

# *Gender Regulation: Restrictive, Facilitative or Transformative Laws?*

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## *Abstract*

In the 21<sup>st</sup> century, Parliaments and the courts are allowing persons some measure of power and agency over their legal gender. This article traces the 40-year trajectory of transgender litigation. It begins by setting out the three main approaches taken by the courts in Australia, the United States and the United Kingdom in determining gender. It then considers specific Australian legislation on the legal recognition of change to a person's gender and the scope and operation of protections against transgender discrimination within Australian anti-discrimination laws. The article explores federal and state legislative schemes in the context of the framework of regulating gender established in the common law tradition. This allows consistencies and differences in the legislative regimes to be identified and reveals common issues confronting legislatures and the judiciary in this area.

## **I Introduction**

A 'picturesque phrase' from the Reformation era states that 'Parliament could do anything but make a man a woman'.<sup>1</sup> Today, both Parliaments and courts allow people a level of agency to change their sex legally. The legal recognition of sex change is extremely important: it dictates who you can marry, what school you can attend, which sporting team you can play for, and, if all goes terribly wrong, the prison in which you will be incarcerated. This is a manifestation of the law's impulse to use categories and draw lines to understand and simplify complex concepts, including social and sexual identity.<sup>2</sup> The focus of this article is on the role that courts and legislators play in regulating gender, and their approach to where the 'sex line' should be drawn.

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<sup>1</sup> Theodore Plucknett, *A Concise History of the Common Law* (Butterworths, 5<sup>th</sup> ed, 1956) 337, citing British lawyers' description of Parliament during the Reformation era. Plucknett makes reference to 1 Mary, sess 3, c 1, s3 which declared that a Queen Regent has all the powers of a King, thus 'making' a woman a man.

<sup>2</sup> See Laura Grenfell, 'Embracing Law's Categories: Anti-Discrimination Laws and Transgenderism' (2003) 15 *Yale Journal of Law and Feminism* 51, 55.

In the Anglo-American legal world, transgender litigation began in 1970 with the case of *Corbett v Corbett*.<sup>3</sup> Since then, the courts have delineated three judicial approaches to where the ‘sex line’ will be drawn and when change of sex will be recognised at law. The first approach is restrictive, being driven solely by an evaluation of biological factors. The second approach finds the congruence of anatomy and psychology to be determinative and may be regarded as facilitative. The third approach emphasises psychology; it is transformative in that it allows a greater degree of agency over sex without demanding substantial anatomical change. In contrast to the courts, legislatures have been slower to act to enable legal recognition of change of sex.

Using the framework of the three judicial approaches to sex, we examine the approaches adopted by Parliaments in Australia in the legal recognition of sex and when extending protections against discrimination to transgender people. We argue that while the second approach dominates legislation facilitating legal recognition of change of sex, a spectrum exists within this approach, requiring courts to step in and draw an anatomical line (the ‘sex line’). The 2011 High Court case of *AB v Western Australia; AH v Western Australia*<sup>4</sup> is used as an illustration of this judicial line-drawing within the second approach. We observe that, on the whole, state and territory legislation, regardless of where it sits within these three approaches, assumes that transgender people identify as heterosexual, an assumption also apparent in many of the cases. In the final part we outline what protections the Australian legal system offers transgender people and whether legal recognition of change of sex triggers the protection of discrimination laws. We examine the limited protection offered by federal legislation in contrast to the more generous protection granted by state and territory legislation. While some of the federal and state anti-discrimination legislation also fits within the second approach, much legislation in this area is more liberally framed than the sex-change recognition legislation. We speculate that the spectre of same-sex marriage may determine which approach is used by both the courts and Parliaments in the regulation of gender.

## II Judicial Approaches to Defining Sex and Gender

### A *The First Approach – Sex as Biology*

The first legal narrative determines sex according to strictly biological factors. This narrative is informed by the biological determinist view that biology is destiny and that its meaning is universal. Ormrod J of the former English Probate Division first articulated this in *Corbett*<sup>5</sup> in 1970.

At issue in *Corbett* was the status of the marriage between Arthur Corbett and April Ashley, a post-operative male-to-female (‘MTF’) transsexual who had a career in fashion modelling as a woman. Nine expert doctors gave evidence, identifying

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<sup>3</sup> [1971] P 83 (‘*Corbett*’). In this paper we use the terms used by courts and Parliaments — namely ‘transsexual’ and ‘transgender’. We apologise if these terms cause offence.

<sup>4</sup> (2011) 244 CLR 390 (‘*AB v Western Australia*’).

<sup>5</sup> [1971] P 83.

four factors as being integral to sex (although they accorded different weight to each factor): chromosomes, genitals, gonads and psychology. Ormrod J used these opinions to determine sex strictly for the purpose of the institution of marriage. In his view there was something unique about marriage. He said: ‘Marriage is a relationship which depends on sex and not on gender.’<sup>6</sup> Of sex he stated:

[S]ex is clearly an essential determinant of the relationship called marriage because it is and always has been recognised as the union of man and woman. It is the institution on which the family is built, and in which the capacity for *natural* heterosexual intercourse is an essential element.<sup>7</sup>

Within the context of marriage, Ormrod J held that sex is a biological matter: it is determined at birth if a person’s chromosomes, gonads and genitals are congruent.<sup>8</sup> A person’s psychological view of their identity is related to gender and not sex. While genitals are important to one’s sex, only the genitals one is born with are considered: if a person has their genitals removed or reconstructed, this might affect their gender, but not their sex.<sup>9</sup> Therefore, April Ashley’s sex remained male despite her sex reassignment surgery and the fact she perceived herself as female.<sup>10</sup>

Although there was widespread criticism of the rigidity of this biological determinist view,<sup>11</sup> it was the dominant approach in the Anglo-American legal world into the 21<sup>st</sup> century. It was upheld in the 2003 case of *Bellinger*.<sup>12</sup> At issue was the validity of Mrs Bellinger’s second marriage. While Mrs Bellinger was described on her marriage certificate as a spinster, on her birth certificate she had been registered as being of the male sex. However, evidence was heard that from early in life she had felt herself to be a woman. At the age of 21 she married a woman, but just four years later the marriage was over and Mrs Bellinger began living as a woman and undergoing treatment — including hormone treatment and gender reassignment surgery to remove her testes and penis — before marrying Mr Bellinger in 1981.

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<sup>6</sup> Ibid 107. When distinguishing ‘sex’ from ‘gender’ it appears Ormrod J understands the latter as cultural. The Australian Human Rights Commission has also defined gender in this way: ‘The term “gender” refers to the way in which a person identifies or expresses their masculine or feminine characteristics. Gender is generally understood as a social and cultural construction. A person’s gender identity or gender expression is not always exclusively male or female and may or may not correspond to their sex.’ Australian Human Rights Commission, *Addressing Sexual Orientation and Sex and/or Gender Identity Discrimination*, Consultation Report (2011) 5. For both theoretical and pragmatic reasons, we use the terms ‘sex’ and ‘gender’ interchangeably in this article. The former relates to the work of gender theorists such as Judith Butler (see Judith Butler, *Gender Trouble: Feminism and the Subversion of Identity* (Routledge, 1999)) while the latter is based on the fact that federal and state legislation in Australia (and many cases considering that legislation) use the terms interchangeably.

<sup>7</sup> *Corbett* [1971] P 83105–6 (emphasis added).

<sup>8</sup> Ibid 106.

<sup>9</sup> Ibid.

<sup>10</sup> For further discussion of the *Corbett* logic, see Stephen Whittle, *Respect and Equality: Transsexual and Transgender Rights* (Cavendish, 2002) ch 7; Andrew Sharpe, *Transgender Jurisprudence: Dysphoric Bodies of Law* (Cavendish, 2002) chs 3, 5 and 6.

<sup>11</sup> The House of Lords acknowledge this rigidity in *Bellinger v Bellinger* [2003] 2 AC 467, 473 (‘*Bellinger*’).

<sup>12</sup> Ibid.

The case, instigated by both the Bellingers, who sought a declaration of the validity of their marriage, was taken all the way to the House of Lords. There, Lord Hope praised Ormrod J's decision in *Corbett* for giving a 'single, clear meaning',<sup>13</sup> to the words 'male' and 'female'. He added:

[Sex reassignment] surgery ... cannot supply all the equipment that would be needed for the patient to play the part which the sex to which he or she wishes to belong *normally* plays in having children. At best, what is provided is no more than an imitation of the more obvious parts of that equipment.<sup>14</sup>

It is clear that the House of Lords was affirming the *Corbett* view that marriage is about the ability to procreate and to achieve penetrative heterosexual intercourse.<sup>15</sup> The Court also agreed that only the genitals with which one is born are relevant when evaluating biological sex. In the view of the House of Lords, *Bellinger* was not a sex-change case — such a thing not being legally recognisable — but a case of same-sex marriage.<sup>16</sup> As a consequence, the Court held that, as Mrs Bellinger was still legally a man, the Bellingers' marriage was invalid under s 11(c) of the *Matrimonial Causes Act 1973* (UK).<sup>17</sup>

The understanding of sex — as biological — articulated in *Corbett* and applied in *Bellinger*, means that sex is considered to be fixed at birth and immutable.<sup>18</sup> According to Lord Rodger in *Bellinger*, this immutability was

<sup>13</sup> Ibid 483. Lords Hobhouse (487), Scott (490) and Rodger (490) expressed agreement with the judgments of Lord Hope and Lord Nicholls.

<sup>14</sup> Ibid 482 (emphasis added).

<sup>15</sup> Lord Hope stated:

Of course, it is not given to every man or every woman to have, or to want to have, children. But the ability to reproduce one's own kind lies at the heart of all creation, and the single characteristic which invariably distinguishes the adult male from the adult female throughout the animal kingdom is the part which each sex plays in the act of reproduction. When Parliament used the words 'male' and 'female' in section 11(c) of the 1973 Act it must be taken to have used those words in the sense which they normally have when they are used to describe a person's sex, even though they are plainly capable of including men and women who happen to be infertile or are past the age of child bearing. ... I do not see how, on the ordinary methods of interpretation, the words "male" and "female" in section 11(c) of the 1973 Act can be interpreted as including female to male and male to female transsexuals": ibid 485.

Lord Nicholls did not state any overt views on the *Corbett* approach but at para 28 he discusses the distinction between male and female by referring to 'the reproductive process' and he made no reference to behavioural differences. In our view, Lord Nicholls' judgment can be read as impliedly following the *Corbett* approach. Lords Hobhouse, Rodger, and Scott do not comment on *Corbett* but agree with the decisions of Lord Nicholls and Lord Hope.

<sup>16</sup> Ibid 486 (Lord Hope).

<sup>17</sup> While impliedly affirming the *Corbett* approach, the House of Lords did, however, declare that s 11(c) of the *Matrimonial Causes Act 1973* (UK) was incompatible with arts 8 and 12 of the *European Convention on Human Rights* (on the right to respect for privacy and the right to marry) in light of the European Court of Human Rights' decision in *Goodwin v United Kingdom* [2002] 35 EHRR 18. In this case, Christine Goodwin was in a similar position to Mrs Bellinger. The declaration of incompatibility made by the House of Lords effectively placed pressure on the UK Parliament to take one of two paths: to take a piecemeal approach by amending the *Matrimonial Causes Act 1973* (UK), or to take a comprehensive approach by introducing legislation to deal with the myriad of problems faced by Mrs Bellinger, Christine Goodwin and April Ashley among others.

<sup>18</sup> Except in intersex cases, which are not the focus of this article. 'Intersex people' were defined by the Australian Human Rights Commission as: 'people who have genetic, hormonal or physical characteristics that are not exclusively 'male' or 'female'. A person who is intersex may identify as

intended by Parliament, as evidenced in s 11(c) of the *Matrimonial Causes Act 1973* (UK) and its context. He stated:

Section 11(c) is different in both respects [from s11(a) and s11(b)]: a marriage is void if ‘the parties are not respectively male and female’. Both the present tense and the omission of any reference to the time of the marriage indicate that, in relation to the validity of marriage *Parliament regards gender as fixed and immutable*.<sup>19</sup>

This approach, however, allows no room for agency in relation to the category of sex. More critically, neither *Bellinger* nor *Corbett* makes any attempt to analyse or articulate why a biological interpretation of sex is necessary in family law.<sup>20</sup> If the ability to procreate were a requirement of both contracting parties to a marriage, then a biological test would understandably be necessary. But this is not the law in England,<sup>21</sup> nor in any common law jurisdiction, including South Africa<sup>22</sup> or various states of the United States (‘US’)<sup>23</sup> where the *Corbett* test has been subsequently applied. In England, non-consummation of a marriage is a ground for nullity<sup>24</sup> but this is clearly not the same as the inability to procreate, as an infertile person may be able to consummate a marriage.

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male, female, intersex or as being of indeterminate sex.’ Australian Human Rights Commission, above n 6, 5.

<sup>19</sup> *Bellinger* [2003] 2 AC 467, 490 (emphasis added). It is interesting that Lord Rodger uses the word ‘gender’ here, given Ormrod J’s view in *Corbett* that marriage is about sex and not gender.

<sup>20</sup> See also *R v Tan* [1983] QB 1053, 1064, where the Court decided to extend *Corbett*’s application merely because ‘common sense and the desirability of certainty and consistency demand’ it so. In this case, Gloria Greaves, a post-operative MTF transsexual, appealed her conviction of living on the earnings of prostitution and her husband’s conviction of living on the earnings of her prostitution of another man, on the ground that she was a woman. Although Greaves had been living as a woman for 18 years and had undergone a sex-change operation, the court deemed her to be a man for the purposes of the *Sexual Offences Act 1967* (UK). The Court applied the *Corbett* test ‘without hesitation’. In its view, consistency was desirable.

<sup>21</sup> Lord Hope states that ‘the words “male” and “female” in s 11(c) of the 1973 Act ... are plainly capable of including men and women who happen to be infertile or are past the age of child bearing’: *Bellinger* [2003] 2 AC 467385 (Lord Hope).

<sup>22</sup> See *W v W* [1976] 2 SALR 308, where the MTF transsexual plaintiff filed for divorce in the Witwatersrand Local Division Court on the grounds of adultery, causing the validity of her marriage to the defendant to come under question. Unlike in *Corbett*, it was an uncontested fact that the marriage had been successfully consummated. The Court held that the plaintiff was a man and the marriage was void. In its reasons, the Court never explicitly stated that the *Corbett* biological criteria were necessary for the purposes of procreation, nor that procreation was an essential part of marriage. But this is arguably the only explanation for the Court’s use of such limited criteria in circumstances where consummation and ‘normal sexual relations’ took place.

<sup>23</sup> *Littleton v Prange*, 9 SW 3d 223 (Tex App, 1999). *Littleton* has most recently been followed by the Kansas State Supreme Court in *Re Estate of Gardiner*, 42 P 3d 120 (Kan, 2002). Presumably a law that required the examination of a person’s ability to procreate would violate the right to privacy.

<sup>24</sup> *Matrimonial Causes Act 1973* (UK) ss 12(a)–(b) provides that a marriage shall be voidable on the following grounds: ‘(a) that the marriage has not been consummated owing to the incapacity of either party to consummate it; (b) that the marriage has not been consummated owing to the wilful refusal of the respondent to consummate it’.

## B *The Second Approach – Sex as Congruent Anatomy and Psychology*

The *Corbett* approach has not been the only approach taken by the courts. A second, less dominant legal narrative determines sex according to the conformity of anatomical (rather than biological) and psychological factors. This approach is consistent with social constructionist views of sex, which challenge biological determinist notions of sex as apolitical and ahistorical.

This narrative was first fully articulated by the Appellate Division of the Superior Court of New Jersey in *MT v JT* in 1976.<sup>25</sup> A MTF post-operative transsexual sought support and maintenance from her former husband, with whom she had lived for 10 years, including two years of marriage. The husband contended in response that, as the plaintiff was male, their marriage was void. In contrast to *Corbett*, the couple had had a significant relationship and had indisputably had intercourse over the period of their marriage. The Court held that sex for the purposes of marriage could be determined by the congruence of anatomy and psychology (which in the case of the post-operative plaintiff were both female)<sup>26</sup> and that as a consequence there had been a valid marriage.

This is also the approach taken by the Australian Full Family Court in *Attorney-General (Cth) v 'Kevin and Jennifer' ('Re Kevin')*.<sup>27</sup> The Court in that case explicitly rejected the *Corbett* test, agreeing with the trial judge, Chisholm J, that *Corbett* espoused a biologically essentialist view of sex and was hence 'too limited' and did not represent Australian law.<sup>28</sup>

*Re Kevin* concerned Kevin, who was born Kimberley, with female gonads, genitals and chromosomes. From early on, Kevin perceived himself as male and in 1995 he started hormone treatment and followed it with a mastectomy and later a total hysterectomy with bilateral oophorectomy.<sup>29</sup> He subsequently had his birth certificate changed to gain legal recognition of his change of sex<sup>30</sup> and married Jennifer. The case concerned the validity of this marriage.

The Full Family Court confirmed the decision of Chisholm J that Kevin was a man at the date of the marriage for the purposes of the Commonwealth's *Marriage Act 1961* (Cth). Ultimately, the decision was framed as one of statutory interpretation, holding that the words 'man' and 'woman' when used in legislation

<sup>25</sup> 335 A 2d 204 (NJ Super, 1976). Most state courts in the United States have taken the *Corbett* approach: see, eg, *Re Estate of Gardiner*, 42 P 3d 120 (Kan, 2002) and *Littleton*, 9 SW 3d 223 (Tex App, 1999).

<sup>26</sup> It is clear that the Court was not only considering the genitals an individual was born with to be relevant in this context. Instead, the Court was prepared to accept reconstructed genitalia as relevant evidence of a person's 'new' sex.

<sup>27</sup> (2003) 172 FLR 300 ('*Re Kevin*') affirming the decision of Chisholm J *Re Kevin* (2002) 28 Fam LR 158. The Court did not specifically mention *MT v JT*, 335 A 2d 204 (NJ Super, 1976) but it is clear that this was the first case to articulate the general approach taken in *Re Kevin*.

<sup>28</sup> *Re Kevin* (2003) 172 FLR 300, 309.

<sup>29</sup> The surgery constituted 'sexual reassignment surgery' within the meaning of the *Birth, Deaths and Marriages Registration Act 1995* (NSW) s 32A. Note that Kevin did not have surgery to construct a penis (phalloplasty).

<sup>30</sup> The process by which legal sex can be changed in Australia will be considered further below.

such as the *Marriage Act 1961* (Cth) have their ordinary contemporary meaning, and that meaning includes *post-operative* transsexuals who have undergone irreversible surgery.<sup>31</sup> A contrary, restrictive, interpretation was not acceptable because it would have a discriminatory effect where Parliament showed no intention of enabling such an approach.<sup>32</sup>

It is interesting to note that in this case marriage was viewed as a social institution and it was therefore relevant to consider how Kevin was perceived by the community. At first instance, Chisholm J took into account extensive evidence as to how Kevin was perceived by friends, family and work colleagues. On appeal, the Commonwealth argued that ‘cultural and social factors were irrelevant and should not, in any event, have been determinative.’<sup>33</sup> On this point, the Full Family Court held that it is

clearly relevant to receive evidence as to how Kevin and Jennifer are perceived by the community in which they live ... society’s perception of the person’s sex provides relevant evidence as to the ordinary, everyday meaning of the words ‘man’ and ‘woman’.<sup>34</sup>

In Australia, this second approach, which considers both the anatomy (including *post-operative* anatomy) of an individual, and their psychological perception of their sex, has also been used by the courts in interpreting social security legislation and criminal law.<sup>35</sup> Generally, this approach is more progressive than that in *Corbett* because it recognises that a person’s sex may be changeable. It has been described as reflecting ‘a compassionate and humane approach to the sensitivities of human sexuality balanced against the need for reasonable certainty’.<sup>36</sup> It has also been praised for the fact that it recognises a (significant?) degree of agency in the subject over their sex.<sup>37</sup>

However, this approach is also subject to criticism. In particular, it is thought to over emphasise anatomy, which effectively sanctions the surgical ‘mutilation’ of transsexual bodies.<sup>38</sup> In addition, it is criticised for effectively leaving pre- or non-operative transsexuals unprotected because the focus on anatomy effectively distinguishes between *post-operative* and pre- and non-operative transsexuals.<sup>39</sup> The arbitrary nature of this distinction has been

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<sup>31</sup> *Re Kevin* (2003) 172 FLR 300, 323, 364.

<sup>32</sup> *Ibid* 363.

<sup>33</sup> *Ibid* 355.

<sup>34</sup> *Ibid*.

<sup>35</sup> *Re Secretary, Department of Social Security and HH* (1991) 23 ALD 58; *Secretary, Department of Social Security v SRA* (1993) 43 FCR 299; *Scafe v Secretary, Department of Families, Housing, Community Services and Indigenous Affairs* [2008] AATA 104; *R v Harris and McGuinness* (1988) 17 NSWLR 158.

<sup>36</sup> *Secretary, Department of Social Security v SRA* (1993) 43 FCR 299, 325 (Lockhart J)..

<sup>37</sup> Stephen Whittle, ‘The Becoming Man — The Law’s Ass Brays’, in Kate More and Stephen Whittle (eds), *Reclaiming Genders: Transsexual Grammars at the Fin de Siècle* (Cassell, 1999)24.

<sup>38</sup> See *Hartin v Director of the Bureau of Records*, 347 NYS 2d 515, 518 (Sup Ct, 1973) where the Court describes sex reassignment surgery as ‘an experimental form of psychotherapy ... mutilating surgery’.

<sup>39</sup> Chisholm J described this line as a ‘convenient and workable line’: *Kevin v A-G (Cth)* (2002) 165 FLR 404, 474 (Chisholm J). Note that unlike a number of US jurisdictions, reconstructive surgery in the form of a penis construction (phalloplasty) was not required by the Court in *Re Kevin*: Dean Spade, ‘Documenting Gender’ (2007) 59 *Hastings Law Journal* 731. The requirement of

recognised in cases where it has been applied to the legal recognition of sex. In *Secretary, Department of Social Security v SRA*, for example, Black CJ recognised that surgical intervention did not necessarily make a person more or less one gender or another, but rationalised that ‘a line has to be drawn somewhere’.<sup>40</sup> In his view it was appropriate, given the social security legislation he was interpreting, to draw the line on the basis of treatment that ‘bring[s] external genital features into general conformity with a person’s psychological sex’.<sup>41</sup>

This, however, creates a further issue; that of determining how much anatomical change is required. Ironically, distinguishing between pre- and post-operative transsexuals also attracted criticism in *Bellinger*, where the distinction was cast as arbitrary. Lord Nicholls commented that: ‘There seem[ed] to be no “standard” operation or recognised definition of the outcome of completed surgery.’<sup>42</sup> He also said:

These are deep waters. Plainly, there must be some objective, publicly available criteria by which gender reassignment is to be assessed. If possible, the criteria should be capable of being applied readily so as to produce a reasonably clear answer.<sup>43</sup>

According to the House of Lords, determining these criteria is Parliament’s responsibility, *not* that of the courts. In the House of Lords’ view it was inappropriate, possibly even illegitimate, for a court to attempt to draw this ‘sex line’.<sup>44</sup> Lord Nicholls listed three reasons for this. First, the courts are ‘not in a position to decide where the demarcation line could sensibly or reasonably be drawn’ in that the ‘solution calls for extensive enquiry and the widest public consultation and discussion’;<sup>45</sup> second, the matter should be ‘considered as a whole and not dealt with in a piecemeal fashion’;<sup>46</sup> and third, the question raises wider issues which challenge the traditional concept of marriage.<sup>47</sup> Lord Hope agreed that determining the sex line in what he seemed to conceptualise as a same-sex marriage case ‘must be left to Parliament’.<sup>48</sup>

The preceding discussion shows that when applying a facilitative approach to legal recognition of change of sex, courts are reluctant to blur the line between

phalloplasty in some US jurisdictions means that there are two subgroups within the ‘post-operative’ group: those that have surgery to remove genitalia and those that have further surgery to construct genitalia.

<sup>40</sup> (1993) 43 FCR 299, 306.

<sup>41</sup> *Ibid.*

<sup>42</sup> [2003] 2 AC 467, 479.

<sup>43</sup> *Ibid.*

<sup>44</sup> *Ibid.* 480 (Lord Nicholls), 482 ( Lord Hope). The Commonwealth made this argument but was unsuccessful in *Re Kevin* (2003) 172 FLR 300, 312, 362.

<sup>45</sup> [2003] 2 AC 467, 478.

<sup>46</sup> *Ibid.* 480.

<sup>47</sup> *Ibid.*

<sup>48</sup> *Ibid.* 486 (Lord Hope). Lord Hope approached this case of one of statutory interpretation. He held that the words ‘male’ and ‘female’ must be given their ordinary everyday meaning and for this purpose used the New Shorter Oxford English Dictionary, which states that male designates ‘the sex which can beget offspring’: at 484. He therefore determined that Mrs Bellinger was male and that her marriage was a same-sex relationship. In contrast, the Full Family Court in *Re Kevin* stated emphatically that the case before it was not a same-sex marriage case, despite the similarity in facts: (2003) 172 FLR 300, 313.



pre-operative, post-operative and non-operative transsexuals without legislative guidance. They feel ill-equipped to draw such an anatomical line because of the arbitrariness of the process and the implications relating to same-sex marriage.<sup>49</sup> Courts would prefer Parliament to determine the legal status of transgender people who have not made changes to their anatomy.

### C *Third Approach – Sex as Psychology*

A third judicial narrative determines sex by giving primacy to behaviour and psychology, and considers anatomy to be of secondary relevance. This approach was taken by the Administrative Appeals Tribunal at first instance in *Re Secretary Department of Social Security and SRA*<sup>50</sup> in 1992. The Tribunal held that psychological sex should be regarded as the most important factor in determining legal sex, and that social and cultural identity are also important factors.<sup>51</sup> The secondary status of anatomical considerations is apparent in the way the Tribunal considered sex reassignment surgery. The Tribunal stated that while sex reassignment surgery could be taken as an indicator of psychological sex, it was not determinative because in itself surgery has no effect upon a transgender person's psychological sex.<sup>52</sup> It further stated that a requirement that a person undergo expensive surgery in order to change their sex was unduly onerous.<sup>53</sup> However, the Federal Court subsequently overruled the decision<sup>54</sup> and the approach has received little support in the courts. When considering legal change of sex in *Bellinger*, Lord Nicholls stated outright that this third approach was not an option. In his view, '[s]elf-definition is not acceptable' as it would 'make nonsense of the underlying biological basis of the distinction.'<sup>55</sup> His fear was that recognition of sex reassignment will involve too much 'blurring of the normally accepted biological distinction between male and female'.<sup>56</sup> It appears that Lord Nicholls wanted to offer Parliament some guidance; he did not agree with Lord Hope's view that such questions 'must' be left to Parliament and that it was inappropriate for courts to determine such issues.<sup>57</sup>

However, the idea of 'gender by choice' in relation to marriage received some implicit support in the UK in *W v W (Physical Inter-sex)*.<sup>58</sup> In that 'physical inter-sex' marriage case the Family Division was asked by the petitioner to

<sup>49</sup> Both marriage between individuals of the same legal sex and the appearance of same-sex marriage are potentially of concern to these courts. For example, in *Corbett* [1971] P 83, April Ashley was legally considered to be a man but her external appearance was of a woman which meant her marriage appeared to be heterosexual.

<sup>50</sup> (1992) 28 ALD 361. See also *Re Secretary, Department of Social Security and HH* (1991) 13 AAR 314, 324 (Member Brennan), where Member Brennan said that 'psychological, social/cultural gender identity are the matters of primary importance' in the case of a post-operative MTF transsexual applicant for the age pension.

<sup>51</sup> *Ibid* 366–7.

<sup>52</sup> *Re Secretary, Department of Social Security and SRA* (1992) 28 ALD 361, 365.

<sup>53</sup> *Ibid* 367.

<sup>54</sup> *Secretary, Department of Social Services v SRA* (1993) 43 FCR 299.

<sup>55</sup> [2003] 2 AC 467, 477.

<sup>56</sup> *Ibid*.

<sup>57</sup> *Ibid* 486 (Lord Hope).

<sup>58</sup> [2001] Fam 111 ('*W v W*').

determine whether his marriage to the intersex respondent was null on the ground that the respondent was legally male at the date of marriage.<sup>59</sup> Justice Charles considered a number of factors in determining legal sex, including chromosomes, gonads, genitals, the respondent's capability to procreate and have sexual intercourse, her 'body habitus' and general appearance, and her choice of sex. Although many of these factors *prima facie* indicated the respondent was male,<sup>60</sup> it seems to have been decisive for his Honour that the respondent had made a '*final* choice to live as a woman'.<sup>61</sup> As a consequence, the Court held the respondent was female at the time of the marriage, which was therefore valid. It is interesting that this case produced little apparent outcry or controversy. Indeed, it appears that the House of Lords in *Bellinger* impliedly affirmed it. In that case Lord Hope stated of 'intersex' cases:

classification of the individual as male or female is best done by having regard to all the factors I have listed. If every person has to be classified as either male or female, that is the best that can be done. That was the course, in line with medical opinion, followed by Charles J in *W v W*.<sup>62</sup>

Lord Hope then went on to distinguish transsexual people from intersex people on the ground that the former are born with congruent physical characteristics.<sup>63</sup>

Interestingly, *W v W* has not been characterised by either the House of Lords or the Family Court of Australia<sup>64</sup> as challenging the traditional concept of marriage — a charge levelled against the Bellingers' petition by Lord Nicholls.<sup>65</sup> It appears that, since procreation is no longer seen as central in the contemporary concept of marriage, what now challenges the concept of marriage is the union of two persons whose sex is of the same *external appearance* regardless of whether they have different chromosomal or genetic sex. This was not the situation in *W v W* in that the parties in that case had the external appearance of a heterosexual couple. This, in addition to the fact that the respondent in *W v W* was intersex, rather than transsexual, may explain the case's failure to generate controversy.

The primary importance of external appearance in relation to the capacity to marry was forcefully made by Ellis J in the New Zealand case of *Attorney General v Otahuhu Family Court*.<sup>66</sup> Here, the New Zealand High Court found that there

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<sup>59</sup> Charles J held that the case did not concern a transsexual and therefore the *Corbett* test was not appropriate: *W v W* [2001] Fam 111, 145. He distinguished 'inter-sex' persons from transsexuals. He described the former as suffering partial androgen sensitivity, which is caused by mutations of the androgen receptors so that the male body is unable to 'see' testosterone. In this case the respondent had male chromosomes, ambiguous gonadal sex, ambiguous external genital appearance, no female internal sex organs, female body habitus (eg little body hair) and female gender identity.

<sup>60</sup> *Ibid* 121–2. For example, it was found that her chromosomal sex was male, her gonads were likely to be male and there was no evidence of any internal or external female genitalia.

<sup>61</sup> *Ibid* 122, 147 (emphasis in original).

<sup>62</sup> [2003] 2 AC 467, 472.

<sup>63</sup> *Ibid*. In Australia the Commonwealth did not seek to argue that this was wrong: *Re Kevin* (2003) 172 FLR 300, 340.

<sup>64</sup> *Bellinger* [2003] 2 AC 467 at para 6; *Re Kevin* (2003) 172 FLR 300, 340.

<sup>65</sup> *Bellinger* [2003] 2 AC 467 480. This argument was also brought by the Commonwealth in *Re Kevin* (2003) 172 FLR 300, 314.

<sup>66</sup> [1995] 1 NZLR 603.

would be ‘no socially adverse effects’ from allowing transsexuals to marry in their adopted sex.<sup>67</sup> In considering the possibility that this would legitimise same-sex marriage, Ellis J reasoned that it is the appearance of a particular sex and the appearance of heterosexuality that is essential to marriage.<sup>68</sup> Justice Ellis went on to examine the implications of the *Corbett* approach to the question of same-sex marriages. He stated:

If the law insists that genetic sex is the pre-determinant for entry into a valid marriage, then a male to female transsexual can contract a valid marriage with a woman and a female to male transsexual can contract a valid marriage with a man. To all *outward* appearances, such would be same-sex marriages.<sup>69</sup>

While this articulation of the issue of same-sex marriage is unusual, Ellis J’s decision fits within the second approach in its focus on external appearance which requires that the transgender person’s anatomy be altered to achieve congruence with their psychology. However, his Honour’s explicit consideration of the issue of same-sex marriage demonstrates it is a spectre in the transgender marriage cases.

Having considered the three primary judicial approaches to legal sex, the next part uses these approaches as a framework to explore how legislatures in Australia have regulated gender and how they have drawn the sex line in this process.

### III Legislative Landscape in Australia

The Australian legislative approach to the problems faced by transgender people is piecemeal, owing largely to Australia’s federal system and the absence of a Bill of Rights at the federal level. Under the *Constitution*, the federal government does not have the power to pass legislation that would confer full recognition on transgender people for all purposes, thus transgender people must navigate the legislation enacted by state and territory governments as well as the federal government. While marriage, social security and passports are predominantly federal matters,<sup>70</sup> registration of births and much of regulating the criminal law are left to the states and territories. In this complicated legal landscape, no single judicial approach has been taken consistently.

The first approach discussed above has not been explicitly adopted by any Australian legislature when providing for legal change of sex. However, until specific legislation dealing with amendment of birth certificates was enacted in each Australian state and territory (Victoria being the final jurisdiction to introduce such legislation in 2004),<sup>71</sup> change of sex on an Australian birth certificate was restricted to situations where the certificate was affected by clerical error. It could

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<sup>67</sup> Ibid 607.

<sup>68</sup> Ibid.

<sup>69</sup> Ibid (emphasis added).

<sup>70</sup> The Commonwealth’s power to enact laws with respect to marriage under s 51(xxi) of the *Constitution* is not exclusive unless Parliament legislates so as to ‘cover the field’ of marriage. If this is the case, the states are unable to pass valid laws regarding same-sex marriage because of the operation of s 109 of the *Constitution*.

<sup>71</sup> *Births, Deaths and Marriages Registration (Amendment) Act 2004* (Vic).

be argued that refusing individuals any agency to change sex legally implied adoption of the first approach.<sup>72</sup>

In contrast, it seems the third approach has been taken by the federal government in relation to identification of sex on Australian passports. In September 2011, it announced changes to Department of Foreign Affairs and Trade guidelines for changing sex on passports so that sex reassignment surgery is no longer a prerequisite to issuing a passport in a person's preferred gender.<sup>73</sup> Instead, the new rules facilitate the issue of a fresh passport in circumstances where the applicant is able to provide:

evidence from a medical practitioner (registered with the Medical Board of Australia or equivalent overseas authority) certifying that they have had, or are receiving, appropriate clinical treatment (including sex reassignment surgery) for transition to a new gender and specifying the new gender.<sup>74</sup>

'Appropriate clinical treatment' is to be determined by the registered medical practitioner and is not defined. While sex reassignment surgery is provided as an example of what could constitute 'appropriate clinical treatment', it appears that other interventions will also satisfy this provision. The Oxford dictionary defines the term 'clinical' to mean 'relating to the observation and treatment of patients'.<sup>75</sup> This definition is clearly broader than surgical treatment, and it is arguable that hormone therapy, counselling or other forms of therapy regarding the transition of gender may be sufficient to constitute appropriate clinical treatment. This appears to focus on the psychological aspects of sex, with no requirement that the applicant produce evidence that their anatomy matches their psychological sex. While this policy maintains a medical approach to changing sex, the federal government has moved away from the second judicial approach (with its dual focus on anatomy and psychology) and into the third, transformative, approach discussed above.<sup>76</sup> This facilitates legal recognition of change of sex more easily than previously, but it should also be noted that the

<sup>72</sup> A number of US states, including Idaho, Ohio and Tennessee, also restrict amendment of birth certificates to situations where there has been a clerical error. See further *Re Ladrach*, 32 Ohio Misc. 2d 6, 8 (Ohio Prob Ct, 1987) in which Ohio's birth certificate statute IDAHO ADMIN. CODE r. 16.02.o8.201 was interpreted as a correction statute that does not enable correction of sex on birth certificates of individuals who have changed their sex by surgical procedure. This is also the case in Ireland: *Foy v An t-Ard Chláraitheoir* [2007] IEHC 470. In contrast, the US state of Tennessee explicitly prohibits the legal reclassification of sex where sex-change surgery has taken place: Tennessee Code Annotation §68-3-203(d) (2006).

<sup>73</sup> Kevin Rudd MP, Minister for Foreign Affairs and Robert McClelland MP, Attorney-General, *Getting a Passport Made Easier for Sex and Gender Diverse People* (Media release, 14 September 2012) <[http://www.foreignminister.gov.au/releases/2011/kr\\_mr\\_110914b.html](http://www.foreignminister.gov.au/releases/2011/kr_mr_110914b.html)>.

<sup>74</sup> Department of Foreign Affairs and Trade, *Change of Sex: Sex and Gender Diverse*, Australian Government: Department of Foreign Affairs and Trade <<http://www.dfat.gov.au/publications/passports/Policy/Identity/Sex/Changeofsexsexandgenderdiverse/index.htm>>.

<sup>75</sup> Judy Pearsall (ed), *Concise Oxford English Dictionary* (Oxford University Press, 10<sup>th</sup> ed, 2001) 268.

<sup>76</sup> The third approach has also been taken by the UK Parliament which enacted the *Gender Recognition Act 2004* (UK) ('GRA') one year after the *Bellinger* case. Under the GRA, unmarried transgender people of adult age can apply to a Gender Recognition Panel for legal recognition of their chosen sex if they can establish that they have gender dysphoria (discontent with their biological sex and/or the gender they were assigned at birth), have lived in the acquired gender for two years and intend to continue to live in the acquired gender until death. There is no legislative requirement that they undergo any form of sex reassignment surgery or even hormonal treatment.

policy does not allow for sex to be determined on the basis of behaviour and psychology alone. In order to obtain a passport in their preferred gender, an individual is required to engage with the medical profession. This does not accommodate those individuals who want to challenge the medical model of intervention or those who want to avoid such intervention.

However, most legislation regarding change of gender on birth registration and identification documents in Australia is even less facilitative, and appears to implement some variation of the second approach. This means that, in Australia, legal sex is primarily determined according to some congruence of psychological and anatomical characteristics.<sup>77</sup> The commonalities and differences in these legislative provisions are examined below.

#### IV The Australian Spectrum within the Second Approach

South Australia was the first Australian state to provide for the legal recognition of reassigned sexual identity in the *Sexual Reassignment Act 1988* (SA). Since then, all states and territories have introduced legislation to allow adult transgender people who have undergone gender reassignment and are not married to apply to amend the gender on their birth certificates.<sup>78</sup> Each of these provisions align generally with the second approach to the legal recognition of gender.

The main differences between the statutory provisions which enable the amendment of birth certificates in Australia relate to where the 'sex line' is drawn *within* the second approach. All jurisdictions in Australia require applicants requesting legal recognition of change of sex to produce evidence regarding their psychology and that they have undergone a 'procedure' to change their sex. However, the kind of procedure required varies.

While Western Australia and South Australia permit legal change if the person concerned has undergone a 'medical or surgical procedure' to alter their 'genitals' and 'other sexual characteristics',<sup>79</sup> all other jurisdictions specifically require 'surgical' intervention to alter 'reproductive organs'.<sup>80</sup> For example, s 32B

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<sup>77</sup> Through a sophisticated theoretical framework, Andrew Sharpe argues that legislatures take this approach to the legal recognition of sex change because they are concerned to decouple transgender bodies from homosexual bodies. See Sharpe, above n 10, ch 8. This second approach is also the norm in most US jurisdictions: Spade, above n 39, 731.

<sup>78</sup> *Sexual Reassignment Act 1988* (SA) s 7; *Births, Deaths and Marriages Registration Act 1995* (NSW) s 32B; *Births, Deaths and Marriages Registration Act 1996* (Vic) s 30A; *Births, Deaths and Marriages Registration Act 1996* (NT) s 28B; *Births, Deaths and Marriages Registration Act 1997* (ACT) s 24; *Births, Deaths and Marriages Registration Act 1999* (Tas) s 28A; *Gender Reassignment Act 2000* (WA) s 15; *Births, Deaths and Marriages Registration Act 2003* (Qld) s 23.

<sup>79</sup> *Sexual Reassignment Act 1988* (SA) s 3. See also *Gender Reassignment Act 2000* (WA) s 3, which is identical to the South Australian provision except for a reference to 'gender' characteristics rather than 'sexual' characteristics.

<sup>80</sup> *Sexual Reassignment Act 1988* (SA) ss 3, 7; *Gender Reassignment Act 2000* (WA) ss 3, 15. Cf *Births, Deaths and Marriages Registration Act 1995* (NSW) ss 32A, 32B; *Births, Deaths and Marriages Registration Act 1996* (Vic) ss 4, 30A; *Births, Deaths and Marriages Registration Act 1996* (NT), ss 28 A, 28B; *Births, Deaths and Marriages Registration Act 1997* (ACT) ss 23, 24;

of the *Births, Deaths and Marriages Registration Act 1995* (NSW) permits alteration of a person's sex on their birth certificate if, among other things, an individual has undergone a 'sex affirmation procedure'. A 'sex affirmation procedure' is defined to mean a 'surgical procedure' involving the 'alteration of reproductive organs'.<sup>81</sup>

There are two significant differences between the Western and South Australian legislation and that of the other Australian states and territories. The first is that surgery is required outside of South and Western Australia, whereas in those states medical intervention may be sufficient to satisfy the legislation. The second is that in South and Western Australia, there is no necessity to alter reproductive organs. Reproductive organs are clearly those involved in reproduction, including the testes and penis of a man and the ovaries and uterus of a woman. However, genitals and other sexual/gender characteristics — which must be altered under the South and Western Australian legislation — may include non-reproductive anatomy, such as a woman's breasts and clitoris.

A legislative requirement that reproductive organs must be surgically altered aligns with the most common form of sex-change procedure for MTF transgender persons: the removal of the penis. This can only be achieved through surgery; it cannot be achieved through medical intervention such as hormone treatment. However, female-to-male ('FTM') transgender people have the option of altering the clitoris through hormone treatment. Under the Western and South Australian legislation, such medical treatment may constitute sufficient alteration of genitalia for the granting of a recognition certificate, even though the clitoris is not directly involved in reproduction. In these jurisdictions surgery is not mandated and the legislation does not specify the alteration of 'reproductive organs', but instead refers more broadly to 'genitalia'.<sup>82</sup> As a consequence, it may be easier for a FTM transsexual to gain legal change of sex in Western Australia and South Australia than in states requiring surgical alteration of reproductive organs. In effect, it appears that jurisdictions other than Western and South Australia require that FTM transgender people have hysterectomies, and hence be sterilised, before they can receive legal recognition of their change of sex.

This shows that while the two legislative approaches effectively make little difference for MTF transgender people (for whom the most common sex-change procedure is surgical removal of the penis, which necessarily results in sterilisation), for FTM transgender people the differences between the legislative provisions create a spectrum within the second approach as to the degree of anatomical intervention which is legally required.

The operation of this spectrum within the second approach can be further illustrated by considering the circumstances in which the sex recorded on an individual's birth certificate can be changed in Western Australia under the *Gender*

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*Births, Deaths and Marriages Registration Act 1999* (Tas) ss 3, 28A; *Births, Deaths and Marriages Registration Act 2003* (Qld) s 23, sch 2.

<sup>81</sup> *Births, Deaths and Marriages Registration Act 1995* (NSW), s 32A. Similar requirements operate in Tasmania, Victoria, the Northern Territory and Queensland.

<sup>82</sup> *Sexual Reassignment Act 1988* (SA) s 3; *Gender Reassignment Act 2000* (WA) s 3.

*Reassignment Act 2000* (WA) ('the WA Act').<sup>83</sup> In October 2011, the High Court considered this legislation in *AB v Western Australia*.<sup>84</sup> The ambiguous nature of this legislation meant that the degree of anatomical intervention required was unclear, and the High Court was forced to draw a judicial 'sex line'.

## V The High Court in *AB v Western Australia*

Under the WA Act, the legal recognition of gender change can be affected by applying to the Gender Reassignment Board ('the Board') for the grant of a recognition certificate. This can then be presented to the Principal Registrar of Births, Deaths and Marriages who will enter the change of sex on the individual's birth certificate.<sup>85</sup> The WA Act provides that a recognition certificate can be issued to an adult who has undergone a reassignment procedure in Western Australia,<sup>86</sup> or to an adult who was born in Western Australia who has undergone such a procedure elsewhere.<sup>87</sup> In order to issue a recognition certificate, the Board must be convinced that: the adult applicant is unmarried; 'believes that his or her true gender is the gender to which the person has been reassigned';<sup>88</sup> 'has received proper counselling in relation to his or her gender identity';<sup>89</sup> and 'has adopted the lifestyle and has the gender characteristics of a person of the gender to which the person has been reassigned'.<sup>90</sup>

The terms 'reassignment procedure' and 'gender characteristics' are defined in the WA Act as follows.

*reassignment procedure* means a medical or surgical procedure (or a combination of such procedures) to alter the genitals and other gender characteristics of a person, identified by a birth certificate as male or female, so that the person will be identified as a person of the opposite sex ...

*gender characteristics* means the physical characteristics by virtue of which a person is identified as male or female[.]<sup>91</sup>

In determining *AB v Western Australia*, Australia's apex court, the High Court focused on what was meant by the term 'gender characteristics' in the WA Act. The two applicants in the case, AB and AH, were FTM transsexuals. They each identified themselves as male although they retained some female characteristics. Each had undergone a bilateral mastectomy (removal of both breasts) and testosterone therapy, following which they applied for certificates

<sup>83</sup> Western Australia has been chosen because the legislation in this jurisdiction was considered by the High Court in October 2011: *AB v Western Australia* (2011) 244 CLR 390. However, it is interesting to note that the Western Australian legislation enacted in 2000 is almost identical in effect to legislation enacted in 1988 in South Australia: *Sexual Reassignment Act 1988* (SA).

<sup>84</sup> *AB v Western Australia* (2011) 244 CLR 390.

<sup>85</sup> *Gender Reassignment Act 2000* (WA) s17.

<sup>86</sup> Ibid s 15(1)(a)(ii).

<sup>87</sup> Ibid s 15(1)(a)(i).

<sup>88</sup> Ibid s 15(1)(b)(i). This provision makes it apparent that the law aims to maintain a binary gender order and requires permanent, even if non-surgical, crossings.

<sup>89</sup> Ibid s 15(1)(a)(iii).

<sup>90</sup> Ibid s 15(1)(a)(ii).

<sup>91</sup> Ibid s 3.

recognising their legal change of sex. However, neither applicant had had a hysterectomy or oophorectomy (removal of the ovaries) to alter or remove their internal female reproductive organs, either of which would have a serious physical impact on the applicants. They had also not had surgery to construct a penis (phalloplasty) and their vaginas remained unaffected except for an inch of clitoral growth resulting from hormone treatment.

In each case the Board, at first instance, was satisfied that the external appearance of the applicants was male. However, it refused to issue a recognition certificate to either AB or AH because each retained female reproductive organs. The Board noted that as AH had a female reproductive system and thus the capacity to bear children, it had to consider the ‘adverse social consequences should Mr H be issued a certificate while he has the capacity to bear children’. It reasoned:

The fact of having a female reproductive system is inconsistent with being male. Because it is inconsistent with being male, it is inconsistent with being identified as male.<sup>92</sup>

On appeal the High Court held that this was an incorrect interpretation of ‘gender characteristics’ in the WA Act. While the Board focused on reproductive organs as determinative of whether an individual was identified as male or female, the High Court suggested that the WA Act actually required consideration of gender from a social perspective. The High Court stated:

The question whether a person is identified as male or female, by reference to the person’s physical characteristics, is intended by the Act to be largely one of social recognition. It is not intended to require an evaluation by the Board of how much of a person’s body remains male or female. ... Such a [social] recognition does not require knowledge of a person’s remnant sexual organs.<sup>93</sup>

The High Court interpreted the WA Act as requiring an emphasis on external physical characteristics rather than internal sexual organs. The Court specifically articulated that while some medical or surgical intervention was required, it did not consider the WA Act to ‘require that the person undertake every procedure to remove every vestige of the gender which the person denies, including all sexual organs’.<sup>94</sup> In other words, compliance with the legislation did not require alteration or removal of all reproductive organs. Nor was it necessary for either applicant to undergo phalloplasty, which is a requirement in many US jurisdictions.<sup>95</sup> Regarding the latter procedure, the Court noted that it is not available in Australia due to associated high risks and the low rate of its success. Presumably the legislative requirement that the applicants undergo a ‘medical or surgical procedure ... to alter the genitals’<sup>96</sup> was satisfied in the High Court’s view by the clitoral growth brought about by medical hormone treatment. In addition to this medical alteration of their genitals, AB and AH had also altered other external gender characteristics by undergoing bilateral surgical mastectomies.

<sup>92</sup> *AB v Western Australia* (2011) 244 CLR 390, 399, quoting the board.

<sup>93</sup> *Ibid* 405 (French CJ, Gummow, Hayne, Kiefel and Bell JJ).

<sup>94</sup> *Ibid*.

<sup>95</sup> Spade, above n 39.

<sup>96</sup> *Gender Reassignment Act 2000* (WA) s 3.



In deciding that external physical characteristics were determinative for the purpose of the WA Act, the High Court did not comment on the ongoing ability of AB and AH to bear children except to note that as long as the applicants continued hormone treatment they would remain infertile.<sup>97</sup> The lack of judicial focus on fertility suggests that, in the High Court's view, the applicants' capacity to bear children was not a relevant consideration under the WA Act. This is interesting considering the strong focus on fertility in the case's procedural history. The applicants' continuing fertility constituted Western Australia's first ground of appeal before the Court of Appeal. The State argued that an error had been made in deciding that the applicants had satisfied the requirements of the WA Act because of the ongoing (even if remote) possibility that they could bear children.<sup>98</sup> The Court of Appeal held that the fact that the applicants retained female productive organs was relevant, even though the possibility of either applicant becoming pregnant was 'very unlikely and remote'.<sup>99</sup>

One can speculate that the April 2008 US case of Thomas Beatie, the pregnant FTM post-operative transsexual who appeared on *The Oprah Winfrey Show*,<sup>100</sup> may have brought the possibility of a FTM transsexual bearing a child to the fore for the courts. However, to require an applicant to become irreversibly infertile through the alteration of reproductive organs is a serious restriction on the right to family.<sup>101</sup> For a court to read the legislation in this highly restrictive manner would require evidence of clear parliamentary intention. One can also presume that the Western Australian Parliament was aware of the much more specific provisions requiring surgical alteration of reproductive organs in other states such as New South Wales, which were discussed above, when it introduced its more liberal legislation in 2000.<sup>102</sup>

For the High Court, the second question raised by the WA Act was by whom the transgendered applicants would need to be identified. The High Court's answer — that 'other members of society' are equipped to identify the sex of the applicants<sup>103</sup> — is in line with its decision that external physical characteristics are determinative. This focus on external evaluation effectively lowers the bar from the consideration of 'community expectations and standards' imposed by the Western Australian Court of Appeal,<sup>104</sup> because 'community standards and expectations' may well take into account the question of fertility.

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<sup>97</sup> *AB v Western Australia* (2011) 244 CLR 390, 400.

<sup>98</sup> *Western Australia v AH* (2010) 41 WAR 431,466, 475.

<sup>99</sup> *Ibid* 458.

<sup>100</sup> CBS Television Distribution (Syndicated Broadcasters), 'First TV Interview: The Pregnant Man', *The Oprah Winfrey Show*, 3 April 2008 (Oprah Winfrey and Thomas Beatie). See also Paisley Currah, 'Expecting Bodies: The Pregnant Man and Transgender Exclusion from the Employment Non-Discrimination Act' (2008) 36 *Women's Studies Quarterly* 330.

<sup>101</sup> Such a right is recognised in the *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 17.  
<sup>102</sup> *Gender Reassignment Act 2000* (WA).

<sup>103</sup> *AB v Western Australia* (2011) 244 CLR 390, 405.

<sup>104</sup> *Western Australia v AH* (2010) 41 WAR 431, 456.

The liberal, facilitative reading of the WA Act in *AB v Western Australia* has sent ripples across the world.<sup>105</sup> Within Australia, the decision is consistent with the line drawn by the Federal Court in *Secretary, Department of Social Security v SRA*<sup>106</sup> and the New South Wales Court of Appeal in the 1988 criminal case of *R v Harris and McGuiness*,<sup>107</sup> both of which focused on external genitalia rather than internal reproductive organs to determine the sex of a transgender person who had undergone surgical intervention. On the spectrum within the second approach, the WA Act sits closest to the third approach in its application to FTM transsexuals because it does not mandate the alteration of internal reproductive organs or, indeed, any surgical intervention. A jurisdiction which requires phalloplasty for FTM transsexuals, such as in the United States, would sit at the other end of this spectrum.

## VI Regulating Gender Discrimination

Legal recognition of one's sex change is just one aspect of the law regarding recognition of gender. Legislation permitting individuals to change their sex legally cannot be considered effective if individuals utilising this agency are subject to subsequent discrimination. Therefore, a second important issue is the legal protections offered to those who either choose to live as a different sex or who also legally change their sex. In Australia, both state and Commonwealth law must be considered.<sup>108</sup>

The protections at federal level are relatively limited. The *Fair Work Act 2009* (Cth) does not include provisions prohibiting discrimination against transgendered people. Similarly, discrimination on the ground of transgender status is not prohibited by federal anti-discrimination legislation. The *Sex Discrimination Act 1984* (Cth) does prohibit discrimination on the basis of sex. Whether this federal prohibition extends to transgender people has not been explored in case law. However, examples of equivalent prohibitions in other Australian jurisdictions can provide guidance as to how the federal law might be interpreted. In various state tribunals, complainants have tested equivalent prohibitions by arguing that they protect a person who is discriminated against on the basis of their *legal* sex, even if this is different from their sex at birth.<sup>109</sup> However, this argument was not successful in the Victorian case of *Menzies v Waycott*.<sup>110</sup> In that case, Sharon

<sup>105</sup> See, eg, Associated Press, 'Transgender Australians Win Landmark Court Case', *The Guardian* (online), 6 October 2011 <<http://www.guardian.co.uk/world/2011/oct/06/transgender-australians-win-court-case>>.

<sup>106</sup> (1993) 43 FCR 299.

<sup>107</sup> (1988) 17 NSWLR 158, 192–3.

<sup>108</sup> An introduction to legislative prohibitions against discrimination based on transsexuality and transgendered status can be found in Neil Rees, Katherine Lindsay and Simon Rice, *Australian Anti-Discrimination Law: Text, Cases and Materials* (Federation Press, 2008) 380–4.

<sup>109</sup> *Sex Discrimination Act 1984* (Cth) s 5. Sex is not defined in the legislation. Arguments made in other jurisdictions as to whether prohibitions against sex discrimination are sufficiently broad to include discrimination against transgendered people are considered in Nicholas Bamforth, Maleiha Malik and Colm O'Connell, *Discrimination Law: Theory and Context — Text and Materials* (Sweet & Maxwell, 2008) 748–53.

<sup>110</sup> (2001) EOC 93-129.

Menzies, a post-operative MTF transsexual, claimed she had been dismissed from her employment because of her transsexual status, and that transsexualism was covered, inter alia, by the prohibition against sex discrimination in the *Equal Opportunity Act 1995* (Vic). While acknowledging that ‘Ms Menzies was treated less favourably because of her transsexualism’<sup>111</sup> the Victorian Civil and Administrative Tribunal held that:

transsexualism is not covered by the attribute of ‘sex’ in section 6(k) of the ... [*Equal Opportunity Act 1995* (Vic)] because transsexualism is ‘the condition of one who firmly believes that he (or she) belongs to the opposite sex to his (or her) biological gender.’<sup>112</sup>

This makes it clear that the Tribunal understood the ground of ‘sex’ within the *Equal Opportunity Act 1995* (Vic) to be limited to providing protection against discrimination based on biological sex, and did not extend to discrimination based on change of sex. Similarly, in *Opinion re: Australian Transgender Support Association of Queensland*, Member Holmes of the Queensland Anti-Discrimination Tribunal considered this issue and stated that the prohibition against sex discrimination under the Queensland legislation did not cover discrimination against a transgendered person per se: that is, ‘where discrimination occurs because of the very change from sex to sex itself.’<sup>113</sup> However, Member Holmes also stated that:

[I]f, for example, a male to female post-operative transgender were discriminated against in what would be her new female capacity, the Act would apply as it would for any woman. If a pre-operative male to female transgender were discriminated against because of a perception that they were female (although no actual physical change had occurred), again the Act would apply, because the assumption that they were female would suffice to constitute the attribute the subject of discrimination.<sup>114</sup>

Having considered how federal legislation might operate to protect transgender people against discrimination, it is necessary to examine the different protections against discrimination at state and territory level. State and territory laws offer more specific, although varied, protections to transgender persons. However, in each instance legislation delimits the category that receives protection.<sup>115</sup>

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<sup>111</sup> Ibid [172].

<sup>112</sup> Ibid [199], quoting Elizabeth A Martin (ed) *Concise Medical Dictionary* (Oxford University Press, 4<sup>th</sup> ed., 1994) 672.

<sup>113</sup> *Opinion re: Australian Transgender Support Association of Queensland* [1996] QADT 8 (17 May 1996) [9]4.

<sup>114</sup> Ibid [8] 4. This invoked prohibitions against discrimination based on assumptions regarding sex which exist in some state and territory legislation. See, eg, *Anti-Discrimination Act 1991* (Qld) s 8(c): ‘Discrimination on the basis of an attribute includes direct and indirect discrimination on the basis of — an attribute that a person is presumed to have, or to have had at any time, by the person discriminating’. Because these provisions relate to assumptions regarding sex, rather than transgender status per se, they are not strictly analogous to the more direct state protections considered above. While some transgender people may be able to utilise these protections when discriminated against because of assumptions about their sexuality or gender identity (see, eg *M v A and U* [2007] QADT 8 (16 March 2007)), the protections are not actually triggered by transsexual status. Therefore they will not be further considered in this article.

<sup>115</sup> ‘[F]aced with transgenderism, law desires to fix the categories of sex and, to the extent that it is produced as a legal category, transgender, as a mode of regulation’: Andrew Sharpe ‘Transgender

With the exception of Western Australia, there is a degree of commonality throughout Australia in the approach taken to the prohibition of discrimination. Victoria, Queensland and the Australian Capital Territory prohibit discrimination on the basis of ‘gender identity’.<sup>116</sup> New South Wales prohibits discrimination against a ‘transgender’ person or ‘recognised transgender person’,<sup>117</sup> and the Northern Territory and Tasmania prohibit discrimination on the basis of a person’s ‘transsexuality’ within the provisions on sexuality and sexual orientation.<sup>118</sup> These jurisdictions offer protection against discrimination directed toward individuals who live as a member of their preferred gender, or who have assumed characteristics of that gender. Critically, the protections do not require transgender people to undergo any medical or surgical intervention to change their anatomy. In order to trigger the protections, it is sufficient that the individual is socially perceived as of the other sex.<sup>119</sup>

A similar approach is taken in South Australia. From 1986 until 2009 the *Equal Opportunity Act 1984* (SA) prohibited discrimination based on sexuality, which was defined to include ‘transsexuality’.<sup>120</sup> ‘Transsexual’ was defined to mean ‘a person of the one sex who assumes characteristics of the other sex’.<sup>121</sup> This extended protections against discrimination to transgender persons regardless of whether they had undergone surgical or medical intervention to modify their sexual characteristics, and regardless of their legal sex. The South Australian legislation was amended in 2009<sup>122</sup> to replace the inclusion of transsexuality in the broader prohibition of sexuality discrimination with a specific prohibition against discrimination on the basis of ‘chosen gender’.<sup>123</sup> This is where a person:

identifies on a genuine basis as a member of the opposite sex by assuming characteristics of the opposite sex (whether by means of medical intervention, style of dressing or otherwise) or by living, or seeking to live, as a member of the opposite sex.<sup>124</sup>

With the exception of the prohibition against discrimination against a ‘recognised transgender person’ in New South Wales,<sup>125</sup> all of these provisions appear to implement the third approach to sex — sex is seen as primarily psychological. Emphasis is clearly placed on an individual genuinely identifying as a

Performance and the Discriminating Gaze: A Critique of Anti-Discrimination Regulatory Regimes’ (1999) 8 *Social & Legal Studies* 5, 7.

<sup>116</sup> *Equal Opportunity Act 1995* (Vic) ss 4(1), 6(ac); *Anti-Discrimination Act 1991* (Qld) ss 4, 7(m); *Discrimination Act 1991* (ACT) ss 2, 7(1)(c).

<sup>117</sup> *Anti-Discrimination Act 1977* (NSW) s 4(1), pt 3A (especially s 38A).

<sup>118</sup> *Anti-Discrimination Act 1992* (NT) s 4(1); *Anti-Discrimination Act 1998* (Tas) s 3.

<sup>119</sup> A ‘recognised transgender person’ in NSW is a person who has received a recognition certificate in their new sex, which requires surgical alteration of reproductive organs. However, no medical or surgical intervention is required order to be considered a ‘transgender person’: *Anti-Discrimination Act 1977* (NSW) s 4(1), pt 3A (see especially s 38A).

<sup>120</sup> *Equal Opportunity Act 1984* (SA) ss 5, 29(3).

<sup>121</sup> *Ibid* s 5.

<sup>122</sup> *Equal Opportunity (Miscellaneous) Amendment Act 2009* (SA).

<sup>123</sup> *Equal Opportunity Act 1984* (SA) s 29(2a). In 2011, the Australian Human Rights Commission noted some dissatisfaction with the term ‘chosen gender’ because it implies a choice that many gender diverse people do not believe they have: Australian Human Rights Commission, above n 6, 27.

<sup>124</sup> *Equal Opportunity Act 1984* (SA) s 5(5)(a).

<sup>125</sup> *Anti-Discrimination Act 1977* (NSW) s 4(1).

member of the opposite sex. External characteristics (including physical appearance but also other attributes according to which sexual identity is judged by other members of society) are considered to be evidence of an individual's psychological state, rather than being independently determinative of sexual identity. This focus on external gender characteristics — rather than anatomical features which are unlikely to be immediately apparent to other members of society — is consistent with that adopted by the High Court in *AB v Western Australia*.<sup>126</sup>

However, in contrast to this generally consistent application of the third judicial approach, Western Australian anti-discrimination laws are radically different, and clearly prioritise anatomy in a manner consistent with the second of the three judicial approaches.<sup>127</sup> The Western Australian legislation prohibits discrimination on the basis of 'gender history' against 'a gender reassigned person'.<sup>128</sup> 'Gender reassigned person' is defined as 'a person who has been issued with a recognition certificate under the *Gender Reassignment Act 2000* (WA) or a certificate which is an equivalent certificate for the purposes of that Act.'<sup>129</sup> Therefore, the anti-discrimination protections are not triggered unless a person has received legal recognition of their change of sex, and this involves alteration of genitals and other gender characteristics. Thus, until *AB* and *AH* were successful before the High Court,<sup>130</sup> they did not attract any protection as gender reassigned persons under Western Australia's anti-discrimination legislation.

It is notable that, in contrast to the facilitative laws regarding legal recognition of change of sex in Western Australia (which do not require surgical intervention), the anti-discrimination provisions are restrictive compared to those in other Australian jurisdictions. They effectively offer no protection to people who, for various reasons such as cost, personal choice, or pre-existing medical conditions, have not undertaken medical or surgical treatment and have not legally changed their sex. Compliance with the laws regarding legal recognition of sex in fact determines whether or not an individual will enjoy any legal protection against discrimination based on their transgender status. It appears that the Western Australian Parliament has very deliberately crafted the protections in this way. The objects clause of the *Equal Opportunity Act 1984* (WA) states that the objects of the Act include eliminating 'so far as is possible' discrimination on a wide range of grounds including sex, marital status, pregnancy, family responsibility, sexual orientation, race, religious or political conviction, impairment and age. However, the Act only aspires to eliminate discrimination based on gender history 'in certain cases'.<sup>131</sup> The narrow scope of the Western Australian legislation is unfortunate given the growing international support for recognising the rights of all people

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<sup>126</sup> (2011) 244 CLR 390.

<sup>127</sup> The limited protection offered under the Western Australian legislation may also contribute to the small number of complaints received. Only one complaint of gender history discrimination was received in each of 2009–10, and 2010–11: Equal Opportunity Commission, *Annual Report 2010–11* (2011) 36.

<sup>128</sup> *Equal Opportunity Act 1984* (WA) s 35AB.

<sup>129</sup> *Ibid* s 4(1).

<sup>130</sup> *AB v Western Australia* (2011) 244 CLR 390.

<sup>131</sup> *Equal Opportunity Act 1984* (WA) s 3.

regardless of their gender identity,<sup>132</sup> and the numerous instances of discrimination which are reported by transgender people around Australia.<sup>133</sup>

The preceding analysis has demonstrated that, while the federal protections against transgender discrimination are limited, most states and territories have enacted provisions designed to protect transgender persons. With the exception of Western Australia, the prohibitions enacted have adopted the third judicial approach: psychological sex is considered of primary importance in determining who receives protection. Western Australia has enacted anti-discrimination provisions which are not triggered unless an individual's change of sex has been legally recognised; its anti-discrimination legislation therefore adopts the second approach — sex determined by a congruence of anatomy and psychology.

## VII Conclusion

Since 1970, Anglo-American courts have engaged multiple times with the legal meaning of sex and have developed three main approaches to determining the sex of transgender persons. In contrast to the courts, Parliaments have been slow to decide when and how legal sex can be changed. However, unlike Parliament at the time of the English Reformation, contemporary Australia Parliaments at both the federal and state level have the power to 'make a man a woman' and have utilised this power to enact legislation permitting the legal recognition of change of sex.<sup>134</sup> The result is a confusing patchwork of gender regulation. One way to grapple with the web of Australian legislation which now regulates legal sex is to analyse the legislation according to the three judicial approaches. This analysis allows consistencies and differences in the legislative regimes to be more easily identified.

While considering Australian regulation of sex through the lens of the three judicial approaches serves a useful purpose in that it assists us to understand more clearly the operation of the different legislative regimes, it does not explain why different approaches have been adopted. We believe this is explained by an issue clearly and repeatedly identified in the judicial consideration of the regulation of sex: the spectre of same-sex marriage.<sup>135</sup> In this paper we observe that the second judicial approach is most commonly used by Australian legislators when communal relations such as marriage and the family may be affected. We speculate that this is because of unresolved tensions about same-sex marriage, which could be increased if legal sex was determined by psychology alone. Notably, at the federal level, where marriage is defined as between a man and a woman, no anti-discrimination protections are

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<sup>132</sup> For a discussion of international statements regarding equality based on gender identity, see Australian Human Rights Commission, above n 6, 8.

<sup>133</sup> For examples of discrimination and harassment against transgendered people see *ibid* 10–16. For further examples see Irwin's analysis of discrimination against transgendered people working in education: Jude Irwin, 'Discrimination Against Gay Men, Lesbians, and Transgender People Working in Education' (2002) 14(2) *Journal of Gay & Lesbian Social Services* 65–77.

<sup>134</sup> Plucknett, above n 1, 337.

<sup>135</sup> See Andrew Sharpe's analysis of cases in which the marriages of transgender people are recognised and those in which they are invalidated. He argues that in these cases judges are willing to recognise a person's transitioned-to sex where doing so maintains the anti-gay status quo: Andrew Sharpe, above n 10, pt II.

offered to either transgender persons or gays and lesbians. In contrast, in areas with no connection with the family and marriage, most Parliaments have been willing to utilise the more liberal third judicial approach by giving transgender persons increased agency and protection without requiring that they undergo expensive and potentially dangerous anatomical alterations. This dynamic may change in the near future as there is growing acceptance of same-sex marriage at the political and community level.<sup>136</sup> In turn, this may lead to expanding rights for transgender people in the future. Removing the perceived obstacle of same-sex marriage may enable Parliaments and courts to facilitate a more genuinely transformative approach to gender regulation whereby, for example, gender could be self-determined without any medical intervention or treatment.

In the meantime, the High Court case of *AB v Western Australia* shows that despite legislative efforts to bring some clarity and predictability to this area of law, courts still have an important role to play in drawing the sex line. Australian legislation ensures our courts have some guidance in drawing this line but it is ultimately necessary for Australian courts to determine critical issues in applying the legislative framework. These include questions such as: if, and how much, surgery is required to satisfy the legislation? To what parts of the body? Is it determinative if an individual appears to other members of society to be of the sex they aspire to be? Or is a consideration of their reproductive system essential? The High Court's judgment in *AB v Western Australia* is notable because it takes a liberal but careful interpretation of the anatomical alteration required by the legislation and of the test of identification. More critically, in drawing the sex line, the High Court does not become distracted by the spectre of same-sex marriage or by the possibility of 'man gives birth to child'. The judgment is a good model of how focused courts should be in drawing the sex line when they are required to do so by legislation.

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<sup>136</sup> Recent reports indicate that over 60 per cent of Australians support the rights of same-sex couples to enter into marriage: Australian Marriage Equality, *Public Opinion Nationally* (2012) Australian Marriage Equality <<http://www.australianmarriageequality.com/wp/who-supports-equality/a-majority-of-australians-support-marriage-equality/>>.

