

## The RCH Alumni: Legal Reform in transgender adolescents

Thank you for the invitation to speak at this meeting today. It is a pleasure to be here.

I am going to tell a story about the interaction of the law and transgender youth in Australia.

But before I begin, it is important to point out that all of the patient information that I will present is already on the public record either through court judgements or media reports. I also have permission from the young people and their families who are featured in my photos with their true identities.

Despite the subject matter being rather contemporary and of local relevance, my story starts overseas with the birth of a healthy baby 27 years ago. It was in 1991. This baby was a very normal baby who looked exactly as one would expect of a little baby girl. But as the baby grew into a child he didn't experience himself as being female. His deep, inner sense of self, was a boy. As a very young child he showed a preference for stereotypical boys' clothes and toys and as he grew older he repeatedly requested that he be referred to with a male name and with the male pronouns "he" and "him". I am going to refer to him by his anonymised legal name, Alex **(Slide of Alex)**.

Alex was the only child born to married parents. Whilst Alex was very young, the three of them lived together in a house with Alex's paternal grandparents and an uncle. Apparently his parents fought quite a lot but Alex felt that they loved each other. He experienced his parents in contrasting ways. Alex was very close to his father and spent virtually all of his time with him. Alex said that his father was gentle, a "good man" and someone that the

whole family loved very much. Alex saw him as a best friend, playing with him and following his interests. Alex never liked playing with dolls, he liked playing with tanks and swords and his father participated in this play. He later taught Alex karate and how to protect himself with punching and kicking techniques. When Alex was sad he would confide in his father and his father would protect him... from his own mother.

Alex says that his mother never loved him. She was in Alex's words, "affectionless and harsh". He felt rejected by her from early on in his life and she expressed that Alex was a follower of the devil and a risk to the family. She feared that he would harm them. She prohibited him from playing with other boys and dismissed his feelings of being male.

When Alex was only 6 years of age, his father died suddenly and unexpectedly of a stroke. Alex was extremely distressed. He thought that something had "blown up in his father's head" and he died on his way to hospital in an ambulance. He could not see his father's body for some three days afterwards and he continued to have vivid flashbacks of the events of his death well into adolescence. Long after his death, Alex continued to speak to his father and described feeling as if he was smiling in his mind, often appearing in his dreams at night.

A few years after his father's death, Alex's mother re-married a man who sponsored the mother and Alex to move to Australia. His grandparents and other extended family were opposed to her re-marriage and the mother subsequently ceased all contact with them. It

was now the year 2000, Alex was 9 years old, living in Australia with his mother, a step father who didn't want him and two younger step-siblings. He spoke virtually no English. At home, Alex slept in his own bedroom while his mother and the younger two children slept in a room that was locked to prevent Alex from entering.

Nine months after immigrating to Australia child protection services became involved. Alex was not enrolled in any formal education. His mother told the Government Department investigating the situation that there was no love between her and Alex. His step father said that he had no relationship with Alex and he did not see him as being important. The mother verbalised that she wanted Alex out of the home and that in their country of origin, she had asked the authorities to take Alex away, but they had refused. The child protection professionals noted that Alex presents as very masculine and wears boy's clothes. He had told his mother that he wanted to be a boy. During the course of the investigation and subsequently, Alex was placed in substitute residential care. Alex's mother refused attempts by the Department to arrange for her to have contact with Alex and would not become involved with decisions concerning Alex's day to day care, safety or well-being. The investigation concluded that, at 10 years of age, Alex had been rejected by his family and that his mother did not wish to work towards Alex returning to her care. She said that she did not want Alex in her life and did not want to see him again.

Despite this, there was an attempt at reconciliation in 2001 but his mother and step father excluded Alex from the application they made for permanent residential status and both wrote to child protective services at this time renouncing their relationship with Alex.

It was around this time that contact was able to be made with an aunt who lived in Australia. She was the older sister of Alex's mother. Alex began living with her and his cousin and was enrolled in a local primary school. His aunt was caring but times were often difficult for everyone. Alex's behaviour was sometimes aggressive and hard to manage, and she had difficulty coming to terms with his gender identity issues and she tried to dissuade him initially from presenting as male. At school, Alex was meant to use the girl's toilets but he was so resistant to doing so that he did not drink all day and wore nappies to school. He became upset when having to stand in the line for girls and instead he stood in the middle, between the lines designated for the girls and the boys.

As Alex started to experience puberty in the final year of primary school he became very distressed. He was threatening to kill himself to his aunt at home, telling her that he'd rather be dead than live this way. He wasn't a girl and he didn't want to be a girl. He told her that there had been times when he had thrown himself down the stairs to try and kill himself and she was frightened by her sense that, determined as he was, Alex was at risk of succeeding in this. He went into the school principal's office and, distraught, told him that he wanted to kill himself because nobody was taking this whole thing about his gender seriously.

His aunt started to accept him as a boy and introduced him socially as such. The school principal found a solution with the toilets whereby Alex would use the enclosed toilet for people with disabilities within the student toilet block. The school supported the students referring to him as "he and him" and he joined in with the boys' activities. He went on year

6 camp with his peers where he did Indian arm wrestles with all the boys and, of course, he beat everybody. With that he developed some kudos with the other kids and joined the boy's cricket team.

As Alex became recognised and accepted as a boy, he became happier. His behaviour improved with less expressed anger and his aunt commented that "he seemed to have some direction and some plan for the future".

In 2003 The Government Department, who remained as his legal guardian, arranged for Alex to be seen at the Children's Hospital. This is where he met an Associate Professor of Psychiatry and a Professor of Endocrinology who became his treating doctors. They went through his history at length. They examined him and did tests. They confirmed that anatomically Alex was female with normal female chromosomes. He had normal female hormone levels. But he was psychologically a boy. Intensely, consistently and persistently. There was no doubt that Alex's inner sense of who he was, was male. Alex was transgender, and experienced extreme distress when unable to live in his preferred gender, a situation known medically as gender dysphoria.

Alex was the first young person to present with these circumstances to the Children's Hospital. His treating doctors both recognised the need to intervene to help Alex's mental state. It is well known that trying to change someone's gender identity in a psychological sense (known as conversion therapy) not only doesn't work, but increases the risk of

depression, self-harm and suicide. A new treatment regimen developed by a group of doctors in the Netherlands had been taking hold in Europe and preliminary results were positive. This treatment involved starting adolescents on puberty blocking GnRH analogues, a reversible treatment that stops development of secondary sexual characteristics whilst allowing the young person to continue to otherwise grow normally in a physical, emotional and cognitive sense. On puberty blockers, Alex would not experience further breast growth and would not menstruate, two occurrences that caused him great distress. Without this distress, Alex could continue to present as male with confidence and it would give him time to mature before making treatment decisions that were not totally reversible like the blockers are, namely, using testosterone to masculinise his body. With testosterone, recommended by the Dutch group to start at age 16, Alex would experience a deepening of his voice, growth of body and facial hair, increased musculature and redistribution of fat deposits from his hips and buttocks to a more male physique. His facial bones would also change in subtle ways, with stronger jaw lines and harsher features and, when wearing clothes, he could exist in the world as a male without experiencing what the transgender community do on a daily basis. He would not get the strange looks, the double glances, suffer stigmatisation, discrimination, harassment and abuse. He would not be verbally and physically assaulted at school or on public transport. He could achieve educationally and vocationally to his potential and, in doing so, likely avoid the problems of most transgender people. Problems reported in statistics that are frightening. In Australia, 80% of transgender young people self-harm and 48% attempt suicide before the age of 24 years.

With this treatment recommended by the consultants involved in his care, there was a problem with gaining consent. Alex was desperate to start the blocker but he was only 13, he was estranged from his mother with the State Government being his legal guardian. This treatment was untested in Australia and, with its novelty in an area considered socially controversial, the Department in charge of his care sought legal advice. It was taken to the Family Court in December 2003 with the application accompanied by a supporting affidavit from Alex's child protection case worker of 18 months.

The Honourable Justice Nicholson presided over the case. It was conducted in an inquisitorial rather than an adversarial format. Alex had requested to meet with Justice Nicholson in private and was granted this opportunity, the content of this discussion, as requested by Alex, remains confidential.

An impressive array of expert medical witnesses with significant publication records both in clinical and teaching experience also gave evidence at the proceedings. There were his two treating Professors, an independent child and adolescent psychiatrist with experience in gender dysphoria, a specialist gynaecologist and fertility expert and an overseas expert child and adolescent psychiatrist and senior lecturer at an English university medical school. This last witness was the director of the specialist clinical service for children and adolescents with gender dysphoria in London and was asked to give his opinion on the current research and treatment options for gender dysphoria in children and adolescents.

The applicant also called the principal of Alex's primary school and the principal of his intended secondary school, both of which provided a faith based educational setting. They gave evidence orally. A child representative obtained the mental health file on Alex and it was received into evidence. The child representative also arranged for the preparation of a family report by a counsellor external to the Court, a person who had been working with Alex in the community for over 2 years during 2001 to 2003. This man was identified as the most appropriate person to make such a report given the relationship he had built up with Alex over time and the counselling he had provided in respect to his gender identity, his anger towards his mother and step father, his behaviour living at his aunt's, his peer relationships and his anxiety about situations where he might have to reveal that he has a female physical appearance.

It is clear from reading Justice Nicholson's judgement that he had connected with Alex's plight. He writes with empathy and concern for Alex's wellbeing. He states, "The evidence speaks with one voice as to the distress that Alex is genuinely suffering in a body which feels alien to him and disgusts him, particularly due to menstruation. It is also consistent as to his unwavering and profound wish to present as the male he feels himself to be." He also states that, "In the past, Alex has been depressed and self-harming when he has thought that his deep wish to present as a male has not been taken seriously. Those who know him well are supportive of the treatment that is proposed and concerned about the self-harming conduct if he is unable to embark on the proposed treatment." "On the other side of the balance, if treatment is not permitted there is consistent concern that Alex will revert to unhappiness, behavioural difficulties and self-harming behaviour. Socially, he will be significantly ill at



ease with body and self-image during his period of adolescent development until he is competent to make his own treatment decision. Transition into a male public identity will be more difficult than if it occurs at the commencement of secondary school.”

Justice Nicholson gave interim substantive orders for Alex to commence the recommended treatment as soon as possible. He also made orders permitting Alex to enrol in his new secondary school due to commence in 2004 under his preferred male name.

In the judgement, the orders were undoubtedly in Alex’ best interests. But, it has been the comments regarding consent for young people with gender dysphoria that have had a significant impact on future cases. For someone like me without legal expertise, the particular precedents and legal arguments used are difficult to comprehend. Justice Nicholson, using the case *Re: Marion* from the High Court of Australia (a case of an intellectually disabled girl whose parents requested a non-therapeutic hysterectomy to help manage her care) concludes that treatment for gender dysphoria in adolescents should also be classified as a special medical procedure. He states that in light of his analysis, “I am therefore satisfied that the treatment plan in the present case falls within the category of cases that require court authorisation.”

In 2007, the third such case of a child with gender dysphoria presented to the Royal Children’s Hospital. A seven year old transgender girl called Georgie (**Slide of Georgie**). Like Alex, she was highly distressed and needing urgent treatment to avoid self-harming

behaviour. When Georgie was only 10 years of age, she had a rapid and intense onset of male puberty with a voice that would soon deepen. She was extremely frightened, anxious. She said that she didn't want to live anymore. She had socially transitioned and was living as a girl. She had supportive and highly educated parents who were able to source pro bono legal representation to urgently access puberty blockers from the Family Court. This is the case known as Re: Jamie. Georgie is now able to be identified publicly following Family Court approval for this in 2013 and you may have seen her personal story, aired on the ABCs Australian Story in 2016.

In 2011, Georgie was given approval to start puberty blockers in an urgent manner but, as she was only 10 years and 11 months of age at the time, she was asked by the court to represent again in later adolescence for permission to commence oestrogen. This decision to have to reappear and again justify her need for treatment to the court was appealed by Georgie's family. It went to the Full Bench of the Family Court with the judgement being handed down 18 months later in 2013. The judgement of the Full Bench changed the legal landscape for transgender adolescents, but only partially **(See slide on medical treatment)**. Stage 1 treatment (use of puberty blockers) was no longer requiring court approval, but gender affirming hormones such as oestrogen and testosterone (known as stage 2 treatment) **(click slides to show court involvement)** are. It was the court that was required to determine whether or not a young person is competent to make the decision about hormone treatment. It didn't matter if that young person, their parents and a team of gender specialist doctors agreed that they were capable of providing consent and it was in their best interest. It was the court that must decide. In 2015 Georgie went back to court.

After 5 years of court proceedings regarding her gender identity and her treatment, she was finally given permission to start what we all knew she would need from the beginning. One tablet of oestrogen daily.

Few could have foreseen the social changes that would soon unfold across the western world with regards to gender identity after the decisions in Re: Alex and Re: Jamie. The visibility of trans people both young and old has been magnified exponentially through personal stories told through both mainstream and social media. There was the American youngster Jazz Jennings whose childhood and adolescent transition was documented in detail on YouTube. **(Slide of Jazz)** She became the face of Clean 'n Clear acne treatment and is now recognisable across the United States and beyond. Many others followed suit. **(Slide of John and Chaz)** Celebrity culture has contributed too, with the son of Angelina Jolie and Brad Pitt transitioning from Shiloh to John, Chaz Bono is now the son and not the daughter of Cher and Sonny Bono. Then there was, of course, the Kardashian contribution to this social phenomenon. **(Slide of Caitlyn Jenner)** Caitlyn Jenner came out on the front page of Vanity Fair after her surgical transition and with blanket publicity. She had gone from an Olympic gold medallist and all American hero as a man, to a woman who had the world talking.

This was happening in Australia too. Media interest in our Gender Service at the Royal Children's Hospital resulted in the ABC documentary 4 Corners **(Slide 4 corners)**. This was watched by 1.2 million Australians. In his introduction, Kerry O'Brien described it as such....

***“You don't set out to measure these things but I can't think of a more powerfully poignant story that I've introduced than this one. Nor can I think of one more capable of suspending prejudice and creating understanding. It's about transgender children, the potential nightmare they have to confront, the lives that hang in the balance and a special brand of courage that is ultimately inspirational.”*** There was the recent Australian Story episode on Georgie Stone which had over 1 million viewers too. Even this birth notice put in a local paper in rural Queensland shows that acceptance can be found where it is least expected **(Kai Slide)**. ***A retraction – Bogart. In 1995 we announced the arrival of our sprogget, Elizabeth Anne, as a daughter. He informs us that we were mistaken. Oops! Our bad. We would now like to present our wonderful son – Kai Bogert. Loving you is the easiest thing in the world. Tidy your room.***

Caitlyn Jenner says she knew all of her life that she was female, it is only now that she can live as herself. This is a message we hear from virtually all of the trans people who come to us and to the adult gender services too, where the average age of presentation is 40 years old. They tell us that they have always felt this way, but only now it feels safe to say who you feel you are. Safe in the knowledge that you are not alone. Safe in the knowledge that others haven't lost the love from their family by coming out, safe in the knowledge there are people who can help.

Numbers of children and young people asking for our support and treatment started increasing around 2011 and every year the numbers keep growing. **(Slide of GRAPH)**. I took over as the Director of the Gender Service soon after Professor Garry Warne retired in 2012.

Even then, I thought that it was going to be a small area of interest within my adolescent medicine practice. I was wrong. Very wrong. In 2017 we had 253 new patients referred to us. Our team has grown from 4 people in 2012 to now having 16 staff thanks to the generous support of the Victorian Government. With best estimates of transgender prevalence being 1.2% of the population, these numbers aren't going to be slowing down anytime soon. Nowhere in the western world have they even started to plateau.

As doctors we have no choice but to increase our capacity. The greatest time of risk of suicide is between the time that one decides they want help, and the time that they actually start to receive it. Our waiting list can literally be a killer. Every gender service around the world has this same problem and we are all doing our best. But, it was only in Australia that young people had to go to court for hormone treatment. We are were unique. We had a problem that impacted our care of these vulnerable young people that no one else in the world did.

The Court caused very real stress for the young person and the parents. Reassurance that the court had never refused anyone treatment was of little comfort. Uncertainty about the future with a trans child is bad enough; worrying about how they may fair in the playground at school, getting a job, a relationship, staying alive is enough. But the court brought more worries for them:

- What if my child is the first to be refused treatment?

- What if we can't find a lawyer that we can afford?
- What if my child becomes distressed with the months of delays and self-harms?
- What if I just can't do this anymore, when every step along the way of supporting my child is another battle?

For those willing to go through the Court, the process took on average 8 months and for some families cost upwards of \$30,000.

For the adolescents or parents who didn't want to go through the court process, the main problem was keeping the young person safe in the interim months or years. With intensive support, counselling and sometimes antidepressant medication, we could get them to their 18<sup>th</sup> birthday and help them to celebrate the milestone with a legal prescription. These 18<sup>th</sup> birthday appointments were always my favourite.

Increasingly though, the problems we faced related to the young people accessing the hormones off the internet from overseas. Not only did they not know exactly what is in them or what dose it might contain, they also didn't know what dose they should be taking, and often they don't tell us they are taking it as they know it was illegal.

The general community is shifting towards the view that being transgender is a part of normal gender diversity. Just as being lesbian or gay is being accepted as part of normal variation in sexual orientation. What families and young people were telling us was that the

mere thought of going to court gave them a message that there is something wrong with them. Every other competent young person could make decisions about their medical treatment but being transgender was enough to mean that they couldn't. This, in my view, was institutional discrimination.

We went about trying to change things. After the Jamie decision in 2013, where we felt that the judges had got it wrong, Georgie Stone and her family approached me to ask what we could do together. We sought out a legal academic, Associate Professor Fiona Kelly, an expert in Family Law. At first we tried to make the court process simpler, cheaper and less onerous on families through discussions with the relevant people within the Family Court. Despite reassurances from the highest level that the Court would do this, nothing changed. Nothing at all. We looked into the possibility that we could get change through some sort of appeal in the High Court but that was deemed highly unlikely given that a young person and their family would have to put themselves through it without any personal benefit in doing so. We went about trying to change the situation through federal legislation. We started doing this quietly **(Slide at Parliament House)** and then, more loudly. **(Media clip slide)**. We met with a large number of parliamentarians and their advisors over time, each one represented in the slide **(Slide politicians)**. We met with Human Rights Commissioners and presented at Senate Committees and written many letters. **(Slide Brandis)**. We had success with getting positive media coverage and the Attorney General appeared on our side, but with a liberal government housing a vocal and dominant right faction (think George Christenson, Cory Bernadi and Tony Abbott) we had no success in achieving any tangible, practical change.

Whilst this was happening, I was being targeted personally on line. AHPRA received a letter from an unnamed group, notifying them that I was a child abuser due to the nature of my work. As instructed by AHPRA I made an appointment with Christine Kilpatrick to inform her of the notification. Christine said, “show me that letter” and then went to say she’d been sent the same one but had thrown it in the bin. Fortunately the Medical Board also dismissed it as being politically motivated.

In 2017, a clever group of lawyers in Sydney created a situation known as a “case stated” which was able to appeal the Jamie decision of 2013. This was not through the High Court but with five judges rather than three on the Full Bench of the Family Court. This case is known as Re Kelvin **(Kelvin Slide)**.

The ground work had already been done and the intervening parties assembled. **(Slide of the Court makeup)**. On the side arguing for removal of the court were Kelvin’s lawyers, the Attorney General’s Office, The Australian Human Rights Commission and, with John Stanway’s support and financial backing, the Royal Children’s Hospital. Opposing us was the NSW Government Department of Family and Community Services.

Two weeks prior to the case being heard, the NSW Government lawyers requested that all of my written evidence be removed on the basis that it was opinion and not fact. This was despite the fact that it included the Australian Standards of Care and Treatment Guidelines I had written with more than 30 colleagues from across Australia based on all the available



published studies. A pre-trial hearing was arranged and as a result my evidence was not only to remain present for the case, but was admitted into evidence “as fact”.

In Court I experienced the joy of seeing powerful groups working together to support this most vulnerable and marginalised group of young people. I also experienced the schadenfreude of watching the barrister for our opposition get eaten alive by the five judges who had been through too many of these individual cases to count. Mr \*\*\*, representing the NSW Government presented evidence via articles written by an associate of the Australian Christian Lobby in a magazine called Quadrant. He was interrupted 20 seconds into his evidence by Justice Ryan, “Mr \*\*\*, the Quadrant Magazine is hardly a peer reviewed medical journal now is it”. He moved on to argue that the Court should remain in place to protect these children, criticizing “doctors like me” by saying that we didn’t have the children’s best interests at heart, that we were driven by our own political agenda and couldn’t be trusted. Justice Thackeray piped up looking flabbergasted, “Mr \*\*\*, do you really think these parents would rather trust a barrister like you than the Royal Children’s Hospital?” Just when you thought that it couldn’t get any worse for Mr \*\*\*, during a period of shuffling through his papers looking for something sensible to say he noticed that Justice Ainsley-Wallace was looking at him with an inquisitive look. “I’m sorry Your Honour, do you have a question for me?” Justice Ainsley-Wallace looking suitably unimpressed replied, “No, Mr \*\*\*, this is just my thinking face thank you. Move on!”

Two months later, on 29<sup>th</sup> November 2017, news came through that Justice Thackeray was handing down the judgement from the Full Bench. We gathered to await the news. The

clinical team, the lawyers, the young people and their parents standing together, just next door as it turns out. We had changed the law. Transgender adolescents now have the same legal rights to access medical treatment as all other adolescents.

Thank you.