otahuhu Family Court* [1995] 1 NZLR 603 at 612.

38 *Re Kevin and Jennifer v Attorney-General for the Commonwealth* [2001] FamCA 1074 at paragraph 94.

39 It should be noted that chromosomal analysis receives some attention in *Secretary, Department of Social Security v HH* [1991] 23 ALD 58 at 61–63.

40 *Re Kevin and Jennifer v Attorney-General for the Commonwealth* [2001] FamCA 1074 at paragraph 23.

transsexual narrative.[41] In 1995, Kevin embarked on hormonal treatment. In 1997 he underwent breast surgery whereby the size of his breasts was reduced by liposuction. In 1998 he underwent a total hysterectomy with bilateral oophorectomy. He elected not to undergo phalloplastic surgery. This is not uncommon, given that construction of a penis is expensive, complex and prone to complications.[42]

Kevin then applied to the Registrar of the New South Wales Registry of Births, Deaths and Marriages for a new birth certificate showing him to be male. To this end, and in accordance with New South Wales legislation allowing for legal change of sex on birth certificates,[43] he supplied statutory declarations by two appropriately qualified medical practitioners stating that he had undergone the necessary surgery as required by the Act. In October 1998, the Registrar issued Kevin with a new birth certificate on which his sex is shown as male. In mid 1999 Kevin and his partner Jennifer, whom he met in 1996, took formal steps to get married. They gave the necessary notice to an authorised marriage celebrant, and each made a statutory declaration under the *Marriage Act 1961* stating that they believed that there was no legal impediment to the proposed marriage. On 21 August 1999, the celebrant issued a certificate of marriage stating that on that day the marriage had been duly solemnised in accordance with the provisions of the *Marriage Act 1961*. The parties to the marriage then applied to the Family Court of Australia for a declaration as to its validity. In response, the Attorney-General disputed the validity of the certificate of marriage. As already explained, Chisholm J found the marriage to be valid because he found Kevin to be a man for the purposes of the *Marriage Act 1961* (Cth).[44] The legal reasoning adopted, however, calls for close scrutiny.

Beyond Genitocentrism

In recognising Kevin, a vaginaed man, as a man for marriage purposes, Chisholm J departs from the genitocentrism of prior transgender reform jurisprudence. He is not to be criticised for doing so. On the contrary, the possibility of substantive justice in the case required as much. Equally, I am not suggesting that Chisholm J was 'bound' to follow prior Australian authorities. As he himself rightly pointed out, the legal status of transgender people for marriage purposes in Australia is 'a matter of first impression'.[45]

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41 See Stoller (1968, 1973, 1975). For a sociological discussion of this notion of 'classic' transsexuality, see King (1993). See also Sharpe (2002a), Ch 2.

42 See, for example, Walters and Ross (1986), p 112; Garber (1989). p 148; Devor (1997), p 447. Affidavit evidence by Dr Haertsch was presented at the hearing in this regard.

43 *Births, Deaths and Marriages Registration Act* 1995 (NSW) Part 5A.

44 In doing so, and consistent with prior reform jurisprudence, he interpreted the term 'man' with reference to the present and not to some earlier moment such as the time of enactment of the *Marriage Act 1961* (Cth)

45 *Re Kevin and Jennifer v Attorney-General for the Commonwealth* [2001] FamCA 1074 at paragraph 2.

Rather, my difficulty with this important aspect of the judgment lies in the fact that Chisholm J fails to bring it fully to the surface. That is to say, the 'radicality' of the decision and the affirmative story contained therein are veiled in the judgment. This is in part due to the fact that counsel for the Attorney-General agreed that 'sex reassignment surgery' had taken place, choosing to contest the matter on the basis of the desirability of following *Corbett*. It is perhaps also due to Chisholm J's desire to play down 'departure' from, and therefore violence to, an existing body of reform jurisprudence. In emphasising continuity with prior reform jurisprudence, the legal reasoning of Chisholm J not only contains a disingenuous quality, but it detracts from the reconstitution of the pre/post-operative distinction that lies at the heart of the decision.

In abandoning genitocentric, if not anatomical, considerations in determining legal sex for the purposes of marriage, Chisholm J, in response to counsel for the Attorney-General's suggestion that to do so would constitute a 'giant leap'[46] and a 'radical step',[47] states: 'It seems to me quite orthodox, rather than radical to apply to marriage the ordinary meaning of the terms 'man' and 'woman' as set out in the Australian authorities.'[48] The 'radicality' of the decision lies precisely in the fact that prior Australian authority — and indeed common law authority generally — provides no warrant for concluding that the ordinary meaning of the terms man and woman might have a meaning that contradicts the couplings man/penis and woman/vagina. The claim of Chisholm J to 'respectfully agree with the views of Chief Justice Street, Chief Justice Black and Justices Mathews and Lockhart as to [the legal position of] post-operative transsexuals'[49] is somewhat remarkable given particular and unambiguous passages contained in their judgments, and indeed ones Chisholm J actually cites. Consider his claim to do no more than apply existing law to the arena of marriage in light of the following Australian judicial statements:

> The other criterion should be whether through medical intervention or otherwise, the person has assumed the external *genital* features of the

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46 *Re Kevin and Jennifer v Attorney-General for the Commonwealth* [2001] FamCA 1074 at paragraph 293.

47 *Re Kevin and Jennifer v Attorney-General for the Commonwealth* [2001] FamCA 1074 at paragraph 293.

48 *Re Kevin and Jennifer v Attorney-General for the Commonwealth* [2001] FamCA 1074 at paragraph 294. His Honour rejected the contention that there were 'special considerations' pertaining to marriage which precluded such a step. Specifically, he rejected theological objections and pointed to the fact that the validity of a marriage in Australia does not depend on the ability to procreate or to engage in sexual intercourse (at paragraphs 280–289).

49 *Re Kevin and Jennifer v Attorney-General for the Commonwealth* [2001] FamCA 1074 at paragraph 158.

> opposite sex, thereby bringing those *genital* features into conformity with the person's psychological sex.[50]
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> There is no occasion to depart in this case from the ordinary meaning of the words used in the [*Social Security] Act* and it would be going well beyond the ordinary meaning of the words in question to conclude that a pre-operative male to female transsexual, having male external *genitalia*, is a 'woman'.[51]
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> Drawing the line by reference to what in popular usage is called a 'sex change operation' or a 'sex change' in circumstances that bring external *genital* features into general conformity with a person's psychological sex is appropriate as a matter of statutory interpretation, and it is in desirable conformity with the decision reached by a majority of the New South Wales Court of Criminal Appeal after a comprehensive review of cases in many jurisdictions in *R v Harris and McGuiness*.[52]

In a similar vein, Chisholm J draws attention to the judgment of Thorpe J in the recent English Court of Appeal decision in *Bellinger v Bellinger*.[53] Yet it is clear from his judgment that Thorpe J confined the possibility of future reform to 'cases of *fully achieved* post-operative transsexuals such as the present appellant'.[54] Moreover, it is curious that Chisholm J refers only in passing to the English Court of Appeal decision in *S-T (formerly J) v J*.[55] This is especially so given that J, like Kevin, is a transgender man who has not undergone phalloplastic procedures. While in that case, as Chisholm J notes, Ward LJ imagined future departure from *Corbett*, it is clear that genital reconstruction is central to the reform imagined:

> For present purposes, it should, however, be stressed that ... declaration of validity [of marriage] will only apply in a case where there has been 'physical conformation' to the desired sex by full reconstructive surgery, *including in the case of a female-to-male transsexual, surgical construction of a penis*.[56]

These genitocentric articulations of legal sex capture a key feature of reform jurisprudence to date. This feature is masked in Chisholm J's judgment.

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50 *R v Harris and McGuiness* [1989] 17 NSWLR 158 at 194 per Mathews J (my emphasis).

51 *Secretary, Department of Social Security v SRA* [1993] 118 ALR 467 at 471 per Black CJ (my emphasis).

52 *Secretary, Department of Social Security v SRA* [1993] 118 ALR 467 at 474 per Black CJ (my emphasis).

53 *Bellinger v Bellinger* (unreported, CA [2001] EWCA Civ 1140, 17/7/01.

54 *Re Kevin and Jennifer v Attorney-General for the Commonwealth* [2001] FamCA 1074 at paragraph 299 (my emphasis). Mrs Bellinger had undertaken full sex reassignment surgical procedures including the construction of a vagina.

55 *S-T (formerly J) v J* [1998] 1 All ER 431. For an analysis and critique of this case see Sharpe (2002b).

56 *S-T (formerly J) v J* [1998] 1 All ER 431 at 447 (my emphasis).

Thus he contends: 'In my view it is clear from the judgments, especially in *SRA*, that under Australian law unless the context indicates reasons for a different approach, words like 'man' and 'woman' in legislation will be treated as ordinary words, and will normally be taken to refer to the reassigned sex of post-operative transsexuals'.[57] The difficulty with this statement, given the facts of *Re Kevin and Jennifer*, is that there is a slippage between a requirement for genital surgery as established by the case law and sex reassignment surgery. In effect, prior reform jurisprudence is treated as authority for the proposition that legal sex is an effect of sex (though not necessarily genital) reassignment surgery. This is, in part, due to the fact that the parties to the hearing agreed, and in the case of counsel for the Attorney-General conceded unnecessarily, that sex reassignment surgery had taken place. However, it is also due to an interpretation of the case law that is difficult to sustain.

This slippage between *genital* and *sex* reassignment surgery is again apparent in the treatment of the fact that Kevin had been issued a new birth certificate showing him to be male. The issue of the new birth certificate had been possible under New South Wales legislation because statutory declarations had been supplied by two appropriately qualified medical practitioners stating that Kevin had undergone the necessary surgery as required by the Act. Section 32A of the *Births, Deaths and Marriages Registration Act* (NSW) 1995 defines 'sexual reassignment surgery' to mean a 'surgical procedure involving the alteration of a person's reproductive organs'. While the judgment of Chisholm J does not depend on this fact of birth certificate change, and while state recognition of sex claims — or indeed refusal of such claims — can never conclusively settle the matter in relation to a Commonwealth head of power like marriage,[58] weight is given to this aspect of the story. In this respect, medical knowledge trumps prior legal understandings. While the phrase 'alteration of a person's reproductive organs' might be considered to cover Kevin, given his hysterectomy, it is most unlikely that the New South Wales parliament — or indeed any other Australian jurisdiction enacting similar legislation[59] — ever intended to rearticulate sex so as to depart from the couplings man/penis and woman/vagina.[60]

By way of comparison, consider the Canadian decision of *B v A*.[61] Here an Ontario court had to consider the sexed status of B for the purposes of the

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57 *Re Kevin and Jennifer v Attorney-General for the Commonwealth* [2001] FamCA 1074 at paragraph 158.

58 See Otlowski (1990).

59 *Births, Deaths and Marriages Registration Act* 1997 (ACT), *Births, Deaths and Marriages Registration Amendment Act* 1997 (NT); *Sexual Reassignment Act* 1988 (SA); *Gender Reassignment Act* 2000 (WA).

60 While it is permissible to consider extrinsic materials, like second reading speeches, in order to discover the legislative meaning of the phrase 'sex reassignment surgery' (see Pearce et al, 1996, pp 57–58), Chisholm J does not consider such material.

61 *B v A* [1990] 29 RFL 3d 262.

Ontario *Family Law Act* 1986. Like Kevin, B had not undertaken phalloplastic surgery. Moreover, and supported by two medical certificates stating that he had undergone 'transsexual surgery', he had his birth certificate altered pursuant to Ontario legislation.[62] However, Master Cork took the view that, in the absence of phalloplasty, this medical conclusion was 'patently erroneous'[63] and contrary to 'the purpose of s 32 of the *Vital Statistics Act*'.[64] It is not intended here to privilege Master Cork's interpretation of the law or his attitude towards the relationship between medicine and law over that of Chisholm J. Rather, the article draws attention to the fact that Chisholm J's treatment of the relevance of birth certificates serves, like his treatment of prior reform jurisprudence, to impose on the phrase *sex reassignment surgery* a non-genital meaning. The criticism here lies not in his departure from the genitocentrism of law, but rather in a dubious appeal to case law and legislation to that end. In seeking to maintain order and continuity in the development of reform jurisprudence, Chisholm J disguises the moment of rupture — if not rapture — so central to his judgment. In this way, the 'radicality' of the decision and the affirmative story contained therein never fully materialise.

However, while it is important to detail Chisholm J's blurring of the meaning of *sex reassignment surgery*, his departure from the genitocentrism of law is to be welcomed. It is this portion of the judgment, after all, which contains — no matter how muted it may be — an affirmative narrative for transgender people and, importantly, for a much larger portion of transgender communities than any prior judgment. Nevertheless, and as indicated at the outset, Chisholm J does not offer a linear narrative — one premised on a simple retreat from genitocentrism. Rather, there are other stories at play in his judgment that are much more problematic. It is to these sub-plots of the judgment that attention now turns.

The Return of (Bio)logic

While Chisholm J states that '[t]he task of the law is not to search for some mysterious entity, the person's "true sex", but to give an answer to a practical human problem',[65] it would seem that the 'search for some mysterious entity' is not so easily abandoned. At the hearing, counsel for Kevin advanced the argument that 'recent discoveries show that the traditional understanding, by which transsexuals are seen as *biologically* of one sex but *psychologically* of another, is mistaken'.[66] This argument, which has been a notable feature of transgender reform activism in England, explicable perhaps in terms of the continued refusal to recognise transgender sex claims in that jurisdiction, has

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62 Ontario *Vital Statistics Act 1980* s32(2)(a)(1).

63 *B v A* [1990] 29 RFL 3d 262 at 267.

64 *B v A* [1990] 29 RFL 3d 262 at 266.

65 *Re Kevin and Jennifer v Attorney-General for the Commonwealth* [2001] FamCA 1074 at paragraph 109.

66 *Re Kevin and Jennifer v Attorney-General for the Commonwealth* [2001] FamCA 1074 at paragraph 239.

rarely featured otherwise in reform jurisprudence either in Australia or elsewhere. According to this argument, genetically male transsexuals possess a female brain structure while genetically female transsexuals possess a male brain structure. This claim is said to support the hypothesis that gender identity develops as a result of an interaction of the developing brain and sex hormones. The tiny region of the brain that has been scrutinised is the central subdivision of the bed nucleus of the stria terminalis, known as BSTc. It is the part of the hypothalamus which helps to keep the different systems of the body working in harmony and which is viewed as essential for sexual behaviour. This area of the brain is ordinarily larger in men than in women, while in transsexuals post-mortem studies suggest that size corresponds with assumed gender.[67]

The medical experts called for Kevin conceded that 'brain development cannot yet be identified in living persons'[68] and that, while there is 'emerging evidence ... that transsexualism is related to some known biological factors ... at this stage science cannot say so with certainty'.[69] Nevertheless, they tended to share Professor Diamond's view that 'further research will confirm the present evidence that brain sex or mental sex is a reality which will explain the persistence of a gender identity in the face of or contrary to external influences'.[70] In considering this evidence, Chisholm J, in the absence of contrary evidence before the court, accepted the proposition on the balance of probabilities that 'brain development is (at least) an important determinant of a person's sense of being a man or a woman'.[71] This approach can be contrasted with the unwillingness of the European Court of Human Rights to read scientific uncertainty in favour of transgender litigants.[72]

While Chisholm J explained that he did not base his decision 'on the view that "brain sex" is in law the decisive factor in determining whether a person is a man or a woman',[73] it is clear that this factor is attributed weight. While it is understandable how the notion of foundational identity might seduce those at the margins in their engagement with law, the incorporation of (bio)logic into reform jurisprudence is a disturbing development. The reasons for this are several. First, the emphasis on 'brain sex' serves to re-establish the importance

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67 See Gooren et al (1995); Gooren et al (2000).

68 *Re Kevin and Jennifer v Attorney-General for the Commonwealth* [2001] FamCA 1074 at paragraph 240.

69 *Re Kevin and Jennifer v Attorney-General for the Commonwealth* [2001] FamCA 1074 at paragraph 242. For criticism of the 'brain sex' thesis, see Breedlove (1995).

70 *Re Kevin and Jennifer v Attorney-General for the Commonwealth* [2001] FamCA 1074 at paragraph 244.

71 *Re Kevin and Jennifer v Attorney-General for the Commonwealth* [2001] FamCA 1074 at paragraph 247.

72 *X, Y and Z v UK* (1997) 24 EHRR 143 at 171-2; *Sheffield and Horsham v UK* (1998) 27 EHRR 163 at 192.

73 *Re Kevin and Jennifer v Attorney-General for the Commonwealth* [2001] FamCA 1074 at paragraph 273.

of the birth moment in determining legal sex. In this regard, Chisholm J's judgment, while highly critical of Ormrod J's reasoning in *Corbett*, reproduces the temporal specificity of that landmark English decision. This move is perhaps especially disturbing in the context of Australian transgender jurisprudence, given the prior irrelevance of (bio)logical considerations. While decisions that have articulated the story of *psychological and anatomical harmony* have had an eye to the past in terms of a concern over 'authenticity' of transsexual identity, and while surgery has often been viewed as confirmation of some 'truth' that lies in the past,[74] the judgment of Chisholm J reconfigures law's understanding of sex across temporal lines.

The emphasis on 'brain sex' proves problematic because it seeks to impose 'the ideal of being onto the fact of becoming'.[75] While some medical experts believe that future study will establish conclusively a link between brain sex and gender identity, this might be viewed as something other than utopic moment. Thus we might ask this question: should a test become available capable of determining the 'brain sex' of the living, what would be the position of a transgender person lacking a positive test result? Logically, such a development would provide a discourse through which to resist claims as well as to produce a new medical and legal taxonomy for understanding, positioning and, of course, ranking transgender experiences. Moreover, reliance on (bio)logic by reform groups might have the unintended consequence of fuelling a desire to eradicate 'deviant' people altogether. While the idea of fixed identity is seen by some as offering 'resistance to the social-engineering momentum apparently built into every one of the human sciences',[76] it is also, as Sedgwick notes:

> the conjecture that a particular trait is genetically or biologically based, *not* that it is 'only cultural', that seems to trigger an estrus of manipulative fantasy in the technological institutions of the culture. A relative depressiveness about the efficacy of social-engineering techniques, a high mania about biological control: the Cartesian bipolar psychosis that always underlay the nature/nurture debates has switched its polar assignments without surrendering a bit of its hold over the collective life.[77]

Further, the emphasis on 'brain sex' in Chisholm J's judgment can be viewed as a strategy through which Kevin's body is 'naturalised' as a prelude to his entry into the symbolic order of marriage law as a man. This desire to 'naturalise' is perhaps linked to the fact that Kevin is a vaginaed man. That is to say, in exploding the coupling man/penis, the desire to ground Kevin's identity in the past (and specifically at birth) perhaps takes on special significance. This 'naturalising' dimension of both the judgment and litigation

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74 See generally Sharpe (2002a).

75 Booth (1985), p 132.

76 Sedgwick (1990), p 42.

77 Sedgwick (1993), p 43.

strategy is also evident in discourse around the transgender/intersex relation. Thus, and drawing on the medical evidence presented, Chisholm J expressed the view:

> the characteristics of transsexuals are as much 'biological' as those of people thought of as inter-sex. The difference is essentially that we can readily observe or identify the genitals, chromosomes and gonads, but at present we are unable to detect or precisely identify the equally 'biological' characteristics of the brain that are present in transsexuals.[78]

This articulation is significant when placed in the context of the fact that Ormrod J in *Corbett* distinguished intersex people from transsexuals in terms of legal recognition.[79] Moreover, and more recently, the legal recognition of Mrs W in the English decision of *W v W*[80] was premised precisely on the fact that she was considered to be intersex rather than transsexual. While resort to (bio)logic might be viewed as the most disturbing aspect of this reform decision, it contains other problematic stories and, it would seem, requirements of legal recognition.

Social/Cultural Sex

While Chisholm J purports to follow the established Australian and common law test of *psychological and anatomical harmony*, this article has shown how harmony is rearticulated through judicial reconfiguration of the pre/post-operative distinction. That is to say, while surgical intervention continues to be required, such intervention need no longer be directed toward the genitals. Further, while surgical intervention, in and of itself, serves to assuage in some measure anxiety regarding transgender 'authenticity', the decision departs from prior reform jurisprudence in its attempt to ground psychological understandings of sex in (bio)logic. However, in addition to these important aspects of his judgment, Chisholm J introduces two other elements that together raise a distinct set of problems previously absent in reform jurisprudence. Detailed at length in his judgment is the non-medical affidavit evidence of 39 people: members of Kevin's family, friends, work colleagues and acquaintances. The detail is apparently necessary in order to 'convey the vividness and concreteness of the evidence'.[81] Thus we learn that:

> From the time he was little Kevin had always walked, talked, dressed, behaved and had the attitude of a male. Kevin always enjoyed playing

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78 *Re Kevin and Jennifer v Attorney-General for the Commonwealth* [2001] FamCA 1074 at paragraph 272.

79 *Corbett v Corbett* [1970] 2 All ER 33 at 48.

80 *W v W* [2000] Fam. 111. For an analysis and critique of this decision, see Sharpe (2002b).

81 *Re Kevin and Jennifer v Attorney-General for the Commonwealth* [2001] FamCA 1074 at paragraph 47.

> sports such as soccer and played male childhood games. I cannot recall ever seeing Kevin playing girls' games or behave as a girl.[82]
>
> Now if you didn't know Kevin's history you would take him to be a man, just like any other man, and would never be aware of his background.[83]
>
> I was pleased for Kevin when he realised his public male identity and married Jen, and as far as I am concerned he is a fine husband and father to Quentin.[84]
>
> Over the years, Kevin's discomfort when being obliged to appear as female became more and more obvious as did his naturalness in expressing his maleness.[85]
>
> Kevin's appearance, physique, mannerisms, speech, attitude and interests all demonstrate his maleness.[86]
>
> I recall when I first started visiting his home my impression was that, although he had expertly landscaped the garden and the surrounds of his home, the inside of his home revealed a bachelor-like Spartan appearance.[87]

These comments capture some of the key themes contained within the non-medical affidavit evidence. Specifically, the witnesses point to stereotypical masculine behaviour, both past and present, as well as to Kevin's ability to 'pass' as male with relative ease. Indeed, Chisholm J himself, while recognising the stereotypical nature of these characterisations of masculinity, says of a 'most remarkable'[88] photograph taken when Kevin was 15 or 16: 'To my eye, despite the shoulder length hair, he looks as much like a boy as a girl.'[89] In summing up the non-medical affidavit evidence, Chisholm J states: 'They see him and think of him as a man, doing what men do. They do not see

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82 *Re Kevin and Jennifer v Attorney-General for the Commonwealth* [2001] FamCA 1074 at paragraph 48.

83 *Re Kevin and Jennifer v Attorney-General for the Commonwealth* [2001] FamCA 1074 at paragraph 50.

84 *Re Kevin and Jennifer v Attorney-General for the Commonwealth* [2001] FamCA 1074 at paragraph 51.

85 *Re Kevin and Jennifer v Attorney-General for the Commonwealth* [2001] FamCA 1074 at paragraph 52.

86 *Re Kevin and Jennifer v Attorney-General for the Commonwealth* [2001] FamCA 1074 at paragraph 57.

87 *Re Kevin and Jennifer v Attorney-General for the Commonwealth* [2001] FamCA 1074 at paragraph 59.

88 *Re Kevin and Jennifer v Attorney-General for the Commonwealth* [2001] FamCA 1074 at paragraph 25.

89 *Re Kevin and Jennifer v Attorney-General for the Commonwealth* [2001] FamCA 1074 at paragraph 25.

him as a woman pretending to be a man. They do not pretend that he is a man, while believing he is not.'[90]

These portions of the judgment are problematic in that they delimit gender performance and place value on the practice and ability to 'pass'. However, my present concern is not simply to point out that Chisholm J's judgment reproduces dominant understandings of masculinity through its narrative form. Rather — and while not seeking to diminish this troubling aspect of his judgment — my prime concern is to highlight how gender reproduction in the judgment is not reducible to narrative. Rather, 'appropriate' gender performance and the ability to 'pass' prove central to the very question of the legal determination of Kevin's sex. Thus, in concluding his judgment, Chisholm J offers a list of reasons why Kevin's application was considered successful. In addition to noting the fact that Kevin perceived himself to be a man and had gone through sex reassignment procedures, the following matters are emphasised:

> [Kevin] was perceived by those who knew him to have had male characteristics since he was a young child.[91]
>
> At the time of the marriage, in appearance, characteristics and behaviour, he was perceived as a man, and accepted as a man, by his family, friends and work colleagues.[92]
>
> He was accepted as a man for a variety of social and legal purposes, including name, and admission to an IVF program.[93]
>
> His marriage as a man was accepted, in full knowledge of his circumstances, by his family, friends and work colleagues.[94]

The delineation of such matters as central to the decision-making process is of tremendous significance as well as being an obvious departure from the prior trajectory of reform jurisprudence. In short, in addition to the *psychological* and the *anatomical*, Chisholm J inserts into reform jurisprudence the *social* and the *cultural*. In this respect, legal recognition of sex claims becomes inextricably bound up with the reproduction of gender stereotypes. More pertinently for present purposes, however, is the fact that the moment for reproducing gender becomes one in which transgender self-perception is potentially trumped by the perceptions of others in the legal determination of sex itself. As Otlowski points out, apparently unaware of the

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90 *Re Kevin and Jennifer v Attorney-General for the Commonwealth* [2001] FamCA 1074 at paragraph 68.

91 *Re Kevin and Jennifer v Attorney-General for the Commonwealth* [2001] FamCA 1074 at paragraph 330.

92 *Re Kevin and Jennifer v Attorney-General for the Commonwealth* [2001] FamCA 1074 at paragraph 330.

93 *Re Kevin and Jennifer v Attorney-General for the Commonwealth* [2001] FamCA 1074 at paragraph 330.

94 *Re Kevin and Jennifer v Attorney-General for the Commonwealth* [2001] FamCA 1074 at paragraph 330.

difficulty, Chisholm J's reasoning potentially covers 'all post-operative transsexuals who are well adjusted and *accepted* in their reassigned sex'.[95]

The difficulty lies in the fact that the elements of the *social* and *cultural* which Chisholm J introduces are not premised on the autonomy of transgender people. On the contrary, the judgment of Chisholm J serves to subject transgender people to greater levels of gender scrutiny. That is to say, in addition to the gaze of medicine and of law, the transgender body is now to be exposed to the gaze of others (the community). In other words, assessments of masculinity by community members become significant in determining the sex of a transgender man. Of course, readings of gender by the community might be favourable, as was the case for Kevin. The difficulty lies in the fact that there is no guarantee — especially in a transphobic society — that this will be the case. Rather, rendering such factors legally relevant might be viewed as creating a legal space for the reproduction of oppression of a marginalised group. That is to say, the negative reactions and misunderstandings that many transgender people experience both from their families, within workplace contexts and in the wider society on a regular basis[96] might be redeployed in courts of law to defeat their sex claims. In the final analysis, the invocation of *social* and *cultural* elements serves to create new speaking parts in a play in which the transgender subject's voice is muted further.

Conclusion

In some ways — and not withstanding the fact that Chisholm J recognises a vaginaed man as male for the purposes of marriage, and in that respect is to be commended — the decision in *Re Kevin and Jennifer* offers the worst of all possible reform worlds. That is to say, the existing legal test of *psychological and anatomical harmony*, albeit stripped of its genitocentrism, is retained. In this regard, the notion — antithetical to feminism — that 'anatomy determines destiny' is preserved.[97] In addition to this, the psychological component of the test, previously understood as a matter of self-perception and psychological evidence, is now additionally grounded in medical knowledge surrounding 'brain sex'. While departure from genitocentric thinking provides, perhaps, an occasion for apportioning more weight to self-perception, this only proves possible in Chisholm J's judgment through refracting self-understandings through the lens of (bio)logic. Further, the 'truth' of the transgender subject's sex claims is no longer to be known through the lens of medicine and of law alone. Rather, 'truth' is now additionally to be gauged from the perspectives of the community. The requirement that transgender people negotiate not only legal and medical hegemony, but also lay understandings of their embodied experiences, serves to undermine further a concern for transgender autonomy

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95 Otlowski (2002) p 29, my emphasis.

96 See Perkins et al (1994); Hooley (1996); Short (1997); GenderPAC (1997); NCAVP (1999); Sharpe and Moran (2002); Sharpe and Moran (2003) forthcoming.

97 de Beauvoir (1953).

and may prove to be a particularly onerous burden to discharge for some, if not many, transgender people.

In my view, it would have been better had the decision been articulated solely in terms of the development of the test of *psychological and anatomical harmony*. That is to say, it would have been better to render explicit the fact that anatomical harmony is reconstituted in Chisholm J's judgment so as to depart from the genitocentrism of law. It would be better still if surgical procedures had been dispensed with altogether.[98] By the same token, it would have been better to view biological, social and cultural factors as irrelevant to the legal determination of sex. However, as in previous decisions, it is apparent that the court sought to draw a line. In the past, that line — the need for which has consistently been explained in terms of a legal desire for certainty[99] — has been drawn at 'full' sex reassignment surgery which has hitherto been understood to include genital surgery. In *Re Kevin* the line is redrawn. For Chisholm J, 'the irreversible surgery that completes the sex-reassignment process provides a convenient and workable line for the law to draw'.[100] However, while sex in Australian marriage law no longer requires genital surgery, it is now bolstered by biological, social and cultural factors.

In thinking about the decision in *Re Kevin*, we might wonder as to why the 'radicality' of the decision — that is to say, the movement away from genitocentrism — is not more pronounced in Chisholm J's judgment. Equally, we might wonder why (bio)logic receives such extensive treatment in the judgment and why *social* and *cultural* elements are introduced into the legal test for determining sex when such factors were previously absent, or marginal, within transgender reform jurisprudence. In responding to these questions, it may be useful to consider the possible relevance of the homophobia of law. While the arguments made in this article thus far do not

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98 Of course, even this step would still reproduce binary understandings of sex/gender. However, it must be recognised that few transgender people, seek to occupy third (fourth, fifth ...) sex/gender positions. Moreover, it should not be thought that transgender law reform serves only to recuperate the gender order because it works within a binary frame. Rather, it also serves to disrupt that order by working on the insides of our inherited vocabulary of sex and gender. Thus, even before *Re Kevin,* the concept of sex — as legally comprehended — had been uncoupled from (bio)logic through the test of *psychological and anatomical harmony*. In *Re Kevin*, this more malleable concept is reinvented to separate sex claims from the present state of genitalia By the same token, resort to *social* and *cultural* elements introduces further indeterminacy regarding the question of sex in law. For further discussion of these and related themes, see Sharpe (2002) pp 80–83.

99 *Re Kevin and Jennifer v Attorney-General for the Commonwealth* [2001] FamCA 1074 at paragraph 321. See also, for example, *Corbett v Corbett* [1970] 2 All ER 33; *R v Tan* [1983] QB 1053; *Bellinger v Bellinger* (unreported, CA [2001] EWCA Civ 1140, 17/7/01); *R v Harris and McGuiness* [1989] 17 NSWLR 158; *Secretary, Department of Social Security v SRA* [1993] 118 ALR 467.

100 *Re Kevin and Jennifer v Attorney-General for the Commonwealth* [2001] FamCA 1074 at paragraph 321

depend on the reader accepting a homophobia thesis, it may prove of value in trying to comprehend more fully the particularities of the *Re Kevin* decision.

At first glance, it might seem counter-intuitive to think of the decision in *Re Kevin* in these terms. However, it might be premature to conclude in this way. For the homophobia of law has operated as something akin to a structuring principle within transgender jurisprudence more generally, irrespective of judicial approach.[101] It is not my intention here to present Chisholm J as homophobic. Rather, I think it is possible to view his judgment as written with a view to the — perhaps inevitable — appeal. In this respect, his judgment might be understood in terms of an attempt to reduce homophobic anxiety generated by the incorporation of a vaginaed man within the sanctity of marriage law. Thus it might be possible to view the conflation of sex reassignment surgery and genital reassignment surgery in Chisholm J's judgment in this way. The emphasis in the judgment on (bio)logic might also be viewed in this light, given that (bio)logic serves to 'naturalise' transgender sex claims through linking them to the birth moment and that the nature/artifice dyad has functioned consistently within transgender jurisprudence to distinguish transgender from homosexuality.[102] By the same token, the introduction of *social* and *cultural* elements might also been seen in terms of assuaging legal appellate and broader cultural anxiety.

Moreover, this reading of the case is perhaps supported by other portions of Chisholm J's judgment. Thus, in referring to the evidence of Dr Greenway, Chisholm J notes that Kevin presented his history 'in a very matter-of-fact way and does not come across as *histrionic*'.[103] Again the nature/artifice distinction is apparent. Perhaps of particular significance is the fact that Chisholm J notes that Kevin and Jennifer's 'respective families were fully aware of Kevin's transsexual history'.[104] The possibility of non-disclosure of transgender status prior to a marriage, which courts have tended to characterise as inter-personal 'fraud',[105] has consistently provoked anxiety in the case law[106] around the possibility of inadvertent communion with the homosexual.[107] Again, in

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101 See Sharpe (2002), Chs 5 and 6.

102 See Sharpe (2002) generally.

103 *Re Kevin and Jennifer v Attorney-General for the Commonwealth* [2001] FamCA 1074 at paragraph 46, my emphasis.

104 *Re Kevin and Jennifer v Attorney-General for the Commonwealth* [2001] FamCA 1074 at paragraph 39.

105 This view of non-disclosure as 'fraud', which has found support among legal scholars (see, for example, van NieKerk, 1970, p 241; Smith, 1971, pp 970–71; Kennedy, 1973, pp 131–32; Lupton, 1976, p 387; Samuels, 1984, p 166; Otlowski, 1990, p 74; Finlay, 1996, p 533), presents difficulties. It serves, through reinscription of the past as 'truth', to impose the 'ideal of Being on the fact of Becoming' (Booth, 1985, p 132).

106 See, for example, *Anonymous v Anonymous* 325 NYS 2d 499 at 500 (1971); *MT v JT* 355 A 2d 204 at 204 (1976); *M v M* [1991] NZFLR 337 at 348; *S-T (formerly J) v J* [1998] 1 All ER 431 at 441.

107 See Sharpe (2002), Chs 5 and 6.

detailing the facts of the case, Chisholm J notes that, as a result of hormonal treatment and a total hysterectomy, 'Kevin's body was no longer able to function as that of a female particularly for the purposes of reproduction and sexual intercourse'.[108] In view of His Honour's insistence that 'irreversible surgery that completes the sex-reassignment process provides a convenient and workable line for the law to draw', it would appear that a condition of reform in *Re Kevin* is the sterilisation of transgender bodies. While this is highly problematic in itself, and inconsistent with the context of human rights in relation to which the case has been celebrated, evidence that Kevin can no longer function as a female for the purposes of sexual intercourse might be viewed in the context of alleviating homophobic anxiety. Indeed, in this respect it is perhaps overstated to view *Re Kevin* as an epistemological break with the genitocentrism of law. Finally, like reform judges before him,[109] Chisholm J notes that to deny Kevin's sex claims would be to produce a situation where he is 'entitled to marry a man, but not a woman. Ironically, to the outside world such an event would appear to involve a legal marriage of a same-sex couple.'[110] Here the prospect of rendering visible 'gay' marriages produces a concern that law should not hinder the 'heterosexualisation' of transgender bodies effected by sex reassignment surgery. In all of these ways, it would seem that the transgender/marriage relation is not so easily divorced from the spectre of homosexuality.

References

Rebecca Bailey-Harris (1979) 'Recent Cases in Family Law — Decree of Nullity of Marriage of True Hermaphrodite who has Undergone Sex-Change Surgery' 53 *ALJ* 660.

Frank Bates (1993) 'When Is a Wife ... ?' 7 *Australian Journal of Family Law* 274.

Simone de Beauvoir (1953) *The Second Sex*, Bantam.

David Booth (1985) 'Nietzsche on the Subject as Multiplicity' 18 *Man and World: International Philosophical Review* 121.

Simon M Breedlove (1995) 'Another Important Organ' 378 *Nature* 15.

Richard Collier (1995) *Masculinity, Law and the Family*, Routledge.

Mary Coombes (1998) 'Queer Matters. Emerging Issues in Sexual Orientation Law: Sexual Dis-Orientation, Transgender People and Same-Sex Marriage' 8 *UCLA Women's LJ* 219.

Edward S David (1975) 'The Law and Transsexualism: A Faltering Response to a Conceptual Dilemma' 7 *Connecticut L Rev* 288.

Holly Devor (1997) *F2M: Female-to-Male Transsexuals in Society*, Indiana University Press.

John Dewar (1985) 'Transsexualism and Marriage' 15 *Kingston L Rev* 58.

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[108] *Re Kevin and Jennifer v Attorney-General for the Commonwealth* [2001] FamCA 1074 at paragraph 30.

[109] See, for example, *Attorney-General v Otahuhu Family Court* [1995] 1 NZLR 603 at 607 per Ellis J.

[110] *Re Kevin and Jennifer v Attorney-General for the Commonwealth* [2001] FamCA 1074 at paragraph 304.

Henry Finday (1996) 'Legal Recognition of Transsexuals in Australia' 12 *Journal of Contemporary Health Law and Policy* 503.

Majorie Garber (1989) 'Spare Parts: The Surgical Construction of Gender' 1 *Differences: A Journal of Feminist Cultural Studies* 137.

GenderPAC (1997) *The First National Survey of Transgender Violence* (www.gpac.org/violence/HateCrimeSurvey97/)

Louis JG Gooren et al (1995) 'A Sex Difference in the Human Brain and its Relation to Transsexuality' 378 *Nature* 68.

Louis JG Gooren et al (2000) 'Male-to-Female Transsexuals Have Female Neuron Numbers in a Limbic Nucleus' 85 *Journal of Clinical Endocrinology and Metabolism* 2034.

David Green (1970) 'Transsexualism and Marriage' 120 *NLJ* 210.

Jill Hooley (1996) *The Transgender Project*, Sydney Central Area Health Authority.

Dave King (1993) *The Transvestite and the Transsexual*, Avebury.

Ian McColl Kennedy (1973) 'Transsexualism and Single Sex Marriage' *Anglo-American L Rev* 112.

M Lupton (1976) 'The Validity of Post-Operative Transsexual Marriages' 93 *South African LJ* 385.

Eithne Mills and James McConvill (2002) 'The Case of Kevin and Jennifer — Transsexual Marriage in Australia' 76(8) *Law Institute Journal* (http://library.ftmaustralia.org/society/02/0900.htm).

John Mountbatten (1994) 'Transsexuals and Social Security Law: The Return of Gonad the Barbarian' *Australian Journal of Family Law* 166.

Vivienne Muller (1994) 'Trapped in the Body — Transsexualism, the Law and Sexual Identity' 3 *Australian Feminist LJ* 103.

NCAVP (1999) *Anti-Lesbian, Gay, Bisexual and Transgender Violence in 1998: A Report of the National Coalition of Anti-Violence Programs*, New York, NCAVP.

B van Niekerk (1970) ' Sex-Change Operations and the Law' 87 *South African LJ* 239.

Katherine O'Donovan (1985) 'Transsexual Troubles: The Discrepancy between Legal and Social Categories', in S Edwards (ed) *Gender, Sex and the Law*, Croom Helm.

Margaret Otlowski (1990) 'The Legal Status of a Sexually Reassigned Transsexual: *R v Harris and McGuiness* and Beyond' 64 *ALJ* 67.

Margaret Otlowski (2002) 'Cases and Comments: What is the Harm Anyway?: *Re Kevin* and the Recognition of Transsexual Marriage' 16 *Australian Journal of Family Law* 1.

Dennis C Pearce et al (1996) *Statutory Interpretation in Australia*, 4th edn, Butterworths.

Roberta Perkins et al (1994) *Transgender Lifestyles and HIV/AIDS Risk: National Transgender HIV/AIDS Needs Assessment Project*, School of Sociology, University of New South Wales, Sydney.

Alex Samuels (1984) 'Once a Man, Always a Man; Once a Woman, Always a Woman — Sex Change and the Law' *Medicine and Science Law* 163.

Eve Sedgwick (1990) *Epistemology of the Closet*, Penguin.

Eve Sedgwick (1993) 'How to Bring Your Kids Up Gay', in M Warner (ed), *Fear of a Queer Planet: Queer Politics and Social Theory*, University of Minnesota Press.

Andrew N Sharpe (1997) 'Anglo-Australian Judicial Approaches to Transsexuality: Discontinuities, Continuities and Wider Issues at Stake' 6 *Social and Legal Studies* 23.

Andrew N Sharpe (2002a) *Transgender Jurisprudence: Dysphoric Bodies of Law*, Cavendish.

Andrew N Sharpe (2002b) 'English Transgender Law Reform and the Spectre of *Corbett*' 10 *Feminist Legal Studies* 1.

Andrew N Sharpe and Leslie J Moran (2002) 'Policing the Transgender/Violence Relation' 13 *Current Issues in Criminal Justice* 269

Andrew N Sharpe and Leslie J Moran (2003) 'Challenging Safety: The Case of Violence Against Transgender People', forthcoming.

Shan Short (1997) *Report of the Transgender Anti-Violence Project*, Sydney.

Douglas Smith (1971) 'Transsexualism, Sex Reassignment and the Law' 56 *Cornell L Rev* 963.

Robert J Stoller (1968) *Sex and Gender*, Science House.

Robert J Stoller (1973) 'Male Transsexualism. Uneasiness', 130 *American Journal of Psychiatry* 536.

Robert J Stoller (1975) *The Transsexual Experiment*, Hogarth.

Jerome Taitz (1986) 'The Law Relating to the Consummation of Marriage Where One of the Spouses is a Post-Operative Transsexual' 15 *Anglo-American L Rev* 141.

William AW Walters and Michael W Ross (1986) *Transsexualism and Sex Reassignment*, OUP.

Cases

Anonymous v Anonymous 325 NYS 2d 499 (1971)

Anonymous v Irving Mellon as Director of Bureau of Vital Records, Department of Health of the City of New York 398 NYS 2d 99 (1977)

Attorney-General v Otahuhu Family Court [1995] 1 NZLR 603

B v A [1990] 29 RFL 3d 262.

Bellinger v Bellinger (unreported, CA [2001] EWCA Civ 1140, 17/7/01

Canada v Owen [1993] 110 DLR (4th) 339)

Collins v Wilkin Chapman [1994] EAT/945/93

Corbett v Corbett [1970] 2 All ER 33

Cossey v UK [1991] 13 EHRR 622

Dec CP 6/76 National Insurance Commissioner Decisions

EA White v British Sugar Corporation [1977] IRLR 121

Franklin v Franklin (1990) *The Scotsman*, 9 November

K v Health Division of Human Resources 560 P 2d 1070 (1977)

Lim Ying v Hiok Kian Ming Eric [1992] 1 SLR 184

Littleton v Prange 9 S.W. 3d 223 (Tx App 1999)

M v M [1991] NZFLR 337

MT v JT 355 A 2d 204 (1976)

Peterson v Peterson (1985) The Times, 12 July

R v Harris and McGuiness [1989] 17 NSWLR 158

R v Tan [1983] QB 1053

Re Anonymous 293 NYS 2d 834 (1968)

Re the Estate of Marshall G Gardiner Kan App LEXIS 376 (2001)

Re Kevin and Jennifer v Attorney-General for the Commonwealth [2001] FamCA 1074

Re Ladrach 32 Ohio Misc 2d 6 (1987)

Re the Marriage of C v D (falsely called C) [1979] 35 FLR 340

Re P and G [1996] 2 FLR 90

Re SRDD v Secretary, Department of Family and Community Services [1999] 56 ALD 777

Re T [1975] 2 NZLR 449

Rees v UK [1986] 9 EHRR 56
Richards v United States Tennis Association 400 NYS 2d 267 (1977)
Secretary, Department of Social Security v HH [1991] 23 ALD 58
Secretary, Department of Social Security v SRA [1992] 28 ALD 361
Secretary, Department of Social Security v SRA [1993] 118 ALR 467
Sheffield and Horsham v UK [1998] 2 FLR 928
Social Security Decision Nos R(P)1 and R(P)2 [1980] National Insurance Commissioner Decisions
S-T (formerly J) v J [1998] 1 All ER 431
W v W [1976] 2 SALR 308
W v W [2001] Fam. 111
X, Y and Z v UK [1997] EHRR 143

Legislation

Births, Deaths and Marriages Registration Act 1997 (ACT).
Births, Deaths and Marriages Registration Act 1995 (NSW).
Births, Deaths and Marriages Registration Amendment Act 1997 (NT).
Family Law Act 1986 (Ontario).
Gender Reassignment Act 2000 (WA)
Marriage Act 1961 (Cth).
Sexual Reassignment Act 1988 (SA)
Vital Statistics Act 1980 (Ontario).