

# AB v Western Australia



**Bronwyn Byrnes**  
Senior Lawyer  
Australian Human  
Rights Commission

## HIGH COURT RULES "GENDER CHARACTERISTICS" ARE TO BE CONSIDERED FROM A SOCIAL PERSPECTIVE

In *AB v Western Australia*,<sup>1</sup> the High Court considered the application of the *Gender Reassignment Act 2000 (WA)* (GR Act) to two transsexual men\* who had undergone double mastectomies and hormone treatment. The High Court unanimously found that the GR Act did not require these men to undergo further surgery to remove their uterus and ovaries (hysterectomy) or construct a penis (phalloplasty) in order to obtain a gender recognition certificate recognising them as men. This decision confirms that the Gender Reassignment Board must consider how others perceive an individual in everyday interactions rather than simply the state of his or her genitalia and reproductive organs.

### STATUTORY FRAMEWORK

Under the GR Act, a person may apply to the Board for a gender recognition certificate, where he or she has undergone a reassignment procedure.<sup>2</sup> A reassignment procedure means 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 to that appearing on his or her birth certificate.<sup>3</sup>

In order to issue a recognition certificate, the Board must also be satisfied, among other things, that the person has the "gender characteristics of a person of the gender to which the person has been reassigned" (the relevant inquiry).<sup>4</sup> The GR Act defines gender characteristics to be the "physical characteristics by virtue of which a person is identified as male or female".

The *Equal Opportunity Act 1984 (WA)* affords non-discrimination protection on the ground of "gender history" to persons issued a gender recognition certificate.<sup>5</sup>

### CIRCUMSTANCES OF THE APPELLANTS

The appellants, AB and AH were both born with the biological sex characteristics of a female but identified as a male from an early age. AB was approximately 33 and AH was approximately 28 at the time of the High Court's hearing. Both had undergone a bilateral mastectomy and commenced testosterone therapy some years ago. Consequently, both have "the voices, body shapes, musculature, hair distribution, general appearance and demeanour by virtue of which a person is identified as male".<sup>6</sup> They have undergone clitoral growth. Only an internal medical examination would disclose what remains of their internal reproductive systems.<sup>7</sup> Neither contemplates any further surgical

procedures, in part because a phalloplasty is not performed in Australia due to its lack of success and high attendant risks.<sup>7</sup>

### BOARD, TRIBUNAL AND COURT OF APPEAL DECISIONS

The Board refused to grant either appellant a recognition certificate for the sole reason that they each retained a female reproductive system. The State Administrative Tribunal in Western Australia overturned the Board's decision.<sup>8</sup> The majority of the Court of Appeal (Buss JA dissenting) reinstated it, holding 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".<sup>9</sup>

### COMMISSION'S INTERVENTION

The Australian Human Rights Commission was granted leave to intervene in the High Court proceedings.<sup>10</sup> The Commission submitted that the focus of the relevant inquiry should be on how those with whom the appellants will deal in their daily lives will perceive them and how they perceive themselves and present to others. This construction was evident from the GR Act's overarching purpose, which is to eliminate discrimination both in terms of enabling applicants to obtain a certificate recognising his or her correct gender and prohibiting others from discriminating against a person on the basis of their gender history in their daily lives.

The Commission also submitted that this construction was consistent with the right to recognition as a person before the law under article 16 of the *International Covenant on Civil and Political Rights* (ICCPR) and the right to privacy under article 17 of the ICCPR as understood by the *Yogyakarta Principles*.<sup>11</sup> Additionally, the Commission submitted that a construction that requires transsexual men to undergo a phalloplasty in order to qualify for a recognition certificate is discriminatory and should be avoided, as it would make it more difficult, if not impossible, for transsexual men to obtain a recognition certificate.

### HIGH COURT'S DECISION

The High Court overturned the Court of Appeal's decision with the result that both appellants were granted recognition certificates recognising them as men. Consequently, they will both benefit from the relevant non-discrimination provisions in the *Equal Opportunity Act 1984 (WA)*. Consistent with the commission's submissions, the High Court determined that the relevant inquiry under the GR Act required the board to approach its task from a "social perspective", that is, by reference to "how other members of society would perceive the person, in their day-to-day lives".

That conclusion would be reached by reference to the person's appearance and behaviour, among other things. It does not require detailed knowledge of a person's bodily state<sup>12</sup> or remnant sexual organs.<sup>13</sup>

In this case, the appellants had undergone the requisite reassignment procedure by having a double mastectomy and hormone treatment. The High Court recognised that under the terms of the GR Act, a reassignment procedure could be either a medical or surgical procedure. It confirmed that hormone therapy is sufficient.<sup>14</sup> The court then determined that each of the appellants would be identified as having the gender characteristics of a male in their daily interactions, despite not having had a phalloplasty or hysterectomy.

## CONCLUSION

The High Court's decision clarifies that surgery to construct and remove a person's genitals and reproductive organs is not required for a grant of a recognition certificate under the GR Act. This decision is critical for transsexual men with a connection to Western Australia because it will enable them to apply for a recognition certificate without first undergoing a phalloplasty, which is risky, expensive and generally not performed in Australia. The decision will also be important for transsexual men with a connection to South Australia, as the *Sexual Reassignment Act 1988* (SA) is written in similar terms to the GR Act.<sup>15</sup>

While the High Court's decision turns on the construction of the GR Act, members of the broader transsexual community should still celebrate it. The decision supports the view that surgery to fully remove and construct genitalia is not required in order for community members to identify a person as a man or woman in their daily lives. This view contrasts with the dictionary definitions of the male and female gender and perceived community standards, which focus upon genitalia and reproductive organs.<sup>16</sup> Indeed, statutory gender or sex recognition regimes in all other Australian states (other than South Australia) and territories only enable legal recognition of a person's gender after they have undergone surgery to alter their reproductive organs.<sup>17</sup> These states and territories should seek to amend their legislation so that risky surgery, not performed in Australia, is no longer a prerequisite to legal recognition of gender or sex in Australia.

## NOTES

\* The author acknowledges that terminology is strongly contested. This article uses the term 'transsexual' to refer to an individual who has taken some surgical or medical treatment to assume the physical characteristics of another gender.

1. *AB v Western Australia* 244 CLR 390.
2. *Gender Reassignment Act 2000* (WA), s14(1).
3. *Gender Reassignment Act 2000* (WA), s3.
4. *Gender Reassignment Act 2000* (WA), s15(1)(B)(ii).
5. *Equal Opportunity Act 1984* (WA), ss35AB & 4.
6. *AB & AH v Gender Reassignment Board of Western Australia* [2009] WASAT 152 [138].
7. *ibid.*
8. *AB & AH and Gender Reassignment Board of Western Australia* [2009] WASAT 152.
9. *The State of Western Australia v AH* [2010] WASCA 172, [125] (Martin CJ); [125] (Pullin J).

10. See s11(1)(o) of the *Australian Human Rights Commission Act 1986*.
11. In 2007, a group of academics and UN human rights experts developed the 'Yogyakarta Principles'. The experts agree that the Yogyakarta Principles reflect the existing state of international human rights law in relation to issues of sexual orientation and gender identity and affirm binding international legal standards with which all states must comply. See: <http://www.yogyakartaprinciples.org/> (viewed 10 July 2012).
12. 244 CLR 390, 405 [34].
13. *ibid.*, 405 [35].
14. *ibid.*, 404 [32].
15. *Sexual Reassignment Act 1988* (SA), s7.
16. *The State of Western Australia v AH* [2010] WASCA 172, 37, 38 [114] (Martin CJ); 39 [124] – 40 [125] (Pullin J).
17. *Births, Deaths and Marriages Registration Act 1995* (NSW), s32B; *Births, Deaths and Marriages Registration Act 1996* (Vic), s30A; s7; *Births, Deaths and Marriages Registration Act 2003* (Qld), s23; *Births, Deaths and Marriages Registration Act 1999* (Tas), s28A; *Births, Deaths and Marriages Registration Act 1996* (NT), s28B; *Births, Deaths and Marriages Registration Act 1997* (ACT), s24. For a useful summary, see: The Australian Human Rights Commission, *Sex Files Report* (2009), 15–21.

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