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Gender Discrimination issues for Churches

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“Gender” or “Sex” – Recent Case Law

- The law is reducing the amount of obstacles needed to be overcome by transgender persons in order to be recognised as the particular sex they identify with (gender identity). Sexual Reassignment Surgery is not necessary for this.
- The High Court in *NSW Registrar of Births, Deaths and Marriages v Norrie* [2014] HCA 11 recognised that the *Births, Deaths and Marriages Registration Act 1995* (NSW) legally permitted the Registrar to register a person's sex as "non-specific".
 - Norrie, who went by first name only, was issued a change of sex and change of name certificate after undergoing a sex- affirmation procedure. Norrie attempted to register as ‘non-specific’ in relation to gender.
 - The Registrar argued that this was impermissible.
 - The High Court found, “the Act does not require that people who, having undergone a sex affirmation procedure, remain of indeterminate sex, that is, neither male nor female – must be registered, inaccurately, as one or the other”.



“Gender” or “Sex” – Recent Case Law

AB v Western Australia; AH v Western Australia [2011] HCA 42

- The Court had to decide the extent of surgery necessary (if necessary) required for a person to identify themselves as a particular sex in order to change their birth certificate.
- Under the *Gender Reassignment Act 2000* (WA) the Gender Reassignment Act could only change a person’s sex on their birth certificate if the person had undergone gender reassignment procedures.
- Here both applicants had undergone gender reassignment procedures in the form of a bilateral mastectomy and testosterone therapy. Both applicants, however, retained female reproductive systems. The applicants did not contemplate phalloplasty (male genitalia construction) as it was not performed in Australia and had a very low success rate.
- The Board refused to change the applicants’ birth certificates, reasoning that:

The fact of having a female reproductive system is inconsistent with being male. Because it is inconsistent with being male, it is inconsistent with being identified as being a male.”



“Gender” or “Sex” – Recent Case Law

AB v Western Australia; AH v Western Australia [2011] HCA 42

- The High Court had to decide whether the applicants, by reason of their gender reassignment procedures, had the “gender characteristics” of a person of the gender to which the person had been reassigned pursuant to section 15(1)(b)(ii) of the Act, despite still possessing a female reproductive system.
- The High Court accepted the dissenting view in the prior Court of Appeal case, which stated:

“The physical characteristics by which a person is identified as male or female are confined to the external characteristics, for the purpose of the Act.”
- Court stated that a “surgical procedure” is not required of an applicant for a recognition certificate.
- The High Court held that society, “by reference to a person’s appearance and behaviour in the conduct of their life”, should be able to deem that person as conforming to a particular gender.
- Thus, demonstrating hormonal treatment and lifestyle changes was enough to constitute a “reassignment procedure” in the eyes of the Court.



“Gender” or “Sex” – Recent Case Law

Legislative position in Queensland

- Reassignment of “sex” on the Births/Adopted Childrens’ Register requires “sexual reassignment surgery”
 - a surgical procedure involving the alteration of a person’s reproductive organs carried out—(a) to help the person to be considered to be a member of the opposite sex; or (b) to correct or eliminate ambiguities about the sex of the person.
 - Confirmed by two medical practitioners
- It is a notation of the change in the Register, not a retrospective amendment
- But even without reassignment surgery, the person can still identify as being of the opposite gender.



“Gender” or “Sex” – Recent Case Law

Tafao v State of Queensland and Others [2018] QCAT 409

- Tafao was a transgender women prisoner in a male prisoner.
- She had undergone hormone treatment and partial surgery, but still retained male genitalia.

“A person who lives and seeks to live as a member of the opposite sex, will refer to themselves by the language associated with the gender with which they identify. That mode of speech is a characteristic of the attribute [gender identity].... On the facts of this case the Applicant identifies as a member of the opposite sex, that is female, by living or seeking to live as a member of the female sex and referring to herself as female and seeking to be referred to as a female and by feminine pronouns.”



Understanding Discrimination Law - Queensland

•Anti Discrimination Act (QLD) (ADA):

- Discrimination on basis of certain attributes, in certain areas, is prohibited
- Sexuality, Gender Identity and Relationship Status protected attributes
- Gender Identity: person who identifies, or has identified, as a member of the opposite sex by living or seeking to live as a member of that sex; or is of indeterminate sex and seeks to live as a member of a particular sex.
- Areas include: Work (inc voluntary work), education, goods and services, accommodation
- ADA – must be the dominant reason for the decision.

Direct Discrimination

- Less favourable treatment on the basis of an attribute
- Where more than 1 reason - Attribute must be a substantial reason
 - Tafao* – Less favourable treatment (not using “female pronouns”) was not on the basis of the attribute [Gender Identity], but the application of the Custodial Operation Practice Directive.
- Comparator Test
 - Tafao* - Comparator was a cisgender male who engaged in sexual behaviour which threatened his protection. The applicant was treated no less favourably than the comparator would have been treated.



Understanding Discrimination Law - Queensland

•Anti Discrimination Act (QLD) (ADA):

Indirect Discrimination

- Imposition of a term which cannot be complied with (or compliance result in indignity)
 - i.e. That a person use the male toilet when the person identifies as female.
 - The person could comply with the term, but would compliance result in indignity?
- Those without the attribute can comply with the term
- The term is not reasonable to impose
 - Onus of proving reasonableness rests with the Respondent
 - “Test is an objective one, less demanding than a test of necessity, but more demanding than a test of convenience. I am required to weigh the “nature and extent of the discriminatory effect, on the one hand, against the reasons advanced in favour of the term on the other and all other circumstances, including those specified.” *Mahommed v State of Qld*
 - Is it reasonable to require the person to use a male toilet? Conversely, requiring a person to use a “unisex” toilet would arguably be reasonable (and also arguably not amount to indignity).

Understanding Discrimination Law - Queensland

•Anti Discrimination Act (QLD) (ADA):

•Work Area

- Includes paid and volunteer/unpaid work
- Applies during the “lifecycle” of the worker’s engagement (application through to dismissal)

•Education Area

- Educational Authority/Educational Institution (school, college, university or other institution providing training or instructions)
- Applies during the “lifecycle” of the student’s enrolment (application through to expulsion)

•Goods and Services Area

- Any person who supplies goods or services
- But excludes NFP associations for social, literary, cultural, political, sporting, athletic, recreational, community service or other similar lawful purpose. Query: Could this extend to Church care arms?

•Accommodation Area

- Business premises, house/flat, hotel/motel, boarding house/hostel, manufactured home, camping site, building/construction site
- Pre-accommodation and during the term of the accommodation.



Understanding Discrimination Law - Queensland

•Exemptions

•Generic Exemption

•Act does not apply to:

- Ordination of priests, ministers, members of a religious order
- Training/education of persons seeking such ordination/appointment
- Selection or appointment of people to perform functions in relation to, or otherwise participate in, any religious observance or practice

Query: Extent of “religious observance or practice”

- An act in accordance with doctrine of a religious body AND necessary to avoid offending religious sensitivities of the people of the religion (NB – not applicable in work and education areas)

Understanding Discrimination Law - Queensland

•Exemptions

•Work Area

- Genuine Occupational Requirements
- Necessary, Essential and Indispensable to the position
- Objective assessment (is it really necessary) and Subjective Assessment (would this particular employee be otherwise suitable for the position)
- Walsh v St Vincent de Paul (2008 QADT)*
 - President of a St Vincent de Paul Chapter
 - Not inherent requirement that she be a Catholic, despite the role carrying spiritual duties
 - The rules were unclear and inconsistently applied



Understanding Discrimination Law - Queensland

•Exemptions

•Work Area

- Additional Genuine Occupational Requirement exemption
- Work for an educational institution under direction or control of a body established for religious purposes
- Work for a body established for religious purposes and the work genuinely involves adhering to and communicating the body's religious beliefs
- Person openly acts in a way they know, or ought reasonably to know, is contrary to the religious beliefs
- It must be a genuine occupational requirement that person act consistently with employer's religious beliefs
- Discrimination must not be unreasonable, having regard to all circumstances.
 - Harsh, unjust or disproportionate
 - What are the consequences
- Don't ask, Don't Tell provision



Understanding Discrimination Law - Queensland

•Exemptions

•Education Area

- Education Authority that operates wholly or mainly for students of a particular sex or religion
- May exclude applicants not of the particular sex or religion
 - Query – For same sex schools, could this provision apply to an existing student who transitions to a different sex? Probably not, given the wording of the Act.

•Goods and Services Area

- May restrict access to land or building or religious significant to persons not of a particular sex or religion, if the restriction is in accordance with the doctrine of the religion concerned AND necessary to avoid offending religious sensitivities

•Accommodation Area

- Education Accommodation – institution wholly or mainly for students of a particular sex or religion
- Accommodation under the direction or control of a religious body AND the discrimination is in accordance with doctrine AND is necessary to avoid offending religious sensitivities



Understanding Discrimination Law - Commonwealth

- Sex Discrimination Act – Direct or Indirect Discrimination on basis of Sexual Orientation, Gender Identity, Intersex Status
 - Gender Identity: means the gender-related identity, appearance or mannerisms or other gender-related characteristics of a person (whether by way of medical intervention or not), with or without regard to the person's designated sex at birth
 - Intersex Status - means the status of having physical, hormonal or genetic features that are neither wholly female nor wholly male; or a combination of female and male; or neither female nor male.
- Education Area (Exemption includes where institution operated solely for students of a particular sex)
- Goods, services and facilities area (whether for payment or not)
- Accommodation Area (but excluding accommodation provided by a religious body, unless it is Commonwealth funded aged care)



Understanding Discrimination Law - Commonwealth

- Exemptions

- Ordination or appointment of ministers or members of a religious order
- Training or education of such persons
- Selection or appointment of persons to perform duties or functions for the purposes of, or in connection with, any religious observance or practice
- Any other act or practice by a religious body, that conforms to the doctrines, tenets, beliefs or the religions OR is necessary to avoid offending religious susceptibilities of adherents (does not apply to Commonwealth Funded Aged Care, except in employment)

- Religious Educational Institutions

- Employment of a staff member or education of a student – done in good faith to avoid injury to religious susceptibilities

- Exemptions have broader application than the Queensland legislation



Religious Sensitivities Exemption – The Case Law

- Wesley Mission Case (2010 NSW Court of Appeal (NSW Legislation))
 - Same Sex Couple that sought to become foster carers through Wesley Mission
 - Application was rejected by the Wesley Mission
 - Legislation in NSW – any other act or practice of a body established to propagate religion that conforms to the doctrines of that religion OR is necessary to avoid injury to the religious susceptibilities of the adherents of that religion
 - At first instance
 - Religion was “Christianity” – not Wesley Mission. Broad view regarding sexuality
 - Doctrine – principle taught by the religion, in relation to an issue of real significance to the faithful. It must have a source in significant religious texts or oral traditions regarded as authority
 - “Monogamous heterosexual partnership within marriage is both the norm and ideal of the family” is not a “doctrine” of the Christian religion
 - Avoid injury to adherents (all of a significant majority of the adherents) – Christian religion with a diversity of view regarding sexuality.
 - On appeal to Appeal Panel
 - Definition of religion was too narrow – it should be Wesleyanism
 - What is “religion”? Broader interpretation accepted (religion was Wesleyan)



Religious Sensitivities Exemption – The Case Law

- Wesley Mission Case (2010 NSW Court of Appeal (NSW Legislation))
 - On Appeal to Court of Appeal
 - Doctrine – not uncontroversial to use definition “creed or body of teachings proclaimed by ecclesiastical authorities to be true
 - Religion – Wesleyan – focus on their doctrine and adherents
 - Remitted for re-hearing,
 - Doctrine – “particular moral or religious principles taught or advocated” (can include sexuality if so propagated by the Wesley Mission)
 - No need to then consider if there might be injury to adherents (two limbs to the defence, and the first limb was made out)
 - Complaint dismissed



Religious Sensitivities Exemption – The Case Law

- CYC Case (2014 Victorian Court of Appeal)
 - Complainant ran a project for suicide prevention (same sex youths)
 - Sought to book the CYC (Brethren Movement) campsite on Phillip Island
 - Was CYC a “religious body”
 - Majority (2 of 3) said No, it did not exist for religious purposes
 - Secular resort
 - No explicit religious connection (aspirational only to manage the facilities in a Christian spirit and make attendees aware of this)
 - Had a “doctrine” been breached?
 - Difference between “doctrine” and “beliefs”
 - Doctrine – set out in Trust Deed – CYC relied on Plenary inspiration
 - Subsequently (during the appeal) sought to argue that sexuality and sexual activity were also doctrine, but this was rejected.
 - View on homosexuality was not a doctrine – but was an application of the doctrine – more akin to a belief
 - Importantly, Christianity does not impose beliefs on non-Christians – the action taken did not conform with the doctrine



Religious Sensitivities Exemption – The Case Law

- CYC Case (2014 Victorian Court of Appeal) (continued)
 - Injury to adherents?
 - Affront to reasonable expectations of church members?
 - Premises were not church premises
 - Insufficient connection between CYC and Church
 - “Wholly unsurprising that not steps have ever been taken by CYC to prevent its camps being attended by persons in same sex relationships”
 - Leave to Appeal to High Court
 - Not persuaded that the interests of the administration of justice, either generally or in this particular case, require a grant of special leave to appeal. Special leave to appeal refused with costs
 - Does “Beliefs” really help?
 - Queensland Legislation – Doctrine only (not include beliefs) – but Wesley Mission suggests broader meaning
 - SDA – Extends to Doctrines, Tenets and Beliefs
 - But is the discrimination “necessary” to avoid offending religious sensitivities (both limbs in QLD and FWA)
 - Maxwell P - The belief was a rule of “private morality only, and only applied to the sexual practices of adherents – therefore is was not “necessary” to avoid causing offence



What about the proposed Religious Discrimination Bill?

- Bill makes discrimination on the basis of religious belief or activity unlawful (i.e. It provides an additional cause of action for discrimination), and establishes certain defences for religious bodies.
- These defences only apply to complaints of discrimination under the proposed Bill (i.e. Not to complaints under other legislation).
- It has no application to the Sex Discrimination Act.
- It has no application to complaints under the Queensland legislation.
- However, a Statement of Belief will not constitute discrimination (under any Anti-Discrimination Law), unless:
 - It is malicious; or
 - would, or is likely to, harass, vilify or incite hatred or violence against another person or group of persons; or
 - Counsels, promotes, encourages or urges conduct that would constitute a serious offence.



Way forward?

- Work on your doctrines, tenets and beliefs now
- Identify what is acceptable/not acceptable, to ensure consistent application
- Employment/ Volunteers – Should preserve the right to choose (genuine occupational requirements and exemptions for religious observance/practice roles). But consider to what extent this is required, justify it, and apply it consistently?
- Link your charities/ministries closely to your church (ministry, mission and beliefs)
 - Note the CYC Decision where CYC was not closely associated with the Church and carrying out secular activities
 - Check your public communications, websites etc
 - How will injury be caused to adherents by the activities of associated entities
- May need to closely examine constituent documents and employment/volunteer practices to evidence these requirements/desires



Way forward?

- Delivery of services/ church attendees – probably more difficult to rely on an exemption (and often Churches would probably not want to)
 - Maxwell P – For Christianity – belief is a rule of “private morality” and only applied to the sexual practices of adherents
 - Implications – Gender Identity
 - Sporting Activities – until 12 years – no discrimination. From 12 years – can have regard to strength, stamina and physique requirements
 - Toileting/Change Facilities – using disabled toilets may cause undue attention to the individual. Could consider renaming to “Unisex” if ever raised by an individual.
 - Camps and Sleeping Arrangements – separate room?
 - Group Segregation (Boys/Girls Groups) – How will this be decided?
- Vilification provisions – public act that incites hatred, serious contempt or severe ridicule, of persons on ground of sexuality or gender identity

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