
JURISDICTION : STATE ADMINISTRATIVE TRIBUNAL

STREAM : HUMAN RIGHTS

ACT : GENDER REASSIGNMENT ACT 2000 (WA)

CITATION : AB & AH and GENDER REASSIGNMENT BOARD
OF WESTERN AUSTRALIA [2009] WASAT 152

MEMBER : MS J TOOHEY (SENIOR MEMBER)
MR M ALLEN (SENIOR MEMBER)
DR L FARRELL (SENIOR SESSIONAL MEMBER)

HEARD : 24 AND 25 FEBRUARY 2009

DELIVERED : 14 AUGUST 2009

FILE NO : GRA 1 of 2008
GRA 2 of 2008

BETWEEN : AB
AH
Applicants

AND

GENDER REASSIGNMENT BOARD OF
WESTERN AUSTRALIA
Respondent

STATE OF WESTERN AUSTRALIA
Intervener

Catchwords:

Gender reassignment - Review of decisions of the Gender Reassignment Board refusing recognition certificates - Both applicants born female - Reassignment procedure - Medical and surgical procedures undertaken - Bilateral

mastectomies and testosterone treatment - Genitals and other gender characteristics altered - Whether hysterectomy necessary in order to satisfy requirements of the *Gender Reassignment Act 2000* (WA) - Gender characteristics - Whether applicants have the physical characteristics by virtue of which a person is identified as male - Finding that applicants satisfy provisions of the legislation - Decision under review set aside

Legislation:

Births, Deaths and Marriages Act 1995 (NZ)

Births, Deaths and Marriages Registration Act 1995 (NSW), s 32A

Births, Deaths and Marriages Registration Act 1996 (Vic), s 30A

Births, Deaths and Marriages Registration Act 1996 (NT), s 28A

Births, Deaths and Marriages Registration Act 1997 (ACT), s 23

Births, Deaths and Marriages Registration Act 2003 (Qld), s 22

Crimes Act 1990 (NSW), s 81A

Equal Opportunity Act 1984 (WA)

Gender Reassignment Act 2000 (WA), s 3, s 5, s 14, s 14(1), s 14(9), s 15(1), s 15(1)(a), s 15(1)(b), s 15(3), s 16(1), s 17, s 18, s 21

Interpretation Act 1984 (WA), s 18, s 56

Sexual Reassignment Act 1988 (SA)

Social Security Act 1947 (Cth), s 37(1)(a)

State Administrative Tribunal Act 2004 (WA), s 27, s 37

Result:

Decision under review set aside

Category: B

Representation:

Counsel:

Applicants : Mr S Penglis
Respondent : N/A
Intervener : Mr G Tannin SC

Solicitors:

Applicants : Freehills
Respondent : N/A
Intervener : State Solicitor's Office

Case(s) referred to in decision(s):

Attorney-General for the Commonwealth v Kevin and Jennifer
[2003] FamCA 94
Corbett v Corbett [1971] P 83
IW v City of Perth (1997) 191 CLR 1
Michael v Registrar-General of Births, Deaths and Marriages
[2008] 27 FRMZ 58
R v Harris and McGuinness (1989) 17 NSWLR 159
Re Alex [2004] FamCA 297
Re Secretary, Department of Social Security and HH (1991) 14 ALD 58
Scafe v Secretary, Department of Families, Housing, Community Services and
Indigenous Affairs [2008] AATA 104
Secretary, Department of Social Security and SRA (1993) 43 FCR 299

REASONS FOR DECISION OF THE TRIBUNAL:

Summary of Tribunal's decision

1 The applicants sought review of decisions of the Gender Reassignment Board of Western Australia refusing to issue them with certificates recognising the reassignment of their gender from female to male.

2 Both applicants had undergone bilateral mastectomies, and testosterone treatment as a result of which each had undergone extensive physical changes consistent with being male. Both were infertile. Both presented as, and appeared to be, males. Neither had undergone any surgical procedure to alter their ovaries, uterus or vagina. Neither had had a penis constructed.

3 The Gender Reassignment Board of Western Australia found that each applicant satisfied all the requirements of the *Gender Reassignment Act 2000* (WA) for the issue of a recognition certificate except the requirement that they have the gender characteristics, as defined, of a male. In that regard, the Gender Reassignment Board of Western Australia found the fact of having a female reproductive system inconsistent with being male.

4 On review, the Tribunal accepted the evidence of each applicant that he intended to continue testosterone treatment for the rest of his life. It accepted the medical evidence that each was, and would remain, infertile for as long as he continued testosterone treatment. It accepted that there was no real prospect of pregnancy in the future. It noted that a surgical procedure is not mandated by the *Gender Reassignment Act 2000* (WA).

5 The Tribunal noted that it is impossible for a person to have all the physical characteristics by virtue of which to be identified as being of the opposite sex and found that, necessarily, having the gender characteristics of a male within the meaning of the *Gender Reassignment Act 2000* (WA) means having sufficient of those characteristics. It accepted that a female reproductive system is a fundamental, although not essential, physical characteristic of being female. However, it was not persuaded that the presence of those organs alone, in circumstances in which there was no longer a capacity to bear children, and no real prospect of that changing in the future, outweighed the other physical characteristics by virtue of which each applicant is now identified as male.

6 The Tribunal stated that there are important policy reasons for requiring certainty in the area of gender reassignment. However, whether a person has the gender characteristics of the gender to which they seek to be reassigned must be determined according to the circumstances of the individual in light of the terms and purpose of the *Gender Reassignment Act 2000* (WA). In the circumstances of the applicants in these proceedings, it was satisfied that each was entitled to a recognition certificate.

Background

7 AB and AH seek review of decisions of the Gender Reassignment Board of Western Australia (Board) to refuse to issue them with certificates recognising the reassignment of their gender from female to male. The applications are made pursuant to s 21 of the *Gender Reassignment Act 2000* (WA) (GR Act).

8 The facts in each application raise the same issues of statutory construction and, for convenience, we deal with them together in this statement of reasons. Both applicants identify as male and we refer to them as such.

9 On 14 November 2007 and 11 April 2008 respectively, AB and AH applied to the Board under s 14(1) of the GR Act for a recognition certificate.

10 On 16 June 2008, the Board refused both applications. It subsequently issued a written statement of reasons for its decision in each case.

11 The applications fall within the Tribunal's review jurisdiction. The review is by way of a hearing de novo, the purpose of which is to produce the correct and preferable decision at the time of the decision upon the review: s 27 *State Administrative Tribunal Act 2004* (WA) (SAT Act).

12 Appropriately, the Board gave notice to the Tribunal that it did not intend to be heard by counsel and would abide by the decision of the Tribunal in both proceedings. At an early stage in the proceedings, the Attorney General for the State of Western Australia intervened on behalf of the State pursuant to s 37 of the SAT Act.

13 The applications were heard together, the applicants being represented by the same solicitors and counsel, and the intervener being

represented by the same counsel, in both proceedings. The Tribunal records its appreciation for the assistance provided by counsel.

14 The Tribunal has received written submissions from the applicants and the intervener, and medical reports and other documents submitted by the parties including correspondence between medical practitioners involved in each applicant's gender reassignment, confirming their diagnoses of gender dysphoria and the progress of their reassignment from female to male. The Tribunal heard oral evidence from the applicants and from medical practitioners on their behalf, and from a medical practitioner on behalf of the intervener.

The statutory framework

15 The functions of the Board under the GR Act are to receive and determine applications for recognition certificates and to issue recognition certificates in suitable cases: s 5.

16 A person who has undergone a reassignment procedure may apply to the Board for the issue of a recognition certificate: s 14(1). Applications must be made in the manner set out in s 14 of the GR Act. The Board must determine every application by giving a written decision containing the reasons for the decision: s 14(9).

17 'Reassignment procedure' in the GR Act 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 3)

18 'Gender characteristics' in the GR Act means:

the physical characteristics by virtue of which a person is identified as male or female. (s 3)

19 By s 15(1) of the GR Act, on an application relating 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.

20 A recognition certificate cannot be issued to a person who is married:
s 15(3).

21 A recognition certificate is conclusive evidence that the person to
whom it refers has undergone a reassignment procedure and is of the sex
stated in the certificate: s 16(1).

22 If a recognition certificate is produced to the Registrar of Births,
Deaths and Marriages, the Registrar must register the reassignment of
gender and make such other entries and alterations on any register or
index kept by the Registrar as may be necessary in view of the
reassignment: s 17. Any birth certificate subsequently issued by the
Registrar for the person concerned must, unless otherwise requested by
the person or permitted by the regulations made under the GR Act, show
the person's sex in accordance with the register as altered and must not
include a statement that the person has changed sex: s 18.

23 A person aggrieved by a decision of the Board on an application for
the issue of a recognition certificate may apply to the Tribunal for review
of that decision: s 21.

The Board's reasons for decision

24 The Board's reasons do not limit the Tribunal in conducting a review
but they are a useful starting point in understanding the way the Board
approached its task.

25 The Board was satisfied that both applicants met s 15(1)(a) of the
GR Act in that their births are registered in Western Australia, the

reassignment procedure was carried out here and each had been resident in Western Australia for not less than 12 months. (The Board noted that any one of these would have been sufficient for the purposes of the GR Act.)

26 Both applicants have undergone bilateral mastectomies and testosterone treatment. Neither has undergone any surgical procedure to alter their ovaries, uterus or vagina. Neither has had a penis constructed.

27 In both cases, the Board found that the bilateral mastectomy which the applicant had undergone was a 'reassignment procedure' within the meaning of the GR Act, being a surgical procedure to alter the applicant's gender characteristics so as to be identified as a member of the opposite sex.

28 In relation to s 15(1)(b) of the GR Act, the Board was satisfied that each applicant believed his true gender was that to which he had been reassigned and had received proper counselling in relation to his true gender identity. Each therefore satisfied s 15(1)(b)(i) and s 15(1)(b)(iii) of the GR Act.

29 In relation to s 15(1)(b)(ii) of the GR Act, the Board was satisfied that each applicant had adopted the lifestyle of a male person. However, it was not satisfied that either had the gender characteristics of a male person. It was on the meaning of this expression that each application turned, and failed.

30 The Board stated, in relation to each applicant, that:

[The applicant] no longer has the physical characteristic of female breasts. In that one aspect, [the applicant] could be identified as male. In other aspects, [the applicant] cannot be identified as male. In the Board's opinion, [the applicant] cannot be identified as male because he has a female reproductive system. The fact of having a female reproductive system is inconsistent with being male. Because it is inconsistent with being male, it is inconsistent with being identified as male.

31 In relation to AH, the Board said:

Dr Coombes says in her report that [AH]'s female reproductive system is effectively inoperative by virtue of the fact that he receives regular testosterone injections. In the Board's opinion, that has no bearing on the question of whether [he] has the gender characteristics of a male. The physical characteristics which identify [him] as female, and therefore not male, are still present.

32 In relation to AB, the Board said:

In his written submission [AB] referred to the fact that he has undergone testosterone therapy for many years. He says that '... research also indicates that testosterone therapy causes atrophic changes of the cervical epithelium, uterus and ovaries altering their function characteristics and thus inducing sterility'. The physical characteristics which identify [AB] as female, and therefore not male, are still present.

33 The Board stated in each case that, in reaching the conclusion that the applicant did not have the gender characteristics of a male person, it placed no weight on the fact that he had not had a surgical procedure to construct a penis.

34 The Board stated, in addition, that it refused to issue a certificate because each applicant '... has a female reproductive system, and therefore has the capacity to bear children':

The Board sees [the applicant]'s situation as analogous to that which is specifically provided for by s 15(3). That section precludes the issue of a certificate to a person who is married. No doubt that section was inserted into the Act because of the adverse social and legal consequences which would flow if a certificate was issued to a married person. In our opinion, there would be equally adverse social and legal consequences should [either applicant] be issued a certificate whilst he has the capacity to bear children. Those consequences would occur if and when [either applicant] decided to bear a child.

35 The Board said it was mindful that AH said he had no intention of bearing children, but it thought that statement of intention could not be determinative, because '[he] has the capacity to decide otherwise in the future'.

36 The Board said it was mindful that AB had submitted that he had undergone testosterone therapy and that 'there is research which indicates sterility is induced' but it was not satisfied on the medical evidence that he was, in fact, sterile and, even if he was, it was not satisfied that 'the position is irreversible'; in short, '[he] has the capacity to bear children should he decide to do so'.

Has each applicant undergone a reassignment procedure

37 Although in the end the matter was not pressed, it was submitted for the intervener that the first issue for determination is whether the applicant in each case has undergone a reassignment procedure within the meaning of s 3 of the GR Act.

38 The evidence is that each applicant has undergone a combination of medical and surgical procedures, the effect of which is to alter his genitals and other gender characteristics. As a result of testosterone treatment, each applicant's reproductive organs have been altered, with the result that he is now infertile, and he has undergone clitoral growth. We set out below the particular alterations each has undergone as a result of testosterone treatment. Each has undergone a bilateral mastectomy.

39 The intervener accepted that 'the genital and other gender characteristics' of each applicant have undergone alteration as required by the definition in s 3 of the GR Act, but submitted that in neither case is the alteration sufficient such that the applicant 'will be identified as a person of the opposite sex'.

40 Section 3 of the GR Act defines a reassignment procedure as:

[A] medical or surgical procedure (or a combination of such procedures) to alter the genitals and other gender characteristics of a person ... so that they *will* be identified as a person of the opposite sex. (Emphasis added)

41 The language of the definition is prospective: it is concerned with the alteration of gender characteristics for the purpose of being identified as a person of the opposite sex rather than with whether the procedure in fact achieves the outcome of being identified as a person of the opposite sex.

42 This view is consistent with the language of s 15(1)(b)(ii) of the GR Act which, in addition to requiring that a person has adopted the lifestyle, makes it a condition of issuing a recognition certificate that the person also:

... *has* the gender characteristics of a person of the gender to which the person has been reassigned; (Emphasis added)

43 We are satisfied on the evidence that each applicant has undergone a combination of medical and surgical procedures comprising testosterone therapy and a bilateral mastectomy to alter his genitals and other gender characteristics so that he will be identified as a male. We find that each has undergone a reassignment procedure within the meaning of s 3 of the GR Act.

44 Whether, as a result of undergoing the reassignment procedure, the applicant in each case *has* the gender characteristics of the gender to which they have been reassigned is another question.

The issue to be determined

45 There is no issue, and we find on the evidence that each applicant meets each of the criteria in s 15(1)(a) of the GR Act (the satisfaction of any one of which would be sufficient).

46 There is no issue, and we are satisfied on the evidence that each applicant believes his true gender to be that to which he has been reassigned, each has adopted the lifestyle of a male, and each has received proper counselling in relation to his gender identity. We find that each meets the criteria in s 15(1)(b)(i) and s 15(1)(b)(iii), and the first limb of s 15(1)(b)(ii) of the GR Act.

47 Both applications raise the same issue, namely, whether the applicant meets the second limb of s 15(1)(b)(ii) of the GR Act because he has the gender characteristics of a male person. In order to do so, he must have 'the physical characteristics by virtue of which a person is identified as male: s 3.

48 The intervener did not press the argument, originally made, that, even if the applicants were to meet all the criteria in s 15(1), the Tribunal has a residual discretion by which it can, and should, refuse the applications.

The evidence of AB

49 AB is aged 31. He is supported in his application by his family, in particular his mother and brother, and by his partner of four years. He described how, at school, he dressed in male clothes but he did not understand why he felt different. In a report dated 29 March 2004, Dr Russell Date, psychiatrist, confirms his diagnosis of 'Gender Dysphoria/Female to Male Transsexualism' and describes AB as 'insightful and psychologically minded'.

50 AB decided to undergo female to male gender reassignment in 1997 but it was not until 2004 that he felt comfortable approaching a doctor about it. He commenced testosterone therapy in May 2004 and now self-administers regular injections to maintain his testosterone level within a normal male range. He underwent a bilateral mastectomy in July 2005.

51 AB described the following internal and external changes as a result of the testosterone treatment:

- i) sore throats and, over time, his voice broke;

- 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 his chest, from size 38 business shirt to size 44;
- viii) redistribution of body fat from his thighs and bottom to his 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 his internal organs.

52 AB has decided against undergoing a hysterectomy at this time. He says he is not conscious of his internal organs, they have no bearing on his identity as a male and they cause him no distress; he has suffered adverse effects of surgery in the past and wishes to avoid surgical procedures where possible; he does not want to undergo surgery that is not medically necessary; and he cannot financially afford the six weeks off work necessary for the surgery and recovery.

53 Although he considers phalloplasty the 'ultimate utopia' in his transition from female to male, AB does not intend undergoing surgery to construct a penis because the procedure comes with substantial risks and limited success. However, he wishes to retain his internal organs for the purpose of future phalloplasty if technological advances make phalloplasty feasible.

54 The timing of the Tribunal hearing meant that AB was not able to attend in person and he gave his oral evidence by video link. His appearance and presentation is in all respects male. He described the 'choice' that he has, to stop testosterone treatment at any time should he wish, as 'almost not a choice because without [the injections] I couldn't live my life'.

55 The Tribunal was impressed by AB's oral evidence and accepts his testimony without reservation. In particular, we accept that he has no intention of stopping testosterone therapy and no intention of trying to conceive a child at any time in the future.

The evidence of AH

56 AH is aged 26. He lives with his female partner. He grew up in a devoutly religious family; other than a sister, he no longer has contact with his family. He was always a 'tomboy'; he preferred the activities of boys to those of girls and refused to wear dresses other than to church with his family. His teenage years were difficult but, according to a report from Dr Russell Date dated 7 September 2006, he is now 'intelligent and articulate with little to suggest any maladaptive personality traits'.

57 In 2006, Dr Date diagnosed as AH as having 'gender identity disorder/female to male transsexualism'. He commenced testosterone therapy in September 2006 in order to have his gender reassigned from female to male. He now maintains his testosterone level by means of self-administered, regular injections. In June 2007, he underwent a bilateral mastectomy with a minor, final revision in November 2008 to improve the outcome of the reconstruction.

58 AH described the following internal and external changes as a result of testosterone treatment:

- i) increased body temperature;
- ii) increased appetite;
- iii) increased cranky and irritable behaviour;
- iv) increased libido;
- v) increased body hair such that it is now 'profound';
- vi) deepening of his voice;
- vii) increased skin sensitivity and pimple breakouts;
- viii) clitoral growth;
- ix) cessation of menstrual periods;
- x) increased muscle capacity;

- xi) redistribution of fat to around his stomach;
- xii) changes to his hairline;
- xiii) broadening of his forehead;
- xiv) stronger and more defined chin; and
- xv) changes to his internal organs.

59 AH has decided against undergoing a hysterectomy at present. He considers the disadvantages of hysterectomy outweigh any advantages. In particular, he suffered serious adverse consequences of surgery in the past and does not wish to risk a similar experience again; he is unable to see his internal organs and, unlike his breasts, is not aware of their presence; he does not consider it necessary for his mental wellbeing to undergo a hysterectomy. He would only consider the risks associated with hysterectomy worthwhile if it were necessary for medical reasons, which it is not at present. Further, medical opinion is that a hysterectomy could compromise the possibility of successful phalloplasty in the future.

60 AH describes phalloplasty as 'the holy grail' but he does not propose undergoing this surgery while medical technology is not able to achieve a satisfactory result.

61 It was put to AH by counsel for the intervener that he continues his testosterone injections voluntarily and could stop at any time. In response, AH said that proposition fails to understand the importance of the therapy to his health and wellbeing and ongoing existence as a human being; he could stop but he will not. He gave evidence that, of the 'many' female to male transsexuals he knows, none has stopped their testosterone therapy.

62 The Tribunal was impressed by AH's oral evidence and accepts his testimony without reservation. We accept that he has no intention of stopping testosterone therapy and no intention of trying to conceive a child at any time in the future.

Medical evidence

63 Gender identity disorder, or gender dysphoria, is a recognised psychiatric diagnosis. According to the *Diagnostic and Statistical Manual of Mental Disorders* (DSM-IV-TR) (4th ed, 2000) 535:

Gender Identity Disorders are characterised 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 opposite sex.

64 There is no dispute that both applicants in these proceedings have been diagnosed with gender identity disorder or gender dysphoria.

65 The Tribunal received written reports from five medical practitioners. Three gave oral evidence for the applicants. One gave oral evidence for the intervener. A fifth submitted a report but was not called to give oral evidence.

66 Dr Fiona Coombes is a general practitioner who has been treating transgender patients, including both applicants, for approximately 10 years. She gave evidence that the testosterone therapy undertaken by each applicant is consistent with that typically prescribed for female to male transgender patients. Treatment starts with daily oral doses of testosterone and increases gradually over several months before changing to intramuscular injections every two to four weeks. Thereafter, treatment continues in this way, with the patient monitoring his blood levels to ensure his testosterone is within normal male levels.

67 Dr Coombes gave evidence that both applicants have followed specialist instruction about their testosterone treatment and she does not think there is anything further they should be doing in this regard. There is nothing further, short of a hysterectomy, that either needs to do from a medical point of view to complete their reassignment.

68 Dr Coombes told the Tribunal that the physical effects described by each applicant are consistent with what she would expect after continuous use of testosterone over a two-year period. They include deepening of the voice associated with thickening of the vocal chords and enlargement of the larynx; changes in hair distribution to the chest and lower abdomen; a male pattern of head hair including thinning over the crown and temples; growth of facial hair around the beard and moustache area; enlargement of the clitoris; increase in body muscle mass; ovarian suppression leading to cessation of menstrual periods and infertility; and changes to the cervical epithelium.

69 According to Dr Coombes, the most recent ultrasound reports for both applicants demonstrate:

... 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.

70 To the best of Dr Coombes' knowledge, both applicants would be infertile while taking testosterone treatment. Whether the anatomical and hormonal changes brought about by testosterone therapy are functionally reversible is not a matter within her expertise.

71 Of the 10 or 11 transgender patients Dr Coombes has treated, she estimated eight have been female to male transsexuals. To her knowledge, none has ceased his testosterone therapy. Only two have had a hysterectomy subsequently; the others have not, apparently because it would make little difference to their presentation or life as a male and because of the risks associated with the surgery.

72 Dr John Overton, a consultant obstetrician and Head of Gynaecology at King Edward Memorial Hospital in Subiaco, Western Australia, gave evidence that hysterectomy is associated with 'significant risk of complications and readmission' including haemorrhage and post-operative infection. In his opinion, having regard to the applicants' medical history, there is no medical reason for either to undergo a hysterectomy.

73 Dr Overton was unable to comment on the effects of testosterone treatment on either applicant's ability to bear children in the future.

74 Dr Vin Tangpricha, Assistant Professor of Medicine in the Division of Endocrinology, Metabolism and Lipids at the Department of Medicine at Emory University in Atlanta, US, gave evidence by video link. He has not met either applicant but has been provided with medical and other relevant information about both.

75 Dr Tangpricha was asked whether continued testosterone therapy for two or more years is 'sufficient to render a female reproductive system permanently and irreversibly inoperative'. He says this would depend on the type of testosterone therapy and the dose and frequency of the testosterone; an individual on continuous testosterone therapy in a dose and frequency used to maintain male testosterone levels would have severe difficulty in achieving spontaneous pregnancy, even if the testosterone therapy were discontinued, because the pituitary gland has been suppressed from the chronic testosterone administration and because the uterus may have been considerably atrophied. Furthermore, polycystic ovarian disease, which is a known complication of testosterone therapy, may have developed, further affecting fertility.

76 Dr Tangpricha gave evidence that the chances of a successful pregnancy would be less than 20% in the initial year after ceasing testosterone therapy; in the second and third years, the chances of a successful pregnancy would be less than 25% depending on whether the pituitary gland has recovered from the suppression from testosterone. If the pituitary gland remained suppressed after one year, then the chance of pregnancy would be less than 10%.

77 In relation to AB, Dr Tangpricha estimates that, given he has 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.

78 In relation to AH, Dr Tangpricha estimates that, given he initiated testosterone therapy in September 2006 and has only been on male replacement testosterone since September 2008, he would have a greater chance to bear children: less than 25% in the first year of stopping therapy and less than 50% in future years.

79 These estimates are based on spontaneous pregnancy and may be up to 10% higher with artificial insemination, although the success rate of pregnancy by artificial insemination would also be affected.

80 Dr Tangpricha has treated over 200 transsexual patients in his career, approximately 40% of whom were female to male transsexuals. He gave evidence that probably less than 10% have had (penis) reconstructive surgery for reasons including financial cost, lack of effective surgical techniques and risk of complication.

81 Dr Tangpricha told the Tribunal that he has not encountered one female to male transsexual who stopped hormone therapy; he encountered one who wished to stop in order to conceive a child but that person was discouraged from stopping testosterone therapy because his chance of fertility was low and the risk to the foetus would be high.

82 Dr Trudi Kennedy is a psychiatrist who has been the Director of the Gender Dysphoria Clinic in Victoria since 1975 and is a recognised expert in the field. Of the 90 new patients seen at the clinic last year, about 30 were female to male transsexuals.

83 Dr Kennedy was asked what would be the effects if a female to male transsexual person were to stop taking testosterone after two years of treatment. In her written report, she stated that menstruation would recur after six months and, most likely, consequent fertility would not be

impaired; facial hair would remain and the deepening of the voice and laryngeal growth would be unchanged; in time, muscular development and fat redistribution would occur; the effects of stopping after four years of testosterone treatment would not differ very significantly. In oral evidence, Dr Kennedy described the possibility of fertility in these circumstances as 'quite small'.

84 In Dr Kennedy's experience, the incidence of regret after reassignment is rare; the reversion rate is rare and the evidence of fertility rarer still, although the oestrogen level will revert to normal if testosterone is ceased in a person of the applicants' ages. This does not necessarily mean that the person is able to conceive or bear children after many years of oestrogen suppression.

85 The Tribunal received a statement from Dr Timothy Welborn, a physician in endocrinology and a Clinical Professor at the University of Western Australia, including reports from Dr Welborn to Dr Coombes about each applicant. Dr Welborn was involved in both applicants' reassignment but was not called to give oral evidence.

86 In his statement, Dr Welborn describes each applicant's course of testosterone treatment as 'typically prescribed' but says there is insufficient long-term experience of what changes occur in the uterus. Given the duration of each applicant's testosterone therapy and with regard to the current states of their uteruses, in Dr Welborn's opinion:

Assuming continuation of effective therapeutic testosterone injections, their present ability to bear children is virtually zero. If such testosterone therapy were ceased, the question of future fertility is uncertain but not entirely excluded.

My experience is that most patients who show a good response to therapy continue such treatment indefinitely and under such circumstances will be infertile.

Submissions for the intervener

87 It was accepted for the intervener that, as a result of medical and surgical procedures, the genitals and other gender characteristics of each applicant have undergone alteration, but it was submitted that the alteration is not sufficient for either applicant to be identified as male.

88 It was submitted that what is 'male' and what is 'female' are left undefined by the GR Act and the Tribunal should take it that Parliament meant not to interfere with the ordinary meaning of those words.

89 As a starting point, it was submitted, identification as a male necessarily means, at least, that a person is not identified as female or 'belonging to the sex which bears children' because the retention of the essentially female characteristic of the capacity to bear children is incompatible with the gender characteristics of a male.

90 It was submitted that the reassignment must be 'complete' in order for each applicant to have the gender characteristics of a male, that the GR Act requires absence of the gender characteristics of the gender from which the person seeks to 'transit'. The intervener accepted that it is not possible to alter all gender characteristics and that chromosomes, for example, cannot be altered by any means. However, it was argued that neither applicant has altered sufficient of their gender characteristics and nor have they taken sufficient steps to ensure the transition is permanent; until he takes such steps, each continues to be identified as female and not male for the purposes of the GR Act.

91 It was accepted for the intervener that each applicant intends to continue testosterone treatment and will remain sterile for as long as he does, but it was submitted that the residual capacity to bear children that remains is inconsistent with the genital qualities of a male and necessarily results in the applicant not possessing the gender characteristics of a male.

92 The intervener submitted there is a paramount public interest in ensuring the accuracy and truth of any register or index maintained by the Registrar of Births, Deaths and Marriages and, as a consequence, the Tribunal must have regard to factors including certainty and permanency.

Submissions for the applicants

93 The applicants submitted that the GR Act is beneficial legislation and should be given a liberal, rather than a literal or technical, interpretation.

94 In answering the question 'does the applicant have the physical characteristics by virtue of which a person is identified as male', it was submitted that:

- i) merely retaining a physical characteristic of the gender from which a person has been reassigned does not necessarily mean that she or he has not acquired the physical characteristics by virtue of which they are identified as a person of the opposite sex;

- ii) the mere fact that something is inconsistent with being a particular gender does not necessarily make it inconsistent with being 'identified' as being of that gender;
- iii) possession of the internal organs of a woman does not affect whether a person has the physical characteristics by virtue of which a person is identified as male, particularly given that a reassignment procedure as defined need not involve surgery;
- iv) properly understood, 'gender characteristics' speaks merely of those physical characteristics which give a person the physical appearance of a male such that the person would be identified in everyday life as being a male; those physical characteristics of a person's outward, physical appearance are their size, shape, skin, hair, musculature, facial hair, voice and so on;
- v) 'gender characteristics' in s 15(1)(b)(ii) of the GR Act should be read with the requirement with which it appears: that the applicant has adopted the lifestyle, meaning that, to an objective observer, the person is identified as a member of that gender, both by their physical (outward) characteristics and their lifestyle;
- vi) the capacity to bear children is not a 'physical' characteristic.

95 It was further submitted that to impose permanent sterilisation as a requirement for a recognition certificate would require clear words and a clear mandate from Parliament. In any event, the applicants are now sterile and there is nothing more they can do to effect the reassignment, short of surgery which the GR Act does not require.

Decisions of courts and tribunals

96 Australian courts and tribunals have considered cases of transgendered persons on several occasions in varying contexts and have declined to follow the line of authority established by *Corbett v Corbett* [1971] P 83.

97 The decisions evince an increasingly compassionate approach towards transgendered persons. In particular, courts and tribunals have

recognised post-operative female to male and male to female transsexuals in the context of marriage and social security legislation. We have considered the decisions carefully. However, insofar as none deals with legislation in the same terms as the GR Act, and none concerns a female to male transgendered person who has not undergone a hysterectomy, they are of limited assistance.

98 In *R v Harris and McGuinness* (1989) 17 NSWLR 159 (*Harris*), the New South Wales Court of Appeal had to determine the meaning of 'a male person' in s 81A of the *Crimes Act 1990* (NSW) which made it an offence to procure or attempt to procure the commission of an act of indecency by a male. The majority found that Harris, a post-operative transsexual who had undergone surgery to remove his external male genitalia and create a vagina, was not 'a male person' for the purposes of the legislation. The Court found that McGuinness, who had undergone hormone therapy but not reassignment surgery, was still 'a male person' for the purposes of the legislation.

99 The Court expressed sympathy for McGuinness but did not accept the contention that biological factors could be treated as entirely secondary to psychological factors, so that where gender identification and biological sex differ, the former should prevail. Matthews J said (at [85]):

It would follow [from that approach] that all transsexuals would be treated in law according to their sex of identification, *regardless of whether they had undertaken any medical treatment to make their bodies conform with that identification*. Whilst I have the greatest of sympathy for Ms McGuinness and for others in her predicament, I could not subscribe to this approach. It goes far beyond anything which has so far been suggested by even the most progressive of reviewers. It would create enormous difficulties of proof, and would be vulnerable to abuse by people who were not true transsexuals at all. To this extent it could lead to a trivialisation of the difficulties genuinely faced by people with gender identification disharmony. (Emphasis added)

100 In *Re Secretary, Department of Social Security and HH* (1991) 14 ALD 58, the Administrative Appeals Tribunal (AAT) determined that HH, a post-operative male to female transsexual, was a woman for the purposes of the *Social Security Act 1947* (Cth) and qualified for an age pension at 60 years. The AAT said (at [23]) that the law must acknowledge that Australian society has permitted sex reassignment surgery to take place and accept the medical decisions which have been made. It was relevant that HH had undergone reassignment surgery. The AAT commented (at [24]):

It should also be borne in mind that such surgery is irreversible. A requirement that reassignment surgery be completed before the law recognises the reassigned sex of an individual protects the public against possible fraud and acknowledges that an irreversible medical decision has been made affirming the patient's psychological sex choice.

101 In *Secretary, Department of Social Security and SRA* (1993) 43 FCR 299 (*SRA*), the appeal to the Full Court of the Federal Court turned on the meaning of the words 'woman' and 'wife' in the *Social Security Act 1947* (Cth). The Full Court set aside a decision of the AAT that SRA, a male to female transsexual who satisfied the criteria for reassignment surgery but had not undergone surgery (on account of cost), was a woman for the purposes of s 37(1)(a) of the Act and entitled to a wife's pension.

102 The AAT had determined that psychological sex is the most important factor in determining sex for the purposes of the *Social Security Act 1947* (Cth). The Full Court disagreed. Black CJ expressed his sympathy for SRA but said [at 27]:

Nevertheless a line has to be drawn somewhere. Drawing the line by reference to what in popular usage is called a 'sex change operation' or a 'sex change' in circumstances that bring *external genital features* into general conformity with a person's psychological sex is appropriate as a matter of statutory interpretation, and it is in desirable conformity with the decision reached by a majority of the New South Wales Court of Criminal Appeal after a comprehensive review of cases in many jurisdictions in *R v. Harris and McGuinness*. A line drawn where the usage of the English of today would place it also has the merit, in situations of this nature, of providing a measure of certainty in an area where certainty is obviously desirable. (Emphasis added)

103 Black CJ (at [15]) said:

There is no occasion to depart in this case from the ordinary meaning of the words used in the Act and it would be going well beyond the ordinary meaning of the words in question to conclude that a *pre-operative male to female transsexual, having male external genitalia is a 'woman'* for the purposes of the [Act] and may be a 'wife' as that expression is defined in the Act. I do not consider that the language used in the relevant parts of the Act allows primacy to be given to psychological factors and certainly *not to the virtual exclusion of anatomical factors*. (Emphasis added)

104 In *Attorney-General for the Commonwealth v Kevin and Jennifer* [2003] FamCA 94, the Full Court of the Family Court upheld the decision of Chisolm J that Kevin, a female to male transsexual who had undergone a total hysterectomy with bilateral oophorectomy, as well as testosterone

treatment, was a man for the purposes of determining the validity of his marriage to Jennifer. In reaching this decision, the Full Court found it was not necessary for Kevin to have a penis constructed.

105 Nicholson CJ noted (at [66] and [382]) that 'the more difficult question of the status of pre-operative transsexual persons' was not directly in issue. He noted that comments had been made in the decided cases to the effect that it was for Parliament to determine the position of 'pre-operative' transsexual persons but he questioned (at [383]) the logic of this approach. He suggested 'the reluctance of the courts to enter this area seems to be based upon ... an inability to be able to make a physical or scientific examination in order to determine the sex of a person' and questioned 'why [a person] must subject himself to radical and painful surgery to establish this fact'.

106 Recently, in *Scafe v Secretary, Department of Families, Housing, Community Services and Indigenous Affairs* [2008] AATA 104, the AAT considered whether Ms Scafe, who had been born male, was 'of the opposite sex' for the purposes of the *Social Security Act 1947* (Cth).

107 Ms Scafe had been taking hormone replacement therapy since 1997 and the AAT accepted that the sexual and reproductive functions of her genitals had probably been lost as a consequence. She had not had genital surgery for gender realignment for what the Tribunal accepted were sound medical reasons.

108 The AAT accepted that Ms Scafe was psychologically, socially and culturally a woman and had taken all the physiological steps that she could take to become a woman. It questioned (at [23]) 'the cogency of treating the presence of male genitalia as the deciding factor of gender when those organs do not function sexually or reproductively' and, to that extent, disagreed with comments of Black CJ and Lockhart J in *SRA* about the significance of retaining male genitals. Nevertheless, the AAT considered that 'the clear and unanimous statements of the Court' in *SRA* that a completed surgical reassignment of gender was necessary for an alteration of gender were determinative of the outcome in the matter before it; but for that decision, it would have found Ms Scafe to be female for the purposes of the *Social Security Act 1947* (Cth).

109 In *Re Alex* [2004] FamCA 297, Nicholson J considered the case of a 13-year-old child who was anatomically a girl but who had been diagnosed with gender identity dysphoria. The applicant, who was Alex's legal guardian, sought orders for consent to the administration of

hormonal therapy that would start a 'sex change' process. The applicant also sought orders authorising the applicant to apply to register Alex's change of name to reflect the (male) name he was using.

110 No application was made in relation to change of Alex's sex but Nicholson J commented on the legislation in Australian states and territories, distinguishing the Western Australian and South Australian legislation, neither of which in terms require surgery, from those which require surgery. He expressed (at [234]) his 'regret that a number of Australian jurisdictions require surgery as a prerequisite to the alteration of a transsexual person's birth certificate in order for the record to align a person's sex with his/her chosen gender identity'. He commented (at [237]):

The requirement of surgery seems to me to be a cruel and unnecessary restriction upon a person's right to be legally recognised in a sex which reflects the chosen gender identity and would appear to have little justification on grounds of principle.

111 *Michael v Registrar-General of Births, Deaths and Marriages* [2008] 27 FRMZ 58 (*Michael*), a decision of the Family Court of New Zealand, is of interest because its facts are similar to the present cases. Michael, a female to male transgendered person, sought a declaration that he was male and for a birth certificate to be issued showing he was male. In identity, manner, appearance and outlook he was male. He had undergone testosterone therapy and mastectomy, but not hysterectomy, ovariectomy or reconstructive surgery. The Court found he was not disqualified from being declared male by virtue of retaining a uterus and ovaries.

112 It is important to note that the decision in *Michael* turned on provisions in the *Births Deaths and Marriages Act 1995* (NZ), which required that an applicant had undergone 'such 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 of the nominated sex'.

113 We have considered each of these decisions carefully. They enunciate important principles of social and legal policy, in particular the desirability of certainty in this area and the need to protect the public from possible fraud. Our task remains to interpret the relevant provisions of the GR Act as they apply to the facts in the proceedings before us.

Is surgery required by the GR Act

114 The GR Act is clear that a reassignment procedure:

... means a medical *or* surgical procedure (or a combination of such procedures) to alter the genitals and other gender characteristics
(Emphasis added)

115 The language is plain: a reassignment procedure may be effected by surgery but surgery is not mandated by the legislation. In this respect, the language of the GR Act mirrors that of the *Sexual Reassignment Act 1988* (SA) which defines a reassignment procedure in identical terms but refers to 'sexual characteristics' rather than 'gender characteristics'. We do not think there is a significant distinction for present purposes. 'Sexual characteristics' has the same meaning as 'gender characteristics' in s 3 of the GR Act.

116 The South Australian approach can be contrasted with the approach subsequently adopted by those other Australian jurisdictions that provide for recognition of gender or sexual reassignment. All require that a person has undergone 'sexual reassignment surgery' defined as 'a surgical procedure involving the alteration of a person's reproductive organs' that is carried out 'for the purpose of assisting a person to be considered to be a member of the opposite sex: s 32A of the *Births, Deaths and Marriages Registration Act 1995* (NSW); s 28A of the *Births, Deaths and Marriages Registration Act 1996* (NT); s 23 of the *Births, Deaths and Marriages Registration Act 1997* (ACT); s 30A of the *Births, Deaths and Marriages Registration Act 1996* (Vic); s 22 of the *Births, Deaths and Marriages Registration Act 2003* (Qld).

117 It is evident from the Bill's Second Reading Speech in April 1997 (*Hansard, Wednesday, 9 April 1997*) that Parliament was familiar with the legislation in other states. It is reasonable to infer that Parliament was aware of the requirement in most jurisdictions for surgery but preferred the South Australian approach. This may mean no more than that Parliament recognised that the circumstances of each individual will vary and some individuals may not require surgery in order to have the gender characteristics of the gender to which they have been reassigned. Nevertheless, Parliament did not consider surgery a necessary step in order to acquire the gender characteristics by which to be identified as male or female.

Consideration of evidence and submissions

118 These applications raise complex and difficult questions about which individuals will hold different views and which go to fundamental issues of how society organises itself. These views inevitably inform the approach that anyone brings to questions such as these. However, the Tribunal's task is one of statutory construction and the application of the law, as we find it, to the facts of the matters before us and we have approached our task with that firmly in mind.

119 We have noted that the decisions of Australian courts and tribunals have been of limited assistance in interpreting the provisions of the GR Act, and that Parliament has given us little guidance.

120 Section 18 of the *Interpretation Act 1984* (WA) provides:

In the interpretation of a provision of a written law, a construction that would promote the purpose or object underlying the written law (whether that purpose or object is expressly stated in the written law or not) shall be preferred to a construction that would not promote that purpose or object.

121 In *IW v City of Perth* (1997) 191 CLR 1, the High Court, considering the meaning of terms used in the *Equal Opportunity Act 1984* (WA), noted (at [12] per Brennan CJ and McHugh J):

The injunction contained in s 18 of the *Interpretation Act* is reinforced by the rule of construction that beneficial and remedial legislation, like the Act, is to be given a liberal construction. It is to be given 'a fair, large and liberal' interpretation rather than one which is 'literal or technical.

122 The Court cautioned, however, that:

[n]evertheless, the task remains one of statutory construction. Although a provision of the Act must be given a liberal and beneficial construction, a court or tribunal is not at liberty to give it a construction that is unreasonable or unnatural. But subject to that proviso, if the term 'service', read in the context of the Act and its object, is capable of applying to an activity, a court or tribunal, exercising jurisdiction under the Act, should hold that that activity is a 'service' for the purpose of the Act.

123 The Court was assisted in its task by the objects clause in the *Equal Opportunity Act 1984* (WA) which led it to find (at [12]) that 'the provisions of the Act should as far as possible be given a construction that would eliminate discrimination on the ground of impairment'.

124 In contrast, the GR Act offers little assistance. It has no objects clause. Its long title provides that it is an Act:

... to allow the reassignment of gender and establish a gender reassignment board with power to issue recognition certificates; to make consequential amendments to the Constitution Acts Amendment Act 1899 and the Births, Deaths and Marriages Registration Act 1998; to amend the Equal Opportunity Act 1984 to promote equality of opportunity, and to provide remedies in respect of discrimination, on gender history grounds in certain cases; and for connected purposes.

125 The Second Reading Speech discloses that Parliament intended that persons 'suffering from gender dysphoria and who have completed medical procedures to alleviate their condition will gain legal recognition of their reassigned gender' and that 'the legislation will assist persons who have undergone reassignment procedures by clarifying their legal status and rights' (*Hansard, Wednesday, 9 April 1997, 1361*). Parliament apparently took a humane approach based on relieving and alleviating 'suffering' but what is meant by 'have completed medical procedures' is not clear other than that there is no reference to surgery.

126 It is well settled that ordinary, everyday words in statutes should be given their ordinary, everyday meaning. As Black CJ observed in *SRA* (at [8] - [9]), the words 'male' and 'female', and the expression 'opposite sex', are ordinary English words and, in ordinary English usage, words such as 'male' and 'female' and 'sex' relate to anatomical and physiological differences rather than psychological ones.

127 *The Shorter Oxford English Dictionary* (5th ed, 2002) relevantly defines 'male' as 'Of, pertaining to, or designating the sex which can beget offspring' and 'Of, pertaining to, or characteristic of men or boys ...' and the noun as 'A male person ...; member of the male sex; a man or boy as distinguished from as woman or girl'. *The Macquarie Concise Dictionary* (3rd ed, 2002) defines 'male' as 'belonging to the sex which begets young, or any division or group corresponding to it; relating to or characteristic of this sex'.

128 *The Shorter Oxford English Dictionary* (5th ed, 2002) relevantly defines 'female' as 'Of, pertaining to, or designating the sex which can bear offspring or produce eggs'; 'Of, pertaining to, or characteristic of women or girls ...' and the noun as 'A female person ...; member of the female sex; a woman or girl as distinguished from as man or boy or girl'. *The Macquarie Concise Dictionary* (3rd ed, 2002) defines 'female' as 'a human being of the sex which conceives and brings forth young; a woman or girl'.

129 The expression we have to consider here is 'the gender characteristics
(meaning the physical characteristics) by virtue of which a person is
identified as male'. The questions arise 'what are those gender
characteristics' and 'identified by whom'?

130 The GR Act does not in terms require a person to have all of the
physical characteristics by virtue of which a person maybe identified as of
the opposite sex. It is well understood that some characteristics, such as
chromosomes, cannot be changed. It follows that s 15(1)(b)(ii) requires
that a person have *sufficient* of the gender characteristics by which is to be
identified as a person of the opposite sex in order the meet the
requirements of the Act.

131 It was submitted for the intervener, and we agree, that these
applications do not require the Tribunal to attempt to prescribe all of the
physical characteristics by which a person is identified as male or female.

132 The question is whether retention of the uterus and ovaries,
regardless of lack of function, is so at odds with having the gender
characteristics of a male that neither can be said to have the physical
characteristics by which a person is identified as male.

133 It was submitted for the applicants that the focus of the GR Act is on
acquiring and having the physical characteristics of the gender to which a
person seeks to be reassigned, rather than on the physical characteristics
of the gender they seek to leave behind. We accept that submission,
although it only takes the matter so far. Each case must still be considered
on its merits and each applicant must still satisfy the requirements of the
GR Act.

134 The Board stated in its reasons in each case that, in reaching its
conclusion, it placed no weight on the fact that the applicant had not had a
surgical procedure to construct a penis. The basis for this is not clear.
The intervener takes no issue with this position and neither does the
Tribunal, but it is not easy to reconcile the absence of a significant male
physical identifier with the finding that each applicant has the physical
characteristics by virtue of which a person is identified as male. Nor is it
easy to reconcile with the line of Australian authority that emphasises
anatomical and psychological congruity, in particular in *SRA*, where the
Court emphasised the need to bring *external* genital features into general
conformity with a person's psychological sex.

135 The Tribunal heard evidence from Dr Kennedy that phalloplasty is
not performed in Australia because of the high risks and lack of success of

the surgery, and that a person wishing to undergo the procedure must go overseas. The Board may have had this in mind when making its finding, but we do not know. However, the relevance of the Board's finding is to underline the continuum along which transgendered persons may find themselves and that each person must be considered in light of the totality of their characteristics rather than any particular characteristic. Obviously, the more fundamental a characteristic, the greater its significance to the identification of a person as being of a particular gender, but it must still, in our view, be considered in light of the totality of a person's gender characteristics.

136 It is relevant, in our view, that Parliament chose to make it a requirement that a person 'has adopted the lifestyle and has the gender characteristics of a [male] person'. It was open to Parliament to separate these requirements so that each stands alone in the same way as s 15(1)(b)(i) and s 15(1)(b)(iii) of the GR Act, but it did not. Read in light of the lifestyle requirement, the 'physical characteristics' by virtue of which a person is identified as male is open to broader interpretation than if it stood alone.

137 The courts have identified the sound reasons for which certainty in this area is important. A person wishing to be recognised as being of the opposite sex must do more than merely alter their external appearance by superficial means. Otherwise, identification may be entirely subjective and at odds with the context and purpose of the legislation as a whole. By definition, gender characteristics in the GR Act include characteristics that may not be immediately apparent to the casual observer.

138 The applicants have not merely altered their external appearance by superficial means. The medical and surgical procedures they have undergone have altered their genitals and other gender characteristics in profound ways. They have undergone clitoral growth and have the voices, body shapes, musculature, hair distribution, general appearance and demeanour by virtue of which a person is identified as male. They have acquired characteristics that are consistent with being male, and inconsistent with being female, to the extent that only an internal medical examination would disclose what remains of their female gender characteristics. Insofar as what remains of their female gender characteristics has been altered to such an extent that it no longer functions, it is no longer a female gender characteristic.

139 We are mindful of the courts' comments in *Harris* and *SRA* about conformity of physical or anatomical identity and psychological identity.

In both cases, the court was concerned with the primacy given to psychological identity over anatomical identity. In the present cases, 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.

140 Despite some difference in the medical opinions as to degree, the possibility of either applicant becoming pregnant if they were to stop testosterone treatment in the future cannot be entirely excluded; neither can either applicant be said to be permanently infertile with absolute certainty.

141 Both applicants are infertile and will remain so for as long as they take testosterone. Merely because an applicant maintains he will continue testosterone therapy is not sufficient, but we accept the evidence of each applicant in this regard that he would simply not be the person he is without it. Each is supported in this regard by the evidence of Dr Coombes and Dr Tangpricha that they have not come across a single female to male transgender patient who has stopped their testosterone treatment, and Dr Kennedy's evidence that the reversion rate is rare.

142 Both applicants in these proceedings have been diagnosed with a recognised psychiatric disorder. Both have done everything medically available, short of hysterectomy, to alter their genitals and other gender characteristics so as to be identified as male. They satisfy the requirements of the GR Act in all other respects. A requirement that each go even further and undergo a hysterectomy in these circumstances would seem to serve the purpose only of requiring further proof of their conviction.

143 The applicants' circumstances raise the question whether a female to male transsexual who retains a uterus, but is permanently infertile for some reason, is required by the GR Act to undergo a hysterectomy in order to satisfy the requirements for a recognition certificate. It is not fanciful to say that advances in reproductive technology make pregnancy possible for almost any woman who retains a uterus. It would follow that every female to male transsexual would have to undergo hysterectomy in order to satisfy the GR Act. It was open to Parliament to require this but it did not.

144 For these reasons we find that each applicant satisfies the requirements of s 15(1) of the GR Act and is entitled to a recognition certificate.

Orders

145 In respect of each applicant the Tribunal makes the following orders:

1. The decision under review is set aside.
2. The application for a recognition certificate is granted.
3. The Gender Reassignment Board of Western Australia is directed to issue a recognition certificate to the applicant.

I certify that this and the preceding [145] paragraphs comprise the reasons for decision of the State Administrative Tribunal.

MS J TOOHEY, SENIOR MEMBER