

CASE COMMENT: ‘MICHAEL’ V REGISTRAR-GENERAL OF BIRTHS, DEATHS AND MARRIAGES

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The New Zealand Family Court case of *‘Michael’ v Registrar-General of Births, Deaths and Marriages* (Michael)¹ and the recent release of an appeal of two decisions of the Gender Reassignment Board of Western Australia² provide an opportunity to review the issue of the criteria for legal declarations of changes of sex in New Zealand under the Births, Deaths, Marriages and Relationships Registration Act 1995 (BDMRRA).³

In recent years a number of studies of issues facing transgender people,⁴ including issues surrounding legal declarations of ‘sex’ have been undertaken.⁵ In New Zealand section 28(3) of the BDMRRA includes provisions for trans people to apply for changes of the ‘sex’ indicator on their birth certificates.⁶ Section 28 provides for a Court to issue a declaration of sex to be shown on a birth certificate where the Court finds that the person is ‘not a person of the nominated sex’ but (in relevant part):

28(3)(b)(i) Has assumed and intends to maintain, or has always had and intends to maintain, the gender identity of a person of the nominated sex; and

(c) Either—

(i) It is satisfied, on the basis of expert medical evidence, that the applicant—

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1 (2008) 27 FRNZ 58.

2 *AB, AH v Gender Reassignment Board of Western Australia* [2009] WASAT 152; *AH v Gender Reassignment Board of Western Australia* [2009] WASAT 153.

3 The Births, Deaths and Marriages Registration Act 1995 was renamed the ‘Births, Deaths, Marriages, and Relationships Registration Act 1995’, as from 24 January 2009, by s 5(1) Births, Deaths, Marriages, and Relationships Registration Amendment Act 2008 (2008 No 48). The former title was in effect when *Michael* was decided. The current title will be used here.

4 For a discussion of the term ‘transgender’ see below footnotes 21 and 22 and accompanying text.

5 Joy Liddicoat, *To Be Who I am: Report of the Inquiry into Discrimination Experienced by Transgender People, He Purongo mo te Uiuitanga mo Aukatitanga e Pangia ana e nga Tangata Whakawhitira*, (2008) Wellington: Human Rights Commission; Australian Human Rights Commission, *Sex Files: the legal recognition of sex in documents and government records* (March 2009) Sydney: Human Rights and Equal Opportunity Commission; Amnesty International, *Stonewalled-still demanding respect!: Police abuses against lesbian, gay, bisexual and transgender people in the USA* (2006) Oxford: the Alden Press, available at <<http://www.amnesty.org>> at 27 May 2009; Stephen Whittle, Lewis Turner and Maryam Al-Alami, *Engendered Penalties: Transgender and Transsexual People’s Experiences of Inequality and Discrimination* (2007) Wetherby: Communities and Local Government publications; Transgender Law Center, *State of Transgender California: Economic Health of Transgender Californians* (March 2009) available at <<http://www.transgenderlawcenter.org>> at 25 May 2009.

6 Minor amendments to Section 28(1), (2) and (3)(a) by s 16(1), (2) and (3) of the Births, Deaths, Marriages, and Relationships Registration Amendment Act 2008 (2008 No 48) became effective on 24 January 2009.

- (A) Has assumed (or has always had) the gender identity of a person of the nominated sex; and
- (B) Has undergone such medical treatment as is usually regarded by medical experts as desirable to enable persons of the genetic and physical conformation of the applicant at birth to acquire a physical conformation that accords with the gender identity of a person of the nominated sex; and
- (C) Will, as a result of the medical treatment undertaken, maintain a gender identity of a person of the nominated sex.

The New Zealand Human Rights Commission Report ‘To Be Who I am: Report of the Inquiry into Discrimination Experienced by Transgender People, He Purongo mo te Uiuitanga mo Au-katitanga e Pangia ana e nga Tangata Whakawhitiira’ (HRC Report)⁷ found that many trans people have the impression that subsection 28(3)(c)(i)(B) requires full gender reassignment surgery before a declaration of sex will be made.⁸ The HRC Report notes that some people were given this advice by the Department of Internal Affairs (DIA) or their local family court; many of the Family Court cases considering the section are unreported, and it is therefore difficult to obtain certainty on the issue.⁹ The DIA reported to the Human Rights Commission inquiry that a court might determine that a declaration should be issued when ‘substantive, but not complete, surgery has taken place.’¹⁰ However, the DIA noted that family courts often interpret the section contrary to this interpretation and consistent with the interpretation of many trans people, ‘our understanding is that the Family Court to date has often interpreted this [subsection (3)(c)(i)(B)] to mean that full gender reassignment surgery is required.’¹¹ Nevertheless, some trans men who have not had full gender reassignment surgery reported that they have had declarations from the Family Court enabling them to change their birth certificates.¹² At the time of the HRC Report the position was therefore unclear.

The decision in *Michael* was explicitly intended to respond to this lack of clarity. The Court noted that the Registrar-General ‘believes this application raises important and novel issues of public interest not previously considered by the Family Court and seeks a decision that will give guidance as to how the section should be interpreted and applied in future,’ and explicitly stated its intention to provide such guidance.¹³

The facts of the case provide a particularly sympathetic picture. Michael was born with a female body, but identified as male from an early age, and dressed in male clothing from the age of 9.¹⁴ He was aware of a sexual attraction to women at the age of 12, thought of himself as gay, and had several relationships with women.¹⁵ He completed his first university degree at the early age of 19; while at university he became aware of the category of ‘transgender’, and decided that he was transgender rather than gay. He then moved to a city with a large transgender population and lived there as a male for a year.¹⁶

7 Liddicoat, above n 5.

8 Liddicoat, above n 5, 68-70, 72-74.

9 Liddicoat, above n 5, 69.

10 Liddicoat, above n 5, 73.

11 Liddicoat, above n 5, 73.

12 Liddicoat, above n 5, 73-74.

13 27 FRNZ 58, 60.

14 27 FRNZ 58, 60.

15 27 FRNZ 58, 60.

16 27 FRNZ 58, 60.

Michael commenced the process of changing sex in 2003 by consulting a sexual health physician and changing his name by deed poll.¹⁷ In early 2004 he consulted a psychiatrist experienced in dealing with gender identity issues, commenced hormone treatment, and had a bilateral mastectomy as part of his gender reassignment programme.¹⁸ The psychiatrist diagnosed Michael with gender dysphoria according to international guidelines, and the approach taken for his treatment was consistent with the relevant international guidelines, which reflect international professional consensus.¹⁹ Michael's father deposed that both he and the family believe that Michael is in his correct gender.²⁰

The Court discussed transsexualism and gender dysphoria, noting that the latter is 'the enduring, pervasive, compelling desire to be a person of the opposite sex.'²¹ Transsexuals 'are born with the anatomy of a person of one sex but with an unshakable belief or feeling that they are persons of the opposite sex.'²² Gender dysphoria, or gender identity disorder, are the names given to the psychiatric disorder represented by transsexualism.²³ The HRC Report used the term transsexual for those people who have changed, or are in the process of changing, their physical sex to conform to their gender identity; 'trans person' and 'transgender' are used more broadly to include those who may not be able to, or may not want to change their physical sex, as well as others such as cross-dressers, who wear clothing that is considered to correspond to the opposite gender.²⁴

This issue for the Court was the extent of 'medical treatment' necessary to meet the statutory test of 'usually regarded by medical experts as desirable' to 'acquire a physical conformation that accords with the gender identity of a person of the nominated sex.'²⁵ As discussed, the HRC Report noted that many trans people, and perhaps some family courts and employees of the DIA, regarded full gender reassignment surgery as necessary to meet the test. Full gender reassignment surgery, including genital surgery, may not be available to many, may be very costly and may present significant health risks to some people. Many trans people will choose not to have full surgery, or even any surgery, for various reasons, including cultural and religious ones.²⁶ This participant in the HRC research reflects both the understanding of many trans people regarding the requirements at the time of the HRC inquiry, and the difficulty with meeting the requirements as understood, particularly for a female to male trans person:

I can't change [my birth certificate] legally until I have had all surgeries deemed necessary, which for transguys is no mean feat if that includes 'lower' surgery. We can't get that done in New Zealand, most of us don't have the \$50-\$100K needed to do it overseas, it can involve as many as five risky operations with a very variable outcome, and many of us will never choose to have it.²⁷

17 27 FRNZ 58, 61.

18 27 FRNZ 58, 61.

19 27 FRNZ 58, 61-62.

20 27 FRNZ 58, 62.

21 27 FRNZ 58, 62.

22 27 FRNZ 58, 63.

23 27 FRNZ 58, 63; the HRC Report states that some trans people reject the implication that they have a mental illness. Liddicoat, above n 5, 53.

24 Liddicoat, above n 5, 13. It has been noted that many people have complex gender identities, sometimes moving from one 'trans' category to another; in the UK one study found that 44% of cross-dressers intended to live permanently in their preferred gender at some point in the future. Whittle (2007) 14.

25 BDMRRA 1995, s 28(3)(c)(i)(B); 27 FRNZ 58, 68, 70.

26 Liddicoat, above n 5, 20, 69, 96.

27 Liddicoat, above n 5, 69.

Some trans people believe it is inappropriate for the medical profession to make determinations regarding their gender identity.²⁸

In deciding whether Michael met the statutory test for a declaration the Court considered the legislative history of section 28, stating that the changes between the original Bill²⁹ and the section in its enacted form revealed a ‘significant relaxation’ of the extent of medical treatment necessary for a declaration.³⁰ In particular, the Court noted the change in language from ‘all medical procedures usually regarded by medical experts a *necessary*’, to ‘*all* medical treatment usually regarded by medical experts as *desirable*’ to the current requirement of ‘*such* medical treatment usually regarded by medical experts as desirable.’³¹ The Court concluded that Parliament did not intend that all available surgical procedures, including full genital surgery, should be necessary to satisfy the test, but stated that the extent of treatment required to obtain a physical conformation that accords with the nominated sex was not clear.³² In particular, it was not clear whether an applicant had to undergo surgery to alter their genitals in order to satisfy the test, and if so, the extent of such surgery necessary to give the genitals the physical conformation of the nominated sex.³³ Michael had not had any genital surgery.

Interpreting the section, the Court pointed out that the interpretation of ‘medical’ included both psychological and surgical,³⁴ and therefore medical treatment meant both surgical and non-surgical treatment, including hormonal therapy.³⁵ The Court noted that the requirement of ‘a’ physical conformation that accords with the nominated sex rather than ‘the’ physical conformation suggests that complete conformity with the nominated sex is not necessary.³⁶ Importantly, the Court stated that the ‘applicant’s degree of comfort with, or physical conformity to their nominated gender identity is the proper focus of treatment decisions’ and stated that what was intended was a case by case assessment of whether the steps taken satisfied the test.³⁷ The Court concluded that it is not necessary in all cases for an applicant to have undergone full gender reassignment surgery to receive a declaration.³⁸ However, section 28(3)(c)(i)(C) requires that the applicant ‘[w]ill, as a result of the medical treatment undertaken, maintain a gender identity of a person of the nominated sex’, and the Court held that this means that the medical treatment itself must have the effect of maintaining a particular gender identity.³⁹

The Court noted that Michael’s psychiatrist believed that Michael:

has assumed the gender identity of a male, has undergone such medical treatment as is desirable to enable him to acquire the physical conformation of a male, and such medical treatment will allow him to maintain that gender identity.... A hysterectomy, ovariectomy or reconstructive surgery are not essential and

28 Liddicoat, above n 5, 39, 91-92, 93-94.

29 The Births, Deaths and Marriages Registration Bill No 193-1, 5/11/89. cl 29.

30 27 FRNZ 58, 68.

31 27 FRNZ 58, 67-68.

32 27 FRNZ 58, 68.

33 27 FRNZ 58, 70.

34 BDMRRA s 2.

35 27 FRNZ 58, 70.

36 27 FRNZ 58, 70.

37 27 FRNZ 58, 70, 68, 71.

38 27 FRNZ 58, 71.

39 BDMRRA s 28(3)(c)(i)(C); 27 FRNZ 58, 71.

he would not recommend such surgery for Michael at this stage ... [the basic premise is] 'all unnecessary surgery should be avoided'.⁴⁰

Therefore, in applying subsection 28(3)(c)(i)(B) the Court stated that 'the combination of the ongoing testosterone hormone therapy, and the surgery, mean that Michael will never exhibit the secondary sexual characteristics of breasts in future, and therefore will continue to physically conform in that respect to the nominated gender.'⁴¹ The psychiatrist's view that these medical treatments were sufficient for Michael was formed with reference to internationally recognised standards of care, and therefore met the test of 'usually regarded by medical experts as desirable' in that subsection.⁴² To some extent the effects of the hormone therapy are irreversible, and there was evidence that Michael would, as a result of his treatment, maintain a gender identity of male as required by subsection 28(3)(c)(i)(C), and the Court so held.⁴³

This decision is well reasoned, and generally sympathetic to trans people. It accepts and responds to the uncertainty identified in the HRC Report, and clarifies that full gender reassignment surgery is not a requirement in all cases. It also provides guidance as to the considerations that a court may take into account in deciding the extent of surgery necessary. Importantly, it clarifies that female-to-male transsexuals will not, in all cases, have to undergo full gender reassignment surgery in order to obtain a declaration. However, the fact that the determination will be made on a case by case basis still leaves some uncertainty for trans people.

In part in response to the uncertainty prior to the *Michael* case, the HRC Report recommended amending section 28(3)(c)(i)(B) and (C) of the BDMRRA to replace the requirement of medical evidence of physical conformity with the nominated sex with a test requiring medical evidence that the applicant has 'taken decisive steps to live fully and permanently in the gender identity of the nominated sex' and will, as a result of the 'those decisive steps' (rather than 'as a result of the medical treatment undertaken') maintain that gender identity.⁴⁴ It noted that while medical evidence of physical conformity was problematic for many trans people, the proposed amendment retained the objective standard of medical evidence, and aligned it with a broader range of possible medical steps that can be taken to live in a nominated sex.⁴⁵

The Court in *Michael* noted that the approach suggested by the HRC Report recommendation was consistent with observations made by overseas Courts and with the information presented by medical experts in the case, stating that 'the law needs to keep pace with medical research and be applied in a manner that achieves justice for those concerned.'⁴⁶ Indeed, some in the transgender community continue to advocate for implementation of the HRC Report recommendation after the *Michael* decision.⁴⁷ Another option would be to enact legislation such as the Gender Registration

40 27 FRNZ 58, 61.

41 27 FRNZ 58, 72.

42 27 FRNZ 58, 73.

43 27 FRNZ 58, 73.

44 Liddicoat, above n 5, 97-98.

45 Liddicoat, above n 5, 98.

46 28 FRNZ 58, 76.

47 See GayNZ.com Daily News staff, (27 August 2009) 'MPs from across the main political parties are pledging their support for changes to legislation to improve the legal status of transgender people' 27 August 2009 available at <http://www.gaynz.com/articles/publish/2/printer_7828.php> at 28 August 2009, reporting that National MP Nikki Kaye and ACT leader Rodney Hide are supportive, that Green MP Kevin Hague has confirmed support of all nine Green MPs, that Justice Minister Simon Power is 'understood to be supportive' and that the Labour party 'looks favourably on such changes'.

Act 2004 (UK), which provides for recognition of the appropriate gender for people who have, or have had, gender dysphoria, have been living in their acquired gender for two years, and intend to continue living in that gender indefinitely.⁴⁸

Michael was recently cited in Western Australia, where two decisions of the Gender Reassignment Board of Western Australia (GRB), with similar facts to *Michael*, were appealed to the State Administrative Tribunal (Tribunal).⁴⁹ In both instances the female-to-male trans applicants had undergone bilateral mastectomies, and received hormone treatment resulting in extensive physical changes consistent with being male. The GRB refused to issue gender reassignment certificates on the basis that the applicants did not have the gender characteristics of a male, as required, because having a female reproductive system was inconsistent with being male.⁵⁰ The Tribunal considered *Michael* along with a number of Australian cases, noting that *Michael* was of interest because of its similar facts; none of the Australian cases considered a female-to-male transgendered person who had not undergone a hysterectomy.⁵¹ The Tribunal's decision included a list of the changes for each applicant resulting from testosterone treatment and the statement that Parliament did not consider surgery a necessary step in acquiring a specific set of gender characteristics.⁵² It held that the applicants met requirements for a gender recognition certificate, as to refuse certificates on the basis that the applicants retained a uterus would give primacy to 'that anatomical feature to the exclusion of the totality of the male gender characteristics of each applicant.'⁵³ The Attorney-General of Western Australia intervened in the Tribunal review on behalf of the State, arguing that the alterations to the gender characteristics of the applicants were not sufficient for them to be identified as male.⁵⁴ The Attorney-General has reportedly appealed the decision.⁵⁵

Michael sets the standard for interpretation of the present statutory test for a declaration of sex under the BDMRRA, and has provided an example of an appropriate approach to these issues for Australia. It remains for Parliament to consider statutory changes to align the requirements for changes to sex with those in the HRC Report, which reflect international standards.

48 Gender Recognition Act 2004 (UK) s 1, 2; see PRH Webb, 'Case Note: Getting a new birth certificate' (2008) 6 *New Zealand Family Law Journal* 110, 115 (stating that Parliament would do well to enact such legislation).

49 *AB, AH v Gender Reassignment Board of Western Australia* [2009] WASAT 152; *AH v Gender Reassignment Board of Western Australia*. Review by the State Administrative Tribunal of Western Australia is de novo; the Tribunal heard the applications together as the facts in each raised the same issues and the applicants were represented by the same solicitors and counsel. [2009] WASAT 152, 5.

50 Gender Reassignment Act 2000 (WA) s 15(1)(b)(ii); [2009] WASAT 152, 4, 7-9, the GRB does not publish any decisions.

51 [2009] WASAT 152, 21, 24.

52 [2009] WASAT 152, 11-14, 25.

53 [2009] WASAT 152, 30.

54 [2009] WASAT 152, 5, 18-19.

55 Roy Gibson, 'AG bid to bend gender ruling' *The Western Australian*, 16 Sept 2009, available at <<http://aunews.yahoo.com/thewest/a/-/newshome/6037667/ag-bid-to-bend-gender-ruling>> at 16 September 2009.