

RECENT DEVELOPMENTS IN THE LAW RELATING TO TRANSGENDER PEOPLE

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Background

- WA and SA are the only States that do not require gender reassignment surgery to change your sex.
- At common law there has been a preoccupation with genitals and genital surgery as seen in *R v Harris (1988)* and *Secretary, Department of Social Security v SRA (1993)*.

AB v WA and AH v WA [2011]

Two transgender men, AH & AB, apply to the Gender Reassignment Board for Gender Recognition Certs. Undergone double mastectomies and testosterone therapy, but not hysterectomies. Application denied because Applicants retained a, *“female reproductive system, inconsistent with being male.”* **1**

Appeal to Tribunal sets aside Board decision and orders them to issue a Certificate to each Applicant, *“to refuse recognition certificates on the basis of the retention of the uterus would, in our view, give primacy to that anatomical feature to the exclusion of the totality of the male gender characteristics of each applicant.”* **2**

AH & AB appeal. High Court upholds appeal and reinstates Tribunal decision, saying that the physical characteristics by which a person is identified as male or female are confined to external physical characteristics that are socially recognisable. Social recognition of a person's gender does not require knowledge of a person's remnant sexual organs. **4**

AG of WA appeals SAB decision. Court of Appeal upholds the appeal saying, *“the physical characteristics, by virtue of which a person is identified as male or female, are confined to external physical characteristics; that is, physical characteristics that are apparent to or may be perceived by another person.”* **3**

WA Gender Reassignment Act(2000)

s.3 Definitions

gender characteristics: means the physical characteristics by virtue of which a person is identified as male or female;

reassignment procedure: means a medical **or** surgical procedure (or a combination of such procedures) to alter the genitals and other **gender characteristics** of a person, 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;

s.14(1) Where a person has undergone a reassignment procedure (before or after the commencement of this Act and within the State or elsewhere), application may be made to the Board in accordance with this section for the issue of a recognition certificate.

s.15(1) Where an application under section 14 relates to an adult, the Board may issue a recognition certificate 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.

HCA interpretation of the WA Gender Reassignment Act (2000)

- Once a person meets the surgical or medical procedure requirements under s.14 (including hormone therapy with no surgery) and the requirements under s.15(1)(a), the question of physical anatomy should not be considered any further.
- The requirements for s.15(1)(b) are therefore ***“what other members of society would perceive the person’s gender to be...what gender the person exhibits to other members of society, by reference to the gender characteristics they now have and to their lifestyle. That conclusion would be reached by reference to the person’s appearance and behaviour, amongst other things. It does not require knowledge of a person’s remnant sexual organs.”***

Questions arising from the recent decision

- Will the same apply to transgender women given the availability of surgery in Australia?
- Will mutual recognition certificates allow people to move states to legally change their sex? Given that NSW has a strictly surgical test, what will the legal repercussions be?
- Problems resulting from the social identification standard applied in the judgment
- What can be defined as a surgical procedure to the reproductive system to identify as the other sex? *R v Harris* (1988)