



## EDITORIAL

## THE LEGAL CONSEQUENCES OF GENDER REASSIGNMENT PROCEDURES — A JURISTIC VACUUM

Medical sciences have advanced extensively during the previous century. The legal fraternity has likewise tried to keep abreast of these advances and to respond to emerging challenges. However, in the case of transsexualism (the gender dysphoria syndrome), the legal position of the patient after reassignment procedures has as yet not been resolved. In the gender dysphoria syndrome the unfortunate blend of the vital components for a balanced personality results in a deeply confused and unhappy person whose maladjustment gives rise to serious psychological problems.<sup>1</sup> The difference between physical reality of the body, and gender of the mind in these patients often leads to a lack of psychological wholeness and failure to integrate socially.<sup>2</sup>

Psychiatric treatment of patients with the fully fledged syndrome is seldom effective and is usually unable to overcome the conflict raging inside the transsexual. In many cases surgery, which converts and thereby unites the individual's outward sexual appearance with his/her psychological sex, is the only treatment that will enable him/her to find happiness and the semblance of a normal life.<sup>3</sup>

However, the legality of gender reassignment surgery can be described as languishing in limbo — it has neither been prohibited nor has the surgery received any official sanction in South Africa.<sup>4</sup> Consequently, as this type of surgery is not considered *contra bonos mores*, it cannot be regarded as a violation of the criminal law and doctors are free to perform it according to the dictates of their consciences, and in line with accepted medical practice. Nevertheless, not all juristic problems connected with transsexualism have been solved. The legal position of the postoperative transsexual presents a challenge to lawyers and jurists. Although the medical profession has made the notion of gender reassignment and hence gender change a reality, it is the lawyers and the courts that have been presented with the medical *fait accompli*. The courts have been required to place the postoperative individual within the limitations of the existing law; up to 1996, i.e. before passing of the Constitution,<sup>5</sup> the law recognised only biological males and females. The rights of transsexuals are governed by the status conferred on them by common law, the state and the Constitution. Where the common law does not sufficiently

protect status, the legislature should intervene to ensure that the law is consistent with the Constitution.

Our common law was developed on the premise that there are two immutable sexes. It did not recognise the phenomenon of transsexualism or lend any support to the notion of gender reassignment.<sup>6</sup> Nevertheless, for the postoperative transsexual the logical step after completion of surgery is one of having all his/her documentation altered accordingly.

Although parliament had previously made provision to allow for the change of the sex description of a postoperative transsexual in such person's birth register by the addition of section 7B to the then Births, Marriages and Deaths Registration Act, there was no legislation unequivocally recognising such person's postoperative gender for all purposes of the law.<sup>7</sup>

However, where social and commercial practices required the production of a birth certificate, the postoperative transsexual was not placed in the humiliating position of having to explain his/her predicament. In *W v. W*,<sup>8</sup> the leading case in South Africa concerning the determination of the sexual identity of a postoperative female in a divorce case, the courts did not interpret the provision made by section 7B as assisting in solving the dilemma of the transsexual.

The *W v. W* case negated the possibility of postoperative transsexuals being recognised in South African law as members of their postoperative gender. It also served to negate the possibility of section 7B becoming the cornerstone for the recognition of a transsexual's postoperative gender. The provision was subsequently repealed by the new Births and Deaths Registration Act implemented in August 1992.<sup>8</sup> The justification for this step was stated as follows during the second parliamentary session reading in 1992: '... 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 man, no longer exist as a result of court judgements in that regard.'<sup>9</sup>

The failure to recognise the status of transsexuals who now undergo gender reassignment procedures may well be unconstitutional and amount to unfair discrimination and unjust administrative action in contravention of sections 9 and 33 of the Constitution<sup>5</sup> respectively.

In 1995 the South African Law Commission submitted proposed legislation to address these legal anomalies to the then Minister of Justice for consideration,<sup>10</sup> but no legal response has as yet been forthcoming. This is probably because legislative issues of greater import have been given priority during the transformation process in post-apartheid South Africa.



Nevertheless, it is recommended that the legislature should take immediate steps to ensure that the results of legally performed reassignment procedure of a therapeutic nature receive legal recognition.

**A Dhai**  
**J Moodley**

*Department of Obstetrics and Gynaecology  
Nelson R Mandela School of Medicine  
Faculty of Health Sciences  
University of Natal  
Durban*

1. Strauss SA. *Legal Handbook for Nurses and Health Personnel*. Cape Town: King Edward VII Trust, 1981: 17 (C1).
2. Hage JJ. Medical requirements and consequences of sex reassignment surgery. *Med Sci Law*. 1995; 35: 1-17.
3. Mason JK, McCall Smith RA. *Law and Medical Ethics*. 5th ed. London: Butterworths, 1999: 37.
4. Strauss SA. *Doctor, Patient and the Law*. 3rd ed. Pretoria: Van Schaik, 1991: 228, 229, 235.
5. Constitution of the Republic of South Africa, Act 108 of 1996.
6. *W v W* 1976 (2) SA 308 (W).
7. Births, Marriages and Deaths Registration Act 81 of 1963.
8. Births and Deaths Registration Act 51 of 1992.
9. Minister of Interior: *Hansard House of Assembly Debates* col 2356 19 March 1992.
10. South African Law Commission. *Report on the Investigation into the Legal Consequences of Sexual Reassignment and Associated Matters*. Projects 52. 1995.



## STATEMENTS

### **HIV CAUSES AIDS: PREVENTION IS POSSIBLE AND TREATMENT CAN BE EFFECTIVE**

The South African Medical Association (SAMA), the representative body of South Africa's doctors, reiterates unequivocally that HIV causes AIDS — an opinion based on well-established scientific data. SAMA emphasises, once again, that the spread of AIDS can be prevented by adopting well-worked-out preventive measures, including 'safe sexual practices', and by providing drug therapy for those with HIV/AIDS. Prevention is attainable.

Furthermore, specific treatment is possible for patients with the disease. There are currently accepted methods of drug treatment, which can provide a successful therapy as with many other serious medical illnesses, such as cancer. All of these drugs have side-effects, but these can be minimised by expert medical supervision of therapy. 'South Africans deserve to have this therapy made available to them. A strategy needs

SAMA has recently issued a number of statements on AIDS: 'SA Medical Association states unequivocally that HIV triggers AIDS' (6 April 2000); 'Doctors' body reiterates statement that HIV causes AIDS' (17 April 2000); 'The way forward for South Africa's doctors after AIDS 2000' (14 July 2000); 'Gynaecologists call for acknowledgement of HIV/AIDS link' (28 September 2000); and a statement by Dr Zolile Mlisana, Chairman, South African Medical Association: 'The Causal relationship between HIV and AIDS' (2 October 2000).

to be devised in attempt to bring down the prices,' said Dr Kgosi Letlape, chairman of SAMA. This applies particularly to pregnant mothers and children, but none should be deprived of the chance of significant palliation. It is their constitutional right, as long as it is within the State's available resources, which we believe it is.

### **SAMA SUPPORTS THE MRC REPORT**

In the light of the above, SAMA wishes to document its support for the conclusions of the recently released 'AIDS Report' by the Medical Research Council (MRC).

SAMA does not wish to enter further public debates on this issue, which should have been resolved a long time ago. The ongoing debates have unfortunately delayed action in developing sound policies and guidelines on prevention and treatment. This has also delayed the provision of medication that has the potential of improving the quality of life of thousands of South African HIV-positive patients, thereby enabling them to raise their children, care for their families, serve their communities, and remain active in the economy for as long as possible.

While this confusion continues in the press and in the public domain, doctors have to face increasing numbers of HIV-positive patients daily. They continually confront the reality of a disease that is having devastating effects on our population. Doctors also have to deal with the emotional and social consequences of patients being sent home to die, because they cannot afford the drugs that could improve their health and increase life expectancy.

The medical profession and its representative body, SAMA, acknowledge their duty and responsibility to act in the best interests of patients and the community at large, and to help ensure that patients affected by any serious illness, including HIV/AIDS, receive the best treatment available within affordable means.