

SOUTH AFRICAN LAW COMMISSION

WORKING PAPER 24

PROJECT 52

**EXAMINATION OF THE LEGAL CONSEQUENCES
OF SEXUAL REALIGNMENT AND RELATED MATTERS**

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INTRODUCTION

The South African Law Commission was established by the South African Law Commission Act, 1973 (Act 19 of 1973).

The members of the Commission are -

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PREFACE

This working paper was prepared on behalf of the Commission by Dr Jerold L Taitz, then Director of the Medico-Legal Unit and Associate Professor of Law at the University of Cape Town. The comments of Professor C Bloch, Head of the Department of Plastic, Reconstructive and Maxillo-facial Surgery at the University of Cape Town, and Dr R E Hemphill of the Department of Plastic Surgery at the Groote Schuur Hospital in Cape Town, as well as the Commission's researchers, are incorporated, as indicated, in the text. The points of view, conclusions and recommendations contained herein should not at this stage be regarded as those of the Commission. The working paper is being published in full to furnish persons and bodies wishing to comment or to make suggestions for the development, improvement, modernisation or reform of this particular branch of the law with sufficient background information to enable them to place substantiated submissions before the Commission.

Requests that comments or parts of comments on the working paper be regarded as confidential will be respected. If no request for confidentiality or anonymity is made, the Commission will assume that commentators agree to the Commission's quoting from or referring to comments and ascribing comments to commentators.

Any persons or bodies wishing to make oral representations to the Commission should submit a brief résumé of their proposed representations, together with a request to be heard by the Commission, to the Commission in writing.

It would be appreciated if written comments, representations or requests could reach the Commission not later than 31 August 1994 at the address appearing on the previous page. Please contact the researcher if you cannot submit your comments in time.

The research worker responsible for the project, who may be contacted for further information, is Mr W F Schröder. The project leader is Mr Justice P J J Olivier.

HIERDIE WERKSTUK IS OOK IN AFRIKAANS BESKIKBAAR.

SUMMARY

1. This investigation concerns the legal recognition of the change of a person's sex status. The operations and medical treatment that a person undergoes to change his or her sex appearance are aimed at the acceptance of that person in the community in which he or she lives as a person of the sex indicated by his or her changed appearance. However, the successful completion of the process will achieve nothing if the person's change of sex appearance is not recognised by law as a change in sex status as well. On the contrary, the lack of such recognition will lead to numerous legal anomalies in respect of marriage and related matters, rape, statutory offences aimed at the protection of the chastity and dignity of women, military service, employment, succession and damages for the unlawful death of a spouse. The law cannot disregard reality. The reality is that there are transsexual persons in society; that these persons have a real need to be accepted as persons of the opposite sex to that of their physical appearance; that it is possible for them to change their physical appearance as such so that they can indeed be accepted as persons of the opposite sex; and that this possibility is in fact used by some persons and will probably be used even if their changed sex appearance is not recognised by law. Even if sex change procedures were to be prohibited the danger would exist that they would still be conducted in secret, which would have the said unsatisfactory legal consequences. It is therefore recommended that provision be made for the recognition in certain

circumstances of the changed sex status of certain persons. The question is then to what extent control is needed for the change of a person's sex status.

2. The external researcher that the Commission employed to do the research in this investigation (Professor Gerald Taitz of the University of Durban-Westville) recommends that no person other than a transsexual or intersexual should be eligible to undergo sex-change procedure. According to him no sex-change procedure should be commenced or carried out upon -

- (a) a person under the age of 21 years;
- (b) a married person during the subsistence of his or her marriage;
- (c) a person who suffers from or is a carrier of a communicable disease;
- (d) a person who has been convicted of an offence relating to the offering of his or her body for material gain;
- (e) a person who is addicted to drugs or alcohol;
- (f) person who is considered psychologically incapable of or unsuitable for undergoing the necessary series of surgical procedures; or

(vi)

(g) a person who has had children.

3. The procedure for a sex-change, as recommended by Professor Taitz, entails the establishment of gender clinics in the main centres to control sex-change procedures. Such clinics should be controlled by the State. The necessary surgery and treatment should be performed and undergone only with the authorisation by such a clinic.

4. After a person has undergone a sex-change operation and has received treatment according to the authorisation of the gender clinic and subject to the conditions of the clinic he or she may apply to the Supreme Court for an order under which his or her post-operative sex is acknowledged and that directs the Director-General of Births, Marriages and Deaths to alter the registers accordingly.

5. The working committee of the Commission is of the opinion that Professor Taitz's suggestions are unnecessarily formalistic and would require expensive administration. The committee suggests that someone whose sex appearance is changed by surgery and other medical treatment so that he or she passes as someone of the opposite sex to his or her former sex should be able to apply to the Director-General of Home Affairs for the recognition of his or her altered sex appearance. The necessary proof should be furnished to the Director-General of Home Affairs. Should the Director-General refuse to recognise the person's altered sex appearance the party could apply in camera to the magistrate of

(vii)

the district in which he or she resides. The magistrate could request further information, after which he could issue an order whereby such change of sex appearance is accepted for all purposes of the law from the date of such order. The sex description of the person concerned could then be altered in the register of births according to the order of the magistrate. The issuing of an order and the ensuing alteration of the sex description in the register of births would have no effect on rights and obligations already imposed in terms of the person's previous sex appearance.

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CHAPTER 1"SEX-CHANGE" PROCEDURES AND PERSONS WHO REQUIRE SUCH PROCEDURES1.1 "Sex-change" procedures

One of the results of modern sophisticated medical and surgical knowledge is "sex-change" procedure. Today by means of plastic surgery and hormonal treatment a normal biological male or female may be given the appearance of a member of the opposite sex. While there is no such phenomenon as a true sexual metamorphosis, with proper deportment and voice training it is extremely difficult, if not impossible, to detect a post-operative transsexual as having been a member of his or her former sex.

Not only does "sex-change" procedure, i.e. "sex-change" surgery and hormonal treatment, give the patient a realistic outward appearance of the opposite sex, the procedure includes the creation of the apparent sexual organs of the opposite sex.¹ Neither post-operative males nor females are capable of having children, although both are able to have sexual intercourse with members of their former sex.² Post-operative females that have had a vagina constructed in their bodies are able to have sexual intercourse in the same physical manner as any biological female.

1 J R B Ball, "Thirty Years' Experience with Transsexualism" (1981) 15 Australian and New Zealand Journal of Psychiatry 39 at 42 (last paragraph) et seq; Howard W Jones, "Operative Treatment of the Male Transsexual" and John E Hoopes "Operative Treatment of the Female Transsexual" at 313 and 353, respectively, in Transsexualism and Sex Reassignment (edited by R Green & J Money, 1969).

2 Ball (footnote 1) at 42; see also Norman L Block & Arthur N Tessler, "Transsexualism and Surgical Procedures" (1971) 132 Surgery, Gynaecology and Obstetrics 517 at 522; William H Masters & Virginia E Johnson, Human Sexual Response (1966) Ch 7 2The Artificial Vagina"; Jerold Taitz, "The Law Relating to the Consummation of Marriage where One of the Spouses is a Post-operative Transsexual" (1986) 15 Anglo American Law Review 141.

Post-operative males, too, are able to have sexual intercourse but require medical treatment to enable them to achieve an erection.

1.1.1 Male-to-female "sex-change" procedure³

In the case of male-to-(post-operative)female procedure, castration and the amputation of the male genitalia are required. Thereafter by plastic surgery an artificial vagina is constructed in more or less the identical place of a natural vagina. Female-like breasts are formed by the intake of hormones or may be constructed by plastic procedures. After successful surgery and hormonal treatment, the body of the post-operative female appears to have a regular female form and female organs. A properly constructed artificial vagina can fully accept an erect male penis and, as indicated above, the post-operative female may have sexual intercourse in the same manner physically as a biological female.

1.1.2 Female-to-male "sex-change" procedure⁴

The surgery procedure for a female-to-(post-operative)male procedure requires the amputation of the female breasts, a hysterectomy and the construction of a penis and scrotum by plastic procedures. As in the case of a post-operative female, the reallocation of the urethra in the post-operative male requires delicate surgery. After the various operations the post-operative male takes on a masculine form. With regard to sexual intercourse, post-operative males, and indeed biological males who as a result of injury or other reasons are unable to achieve an erection and have sexual

3 Inter alia: Howard W Jones, "Operative Treatment of the Male Transsexual" (footnote 1); J Hoenig et al, "Surgical Treatment for Transsexualism" (1971) 47 Acta Psychiatrica Scandinavica at 109 et seq; S S Ratnam & S M Lim, "Surgical Treatment of Transsexualism" in Progress in Obstetrics and Gynaecology (ed John Studd 1982) Volume II at 22 et seq.

4 Inter alia: John E Hoopes "Operative Treatment of the Female Transsexual" (footnote 1); S S Ratnam & S M Lim, "Surgical treatment of Transsexualism" (footnote 3); J Hoenig et al, "Surgical Treatment for Transsexualism" (footnote 3).

intercourse, are able to do so with the help of special medical appliances, some of which may be built into the penis.

The "sex-change" surgery for both post-operative females and males consists of a number of major operations over many months. The surgery presents a high percentage risk factor to the patient as does the necessity for the post-operative patient to take hormones for the rest of his or her natural life.⁵ According to Professor C Bloch, Head of the Department of Plastic, Reconstructive and Maxillo-facial Surgery at the University of Cape Town,⁶ surgery does not present an abnormal risk factor to the patient. There seems to be no consensus as to whether this kind of surgery is irreversible. Dr R E Hemphill of the Department of Plastic surgery at the Groote Schuur Hospital in Cape Town is of the opinion that such surgery is irreversible.⁷

Professor Bloch is of the opinion that reversal surgery is possible but would only be justified in very rare instances, for example a misdiagnosis of the patient's condition before a "sex-change" procedure.

1.2 Persons requiring a "sex change"

1.2.1 Transsexuals

Transsexualism or gender dysphoria syndrome is a medically recognised psychological disorder.⁸ It has been described as:

5 Inter alia: The expert evidence in Rush v Johnson 565 F Supp 856 (1983) at 868; Ball (footnote 1) at 43; W St C Summers, "Carcinoma of Breast in Transsexual Individuals after Surgical and Hormonal Interference with Primary and Secondary Sex Characteristics" 1968 (April-June) British Medical Journal 83; Kenneth L Lehrman, "Pulmonary Embolism in a Transsexual Man taking Diethylstilbestol" (1976) 235(5) Journal of the American Medical Association (2 Febr 1976) 532.

6 In a memorandum sent to the South African Law Commission on sexual realignment and related matters.

7 In a memorandum sent to the Commission by Dr Hemphill.

8 See The Oxford Companion to Medicine (edited by John Walton,
(Continued on next page)

a passionate, life-long conviction that one's psychological gender - that indefinable feeling of maleness or femaleness - is opposite to one's anatomic sex.⁹

According to Dr R E Hemphill, "gender dysphoria", which means "gender discontent", is ambiguous, refers to feelings and not facts, and should not be used.¹⁰ He defines transsexualism as:

A rare congenital defect or anomaly whereby a person of male, or of female, gender is born with the reproductive system and genitalia of the opposite sex, female or male respectively. Sex and gender normally concordant, are discordant.¹¹

To a person suffering from the condition it is no less real than the awareness and effect of any serious illness, incurable defect or physical malformation of the body. The syndrome may manifest itself in various neurotic or psychotic forms, leading even to suicide in extreme cases.¹² Dr R E Hemphill states¹³ that neurosis and psychosis, if present, would be coincidental. A transsexual is usually obsessively disgusted by his sexual organs, which he may seek to conceal from himself, and other persons, as these identify him with his abhorrent anatomical sex.¹⁴ It is not unknown for transsexual males to amputate their genitalia or

9 M M Belli, "Trans-Sexual Surgery" (1978) 239 Journal of the American Medical Association 2143 at 2144; see also MT v JT 355 (A) (2d) 204 (1976) at 207.

10 Hemphill's memorandum 10.

11 Ibid 10.

12 MT v JT (footnote 9) at 206; Hoenig et al "Surgical Treatment for Transsexualism" (footnote 3) at 110, 120, 128 and 131; see also the evidence of Dr John Hoopes in GB v Lackner. App 145 CAL RPTR 555 (1978) at 557.

13 Hemphill's memorandum 5.

14 W S Sahakian, Psychopathology Today - the Current Status of Abnormal Psychology (2 ed 1979) at 379.

to attempt to do so.¹⁵ According to Dr R E Hemphill the self-mutilation of genitals is rare at all times, and is a consequence of psychotic illness, confusion or psychopathic disorders and not transsexualism.¹⁶

A transsexual's belief and conviction that he is really a member of the opposite sex, imprisoned in the wrong body, is constant and inflexible. The transsexual state of mind has been described in the following terms:

... no true transsexual (has) yet been persuaded, bullied, drugged, analysed, shamed, ridiculed or electrically shocked into (the) acceptance of his physique. It (is) an immutable state ...¹⁷

In most medical circles it is considered that the only remedy for transsexualism is to bring the individual's body into alignment with his psychological gender by way of "sex-change" procedure.¹⁸ For Dr Hemphill¹⁹ gender is not psychological, it is the quality of the "self".

At this stage it is relevant to point out that the number of transsexuals is not as low as is generally believed, the ratio being 1:37 000 of the general population, with male-to-female transsexuals being three to four times greater in number than

15 John Randell "Preoperative and Postoperative Status of Male and Female Transsexuals" in Transsexualism and Sex Reassignment (footnote 1) at 355.

16 Hemphill 6.

17 Ian Morris, Conundrum (1974) 50; see also MT v JT (footnote 9) at 205.

18 Footnotes 3 & 4; see the evidence of Drs Leibman, Brown, Tenant, Crews and Hoopers in GB v Lackner (footnote 12) at 556 et seq; see also Rush v Johnson (footnote 5) at 863 et seq.

19 Hemphill 6.

female-to-male transsexuals.²⁰ Accordingly the number of transsexuals in South Africa should be approximately 800, of which figure approximately 600 are male-to-female transsexuals and the rest female-to-male. Obviously only a number of transsexuals approach the medical profession for relief, and not all of these are suitable subjects for "sex-change" surgery. This is on account of their physical and psychological make-up. There is also the question of age. Beyond a certain age surgery is not appropriate. According to Dr R E Hemphill,²¹ 150 transsexuals were involved in consultations at Groote Schuur Hospital from 1969 to 1984.

The major aspiration of transsexuals, a fortiori post-operative transsexuals, is to be recognised as members of their opposite or post-operative sex and to become fully integrated into society as members of that sex. To be able to marry a member of their original sex is regarded as the ultimate in such recognition and integration. In a research report on transsexualism two eminent American medical researchers described this situation regarding post-operative transsexual females in the following terms:

Marriage is the foremost ambition of a converted transsexual. This is easily understood when one realizes that it is the most complete affirmation of femininity.²²

Where marriage is not possible, whether due to the law of the land or otherwise, a terrible indictment is made against the socio-legal system because:

Prostitution sometimes becomes a tempting substitute for marriage. There is no greater confirmation of femininity than that of having normal heterosexual men again and again

20 Sir Martin Roth, "Transsexualism and the Sex-change Operation: A Contemporary Medico-Legal and Social Problem" (1981) 49 Medico-Legal Journal 5 at 13-14; J K Mason and R A McCall Smith Law and Medical Ethics (2ed, 1987) 35.

21 Hemphill 6.

22 Block & Tessler (footnote 2) at 522.

accept her as a woman and even pay her for her sex services.²³

Transsexuals are often confused with transvestites, homosexuals and hermaphrodites. Each of these conditions will be examined separately. It is however important to point out that certain hermaphrodites and pseudo-hermaphrodites (intersexuals) may require sex alignment (rather than "sex-change" surgery as described above) in order to have their sex properly determined.²⁴ This type of surgery may place the intersexual, who has been raised as a member of the wrong psychological sex, in the same legal situation as a post-operative transsexual. Accordingly, intersexuals will be considered separately below. In general terms intersexuals are persons born with the genitalia and/or gonads of both sexes, while transsexuals are born biologically of one sex or the other but believe they are members of the opposite sex who are "trapped" in the wrong biological bodies.

(a) Transvestites

A transvestite is any person who dresses in the clothing of the opposite sex (cross-dressing).²⁵ The terms covers inter alia:

- (i) Costume fetishists who wear the garments of the opposite sex, usually of an intimate nature, for sexual arousal or as sex objects (symptomatic transvestism);

23 Block & Tessler (footnote 2) at 522.

24 J Money "Sex Reassignment as related to Hermaphroditism and Transsexualism" in Transsexualism and Sex Reassignment (footnote 1) at 91; see 7 below.

25 Inter alia: H Benjamin, the Introduction to Transsexualism and Sex Reassignment (footnote 1) 1 at 2 and "Transvestitism and Transsexualism" (1953) 7 International Journal of Sexology 12; William A W Walters, "Transsexualism - Medical and Legal Aspects" (1983) 16(2) Australian Journal of Forensic Science 65 at 67.

- (ii) female impersonation entertainers (drag artists);
- (iii) prostitutes, sado-masochists and others who wear clothing of the opposite sex for deviant purposes (this group would include homosexuals who cross-dress for the purpose of prostitution);
- (iv) criminals who wear clothing of the opposite sex in order to carry out criminal acts.

Transsexuals show a preference for clothing worn by the opposite sex - this is often a symptom of the gender dysphoria syndrome. However, in cross-dressing, the transsexual seeks to identify himself with the sex to which he believes he belongs. In this sense transsexuals may be transvestites, but not all transvestites are transsexuals. Dr Hemphill is of the opinion that transsexuals do not show a preference to cross-dress as their dress is correct for their gender.²⁶ According to Dr Hemphill, transvestites deliberately cross-dress contrary to their gender for criminal, psychopathic or other reasons.²⁷

(b) Homosexuals²⁸

Homosexuals are individuals who are sexually attracted to persons that they know are of the same biological sex as themselves. Homosexuals are satisfied with their biological sex and would not like to lose those organs that give them pleasure.²⁹ Strictly speaking, a transsexual cannot be a homosexual, even if he is attracted to members of his own biological sex. By the very nature of the gender dysphoria syndrome he genuinely regards such

26 Hemphill 7.

27 Hemphill 11.

28 Elliot Slater & Martin Roth, Clinical Psychiatry (3 ed 1977) 169 et seq; W S Sahakian Psychopathology Today (footnote 14) at 374 et seq.

29 Sir Martin Roth (footnote 20) at 13-14. Sir Martin is of the view that "limited surgery rarely, if ever, satisfies".

persons as being of the opposite sex to himself. Dr Hemphill defines homosexuals as people attracted by those of the same gender who normally are of the concordant biological sex.³⁰

1.2.2 Intersexuals, i.e. hermaphrodites and pseudo-hermaphrodites

Hermaphrodites and pseudo-hermaphrodites (known as intersexuals) are persons with gonads and/or genitalia of both sexes. As indicated above, transsexuals have the unequivocal biological bodies and functions of normal members of their initial sexes. Transsexuals are not hermaphrodites, nor are hermaphrodites transsexuals.

No fewer than 15 types of intersexuals are known to the medical profession. Among the rarest would appear to be the true hermaphrodite (hermaphrodites verus), who possesses the genitalia and gonads of both sexes. The respondent in the Australian case In the Marriage of C and D (falsely called C)³¹ considered below³² was a true hermaphrodite who had had surgery in order to have his sex aligned solely as a male. Despite the rarity of the true hermaphrodite there would appear to be a greater-than-average ratio of this physical abnormality in Southern Africa.³³ Other types of intersexuals who require surgery in order to have their sex properly determined include cases of testicular feminisation (hypospadias and breast development), male hermaphroditism (with uterus and penis or with hypospadias with uterus differentiated), female hermaphroditism, etc.

Furthermore, the physical abnormality problem may be aggravated if, at birth, intersexuals are erroneously designated to the sex

30 Hemphill 7.

31 (1979) FLC 340.

32 See 45 below.

33 J J L de Souza, P Barnett, C D Kisner & J P Murray, "True Hermaphroditism" (1984) 66 SA Medical Journal 853.

opposite to that of their psychological sex (gender). They are then raised as members of the wrong psychological sex. These individuals, too, may require sex alignment surgery in order to correct the anomalous situation in which they find themselves.

Depending on the actual type of intersexualism and sex description given in the person's birth register, the legal consequences of the sex alignment surgery may be synonymous with the legal consequences of the "sex-change" procedures undertaken by transsexuals.

1.2.3 Male infants who have suffered total penile destruction in their early infancy

This unusual situation may occur when a little boy has lost his sexual organs by accident, or disease, and is then intentionally raised as a girl. Some degree of "sex-change" surgery and hormonal treatment is commenced at puberty and is completed by the time the patient reaches the age of 20 years.³⁴

The legal consequences of this type of "sex change" would be substantially the same as in the case of a transsexual, should the little boy have been initially registered as a male in his birth register.

The researcher has been unable to find any reference to such a situation in South Africa, although it is not unknown in the United States. The researcher is of the view that this type of situation is extremely rare, and since any possible success ratio remains unresearched in medical circles no further reference will be made to it in this paper.

1.3 Summary

1. The nature of "sex-change" procedures has been examined and it is noted that there is no such phenomenon as a true sex

34 J Money & A A Ehrhardt, Man and Woman: Boy and Girl (1980 reprint) at 18, 118-123, 162.

change or sexual metamorphosis.

The transsexual who has undergone "sex-change" procedure takes on the realistic form and appearance of his or her post-operative sex.

Post-operative transsexuals are capable of having sexual intercourse with members of their now opposite sex but are incapable of having children.

"Sex-change" procedures carry a high risk factor to the patient's life and health and the surgery is irreversible.

2. The following persons require "sex-change" procedure:

(a) Transsexuals

- (i) Transsexuals, ie biological males and females suffering from the gender dysphoria syndrome, a medically recognised psychological disorder.
- (ii) Transsexuals believe that they are members of the opposite sex and that they are trapped in the wrong biological bodies.
- (iii) The number of transsexuals is not as low as is generally believed, the ratio being 1:37 000 of the general population, with male-to-female transsexuals being three to four times greater in number than female-to-male transsexuals.
- (iv) Transsexuals are not homosexuals nor are they hermaphrodites or pseudo-hermaphrodites (intersexuals).

(b) Intersexuals (i.e. hermaphrodites and pseudo-hermaphrodites)

- (i) Persons with various forms of intersexualism require sexual alignment in order to have their sex properly determined.
 - (ii) The legal consequences of sexual alignment for intersexuals is often identical to the legal consequences resulting from a "change of sex" for transsexuals.
- (c) Male infants who have suffered penile destruction in their early infancy may be considered as subjects for subsequent "sex-change" surgery, but owing to the rarity of this condition and the lack of available information the researcher recommends that this situation should not be considered further.

CHAPTER 2THE LEGAL CONSEQUENCES OF "SEX CHANGE" IN SOUTH AFRICAN LAW2.1 Section 7B of the Births, Marriages and Deaths Registration Act, 1963 (Act 81 of 1963)

Although Parliament has made provision for the change of the sex description of a post-operative transsexual in such person's birth register, there is at present no legislation unequivocally recognising such person's post-operative sex for all purposes of the law. The legislative enactment concerning the change of sex description of a post-operative transsexual (section 7B of Act 81 of 1963)³⁵ provided that:

The Secretary (for the Interior) may on the recommendation of the Secretary for Health alter, in the birth register of any person who has undergone a change of sex, the description of the sex of such person and may for the purpose call for such medical reports and institute such investigation as he may deem necessary. (Our italics).

It is worth noting that the Deputy Minister of the Interior, when introducing the Bill regarding section 7B, informed Parliament inter alia:

For the past few years the Department of the Interior has, on request, altered a person's sex description in his or her birth register after such person has undergone a change of sex as a result of medical treatment ... The Government law advisers have confirmed that no provision exists in the Act in terms of which the sex description of a person who has undergone a change of sex may be altered in his birth register ... It is consequently being proposed, firstly, that the Secretary for the Interior be vested with power to alter in a person's birth register the sex description of a person who has undergone a change of sex on the recommendation of the Secretary for Health ... and, secondly, that the alterations of sex descriptions of persons who have undergone a change of sex, which have already been effected in the birth registers,

35 Act 81 of 1963.

shall be deemed to have been effected legally.³⁶ (Our italics).

From the above it is apparent that the notion of a "sex change" is not considered contra bonos mores by the State, which recognises the fact that a "sex change" is accepted medical treatment. Although section 7B has a minimal effect on the general way of life and full integration into society of a post-operative transsexual,³⁷ the enactment enables a post-operative transsexual to obtain official documents, eg a book of life, indicating his post-operative sex, with no reference to his former sex. Hence there is no discrepancy between his apparent sex and his registered sex.

Where social and commercial practices require the production of a birth certificate, the post-operative transsexual is not placed in the humiliating situation of having to explain his predicament as is the case in countries that do not permit the alteration of sex description in the transsexual's birth register, eg the United Kingdom.³⁸

Furthermore, by being able to obtain an identity document indicating his post-operative sex, a transsexual -

- (i) has the advantage of retaining his original driver's licence (the copy in his identity document does not indicate his (previous) names or sex);

36 House of Assembly Debates Vol 51 cols 4441-2. 4 October 1974.

37 W v W 1976 2 SA 308(W) at 314F et seq.

38 See Rees v United Kingdom Eur Court HR Rees Judgment 17 October 1986 Series A No 106, which case is considered more fully at 44 et seq below.

- (ii) cannot be convicted of contravening the Prohibition of Disguises Act 1969³⁹ or of impersonating a member of his opposite sex in contravention of any ordinance or by-law;
- (iii) has little difficulty in obtaining a passport in his post-operative names⁴⁰ and sex.

2.2 The case of W v W 1976 2 SA 308 (W)

The leading case in South Africa concerning a post-operative transsexual is W v W, a decision of Nestadt J in the Witwatersrand Local Division. The essential issue before the court was the determination of the sexual identity of a post-operative female in a divorce case.

The plaintiff, a post-operative female, sued her husband, a normal biological male, for divorce on the grounds of adultery. The fact that the plaintiff's cause of action was based on the defendant's adultery, which is no longer a ground for divorce per se, is irrelevant. In casu the plaintiff had been born and registered as a male, but had been diagnosed as transsexual and had undergone "sex change" surgery on psychiatric advice. After the "sex-change" the plaintiff had changed her first names and had had her sex description in her birth register altered. The parties were married in 1972. The defendant's was aware of the plaintiff's change of sex. According to the evidence the marriage was consummated and the parties enjoyed normal sexual relations.⁴¹ The court was informed that the breakdown in the marriage "was not

39 Act No 16 of 1969.

40 The change of first name may be accomplished by a simple application to the Registrar of Births, Marriages and Deaths.

41 W v W (footnote 37) at 310A et seq.

due to any inadequacy as a woman on the part of the plaintiff".⁴² Is it worth noting that no medical evidence regarding the plaintiff's pre-operative and post-operative physical and psychological condition was led before the court. Relying on s42(3) of the Births, Marriages and Deaths Registration Act, 1969, which provides that a birth certificate issued in terms of the Act -

... shall in all courts of law and public offices be prima facie evidence of the particulars set forth therein

the plaintiff sought to prove her sexual identity by the production of her amended birth certificate, which indicated her sex as female. Previously, in R v Chizah,⁴³ the Appellate Division considered the meaning and effect of the statutory presumption and held as follows:

Luidens Art 40(2) (now s42(3)) geld 'n behoorlik ondertekende sertifikaat in alle geregshoue as prima facie bewys van die besonderhede daarin vermeld. Dit beteken dat 'n regterlike beampste die besonderhede as juis moet aanvaar totdat hy oortuig is dat hy nie op hul kan staatmaak nie. Of so 'n oortuiging geregverdig is, moet afhang van die getuienis wat die inhoud van die sertifikaat weerlê of in twyfel trek.⁴⁴

Clearly the contents of a birth certificate are not conclusive, but in the absence of evidence to the contrary the court is obliged to accept the correctness of the information contained in the certificate. In W v W Nestadt J held that the statutory presumption established by s42(3) of Act 81 of 1963 (above) was rebutted by the plaintiff's evidence that she had been born a (biological) male and continued to be a male until she underwent "sex-change" surgery.

The learned judge then applied the so-called Ormrod Test in order to determine the plaintiff's sexual identity. This controversial

42 At 310B.

43 1960 1 SA 435(A).

44 At 442E-F.

test⁴⁵ was formulated by Ormrod J in the English case of Corbett v Corbett (orse Ashley),⁴⁶ which case is considered more fully below.⁴⁷ The Ormrod Test is a purely biological test requiring the congruence of the following biological factors, more particularly: the party's chromosomes, gonads (ie the presence or absence of testes or ovaries) and genitalia (including internal sex organs) at the time of such person's birth.⁴⁸ Ormrod J concluded that:

... the biological sexual constitution of an individual is fixed at birth (at the latest), and cannot be changed, either by natural development of organs of the opposite sex, or by medical or surgical means. The respondent's operation (a "sex change" similar to that of the plaintiff in W v W), therefore, cannot affect her true sex.⁴⁹

An application of the Ormrod Test to the plaintiff's evidence in W v W indicated that at birth she was a biological male and that the "sex-change" surgery did not make her a biological female. As a marriage is a union between persons of opposite biological sexes, the plaintiff's purported marriage was held to be a nullity.⁵⁰

45 There has been much criticism of the decision in Corbett v Corbett (orse Ashley) and its attendant biological Ormrod Test from both legal and medical quarters. See, inter alia, I M Kennedy, "Transsexual and Single Sex Marriage" (1973) 2 Anglo-American Law Review 112; Gail Brent "Some Legal Problems of the Post-Operative Transsexual" (1972-1973) 12 Journal of Family Law 405; "Transsexuals in Limbo" (editorial)(1971) 31 Maryland Law Review 235; William A W Walters "Transsexualism - Medical and Legal Aspects" (1983) 16(2) Australian Journal of Forensic Science 65. See also MT v JT 335(A) (2d) 204 (1976) at 208 et seq, which is considered more fully at 51 below.

46 [1971] p 83.

47 See 22 et seq and 42 et seq below.

48 Corbett case at 104D-E.

49 Ibid.

50 W v W at 315D et seq.

2.3 The effect of the decision in W v W

The effect of W v W has been to negate the possibility of post-operative transsexuals being recognised in South African law as members of their post-operative sex.⁵¹ The decision in W v W has also negated the possibility of section 7B of Act 81 of 1963 becoming the cornerstone in the recognition of a transsexual's post-operative sex. There is still a strong feeling among certain members of the legal profession that section 7B was intended not only to indicate that "sex-change" surgery is not contra bonos mores but also that Parliament intended a transsexual's post-operative sex to be recognised for all aspects of the law in South Africa.

2.4 The effect of W v W on section 7B of the Births, Marriages and Deaths Registration Act 81 of 1963

As has been mentioned in the Preface, this working paper was drafted on behalf of the Commission by Professor J L Taitz. At the time of completion of the working paper section 7B of the Births, Marriages and Deaths Registration Act 81 of 1963 was in operation.

However, during the 1992 Parliamentary session the Births and Deaths Registration Act 51 of 1992 was enacted and came into operation on 1 August 1992. It repealed the entire Births, Marriages and Deaths Registration Act 81 of 1963.

As substantiation for this step the following was said during the second reading:

... I just want to issue a final word of warning to those hon members who have nevertheless considered undergoing a sex change operation that the good old days when a man could become a woman after a sex change operation, and a woman a

51 See Simms v Simms 1981 4 SA 186(D).

man, no longer exist as a result of court judgments in that regard.⁵²

The significance of the repeal is that the conclusions and recommendations contained in the working paper, including the proposed draft Bill and especially clauses 4 and 5 thereof, are affected by the enactment of the Births and Deaths Registration Act 51 of 1992. Section 7 of the Births and Deaths Registration Act 51 of 1992 provides as follows:

7. Verification, supplementation and rectification of particulars

(1) The Director-General may -

- (a) require the person who has furnished any particulars in terms of this Act to furnish the Director-General with proof of the correctness of such particulars; and
- (b) investigate or cause to be investigated any matter in respect of which particulars are to be used for the registration thereof in terms of section 5.

(2) If by virtue of subsection (1) it comes to the attention of the Director-general that any particulars in respect of any person in any document submitted or preserved in terms of this Act are not correctly reflected, the Director-General may supplement and correct such particulars.

It is apparent that section 7 makes no provision for the alteration of the description of the sex of any person who has undergone a change of sex. The provisions of section 7B of the repealed Act have not been re-enacted in the new Act. It is therefore clear that according to the new Act it is not possible for any person who is currently undergoing a series of sex-change operations to alter his or her sex description in his or her birth register. The Act came into operation on 1 August 1992.

Nevertheless, during the 1993 Parliamentary session section 33 of the Births and Deaths Registration Act 51 of 1992 was amended by

52 See Hansard col 2356 19 March 1992.

the addition of the following subsection:

(3) A person who was in the process of undergoing a change of sex before the commencement of this Act, may on completion of the said process apply in terms of section 7B of the Births, Marriages and Deaths Registration Act, 1963, for the alteration of the sex description in his birth register."

This subsection came into operation on 1 September 1993. Since the arguments contained in Chapter 2 remain relevant to the debate, they are left unchanged and any other reference to section 7B of the Births, Marriage and Deaths Registration Act 81 of 1963 has to be read with the new enactment.

2.5 Summary

The legal position in South Africa regarding the post-operative sex of transsexuals is as follows:

- (i) "Sex-change" procedures are not contra bonos mores.
- (ii) A transsexual may have the sex description in his birth register altered to that of his post-operative sex.
- (iii) The post-operative sex of a transsexual is not recognised by the law, certainly not for the purpose of the law of marriage, and it would appear that in general the courts will recognise only a post-operative transsexual's original sex.

CHAPTER 3SPECIFIC LEGAL CONSEQUENCES OF A "SEX CHANGE" IN SOUTH AFRICAN LAW

Various legal situations will be examined on the basis of W v W⁵² (above), which decision effectively held that a post-operative transsexual remains a member of his initial or former sex despite the irreversible nature of "sex-change" procedures and the fact that the transsexual will for the rest of his or her life retain the appearance of a member of his or her post-operative sex. The following situations will be considered:

- 3.1 Marriage and matters ancillary thereto
 - 3.1.1 A marriage where one of the parties is a post-operative transsexual
 - 3.1.2 The effect of a "sex-change" on an existing marriage
- 3.2 Criminal law
 - 3.2.1 Rape
 - 3.2.2 Prostitution and soliciting
 - 3.2.3 Statutory offences intended to protect the chastity and dignity of women
 - 3.2.4 Bigamy
- 3.3 Law of evidence
- 3.4 Income tax
- 3.5 Conscription

- 3.6 Employment
- 3.7 Succession (intestate and testate)
- 3.8 Damages for the unlawful death of a spouse
- 3.1 Marriage and matters ancillary thereto

When considering the legal consequences of a "sex change" in relation to the law of marriage, a distinction must be drawn between (purported) marriages where one of the spouses is a post-operative transsexual (and matters incidental to such marriages, eg children, adoption and maintenance) and existing marriages during the subsistence of which, one of the spouses undergoes a "sex change".

3.1.1 A marriage where one of the spouses is a post-operative transsexual.

As indicated above, the court in W v W concluded that a (purported) marriage where one of the parties is a post-operative transsexual, is void ab initio.⁵³ This serves to negate a post-operative transsexual's greatest opportunity of becoming fully integrated into society as a member of his or her post-operative sex.

It is important to note that in W v W the learned judge relied on the biological Ormrod Test, which, as indicated above, was formulated in the English case of Corbett v Corbett (orse Ashley).⁵⁴ This test is concerned solely with the congruence of an individual's chromosomes, gonads and genitalia at the time of birth. In formulating this test Ormrod J, the judge in Corbett v Corbett, specifically avoided any reference to a person's psychological

53 At 315 D et seq; see 16 above.

54 [1971] p 83.

sex, ie gender. As in W v W, the Corbett case concerned the validity of a purported marriage in which one of the parties was a post-operative transsexual. In the Corbett case the expert medical witnesses for both sides were unanimously of the view that in addition to biological factors (as set out in the Ormrod Test) a person's psychological sex is also an essential factor.⁵⁵ Despite this uncontroverted evidence, Ormrod J formulated the solely biological test of sexual identity. Although the learned judge was strongly criticised⁵⁶ for this decision it must be borne in mind that the issue in Corbett was the validity of a marriage which in English law (as in South African law) is a union between a (biological) male and a (biological) female.

The decision in W v W has also been criticised, as in that case Nestadt J inter alia adopted the purely biological Ormrod Test and he, too, failed to consider a person's psychological sex as a factor.⁵⁷ It is, respectfully, unfortunate that Nestadt J adopted the Ormrod Test, which was a finding of fact after the hearing of expert medical evidence in an English case.⁵⁸ Omitting any reliance on the Ormrod Test, Nestadt J cannot, with respect, be faulted on the ultimate decision. No medical evidence was presented by the plaintiff post-operative female that she was other than a male who had undergone medical procedures that merely gave her the appearance of a female.⁵⁹ Under the particular circumstances of the case there was no need for the learned judge to have adopted the Ormrod Test or even to have referred to it.

55 At 100D et seq.

56 See footnote 45 at 17 above.

57 See inter alia: David Pannick, Sex Discrimination Law (1985) 216; M L Lupton "The Validity of Post-operative Transsexual Marriages" (1976) 93 SALJ 385; and cf Jerold Taitz "The Legal Consequences of a Sex-change - A Judicial Dilemma" (1980) 97 SALJ 65.

58 W v W (footnote 37) at 311B et seq.

59 At 314C; see Taitz, "The Legal Consequences of a Sex-change - A Judicial Dilemma" (footnote 57) at 75 et seq.

As matters stand the ultimate decision in W v W is correct as far as the facts in that case are concerned. It remains for the legislature in South Africa to decide the criteria for the determination of sexual identity.

(a) Maintenance and proprietary rights

A marriage set aside by the court as being void ab initio places no obligations on either party concerning maintenance and the normal division of proprietary rights, flowing from the dissolution of a valid marriage.

Where the parties have cohabited as man and wife for some time and have both contributed towards the marital estate, the division of the estate would be as difficult as the settling of assets of an invalid partnership.

Legislative certainty regarding the validity of the purported marriage based on the determination of the sexual identity of the post-operative transsexual is essential to the solution of the problem.

(b) The adoption of children by the parties to a purported marriage

According to information gleaned by the researcher, when they are aware that one of the parties is a post-operative transsexual, adoption authorities are not prepared to recommend the adoption of children by the spouses, irrespective of the stability or length of the marriage.

This is an anomalous policy because in terms of the Child Care Act 74 of 1983, not only may a child be adopted by a married couple, but also by a single parent such as a widow, a widower, a divorced person or even an unmarried person with the consent of the

Minister.⁶⁰ The refusal to permit adoption by the parties to a transsexual marriage once again shows the failure by authorities to understand the nature of transsexualism. Many post-operative females make good mothers. The criterion should be whether or not the adoptive parents are fit and proper persons to be permitted to adopt children and not whether one of the spouses is a post-operative transsexual who renders the marriage invalid. The solution to this issue lies in legislative certainty.

(c) Conception of a child by AID

In marriages where the wife is a normal biological female and the husband a post-operative male, the wife could conceive by AID. The researcher is aware of a number of such marriages in which children have been procreated by using this method of conception.

The regulations framed in terms of the Human Tissue Act 65 of 1983 require the recipient of artificial insemination to be validly married.⁶¹ In other words, a female who is "married" to a post-operative male is not entitled to the privileges of AID. There is, at present, a case in which the female in such a marriage previously gave birth to a child by AID. The particular hospital's infertility unit was at the time not aware that her marriage was invalid. She subsequently returned to the unit to receive artificial insemination a second time, only to be refused because the unit had since learned of the invalidity of her marriage. This case is another example of the untold hardship and hurt to a couple who believed that they had entered into a valid marriage and that their child was legitimate.

Apart from the distress suffered by such persons, surely a real danger in refusing to allow a biological female spouse to conceive (or indeed to adopt children) would be that it might force her to

60 S17 of the Child Care Act 74 of 1983.

61 Regulation 8(1) of the Regulations regarding the Artificial Insemination of Persons, and Related Matters, Government Notice No R.1182 dated 20 June 1986.

find a man to make her pregnant.

(d) The actual marriage ceremony

Research has shown that a post-operative transsexual in possession of an amended birth certificate has no difficulty in marrying a biological person of the apparent opposite sex. Such marriages are performed either in church or by a magistrate at a registry office. No questions are asked. In fact few marriage officers are aware of the decision in W v W.

3.1.2 The effect of a "sex change" upon an existing marriage

There can be little doubt that a party to a marriage may successfully seek a divorce should the other spouse undergo "sex-change" procedure during the subsistence of the marriage.⁶² A spouse undergoing "sex-change" procedure must be seen as attempting to bring the existing marriage to an end.

"Sex-change" procedure should be controlled by legislation and should not be permitted to a party during the subsistence of a marriage, especially where children have been born of such marriage.⁶³

(a) Custody of children of an existing marriage

In any matter before it, the court, as upper guardian of all minors, must consider the best interests of any child. The custody of a minor child, whether opposed or subject to consent between the divorcing parents, must be decided in the child's best interests. Where the court is faced with a custody issue, in a case in which one of the parents has undergone a "sex change", the question of the child's best interests becomes more complicated - which of the two mothers or two fathers, as the case may be, is

62 See the US case of Steinke v Steinke 238 Pa Super 74, 357A (2d) 674 (1975).

63 See S3(2)(b) of the draft legislation at 64 below.

the best person to be awarded custody?⁶⁴ The court should not dismiss a claim for custody of a child by a post-operative transsexual solely on the ground that such person is no longer of the apparent sex he was when he fathered the child. If not controlled by legislation this is a subject fraught with difficulty.

3.2 Criminal law

It will be recalled that the "sex-change" procedure undertaken by a male-to-female transsexual includes the construction in her of a vagina. The post-operative female is, as indicated above, capable of having sexual intercourse in the same physical manner as a normal biological female.⁶⁵ Should the law in South Africa fail or neglect to recognise a transsexual's post-operative sex, a number of anomalous criminal law situations could arise.

3.2.1 Rape

Physically, a post-operative female may be raped with all the horror, pain and indignity that would be experienced by an ordinary biological female. Since rape is defined as "the intentional unlawful sexual intercourse with a woman without her consent",⁶⁶ the rapist of a post-operative female cannot be convicted of rape so long as the victim is not regarded in law as a woman. Of course, the accused may be convicted of indecent assault or assault with intent to commit rape or attempted rape. However, these offences are not generally as serious as rape per se.

64 See the US case of Christian v Randall 33 Colo App 129, 615P (2d) 132 (1973).

65 See footnote 2 at 1 above.

66 P M A Hunt South African Criminal Law and Procedure (2 ed by J R L Milton) Vol II Common Law Crimes (1982) 435.

3.2.2 Prostitution and soliciting

Prostitution is defined as "the offering by a woman of her body to indiscriminate lewdness for hire".⁶⁷ Clearly a post-operative female who commits acts of prostitution cannot be convicted of the offence if the law does not regard her as a woman.

The same anomalous situation would apply to a post-operative female charged with soliciting. This crime may be committed only by a "common prostitute or night walker"⁶⁸, a calling which may be practised only by a woman.

3.2.3 Statutory offences intended to protect the chastity and dignity of women

The following offences were created by the Sexual Offences Act 1957⁶⁹ for the protection of the chastity and dignity of women. An accused who is charged with having committed any of the following offences cannot be found guilty if the complainant is a post-operative female:

- (a) Procuring or attempting to procure any female to have unlawful carnal intercourse with any person other than the procurer, or in any way assisting in bringing about such intercourse;⁷⁰
- (b) inveigling or enticing any female to a brothel for the purpose of unlawful carnal intercourse or prostitution or con-

67 J R L Milton & N M Fuller South African Criminal Law and Procedure. Vol III Statutory Offences. (1982) 435.

68 Ibid.

69 No 23 of 1957.

70 S10(a).

cealing in any house or place any female so inveigled or enticed;⁷¹

- (c) procuring or attempting to procure any female to become a common prostitute or to become an inmate of a brothel;⁷²
- (d) applying or administering to any female, intoxicating liquor, matter or thing with intent to stupefy or overpower her so as thereby to enable any person other than the procurer to have unlawful carnal intercourse with such female.⁷³

3.2.4 Bigamy

A person may be convicted of bigamy⁷⁴ only where he is a party to a subsisting legally valid marriage. This means that neither spouse of a marriage, where one of the parties is a post-operative transsexual, can be convicted of bigamy should either or both spouses enter into second marriages with another person or persons. Furthermore, a party to an existing valid marriage cannot be convicted of bigamy should such party enter into a second marriage where the other spouse is a post-operative transsexual.

If, however, the bigamous spouse was not aware that the existing or subsequent marriage with a post-operative transsexual was void ab initio, the bigamous spouse may come within the rule of R v Davies⁷⁵ and may be convicted of attempted bigamy by attempting to commit the impossible.

71 s10(b).

72 s10(c) and (d).

73 s10(e).

74 Bigamy is defined as "unlawfully and intentionally entering into what purports to be a lawful marriage ceremony with one person while lawfully married to another" (South African Criminal Law and Procedure Vol II (footnote 66) at 245).

75 1956 3 SA 32(A).

3.3 Law of evidence

Spouses to a valid marriage, and seemingly also to a union that has the essential attributes of a Christian marriage (ie a voluntary union of one man and one woman, for life, to the exclusion of all others), enjoy the following common law and statutory privileges,⁷⁶ inter alia:

- (a) In either criminal or civil proceedings spouses enjoy the right to refuse to disclose communications made to them by the other spouse during the subsistence of the marriage.⁷⁷
- (b) In addition, a spouse may refuse to answer any question, in judicial proceedings, which the other spouse could not have been compelled to answer.⁷⁸
- (c) The privilege to refuse to disclose communications extends to a former husband or wife in respect of communications made during the subsistence of the marriage.⁷⁹
- (d) Admissions of fact by one spouse are generally not admissible against the other spouse unless such admissions were made under the authority of the latter or such admissions related to joint interests of the spouses in the common estate.⁸⁰

76 S v Vengetsamy 1972 3 SA 351(D); cf. Hoffmann & Zeffertt South African Law of Evidence (3 ed) (hereinafter referred to as Hoffmann & Zeffertt) 298; S E van der Merwe, D W Morkel, A P Paizes, A St Q Skeen Evidence 1983 (hereinafter referred to as Van der Merwe Evidence) 315; cf. s195(2) of the Criminal Procedure Act, 1977.

77 s198(1) of the Criminal Procedure Act, 1977; s10 of the Civil Proceedings Act 1965; Hoffmann & Zeffertt (footnote 76) at 199; Van der Merwe, Evidence (footnote 76) 142 et seq.

78 S v Khanvapa 1979 1 SA 824(A); cf Hoffmann & Zeffertt (note 76) 299; Van der Merwe, Evidence 312.

79 Hoffmann & Zeffertt (footnote 76) 200.

80 Hoffmann & Zeffertt (footnote 76) 165.

- (e) Spouses in a valid marriage (or a union that has all the attributes of a Christian marriage) are generally competent but not compellable witnesses for the prosecution or the defence in a criminal case where a spouse is an accused, and may only be called at the request of the accused spouse.⁸¹

Spouses to a (putative) marriage where one of the parties is a post-operative transsexual do not enjoy the above privileges afforded to a spouse of a valid marriage by the law of evidence. Because such (putative) marriage is void ab initio on account of the post-operative spouse being regarded as a member of his or her former sex, the spouses in such marriage fall outside the rule extending these privileges to the parties to a union that has the attributes of a Christian marriage. Should the law recognise a transsexual's post-operative sex, this anomalous situation regarding such persons would fall away.

3.4 Income tax

In terms of the Income Tax Act 1962⁸² married persons who are liable as taxpayers are entitled to certain advantages over unmarried tax-payers, inter alia -

(i) a greater primary rebate;⁸³

(ii) a greater deduction for medical and dental expenses.⁸⁴

A taxpaying spouse to a (putative) marriage, where one of the parties is a post-operative transsexual, is not entitled to the

81 Hoffmann & Zeffertt (footnote 76) 299 et seq; Van der Merwe, Evidence 21.10-21.14.4 at 311-314; see ss 195-196 of the Criminal Procedure Act 51 of 1977.

82 Act 58 of 1962 (as amended).

83 S6(2)(a).

84 S18(2)(b).

advantages available to a spouse to a valid marriage notwithstanding the fact that both may be the sole breadwinners of their respective marriages.

3.5 Conscription

Every male citizen between the ages of 17 and 65 years of age (both years included) is liable to render service in the Defence Force as a member of the Permanent Force, the Citizen Force, the Commandos or one of the Reserves.⁸⁵ To this end every White male citizen is obliged to register during the year in which he turns 16 years of age.⁸⁶

Both post-operative females and males may find themselves in an invidious situation in relation to the Defence Act 44 of 1957. If a post-operative female is regarded by the law as a male for the purposes of the Defence Act, not only must she have registered during her sixteenth year, but she also remains liable to be called up for national service as a male serviceman. She may of course be exempted from service for medical reasons. On the other hand, post-operative males may be refused permission to enlist for national service as they are regarded by the law as female.

3.6 Employment

Persons dismissed from their employment solely on account of having undergone "sex-change" procedures may find that they are not protected by the rules relating to unfair dismissal. In terms of Article 5 of the International Labour Organization Convention 158 of 1982 (which convention has been adopted by the Industrial

85 S3(1)(b) read with section 2(1)(b) of the Defence Act 44 of 1957.

86 S63(1).

Court in South Africa)⁸⁷ the following grounds inter alia shall not constitute valid grounds for termination of employment:

Race, colour, sex, marital status, family responsibilities, pregnancy, religion, national extraction or social origin.⁸⁸

Since an employee's post-operative sex is not recognised in law on the basis of W v W, the transsexual has no grounds for unfair dismissal on the basis of sex. Effectively he is dismissed for having undergone "sex-change" procedure and not on account of his sex.⁸⁹

Furthermore, there are certain jobs that are reserved for a particular sex, eg under mining legislation no female may be employed underground.⁹⁰ Does this mean that a post-operative female may be thus employed? On the other hand, it would appear that a post-operative male may not be employed underground, regardless of his physical strength.

3.7 Succession (intestate and testate)

In terms of the Succession Act 13 of 1934 only the surviving spouse of a (valid) marriage, in or out of community of property, is entitled to succeed by intestacy to a share of his or her

87 Cf. Metal and Allied Workers Union and Others v Stobar Reinforcing (Pty) Ltd and Another (1983) 4 ILJ 84; Van Zyl v O'Okiep Copper Co Ltd (1983) 4 ILJ 25; Dhlamini v Cargo Carriers (Natal)(Pty) (1985) 6 ILJ 42; see Julian Riekert, Basic Employment Law (1987) 66-69.

88 See Julian Riekert (footnote 87) for the common law position regarding dismissal 63 et seq and for dismissal under the ILO Convention 70 et seq.

89 While there are no reported South African cases on this matter, the approach by the courts in the United States clearly makes the point (see Discrimination against Transsexuals in Employment Situations at 48 below).

90 S11(1) of the Mines and Works Act 27 of 1956.

deceased spouse's estate.⁹¹ Clearly a spouse to a putative marriage, where one of the parties is a post-operative transsexual, cannot so succeed by intestacy.

In so far as specific bequests are concerned, if an heir is described solely by sex, eg where a parent or grandparent has left his estate exclusively to unnamed "sons or grandsons", a post-operative transsexual female may find herself disinherited should she have undergone "sex-change" procedure before she could claim under the estate. On the other hand a male transsexual heir (who has not undergone "sex-change" procedure but who considers himself a female) may still inherit as a male. An equally anomalous situation would apply in cases where a testator bequeaths property to his heirs in different share ratios according to their sex.

3.8 Damages for unlawful death of a spouse

The question is whether a surviving spouse to a marriage, where one of the parties is a post-operative transsexual, is entitled to damages for the unlawful death of the deceased spouse. Before legislation was passed to resolve this issue, there was controversy as to whether a spouse to an indigenous customary union (not a valid marriage according to South African law) was entitled to damages for the loss of her breadwinner spouse.⁹² On the other hand there can be little doubt that in terms of W v W a surviving spouse to a putative marriage (on account of one of the parties being a post-operative transsexual) would not be entitled to damages. Such a marriage is at present regarded in the same light as a single-sex marriage because the post-operative spouse is regarded as a member of the original and not the post-operative sex.

91 S1 of Act 13 of 1934.

92 S31 of the Black Laws Amendment Act 76 of 1963; S5(6) of the Maintenance Act 23 of 1963; see A J Kerr "Customary-nion Widow's Claim in Delict" (1984) 101 SALJ 224.

3.9 Further comments and summary

The various legal consequences in South African law relating to a "sex change", as set out above, are not exhaustive and are intended merely to show the anomalous and sometimes bizarre effect of the failure of our law to recognise a transsexual's post-operative sex. Various other legal consequences have not been considered above, eg the effect of the insolvency of a spouse to a marriage in which one of the spouses is a post-operative transsexual. A further problem is the effect of a "change of sex" upon existing insurance policies (including retirement annuities) and pensions where the premiums and conditions for males and females are different. Furthermore, no provision appears to exist, in the rules of universities and matriculation examination bodies, regarding the reissuing of a diploma, degree or certificate in the post-operative name of any party.

In every situation in which the law recognises a distinction between males and females, for whatever reason, a party who has undergone a "sex change" is placed in an anomalous, and often bizarre, situation.

It should be borne in mind that a post-operative transsexual takes on the appearance of a member of the post-operative sex, the actual surgery being irreversible. Furthermore, even though a post-operative transsexual is in possession of a birth certificate amended in terms of section 7B of Act 81 of 1963, which shows his sex as being that of his post-operative sex, and is regarded by members of society as a member of his post-operative sex, if the decision in W v W is to be followed then a post-operative transsexual remains a member of his original sex.

In the final analysis, the essential legal consequence of a "sex change" is the determination of the sexual identity of the post-operative transsexual.

CHAPTER 4

THE RECOGNITION OF A TRANSSEXUAL'S POST-OPERATIVE SEX: A COMPARATIVE STUDY

The essential legal consequence of "sex-change" procedures has been described above as the determination of the sexual identity of the post-operative transsexual. This essential consequence has been resolved in certain countries by the introduction of legislation recognising the transsexual's post-operative sex for all legal purposes including the law of marriage. A second and unusual situation occurs in a few countries, eg Norway, Poland and Portugal, where the issue has been determined solely through the administrative process. In some of these countries a court order is necessary.

In other countries, including the United Kingdom, the United States of America, Australia and South Africa, a third development regarding the determination of sexual identity has taken place. In these countries sexual identity has been determined on an ad hoc basis by the courts. These three situations will be examined separately.

4.1 Recognition of post-operative sex by legislation

A number of countries, including Germany, Finland, Czechoslovakia, Greece, the Netherlands, Italy, Sweden and Switzerland, have passed legislation recognising a transsexual's post-operative sex for all purpose of the law, including the right to marry a member

of his or her former sex. The legislative and administrative requirements for recognition vary from country to country.⁹³

4.1.1 Germany⁹⁴

The following conditions must be met before a "sex change" is recognised by the law:

- (a) The transsexual must be not less than 25 years of age;
- (b) the "sex-change" surgery and medical procedures must have been completed; and;
- (c) the transsexual must have lived as a member of his post-operative sex for at least three years.

4.1.2 Finland⁹⁵

After the completion of the "sex-change" procedures, the post-operative transsexual is obliged to satisfy a rigorous (state-controlled) psychological test. Thereafter all documentation, including details of the surgery etc., has to be furnished to the Finish Medical Court, which has the power to decide whether the transsexual's post-operative sex should be recognised by the state.

93 The information regarding the legislative recognition of a transsexual's post-operative sex by legislation (footnotes 91-99) and recognition by way of the administrative process (footnote 92-94) was obtained from the records of the European Court of Human Rights, more particularly in the case of Rees v United Kingdom Eur Court HR Rheas Judgment 17 October 1986 Series A No 106 (filed with Registry 13 March 1986 (hereinafter referred to as Documents in Rees v United Kingdom)).

94 Documents in Rees v United Kingdom (footnote 93) at 16; see also the German legislation on transsexuals of 10 September 1980, BG B1 1980, 1, p 1654.

95 Documents in Rees v United Kingdom (footnote 93) at 15.

4.1.3 Czechoslovakia⁹⁶

After the completion of the "sex-change" procedures, certificates from the psychiatrist and surgeons who treated the transsexual have to be furnished to the State Health Institution, which has the power to issue an official document confirming the "change of sex".

4.1.4 Greece⁹⁷

Before being recognised as a member of his or her post-operative sex, the transsexual requires an order of the Supreme Court following an application setting out full details of the particular case supported by medical evidence.

4.1.5 The Netherlands⁹⁸

Legislation provides that a post-operative transsexual must apply to the appropriate administrative authorities for the recognition of his or her post-operative sex. This application must be supported by medical certificates from the medical specialists who dealt with the case.

4.1.6 Italy⁹⁹

Before a change of sex is recognised in Italy the post-operative transsexual is required to obtain a court order.

96 At 14.

97 At 16.

98 Ibid.

99 At 17; see also the Italian Act of 4 May 1982 on the correction of sexual status - Norme in materia de Rettificazione Di Attribuzione Di Sesso legge 14 April 1982-and Salvatore Patti & Michael R Will, La Rettificazione Di Attribuzione Di Sesso: Prime Considerazioni (1982).

4.1.7 Sweden¹⁰⁰

For the recognition of his or her post-operative sex for all purposes of the law (save marriage) the transsexual is required to make an application, supported by the relevant medical documentation, to a specific administrative authority. Thereafter, should the post-operative transsexual wish to marry, it is necessary for him or her to obtain a specific court order.

4.1.8 Switzerland¹⁰¹

As in the case of the recognition of a transsexual's post-operative sex in the Netherlands, a transsexual in Switzerland is required to apply to the appropriate administrative authority for recognition. The application must be supported by the relevant medical documentation.

4.2 Determination of the sexual identity of post-operative transsexuals by way of the administrative process

In certain countries, including Norway, Poland and Portugal, a transsexual's post-operative sex is recognised solely through state administration process (not by legislation). Since there is no specific legislation on the subject in these states, policy decisions on the part of appropriate administrative authorities determine the sexual identity of post-operative transsexuals. The procedures and conditions of recognition of post-operative sex in these countries are as follows:

100 Documents in Rees v United Kingdom (footnote 93) at 20; see also the Swedish Act of 21 April 1972 - Lag om fastallande av konstillhorighet i vissa fall - SFS 1972 119.

101 Documents in Rees v United Kingdom (footnote 93) at 20; see also Michael R Will, Geburt Eines Menschenrechts, Geschlechtsidentität in Europarecht und Staatenintegration (1983) at 911 et seq, cited by the European Commission of Human Rights in its opinion in Rees v United Kingdom at §44 p 25 of the official publication of the European Court of Human Rights Eur Court HR Rees Judgment 17 October 1986 Series A No 106.

4.2.1 Norway¹⁰²

Once medical confirmation of the completed "sex-change" procedure has been furnished, the Central Bureau of Statistics changes the person's registration number and sex status. A post-operative transsexual may marry a person of his or her former sex if such person is aware that the "sex change" has taken place. The Norwegian administrative procedure appears to have been confirmed only by executive ministerial approval and not by legislation.

4.2.2 Poland¹⁰³

In Poland a change of sex is regarded as a purely medical problem. In order to become registered as a member of his or her post-operative sex, a transsexual is required to obtain a court order indicating that he or she is a genuine transsexual and that the medical procedures have been completed. Once registered as a member of his or her post-operative sex, the transsexual is free to marry a member of his or her now opposite sex.

4.2.3 Portugal¹⁰⁴

In Portugal, too, there is no specific legislation. However, once a party has undergone "sex-change" procedure his or her identity documents are amended on production of a court order. A post-operative transsexual may then marry a member of his or her now opposite sex.

4.3 Judicial determination of the sexual identity of post-operative transsexuals

Where no legislation or administrative process has been available to deal with the situation of a "sex change", the courts have been

102 Documents in Rees v United Kingdom (footnote 93) at 18.

103 At 19.

104 Ibid.

required to determine the sexual identity of post-operative transsexuals on an ad hoc basis. While some of the cases related to allegations of invalid dismissal from employment on account of the employee having undergone "sex-change" procedure, most of them concerned a marriage situation in which one of the spouses was a post-operative transsexual. This has been the position in the United Kingdom, the United States of America, Australia and as indicated above, South Africa.

Save for the last reported case concerning the validity of a marriage in the United States, MT v JT¹⁰⁵ (considered below), the various courts found themselves forced to refuse acknowledgement of a transsexual's post-operative sex. The reason for this is in no small way that the courts have been fettered by long-established legal and social definitions of what previously appeared immutable conditions, such as that of a male, a female and the description of marriage. When these definitions and descriptions were formulated the notion of a "sex change" was beyond the comprehension of the lawmakers. A further difficulty with these decisions is that they are often tainted by the subjective (and sometimes incorrect) views of the judge towards transsexualism and homosexuality and the fear that recognition of the transsexual's post-operative sex will open the floodgates to a tide of single sex marriages.¹⁰⁶

The refusal by the courts to recognise "sex-change" has done little towards solving a modern medical and sociological problem; on the contrary, such refusal has only aggravated the situation by giving it an anomalous, and even bizarre, legal facade that can only be satisfactorily resolved by legislation.

105 355(A) (2d) 204 (1976); see p 51 below.

106 See inter alia: I M Kennedy, "Transsexualism and Single Sex Marriage" (1973) 2 Anglo-American Law Review 112 at 130 et seq; Gail Brent, "Some Legal Problems of the Post-operative Transsexual" (1972-1973) 12 Journal of Family Law 405 at 421; cf (1970-1971) 814 Hansard col 1847.

4.3.1 The United Kingdom

Not only is there no legislation in the United Kingdom recognising a transsexual's post-operative sex, there is also no legislation permitting the change of a post-operative transsexual's sex description in his birth register, as there is in South Africa, most European states and the majority of states of the United States of America. The two leading English law cases of Corbett v Corbett (orse Ashley)¹⁰⁷ and R v Tan and Others¹⁰⁸ will be considered briefly, as will Rees v United Kingdom,¹⁰⁹ a decision of the European Court of Human Rights concerning the refusal of the authorities in the United Kingdom to issue an amended birth certificate to a post-operative transsexual.

(a) Corbett v Corbett(orse Ashley) [1971] P 83

As indicated above this case concerned the validity of a marriage in which one of the parties was a post-operative transsexual. In seeking to determine the sexual identity of the post-operative transsexual, the court adopted a solely biological test. In terms of the test (the Ormrod Test) a person whose chromosomes, gonads and genitalia were congruent (in other words, of the same biological sex) at the time of that person's birth, must be determined as a member of that particular sex.¹¹⁰ The court held, by way of an obiter dictum, that where these biological factors were not congruent the genitalia would determine sexual

107 [1970] P 83.

108 [1983] QBD 1053 (CA).

109 Eur Court HR Rees Judgment 17 October 1986 Series A No 106.

110 Corbett case (footnote 107) at 104D-E and 106D.

identity.¹¹¹ In its alternative judgment the court held that the marriage was a nullity in that proper consummation (vera copula) between the spouses was not possible.¹¹²

As indicated above, the court did not consider the absolute consensus of expert medical evidence that, in order to determine sexual identity from a medical point of view, an individual's psychological sex (gender) had to be taken into account.¹¹³ Regarding the alternative judgment, the court, with respect, erred in first considering the spouses to be of the same sex before it considered the subject of consummation.¹¹⁴ There is no doubt that post-operative transsexuals of either sex are capable of physically consummating a marriage.¹¹⁵

(b) R v Tan and Others [1983] QBD 1053 (CA)

The facts in R v Tan are relevant. A co-accused in the case, Gloria Greaves, was charged inter alia with living on the earnings of prostitution - an offence which in England may be committed only by a male. Her defence was that she was a post-operative female and accordingly was not a male. She considered herself a female in all respects and was regarded as such by others. For 20 years she had been recognised as a female for National Insurance purposes. Furthermore, she had gone through a ceremony of

111 At 106E.

112 At 107F.

113 See 100D et seq for the medical evidence. Ormrod J specifically omitted reference to an individual's psychological factors when formulating the Ormrod Test at 106D.

114 At 107B; cf 107G.

115 See Jerold Taitz "The Law Relating to the Consummation of Marriage where One of the Parties is a Post-operative Transsexual" (1986) 15 Anglo-American Law Review 141; see also Gordon Samuels "Transsexualism" (1983) 16 Australian Journal of Forensic Science 57 at 62; J R B Ball, "Thirty Years Experience with Transsexualism" (1981) 15 Australian and New Zealand Journal of Psychiatry 39.

marriage with a biological male, Brian Greaves, who at all times regarded her as a female.¹¹⁶

Ignoring her counsel's plea to regard Gloria Greaves as female, the English Court of Appeal held that -

both common sense and the desirability for certainty and consistency demand that the decision in Corbett v Corbett should apply not only for marriage¹¹⁷

She was accordingly convicted and sentenced. While a decision not to have different tests for the determination of sexual identity in different fields of the law is understandable, the decision nevertheless appears contrary to traditional English criminal law policies and the presumption in favorem innocentiae. While "certainty and consistency" may be a convenient "tag", it is no substitute for tried and tested criminal law policies and notions of justice.

(c) Rees v United Kingdom Eur Court HR Rees Judgment 17 October 1986, Series A No 106

A third case concerning a post-operative transsexual in England is Rees v United Kingdom, a decision of the European Court of Human Rights in which the United Kingdom was the respondent. The applicant Rees, a post-operative male, argued that the refusal by the authorities in the United Kingdom to amend his sex description in his birth register violated the European Convention of Human Rights, more particularly Article 8 (the right to privacy) and Article 12 (the right to marry). Allegations of violations of the Convention are considered first by the European Commission of Human Rights and may then be referred to the European Court of Human Rights by the Commission. Although this case is not strictly relevant to this working paper, as provision is made in South African law for the amendment of a post-operatative transsexual's

116 [1983] QBD 1053 (CA) at 1056.

117 At 1064D.

birth register,¹¹⁸ the case and an earlier case based on almost identical facts (Van Oostewijck v Belgium)¹¹⁹ clearly indicate the attitudes of the European Commission of Human Rights and the European Court of Human Rights to the plight of post-operative transsexuals.

In Rees v United Kingdom the European Court of Human Rights found that, on the particular facts of the case, the United Kingdom had not violated the European Convention. However, the Court added that it -

... is conscious of the seriousness of the problems affecting ... (transsexuals) and the distress they suffer ... The need for appropriate legal measures should be kept under review ...¹²⁰

The earlier case Van Oostewijck v Belgium was not referred to the European Court for a decision, as the applicant had not exhausted his domestic remedies. None the less the European Commission of Human Rights found it necessary to state that, in refusing to acknowledge Van Oostewijk's post-operative sex, Belgium had violated Article 8 of the European Convention of Human Rights, ie respect for private and family life, in that Belgium had refused -

... to recognise an essential element of his personality: his sexual identity resulting from his changed physical form, his physical make-up and his social role. In doing so it (Belgium) treats him as an ambiguous being, an "appearance", disregarding in particular the effects of lawful medical treatment aimed at bringing the physical sex and psychical sex into accord with each other ... it restricts the appli-

118 S7B of the Births, Marriages and Deaths Registration Act, 1963; see 35 above.

119 3 EHRR 557.

120 Eur Court HR Rees Judgment 17 October 1986 Series A No 106 at 18 (§47).

cant to a sex which now can scarcely be regarded as his own.¹²¹

4.3.2 Australia

The sole Australian case In the Marriage of C and D (falsely called C)¹²² does not concern a post-operative transsexual but an intersexual, a true hermaphrodite (hermaphroditus verus). The hermaphrodite (hereinafter referred to as Mr C) had been raised as a male. Physically he possessed a short phallus, a testis on his left side, an ovary and a fallopian tube on his right side. He had a mid-line urethral orifice at the base of the scrotum and a rudimentary form of vagina. His chromosome arrangement was female. By the time he was 16 years of age he developed breasts and was subject to periodic abdominal pains accompanied by a slight bleeding through the urethral orifice. In general appearance he was an average sized, non-athletic male with slight growth of hair on his chin and upper lip.

It was decided by the medical specialists to remove the vestiges of female anatomy. One cannot speak here of the surgical procedure as a "sex change", but rather as "sexual alignment" since the patient's sex was not being changed but properly determined. The surgery was successful and Mr C took on the sexual appearance of a male.

Mr C subsequently married a normal biological female. Some years later his wife instituted nullity proceedings in the Australian Family Court. The court granted a decree of nullity of the marriage on two grounds. First, that there had been no valid consent to the marriage since the applicant had been mistaken as to the identity of the respondent, Mr C. She believed that she was marrying a male, whereas in fact she had married a combination of a male and a female. The second ground of nullity was that since

121 3 EHRR 557 at 584.

122 (1979) FLC 340.

"marriage is the union between one man and one woman to the exclusion of all others ... for life" and since Mr C was neither a man nor a woman, there could be no valid marriage.¹²³

The above reasoning by the court has been criticised.¹²⁴ The reasoning regarding the mistaken identity of Mr C's sex is in conflict with Australian law generally. There could have been no mistake regarding the actual identity of Mr C. The applicant did not believe that she was marrying anyone other than Mr C. Furthermore, from the judgment it would appear that although the learned judge sought to apply the Ormrod Test, as formulated in Corbett v Corbett, he arrived at his decision that the respondent was neither male nor female through to a misunderstanding of the Ormrod Test. The learned judge considered the biological factors at the post-operative stage and not at the time of the respondent's birth. Furthermore, having applied the Ormrod Test at the wrong stage, he then failed to take into account the reasoned suggestion (albeit obiter dictum) by Ormrod J in Corbett that, in cases of biological incongruity, preference should be given to the genital criterion.¹²⁵

In refusing to regard Mr C as either male or female, in spite of the medical procedures, the Australian court indicated, once again, the dangers of leaving the determination of sexual identity to ad hoc decisions by the court.

4.3.3 The United States of America

There have been a number of cases concerning transsexuals in the United States. These cases have concerned various facets of law,

123 Footnote 120 at 345; for the medical history of the respondent (Mr C) see Sir Kenneth Fraser, M J J Reilly & J R Rintoul "Hermaphroditus Verus with Report of a M Case" 1966 Medical Journal of Australia Vol 1 1033.

124 H A Findlay, "Sex Identity and the Law of Nullity" (1980) 54 ALJ 115; see also the case note by Rebecca J Bailey (1979) 53 ALJ 659.

125 Rebecca J Bailey (footnote 124) at 660.

including "sex change" as a ground for divorce,¹²⁶ discrimination in employment resulting from "change of sex",¹²⁷ claims for state medical aid funding for "sex-change" surgery,¹²⁸ and custody suits contested on account of an applicant parent having undergone "sex-change" surgery.¹²⁹ For the purpose of this working paper, the researcher attaches great importance to the US cases concerning discrimination against transsexuals in employment situations, on the one hand, and the judicial approach to marriages where one of the parties is a post-operative transsexual, on the other hand.

(a) Discrimination against transsexuals in employment situations

Title VII of the US Civil Rights Act, 1964, prohibits discrimination in employment situations, inter alia on grounds of sex. A number of transsexuals, who had been dismissed from their employment because they had undergone "sex-change" procedure or because they had commenced or merely intended to undertake the procedure, sought to have their dismissals set aside by the court on the grounds that such dismissal was discriminatory on the basis of sex and contrary to Title VII of the Civil Rights Act.¹³⁰ A further argument raised was that such dismissal was in violation of the due process and equal protection amendments to the US

126 Steinke v Steinke 238 Pa Super 74, 357A (2d) 674 (1975).

127 See inter alia: Ulane v Eastern Airlines 742F (2d) 1081 (1984); Holloway v Arthur Andersen & Co 566F (2d) 659 (CA 9th 1977); In the matter of Grossman 157 N J Super 165, 384A (2d) 855 (1978); Voyles v Ralph K Davies Medical Centre 403F Supp 456 (ND Cal 1975).

128 See inter alia: Rush v Johnson 565 F Supp 856 (1983); GB v Lackner App 145 CAL RPTR 555 (1978).

129 Christian v Randall 33 Colo App 129, 615P (2d) 132 (1973)).

130 See cases cited in footnote 127 and Stan Twardy "Medicolegal Aspects of Transsexualism" (Winter) 1980 Medical Trial Technique Quarterly 249 at 281-288.

Constitution, and more particularly the Fourteenth Amendment.¹³¹

In no single case did the transsexual plaintiff succeed on either of the above grounds. The respective courts held that while Title VII remedies are available for employment discrimination based on sex, the transsexuals were discriminated against not because they were male or female, but because they were transsexuals who had undergone or who intended undergoing "sex-change" procedure.¹³² In other words a transsexual's decision to undergo "sex-change" procedure did not bring him (or transsexuals as a class or group) within the ambit of Title VII.¹³³

In the much publicised case of Ulane v Eastern Airlines¹³⁴, a case concerning the dismissal of an airline pilot on account of his having undergone a change of sex, the court held that:

If Eastern did discriminate against Ulane, it was not because she is a female but because Ulane is a transsexual ... since Ulane was not discriminated against as a female, and since Title VII is not so expansive in scope as to prohibit discrimination against transsexuals, we reverse the order of the trial court (and enter) judgement in favour of Eastern ...
 .¹³⁵

Argument that dismissal from employment on account of a "sex change" violates the Fourteenth Amendment to the US Constitution, also did not commend itself to the court. The court held that transsexuals who undergo "sex-change" procedure are not a group intended to be protected by the amendment and that dismissal from employment for having initiated "sex-change" procedure does not

131 Holloway v Arthur Andersen & Co (footnote 127) at 663 et seq; see also Twardy (footnote 127) at 282 and 287.

132 See Voyles v Ralph K Davies Medical Centre (footnote 127) at 457, Holloway v Arthur Andersen & Co (footnote 127) at 659 et seq.

133 Sommers v Budget Marketing Inc 667F (2d) 748 (1982) at 750; Holloway v Arthur Andersen & Co (footnote 127) at 662-663.

134 Footnote 127.

135 At 1087.

violate the doctrine of due process and equal protection.¹³⁶ It is clear that, for the purposes of unfair dismissal cases, the US courts do not regard a transsexual as a member of his post-operative sex, but of his initial sex. The reason for this judicial approach appears to be based on the courts' insistence on regarding the words "male" and "female" solely in their biological sense¹³⁷ and, as indicated above, the court regarded undergoing or intention to undergo "sex-change" surgery as valid grounds for dismissal from employment.

(b) Marriage

In their decisions regarding marriages in which one of the parties is a post-operative transsexual, the US courts appear to have shown a greater understanding of the transsexual problem than their counterparts in England and Australia.

Of the three leading US cases the first two concern marriages in which the transsexual spouse had not completed "sex-change" procedures. In the first case, Anonymous v Anonymous,¹³⁸ the transsexual spouse (a male-to-female transsexual) had entered into the marriage posing as a female. After the marriage ceremony "she" was found to have "male sexual organs". Although "she" subsequently underwent "sex-change" surgery, the court found that at the time of the marriage "she" was a male. The court held the marriage to be null and void.

In the second of the cases, B v B,¹³⁹ the transsexual spouse (in this case a female-to-male transsexual) was found not to have male sexual organs and, as stated by the court, "does not possess a

136 See footnote 131.

137 In Holloway v Andersen & Co (footnote 127) the court found that in framing Title VII "Congress had only the traditional notions of sex in mind".

138 325 NYS (2d) 499 (1971).

139 355 NYS (2d) 713 (1974).

normal penis and in fact does not have a penis".¹⁴⁰ As indicated above, the post-operative male is able to have a penis constructed by plastic surgery. Although the post-operative male is unable to achieve an erection with such penis, appliances may be surgically implanted into the organ that will assist the party in obtaining an erection.¹⁴¹ This form of medical treatment is also used successfully in cases in which males have suffered certain spinal or penile injury. After such treatment the post-operative transsexual male is able to consummate a marriage. However, in B v B the defendant's transsexual husband had not undergone plastic surgery for the construction of a penis. Under the particular circumstances of the case, the court held that defendant could not be regarded as male.¹⁴²

In the third case, MT v JT,¹⁴³ while denying the possibility of a valid single-sex marriage, the Appellate Division of the Supreme Court of New Jersey rejected the decision in Corbett v Corbett and the attendant Ormrod Test. It held that a post-operative transsexual may in law be recognised as a member of his post-operative sex -

... if (the) anatomical or genital features of (a) genuine transsexual are made to conform to (that) person's gender, psyche or psychological sex, then (sexual) identity must be governed by (the) congruence of these standards.¹⁴⁴

140 At 717.

141 See 2 above; Jerold Taitz, "The Law Relating to the Consummation of Marriage where One of the Spouses is a Post-operative Transsexual" (footnote 115) at 144.

142 In B v B (footnote 139) the court considered that by concealing the fact that he had undergone "sex-change" procedure a post-operative transsexual would be acting fraudulently. To avoid this situation in a marriage where one of the spouses is a post-operative transsexual, the researcher has recommended that a post-operative transsexual may validly marry only if he can satisfy the marriage officer that his intended spouse is aware that he has undergone "sex-change" procedure. See draft Bill section 4(5) at 66 below.

143 355(A) (2d) 204 (1976).

144 At 209.

The rationale of the decision is to be found in the following statement by the court:

A transsexual in a proper case can be treated medically by certain supportive measures and through surgery to remove and replace existing genitalia with sex organs which coincide with the person's gender. If such sex reassignment surgery is successful and the post-operative transsexual is, by virtue of medical treatment thereby possessed of the full capacity to function sexually as a male or female, as the case may be, we perceive no legal barrier, recognizable social taboo or reason grounded in public policy to prevent the person's identification at least for the purpose of marriage to the sex finally indicated.¹⁴⁵

Dr Hemphill is of the opinion that existing (original biological) genitalia cannot be replaced with "sex organs". A transsexual is neutered by the operation, and the functioning parts of the reproductive apparatus specific to the sex, as well as the visible genitalia, are removed. He, or she, thereafter cannot have the full, or any, biological capacity to function sexually beyond achieving a sexual orgasm similar to what could be applied using an instrument. With reference to the above-mentioned rationale by the court Dr Hemphill came to the conclusion that as long as the "biological test" is applied there cannot be a normal marriage union. If the "gender" standard is applied a marriage should not be contested, at least no more than in the case of an involuntary castrate.¹⁴⁶

4.4 Summary

The determination of sexual identity is a subject that should not be left to ad hoc decisions by the courts, but that should be resolved by legislation. In the first place, the determination of sexual identity is a medical problem. Secondly, who is to receive "sex-change" procedure, and who not, is solely a medical decision. To require judges to decide, on an ad hoc basis, issues as scien-

145 At 210.

146 Hemphill 9.

tifically complex as the determination of the sexual identity of post-operative transsexuals (and intersexuals) is unreasonable and is not in the interest of the public or of transsexuals. As indicated above, where there is no legislation to guide their decisions concerning the most modern, sophisticated medical procedures, the courts are placed in the invidious position of having to seek guidance in definitions and descriptions that were established during ancient law periods when the only criteria were man's personal experience concerning biological phenomena.¹⁴⁷ Most of the leading judicial decisions have brought no resolution to the hardship and distress suffered by transsexuals and intersexuals. On the contrary, they have aggravated existing unfortunate and anomalous social and legal conditions.

On the other hand, in countries in which legislation has been passed regarding the recognition of transsexuals' (or intersexuals') post-operative sex, the difficulties and bizarre anomalies regarding legal consequences have been satisfactorily removed.

147 See 47 above.

CHAPTER 5RECOMMENDATIONS5.1 Recognition of post-operative sex

In fine, it is appropriate to consider the following factors concerning transsexuals, "sex-change" procedure and medical treatment:

- (i) It is accepted that every person is entitled to access to medical relief from any injury, illness or psychological disorder.
- (ii) Transsexualism or the gender dysphoria syndrome is a medically recognised psychological disorder.¹⁴⁸
- (iii) "Sex-change" procedure, ie "sex-change" surgery and hormonal treatment, is acknowledged by the majority of medical specialists to be the most effective therapy for the gender dysphoria syndrome.¹⁴⁹
- (iv) Despite the high risk factor involved in "sex-change" procedure, together with the pain and suffering following the various operations, genuine transsexuals undertake or wish to undertake the treatment to obtain relief from the disorder and to become useful and integrated members of society.¹⁵⁰
- (v) Post-operative transsexuals permanently take on the form and appearance of their post-operative sex and "sex-change" surgery is irreversible.¹⁵¹

148 See 4 above.

149 See 4 above.

150 See 3, 4 and 5 above.

151 See footnote 7 above.

- (vi) Where courts have been required to determine the sexual identity of post-operative transsexuals they have generally failed to consider the above factors in totality, and hence the anomalous legal situations experienced by post-operative transsexuals.

It is necessary to consider section 7B of the Births, Marriages and Deaths Registration Act 81 of 1963, in which reference is made to "any person who has undergone a change of sex".¹⁵² Furthermore, in his speech introducing the relevant Bill, the Deputy Minister referred to "a person who has undergone a change of sex", no fewer than four times.¹⁵³ Clearly Parliament acknowledges the notion of a "change of sex". Perhaps it would not be inappropriate also to reiterate the statement by the European Commission of Human Rights, which found that, in failing to recognise a transsexual's post-operative sex, a state violates basic aspects of the European Convention of Human Rights in that it (the state) fails or refuses:

'... to recognise an essential element of his personality: his sexual identity resulting from his changed physical form, his physical make-up and his social role. In doing so it (the state) treats him as an ambiguous being, an 'appearance', disregarding in particular the effects of lawful medical treatment aimed at bringing the physical sex and psychical sex into accord with each other ... it restricts the applicant to a sex which now can scarcely be regarded as his own.'¹⁵⁴

152 See 13 et seq above.

153 See the text relating to footnote 36 at 13 and 14 above.

154 Van Oostewijck v Belgium 3 EHRR 557 at 584(2).

Accordingly it is recommended that the South African Parliament should follow the example of Germany,¹⁵⁵ Italy,¹⁵⁶ and the other European countries¹⁵⁷ (as set out above) and pass legislation in the form of the attached draft Bill recognising the post-operative sex of transsexuals (and of intersexuals) for all purposes of the law, including permitting such persons to validly marry members of their initial (and now opposite) sex.¹⁵⁸

Notwithstanding the above, it is further recommended that "sex-change" procedure should not be available "on demand" and that, for the reasons indicated below, such procedure should be controlled by the State.

5.2 Control of "sex-change" procedure

Not all transsexuals are appropriate subjects for "sex-change" surgery. For instance many male-to-female transsexuals would on account of their physical build be quite unsuitable to take on a feminine appearance. Also, persons over the age of 40 years may be subject to medical problems that would not be experienced by younger transsexuals. On the other hand, it would be inadvisable to perform "sex-change" surgery, an irreversible procedure, on minors, irrespective of consent by their parents or legal guardian.

A further reason for control is that "sex-change procedure may be sought by persons with disorders other than the gender dysphoria syndrome, eg transvestites. Homosexuals, too, are known to seek

155 See footnote 94 and the text relating thereto at 37 above.

156 See footnote 99 and the text relating thereto at 38 above.

157 See 35-38 above.

158 See the draft Bill at 65 et seq below.

"sex-change" procedure,¹⁵⁹ inter alia for purposes of prostitution. Also it is not unknown for persons to seek a "sex change" in order to avoid responsibilities, eg long-term prisoners have been known to seek "sex-change" procedure with a view to being transferred to a female prison where lighter duties are performed.¹⁶⁰ Finally, there is always the possibility that a person may wish to undergo a "change of sex" for criminal purposes or to avoid identification for some previous criminal offence. These examples are not exhaustive.

For the above reasons it is thought necessary for "sex-change" surgery to be subject to strict control by the State authorities, more particularly the Department of National Health and Population Development and, to a lesser extent, the Supreme Court.

SUGGESTED CONTROLS

1. No person should be permitted to undergo "sex-change" procedure who is not a transsexual or an intersexual and who is not in possession of a certificate authorising such procedure, issued to him by the board of a gender clinic established by the Minister of National Health.
2. The composition of the board of a gender clinic should be determined by such Minister acting by virtue of powers vested in him under the legislation proposed below.

159 Sir Martin Roth, "Transsexualism and the Sex-change Operation: A Contemporary Medico-Legal and Social Problem" (1981) 49 Medico-Legal Journal 5 at 14; cf J R B Ball, "Thirty Years Experience with Transsexualism" (1981) 15 Australian and New Zealand Journal of Psychiatry 39 at 40-41.

160 An eminent Cape Town psychiatrist informed the researcher that he knows of two cases of long-term prisoners (one a life prisoner) seeking psychiatric aid in order to be referred for "sex-change" surgery. During the psychiatric investigation stage the prisoners admitted to him that they were not transsexuals but wished to have a "sex change" in order to be transferred to a female prison with lighter duties.

It is suggested that each board should have a State or provincial psychiatrist as chairman, with the other members to include a consulting psychiatrist, an endocrinologist, a plastic surgeon, a gynaecologist, a general surgeon and a registered psychological social worker.

The board of a gender clinic should have the power to grant a certificate authorising the patient to undergo "sex-change" surgery subject to any reasonable condition imposed by the board, eg that the patient is to receive instruction in deportment or elocution to enable him or her to become more fully integrated into society as a member of his or her intended post-operative sex.

3. The following persons should not be granted a certificate by the board authorising "sex-change" procedure:

- (a) Any person under the age of 21 years;
- (b) any married person;
- (c) any person who is suffering from any communicable disease or who is found to be a carrier of a communicable disease, eg AIDS;
- (d) any person who has been convicted of any offence directly or indirectly relating to prostitution or an offence relating to the offering of his or her body for material gain;
- (e) any person who is addicted to any form of drug including alcohol;
- (f) any person who is considered psychologically incapable of or unsuitable for undergoing the necessary series of surgical procedures;
- (g) any person who has had children.

4. On completion of the "sex-change" procedure and the fulfilment of any condition imposed by the board of a gender clinic, the post-operative transsexual must apply to the division of the Supreme Court that has jurisdiction over him for an order directing the Director-General of Home Affairs to amend his sex description in his birth register. Notice of the application to the court must be given to the board of the gender clinic concerned.

The documentation contained in the application to the court must include the certificate authorising the "sex-change" procedure issued by the board of the gender clinic and documentary proof that the "sex-change" procedure has been completed and that any condition imposed by the board has been complied with. All applications under this Act must be heard by the court in camera.

5. On the change of sex description in the post-operative transsexual's birth register by the Director-General, the party concerned will for all purposes of the law be regarded as a member of his or her post-operative sex.

6. Any person who has undergone a change of sex and has had his or her sex description in the birth registers amended in terms of section 7B of the Births, Marriages and Deaths Act, 1963, may apply to the division of the Supreme Court having jurisdiction, which court will have power in terms of the proposed legislation, if satisfied as to the factual situation, to declare such person to be a member of his or her post-operative sex for all purposes of the law.

7. A post-operative transsexual, whose post-operative sex has been recognised for all purposes of the law, may validly marry a member of his or her now opposite sex, subject to such other person acknowledging to the officiating marriage officer in affidavit form that he or she is aware that his or her intended spouse is a post-operative transsexual who has undergone a "change of sex".

5.3 SUMMARY

It is recommended -

- (1) that the post-operative sex of transsexuals and intersexuals be recognised for all purposes of the law, including the law of marriage;
- (2) that certain specified persons may not undergo "sex-change" procedure;
- (3) that "sex-change" procedure should be subject to control by an administrative process, and should be carried out by gender clinics established by the Minister of National Health and Population Development;
- (4) that the post-operative sex of transsexuals should not be recognised for all purposes of the law unless the fulfilment of conditions for the "sex-change" procedure as required by the gender clinic has been confirmed by the Supreme Court;
- (5) that a marriage between a post-operative transsexual and a member of his or her now-opposite sex should be possible only if such spouse acknowledges being aware that the post-operative transsexual is a transsexual and has undergone "sex-change" procedure;
- (6) that provision be made for the recognition of the post-operative sex of transsexuals who have undergone "sex-change" procedures before the passing of the draft legislation envisaged below;
- (7) that the administrative procedure for the recognition of the post-operative sex of transsexuals or intersexuals as set out in this chapter under the heading Suggested controls be adopted by the authorities concerned.

- (i) "court" means a provincial or local division of the Supreme Court of South Africa having jurisdiction; (iv)
- (ii) "Director-General" means the Director-General of Home Affairs; (i)
- (iii) "gender clinic" means a clinic established in terms of section 2 for the purpose of controlling the carrying out of sex-change procedures; (ii)
- (iv) "hermaphrodite" means a person who possesses genitalia and gonads of both sexes; (iv)
- (v) "intersexual" includes hermaphrodites and pseudo-hermaphrodites; (vi)
- (vi) "Minister" means the Minister of National Health; (vii)
- (vii) "pseudo-hermaphrodite" means a person who by some biological process has acquired the appearance of possessing both male and female genitalia; (viii)
- (viii) "sex-change procedure" means the surgical and medical procedures intended to result in a person taking on the appearance and characteristics of his or her opposite sex and includes the construction in such person of the sexual organs of his or her opposite sex and the corrective surgery appropriate to achieving in an intersexual congruence with his or her proper sex as medically determined; (iii) and

- (ix) "transsexual" means a person who suffers from the psychological disorder known as gender dysphoria syndrome. (ix)

Establishment of gender clinics

2.(1) The Minister shall establish at such places within the Republic as he deems necessary, clinics to be known as gender clinics for the control of sex-change procedures.

(2) After the commencement of this Act no person shall perform or undergo sex-change procedure unless such procedure has been authorised in terms of a certificate issued by a gender clinic established in terms of subsection (1).

(3) Any person who contravenes the provisions of subsection (2) shall be guilty of an offence and liable conviction to imprisonment for a period not exceeding five years or to a fine not exceeding R25 000 or to both such imprisonment and such fine.

(4) The Minister may make regulations not inconsistent with this Act, regarding -

- (a) the establishment and composition of a gender clinic;
- (b) the powers and duties of a gender clinic;
- (c) the steps to be followed in seeking authorisation to undertake or undergo sex-change procedure;
- (d) in general, any matter which in terms of this Act shall or may be prescribed or which is necessary or desirable for the effective carrying out of the provisions of this Act.

Eligibility to undergo sex-change procedure

3.(1) No person other than a transsexual or an intersexual shall be eligible to undergo sex-change procedure.

(2) No sex-change procedure shall be commenced or carried out upon -

- (a) any person under the age of 21 years;
- (b) any married person;
- (c) any person who suffers from or is a carrier of a communicable disease;
- (d) any person who has been convicted of an offence relating to the offering of his or her body for material gain;
- (e) any person who is addicted to drugs or alcohol;
- (f) any person who is considered psychologically incapable of or unsuitable for undergoing the necessary series of surgical procedures; or
- (g) any person who has had children.

Recognition of post-operative sex

4.(1) On the completion of sex-change procedure and the fulfilment of any conditions imposed by a gender clinic in authorising the sex-change procedure, the person who underwent the sex-change procedure may apply to the court for an order -

- (a) directing the Director-General to alter, in the birth register of the applicant, the description of the applicant's sex; and

(b) declaring the applicant to be a member of his post-operative sex for all purposes of the law.

(2) Before issuing an order contemplated in subsection (1) the court shall be satisfied -

(a) that the applicant was not disqualified by virtue of the provisions of section 3 from undergoing sex-change procedure;

(b) that before undergoing "sex-change" procedure the applicant was in possession of a certificate contemplated in section 2(2);

(c) that the sex-change procedure has been completed and that any conditions imposed by the gender clinic have been met; and

(d) that notice of the application has been given to the gender clinic that issued the certificate contemplated in section 2(2).

(3) Upon the issue by the court of an order contemplated in subsection (1) the applicant shall be regarded for all purposes of the law as being a member of his post-operative sex and, without derogation from the generality of the foregoing, for purposes of the law of marriage where one of the parties is a post-operative transsexual or where both parties are post-operative transsexuals the marriage shall be deemed to be consummated upon the first post-marriage-ceremony sexual penetration by the male of the female party.

(4) Notwithstanding the provisions of paragraphs (b) and (d) of subsection (2) the court may issue an order contemplated in subsection (1) in respect of an applicant who underwent sex-change procedure before the commencement of this Act.

(5) Notwithstanding the provisions of subsection (3) no marriage between a person who has undergone sex-change procedure and any other person shall be valid unless the latter person has, prior to the marriage ceremony, furnished to the officiating marriage officer an affidavit to the effect that he or she is aware that his or her intended spouse has undergone sex-change procedure.

Substitution of section 7B of Act 81 of 1963 as inserted by section 1(1) of Act 51 of 1974 and amended by section 4 of Act 35 of 1982

5. The following section is hereby substituted for section 7B of the Births, Marriages and Deaths Registration Act, 1963:

"Alteration of sex description of person in his birth register

7B. The Director-General [may] shall on the [recommendation] order of the [Secretary for Health] Supreme Court alter, in the birth register of any person who has undergone a change of sex, the description of the sex of such person [and may for this purpose call for such medical reports and institute such investigations as he may deem necessary].".

Short title

6. This Act shall be called the Sex Change Act, 19 ...

CHAPTER 6

EVALUATION OF RESEARCH RESULTS

6.1 The working committee of the South African Law Commission has taken note of the research results that are set out in the five previous chapters. Notice has also been taken of the legal questions that have been put forward in connection with a so-called sex change. Notice has been taken of the manner in which these questions are dealt with in other legal systems. Although the committee is of the view that the change of a person's sex appearance should be recognised in law and that some or other form of governmental control over "sex change" is necessary, it nevertheless doubts whether the form of control that is suggested by the researcher can be justified in the South African situation.

6.2 In paragraph 1.2.1 it is stated that the number of cases of transsexuality that occur constitutes approximately 1:37 000 of the general population. This means that there are approximately 800 transsexuals in South Africa. It is further stated that during the 15 years from 1969 to 1984 a total of 150 cases were treated at the Groote Schuur hospital in Cape Town. The hospital concerned is one of the few in the country where these types of operations are performed. The series of operations and the medical treatment that are necessary to effect a total "change of sex" are probably unaffordable for the greater majority of transsexuals and hermaphrodites. Consequently, the number of persons who would benefit from the proposed legislation is relatively small. The question is whether it is justifiable to create and maintain expensive structures in the form of gender clinics to meet the needs of a small number of persons. The committee is of the opinion that simpler and cheaper methods should be sought to remedy the unsatisfactory legal position in which transsexuals find themselves with regard to the change of their sex status.

6.3 This investigation concerns the legal recognition of the change of a person's gender status. The purpose of the surgery and medical treatment that a person undergoes in order to change his or her sex appearance is that that person will be accepted in the community in which he or she lives as a person of the gender that his or her changed appearance indicates. However, the successful completion of the procedure serves no useful purpose if the person's change in sex appearance is not also legally recognised as a change of sex status. On the contrary, the lack of such recognition gives rise to the sort of legal anomalies that are referred to in Chapter 3 above. The law cannot close its eyes to reality. The reality is that there are transsexuals in the community; that those persons have a real need to be accepted as persons of the opposite sex to that of their physical appearance; that it is possible to change their physical appearance as such so that they can in fact be accepted as persons of the opposite sex; and that this possibility is indeed used by some of them and probably will be used even if their changed sex appearance is not legally recognised. This gives rise to the legal anomalies that have been referred to above. Even if the sex change procedures were to be prohibited the danger exists that they would still be performed in secret, which would result in the said unsatisfactory legal consequences. It is therefore suggested that provision should be made for the recognition of change of sex status in appropriate cases.

6.4 The question is then to what extent governmental control over the change of a person's sex status is necessary. The ideal would probably be to apply a relatively strict form of control similar to that which is found in some of the legal systems referred to above and which is also recommended by the researcher. The committee is however of the view that control could be exercised just as effectively in a simpler manner. It is suggested that any person who has successfully undergone "sex change" procedure and who wishes to change officially his or her sex status should be able to apply to the Director-General of Home Affairs to record the change of his or her sex description in the birth register. The application should be accompanied by

the evidence on which it is based, which should include the applicant's birth certificate; an affidavit by or on behalf of the applicant in which the reasons are fully set out why the change of the applicant's sex appearance has been performed; reports by the medical practitioners who performed the medical procedures and applied the treatment for the change of the applicant's sex appearance, stating the nature of those procedures and treatment and the results thereof; and a report concerning the present sex appearance of the applicant by a physician who did not take part in any of the procedures or treatment of the applicant to alter his or her sex appearance, but who medically examined the applicant in order to establish his or her sex appearance. The Director-General of Home Affairs may require of the applicant that he or she furnishes proof to the Director-General's satisfaction that the "sex-change" procedure has been completed. Where an application has been refused by the Director-General, the applicant may apply to the magistrate of the district in which he or she resides for an order authorising the change of his or her sex description. The magistrate may gather such further evidence as he considers necessary and issue an order authorising the Director-General of Home Affairs and any other institution where that person's sex status has been recorded to alter his or her sex description in accordance with such order. After a person's sex description has been changed in the birth register pursuant to an instruction of the Director-General or a magistrate's order, that person is legally deemed for all purposes to have the sex status of his or her changed sex description. The magistrate's decision can be taken on review in the usual manner.

6.5 The preliminary recommendations of the Commission's Working Committee on which comments are sought are contained in the Bill that appears in Annexure A of this working paper.

BILL

To provide for the alteration of the sex description of certain persons in certain circumstances, and for matters connected therewith.

Introduced by the Minister of Justice

BE IT ENACTED by the State President and the Parliament of the Republic of South Africa, as follows:-

Application for alteration of sex description

1(1) Any person whose sex appearance has been altered by surgery and any medical treatment so that such person has the opposite sex appearance of his or her biological sex may apply to the Director-General of Home Affairs for the alteration of his or her sex description in the birth register in order to bring it into line with his or her altered sex appearance.

(2) An application contemplated in subsection (1) shall be accompanied by -

- (a) the birth certificate of the applicant;
- (b) a statement by or on behalf of the applicant in which the reasons are set out fully why the alteration of the sex description of the applicant was effected;
- (c) reports from the medical practitioners who conducted the processes and applied the treatment to alter

the sex appearance of the applicant, stating the nature of those processes and treatment and the results thereof; and

- (d) a report concerning the present sex appearance of the applicant by a medical practitioner who did not take part in any of the processes or treatment of the applicant to alter his or her sex appearance, but who has medically examined the applicant in order to establish his or her sex appearance.
- (3) The Director-General of Home Affairs may require of the applicant that he or she furnish evidence to the Director-General's satisfaction that the sex change procedure has been completed.
 - (4) Where an application contemplated in subsection (1) is refused by the Director-General, the applicant may apply to the magistrate of the district in which he or she resides for an order authorising the change of his or her sex description.
 - (5) An application contemplated in subsection (1) shall be accompanied by the documents mentioned in subsection (2) and by proof that the sex change procedure has been completed.
 - (6) The applicant shall on the date and at the time determined by the magistrate appear in person before the magistrate in chambers and shall at the request of the magistrate furnish the additional information and proof which the magistrate requires.
 - (7) If the application is granted the magistrate shall issue an order authorising the Director-General to alter, in accordance with the order, the sex description in the birth register of the person named in the order.

- (8) An applicant may at his or her appearance before the magistrate be represented by a lawyer.

Acknowledgement of the alteration of sex appearance

- 2(1) Where the Director-General of Home Affairs grants an application contemplated in section 1(1) or receives an order from a magistrate as contemplated in section 1(4) he shall in accordance with the provisions of section 24A of the Births and Death Registration Act, 1992 (Act No. 51 of 1992), allow the alteration of the sex description of the person concerned and such person shall from the date of the recording of such alteration be legally deemed for all purposes to be a person of the sex description so recorded.
- (2) Rights and obligations that have been acquired by or accrued to the said person before the alteration of his or her sex description or the date of the order shall not be abolished by the alteration or by the order.

Amendment of Act 51 of 1992

3. The Births and Deaths Registration Act, 1992 (Act No. 51 of 1992), is hereby amended by the insertion of the following section after section 24:

"24A The Director-General may in terms of section 2 of the Alteration of Sex Description Act, 19 ... (Act No. of 19), order that the sex description of a person be altered in the birth register. An alteration so recorded shall be dated and after the recording of the said alteration the person concerned shall be entitled to be issued with an amended birth certificate."

Short title

4. This Act shall be called the Alteration of Sex Description Act, 19.. .

