

(The Gender Centre advise that this article may not be current and as such certain content, including but not limited to persons, contact details and dates may not apply. Where legal authority or medical related matters are cited, responsibility lies with the reader to obtain the most current relevant legal authority and/or medical publication.)

## Family Court Endorses Transsexual Marriage

The Marriage between a Man of Transsexual Background and his Wife is declared Valid by the Family Court of Australia.

by The Gender Centre

Article appeared in Polare magazine: December 2001 Last Update: October 2013 Last Reviewed: September 2015



The Applicants' lawyer,  
Rachael Wallbank.

### Re: Kevin and Jennifer v. The Attorney-General for the Commonwealth

Kevin and Jennifer speak publicly for the first time about their landmark legal victory and what it means to them

*The Applicants successfully argued that ... Kevin, a so-called post-operative female-to-male transsexual, was a man within the ordinary everyday meaning of that word ...*

**O**n 12th October 2001 His Honour Justice Richard Chisholm of the Family Court of Australia delivered a landmark judgement *Re: Kevin and Jennifer v. The Attorney-General for the Commonwealth* whereby a Sydney couple won their legal battle against the Commonwealth to have their marriage declared to be valid.

The decision, which declared the law of Australia, is of considerable legal and social significance; especially for people who have experienced transsexualism and other people who have experienced variation in their development or formation as human beings as well as their loved ones, family and friends.

The singular question to be answered in the case was whether Kevin, the Applicant Husband, was a man for the purpose of the marriage law of Australia notwithstanding his transsexual background; Kevin being more commonly referred to as 'a post-operative female-to-male transsexual'.

### Kevin and Jennifer

Kevin and Jennifer are concerned to ensure that others who have experienced suffering as a result of difference can take heart from their victory in this case. At the same time Kevin and Jennifer are obliged to exercise some care concerning what they presently say about this important decision given that the Commonwealth Government has until late November in which to appeal the decision.

In these circumstances Kevin and Jennifer issue the following joint statement:

As we celebrate our Family Court victory we acknowledge with gratitude the many people who helped to make it possible. We thank our legal team, particularly Rachael Wallbank, for her dedication to our case (above and beyond the call of duty) and for her grace under pressure. We thank our family, friends, colleagues and other community members for lending support during this difficult process. We thank our expert witnesses, whose contributions to this case and to the body of medical and scientific knowledge are incalculable. Finally we pay tribute to all the heroic individuals who have experienced transsexualism, and their loved ones, who inspired us and paved the way. In turn we hope Justice Chisholm's findings bring comfort and relief to others who, through no fault or choice, experience a similar predicament. We have risen above ignorance and prejudice to live simple, honest lives with dignity, as productive members of our society, harming no one. Our life together has been dominated by a quest for equal rights – the kind of security, responsibilities, privileges and social recognition which other couples and their children may take for granted. We sought to bring anomalies and injustices to light, and challenged the misconceptions, bias and blame which have so often clouded transsexualism. In so doing we developed deep pride in each other and demonstrated our strength as a family. We now hope to emerge from the shadow of legal uncertainty, and return our focus to our family life as we await with great excitement the birth of our second child.

### Rachael Wallbank - Applicants' Lawyer

The Applicants' lawyer, Rachael Wallbank, said: "I saw my most important work in the case as ensuring that His Honour, who had the task of declaring the law of Australia in respect of these issues, had at his disposal extensive evidence of how Kevin was perceived as a man in his daily life and how the average Australian understood transsexualism. Equally important was to ensure that His Honour had

before him the very best expert medical and scientific evidence Australia and the world had to offer. We filed thirty-nine affidavits of family, friends, work colleagues and acquaintances who vividly confirmed their perception of Kevin as a man, a mate, a son-in-law, a husband and a father. I was fortunate to be able to obtain the assistance of a number of the best Australian and international experts on the subject of human sexual formation and transsexualism. From across the medical disciplines these eminent experts cumulatively provided the evidence sufficient for His Honour to find that a human being's sexual identity is biologically derived as a result of the sexual differentiation of the brain which, like the genitalia and gonads, irreversibly differentiates in the process of a person's formation as a human being. In this context then, the procedure called sex assignment or reassignment can be seen to be a process of rehabilitation of the individual's body in order to help bring it into harmony with the mind. The reality is that a small but significant proportion of the population experience difference in their sexual formation requiring sex assignment and reassignment. Justice Chisholm found that Kevin, a so-called post-operative 'female-to-male transsexual', was a man within the ordinary, everyday meaning of that word. His Honour also found that, in so far as the test of a person's sex for the purpose of marriage is concerned, the law of Australia should not be limited to one arbitrary set of characteristics, but should have regard to all of the sexually differentiated biological characteristics of a person, including brain sex, as well as the cultural characteristics of the person such as his or her lived sex. I hope people can begin to appreciate the incredible courage demonstrated by Kevin and Jennifer in their bringing this case and seeing it through. I trust that the information and the message of appreciation and inclusion expressed in this judgement confirms that Australians continue to be a people conspicuous for their humanity and sense of justice."

Rachael Wallbank, a Specialist Family Lawyer accredited by the Law Society of N.S.W. and herself a woman of transsexual background, was interviewed by Damien Carrick about the case on A.B.C. Radio National's The Law Report on Tuesday 6th November, 2001.

### Further Information:

1. One of the central legal issues His Honour had to decide was whether to follow the long determinative United Kingdom decision of Justice Ormrod in the 1971 case Corbett v. Corbett which had established that a person's sex for the purpose of marriage is to be determined by an arbitrary test based upon the congruity or sameness of a person's genital, gonadal and chromosomal characteristics at birth without regard for any other characteristic of the person, or his or her life, such as the person's sexual identity, lived or cultural sex, at the time of the marriage. The Commonwealth's case was very much founded on the correctness of that decision.
2. The Corbett decision had been recently affirmed in the United Kingdom (in the 2001 Court of Appeal decision in the case of Bellinger and Bellinger) and in Texas, U.S.A. (in the 1999 case of Littleton and Prange) so as to deny marriage rights to people of transsexual background. In the Texas case the result was to deny to a woman the right to sue for medical negligence in respect of the death of her husband, to whom she had been married for many years, simply because she was a woman of transsexual background.
3. A key focus of the Applicant's case was to show the legal and logical error of the Corbett decision, which had long been the subject of considerable criticism by numerous eminent Australian lawyers; both judges and academics. In his judgement Justice Chisholm critically examined the reasoning applied in that decision which he finds characterised by what he calls an 'essentialist' approach to the question of sexual identity which sought a determination of a being's 'true sex' by way of an arbitrary test.
4. Australian case law on the subject, specifically the 1988 N.S.W. Supreme Court case of Harris and McGuiness (Criminal law) and the Full Court of the Federal Court's 1993 decision Secretary of Department of Social Security v. S.R.A. (Social Security law), confirmed the Applicant's contention that Australian law had developed a distinct, humane and informed approach to the issue of transsexualism that had rejected the essentialist Corbett approach and found that individuals who have undertaken the rehabilitative medical process called 'sex change', 'sex assignment' or 'sex reassignment' so as to bring the sexually differentiated features of their body into harmony with their self-perceived sex or psychological sex are entitled to be of that sex in determining an individual's sex at law; which only envisaged individuals as being either male or female.
5. His Honour reviewed a number of international decisions which had also not followed the Corbett approach such as the New Zealand High Court decision in the case of Attorney-General v. Otahuhu Family Court (M. v. M.) in 1994 that recognised a person's sex reassignment for the purpose of marriage.
6. The Applicants successfully argued that in the Australian context Kevin, a so-called post-operative female-to-male transsexual, was a man within the ordinary everyday meaning of that word and that in applying that meaning to the law of marriage in Australia, His Honour was merely bringing that law into conformity with Australian Criminal and Social Security Law. His Honour also found that, in so far as the test of a person's sex for the purpose of marriage is concerned, the law of Australia should not be limited to one arbitrary set of characteristics, but should have regard to all of the sexually differentiated biological characteristics of a person, including brain sex, as well as the cultural characteristics of the person, such as his or her lived sex.
7. The principal findings to be drawn from the case include:
  - 7.1 The decision of Corbett is not persuasive and does not represent Australian law;
  - 7.2 There may be circumstances in which a person who at birth had gonads, chromosomes and genitals of one sex, may nevertheless be of the other sex at the date of his or her marriage; such as in the case of a person who has, prior to the marriage, undergone the medical procedure called sex assignment or reassignment;
  - 7.3 That brain development is (at least) an important determinant of a person's sense of being a male or female, that the characteristics of transsexuals are as much 'biological' as those of people thought of or referred to as intersex and that there is a biological feature of the brain that determines whether individuals think of themselves as male or female; whatever their other biological characteristics.
8. Thus, transsexualism is now properly recognised as a natural variation in human formation within the so-called intersex continuum;

and not some form of psychological or mental illness. Like any predicament of human variation or difference, the prime ongoing disability of transsexualism for the persons who experience it, their families and their loved ones is not the predicament itself, but the response of others.

The Applicants trust that the understanding and inclusive message contained in this judgement by His Honour Justice Richard Chisholm of the Family Court of Australia confirms that Australians continue to be a people conspicuous for their humanity and sense of justice.

## Rachael Wallbank

**From Lynn Conway's website:**  Born on the 4th March 1956, Rachael Denise Wallbank was admitted to practice as a solicitor and attorney of the Supreme Court of New South Wales on the 4th July 1980; after completing an Arts Law degree at the University of New South Wales. Rachael has practiced law continuously since that time and established her own firm, Wallbanks, on the first of July 1985. Wallbanks specialises in undertaking legal work on behalf of people in the areas of family, de-facto relationship and estate law. Rachael has also obtained post-graduate qualifications in mediation and alternative dispute resolution at the University of Western Sydney. Rachael is an accredited specialist in Family Law as awarded by the Specialist Accreditation Board of the Law Society of New South Wales.



Rachael has three children, Kate, Rebecca and James. Having accepted her transsexualism, Rachael transitioned and has subsequently undergone sex affirmation procedures and had her legal sex reassigned in the State of New South Wales pursuant to that State's, births, deaths and marriages law.

From 1999 to 2003 Rachael appeared on behalf of the Applicants, Kevin and Jennifer, in their successful original and appeal proceedings before the Family Court of Australia against the Attorney General for the Commonwealth of Australia recorded in the judgments of Justice Richard Chisholm delivered 12th September 2001 and the Full Court of the Family Court of Australia delivered 21 February 2003 whereby the marriage between Jennifer and Kevin, a man of transsexual background, was declared a valid marriage according to the marriage law of Australia.

Rachael also represented the applicant parents in the case *Re: Bernadette (Special Medical Procedure) [2010] FamCA 94* which was the first case in Australia where both Phase 1 (puberty suppression) and Phase 2 (affirmed sex development) hormonal treatment was approved for an Australian adolescent and the jurisdiction of the Family Court to determine whether or not young Australians can receive such therapeutic medical treatment was challenged.

**For further information about Rachael and Wallbanks Legal, visit her website.** 

Polare Magazine is published quarterly in Australia by The Gender Centre Inç., which is funded by the Department of Family & Community Services under the S.A.A.P. program and supported by the N.S.W. Health Department through the AIDS and Infectious Diseases Branch. Polare provides a forum for discussion and debate on gender issues. Unsolicited contributions are welcome, the editor reserves the right to edit such contributions without notification. Any submission which appears in Polare may be published on our internet site. Opinions expressed in this publication do not necessarily reflect those of the Editor, The Gender Centre Inç., the Department of Family & Community Services or the N.S.W. Department of Health.

The Gender Centre is committed to developing and providing services and activities, which enhance the ability of people with gender issues to make informed choices. We offer a wide range of services to people with gender issues, their partners, family members and friends in New South Wales. We are an accommodation service and also act as an education, support, training and referral resource centre to other organisations and service providers. The Gender Centre is committed to educating the public and service providers about the needs of people with gender issues. We specifically aim to provide a high quality service, which acknowledges human rights and ensures respect and confidentiality.