

## Opinion

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### Policy formulation in a vacuum

The AAT's decision in *HH* (p.838) is compassionate and accords with social reality. It does, however, raise interesting questions regarding the role of the Tribunal in formulating policy. In a majority decision the Tribunal held that *HH*, a transsexual who had been born a male, but who had undergone sex reassignment surgery, was to be treated as a woman for the purposes of the *Social Security Act*.

*HH* applied for age pension at 60 years which is the qualifying age for women. Counsel for the DSS said the Department had not developed any tests to be applied when determining a person's sex and had no strong views either way on the outcome of the case. The Tribunal sought the Department's views on existing policy and of implications for other areas of the *Social Security Act*, such as de facto relationships, but was told there was no policy and the Tribunal was invited to develop policy in this area.

The Tribunal's 'shocked' response at Counsel's request rings a little hollow in view of the fact that it went on to decide that transsexuals who can prove they have had sex reassignment surgery are to be treated as women for the purposes of all sections of the Act. Further, the Tribunal set out guidelines for the administration of its decision, for example, post operative transsexuals should be required to furnish the Department with a certificate along the lines of that provided for in the South Australian *Sexual Reassignment Act 1988*. Transsexuals who undergo surgery outside Australia would be required

to obtain a certificate from an Australian hospital. If this is not policy formulation then what is?

The minority decision in *HH* recognised that the matter was to be determined by the President and arrived at a similar conclusion by a different route. Brennan also had difficulty with the Department's request to develop policy arguing that *Drake v Minister for Immigration and Ethnic Affairs* (1979) 2 ALD 60 states that it is the Tribunal's role to take policy into account but not to formulate policy. Her decision differs from that of the majority in that she agrees that *HH* is to be treated as a woman for the purposes of the age pension provisions but declines to express any view on whether *HH* should be regarded as a woman for the purposes of any other section.

It is Brennan's view that the terms 'man' and 'woman' may be interpreted only in the context of the age pension sections and that they must be interpreted in the light of objects of the Act as a whole. Other provisions, she said, may have been interpreted for entirely different reasons and in the absence of any evidence as to their objectives and associated policy she would be obliged to adopt a very conservative view. In other words, if she was required to decide whether *HH* was a woman for the entire Act then she would decide in the negative despite the reassignment surgery.

Clearly the majority decision in *HH* is preferable. The case demonstrates that the Tribunal is sometimes called upon to formulate policy. That it had done its task well is to its credit, but pretending that it does not formulate policy is simply unrealistic.

[B.W.]

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