other hand, art. 17 is an example of a provision in the Agreement which, in order to have any effect, must prevail against the statutory definition of 'income', and by virtue of s.1208 does so prevail.'

(Reasons, p. 12)

Formal decision

The Federal Court allowed the appeal, set aside the AAT's decision and affirmed the decision of the DSS review officer.

[P.H.]

Wife's pension: male to female transsexual

SECRETARY TO DSS v SRA

(Federal Court of Australia)

Decided: 1 December 1993 by Black CJ, Lockhart and Heerey JJ.

This was an appeal from the decision of the President of the AAT, O'Connor J, in *SRA* (1992) 69 *SSR* 991.

The AAT had decided that a pre-operative male-to-female transsexual could be treated as a woman for the purposes of qualifying for wife's pension under the *Social Security Act* 1947, because 'psychological sex [was] the most important factor in determining sex for the purposes of the *Social Security Act*'.

The legislation

Section 37 of the 1947 Act provided that a woman (who was not an age or invalid pensioner) and who was an Australian resident would qualify for wife pension if she was the wife of an age or invalid pensioner.

Section 3(1) defined 'wife' to mean a 'female married person'; and 'married person' was in turn defined to include a person living with a person of the opposite sex in a marriage-like relationship.

The facts

SRA was born as a male in 1965. At the age of 16 she realised that she was a transsexual and sought psychological counselling. She commenced hormone therapy in 1983 and started to present as a woman. In April 1984, SRA started to live with a man, B. There were some interruptions to this relationship; but SRA and B were living together at the time when the DSS decided that SRA did not qualify for wife pension – October 1990.

In 1989, a psychiatrist advised SRA that she was ready for sex reassignment surgery; but SRA did not proceed with surgery because of the cost. The AAT found that SRA regarded herself as a woman, although she was physically and biologically a man.

Physical characteristics decisive

Black CJ said that, in ordinary English usage, words such as 'male' and 'female', 'man' and 'woman' and the word 'sex' related to anatomical and physiological differences rather than to psychological ones.

Although the *Social Security Act* was concerned with social policy and was beneficial legislation, Black CJ said, ordinary words used in the Act should receive their ordinary meaning. It would be going well beyond the ordinary meaning of the words to conclude that a person with male external genitalia was a 'woman' for the purposes of the *Social Security Act* and could be a 'wife' under the Act.

Primacy could not be given to psychological factors to the virtual exclusion of anatomical factors. It had not been open to the AAT to conclude that SRA was eligible for wife's pension and it had erred in law in doing so: Reasons, pp. 6-7.

Black CJ said that this conclusion was consistent with the decision of the NSW Court of Appeal in *R v Harris & McGuinness* (1988) 17 NSWLR 158, where it had been held that a pre-operative male-to-female transsexual was, and a post-operative male-to-female transsexual was not, a 'male person' under s. 81A of the *Crimes Act* 1900 (NSW) which made it an offence for a male person to procure the commission of an act of indecency between male persons.

The Chief Justice observed that a post-operative male-to-female transsexual could be regarded as a woman for the purposes of the Act:

> 'Whatever may once have been the case, the English language does not now condemn male-to-female transsexuals to being described as being of the sex they profoundly believe they do not belong to and the external genitalia of which, as a result of irreversible surgery, they no longer have. Where through medical intervention a person born with the external genital features of a male has lost those features and has assumed, speaking generally, the external genital features of a woman and has the psychological sex of a woman, so that the genital features and the psychological sex are in harmony, that person may be said, according to ordinary English usage today, to have undergone a sex change.'

(Reasons, p. 9)

Black CJ said that there were limits on the capacity of surgery to change the physical characteristics of a person's sex: a person who had undergone a male-to-female operation could not conceive or bear children and would retain a male's chromosomes; but the expressions 'sex change' and 'sex change operation' were in common use and were clearly understood. Once a male-to-female transsexual had undergone a 'sex change operation', 'the person may properly be described by the word appropriate to the person's psychological sex and to external genital features which are now in conformity with the person's psychological sex': Reasons, p. 10.

In a separate judgment, **Lockhart J** reviewed the history of transsexualism, the distinctions between transsexuals, transvestites, homosexuals and intersexuals, and legislative and judicial developments in Australia, the UK, European countries, the USA, Canada, South Africa and New Zealand.

Lockhart J acknowledged that post-operative transsexuals should be recognised by the law as having changed their gender: 'Post-operative transsexuals should not be denied by society the inner peace of life which is their right': Reasons, p.46.

Lockhart J said he would follow *R v Harris & McGuinness* (above), an unreported Victorian decision, *R v Cogley* (20 February 1989) and a US decision, *Richards v US Tennis Association* 400 NYS 2d 267 (1977). Lockhart J declined to follow an English decision, *Corbett v Corbett* [1971] P 83; and two decisions of the European Court of Human Rights, *Rees v United Kingdom* (1986) 9 EHRR 56 and the *Cossey Case* (1991) EHRR 622; as well as a New Zealand decision, *Re T* [1975] 2 NZLR 449, and a South African decision, *W v W* [1976] 2 SALR 310.

But Lockhart J said that he could not pass beyond the point of treating as female a post-operative transsexual to the recognition of a pre-operative transsexual as being a member of the adopted sex for the purposes of the law:

> 'I recognize the force of the argument in the case of a male-to-female transsexual, that she has doubtless lived most of her life in a position of ambiguity, wanting to be a female but trapped in the body of a male, who later adopts the appearance of a woman, has hormonal treatment

which may result in the enlargement of breasts, and adopts certain secondary sex characteristics. But such a person has not harmonized her anatomical sex and her social sex; they are not in conformity. She still has the genitals of a man. I realize that there are cases (and such is such a case) where a person has not undergone such surgery for legitimate reasons, including its cost or medical or psychological reasons which render them unfit for the operation. Nevertheless the interests of society and the individual must be balanced in the determination of the ordinary meaning of the words with which this case is concerned and the application of the facts to those meanings. The requirement of reassignment surgery also has the benefit of society acknowledging that an irreversible medical decision has been made, confirming the person's psychological attitude.

Negative attitudes towards transsexuals are based fundamentally on religious and moral views and assumptions which are slowly changing in modern society. There is an increasing awareness today of the importance of the right to privacy, and growing tolerance of a person's identity. But where the psychological sex and the anatomical sex of a person do not conform to each other it seems to me that the sex of a person must be determined by the anatomical sex...

I reach this conclusion with regret. A transsexual who genuinely regards himself or herself as having achieved the new sex must find life extremely difficult. Judicial opinions in this area of the law must be liberal and understanding, guided by the signposts of what is in the best interests of society and the transsexual. They do not conflict in the case of the post-operative transsexual, but in my opinion the conflict still exists in the case of the pre-operative transsexual.

Society would in my view regard an anatomical male as male regardless of the feminine appearance of the person or the inner beliefs and convictions of that person. There are, I think, dangers in a male capable, or giving the appearance of being capable, of procreation being classified by the law as a female, but this is plainly not the case after sex reassignment surgery has been performed. The individual is no longer procreatively of his original sex.'

(Reasons, pp. 47-9)

Formal decision

The Federal Court allowed the appeal, set aside the AAT's decision and remitted the matter to the AAT for determination according to law.

[P.H.]

Compensation preclusion: lump sum or periodic payment?

Re BLUNN and CLEAVER

(Federal Court of Australia)

Decided: 26 November 1993 by Sheppard, Neaves and Burchett JJ.

Bruce Cleaver received payments of sickness and unemployment benefits between October 1989 and November 1990. In February 1992, a decision was made under the *Commonwealth Employees' Rehabilitation and Compensation Act* 1988 that Cleaver was entitled to weekly compensation from his employer for certain periods between September 1989 and November 1990, totalling $22,950.40.

The DSS then notified Cleaver's employer under s.1174 of the *Social Security Act* 1991 that Cleaver had received payments of social security benefit of $7614.18 during the period for which he was entitled to compensation; and required the employer to pay that amount to the DSS.

Cleaver's employer paid that amount to the DSS and the balance to Cleaver. The DSS subsequently amended the notice so as to claim $4644.65, and refunded the balance to Cleaver.

The SSAT then decided that the DSS could not recover the amount of $4644.65 from Cleaver's compensation entitlements. The DSS applied to the AAT for review of the SSAT's decision.

The AAT referred a question of law to the Federal Court under s.45 of the *AAT Act*: was the compensation payment made to Cleaver properly characterised as 'periodic compensation payments' or 'compensation in the form of a lump sum' under Part 3.14 of the *Social Security Act* 1991?

Periodic payments of compensation

On behalf of Cleaver, it was argued that the character of the payment in question should be determined by looking at the manner in which the payment was received by Cleaver. On the other hand, the DSS contended that its character depended on the nature of the payment and the circumstances which gave rise to the entitlement to payment.

The Full Court considered the history of the compensation preclusion provisions and the passage of the 1991 'plain English' Act. The Court said that the perceived legislative intention in Part 3.14 of the 1991 Act was to prevent 'double dipping'. In the light of that intention, all the provisions in Part 3.14 should operate according to the nature of the entitlement to the compensation payment rather than to the manner in which the payment was, in fact, made.

The Act appeared, on its face, to distinguish between a payment 'in the form of a lump sum' and 'a series of periodic compensation payments'. Considered without reference to the context, those references might appear to favour Cleaver's argument, the Full Court said. But the context and purpose served by the provisions in Part 3.14, and the consistency and fairness of their operation, were better guides to their meaning than a bare appeal to the literal sense of the words used:

> 'The language of the provisions does not so clearly and unambiguously support the construction contended for by [Cleaver] as to require us to construe the legislation in that way. We see nothing incongruous in treating a person who receives a single payment which is made up of weekly amounts of compensation in respect of a number of consecutive weeks as being the recipient of a series of periodic compensation payments.'

(Reasons, p.33)

The alternative construction contended for by Cleaver would lead to arbitrary and capricious results, the Court said. It was prepared to adopt the approach for which the DSS argued.

'Plain English'?

The Court concluded its judgment by criticising the drafting of the 1991 Act. While the aim of making legislation shorter, simpler and more easily intelligible would provide a good reason for expressing that legislation in 'plain English', the Court said that the aim should not have priority over the first requirement of legislation – the clear expression of what Parliament intended. The Court continued:

> '...the increasingly complex society in which we all live very often demands that legislation be expressed in a complex form. That is the factor which will so often operate to prevent simplicity in legislative drafting. The area of social services legislation is a complex one as the terms of the previous legislation and judicial decisions on it have demonstrated. That is what the draftsman of this legislation may have sought to overcome. Regrettably, the replacement consists of a maze of provisions made the more complex by prolix definitions, provisos and exceptions. Both those who