> Men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right.

The first case was *Van Oosterwijck v Belgium* (1980) 3 EHRR 557, which concerned a female-to-male transexual. The Commission found unanimously that there was a breach of Article 8, and by a majority, of Article 12 (at 581-91).

In relation to Article 8, the Commission noted that although on many documents sex was not mentioned, full birth certificates were sometimes required to be produced and that generally Belgian law did not recognise Van Oosterwijck as a member of the male sex. In the Commission's opinion, the state had 'refused to recognise an essential element of his personality: his sexual identity, his psychical make-up and his social role' and its failure to take account of lawfully undertaken changes to his civil status amounted 'not to an interference in the applicant's exercise of his right to respect for private life, but a veritable failure to recognise the respect due to his private life within the meaning of Article 8(1) . . . ' (at 584).

In relation to Article 12, the Commission noted that although the right to marry was subject to domestic requirements, national law could not completely deprive a person or category of persons of the right to marry. The Commission went on to state that as marriage required a relationship between two people of the opposite sex,[11] it was then a question of the criteria and procedure for the identification of sex laid down by the state. In this instance, the state, by raising objections based solely on the physical form recorded on the birth certificate, without having considered the applicant's psychological sex and the physical conversion undergone by him, which enabled him to have sexual relations,[12] had failed to recognise his right to marry.[13]

When the matter came to the European Court of Human Rights, however, the court did not consider the merits of the case because it found that Van Oosterwijck had not exhausted domestic remedies.

The second case was *Rees v United Kingdom* (1985) 7 EHRR 429, which again involved a female-to-male transexual.

Rees argued that transexualism was predetermined at birth, although not evident until later in life, and thus at birth a transexual is neither fully male nor female, and the entry then made that he was male was incorrect at that time, and should be corrected. The Commission was again unanimous that the United Kingdom has breached Article 8. Acknowledging sex as one of the essential elements of human personality, it stated that Article 8 was to be interpreted as protecting a sexually reassigned person against the non-recognition of their reassigned sex as part of their personality, but that such recognition need only occur after the physical change of sex (at 433). The Commission noted that several member states already provided for recognition of transexuals,[14] and found that the refusal by the United Kingdom to recognise the new sex was not justified by reasons of public interest.

In relation to Article 12, however, the Commission held unanimously that there was no breach of the right to marry but the members of the Commission were divided in their reasons. Half said the allegation was premature, in that once the Article 8 breach was rectified there could well be no bar to marriage (at 434). The other half said that the national laws of a country could restrict the right to marry to those physically capable of procreation, and thus exclude both transexuals and homosexuals (at 435).

The court, however, held that the existence of positive obligations imposed on a State by Article 8 was to be determined by reference to a fair balance between the interests of the individual and the general interests of the community ((1987) 9 EHRR 56). The court decided that:

- requiring the United Kingdom to follow the practice of several other parties to the Convention and establish an integrated system of civil status registration would be too onerous; and
- requiring annotations to the current birth register would be of little assistance as it would not give Mr Rees all the biological characteristics of the new sex, and in order to fully protect his privacy such a change on the register would have to be kept secret, which would involve detailed and complex legislation, and that the positive obligations of Article 8 did not extend that far.

The three dissenters on the Article 8 issue felt that an annotation to the register and the issue of an extract showing only the new sex would solve a lot of the problems, and that such a system could be relatively simply established, especially since a similar system for adoption was already in use in the United Kingdom. However, they did not feel that Article 8 required that the register or such annotations be kept secret, as there was a clear general interest in the register remaining a public document (at 69-70).

Thus there was no breach of Article 8. Nevertheless, the court noted the seriousness of the problems affecting transexuals and said that the issue should be kept under review having regard to scientific and societal developments.

In relation to Article 12, the court said that the Article referred to the traditional marriage between people of opposite biological sex, and accordingly there was no breach of Article 12 (at 68).

The third case was that of *Cossey v United Kingdom*,[15] involving a male-to-female transexual. Unfortunately, the court[16] again held there was no violation of Article 8, noting that although there had been some developments in the law of some of the member states since *Rees*, there was still little common ground between them, and that there had been no significant scientific developments either. However, the decision was by 10 votes to 8 and the court reiterated that the issue needed to be kept under review.

Similarly with Article 12, the court decided (14 to 4) that the criteria of English law[17] were in conformity with the right guaranteed by the Article, and although some states would regard such a marriage as valid, this did not evidence any general abandonment of the traditional concept of marriage, and thus there was no breach of the Article.[18]

In fact, however, 14 member states (as opposed to five at the time of the *Rees* case) provided for legal recognition of gender reassignment, although the method of recognition varied. Furthermore, in 1989 both the Parliamentary Assembly of the Council of Europe and the European Parliament had passed resolutions recommending that reclassification following sex reassignment should be made legally possible.

As Judge Martens pointed out in his dissent (pp. 29–30 of the judgment), there are hidden policy reasons behind the court's unwillingness to accept these events as relevant societal developments: in relation to family law and sex-

uality issues, the court has generally moved extremely cautiously and has been reluctant to accept societal changes until virtually all member states have adopted the new ideas.

Conclusion

Both the right to privacy and the right to marry are contained in other human rights instruments including the International Convention on Civil and Political Rights, which Australia has ratified. However, Conventions do not automatically become part of Australian domestic law until legislation is enacted, which has not been done, and the Australian *Bill of Rights Bill* 1985 which also contained these rights was never passed.

Moreover, given the above decisions of the European Court of Human Rights, it is by no means certain that the use of such rights would be successful. Attempts by homosexuals to use the right to privacy under the US *Bill of Rights* and in the European Court have met with mixed success.

For both homosexuals and transexuals it comes down to the same thing — a question of sex. The only real difference between homosexuals and heterosexuals is the sex of the people involved; similarly, for transexuals. It is not really a question of sexual practices. Armstrong and Walton argue that 'the ultimate fundamental human right is to know the answer to the question 'Am I a man or a woman?'[19] Given the restrictions still imposed on people to conform to sex roles, a more fundamental right would be for the question not to need to be asked at all, in essence, that all rights and freedoms be truly available without distinction as to sex.

Two recent cases, however, indicate that full legal recognition of reassigned transexuals in Australia may be not far off. In *R v Harris and McGuiness* (1988) 35 A Crim R 146, the NSW Court of Criminal Appeal held that for the purposes of the criminal law, a reassigned transexual was to be considered a member of the reassigned sex and in *HH v Department of Social Security*[20] the AAT came to a similar conclusion in relation to eligibility for the age pension. Both decisions rejected the *Corbett v Corbett* test that sex is to be determined by the biological criteria appertaining at birth. The AAT decided that, where physical reassignment had taken place, psychological sex and chromosomal sex were the only criteria of relevance, and that psychological sex should take precedence, noting that if society has permitted sex reassignment operations to take place, the law should acknowledge this and accept the medical decisions, especially given that such surgery was irreversible.[21] For the majority of the Court of Criminal Appeal, given the sexual nature of the particular offence, the physical attributes of the person were much more relevant than chromosomes.

Although neither of these cases concerned marriage, and both expressly confined their decisions to the relevant area of law, it seems very likely that when the issue of marriage of reassigned transexuals does arise in Australia, a decision recognising the true sex of the transexual will occur.

References

1. Despite Justice Bell's finding in *In the Marriage of C and D* (1979) 28 ALR 524 that the respondent, a hermaphrodite was 'neither man nor woman': at p.528.
2. Durden-Smith J. and de Simone, D., *Sex and the Brain*, Pan Books, London and Sydney, 1983, at pp.85-87.
3. In Australia, only the South Australian Equal Opportunity Act 1984 specifically covers transexuals under the general ground of sexuality. The Act would appear to cover both pre- and post-operative transexuals (see definition of 'transexual' in s.5(1). However, s.29(4) exempts discrimination in employment on the basis of appearance or dress where that appearance or dress is 'characteristic of or an expression of' the person's sexuality and the discrimination is 'reasonable in all the circumstances'. This exemption could be a problem: there have been no cases on the sexuality provisions of the SA Act to date. The 'presumed homosexuality' ground under the NSW *Anti-Discrimination Act* 1977 may be of some limited protection to transexuals, especially preoperative, but this has not been used so far.
4. A draft *Sex Reassignment Act* (NSW) was prepared in 1986 along similar lines to that of South Australia, but has not yet been tabled in Parliament: NSW Law Reform Commission, *Names: Registration and Certification of Births and Deaths Report*, 1988, Sydney, para [4.111], p.53.
5. *Sex Reassignment Act*, 1988 (SA), s.6. Hospital approval to carry out such procedures will be dependent upon, *inter alia*, the availability of proper counselling to patients.
6. Section 7 provides for a person who has undergone sex reassignment in SA, or a person whose birth is registered in SA, to apply to a magistrate for the issue of a 'recognition certificate'; before issuing such a certificate the magistrate must be satisfied that the person believes the reassigned sex to be their true sex, that they have adopted the lifestyle and have the sexual characteristics of the reassigned sex, and that they have received proper counselling. A certificate may not be issued to a married person: s.7(10).
7. NSW Law Reform Commission, *Names: Registration and Certification of Births and Deaths Report*, 1988, Sydney, pp.50-53.
8. *R v Tan* [1983] QB 1083.
9. Th judge further held that the 11-year marriage was void on the ground of 'mistaken identity' (s.18(1)(d)) of the *Matrimonial Causes Act* 1959) in that 'the wif was contemplating immediately prior to marriage and did in fact believe that she was marrying a male . . . and the wife was mistaken as to the identity of her husband'. Further, the evidence was that the marriage had never been consummated, which would seem to have been a better ground for declaring the marriage void than either of the two used: there was no appearance by the husband.
10. See, for instance, Bailey-Harris, R., 'Sex Change in the Criminal Law and Beyond' (1989) 13 *Criminal Law Journal* 353.
11. *Van Oosterwijck v Belgium* (1980) 3 EHRR 557, para 57,thus neatly cutting out homosexual marriages: Denmark is the only country to allow homosexual marriag s, and that only occurred in 1990.
12. Although he was not capable of procreation, the Commission found that this capacity was neither an essential condition nor essential purpose of marriage.
13. (1980) 3 EHRR 557, paras 57-60, p.586. There were three Commissioners in dissent; one thought the state had considered the issue of identification of sex (pp.588-9); the other two felt the question of the right to marry was premature, in that once the Article 8 breach was corrected, there might be no impediment to marry (p.589).
14. And marriage: Sweden, Germany; Italy, Switzerland, Norway: at 433.
15. Decided 27 September 1990.
16. The Commission decided 10 to 6 that th re had been a violation of Article 12 but not of Article 8.
17. Referring to the test set down in *Corbett v Corbett* [1970] 2 All ER 33.
18. Para. 46. p. 18 of the judgment.
19. Armstrong, C.N., and Walton, T., 'Transexuals and the Law', (1990) *New Law Journal* 1384, p.1386.
20. Unreported, AAT, Matter No. Q90/118, 23 April 1991.
21. p.11 of the judgment.

unions of the occupational health and safety issues show that corrective services departments are acknowledging the public health danger posed by HIV/AIDS. One example of prison officers' concern about HIV/AIDS is a training film inspired in part by concerns of prison officer John Doyle, called 'Just Another Day'. In this film prison officers are vividly shown methods of nullifying blood spills with bleach and gloves. In fact, when it comes to prison officers, the New South Wales Department of Corrective Services is very serious in the prevention stakes. Officers are provided with 'AIDS pouches' which officers are supposed to carry at all times.[3]

Prisoners, on the other hand, are offered no means of self-protection. Until prisoners are allowed to have condoms, needles and syringes, much of the NSW Department's educational effort is wasted. The focus of these educational efforts can also be scrutinised on the basis that they provide scant education for lifestyle management of people who are ill. Education focuses almost solely on prevention and this approach will not be challenged until the corrective services departments stop looking at the success of their policies only in terms of how many people acquire HIV.

Effective strategies

Corrective services departments in Australia lack the specialised knowledge of what is required for effective HIV/AIDS management strategies: doctors with expertise in AIDS management; and carers and community organisations which have experience in providing services to people with AIDS. The Prison Medical Service in New South Wales, for example, does not have this range of services. It is administered by the Department of Health, a cause of growing tension as the Corrective Services Department feels that its security concerns are compromised. It is difficult to ascertain how this tension has affected the types of services which are available because an inquiry into the service conducted 12 months ago has been shelved by the NSW Government, presumably because of its findings. One area of the Prison Medical Service functioning which has attracted some attention is its administration of the methadone program.

Methadone is one of the key methods of drug rehabilitation in the community. In New South Wales 6000 people are in registered programs. In the absence of condoms and needle and syringe exchanges, methadone takes on an added importance as a prevention strategy. Ostensibly the program is available from the Prison Medical Service to any drug user who uses intravenous narcotics and who wants to participate. It is thus an attempt not only to rehabilitate the prisoner with small doses (a maximum of 80 mg) of methadone, but is also an attempt to cut down on the need for drug users to share needles since methadone is administered orally. Sharing needles is a more efficient means of acquiring the virus than anal intercourse. Sharing needles is also a much more common activity with 73% of prisoners admitting to the practice,[4] whereas the prevalence of homosexual intercourse is around 2-12%.[5] These figures alone show the importance of the methadone program for HIV/AIDS prevention.

The NSW Minister for Corrective Services, Terry Griffiths, has threatened to reduce the number of prisons in which the service is available from 28 to 9.[6] It appears that prisoners are being taken off methadone when they have contravened prison rules. Methadone is thus being administered on a punishment rather than a medical model. It has been mooted by Mr Griffiths that methadone only be permitted in maximum security prisons which will force those minimum security prisoners on the program into a more arduous form of sentence. It also disadvantages those prisoners who have been on methadone in the community and find that they have the choice between being taken off the program or going into a maximum security.

Threats to the methadone program are of special concern for women. Women are proportionately more likely than men to have been charged with drug-related offences. Reducing their access to methadone increases the chance that they will engage in unsafe drug-using practices. Frank McLeod, the Director of the Prison Medical Service, has described the attitude of the Corrective Services Department to be one of 'intransigent ignorance about methadone and its place in the overall AIDS armamentarium'.[7]

HIV/AIDS-positive prisoners

Whilst corrective services departments have been willing to discuss to a small degree HIV/AIDS prevention, there has been total silence on the issue of how to manage prisoners who are HIV-positive. Some sections of the New South Wales Department have made attempts to establish a lifestyle unit for HIV-positive prisoners. The purpose of the lifestyle unit was to provide a short-term live-in environment where prisoners could learn the skills necessary to monitor their health and reduce their stress levels inside and outside prison. Once the unit was built and furnished, the Corrective Services Department backed away from its original undertaking and has decided that it should now be a 'suicide unit'. At first the Department wanted to house the suicide unit and prisoners who were HIV-positive together! This would have been disastrous for both groups. People who are HIV-positive need to reduce their stress levels and being placed in such a unit would undoubtedly have exacerbated their stress.

Prisoners with HIV often have no-one to explain to them the expected course of the illness. The proper management of the virus requires constant monitoring of a person's T-cell count, diet and general health. Prisoners have approached organisations such as the AIDS Council of New South Wales (ACON) to run support programs. People who are HIV/AIDS-positive require the most up-to-date knowledge on treatments. The AIDS Council of New South Wales has received numerous complaints about doctors who are reluctant to prescribe AZT which is a life-prolonging drug. The side-effects of AZT are apparently rarely explained, nor is the existence of other drugs such as dideoxycytidine (DDC), an anti-viral drug which is important for people resistant to or intolerant of AZT. The medical and pastoral care which other HIV-positive people receive in the community is being denied to prisoners.

In the light of the general slavish embracing of privatisation policies in other facets of corrective services it is fascinating to witness how outside groups offering specialist support services are rejected out of hand. Efforts to discuss why outside groups are necessary — so prisoners can talk without fears about their confidentiality being compromised — have largely been ignored. Some groups, such as the Centre for Education and Information on Drug and Alcohol (CEIDA), who have successfully run the Peer Education program are a welcome exception.

Discrimination

In the submission by ACON to the New South Wales Anti-Discrimination

Board's Inquiry into AIDS-related discrimination in 1991, there are cases of HIV-positive prisoners being bashed by prison officers after complaining about conditions and being denied medical treatment.[8] ACON has also documented how prisoners who are HIV-positive are often segregated in a de facto manner from the rest of the population on the basis of a minor breach of discipline only to find that their segregation has been extended indefinitely. In one case a prisoner was segregated for three months because his cell mate allegedly deliberately infected an officer with HIV. The prisoner reported that he was handcuffed and bashed.[9] ACON has recently received a complaint from a prisoner who has been segregated for two months, yet has not been charged with any formal breach of discipline.

Once prisoners are segregated, they are not allowed to participate in normal activities such as work or education. They have difficulty getting access to medical care and the isolation leads to increased levels of stress. These examples illustrate that even supposedly enlightened policies of integration can be undermined on the basis of what the corrective services departments would refer to as the 'realities' of prison management.

These intransigent attitudes should be attacked but anyone with experience in the area soon realises that there is an insurmountable difficulty in gaining sympathy for prisoners when many people think that prisoners deserve to be punished. There is also a problem with getting information in and out of the prison system. Those who are employed by the corrective services departments effectively have their hands tied and are unable to criticise departmental policy publicly. Thus debates such as whether it is more desirable to have a lifestyle unit for prisoners who are HIV-positive or a suicide unit fail to get a public airing. The Corrective Services Department is able to control the agenda by making it difficult to find out even simple facts such as how many people who have had AIDS have died in prison.

Redress and reform

So what can be done to make corrective services departments accountable and to stop prisons from becoming the black hole of AIDS policy? Without public support it is hard to mount a political campaign which would encourage governments to change their policies. It appears that corrective services departments and governments in general will not radically change their policies until they are convinced that the spread of HIV/AIDS in prison presents a great danger to the wider community. There is, however, some hope in convincing governments that present policies are going to cost them a considerable amount of money if prisoners can mount negligence actions against them. This is especially so in cases where prisoners who tested negative on entry to prison can prove they seroconverted whilst in prison.

Arguments about duty of care to prisoners have had an unfortunate history in Australia. Dixon's judgment in *Flynn v R* (1949) 79 CLR 1 established the principle that prison regulations do not necessarily confer rights on prisoners. There has, however, been a slow recognition by courts that a duty of care does exist towards prisoners and that, for example, prisoners have enforceable rights to adequate health treatment. Godwin points out that in the second reading of the amendment of the *Prisons (Medical Tests) Amendment Act* 1990 (NSW) to allow compulsory testing, it was acknowledged by the then Minister for Corrective Services, Mr Yabsley, that 'prison administrators have a duty of care at common law and under statute to protect the health of prisoners'.[10]

The door is also open to bring actions under various anti-discrimination acts. In Western Australia such a course was fruitfully undertaken in *Hoddy v Executive Director Department of Corrective Services*.[11] The complainant was HIV-positive and was classified as being a minimum security prisoner. However, he was denied the opportunity to undertake the minimum security work arrangements and activities. It was held by the Tribunal that the lymphadnopathy caused by HIV constituted a physical impairment.

The substance of the Tribunal's decision was that the Director of Corrective Services was obliged under s.96 of the *Prisons Act* (WA) to allow the complainant the 'benefits' provided in the Act such as 'an opportunity to earn remuneration . . . and to take advantage of counselling facilities and recreational benefits, such as the minimum security activities'. In New South Wales, however, there are further jurisdictional hurdles presented by s.46 of the Prisons Act which varies the common law right to make a civil claim unless 'it is proved that such an act was done maliciously and without reasonable and probable cause'.

I have painted a bleak picture of the management of HIV/AIDS in Australian corrective systems. Whilst Australia leads the world in areas of prevention and care such as needle exchange provisions, public education and community care for people who are HIV-positive, our efforts in managing the pandemic in prisons should be criticised. Complacency is an enemy as is the reluctance of corrective services departments to encourage public debate of their policies. The structures do exist within the Commonwealth-funded National AIDS in Prison Clearing House (NAIPIC) for such a debate to take place for the benefit not only of those prisoners who have contracted the virus, but also for the protection, rights and conditions of all other prisoners. This debate may be seen as a way of prising open the door of prison policy in the 1990s which has been firmly closed ever since the Nagle Inquiry in the 1970s.

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