IN THE HIGH COURT OF AUSTRALIA
PERTH REGISTRY

NO P15 OF 2011

AB
Appellant

AND

STATE OF WESTERN AUSTRALIA
First Respondent

AND

10

GENDER REASSIGNMENT BOARD OF WESTERN AUSTRALIA
Second Respondent

IN THE HIGH COURT OF AUSTRALIA
PERTH REGISTRY

NO P16 OF 2011

AH
Appellant

AND

STATE OF WESTERN AUSTRALIA
First Respondent

AND

20

GENDER REASSIGNMENT BOARD OF WESTERN AUSTRALIA
Second Respondent

SUBMISSIONS ON BEHALF OF THE AUSTRALIAN HUMAN RIGHTS COMMISSION (INTERVENING)

Filed by the Australian Human Rights Commission:

Australian Human Rights Commission
Level 8, 133 Castlereagh Street
Sydney NSW 2000

Contact: Michelle Lindley

Telephone: 02 92849679
Facsimile: 02 92849787
E-mail: michelle.lindley@humanrights.gov.au

I: CERTIFICATION

1. These submissions are in a form suitable for publication on the internet.

II: BASIS OF INTERVENTION

2. The basis of the proposed intervention is s 11(1)(o) of the *Australian Human Rights Commission Act 1986* (Cth) (the **AHRC Act**), which provides that one of the functions of the Australian Human Rights Commission (the **Commission**) is to intervene in legal proceedings that involve human rights issues, with the leave of the court, where the Commission considers it appropriate to do so.[1] These proceedings involve human rights issues, namely issues concerning the rights of the appellants (and of other persons who have undergone medical treatment to align their physical characteristics with their true gender (**transsexuals**[2])) to recognition before the law, privacy and non-discrimination.

III: WHY LEAVE TO INTERVENE SHOULD BE GRANTED

3. The Commission has an interest and expertise in relation to the rights of transgender persons generally, and transsexuals more particularly, as set out in paragraphs 7 and 12 of the affidavit of Catherine Branson filed on 27 April 2011. Accordingly it will be able to assist the Court by way of these written submissions and, if appropriate, by way of oral submissions.

4. The Commission's submissions are filed in support of the appellants. They address issues not dealt with by the appellants, namely:

   (1) the role of international law in the interpretation of State legislation;

   (2) the effect of the right to privacy under article 17 of the ICCPR on the construction of the *Gender Reassignment Act 2000* (WA) (the **Act**);

   (3) the effect of the right to non-discrimination under articles 2 and 26 of the ICCPR on the construction of the Act; and

   (4) the principle of non-discrimination as an interpretive principle in Australian domestic law.

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1 'Human rights' is defined in s 3 of the AHRC Act to mean the rights and freedoms recognised in the International Covenant on Civil and Political Rights [1980] ATS 23 (**ICCPR**). Australia ratified the ICCPR on 13 August 1980 and the ICCPR entered into force for Australia on 13 November 1980, except for Article 41 which entered into force on 28 January 1993.

2 The Commission recognises that terminology in relation to gender identity is strongly contested and that there is no clear consensus on what is appropriate terminology in this area. Different persons use different terminology in relation to their identity. In this submission the Commission has adopted terminology suitable for use in these particular legal proceedings.

5. The Commission's submissions also develop in more detail some matters raised by the appellants, including:

   (1) The effect of the right to recognition before the law under article 16 of the ICCPR on the construction of the Act;

   (2) The role of a remedial and beneficial approach to construction; and

   (3) How to construe ss 14 and 15 of the Act in a way that gives each a distinct and rights-consistent role.

6. The Commission thus offers the Court assistance in relation to the above issues that will likely not be offered by other parties.[3]

10 **IV: APPLICABLE STATUTORY PROVISIONS**

7. The applicable statutory provisions are set out in the attached Annexure.

V: ISSUES ON WHICH THE COMMISSION MAKES SUBMISSIONS

8. If leave to intervene is granted the Commission will make submissions on the following issues:

   (1) the relevance of Australia's obligations under the ICCPR to the construction of ss 3 and 15 of the Act, namely the obligation to respect, protect and promote the following rights:

      (a) the right to recognition as a person before the law (article 16);

      (b) the right to be protected from arbitrary or unlawful interference with
20 privacy (article 17); and

      (c) the right to equality and non-discrimination (arts 2 and 26).

   (2) independently of (1), the need for a purposive construction of the Act and the relevance of the right to non-discrimination to a purposive construction of ss 3 and 15; and

   (3) applying the approach in (1) and (2), a reconciliation of ss 14 and 15 of the Act which produces a coherent and rights consistent construction of the relevant provisions.

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3 See discussion in *Levy v Victoria* (1997) 189 CLR 579 at 603-4 (Brennan J).

A. Introduction

A.1 Section 15(b): the construction of the majority in the Court of Appeal

9. Martin CJ (with whom Pullin J relevantly agreed) held that:

   (1) "gender characteristics" means "all aspects of an individual's physical make up, whether external or internal, that could be considered as bearing upon their identification as either male or female according to accepted community standards and expectations" (Reasons [109]). Neither Martin CJ nor Pullin J defined or explained what they meant by "general community standards or expectations";

10 (2) where matters of sex are involved (it appears his Honour may mean gender) "particular attention is focused, according to ordinary and accepted community standards, upon genitalia and reproductive organs" (Reasons [114]); and

   (3) both applicants had the genitalia and reproductive organs associated with membership of the female sex and therefore they would not be identified, according to accepted community standards and expectations, as members of the male gender (Reasons [115]).

10. Although the reasons are not clear, it appears that the Appellant is correct (submissions at [22]) to interpret the majority's reasoning as requiring that a female

20 to male transsexual must have had a hysterectomy and also a phalloplasty (that is, the surgical construction of a penis and testes), and that a male to female transsexual must have had her penis and testes removed. Or to put it in a construction sense (although majority does not do this) "physical characteristics" in the statutory definition of "gender characteristics" means "genital and reproductive organs".[4] This approach is unnecessarily narrow and pays insufficient regard to surgical alteration of breasts and to other forms of medical treatment that can alter a person's physical characteristics (such as hormone treatment).

A.2 Section 15(b) The Commission's construction

11. The Commission contends that the purposes of the Act, which are required to be

30 taken into consideration in its construction, are threefold:

[4] This is reflected in the conclusions expressed by Martin CJ at paragraph [115] in the court below: *Western Australia v AH* [2010] WASCA [115] (AB).

(1) to provide recognition of the true gender of transsexuals, by issue of a recognition certificate;

(2) to protect transsexuals from being forced to disclose the gender of their birth in the course of their interaction with the outside world; and

(3) to protect transsexuals from discrimination.

12. This Court's approach to the construction of the Act ought to reflect those purposes.

13. The key provisions in relation to the issue of a recognition certificate are ss 14 and 15.

(1) Section 14 imposes a threshold requirement that a person applying for a recognition certificate has undergone a "reassignment procedure". That is a defined term that requires a medical or surgical procedure to alter "the genital and other gender characteristics" of a person.

(2) Section 15 requires that the gender Reassignment Board be satisfied that the applicant "has adopted the lifestyle and has the gender characteristics of a person of the gender to which the person has been reassigned.

14. Each of ss 14 and 15 uses the term "gender characteristics", which is defined in s 3 of the Act. The task is to construe that statutory definition in the context of the provision in which it appears, as well of course as the scheme in which it appears. For reasons set out at [69]-[71] below, the Commission contends the focus of s 15 is quite different from the one described by the majority in the Court of Appeal: the real focus of s 15 (as opposed to s 14) is on how the applicants will be perceived by those with whom they will deal in their daily lives, and how the applicants perceive themselves and present to others.

15. The Commission contends that the expression "the physical characteristics by virtue of which a person is identified as male or female" means a sufficiency of externally perceptible physical characteristics for a reasonable person to recognise an applicant as male or female as the case may be. Section 15 does not require medical intervention to "turn a man into a woman or vice versa".[5]

16. On this construction, whether a female to male transsexual has or has not undergone a hysterectomy is irrelevant to the construction and operation of s 15(b). Whether a person has a uterus, or not, is not a feature which makes that person

[5] *Bellinger v Bellinger* [2003] UKHL 21; [2003] 2 All ER 593 at 41.

identifiable as a woman. Many women do not have uteruses. The presence or absence of a uterus is not perceptible visibly, aurally, or in any other way to those who deal with a person.

17. Similarly, whether a female to male transsexual has or has not undergone a hysterectomy is irrelevant to the operation of s 14. It is not a surgical procedure to alter the genitals of a person. It is not, for the reasons given above, a surgical procedure to alter the externally perceptible characteristics of a person. It may remove an organ that many women have (the focus not being for the purposes of the Act on the gender which is being given up), but that is all.

10 18. The Commission's construction is supported by reference to Australia's human rights obligations (outlined in Part B) and by reference to the purpose of the Act (outlined in Part C).

B. Australia's international obligations and the construction of the Act

B1. Role of international law in statutory construction

19. It is well settled that, as a general proposition, legislative provisions that are ambiguous are to be interpreted by reference to the presumption that Parliament did not intend to violate Australia's international obligations.[6] The requirement of ambiguity has been interpreted broadly; as Mason CJ and Deane J observed in *Teoh*:[7]

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> there are strong reasons for rejecting a narrow conception of ambiguity. If the language of the legislation is susceptible of a construction which is consistent with the terms of the international instrument and the obligations which it imposes on Australia, then that construction should prevail.

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6 This principle was first stated in the Commonwealth context in *Jumbunna Coal Mine No Liability v Victorian Coal Miners' Association* (1908) 6 CLR 309 at 363. It has since been reaffirmed by this Court on many occasions: see, eg, *Polites v Commonwealth* (1945) 70 CLR 60 at 68-69, 77, 80-81; *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1 at 38 (Brennan, Deane and Dawson JJ); *Minister for Immigration & Ethnic Affairs v Teoh* (1995) 183 CLR 273 at 287; *Re Minister for Immigration and Multicultural and Indigenous Affairs ex parte Lam* (2003) 214 CLR 1 at 33 (McHugh and Gummow JJ); *Coleman v Power* (2004) 220 CLR 1 at 27 (Gleeson CJ), 91-4 (Kirby J). Despite his stringent criticism of the rule, in *Al-Kateb v Godwin* (2004) 219 CLR 562 at [63]-[65] McHugh J acknowledged that "it is too well established to be repealed now by judicial decision".

7 (1995) 183 CLR 273 at 287-8.

20. The Commission contends that this principle applies to State legislation as much as to federal legislation. As Gummow and Hayne JJ observed in *Kartinyeri v Commonwealth*:[8]

> It has been accepted that a statute of the Commonwealth **or of a State** is to be interpreted and applied, as far as its language permits, so that it is in conformity and not in conflict with the established rules of international law. On the other hand, the provisions of such a law must be applied and enforced even if they be in contravention of accepted principles of international law.

21. The judgment of Gleeson CJ in *Coleman v Power*[9] should not be understood as casting doubt on the proposition that State legislation is to be construed with appropriate regard for Australia's international obligations.

22. The principle that legislation is to be construed so as to give effect to, and not to breach, Australia's international obligations assists in minimising the risk of legislation inadvertently causing Australia to breach international law; rather, any breach of international law occasioned by an Act of Parliament ought to be the result of a deliberate decision of the Parliament in question. To this end, where a construction that is consistent with international law is open, that construction is to be preferred over a construction that is inconsistent with international law.[10] This principle, although developed in the context of Australia's federal parliament, is equally apposite at the State level. It is possible for State legislation to cause Australia to be in breach of Australia's international obligations.[11] Thus application of the principle to State legislation assists in ensuring that States do not inadvertently place Australia in breach of Australia's international obligations. As with the Commonwealth Parliament, it ought to be presumed that States do not intend to violate international law, whilst recognizing that they remain capable of doing so.[12]

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8 (1998) 195 CLR 337 at 384 (footnotes omitted, emphasis added). See also *Cornwell v R* (2007) 231 CLR 260 at 320-322, where Kirby J applied the principle in relation to the construction of a State Act.

9 (2004) 220 CLR 1 at 27-29.

10 *Teoh* (1995) 183 CLR 273 at 287 (Mason CJ and Deane J); *Chu Kheng Lim* (1992) 176 CLR 1 at 38 (Brennan, Deane and Dawson JJ).

11 For an example of where this occurred, see *Toonen v Australia* CCPR/C/50/D/488/1992 (Jurisprudence), where Australia was found by the UN Human Rights Committee to be in breach of the ICCPR by reason of Tasmanian legislation criminalising sex between males.

12 The presumption that legislation is construed so as not to violate international law has always recognised that a legislature may choose to legislate inconsistently with Australia's international obligations and that it retains the power to do so; in other words, international law is not a limitation on legislative power. See, eg, *Polites* (1945) 70 CLR 60 at 68-69, 77, 80-81; *Zhang v Zemin* [2010] NSWCA 255 at [125] (Spigelman CJ).

23. The principle has been regarded as limited to statutes enacted after Australia's entry into the treaty in question;[13] in this case, the Act was enacted in 2000, well after Australia's ratification of the ICCPR in 1980.

24. Australia has relevant international legal obligations under the ICCPR, being obligations to respect, protect and promote the following rights:

(1) the right to recognition everywhere as a person before the law (Art 16);

(2) the right not to be subjected to arbitrary or unlawful interference with privacy and the right to the protection of the law against such interference (Art 17); and

10 (3) the right to equality and non-discrimination (Arts 2 and 26).

25. The Commission contends that these obligations are to be interpreted in accordance with international legal principles governing the interpretation of treaties. This Court has, in a series of cases, taken the view that where a statute implements a treaty, the treaty (and hence the statute) is to be interpreted in light of international norms of interpretation, and further that treaties ought to be interpreted uniformly by contracting states.[14] The Commission contends that the same approach to treaty interpretation applies where a treaty is being used as an aid to the interpretation of a statute that was not enacted for the purpose of implementing a treaty obligation.

26. Articles 31 and 32 of the Vienna Convention on the Law of Treaties[15] (**VCLT**) set out
20 the following relevant principles applicable to the interpretation of treaties:

> **Article 31: General rule of interpretation**
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> 1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.
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> ...

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13 See, eg, *Teoh* (1995) 183 CLR 273 at 287 (Mason CJ & Deane J); *Kruger v Commonwealth* (1997) 190 CLR 1 at 71 (Dawson J); *Coleman v Power* (2004) 220 CLR 1 at 27-8 (Gleeson CJ), *contra* 94-6 (Kirby J).

14 See, eg, *Povey v Qantas Airways Ltd* (2005) 223 CLR 189 at 202 [24]-[25] (Gleeson CJ, Gummow, Hayne and Heydon JJ); *Shipping Corporation of India Ltd v Gamlen Chemical Co A/Asia Pty Ltd* (1980) 147 CLR 142, 158-60; *A v Minister for Immigration & Ethnic Affairs* (1997) 190 CLR 225 at 239-240 (Dawson J); *Thiel v Federal Commissioner of Taxation* (1990) 171 CLR 338 at 349-350 (Dawson J).

15 [1974] ATS 2; entered into force for Australia and generally on 27 January 1980. The principles contained in the VCLT may properly be utilised even though the VCLT entered into force after the ICCPR because the VCLT is a codification of the customary law rules of the interpretation of treaties: *Thiel v Federal Commissioner of Taxation* (1990) 171 CLR 338 at 356 (McHugh J).

> 3. There shall be taken into account, together with the context: ...
>
> (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation; ...
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> **Article 32: Supplementary means of interpretation**
>
> Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:
>
> (a) leaves the meaning ambiguous or obscure; ...

10 27. It is accepted that "technical principles of common law construction are to be disregarded in construing the text" of a treaty.[16]

28. The rights provided for in the ICCPR, expressed as they are at a high level of generality, are ambiguous in their application to transgender persons; hence recourse may be had to supplementary means of interpretation,[17] including the Principles of the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity (the **Yogyakarta Principles**).[18]

29. The Yogyakarta Principles were developed by a group of academic and UN human rights experts[19] in 2006. The experts "agree that the Yogyakarta Principles reflect the existing state of international human rights law in relation to issues of sexual

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16 *A v Minister for Immigration & Ethnic Affairs* (1997) 190 CLR 225 at 240 (Dawson J).

17 Such means not being limited to "the preparatory work of the treaty and the circumstances of its conclusion", but extending to materials that "provide a guide to the current usage of terms by the parties": *Thiel v Federal Commissioner of Taxation* (1990) 171 CLR 338 at 349-350 (Dawson J). As Kirby J observed in *De L v Director-General, Department of Community Services (NSW)* (1996) 187 CLR 640 at 676, "[e]xcept in cases of unarguably clear treaty language, courts today regularly have resort to the opinions of scholars, reports on the operation of the treaty and decisions of municipal courts addressing analogous problems".

18 The Yogyakarta Principles are principles on the application of international human rights law in relation to sexual orientation and gender. They were adopted in 2007 by a group of 29 human rights experts from 25 countries representative of all geographic regions. The experts included one former UN High Commissioner for Human Rights, 13 current or former UN human rights special mechanism office holders or treaty body members, two serving judges of domestic courts and a number of academics.

19 The experts came from 25 countries representing all geographic regions. They included Philip Alston, UN Special Rapporteur on extrajudicial, summary and arbitrary executions and Professor of Law at New York University; Edwin Cameron, Justice of the South African Supreme Court of Appeal; Elizabeth Evatt, former member and Chair of the Committee on the Elimination of All Forms of Discrimination Against Women; and Mary Robinson, former UN Commissioner for Human Rights. The full list of signatories is annexed to the Yogyakarta Principles. The process for the development of the Yogyakarta Principles is described in O'Flaherty & Fisher, "Sexual Orientation, Gender Identity and International Human Rights Law: Contextualising the Yogyakarta Principles" (2008) 8 *Human Rights Law Review* 207 at 232-237.

orientation and gender identity"[20] and "affirm binding international legal standards with which all states must comply"[21]. The Yogyakarta Principles have since been referred to and utilized by a variety of international and state bodies, evidencing the general acceptance of them as reflecting existing international human rights obligations.[22]

30. Interpretation of the ICCPR is not confined to a consideration of the intentions of the drafters or signatories as at 1966 (being the year it opened for signature). In relation to the Convention Relating to the Status of Refugees, this Court has held that categories of persons who fear persecution may be recognised as refugees even though the drafters or signatories to that convention would not have envisaged such recognition, the principal example being lesbians and gay men.[23] As was observed in *A v Minister for Immigration & Ethnic Affairs*:[24]

> It would be an error to construe the definition [of 'refugee'] so as to ignore the changing circumstances of the world in which the Convention now operates. Thus, it was agreed for the Minister that, appearing as it does in a treaty of general application, the phrase "a particular social group" could not be confined to those groups which were in the minds of the drafters of the Convention in 1951. For example, at that time persons having a well-founded fear of persecution for reasons of their sexual orientation would in many, perhaps most, countries (including Australia) have been identified as criminals. ... Nowadays, a different content and application of the phrase affords the protection of the Convention deriving from a larger understanding of the "persecution" and the identity of the "particular social group" in question. The concept is not a static one. Nor is it one fixed by historical appreciation.

31. On the same basis, the Yogyakarta Principles can assist in ascertaining the contemporary meaning of the text of the ICCPR and the application of that text to transgender persons.

32. Finally, decisions of the European Court of Human Rights in relation to the European Convention on Human Rights, which convention contains broadly the

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[20] Yogyakarta Principles at 7.

[21] Yogyakarta Principles, Introduction.

[22] See Ettelbrick & Zeran, *The Impact of the Yogyakarta Principles on International Human Rights Law Development: A Study of November 2007–June 2010 — Final Report* http://www.ypinaction.org/files/02/57/Yogyakarta_Principles_Impact_Tracking_Report.pdf; O'Flaherty & Fisher, "Sexual Orientation, Gender Identity and International Human Rights Law: Contextualising the Yogyakarta Principles" (2008) 8 *Human Rights Law Review* 207 at 237-247.

[23] *S395/2002 v Minister for Immigration and Multicultural Affairs* (2007) 216 CLR 473; *A v Minister for Immigration & Ethnic Affairs* (1997) 190 CLR 225 at 300-301.

[24] (1997) 190 CLR 225 at 293-294 (Kirby J) (footnote omitted).

same rights as the ICCPR, may also assist in understanding the contemporary meaning and application of the rights protected by the ICCPR.[25]

B2. Right to recognition as a person before the law

33. The right to recognition as a person before the law is protected by Article 16 of the ICCPR as follows:

> Everyone shall have the right to recognition everywhere as a person before the law.

34. Legal recognition of an individual encompasses recognition of their true gender as an element of their personhood. This is particularly pertinent in the present context, which involves the interaction of an individual's personal status with the legal and
10 bureaucratic systems of the State. So much is recognised by Article 3 of the Yogyakarta Principles which provides, *inter alia* that:

> Each person's self-defined sexual orientation and gender identity is integral to their personality and is one of the most basic aspects of self-determination, dignity and freedom.

35. Consideration of the right to recognition before the law, understood by reference to the Yogyakarta Principles, in the construction of s 15 of the Act leads to an interpretation that maximizes scope for an individual to have their true gender identity recognised. The Court should eschew any interpretation that would narrow the availability of certificates under the Act by making it too onerous for an individual
20 to have their gender identity properly recognised.

36. This is particularly so because one of the fundamental purposes of the Act is to provide for recognition before the law as a person through the issue of a *recognition* certificate. In that sense, Parliament intended[26] to provide for legal recognition of a person's self-identified gender; and in that sense, Parliament intended a result that is consistent with Australia's legal obligations under article 16 of the ICCPR.

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25 As Louise Arbour, UN High Commissioner for Human Rights, observed in "Opening of the Judicial Year 2008 of the European Court of Human Rights" (25 January 2008) http://www.echr.coe.int/NR/rdonlyres/2A9BAFB0-181F-4484-A525-561EFFE08B32/0/Ouverture_Annee_Judiciaire_Louise_Arbour.pdf:

> [C]ontrasting conclusions of law between the Court and, for example, the Human Rights Committee on essentially the same questions of law would be rare and exceptional. ... [I]n circumstances where a substantive legal issue comes before an international body that has already been carefully resolved by another, in my view special attention should be paid to the reasoning and adequate reasons should be expressed in support of any contrary views of the other body before an contrary conclusion of law is reached. Ultimately, the systems of law are complementary rather than in competition with each other.

26 Here, intention is not a reference to the subjective intentions or motivations of the members of Parliament; rather, the term "intended" is used in the sense discussed by this Court in *Dickson*

37. An approach that is consistent with article 16 and the Yogyakarta Principles is likewise consistent with a broad reading of the Act that emphasises the remedial or beneficial purposes of the legislation, discussed at [60]-[65], below.

B3. Right to protection against interference with privacy

38. The right to the protection against interference with privacy is recognised and protected by article 17 as follows:

> No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor unlawful attacks on his honour and reputation.

39. The right to privacy does not merely compel the State to abstain from such interference: in addition, there are positive obligations inherent in an effective respect for private or family life which may require the adoption of measures designed to secure respect for private life.[27]

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40. The right to private life has been considered by the European Court of Human Rights to be broad,[28] covering among other things, development of one's own personal identity and physical integrity.

Personal identity and disclosure

41. In this case, the right to privacy arises first because of the fact that there are circumstances where a person's officially registered gender is at odds with their generally observable gender characteristics. As the European Court of Human Rights said in *Goodwin v United Kingdom*:[29]

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> It must also be recognised that serious interference with private life can arise where the state of domestic law conflicts with an important aspect of personal identity (see, mutatis mutandis, *Dudgeon v. the United Kingdom* judgment of 22 October 1981, Series A no. 45, § 41). The stress and alienation arising from a discordance between the position in society assumed by a post-operative transsexual and the status imposed by law which refuses to recognise the change of gender cannot, in the Court's view, be regarded as a minor inconvenience arising from a formality. A conflict between social reality and law arises which places the transsexual in an anomalous position, in which he or she may experience feelings of vulnerability, humiliation and anxiety.

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42. Consistently with this, principle 6(f) of the Yogyakarta Principles states:

> States shall ... (f) ensure the right of all persons ordinarily to choose when, to whom and how to disclose information pertaining to their sexual orientation or gender identity, and

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v The Queen (2010) 270 ALR 1 at [32]-[33] and *Zheng v Cai* (2009) 239 CLR 446 at 455-456 [28].

27 See, eg, *X and Y v. the Netherlands*, 26 March 1985, § 22, Series A no. 91.

28 Refer for example to *Pretty v United Kingdom* (2346/02) (2002) 35 EHRR 1 at [61].

29 *Goodwin v UK* (2002) 35 EHRR 18 at [77].

> protect all persons from arbitrary or unwanted disclosure, or threat of disclosure of such information by others.

43. In the context of the present case similar considerations apply. Without the Act, a person who has had relevant medical or surgical treatment and who presents as his or her self-identified gender, will, on a regular basis, be required to produce identification that shows them to be of a different gender (such as a birth certificate, driver's licence or passport). This interferes with their privacy. A certificate granted under the Act permits the individual to operate within society without drawing attention to their gender history (i.e. the gender of birth) or medical condition (i.e. that the person is undergoing, or has undergone treatment for gender identity disorder). The Act thus operates to remove or ameliorate the interference with privacy that would otherwise occur. The Court ought to prefer an interpretation that operates to protect, to the maximum extent possible, the individual's privacy in respect of their gender and medical history.

Physical integrity

44. The right to privacy also arises in this case in relation to the issue of physical integrity. In international human rights law the right to privacy is recognised as protecting a person's physical integrity.[30]

45. Principle 3 of the Yogyakarta Principles deals specifically with the physical integrity of transgender persons in relation to surgical intervention as follows:

> No one shall be forced to undergo medical procedures, including sex reassignment surgery, sterilization or hormonal therapy, as a requirement for legal recognition of their gender identity.

46. The decision about which hormonal, surgical or other medical procedures to undertake to treat gender identity disorder is a highly personal decision based on medical advice and an assessment of the possible but not guaranteed benefits, costs and risks of treatment. The Commission contends that this sphere of autonomy should not be lightly interfered with. Requiring, as a precondition to the issue of a recognition certificate, unnecessary and invasive surgery that is unrelated to the person's self-identified gender identity or the perception of their gender by others involves a violation of the right to privacy.

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[30] See, eg, *X and Y v. the Netherlands*, 26 March 1985, § 22, Series A no. 91; *Y.F. v. Turkey*, no. 24209/94, § 33, ECHR 2003-IX; *Glass v. the United Kingdom*, no. 61827/00, § 70, ECHR 2004-II.

Conclusion on privacy

47. The Court ought to adopt an interpretation of s 15 of the Act that minimizes the impact of gender reassignment upon the person's privacy by adopting an interpretation that:

    (1) focuses on externally perceivable characteristics of the individual when considering whether they have adopted the 'gender characteristics' of a person of the gender to which the person has been reassigned; and

    (2) has as its aim the preservation of personal privacy of the individual the subject of the application, i.e. by avoiding a technical or legalistic approach that would restrict the range of persons who could benefit by the Act or require persons to subject themselves to a violation of physical integrity in order to benefit from the Act.

B4. Right to equality and non-discrimination

48. The right to equality and non-discrimination is protected by Article 26 of the ICCPR, which provides:

> **Article 26:**
>
> All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

49. It is generally accepted in international human rights law that the right to equality and non-discrimination includes both direct and indirect discrimination.[31] That is:[32]

> ... discrimination may be constituted by acts or decisions having a discriminatory effect or disparate impact (indirect discrimination) as well as by acts or decisions based on discriminatory considerations (direct discrimination).

50. The construction of s 15 proposed by the Court of Appeal operates in a manner that discriminates directly and indirectly against individuals born as women who seek to transition to the male gender. Such a construction ought to be rejected in favour of one that provides substantive equality irrespective of the gender of birth.

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[31] See, eg, *Derksen v. Netherlands*, Communication No. 976/2001, U.N. Doc. CCPR/C/80/D/976/2001 (2004), *Althammer v Austria*, Communication No. 998/2001, U.N. Doc. CCPR/C/78/D/998/2001 (2003); *DH v Czech Republic* (ECtHR App 57325/00) (Judgment of 13 November 2007).

[32] *Street v Queensland Bar Association* (1989) 168 CLR 461 at 566 (Gaudron J).

Direct discrimination

51. The construction adopted by the Court of Appeal directly discriminates against female to male transsexuals on the basis of gender because it effectively imports, for them, a requirement for surgery that is unconnected with that person's genitals and is beyond the specific requirements of the Act (i.e. by requiring a hysterectomy). In contrast, male to female transsexuals are not required to undertake any surgical procedures other than upon their genitals,[33] nor any surgery that is entirely unconnected with their external appearance.

52. For the reasons set out in paragraph [16]-[17], above, the question of whether an applicant has had a hysterectomy is not relevant to the scheme of the Act. Consideration of whether a person has had a hysterectomy constitutes an additional requirement imposed upon female to male transsexuals by reason of their original (female) gender. It is a construction that ought to be rejected, in keeping with the right to equality and non-discrimination enshrined in the ICCPR.

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Indirect discrimination

53. The construction adopted by the Court of Appeal also indirectly discriminates against female to male transsexuals on the basis of gender because, although facially neutral, a requirement of surgery to construct external genitalia consistent with their self-identified gender impacts detrimentally on female to male transsexuals. This is because, in the case of a female to male transsexual, a phalloplasty:

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(1) Is attended with substantial risks;

(2) has limited prospects of success; and, as a consequence,

(3) is not performed in Australia;[34]

54. The imposition of a requirement to have a phalloplasty appears to involve a neutral requirement, that the applicant construct genitals consistent with their reassigned

33 The Commission notes that less intrusive surgery may satisfy the requirements of the Act for the purposes of male to female transsexuals, although that issue is beyond the scope of this appeal.

34 See paragraph 13 of the Applicant's submissions; *Western Australia v AH* [2010] WASCA [17] per Martin CJ (AB), [194] (Buss J)(AB).

gender. In fact, when considered in light of the matters outlined above, it is clear that it has the effect of imposing a requirement that is discriminatory in its effect.[35]

55. The discriminatory nature of the majority's interpretation of the Act was recognised as such by Martin CJ:

> 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.[36]

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56. The use of 'general terms' by the legislature invites adoption of a construction consistent with international and domestic human rights norms, including the right to non-discrimination. By failing to adopt such a construction, the Court of Appeal fell into error.

C. The principle of purposive construction and the construction of the Act

57. Section 18 of the *Interpretation Act 1984* (WA) provides as follows:

> 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.

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58. The purposes of the Act can be garnered from a range of sources, including the Long Title, which states:

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

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59. First and foremost, the Long Title of the Act discloses that it is intended to operate as broadly as possible insofar as it is established to '*allow the reassignment of gender*', rather than to prevent it.

60. The Commission contends that Long Title discloses the purposes of the Act as being to assist those who suffer from gender identity disorder to receive effective treatment, to protect those individuals from being forced to disclose the gender of

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[35] It has not been suggested in the evidence or the judgment of the majority that similar hurdles apply to the construction of female genitals in male to female transsexuals.

[36] *Western Australia v AH* [2010] WASCA [116] per Martin CJ (AB).

their birth in the course of their interaction with the outside world, and to protect them from discrimination. These purposes are remedial or beneficial in nature; contrary to the majority's approach in the court below, this understanding of the Act's purposes is of assistance in the construction of the Act.[37]

61. In its text and structure, the Act is concerned with ensuring that transsexual people are able to engage with the outside world (such as employers and Government departments) in a manner that is consistent with their true gender, thereby avoiding the traumatic dissonance that arises when official documentation undermines that individual's self-understanding. This is apparent from the intended scope and
10 operation of the recognition certificate, including to permit the issuing of a new birth certificate (s 18 of the Act).

62. A birth certificate is the gateway to most other official documents that are required for a person to interact with society at large. It permits the issuing of a driver's licence and passport displaying the person's true gender. A person's gender is reflected in official documentation required to engage in a broad range of every-day circumstances, including, for example:

(1) opening a bank account;

(2) providing a driver's licence at the request of a police officer in the course of routine operations;

20 (3) checking in at a hotel or the airport.

63. These are routine acts of everyday life that would, on the majority's construction, require disclosure of a person's birth gender and medical status because they have failed to undertake a phalloplasty or hysterectomy.

64. Fundamentally, the purpose of the Act is to eliminate discrimination, both in terms of enabling a transgendered applicant to obtain a certificate recognizing his or her correct gender and in terms of preventing others from discriminating against a person on the basis of their gender history. This purpose is not advanced by adopting a construction of s 15 that is itself discriminatory (in the two senses explained in part B4, above). Furthermore, the majority's construction violates the
30 general principle of non-discrimination on the basis of gender, recognised in the *Sex Discrimination Act 1975* (Cth) and in state anti-discrimination legislation.

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[37] *Western Australia v AH* [2010] WASCA [105] per Martin CJ (AB).

65. Finally, a purpose of the Act is to ameliorate the effect on a person of gender identity disorder,[38] which can be ameliorated by a grant of a recognition certificate. This purpose is not advanced by making it all but impossible for a female-to-male applicant to obtain a certificate.

D. Coherent and rights consistent construction of ss 3, 14 and 15 of the Act

66. In light of Australia's international obligations in respect of the human rights set out in Part B, above, and the content of those rights, and in light of the purposive construction for which the Commission contends, insofar as it is possible to do so, ss 14 and 15 should be given a meaning and operation which maximizes access to recognition certificates for people suffering gender identity disorder, which recognizes the long term, invasive and difficult steps necessary for gender reassignment and does not impose any more onerous requirements on people in this situation than are necessary.

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67. Sections 14 and 15 should also be given a construction and operation that allows each provision to perform a meaningful role without overlap or duplication. The Commission submits the Court should recognize that the functions of ss 14 and 15 are quite different.

68. Part 3 of the Act begins with a requirement that a person has undergone a 'reassignment procedure'. That term is defined in s 3 in the following terms:

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> 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 or procedures) to correct or eliminate ambiguities in the child's gender characteristics.

69. The focus of s 14 is therefore on medical or surgical procedures that have certain purposes. That is because underlying the scheme as a whole is a legislative policy that a reassignment from one gender to another must involve tangible and significant physical changes, and not only acknowledgment of a choice. Section 14(1) is expressed as a jurisdictional fact. There has never been a challenge to the satisfaction of s 14 by each of the appellants.

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70. After the jurisdictional fact in s 14 is met, s 15 deals with matters about which the Board must be satisfied. The Commission submits these matters are quite separate and have a different focus from s 14, specifically an applicant's subjective belief (s

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38 Gender identity disorder, in this regard, is a physical disability that would be protected under the *Disability Discrimination Act 1992* (Cth).

15(1)(b)(i)); adoption of lifestyle and gender characteristics (s 15(1)(b)(ii)); and sufficient counseling requirement (s 15(1)(b)(iii)). The standard imposed by s 15 is satisfaction of the Board, rather than any approach based on 'accepted community standards and expectations'.

71. The interpretation of s 15 adopted by the majority of the Court of Appeal effectively duplicates the s 14 requirement that there has been a medical or surgical procedure to alter the '*genitals and other gender characteristics of a person*'. Moreover, the s 15 requirement adopted by the majority in the Court of Appeal is effectively more onerous than the s 14 threshold requirement (which has been satisfied in this case).

10 72. The legislature has evinced a clear intention to specify the extent of surgical intervention required to enliven the Board's jurisdiction to consider whether to grant a certificate under the Act. The interpretation adopted by the Court of Appeal would effectively involve 'reading in' a second surgical requirement, contrary to the intention of the Act and the words of the statute. Such an approach should be resisted in accordance with the well-known principle enunciated in *Thompson v Goold & Co*[39]

> It is a strong thing to read into an Act of Parliament words which are not there, and in the absence of clear necessity it is a wrong thing to do.[40]

73. Surgical procedures ought to be considered in the factual matrix specific to each
20 individual case, but an approach that adopts a surgical pre-condition as an element of s 15 of the Act ought to be rejected as inconsistent with the structure and operation of the Act.

Dated: 12 May 2011

DEBBIE MORTIMER SC	KRISTEN WALKER	ELIZABETH BENNETT
Melbourne Chambers	Melbourne Chambers	Joan Rosanove Chambers

39 [1910] AC 409 at 420.

40 This principle has been expanded upon and clarified in a number of cases, including by McHugh JA in *Bermingham v Corrective Services Comm of New South Wales* (1988) 15 NSWLR 292 at 302; see also *James Hardie & Co Pty Ltd v Seltsam Pty Ltd* (1998) 196 CLR 53 at 82 per Kirby J.