

LETTER TO THE EDITOR

KAREN GURNEY responds to the article 'Homophobia Perpetuated: The Demise of the Inquiry into the Marriage Amendment Bill' by Sandra Berns and Alan Berman published in the *Alternative Law Journal* in June 2005.

I gratefully thank Sandra Berns and Alan Berman for their very informative article,¹ but offer some alternative thoughts about current and future marriage rights for people with transsexualism and other variations in sexual formation (intersex conditions). I also respectfully offer some thoughts on appropriate terminology when dealing with those of us who live with such differences.

The medico-legal stuff

The decision at first instance in *Re Kevin*² owed much to the wisdom and compassion of his Honour, Justice Richard Chisholm, and to the exceptional credibility of the expert witnesses marshalled by counsel for the applicants, Ms Rachael Wallbank. It was a decision that certainly did 'resonate throughout the common law world'³ once confirmed on appeal, and has been cited with authority in cases before the European Court of Human Rights⁴ and in the USA.⁵ The crux of the decision can be distilled in the statement that 'the sex of a person, for the purpose of marriage, is their sex at the time of the marriage'.⁶

It is quite true, as Berns and Berman suggest, that there was considerable disquiet about the decision from groups aligned to the religious right. This was followed by an appeal to the Full Court by the then Attorney General Daryl Williams. Significantly, no further appeal ensued. In my view it is not correct on the facts, to tie the Bill to amend the *Marriage Act 1961* to the decision in *Re Kevin*. While some of those same religious right tried to argue that it was the thin end of the wedge opening the way to eventual same-sex marriage, it was apparent from correspondence emanating from the office of Williams' successor, Attorney General Ruddock, this was not how he read the case.⁷ It seems he at least was well able to see the impossibility of inserting a definition of 'man' and 'woman' into the Act that would serve to deny heterosexual marriage to a person of transsexual background without, at the same time, denying the right to anyone with a congenital sex difference. Important to understanding his position is an analysis of the matters considered by the Family Court at first instance and by the Full Court on appeal.⁸

The full weight of the expert evidence adduced in *Re Kevin* was that transsexualism is another of the variations that may occur in human sexual formation. That evidence looked at the role of hormones in foetal development and the very recent research into the sexual morphology of the brain and genetic gender markers other than those on the X and/or Y

chromosomes. It also considered the total inability of science to explain the absolute conviction of people with transsexualism that they are indeed members of the sex opposite that predicated by their genotype, and their absolute determination to rehabilitate their phenotype accordingly, otherwise than from a somatic basis. The court ultimately accepted that transsexualism is as much a conflict of biology with biology as are (other) intersex conditions, saying: 'characteristics of transsexuals are as much "biological" as those of people thought of as inter-sex. The difference is essentially that we can readily observe or identify the genitals, chromosomes and gonads, but at present we are unable to detect or precisely identify the equally biological characteristics of the brain that are present in transsexuals'.⁹

The Full Court not only affirmed the decision on appeal, it considered and adopted the reasoning of Charles J in the UK High Court of Justice in *W v W*¹⁰ where it was held that 'intersex persons can, in effect, choose their sex and marry'.¹¹ In so doing, the Full Court expressly held that an earlier decision in *C v D*,¹² an intersex marriage case, was wrongly decided and was not a correct statement of the law of Australia. This decision had followed the now discredited reasoning adopted in the UK case of *Corbett v Corbett*¹³ and held that the marriage of an intersex person was void ab initio on the basis that the person was neither a man nor a woman for the purposes of the Act.

The Full Court also said:

It seems illogical that the courts can decide that marriage can extend to intersex persons, who can adopt the sex of their choice, but not to post-operative transsexual people ...¹⁴

if there is substance in the view that brain sex is one of the most significant determinants of gender, then the distinction between intersex and transsexual persons becomes meaningless ... This is because an intersex person appears to be defined as someone with at least one sexual incongruity. If brain sex can give rise to such an incongruity then, legally, we think that there may be no difference between an intersex person and a transsexual person ...¹⁵

Dealing first with brain sex, we think that it was open to the trial Judge, on the evidence before him, to find as a matter of probability that there was a biological basis for transsexualism'.¹⁶

From the foregoing, it can be seen that the rights of all intersex people, including those with transsexualism, to heterosexual marriage were insightfully clarified by the Family Court, and those rights have not been

REFERENCES

- (2005) 30(3) *Alternative Law Journal* 104.
- Re Kevin (validity of marriage of transsexual)* [2001] FamCA 1074.
- Eithne Mills and James McConville, 'The case of Kevin and Jennifer: Transsexual Marriage in Australia' (2002) (76) 8 *LJ* 69, 72.
- Goodwin v UK* [2002] 2 FCR 577 and *I v UK* [2002] 2 FCR 613.
- In Re The Marriage of Michael Kantaras v Linda Kantaras* [2003] 98-5375CA.
- See *Re Kevin*, above n 2 particularly 330.1.
- The Attorney General's acceptance of the ratio in *Re Kevin* was confirmed by Senator Coonan on his behalf by way of a reply to a question from Senator Nettle on the point: Commonwealth, *Parliamentary Debates*, Senate, 12 August 2004, 26148-9. A further answer to a supplementary question from Senator Nettle saw acceptance of the continuing validity of a heterosexual marriage where one of the parties subsequently undergoes sex affirmation surgery: Commonwealth, *Parliamentary Debates*, Senate, 9 February 2005, 82.
- Attorney General of the Commonwealth v Kevin & Jennifer and the Human Rights & Equal Opportunity Commission* [2003] FamCA 94 ('*Kevin and Jennifer*').
- Re Kevin*, above n 2, 272.
- W v W* [2001] 2 WLR 674.
- Kevin and Jennifer*, above n 8, 231.
- Marriage of C and D (falsely called C)* [1979] 5 Fam LR 636.
- Corbett v Corbett (orse Ashley)* [1971] P83.
- Kevin and Jennifer*, above n 8, 232.
- Ibid* 235.
- Ibid* 326. Nevertheless, it needs to be emphasised that neither biological factors nor social factors alone were persuasive. The test formulated by Chisholm J was an inclusive test that also considered issues of self-perception (psyche), his status according to other Australian laws, and especially the hormonal and surgical steps he had taken to ensure he no longer functioned as female.
- Kevin and Jennifer*, above n 8, 353-4.

diminished by any subsequent actions taken by the Commonwealth. Contrary to the assertions of Berns and Berman, neither Commonwealth statute nor the common law has defined intersex people as being of 'indeterminate sex' for the purpose of the *Marriage Act*. Rather, they can affirm their inherent sex as either male or female and marry as a member of that sex. The difficulty for the very small minority who self-identify as 'intersex', rather than as male or female, and have gained legal recognition as such in the form of a birth certificate is the same irrespective of recent changes to the Act. On the basis of the decisions at first instance and on appeal, the evidence as to sex provided by such a birth certificate is but prima facie and can therefore be rebutted by other relevant evidence.¹⁷

Finally, it should also be said that the sex recorded on a passport is there solely to aid the safe passage of citizens travelling abroad and has no effect whatsoever on the question of sex for the purposes of marriage. A number of Australian citizens (including me) in fact hold passports in the sex opposite that recorded on their birth certificates because, until the beginning of this year, not all States had legislation in place to allow birth certificates to be corrected following sex affirmation surgery.

Now a little on labels

We are not transsexual: male-to-female or female-to-male. Neither are we transgender. Our condition (transsexualism) is one that requires rehabilitation of our sexual identity, not our gender since that is fixed. Hormonal and surgical sex affirmation together comprise the treatment for our transsexualism and, upon completion, we are simply the men and women we have always known ourselves to be.

Our transsexualism has nothing to do with our sexuality. We are predominantly heterosexual after sex affirmation as is the case in the wider community, but we do have a somewhat larger representation of same-sex attracted, bi-sexual and asexual people.

We are found in a thoroughly uninteresting group of people of all ages including doctors, lawyers, psychologists nurses, fire officers, police officers, tradespeople, shop assistants, engineers, pilots, store people, journalists, film stars and sex workers. We are mums and dads, partners, brothers and sisters and some of us are all alone. We are just ordinary folk who happened to have been born with an unusual variation in sexual formation. Nothing more or less.

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The Law of Planting Trees for Profit

I bought a video of history
I listened to the excuses on the radio
And the ads for the video
I made pirate copies of the video
And sold them on the black market
No-one reads books about it anymore
Because they've seen the picture
No-one denies me
Or things done
Things happened
I myself will not deny
The greatness of the greatness
The only end this has
Is we can see all of it

The Law of Abandonment

Letting go!
Pointing the gun at the mirror!
Finally, believing in life!
All things eventually pass into humour.
Faith always happens in the dark.
The body is a pot which reduces everything to feelings.
Canned food is a certain kind of abandonment.
So is an occupation.
Phyllis was a girl who died for love.
She transformed into an almond tree.
Adam rejected a wife before Eve.
Did she look too much like a snake?
Death is such a fascinating idea.
What we're not.
We can abandon everything but the dead.
They enter and re-enter us over and over.
The maggots of history discovering fresh meat.
First there was a package thrown onto a train.
Then a stowaway.
The ecstasy of falling asleep is embedded in our fear.
To leave, you must give up the embrace.

M T C Cronin