

JURISDICTION : SUPREME COURT OF WESTERN AUSTRALIA

TITLE OF COURT : THE COURT OF APPEAL (WA)

CITATION : THE STATE OF WESTERN AUSTRALIA -v- AH
[2010] WASCA 172

CORAM : MARTIN CJ
PULLIN JA
BUSS JA

HEARD : 2 MARCH 2010

DELIVERED : 2 SEPTEMBER 2010

FILE NO/S : CACV 113 of 2009

BETWEEN : THE STATE OF WESTERN AUSTRALIA
Appellant

AND

AH
First Respondent

GENDER REASSIGNMENT BOARD OF
WESTERN AUSTRALIA
Second Respondent

FILE NO/S : CACV 114 of 2009

BETWEEN : THE STATE OF WESTERN AUSTRALIA
Appellant

AND

AB
First Respondent

GENDER REASSIGNMENT BOARD OF
WESTERN AUSTRALIA
Second Respondent

ON APPEAL FROM:

Jurisdiction : STATE ADMINISTRATIVE TRIBUNAL OF
WESTERN AUSTRALIA

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

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

File No : GRA 1 of 2008, GRA 2 of 2008

Catchwords:

Statutory interpretation - *Gender Reassignment Act 2000* (WA) - Application for recognition certificate - Interpretation of the words and phrases: 'reassignment procedure', 'gender characteristics', 'physical characteristics' and 'identified' - Beneficial and remedial legislation - Comparison of legislation and case law in other jurisdictions - Relevance of parliamentary debates

Legislation:

Births, Deaths & Marriages Registration Act 1995 (NSW), s 32A, s 32B
Births, Deaths & Marriages Registration Act 1995 (NZ), s 28(c)
Births, Deaths & Marriages Registration Act 1996 (NT), s 28A, s 28B
Births, Deaths & Marriages Registration Act 1996 (Vic), s 4, s 30A
Births, Deaths & Marriages Registration Act 1997 (ACT), s 23, s 24
Births, Deaths & Marriages Registration Act 1999 (Tas), s 3, s 28A
Births, Deaths & Marriages Registration Act 2003 (Qld), s 22, sch 2
Gender Reassignment Act 2000 (WA)
Gender Recognition Act 2004 (UK)
Interpretation Act 1984 (WA), s 18, s 19(1), s 19(2), s 56
Marriage Act 1961 (Cth)
Sexual Reassignment Act 1988 (SA)

State Administrative Tribunal Act 2004 (WA), s 105(1), s 105(2)

Result:

Appeals allowed

Category: A

Representation:

CACV 113 of 2009

Counsel:

Appellant : Mr G T W Tannin SC & Mr C S Bydder
First Respondent : Mr S Penglis & Mr A Golem
Second Respondent : No appearance

Solicitors:

Appellant : State Solicitor for Western Australia
First Respondent : Freehills
Second Respondent : No appearance

CACV 114 of 2009

Counsel:

Appellant : Mr G T W Tannin SC & Mr C S Bydder
First Respondent : Mr S Penglis & Mr A Golem
Second Respondent : No appearance

Solicitors:

Appellant : State Solicitor for Western Australia
First Respondent : Freehills
Second Respondent : No appearance

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

AK v The State of Western Australia [2008] HCA 8; (2008) 232 CLR 438
Attorney-General (Commonwealth) v Kevin [2003] FamCA 94; (2003) 172
FLR 300
Attorney-General v Otahuhu Family Court [1995] 1 NZLR 603
Barns v Barns [2003] HCA 9; (2003) 214 CLR 169
Bellinger v Bellinger [2002] Fam 150; [2002] 1 All ER 311
Bellinger v Bellinger [2003] 2 AC 467; [2003] 2 All ER 593
CIC Insurance Ltd v Bankstown Football Club Ltd [1997] HCA 2; (1997) 187
CLR 384
Collector of Customs v Pozzolanic Enterprises Pty Ltd (1993) 43 FCR 280
Corbett v Corbett [1971] P 83; [1970] 2 All ER 33
Hope v Bathurst City Council [1980] HCA 16; (1980) 144 CLR 1
IW v City of Perth [1997] HCA 30; (1997) 191 CLR 1
Kevin v Attorney-General (Commonwealth) [2001] FamCA 1074; (2001) 165
FLR 404
Michael v Registrar General of Births, Deaths & Marriages (2008) 27 FRNZ 58
Newcastle City Council v GIO General Ltd [1997] HCA 53; (1997) 191 CLR 85
Paridis v Settlement Agents Supervisory Board [2007] WASCA 97; (2007) 33
WAR 361
Project Blue Sky Inc v Australian Broadcasting Authority [1998] HCA 28;
(1998) 194 CLR 355
R v Harris and McGuinness (1988) 17 NSWLR 158
Re Secretary Department of Social Security and HH (1991) 23 ALD 58
Scafe v Secretary, Department of Families, Housing, Community Services &
Indigenous Affairs [2008] AATA 104
Secretary, Department of Social Security v SRA (1993) 43 FCR 299
Tame v The State of New South Wales [2002] HCA 35; (2002) 211 CLR 317

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For the purposes of the definitions of 'gender characteristics' and 'reassignment procedure', and the provisions of s 14(1) and s 15(1), will a person who has undergone female to male transgender procedure(s) not be entitled to the issue of a recognition certificate unless those procedure(s) include surgery for phalloplasty? 54

For the purposes of the definitions of 'gender characteristics' and 'reassignment procedure', do the physical characteristics, by virtue of which a person is identified as male or female, comprise their external and internal physical characteristics or are they confined to external physical characteristics? 55

For the purposes of the definition of 'reassignment procedure', is it necessary that all of the physical characteristics, by virtue of which a person is identified as male or female, be altered by a medical or surgical procedure (or a combination of such procedures)? 57

For the purposes of the definition of 'reassignment procedure', the provisions of s 14(1) and the criterion specified in s 15(1)(a)(i), does the phrase 'so that the person will be identified as a person of the opposite sex', within the definition, refer to the object of the relevant medical or surgical procedure or procedures or to the outcome of such procedure or procedures? 59

For the purposes of the second limb of s 15(1)(b)(ii), 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'? 60

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MARTIN CJ:**Introduction**

1 Orders have been made suppressing the publication of the identity of the individuals the subject of these proceedings, who I shall describe as AB and AH. Each of AB and AH were registered in Western Australia as female at the time of their birth. Each applied under the *Gender Reassignment Act 2000* (WA) (the Act) to the Gender Reassignment Board of Western Australia (the Board) for the issue of a recognition certificate recognising the reassignment of their gender from female to male. Both applications were refused by the Board. Each of AB and AH appealed to the State Administrative Tribunal (the Tribunal). The Attorney General on behalf of the State of Western Australia intervened in the proceedings before the Tribunal. The appeals were heard together. The Tribunal upheld each appeal and set aside the decision of the Board refusing to grant a recognition certificate and instead directed that recognition certificates be granted to each of AB and AH. The State appeals from the decision of the Tribunal.

2 The Tribunal gave its reasons for upholding each appeal in a single set of reasons. Although there are two appeals before this court, they were heard together and give rise to identical issues. It is convenient to provide a single set of reasons for the determination of both appeals.

The facts

3 A substantial body of evidence was placed before the Tribunal. However, in the result, the material facts were not contentious. Those facts, as found by the Tribunal, were as follows.

4 Each of AB and AH have adopted male appearances and identities. They are generally referred to by others using masculine forms of the various pronouns. I will adopt the same course out of courtesy and respect. In doing so, I should not be taken to have prejudged the outcome of these appeals, any more than if I had, instead, adopted the feminine form of pronouns in deference to their gender at the time of birth.

AB

5 At the time of the proceedings before the Tribunal, AB was aged 31. He manifested a desire to appear as a male during childhood, and in 1997 decided to undergo female to male gender reassignment. However, it was not until 2004 that AB felt comfortable approaching a doctor about it. In

March 2004, AB was diagnosed by Dr Russell Date as suffering gender dysphoria.

6 AB commenced testosterone therapy in May 2004, and maintains testosterone levels within a normal male range by the self-administration of regular injections. AB underwent a bilateral mastectomy in July 2005.

7 The testosterone treatment brought about the following changes:

- 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.

8 AB has decided against undergoing a hysterectomy at this time. His reasons for that decision, which were accepted by the Tribunal, were that: he was not conscious of his internal organs and that his internal organs had no bearing on his identity as a male and caused him no distress; he has suffered adverse effects of surgery in the past and wishes to avoid further surgery if possible; he does not wish to undergo surgery that is not medically necessary; and, he cannot afford the time off work that would be necessary for the surgery and recovery.

9 AB does not presently intend to undergo phalloplasty in order to construct a penis, because he has been advised that the procedure carries

substantial risks and has limited prospects of success. However, he wishes to retain his internal organs for the purpose of use in future phalloplasty if technological advances make such a procedure feasible. AB gave evidence to the Tribunal to the effect that he had no intention of stopping testosterone therapy and had no intention of trying to conceive a child at any time in the future. That evidence was accepted by the Tribunal.

AH

10 AH was aged 26 at the time of the proceedings before the Tribunal. Like AB, he manifested a male orientation during his childhood. In 2006, he was diagnosed by Dr Date as suffering gender dysphoria. He commenced testosterone therapy in September 2006 and, like AB, maintains his testosterone level within the normal male range by the self-administration of injections. In June 2007, AH underwent a bilateral mastectomy.

11 The testosterone treatment has had the following effects on AH:

- 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.

12 AH has also decided against undergoing a hysterectomy at present. Like AB, he does not wish to undergo surgery which he considers to be unnecessary. AB stated that he is unable to see his internal organs and that unlike his breasts, which have been removed, he is not aware of the presence of his internal organs, meaning that he does not consider it necessary for his mental wellbeing to undergo a hysterectomy.

13 AH also has a similar attitude to AB towards undergoing phalloplasty. While he has given consideration to that course, he does not propose to undergo the procedure at this time, given his advice that medical technology is unable to achieve a satisfactory outcome. However, he wishes to retain his internal organs for possible use in phalloplasty should medical technology develop over time.

14 Like AB, AH also gave evidence, which the Tribunal accepted, to the effect that he had no intention of stopping testosterone therapy or of trying to conceive a child at any time in the future.

Facts applicable to both cases

15 Although the Tribunal made no express finding to this effect, it is to be clearly inferred from the findings that were made in respect of the procedures and treatment which each of AB and AH have undergone that, save to the extent of the changes expressly identified, the physical characteristics with which they were born remain unaffected. Before us, counsel for each of AB and AH conceded that aside from the clitoral growth each experienced, and the effect which testosterone treatment has had upon menstruation and reproductive capacity, their female genitalia, including the vulva, vagina and other internal organs are unaffected.

16 The evidence given by each of AB and AH as to the consequences of testosterone treatment was confirmed by medical evidence given to the Tribunal. Evidence was given of ultrasound examination of each of AB and AH, which disclosed:

... 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.

17 The Tribunal also received medical evidence on the subject of the fertility of AB and AH in the event that they discontinued testosterone therapy. One witness, Dr Tangpricha, gave evidence that in the case of AB, if he ceased testosterone treatment, his chances of fertility would be

less than 5% in the first year after ceasing therapy, and less than 25% in future years. In relation to AH, Dr Tangpricha estimated that if he ceased testosterone treatment, his chances of conceiving would be less than 25% in the first year after cessation of treatment, and less than 50% in future years. Those prospects could be increased in each case by up to 10% with artificial insemination. The medical evidence also confirmed the unreliability of the outcomes of phalloplasty.

18 A number of practitioners also gave evidence to the effect that, in their experience, cessation of testosterone treatment by those who had embarked upon such treatment in order to reassign gender from female to male was extremely rare.

The Act

19 The Act creates a process by which those who have undertaken gender reassignment may obtain a recognition certificate confirming that they are a person of the gender to which they have been reassigned. The Act creates a Board which has the function of receiving and determining applications for recognition certificates, and issuing those certificates in appropriate cases (s 5).

20 Section 14 provides that an application for a recognition certificate may be made by a person who has undergone a 'reassignment procedure'. That term is defined by s 3 of the Act to mean:

... 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.

21 Section 15 of the Act specifies the conditions that must be met prior to the issue of a recognition certificate. In the case of adults, s 15(1) provides:

15. Issue of recognition certificates

- (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.

22 Section 15(3) provides that a recognition certificate cannot be issued to a person who is married. The Parliamentary Debates confirm that this provision was inserted to avoid possible inconsistency with the provisions of the *Marriage Act 1961* (Cth), and consequential invalidity - see for example: Western Australia, Parliamentary Debates, Legislative Council, 25 November 1999, 3823 (Mr P Foss, Attorney General).

23 The expression 'gender characteristics' is defined by s 3 of the Act as:

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

The decisions of the Board

24 In the case of AH, the Board published its reasons for decision on 1 July 2008. In those reasons, the Board describes AH as having undergone a reassignment procedure as defined by s 3 of the Act in the form of the bilateral mastectomy carried out in June 2007. This conclusion reflects an erroneous view of the meaning of the term 'reassignment procedure'. Section 3 of the Act requires that in order to meet the description of such a procedure, 'the genitals and other gender characteristics of a person' must be altered. A bilateral mastectomy does not alter the genitals and is, by itself, incapable of constituting a 'reassignment procedure'. However, for reasons which I will explain, nothing turns on this error.

25 The Board was satisfied that all requirements of s 15 were met, other than the requirement that AH have the gender characteristics of a male person. In that regard, the Board stated:

As noted above, the reassignment procedure carried out ... was bilateral subcutaneous mastectomies. Mr H no longer has the physical characteristic of female breasts. In that one respect, Mr H could be identified as male. In other aspects, Mr H cannot be identified as male. In the Board's opinion, Mr H 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.

Dr Coombes says in her report that Mr H'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 Mr H has the gender characteristics of a male. The physical characteristics which identify Mr H as female, and therefore not male, are still present.

In reaching this conclusion, the Board places no weight on the fact that Mr H's genitals remain unchanged. The Board does not see it as determinative that Mr H has not had surgical procedures to construct a penis.

26 It is, with respect, difficult to reconcile the last paragraph of this part of the Board's reasons with the two paragraphs which precede it. Those paragraphs suggest that the Board's conclusion turned upon the weight which the Board attributed to the fact that AH had retained his female reproductive organs, which must necessarily include his genitals. It is impossible to reconcile that line of reasoning with the assertion that 'the Board places no weight on the fact that Mr H's genitals remain unchanged'.

27 The Board went on to observe:

Discretion

In addition to not being satisfied that Mr H has the gender characteristics of a male, the Board in exercising its discretion determined not to issue a certificate. The Board exercised its discretion against Mr H because he has a female reproductive system, and therefore has the capacity to bear children.

The Board sees Mr H'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 Mr H be issued a certificate while he has the capacity to bear children. Those consequences would occur if and when Mr H decided to bear a child. In reaching this conclusion, the Board was mindful of the fact that Mr H said at the hearing that he has no intention of bearing children. That statement of intention cannot be determinative, because Mr H has the capacity to decide otherwise in the future.

28 A number of observations might usefully be made about this portion of the Board's reasons. First, the Board has purported to exercise a discretion against the issue of a recognition certificate. While the use of the word 'may' in s 15 would ordinarily connote the existence of a discretion to refuse a certificate (*Interpretation Act 1984* (WA), s 56), such a discretion could only arise if all the conditions for the grant of the recognition certificate required by s 15 were satisfied. As the Board had concluded that those conditions were not satisfied, no question of the exercise of a discretion against the issue of a recognition certificate arose.

29 Second, although as a matter of statutory interpretation s 15 may properly be construed as conferring a discretion upon the Board, given the nature of the conditions which must be satisfied before the Board is empowered to issue a recognition certificate, it is extremely difficult to envisage circumstances in which it would be appropriate to exercise a discretion to refuse a recognition certificate notwithstanding that all conditions for the issue of a recognition certificate had been satisfied. I do not mean to suggest that it is impossible to envisage circumstances in which the Board might exercise a residual discretion to refuse a certificate notwithstanding that the conditions for issue of a certificate were satisfied, but rather, that having regard to the conditions specified by the legislature, those circumstances would be extremely rare.

30 Third, the Board has drawn a conclusion of legislative intention from s 15(3), which precludes the issue of a recognition certificate to a person who is married. As I have noted, it is clear that this provision was inserted to avoid possible inconsistency with Commonwealth legislation, and no greater inference of legislative purpose should be drawn from its inclusion in the Act.

31 The Board delivered its reasons for refusing AB's application on 9 July 2008. Those reasons were similar in all relevant respects to the reasons given for the refusal of AH's application.

The decision of the Tribunal

32 The proceedings before the Tribunal were conducted on the basis that it was common ground that each of AB and AH had undertaken a reassignment procedure within Western Australia, and the Tribunal found accordingly. That position, and the finding of the Tribunal, did not proceed upon the same basis as the conclusion reached by the Board, relying only upon the bilateral mastectomies. Rather, reliance was placed upon the effect which the testosterone treatment undertaken by each of AB and AH had produced upon their genitalia, including the clitoris and uterus. I will return later to discuss the correct approach to be taken to the meaning of the term 'reassignment procedure' given the definition contained in s 3 of the Act.

33 It was also common ground before the Tribunal, and the Tribunal found that each of AB and AH:

- (a) had their birth registered in Western Australia;
- (b) were residents of Western Australia and had been so resident for not less than 12 months;
- (c) believed that their true gender was male;
- (d) had adopted the lifestyle of a male; and
- (e) had received proper counselling in relation to their gender identity.

34 Accordingly, as the Tribunal noted, the only condition that remained contentious and which had to be satisfied before the Tribunal was empowered to issue a recognition certificate under s 15 of the Act was the condition that each of AB and AH have 'the gender characteristics of' a male.

35 The reasoning of the Tribunal in relation to that issue commenced with an observation that the definition of 'reassignment procedure' expressly enabled that requirement of the Act to be met by either medical or surgical procedures. As the Tribunal noted, in this respect the Western Australian legislation is materially identical to the South Australian legislation - the *Sexual Reassignment Act 1988* (SA) - and unlike the legislation in other Australian jurisdictions which requires a surgical procedure to be undertaken before a person can be officially recognised as a member of the opposite sex - see s 32A and s 32B of the *Births, Deaths & Marriages Registration Act 1995* (NSW); s 28A and s 28B of the *Births, Deaths & Marriages Registration Act 1996* (NT); s 23 and s 24 of

the *Birth, Deaths & Marriages Registration Act 1997* (ACT); s 4 and s 30A of the *Births, Deaths & Marriages Registration Act 1996* (Vic); s 22 and sch 2 of the *Births, Deaths & Marriages Registration Act 2003* (Qld) and s 3 and s 28A of the *Births, Deaths & Marriages Registration Act 1999* (Tas). I will return to the significance properly attributed to this distinction later in these reasons.

36 The Tribunal then referred to s 18 of the *Interpretation Act* which 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.

37 In that context, the Tribunal also referred to *IW v City of Perth* [1997] HCA 30; (1997) 191 CLR 1, in which Brennan CJ and McHugh J observed (at 12):

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 [the *Equal Opportunity Act 1984*], 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'. Nevertheless, 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.

I will also return to the significance of such an approach to construction in this particular case later in these reasons.

38 The Tribunal then turned to consider various dictionary definitions of the words 'male' and 'female'. As the Tribunal noted, the word 'male' is generally defined as 'the sex which can beget offspring', whereas the term 'female' is generally defined as 'the sex which can bear offspring'. More contemporary language is found in the Macquarie Dictionary (5th edn) definitions:

Male - of or relating to the types of humans or animals which in the normal case produce spermatozoa with which to fertilise female ova.

Female - of or relating to the types of humans or animals which, in the normal case, produce ova which can be fertilised by male spermatozoa.

39 Because of the arguments addressed to the court with respect to the possible significance of an individual's capacity to bear or beget children, it is significant to observe that the definitions of male and female do not

connote that fertility of an individual is an essential aspect of being either. Rather, the means of reproduction is identified as the characteristic which defines each gender. However, an individual's physical capacity to reproduce is not essential for membership of either gender. Prepubescent children are every bit as male or female as post-pubescent adults. Post-menopausal women do not lose the characteristic of being female, nor do impotent men lose the characteristic of being male.

40 The Tribunal observed (at [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'?

41 However, having identified these questions, at no point in its reasons did the Tribunal purport to answer them.

42 The Tribunal continued (at [130]):

The GR Act does not in terms require a person to have all of the physical characteristics by virtue of which a person may be 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 ... to be identified as a person of the opposite sex in order to meet the requirements of the Act.

That observation as to the effect of the Act cannot, with respect, be faulted. However, the Tribunal went on (at [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.

43 That was not the question the Tribunal had to determine. Rather, the question it had to determine was whether each appellant had the physical characteristics by which a person is identified as male. Expressed in this way, the focus of the issue is upon the acquisition of male characteristics, not the retention of female characteristics. This is of course not to say that the retention of female characteristics is irrelevant - but the way in which the question was posed by the Tribunal in this paragraph directs primary attention to the female characteristics retained by each appellant, when the Act requires primary attention to be directed to such of their physical characteristics as would result in them being identified as male.

44 The Tribunal went on to observe (at [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.

45 With respect to the Tribunal, this process of reasoning is erroneous for two reasons. First, it is impossible to see how the collocation of the word 'lifestyle' with the term 'gender characteristics', which has been defined to refer only to the physical characteristics of a person, can shed any light upon the meaning to be given to 'physical characteristics'. Put another way, by defining 'gender characteristics' by reference only to physical characteristics, it is clear that Parliament intended this particular requirement to refer only to the composition of a person's body, and not the uses to which they put their body, or the way that they live.

46 Second, the grammatical structure of s 15(1)(b) of the Act has been taken from s 7(8) of the *Sexual Reassignment Act* (SA), upon which the Western Australian legislation is obviously modelled. That structure is, in turn, obviously driven by sentence syntax and grammar. Clause (i) of par (b) relates to the existence of a belief, cl (ii) is concerned with the characteristics of the applicant, and cl (iii) is concerned with the receipt of counselling. No inference of parliamentary intent is properly drawn from the use of an unexceptional grammatical structure.

47 The Tribunal also concluded (at [137]) that the term 'gender characteristics' in the Act must be construed as including characteristics that may not be immediately apparent to the casual observer. For reasons which I will develop below, I would agree with this conclusion.

48 The Tribunal went on (at [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.

49 The proposition that 'only an internal medical examination would disclose what remains of their female gender characteristics' is inconsistent with the findings made by the Tribunal as to the extent of the physical alterations caused by the testosterone treatment undertaken by each appellant. As was conceded by their counsel during the hearing of this appeal, apart from the clitoral growth which they experienced, the external genitalia and vagina of each of AB and AH remain unaffected. It follows that, for example, a vulva, characteristic of a female, would be apparent upon external examination. For reasons which I will develop below, the Tribunal's failure to identify and expressly consider the retention by each appellant of all female reproductive organs (as opposed to just the uterus and ovaries – as identified in [132] of the Tribunal's decision), including external genitalia, appears to have been significant in the conclusion at which it arrived. However, I reiterate that although the retention of female characteristics is not irrelevant, the focus of the test imposed by the Act is upon the acquisition of male characteristics, where female to male reassignment is at issue.

50 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.

51 The Tribunal went on (at [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.

52 With respect to the Tribunal, the task which it was required to perform was to apply the facts which it had found to the Act as it construed it. Rhetorical observations of this kind raise issues of policy for

the Parliament and distract attention from the Tribunal's essential task, which was one of statutory construction.

53 The Tribunal approached the issue as one of construction in the last substantive paragraph of its reasons in which it observed (at [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.

54 Three observations might usefully be made about this paragraph. First, like [132] of the Tribunal's decision set out above, it focuses critical attention upon the retention of female characteristics, rather than the acquisition of male characteristics. As I have observed, it is the acquisition of the characteristics of the gender in respect of which a recognition certificate is sought with which the Act is primarily concerned.

55 Second, the omission of Parliament to specify that a hysterectomy was required for a female to successfully complete reassignment to the male gender would only be significant if the Act had taken the form of specifically identifying a particular physical characteristic or characteristics which had to be altered before male to female reassignment could be recognised and vice versa. However, the Act has not taken that form. Rather, the Act takes a very general approach in which no attempt is made to specify those characteristics which are male, and those which are female. In legislation of that kind, failure to refer, for example, to the requirement of hysterectomy is, with respect to the Tribunal, of no significance.

56 Third, in the critical portion of its reasons, (see also [132] of the Tribunal's decision set out above) the Tribunal has fixed almost exclusively upon the retention of the uterus of each appellant. No significance appears to have been attached to the retention of the genitals of each appellant, including the vulva and vagina. There is no statutory basis for this focus upon one particular physical characteristic.

The scope of the appeal

57 With some exceptions not presently relevant, appeals from the Tribunal to this court are limited to questions of law - s 105(2) *State Administrative Tribunal Act 2004* (WA). However, it is well established that 'the question whether facts fully found fall within the provisions of a statutory enactment properly construed is a question of law' (per Mason J) in *Hope v Bathurst City Council* [1980] HCA 16; (1980) 144 CLR 1, [7], also *Collector of Customs v Pozzolanic Enterprises Pty Ltd* (1993) 43 FCR 280.

58 In these cases, the relevant facts have been found by the Tribunal and are not contentious. The critical issue, which is whether those facts lead to the conclusion that each appellant has the gender characteristics of a male, within the meaning properly given to the expression 'gender characteristics' in the Act is a question of law, and falls within the appellate jurisdiction of this court.

The cases

59 As I have noted, the Act is modelled largely on the *Sexual Reassignment Act* (SA). However, there do not appear to have been any cases decided under either the South Australian or the Western Australian legislation which shed any light on the issues to be addressed in this case. Because those issues are essentially issues of statutory construction, limited benefit is to be derived from cases determined in other jurisdictions and in other statutory contexts. Further, aside from the recent New Zealand case of *Michael v Registrar General of Births, Deaths & Marriages* (2008) 27 FRNZ 58, I have found no case law directly relating to the issue of a recognition certificate or other equivalent document. The cases need to be considered in the context of the area of law to which they relate. However, a consideration of the approach taken by courts and legislatures to transgender issues in other jurisdictions nevertheless provides some general background for the more specific consideration of the issues which arise under the Act. Like other Australian cases decided in this area, I have found the jurisdictions of England and New Zealand to be of most assistance.

England

Corbett v Corbett

60 The position under English common law was established by the decision of Ormrod J in *Corbett v Corbett* [1971] P 83; [1970] 2 All ER

33. The parties to those proceedings had gone through a ceremony of marriage under their names Arthur Corbett and April Ashley. April Ashley was born and brought up as a boy under the name George Jamieson. After working as a female impersonator and taking oestrogen to encourage the development of breasts and a feminine physique, he underwent a surgical procedure which involved the amputation of the testicles and 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. The question before the court was whether the marriage was valid. It was held that marriage was a union between a man and a woman. It was further held that April Ashley retained the gender of her birth, and was therefore a man at the time of the marriage ceremony, who could not lawfully marry another man, with the result that the marriage was null and void.

Bellinger v Bellinger

61 The issue which arose in *Bellinger v Bellinger* [2002] Fam 150; [2002] 1 All ER 311 was essentially identical to the issue which had arisen in *Corbett*. One of the parties to a ceremony of marriage had been correctly classified at birth as male, but had undergone gender reassignment surgery to obtain the characteristics of a female prior to undertaking the ceremony of marriage with a male. By a majority, the Court of Appeal followed *Corbett*, and held that the marriage was invalid. An appeal to the House of Lords was dismissed (*Bellinger v Bellinger* [2003] 2 AC 467; [2003] 2 All ER 593). The observations of Lord Nicholls of Birkenhead eloquently depict the difficulties of degree which are likely to arise in transgender cases, and the desirability of legislative prescription. His Lordship observed:

[M]uch uncertainty surrounds the circumstances in which gender reassignment should be recognised for the purposes of marriage. The present case concerns one individual and her particular condition and circumstances. Although some of the evidence produced is of a general nature, the evidence before the House is focused on the facts of this case. So were the arguments. In particular, Miss Scriven QC submitted that wherever the line marking the transition from one sex to the other is to be drawn, Mrs Bellinger is on the reassigned gender side of the line.

I do not consider this would be a proper or, indeed, a responsible basis on which to change the law. 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) 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. Parties proposing to enter into a marriage relationship need to know whether their marriage will be valid. Other people need to know whether a marriage was valid. Marriage has legal consequences in many directions: for instance, housing and residential security of tenure, social security benefits, citizenship and immigration, taxation, pensions, inheritance, life insurance policies and criminal law (bigamy). 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 [2002] 1 All ER 311 at [104].

Your Lordships' House is not in a position to decide where the demarcation line could sensibly or reasonably be drawn. Where this line should be drawn is far from self-evident. The antipodean decisions of *A-G v Otahuhu Family Court* [1995] 1 NZLR 603 and *Re Kevin* have not identified any clear, persuasive principle in this regard [39] - [43].

62 These observations were of course made after the passage of the Act in Western Australia. However, the generality of the approach taken in the Act, and the failure to specify objective criteria capable of being readily applied so as to produce a reasonably clear answer has meant that the Board, the Tribunal and ultimately the court, must confront many of the difficulties identified by Lord Nicholls.

The Gender Recognition Act 2004 (UK)

63 The plea for parliamentary intervention made in *Bellinger* was heard by the UK Parliament and resulted in the passage of the *Gender Recognition Act 2004* (UK). That Act established a panel with power to grant recognition certificates to appellants who:

- (a) have or have had gender dysphoria;
- (b) have lived in the acquired gender for the period of two years ending with the date on which the application is made;
- (c) intend to continue to live in the acquired gender until death; and
- (d) comply with the evidentiary requirements imposed by the Act, which include the provision of reports by two medical practitioners (or one chartered psychologist and one medical practitioner), at least one of whom practises in the field of gender dysphoria, whose reports are to include details of the treatment undergone for the purpose of modifying sexual characteristics (s 2 and s 3 of the *Gender Recognition Act*).

Australia***R v Harris and McGuinness***

64 *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. Both accused had been born male. One had undergone reassignment surgery which involved removal of all the male external genitalia and the construction of an artificial vagina. The other had dressed and acted as a woman since teenage years, had taken female hormones which had increased her breasts, but had not undertaken sex reassignment surgery at the time of the alleged offence.

65 The Court of Criminal Appeal held, by a majority, that the accused who had undertaken sex reassignment surgery should, for the purposes of the relevant offence provision, be taken to be a woman, and therefore could not be guilty of the offence. However, the court held that the accused who had not undertaken sex reassignment surgery should be regarded as a man for the purposes of the section, and was therefore guilty of the offence.

66 Mathews J, with whom Street CJ agreed, was critical of the decision in *Corbett*. Her Honour's approach was significantly influenced by the context in which the issues arose - namely that of criminal law. She observed (at 192):

... I cannot see that the state of a person's chromosomes can or should be a relevant circumstance in the determination of his or her criminal liability. It is equally unrealistic, in my view, to treat as relevant the fact that the person has acquired his or her external attributes as a result of operative procedure. After all, sexual offences - with which we are particularly concerned here - frequently involve the use of the external genitalia. How can the law sensibly ignore the state of those genitalia at the time of the alleged offence, simply because they were artificially created or were not the same as at birth?

The time, then, has come when we must, for the purposes of the criminal law, give proper legal effect to successful reassignment surgery undertaken by transsexuals.

67 Mathews J rejected the proposition that biological factors should be regarded as entirely secondary to psychological ones (at 193). In her view, the uncertainties and difficulties of proof which would emerge from this approach rendered it impractical.

Re Secretary Department of Social Security and HH

68 In *Re Secretary Department of Social Security and HH* (1991) 23 ALD 58, the Administrative Appeals Tribunal (Justice O'Connor presiding) 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).

69 The Tribunal referred to evidence which established a number of factors that would be regarded by medical opinion as being relevant to the determination of gender, including (at 62):

- (a) sex chromosome constitution;
- (b) gonadal sex;
- (c) sex hormone pattern;
- (d) internal sex organs (uterus, sperm ducts);
- (e) genitalia;

- (f) secondary sex characteristics (facial hair, body shape);
- (g) sex of rearing; and
- (h) psychological sex.

70 After considering each of these factors, the Tribunal 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. To that extent, the decision was entirely consistent with the decision in *R v Harris and McGuinness*.

Secretary, Department of Social Security v SRA

71 In *Secretary, Department of Social Security v SRA* (1993) 43 FCR 299 the question was 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.

72 Black CJ referred to the passage in the psychiatrist's report identified by Lord Nicholls in *Bellinger* (above) to the effect that the applicant for the pension 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 the view of Black CJ (at 306):

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 the 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*.

Kevin v Attorney-General (Commonwealth)

73 In *Kevin v Attorney-General (Commonwealth)* [2001] FamCA 1074; (2001) 165 FLR 404, the question, like that in *Corbett* and *Bellinger*, was whether a marriage was valid. The marriage was between a woman, and a person who, at the time of the marriage was a post-operative female to male transsexual. He had undergone a process of reassignment which involved hormone treatment and surgery, including a total hysterectomy. However, he had elected not to undertake phalloplasty. Prior to the marriage, Kevin had been registered as a male pursuant to s 32B of the *Births, Deaths & Marriages Registration Act (1995)* (NSW). At first instance, Chisholm J held the marriage to be valid

on the basis that Kevin was a male at the time the marriage was undertaken. That decision was upheld on appeal: *Attorney-General (Commonwealth) v Kevin* [2003] FamCA 94; (2003) 172 FLR 300. 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.

Scafe v Secretary, Department of Families, Housing, Community Services & Indigenous Affairs

74 In *Scafe v Secretary, Department of Families, Housing, Community Services & Indigenous Affairs* [2008] AATA 104 the question before the Administrative Appeals Tribunal (AAT) was 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 AAT found that the oestrogen treatment undertaken by the appellant would have rendered the appellant's penis non-functional (in terms of capacity to perform sexual intercourse) and had produced breast growth and body fat distribution of a female character. However, as the AAT found, as a consequence of a skin infection suffered by the applicant, genital surgery was unwise for medical reasons. The AAT accepted that the applicant was, psychologically, socially and culturally a woman and had taken all the physiological steps that could reasonably be taken to become a woman. Nevertheless, the AAT felt bound to follow the decision in *SRA* and to conclude that in the absence of surgical reassignment, the applicant was to be treated as a male for the purposes of the social security legislation ([29]).

New Zealand

Attorney-General v Otahuhu Family Court

75 In the case of *Attorney-General v Otahuhu Family Court* [1995] 1 NZLR 603 declaratory relief was sought as to the validity of a marriage where one of those persons had adopted the sex opposite the proposed marriage partner through sexual reassignment. As 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.

76 On those factual assumptions, Ellis J concluded that there was no statutory provision in New Zealand which precluded a transsexual person from marrying as a person of his or her adopted sex, and they should be allowed to do so.

Michael v Register General of Births, Deaths & Marriages

77 In *Michael v Registrar General of Births, Deaths & Marriages* (2008) 27 FRNZ 58, declaratory relief was sought in relation to the issue of a birth certificate recording the applicant as a male. Under the relevant legislation, 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. (s 28(c) of the *Births, Deaths and Marriages Registration Act 1995* (NZ))

78 The applicant was born as a female, but had undergone continuous hormone therapy and a bilateral mastectomy. The court received expert evidence, which it accepted, to the effect that further surgery was not an essential part of treatment regarded by experts as necessary for gender reassignment. The court therefore found that the applicant had undergone the treatment usually regarded by medical experts as desirable to conform with the nominated sex - namely male - and the relief was granted.

Summary of the cases

79 As I observed at the commencement of the review of the cases, limited assistance is to be gained from them given the different statutory contexts in which the issues have arisen. However, the Australian cases manifest a consistent focus upon sexual reassignment surgery that involves alteration of a person's reproductive organs and genitalia as the line of demarcation between the sexes. This is consistent with the approach taken in all Australian jurisdictions other than Western Australia and South Australia, where the legislature expressly requires that a surgical procedure be undertaken prior to recognition of reassignment.

80 The legislative approach taken in the majority of Australian jurisdictions is consistent with the approach taken in most American states, where amendment of designated sex on birth certificates can only be made after a surgical procedure has been undertaken. The same approach is taken in most provinces of Canada (see the *Vital Statistics Acts* of many provinces). As an example, s 71 of the *Civil Code of Quebec* provides that:

Every person who has successfully undergone medical treatments and surgical operations *involving a structural modification of the sexual organs* intended to change his secondary sexual characteristics may have the designation of sex which appears on his act of birth and, if necessary, his given names changed. [emphasis added]

81 The one case where reassignment has been recognised without the applicant having undertaken genital or reproductive surgery is the New Zealand decision in *Re Michael*, where the relevant statutory provision is quite different to that found in the Western Australian Act.

The Parliamentary Debates

82 The Tribunal referred in its reasons to statements made in the course of debate in the Parliament during the passage of the bill which became the Act. Having reviewed the transcript of those debates, it does not appear to me that they shed a great deal of light on the critical issues in this case. In the second reading speech given by the Attorney General of the day, he observed that:

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. (Western Australia, Parliamentary Debates, Legislative Council, 25 November 1999, 3822 (Mr P Foss, Attorney-General))

83 However, the speech does not identify what was meant by the expression 'completed medical procedures'. It seems that some of the members participating in the debate were uncertain as to precisely what might be required to obtain a recognition certificate under the bill. For example, Ms McHale asserted that the bill would only offer protection after a surgical reassignment operation had been completed (Western Australia, Parliamentary Debates, Legislative Assembly, 24 November 1999, 3764 – 3765 (Ms S McHale)). On the other hand, Ms Hodgson asserted that:

It is clear that it applies only to post-operative reassigned persons, although that includes people who have received chemical and hormonal treatments as well as surgical processes. (Western Australia, Parliamentary Debates, Legislative Council, 15 March 2000, 4996 (Hon H Hodgson))

84 In the result, I conclude that the language used in the course of the parliamentary debates during the passage of the bill was insufficiently particular or precise to be of any real assistance in the resolution of the issues before the court.

Analysis

85 It is appropriate now to analyse the submissions and arguments which have been developed in the course of this appeal, and in the reasons of the Tribunal. Before turning to the critical issue, which concerns the meaning to be given to the phrase 'the physical characteristics by virtue of which a person is identified as male', it is appropriate to consider a related issue, which is the proper interpretation of the expression 'reassignment procedure'.

'Reassignment procedure'

86 It is possible to read the definition given to the expression 'reassignment procedure' as only applying if the procedure has been successful in causing the person who has undertaken the procedure to be identified as a person of the opposite sex. Such a construction would place emphasis upon the words 'so that the person will be identified'.

87 The Tribunal rejected that approach to the construction of the expression. Rather, the Tribunal took the view that the definition 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. There are two reasons why that approach is correct.

88 First, the language of the definition is purposive in character - the phrase 'so that the person will' connotes notions of purpose, rather than effect.

89 Second, if the definition were to be construed in such a way that a person would only be taken to have undergone a reassignment procedure if the procedure had resulted in that person being identified as a person of the opposite sex, that part of s 15 which requires an applicant for a recognition certificate to establish that he has the gender characteristics of the gender to which the person has been reassigned would be entirely otiose and redundant. That is because a person can only apply for a recognition certificate if they have undergone a reassignment procedure (s 14(1)). If that requirement carries with it the requirement that the procedure have the effect that the person have the physical characteristics which would result in them being identified as a person of the opposite sex, the specific requirement to the same effect in s 15(1)(b)(ii) would be unnecessary. A construction of the Act which would render one of its provisions otiose or redundant is to be avoided.

90 Other aspects of the definition of 'reassignment procedure' should be noted. First, as I have already observed, the procedure may be medical, or surgical, or a combination of both. The lack of the mandatory requirement for surgical procedure distinguishes the Western Australian and South Australian legislation from other Australian and much North American legislation of this kind. The significance of this distinction will be considered below.

91 Next, the procedure has to alter both the genitals and other gender characteristics. Thus, as I have noted, a procedure which only alters non-genital characteristics, such as breast removal, cannot, of itself, fall within the scope of the definition. However, in the present case, the medical procedure undertaken by each of AB and AH, in the form of the testosterone treatment, has resulted in genital alteration, so as to satisfy the definition or requirement. Further, because the definition incorporates alteration to 'other gender characteristics', the mastectomies undertaken by each of AB and AH are relevantly considered. This is why I earlier expressed the view that although the Board appears to have taken an erroneous approach to the definition of 'reassignment procedure', in the result, nothing appears to turn upon that error.

92 Another point to note from the definition of reassignment procedure is that it only requires *alteration* of genitals and other gender characteristics. It does not require, for example, the removal or obliteration of all genital or gender characteristics of the sex from which the person is moving. However, this observation cannot be taken too far. In particular, it does not answer the critical question in this case, which is the degree of alteration required to result in each of AB and AH being identified as males.

93 The last point I would draw from the definition of 'reassignment procedure' arises from the use of the word 'identified'. This word is used twice in the definition of 'reassignment procedure'. The first occasion upon which the word is used is in the context of a person being 'identified by a birth certificate as male or female'. The word is used in the definition of 'recognition certificate' in a similar context, where reference is made to a certificate

... that identifies a person who has undergone a reassignment procedure as being of the sex to which the person has been reassigned. (s 3 of the Act)

94 The second time the word is used is in a context which is virtually identical to the use of the word in the definition of 'gender characteristics' - namely, the identification of a person as male or female. The usage seen as the first occasion sheds light upon the meaning to be given to the word 'identified' when used in the definition of 'gender characteristics'. Given that the same word is used with reference to each of a birth certificate and a recognition certificate, it carries the connotation of 'established' or 'accepted as'. It is tempting to use the word 'recognised' as a synonym for 'identified', but the word 'recognised' itself bears shades of meaning. At one level, a person might be 'recognised' at a distance by their facial appearance, but at another level a person might be 'recognised' in the sense of accepted as having a particular quality or characteristic. It is only in that latter sense that, in my view, the meaning 'recognised' would be equivalent to the meaning properly given to the word 'identified' when used in the Act.

95 The Tribunal placed considerable reliance upon the lack of any express legislative requirement that an applicant for a recognition certificate have undergone a surgical procedure. In submissions to this court, the respondents similarly place considerable emphasis upon that feature of the definition of 'reassignment procedure'. They invite the court to conclude that it was not the intention of Parliament that in order to obtain their recognition certificates they should be required to undergo

surgery, altering either their external genital characteristics or their reproductive organs.

96 This proposition can only be taken so far. 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.

97 Another reason why this proposition can only be taken so far is that even though the legislature has not required that a surgical procedure be undertaken in all cases in which a recognition certificate is issued, it has expressly required, by s 15, that applicants for a certificate have the physical characteristics by virtue of which they are identified as a member of the gender to which they wish to be assigned. Thus, the legislature has retained a specific requirement for, and focus upon, the physical considerations of gender.

98 It is also significant that a person is only eligible to apply for a recognition certificate if they have undergone a 'reassignment procedure'. As I have noted, the definition of that expression requires at least some alteration to the genitals of the applicant.

99 It can also be assumed that those responsible for the formulation of the Act would have been well aware of the line of Australian cases, particularly *R v Harris and McGuinness* and *SRA*, which established that the point of demarcation between those who should be regarded as retaining their gender of birth, and those who should be regarded as having changed their gender, was whether they had undergone a procedure which transformed their genitalia and reproductive organs. It must have been obvious, when the Act was formulated and passed, that the adoption of a criterion which focused upon the physical characteristics which identified a person as either male or female was likely to result in

the adoption of the line of demarcation established by the previously decided cases.

'Gender characteristics'

100 I turn now to the critical question in the case, which concerns the meaning to be given to the expression 'gender characteristics'. The first point to note is the point I have already made, and that is that the definition focuses upon the characteristics by which a person is to be identified as a member of the gender to which they seek to be assigned, rather than the characteristics of their gender of birth. So, in the case of AB and AH, the critical question is whether they have the physical characteristics by which they are identified as male, which is of course related to, but not the same as, the question of whether they retain characteristics which would identify them as female.

101 This observation leads me to endeavour to answer the two questions posed by the Tribunal at [129] of its reasons, and which it failed to answer. Those questions are 'what are the gender characteristics?' and 'identified by whom'.

102 I have given my reason for concluding that 'identified' in this context means 'established as' or 'accepted as'. Consistently with that view, 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.

103 Turning then to the issue of the relevant physical characteristics, it is inevitable that each applicant for a recognition certificate will possess a range of physical characteristics, some of which will be identified with the gender of their birth (such as chromosomes) and others of which will be identified with the gender to which they seek reassignment (as a consequence of the reassignment procedure). Whether, after taking account of all relevant characteristics, the person should be accepted, according to general community standards and expectations, as having the physical characteristics to be regarded as a member of the sex to which they seek to be reassigned, will depend critically upon the particular facts and circumstances of each case, and the balance of factors which would point to one gender rather than another.

104 Put another way, in the context of this legislation, it could not have been intended by the Parliament that in order to be identified as a member of one gender, the person have all the physical characteristics of that gender, and only those characteristics. Rather, it is inherent in the nature

of the processes contemplated by the Act that applicants will possess at least some physical characteristics normally associated with each gender. 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.

105 On the approach that I take to this issue, characterisation of the legislation as being 'beneficial', or requiring a construction that would promote the purpose or object underlying the Act (in accordance with s 18 of the *Interpretation Act*), or asserting that the Act should be given 'a fair, large and liberal' interpretation rather than a 'literal or technical' application, is of no assistance (*IW v City of Perth*). That is because the Parliament has determined that value judgments are to be made, involving questions of fact and degree, as to the gender with which a particular applicant is to be identified. The Parliament has specified standards (albeit in general terms) which must be met before a recognition certificate can be granted. Plainly, it was not the intention of Parliament that every applicant for a recognition certificate should be successful, nor that only those applicants who displayed every characteristic of the gender to which they have been reassigned (other than chromosomes) should be granted such a certificate. 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.

106 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.

107 One issue which arose in the course of argument was whether, in making the judgment or assessment to which I have referred, regard should only be had to external genitalia. Neither the State nor the respondents pressed that view, although in proceedings of this kind, where we are called upon to construe for the first time legislation which is of great importance to those affected by it, the court should not be constrained necessarily by the positions adopted by the particular parties before it.

108 The views expressed by Mathews J in *R v Harris and McGuinness* would lend support to the proposition that the focus should be upon external genitalia, rather than internal reproductive organs. However, her Honour expressly restricted her remarks to the context of the cases she was deciding - namely, the application of the criminal law - where external genitalia are most relevant. Some dictionary definitions would also lend support to a focus upon external genitalia, such as the Macquarie Dictionary (5th edn), which refers to genitals as:

The reproductive organs, especially the external organs.

However, that definition would still not exclude internal reproductive organs from the meaning to be given to 'genitals'.

109 It is important to recall that the word 'genitals' is not used in the definition of 'gender characteristics'. It is only used in the definition of 'reassignment procedure'. 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.

110 The respondents also suggested in argument that the question was to be viewed from the perspective of the casual observer, forming perhaps a superficial view as to the gender of the applicant. That proposition must be rejected. On the view which I take of the meaning to be given to 'physical characteristics', it would extend to all of those characteristics which have a bearing upon the identification of the applicant as either male or female. Many of those characteristics would not be visible to the casual observer, especially if the applicant is clothed. The terms of the Act provide no basis for restricting the characteristics properly taken into account to those that might be seen by the casual observer or bystander.

111 The first ground of appeal advanced by the State focusses critical importance upon reproductive capacity or fertility. That ground of appeal asserts that the Tribunal erred by concluding that each of AB and AH had the physical characteristics identifying them as males, when they retained the capacity to bear children in the event that they discontinued their testosterone treatment and took steps to become pregnant. 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.

112 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 to, but not necessarily determinative of, the process of evaluation.

113 Appeal ground 2 presupposes that a broader range of physical characteristics are properly taken into account when undertaking the process of evaluation I have described, consistently with what I take to be the proper construction of the Act.

The outcome of these cases

114 It is necessary now to apply the approach which I consider is required by the proper construction of the Act to the facts found by the Tribunal in relation to each of AB and AH. Each has undergone testosterone treatment, which has resulted in the various physical changes which I have set out above. Each has undergone a bilateral mastectomy. The consequence is that each has a number of the physical characteristics which would, according to established community standards and expectations, be associated with members of the male gender. These include the general physique, voice and hair configuration characteristics which would be associated with the male gender. However, neither has any of the genitalia or reproductive organs which would normally be associated with the male gender. Rather, save for their clitoral growth, and the impact which testosterone treatment has had upon ovulation and the functioning of their uterus, each otherwise has the external genital appearance and internal reproductive organs which would, according to accepted community standards, be associated with membership of the female sex. As the dictionary definitions of the male and female gender demonstrate, when matters of sex are involved, particular attention is focused, according to ordinary and accepted community standards, upon genitalia and reproductive organs. 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.

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.

116 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.

117 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.

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

119 **PULLIN JA:** Originally the appellant had one ground of appeal which alleged that the Tribunal erred in law in finding that the first respondents satisfied the requirement of s 15(1)(b)(ii) of the *Gender Reassignment Act 2000* (WA) that the first respondents have the gender characteristics of a male because the first respondents retained the capacity to bear children.

120 During the hearing, a second ground of appeal was added by leave of the court. It read:

The Tribunal erred in law in finding that the first respondent satisfied the requirements of s 15(1)(b)(ii) of the *Gender Reassignment Act 2000*, that the respondent have the gender characteristics of a male when the respondent retained the genitals which would cause the respondent to be identified as a female.

121 The appellant also sought leave to add another ground of appeal which read:

The Tribunal erred in law in finding that the first respondent had undergone a reassignment procedure as required by s 14(1) of the *Gender Reassignment Act 2000* when the first respondent's genitals were not modified in such a way as would cause the first respondent to be identified as a male.

122 Leave to amend in those terms was refused because the proposed ground was an attempt to raise an issue which had not been an issue in the proceedings below. As a result, I would prefer not to express any opinion about the meaning of the expression 'reassignment procedure' which is defined in the Act, save to agree as the Tribunal stated and as the Chief Justice says, that the definition of 'reassignment procedure' focuses upon purpose rather than outcome. I wish to make it clear that nothing that I say should be regarded as accepting that the therapy and operation involved in this case would, in another case, establish that there had been a 'reassignment procedure'.

The issue on which the appeal was fought

123 The issue on which the appeal was fought was whether the facts as found established that the first respondents had the 'gender characteristics' of a male. The expression 'gender characteristics' is defined in the Act to mean 'the physical characteristics by virtue of which a person is identified as male or female'. This requires a consideration not of purpose but of outcome, or more accurately, on whether, inter alia, the Board is satisfied that the applicant 'has' the relevant gender characteristics. I agree with the Chief Justice that the Tribunal erred in law in failing to focus its primary attention on that question. This was an error of law because it reflected a wrong view of the law. That error having been established, the Tribunal's decision should be set aside and it then falls to this court to make the decision that the Tribunal should have made. See s 105(9) of the *State Administrative Tribunal Act 2004* (WA).

Community standards to be applied

124 I agree with the Chief Justice that 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).

Respondents would not be identified by community standards as males

125 Each respondent has a number of physical characteristics which by community standards would be associated with members of the male gender. However, identification according to community standards requires all relevant information to be considered. The word 'identify' means to recognise or establish or prove to be as asserted (*Macquarie Dictionary*). 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.

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

127 **BUSS JA:** These appeals are concerned with the proper construction and application of various provisions of the *Gender Reassignment Act 2000* (WA) (the Act).

128 Each of AH (the first respondent in CACV 113 of 2009) and AB (the first respondent in CACV 114 of 2009) is an adult. Each is chromosomally a female. At birth, they had the internal and external organs of females, and the birth certificates issued by the Registrar of Births, Deaths and Marriages show their sex as female.

129 On 11 April 2008 and 14 November 2007 respectively, each of AH and AB applied to the Gender Reassignment Board of Western Australia (the Board) for the issue of a recognition certificate under s 15 of the Act. On 16 June 2008, the Board refused their applications.

130 AH and AB then applied to the State Administrative Tribunal (the Tribunal) for a review of the Board's decision. The Attorney General for the State intervened in the proceedings on behalf of the State pursuant to s 37 of the *State Administrative Tribunal Act 2004* (WA) (the SAT Act).

131 The Tribunal decided that each of AH and AB satisfied the requirements of s 15(1) of the Act, and was entitled to the issue of a recognition certificate. It ordered, in respect of each of AH and AB, that the Board's decision be set aside, the application for a recognition certificate be granted, and the Board be directed to issue a recognition certificate.

132 The State applied to the Supreme Court for leave to appeal. On 15 September 2009, the Chief Justice ordered, relevantly, that:

- (a) pursuant to s 43 of the *Supreme Court Act 1935* (WA), the appeals be reserved to this court for hearing and determination; and
- (b) leave to appeal be granted.

The relevant provisions of the Act

133 Section 3 of the Act contains a number of definitions. It provides, relevantly, that in the Act, unless the contrary intention appears:

Board means the Gender Reassignment Board of Western Australia established by section 5;

...

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;

recognition certificate means a certificate issued under this Act that identifies a person who has undergone a reassignment procedure as being of the sex to which the person has been reassigned;

Registrar means the Registrar of Births, Deaths and Marriages, referred to in section 5 of the *Births, Deaths and Marriages Registration Act 1998*.

134 Section 5 establishes the Board. Its functions are to receive and determine applications for recognition certificates and to issue recognition certificates in suitable cases.

135 The Governor appoints the president of the Board. A person may be appointed as president only if, relevantly, he or she is or has been a judge of the Supreme Court, the District Court or the Family Court of Western Australia, or is or has been an Australian legal practitioner admitted for not less than eight years. See s 6. The Governor may appoint not more than five persons, in addition to the president, as members of the Board, and such persons must include a medical practitioner, a person who has undergone a 'reassignment procedure' and a person with experience in equal opportunity matters. See s 7.

136 Section 8(2) provides that the Board must be constituted by not less than three members.

137 By 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.

138 Section 15(1) provides:

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.

139 Section 15(2) contains different provisions from s 15(1) for the issue of a recognition certificate where an application under s 14 relates to a child. By s 15(3), a recognition certificate cannot be issued to a person who is married.

140 By s 16(1), 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.

141 Section 21(1) provides that an aggrieved person may apply to the Tribunal for a review of a decision of the Board on an application for the issue of a recognition certificate.

The reasons of the Board

142 The Board published separate, but relevantly identical, reasons for its decisions in relation to AH and AB (BAB 38 - 42, 49 - 53).

143 It held that s 15(1)(a)(i), (ii) and (iii) of the Act had been satisfied in relation to each of them.

144 As to s 15(1)(b) of the Act, the Board held that all but one of the criteria set out in that provision had been satisfied.

145 The criterion in s 15(1)(b) which the Board held was not satisfied concerned whether each of AH and AB had 'the gender characteristics of a person of the gender to which the person has been reassigned'. The Board noted that each of them had undergone a bilateral subcutaneous mastectomy. It then said:

[AH/AB] no longer has the physical characteristic of female breasts. In that one aspect, [AH/AB] could be identified as male. In other aspects, [AH/AB] cannot be identified as male. In the Board's opinion, [AH/AB] 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 (BAB 41, 52).

146 The Board recorded that it placed no weight on the fact that each of
AH and AB had not had a surgical procedure to construct a penis
(BAB 42, 53).

147 In addition to not being satisfied that each of AH and AB had the
gender characteristics of a male, the Board decided that, in any event, the
word 'may' in s 15(1) conferred on it a discretion to withhold a recognition
certificate to an applicant who satisfies s 15(1)(a) and (b). It said that it
exercised its discretion against AH and AB because they have female
reproductive systems and, therefore, the capacity to bear children
(BAB 42, 53).

The nature of the proceedings before the Tribunal

148 The proceedings before the Tribunal were within its review
jurisdiction. See s 17(1) of the SAT Act and s 21(1) of the Act.

149 By s 27(1) of the SAT Act, the review of a reviewable decision is to
be by way of a hearing de novo.

150 Section 29(1) of the SAT Act provides:

The Tribunal has, when dealing with a matter in the exercise of its review
jurisdiction, functions and discretions corresponding to those exercisable
by the decision-maker in making the reviewable decision.

The reasons of the Tribunal

151 The Tribunal was satisfied that each of AH and AB had 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' [43]. The Tribunal
found that they had undergone a 'reassignment procedure', as defined in
s 3 of the Act.

152 The Tribunal held that each of AH and AB satisfied the criteria in
s 15(1)(a) of the Act [45]. It also held that each of them satisfied 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 Act [46].

153 The critical issue before the Tribunal, as before the Board, was
whether each of AH and AB satisfied the second limb of s 15(1)(b)(ii)
[47].

154 At the time of the hearing before the Tribunal, AH was aged
26 years. In 2006, Dr Russell Date, a psychiatrist, diagnosed AH as

having 'gender identity disorder/female to male transsexualism'. AH commenced testosterone therapy in September 2006 for the purpose of having his gender reassigned from female to male. AH maintains his testosterone level by self-administered regular injections. In June 2007, AH underwent the bilateral mastectomy and in November 2008, he had a minor, final revision to improve the outcome of the reconstruction [57].

155 AH's testosterone treatment has resulted in the following internal and external physical changes [58]:

- 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.

156 At the time of the hearing before the Tribunal, AB was aged 31 years. In 2004, Dr Date diagnosed AB as having 'Gender Dysphoria/Female to Male Transsexualism' [49].

157 AB commenced testosterone therapy in May 2004, and now self-administers regular injections to maintain his testosterone level within a normal male range. In July 2005, he underwent the bilateral mastectomy.

158 AB's testosterone treatment has resulted in internal and external physical changes, as follows [51]:

- 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.

159 Neither AH nor AB has had a hysterectomy. The Tribunal heard evidence from 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. Dr Tangpricha gave evidence as to, amongst other things, the prospects of AH or AB conceiving a child if he were to cease testosterone treatment. The Tribunal recorded his evidence, as follows:

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.

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.

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 [77] - [79].

160 Neither AH nor AB has had a phalloplasty. Dr Tangpricha said in evidence that he had treated more than 200 transsexual patients, about 40% of whom were female to male transsexuals. He gave evidence that probably less than 10% have had penis reconstructive surgery for various reasons including financial cost, lack of effective surgical techniques and the risk of complications [80].

161 AH has decided against undergoing a hysterectomy. He considers that the disadvantages of a hysterectomy outweigh any advantages [59]. AH has suffered serious adverse consequences from surgery in the past and does not wish to risk a similar experience again [59]. He would only consider the risks associated with a hysterectomy worthwhile if it were necessary for medical reasons, which it is not, at present [59]. Further, medical opinion is that a hysterectomy could compromise the possibility of a successful phalloplasty in the future [59]. AH described phalloplasty as the 'holy grail', but he does not want to undergo this surgery while medical technology is unable to achieve a satisfactory result [60]. The Tribunal unreservedly accepted AH's evidence; in particular, his evidence that he has no intention of ceasing testosterone therapy and no intention of attempting to conceive a child at any time in the future [62].

162 AB has also decided against undergoing a hysterectomy. He has suffered adverse effects from surgery in the past and does not want to undergo surgery that is not medically necessary [52]. Also, he cannot afford financially the six weeks absence from work required for the surgery and recovery [52]. Although he described phalloplasty as the 'ultimate utopia', AB does not intend undergoing surgery to construct a penis because the procedure involves substantial risks and has had only limited success [53]. However, he wishes to retain his internal organs for the purpose of future phalloplasty, if technical advances make this operation feasible [53]. The Tribunal accepted AB's evidence without reservation; in particular, his evidence that he has no intention of ceasing testosterone therapy and no intention of attempting to conceive a child at any time in the future [55].

163 The Tribunal construed s 15(1)(b)(ii) of the Act as requiring that a person have *sufficient* of the gender characteristics of a person of the gender to which the person has been reassigned [130].

164 According to the Tribunal, the critical question was this:

[W]hether 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 [AH nor AB] can be said to have the physical characteristics by which a person is identified as male [132].

165 The Tribunal referred to the statement in the Board's reasons that, in reaching its conclusion, it placed no weight on the fact that neither AH nor AB has had a surgical procedure to construct a penis. The Tribunal added:

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 [134].

166 The Tribunal then mentioned the evidence of Dr Trudy Kennedy, a psychiatrist and the director of the Gender Dysphoria Clinic in Victoria, 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 have this procedure must go overseas [135]. The Tribunal then said that the relevance of the Board's finding about the fact that neither AH nor AB has had a surgical procedure to construct a penis is:

[T]o 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 [135].

167 The Tribunal reasoned that it was of some relevance that the Parliament had combined two requirements in s 15(1)(b)(ii) of the Act; that is, the person 'has adopted the lifestyle', and 'has the gender characteristics', of a person of the gender to which the person has been reassigned. According to the Tribunal, when s 15(1)(b)(ii) is 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' [136].

168 The Tribunal emphasised that AH and AB have not merely altered their external appearance by superficial means. The medical and surgical procedures they had undergone had altered their genitals and other gender characteristics in profound ways. In particular:

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 [138].

169 The Tribunal decided that to refuse recognition certificates on the basis of the retention of the uterus would give 'primacy to that anatomical feature to the exclusion of the totality of the male gender characteristics of each applicant' [139]. The Tribunal said that it was open to the Parliament to have required that every female to male transsexual undergo hysterectomy, but it did not [143].

170 The Tribunal concluded that each of AH and AB had satisfied the requirements of s 15(1) of the Act, and was entitled to a recognition certificate [144].

The statutory basis of the appeal to this court

171 Section 105(1) of the SAT Act provides:

A party to a proceeding may appeal from a decision of the Tribunal in the proceeding, but only if the court to which the appeal lies gives leave to appeal.

The term 'decision', in the context of a decision of the Tribunal, is defined in s 3(1) to include an order, direction or determination of the Tribunal.

172 By s 105(2) of the SAT Act, an appeal can only be brought 'on a question of law'. In *Paridis v Settlement Agents Supervisory Board* [2007] WASCA 97; (2007) 33 WAR 361, I said (Wheeler & Pullin JJA agreeing):

An appeal 'on a question of law' is narrower than an appeal that merely 'involves a question of law'. Where an appeal lies 'on a question of law' the subject matter of the appeal is the question or questions of law. If a question raised by a litigant, properly analysed, is not a question of law, linguistic gymnastics in the formulation of the grounds of appeal cannot convert it into a question of law. A question of mixed law and fact is not a question of law within s 105(2) [53].

The grounds of appeal

173 Initially, the State relied on one ground of appeal, which reads:

The Tribunal erred in law in finding that [AH/AB] satisfied the requirement of section 15 (1) (b) (ii) of [the Act] that [AH/AB] have the gender characteristics of a male, despite its finding at [140] that the possibility of [AH/AB] becoming pregnant if [AH/AB] ceased testosterone treatment in the future could not be entirely excluded and that [AH/AB] could not be said to be permanently infertile with absolute certainty. 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.

I will refer to this ground as ground 1.

174 At the hearing of the appeals, this court granted the State leave to rely on another ground of appeal, as follows:

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.

I will refer to this ground as ground 2.

175 The grounds of appeal must be understood in conformity with the limits on this court's jurisdiction to entertain an appeal under s 105(1) and (2) of the SAT Act; that is, the appeal can only be brought 'on a question of law', and the grounds must be confined to a question or questions of law.

The proper approach to statutory construction

176 The proper approach to statutory construction was considered by the High Court in *Project Blue Sky Inc v Australian Broadcasting Authority* [1998] HCA 28; (1998) 194 CLR 355. McHugh, Gummow, Kirby and Hayne JJ said, relevantly:

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 [See *Taylor v Public Service Board (NSW)* (1976) 137 CLR 208 at 213, per Barwick CJ]. The meaning of the provision must be determined 'by reference to the language of the instrument viewed as a whole' [*Cooper Brookes (Wollongong) Pty Ltd v Federal Commissioner of Taxation* (1981) 147 CLR 297 at 320, per Mason and Wilson JJ. See also *South West Water Authority v Rumble's* [1985] AC 609 at 617, per Lord Scarman, 'in the context of the legislation read as a whole']. In *Commissioner for Railways (NSW) v Agalianos* [(1955) 92 CLR 390 at 397], Dixon CJ pointed out that 'the context, the

general purpose and policy of a provision and its consistency and fairness are surer guides to its meaning than the logic with which it is constructed'. Thus, the process of construction must always begin by examining the context of the provision that is being construed [*Toronto Suburban Railway Co v Toronto Corporation* [1915] AC 590 at 597; *Minister for Lands (NSW) v Jeremias* (1917) 23 CLR 322 at 332; *K & S Lake City Freighters Pty Ltd v Gordon & Gotch Ltd* (1985) 157 CLR 309 at 312, per Gibbs CJ; at 315, per Mason J; at 321, per Deane J] [69].

177 By s 18 of the *Interpretation Act 1984* (WA), 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.

178 Section 19(1) of the *Interpretation Act* permits a court to refer to extrinsic material, in the interpretation of a provision of a written law, if the material is capable of assisting in ascertaining the meaning of the provision, in order to confirm that the meaning of the provision is the ordinary meaning conveyed by the text of the provision, taking into account its context in the written law and the purpose or object underlying the written law, or to determine the meaning of the provision when the provision is ambiguous or obscure or when the ordinary meaning conveyed by the text of the provision, taking into account its context in the written law and the purpose or object underlying the written law, leads to a result that is manifestly absurd or unreasonable. By s 19(2), the extrinsic material that may be considered in accordance with s 19(1) includes, relevantly:

- (f) the speech made to a House of Parliament by a Minister on the occasion of the moving of a motion that the Bill containing the provision be read a second time in that House.

179 At common law (that is, independently of s 19 of the *Interpretation Act*), a court is also permitted, in construing a statute, to have regard to the words used by the Parliament in their legal and historical context and, if appropriate, to give them a meaning that will give effect to any purpose of the legislation that can be deduced from that context. See *CIC Insurance Ltd v Bankstown Football Club Ltd* [1997] HCA 2; (1997) 187 CLR 384, 408; *Newcastle City Council v GIO General Ltd* [1997] HCA 53; (1997) 191 CLR 85, 112 - 113.

The apparent purpose of the Act

180 The Act does not contain an express statement of the Parliament's purpose in enacting its provisions.

181 However, the Attorney General, in his second reading speech on the Bill, did make explicit reference to the purpose of the legislation. The Hon Peter Foss said, relevantly:

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. (emphasis added)

(See Western Australia, *Parliamentary Debates*, Legislative Council, 25 November 1999, 3822.)

182 This statement of legislative purpose, in the context of the Act as a whole, indicates that it was a remedial or beneficial enactment. It is therefore to be given a liberal interpretation, so as to give the fullest relief which the fair meaning of its language will allow. See *IW v City of Perth* [1997] HCA 30; (1997) 191 CLR 1, 12; *Barns v Barns* [2003] HCA 9; (2003) 214 CLR 169 [42] - [44].

The essence of gender dysphoria

183 The Attorney General said in his second reading speech that people suffering from 'gender dysphoria' who have completed medical procedures to 'alleviate their condition' will gain legal recognition of their reassigned gender.

184 The essence of gender dysphoria is explained in the following passage from *Diagnostic and Statistical Manual of Mental Disorders* (4th ed, 2000, text revision) American Psychiatric Association:

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 (535).

185 Gender dysphoria therefore involves an incongruity between a person's actual biological or chromosomal gender, on the one hand, and the person's psychological rejection of his or her assigned gender combined with 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, on the other.

The critical issues in the proper construction of the Act

186 The critical provisions of the Act, for the purposes of these appeals, are the definitions of 'gender characteristics' and 'reassignment procedure', and the provisions of s 14(1) and s 15(1).

187 A number of issues of construction arise upon an examination of the definitions of 'gender characteristics' and 'reassignment procedure', and the provisions of s 14(1) and s 15(1). The issues include:

- (a) For the purposes of the definitions of 'gender characteristics' and 'reassignment procedure', and the provisions of s 14(1) and s 15(1), will a person who has undergone female to male transgender procedure(s) not be entitled to the issue of a recognition certificate unless those procedure(s) include surgery for phalloplasty?
- (b) For the purposes of the definitions of 'gender characteristics' and 'reassignment procedure', do the physical characteristics, by virtue of which a person is identified as male or female, comprise their external and internal physical characteristics or are they confined to external physical characteristics?
- (c) For the purposes of the definition of 'reassignment procedure', is it necessary that all of the physical characteristics, by virtue of which a person is identified as male or female, be altered by a medical or surgical procedure (or a combination of such procedures)?

- (d) For the purposes of the definition of 'reassignment procedure', the provisions of s 14(1) and the criterion specified in s 15(1)(a)(i), does the phrase 'so that the person will be identified as a person of the opposite sex', within the definition, refer to the object of the relevant medical or surgical procedure or procedures or to the outcome of such procedure or procedures?
- (e) For the purposes of the second limb of s 15(1)(b)(ii), 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'?

188 These issues must, of course, be resolved by construing the statutory language in the context of the Act as a whole, including its apparent purpose and its evident status as a remedial or beneficial enactment.

189 I will consider, successively, each of the issues I have identified, and then address the grounds of appeal.

For the purposes of the definitions of 'gender characteristics' and 'reassignment procedure', and the provisions of s 14(1) and s 15(1), will a person who has undergone female to male transgender procedure(s) not be entitled to the issue of a recognition certificate unless those procedure(s) include surgery for phalloplasty?

190 The definition of 'reassignment procedure' refers to the defined term 'gender characteristics' in the phrase 'to alter the genitals and other gender characteristics of a person'. It is apparent, therefore, that the 'gender characteristics', as defined, of a person include the person's genitals. Also, the definition of 'gender characteristics', read with the definition of 'reassignment procedure', confirms that the physical characteristics in question include a person's genitals.

191 The definition of 'reassignment procedure', read with the definition of 'gender characteristics', requires that an applicant for a recognition certificate have undergone a medical or surgical procedure (or a combination of such procedures) *to alter* the person's genitals and other gender characteristics. Neither the definitions nor any other provisions of the Act expressly stipulate that a person undergoing a female to male transgender reassignment will not be entitled to a recognition certificate unless the person's genitals have been altered by surgery for phalloplasty.

192 In my opinion, the Parliament must have intended, when it passed the Act, that its provisions would have a practical operation in relation to

both male to female, and female to male, reassignments. Also, the Parliament must be taken to have known of the technical limitations on medical or surgical procedures for the alteration of a person's genitals and other gender characteristics, and to have intended the Act to have been workable, in accordance with its purpose, despite any such technical limitations.

193 The Parliament expressly contemplated that 'reassignment procedures' would be carried out in this State. See s 15(1)(a)(i) of the Act, which provides that the Board may issue a recognition certificate, on an application made by an adult, if, relevantly, 'the reassignment procedure was carried out in the State'.

194 It is apparent from Dr Kennedy's evidence before the Tribunal that phalloplasty is not performed in Australia because of the high risks and lack of success of the surgery [135]. Dr Tangpricha and Dr Kennedy said that testosterone therapy is used universally as a female to male transgender treatment procedure (SAT ts 112). This therapy alters the female genitals by causing clitoral growth of about one inch (SAT ts 117).

195 In these circumstances, the Parliament must have intended that a person who has undergone female to male transgender procedure(s) may be entitled to the issue of a recognition certificate even though the person has not had surgery for phalloplasty.

For the purposes of the definitions of 'gender characteristics' and 'reassignment procedure', do the physical characteristics, by virtue of which a person is identified as male or female, comprise their external and internal physical characteristics or are they confined to external physical characteristics?

196 The Act does not expressly state whether, for the purposes of the definitions of 'gender characteristics' and 'reassignment procedure', the physical characteristics (referred to directly in the definition of 'gender characteristics' and indirectly in the definition of 'reassignment procedure'), by virtue of which a person is identified as male or female, comprise external and internal physical characteristics or are confined to external physical characteristics.

197 In my opinion, for the purposes of these definitions, 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, without reference to the person's internal organs or internal bodily

functions and without technological equipment. I am of that opinion for the following reasons.

198 First, as I have mentioned, the physical characteristics of a person, for the purposes of the Act, include the person's genitals. The primary meaning of 'genitals' is the external reproductive organ or organs. The word is, however, sometimes used to describe the reproductive organs generally. See *The Australian Oxford Dictionary* (2nd ed, 2004), which defines 'genitals' as 'the external reproductive organ or organs' (520), and *The Macquarie Dictionary* (4th ed, 2005), which defines 'genitals' as 'the reproductive organs, especially the external organs' (591).

199 The better view, in the context of the Act as a whole including its purpose, is that the word 'genitals' refers solely to the external reproductive organ or organs of the male or the female, as the case may be, and does not include the internal reproductive organs.

200 Secondly, it is well-known that generally accepted medical and surgical procedures include the removal of various internal organs associated with reproduction; for example, the prostate gland in the case of males and the uterus and ovaries in the case of females. However, such procedures do not include the insertion in a male or a female of a functioning prostate gland, uterus or ovaries.

201 It would be pointless to require a person, who wishes to take advantage of the remedial or beneficial provisions of the Act, to undergo surgery for the insertion of an artificial and non-functioning 'prostate gland', 'uterus' or 'ovaries', as the case may be (assuming that such an operation is technically feasible). This indicates that it is the external reproductive organ or organs of the male or the female which are to be considered.

202 Thirdly, as I have mentioned, the purpose of the Act is to alleviate the condition of people suffering from gender dysphoria, a psychiatric disorder, by providing a legislative mechanism which will enable their reassigned gender to be legally recognised. There are obvious biological (or chromosomal) and physical limitations on the extent to which accepted medical and surgical procedures may alter a person's physical characteristics.

203 The purpose of the legislation would be promoted by a construction of the terms 'gender characteristics' and 'physical characteristics' which accepts that the fundamental disconformity inherent in gender dysphoria is between the person's psychiatric condition (namely, the rejection of his

or her assigned gender combined with 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) on the one hand, and the person's external physical characteristics, on the other. 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.

204 Fourthly, the definition of 'gender characteristics' refers to the physical characteristics by virtue of which a person *is identified as* male or female (emphasis added). Similarly, the definition of 'reassignment procedure' refers to the alteration of the genitals and other gender characteristics of a person so that the person *will be identified as* a person of the opposite sex (emphasis added).

205 The words 'identified as' connote 'recognised as'. This language, in the context of the purpose of the Act, suggests that the identification or recognition is by reference to a person's external physical characteristics.

206 If the Parliament had intended that, for the purposes of the definitions of 'gender characteristics' and 'reassignment procedure', the physical characteristics, by virtue of which a person is identified as male or female, should include internal physical characteristics (in particular, those organs and bodily functions associated with the person's gender at birth), it is likely that the definitions would have referred to the physical characteristics by virtue of which a person *'is'* a male or female or *'will be'* a person of the opposite sex.

For the purposes of the definition of 'reassignment procedure', is it necessary that all of the physical characteristics, by virtue of which a person is identified as male or female, be altered by a medical or surgical procedure (or a combination of such procedures)?

207 It is necessary, for the purposes of the definition of 'reassignment procedure', that an applicant for a recognition certificate have undergone a medical or surgical procedure (or a combination of such procedures) to alter the person's genitals and other gender characteristics. Neither the definition nor any other provision of the Act expressly requires that all of the person's physical characteristics have been altered.

208 I have already decided that, on the proper construction of the Act, the physical characteristics, by virtue of which a person is identified as male or female, are confined to external physical characteristics.

209 The definition of 'reassignment procedure', read with the definition of 'gender characteristics', requires that, in every case, an applicant for a recognition certificate 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'.

210 However, 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. My reasons for that opinion are as follows.

211 First, the object of the alteration of the physical characteristics of an applicant is to ensure that the person in question will be identified or recognised as a person of the opposite sex. The Act expressly contemplates, in the definition of 'gender characteristics', that there are physical characteristics by virtue of which a person is identified as male and physical characteristics by virtue of which a person is identified as female. But common human experience teaches that questions of fact and degree are involved with these characteristics, as between individuals of each sex and individuals generally. The external physical characteristics by virtue of which a person is identified as male include, for example, a penis and a scrotum, absence of or only rudimentary breast development, facial and bodily hair, baldness, muscular development, distribution of body fat on the stomach and upper hips, a larger larynx, depth of voice and a larger sweat capacity. The external physical characteristics by virtue of which a person is identified as female include, for example, a vulva, breast development, relative absence of facial and bodily hair, absence of baldness, lesser muscular development, distribution of body fat on the thighs and buttocks, a smaller larynx, softness of voice and a lesser sweat capacity. It is scarcely necessary to note that many of these characteristics of a male or a female are general and stereotypical, and there are wide variations within each sex. The questions of fact and degree inherent in determining whether a person has the external physical characteristics by virtue of which a person is identified as male or female indicate that, apart from the person's genitals, it is unnecessary that an applicant for a recognition certificate have undergone a medical or surgical procedure (or a combination of such procedures) for the alteration of each and every other physical characteristic.

212 Secondly, 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'.

213 The requirement that the Board be satisfied that the person has adopted the lifestyle of a person of the gender to which the person has been reassigned indicates that it is not necessary that the person have all of the physical characteristics of a person of the reassigned gender. It is difficult, in the context of the Act's remedial or beneficial purpose, to understand the importance of the person having adopted the lifestyle of a person of the reassigned gender if the person has all of the physical characteristics of the reassigned gender. The importance of lifestyle must be understood against the background of the nature of gender dysphoria and the requirements set out in s 15(1)(b)(i) (namely, the Board is satisfied that the person believes that his or her true gender is the reassigned gender) and s 15(1)(b)(iii) (namely, the Board is satisfied that the person has received proper counselling in relation to his or her gender identity). The combination of the requirement concerning lifestyle with the requirement concerning gender characteristics suggests that it is unnecessary for the person to have all of the physical characteristics of a person of the reassigned gender.

For the purposes of the definition of 'reassignment procedure', the provisions of s 14(1) and the criterion specified in s 15(1)(a)(i), does the phrase 'so that the person will be identified as a person of the opposite sex', within the definition, refer to the object of the relevant medical or surgical procedure or procedures or to the outcome of such procedure or procedures?

214 The definition of 'reassignment procedure' refers, relevantly, to a medical or surgical procedure (or a combination of such procedures) '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'. The words 'to alter' connote what is intended and not what has happened. The phrase 'so that the person *will be* identified' (emphasis added) indicates that identification as a person of the opposite sex is the object of the procedure(s) in question. The definition focuses upon the object or purpose of the procedure(s) to be carried out rather than its (their) outcome or effect.

215 This construction of the definition is consistent with its primary use in the Act, which is to be found in s 14(1). By s 14(1), it is necessary for a person to have undergone a 'reassignment procedure' before the person

may make application to the Board for the issue of a recognition certificate. Also, the construction which I prefer is not inconsistent with the use of the definition in s 15(1)(a)(i).

216 I am therefore of the opinion that, for the purposes of the definition of 'reassignment procedure', the provisions of s 14(1) and the criterion specified in s 15(1)(a)(i), the words 'so that the person will be identified as a person of the opposite sex', within the definition, refer to the object of the relevant medical or surgical procedure or procedures rather than to the outcome of such procedure or procedures.

For the purposes of the second limb of s 15(1)(b)(ii), 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'?

217 Section 15(1)(b)(ii) provides that the Board may issue a recognition certificate if it is satisfied that the person in question 'has adopted the lifestyle and has the gender characteristics of a person of the gender to which the person has been reassigned'. The person in question must, of course, also satisfy the Board in relation to the criteria set out in s 15(1)(b)(i) and (iii).

218 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.

219 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. My reasons for this opinion are these.

220 First, the decision as to whether a recognition certificate should be issued or not is to be made by the Board, and the Board's membership is broadly representative of those members of the community who are likely to have an understanding of the subject matter and issues with which the Act is concerned. It is not comprised of medical practitioners. Although the Board must include a medical practitioner, it must also include, in essence, a person who is or has been or is qualified to be a judge (as president), a person who has undergone a 'reassignment procedure' and a person with experience in equal opportunity matters. The Board, in making a decision under s 15, may be constituted by three members. See s 8(2).

221 Secondly, on my construction of the Act, the second limb of s 15(1)(b)(ii) is concerned with the external physical characteristics of a person. The focus is upon the physical characteristics that are apparent to or may be perceived by other people in the community.

222 Thirdly, on my construction of the Act, the Act does not, in the context of the purpose for which it was enacted, require the alteration of each and every physical characteristic (or, indeed, any particular physical characteristic) of an applicant for a recognition certificate, apart from his or her genitals.

223 Fourthly, as I have mentioned, the determination by the Board as to whether it is satisfied that a person has the gender characteristics of a person of the reassigned gender will necessarily involve questions of fact and degree. The evaluative judgment which is central to this determination will be based on common human experience.

224 Fifthly, the provision in s 15(1)(b)(i) that the Board 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.

The merits of ground 1 of the appeals

225 Ground 1 of the appeals alleges that the Tribunal erred in law in finding that each of AH and AB satisfied the requirement of s 15(1)(b)(ii)

of the Act that he have the gender characteristics of a male, despite finding that the possibility of AH or AB becoming pregnant if he ceased testosterone treatment in the future could not be entirely excluded, and that he could not be said to be permanently infertile with absolute certainty.

226 Counsel for the State submitted that the Tribunal should have found that the retention of the capacity to bear children is inconsistent with the gender characteristics of a male and, in the circumstances, the Tribunal should have found that neither AH nor AB had the gender characteristics of a male, and should not have issued a recognition certificate.

227 I am satisfied, for the reasons I have given in the course of considering the proper construction of the Act, that the Tribunal did not make an error of law as alleged in ground 1.

228 The Parliament could have stipulated, but did not stipulate, that a recognition certificate not be granted unless the Board was satisfied that a female to male transgender applicant had undergone surgery for a hysterectomy or permanent sterilisation. Comparable legislation in other jurisdictions contains such a requirement. For example:

- (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'.

See *The Problems of Gender Re-registration: A Consultation Paper to the Interdepartmental Working Group on Transsexual People's Issues* (16 February 2000) (Germany & Sweden, page 46); YB Bustos Moreno, *La Transexualidad* (2008) (Finland, page 399; Netherlands, page 409).

229 Ground 1 fails.

The merits of ground 2 of the appeals

230 Ground 2 of the appeals alleges that the Tribunal erred in law in finding that each of AH and AB had satisfied the requirement of s 15(1)(b)(ii) of the Act that he have the gender characteristics of a male, when AH and AB retained the genitals which would cause him to be identified as a female.

231 For the reasons I have given, in the course of considering various issues as to the proper construction of the Act, I am satisfied that a person who has undergone female to male transgender procedure(s) may be entitled to the issue of a recognition certificate even though the person has not had surgery for phalloplasty. The Tribunal found that each of AH and AB had undergone a medical procedure to alter his genitals. The alteration involved clitoral growth of about one inch.

232 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).

233 Ground 2 fails.

Conclusion

234 I would dismiss the appeals.