

BETWEEN:



NSW REGISTRAR OF BIRTHS,
DEATHS AND MARRIAGES
Appellant

and

NORRIE
Respondent

10

APPELLANT'S SUBMISSIONS

PART I: INTERNET CERTIFICATION

1. The appellant ("the Registrar") certifies that these submissions are in a form suitable for publication on the Internet.

PART II: CONCISE STATEMENT OF THE ISSUES

- 20 2. The issue the Registrar contends the appeal presents is whether s 32DC of the *Births, Deaths and Marriages Registration Act 1995* (NSW) ("the Act") permits registration of a person's change of sex to a category other than "male" or "female" and, if so, whether it extends to allowing the registration of a specification of the kind sought by the Respondent, namely, "non-specific".

PART III: s 78B NOTICES

3. The Registrar does not consider that notification under s 78B of the *Judiciary Act* is necessary.

PART IV: CITATIONS OF REASONS FOR JUDGMENT

4. The citations of the decisions below are:

- 30 (a) in the New South Wales Court of Appeal — *Norrie v NSW Registrar of Births, Deaths and Marriages* [2013] NSWCA 145 ("CA");

(b) in the Appeal Panel of the New South Wales Administrative Decisions Tribunal — *Norrie v NSW Registrar of Births, Deaths and Marriages* [2011] NSWADTAP 53;

(c) in the New South Wales Administrative Decisions Tribunal — *Norrie v NSW Registrar of Births, Deaths and Marriages* [2011] NSWADT 102.

PART V: RELEVANT FACTS

5. The respondent (“Norrie”) was born in Scotland as a male and in 1989 underwent sexual reassignment surgery (CA [6]).
6. On 26 November 2009, Norrie made an application to the Registrar to register a change of sex under s 32DA of the *Births, Deaths and Marriages Registration Act 1995* (NSW) (“the Act”) to the category of “*Non Specific*” (CA [6]-[7]). Norrie also made an application for a change of name under s 27 of the Act (CA [7]).
7. Because Norrie’s birth had not been registered in NSW, ss 32DA-DD of the Act were potentially apposite. Section 32DC empowers the Registrar to determine an application, by a person who satisfies the criteria in s 32DA (including having undergone a “*sex affirmation procedure*”), by registering the person’s *change of sex* or refusing to register the person’s *change of sex*.
8. On 24 February 2010, the Registrar wrote to Norrie purporting to approve both of her applications. The letter attached a *Change of Name Certificate* and a *Recognised Details (Change of Sex) Certificate*, both of which recorded Norrie's sex as “*Not Specified*” (CA [8]).
9. On 16 March 2010, the Registrar wrote to Norrie informing her of two decisions, altering the approvals purportedly given on 24 February 2010:
 - (a) a decision that the approval of Norrie’s application for a change of sex had been beyond power and that, as a result, the *Recognised Details (Change of Sex) Certificate* issued under s 32DD had been issued in error; and
 - (b) a decision that the *Change of Name Certificate* had been reissued so that the entry “Not Specified”, in relation to “sex”, had been replaced with the words “Not Stated” (CA [8]).

10. On 26 March 2010 Norrie lodged an application for review of the Registrar's two decisions in the Administrative Decisions Tribunal, which application was dismissed: [2011] NSWADT 102. Norrie then appealed to the Appeal Panel of the Administrative Decisions Tribunal on a question of law in relation to the first decision only, relating to the change of sex certificate (CA [9]). The appeal was dismissed: [2011] NSWADTAP 53.
11. Norrie then appealed to the Court of Appeal of the NSW Supreme Court asserting, inter alia, that the Appeal Panel erred in holding that s 32DC does not permit registration of a person's change of sex to a category other than "male" or "female" and by failing to hold as a matter of law that it was open to the Registrar to register Norrie's sex as
10 "Non Specific" (CA [51]).
12. The Court of Appeal upheld the appeal, concluding that:
 - (a) s 32DC does permit registration of a person's change of sex to a category other than "male" or "female";¹ and
 - (b) it was potentially open to the Registrar to register Norrie's sex as "*Non Specific*", subject to evidence as to, and consideration of, whether or not this term fell within the meaning of "sex" as employed in the Act.²
13. The Court of Appeal then remitted the matter to the Tribunal to make factual findings on the appropriate classification of Norrie's sex. In doing so, the Court did not identify the categories of a person's "sex" that may be registered under Part 5A.³
- 20 14. In the Court of Appeal, Sackville AJA adopted Beazley ACJ's analysis of the facts, legislation and arguments presented on appeal, and stated his own reasons for concluding that the Appeal Panel erred on its construction of s 32DC (CA [208]-[209]). Preston CJ of LEC agreed with the reasons of both other judges, and added some observations of his own (CA [282]).

¹ CA [200] per Beazley ACJ (Preston CJ of LEC agreeing at [281]), at [242], [257], [274] per Sackville AJA; at [287], [291] per Preston CJ of LEC

² CA [203]-[205] per Beazley ACJ (Preston CJ of LEC agreeing at [282] and [306]), and at [274]-[279] per Sackville AJA

³ CA [205] per Beazley ACJ; at [275], [278]-[279] per Sackville AJA; at [281], [306] per Preston CJ of LEC

PART VI: ARGUMENT

15. The Act is relevantly an Act to provide for the registration of births, deaths, marriages, adoptions, changes of name and changes of sex, and the keeping of registers for recording information about those matters (s 3).
16. The Registrar is required to maintain a register of "registrable events" (s 43(1)). A "registrable event" is defined in s 4 to mean "a birth, adoption or discharge of adoption, change of name, change of sex, death or marriage". An application for the registration of a change of sex is dealt with in Part 5A of the Act (see CA [21]-[27] for the full text of the relevant statutory provisions).
- 10 17. Part 5A, encompassing ss 32A-32J and entitled "Change of sex", applies where a person has undergone a "sex affirmation procedure". Sections 32B-32D deal with alteration of a "person's sex" in the birth certificate of a person whose birth had been registered in NSW. Sections 32DA-32DD deal with a person whose birth is not registered under the Act but who wishes to apply to register the person's sex in the Register (after having undergone a "sex affirmation procedure").
18. Relevantly here, s 32DC of the Act empowered the Registrar to determine an application, by a person who has undergone a "sex affirmation procedure" (s 32A) and who otherwise satisfies the criteria in s 32DA, for the registration of the person's sex in the Register, by registering the person's change of sex or refusing to register the person's change of sex.
- 20 19. Neither "sex" nor "change of sex" is defined in the Act.
20. The Registrar's contentions are that a person can only undergo a "change of sex" to either "male" or "female", and that in any case specifications such as "non-specific" are not capable of being registered. Those contentions are supported by:
- (a) textual considerations;
 - (b) the ordinary use of language, and the absence of any basis for the claimed broader meaning/s;
 - (c) the purpose and consequences of the provisions;
 - (d) the existence of "intersex" persons not altering this reasoning or supporting the Court of Appeal's conclusions; and

(e) the legislative history.

(a) *Textual Considerations*

21. Section 32A of the Act provides that:

“*sex affirmation procedure* means a surgical procedure involving the alteration of a person’s reproductive organs carried out:

- (a) for the purpose of assisting a person to be considered to be a member of the opposite sex, or
- (b) to correct or eliminate ambiguities relating to the sex of the person.”

10 22. The term “sex affirmation procedure” implies falling within one or other of the two basic categories of sex.

23. Similarly, the reference in s 32A(a) to “member of the opposite sex” manifests that “sex” is taken to be a binary term, involving two classifications, male or female. The notion of there being an opposite presupposes a relevant pairing.

20 24. The alternative definition, in s 32A(b), is “to *correct* or *eliminate* ambiguities relating to the sex of the person”, which again implies falling within one category or other. The reference to a surgical *procedure* “to *correct* or *eliminate* ambiguities relating to the sex of the person” implies not some statutory acceptance of a range of categories that might be officially recognised, but an acceptance that people may choose to undergo a surgical procedure in order to bring themselves more clearly within one of the two generally-accepted categories.

25. The references to “*change of sex*” (ss 32D(2), 32DC(1), 32DD(1)) also implicitly suggest moving from one accepted category to the other.

26. If the Parliament had meant to recognise some third category (or even many categories, as contemplated by the Court of Appeal), it could readily have said so – and it certainly would not have required the undertaking of a surgical procedure as the precondition of recognising that category or categories.

27. The Court of Appeal attributed significance to the fact that, whilst “sex” was qualified by “opposite” in s 32A(a), it was not so qualified in s 32A(b).⁴ That conclusion is contrary to

⁴ CA [185]-[186] per Beazley ACJ, [246]-[247] per Sackville AJA.

a basic presumption of statutory construction – that where the legislature uses the same word (“sex”) in one part of an Act, especially in a single provision, it should be given the same meaning, in the absence of good reason to the contrary.⁵

28. There is nothing in s 32A(b) which suggests that the word “sex” is intended to have a different meaning in that subsection to its binary meaning in s 32A(a). Whilst subs. 32A(a) and (b) are clearly directed towards different circumstances, the use of the term “sex” in each is the same. As the Appeal Panel concluded at [23]:

10

The interpretation of s 32A put forward by [Norrie] is also contrary to the plain meaning of the words in the provision. When interpreted in context, s 32A(a) refers to surgery performed on a person who is male or female for the purpose of that person being considered to be a person of the opposite sex. The word “opposite” suggests that gender is binary - there are only two alternatives - male or female.

20

Section 32A(b) refers to surgery performed on a person who is not unambiguously male or female (sometimes referred to as androgynous or intersex) and who wishes to correct or eliminate that ambiguity by being considered to be either male or female. The purpose of the surgery is to “correct or eliminate” the ambiguity in relation to their sex. Read in context, s 32A(b) means that the surgery is carried out to alter the person's reproductive organs so that the person can more definitively be regarded as either male or female.

(b) Ordinary use of language, and lack of basis for claimed broader meaning

29. In the absence of a statutory definition of the terms “sex” and “change of sex”, these words should be given their natural and ordinary meaning, unless the Act indicates an intention to depart from the ordinary meaning (which, as described above, it does not). The ordinary use of language supports the Registrar’s construction of the term “sex”. Identification of people as either “male” or “female” is a practice which is deeply engrained and of very long-standing.

30

30. There is no material support for the suggestion that there have been developments relating to the meaning of a person’s “sex” reflected in the literature, case law and dictionary definitions such as to indicate the Parliament meant to refer to something else. For example, the only dictionary definition cited in support by Beazley ACJ at CA [84]-[90] was from the online version of the Oxford English Dictionary (OED), yet that still referred, in its primary definition, to “the two main categories”. It also referred to “In extended use,

⁵ *Registrar of Titles (WA) v Franzon* (1975) 132 CLR 611 at 618 per Mason J; *Hatcher v Cohn* (2004) 139 FCR 425 at [51] per Kiefel J (“words are to be assumed to be used consistently: *Craig, Williamson Pty Ltd v Barrowcliff* [1915] VLR 450 at 452, unless a contrary intention appears.”)

esp. as the third sex”: There is no basis for suggesting the Parliament intended some such extended use. Further, the “third sex” notion referred to in that definition seems more like the notion of “intersex”, discussed below, than some recognition of a range of categories, extending to, for example, “non specific”. The definition from the online version of the OED has only been extended recently. The 2007 6th edition of the *Shorter Oxford English Dictionary* did not contain the extended definition.

31. Courts have grappled for some time with the question of how to determine the legal status of transsexual persons.⁶ The principal modern Australian authorities on identification and legal significance of sex establish the following propositions:

- 10
- (a) the ordinary English meaning of the word “sex” is the quality of being male or female;⁷
 - (b) the law in most societies (including, implicitly, ours) is based on an assumption that there are only two sexes;⁸
 - (c) there is no place in the law for a “third sex”;⁹
 - (d) it is impractical and would cause insuperable difficulties to abandon the two-sex assumption at law;¹⁰
 - (e) the task of the law is to assign people to one sex or the other for legal purposes rather than seeking to discover some entity that is the person’s “true sex”.¹¹

20

32. In the case of *In the Marriage of C and D (falsely called C)*, Bell J held in the Family Court that an “hermaphroditus” person “was neither man nor woman but was a combination of both, and a marriage in the true sense of the word ... could not have taken place and does not exist” (at 345).¹² On that basis, the marriage was held to be a nullity. This decision has been the subject of strong criticism.¹³ It illustrates that to seek to

⁶ Note *AB v Western Australia* (2011) 244 CLR 390 at [1].

⁷ *Secretary, Department of Social Security v SRA* (1992) 43 FCR 299 (*SRA case*) at 301-2 per Black CJ

⁸ *SRA case* at 313 per Lockhart J

⁹ *R v Harris* (1988) 17 NSWLR 158 at 194 per Matthews J (see also at 182), Street CJ agreeing at 162

¹⁰ *Re Secretary, Department of Social Security and “HH”* (1991) 23 ALD 58 at [13]; *R v Harris* at 194 (see also at 182)

¹¹ *Kevin v Attorney General for the Commonwealth* (2001) 165 FLR 404 at [119], [315] per Chisholm J

¹² (1979) 35 FLR 340 at 345.

¹³ See *R v Harris* at 176-7

recognise some middle ground between male and female may relegate the persons in question “to a legal ‘no man’s land’”.¹⁴

33. Given the deep-seated assumption of two sexes, which sounds throughout the legal system, it is improbable that the legislature would overthrow fundamental principles or depart from the general system of law without expressing its intention with irresistible clearness.¹⁵ There is no indication in the Act itself that Parliament intended to take so radical a step as recognising categories of sex that are not “male” or “female” by the enactment of Part 5A of the Act. It can be assumed that if Parliament had intended to enact so fundamental a reform, it would have said so in express and unmistakable terms. For example, one would expect Parliament to define, with some specificity, in the Act the parameters and criteria for membership of the additional categories of sex (or, given the Act is a registration statute, to identify what those additional categories are).

10

34. Beazley ACJ also referred to various academic material at [91]-[114], concluding at [114] that “[i]t is apparent from this material that questions of sexual identity are more complex and the characterisations of persons being ‘male’ or ‘female’”. This statement illustrates the uncertainty created by the indeterminate potential categories of registration. For example, Beazley ACJ:

20

- (a) employed the concepts of “gender” and “sex” (and “gender identity” and “sexual identity”) interchangeably;¹⁶ and
- (b) proceeded on the basis that the Act in effect provides for the registration of a person’s “sexual identity” – which on any view is a different and much broader concept than that actually provided for in the Act (being registration of a “person’s sex”), as it would encompass, for example, sexual orientation.¹⁷

35. The error in relation to transposition of language in the judgments illustrates the dangers of relying upon such academic material – let alone references to *Wikipedia* (see at [112]-[113]) – in order to construe the Parliament’s intention in invoking the well-understood and long-established notion of “sex”.

¹⁴ *R v Harris* at 194, quoting an American decision which is more fully quoted at 182.

¹⁵ See *Potter v Minahan* (1908) 7 CLR 277 at 304 per O’Connor J for the general principle; note more specifically the *SRA case* at 326-7 per Lockhart J.

¹⁶ At [11], [46], [76], [78], [83], [104], [108], [110], [152], [177], [184], [190]-[191], [204]; esp at [184], [190]-[191], [204] per Beazley ACJ

¹⁷ At [45], [78], [129], [147], [177], [182], [190]-[191], [193], [199], [200], [204], [205] esp at [200] (“There are other sexual identifications that may be registered”) per Beazley ACJ:

36. Beazley ACJ stated at [178] that “[i]f the underlying scientific or medical advancement, or even sociological research, is not fully accepted by the community, change in the language associated with such matters is likely to have variable acceptance in the community”. Yet the material referred to by the Court did not establish there had been more than thin, variable and ambiguous acceptance for moving beyond the two established categories.

(c) *Purpose and consequences of the provisions*

37. The level of ambiguity as to the outer limits of what is registrable is particularly significant given that the objects of the Act are to register particular categories of information and keep registers recording information about those categories (ss 3, 43). If there is any doubt
10 about the proper construction of the terms “sex” and “change of sex” in Part 5A of the Act (which is not conceded), a construction that promotes the purpose or object underlying the Act should be preferred.¹⁸

38. Registration has broader consequences than those immediately felt by the individual. Registration is not merely a matter of publicly recognising a person’s private identity – it confers a legal status upon a person. Section 32J of the Act provides that a person who registers a change of sex under Part 5A is, for the purposes of, but subject to, any law of New South Wales, a person of the sex so registered. The effect of that section is significant. It has the consequence that the individual who registers a change of sex is thereafter recognised by law as the sex registered for the purpose of all NSW laws, unless a
20 contrary law provides otherwise (see also s 32I).

39. There are a large number of NSW laws which are otherwise premised on a binary division between the sexes into “male” and “female”.¹⁹ There are also a large number of NSW laws which use the term “sex” in conjunction with “opposite sex”.²⁰ Similarly, sex is a basic category of human identification in a wide range of laws in other jurisdictions.²¹

¹⁸ s 33 *Interpretation Act 1987* (NSW)

¹⁹ See for example, *Crimes Act 1900*, s 61H; *Crimes (Administration of Sentences) Regulation 2008*, cl 22-23, 31, 43(2); *Law Enforcement (Powers and Responsibilities) Act 2002*, s 32(7), (11); *Terrorism (Police Powers) Act 2002* Sch. 1 (5); *Court Security Act 2005*, s 10; *Children (Education and Care Services) Supplementary Provisions Regulation 2012*, cl 34(3); *Transport Employees Retirement Benefits Act 1967*, s 23(4); *Industrial Relations Act 1996*, s 55(4); *Landlord and Tenant (Amendment) Act 1948*, s 62(5)(t); *Conveyancing Act 1919*, ss 34(1), s 76; *Combat Sports Regulation 2009*, cl 38; *Privacy and Personal Information Protection Act 1998*, s 53(7A); *Succession Act 2006*, s 54.

²⁰ *Anti-Discrimination Act 1977*, ss 24, 31, 31A, 34A(3), 38A, 38Q; *Building Professionals Act 2005*, ss 68, 83; *Coal and Oil Shale Mine Workers (Superannuation) Act 1941*, Sch 2, cl 27(9); *Crimes Act 1900*, s 45; *Crimes (Forensic Procedures) Act 2000*, ss 44, 51A; *Privacy and Personal Information Protection Act 1998*, s 53(7A), 55(4A); *Property (Relationships) Act 1984*, s 62; *Status of Children Act 1996*, s

40. In that regard it may be noted that registration under Part 5A of the Act has broader consequences under the laws of other States and Territories. Legislation in South Australia, Queensland, Tasmania, the Australian Capital Territory and the Northern Territory each gives effect to a *Recognised Details Certificate* issued under s 32DD of the NSW Act certifying a person's "change of sex", with the effect that the person is, for the purpose of the laws in those other States or Territories, a person of the sex as stated in the NSW certificate.²²
41. It is unlikely to have been the Parliament's intention, in enacting Part 5A of the Act, to allow persons to register a sex other than "male" or "female", and for those persons to immediately thereafter find themselves with no definable position under a broad range of statutory provisions, both under NSW law and elsewhere.
42. Beazley ACJ stated at [191] that any difficulties caused by the construction adopted "is a matter for consideration by the legislature and/or law reform bodies". Yet such a result should not lightly be accepted: "the law presumes that statutes do not contradict one another".²³ Further, there is "a need to apply the law consistently" across all areas of law with respect to sex, so far as possible.²⁴ The statement by Beazley ACJ serves to emphasise the problem; it does not answer it.
43. A further and significant difficulty arising out of the Court of Appeal's decision is that the potential categories of registration are indeterminate. Before the Tribunal, it was not in dispute that there was evidence establishing that Norrie would meet the legislative

14(6); *Succession Act 2006*, s 54. Further, a definition of a "transgender" person in the same terms as s 38A of the *Anti-Discrimination Act 1977* is found in the following statutes: *Crimes (Forensic Procedures) Act 2000*, s 3; *Law Enforcement (Powers and Responsibilities) Act 2002*, s 32(11); *Terrorism (Police Powers) Act 2002*, Sch 1 cl 11.

²¹ See for example, at the federal level: *Crimes Act 1914* (Cth) (contains multiple references to a person's "sex", the "same sex" and the "opposite sex"); *Marriage Act 1961* (Cth) (definition of "marriage"); *Defence Forces Retirement Benefits Act 1948* (Cth) (which outlines the benefits a widow to a male retired serviceman will receive in the event of that servicemen's death); *Social Security Act 1991* (Cth) (provisions relating to widows' pensions provide that only females are capable of being a widow to a deceased male spouse); *Higher Education Funding Act 1998* (Cth) (which provides that grants made under the Act are to be made equally available to male and female students); *Superannuation Act 1922* (Cth) (which makes a number of distinctions between male and female pensioners); *Fair Work Act 2009* (Cth) and the *Maternity Leave (Commonwealth Employees) Act 1973* (Cth) (which provide that an employee's rights to maternity leave only applies to females).

²² See *Sexual Reassignment Act 1998* (SA), s 8(2) and *Sexual Reassignment Regulations 2000* (SA), cl 5; *Births, Deaths and Marriages Registration Act 2003* (QLD), s 24; *Births, Deaths and Marriages Registration Act 1999* (Tas), s 28H; *Births, Deaths and Marriages Registration Act 1997* (ACT), s 29(2) and *Births, Deaths and Marriages Registration Regulation 1998* (ACT), cl 8; *Births, Deaths and Marriages Registration Act* (NT), s 28J.

²³ *Commissioner of Police v Eaton* (2013) 294 ALR 608 at [48] per Crennan, Kiefel & Bell JJ.

²⁴ See *SRA case* at 327 per Lockhart J.

requirements under the Act to register a change of sex from male to female but she did not identify as either male or female.²⁵ Yet the Court held that, upon remittal, “[t]he question for the Tribunal will be whether there is evidence to support an entry in the register of Norrie’s sex as ‘non specific’”.²⁶ Beazley ACJ stated at [205] that the categories are “likely” to include “intersex”, “androgynous” and “transgender”. The categories of “sex” were effectively left open-ended by the Court.

10 44. The Court did not identify with any precision the criteria or evidence by reference to which recognition and registration of some new sex is to be accepted by the Registrar and/or the Tribunal. Beazley ACJ and Preston CJ of LEC referred to whether the proposed specification has come into common or current usage.²⁷ Sackville AJA appeared to envisage that medical opinion might be significant in this regard.²⁸

45. It is significant that the only evidence that the Act itself requires be submitted with an application to register a change of sex (s 32DB(a)) or an application to alter the register to record a change of sex (s 32C(a)) is statutory declarations by two medical practitioners “verifying that the person the subject of the application has undergone a sex affirmation procedure”.²⁹ That requirement suggests that Parliament had in mind the provisions applying upon a change of sex from male to female, or vice-versa. If other broad and indeterminate categories had been in contemplation then additional, detailed information would have been required relating to the nature and existence of the claimed category, and
20 how the applicant fell within that category.

46. It is most unlikely that the Parliament would have intended that the identification of fundamental categories of registration be left to the Registrar’s or Tribunal’s assessment of changing linguistic practices or variable medical opinion. The Court’s decision puts a very evaluative, subjective and potentially controversial assessment into the hands of a public official where there is no statutory guidance on how to approach the task.³⁰

²⁵ Appeal Panel at [9(4)-(5)]

²⁶ CA [203] per Beazley ACJ; see also at [274]-[278] per Sackville AJA

²⁷ CA [204] per Beazley ACJ; [290] per Preston CJ of LEC.

²⁸ CA [277].

²⁹ See in this case the Statutory Declaration of Dr Frank Schultheiss (dated 9 December 2009) and the Statutory Declaration of Dr John Kearley (dated 10 December 2009)

³⁰ See analogously, *AB v Western Australia* (2011) 244 CLR 390 at [38]

47. These difficulties cannot be sidestepped by invoking the notion that the statute is always speaking.³¹ That principle invokes the familiar connotation/denotation principle.³² That principle involves identification of some essential, core attributes of the term. No such meaning was identified by the Court. For the reasons given, it is most unlikely to have been “whatever ‘sex’ comes to mean in common, or medical, usage”.

(d) *Intersex persons*

48. The Court of Appeal, in referring to the academic material and more broadly, relied upon the existence of the condition of being “intersex” as a key basis for concluding that the term “sex” is not used in a binary sense in Part 5A.³³ It may be noted that Norrie does not
10 assert she is an “intersex” person, and did not apply to be registered as such.³⁴

49. The Court proceeded on the basis that the term “intersex” has the meaning ascribed to it by Professor Greenberg; namely, a congenital condition of a person whose sex chromosomes or sexual anatomy do not fit clearly into the binary male/female categories.³⁵ That congenital condition arises regardless of, and prior to, any sex affirmation procedure. By that definition, one cannot undergo surgery in order to become intersex.

50. However, the Court appears to have proceeded on the assumption that a person could have a surgical procedure and then apply to the Registrar to register the person’s “change of sex” under s 32DC to the category of “intersex”.³⁶ In doing so, the Court did not consider or resolve the question of how such a procedure could meet the description of a *sex affirmation procedure*; that is, be carried out to *correct* or *eliminate* ambiguities – rather
20 than to *create* ambiguities – relating to the sex of the person: s 32A(b).³⁷ Part 5A is directed to “*change of sex*”.³⁸

³¹ Cf. CA [288] per Preston CJ of LEC.

³² See *Lake Macquarie Shire Council v Aberdare County Council* (1972) 123 CLR 327 at 331 per Barwick CJ.

³³ CA [112]-[114], [205] per Beazley ACJ ; at [240] per Sackville AJA, at [291] per Preston CJ of LEC

³⁴ Accepted by Beazley ACJ at CA [206]; at [228] per Sackville AJA

³⁵ See CA [109], [112]-[113] per Beazley ACJ; at [228] per Sackville AJA; at [290] per Preston CJ of LEC

³⁶ CA [205] per Beazley ACJ; at [240] per Sackville AJA, at [291] per Preston CJ of LEC

³⁷ See CA[205] per Beazley ACJ; at [240], [257] per Sackville AJA; at [291] per Preston CJ of LEC

³⁸ See heading to Part 5A is “*Change of sex*” which is taken to be part of the Act: s 35(1)(a) of the *Interpretation Act 1987* (NSW); see also s 32DC (“the person’s *change of sex*”).

51. There is no basis for suggesting that what the Parliament intended to permit was recognition of new sexual categories after surgical procedures which produce ambiguity. That conclusion is reinforced by the fact that the Act is a registration statute.

52. If, as is apparent from the terms of s 32A(b), one cannot undergo a sex affirmation procedure in order to change to "intersex", the existence of the intersex condition becomes largely irrelevant to the construction of the term "sex" in Part 5A.

(e) *Legislative history*

10 53. It would be expected that a radical reform altering the established social and legal understanding as to the categories of "sex" would be mentioned in the parliamentary extrinsic materials. In fact, those materials run counter to the Court of Appeal's construction.

54. Part 5A (not including ss 32DA-32DD and s 32J) was inserted into the Act by the *Transgender (Anti-Discrimination and Other Acts Amendment) Act 1996* on 1 October 1996 (the "1996 amending Act"). The second reading speech for the underlying bill stated that its purpose was "to provide for the legal recognition of post-operative transgender persons", in particular "to enable persons who were born in this State and have undergone sexual reassignment surgery to apply for new birth certificates showing their new sex" (Hansard, Legislative Assembly, Minister Yeadon, 1 May 1996).

20 55. It is apparent that when Parliament (in naming the 1996 amending Act) and the Minister (in the second reading speech) referred to "transgender" persons, the reference was to persons having physical characteristics of one sex and psychological and other characteristics of the other sex (such that those persons might undergo sexual reassignment surgery). In this respect, it is made clear in the second reading speech that the Parliament was proceeding on the basis that there are two sexes when using the term "transgender". The second reading speech contains references to:

(a) "...people who are born as a member of one sex, but who assume the characteristics of the other sex";

(b) "...a person who is born as a member of one sex but who has lived, or lives, or seeks to live as a member of the other sex";

- (c) "...persons who cross-dress or who have adopted characteristics of the other sex, say, for example, a male person who from time to time wears makeup, or high heels, who has not chosen to live as a member of the other sex".

56. The 1996 amending Act also inserted Part 3A ("Discrimination on transgender grounds") into the *Anti-Discrimination Act 1977*. This defined a "transgender" person, for the purposes of the *Anti-Discrimination Act*, as (s 38A):

"a reference to a person, whether or not the person is a recognised transgender person:

- 10
- (a) who identifies as a member of the opposite sex by living, or seeking to live, as a member of the opposite sex, or
 - (b) who has identified as a member of the opposite sex by living as a member of the opposite sex, or
 - (c) who, being of indeterminate sex, identifies as a member of a particular sex by living as a member of that sex,

and includes a reference to the person being thought of as a transgender person, whether the person is, or was, in fact a transgender person."

57. The concept of a transgender person in the *Anti-Discrimination Act 1977* is thus a person who identifies as "a member of the opposite sex" or "a member of a particular sex", that is either male or female, not a person who is or identifies as being of indeterminate sex or whose gender identity is fluid. Again, it is clear from the use of the phrase "opposite sex" that the word "sex" in s 38A of the *Anti-Discrimination Act 1977*, means "the character of being either male or female".

20

58. It is to be presumed that, when Parliament passed the 1996 amending Act (thereby amending both the *Anti-Discrimination Act* and the *Births Deaths and Marriages Registration Act*), Parliament used the words "transgender" and "sex" in the amending Act consistently.

59. The respondent's case is not assisted by the definition of a "transgender" person in s 38A(c) of the *Anti-Discrimination Act 1977*. First, s 38A(c), though recognising that some persons may be "of indeterminate sex", nevertheless requires that they identify as a member of a "particular sex" in order to come within the definition of a "transgender" person (see also s 38Q which refers to a "person [who] treats the transgender person as being of the opposite sex to the sex with which the transgender person identifies").

30

60. Secondly, while Parliament chose to include the term “indeterminate sex” in the definition of “transgender person” in s 38A, there is no such usage of the term “indeterminate sex” in Part 5A of the Act itself. If Parliament had intended this to be one of the possible registration *outcomes* permitted under Part 5A, it could and would have said so. Recognition of some indeterminacy in some people may have lain behind the reference in s 32A of the Act to procedures “to correct or eliminate ambiguities”. That reinforces the point that the precondition of an application under Part 5A is a sex *affirmation* procedure.

10 61. Part 5A was next amended on 27 February 2009 by the *Courts and Crimes Legislation Amendment Act 2008* which inserted new ss 32DA-32DD and 32J into Part 5A of the Act (the “2008 amending Act”), thereby bringing persons not born in New South Wales within the provisions of Part 5A. The Agreement in Principle Speech noted the absence of a “means for transgender people who were born overseas to have their change of sex legally recognised in New South Wales” and provided that the bill would amend the Act “to provide that New South Wales residents regardless of where they were born will be able to apply for legal recognition of their change of sex” (Hansard, Legislative Assembly, Minister Perry, 6 June 2008). The Agreement in Principle speech for the 2008 Bill supports the view that Parliament was proceeding on the basis that there are two sexes only (stating “applicants must be unmarried and have undergone surgery for the purpose of assisting them to be considered a member of the *opposite sex*”).

20 **PART VII: APPLICABLE CONSTITUTIONAL AND LEGISLATIVE PROVISIONS**

62. The relevant legislative provisions are set out in Annexure A.

PART VIII: PRECISE FORM OF ORDERS SOUGHT

63. The Registrar seeks the following orders:

- (a) Appeal allowed.
- (b) All orders of the Court of Appeal except order 3(c) are set aside.
- (c) The appellant to pay the respondent’s costs in this Court.

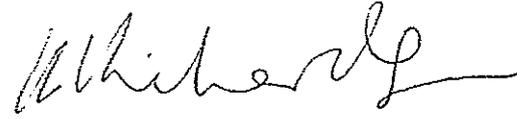
PART IX: ORAL ARGUMENT

64. The Registrar estimates that 1.5 to 2 hours will be required for the presentation of his oral argument in chief and 30 minutes in reply.

Dated: 12 December 2013



J K Kirk
Ph: 02 9223 9477
Fax: 02 8028 6060
kirk@wentworthchambers.com.au



K M Richardson
Ph: 02 8239 0266
Fax: 02 9210 0649
kate.richardson@banco.net.au

ANNEXURE A TO APPELLANT'S SUBMISSIONS

Births, Deaths and Marriages Registration Act 1995 (NSW) (electronic compilation)

Section 4 (Historical version for 1 March 2011 to 9 April 2012)

4 Definitions

(1) In this Act:

...

registrable event means a birth, adoption or discharge of adoption, change of name, change of sex, death or marriage.

...

Section 27 (Historical version for 1 March 2011 to 9 April 2012)

27 Application to register change of child's name

An adult person may apply to the Registrar, in a form approved by the Registrar, for registration of a change of the person's name if:

- (a) the person's birth is registered in the State, or
- (b) the person was born outside Australia, the person's birth is not registered in Australia and the person has been resident in the State for at least 3 consecutive years immediately preceding the date of the application.

Part 5A (Historical version for 1 March 2011 to 9 April 2012)

32A Definitions

In this Part:

recognised details certificate means a certificate issued under section 32DD certifying the sex of a person who has undergone a sex affirmation procedure.

sex affirmation procedure means a surgical procedure involving the alteration of a person's reproductive organs carried out:

- (a) for the purpose of assisting a person to be considered to be a member of the opposite sex, or
- (b) to correct or eliminate ambiguities relating to the sex of the person.

32B Application to alter register to record change of sex

(1) A person who is 18 or above:

- (a) whose birth is registered in New South Wales, and
- (b) who has undergone a sex affirmation procedure, and
- (c) who is not married,

may apply to the Registrar, in a form approved by the Registrar, for alteration of the record of the person's sex in the registration of the person's birth.

(2) The parents of a child (or a parent if the applicant is the sole parent), or the guardian of a child:

- (a) whose birth is registered in New South Wales, and
- (b) who has undergone a sex affirmation procedure, and
- (c) who is not married,

may apply to the Registrar, in a form approved by the Registrar, for alteration of the record of the child's sex in the registration of the child's birth.

32C Application must be accompanied by declarations by doctors

An application under section 32B must be accompanied by:

- (a) statutory declarations by 2 doctors, or by 2 medical practitioners registered under the law of any other State, verifying that the person the subject of the application has undergone a sex affirmation procedure, and
- (b) such other documents and information as may be prescribed by the regulations.

32D Alteration of register

(1) The Registrar is to determine an application under section 32B by making the alteration or by refusing to make the alteration.

(2) Before altering the record of a person's sex in the registration of the person's birth, the Registrar may require the applicant to provide such particulars relating to the change of sex as may be prescribed by the regulations.

(3) An alteration of the record of a person's sex must not be made if the person is married.

32DA Application to register change of sex

(1) A person who is 18 or above:

- (a) who is an Australian citizen or permanent resident of Australia, and
- (b) who lives, and has lived for at least one year, in New South Wales, and
- (c) who has undergone a sex affirmation procedure, and
- (d) who is not married, and
- (e) whose birth is not registered under this Act or a corresponding law,

may apply to the Registrar, in a form approved by the Registrar, for the registration of the person's sex in the Register.

(2) The parents of a child (or a parent if the applicant is the sole parent), or the guardian of a child:

- (a) who is an Australian citizen or permanent resident of Australia, and
- (b) who lives, and has lived for at least one year, in New South Wales, and
- (c) who has undergone a sex affirmation procedure, and
- (d) who is not married, and
- (e) whose birth is not registered under this Act or a corresponding law,

may apply to the Registrar, in a form approved by the Registrar, for the registration of the child's sex in the Register.

32DB Documents to accompany application to register change of sex

An application under section 32DA must be accompanied by:

- (a) statutory declarations by 2 doctors, or by 2 medical practitioners registered under the law of another State, verifying that the person the subject of the application has undergone a sex affirmation procedure, and
- (b) such other documents and information as may be prescribed by the regulations.

32DC Decision to register change of sex

(1) The Registrar is to determine an application under section 32DA by registering the person's change of sex or refusing to register the person's change of sex.

(2) Before registering a person's change of sex, the Registrar may require the applicant to provide such particulars relating to the change of sex as may be prescribed by the regulations.

(3) A registration of a person's change of sex must not be made if the person is married.

32DD Issue of recognised details certificate

(1) This section applies if the Registrar registers a person's change of sex under section 32DC.

(2) The Registrar must, on application by or on behalf of the person, issue a certificate certifying the particulars contained in the entry in the Register.

32E Issuing of new birth certificate

(1) After the record of a person's sex is altered under this Part, a birth certificate issued by the Registrar for the person must, unless otherwise requested by the person, show the person's sex in accordance with the record as altered.

(2) Any such birth certificate must not include a statement that the person has changed sex.

32F Issuing of old birth certificate

(1) The child of a person the record of whose sex is altered under this Part, or a person prescribed by the regulations, may apply to the Registrar for a birth certificate for the person that shows the person's sex before the record was so altered.

(2) Despite section 32E, the Registrar may issue such a birth certificate to the child or prescribed person.

32G, 32H (Repealed)**32I Effect of alteration of register and interstate recognition certificates**

(1) A person the record of whose sex is altered under this Part is, for the purposes of, but subject to, any law of New South Wales, a person of the sex as so altered.

(2) A person to whom an interstate recognition certificate relates is, for the purposes of, but subject to, any law of New South Wales, a person of the sex as stated in the certificate.

(3) An *interstate recognition certificate* is a certificate issued under the law of another State that is prescribed by the regulations for the purposes of this section.

32J Effect of registration of change of sex and interstate recognised details certificates

(1) A person the record of whose sex is registered under this Part is, for the purposes of, but subject to, any law of New South Wales, a person of the sex so registered.

(2) A person to whom an interstate recognised details certificate relates is, for the purposes of, but subject to, any law of New South Wales, a person of the sex stated in the certificate.

(3) An *interstate recognised details certificate* is a certificate issued under the law of another State that is prescribed by the regulations for the purposes of this section.

Section 43 (Historical version for 1 March 2011 to 9 April 2012)**43 The Register**

(1) The Registrar must maintain a register or registers of registrable events.

(2) The Register:

(a) must contain the particulars of each registrable event required under this Act, or another law, to be included in the Register, and

(b) may contain such further information as the Registrar considers appropriate for inclusion.

(3) The Register may be wholly or partly in the form of a computer data base, in documentary form, or in another form the Registrar considers appropriate.

(4) The Registrar must maintain the indexes to the Register that are necessary to make the information contained in the Register reasonably accessible.

(5) A reference in this Act to the *Register* is a reference to all the registers kept under subsection (1).

(6) The Register may be referred to as the Births, Deaths and Marriages Register and a reference in any Act or any instrument made under any Act to the Births, Deaths and Marriages Register is taken to be a reference to the Register.

All of the above provisions are still in force, in this form, at the date of filing the Appellant's submissions.