ANNOTATED

**IN THE HIGH COURT OF AUSTRALIA**
**PERTH REGISTRY**

No P16 of 2011

**Between:**

**AH**

Appellant

**and:**



**STATE OF WESTERN AUSTRALIA**

First Respondent

**GENDER REASSIGNMENT BOARD OF WESTERN AUSTRALIA**

Second Respondent

## APPELLANT'S ANNOTATED REPLY TO THE FIRST RESPONDENT'S SUBMISSIONS

1 **As to paragraph 21**: The First Respondent contends that "*[t]he term "identified" should be construed to mean "established" or "accepted as" ...*" and that "*[a]ll members of the Court of Appeal were essentially of this view*".

2 That contention is incorrect: Buss JA found that the words "*identified as*" connote "*recognised as*"[1].

3 In any event, in construing the Act, the Court ought not seek to determine what synonyms may be used to explain the word "identified". That approach leads to error. The task is to construe the word "identified" in the context in which it appears.

4 **As to paragraph 26**: The technical dictionary definitions of the words "male" and "female" relied upon by the First Respondent ("*which refer to the capacity to bear and beget children*") are not to the point. The issue is not what is the meaning of the words "male" or "female". Rather, the issue is what, for the purposes of the Act, are the "*physical characteristics by virtue of which a person is identified as male or female*". The "*capacity to bear and beget children*" is patently not one of them. As was noted by the Chief Justice, "*an individual's physical capacity to reproduce is not essential for membership of either gender*"[2].

5 **As to paragraph 27**: The Appellant's submissions[3] are not properly categorised as seeking to read down the meaning of the term "*gender characteristics*" " *so that it only includes external characteristics*". The Appellant's submissions are directed to identifying what Parliament intended as the subject matter of the identification contemplated by the definition of "*gender characteristics*" and whether, having regard

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[1] See [205] of the Court of Appeal Reasons (see AB 449)
[2] See [39] of the Court of Appeal Reasons (see AB 408-409)
[3] See [66] of the Appellant's Submissions dated 6 May 2011

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to all the circumstances, Parliament intended that identification to include characteristics that can only be ascertained by an internal medical examination.

6 **As to paragraph 28**: As noted in the Appellant's primary submissions[4], the Appellant agrees that the definition of "*gender characteristics*" does not refer to "*genitals*" and thus its meaning does not turn on the meaning of the word "*genitals*"[5]. It was the First Respondent who agitated the point before the Court of Appeal that certain dictionary definitions of "*genitals*" extended to include the internal reproductive organs. In particular, the First Respondent cast his second ground of appeal (on which he succeeded by majority) in terms of the Appellant not having the gender characteristics of a male as he "*retained the genitals which would cause the (Appellant) to be identified as a female*"[6]. That is the context in which the debate about whether the word "*genitals*" included the internal reproductive system arose. It is not something the Appellant raised.

7 Also, the first reason given by Buss JA was a consideration of another section of the Act so as to put the proper construction of the expression "*gender characteristics*" into context[7]. His Honour stated that, "*[t]he better view, in the context of the Act as a whole including its purpose*", was that the word "*genitals*" was a reference to the external genitals[8]. If this is correct, it is relevant to giving context to the proper construction of the term "*gender characteristics*" and supports the Appellant's case. If it is not correct, then it is neutral to the construction exercise given that all that the definition of "*reassignment procedure*" requires is some alteration to the genitals (ie, it would be satisfied even if the only alterations were to the external genitals).

8 **As to paragraph 29**: The First Respondent's submissions are telling in their inability to properly respond to the second reason given by Buss JA. Not only does the First Respondent simply make bald assertions without any explanation or support for the same, but the explanations are inconsistent with the (majority) decision of the Court of Appeal. On the majority decision, there is no reason why "*artificial and non-functional internal organs*" need not be inserted. Moreover, the final sentence of the submission is wholly inconsistent with the majority decision which would require a female-to-male applicant having to undertake (overseas) a medical procedure to insert an "*artificial and non-functional internal organ*".

9 **As to paragraph 30**: The Appellant accepts that the fact that there are obvious biological limitations on the extent to which accepted medical and surgical procedures may alter a person's physical characteristics is not itself a reason to require that internal physical characteristics be disregarded. However, that is not what Buss JA said. First, his Honour referred to "*biological (or chromosomal) and physical limitations on the extent to which accepted medical and surgical procedures may alter a person's physical characteristics*"[9] (emphasis added), stating that the purpose of the Act will be promoted by a construction of the terms "*gender characteristics*" and "*physical characteristics*" which accepts that the fundamental disconformity inherent in gender dysphoria as between the person's psychiatric condition on the one hand and the person's external

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[4] See [52] of the Appellant's Submissions dated 6 May 2011

[5] See also [109] of the Court of Appeal Reasons per Martin CJ (see AB 428)

[6] See the First Respondent's Amended Grounds of Appeal dated 3 March 2010 (see AB 390-391)

[7] See [198] of the Court of Appeal Reasons (see AB 448) and the definition of "reassignment procedure" in section 3 of the Act which refers to genitals.

[8] See [199] of the Court of Appeal Reasons (see AB 448)

[9] See [202] of the Court of Appeal Reasons (see AB 448)

physical characteristics on the other. His Honour said, "*[i]t 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*"[10]. What his Honour said in regard to a person's external physical characteristics being more susceptible to alteration by medical or surgical procedures was said in addition to that (hence the word "*also*").

10 **As to paragraphs 34 to 47**: The Appellant accepts that, when it is said the legislative "*intention*" is to be ascertained, "*what is involved is the 'intention manifested' by the legislation*"[11]. However, contrary to the submissions of the First Respondent, the legislative purpose identified by the First Respondent[12] is not the only legislative
10 purpose apparent from the text of the Act.

11 The Long Title of the Act[13] records that the purpose of the Act is "*to allow the reassignment of gender*" (emphasis added). Part 3 of the Act provides the mechanism by which that is to occur (ie, by the Board issuing a recognition certificate, in certain circumstances, to a person that has undergone a reassignment procedure). Furthermore, the Act expressly contemplates that "*reassignment procedure[s]*" would be carried out in Western Australia[14]. Accordingly, it is apparent from the text of the Act, that the legislation was intended to allow or enable persons who have undergone reassignment procedures in Western Australia to obtain a recognition certificate from the Second Respondent. These matters bear upon the construction of the identification
20 requirement[15].

12 To the extent that the construction of the Act preferred by the majority of the Court of Appeal requires an applicant to undergo surgery, that construction is plainly inconsistent with the legislative purpose described at [11] above, which is apparent from the text of the Act.

13 The legislative purpose expressed in the Long Title of the Act is reinforced in the second reading speech for the Bill which ultimately became the Act[16]. Indeed, the second reading speech discloses a further legislative purpose of the Act. Parliament apparently took a humane approach based on relieving and alleviating "suffering". In these circumstances, Parliament must have intended that a person who has undergone
30 female-to-male "*reassignment procedure[s]*" may be entitled to the issue of a recognition certificate without recourse to surgery, and particularly without surgery which is not available in Australia.

14 The legal and historical context of the Act provides further support for this contention. At the time that the Bill was introduced, each of New South Wales, the Northern Territory and the ACT had legislation in place providing for legal recognition of an applicant's reassigned gender. The legislation in each of those jurisdictions expressly required (and continues to require) that an applicant seeking legal recognition of their

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[10] See [203] of the Court of Appeal Reasons (see AB 448-449)

[11] *Saeed v Minister for Immigration and Citizenship* (2010) 241 CLR 252 at [33]-[34] (per French CJ, Gummow, Hayne, Crennan and Kiefel JJ) (applying *Wik Peoples v Queensland* (1996) 187 CLR 1 at 168-198 per Gummow J)

[12] See [34] of the First Respondent's Submissions

[13] The Long Title of the Act is reproduced at [6] of the First Respondent's submissions

[14] See section 15(1)(a)(i) of the Act

[15] Compare [34] of the First Respondent's submissions

[16] The second reading speech is set out at [181] of the Court of Appeal Reasons (see AB 444). Relevantly, it records that:

*The purpose of this Bill is to enable persons who have undergone reassignment procedures to obtain a recognition certificate indicating that they have undergone a reassignment procedure and are of the gender stated in the certificate. People suffering from gender dysphoria and who have completed medical procedures to alleviate their condition will gain legal recognition of their reassigned gender under this proposed legislation* (emphasis added)

gender reassignment must undergo a surgical procedure involving the alteration of a person's reproductive organs[17].

15 The Western Australian Parliament chose to model its legislation on the *Sexual Reassignment Act 1988* (SA). The South Australian legislation does not mandate surgery by expressly providing that medical procedures other than surgery may constitute a reassignment procedure[18].

16 The Western Australian Parliament, in choosing to follow the approach taken in South Australia, must be taken to have intended that persons suffering from gender dysphoria (including male-to-female reassignees) could gain recognition of their reassigned gender without recourse to surgery involving the alteration of a person's reproductive organs. As was noted by the State Administrative Tribunal, "*Parliament did not consider surgery a necessary step in order to acquire the gender characteristics by which to be identified as male or female*"[19].

17 Thus, contrary to the position adopted by the First Respondent[20], it is apparent that the Western Australian Parliament chose not to adopt what had traditionally been the line of demarcation established by the Courts as to when a person should be regarded as having changed their gender.

18 While one may speculate as to the possible legislative objectives why Parliament chose not to require surgical procedures be undertaken in each and every case, such objectives may be discounted where there is nothing in the Act or the second reading speech to support the conclusion that the objectives were intended by Parliament[21].

19 **As to paragraph 49**: For the reasons advanced in the Appellant's primary submissions[22], it is wrong to suggest that the construction adopted by the majority is not manifestly absurd or unreasonable. The construction has the effect of causing the Act to misfire with respect to female-to-male assignees.

20 Moreover, there is no inherent inconsistency between the purpose which can be drawn from the second reading speech and the words used by the Act. In accordance with the rules of construction laid down by this Honourable Court[23], the words used by the Act and the purpose which can be drawn from the second reading speech are well capable of co-existing in perfect harmony.

21 **As to paragraphs 66 to 75**: The majority's construction of the Act does not just "*make it more difficult for a female-to-male applicant to obtain a registration certificate*"[24], it is a construction which simply means that on the present state of medical science in Australia, it will be impossible for female-to-male applicants to satisfy: hence the previous statement that the construction results in the Act misfiring with respect to such applicants[25].

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[17] See Part 5A of the *Births Deaths and Marriages Registration Act 1995* (NSW): ss 32A and 32C; Part 4A of the *Births, Deaths and Marriages Registration Act 1996* (NT): ss 28A and 28B; *Births Deaths and Marriages Registration Act 1997* (ACT): ss 23 and 24.

[18] See [117] of the SAT Reasons for Decision (see AB 372)

[19] See [117] of the SAT Reasons for Decision (see AB 372)

[20] See [35(f)] of the First Respondent's submissions

[21] See [40] of the First Respondent's submissions and [51] of the Appellant's submissions

[22] See, in particular, [60] of the Appellant's Submissions dated 6 May 2011

[23] See [36] and [37] of the Appellant's Submission dated 6 May 2011

[24] See [72] the First Respondent's submissions

[25] See [20] of these submissions

22 The majority's construction of the Act, therefore, denies the reach of the Act to female-to-male applicants. It patently amounts to indirect discrimination (not just "*at least arguable*")[26].

23 The First Defendant's contention that there is "*reasonable or objective justification*" for such preferential treatment is erroneous. There is obviously no dispute with the proposition that "*the different procedures required for female-to-male and male-to-female applicants to satisfy the identification requirement are inevitable*"[27]. However, where the language of a statute is susceptible of a construction which is consistent with the terms of the international instrument and the obligations which it imposes on Australia, then that construction should prevail[28]. The construction of the Act adopted by Buss JA, and contended for by the Appellant, does not give rise to the Act discriminating between female-to-male and male-to-female applicants and, as such, is wholly consistent with the terms of Article 26 of the Covenant.

24 In circumstances where the Appellant's construction is open on the words of the Act, the majority's construction (which is adopted by the First Respondent) cannot properly be considered "*reasonable or objective*" for the purpose of applying Australia's obligations under Article 26 of the Covenant.

25 Finally, reference is made to the statement that "*the facts and circumstances of a different case may produce a different result for a female-to-male applicant who has not had a hysterectomy*"[29]. This statement is at odds with the majority's decision. The fact of the matter (which is not challenged) is the Appellant has done everything that can be done other than have a hysterectomy (which is a surgical procedure available in Australia) and undertake a phalloplasty (which is not a surgical procedure available in Australia)[30]. There is nothing unusual or unique about the Appellant insofar as the application of his circumstances to the Act are concerned. It is therefore entirely spurious to make comments such as that of the First Respondent referred to above. The simple fact of the matter is that the majority decision of the Court of Appeal turned on the fact that the Appellant's "*physical characteristics*" which disqualified him from a recognition certificate were due to him not having undertaken a hysterectomy and a phalloplasty. To suggest that the facts and circumstances of a different case may produce a different result for an applicant who has not had a hysterectomy (noting that the First Respondent makes no mention at all about a phalloplasty) is wholly erroneous.

Dated the 16th day of June 2011

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[26] See [72] the First Respondent's submissions

[27] See [72] the First Respondent's submissions

[28] *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273 at 286-7

[29] See [71] the First Respondent's submissions

[30] See [36] and [37] of the Appellant's Submission dated 6 May 2011