

# HUMAN RIGHTS and DIVERSITY IN SEXUAL FORMATION AND EXPRESSION

XX111 ILGA World Conference

Geneva 2006

‘Glory be to God ...  
for dappled things...’\*

Rachael Wallbank  
[www.wallbanks.com](http://www.wallbanks.com)

\**Pied Beauty* by Gerard Manley Hopkins (1844-89)

# Jesus Christ and Transsexualism

As per the New Testament, Jesus:

- was not interested in judging others, including with regard to their sex, sexuality or gender differences, and advocated treating others as you would treat yourself
- said the only method of our judgement by the God of Love would be – how well we each had treated the least of the brothers and the sisters we had met in our lives

# *Assigned Sex or Legal Sex*

- Part of the legally recorded particulars of a person created by a state or government at or near the birth event
- Determined by a casual inspection of the external genitalia (only) – may not equate with a person's predominant biological sex
- Evidenced by a 'Birth Certificate'
- Is a legal (*and not a biological*) act and can be altered/amended by the State

# DIVERSITY IN SEXUAL FORMATION

- CHROMOSOMAL SEX
- GENITAL SEX  
(Internal and external genitalia)
- NEUROLOGICAL SEX / 'BRAIN SEX'
- HORMONAL SEX
- GENETIC SEX  
(present in plant, animal and human beings)

# Diversity in Sexual Formation

- male external genitalia as observed at birth

XY (Standard)

XXY (Klinefelter Syndrome)

XYY

XY (Transsexualism)<sup>^</sup>

- female external genitalia as observed at birth

XX (Standard)

XO (Turner Syndrome)

XX (Congenital Adrenal Hyperplasia)<sup>\*^</sup>

XY (Complete Androgen Insensitivity Syndrome)<sup>^</sup>

XY (Partial Androgen Insensitivity Syndrome)<sup>\*^</sup>

XY (5alpha-RD)<sup>\*^</sup>

XY (17beta-HSD)<sup>\*</sup>

XX (Transsexualism)<sup>^</sup>

- \* Gross genital ambiguity may be apparent at birth

- <sup>^</sup> can be assigned to a legal sex at odds with neurological sex / gender identity due to genital appearance at birth – only observable at puberty or later

# Defining Male and Female (1)

“Recent advances in the field of the genetics of sexual development have shown the extreme complexity of defining males and females from a biological standpoint. There is no one biological parameter that clearly defines sex. The second point is that there are differences between male and female brains very early in development. This suggests that the sexualization of the brain happens very early during embryonic life. The last point is that significant minorities of individuals are left out of simple civil rights because they don't fit established categories of sex.”

Dr Eric Vilain, paediatrician, Chief of Medical Genetics at the University of California USA. ABC Radio National 'The Health Report' 14.03.2005

# Defining Male and Female (2)

“And what I began to realise very early on is that in order to discover who or what a child is or for that matter who or what an adult is you have to ask them...I have a six year old, two seven year olds, (and) two eight year olds who spontaneously declare it (a sex different from that assigned based upon genitalia). They say “I’m a boy and I don’t know how you could not know that...” and sometimes they’ll start just saying “My name is Bob...”

\*Dr. William Reiner, child psychiatrist, University of Oklahoma Health Sciences Center ABC Radio National ‘The Health Report’ 14.03.2005

# Defining Male and Female (3)

“Traditionally an individual's primary sex characteristic is the person's gonads. It is now understood that an individual's gonads or other characteristics frequently do not correspond with other features of self and variations are common. And this is the case in conditions of transsexuality and intersex\* (and transsexuality can be considered a form of intersexuality)..”

\*individuals with apparent admixtures of male and female biological characteristics

Professors M Diamond & H G Beh “Ethics & Gender: The Right to be Wrong” University of Hawaii  
(publication pending)

# Australian Statute Law (1)

- Laws for the reassignment of legal sex and anti-discrimination law to protect people with diverse gender expression
- Some States, like New South Wales, treat all people with intersexual conditions, including transsexualism, (except infants) the same way
- Only Western Australia has a Panel Approval System
- All require Sex Affirmation Surgery (SRS) as a pre-condition to the reassignment of Legal Sex

# Australian Statute Law - Key Issues

1. \*Section 32A of *NSW Births, Deaths and Marriages Registration Act 1995* defines “**sexual reassignment surgery**” as  
“*a surgical procedure involving the alteration of a person’s reproductive organs carried out:*  
  
*(a) for the purpose of assisting a person to be considered to be a member of the opposite sex, or*  
  
*(b) to correct or eliminate ambiguities relating to the sex of the person.*”

# Australian Statute Law - Key Issues

2. \*Section 32I of *NSW Births, Deaths and Marriages Registration Act 1995* clearly states the effect of a change of a person's birth particulars as to their sex:

*“A person the record of whose sex is altered under this Part is, for the purposes of, but subject to, any law of New South Wales, a person of the sex as so altered.”*

\* As in any reassignment of *Legal Sex* due to an intersexual condition, the primary legal particulars and the actual birth certificate are amended

# Australian Statute Law - Key Issues

## 3. Current Law Reform Issues:

- The introduction of compassionate exceptional provisions to provide the re-assignment of legal sex where sex affirmation surgery is impossible due to age or health related issues
- Removal of prohibition on married people having their legal sex reassigned
- A Centre of Excellence to provide dedicated health services (especially for the young) and medical education

# Australian Common Law (1)

## *Re Kevin* (2001-2003)

*“In my view the expert evidence in this case affirms that brain development is (at least) an important determinant of a person’s sense of being a man or a woman. No contrary opinion is expressed. All the experts are very well qualified.”*

(Chisholm J at para 247)

## Re Kevin (2)

*“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”.*”

Chisholm J - at paragraph 272 ***Re Kevin: Validity of Marriage of Transsexual*** (2001) 28 Fam LR 158; [2001] FamCA 1074

## *Re Kevin* (3)

# The Fundamental Task of the Law

“...the fundamental task of the law..., in a legal and social context that divides all human beings into male and female, is to assign individuals to one category or the other, including individuals whose characteristics are not uniformly those of one or other sex.” (para 315)

“It is clear from the Australian authorities that post-operative transsexuals will normally be members of their reassigned sex” (para 329)

Chisholm J - at *Re Kevin: Validity of Marriage of Transsexual* (2001) 28 Fam LR 158; [2001] FamCA 1074

# The Common Law of Australia after *Re Kevin*

1. Transsexualism is a biologically derived intersexual condition and should be treated as such at law
2. Sex affirmation Treatment (including SRS) is rehabilitative of the condition of transsexualism – and purely cosmetic or imitative, but is intended to resolve the brain/body gender identity disunity that is transsexualism
3. After sex affirmation surgery, a person with transsexualism is of their affirmed sex at law and entitled to a legal marriage in that sex.

# Human Rights

The Preamble to the Universal Declaration of Human Rights:

*“...recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world”.*

# Human Rights

- universal and inalienable
- a concept that acknowledges the equality of all human beings;
- Acknowledges the mutually dependent need each of us has for the respect and honourable regard other
- Require ***Clarity of Expression*** and ***Reception*** as much as ***Assertion***

# Ubuntu

*“Umuntu ngumuntu ngabantu”* – “a person is a person because of other people. You can do nothing if you do not get the support of other people” (Nelson Mandela)

“It refers to gentleness, to compassion, to hospitality, to openness to others, to vulnerability, to be available to others and to know that you are bound up with them in the bundle of life” (Archbishop Tutu)

# The Importance of Diversity in Human Sexual Formation, Orientation and Expression

- To a specie's Biological health
- To a specie's Psychological health
- The  
    ‘**SHADOW**’ OF THE HUMAN PSYCHE \*  
    the *difference most feared* and  
    the *essential richness* needed for a  
    healthy experience of humanity

\* Dr Jung – that part of us we fail to see or know – Robert A. Johnson “Owning Your Own Shadow”.

# Diversity or difference in human sexual formation, orientation and expression as **Cultural *Shadow***

- *The* factor uniting diverse GLBTI people
- *Explains* the lengths to which cultures have gone to deny our existence – to refuse to see us - or to hear our reports of our experiences of difference as legitimate and other than evidence of mental illness
- *Confirms* how much the health of humanity as a whole depends upon the acceptance and appreciation of its diversity

# The Language of Human Rights Law Reform

- Demonstrate and Demand Clarity
- Avoiding Vague / Labelling / Medicalised / Diagnostic / Pathologising Words; eg Transgender, Transsexual, Intersex, GID, Gender Dysphoria etc
- Use descriptions of what people do rather than characterisations – to neutralise and normalise language and empower clarity in the communicating and defining rights

“If the 20<sup>th</sup> Century can be said to be the one in which the world was made safe for democracy, let it be said that the 21<sup>st</sup> century was the one in which the world was made safe for diversity.”

Shashi Tharoor - Author and UN Undersecretary-General for Communications and Public Information

“My Life is My Message”

M Gandhi

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