IN THE HIGH COURT OF AUSTRALIA
PERTH REGISTRY

No P15 of 2011

Between:

AB

Appellant

and:

STATE OF WESTERN AUSTRALIA

First Respondent

GENDER REASSIGNMENT BOARD OF WESTERN AUSTRALIA

Second Respondent

APPELLANT'S SUBMISSIONS

Part I: Certification of suitability for publication on the Internet

1 These submissions are in a form suitable for publication on the internet.

Part II: Statement of Issues

2 The appeal concerns the proper construction of the *Gender Reassignment Act 2000* (WA) (the **Act**).

3 In particular, the appeal concerns the proper construction to be given to the words "*the gender characteristics of a person of the gender to which the person has been reassigned*" as they appear in section 15(1)(b)(ii) of the Act in light of the definition of:

(a) "*gender characteristics*" in section 3 of the Act (which are defined to mean "*the physical characteristics by virtue of which a person is identified as male or female*"); and

(b) "*reassignment procedure*" in section 3 of the Act (which 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...so that the person will be identified as a person of the opposite sex*").

4 The ultimate issue which falls for determination is whether the appellant satisfies section 15(1)(b)(ii) of the Act notwithstanding that the appellant:

(a) does not possess the external genitals of a male; and

(b) possesses certain internal organs of a female.

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5 The issues which present themselves for consideration and determination include:

5.1 How is the fact that the Act is a remedial and beneficial enactment to be taken into account when determining theses issues?

5.2 Does the Act require an applicant to satisfy the second respondent (the **Board**) that the applicant possesses all of the physical characteristics by virtue of which a person is identified as the gender to which the applicant seeks to be reassigned, or only some of them?

5.3 If only some of them, which of them? In particular, does the Act require a female-to-male applicant to possess the external genitals of a male:

(a) which can only be achieved by surgery;

(b) when such surgery is attended with high risks and low success; and

(c) when, as a result, such surgery is not available in Australia?

5.4 Do the "*gender characteristics*" include internal physical characteristics? If so, what are the internal physical characteristics that the Act requires a female-to-male applicant to possess?

5.5 From what perspective is the Board's determination for the purposes of section 15(1)(b)(ii) of the Act to be made and against what criteria?

5.6 Does the appellant satisfy the Act upon its proper construction?

Part III: Certification as to compliance with section 78B of the Judiciary Act 1903

6 The appellant has considered whether any notice should be given in compliance with section 78B of the *Judiciary Act 1903* (Cth) and has concluded that no such notice should be given.

Part IV: Citation of judgments below

7 There are no authorised reports of the reasons for judgment of the State Administrative Tribunal (the **SAT**) or of the Court of Appeal of Western Australia. The citation of the decision of the SAT is *AB & AH and Gender Reassignment Board of Western Australia* [2009] WASAT 152. The citation for the decision of the Court of Appeal of Western Australia is *The State of Western Australia v AH* [2010] WASCA 172.

Part V: Background facts

8 The relevant facts as found by the SAT in its reasons for decision (**SAT Reasons**) are set out in [3]-[9], [15]-[18] of the judgment of the Chief Justice in the Court of Appeal Reasons. As noted by the Chief Justice, the material facts are not contentious[1].

9 On 29 March 2004 the appellant was diagnosed as having gender identity disorder[2]. The appellant commenced testosterone therapy in May 2004[3]. The testosterone treatment brought about the following changes, namely sore throats and, over time, deepening voice, increased hair growth, increased acne, increased libido, development of a masculine hairline, cessation of menstrual periods, increase in size and depth of

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[1] See [3] of the Court of Appeal Reasons (see AB)

[2] See [5] of the Court of Appeal Reasons (see AB)

[3] See [6] of the Court of Appeal Reasons (see AB)

the chest, from size 38 business shirt to size 44, redistribution of body fat from the thighs and bottom to the upper hips and stomach, increased strength and muscle development, increased sweat capacity, clitoral growth of approximately one inch and changes to the internal organs, including atrophy of the uterus[4].

10 The appellant underwent a bilateral mastectomy in July 2005[5].

11 The unchallenged medical evidence on the subject of fertility established that:

(a) the appellant is infertile and will remain so for as long as he takes testosterone[6];

(b) given that the appellant has been on testosterone therapy since May 2004, his ability to bear children if he were to stop testosterone would be less than 5% in the first year of stopping therapy and less than 25% in future years[7]; and

(c) cessation of testosterone treatment by those who had embarked on such treatment in order to reassign gender from female to male is extremely rare[8].

12 The unchallenged evidence on the subject of a hysterectomy established that:

(a) the appellant has decided against undergoing a hysterectomy at this time because:

(1) he is not conscious of his internal organs: his internal organs have no bearing on his identity as a male and cause him no distress;

(2) he has suffered adverse effects of surgery in the past and wishes to avoid further surgery if possible;

(3) he does not wish to undergo surgery that is not medically necessary;

(4) he cannot afford the time off work that would be necessary for the surgery and recovery; and

(5) he wishes to retain his internal organs for the purpose of future phalloplasty if technological advances make phalloplasty feasible[9];

(b) hysterectomy is associated with "*significant risk of complications and readmissions*" including haemorrhage and post-operative infection[10]; and

(c) having regard to the appellant's medical history, there is no medical reason for him to undergo a hysterectomy[11].

13 The unchallenged evidence on the subject of phalloplasty (ie, surgery to construct external male genitals) established that:

(a) phalloplasty is not performed in Australia because of the high risks and lack of success of the surgery[12];

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[4] See [7] of the Court of Appeal Reasons (see AB)
[5] See [7] of the Court of Appeal Reasons (see AB)
[6] See [70] of the SAT Reasons (see AB)
[7] See [17] of the Court of Appeal Reasons (see AB)
[8] See [18] of the Court of Appeal Reasons (see AB)
[9] See [52] of the SAT Reasons (see AB) and [8] – [9] of the Court of Appeal Reasons (see AB)
[10] See [72] of the SAT Reasons (see AB)
[11] See [72] of the SAT Reasons (see AB)
[12] See [135] of the SAT Reasons (see AB)

(b) although the appellant considers phalloplasty to be the "ultimate utopia" in his transition from female to male, the appellant does not presently intend to undergo phalloplasty because he has been advised that the procedure carries substantial risks and has limited prospects of success[13]; and

(c) the appellant wishes to retain his internal organs for the purpose of use in future phalloplasty if technological advances make such a procedure feasible[14].

14 In short, the unchallenged evidence was that, save for undergoing a hysterectomy, there is no other medical or surgical procedure available in Australia which the appellant (or anyone in the appellant's position) could undertake. Indeed, such a finding was made by the SAT and has not been challenged by the respondents[15].

15 The appellant's application under the Act for a recognition certificate was first considered by the Board on 16 June 2008. The Board refused the application holding that the appellant:

> "... *cannot be identified as male because he has a female reproductive system. The fact of having a female reproductive system is inconsistent with being a male. Because it is inconsistent with being a male, it is inconsistent with being identified as male*"[16].

16 In reaching its conclusion, the Board expressly stated that it "*places no weight on the fact that (the appellant) has not had a surgical procedure to construct a penis*"[17].

17 When the appellant applied to the SAT to review the Board's decision, the first respondent intervened. The first respondent contended that the Board's decision was correct as the appellant had not undertaken a hysterectomy and therefore retained a "*capacity to bear children*"[18]. As noted by the SAT, no point was made by the first respondent before the SAT that the appellant did not satisfy the requirements for a gender reassignment because the appellant had not (successfully) undertaken "*a surgical procedure to construct a penis*"[19].

18 The SAT ordered the Board's decision to be set aside, granted the application for a recognition certificate and directed the Board to issue a certificate to the appellant[20].

19 The first respondent then sought leave to appeal to the Western Australian Supreme Court. That leave was granted and the matter referred to the Western Australian Court of Appeal for determination.

20 The first respondent's sole ground of appeal was that:

> *"The Tribunal erred in law in finding that the Respondent satisfied the requirement of section 15(1)(b)(ii) of the Gender Reassignment Act 2000 (WA) that the Respondent have the gender characteristics of a male, despite its finding at [140] that the possibility of the First Respondent becoming pregnant if the First Respondent ceased testosterone treatment in the future could not be entirely excluded and that the First*

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[13] See [53] of the SAT Reasons (see AB) and [9] of the Court of Appeal Reasons (see AB)

[14] See [53] of the SAT Reasons (see AB) and [9] of the Court of Appeal Reasons (see AB)

[15] See [142] of the SAT Reasons (see AB)

[16] See page 4 of the second respondent's reasons for decision (**Board's Reasons**) (see AB)

[17] See page 5 of the Board's Reasons (see AB)

[18] See [90]-[91] of the SAT Reasons (see AB) and [111], [119] and [173] of the Court of Appeal Reasons (see AB)

[19] See [134] of the SAT Reasons (see AB)

[20] See [145] of the SAT Reasons (see AB)

Respondent could not be said to be permanently infertile with absolute certainty. The Tribunal should have found that the retention of the capacity to bear a child is inconsistent with the gender characteristics of a male and consequently a recognition certificate could not be granted"[21].

21 The absence of external male genitals only became an issue when, at the commencement of the hearing of the appeal, the Chief Justice of Western Australia said to Senior Counsel representing the first respondent:

> *"The point that I would want to emerge – I would want the court to be able to consider whether the existence of both external and internal genitalia, irrespective of capacity to bear children – that is those genitalia that would ordinarily be associated by members of the community with membership of the female gender – whether that of itself is sufficient [to prevent the appellant from qualifying for a gender reassignment] irrespective of functionality"*[22].

22 The first respondent amended its grounds of appeal accordingly[23], and it is that ground (and only that ground) that was upheld by a majority of the Court of Appeal, holding that the appellant did not "*ha(ve) the gender characteristics of a person of the (male) gender*" within the meaning of the Act as the appellant had not successfully undertaken surgery (not available in Australia) to construct external male genitals and possessed the internal genitals of a female[24].

Part VI: Argument

Summary of appellant's submissions

23 Of the issues identified in [5] above, the appellant's submissions are as follows:

23.1 The fact that the Act is a remedial and beneficial enactment means that it is to be given "*a fair, large and liberal*" interpretation rather than one which is "*literal or technical*"[25]. The majority of the Court of Appeal erred in holding the fact that Parliament may have 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, causes section 18 of the *Interpretation Act 1984* (WA) (the **Interpretation Act**) and the cases referred to at [36] below to be "*of no assistance*"[26].

23.2 The Act does not require a person to possess all of the gender characteristics of the gender to which they seek to be reassigned, nor does it require them to possess none of the gender characteristics of the gender from which they seek to be reassigned. What the Act requires is that the applicant possess sufficient of the gender characteristics of the gender to which they seek to be reassigned so as to satisfy the identification test provided by section 15(1)(b)(ii) of the Act and the definition of "*gender characteristics*".

23.3 It is neither possible nor desirable to articulate which particular characteristics an applicant must possess as each case will turn on its own facts. However, the

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[21] See First Respondent's Amended Notice of Appeal dated 7 September 2009 (see AB)

[22] See transcript from the Court of Appeal proceeding on 2 March 2010 at T:9 (see AB)

[23] See First Respondent's amended grounds of appeal dated 3 March 2010 (see AB)

[24] See transcript from the Court of Appeal proceeding on 2 September 2010 (see AB)

[25] See *IW v City of Perth* (1997) 191 CLR 1 at [12]

[26] See [105] of the Court of Appeal Reasons (see AB)

Act does not require a female-to-male applicant to possess the external genitals of a male in order to satisfy section 15(1)(b)(ii) of the Act.

23.4 The "*gender characteristics*" are confined to external physical characteristics: they do not include internal characteristics.

23.5 The determination is to be made from the perspective of the hypothetical ordinary reasonable member of the community who is informed of the relevant facts and circumstances including the remedial and beneficial purpose of the Act.

23.6 The appellant has done everything medically available in Australia, other than having a hysterectomy, to alter his genitals and other gender characteristics so as to be identified as male. Because the Act should not be construed so as to apply to internal physical characteristics, the fact that the appellant maintains the internal reproductive organs of a female is irrelevant, alternatively is not of itself sufficient (having regard to all of the other physical characteristics of the appellant) to cause a conclusion to be reached that the appellant does not satisfy the Act.

The Act

24 The Board is established by section 5(1) of the Act. By section 5(2) of the Act, the functions of the Board are to receive and determine applications for recognition certificates and to issue recognition certificates in suitable cases.

25 In addition to the president of the Board appointed pursuant to section 6 of the Act, the Governor may appoint not more than 5 other persons as members of the Board[27]. The other members of the Board are to include a:

(a) medical practitioner;

(b) person who has undergone a reassignment procedure; and

(c) person with experience in equal opportunity matters.

26 The Board must not be constituted by less than 3 members[28].

27 Section 14(1) of the Act provides that where a person has undergone a reassignment procedure, application may be made to the Board in accordance with that section for the issue of a recognition certificate.

28 The terms "*reassignment procedure*" and "*gender characteristics*" are defined by section 3 of the Act in the manner set out in [3] above.

29 By section 15(1) of the Act, where an application under section 14 relates to an adult, the Board may issue a recognition certificate if:

(a) (1) the reassignment procedure was carried out in Western Australia; and/or

(2) the applicant's birth is registered in Western Australia; and/or

(3) the applicant is a resident of Western Australia and has been so resident for not less than 12 months;

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[27] See section 7 of the Act

[28] See section 8(2) of the Act

and

(b) the Board is satisfied that the applicant:

(1) believes that his or her true gender is the gender to which the person has been reassigned; and

(2) has adopted the lifestyle and has the gender characteristics of the person of the gender to which the person has been reassigned; and

(3) has received proper counselling in relation to his or her gender identity.

30 By section 16 of the Act, a recognition certificate is conclusive evidence that the person to whom it refers has undergone a reassignment procedure and is of the sex stated in the certificate.

31 By section 17 of the Act, if a recognition certificate relating to the person whose birth is registered in Western Australia is produced to the Registrar for Births, Deaths and Marriages, the Registrar must register the reassignment of gender and make such other entries and alterations on any register or index kept by the Registrar as may be necessary in view of the reassignment.

32 By section 18 of the Act, after the reassignment of gender is registered by the Registrar and the register has been altered accordingly, a birth certificate issued by the Registrar for the person must, unless otherwise requested by the person or permitted by the regulations, show the person's sex in accordance with the register as altered.

33 By Schedule 2 to the Act, extensive amendments were made to the *Equal Opportunity Act 1984* (WA) (**EO Act**). Generally speaking, those amendments made it unlawful to discriminate against a "*gender reassigned person on gender history grounds*" in certain circumstances[29].

34 By section 4 of Schedule 2 to the Act, section 4(1) of the EO Act was amended to include the following definition: "*'Gender Reassigned Person' means a person who has been issued with a recognition certificate under the Gender Reassignment Act 2000 or a certificate which is an equivalent certificate for the purposes of that Act*".

35 By section 5 of Schedule 2 to the Act, section 35AA of the EO Act was inserted which, inter alia, provides that "*[f]or the purposes of this Part, a person has a gender history if the person identifies as a member of the opposite sex by living, or seeking to live, as a member of the opposite sex*". The term "*opposite sex*" is defined by the same section to mean "*a sex of which the person was not a member at birth*".

The proper approach to statutory interpretation

36 The proper approach to statutory interpretation has recently been expressed in the following ways:

(a) "*[t]he construction ... begins with the ordinary and grammatical sense of the words having regard to their context and legislative purpose*"[30];

(b) "*... the context, general purpose and policy of the statutory provision may be the surest guides to construction*"[31];

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[29] See section 35AB of the EO Act

[30] See *Minister for Immigration and Citizenship v SZJGV & Anor* (2009) 238 CLR 642 (**SZJGV**) at [5] per French CJ and Bell J

(c) words may be susceptible of a construction other than a literal construction when "*read in their context and with proper attention to the purposes of the statute as a whole*"[32]; and

(d) a construction of a section to avoid a result which would be "*irrational*" may properly encompass a departure from the literal or natural and ordinary meaning of the text[33].

37 As to the proper use of extrinsic materials, it is acknowledged that it is "*erroneous to look at extrinsic materials before exhausting the application of the ordinary rules of statutory construction*" and that whilst "*resort to the extrinsic materials may be warranted to ascertain (the context and objective of an enactment) ... that objective cannot be equated with the statutory intention as revealed by the terms of the subdivision*"[34].

Remedial/beneficial legislation

38 In *IW v The City of Perth* (1997) 191 CLR 1, Brennan CJ and McHugh J observed (at 12):

> "*The injunction contained in s18 of the Interpretation Act is reinforced by the rule of construction that beneficial and remedial legislation ... is to be given a liberal construction. It is to be given "a fair, large and liberal" interpretation rather than one which is "literal or technical". Nevertheless, the task remains one of statutory construction. Although a provision of the Act must be given a literal and beneficial construction, a court or tribunal is not at liberty to give it a construction that is unreasonable or unnatural*" (footnotes omitted).

39 The objective of the Act, and the fact that it is remedial or beneficial legislation, is manifest from its long title (ie, "*An Act to allow the reassignment of gender ... amend the Equal Opportunity Act 1984 to promote equality of opportunity, and provide remedies in respect of discrimination, on gender history grounds in certain cases...*") and from a simple reading of the Act.

40 If more is required, it is permissible to have regard to the then Attorney General of Western Australia's second reading speech on the Bill in order to determine the context and objective of the Act, both by reason of section 19 of the Interpretation Act and at common law[35].

41 As stated by Buss JA[36], this statement of legislative purpose, in the context of the Act as a whole, indicates that it is a remedial or beneficial enactment and thus ought be given a liberal interpretation so as to give the fullest relief which the fair meaning of the language will allow.

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[31] See *SZJGV* at [47] per Crennan and Kiefel JJ (applying *Commissioner for Railways (NSW) v Agalianos* (1955) 92 CLR 390 at 397 per Dixon CJ as referred to in *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at [69] per McHugh, Gummow, Kirby and Hayne JJ)

[32] *SZJGV* at [20] per Hayne J

[33] *SZJGV* at [9] per French CJ and Bell J applying *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 284 at 408

[34] *Saeed v Minister for Immigration and Citizenship* (2010) 241 CLR 252 at [33]-[34] (per French CJ, Gummow, Hayne, Crennan and Kiefel JJ) (applying *Catlow v Accident Compensation Commission* (1989) 167 CLR 543 at 550 per Brennan and Gaudron JJ)

[35] See also *Saeed* (ibid) and *CIC Insurance Ltd v Bankstown Football Club Ltd* [1997] 187 CLR 384 at 408. The relevant part of the second reading speech is set out at [181] of the Court of Appeal Reasons (see AB)

[36] At [182] of the Court of Appeal Reasons (see AB)

42 It is submitted that the majority of the Court of Appeal erred as to the proper application of this principle[37]. The fact that Parliament may have 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, does not cause section 18 of the Interpretation Act and the cases referred to at [36] above to be "*of no assistance*". An important distinction needs to be drawn between the exercise of construing an Act and the separate and subsequent exercise of applying the Act in accordance with its proper construction. The fact that the latter exercise may involve the application of a value judgment does not exclude the operation of section 18 of the Interpretation Act and the cases referred to at [36] above from applying to the initial construction question.

43 The approach taken by Buss JA[38] is to be preferred to the approach of the majority.

Specific observations about the Act

44 The appellant makes the following observations with respect to the Act:

(a) with respect to the definition of "*reassignment procedure*":

(1) it contemplates that the procedure to be undertaken for the purpose specified may be a "*medical*" procedure, a "*surgical*" procedure or a combination of both procedures. The Act thus expressly contemplates that a "*reassignment procedure*" may not involve surgery;

(2) the nature of the relevant procedure(s) is "*to alter the genitals and other gender characteristics*" of the applicant (ie to alter the genitals and other physical characteristics by virtue of which a person is identified as male or female). Moreover, it requires "*other*", not all other, gender characteristics to be altered; and

(3) the purpose of the relevant procedure(s) is "*so that the (applicant) will be identified as a person of the opposite sex*";

(b) with respect to the definition of "*gender characteristics*":

(1) the "*characteristics*" are qualified by the use of the word "*physical*"; and

(2) the "*characteristics*" are not those "of" a male or female, but are those "*by virtue of which a person is identified*" as male or female;

(c) where the word "*identified*" is used in the definitions of "*gender characteristics*" and "*reassignment procedure*", the Act does not expressly provide an answer to the question "identified by whom?" or state against what criterion the determination is to be undertaken; and

(d) the protections afforded by the extensive amendments to the EO Act "*on gender history grounds*" are only available to persons to whom a recognition certificate has issued (or persons who hold an equivalent certificate issued in another State or Territory).

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[37] See [105] of the Court of Appeal Reasons (see AB)

[38] At [176]-[182] of the Court of Appeal Reasons (see AB)

The Act does not require a person to possess all of the gender characteristics of the gender to which they seek to be reassigned or to possess none of the gender characteristics of the gender from which they seek to be reassigned

45 A strictly literal interpretation of "*has the gender characteristics*" (ie has "*the physical characteristics by virtue of which a person is identified as male or female*") might suggest that the person needs to possess all of the gender characteristics of the gender to which they seek to be reassigned.

46 The appellant submits this is not so. Particularly given that:

(a) section 15(1)(b)(ii) does not require the Board to be satisfied that the person has "*all*" the gender characteristics of the gender to which the person seeks to be reassigned; and/or

(b) the definition of "*gender characteristics*" does not speak of the physical characteristics "of" a male or female, but rather introduces the notion of identification,

the appellant submits that the Act should not be construed as if it had been drafted in either of the manners referred to above.

47 Further support for this conclusion is that nowhere in the Act does it state that a person must not possess any of the "*gender characteristics*" of a person of a gender from which the person has been reassigned (although it is accepted that the retention of such characteristics may properly be taken into account in determining whether the person possesses the physical characteristics by virtue of which a person is identified as male or female).

48 Neither of the respondents have ever suggested to the contrary and, moreover, the Court of Appeal (and the SAT) so held[39].

The Act expressly contemplates the grant of a reassignment certificate where the applicant has not had surgery

49 Important context is provided by the fact that the Act expressly contemplates that a person may qualify for a recognition certificate by undertaking a procedure not involving surgery. The SAT[40] and Buss JA[41] gave proper regard to this in reaching their respective decisions.

50 The majority of the Court of Appeal failed to do so[42]. In short, the Chief Justice acknowledged that "*the legislature has not required that a surgical procedure be undertaken in all cases in which a recognition certificate is issued*", but held that this "*can only be taken so far*" because:

(a) "*the failure to expressly require surgical procedures in each and every case could be explained by a number of possible legislative objectives. One such objective might have been to allow for developments in medical science which would enable significant physical changes to be achieved through non – surgical means, such as by drug treatment. Another possible legislative*

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[39] See [92] (per Martin CJ) (see AB) and [210]-[213] (per Buss JA) (see AB) of the Court of Appeal Reasons

[40] See [114]-[117] of the SAT Reasons (see AB)

[41] See [191]-[195] of the Court of Appeal Reasons (see AB)

[42] See [96] and [97] of the Court of Appeal Reasons (see AB)

objective.....might have been to recognise the myriad range of cases in which gender reassignment might arise, including cases of children born with malformation of the genitals, or perhaps some of the physical characteristics of both sexes, and for whom medical treatment may establish sufficient physical alteration for them to be identified as a member of the opposite sex"[43]; and

(b) "*...the legislature...has expressly required, by s 15, that applicants for a certificate have the physical characteristics by virtue of which they are identified as a member of the gender to which they wish to be assigned. Thus, the legislature has retained a specific requirement for, and focus upon, the physical considerations of gender*"[44].

51 It is submitted that:

(a) the Chief Justice erred in speculating why Parliament chose not to require surgical procedures be undertaken in each and every case, particularly where there is nothing in the Act, nor the second reading speech, to suggest that one of the objectives postulated by the Chief Justice was in fact the objective of Parliament; and

(b) the Chief Justice failed to construe section 15 of the Act by reference to the context to be provided for its proper construction by Parliament recognising that a certificate may be granted notwithstanding that surgical procedures have not been undertaken.

52 To construe section 15 in a way that will almost invariably require every applicant for a recognition certificate to undertake surgery is in error when one has regard to the definition of "*reassignment procedure*". It is also placing undue weight on the word "*genitals*", a word that only appears in the definition of "*reassignment procedure*" – it does not appear in section 15 or the definition of "*gender characteristics*" – and where Parliament has indicated that what is required is to "*alter*" the same – not eliminate them entirely or replace them with the genitals of the gender to which the person seeks to be reassigned.

53 Moreover, to construe section 15 of the Act in a way that will almost invariably require every applicant for a recognition certificate to undertake surgery where the Act does not mandate surgery, is inconsistent with the general principles that where legislation is ambiguous, the courts should favour a construction that ought be construed in a manner that accords with Australia's obligations under a treaty or international convention entered into prior to the enactment of the legislation in question: *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273 at 286 - 7[45].

54 In this regard reference is made to Article 16 of the *International Covenant on Civil and Political Rights* which Australia ratified in 1980 (with some reservations), which provides that "*[e]veryone shall have the right to recognition everywhere as a person before the law*". The interpretation and application of Article 16 to issues of gender

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[43] See [96] the Court of Appeal Reasons (see AB)

[44] See [97] the Court of Appeal Reasons (see AB)

[45] See also *Re Alex (Hormonal Treatment for Gender Dysphoria)* (2004) 180 FLR 82 (*Re Alex 2004*) at [239]; [241]; *Coleman v Power* (2004) 220 CLR 1 at [225]; *Re Alex* (2009) 42 Fam LR 645 (*Re Alex 2009*) at [182]

identity[46] is informed by Yogyakarta Principle 3 which, though not legally binding, provides that "*[n]o one shall be forced to undergo medical procedures, including sex reassignment surgery, sterilisation or hormonal therapy as a requirement for legal recognition of their gender identity*".[47]

55 Although it has never been raised by the first respondent, for the sake of completeness the appellant acknowledges that, by section 15(2) of the Act, where an application under section 14 relates to a child[48], the Board may issue a recognition certificate if:

(a) (1) the reassignment procedure was carried out in Western Australia; and/or

(2) the child's birth is registered in Western Australia; and/or

(3) the child is a resident of Western Australia and has been so resident for not less than 12 months;

and

(b) the Board is satisfied "*that it is in the best interests of the child that the certificate be issued.*"

56 Accordingly, for the purposes of an application by a child under section 14 of the Act, the Board is not required to be satisfied of the matters in section 15(1)(b)(i)-(iii) of the Act, including whether the child "*has the gender characteristics of a person of the gender to which child has been reassigned*" (ie, has "*the physical characteristics by virtue of which a person is identified as male or female*").

57 The significance of this, it may be argued, is the fact that surgery is not mandated by the Act may be explained by reference to the difference in the criteria to be applied by the Board in respect of applications under section 14 of the Act brought by an adult and child.

58 There would be no substance in any such argument. Indeed, to the contrary, this fact provides further context as to why the identification test inherent in the Act ought not be construed so as to require surgery.

59 In this regard it is noted that section 14(1) requires even a child to undergo a "*reassignment procedure*" in order to make an application for a recognition certificate. The definition of "*reassignment procedure*" requires the relevant procedure to be undertake "*so that the person will be identified as a person of the opposite sex*". In other words, the fact that the definition of "*reassignment procedure*" includes an identification requirement essentially in the same terms as the definition of "*gender characteristics*" means that the fact that surgery is not mandated cannot be explained away by the fact that a child is not required to establish that they have, inter alia, the "*gender characteristics*" of the opposite sex.

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[46] It is noted that in December 2008 Australia was a signatory to a statement at the United National General Assembly that international human rights protections include sexual orientation and gender identity. See section 6 of Australian Human Rights Commission's publication "Sex Files: the legal recognition of sex in documents and government records" (2009) (available from the Commission's website at www.humanrights.gov.au/genderdiversity/index/html) **(Report of AHRC 2009)**

[47] See generally Section 6 of the Report of AHRC 2009; see also *Re Alex 2004* at [178], [179], [183] – [186]

[48] Defined by section 3 of the Act as a person under the age of 18 years

60 Indeed, this supports the construction of "*gender characteristics*" contended for by the appellant, as it would be illogical to have what is in essence the same concept given different meanings in the one piece of legislation. If the term '*gender characteristics*" is to be given the meaning determined by the majority of the Court of Appeal, it must follow that the same meaning ought be given to the identification requirement of a "*reassignment procedure*". Whilst it has never been disputed that the definition of "*reassignment procedure*" focuses on the purpose of the procedure(s) (whereas section 15(1)(b) focuses on the result of the procedure(s)), procedures undertaken will not qualify as a "*reassignment procedure*" if their purpose is not "*so that the person will be identified as a person of the opposite sex*". The majority view would thus require even a child to undertake procedures so that they would be identified as a person of the opposite sex to that which is shown in their birth certificate "*according to accepted community standards and expectations*". According to the majority, this would require surgery for the purpose of altering, *inter alia,* their external genitals so as to be indentified as the genitals of the sex to which they seek to be reassigned. That a child would have to undergo such surgery could not have been intended. To construe the Act in this way would be manifestly unreasonable.

Do the "*gender characteristics*" include internal physical characteristics? If so, what are the internal physical characteristics that the Act requires a female to male applicant to possess?

61 A recognition certificate cannot issue under the Act unless the Board is satisfied that the applicant has, amongst other things, "*adopted the lifestyle and has the gender characteristics of a person of the gender to which the person has been reassigned*"[49].

62 The Act does not expressly state whether, for the purposes of the definition of "*gender characteristics*", the "*physical characteristics*" by virtue of which a person is identified as male or female, comprise external and internal physical characteristics or are confined to external physical characteristics.

63 Importantly in this regard are the words "*by virtue of which a person is identified as*", as opposed to simply "*of*" in section 15(1)(b)(ii) of the Act (see [44(b)(2)] above). Section 15(1)(b)(ii) of the Act is not concerned with possession of *all* the physical characteristics of a male, but rather the possession of sufficient physical characteristics which would give that person the physical appearance of a male such that the person would be identified as being male.

64 The Chief Justice stated that he took the word "*identified*" "*to mean established or accepted according to general community standards and expectations ...*"[50]. Consistent with that view, the Chief Justice found that "*physical characteristics*":

> *... include all aspects of an individual's physical make-up, whether external or internal, which would be considered as bearing upon their identification as either male or female according to accepted community standards and expectations*[51].

65 It is submitted that the Chief Justice erred in:

(a) construing the word "*identified*" to mean "established" or "accepted"; and

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[49] Section 15(1)(b)(ii) of the Act

[50] See [102] of the Court of Appeal Reasons (see AB)

[51] See [109] of the Court of Appeal Reasons (see AB)

(b) finding that the appellant's "*physical characteristics*" included "*all aspects of an individual's physical make-up, whether external or internal*".

66 The applicant respectfully adopts the conclusion and reasoning of Buss JA[52] in His Honour's dissenting judgment that "*physical characteristics*" by virtue of which a person is identified as male or female, are confined to external physical characteristics: namely, those characteristics apparent to or that may be perceived by another person, without reference to the person's internal organs or internal bodily functions and without technological equipment.

67 As was found by Buss JA[53], the appellant submits that the words "*identified as*" connote "*recognised as*". This language, in the context of the purpose of the Act (see [38] to [43] above), suggests that the identification or recognition is by reference to a person's external physical characteristics (for example, a person's size, shape, skin, hair, musculature, facial hair and voice).

68 Such a construction is consistent with the language of section 15(1)(b)(ii) of the Act, and the definitions of "*gender characteristics*" and "*reassignment procedure*". As Buss JA stated:

> *"If the Parliament had intended that, for the purposes of the definitions of 'gender characteristics' and 'reassignment procedure', the physical characteristics, by virtue of which a person is identified as male or female, should include internal physical characteristics (in particular, those organs and bodily functions associated with the person's gender at birth), it is likely that the definitions would 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"*[54].

69 The construction contended for by the appellant is consistent with the statement of legislative purpose contained in the Second Reading Speech (see [41] above). The purpose of the Act would be promoted by a construction of the terms "*gender characteristics*" and "*physical characteristics*" which accepts that the fundamental disconformity inherent in gender dysphoria is between the person's psychiatric condition on the one hand, and the person's external physical characteristics, on the other. It is the person's external (and not his or her internal) physical characteristics which are apparent to other people, and most apparent to the person in question.

70 For this reason, the construction adopted by Buss JA[55] (and contended for the appellant) is to be preferred to that of the majority.

From what perspective is the Board's determination for the purposes of section 15(1)(b)(ii) of the Act to be made and against what criteria?

71 Neither section 15(1)(b)(ii) of the Act, nor any other provision of the Act, expressly states the:

(a) perspective from which the Board is to make its determination for the purposes of section 15(1)(b)(ii) of the Act; and

(b) criteria against which the determination is to be made.

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[52] See [196]-[206] of the Court of Appeal Reasons (see AB)

[53] See [205] of the Court of Appeal Reasons (see AB)

[54] See [206] of the Court of Appeal Reasons (see AB)

[55] See [197] of the Court of Appeal Reasons (see AB)

72 The Chief Justice held that the question of "*identified by whom*" for the purpose of section 15(1)(b)(ii) of the Act meant "*established as*" or "*accepted as*" and "*consistently with that view, I will take 'identified' to mean established or accepted according to general community standards and expectations, rather than by reference to the satisfaction of a particular person or group*"[56].

73 It is submitted that the majority of the Court of Appeal erred in adopting the above perspective and should have found that the determination is made from the perspective of the hypothetical ordinary member of the community who is informed of the relevant facts and circumstances, including the remedial or beneficial purpose of the Act[57].

74 It is the Board, constituted by not less than 3 members, that may issue a recognition certificate where it is satisfied, amongst other things, that the applicant "*has adopted the lifestyle and has the gender characteristics of a person of the gender to which the person has been reassigned*"[58]. As set out at [25] above, in addition to the president of the Board, the Board may consist of up to 5 persons, with such persons to include a medical practitioner, a person who has undergone a reassignment procedure and a person with experience in equal opportunity matters[59]. Accordingly:

(a) as stated by Buss JA, "*the Board's membership is broadly representative of those members of the community who are likely to have an understanding of the subject matter and issues with which the Act is concerned*"[60]; and

(b) the perspective adopted by the Chief Justice namely, "*according to accepted community standards and expectations*", is overly simplistic in its formulation and fails to have regard to the skills and experience of the Board's members.

75 As set out at [61]-[69] above, the "*gender characteristics*" referred to in section 15(1)(b)(ii) of the Act are concerned with the external physical characteristics of a person. Consequently, the "*focus is upon the physical characteristics that are apparent to or may be perceived by other people in the community*"[61].

76 Further, for the reasons set out at [45]-[47] above, the Act does not require an applicant for a recognition certificate to have all the gender characteristics (ie, physical characteristics) of the gender to which the person has been reassigned. Nor does the Act require an applicant to possess none of the gender characteristics of their biological gender. However, an applicant is required to have altered their genitals: see definition of reassignment procedure in the Act. The Board's determination of whether an applicant has the gender characteristics of a person of the gender to which the applicant has been reassigned involves "*questions of fact and degree*" based on common human experience[62].

77 Finally, as stated by Buss JA, for the Board to be satisfied, pursuant to section 15(1)(b)(i) of the Act, that an applicant "*believes that his or her true gender is the gender to which the [applicant] has been reassigned*", requires the Board to consider and make a finding as to the applicant's intention of procreating a child or conceiving

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[56] See [102] of the Court of Appeal Reasons (see AB), with Pullin JA agreeing at [124] (see AB)

[57] See [219] of the Court of Appeal Reasons per Buss JA (see AB)

[58] See section 8(2) of the Act

[59] See section 7 of the Act

[60] See [220] of the Court of Appeal Reasons (see AB)

or giving birth to a child, as the case may be[63]. Whether or not such an intention exists, "*is directly relevant to whether the applicant believes that his or her true gender is the gender to which the applicant has been reassigned*"[64].

78 The approach taken by Buss JA[65] is to be preferred to the approach of the majority.

The medical limitations on altering a person's "*genitals and other gender characteristics*"

79 The evidence and findings of the SAT in this regard are set out at [13] and [14] above.

80 The difficulties associated with phalloplasty have been recognised in other cases[66].

81 The Chief Justice stated that he accepted that the approach he favoured as:

> "*to the construction and application of the Act might, in the current state of medical science, make it more difficult for female to male gender reassignees to obtain a recognition certificate than male to female reassignees. However, if that is so, it is the consequence of the legislature's use of norms expressed in general terms, which may have different impacts in the extent of the procedures necessarily undertaken by each gender to meet the conditions required for the grant of a recognition certificate.*"

82 The proper conclusion on the evidence is that no female to male reassignee will be able to satisfy the requirements of the Act if it is given the construction preferred by the Chief Justice without having to undertake in a foreign country surgery attended with high risks and low success and when, for those reasons, such surgery is not available in Australia. Accordingly, to state that the construction and application "*might ... make it more difficult for female to male gender reassignees to obtain a recognition certificate than male to female assignees*" is to significantly understate the consequences of the majority's approach.

To what extent may regard be had to the state of medical science when construing the Act?

83 It is submitted that it is proper to approach the construction issues on the basis that:

> "*Parliament must be taken to have known of the technical limitations on medical or surgical procedures for the alteration of a person's genitals and other gender characteristics, and to have intended the Act to have been workable, in accordance with its purpose, despite any such technical limitations*"[67].

84 If regard may be so had, the medical limitations on constructing external male genitals (let alone functioning genitals) serve to reinforce the appellant's submissions as to the proper construction of the Act as the Act ought not be construed in a way that would mean that it is not workable, in accordance with its purpose, as regards female to male reassignees.

85 In any event, given the medical limitations on constructing external male genitals (let alone functioning genitals), to now construe the Act in the manner preferred by the

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[61] See [221] of the Court of Appeal Reasons per Buss JA (see AB)

[62] See [211] and [223] of the Court of Appeal Reasons per Buss JA (see AB)

[63] See [224] of the Court of Appeal Reasons (see AB)

[64] See [224] of the Court of Appeal Reasons per Buss JA (see AB)

[65] See [219] – [224] of the Court of Appeal Reasons (see AB)

[66] See, for example, *Re Alex 2004* at [239] and *Attorney-General v "Kevin and Jennifer"* [2003] FamCA 94 at [385]-[386].

[67] See Buss JA at [192] (see AB)

majority would be to construe it in a manner that constitutes a form of indirect discrimination inconsistent with Articles 2(1) and 17 of the *International Covenant on Civil and Political Rights*; and Article 16 of the *International Covenant on Civil and Political Rights* (informed by the interpretation suggested in Yogyakarta Principle 3) and, in the case of children, Article 2 of the *Convention on the Rights of the Child*[68]. For the reasons stated in [53] above, such a result ought be avoided .

To what extent may regard be had to the common law as it stood at the time when construing the Act?

86 It is accepted that it is proper to approach the construction issues on the basis that the Act was introduced against the background of a body of common law as to the recognition of the position of transgendered persons (particularly since this is something that was expressly referred to in the Attorney General's Second Reading Speech)[69].

87 If regard may be so had, it becomes clear that Parliament was intending to modify the law with respect to transgendered persons, not codify it. This is because:

(a) the common law had fixed the distinction between "pre-operative" and "post-operative" transsexuals. The Act, however, contemplates that a person may be successful in their application for a recognition certificate notwithstanding they undertake no operation at all;

(b) there is absolutely no reason to not hold that, by the Act, Parliament has done that which the courts have commented "*to the effect that the common law distinction between post-operative and pre-operative transsexual persons is a matter for Parliament to determine*"[70].

The appellant's construction is consistent with Parliament's decision to base the Act on the South Australian legislation in preference to legislation of other Australian States and Territories

88 It is apparent that the Act was modelled on the *Sexual Reassignment Act 1988* (SA)[71]. This was the first such legislation providing a formal mechanism for the reassignment of one's gender. The approach subsequently adopted by all other Australian jurisdictions (with the exception of Western Australia) provided for recognition of gender or sexual reassignment as a result of a surgical procedure being undertaken[72].

89 As noted by the SAT[73], it is evident from the Bill's second reading speech in April 1997 that Parliament was familiar with the legislation then applicable in other States, namely South Australia, New South Wales, Victoria and Queensland. It is thus reasonable to infer that Parliament was aware of the requirement in those other jurisdictions for surgery, but preferred the South Australian approach.

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[68] See also *Re Alex 2004* at [239]

[69] See, for example, *Wilson v State Rail Authority of New South Wales* [2010] NSWCA 198 at [15] per Allsop P (with whom Giles JA, Hodgson JA, Tobias JA and Macfarlan JA agreed)

[70] See *Attorney-General (Cth) v Kevin* [2003] FamCA 94 at [382] (per the Full Court of the Family Court)

[71] See [35] and [46] of the Court of Appeal Reasons (see AB)

[72] See [116] of the SAT Decision (see AB); see also, for example, Part 5A of *the Births Deaths and Marriages Registration Act* 1995 (NSW) which defines a "*sex affirmation procedure*" by reference to "*a surgical procedure*"

[73] See [117] of the SAT Decision (see AB)

The appellant's construction is consistent with recent judicial pronouncements in the area of recognising and dealing with gender dysphoria and recommendations of the Australian Human Rights Commission

90 The imposition of a requirement to undertake a hysterectomy (let alone a phalloplasty) would be inconsistent with:

(a) recent judicial pronouncements in the area of recognising and dealing with gender dysphoria[74]; and

(b) recommendations of the Australian Human Rights Commission that the definition of sex affirmation treatment should be broadened so that surgery is not the only criteria for a change in legal sex[75].

The appellant's construction (so as to not require an applicant to possess the genitals of the gender to which they seek to be reassigned) is consistent with past decisions of the Board

91 As has already been noted, the Board placed "*no weight on the fact that (the appellant's) genitals remain unchanged*" and did not "*see it as determinative that (the appellant) has not had surgical procedures to construct a penis*"[76]. The sole reason why the Board was not satisfied that the criteria had been met was because the appellant had not had a hysterectomy.

92 Indeed, on 16 June 2008 (ie, the same day that the Board refused the appellant's application), the Board granted to three female-to-male applicants (in three separate applications before it) a recognition certificate in circumstances where those applicants had not undergone surgery to construct a penis[77].

Application to the facts of this matter

93 The majority of the Court of Appeal approached the matter on the basis that because the appellant possesses:

> "*none of the genital and reproductive physical characteristics of a male and retain(s) nearly all of the normal external genital characteristics and internal reproductive organs of a female (he) would not be identified by community standards as male despite the existence of some secondary male physical characteristics*"[78].

94 The fact of the matter is as found by the SAT (which finding has never been challenged by either of the respondents):

> "*The applicants have not merely altered their external appearance by superficial means. The medical and surgical procedures they have undergone have altered the genitals and other gender characteristics in profound ways. They have undergone clitoral growth and have the voices, body shapes, musculature, hair distribution,*

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[74] See, for example *Re Kevin (Validity of marriage of transsexual)* (2001) 165 FLR 404; *The Attorney General for the Commonwealth v "Kevin and Jennifer" and Human Rights and Equal Opportunity Commission* (2003) 172 FLR 300; *Re Alex 2004* and *Michael v Registrar – General of Birth, Deaths and Marriages* [2008] 27 FRMZ 58

[75] See Report of AHRC 2009

[76] See pages 4 and 5 of the Board's decision (see AB)

[77] See Exhibit 9 tendered in the proceedings before the SAT, being the Second Respondent's reasons in GRB 4/2004, GRB 1/2006 and GRB 1/2008 (see AB)

[78] Pullin JA at [125] (see AB) and see Martin CJ at [115] (see AB)

general appearance and demeanour by virtue of which the person is identified as a male"[79].

95 As already noted, the appellant has done everything medically available in Australia other than a hysterectomy, to alter his genitals and other gender characteristics so as to be identified as male: see paragraph [14] above.

96 It is submitted that, on the construction advanced by the appellant, the appellant has the gender characteristics of a male in that he possesses all of the external physical characteristics of a male that can be delivered by any medical (including surgical) procedure available in Australia.

Part VII: Applicable statutes

97 The legislation in Annexure "A" are in the terms as they existed when the appellant lodged his application for a recognition certificate and are still in force, in that form, as at the date of these submissions. Indeed, the provisions of the Act referred to in these submissions have never been amended.

Part VIII: Orders sought

98 The orders sought are as follows:

(a) The appeal is allowed.

(b) The orders made by the Court of Appeal of Western Australia on 2 September 2010 are set aside.

(c) In lieu thereof, there be orders that:

(1) the appellant's application for a recognition certificate is granted;

(2) the Gender Reassignment Board of Western Australia is directed to issue a recognition certificate to the appellant;

(3) the first respondent do pay the appellant's costs of the appeal, including the applicant's costs of the application for leave to appeal.

99 As to (c) above, if the Court accepts the appellant's submission that the Court of Appeal (by majority) erred in construing section 15(1)(b)(ii) of the Act, then the appellant submits that the Court is in a position to make the ultimate determination as to whether the appellant satisfies the criteria prescribed by the Act for the grant of a recognition certificate.

100 Alternatively, the Court should remit the matter to the SAT (or alternatively to the Board) to determine the appellant's application in accordance with law.

Dated the 6th day of May 2011

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[79] See [138] of the SAT Decision (see AB)