

## CASE COMMENT

JESSICA BERRY\*

Case name and citation: *AB v Western Australia; AH v Western Australia* (2001) 244 CLR 390

Court: High Court of Australia

Judges: French CJ, Gummow J, Hayne J, Keifel J, Bell J

Judgment date: 6 October 2011

### 1 Summary of Facts

AB and AH were both born female. ‘Each identified as male from an early age and was diagnosed as suffering from a gender identity disorder, or gender dysphoria.’<sup>1</sup> Both AB and AH had undergone gender reassignment procedures in the form of a bilateral mastectomy and testosterone therapy.<sup>2</sup> Neither had undergone a phalloplasty as the procedure is not performed in Australia because of the high risks associated with it and its low rate of success.<sup>3</sup> Neither had contemplated any further surgeries including a hysterectomy or oophorectomy as they did not consider it necessary to their sense of male identity.<sup>4</sup> In addition, ‘each had suffered the effects of surgery in the past and wished to retain their internal organs because they believed they might be beneficial for future phalloplasty, if advances in that procedure made it feasible.’<sup>5</sup>

### 2 Procedural History

The appellants applied to the Gender Reassignment Board (‘Board’) for a recognition certificate which would provide conclusive proof that each had undergone a reassignment procedure and was of male sex. Such a certificate is required for the issue of a birth certificate showing the person’s legally recognised sex. While the Board was satisfied that the appearance of both appellants was that of a male person and that both had adopted the lifestyle of a male person, in both cases it determined not to issue a recognition certificate because the appellants retained female reproductive systems. The Board held that ‘having a female reproductive system is inconsistent with being male, and inconsistent with being identified as male.’<sup>6</sup> The Board also determined that there could be adverse social and legal consequences if the appellants were issued a recognition certificate while they still had the

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\*Jessica Berry, BBus, is an LLB Candidate at Murdoch University. Jessica can be contacted via email at [jmberry50@hotmail.com](mailto:jmberry50@hotmail.com). Written correspondence can be sent care of *Murdoch University Law Review*, Murdoch University School of Law, 90 South Street, Murdoch, Western Australia 6150.

<sup>1</sup> *AB v Western Australia; AH v Western Australia* (2011) 244 CLR 390 [14].

<sup>2</sup> *Ibid* [11].

<sup>3</sup> *Ibid* [15].

<sup>4</sup> *Ibid*.

<sup>5</sup> *Ibid*.

<sup>6</sup> *Ibid* [12].

capacity to bear children. This determination was made even though the testosterone therapy undertaken by the appellants meant they were infertile, and that both had indicated an intention to continue testosterone therapy indefinitely.

After reviewing the Board's decisions, the State Administrative Tribunal ('SAT') set aside the decisions and granted each application for a certificate.<sup>7</sup> The State of Western Australia appealed the SAT's decisions and the Court of Appeal of the Supreme Court of Western Australia allowed the appeals from those decisions and set aside the SAT's decisions.<sup>8</sup> A majority composed of Martin CJ and Pullin J held that as the appellants had not had hysterectomies, members of the community would not identify them as male.<sup>9</sup> Buss JA dissented, noting the limited extent to which a person can alter their physical characteristics and that for the purposes of the Act, external physical characteristics were the relevant consideration.<sup>10</sup> The appellants then appealed to the High Court of Australia. The State of Western Australia was the first respondent with the Gender Reassignment Board joining as second respondent; the Australian Human Rights Commission was granted leave to intervene.

In a single judgment the High Court unanimously upheld the appeals and ordered that the decision of the Court of Appeal be set aside, having the effect of reinstating the orders of the SAT. The appellants sought and were awarded costs against the State of Western Australia.

### 3 Relevant Legislative Sections

The primary issue for determination was the interpretation of s 15(1)(b)(ii) of the *Gender Reassignment Act 2000* (WA) ('the Act') which provides that the Board must be satisfied that the person applying for a certificate has the 'gender characteristics' of the gender to which the person has been reassigned. (Interestingly, the Act uses the words 'has been reassigned,' not 'seeks to be reassigned to'). S 3 defines gender characteristics as 'the physical characteristics by virtue of which a person is identified as male or female.' The issue before the Court was what constitutes the gender characteristics by which a person is identified as either male or female, and if AB and AH exhibited these characteristics. 'The problem that vexed the Board, the SAT and the Court of Appeal...[was] that the Act is not clear and does not expressly state by whom the identification is to occur and against which criteria is the determination to be undertaken.'<sup>11</sup>

A secondary consideration in the case was the interpretation of s 14(1) which requires a person must have undergone a 'reassignment procedure' before that person can be issued a recognition certificate by the Board. S 3 defines a reassignment procedure as a medical or surgical procedure (or a combination of such procedures) to alter the genitals and other gender characteristics of a person, so that the person will be identified as a person of the opposite sex as to that indicated on their birth certificate. The Court had to determine whether the appellants had undergone a medical procedure as per this definition.

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<sup>7</sup> See *AB & AH v Gender Reassignment Board (WA)* (2009) 65 SR (WA) 1.

<sup>8</sup> See *Western Australia v AH* (2010) 41 WAR 431.

<sup>9</sup> *AB v Western Australia; AH v Western Australia* (2011) 244 CLR 390 [19].

<sup>10</sup> *Western Australia v AH* (2010) AMLC 30-025, 36,068 [197], [200]-[201], as cited in [21] of the High Court's judgment.

<sup>11</sup> Transcript of Proceedings, *AB v Western Australia; AH v Western Australia* [2011] HCATrans 178 (22 June 2011) [30].

Two approaches to statutory interpretation were used by the Court. The first being that the Act was interpreted in terms of its wider context including the ‘mischief rule.’<sup>12</sup> In this case the Act’s Long Title declares its purpose to be ‘to allow the reassignment of gender...in order to promote equality of opportunity and to provide remedies in respect of discrimination.’ The Act therefore seeks to remedy the difficulties faced by people who identify with the opposite sex to that noted on their birth certificate by providing a means for legal recognition of the person’s perception of their gender. The Court’s decision in favour of the appellants upheld this rule. The second interpretive approach acknowledges that because the nature of the Act is beneficial and remedial, and it deals in the protection of human rights, it ought to be given a ‘fair, large and liberal interpretation.’<sup>13</sup> This approach was used in interpreting the meaning of ‘surgical procedure’ in s 14(1) in particular.

#### 4 Arguments Presented

In relation to the construction of gender characteristics in s 15(1)(b)(ii), the appellants argued the section referred to social recognition of gender rather than actual possession of all physical characteristics of the gender to which assignment was sought.<sup>14</sup> In other words, how the proverbial man on the Clapham omnibus would recognise a person as a male or a female was submitted as the appropriate test. AB and AH argued that requiring them to have their remnant female reproductive organs removed would be an ‘unnecessarily restrictive application of the Act.’<sup>15</sup> They asked why, ‘when one looks at the beneficial purpose of this legislation... would Parliament have concerned itself not only with external characteristics, but also internal characteristics, characteristics known by no one other than the applicant themselves or apparent from medical intervention?’<sup>16</sup>

In turn, the respondent argued that the fact that the appellants retained female reproductive organs meant they could not be said to have the gender characteristics that would identify them as male.<sup>17</sup> They argued for a strict interpretation of the Act that, in the case of a female to male assignee, had the effect that the reassignee who had undergone a medical procedure that had the effect of altering their genitals and other gender characteristics and not undergone an operation considered too risky to be allowed to be performed in Australia, would inevitably be ineligible to make application under 14(1).<sup>18</sup> Gummow J noted that this strict interpretation could be seen as causing the Act to ‘misfire’ by treating differently male to female assignees and female to male assignees.<sup>19</sup> The respondent argued in response that ‘the fact that the Act is to attract a liberal and beneficial construction does not permit the Court, in effect, to ignore the language of the Act’<sup>20</sup> and that ‘[t]he identification requirement

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<sup>12</sup> This rule provides that where the words of a statute are ambiguous, a court should look to the defect the legislation sought to remedy and then adopt an interpretation of the words so as to ‘suppress the mischief and advance the remedy’: *Heydon’s Case* (1584) 3 Co Rep 7; *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR [408] cited with approval in *AB v Western Australia; AH v Western Australia* [2011] HCA 42 [10].

<sup>13</sup> *Waters v Public Transport Corporation* (1991) 173 CLR 1 [12], cited with approval in *AB v Western Australia; AH v Western Australia* (2011) 244 CLR 390 [24].

<sup>14</sup> Transcript of Proceedings, *AB v Western Australia; AH v Western Australia* [2011] HCATrans 178 (22 June 2011) [30].

<sup>15</sup> *Ibid* [20].

<sup>16</sup> *Ibid*.

<sup>17</sup> *Ibid* [40].

<sup>18</sup> *Ibid* [30].

<sup>19</sup> *Ibid* [5].

<sup>20</sup> *Ibid* [15].

in s 15(1)(b)(ii) is not merely... a general social identification'<sup>21</sup> but rather a reference to objective physical criteria by which identification is made. Taking the appellant's argument to its logical extreme, the respondent asserted that mere social identification was insufficient to meet the statutory test as if that were so, 'simply dressing as one gender or the other would be sufficient.'<sup>22</sup>

Regarding the construction of s 14(1), the appellants observed that the Act expressly eschews the undertaking of surgery as a prerequisite for the issue of a recognition certificate. They argued that the bilateral mastectomies and testosterone therapy that they had both undergone qualified as a reassignment procedure that altered their genitals and other gender characteristics as per the s 3 definition of 'medical procedure.' Interestingly, as the appellants pointed out, the fact that neither AB nor AH had undergone a phalloplasty was only an issue in the Court of Appeal; it was not raised before either the Board or the SAT. On this point the respondent argued that the Act could not be construed so as to ignore the genitalia as specific reference to the genitals is contained in the definition of reassignment procedure.<sup>23</sup>

## 5 Decision and Orders

The Court favoured the 'social identification' argument put forward by the appellants in their arguments regarding s 15(1)(b)(ii). It held that the physical characteristics by which a person is identified as male or female are confined to external physical characteristics that are socially recognisable and that social recognition of gender does not require detailed knowledge of a person's remnant sexual organs.<sup>24</sup> Buss JA in the Court of Appeal, and in turn the judges of the High Court, treated Parliament's use of the word 'identified as' rather than 'is' or 'will be' in the definition of 'gender characteristics' to support the conclusion that changes to internal sexual organs are not required by the Act. The Court noted that the Act contains no further requirements such as potential adverse social consequences as suggested in the respondent's arguments.<sup>25</sup> The Court approved of Buss JA's approach to interpretation of s 15(1)(b)(ii) because it 'gives effect to the evident purpose of the legislation and is consistent with its terms. It is an approach that gives proper weight to the central issue with which the legislation grapples: that the sex of a person is not, and a person's gender characteristics are not, in every case unequivocally male or female.'<sup>26</sup> The Court agreed that Buss JA's approach correctly gives s 15(1)(b)(ii) a 'fair and liberal interpretation in order... [to] achieve the Act's beneficial purposes.'<sup>27</sup>

In relation to the definition of 'reassignment procedure,' the Court held the Act did not require surgical intervention, and that either medical procedures (like testosterone therapy) or surgical procedures would satisfy the requirements. The Court noted that surgery is expressly required in other jurisdictions, and that the Western Australian Parliament was familiar with the other legislation and nonetheless did not expressly require surgery in order to acquire the gender characteristics by which a person is identified as male or female.<sup>28</sup> The Court further observed that s 14(1) does not require that an assignee undertake every possible procedure 'to

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<sup>21</sup> Ibid.

<sup>22</sup> Ibid [35].

<sup>23</sup> Ibid [45].

<sup>24</sup> *AB v Western Australia; AH v Western Australia* (2011) 244 CLR 390 [23].

<sup>25</sup> Ibid [38].

<sup>26</sup> Ibid [24].

<sup>27</sup> Ibid [21]-[24].

<sup>28</sup> Ibid [32].

become as male or as female as possible'<sup>29</sup> but rather requires only that the medical or surgical procedure alter the genitals and other gender characteristics of a person.

The Court found that policy considerations were appropriately considered by Parliament when the legislation was enacted and thus consideration of any adverse social or legal consequences of the appellants being legally recognised as male while still technically able to fall pregnant fell outside the appropriate considerations.<sup>30</sup>

## 6 Comment

This decision clarified that complete physical reassignment from one sex to another is not necessary in order to qualify for a recognition certificate. The decision established that a combination of non-surgical medical procedures, a person's perception of themselves and society's perception of them is sufficient. The Western Australian Equal Opportunity Commissioner hailed the decision as 'welcome' and one that brought clarity to the legislation.<sup>31</sup> Their Honours commenced their judgment by explaining why legislative intervention is necessary to enable courts to make a declaration about the gender of a person that is binding on others not party to the proceedings.

The words 'the sex of a person is not, and a person's gender characteristics are not, in every case unequivocally male or female' constitute a powerful declaration by the High Court about the reality that sex and gender are not a two option dichotomy where every person is exclusively male or female. The acceptance by the High Court of this approach to sex and gender may have implications for intersex and transgender people in future legal cases where there is a need to define their sex (for example, for the purpose of marriage).<sup>32</sup>

The appellants argued that the legislation modified, not codified the common law with respect to the s 14(1) surgery requirements, doing away with the previous common law distinction between post-operative and pre-operative transsexual persons. The ACT's Law Reform Advisory Council has said the decision has the effect of making the s 14(1) requirement 'pointless.'<sup>33</sup> The decision also stands as authority for 'beneficial' legislation which promotes or empowers human rights to be given a broad, fair and liberal interpretation to achieve its human rights objectives.'<sup>34</sup>

By clarifying the requirements for a recognition certificate and by making these requirements easier to meet, this decision has had a direct impact on the gender history provisions of the *Equal Opportunity Act 1984* (WA). Western Australia is the only state that does not recognise gender identity or transsexual discrimination as a ground of discrimination, which leaves members of the transgender community unprotected. In making recognition certificates easier to acquire, and equally easy to meet for female to male transgender persons

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<sup>29</sup> Ibid.

<sup>30</sup> Ibid [38].

<sup>31</sup> Western Australia, Equal Opportunity Commission. 'High Court Gender Reassignment Decision Welcomed' (Media Statement, 6 October 2011).

<sup>32</sup> Olivia Rundle, 'High Court interprets WA Provisions for Legal Recognition of Reassigned Gender' *Australian Health Law Bulletin* 2 (2012) 182 [184].

<sup>33</sup> Nicolas Perpetch, 'Sex-Swap Pair Win Court Case' *The Australian* (online), 7 October 2011 <<http://www.theaustralian.com.au/business/legal-affairs/sex-swap-pair-win-court-case/story-e6fmg97x-1226160667223>>.

<sup>34</sup> Lee Carnie, 'High Court Affirms Right to Gender Identity and Expression' Human Rights Law Centre, <<http://www.hrlc.org.au/jurisdiction/australia/b-v-western-australia-2011-hca-42-6-october-2011/>>.

as they are for male to female transgender persons, the decision allows more transgender individuals to access legislative protection of their rights. More widely, the decision has been recognised as one that encourages a broader acknowledgement of the challenges faced by transgender people and their rights. Commenting on the case, the Human Rights Law Centre said that ‘flexible understandings are required to grapple with the way that sex and gender are often assumed as unequivocal, in order to adequately respect the rights of transgender people.’<sup>35</sup>

Following the handing down of the court’s decision the Western Australian Attorney-General, Christian Porter, who was behind the appeal of the SAT’s decision released a statement to the media. In his statement Mr Porter said, “whether this outcome was what Parliament intended when the law was passed is unclear and today’s decision will be considered in detail in the context of the Parliament debates at the time the legislation was passed in the coming weeks.”<sup>36</sup> To date, however, there has been no change to the legislation.

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<sup>35</sup>Ibid.

<sup>36</sup> Quoted by Emily Moulton, ‘Court Rules Transsexuals Do Not Require Gender Reassignment to Become Men’ *The Australian* (Online) 6 October 2011 < <http://www.theaustralian.com.au/court-rules-transsexuals-do-not-require-gender-reassignment-to-become-men/story-e6frg13u-1226160129097>>.