

HIGH COURT OF AUSTRALIA

FRENCH CJ,
GUMMOW, HAYNE, KIEFEL AND BELL JJ

Matter No P15/2011

AB

APPELLANT

AND

STATE OF WESTERN AUSTRALIA & ANOR

RESPONDENTS

Matter No P16/2011

AH

APPELLANT

AND

STATE OF WESTERN AUSTRALIA & ANOR

RESPONDENTS

AB v Western Australia
AH v Western Australia
[2011] HCA 42
6 October 2011
P15/2011 & P16/2011

ORDER

In each matter:

1. *Appeal allowed.*

2. *Set aside paragraphs 1 to 4 of the order of the Court of Appeal of the Supreme Court of Western Australia made 2 September 2010 and in their place order that the appeal to that Court be dismissed.*
3. *The first respondent pay the appellant's costs in this Court.*

On appeal from the Supreme Court of Western Australia

Representation

S Penglis for the appellant in both matters (instructed by Freehills)

G T W Tannin SC with C S Bydder for the first respondent in both matters (instructed by State Solicitor (WA))

Submitting appearance for the second respondent in both matters

Intervener

D S Mortimer SC with E A Bennett intervening on behalf of the Australian Human Rights Commission (instructed by Australian Human Rights Commission)

Notice: This copy of the Court's Reasons for Judgment is subject to formal revision prior to publication in the Commonwealth Law Reports.

CATCHWORDS

AB v Western Australia

AH v Western Australia

Statutes – Construction – Gender reassignment – Applications for recognition certificates as males – Reassignment procedures undertaken to alter genitals and gender characteristics – Appellants adopted lifestyle and have physical appearance of males – Retain some female sexual organs – Whether requirement that person have "the physical characteristics by virtue of which a person is identified as male or female" met – Whether adverse social consequences or community standards and expectations permissible considerations.

Words and phrases – "gender", "gender characteristics", "physical characteristics by virtue of which a person is identified", "reassignment procedure", "recognition certificate", "transsexual".

Gender Reassignment Act 2000 (WA), ss 14(1), 15(1).

FRENCH CJ, GUMMOW, HAYNE, KIEFEL AND BELL JJ. For many years the common law struggled with the question of the attribution of gender to persons who believe that they belong to the opposite sex. Many such persons undertake surgical and other procedures to alter their bodies and their physical appearance in order to acquire gender characteristics of the sex which conforms with their perception of their gender. Self-perception is not the only difficulty with which transsexual persons must contend. They encounter legal and social difficulties, due in part to the official record of their gender at birth being at variance with the gender identity which they have assumed.

Lockhart J in *Secretary, Department of Social Security v "SRA"* and

Mathews J in *R v Harris* reviewed decisions in Australia and overseas which dealt with the question of the recognition to be afforded by courts to the gender of a transsexual person who had undertaken a surgical procedure. In each case it was held that the decisions in *Corbett v Corbett* and *R v Tan*, which applied a purely biological test, should not be followed. Lockhart J in *SRA* observed that the development in surgical and medical techniques in the field of sexual reassignment, together with indications of changing social attitudes towards transsexuals, led to that conclusion. His Honour said that gender should not be regarded merely as a matter of chromosomes. It is partly a psychological question, one of self-perception, and partly a social question, how society perceives the individual.

In *Re T McMullin* J observed that whilst courts could deal with some legal situations involving the reassignment of gender, they could not make a declaration as to the gender of a person which would bind persons who were not parties to the proceedings. Legislation was necessary.

Legislation which provides for the registration of a change to the official records of a person's gender has been passed in each of the States and Territories of Australia. In Western Australia the *Gender Reassignment Act 2000* (WA) ("the Act") provides for the issue of a recognition certificate which is conclusive evidence of the fact that a person has undergone a reassignment procedure and "is of the sex stated in the certificate".

The long title of the Act states that its purposes are to allow the reassignment of gender and establish a Gender Reassignment Board ("the Board") with power to issue recognition certificates, and to make necessary consequential legislative amendments, in order to promote equality of opportunity and to provide remedies in respect of discrimination. These statutory objects and their nature, which is remedial and beneficial, assume importance in these appeals.

The functions of the Board are to receive and determine applications for recognition certificates and to issue recognition certificates in suitable cases. On its production the certificate is required to be registered by the Registrar of Births, Deaths and Marriages ("the Registrar"), who must alter any register or index kept by the Registrar as may be necessary in view of the reassignment. A birth certificate for the person is to issue from the Registrar showing the person's sex in accordance with the register.

Before a person can apply to the Board for a certificate, it is necessary that the person has undergone a reassignment procedure. A "reassignment procedure" is defined to mean:

"a medical or surgical procedure (or a combination of such procedures) to alter the genitals and other gender characteristics of a person, identified by a birth certificate as male or female, so that the person will be identified as a person of the opposite sex and includes, in relation to a child, any such procedure (or combination of procedures) to correct or eliminate ambiguities in the child's gender characteristics".

Section 15 of the Act contains the conditions for the grant of a recognition certificate. Section 15(1)(a) contains certain jurisdictional requirements. It is satisfied if one or more of the following applies: that the reassignment procedure which the applicant has undertaken was carried out in Western Australia; the applicant's birth is registered in that State; or the applicant has been a resident of the State for not less than 12 months.

Section 15(1)(b) provides that the Board must be satisfied that the person applying for a recognition certificate:

- "(i) believes that his or her true gender is the gender to which the person has been reassigned;
- (ii) has adopted the lifestyle and has the gender characteristics of a person of the gender to which the person has been reassigned; and
- (iii) has received proper counselling in relation to his or her gender identity."

The focus of these appeals is sub-par (ii) and the term "gender characteristics". That term is defined to mean "the physical characteristics by virtue of which a person is identified as male or female". What is comprehended by that part of s 15(1)(b)(ii) falls to be determined by construing its terms in the context of the Act as a whole and by reference to its evident purposes. In *Commissioner for Railways (NSW) v Agalinos*, Dixon CJ referred to the importance of the context, general purpose, policy and fairness of a statutory provision, as guides to its meaning. The modern approach to statutory interpretation uses "context" in its widest sense, to include the existing state of the law and the mischief to which the legislation is addressed. Judicial decisions which preceded the Act may be relevant in this sense, but the task remains one of the construction of the Act.

Each of the appellants, AB and AH, identify themselves as male although they retain some gender characteristics of a female. Each of the appellants has undergone gender reassignment procedures, in the nature of a bilateral mastectomy and testosterone therapy.

The Board was satisfied in each case that the appearance of each of the appellants is that of a male person and that all the indications were that they had adopted the lifestyle of such a person. The sole reason why it determined not to issue a certificate to them was that they retained a female reproductive system. The Board reasoned:

"The fact of having a female reproductive system is inconsistent with being male. Because it is inconsistent with being male, it is inconsistent with being identified as male."

The Board went on to say that there would be adverse social and legal consequences should the appellants be issued a recognition certificate whilst they have the capacity to bear children.

Following a review of the Board's decisions in each case, pursuant to s 21(1) of the Act, the State Administrative Tribunal ("the Tribunal") set the decisions aside, granted each application for a recognition certificate and directed the Board to issue such a certificate. The Court of Appeal of the Supreme Court of Western Australia allowed appeals from those decisions and set aside the Tribunal's decisions, but made no orders as to costs. For the reasons which follow these appeals should be allowed with costs and the orders of the Court of Appeal set aside, with the result that the decision and orders of the Tribunal are reinstated.

Each of the appellants gave evidence before the Tribunal and led medical evidence. Each identified as a male from an early age and was diagnosed as suffering from a gender identity disorder, or gender dysphoria. The *Diagnostic and Statistical Manual of Mental Disorders*, to which the Tribunal referred, explains that the term "gender dysphoria" denotes "strong and persistent feelings of discomfort with one's assigned sex, the desire to possess the body of the other sex, and the desire to be regarded by others as a member of the other sex." AB was aged 31 at the time of the Tribunal hearing and AH was 26. AB commenced testosterone therapy in 2004 and underwent a bilateral mastectomy in 2005. AH commenced the same therapy in 2006 and underwent the same surgical procedure in 2007 and had a further revision of the procedure in 2008.

Neither AB nor AH contemplate any further surgical procedures. It was explained, by medical evidence to the Tribunal, that a penis construction (phalloplasty) is not performed in Australia, because of the high risks associated with it and its low rate of success. Neither of the appellants wished to have a hysterectomy. Neither considered it necessary to their sense of male identity. Each had suffered the effects of surgery in the past and wished to retain their internal organs because they believed that they might be

beneficial for future phalloplasty, if advances in that procedure made it feasible.

Each of the appellants has maintained testosterone therapy. Whilst they continue that treatment they will remain infertile. Evidence of an endocrinologist was tendered at the Tribunal hearing concerning the possibility, expressed as a percentage, that each of AB and AH might conceive children were they to discontinue that treatment. The endocrinologist gave evidence that he had not encountered one female to male transsexual who had ceased the therapy. Each of AB and AH told the Tribunal that they would not do so and explained that it was essential to their way of life that they maintain it. The Tribunal accepted this evidence "without reservation".

The Tribunal detailed the changes which had been brought about to the appellants both internally, with respect to their sexual organs, and externally. The Tribunal stated:

"The applicants have not merely altered their external appearance by superficial means. The medical and surgical procedures they have undergone have altered their genitals and other gender characteristics in profound ways. They have undergone clitoral growth and have the voices, body shapes, musculature, hair distribution, general appearance and demeanour by virtue of which a person is identified as male. They have acquired characteristics that are consistent with being male, and inconsistent with being female, to the extent that only an internal medical examination would disclose what remains of their female gender characteristics. Insofar as what remains of their female gender characteristics has been altered to such an extent that it no longer functions, it is no longer a female gender characteristic."

The Tribunal was mindful of the possibility that the appellants could not be said, with absolute certainty, to be permanently infertile. However, it accepted that the reversion rate of female to male transsexuals was rare. In the view of the Tribunal the appellants had done "everything medically available, short of hysterectomy, to alter their genitals and other gender characteristics so as to be identified as male." It said "[a] requirement that each [appellant] go even further and undergo a hysterectomy in these circumstances would seem to serve the purpose only of requiring further proof of their conviction."

The issue before the Court of Appeal was whether the appellants satisfied the requirement of s 15(1)(b)(ii). In turn, this required consideration of the definition of the term "gender characteristics" and, in particular, whether each of the appellants has the "physical characteristics by virtue of which a

person is identified" as male. The majority (Martin CJ and Pullin JA) did not consider this question could be answered in the appellants' favour, because the appellants retain some characteristics of a female. Martin CJ held that each of the appellants "possess none of the genital and reproductive characteristics of a male, and retain virtually all of the external genital characteristics and internal reproductive organs of a female" and that "[t]hey would not be identified, according to accepted community standards and expectations, as members of the male gender." Pullin JA agreed that it was necessary to apply community standards in order to answer the question posed by the Act.

Martin CJ recognised the nature of the legislation to be beneficial, but said that it was of no assistance on the approach which he took to the requirements of s 15(1)(b)(ii). That approach was necessitated because Parliament had determined "that value judgments are to be made, involving questions of fact and degree, as to the gender with which a particular applicant is to be identified." His Honour rejected the prospect that a person's gender characteristics might be determined by the observation of a casual bystander.

Buss JA dissented. His Honour considered that the physical characteristics by which a person is identified as male or female are confined to external physical characteristics, for the purposes of the Act. His Honour noted that there are obvious limitations to the extent to which a person's physical characteristics could be altered. His Honour observed that the purpose of the Act is to alleviate the condition of persons suffering from gender dysphoria, by providing a legislative mechanism which will enable their reassigned gender to be legally recognised. The disconformity inherent in gender dysphoria is as between the person's rejection of their assigned gender and their external physical characteristics. It is the latter to which the legislation is directed, his Honour said.

Buss JA also considered the language chosen by the Parliament in the definitions of the terms "gender characteristics" and "reassignment procedure" in the Act. His Honour observed that, if the physical characteristics by virtue of which a person is identified as male or female were intended to include internal physical characteristics, such as organs associated with the person's gender at birth, the definitions would respectively have referred to the physical characteristics by virtue of which a person "*is*" a male or female or "*will be*" a person of the opposite sex. Instead the definitions refer to the physical characteristics by which a person is, or will be "identified" as a person of the opposite sex. His Honour read the words "identified as" as connoting "recognised as".

The general approach of Buss JA is to be preferred. 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. As the definition of "reassignment procedure" makes plain, a person's gender characteristics may be ambiguous.

The injunction contained in s 18 of the *Interpretation Act* 1984 (WA) is relevant to the task of construing the provisions of the Act. Moreover, the principle that particular statutory provisions must be read in light of their purpose was said in *Waters v Public Transport Corporation* to be of particular significance in the case of legislation which protects or enforces human rights. In construing such legislation "the courts have a special responsibility to take account of and give effect to the statutory purpose". It is generally accepted that there is a rule of construction that beneficial and remedial legislation is to be given a "fair, large and liberal" interpretation.

The Act acknowledges the difficulty under which certain members of society labour by reason of the disconformity between their belief about who they are, by reference to their gender, and the social-historical record of their gender at birth. It seeks to alleviate that suffering and the discrimination which such persons may face by providing legal recognition of the person's perception of their gender.

However, a person's belief about their gender is but one requirement for the issue of a recognition certificate. Section 14 of the Act contains the minimum condition for a recognition certificate, namely that an applicant for a certificate has undergone a medical or surgical procedure to alter their genitals or other gender characteristics. The undertaking of that procedure may be seen to evidence the commitment by the person to the gender to which the person seeks reassignment. It was the absence of such an undertaking on the part of the applicant for a wife's pension which created the difficulty in *SRA*.

Section 15(1)(b)(i) also requires the Board to be satisfied about the person's belief in his or her true gender and sub-par (iii) requires the person to have received proper counselling concerning his or her gender identity. These are matters which are directed to how the person perceives himself or herself and the certainty of that perception.

Section 15(1)(b)(ii) involves an enquiry, on the part of the Board, of a different kind. It requires, in the first place, that the Board be satisfied that the person has adopted the lifestyle of a person of the gender to which the person seeks reassignment. The adoption of a lifestyle will reflect something about a person's self-perception and, in some respects, about their maleness or

femaleness. The word "lifestyle" refers to the characteristic manner in which a person lives and reflects a collection of choices which that person makes. It has both a private and a public dimension. Many lifestyle choices made by a person are observable by other members of society, by reference to how that person lives and conducts himself or herself. The first enquiry of s 15(1)(b)(ii) may therefore also direct the attention of the Board to a social perspective.

Section 15(1)(b)(ii), read with the s 3 definition of "gender characteristics", further requires the Board to be satisfied that the person has the physical characteristics "by virtue of which a person is identified as male or female". In resolving what is intended by this provision, much turns upon the use of the word "identified". The majority in the Court of Appeal appear to have considered that it required the Board to determine the extent to which a person had assumed the characteristics of the opposite sex. In the way in which that enquiry was approached, it appears to have been assumed that there is some point which is reached, in the transition, when a person might be regarded as male not female or female not male. That is not an approach that is reflected in the provisions of the Act.

Martin CJ observed that the word "identified" is used in s 3 in the definition of "reassignment procedure" ("identified by a birth certificate") and in the definition of "recognition certificate" ("that identifies a person who has undergone a reassignment procedure as being of the sex to which the person has been reassigned"). The inference his Honour drew from the usage of the word "identified" was that it carried the connotation of "established" or "accepted as". This suggests that an applicant for a recognition certificate must have achieved the gender characteristics of the opposite sex to a high standard.

Section 14(1) cannot be taken to require a particular level of success in achieving the gender characteristics of the opposite sex. Such an approach was considered in *R v Harris*, in relation to a male to female transsexual. However, as Lockhart J observed in *SRA*, a male to female transsexual after surgery is no longer a functional male, but a female to male transsexual is in a different situation. Even successful surgery cannot cause him to be a fully functional male. An approach to the requirements of s 15(1)(b)(ii) which has regard to the extent to which a person obtains gender characteristics of the gender to which they identify would therefore operate differentially and unfairly. Such an effect cannot be taken to have been intended in legislation such as this, which is of a remedial and beneficial kind.

It is also relevant that a surgical procedure to alter the genitals or other gender characteristics is not required of an applicant for a recognition certificate. The definition of "reassignment procedure" refers to a "medical *or*

surgical procedure". A medical procedure would include hormone therapy, such as that undertaken by the appellants. As the Tribunal observed, although surgery is a requirement of legislation providing for recognition of gender reassignment in other States, and it is evident that Parliament was familiar with that legislation, Parliament did not consider surgery to be a necessary step in order to acquire the gender characteristics by which a person is identified as male or female. The options thus provided by the Act do not lend support for a view that a person must take all possible steps, including with respect to their sexual organs, to become as male or female as possible.

On one view the definition of "reassignment procedure" might suggest a concern with the result achieved by the surgical procedure. The words "so that the person will be identified as a person of the opposite sex" may be thought to connote a level of certainty of identification as male or female. However, s 14(1) and s 15(1)(b)(ii) may be read together in a more harmonious way, by attributing the purposive aspect of s 14(1) to the person. Section 14(1) may be understood to require that the person undertakes a reassignment procedure with the intention that he or she may be identified by others as being of the gender to which he or she seeks reassignment. Furthermore, s 14(1) requires only that the medical or surgical procedure *alter* the genitals and other gender characteristics of a person. It does not require that the person undertake every procedure to remove every vestige of the gender which the person denies, including all sexual organs.

Martin CJ accepted that it could not have been intended that a person have all of the physical characteristics of a person of the opposite gender and held that the test must be one of sufficiency. However, that leaves unanswered the question – sufficient for what purpose? The answer would appear to be social recognition. The Act does not, by s 15(1)(b)(ii), contemplate some abstract evaluation of maleness or femaleness. Its objects suggest that the question for the Board is to be approached from a social perspective, which is to say, by reference to what other members of society would perceive the person's gender to be. Such a perspective is consistent with the objects of the Act, which are to remove impediments to the way in which a person lives within society. So long as the other requirements of ss 14(1) and 15(1)(a) and (b) are met it is intended that legal recognition be given of the gender with which the person is identified within society. Section 15(1)(b)(ii) is addressed to that perspective. The question it raises is what gender the person exhibits to other members of society, by reference to the gender characteristics they now have and to their lifestyle. That conclusion would be reached by reference to the person's appearance and behaviour, amongst other things. It does not require detailed knowledge of their bodily state.

The question whether a person is identified as male or female, by

reference to the person's physical characteristics, is intended by the Act to be largely one of social recognition. It is not intended to require an evaluation by the Board of how much of a person's body remains male or female. Rather, the Board is directed by s 15(1)(b)(ii) to the question of how other members of society would perceive the person, in their day-to-day lives. Such a recognition does not require knowledge of a person's remnant sexual organs.

The concern of s 15(1)(b)(ii) may be taken to be whether a transsexual person's appearance and behaviour in the conduct of their life would be accepted by other members of society as conforming to the gender to which the person seeks reassignment. That is what is intended by the phrase "is identified as male or female" in the s 3 definition of "gender characteristics". Such an understanding of the operation of s 15(1)(b)(ii) is consistent with the objects of the Act, which are to facilitate the acceptance of a person, as being of the gender to which they are reassigned, within society so that they may fully participate within it. No point would be served, and the objects of the Act would not be met, by denying the recognition provided by the Act to a person who is identified within society as being of the gender to which they believe they belong and otherwise fulfils the requirements of the Act.

The objects of the Act bring to mind what was said in *SRA*. Lockhart J there referred to what had been said many years ago by a Swiss court on the subject of post-operative transsexuals. Having observed that such a person's psychological association with a sex is in such a situation supported by anatomical changes, the Court suggested that it is preferable to legally recognise a state which the law did not prevent from coming into existence. To do so, the Court said, facilitates the person's social adaptation by permitting the person to lead a more normal life than before.

The Act contains no warrant for implying further requirements, such as potential adverse social consequences, to which the Board had regard, or community standards and expectations, to which the majority in the Court of Appeal referred. Such considerations are quite different from the social perspective mentioned above, which has regard to the assessment made of the person by members of society in everyday life. They involve matters of policy and value judgments according to which recognition should be given or refused. Considerations of policy and an understanding of the extent to which society is accepting of gender reassignment are matters which may be taken to have been considered when the Act was passed. The Act reflects the policy decisions taken. The objectives of the Act, and their social and legal consequences, are to be met by reference to its stated requirements. Those requirements, including those of s 15(1)(b)(ii), are to be given a fair and liberal interpretation in order that they achieve the Act's beneficial purposes.

The construction placed upon s 15(1)(b)(ii) and the identification which is its concern, does not mean that a recognition certificate is to be provided based only upon a person's external appearance, and that person's belief about his or her gender. Section 14 must be satisfied before a person can apply for a certificate. But that is the only provision in the Act which requires a surgical or other reassignment procedure. Once that condition and those of s 15(1)(a) are met, the Board is directed by s 15(1)(b) to other enquiries relating to the person's perception of themselves and to social perceptions about them. No further consideration of the extent of the person's bodily state is required.

No issue was taken on these appeals with the conclusion reached by the Board and the Tribunal as to the observable physical characteristics of each of the appellants. Counsel for the State of Western Australia accepted those findings to be correct. It follows that each of the appellants would be identified as having the gender characteristics of a male.

In this Court the Board was joined as the second respondent to each appeal but entered a submitting appearance. The opposition to the appeals was presented by the first respondent, the State of Western Australia. The Australian Human Rights Commission was granted leave to intervene.

As indicated earlier in these reasons, each appeal should be allowed, the orders of the Court of Appeal set aside, and in place thereof the appeals from the Tribunal should be dismissed. This will have the effect of reinstating the orders of the Tribunal. The Court of Appeal made no costs order. The appellants seek and should have orders against the State for their costs in this Court.