

# AB v Western Australia and Anor [2011] HCA 42: Gender Recognition Certificates

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*In Re Kevin, Chisholm J declared that ‘the task of the law is not to search for some mysterious entity, the person’s ‘true sex’, but to give an answer to a practical human problem’. A unanimous High Court decision did just that recently by granting gender recognition certificates to two female to male transgender men.*

## BACKGROUND

AB and AH were born female and manifested desires to appear as male during childhood. Both were diagnosed as suffering from gender dysphoria and had undergone testosterone therapy and bilateral mastectomies.<sup>1</sup> They had not undergone surgery to construct a penis or hysterectomies. The medically risky procedure to construct a penis, phalloplasty, is not available in Australia and both AB and AH did not consider hysterectomies necessary to their sense of male identity.<sup>2</sup>

AB and AH applied to the West Australian Gender Reassignment Board (‘the Board’) for a recognition certificate confirming their gender as male and enabling them to obtain a new birth certificate.

The requirements for obtaining a recognition certificate are outlined in the *Gender Reassignment Act 2000* (WA) (‘the Act’):

- (1) AB and AH must have undergone a ‘reassignment procedure’;<sup>3</sup>
- (2) that reassignment procedure must have been carried out in Western Australia or AB and AH must have born in or residents of Western Australia for twelve months;<sup>4</sup> and

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1 *Re Kevin and Jennifer v Attorney-General for the Commonwealth* [2001] FamCA 1074.

2 *Ibid* [15].

3 *Gender Reassignment Act 2000* (WA) s 14.

4 *Gender Reassignment Act 2000* (WA) s 15(1)(a).

- (3) the Board must be satisfied that AB and AH:
- (i) believe their true gender is male;
  - (ii) have adopted the lifestyle and have the ‘gender characteristics’ of a male; and
  - (iii) received proper counselling regarding their gender identity.<sup>5</sup>

‘Reassignment procedure’ is defined as a medical or surgical procedure to alter the genitals and other gender characteristics of a person so that the person will be ‘identified as’ a person of the opposite sex. ‘Gender characteristics’ is defined as the physical characteristics by virtue of which a person is ‘identified as’ male or female.<sup>6</sup>

The Board decided that a bilateral mastectomy constituted a ‘reassignment procedure’. However, it refused AB and AH’s applications because they retained female reproductive systems, a characteristic inconsistent with being male. The Board also noted the adverse social and legal consequences were AB or AH later to conceive a child.<sup>7</sup>

AB and AH appealed to the State Administrative Tribunal (‘the Tribunal’), which set aside the Board’s decision and granted AB and AH recognition certificates. The Tribunal reasoned that AB and AH had acquired gender characteristics consistent with being male and inconsistent with being female. The Tribunal adopted the Board’s position that AB and AH had undergone a reassignment procedure, but relied upon the effect of the testosterone treatment on their genitals and uterus.<sup>8</sup>

On appeal to the Court of Appeal of the West Australian Supreme Court, a 2:1 majority<sup>9</sup> held that AB and AH did not have the ‘gender characteristics’ that would identify them as male. They possessed none of the genital or reproductive characteristics of a male, and retained virtually all the external genital characteristics and internal reproductive organs of a female. Consequently, AB and AH would be identified as male according to community standards.<sup>10</sup> However, the majority conceded that AB and AH had undergone a reassignment procedure. That being testosterone therapy, not the bilateral mastectomies.<sup>11</sup>

AB and AH appealed successfully to the High Court. The appeal turned upon whether AB and AH had the ‘gender characteristics’ by which they would be ‘identified as’ male under s 15(1)(b)(ii) of the Act.

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5 *Gender Reassignment Act 2000* (WA) s 15(1)(b).

6 *Gender Reassignment Act 2000* (WA) s 3.

7 *AB v WA* [2011] HCA 42, [12].

8 *AB and AH v Gender Reassignment Board* (WA) (2009) 65 SR(WA) 1, [145].

9 The majority consisted of Martin CJ and Pullin JA with Buss JA dissenting.

10 *State of Western Australia v AH* [2010] WASCA 172, [114]-[115] (Martin CJ), [125] (Pullin JA).

11 *AB v WA* [2011] HCA 42, [91].

## THE DECISION

A unanimous High Court comprising French CJ, Gummow, Hayne, Kiefel and Bell JJ upheld the appeal, setting aside the Court of Appeal's decision and reinstating the Tribunal's grant of recognition certificates.

The joint judgment reasoned that AB and AH had the requisite 'gender characteristics' because their external features would cause them to be recognised by society as male.<sup>12</sup> The judges highlighted that the sex of a person and a person's gender characteristics are not always unequivocally male or female and there is no threshold point at which a person is regarded as male or female.<sup>13</sup>

The High Court confirmed that a surgical procedure to alter AB and AH's genitals or other gender characteristics was not required by the Act.<sup>14</sup> Accordingly, AB and AH were not required to 'undertake every procedure to remove every vestige' of their denied female gender, including all sexual and reproductive organs.<sup>15</sup>

The adverse social and legal consequences, and community standards and expectations considered by the Tribunal and the Court of Appeal majority were not relevant considerations under the Act.<sup>16</sup>

## COMMENT

From its early stages before the Board to the final decision of the High Court, the case grappled with a number of human rights and human interest issues. Ultimately, the High Court decision provides a landmark declaration of how gender recognition legislation should be interpreted and when gender recognition certificates should be issued. This declaration also departs from the statutory position in other Australian jurisdictions.<sup>17</sup>

## APPROACH TO STATUTORY INTERPRETATION TO BE ADOPTED WHERE HUMAN RIGHTS AFFECTED

The approach to statutory interpretation applied by the High Court is more consistent with the general rules of statutory interpretation and is to be preferred to that of the Court of Appeal majority. The joint judgment acknowledged that when construing legislation protecting or enforcing human rights, the courts have a 'special responsibility' to consider and give effect to statutory purpose.<sup>18</sup>

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12 Ibid [34].

13 Ibid [23] and [29].

14 Ibid [32].

15 Ibid [33].

16 Ibid [38].

17 *WA v AH* [2010] WASCA 172, [35].

18 *AB v WA* [2011] HCA 42, [24]. The judgment cited *Waters v Public Transport Corporation* (1991) 173 CLR 349, 359 as authority for the proposition concerning statutory interpretation where human rights protected or enforced.

The judges confirmed the Act's beneficial and remedial nature. Consequently, a 'fair, large and liberal' interpretation was to be applied favouring the interests of applicants.

In the Court of Appeal, it was only the minority judge, Buss JA, who recognised the Act's beneficial and remedial nature and applied a purposive approach to statutory interpretation.<sup>19</sup> Martin CJ acknowledged the Act's beneficial nature, but found it irrelevant as the 'value judgment' as to whether an applicant is 'male' or 'female' was 'not assisted by resort to adjectival expressions such as beneficial, liberal or purposive'.<sup>20</sup>

## AUTONOMY AND THE RIGHT TO SELF-DETERMINE

The High Court's decision upheld AB and AH's autonomy by protecting their rights to self-determine and to make their own medical decisions. The judges declared that surgical alteration of genitals and sterilisation were not required by the Act. Parliament was aware of a similar prerequisite in other jurisdictions, but chose not to include it in the Act.<sup>21</sup> The joint judgment also drew greater attention to the significance of self-perception of gender as a factor weighing in favour of issuing a recognition certificate.<sup>22</sup>

The majority judgments in the Court of Appeal did not *directly* infringe on AB and AH's autonomy by requiring surgical alteration of the genitals and reproductive organs as a prerequisite. However, they did so *indirectly* by prospectively coercing AB and AH into surgery if they wished to have their reassigned gender legally recognised. Requiring transgendered persons to forgo their reproductive rights through sterilisation is also inconsistent with international human rights statements.<sup>23</sup>

## ACCESS TO JUSTICE

Arguably, fairness and 'gender justice' required the legal acknowledgement of AB and AH's reassigned gender. The severe burden of gender dysphoria, the indignity often faced by its sufferers and the hindrances that non-recognition can cause to full social integration were clear from evidence given throughout the proceedings and could be alleviated by issuing a certificate.

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19 *WA v AH* [2010] WASCA 172, [182].

20 *Ibid* [105].

21 *AB v WA* [2011] HCA 42, [32].

22 *Ibid* [27]-[28].

23 See, e.g. International Commission of Jurists, *Yogyakarta Principles – Principles on the Application of International Human Rights in Relation to Sexual Orientation and Gender Identity* (March 2007) <<http://www.unhcr.org/refworld/doid/48244e602.html>>, Principle 24.

The High Court's decision makes it easier for transgendered persons to obtain gender recognition certificates. It suggests a lower standard applicants must satisfy to prove they have the requisite 'gender characteristics'. Having the external characteristics by which other members of society would perceive the person to be of the reassigned gender is sufficient.<sup>24</sup> Applicants do not need to remove internal reproductive organs or genitals.

The decision also attempts to ensure equity by removing any additional burden on female to male transgendered persons for whom completely transforming their bodies is more difficult and risky medically. The joint judgment noted that requiring applicants to have the genitals of the reassigned sex would operate unfairly or discriminatory on female to male transsexuals. This could not have been intended in remedial and beneficial legislation.<sup>25</sup>

Arguably, an easier to satisfy test for social recognition is also suggested. What matters is how society would perceive an applicant based on their external characteristics and lifestyle. Whether the applicant meets society's standards and expectations regarding abstract and genito-centric notions of 'maleness' and 'femaleness' is not the appropriate standard.<sup>26</sup>

## CONCLUSION

The High Court's decision sets a powerful precedent, one to which a legislative response will follow. In rejecting any strict male or female gender dichotomy, the joint judgement abandoned any search for the applicants' 'true sex' and instead provided an answer to a human problem. This rejection may have implications for other legislation relying upon strict gender classifications and same sex marriage legislation.

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24 *AB v WA* [2011] HCA 42, [34].

25 *Ibid* [31].

26 *Ibid*.