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Legal Environment following re: Kevin

New Perceptions & Strategies

Speech presented at [N.S.W. State Parliament House](#) on Tuesday 25th February 2003 by Rachael Wallbank, Accredited Specialist, (Family Law) [L.S.N.S.W.](#)

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For Effective Law Reform In Respect Of The Legal Rights Of People Who Experience Variation In Human Sexual Formation And Expression

The Legal Environment following Re: Kevin; new perceptions and strategies for effective law reform in respect of the legal rights of people who experience variation in human sexual formation and expression - a discussion paper.

Introduction

1. We now begin to be able to perceive and explore the more subtle aspects of human sexual formation. We can now appreciate that biological sex is multi-dimensional and is ultimately determined by the sexual differentiation of the human brain; rather than that of body parts such as external genitalia. We now know that a person's legal sex (as per their birth certificate) can be different from their predominant biological or innate sex (as per their "brain sex") and their common law sex as determined by a court. Our society has now begun to understand transsexualism and some other traditionally known intersex conditions and to appreciate the life experience of the people who live with these conditions, whose brain sex differentiation is at odds, or incongruous, with the sexual differentiation of some or all of their body parts and assigned legal sex and that such conditions are nothing more or less than natural variations in human sexual formation. Thus, our culture can also begin to better understand the essential need of an individual who experiences transsexualism to affirm his or her innate sex by undergoing conclusive sex affirmation procedures and then to have his or her legal sex reassigned to secure the issue of an appropriate Birth Certificate in respect of identity and full uncompromised legal rights in the individual's reassigned sex. It is now clear that the need for uniform State and Territory legislative mechanisms guaranteeing individuals the right to reassign their legal sex in the circumstances of transsexualism and certain other traditionally recognised intersex conditions so as to gain uncompromised legal rights in that reassigned legal sex is an issue of fundamental human rights as well as a personal imperative;

2. We are now also able to perceive and explore the more subtle aspects of human gender expression and see that gender expression, rather than being a social constraint, is more naturally a rich aspect of human expression reaching across the whole range of gender possibilities; including those contrary to an individual's sex (or sexual identity) and including those expressions of gender outside or beyond the traditional male/female dichotomy. We now begin to be able to properly distinguish an individual's gender expression (or gender identity)

I see "Definition and Synopsis of the Aetiology of Adult Gender Identity Disorder and Transsexualism" being a paper signed, approved and authorised by 17 of the world's most respected medical and scientific experts in the field as published by the Gay and Lesbian Association of Doctors and Dentists (United Kingdom) 2002 funded by Gender Identity Research & Education Society, the Kings Fund & the [B.C.C.](#) Trans Group, and published at Gender Identity Research And Education Society (G.I.R.E.S.). Note, however, that the reference to the terms "transman" and "transwoman" is not applicable for Australia where these terms have not been accepted and are not popular. I suggest such terminology tends to confuse and/or dehumanise and detracts from the simple assertion by people who experience transsexualism that they are simply women and men who experience a natural variation in human sexual formation. See also the expert evidence adduced in [Re Kevin: Validity of Marriage of Transsexual \(2001\) 28 Fam LR 158](#); [2001] FamCA 1074 (referred to particularly in paragraphs 209-273 thereof) and the judgement of the Full Court delivered 21st January 2003 ("Re Kevin").

3. I represented and appeared on behalf of Kevin and Jennifer in the Family Court of Australia proceedings [Kevin and Jennifer versus The Attorney General for the Commonwealth of Australia \(2001\)](#); now cited as [Re Kevin: Validity of Marriage of Transsexual \(2001\) FamCA 1074](#) and (2001) [FLC 93-087](#) ("Re Kevin") and in the subsequent appeal proceedings instituted by the Attorney General for the Commonwealth of Australia before the Full Court of the Family Court of Australia. Justice Chisholm's landmark decision, granting a Declaration of Validity of Marriage in respect of the marriage of a man of transsexual background, was delivered on 12th October 2001. The appeal before the Full Court of the Family Court of Australia was heard on 18th and 19th February 2002. The Full Court consisted of their Honours Chief Justice Nicholson and Justices Ellis and Brown. The Full Court of the Family Court of Australia delivered its decision on 21st February 2003. In its judgement the Full Court dismissed the appeal, thoroughly reviewed the applicable evidence and legal issues and strongly affirmed the original decision of His Honour Justice Chisholm. In these proceedings my clients successfully contended that, notwithstanding the husband's transsexual background, the husband was entitled to be married as a man because he was a man within the meaning of that expression in section 46(1) of the Marriage Act and section 43 of the Family Law Act at the time of his marriage;

4. The human rights and legal impact of Re Kevin is not limited to Australia. On 11th July 2002, in the landmark decisions of [I versus The United Kingdom](#) and [Christine Goodwin versus The United Kingdom](#), the European Court of Human Rights, quoting Justice

Chisholm's decision in *Re Kevin* at length and with approval, determined that there had been violations of articles 8, 12, 13 and 14 of the Convention for the Protection of Human Rights and Fundamental Freedoms in respect of the legal status of people who had experienced transsexualism in the United Kingdom and, in particular, such people's treatment in the spheres of employment, social security, pensions and marriage. As a result of these decisions the United Kingdom is now preparing to introduce a program of legal reform, including the introduction of the right of people who experience transsexualism to have their legal sex reassigned, in order to remove such violations of human rights. On 22nd February 2003, only hours after the delivery of the decision of the Full Court of the Family Court of Australia in *Re Kevin*, Justice Gerard J. O'Brien in the Circuit Court of the Sixth Judicial Circuit In And For Pasco County, Florida in the United States of America in *The Marriage of Kantaras* case number 98-5375CA 511998DR00537xxxWS, the marriage of Michael Kantaras, a man of transsexual background like Kevin, was declared valid for the first time in a court of the United States of America and Michael Kantaras was awarded the custody of his children who had been born to Mr Kantaras and his wife, Linda. Justice 2 pseudonyms provided by his Honour Justice Chisholm to preserve my clients' anonymity O'Brien approved of, relied upon and quoted extensively from, Justice Chisholm's decision in *Re Kevin*. At page 673 of his decision Justice O'Brien says: "it is essential that Kevin not be given a mere "citation" but studied for what it represents in the law. It is one of the most important cases on transsexualism to come on the scene of foreign jurisprudence." [The full texts of both decisions in Re Kevin can be accessed at my website](#) or the web site of the Family Court of Australia where you may also access my clients' pleadings in the case (made anonymous as required by the protections afforded by the Family Law Act) and links to the site of the European Court of Human Rights and the text of the decision in *Kantaras* as well as other related source material;

5. Thus, the judgements of Chisholm J and the Full Court referred to above in the case *Re Kevin* declare the law of Australia to the effect that the question of whether a person is a man or a woman for the purpose of the marriage law of Australia is to be determined as at the date of the marriage and that there is no rule or presumption of Australian law that the question of whether a person is a man or a woman is to be determined by reference (only) to circumstances at the time of the person's birth. Anything to the contrary in the English decision of *Corbett versus Corbett* (or *se Ashley*) [1971] P83 ("*Corbett*") does not represent Australian law. It was the Commonwealth's contention in these proceedings that the question of whether a person is a man or a woman for the purposes of the marriage law of Australia should be determined pursuant to the reasoning and the test of the congruence of an individual's gonads, genitalia and chromosomal features (alone) as assessed at birth (only) as espoused by the judgement of His Honour Mr Justice Ormrod in *Corbett*;

6. Of significance to both the judgments of Justice Chisholm and of the Full Court was the Courts' acceptance that, for a person who experiences the condition of transsexualism, sex affirmation treatment is personally rehabilitative rather than imitative in purpose. Both Family Court decisions also found that an individual's sex was not to be solely determined by any one or only some of a person's sexually differentiated features such as gonadal, genital or chromosomal characteristics to the exclusion of a person's brain sex or psych and a person's lived or cultural sex. Of further significance is Justice Chisholm's finding, now strongly affirmed by the Full Court, that " ... in my view the evidence demonstrates (at least on the balance of probabilities) that the characteristics of transsexuals are as much "biological" as those of people thought of as inter-sex". At the same time Justice Chisholm found, and the Full Court has affirmed, that like marriage, a person's sex is not a private matter alone to be subject only to individual assertion and that there is a cultural element to the legal assessment or determination of an individual's sex. I was determined in my presentation of my clients' case in *Re Kevin* to put my clients' claim to be entitled to be legally married, and the husband's claim to be a male and a man, as justifiable and understandable demands for the fulfilment of fundamental human rights, rather than a request for socio/legal compassion or charity;

7. Of chief concern now is that future legislative reform after *Re Kevin* results in people who experience variation in human sexual formation being accorded the reasonably exercised legal right to have their legal sex reassigned with full and unconditional equality of legal and civil rights in that reassigned sex. Of equal importance is that the same process of legal reform should ensure that all people, including transgender people, are legally able to express gender along the whole of the possible gender continuum, including contrary to their sex or sexual identity, free from fear and harm. People should not be obliged to identify as a member of a particular category of human being in order to access such fundamental rights and protections;

8. It is this more subtle but clear perception and recognition of the fundamental differences of legal interests and needs existing between different but associated minority peoples within our culture, in this Forum called Transsexuals, Transgender and Intersex, which will allow for the fashioning of clear, non-discriminatory and effective law reform that will serve rather than hinder the rights and liberty of the members of these neglected communities;

9. In taking this brief introductory look at the case *Re Kevin* and the future of law reform in respect of these neglected communities, one must be careful not to forget perhaps the most neglected community of all: the loved ones and families of the people who populate these neglected communities. It is ironic but instructive that, although without Jennifer the case of *Re Kevin* would have been impossible (and not just for her presence, but her insightful and enthusiastic involvement and support), her pseudonym is omitted in the formal short form citation of that case. Perhaps the most fair and accurate way to reflect the true associated shame, neglect, suffering and joint struggle experienced by these loved ones and families is to consciously include them as part of us when we refer to our neglected communities. The number of Australian people affected by the issues discussed in this paper is considerably more than the unaffected population would imagine;

10. It is also easy to overlook the very real fact that the legislative law reform that is the focus of this Paper, namely law reform in New South Wales and uniform State legislation throughout Australia, deals with two quite different aspects of legal rights:

10.1 The right to have one's legal sex reassigned and thereby obtain full and unconditional equality of legal and social rights in society as a member of that reassigned sex; and

10.2 The right to express gender contrary to one's legal sex and otherwise without suffering discrimination and persecution.

11. Further essential consequential issues of these two heads of legislative legal reform arise: the conditions to be placed upon the right to have one's legal sex reassigned, the right of people who experience transsexualism and other conditions arising from natural

variation in human sexual formation to undergo the medical treatment consequent upon such conditions funded by the state and to be recognised and appropriately accommodated and protected when detained in institutional systems such as hospitals and prisons. As a result of the internal personal and external social conflict which it creates, transsexualism is a life threatening condition. Thus, sex affirmation treatment (being those hormonal and surgical procedures also described as sex reassignment treatment) should not be withheld from people diagnosed as experiencing transsexualism merely because they are being detained in prison or in other state institutions or because they do not have the money to fund such medical treatment for themselves. Again, I trust that we are now attaining the depth of appreciation of the predicament of people who experience natural variation in human sexual formation such as transsexualism sufficient to see that to guarantee people who experience these conditions access to medical treatment and protection is a matter of fundamental human rights upon which their lives depend; rather than merely issues of social justice or compassion;

12. Law reform affecting the determination and differentiation of person's legal sex fundamentally affects and concerns the whole society. Such law reform, addressed with the particular interests of a minority community or communities in mind, must be able to be generally accepted and trusted by the greater community in which it takes place in order to be unconditional and effective law. The fact is that the determination of an individual's legal sex is the concern of the whole society and must provide for a certainty and clarity of identification in one sex or the other. After all, it is the society's acceptance of an individual's legal sex that provides for the security and certainty of sexual identity that is the goal of the reassignment of legal sex. It is for these reasons that I believe the statement of the law as per *Re Kevin*, to the effect that a recognition of an individual's right to effect a reassignment of the individual's legal sex is dependent upon the individual first undergoing conclusive sex affirmation treatment (also called "sex reassignment") in order to bring the individual's body into harmony with the individual's innate or brain sex, is the correct approach. I submit that it is the only approach that can result in the acquisition of unconditional equality of civil and legal rights in the reassigned legal sex;

13. Anti-discrimination legislation is another matter. While the aim of such legislation is protection, such legislation can easily be misconceived and serve to create and/or perpetuate confusion which detracts from the ability of such legislation to ease or eliminate discrimination and promote human rights. Even a casual acquaintance with the issues associated with the anti-discrimination and births, deaths and marriages legislation affecting these neglected communities in New South Wales, and other States and Territories in Australia, and a quick perusal of the papers presented at this Forum (including the Anti-Discrimination Board of N.S.W.'s own background paper) demonstrate the considerable conflict and confusion of language, legislative intent and effect experienced by the various communities and people the subject of that legislation. If I were to identify the central difficulty and disaffection evidenced by the papers, and my own experience of such legislation both as a woman of transsexual background and as a lawyer, it would be the requirement that people identify with clumsy and inaccurate classifications in order to gain the limited protections and legal rights sought to be afforded by the legislation. The fact is that the births, deaths and marriages legislation in New South Wales places unreasonable conditions upon an individual seeking to effect a reassignment of the individual's legal sex and fails to deliver unconditional equal civil and legal rights to people who have their sex legally reassigned. The fact is that both the anti-discrimination and births, deaths and marriages legislation in New South Wales call me transgender when I am not; incorporating a monolithic usage of the word "transgender" that robs the words "transsexual/transsexualism" and "transgender" of their distinct and useful meanings. I certainly mean no criticism of any of the parties to the creation or maintenance of the current legislation by these comments. There is no doubt that our understanding of the aspects of humanity under discussion, and their legal implications, have experienced wonderful and dramatic evolution since the New South Wales births, deaths and marriages and anti-discrimination legislation affecting transsexualism and transgender were introduced. It is not too surprising that at the time the very different aspects of humanity, called transsexualism and transgender, were confused. But we have experienced that evolution and we now have the benefit of the evidence adduced in, and the careful consideration of the legal and social implications of transsexualism, in particular, and variation in human sexual formation and our systems for the assignment of legal sex, more generally, as contained in the decisions in *Re Kevin*. It is now time, in the interests of fundamental human rights, to introduce fresh legislation in this State to deliver the quality of legal rights and protections commensurate with our new depth of appreciation and capacity.

14. The decisions of Justice Chisholm's and Chief Justice Nicholson and Justices Ellis and Brown in *Re Kevin* powerfully, and I submit conclusively, evidence and establish the benchmark of Australian legal and community understanding and acceptance of Australians who have experienced the natural variations in human sexual formation called transsexualism and related intersex conditions as being as humane and as well-informed as any other culture on the planet. It is now time to see such humane Australian common law recognition of the fundamental legal rights of people who experience transsexualism and related intersex conditions reflected in clear and unconditional statute throughout Australia. It is correspondingly appropriate to see similarly clear and unconditional statute throughout Australia dealing with the rights of citizens to free gender expression. Such law reform, to be clear, accepted and effective will, of necessity, cease to characterise people and their legal rights using problematic terminology and labels, but will rather seek to recognise and establish the human rights of people who experience difference or variation in human sexual formation and gender expression based upon faithful appreciation of their actual and distinct attributes, needs and legal rights.

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.](#) 

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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.