

DISCUSSING ‘SEX’ AT WORK CAN BE A COSTLY BUSINESS: TRANSLATING THE SCIENCE, LANGUAGE AND LAW BEHIND M V A & U [2007] QADT 8...

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On 16 March 2007, in the matter of M v A & U [2007] QADT 8, the Anti-Discrimination Tribunal of Queensland found that a complaint of discrimination in the supply of goods and services had been made out by the complainant on two grounds: her female sex and lawful sexual activity. The decision would have been quite unremarkable except that ‘M’, as the complainant was known for the purposes of the hearing, is a woman of difference, one who had unusually arrived at her legal female state by completing the sex reassignment process now more commonly described as ‘sex affirmation’.

This article seeks to elaborate on the language and law of transsexualism used by the Tribunal. Its aim is to enhance practitioners’ understanding of the legal and social issues peculiar to those who affirm a sex opposite that first assigned to them so that those practitioners may better interpret the law to their clients. As the instant decision shows, the failure by an employer to take reasonable steps to avoid infringing the Anti-Discrimination Act 1991 (Qld), either on its own part or by the actions of its employees, can prove a costly business indeed.

The author offers a brief synopsis of the current medical viewpoint regarding transsexualism and reviews recent Australian legal developments in the jurisprudence. She reminds practitioners that the Anti-Discrimination Act 1991 (Qld) has since been further strengthened by the inclusion of ‘gender identity’ as a protected attribute, and concludes by proposing the existence of a heightened duty on the part of practitioners to ensure business clients are aware of the full extent of their legal obligations to not discriminate against employees or clients.

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I INTRODUCTION

The facts leading to the decision in *M v A and U* [2007] QADT 8¹ are symptomatic of a certain malaise, the fear of ‘difference’ that still infects the thinking of many in Australian society today. Of all forms of human difference, perhaps none is as threatening to the insecure citizen as is the phenomenon of transsexualism. Thus:

As with males theorizing about women from the beginning of time, theorists of gender have seen transsexuals as possessing something less than agency. As with genetic women, transsexuals are infantilized, considered too illogical or irresponsible to achieve true subjectivity, or clinically erased by diagnostic criteria; or else, as constructed by some radical feminist theorists, as robots of an insidious and menacing patriarchy, an alien army designed and constructed to infiltrate, pervert and destroy "true" women.²

While those words above were first written by academic and transsexual activist Sandy Stone over a decade ago, the fact is that transsexualism is often conceptualized even today as a moral aberration of human kind in contradiction of all the evidence. Little wonder that those who experience it are still marginalised and suffer discrimination at the hands of the uninformed.

Only a small number of our population expresses transgender identities and an even smaller number exhibits ambiguous sex characteristics indicative of transsexualism or some other intersex condition. Recent research clearly demonstrates how vulnerable members of these minority groups are to the many acts of discrimination and worse perpetrated against them in Australian society today.³ A staggering 83.3 per cent report that they modify their daily activities because of a real fear of prejudice or discrimination,⁴ while 50 per cent are sacked after gender reassignment and 38 per cent consider they are subject to reportable levels of discrimination at least once a week.⁵ With the notable exception of the Federal Government, all Australian jurisdictions now have legislation in place that attempts to deal with issues of discrimination against these marginalized groups. In Queensland, the *Anti-Discrimination Act 1991* (‘the Act’) was amended in 2002 to include ‘gender identity’ as a protected attribute. The Act now renders unlawful discrimination occurring on that ground in a wide range of circumstances that includes provision of goods and services, accommodation, education and employment. Very much at the forefront of reform in the area, the Queensland

¹ Date of hearing: 16 March 2007.

² Sandy Stone, *The Empire Strikes Back: A Posttranssexual Manifesto* (1994) Department of Radio, Television and Film, the University of Texas at Austin <<http://www.actlab.utexas.edu/~sandy/empire-strikes-back>> at 30 June 2007.

³ See, for example: Victorian Gay and Lesbian Rights Lobby, *Enough is Enough* (Victorian Gay and Lesbian Rights Lobby, 2000); R McNair and N Thomacos, *Not Yet Equal: Report of the VGLRL Same Sex Relationships Survey* (Victorian Gay and Lesbian Rights Lobby, 2005); J Sanroussi and S Thompson, *Out of the Blue: A Police Survey of Violence and Harassment against Gay Men and Lesbians* (New South Wales Police Service and Price Waterhouse Urwick, 1995).

⁴ M Pitts, A Smith, A Mitchell and S Patel, *Private Lives: A report on the health and wellbeing of GLBTI Australians* (Australian Research Centre in Sex, Health & Society, La Trobe University, 2006).

⁵ *National Transgender Needs Assessment* (School of Sociology, University of New South Wales 2004) 29, in with respect: ‘A Strategy for Reducing Homophobic Harassment in Victoria’ (Joint Working Group of the Victorian Attorney-General’s and Health Minister’s Advisory Committees on Gay, Lesbian, Bisexual, Transgender and Intersex (GLBTI) Issues, 2007).

Government also used the amendment to proscribe acts of vilification on the same ground.⁶

II THE COMPLAINT

In *M v A and U* a complaint of discrimination was brought by M after service was denied her by A, the manager of a grocery store owned by U and co-located in the apartment building where M lived. A and P were friends. P managed a bottle shop adjacent to the grocery store. Both A and P knew M as a regular customer in their respective establishments. They were also aware of M's occupation as a sex worker and the fact she had recently completed sex affirmation treatment for transsexualism. M was walking in the street adjacent to her apartment and in front of the grocery and bottle shop when P yelled out words to the effect of 'Drag Queen' at her. A was outside the bottle shop at the time and laughed at this. M was upset and returned to her apartment. She later attempted unsuccessfully to confront P about his earlier comments and P immediately relayed the fact to A. Shortly after, M went into the grocery and selected a number of items. She placed them on the counter and handed a \$5.00 note to A in payment. She then had a short exchange with A about the offensive nature of his and P's recent comments and actions towards her. A returned M's money to her by placing it on the counter and telling her to take it back. He then scooped the goods on the counter to him. M was shaken by this but took her money and returned to her apartment.⁷

M brought her complaint under s 46(1) of the Act which proscribes discrimination occurring in the goods and services area, including by reason of a failure to supply those goods or services. The incident occurred prior to the 2002 amendment adding 'gender identity' to the list of attributes protected under s 7 of the Act,⁸ and M's complaint consequently alleged direct discrimination on the grounds of sex and lawful sexual activity. Section 10 of the Act tells us that direct discrimination on the basis of an attribute happens if a person treats, or proposes to treat, a person with an attribute less favourably than another person without the attribute is or would be treated in circumstances that are the same or not materially different. One of the first and most important tasks facing the Tribunal, therefore, was determination of the complainant's contemporaneous sex.

III TRANSSEXUALISM: MEDICAL SCIENCE, HUMAN RIGHTS AND THE LAW

Transsexualism has been commonly described as 'gender dysphoria' or 'gender identity disorder' which terms tend to unfairly psychopathologise when viewed in light of recent revelations regarding a biological aetiology. It is true that it is still listed as such in the Diagnostic and Statistical Manual of the United States (DSM IV) published by the American Psychiatric Association, but the purpose of this is to aid differential diagnosis distinguishing transsexualism from contra-indicating conditions such as schizophrenia and Gender Identity Disorders Adult and Adolescent Non-Transsexual (GIDAANTS) thus ensuring that only those who need sex affirmation surgery can access it.

⁶ This was part of a comprehensive suite of changes introduced in the *Discrimination Law Amendment Act 2002* (Qld).

⁷ A distillation of the facts detailed in *M v A and U* [2007] QADT 8, [15]-[26].

⁸ *Discrimination Law Amendment Act 2002* (Qld).

The last two decades in particular, however, have seen rapid advances in neurophysiology leading a new understanding that transsexualism is simply another of the many different variations that may occur in human sexual formation; one in which the sexual morphology of the person's genitalia is incongruent with that of their brain.⁹ The very early work was done by the Dutch team led by Professor Louis Gooren, Chair of the only faculty in Transsexual Medicine in the world, located at University Hospital, Vrije Universiteit, Amsterdam. In 2000, Gooren gave sworn evidence to the United Kingdom (UK) High Court that:

A scientific report (Zhou, Swaab, Gooren & Hoffman, published in "Nature" in 1995) demonstrated that in one of the human brain structures that is different between men and women, a totally female pattern was encountered in six male to female transsexual [people]... This was not due to cross-sex hormone treatment. These findings show that a biological structure in the brain distinguishes male to female transsexuals from men.¹⁰

An expanded group of like researchers in Europe also reported in 2000 that:

Regardless of sexual orientation, men had almost twice as many somatostatin neurons as women. The number of neurons in...male-to-female transsexuals was similar to that of the females...In contrast, the neuron number of female-to-male transsexuals was found to be in the male range...The present findings of somatostatin neuronal sex differences in the BSTc (a part of the brain) and its sex reversal in the transsexual brain clearly support the paradigm that in transsexuals sexual differentiation of the brain and genitals may go into opposite directions and point to a neurobiological basis of gender identity disorder.¹¹

The Harry Benjamin International Gender Dysphoria Association (HBIGDA), the peak group representing medical and legal specialists in transsexualism worldwide, in a recent amicus curiae brief submitted to the United States (US) District Court in West Virginia, explained that:

Transsexualism is a disorder of sexual differentiation, the process of becoming man or woman, as we conventionally understand it. Like other people afflicted with errors in the process of sexual differentiation, people with intersex conditions, transsexual people need to be medically rehabilitated so that they can live normalized lives as men or women.¹²

In fact, transsexualism has long been described as another form of intersex condition, one in which the sex of the reproductive organs is opposite the sex of the brain.¹³ The early evidence was based purely on informed observations and could either be accepted or dismissed according to the bias of the receiver but, especially in the last decade, the extent of biological investigations into the brain has shown that, just as the gonads, genitals and chromosomes differentiate as to sex, so does the brain commencing in the

⁹ This is also the common law position in Australia today: *Re Kevin (validity of marriage of transsexual)* [2001] FamCA 1074.

¹⁰ Affidavit in *Bellinger v Bellinger* TLR 22-11-2000.

¹¹ Zhou et al, 'Male to Female Transsexual Individuals Have Female Neuron Numbers in the Central Subdivision of the Bed Nucleus of the Stria Terminalis' (2000) 85(5) *Journal of Clinical Endocrinology and Metabolism* 2034.

¹² *De'Lonta (Stokes) v Angelone & Ors* [2004] C.A. #7:99-CV-00642.

¹³ M Hirschfeld, 'Die Intersexuelle Konstitution' (1923) 23 *Jahrbuch für sexuelle Zwischenstufen* 3; D Kimura, 'Sex Differences in the Brain' (1999) 10 *Scientific American Summer Quarterly* 26.

first few weeks of gestation.¹⁴ This has led to the inescapable conclusion that an individual's sense of their sex is fundamentally determined by their neurological morphology.¹⁵

Transsexualism is characterised by an overwhelming need to bring the body into harmony with the mind. Triadic treatment by way of psychiatric differential diagnosis, cross-hormone therapy and surgical rehabilitation undertaken together is the only internationally recognised successful treatment for the condition.¹⁶ This treatment regime is successful in more than 97 per cent of cases.¹⁷ All the evidence shows that, unlike those who experience non-transsexual gender identity disorders, once treated, people who have had transsexualism exhibit no significant, associated psychopathologies and can live normal lives when the prevailing social environment allows them to do so.¹⁸

The medical justification for giving legal recognition to the person with transsexualism that has gone to great lengths to alter their body was clearly enunciated by Professor Louis Gooren, Professor of Endocrinology and Transsexualism at the University Hospital in Amsterdam:

¹⁴ See, for example, Zhou et al, above n 11; Wilson et al, 'Sexual Differentiation of the Bed Nucleus of the Stria Terminalis in Humans May Extend into Adulthood' (2002) 22(3) *Journal of Neuroscience* 1027; Swaab et al, 'Sexual Differentiation of the Human Hypothalamus' (2002) 511 *Advances in Experimental Medicine and Biology* 75; C Dennis, 'Brain Development: The Most Important Sex Organ' (2004) 427 *NATURE* 390; R J Agate et al, 'Neural, Not Gonadal Origin of Brain Sex Differences' (2003) 100(8) *Proceedings of the National Academy of Sciences of the United States* 4873; D F Swaab et al, 'Structural and Functional Differences in the Human Hypothalamus' (2000) 40 *Hormones and Behaviour* 93; and K Kula and J Slowikowska-Hilczler, 'Sexual Differentiation of the Human Brain' (2000) 57(1) *Przegl Lek* 41.

¹⁵ Possibly the saddest, and most compelling anecdotal evidence that sexual identity is inherent and independent of both phenotypic sex and gender role can be found in the story of John/Joan, a boy who lost his penis in a botched circumcision and was subsequently raised as a girl. John's treatment by the medical profession became a focus of research into the aetiology of sexual identity by Professor Milton Diamond: see, for example, M Diamond, 'Sexual Identity and Sexual Orientation in Children with Traumatized or Ambiguous Genitalia' (1997) 34(2) *The Journal of Sex Research* 199, 200. The story was first published in the popular media as an online journal article: J Colapinto, 'The True Story of John/Joan' (1997) 11 *Rolling Stone* (December 1997) 54-8, 60, 62, 64, 66, 68, 70, 72-3, 92, 94-7. It later became the subject of a whole book: J Colapinto, *As Nature Made Him: the Boy Who was Raised as a Girl* (HarperCollins, 2000). This was the first independent evidence contradicting the then accepted view that gender is constructed and a consequence of the sex of rearing.

¹⁶ According to the European Commission on Human Rights, 'the medical profession has reached a consensus that transsexualism is an identifiable medical condition in respect of which gender re-assignment is ethically permissible and can be recommended for the purpose of improving the quality of life', *Rachael Horsham v UK* (1997) Eur Comm HR.

¹⁷ R Green and D Fleming, 'Transsexual Surgery Follow-up: Status in the 1990's' (1990) 1 *Annual Review of Sex Research* 163.

¹⁸ See, for example: Miach et al, 'Utility of the MMPI-2 in Assessing Gender Dysphoric Patients' (2000) 75 *Journal of Personality Assessment* 268; Y Smith, L Cohen and P T Cohen-Kettenis, 'Post-operative Psychological Functioning of Adolescent Transsexuals' (2003) 31(3) *Archives of Sexual Behaviour* 255(7); I R Haraldsen and A A Dahl, 'Symptom Profiles of Gender Dysphoric Patients of Transsexual Type Compared to patients with Personality Disorders and Healthy Adults' (2000) 102 *Acta Psychiatrica Scandinavica* 276; Landen and Innula, 'Attitudes Towards Transsexualism in a Swedish National Survey' (2000) 29(4) *Archives of Sexual Behaviour* 375.

Sex reassignment of transsexuals is a medical intervention on a sliding scale. It is not essentially different from procedures in other sex errors of the body. The same interventions including genital surgery are done in other cases of sex errors of the body ... There can be no psycho-medical ground not to treat these people respectfully; we must provide them with reassignment treatment which meets their needs. In the cases of intersex, and this is particularly true of transsexualism, medical treatment does not bring resurrection from one's ashes; it is not a cure. It is not a completely new start; it is a rehabilitation process. We must accept the given fact of sex errors of the body and continue from there. We must create the conditions for successful rehabilitation to the male or female sex as much in cases of transsexualism as in other cases of intersex subject.¹⁹

Similar sentiments were expressed, but with even more force, by Dr Russell Reid, a Harley Street specialist in the field, who gave evidence during the judicial review of the cases of '*P*' and '*G*' v *H.M.Govt.*,²⁰ in March 1996. '*P*' and '*G*' were two women of transsexual background who had been denied new birth certificates recording their affirmed sex. Rebutting the statements contained in an affidavit given to the court by William Jenkins, the UK Registrar of Births, Dr Reid deposed:²¹

The World Health Organisation defines health as 'a state of complete physical, mental and social well-being and not merely the absence of any disease or infirmity'... [I]t is a matter of concern to the UK medical community that the current legal status of people who have been treated for Transsexualism works against their achievement of this. Their legal status marginalises individuals who have no visible difference from others and prevents them from being able to integrate, make relationships or live fulfilling lives and thus impairs quality of life...²²

It is clear... that the current legal status of people treated for transsexualism works directly against their health, as defined by the WHO, and against the best efforts of medicine to maintain their healthy status. It is impossible not to conclude that, for the individual, their legal circumstances constitute a fundamental violation of their right to human dignity.²³

The legal status of a person following sex affirmation surgery is now established for most purposes by statute in all the States and internal Territories of Australia. In each of those jurisdictions, legislation such as the *Registration of Births, Deaths & Marriages Act 1962* (Qld), provides that a person who is over the age of 18 years, is not married and has undergone the requisite surgical treatment for transsexualism is able to apply to the Registrar for an alteration of the record of their sex in the Register.²⁴ A person whose record of birth is thus altered is taken to be a member of their affirmed sex for all relevant purposes.²⁵ Legal recognition is also extended to a person whose birth record has been altered in any comparable Register maintained in another jurisdiction, or who has been issued with a recognition certificate under a law of another State prescribed for

¹⁹ LJG Gooren, *Transsexualism, Medicine and the Law* (1993) Mermaids <<http://www.mermaids.freeuk.com/gooren01.html>> at 7 February 2008.

²⁰ *Re: P and G (Transsexuals)* [1996] 2 FLR 90.

²¹ Dr Russel Reid, *Medical Report on the Affidavits of Registrar William Jenkins* (1996) Press for Change <<http://www.pfc.org.uk/node/615>> at 25 June 2007.

²² *Ibid* [5.1].

²³ *Ibid* [5.5].

²⁴ *Registration of Births, Deaths & Marriages Act 1962* (Qld) s 28B.

²⁵ *Registration of Births, Deaths & Marriages Act 1962* (Qld) s 43B(1).

the purpose.²⁶ Thus, with the unfortunate exception of those who are precluded from undergoing surgery because they are minors or are too infirm by reason of illness or advanced age, those who have managed to maintain their marriage against great odds, and those born overseas in jurisdictions that will not correct the sex on a person's birth record,²⁷ a person resident in Queensland who has experienced the condition of transsexualism can achieve legal sex recognition appropriate to their innate sexual identity.²⁸

There is no Commonwealth legislation establishing legal sexual identity. Indeed, during debate over the recent amendment to the *Marriage Act 1961* (Cth) designed to reinforce the prohibition against same-sex marriage,²⁹ the Commonwealth Attorney-General specifically rejected the notion that legislation to define 'man' and 'woman' was desirable. He wisely relied instead on the ordinary, common meaning of those words as was interpreted most recently in the Family Court in the matter of *Re Kevin (validity of marriage of transsexual)* ('*Re Kevin*').³⁰ The decision in this case was grounded in expert medical evidence, and its legal outcomes honed by the incisive mind of Chisholm J who, after considering the extensive evidence of both domestic and international medical experts in the field, held that:

[T]he words "man" and "woman" should be given their ordinary contemporary meaning..., and that contemporary meaning should be taken to incorporate transsexual people who have successfully completed the personal, social, medical and surgical processes of gender reassignment...³¹

To determine a person's sex... the relevant matters include... the person's biological and physical characteristics at birth (including gonads, genitals and chromosomes); the person's life experiences, including the sex in which he or she is brought up and the person's attitude to it; the person's self-perception as a man or woman; the extent to which the person has functioned in society as a man or a woman; any hormonal, surgical or other medical sex reassignment treatments the person has undergone, and the consequences of such treatment; and the person's biological, psychological and physical characteristics at the time..., including (if they can be identified) any biological features of the person's brain that are associated with a particular sex. It is clear from the Australian authorities that post-operative transsexuals will normally be members of their reassigned sex.³²

²⁶ *Registration of Births, Deaths & Marriages Act 1962* (Qld) s 43C(1).

²⁷ Unfortunately, the *Registration of Births, Deaths & Marriages Act 1962* (Qld), like that in a number of other states, makes no provision for the Registrar to issue a recognition certificate; it only recognises one issued elsewhere. This leaves some citizens residing in Queensland in legal limbo – if they were born overseas in jurisdictions that do not allow a birth registration to be corrected for sex they will be unable to obtain legal recognition in their affirmed sex in Queensland unless, for example, they first move to Victoria and obtain a recognition certificate there.

²⁸ The plights of those for whom these human rights remain presently unattainable have been canvassed elsewhere in great detail. See, for example, K Gurney, 'Bad Policy Makes Bad Law: The Derogation of Human Rights for People with Transsexualism Since the "Justice" Statement' (2006) 31(1) *Alternative Law Journal* 36.

²⁹ *Marriage Act 1961* (Cth), amended by *Marriage Amendment Act 2004* (Cth).

³⁰ [2001] FamCA 1074.

³¹ *Ibid* [294].

³² *Ibid* [329].

His Honour unequivocally rejected the approach taken by Ormrod J, in the UK decision of *Corbett v Corbett (o'rse Ashley)*,³³ finally demonstrating to all of the world the failed reasoning and consequent injustice inherent in this early precedent,³⁴ which still represents the common law in many jurisdictions, including the UK, today.³⁵

The Attorney-General of the Commonwealth appealed the decision³⁶ and argued that, as in *Corbett*, the sex of a person was to be determined solely on the basis of the genitals, gonads and chromosomes, and the sex of all three had to be congruent.³⁷ If accepted, this would have immediately consigned the rights of all those Australian born with variations in sexual formation to legal limbo. The Full Court of the Family Court, however, rejected the Attorney-General's position and upheld the decision at first instance in what is now regarded as the culmination of a series of legal advances in human rights for people with transsexualism in Australia. Their Honours agreed, *obiter*, that:

It was open to the Court at first instance to hold that an individual with transsexualism is born with a brain that recognises him or herself as a member of the sex opposite to that whose physiological indicia he or she bears and that this has a biological origin.³⁸

If... brain sex is one of the most significant determinants of gender, then the distinction between intersex and transsexual persons becomes meaningless... This is because an intersex person appears to be defined as someone with at least one sexual incongruity. If brain sex can give rise to such an incongruity then, legally... there may be no difference between an intersex person and a transsexual person.³⁹

It was open to the trial Judge, on the evidence before him, to find as a matter of probability that there was a biological basis for transsexualism.⁴⁰

Their Honours then went on to adopt the reasoning of Charles J in *W v W (intersex case)*,⁴¹ holding this applied equally to persons born with transsexualism and that either should be able to decide their appropriate sex, affirm it and then be legally accepted as a member of that sex. They found that the words 'man' and 'woman' have their ordinary, contemporary meaning when used in legislation and that it was open to Chisholm J, as a

³³ [1971] P 83.

³⁴ The common law of Australia was originally also informed by the now discredited *Corbett* decision. It led to a most unfortunate outcome in the Family Court, *C v D (falsely called C)* [1979] 5 Fam LR 636, a decision by a single judge which rendered invalid the marriage between an intersexed man and his spouse. The Full Court, in the course of its deliberations on the *Re Kevin* matter, finally held that this decision was an incorrect statement of the law of Australia.

³⁵ Australian common law quickly departed from the narrow essentialism of *Corbett*. The jurisprudence developed in the current direction with the advent of two particularly significant decisions: *R v Harris and McGuiness* [1988] 17 NSWLR 158; and *Secretary, Department of Social Security v SRA* (1993) 118 ALR 467. These held that, following sex affirmation treatment, a woman with transsexualism is regarded as a female for the purposes of the criminal law and social security law, respectively.

³⁶ *The Attorney-General of the Commonwealth and 'Kevin and Jennifer' and the Human Rights and Equal Opportunity Commission* [2003] FamCA 94.

³⁷ *Ibid* [63].

³⁸ *Ibid* [56].

³⁹ *Ibid* [235].

⁴⁰ *Ibid* [290], [326].

⁴¹ [2000] 2WLR 673.

matter of law, to hold that the word ‘man’ included a post-operative transsexual person. The case of ‘Kevin and Jennifer’ truly reverberated around the world.⁴²

IV AT THE TRIBUNAL

Applying *Re Kevin*, the tribunal determined that M was, indeed, a female under the law.⁴³ Although the reported decision is not very specific on the issue, it is clear she identified, and was regarded by others who knew her, as a woman; she lived as a woman by dressing and presenting as one; she had adopted a female name and had changed relevant documents; and importantly, she had also undergone hormonal treatment and surgical procedures to affirm her female sex.⁴⁴

The learned member proposed that a person with a transsexual background may be subjected to unlawful direct discrimination because of their affirmed sex or because of their former sex.⁴⁵ He found that both cases fall within the Acts proscriptions against direct discrimination on the basis of sex because this includes: discrimination on the basis of a characteristic imputed from the person’s sex;⁴⁶ discrimination on the basis of the person’s presumed sex;⁴⁷ or discrimination on the basis of the sex the person had, even if the person did not have it at the time of the discrimination.⁴⁸ The learned member also proposed that a person with a transsexual background might be discriminated against by reason of their lawful sexual activity with another person.⁴⁹ Neither of the respondents challenged these propositions, despite an invitation to do so, and relied instead upon acceptance of their stated version of the events.⁵⁰ The outcome of the complaint therefore turned solely on the facts.

In the event, the tribunal preferred the version given by M and found that the complaint of unlawful sex discrimination was made out.⁵¹ ‘M was treated differently to other female members of the public who were not presumed to be men, in that she was ridiculed outside the premises and refused service inside the premises because she was presumed to be a man.’⁵² The tribunal similarly found that the complaint of discrimination on the ground of lawful sexual activity had been made out because she was presumed to be ‘a (male) transvestite engaged in what A regarded as abnormal sexual activity by having sex with men.’⁵³ The first respondent would not have treated another female who he did not make those assumptions about in the same way’.⁵⁴

⁴² E Mills and J McConvill, ‘The Case of Kevin and Jennifer – Transsexual Marriage in Australia’ (2002) 76(8) *Law Institute Journal* 69, 71.

⁴³ [2007] QADT [11].

⁴⁴ Cf also *C v D (falsely called C)* [1979] 5 Fam LR 636.

⁴⁵ *Re Kevin* [2007] QADT [12].

⁴⁶ *Anti-Discrimination Act 1991*(Qld) s 8(b).

⁴⁷ *Anti-Discrimination Act 1991*(Qld) s 8(c).

⁴⁸ *Anti-Discrimination Act 1991*(Qld) s 8(d).

⁴⁹ [2007] QADT [13].

⁵⁰ *Ibid* [14].

⁵¹ *Ibid* [31].

⁵² *Ibid* [36].

⁵³ *Ibid*.

⁵⁴ *Ibid*.

The matter was adjourned pending a further hearing by the tribunal as to compensation, interest and costs.⁵⁵

V QUO VADECUM?

It is very clear from the literature, as well as from discussions with various State Anti-Discrimination Commissions and sexual minorities' support groups, that business proprietors and their staff are still often ignorant of the extent of their legal obligations not to discriminate in their dealings with each other and with the public. *M v A and U* simply serves to confirm the fact.

The fundamental message that practitioners must surely take from the tribunal's decision in this matter to their commercial clients is that discussing a person's sex at work can be a costly business; the more so since the advent of the 2002 amendment adding 'gender identity' to the list of protected attributes and adding statutory protection against vilification.⁵⁶ Clients need to be made aware that the Act now not only provides that additional protection to those who have undergone a sex assignment in infancy or an adult sex affirmation process for transsexualism,⁵⁷ it also protects for the first time those who are transgendered and hence retain their male sex phenotype and their male legal sex permanently.⁵⁸ Legal practitioners responsible for providing advice to business clients will undoubtedly wish to first ensure they themselves properly comprehend the law as it applies in both circumstances. That task will undoubtedly be made easier if they also take time to comprehend the policy and social issues underlying it.⁵⁹

While the Act renders each employer vicarious liable for the discriminatory acts of their employees,⁶⁰ it at the same time also provides the employer with a defence to proceedings if they can prove, on the balance of probabilities, that they took reasonable steps to prevent the contravention by the employee.⁶¹ A company's equal opportunity policy professionally drafted, or at least settled by the legal practitioner, explaining the Act's major provisions in plain English and establishing clear guidelines for employees,

⁵⁵ Ibid [38]–[9].

⁵⁶ *Discrimination Law Amendment Act 2002* (Qld).

⁵⁷ Sex affirmation surgery is not currently available to minors in Australia and consent to even preliminary hormone interventions falls within the *parens patriae* jurisdiction of the Family Court: *Re Alex (hormonal treatment for gender identity dysphoria)* [2004] FamCA 297.

⁵⁸ Note that transsexualism and transgender are not the same. Transsexualism is about altering the phenotypic sex to accord with the sex of the brain and a person who has undergone sex affirmation treatment is simply a member of their affirmed sex. Transgenders, on the other hand, are people who have a psychological identification with, and live intermittently or permanently as members of the opposite sex, but do not actually take steps to correct their sexual morphology. A useful discussion is available at: http://www.hawaii.edu/PCSS/online_artcls/intersex/sexual_I_G_web.html.

⁵⁹ For example, in order to give properly considered advice, the lawyer must understand the object or purpose of the legislation, since the duty of a court is to give effect to it, so far as the language permits: *Kingston v Keprose Pty Ltd* (1987) 11 NSWLR 404, 424. This is particularly so with remedial legislation which, being designed to achieve the high public purpose of upholding equal opportunity, should be construed beneficially and not narrowly to avoid frustrating the will of Parliament: *IW v City of Perth* (1997) 71 ALJR 943, 974.

⁶⁰ *Anti-Discrimination Act 1991*(Qld) s 133(1). The employer's intention is irrelevant – the absence of a subjective intention to discriminate does not convert discriminatory conduct into neutral policy: *IW v City of Perth* (1997) 71 ALJR 943, 975.

⁶¹ *Anti-Discrimination Act 1991*(Qld) s 133(2).

that is also properly supported by staff training and supervision, will provide cogent proof that reasonable steps were indeed taken.

VI CONCLUSION

This paper has attempted to dispel some of the myths about transsexualism and provide practitioners with a brief insight into the science, law and language that informed the tribunal in the matter of *M v A and U*.

The paper encourages a less judgmental view of transsexualism than has commonly been the case. It does this by making it clear that the condition is biologically based and that while most of us are formed wholly male or wholly female, a few of us are not. It introduces readers to some of the significant research results from which the current aetiology is drawn, and through which the law has increasingly been informed. And in the process of doing so, it silently rejects the psychopathologisation of transsexualism along with the stigma unfairly attached to any diagnosis of a mental disorder, let alone one so long thought of as a psychosexual perversion.

The paper also adopts and promotes a style of language which is inherently respectful of individuals affected by transsexualism. It focuses on the condition rather than the people affected by it, and reflects that same sensitivity and respect shown to the applicant by the Tribunal in the case.

Finally, it is not unreasonable to propose that, since the decision, legal practitioners who are engaged to advise clients in Queensland on the conduct of their businesses now have a heightened duty to ensure those clients are made properly aware of both their obligations in the new circumstances proscribed by the Act, and the likely costs of failing to comply with them.