IN THE HIGH COURT OF AUSTRALIA
PERTH OFFICE OF THE REGISTRY

No. P15 of 2011

BETWEEN:

AB

Appellant

and

THE STATE OF WESTERN AUSTRALIA

First Respondent

and

GENDER REASSIGNMENT BOARD OF WESTERN AUSTRALIA

Second Respondent

FIRST RESPONDENT'S SUBMISSIONS

PART I: CERTIFICATION REGARDING INTERNET PUBLICATION

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

PART II: CONCISE STATEMENT OF THE ISSUES

2. The appeal presents the following issues.

   (a) What is the proper construction of the words "has the gender characteristics of a person of the gender to which the person has been reassigned" in s 15(1)(b)(ii) of the *Gender Reassignment Act 2000* (WA) (**"the Act"**), having regard to:

      (i) the ordinary and grammatical sense of the words in light of their context and legislative purpose and the status of the Act as a remedial Act; and

      (ii) Australia's obligations under the *International Covenant on Civil and Political Rights*[1] (**"the Covenant"**)?

[1] [1980] ATS 23.

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(b) Does the Appellant satisfy the requirement of s 15(1)(b)(ii), properly construed, that he has "the gender characteristics of a person of the gender to which [the Appellant] has been reassigned"?

PART III: CERTIFICATION REGARDING SECTION 78B NOTICES

3. The First Respondent has considered whether any notice should be given in compliance with s 78B of the *Judiciary Act 1903* (Cth) and has concluded that notice should not be given.

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PART IV: STATEMENT OF CONTESTED MATERIAL FACTS

4. No material facts are in contention.

PART V: CONSTITUTIONAL PROVISIONS AND LEGISLATION

5. The Appellant's statement of applicable constitutional provisions, statutes and regulations is accepted. Relevant provisions of the *Equal Opportunity Act 1984* (WA) (**"the EO Act"**) referred to in these submissions are set out in the attached
20 Annexure.

PART VI: STATEMENT OF ARGUMENT

Introduction

6. By its long title, the Act is a statute:

> "to allow the reassignment of gender and establish a Gender Reassignment Board with power to issue recognition certificates; and to make consequential amendments to the *Constitution Acts Amendment Act 1899*[2] and the *Births, Deaths and Marriages*
30 *Registration Act 1998*[3]; 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."

7. The Act allows the reassignment of gender by providing for certain persons to be issued with recognition certificates. The recipient of a recognition certificate (**"a recipient"**) receives the following benefits under the Act.

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[2] The amendment to the *Constitution Acts Amendment Act 1899* (WA) includes the Second Respondent in the list of entities which appears in Part 3 of Schedule V. Under s 37 of the statute, if a person is a member of an entity listed in Part 3 of Schedule V, that person will cease to be a member of the entity if he or she is declared to be elected to the Parliament of Western Australia under s 37. The amendment to the statute is irrelevant for the purposes of this appeal.

[3] The Act made no amendment to the *Births, Deaths and Marriages Registration Act 1998* (WA) (**"the Registration Act"**). When the Act was enacted, the amendment was made to s 65(1) of the repealed *Registration of Births, Deaths and Marriages Act 1961* (WA) (**"the repealed Act"**), which was in force when the Bill which became the Act (**"the Bill"**) began its passage through Parliament. The amendment would have permitted alterations to a register of births, deaths or marriages to be made in accordance with both the repealed Act and the Act, rather than the repealed Act alone. By s 61 of the *Statutes (Repeals and Minor Amendments) Act 2003*, the Act's long title was amended to refer to the Registration Act instead of the repealed Act and s 29(1) of the Act (which purported to amend s 65(1) of the repealed Act) was repealed. It was unnecessary for the Act to amend the Registration Act because s 53 of the Registration Act provides for amendments to be made to the Register in accordance with the requirements of another statute.

(a) The recognition certificate is conclusive evidence that the recipient has undergone a reassignment procedure[4] and is of the sex stated in the certificate[5].

(b) The recipient may produce the certificate[6] to the Registrar of Births, Deaths and Marriages (**"the Registrar"**) not less than one month after the certificate was issued[7]. The Registrar must register the reassignment of gender and make such other entries and alterations on any register or index kept by the Registrar as may be necessary in view of the reassignment[8]. Thereafter, any birth certificate issued by the Registrar for the recipient:

(i) must, unless otherwise requested by the recipient or permitted by the regulations, show the recipient's sex in accordance with the register as altered; and

(ii) must not include a statement that the recipient has changed sex[9].

(c) Documents showing that the recipient has an authorisation or qualification relevant to the recipient's profession, trade, business or employment may be replaced with equivalent documents showing the name adopted by the recipient if the recipient's original name is not attributed by common usage to the gender to which the recipient has been reassigned[10].

8. The recipient also attracts the protection of Part IIAA of the EO Act against discrimination on gender history grounds. A person has a "gender history" in this context if the person identifies as a member of a sex of which the person was not a member at birth by living, or seeking to live, as a member of that sex[11]. Although a person to whom a recognition certificate has not been issued may have a "gender history" in the relevant sense, Part IIAA of the EO Act will not protect that person because its protection only extends to a "gender reassigned person". A "gender reassigned person" is, relevantly, a person who has been issued with a recognition certificate under the Act[12].

9. A person can only be issued with a recognition certificate and thereby enjoy the benefits conferred by the Act if the person is not married[13] and:

(a) the person has undergone a reassignment procedure, which is a threshold requirement for applying to the Second Respondent for a recognition certificate[14]; and

(b) the person satisfies the requirements of s 15(1) of the Act (in the case of an adult) or s 15(2) of the Act (in the case of a child).

10. The term "reassignment procedure" is defined by the Act to mean, unless the contrary intention appears:

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[4] The Act, s 14(1).
[5] The Act, s 16(1).
[6] With the appropriate application and the prescribed fee: see the Act, s 17(3).
[7] See the Act, s 17(2)(a).
[8] The Act, s 17(1).
[9] The Act, s 18.
[10] See the Act, s 20.
[11] EO Act, s 35AA.
[12] EO Act, s 4(1) (definition of "gender reassigned person").
[13] The Act, s 16(3).
[14] The Act, s 14(1).

"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"[15].

The Appellant has had a reassignment procedure within the meaning of the Act which, properly construed, is concerned with the object of the procedure and not its outcome[16].

11. Section 15(1) of the Act 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."

12. The requirements imposed in respect of a child under s 15(2) of the Act differ from those imposed in respect of an adult under s 15(1) only in that the Board must be satisfied that it is in the best interests of the child that the certificate be issued, rather than of the matters set out in s 15(1)(b).

13. The First Respondent submits that the Appellant satisfies the requirements of s 15(1)(a) and all of the requirements of s 15(1)(b) except the requirement that he have "the gender characteristics of a person of the gender to which the person has been reassigned" (**"the identification requirement"**). The term "gender characteristics" is defined by the Act to mean, unless the contrary intention appears, "the physical characteristics by virtue of which a person is identified as male or female"[17]. Consequently, in the absence of any contrary intention the identification requirement as it applies to the Appellant is that he have the *physical characteristics* by virtue of which a person is *identified* as male.

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[15] The Act, s 3.

[16] All members of the Court of Appeal accepted that the definition of "reassignment procedure" is directed to the purpose for which the procedure was undertaken and not its outcome: see *State of Western Australia v AH and AB* [2010] WASCA 172 (**"the Appeal Decision"**) at [86]-[89] per Martin CJ (AB), at [122] per Pullin JA (AB) and at [214]-[216] per Buss JA (AB).

[17] The Act, s 3.

The construction of the identification requirement having regard to its context, the Act's legislative purpose and the status of the Act as a remedial statute

Summary of the First Respondent's submission

14. The First Respondent submits that the majority of the Court of Appeal correctly construed the identification requirement, so that it requires an applicant for a recognition certificate to have acquired, by the reassignment procedure, sufficient of the characteristics of the gender to which the applicant wishes to be reassigned to be established or accepted as a member of that gender according to general community standards and expectations.

15. If this Court considers that the majority erred in its construction of the identification requirement, it is submitted that the construction adopted by the majority should be modified only to the extent necessary to ensure that female-to-male applicants are not prevented from obtaining recognition certificates because they have not undergone surgery which is unavailable in Australia.

Relevant principles of statutory interpretation

16. The task of construing the identification requirement must begin with the ordinary and grammatical sense of the words "the person ... has the gender characteristics of a person of the gender to which the person has been reassigned", having regard to their context and legislative purpose[18]. When ascertaining legislative purpose or intention, it is the intention manifested by the legislation which is to be ascertained and not the legislative intention understood more broadly[19]. In identifying the legislative purpose, it is permissible to have regard to the words used by the Parliament in their legal and historical context[20].

17. Although legislative purpose is more often called in aid of a broader construction than might be achieved by a literal approach, the purpose can also be consistent with a literal construction or require a narrower construction[21].

18. A remedial statute is to be given a liberal and beneficial construction. However, that construction is directed to ensuring that the remedial purposes of the statute are not frustrated by a literal or technical interpretation. The related prohibition upon adopting a construction that is unreasonable or unnatural ensures that in discerning the purpose of the legislature the court does not depart from the language used by the legislature to express and give effect to that purpose[22].

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[18] *Interpretation Act 1984* (WA), s 18; *Minister for Immigration and Citizenship v SZJGV* (2009) 238 CLR 642 (***"SZJGV"***) at 649 [5] per French CJ and Bell J and at 664 [47] per Crennan and Kiefel JJ. In *SZJGV* at 655-656 [19]-[20], Hayne J (in dissent) began with the text of the provision and then considered whether the words of the provision were susceptible of another construction when read in their context and with proper attention to the purposes of the statute as a whole.

[19] *Saeed v Minister for Immigration and Citizenship* (2010) 241 CLR 252 at 264 [31] per French CJ, Gummow, Hayne, Crennan and Kiefel JJ.

[20] *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384 at 408 per Brennan CJ, Dawson, Toohey and Gummow JJ; *Newcastle City Council v GIO General Ltd* (1997) 191 CLR 85 at 112-113 per McHugh J.

[21] See *SZJGV* at 669 [65] per Crennan and Kiefel JJ.

[22] See for example *Waters v Public Transport Corporation* (1991) 173 CLR 349 at 359 per Mason CJ and Gaudron J, with whom Deane J agreed; at 372 per Brennan J; at 394 per Dawson and Toohey JJ; and at 406-407 per McHugh J; *IW v The City of Perth* (1997) 191 CLR 1 at 11-12 per Brennan CJ and McHugh J; at 26-

19. If the natural and ordinary meaning of a provision is plainly at odds with the statutory purpose or leads to an irrational or absurd result which could not have been intended, it is permissible for a court to construe the provision in a way which modifies the meaning of the words and even the structure of the provision. However, the court can only take this approach on the basis that the legislature could not have intended what its words signify and that the modifications are mere corrections of careless language and really give the true meaning. Consequently:

> "Three matters of which the court must be sure before interpreting a statute in this way [are] the intended purpose of the statute, the failure of the draftsman and parliament by inadvertence to give effect to that purpose, and the substance of the provision parliament would have made. The third of these conditions was described as being of 'crucial importance'. Otherwise any attempt to determine the meaning of the enactment would cross the boundary between construction and legislation"[23].

The ordinary and grammatical sense of the identification requirement having regard to its context

20. The identification requirement is that "the person ... has the gender characteristics of a person of the gender to which the person has been reassigned". In light of the Act's definitions of "reassignment procedure" and "gender characteristics", which have been set out above, it is necessary to consider how the terms "identified" (which appears in both definitions) and "physical characteristics" (which appears in the definition of "gender characteristics") are to be construed.

Identified

21. The term "identified" should be construed to mean "established" or "accepted as" and imports general community standards and expectations, with the focus on the characteristics by which the applicant is to be identified as a member of the gender to which they seek to be reassigned, rather than the characteristics of their gender of birth. All members of the Court of Appeal were essentially of this view[24]. They differed on the physical characteristics which are relevant and the relevance of the Act's status as a remedial statute.

22. Buss JA held that identification should be "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*"[25]. With respect, however, the principles applicable to a remedial statute are concerned with the construction of the statute and not whether a person complies with a requirement of the statute, properly construed. It is in this sense that Martin CJ observed[26], with respect correctly, that "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."

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27 per Toohey J; at 39 per Gummow J; at 58 per Kirby J; *Victims Compensation Fund Corporation v Brown* (2003) 77 ALJR 1797 at 1804 [33] per Heydon J (McHugh ACJ, Gummow, Kirby and Hayne JJ agreeing).

[23] *SZJGV* at 652 [9] per French CJ and Bell J (footnote omitted).

[24] The Appeal Decision at [93]-[94], [100]-[105] per Martin CJ (AB), at [124] per Pullin JA (AB) and at [217]-[224] per Buss JA (AB).

[25] The Appeal Decision at [219] (AB) (emphasis added).

[26] The Appeal Decision at [105] (AB).

23. The composition of the Second Respondent, which determines applications for recognition certificates, does not require a different conclusion. The Board is to comprise a president (who is or has been a Western Australian judge or is an Australian legal practitioner admitted for not less than 8 years)[27] and not more than 5 other members[28]. Those other members are to include a medical practitioner, a person who has undergone a reassignment procedure and a person with experience in equal opportunity matters[29]. The Board must be constituted by not less than 3 members[30].

24. As Buss JA observed[31], 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. However, this does not support the proposition that, once the Act has been construed, its remedial purpose should bear upon the Board's determination of whether the requirements imposed by the Act on its proper construction have been met. The Act's remedial purpose has already been recognised and accommodated by the construction of the Act, including the requirements imposed by the Act. The Board's task is to determine, relevantly, whether the applicant for a recognition certificate has acquired, by the reassignment procedure, sufficient of the characteristics of the gender to which the applicant wishes to be reassigned to be established or accepted as a member of that gender according to general community standards and expectations. The performance of this task is not assisted by resort to adjectival expressions such as beneficial, liberal, purposive or remedial.

Physical characteristics

25. The term "physical characteristics" should be construed to mean both the external and internal physical characteristics of an applicant for a recognition certificate.

26. The Act does not confine the term "gender characteristics" to external physical characteristics. The term means the "physical characteristics by virtue of which a person is identified as male or female"[32]. A person can be identified as male or female by reference to a range of characteristics, including both external and internal physical characteristics. Moreover, in the dictionary definitions of the words "male" and "female"[33] the capacity to bear and beget children is the first-mentioned and principal basis for distinguishing between the sexes. That capacity depends upon both external and internal physical characteristics.

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[27] The Act, s 6.
[28] The Act, s 7.
[29] The Act, s 7.
[30] The Act, s 8(2).
[31] The Appeal Decision at [220] (AB).
[32] The Act, s 3.
[33] The *Oxford English Dictionary Online* relevantly defines the adjective "female" to mean "**A.** *adj.* **I.** belonging to the sex which bears offspring" and the adjective "male" to mean "**A.** *adj.* **I.** That belongs to the sex which can beget offspring (contrasted with *female*); characteristic of or relating to this sex. **1. a.** Designating the sex or (formerly) kind which can beget, but not bear offspring." The *Macquarie Dictionary Online* defines the adjective "female" as "**1.** belonging to the sex which brings forth young, or any division or group corresponding to it", while it defines the adjective "male" to mean "of or relating to the types of humans or animals which in the normal case produce spermatozoa with which to fertilise female ova." The definitions of the nouns "female" and "male" do not detract from or contradict the definitions of the corresponding adjectives. However, in the *Macquarie Dictionary Online* the noun "female" is relevantly defined to mean "a human being of the sex which conceives and brings forth young; a woman or girl."

27. The Appellant relies[34] on the reasoning of Buss JA[35] to read down the meaning of the term "gender characteristics" so that it only includes external characteristics. With respect, that reasoning should not be accepted.

28. As to the first reason given by Buss JA[36], the definition of "reassignment procedure" does emphasise the relevance of an applicant's genitals in determining whether the applicant should be granted a recognition certificate by requiring that they be altered. However, the emphasis upon the genitals does not require that the term "gender characteristics" be construed to refer only to external physical characteristics for two reasons. First, the term "genitals" is capable of referring both to internal and external reproductive organs. Second, the definition of "gender characteristics" does not refer to, and is not confined by the meaning of, the term "genitals".

29. As to the second reason given by Buss JA[37], the Act does not require that an applicant for a recognition certificate have artificial and non-functional internal organs surgically inserted. Moreover, the absence of, for example, a prostate gland in an applicant who was born female and wishes to be recognised as male under the Act can be given little or no weight by the decision-maker under the Act. The fact that medical procedures do not involve the insertion of artificial and non-functional internal organs is of no assistance in construing the term "gender characteristics".

30. As to the third reason given by Buss JA[38], while there are obvious biological limitations on the extent to which accepted medical and surgical procedures may alter a person's physical characteristics, those limitations do not require that internal physical characteristics be disregarded. Similarly, while the fundamental disconformity inherent in a person suffering from gender dysphoria is between the person's psychiatric condition and the person's external physical characteristics, that does not require that internal physical characteristics be disregarded. Those physical characteristics are relevant under the Act to identification of the person's gender by others, rather than by the person suffering from gender dysphoria.

31. As to the fourth reason given by Buss JA[39], the use by Parliament of the words "a person is [or will be] identified as" rather than "a person is" male or female has no bearing upon whether "gender characteristics" are confined to external physical characteristics for the purposes of the Act. As has been submitted, a person may be identified as male or female by reference to both external and internal physical characteristics.

32. It does not follow from this reasoning that an applicant for a recognition certificate must have none of the gender characteristics of the sex which the applicant had at birth. As Martin CJ said[40]:

> "Each applicant for a recognition certificate will possess a range of physical characteristics, some of which will be identified with the gender of the applicant's birth (such as chromosomes) and others which will be identified with the gender to which the applicant seeks to be reassigned. Whether, after taking into account all

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[34] The Appellant's submissions at [66] (AB).
[35] The Appeal Decision at [196]-[206] (AB).
[36] The Appeal Decision at [198]-[199] (AB).
[37] The Appeal Decision at [200]-[201] (AB).
[38] The Appeal Decision at [202]-[203] (AB).
[39] The Appeal Decision at [204]-[206] (AB).
[40] The Appeal Decision at [103]-[104] per Martin CJ (AB).

relevant characteristics, the applicant 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 the applicant wishes 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.... The critical question is whether, by the reassignment procedure, an applicant has acquired sufficient of the characteristics of the gender to which the applicant wishes to be reassigned to be identified as a member of that gender."

33. Martin CJ's formulation of the critical question reflects the ordinary and grammatical sense of the identification requirement, having regard to its context. The regard which must be had to the purpose of the Act does not require a different construction.

The construction of the identification requirement having regard to legislative purpose

34. The only legislative purpose apparent from the text of the Act is that of placing the recipient of a recognition certificate in the same position, so far as it is possible for the Parliament to do so, as the person would have been in if he or she had been born as a person of the gender to which the person has been reassigned. However, this purpose is concerned with the consequences which flow from the issue of a recognition certificate and not the circumstances in which a recognition certificate can or should be issued. It does not bear upon the construction of the identification requirement.

35. The text of the Act and the context of the identification requirement do not disclose a broader purpose.

(a) The Act contains no express statement of legislative purpose.

(b) The identification requirement is worded in a way which focuses attention upon whether the applicant for a recognition certificate has, relevantly, the physical characteristics by virtue of which a person is identified as male.

(c) As Martin CJ observed[41], the generality of this approach, with its failure to specify objective criteria capable of being readily applied so as to produce a reasonably clear answer, has left decision-makers under the Act to confront many of the difficulties identified by Lord Nicholls of Birkenhead in *Bellinger v Bellinger*[42].

(d) Given the confusion that may otherwise result, it has also made likely the adoption of the point of demarcation identified in the line of authority which recognised a person's reassignment from one gender to the other only in limited legal contexts[43] (and not in a way that would alter the official records of the First Respondent, such as the registration of the person's sex at birth).

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[41] The Appeal Decision at [61]-[62] (AB).

[42] [2003] 2 AC 467 at 478-479 [36]-[42].

[43] See for example *R v Harris and McGuinness* (1988) 17 NSWLR 158 at 192 per Mathews J, with whom Street CJ agreed, as to whether a transgender person was a male for the purposes of the offence of committing or attempting to commit acts of indecency between males; *Re Secretary, Department of Social Security and HH* (1991) 23 ALD 58, as to whether a transgender person was female for the purpose of determining the age at which the person would be entitled to a pension; and *Attorney-General v Otahuhu Family Court* [1995] 1 NZLR 603 at 607, as to whether a marriage would be valid if one of the partners had adopted the sex opposite to the proposed marriage partner through gender reassignment surgery.

(e) That line of authority 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 genitals and reproductive organs[44]. Except where a relevant statute provides to the contrary, this remains the point of demarcation[45].

(f) It must have been obvious, when the Act was formulated and passed, that the adoption of a criterion for being granted a recognition certificate which focused upon the physical characteristics that 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. It can be assumed in this regard that those responsible for the formulation of the Act would have been well aware of the line of authority referred to above[46].

36. The Appellant relies upon the Act's definition of the term "reassignment procedure", which contemplates that a reassignment procedure may not involve surgery, in support of its submissions that:

(a) a construction of s 15 of the Act which will almost inevitably require every applicant for a recognition certificate to undertake surgery must be in error[47]; and

(b) in light of that definition the Act manifests an intention to depart from the line of demarcation identified by the common law[48].

37. However, the definition of "reassignment procedure" refers to procedures to alter the genitals and other gender characteristics of a person and operates in the context of the identification requirement in s 15(1)(b)(ii), which prevents an applicant from obtaining a recognition certificate unless the applicant has sufficient of the physical characteristics by virtue of which a person is identified as being of the gender to which the applicant has been reassigned[49]. Given the gender characteristics which are commonly associated with adults who are born female, such as developed breasts and the nature of the identification requirement, it will be often be necessary for female-to-male applicants for a recognition certificate to have had surgery in order to comply with the identification requirement. Indeed, the Appellant has already had surgery.

38. Moreover, the definition of "reassignment procedure" requires that the procedure(s) be directed, at the very least, to the alteration of the person's genitals. Although the reassignment procedure is not referred to by s 15 of the Act, this requirement should not be taken as being confined only to meeting the threshold requirement imposed by s 14 of the Act.

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[44] As Martin CJ observed in the Appeal Decision at [79] (AB). Thus in *Secretary, Department of Social Security v SRA* (1993) 43 FCR 299 at 306, Black CJ held that a person living as a woman but who had not undergone gender reassignment surgery was not entitled to a wife's pension on the basis that she was cohabiting with a male invalid pensioner.

[45] Compare *Michael v Registrar General of Births, Deaths and Marriages* (2008) 27 FRNZ 58 with *Kevin v Attorney-General (Commonwealth)* [2001] FamCA 1074; (2001) 165 FLR 404, affirmed on appeal in *Attorney-General (Commonwealth) v Kevin* [2003] FamCA 94; (2003) 172 FLR 300; and *Scafe v Secretary, Department of Families, Housing, Community Services and Indigenous Affairs* [2008] AATA 104 at [29].

[46] The Appeal Decision at [99] per Martin CJ (AB).

[47] The Appellant's submissions at [52] (AB).

[48] The Appellant's submissions at [86]-[87] (AB).

[49] See the Appeal Decision at [97] per Martin CJ (AB).

39. The legislature should not have imputed to it the intention that the applicant's genitals would be considered for the purposes of s 14 and then disregarded in the context of the identification requirement. A person's genitals plainly form part of the person's gender characteristics, as that term is defined by the Act, and will necessarily be one of the characteristics by virtue of which the person is identified as male or female. The requirement that a successful applicant for a recognition certificate has sufficient of the characteristics of the gender to which the applicant wishes to be reassigned to be identified as a member of that gender may have the result that surgery to a person's genitals will be required[50].

40. As Martin CJ observed[51], the failure to expressly require surgical procedures in each and every case could be explained by a number of possible legislative objectives. It would be unsafe to fasten only upon the explanation proffered by the Appellant.

41. In light of the above, there is nothing in the text of the Act or in the identification requirement's context from which a purpose may be identified which requires a different construction of the identification requirement from the one set out above.

42. It is necessary to exhaust the application of the ordinary rules of statutory construction before looking at extrinsic materials[52]. Once this has been done, extrinsic materials which are capable of assisting in the ascertainment of the meaning of a provision may be considered:

(a) to confirm that the meaning of the provision is the ordinary meaning conveyed by the text of the provision taking into account its context and the legislative purpose; or

(b) to determine the meaning of the provision when the provision is ambiguous or obscure or the ordinary meaning conveyed by the text of the provision, taking into account its context and the legislative purpose, is manifestly absurd or is unreasonable[53].

43. The *Interpretation Act 1984* (WA) contemplates that reference will only be made to extrinsic materials which were available before the time when the provision was enacted[54]. It is unlikely that extrinsic materials which came into existence after a provision was enacted would be capable of assisting in the ascertainment of the provision's meaning. The Appellant's reliance upon judicial decisions and Commission recommendations which were not in existence before the Act was enacted[55] is, with respect, misplaced and those decisions and recommendations can be of no assistance in construing the Act.

44. The then Attorney General's second reading speech on the Bill can, of course, be considered as part of the extrinsic material. In the second reading speech, the then Attorney General relevantly observed:

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[50] See the Appeal Decision at [114]-[115] per Martin CJ (AB).
[51] The Appeal Decision at [96] (AB).
[52] *Saeed v Minister for Immigration and Citizenship* (2010) 241 CLR 252 at 265 [33] per French CJ, Gummow, Hayne, Crennan and Kiefel JJ. See also the *Interpretation Act 1984* (WA), s 19(1).
[53] *Interpretation Act 1984* (WA), s 19(1).
[54] *Interpretation Act 1984* (WA), s 19(2).
[55] The Appellant's submissions at [90] (AB).

> "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.
>
> 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.
>
> The Bill has three main purposes. Firstly, to establish a gender reassignment board which will be able to issue recognition certificates to persons who have undergone, whether in Western Australia or elsewhere, gender reassignment procedures. Secondly, to enable the Registrar General to register the reassignment of gender as indicated on the recognition certificate and to issue a new birth certificate showing the person's gender in accordance with the altered register. Thirdly, to provide protection from discrimination on the ground of gender history when a person has undergone reassignment procedures."[56]

45. The second reading speech then referred to gender reassignment legislation in other jurisdictions, the Commonwealth's recognition of reassigned gender in certain circumstances and the provisions of the Bill before concluding with the words "[t]his gender reassignment legislation will assist persons who have undergone reassignment procedures by clarifying their legal status and rights."[57]

46. The second reading speech identifies the class of persons who will benefit from the Act as "[p]eople suffering from gender dysphoria ... who have completed medical procedures to alleviate their condition" and persons who have undergone reassignment procedures. As Martin CJ observed[58], however, the then Attorney General did not identify what was meant by the expression "completed medical procedures" and the parliamentary debates reveal differing understandings of what would be required to obtain a recognition certificate under the Bill.

47. Even if assistance can be drawn from the class of persons identified by the second reading speech in construing the Act, the legislature did not use statutory language which focuses upon medical opinion about whether a person has completed reassignment procedures[59] as the basis for granting a recognition certificate. The Act does not require more than one medical practitioner to be on the Board and it is possible for the Board to be constituted in the absence of that medical practitioner. Instead, the Act uses language which focuses upon whether the person, relevantly, has adopted the lifestyle and has the gender characteristics of a person of the gender to which the person has been reassigned. That language is incompatible with giving effect to a legislative purpose of granting recognition certificates to an applicant who has completed the procedures which medical opinion would identify as necessary but nevertheless does not have sufficient of the gender characteristics of a person of the gender to which the person has been reassigned.

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[56] *Hansard*, Legislative Council, Thursday, 25 November 1999, pp. 3822-3823 (AB).
[57] *Hansard*, Legislative Council, Thursday, 25 November 1999, p. 3823 (AB).
[58] The Appeal Decision at [82]-[83] (AB).
[59] Compare, in this regard, s 28(3) of the recently renamed *Births, Deaths, Marriages and Relationships Registration Act 1995* (NZ) which was considered in *Michael v Registrar of Births, Deaths & Marriages* (2008) 27 FRNZ 58 and referred to by Martin CJ in the Appeal Decision at [77]-[78] (AB).

48. In considering the second reading speech, it is important to recall this Court's observation in *Saeed v Minister for Immigration and Citizenship* that:

> "[s]tatements as to legislative intention made in explanatory memoranda or by Ministers, however clear or emphatic, cannot overcome the need to carefully consider the words of the statute to ascertain its meaning."[60]

49. The construction adopted by the majority in the Court of Appeal is consistent with the words used by the legislature and is not manifestly absurd or unreasonable. Given the inconsistency between the purpose which can be drawn from the second reading speech and the words used by the Act, the majority's construction should be upheld.

50. If, contrary to these submissions, the Court considers that:

(a) the purpose of the Act was to confer the benefits provided by the Act upon "[p]eople suffering from gender dysphoria ... who have completed medical procedures to alleviate their condition", to use the then Attorney General's words; and

(b) the draftsperson and the legislature have failed by inadvertence to give effect to that purpose,

it remains necessary to identify the substance of the provision which the legislature would have made to give effect to that purpose.

51. The impediment to giving effect to that purpose in relation to female-to-male applicants for reassignment certificates lies in:

(a) the identification requirement's concern with whether an applicant for a recognition certificate has acquired sufficient of the characteristics of the gender to which the applicant wishes to be reassigned to be established or accepted as a member of that gender according to general community standards and expectations;

(b) the significance which the Act (in its definition of "reassignment procedure") and general community standards and expectations place upon the genitals as a basis for identifying a person's gender; and

(c) the unavailability in Australia, and the unreliability of the outcomes of, phalloplasty.

52. It is respectfully submitted that any modification to the ordinary meaning of the Act should be confined to what is necessary to overcome this impediment, particularly given:

(a) the Act's emphasis upon the gender characteristics which identify a person as being of the gender to which the person wishes to be reassigned;

(b) the difficulties identified by Lord Nicholls of Birkenhead in *Bellinger v Bellinger*[61] in relation to the line of demarcation and uncertainty; and

(c) the absence of any objective provision in the Act, other than s 15 and especially s 15(1)(b)(ii), which attempts to address those difficulties.

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[60] *Saeed v Minister for Immigration and Citizenship* (2010) 241 CLR 252 at 264-265 [31] per French CJ, Gummow, Hayne, Crennan and Kiefel JJ.

[61] [2003] 2 AC 467 at 478-479 [36]-[42].

The Covenant and the Act

Introduction

53. The Appellant and the Commission submit that the construction adopted by the majority of the Court of Appeal is inconsistent with Australia's international obligations under articles 16, 17 and 26 of the Covenant[62] and that the Act should be construed consistently with those obligations. The First Respondent replies that:

    (a) articles 16, 17 and 26 of the Covenant are irrelevant to the construction of the Act because there is no inconsistency with them;

    (b) alternatively, the inconsistency between articles 16 and 17 of the Covenant and the Act as construed by the majority arose after the Act was enacted and is irrelevant to the construction of the Act;

    (c) alternatively, the Act exhibits an intention that it be construed inconsistently with Australia's obligations under articles 16 and 17 of the Covenant.

54. While the Appellant makes brief submissions in relation to the Covenant they are, with respect, more fully developed by the Commission and it does not appear from the Appellant's submissions that there will be any difference between the Appellant and the Commission in their approach to the Covenant. Accordingly, the First Respondent's submissions in relation to the Covenant reply to the submissions of the Commission.

Relevant principles of statutory and treaty interpretation

55. The First Respondent concedes, on the authorities cited by the Commission[63], that:

    (a) there is a principle that legislative provisions which are ambiguous are to be interpreted by reference to the presumption that the legislature did not intend to violate Australia's international obligations;

    (b) the requirement of ambiguity has been interpreted broadly and 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;

    (c) there is some authority for the proposition that the principle applies to State as well as to Commonwealth legislation;

    (d) the principle is limited to statutes enacted after Australia's entry into the treaty in question;

    (e) treaties are to be interpreted in light of international norms of interpretation and treaties ought to be interpreted uniformly by contracting states;

    (f) articles 31 and 32 of the *Vienna Convention on the Law of Treaties* (**"the VCLT"**) set out relevant principles applicable to the interpretation of treaties; and

    (g) technical principles of common law construction are to be disregarded in construing the text of a treaty.

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[62] Reference is also made to article 2 of the Covenant but is not developed.
[63] The Commission's submissions at [19]-[23], [25]-[27] (AB).

56. However, the Commission also appears to submit that not only the Covenant but the Act itself should be interpreted in light of international norms of interpretation[64], by way of analogy to statutes which are enacted to implement international obligations. If that is the submission, it should not be accepted. The Covenant should be interpreted in light of international norms of interpretation. If the Covenant so interpreted is relevantly inconsistent with the Act, consideration should then be given to whether the language of the Act is susceptible of a construction which is consistent with the obligations which the Covenant imposes on Australia. The latter exercise only becomes necessary if there is shown to be a relevant inconsistency.

Articles 16, 17 and 26 are irrelevant to the construction of the Act

The Yogyakarta Principles

57. The Commission relies upon the *Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity* (**"the Yogyakarta Principles"**) to establish the relevance of the following articles of the Covenant to the construction of the Act:

    (a) the right to recognition everywhere as a person before the law under article 16 of the Covenant; and

    (b) 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 under article 17 of the Covenant.

    The First Respondent concedes that Australia is bound by those articles of the Covenant, as well as articles 2 and 26.

58. On the ordinary meaning of articles 16 and 17 of the Covenant, read in their context and in light of the Covenant's object and purpose, they are irrelevant to the construction of the Act. The articles do not refer to gender reassignment and there is nothing in the Covenant which creates a context in which they should be understood as being concerned with gender reassignment.

59. The subsequent practice referred to by article 31(3)(b) of the VCLT is relevantly concerned with the practice of the parties to the Covenant[65]. It is only the practice of the parties to the Covenant which can establish the agreement of those parties regarding its interpretation. The Commission does not specifically identify any subsequent practice of the parties to the Covenant which establishes their agreement that the articles relied upon by the Commission are concerned with gender reassignment or impose legally binding obligations in terms of the Yogyakarta Principles.

60. The Commission does submit that 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

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[64] The Commission's submissions at [25] (AB).

[65] Article 31(3) of the VCLT states, in full, that "There shall be taken into account, together with the context: (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions; (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation; (c) any relevant rules of international law applicable in the relations between the parties." The focus of article 31(3) is plainly upon the conduct of the parties to the treaty.

obligations"[66]. However, the report and article relied upon by the Commission as authority for that proposition do not demonstrate practice establishing agreement by the parties that the Covenant is to be interpreted in accordance with the Yogyakarta Principles.

61. The Commission does not rely upon anything in the preparatory work of the Covenant, to which regard may be had to confirm the meaning resulting from the application of article 31 of the VCLT or to determine the meaning when the interpretation according to article 31 leaves the meaning ambiguous or obscure[67], to support the view that articles 16 and 17 are concerned with gender reassignment.

62. Instead, the Commission submits that the rights provided for in the Covenant are expressed at a high level of generality and are ambiguous in their application to transgender persons and on this basis recourse can be had to the Yogyakarta Principles[68]. This submission should not be accepted for the following reasons.

(a) A lack of precision often characterises the language of treaties[69].

(b) The mere fact that the rights provided for in the Covenant are expressed at a high level of generality does not lead inevitably to the conclusion that they are ambiguous in their application to transgender persons. The application of the general rule of interpretation provided by article 31 of the VCLT supports the conclusion that those articles are not concerned with gender reassignment and has not left the meaning of those articles ambiguous or obscure.

(c) Unless the application of article 31 of the VCLT leaves the meaning of the articles ambiguous or obscure, there is no basis for having recourse to supplementary means of interpretation except to confirm the meaning resulting from the application of article 31.

(d) Article 31 can accommodate developments in the interpretation of the Covenant – including the Yogyakarta Principles – through subsequent agreement or practice by the parties to the Covenant. Absent subsequent agreement or practice, which has not been demonstrated, the Yogyakarta Principles should not be taken to be a legally binding interpretation of the Covenant merely because the Covenant's articles are expressed at a high level of generality.

63. The Yogyakarta Principles do not constitute a binding interpretation of the Covenant and as such do not form part of Australia's obligations under international law. Accordingly, no inconsistency between the majority's construction of the Act and Australia's obligations exists which would require this Court to consider whether the Act can be construed in a way which avoids inconsistency.

64. If, contrary to the submissions set out above, the Yogyakarta Principles do constitute a binding interpretation of the Covenant, the Commission's reliance upon principle 6 to establish an inconsistency with article 17[70] is not well founded.

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[66] The Commission's submissions at [29] (AB).
[67] The VCLT, article 32.
[68] The Commission's submissions at [28] (AB).
[69] *Applicant A v Minister for Immigration and Ethnic Affairs* (1996) 190 CLR 225 (**"*Applicant A*"**) at 240 per Dawson J; at 255-256 (in the context of a comprehensive analysis of treaty interpretation at 251-256) per McHugh J; at 275 per Gummow J.

65. The Commission cites action (f) of the list of actions which principle 6 asserts that States shall take. The Act takes that action, but confines its operation to persons who comply with the requirements of ss 14 and 15. Confining the action in that way is not inconsistent with principle 6, but principle 3. For the reasons set out below[71], if principle 3 of the Yogyakarta Principles is a binding interpretation of Australia's international obligations, the presumption that the legislature did not intend to contravene those obligations is rebutted.

Equality and non-discrimination

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66. The Commission submits that the majority's construction of the Act is also inconsistent with article 26 of the Covenant[72]. This submission does not depend upon the applicability of the Yogyakarta Principles.

67. Article 26 precludes legislating in a manner which discriminates against a person on any one or more of the grounds enumerated in the article. The guarantee afforded by article 26 requires that laws not be impermissibly discriminatory in purpose or effect[73]. Those categories of discrimination would correspond to the categories of direct and indirect discrimination.

68. The Commission asserts that the majority's construction of the Act is
20 discriminatory because of the practical consequences which it says flow from that construction. The Commission submits that those consequences lie in a requirement that a female-to-male applicant for a recognition certificate have a hysterectomy (which is said to be direct discrimination[74]) and phalloplasty (which is said to be indirect discrimination[75]).

69. The majority's construction of the Act has no discriminatory purpose and does not amount to direct discrimination against female-to-male applicants for a recognition certificate on the ground of their gender. The majority's construction reflects the manner in which the identification requirement is expressed, which is in general terms and is concerned with whether the applicant has sufficient of the
30 characteristics of the male gender to be established or accepted as a member of the male gender according to general community standards and expectations. The different requirements imposed upon female-to-male and male-to-female applicants arise from the identification requirement and are not directly discriminatory.

70. The Commission's submissions on direct discrimination also proceed upon a false premise. The Commission submits that the majority's construction requires all adult female-to-male applicants to have a hysterectomy[76]. The majority did not express that view and it does not follow from their reasoning. The majority found that the Appellant possessed none of the genital and reproductive characteristics of a male and retained virtually all of the external genital characteristics and internal

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[70] The Commission's submissions at [42] (AB).
[71] These submissions at [81]-[82] (AB).
[72] The Commission's submissions at [48]-[56] (AB). As has been noted above, the Commission also refers to article 2 of the Covenant earlier in its submissions, but does not refer to the article in its detailed discussion of equality and non-discrimination.
[73] See *Aurukun Shire Council v CEO Office of Liquor Gaming and Racing in the Department of Treasury* (2010) 237 FLR 369; [2010] QCA 37 at 389 [34] per McMurdo P; at 449 [240]-[241] per Philippides J.
[74] The Commission's submissions at [51]-[52] (AB).
[75] The Commission's submissions at [53]-[56] (AB).
[76] The Commission's submissions at [51] (AB).

reproductive organs of a female and held, in light of that finding, that the Appellant would not be identified, according to accepted community standards and expectations, as a member of the male gender[77].

71. The majority's holding was the outcome of the balancing exercise identified by Martin CJ[78], which depends critically upon the particular facts and circumstances of each case. The facts and circumstances of a different case may produce a different result for a female-to-male applicant who has not had a hysterectomy.

72. The majority's construction of the Act does make it more difficult for a female-to-male applicant to obtain a recognition certificate, a fact recognised by Martin CJ[79]. The fact that the Act is concerned with persons being recognised as of a different gender to the gender of their birth makes an assessment of whether a person is being discriminated against on the ground of their gender more difficult, particularly given the complexities associated with identifying an appropriate line of demarcation. However, it is at least arguable that the majority's construction has a discriminatory effect and amounts to indirect discrimination.

73. Assuming that the majority's construction does amount to indirect discrimination, it does not follow that the majority's construction is inconsistent with Australia's obligations under article 26 of the Covenant. While the Covenant guarantees the enjoyment of freedom and rights on equal footing, this does not mean that identical treatment is required in every case[80]. Article 26 will be breached if other persons in an analogous or relevantly similar situation to the person allegedly discriminated against enjoy preferential treatment, and there is no reasonable or objective justification for this distinction which is aimed at achieving a purpose which is legitimate under the Covenant[81].

74. In providing for the recognition of the reassignment of gender, it is necessary to adopt a line of demarcation. The legislature decided to draw that line based, relevantly, upon the criterion of identification rather than, for example, whether a person has completed the procedures which medical opinion would consider necessary and appropriate to treat gender dysphoria. Given the biological realities of making the transition from one gender to another in the context of the identification requirement, the different procedures required for female-to-male and male-to-female applicants to satisfy the identification requirement are inevitable. They are also reasonable and objectively justified and the measures which the legislature has taken to endeavour to recognise the transition of certain transgender persons from one gender to another is either not addressed by the Covenant or, in the alternative, aimed at a purpose which is legitimate under the Covenant.

75. Consequently, the majority's construction of the Act is not inconsistent with Australia's obligations under the Covenant. The majority's construction similarly cannot be inconsistent with the general principle of non-discrimination to which the Commission refers (without citing authority as to how it may apply to the Act)[82].

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[77] The Appeal Decision at [114]-[115] per Martin CJ (AB) and at [125] per Pullin JA (AB).
[78] The Appeal Decision at [103]-[104] (AB).
[79] The Appeal Decision at [116] per Martin CJ (AB).
[80] Human Rights Commission, *CCPR General Comment No. 18: Non-discrimination* (1989) (**"General Comment No 18"**) at [8]. Available at: http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/3888b0541f8501c9c12563ed004b8d0e?Opendocument
[81] General Comment No 18 at [13].
[82] The Commission's submissions at [64] (AB).

Any inconsistency with articles 16 and 17 of the Covenant is irrelevant because it arose after the Act was enacted

76. If, contrary to the submissions set out above, there is an inconsistency between Australia's obligations under articles 16 and 17 of the Covenant and the majority of the Court of Appeal's construction of the Act, the inconsistency is irrelevant because it arose after the Act was enacted. Both the Yogyakarta Principles and the decisions of the European Court of Human Rights upon which the Commission relies were not in existence when the Act was enacted.

77. This is significant because of the underlying rationale of the principle of statutory construction upon which the Commission relies, namely that the legislature is taken not to have intended to legislate in a way which violates Australia's obligations under international law[83]. As the Yogyakarta Principles and the decisions of the European Court of Human Rights could not have been within the legislature's contemplation at the time the Act was enacted, the legislature can have had no intention which attracts or is assumed by the principle of statutory construction.

78. In support of its submission that the Yogyakarta Principles can assist in ascertaining the Covenant's contemporary meaning and the application of the Covenant to transgender persons (and the Act), the Commission attempts to draw an analogy between this Court's decisions in relation to the construction of the phrase "a particular social group" in the context of the *Convention Relating to the Status of Refugees*[84] (**"the Refugees Convention"**) and this case[85].

79. The analogy is not apt. The Refugees Convention's definition of the term "refugee" was adopted by the *Migration Act 1958* (Cth) and included a person who had a well founded fear of persecution for reasons of membership of a particular social group. The Court considered whether the appellants fell within that definition in light of contemporary circumstances. In contrast, transgender persons are not referred to by the Covenant and the legislature could not have:

    (a) had regard to the Yogyakarta Principles or judicial decisions made after the Act was enacted in considering the Bill or enacting the Act; or

    (b) intended to legislate consistently with Australia's obligations under the Covenant as they developed after the Act was enacted.

The Act exhibits an intention that it be construed inconsistently with articles 16 and 17 of the Covenant

80. If, contrary to the submissions set out above, there is a relevant inconsistency between Australia's obligations under the Covenant and the majority of the Court of Appeal's construction of the Act, the language of the Act:

    (a) rebuts the presumption that the legislature did not intend to violate Australia's international obligations under articles 16 and 17 of the Covenant; or

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[83] *Coleman v Power* (2004) 220 CLR 1 at 28 [19] per Gleeson CJ, *contra* at 93-96 [244]-[246] per Kirby J; *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273 at 287 per Mason CJ and Deane J; *Kruger v The Commonwealth* (1997) 190 CLR 1 at 71 per Dawson J; *Al-Kateb v Godwin* (2004) 219 CLR 562 at 589-590 [63] per McHugh J.

[84] *Applicant A* and *S395/2002 v Minister for Immigration and Multicultural Affairs* (2007) 216 CLR 473.

[85] The Commission's submissions at [30]-[31] (AB).

(b) cannot be reconciled with those obligations.

81. In relation to both articles 16 and 17, the Commission relies upon Principle 3 of the Yogyakarta Principles[86]. Principle 3 states:

> "Everyone has the right to recognition everywhere as a person before the law. Persons of diverse sexual orientations and gender identities shall enjoy legal capacity in all aspects of life. 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. No one shall be forced to undergo medical procedures, including sex reassignment surgery, sterilisation or hormonal therapy, as a requirement for legal recognition of their gender identity. No status, such as marriage or parenthood, may be invoked as such to prevent the legal recognition of a person's gender identity. No one shall be subjected to pressure to conceal, suppress or deny their sexual orientation or gender identity."

The principle then sets out a number of actions which it is said States are to take.

82. The Act is plainly inconsistent with principle 3. An applicant for a recognition certificate must have had a reassignment procedure to alter their genitals and other gender characteristics for the relevant purpose in order to be eligible to apply. Further, a married person cannot obtain a recognition certificate on the basis of that status alone. To the extent that the rebuttable presumption that the legislature did not intend to contravene Australia's international obligations applies, it has been rebutted in relation to principle 3.

Modification of the construction of the Act if required to accommodate international law

83. If, contrary to the above submissions, this Court concludes that the majority's construction of the Act should be modified to accommodate Australia's international obligations, it is respectfully submitted that the modification should be confined to what is necessary to do so and the exercise referred to above must be undertaken[87].

DATED the 27th day of May 2011.

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[86] The Commission's submissions at [34] (AB) and [45] (AB). The principle is incorrectly described as "article 3" at [34].
[87] These submissions at [50] (AB).