WHAT MAKES A REAL MAN? GENDER NORMS AND WESTERN AUSTRALIA v AH [2010] WASCA 172

In Western Australia v AH [2010] WASCA 172 the Western Australian Court of Appeal denied two female-to-male applicants for gender reassignment certificates the right to be legally recognised as men. In so doing, an opportunity was lost for Australia to be one of the first jurisdictions in the world to legally provide a reassignment of gender without requiring permanent sterilising surgery. This column examines not only the legal issues considered in the case but the broader ethical and human rights issues associated with denying female-to-male gender reassignment applicants who have not undergone a permanent sterilisation or genitalia alteration procedure, the right to be identified as males.

INTRODUCTION

In Western Australia v AH [2010] WASCA 172 an appeal was brought against a decision of the Western Australian Supreme Court following an appeal from a decision of the State Administrative Tribunal (the tribunal) which had overturned an earlier decision made by the Gender Reassignment Board of Western Australia (the board).1

Two applicants, AB and AH, were both registered as females at the time of their birth. After reaching majority, each applied under s 14(1) of the Gender Reassignment Act 2000 (WA) (the Act) for issue of a recognition certificate recognising their gender reassignment from female to male after each underwent testosterone treatment and a bilateral mastectomy. Neither had undergone a hysterectomy or phalloplasty. The board found that the applicants had satisfied all the criteria required by the Act to be eligible for the certificate except for the requirement that they have the “gender characteristics” of a male. It was on the interpretation of this phrase that the case turned. The fact that both applicants still had female reproductive organs was considered by the board to be inconsistent with being male and it was on that basis that the applications were rejected. The applicants then appealed to the tribunal under its review jurisdiction.

The review was by way of a hearing de novo: AB and AH and Gender Reassignment Board (WA) [2009] WASAT 152. Written submissions and oral evidence were received by the tribunal, including evidence from medical practitioners confirming that the applicants had been diagnosed with gender dysphoria and were in the process of progressing their reassignment from female to male (at [14]). The tribunal accepted that the applicants had made a commitment to continue to take testosterone for the rest of their lives and both the tribunal and the applicants accepted that as long as they took the testosterone they would be infertile. The tribunal also accepted that the Act did not require any specific surgical procedure to be undertaken to comply with the criteria set out within it and indeed, the requirement of having the characteristics of a male meant “having sufficient of those characteristics” (at [5]). The tribunal found that a “female reproductive system is a fundamental although not essential physical characteristic of being female” and was persuaded that this physical characteristic did not outweigh the other physical characteristics which now identify each applicant as male (at [5]). On this basis, the tribunal overturned the decision of the board and was satisfied that each applicant was entitled to a recognition certificate.

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1 The Supreme Court recognised the decision of the tribunal by dismissing the appeal by the State (appellant) against AB and AH (as first respondents in their respective matters but heard together by the Supreme Court) and the Gender Reassignment Board of Western Australia (as second respondent) on appeal from the State Administrative Tribunal of Western Australia.
The tribunal's decision was appealed by the State to the Supreme Court. As the appeals gave rise to identical issues, they were heard together and a single set of reasons for the determination of both appeals was provided. The case raised significant issues in relation to how the law in Australia does, and should, regard gender dysphoria and reassignment.

**WHAT IS “GENDER DYSPHORIA” AND WHY IS A “CERTIFICATE” SIGNIFICANT?**

According to the DSM-IV:\(^2\)

Gender Identity Disorders are characterized by strong and persistent cross-gender identification accompanied by persistent discomfort with one's assigned sex. Gender identity refers to an individual's self-perception as male or female. 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. The terms gender identity and gender dysphoria should be distinguished from the term sexual orientation, which refers to erotic attraction to males, females, or both.\(^3\)

As a result of this condition, many with the disorder seek assistance in transitioning from their assigned sex to their perceived "true" sex via lifestyle and other social choices, psychological, medical and surgical procedures. This condition was acknowledged as being of sufficient significance that laws were introduced across all Australian jurisdictions to recognise it.\(^4\) Those laws allow for the issuing of a "recognition certificate" to those applicants who satisfy the legislative requirements of gender reassignment. The recognition certificate allows those holding it to produce it to the Registrar of Births, Deaths and Marriages who is then authorised to register the reassignment of gender and any other such entries and amendments to the register as are necessary. The Registrar is then able to issue a new birth certificate which shows the person's sex in accordance with their reassignment. This is a form of identification accepted by all authorities and is therefore extremely significant in that it provides lawful acknowledgment of the person's "true" identity. Indeed, the Act acknowledges this by stating:

The recognition certificate is conclusive evidence that a person to whom it refers has undergone a reassignment procedure and is of the sex stated in the certificate.\(^5\)

The grounds for appeal sought by the State Attorney-General form the basis of discussion of this case because they essentially require that a person seeking to be recognised as the other gender be sterile as an outcome of having genital surgery. This column considers whether this requirement is an infringement of a person's human rights\(^6\) and in addition, it considers how failing to lawfully recognise these members of the community by their "true" gender may do more harm than any postulated benefit to the community.

**WHAT ARE THE PHYSICAL GENDER CHARACTERISTICS OF A MALE?**

The basis of the appeal in this case was that the applicants did not satisfy the board's interpretation of the requirement of having undergone a "reassignment procedure" as is required by s 3 of the Act:

… 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.

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2 Diagnostic and Statistical Manual of Mental Disorders (4th ed, American Psychiatric Association, 2000, text revision) p 535.

3 Diagnostic and Statistical Manual of Mental Disorders, n 2.

4 Births, Deaths and Marriages Registration Act 1995 (NSW), ss 32A, 32B; Births, Deaths and Marriages Registration Act 1996 (NT), ss 28A, 28B; Births, Deaths and Marriages Registration Act 1997 (ACT), ss 23, 24; Births, Deaths and Marriages Registration Act 1996 (Vic), ss 4, 30A; Births, Deaths and Marriages Registration Act 2003 (Qld), s 22 and Sch 2; Births, Deaths and Marriages Registration Act 1999 (Tas), ss 3, 28A; Sexual Reassignment Act 1988 (SA); Gender Reassignment Act 2000 (WA).

5 Gender Reassignment Act 2000 (WA), s 16; AB and AH and Gender Reassignment Board (WA) [2009] WASAT 152 at [21].


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“Gender characteristics” are defined in s 3 as “the physical characteristics by virtue of which a person is identified as male or female”. Section 15 provides for a recognition certificate to be issued if:
(a) one or more of the following applies –
   (i) the reassignment procedure was carried out in the State;
   (ii) the birth of the person to whom the application relates is registered in the State;
   (iii) the person to whom the application relates is a resident of the State and has been so resident for not less than 12 months;
and
(b) the Board is satisfied that the person –
   (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.7

The State initially argued (at [173]) that:
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 in light of the Tribunal’s finding at [140], [AH/AB] did not have the gender characteristics of a male and consequently a recognition certificate could not be granted.

At the hearing of the appeals, however, the State sought leave from the court to rely on another ground of appeal (at [174]):
The Tribunal erred in law in finding that [AH/AB] satisfied the requirement of s 15(1)(b)(ii) of [the Act] that [AH/AB] have the gender characteristics of a male when [AH/AB] retained the genitals which would cause [AH/AB] to be identified as a female.

The court considered the application and agreed that a consideration of the scope and meaning of the expression “gender characteristics” was a question of law and therefore fell within the appellate jurisdiction of the court (at [174]). Martin CJ considered that the critical issue to be determined was the meaning of the phrase, “the physical characteristics by virtue of which a person is identified as male”, and the meaning of the associated expression “reassignment procedure” (at [85]).

**IMPACT OF TESTOSTERONE TREATMENT AND GENITAL SURGERY ON GENDER**

Both applicants had undertaken testosterone treatment as part of their reassignment procedure. The Supreme Court heard and accepted that testosterone treatment results in the following changes (at [7]):

(i) sore throats and, over time, deepening voice;
(ii) increased hair growth;
(iii) increased acne;
(iv) increased libido;
(v) development of a masculine hairline;
(vi) cessation of menstrual periods;
(vii) increase in size and depth of the chest, from size 38 business shirt to size 44;
(viii) redistribution of body fat from the thighs and bottom to the upper hips and stomach;
(ix) increased strength and muscle development;
(x) increased sweat capacity;
(xi) clitoral growth of approximately one inch; and
(xii) changes to the internal organs.

The court also heard that AB had chosen not to undergo a hysterectomy or other genital surgery because he was not aware of his internal female reproductive organs, they caused him no distress and therefore to him they had no bearing on his identity as a male. In addition, AB stated that he had had an adverse experience with surgery in the past and wished to avoid it in the future unless it was absolutely necessary. This aversion to surgery extended to AB’s reluctance to undergo a phalloplasty procedure to construct a penis, having been informed that it “carries substantial risks and has limited prospects of success” (at [8]). AB also said, and it was accepted by the tribunal, that he would continue with testosterone treatment and that he had no intention of conceiving a child (at [8]).

7 See Western Australia v AH [2010] WASCA 172 at [21].
AH also commenced testosterone treatment as part of his reassignment treatment and had also undergone a bilateral mastectomy. The testosterone treatment had similar effects on AH as it had on AB, with the added changes of “increased body temperature, increased appetite, increased cranky and irritable behaviour, broadening of the forehead and a stronger and more defined chin” (at [11]).

AH also decided against a hysterectomy because he did not consider it necessary. He stated that he was unable to see his internal organs, unlike his breasts, and as such he was unaware of their presence and they therefore presented no threat to his mental wellbeing. AH also stated that he believed that medical technology was not sufficiently well developed to produce a phallus that was worth the potential risks associated with the surgery to create one. He went on to say that he intended to keep taking testosterone and not to conceive a child in the future (at [14]). Indeed, the medical evidence suggested (at [16]) that while both applicants continued to take testosterone they would remain effectively infertile, with an ultrasound examination demonstrating that they both have smaller than average size uteruses with a very thin endometrial linings [sic] and no evidence of follicular activity of the ovaries [which is] in keeping with ovarian suppression.

In addition, it was acknowledged by the Supreme Court that the tribunal heard evidence from two doctors (Dr Kennedy and Dr Tangpricha) that phalloplasty is not performed in Australia because of the high risks and lack of success associated with it and that testosterone therapy is used universally as a female-to-male transgender treatment procedure (at [194]). Dr Tangpricha estimated that, given that AB had been on three years of male replacement therapy, 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. In relation to AH, Dr Tangpricha estimated that, because AH had been on testosterone treatment for a shorter period of time, he would have a greater chance of bearing children: “less than 25% in the first year of stopping therapy and less than 50% in future years” (at [159]). However, both AB and AH had given evidence to the court that they did not have any intention of conceiving (at [8], [14]). Despite this evidence, the State’s grounds for appeal effectively required that those seeking reassignment be surgically sterilised, thus permanently and irreversibly ensuring that they have no capacity to bear children in the future.

**THE LEGISLATIVE INTENTION ON GENDER REASSIGNMENT**

The grounds of Western Australia’s appeal were based on an interpretation of sections of the Act and as such, the court considered the language, context and purpose of the Act. It was acknowledged (at [180]) that the Act does not contain an express statement of the Parliament’s purpose. However, an examination of the Second Reading Speech by the then Attorney-General, the Hon Peter Foss, gave some insight into Parliament’s thinking:

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. It is estimated that at least 250 people in Western Australia suffer from gender dysphoria, of whom about 80 have undergone gender reassignment procedures. Presently in Western Australia the law which determines the gender of a person is the biological – that is, chromosomal – identity of a person. Gender reassignment does not alter the chromosomal identity of a person. Therefore such a person, who has undergone reassignment surgery, retains – for the purposes of WA law – their gender of birth.9

In his dissenting judgment, Buss JA considered that this indicated that the Act’s legislative purpose was to act as a remedial or beneficial enactment and as such should be given a liberal interpretation, “so as to give the fullest relief which the fair meaning of its language will allow” (at [182]). Buss JA went on to consider the critical provision of the Act, including the definitions of “gender characteristics” and “reassignment procedure”, and the provisions of s 14(1) and s 15(1) recognising that the language must be considered in the context and purpose of the Act (at [186]).

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8 AB and AH and Gender Reassignment Board (WA) [2009] WASAT 152 at [112].
9 Western Australia, Legislative Council, Parliamentary Debates (25 November 1999) p 3822 (emphasis added).
Buss JA identified a number of key issues including (at [187]):

(a) Whether a female-to-male applicant is entitled to a recognition certificate without having undergone female-to-male transgender surgical procedure(s), including phalloplasty?

(b) Do the physical characteristics which are usually used to identify a person as male or female comprise their external and internal physical characteristics or are they confined to external physical characteristics only and how does this serve to define “gender characteristics” and “reassignment procedure” under the Act?

(c) Is it necessary that all of the physical characteristics that usually identify a person as either male or female be altered by a medical or surgical procedure (or a combination of such procedures) to satisfy the definition of “reassignment procedure” under the Act?

(d) Does the phrase “so that the person will be identified as a person of the opposite sex” in the Act refer to the object or the outcome of the relevant medical or surgical procedure or procedures?

(e) What must a person establish in order to satisfy the board that he or she “has the gender characteristics of a person of the gender to which the person has been reassigned” as set out in s 15(1)(b)(ii) of the Act?

In answer to (a), Buss JA found (at [190]) that the physical characteristics to be considered for the purposes of a “reassignment procedure” include a person’s genitals because of reference to the term “alter the genitals and other gender characteristics of the person”. However, he went on to observe that, although the Act states that an applicant for a recognition certificate must have undergone a medical or surgical procedure (or a combination of such procedures) to alter the person’s genitals and other gender characteristics, there is no express stipulation within the Act that the procedure be a phalloplasty (at [191]). In reference to the evidence of Dr Kennedy that phalloplasty is not even performed in Australia because of the high risks and lack of success of the surgery, Buss JA commented that the Parliament must have been aware of these medical and technical limitations at the time the law was introduced but intended the Act to take effect nonetheless.

Additionally, Dr Tangpricha and Dr Kennedy noted that testosterone therapy is used universally as a female-to-male transgender medical (as opposed to surgical) treatment procedure. The Act allows for either a medical or surgical procedure to have been undertaken to satisfy the language in the relevant section. Buss JA determined therefore that it was logical to conclude that this must be sufficient for the purposes of satisfying the criteria set out in the Act. Thus a person who has undergone this procedure may be entitled to a recognition certificate under the provisions of the Act (at [195]).

In answer to (b), Buss JA found that nowhere in the Act does it explicitly state that the identification of a person should meet any particular external and/or internal physical characteristics (at [196]). As such, Buss JA considered that the physical characteristics of a person, for the purposes of the Act, include the person’s “genitals”, which he defined as the external reproductive organ/s of the male or the female and therefore do not include the internal reproductive organs (at [199]). He gave several reasons for this (at [203]), including that people suffering from the psychiatric condition of gender dysphoria (as was the situation with both patients) have a strong and persistent desire to have the body of the opposite gender and to be regarded by others as a member of the opposite gender … 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. Also, it is the person’s external (and not his or her internal) physical characteristics which are more susceptible to alteration by medical or surgical procedures.

In addition, Buss JA suggested (at [202]-[203]) that the Act is designed to offer a legislative avenue to correct the disconnect that those affected experience between their mind and body, but recognised that, in order for that to occur, a physical correction needs to be undertaken first. However, Buss JA acknowledged that a person’s gender is commonly identified via their external physical characteristics and thus there is no justification for asking applicants to undergo internal physical surgical procedures for the purposes of correcting the psychological disconnect (at [205]).

10 AB and AH and Gender Reassignment Board (WA) [2009] WASAT 152 at [135].
Further to this point and in answer to (c), Buss JA found that the definition of “reassignment procedure”, read with the definition of “gender characteristics”, requires that, in every case, an applicant for a recognition certificate must have undergone a medical or surgical procedure (or a combination of such procedures) to alter the person’s genitals. This is apparent from the express reference to genitals in the definition of “reassignment procedure”. However, he went on to argue (at [210]) that “the Act does not, in the context of the purpose for which it was enacted, require the alteration of each and every other physical characteristic of an applicant for a recognition certificate”. In addition to that, s 15(1)(b)(ii) requires that the board be satisfied that the person “has adopted the lifestyle and has the gender characteristics of a person of the gender to which the person has been reassigned”. In so arguing, Buss JA concluded (at [212]-[213]) that the physical characteristics alone were not what the Parliament had in mind but rather a broader, more holistic understanding of the nature of the condition of gender dysphoria, namely, that a person believes that their true gender is the reassigned gender and, apart from any physical adaptation, this would be further evidenced by the person’s lifestyle.

In answer to (d), Buss JA found that the criterion specified in s 15(1)(a)(i) suggests that the phrase “so that the person will be identified as a person of the opposite sex”, addresses the object or purpose of a procedure(s) to be carried out rather than the “outcome or effect of the procedure/s” (at [216]).

And finally, in answer to (e), Buss JA found that, in order to satisfy the board that he or she has the gender characteristics of a person of the gender to which the person has been reassigned, neither s 15(1)(b)(ii) nor any other provision of the Act expressly states the basis on which the board is to determine whether it is satisfied that an applicant for a recognition certificate has the gender characteristics (that is, on my construction of the Act, the external physical characteristics) of a person of the reassigned gender.

He went on to say (at [219]-[224]):

In my opinion, the Board is to make this determination by reference to an applicant’s external physical characteristics, and from the perspective of the hypothetical ordinary reasonable member of the community who is informed of the relevant facts and circumstances, including the remedial or beneficial purpose of the Act. In particular, the critical question for the Board is whether, by reference to the applicant’s external physical characteristics, the applicant has sufficient of the gender characteristics of a male to be identified or recognised, from the perspective of the hypothetical ordinary reasonable member of the community who is informed of the relevant facts and circumstances and understands the remedial or beneficial purpose of the Act, as a person of the gender to which the applicant has been reassigned … The evaluative judgment which is central to this determination will be based on common human experience … The Board must be satisfied that an applicant believes that his or her true gender is the gender to which the applicant has been reassigned, necessarily requires the Board to consider and make a finding, relevantly, as to whether the applicant has any intention of procreating a child (in the case of a male to female reassignment) or any intention of conceiving or giving birth to a child (in the case of a female to male reassignment). The presence or absence of any such intention is directly relevant to whether the applicant believes that his or her true gender is the gender to which the applicant has been reassigned.

Buss JA agreed with the tribunal members that Parliament could have stipulated that a surgical procedure like a hysterectomy or permanent sterilisation be made a requirement for the granting of a recognition certificate but it did not. He went on to cite comparable legislation in other jurisdictions that made such a requirement explicit. For example (at [228]):

(a) Gender reassignment in Germany is governed by Transsexualengesetz (1980). Second section, subsection 8.1.9(iii) of this statute requires that a person making application for legal recognition of gender reassignment be “continuously non-reproductive”.

(b) Gender reassignment in Sweden is governed by Lag om andring I lagen (1972:119). Section 2 of this statute provides that an applicant for the legal recognition of gender reassignment must have been sterilised or otherwise incapable of procreating.

(c) Gender reassignment in Finland is governed by The Gender Confirmation of Transsexual Individuals Act (2002). By s 1 of this Act, an applicant must be “either sterilised or sterile for some other reason”.

(d) Gender reassignment in the Netherlands is governed by Articles 29-29D of the Civil Code law of 24 April 1985. It is an explicit requirement under Article 29A that the person applying for legal
recognition of gender reassignment, “if assigned male on the birth certificate, will never again be able to procreate, if assigned female on the birth certificate, will never again be able to give birth”.

Buss JA considered (at [232]) that

the critical question for the Board was whether, by reference to AH’s and AB’s external physical characteristics, each of AH and AB had sufficient of the gender characteristics of a male to be identified or recognised, from the perspective of the hypothetical ordinary reasonable member of the community who is informed of the relevant facts and circumstances and understands the remedial or beneficial purpose of the Act, as a male. The Tribunal did not make an error of law, as alleged, in finding that each of AH and AB satisfied the requirements of the second limb of s 15(1)(b)(ii).

As such, Buss JA found that the appeal had failed. Buss JA did not consider the issue of future fertility to be the issue to be decided in these matters but rather the gender that would be assigned to either applicant from the perspective of a “hypothetical ordinary reasonable member of the community” viewing the applicant. The conclusion to be drawn from this position is that, unless the applicants were to become pregnant in the future, thus altering the ease with which their gender may be identified by a “hypothetical ordinary reasonable member of the community”, the issue of their retaining their internal female genital organs is not relevant. Prima facie, it may be assumed that those who suffer from gender dysphoria would be quick to rid themselves of genitalia that does not accord with their psychological identity and certainly in the case of female-to-male transition, a hysterectomy is a relatively safe and cheap procedure. Not undergoing this procedure may appear to conflict with their psychological condition.

However, both applicants gave evidence that they had no wish to conceive and that they believed the surgery to be unnecessary, partly acknowledging that no surgery is without its risks and costs (both financially and in terms of post-surgical recovery like physical pain). Is it unreasonable to ask that future applicants be subjected to further surgery simply in order to prove their commitment to their “true” gender? What social benefit is there in asking these applicants to be subjected to such criteria and conversely, what individual or social harm is there in not requiring this of those with gender dysphoria compared to the harm to their dignity in not recognising their “true” gender? The need for this section of our community to have to disclose their condition at job interviews, polling stations and elsewhere is an indignity that arguably need not be suffered and indeed limits their opportunity to commence full social integration as their “true” gender. With respect to the former question, the majority opinion in this matter found that a person’s intention to conceive was not a relevant component to consider in making these determinations (at [106]) but instead found that their capacity to conceive was (at [112]). In answer to the latter question, “Why should this matter?” the majority were silent.

THE MAJORITY VIEW: GENDER REASSIGNMENT AND THE PLASTICITY OF INTENTION

Despite the acceptance by the court of the statement by both AH and AB regarding their future conception plans, Martin CJ held (at [27]) that “that statement of intention cannot be determinative, because Mr H has the capacity to decide otherwise in the future”. While not having undergone a phalloplasty may have been accepted by the board and the court, it seems that the failure to have a hysterectomy and thus to accept becoming permanently sterile, was the standard required in order to be issued with a recognition certificate by the majority.

In considering the reassignment procedure, Martin CJ acknowledged that the expression “reassignment procedure” should be regarded as focusing upon purpose rather than outcome. In other words, the critical aspect of the definition is the purpose for which the medical or surgical procedure is undertaken, rather than whether the procedure achieved the effect of a person being identified as a member of the opposite sex (at [87]). The majority did not discuss the “purpose” further. However, if the purpose of the “reassignment procedure” were to allow the applicant to match their psychological gender with their physical gender, then surely being infertile via the medical procedure of testosterone injections is, for all intents and purposes, the equivalent of being surgically made infertile and thus the purpose is served. It is likely that this interpretation is more acceptable when considering female-to-male transitions because a bilateral mastectomy does not result in sterilisation. A male-to-female transition which requires a penectomy would result in sterilisation. It was agreed by
the majority (at [89]) that any construction of the Act which would render one of its provisions “otiose or redundant” should be avoided and, in applying this principle, acknowledged that to interpret the provisions of s 14 in any other way would have that effect on s 15 of the Act.

The majority acknowledged that the Act does not make the undertaking of a surgical procedure a mandatory requirement for compliance, unlike other Australian and “much North American legislation of this kind” (at [90]) and also noted the significance of this omission. They recognised that the “reassignment procedure” has to alter both the genitals and other gender characteristics and noted that a procedure “which only alters non-genital characteristics, such as breast removal, cannot, of itself, fall within the scope of the definition” (at [91]). The Chief Justice also noted that AB and AH had satisfied the requirement by taking testosterone treatment that had resulted in genital alteration (extension of the clitoris) alongside alteration to other “gender characteristic”, that is, the breasts via the mastectomies. He noted that the tribunal, and indeed the submissions made to it, placed considerable reliance upon the lack of any express legislative requirement that an applicant for a recognition certificate have undergone a surgical procedure, inviting the court to conclude that it was not Parliament’s intention to make surgery to alter either their external genital characteristics or their reproductive organs a requirement for the issuing of a recognition certificate (at [95]-[96]). However, Martin CJ stated (at [96]):

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 objective for not requiring surgery in every case 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. Where there are a number of possible explanations for the legislature’s failure to expressly require surgical intervention in each and every case, it would be unsafe to fasten only upon the explanation proffered by the respondents.

In his concluding statements, Martin CJ stated (at [114]) that, as a result of having undergone testosterone treatment and a bilateral mastectomy, each applicant had a number of the physical characteristics which would, according to established community standards and expectations, be associated with members of the male gender … neither has any of the genitalia or reproductive organs which would normally be associated with the male gender … There is nothing in the Act which would suggest that full and proper weight should not be given to those considerations when undertaking the process of evaluation required by the Act. To the contrary, the express requirement for at least some genital modification as part of the “reassignment procedure” which is a prerequisite to an application for a recognition certificate reinforces that conclusion.

The Chief Justice also made the point of noting that the definition of “reassignment procedure” in the Act arises from the use of the word “identified”. He observed (at [115]):

Each of AB and AH 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. They would not be identified, according to accepted community standards and expectations, as members of the male gender. In my view, the Tribunal was wrong to conclude otherwise.

This analysis required the Chief Justice to examine the terms “genital characteristics” and “community standards and expectations”.

COMMUNITY IDENTIFICATION OF GENDER CHARACTERISTICS

Martin CJ considered that the critical question to consider was whether AB and AH had the physical characteristics by which they are identified as male which is distinct from the physical characteristics that identify them as female (at [100]). The Chief Justice stated (at [101]) that he felt the tribunal had not adequately answered the questions of “what are the gender characteristics?” and “identified by whom?” In answering the latter question first, he said (at [102]):

I would 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.
Further to this, Pullin JA in his decision, which agreed with that of Martin CJ, stated (at [124]):

"In determining whether the evidence revealed that the respondents had the “gender characteristics” of a male, community standards must be applied. This is because the Act requires the Board to be “satisfied” about the existence of a fact, but the relevant fact concerns the physical characteristics by virtue of which a person “is identified” as male or female. The subject, that is the identifier, is not nominated. That can only mean that community standards are to be applied. There are many instances in the law where a finding of fact has to be made by reference to community standards. See for example, in other contexts Tame v The State of New South Wales [2002] HCA 35; (2002) 211 CLR 317 [116] (McHugh J) and AK v The State of Western Australia [2008] HCA 8; (2008) 232 CLR 438 [95] (Heydon J)."

Martin CJ held (at [104], [106]):

The critical question is whether, by the reassignment procedure, an applicant has acquired sufficient of the characteristics of the gender to which they wish to be assigned to be identified as a member of that gender.

... The only issue in this case is whether the Tribunal was correct to conclude that each of the respondents has the physical characteristics by virtue of which they should be identified as male. The future intentions of each of the respondents in respect of such things as continuation of testosterone treatment and the possibility of having children are irrelevant to that issue which must be determined by reference to the physical characteristics of each at the time of the relevant hearing.

And in explaining the theoretical justification for his interpretation of the legislation, Martin CJ said (at [105]):

The value judgment to be made in each case, depending upon the particular point in the spectrum at which the individual applicant is assessed to fall, is not assisted by resort to adjectival expressions such as beneficial, liberal or purposive.

Martin CJ then referred to the decision of Matthews J in R v Harris and McGuiness (1988) 17 NSWLR 158 which supported his proposition that the focus of determining “gender characteristics” should be upon external genitalia rather than internal reproductive organs. His Honour noted the express restrictions of the remarks made by Matthews J in this case, however, and further he noted that in the Act, the word “genitals” is not used in the definition of “gender characteristics” but instead only used in the definition of “reassignment procedure”. He said (at [109]):

In these cases, it is accepted that each of AB and AH have undergone a reassignment procedure. Accordingly, the precise meaning to be given to the word “genitals” is not critical to the resolution of this case. Central to this case is the definition of “gender characteristics”, which is defined to mean “physical characteristics”. For the reasons I have already given, in my view those 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.

The court acknowledged that many of these characteristics would not be visible to the casual observer, especially if the applicant is clothed (at [110]). However, one of the grounds of appeal asserted that the tribunal erred by concluding that both AB and AH had physical characteristics that would identify them as males, when they retained the capacity to bear children. Martin CJ stated (at [111], [50], [112]):

I have already suggested that functionality, or reproductive capacity, cannot, of itself, be the sole determinant of gender. Human beings are only capable of reproducing for a part of their lives but have a gender all of their lives. A person is no less male, or less female, because they are infertile.

... Further, in respect of this part of the Tribunal’s reasons, the proposition that the remnant female gender characteristics of each appellant which have been “altered to such an extent that [they] no longer function” are to be regarded as “no longer female characteristics” cannot be accepted. This view was expressly disavowed during the appeal by counsel for AB and AH. The uterus of a post-menopausal woman remains a female gender characteristic, as does the penis of a man who suffers from impotence remain a male gender characteristic.
Although functionality or fertility is not the sole determinant of any application for a recognition certificate, neither is it irrelevant. The fact that each of AB and AH retain physical characteristics which would, in very unlikely and remote circumstances, enable them to bear children, is not irrelevant to the process of evaluation which falls to be undertaken, on the view which I take of the Act. Similarly, in the case of male to female reassignment, the fact that medical treatment had, or had not, rendered the person incapable of producing sperm, or generating an erection so as to participate in intercourse would be relevant, but not necessarily determinative of, the process of evaluation.

In arriving at his decision to set aside the tribunal’s decision and reinstate the decision of the board, Pullin JA went on to state (at [125]-[126]):

In my opinion, information about not only external but also internal physical characteristics is relevant to such identification. I agree with the Chief Justice that because each respondent possesses none of the genital and reproductive physical characteristics of a male and retain nearly all of the normal external genital characteristics and internal reproductive organs of a female, they would not be identified by community standards as males despite the existence of some secondary male physical characteristics. The Tribunal’s decision should be set aside and instead the decision of the Board refusing each application should be reinstated.

**Transgender decisions in other jurisdictions**

There are no other cases from Australian courts likely to significantly assist with the interpretation of the legislation in this case. The court did, however, consider the approach taken by courts and legislatures to transgender issues in other jurisdictions in order to provide some “general background” of the issues which arise under the Act.

**Transgender issues in marriage cases**

*Corbett v Corbett* [1970] 2 All ER 33 was a 1970 decision that considered the validity of a marriage between Arthur Corbett and April Ashley, who had been born George Jamieson. Ashley had worked as a female impersonator and took oestrogen to encourage the development of breasts and a feminine physique. She had then submitted to an amputation of the testicles, most of the scrotum and the construction of an orifice occupying the position of the vagina in a female, utilising the skin of the penis after removal of the muscle and other tissues. It was held that despite this, April Ashley retained the gender of her birth, and was therefore a man at the time of the marriage ceremony. Because marriage was to be between a man and a woman, the marriage was deemed null and void.

In the New Zealand case of *Attorney-General v Otahuhu Family Court* [1995] 1 NZLR 603 declaratory relief was awarded after consideration was given to the question of the validity of a marriage where one of those persons had adopted the sex opposite to that of the proposed marriage partner through sexual reassignment. Ellis J observed (at [608]):

Some persons have a compelling desire to be recognised and be able to behave as persons of the opposite sex. If society allows such persons to undergo therapy and surgery in order to fulfil that desire, then it ought also to allow such persons to function as fully as possible in their reassigned sex, and this must include the capacity to marry. Where two persons present themselves as having the apparent genitals of a man or woman, they should not have to establish that each can function sexually. Once a transsexual has undergone surgery, he or she is no longer able to operate in his or her original sex. A male to female transsexual will have had the penis and testes removed, and have had a vagina like cavity constructed, and possibly breast implants, and can never appear unclothed as a male, or enter into a sexual relationship as a male, or procreate. A female to male transsexual will have had the uterus and ovaries and breasts removed, have a beard growth, a deeper voice, and possibly a constructed penis and can no longer appear unclothed as a woman, or enter into a sexual relationship as a woman, or procreate. There is no social advantage in the law not recognising the validity of the marriage of a transsexual in the sex of reassignment. It would merely confirm the factual reality.

*Kevin v Attorney-General (Cth)* (2001) 165 FLR 404; *Attorney-General (Cth) v Kevin* (2003) 172 FLR 300 is perhaps Australia’s best-known transgender marriage case where the court had to consider the validity of a marriage. Unlike the cases of AB and AH, Kevin had already undergone a process of reassignment which involved hormone treatment and surgery, including a total hysterectomy (but not
a phalloplasty) and was registered as a male pursuant to s 32B of the Births, Deaths and Marriages Registration Act 1995 (NSW) prior to his marriage. As such, the court found in his favour. However, the Full Court of the Family Court observed (at [382]):

This leaves the more difficult question of the position of preoperative transsexual persons. As we have said, this case does not require us to determine this question. In all of the decided cases to which we have referred their position has been distinguished from post-operative transsexual persons and comments have been made to the effect that this is a matter for parliament to determine.

Bellinger v Bellinger [2002] 1 All ER 311 was almost identical to Corbett but heard by the court some 10 years later and dismissed on similar grounds. However, Lord Nicholls of Birkenhead noted, although not expressly, the difficult legal, ethical and human rights issues that arise in transgender cases and the need to have them addressed so that transgender people have some certainty about their legal identity and subsequent rights. His Lordship noted that the New Zealand decision of Attorney-General v Otahuhu Family Court [1995] 1 NZLR 603 and the Australian decision of Kevin v Attorney-General (Cth) (2001) 165 FLR 404 did not identify any clear, persuasive principle in this regard. He observed (at [39]-[42]):

Much uncertainty surrounds the circumstances in which gender reassignment should be recognised for the purposes of marriage ... Surgical intervention takes many forms and, for a variety of reasons, is undertaken by different people to different extents. For men it may mean castration or inversion of the penis to create a false vagina. For women it may mean a mastectomy, hysterectomy, or creation of a false penis by phalloplasty. There seems to be no “standard” operation or recognised definition of the outcome of completed surgery. Today the case before the House concerns Mrs Bellinger. Tomorrow’s case in the High Court will relate to a transsexual person who has been able to undergo a less extensive course of surgery. The following week will be the case of a transsexual person who has undergone hormonal treatment but who, for medical reasons, has not been able to undergo any surgery. Then there will be a transsexual person who is medically able to undergo all or part of the surgery but who does not wish to do so. By what criteria are cases such as these to be decided?

But the problem is more fundamental than this. It is questionable whether the successful completion of some sort of surgical intervention should be an essential prerequisite to the recognition of gender reassignment. If it were, individuals may find themselves coerced into major surgical operations they otherwise would not have. But the aim of the surgery is to make the individual feel more comfortable with his or her body, not to “turn a man into a woman” or vice versa. As one medical report has expressed it, a male-to-female transsexual person is no less a woman for not having had surgery, or any more a woman for having had it: see Secretary, Dept of Social Security v SRA [1993] FCA 573; (1993) 118 ALR 467 at 477 These are deep waters. Plainly, there must be some objective, publicly available criteria by which gender reassignment is to be assessed. If possible the criteria should be capable of being applied readily so as to produce a reasonably clear answer ... There must be an adequate degree of certainty. Otherwise, as the majority of the Court of Appeal observed, the applicability of the law to an individual suffering from gender identity disorder would be in a state of complete confusion: see [2001] EWCA Civ 1140; [2002] 1 All ER 311 at [104].

Transgender issues in sex offence and social security cases

Courts have been required to consider transgender issues in a number of other types of criminal and civil matters, including social security matters. R v Harris and McGuinness (1988) 17 NSWLR 158 concerned the question of whether two persons charged with committing or attempting to commit acts of indecency between males were guilty of that offence where both had been born male but one had undergone reassignment surgery. The surgery was recognised by the court as being relevant for the purposes of dealing with the sexual offence. In Re Secretary, Department of Social Security and HHI (1991) 23 ALD 58; [1991] AATA 94, the Administrative Decisions Tribunal was required to determine whether a person who had been born as a male in 1929 and had undergone sex reassignment surgery in 1976 to attain the characteristics of a woman, was entitled to an age pension from the age of 60 years (as a woman) rather than from the age of 65 (as a man). The tribunal considered a number of factors including sex chromosome constitution; gonadal sex; sex hormone pattern; internal sex organs (uterus, sperm ducts); genitalia; secondary sex characteristics (facial hair, body shape); sex of rearing; and psychological sex (at [62]) and concluded that only those who had undergone sex reassignment surgery should be considered, for the purposes of the social security legislation in question, as having their reassigned sex.
In Secretary, Department of Social Security v SRA (1993) 43 FCR 299 the Federal Court considered whether a person living as a woman but who had not undergone sex reassignment surgery was entitled to a wife’s pension on the basis that she was cohabiting with a male invalid pensioner. Black CJ referred to Lord Nicholls in Bellinger and stated that the applicant was no less a woman for not having had surgery, nor would she be any more a woman for having had the surgery. However, in his view, a line was required to be drawn and that line was, “a sex change operation” which would “bring external genital features into general conformity with the person’s psychological sex is appropriate as a matter of statutory interpretation” (at [306]).

In Scafe v Secretary, Department of Families, Housing, Community Services and Indigenous Affairs [2008] AATA 104 the Administrative Appeals Tribunal had to consider whether a person born as a man but who had been living as a woman for many years should be regarded as a woman for the purposes of social security legislation. The tribunal considered the medical treatment that the applicant had undertaken, including oestrogen treatment that rendered the appellant impotent, had produced breast growth and had resulted in body fat distribution that gave the appellant a female figure. The tribunal accepted that the applicant had not had genital surgery because of other medical concerns and, apart from that, the applicant was psychologically, socially and culturally a woman. Nevertheless, the tribunal felt bound by the decision in SRA and concluded (at [29]) that, in order to be treated as a male, the applicant must have had gender reassignment surgery.

Transgender issues and gender identity certification cases

In Michael v Registrar General of Births, Deaths and Marriages (2008) 27 FRNZ 58, declaratory relief was sought in New Zealand in relation to the issue of a birth certificate recording the applicant as a male. The applicant was born a female but had undergone continuous hormone therapy and a bilateral mastectomy. Under the relevant legislation (s 28(c) of the Births, Deaths and Marriages Registration Act 1995 (NZ)), an applicant for alteration of gender registration was required to establish that they had undergone

such medical treatment as is usually regarded by medical experts as desirable to enable persons of the genetic and physical conformation of the applicant at birth to acquire a physical conformation that accords with the gender identity of a person with the nominated sex.

The court heard and accepted evidence that further surgery was not an essential part of treatment regarded by experts as necessary for gender reassignment and therefore found that the applicant had undergone the treatment regarded by medical experts as desirable to conform with the nominated sex – namely male – and the relief was granted.

This decision contrasts with the position adopted by the Australian cases which is that gender reassignment is only lawfully recognised when the person has undertaken surgery to alter their reproductive organs and genitalia. However, it is important to note that all these cases have been heard in Australian jurisdictions where that position reflects the legislation. As discussed, the legislation in Western Australia and South Australia does not explicitly require this and Buss JA in his minority opinion in Western Australia v AH professed reasons why this might be. His decision addressed the social/cultural elements that transgender reform jurisprudence should address and which would “merely confirm the factual reality”.11

Martin CJ and Pullin JA’s decision was genitocentric. It focused on the surgical/non-surgical status of the applicants, namely their decision not to have a hysterectomy or surgically acquire the physical characteristics of a male – a phallus. The decision of the applicants not to procreate emphasises the functionality of the genitalia as an “identifying” feature of gender. Sharpe12 argued a similar position with respect to the decision in Re Kevin v Attorney-General (Cth) (2001) 165 FLR 404, stating that the “anatomy determines destiny” paradigm is what applied in that case; despite Kevin being recognised by the courts as a man for the purposes of marriage, the court’s position was

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11 Quoting Ellis J in Attorney-General v Otahuhu Family Court [1995] 1 NZLR 603 at [608].

As a result of hormone treatment and a total hysterectomy, Kevin’s body was no longer able to function as that of a female, particularly for the purposes of reproduction and sexual intercourse … [that] irreversible surgery completes the sex-assignment process [and] provides a convenient and workable line for the law to draw.

That is essentially the majority view in Western Australia v AH [2010] WASCA 172. The decision reflected the position held in those other cases seemingly for no other basis than the following of precedent. Evidence from medical science and experts was not considered the “truth”, interpretation of the law was arbitrary and it was established (at [116]) that the community view (“norms expressed in general terms”) of what a man should look like will determine the criteria for another being recognised as the gender that they are – or not. Wallbanks says that general medical and legislative language continues to be genitocentric and “to distinguish 'psychological' from 'biological' in respect of sexual identity”. In arriving at his decision, Martin CJ stated (at [116], [117], [118]):

I accept that this approach 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, and 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.

I share the Tribunal’s sympathy for the position in which AB and AH find themselves. No doubt they feel they are in the predicament identified by Lord Nicholls in Bellinger – feeling coerced into undertaking major surgery which they would not otherwise choose. However, that is the consequence of the criteria which the legislature has chosen. The duty of the court is to dispassionately construe and apply the laws passed by the legislature to the facts established by the evidence. The performance of that duty in these cases leads to the conclusion that AB and AH are not presently entitled to the recognition certificates which they seek.

The Tribunal’s decision should be set aside, and instead the decision of the Board refusing each application reinstated.

**PROBLEMS WITH THE WESTERN AUSTRALIAN SUPREME COURT’S APPROACH**

O’Flaherty and Fisher argue that there are persistent human rights abuses of people around the world as a result of their actual or perceived gender identity. The Australian Human Rights Commission acknowledges that there is currently limited human rights protection for gay, lesbian, bisexual, transgender and intersex (GLBTI) people. If governments have a primary obligation to respect, protect and promote the human rights of their citizens, then ending violence, abuse and discrimination against people because of their sexual orientation or gender identity should be considered a priority.

The difficulty with the implementation of the criteria set out in Western Australia v AH [2010] WASCA 172 is that it requires applicants to undergo arguably pointless, risky and costly genital surgery so that they can access a piece of paper that will affirm the identity many of them have recognised in themselves for most of their lives and simply wish others to recognise also. An interesting aspect of the legislation of Western Australian and South Australia is that no other jurisdiction in Australia allows for an interpretation that does not require surgery as a criterion for recognition. Theirs does, at least in potential.

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Martin CJ recognised that there was a consistency among the Australian cases – gender reassignment is only lawfully recognised when the person has undertaken surgery to alter their reproductive organs and genitalia. Martin CJ understandably may have wanted to ensure Western Australia was consistent with that policy position. The fault, it is argued, is not with this stance but rather with the failure to acknowledge the significance of the fact that the legislation in Western Australia and South Australia does not explicitly make this surgery a requirement when it could have done so.

Buss JA in his minority opinion explained well why this might be. Where there is consideration by the court of the statutory construction of the relevant legislation, it is necessary for it to take into account that “the primary object of statutory construction is to construe the relevant provision so that it is consistent with the language and purpose of all the provisions of the statute”.

Section 18 of the Interpretation Act 1984 (WA) states that a construction should promote the “purpose or object” underlying the written law and s 19 gives authority to the court to consider speeches made in the Parliament that relate to the relevant law. Buss JA considered that, if the Parliament had meant the legislation to require that the same criteria be met as are required in other jurisdictions, namely the requirement for surgery, then the legislation or at least the parliamentary speeches would reflect that – they do not. Indeed, the purpose for anyone undertaking any serious form of gender reassignment procedures (be that medical, surgical or social) is to reach “psychological and anatomical harmony” and that should surely set the criteria for the courts. However, the Court of Appeal majority determined that “community standards and expectations” would be the determinant rather than the value the changes would make to the individuals directly concerned. Buss JA and the tribunal recognised that the condition of gender dysphoria and the law’s role in providing some relief from the effects of this condition (by legally recognising the applicant’s “true” gender) was primarily the intention of the Act. This was not, however, the interpretation applied by the board, Martin CJ and Pullin JA.

In addition, in none of the cases considered by the Chief Justice, save Attorney-General v Otahuhu Family Court, did the courts consider the purpose of the legislation or the inherent discrimination within it from a policy perspective. For example, in the social security cases, the broader issue was the discrimination between the ages of retirement for men and women and therefore the eligibility of accessing the pension. The marriage cases all considered the issue of marriage as one between a man and a woman, thus excluding homosexual couples and transgender people from entering into a marriage contract and denying them the same rights as heterosexual couples. Upholding such a position does nothing to address the obligation of governments to end violence, abuse and discrimination against people because of their sexual orientation or gender identity.

**History of Transgender Discrimination under the Law**

In various times and places, transgendered people have been trusted and respected. Several groups in history (such as spiritual leaders) have been given extra reverence because of a transgendered connection. Transgendered behaviour and the androgyny of both Egyptian and Babylonian Pharaohs and Kings was considered as part of a spiritual connection. The wisdom of both sexes was ascribed to American Indians who were transgendered and thus they were valued as leaders of their tribe. Some consider Joan of Arc to be transgendered, as are a number of saints honoured on the Catholic Calendar.

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17 Sharpe, n 12.
Transgender persons have often served in the militaries of various nations, with at least 400 women now known to have fought as men in the United States Civil War. This service was later honoured.\textsuperscript{19}

Gender identity variance is subject to significant cultural differences throughout the world. As a result, access to treatment, cost of treatment, therapies offered and the social attitudes towards gender-variant people differ broadly from place to place. There are no epidemiological studies that establish that a similar base rate of gender identity disorders exists but even if this were the case, “it is likely that cultural differences from one country to another would alter the behavioural expressions of these conditions”.\textsuperscript{20}

While in most countries, crossing gender boundaries usually generates moral censure rather than compassion, there are striking examples in certain cultures of cross-gendered behaviours … that are not stigmatized.\textsuperscript{21}

These cultures include hijra in the Hindi culture,\textsuperscript{22} Mahu in Hawaii, Tongan fakaleiti and Samoan fa’a’afafine.\textsuperscript{23}

**Prevalence of Gender Identity Disorders**

Early estimates of prevalence for adult transsexualism were 1 in 37,000 for men and 1 in 107,000 for women. The most recent prevalence data from The Netherlands (from the transsexual end of the clinical spectrum) are 1 in 11,900 males and 1 in 30,400 females.\textsuperscript{24} Original clinical perspectives on gender identity disorders commonly directed attention toward determining ways of identifying patients for sexual reassignment surgery. As knowledge in the area increased, evidence suggested that a number of persons with gender identity disorders “neither desired nor were candidates for sex reassignment surgery”.\textsuperscript{25} It was also suggested that there may be an even higher prevalence of those with gender identity disorder but in a variety of less well recognised ways:

1. unrecognized gender problems are occasionally diagnosed when patients are seen with anxiety, depression, bipolar disorder, conduct disorder, substance abuse, dissociative identity disorders, borderline personality disorder, other sexual disorders and intersexed conditions;
2. some nonpatient male transvestites, female impersonators, transgender people, and male and female homosexuals may have a form of gender identity disorder;
3. the intensity of some persons’ gender identity disorders fluctuates below and above a clinical threshold;
4. gender variance among female-bodied individuals tends to be relatively invisible to the culture, particularly to mental health professionals and scientists.\textsuperscript{26}

In 2007 Olyslager and Conway recalculated the prevalence from the accumulating incidence data and determined the inherent number of persons who at some point in life will undergo reassignment. Their reanalysis of the early reports determined the lower bounds on the prevalence of the underlying


\textsuperscript{20} World Professional Association for Transgender Health, World Professional Association for Transgender Health’s Standards of Care for Gender Identity Disorders (6th Version), http://www.gidi.ie/Resources_studies/Standards%20of%20Care.htm viewed October 2010.


\textsuperscript{22} Sua’alii’i T, “Samoans and Gender: Some Reflections on Male, Female and Fa’aafafine Gender Identities” in Tangata O Te Moana Nui: The Evolving Identities of Pacific Peoples in Aotearoa/New Zealand (Dunmore Press, Palmerston North, 2001).

\textsuperscript{23} Gooren LJG, Up-to-Date: Transsexualism: Biologic Considerations, Definition, and Diagnosis (2010), http://www.uptodate.com/online/content/topic.do?topicKey=r_endo_m/10904&selectedTitle=1%7E5&source=search_result viewed October 2010; van Kesteren PJ, Gooren LJ and Megens JA, “An Epidemiological and Demographic Study of Transsexuals in The Netherlands” (1996) 25 Arch Sex Behav 589.

\textsuperscript{24} World Professional Association for Transgender Health, n 20.

\textsuperscript{25} World Professional Association for Transgender Health, n 20.
condition of transsexualism to be between 1:1,000 and 1:2,000. More recent incidence data and alternative methods for estimating the prevalence of transsexualism indicate that the lower boundary on the prevalence of transsexualism is at least 1:500, and possibly higher, which is consistent with the above observations. The 3:1 ratio of males to females is widely encountered in the Western world but in other parts of the world shifts in favour of female-to-male transsexualism are encountered.

HUMAN RIGHTS AND TRANSGENDER ISSUES

The United Nations Charter of Human Rights does not focus specifically on sexuality and gender rights but people who are transgender should enjoy the fundamental rights of non-discrimination and equality before the law as set out, eg, in Arts 2 and 26 of the International Covenant on Civil and Political Rights (ICCPR). Similar non-discrimination provisions are in the International Covenant on Economic, Social and Cultural Rights, the Convention on the Rights of the Child, the International Convention on the Elimination of All Forms of Racial Discrimination and the Convention on the Elimination of All Forms of Discrimination against Women.

In March 2007, a group of human rights experts developed and adopted what are known as the Yogyakarta Principles. These confirm that all international human rights laws apply to GLBTI people. The Principles affirm binding international legal standards that were developed in response to an ingrained pattern of human rights violations that include “extra-judicial killings, torture and ill-treatment, sexual assault and rape, invasions of privacy, arbitrary detention, denial of employment and education opportunities, and serious discrimination in relation to the enjoyment of other human rights”. This position was supported by the United Nations High Commissioner for Human Rights who stated that the silence surrounding the ongoing assault and abuse ignores the “fundamental principle of the universality of rights”.

The Yogyakarta Principles are similar to the International Bill of Gender Rights (IBGR) adopted in July 1996, which sought to articulate basic human rights for transgender people. There are several clauses within the Bill that defend the choice of transgender people not to have to accept surgery and more particularly sterilisations as a condition of identity recognition. For example, cl 1 refers to the right to define gender identity, cl 5 the right to control and change one’s own body, and cl 10 the right to conceive, bear or adopt children. These rights are similarly recognised in the United Nations Declaration of Human Rights and Principle 24 of the Yogyakarta Principles – the right to found a family reinforces the universally held belief that all human beings have a right to choose to reproduce human beings.


28 World Professional Association for Transgender Health, n 20; Olyslager and Conway, n 27.


30 International Covenant on Civil and Political Rights (ICCPR), Art 2: “Each State Party to the present Covenant undertakes to respect and ensure to all individuals within its territory and subject to its jurisdiction the rights recognised in the present Covenant, without distinction of any kind such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”

31 International Covenant on Civil and Political Rights (ICCPR), Art 26: “All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”


34 Currah, Juang and Price Minter, n 18.

35 Currah, Juang and Price Minter, n 18.
In addition, in mid-2010, the World Professional Association for Transgender Health (WPATH) issued a statement about “identity recognition” in the interest of the health and wellbeing of transgender and transsexual people, stating:

[N]o person should have to undergo surgery or accept sterilization as a condition of identity recognition. If a sex marker is required on an identity document, that marker could recognize the person’s lived gender, regardless of reproductive capacity. The WPATH Board of Directors urges governments and other authoritative bodies to move to eliminate requirements for identity recognition that require surgical procedures.37

Indeed, the issue of state-mandated sterilisation of the “other” is not a new issue. Sharpe asks what other Australian citizen is subject to compulsory sterilisation.38 In 1942 the United States Supreme Court found that the Oklahoma Habitual Criminal Sterilisation Act was unconstitutional. This Act sought to authorise the state to have “habitual criminals” (those having been convicted two or more times for felonies) rendered sterile by way of vasectomy in the case of a male, and of salpingectomy (surgical removal of the fallopian tube) in the case of a female. The Court found that the legislation touched on the most basic of civil rights (noting that marriage and procreation are fundamental to the very existence and survival of the race) and that to deny such rights would deprive such people forever of a basic liberty.39 In the face of cases like this and the doctrines referred to above, it is difficult to reconcile the very onerous requirement that transgender people must suffer in order to be recognised for their acknowledged medical condition. It should be expected that the role of these doctrines is, as it has been with others, to continue to raise awareness of the issues identified here and to seek both normative and jurisprudential development on those issues.

However, there are examples where regulation of reproduction by the state has been limited. For example, in Dickson v United Kingdom (44362/04) (2007) 44 EHHR 21, the Grand Chamber of the European Court of Human Rights considered whether prisoners and their partners should be allowed access to facilities for artificial insemination and whether the denial of access to such facilities constituted a breach of the applicants’ rights under Art 8 (right to private and family life) and Art 12 (right to marry and found a family) of the European Convention on Human Rights. The Court was, in effect, asked to answer the question of whether the state has the right to regulate the reproductive rights of a person. Codd observed:

[This] raises not only issues of human rights, reproductive autonomy, the nature and purposes of punishment and the role of the state in family life, but also involves consideration of the status and rights of an as-yet-unconceived child. Thus, while the decision is of particular relevance to those interested in medical law in the context of prisoners’ rights and health care, the potential impact of the judgment may be far greater and prompts further legal debate on the status of children who are not only unborn, but also not yet conceived.40

The Grand Chamber held by a 12-to-five majority that there had been a violation of Art 8.41

In a transsexual case, the European Court of Human Rights did further define this right, stating:

The right to respect for private life is the right to live as one desires sheltered from the stares of others. It equally includes, to a certain extent, the right to establish and maintain affective relations for the development and fulfilment of one’s personality.42

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36 Yogyakarta Principles, n 32.
39 Skinner v Oklahoma; Ex rel Williamson 316 US 535 (1942).
41 Codd, n 40.
MEDICAL ISSUES FOR TRANSGENDER PERSONS

The majority decision by the Western Australian Court of Appeal failed to acknowledge that some transgender persons living in the opposite gender to that assigned to them at their birth do not wish, for diverse personal reasons (fear of the operation, or worsening their emotional balance, financial or medical costs) to completely transform their bodies. This should not deny them the right to be lawfully recognised as being of the sex with which they identify (at [160]). There are legitimate and significant reasons why this choice is valid and should be recognised legally. Some male-to-female transgender women do not wish to undergo a vaginoplasty because the hormone therapy can make them sterile and impotent. There is a theoretical possibility of reversibility, although in practice there is little likelihood that fertility could return. Some female-to-male transgender men do not wish to undergo a hysterectomy (or ovariectomy). The World Professional Association of Transgender Health argues that sex reassignment plays an undisputed role in contributing to favourable outcomes for transgender people. However, they also argue that genital reconstruction is not required for social gender recognition, and therefore such surgery should not be a prerequisite for document or record change.

TRANSGENDER PREGNANCY AND THE LAW

In Western Australia v AH [2010] WASCA 172, both the Gender Reassignment Board and the Court of Appeal were troubled by the potential for the applicants to become pregnant should they cease testosterone treatment some time in the future (at [160]). Indeed, this was the most significant barrier to their being denied eligibility for a recognition certificate. The incidence of transgender men actually becoming pregnant is, however, very rare, as was pointed out on behalf of the applicants before the tribunal and as has been discussed earlier.

A high-profile recent case occurred in the United States with a transgender man, Thomas Beatie, successfully becoming pregnant. In this case, Thomas Beatie was born Tracy Lagondino. He underwent treatments to alter his appearance and was lawfully recognised as a male without having the requirement of removal or alteration of the ovaries, uterus or vagina. Beatie married a woman unable to have children and so he ceased hormonal treatment, was inseminated with donor sperm and gestated two successful pregnancies.

As noted in the evidence adduced in Western Australia v AH, long-term hormonal therapy for either MTF (transgender woman) or FTM transsexuals will eventually render the person sterile. Furthermore, long-term hormonal treatment also has some significant side-effects and it may be beneficial to surgically remove the gonads to decrease the risk of malignancy in the future (namely, FTMs on testosterone who are at risk of breast or uterine cancer). Obviously, medical procedures like this require the consent of the patient. It is therefore arguable that participating in this procedure is voluntary and thus not unethical. However, if legislation makes this a requirement in order to secure a recognition certificate, then it is more likely that this could be viewed as an unjust discriminatory and punitive measure applied to only a small section of the community. It is perhaps also important to remember that there was a time when we asked (particularly male) homosexual couples to make similar decisions regarding procreation: live in a heterosexual relationship and have a family or live in a same-sex relationship and don’t.

The morality of coerced sterilisation is dubious, given that there seems to be no harm to society in “allowing” for transgender men to become pregnant and certainly none that appears to outweigh the...
benefits. Unlike surrogacy, eg, there are no issues of exploitation and indeed little psychological
evidence to suggest that the children would be harmed any more so than those children growing up in
homosexual relationships or, indeed, other heterosexual relationships. This position is arguably
perpetuated as a result of fear of those with non-normative sex or gender traits. Rather than being
considered as the “other”, these members of the population should simply be recognised (not
determined) by the state and the community as the identity they consider themselves to be. What is the
harm in that, compared to the harm of not recognising them and the requirement that they undergo
risky, expensive and arguably pointless surgery? At the very least, those unable to undergo the
required surgery as a result of age or ill health should be exempted from this requirement on
compassionate and/or a provisional basis.48

OPTIONS FOR THE REPRODUCTIVE RIGHTS OF TRANSGENDER PEOPLE

De Sutter et al argue that transsexual people who are undergoing transition should be offered the same
options as any person at risk of losing their germ cells (eg chemotherapy for a malignant disease).
Transsexual women (MTF) may be given the option to freeze spermatozoa and transsexual men
(FTM) may be offered the opportunity to store oocytes or ovarian tissue. Current technologies offer
transsexuals the opportunity to have children that are genetically their own, in future relationships.
This is particularly important for transgender persons diagnosed and treated at a young age.49 Other
reproductive options will be determined by a transgender person’s rights to access artificial
reproduction and adoption. It is to be hoped that in the not-too-distant future, transgender people may
be able to found a family with exactly the same rights and equity as infertile heterosexual couples.
While there appear to be some solutions to the issue of reproduction, regulated sexual reassignment
and legislation regarding gender identity, these are a poor second to actually writing legislation that
recognises all the human rights of transgender people.

CONCLUSION

Less than a handful of European jurisdictions recognise that gender reassignment does not require the
permanent, irreversible sterilisation of a person through genital surgery in order to meet gender
recognition criteria. They recognise that it is enough that a person identify as the sex “other” than the
one they were born as and the gender “roles” associated with that sex would, in the case of
female-to-male reassignment, mean that they would not bear children – that is not a “male” role.
Arguably, this is what the Western Australian Parliament also intended in not specifying within the
legislation that irreversible sterilisation was a requirement for eligibility for a recognition certificate.
However, the Court of Appeal in Western Australia v AH did not apply a liberal view but instead
agreed with the interpretation of the term “gender characteristics” as applied by the Gender
Reassignment Board and in a two-to-one decision upheld the appeal, thus denying the applicants the
opportunity to apply for a recognition certificate as having been gender-reassigned from females to
males. This was despite the court having received evidence that the applicants were taking medication
that, in order to make them appear more like men, would also have the effect of making them infertile.
Further to this, the court effectively suggested that the applicants be required to obtain more of the
“physical characteristics” that would be recognised by the community as being associated with the
male gender. Lack of medical technology should not be used as a means of discrimination against
transgender people any longer. Significant human rights violations are being perpetrated globally, as
State and federal administrations compel transgender people into the conundrum of choosing between
their right to found a family or proceeding with irreversible, risky, expensive and arguably pointless
surgery as a condition of being legally recognised for who they are. Indeed, it has been said that “you

48 Wallbanks, n 13.
49 De Sutter P, Kira K, Verschoor A and Hotimsky A, “The Desire to Have Children and the Preservation of Fertility in
www.iiav.nl/ezines/web/ITJ/97-03/numbers/symposium/jitvo06mo03_02.htm viewed November 2010; De Sutter P, “Gender
Reassignment and Assisted Reproduction – Present and Future Reproductive Options for Transsexual People” (2001) 16(4)
Hum Reprod 612.
rob people of human rights when their legal identity doesn’t match their lived identity”. 50 Similarly, Vade argues that “self identified gender is the only true gender”51 and it is therefore necessary for governments to allow for a transgender identity to be recognised with all of its associated rights, including child-bearing. There is no social advantage in the law not recognising their “true” identity without having to undertake surgery. The policy exhibited in this case is unjustified and unjust.

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