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Intersex People and Marriage

If We are Neither Female nor Male what Exactly is the Nature of our Relationship?

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The first thing to address is our right to marriage of any sort. When the Howard government proposed changes to the definition in the Marriage Act so as to make certain that a legal marriage could only be between a man and a woman, it was in fact only making certain that which was already established in law.

The findings of Re: Kevin reinforce the sex binary nature of marriage and encourage surgical interventions on intersex people to make us "marriage ready".

In its application to intersex people there is one key question: just what is meant by a union between a man and a woman?

Those of us in the [L.G.B.T.I.](#) communities and those familiar with gender politics recognise man and woman as gender roles and distinct from anatomical sex, and what is male and female. The law and legislation make no such distinction, so that in the Marriage Act the reference to gender (man and woman) is identical to a reference to sex (male and female). This is made clear by the qualifying document required when applying for a licence to marry. That document is a birth certificate and that certificate specifies sex not gender.

The Marriage Act therefore intends that a marriage shall be between a male and female to the exclusion of all others.

In the Case of C and D (falsely called C)

Many suppose the definition of male and female has not been tested in law so far as the Marriage Act is concerned. That assumption is wrong. In 1979 a case was brought before Bell J. sitting on the Queensland bench of the Family Court of Australia. In that case the parties went through a ceremony of marriage in 1967 and lived together until about May 1978. The husband, unbeknown to the wife at the date of the marriage, had been diagnosed as an hermaphrodite and had undergone certain operations. The wife claimed that the husband was unable to consummate the marriage, and sought an application for a declaration as to the validity of marriage. However, under the Matrimonial Causes Act 1959, the court did not have jurisdiction to make a declaration of validity of marriage, and as the marriage had occurred in England, that a nullity suit was the proper method of having a marriage declared to be void and that no declaration proceedings could be entertained. Bell J. suggested to counsel for the wife that an application for a declaration of nullity be filed, which was done.

Bell in his considerations ventured far and wide through legal precedent much of it not applicable to intersex people. Of that which is relevant:

(iii) the ground in sec. 18(1)(d), namely that "the consent of either of the parties is not a real consent because ... (ii) that party is mistaken as to the identity of the other party ...", was made out. The wife was contemplating immediately prior to marriage and did in fact believe that she was marrying a male. She did not in fact marry a male but a combination of both male and female, notwithstanding the fact that the husband exhibited as a male; and

(iv) further, the definition of "marriage" as understood in Christendom is the voluntary union of one man and one woman to the exclusion of all others for life and a marriage in the true sense of the word within that definition could not have taken place and did not exist.

Bell observed:

At the age of twenty-one years the husband consulted his doctor in Warwick for recurrent abdominal pains. The doctor performed a surgical operation on the abdomen and found that the husband had an ovary and a uterus and he was subsequently referred to a specialist in Brisbane and had four surgical operations at the

age of twenty-two years to correct his external sex organs. He also had an operation for the removal of both breasts. As a result the medical practitioners who were involved presented a paper which was published in the *Medical Journal of Australia* on 11th June 1966. I do not consider that I need to go into any further details concerning the tragic life of the husband in this case but that to say he has been diagnosed as an hermaphroditus verus; in other words a true hermaphrodite.

And that, while his chromosomes were 46,XX, it was recognised that "he was born a male and had been reared as a male". As was said in the *Medical Journal*, an hermaphroditus verus is most uncommon. A karyotype of a cell from the peripheral hood showed a count of 46 chromosomes and a normal female sex chromosome complement and all the cells which were analysed from the husband's body conformed to this pattern. Notwithstanding the chromosomal arrangement, the surgery carried out on the husband was such as to confirm the recognition that he was born a male and had been reared as a male.

This clearly establishes that the person in question was diagnosed as intersex. "Hermaphroditus verus" or "true hermaphrodite" is currently considered by the medical profession to be an "ovo-testicular disorder of sex development", a term that O.I.I. Australia finds pathologising.

The husband had lived in the male role prior to his marriage to his wife. He had "Male" on his birth certificate consistent with his application for a marriage licence and the law at the time, as now, prohibiting same sex marriage. Post-diagnosis, he was surgically altered to confirm his male sex assignment. Despite all these factors, Bell J. found:

I am satisfied on the evidence that the husband was neither man nor woman but was a combination of both, and a marriage in the true sense of the word as within the definition referred to above could not have taken place and does not exist. In those circumstances — It is ordered:

- 1. That the Application for Declaration of Validity of Marriage is dismissed.**
- 2. That a Decree of Nullity is pronounced.**

This establishes in law that intersex marriages are unlawful in respect of the Marriage Act and are open to being nullified should one party to the marriage seek that. Annulment is a declaration that the marriage does not in fact exist.

O.I.I. Australia agrees with Bell J. that an intersex person is neither a male or a female (a man or a woman) in the biological sense of those words. We do not agree that our biological differences should preclude us from marriage, to the contrary we hold that the current definition of a marriage denies many people their human rights by limiting that right to those in possession of certain anatomical features to the exclusion of others.

That is to say, the Marriage Act is contingent on physical biology that excludes in the same way race or disability was once a reason for exclusion.

Re: Kevin

Bell's Judgement was later considered by the Family Court of Australia in the matter known as re: Kevin. The first in 2001 by Chisholm J. sitting in the NSW Family Court, and later in 2003 by the full bench with the consensus judgement being delivered by Nicholson C.J.

It has been speculated that this judgement in fact overturned Bell J. findings. We disagree. Observations in those rulings concerning C and D were inter obiter comments and did not alter or change any part of the judgement. Bell J. stands.

More than that, Chisholm J. and Nicholson C.J. viewed intersex through the prism of the transsexual experience and in that we hold they were mistaken in their views. No intersex people were called to either of these proceedings and those academics present were only concerned with transsexual matters and the right of Kevin to marry. Chisholm noted in his comments:

Kevin was born in 1965 and given the name Kimberley. His birth certificate recorded his sex as "female". No doubt he looked like a girl baby when he was born. There is no direct evidence about the state of his body after birth, but on the available evidence I find that at birth his genitalia and gonads were female, and he had and continues to have female (XX) chromosomes.

Then in this, Kevin was not born physically intersex in the sense that intersex people are born with congenital differences of sex. Chisholm J. continues:

... so far as I am aware all the authorities cited in argument on the meaning of the words in various contexts approached the matter by reference to the contemporary meaning of the words, typically attending to whatever medical evidence was available. This is quite explicit in the Australian authorities on the meaning of "man" and "woman". Thus in S.R.A., in particular, where the issue arose in connection with social security law, the majority of the Full Court of the Federal Court held that the meaning of woman and female was to be determined according to their ordinary meaning, and relied on contemporary dictionaries and medical evidence.

And then to C and D:

Before leaving the Australian case law, I should refer briefly to C and D ... in that case, Bell J. treated Corbett as correct. However the decision is not in point: the case did not involve a transsexual, but a person found to be a "true hermaphrodite"; and the decision was largely based on grounds of no present relevance. Further, Bell J. did not have the advantage of medical evidence and as the proceedings were undefended his Honour did not have the advantage of detailed argument. It does not seem that the correctness of Corbett was challenged, and the reasoning is not of assistance on this subject. In relation to his Honour's conclusion that the individual was in law neither a man nor a woman, it is enough to say that I cannot imagine any circumstances in which I would be persuaded to accept such a conclusion. However since neither party really sought to rely on the decision, I see no purpose in adding to the criticism that the case has received.

So clearly Chisholm J. in no way attempts to make findings that might alter the Judgement in Bell J.'s 1979 ruling.

In the appeal Nicholson C.J. et al. observed:

It was common ground before the trial Judge that Kevin had female chromosomes, gonads and genitals at birth.

That is, Kevin was not intersex. Nicholson C.J. in accepting the evidence of M. Diamond did not rely on any assertion or theories concerning "brain sex", rather he relied on the following from M. Diamond

[Kevin] is typical in choice of surgeries. Most often the female-to-male transsexual will adopt a male name and dress, and work, live and play as expected of a male in society. For the female-to-male (F.T.M.) transsexual the most desired surgery is hysterectomy to stop menses, removal of ovaries to stop oestrogen production and mastectomy to remove the breasts. His taking of male hormones produces hirsutism and a desired deepening of the voice. Phalloplasty, the construction of a penis to improve a male body image or to facilitate sexual activity is not uncommon but is less often requested. Many F.T.M. transsexuals forgo this penile construction surgery due to its difficulty, lack of insurance that the penis will function adequately when surgery is complete and expense. Further, for many transsexuals, living as a male is done for mental reasons less associated with eroticism. Other behaviours can substitute for penile-vaginal intercourse. Following the actual sex reassignment surgery, female-to-male transsexuals generally "pass" quite well and are easily accepted in society. Indeed, conditions are such that [Kevin] cannot probably live in any manner other than as a man in society. Aside from his inner feelings of maleness, his appearance and demeanour would make it difficult for him to be accepted as a woman. To force such a condition would be cruel to him, to his wife and all social contacts. Society would most greatly lose thereby.

Nicholson C.J. went on to say:

For the purpose of ascertaining the validity of the marriage under Australian law, the question whether a person is a man or a woman is to be determined as at the date of the marriage.

There is no rule or presumption that the question whether a person is a man or a woman for the purpose of marriage law is to be determined by reference to circumstances at the time of birth.

Unless the context requires a different interpretation, the words man and woman when used in legislation have their ordinary contemporary meaning according to Australian usage. That meaning includes post-operative transsexuals as men and/or women in accordance with their sexual reassignment.

The context of marriage law, and in particular the rule that the parties to a valid marriage must be a man and a woman, does not require any departure from ordinary current meaning according to Australian usage of the word "man".

There may be circumstances in which a person, who at birth had female chromosomes, gonads, and genitals, may nevertheless be a man at the date of a marriage.

In the present case, the husband at birth had female chromosomes gonads and genitals but was a man for the purpose of the law of marriage at the time of his marriage, having regard to all the circumstances and in particular the following:

1. He had always perceived himself to be a male;
2. He was perceived by those who knew him to have had male characteristics since he was a young child;
3. Prior to the marriage he went through a full process of transsexual reassignment, involving hormone treatment and irreversible surgery, conducted by appropriately qualified medical practitioners;

4. At the time of the marriage, in appearance, characteristics and behaviour he was perceived as a man, and accepted as a man, by his family, friends and work colleagues;
5. He was accepted as a man for a variety of social and legal purposes, including name, and admission to an I.V.F. program, and in relation to such events occurring after the marriage, there was evidence that his characteristics at the relevant times were no different from his characteristics at the time of the marriage;
6. His marriage as a man was accepted, in full knowledge of his circumstances, by his family, friends and work colleagues.

Nicholson observed so far as "brain sex" is concerned:

That further research will confirm the present evidence that brain sex or mental sex is a reality which would explain the persistence of a gender identity in the face of or contrary to external influences.

Falling well short of any declaration in respect of intersex variations he went on to observe:

His Honour said that in his view, the evidence demonstrated, at least on the balance of probabilities, that the characteristics of transsexual people were as much biological as those people thought of as intersex. difference was essentially that we can readily observe or identify genitals, chromosomes and gonads, but at present we are unable to detect or precisely identify the equally biological characteristics of the brain that are present in transsexual people. Having accepted this, however, his Honour said that he did not base his decision on the view that "brain sex" is, in law, the decisive factor in determining whether a person is a man or a woman, but rather one of them. We comment in passing that "brain sex" is a somewhat unsatisfactory and ambiguous term that was used both before his Honour and ourselves.

The appeal made no observation or findings in respect of C and D, excepting that some of the findings in re: Kevin would be useful in an appeal against C and D.

It is O.I.I. Australia's considered view, having listened to legal opinion, that the judgement of Bell J. stands and that intersex people are precluded from marriage as a consequence. We acknowledge an appeal against that judgement would most probably be successful. Our view is that a couple, one of whom is intersex, would have to launch a test case.

We note that even with pro bono assistance that would be expensive, and also that "out" intersex people are generally marginalised and poor.

Marriage and the Gender Binary

Now, let's step aside from, Bell and his judgement, and consider marriage through the lens of re: Kevin and the current requirement that a birth certificate be produced to demonstrate the union will be between a "man and a woman".

Kevin did a number of things so far as marriage is concerned. One of them was to entrench the sex binary requirements of the Marriage Act.

Re: Kevin reinforced, rather than challenged, the notion that there are only men and women in the world.

Kevin, though born female in every observable sense, through behavioural traits, lived experience and surgical confirmation establishing him firmly on the other side of a binary.

Kevin affirmed that a marriage should be between a man and a woman, and went to considerable lengths to qualify as a man and so be "compliant" with the Marriage Act.

In doing this, Kevin consensually undertook the (often non-consensual) surgical and hormonal steps taken to make intersex individuals conform to the sex binary. That is, while Kevin was born of certain sex and chose to authenticate his sense of self by traversing the binary, intersex people who are born of uncertain sex are often compelled without consent into one of the two options using all of the medical interventions Kevin was in a position to consent to. (Note that the husband in the case of C and D was able to consent to treatment because of his age at diagnosis and the state of medical protocols half a century ago).

Kevin in no way contested the right to an unmodified anatomy and the gender of one's instinct irrespective of that anatomy. We would have to wait for the case of AH and AB in the Western Australian Family Court to do that.

For intersex people the most disturbing feature of re: Kevin is the need to medically construct an anatomy that is marriageable. That is, to establish an anatomy congruent with a mind that conforms to male or female and heterosexuality. This need is, in our view, a homophobic need.

As a consequence, we reject the notion that re: Kevin or any judgement or law that entrenches the sex binary paradigm is relevant or helpful to intersex people. Indeed, we contend that it is oppressive of our right to an intact body and a lived gender, even when both of those things confront current social or medical expectations.

Current proposals for marriage equality

Finally, we move to current proposals for marriage equality.

The marriage equality acts proposed for state legislatures are, in our view, same-sex marriage proposals and are not inclusive of intersex. Same-sex marriage is certainly a step in the right direction but it is a long way short of equality.

The arguments that the proposed state based acts would be intersex inclusive rests on the notion that at law there are only males and females, as attested to by those state registers of births, deaths and marriages that only allow male and female appellations on birth certificates.

In our view this is simply attempted denial of an undeniable biological fact. We exist in law so far as Bell, Chisholm J. and Nicholson C.J. et al. are concerned. We exist as a "problem" in a children's hospital near you, and also in the adult gynaecology, urology, endocrinology wards.

The anxiety by activists to be seen to be intersex inclusive when actuality shows otherwise is insulting and hurtful. Best to speak the truth and explain the reasoning for the exclusion than to offer a false hope. To say intersex people can marry as male or female is just the same as saying gay and lesbian people can marry as heterosexuals ... it's just that we can't marry as ourselves, and we have to hope that our claim to marriage will not be called into question.

There is also a notion afoot that only trans people have to divorce to have their cardinal documents changed. Intersex people have to be single to change their cardinal documents when they reject their birth assignment. Perceived same-sex marriage is just as troubling for intersex as it is for trans.

Moreso: we are compelled to take medications and are subjected to surgeries, sometimes against our wills and sometimes also with so little information that consent cannot be considered to be informed.

Summary and conclusions

To summarise:

- The judgement of Bell J. precludes intersex people from marriage.
- The findings of Re: Kevin reinforce the sex binary nature of marriage and encourage surgical interventions on intersex people to make us "marriage ready".
- Current proposals for state based marriage laws similarly require sex binary conformity through medical interventions so that intersex individuals are "marriage compliant".
- The view of intersex through a trans lens is, from our point of view, mistaken. Intersex people do not seek transition, sex/gender binary certainty within the confines of a sex binary paradigm, even though the outcomes of our choices might look like that. Intersex people actually seek the right to self-determination, and autonomy over our anatomy; the right to sex roles that we are comfortable with, and the right to freely given, prior and fully informed consent – especially in respect of medical interventions and lived sex roles.
- Every intervention in our lives is done with a weather eye to heterosexual "marriage readiness". That need for readiness is propelled by a deep-seated homophobic fear that "if we are neither female nor male what exactly is the nature of our relationship?"

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