

IN THE HIGH COURT OF AUSTRALIA

SYDNEY REGISTRY

No: S273 of 2013

ON APPEAL FROM THE NEW SOUTH WALES COURT OF APPEAL

BETWEEN:

NSW REGISTRAR OF BIRTHS,
DEATHS AND MARRIAGES

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Appellant

and

NORRIE

Respondent

RESPONDENT'S SUBMISSIONS

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PART I: INTERNET CERTIFICATION

1. The respondent (“**Norrie**”) certifies that these submissions are in a form suitable for publication on the internet.

PART II: CONCISE STATEMENT OF THE ISSUES

2. Norrie agrees with the Appellant's (“**Registrar**”) identification of the issues.

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PART III: S78B NOTICES

3. Norrie does not consider that notification under s 78B of the *Judiciary Act* 1903 (Cth) is necessary.

PART IV: RELEVANT FACTS

4. Subject to the following, Norrie does not contest, or wishes to add to, the content of the Registrar's narrative statement of facts contained in Part V of the Registrar's submissions¹.

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5. First, although some factual aspects of Norrie's predicament were uncertain in the New South Wales Administrative Decisions Tribunal (“**ADT**”), there are concurrent findings of fact that:

¹ Henceforth, reference to the Registrar's submissions will be denoted by use of the prefix “**AS**” followed by the relevant paragraph numbering.

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- 5.1 the surgical procedure Norrie underwent in 1989 involved castration and the creation of a semi-functioning vagina;
- 5.2 following that procedure, Norrie perceived herself and has been perceived by others, to be of 'non-specific' sex; that is, as neither male nor female; and
- 5.3 this perception is reflected in the statutory declarations of two medical practitioners².

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6. Secondly, the appeal to the New South Wales Court of Appeal ("Court of Appeal") proceeded on the assumption that Norrie had satisfied all of the statutory preconditions in s 32DA(1) of the *Births, Deaths and Marriages Registration Act* 1995 (NSW) ("Act"), including the requirement to have undergone a 'sex affirmation procedure' (CA [6]), [210(6)].

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7. Thirdly, as to AS 12(b), it is more accurate to say that although it did not discount the possibility that it might do so, the Court of Appeal did not ultimately determine that the power in s 32DC of the Act extended to allow registration of a specification of 'non-specific'. To the extent that views on this question were expressed in the separate judgments in the Court of Appeal at all, they were made in the context that the question of law on appeal did not squarely raise the question of what sex identification may be raised on the register if Norrie's construction of s 32DC was correct (CA [167]). The expression of views by the Judges in the Court of Appeal's in this respect was also influenced by the belief that the question needed to be addressed, on the merits; and was influenced, among other things, by medical opinion (eg CA [277]-[278]). These were factual matters which remained unsettled in the ADT and which explained the Court of Appeal's remittal.

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PART V: STATEMENT OF LEGISLATIVE & REGULATORY PROVISIONS

8. Norrie accepts the Registrar's statement (in Annexure A to the Registrar's submissions) of applicable statutory provisions and regulations.

PART VI: ARGUMENT

General introduction

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9. The primary purpose of a statute dealing with the registration of a person's birth, death and marriage, as well as, a person's sex, is to record the truth about those matters in so far as they concern that person.

10. As a factual matter, there is no doubt that there are and always have been people who are neither 100% male nor 100% female but are somewhere on a continuum between them. This can be gleaned, inter alia, from:

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² CA [6], [25]; *Norrie v Registry of Births, Deaths and Marriages* [2011] NSWADT 102 at [5], [95]; *Norrie v Registrar of Births, Deaths and Marriages* [2011] NSWADTAP 53 at [1].

- 10.1 the dictionary definitions of the word “hermaphrodite” and its origins;
- 10.2 the dictionary definitions of the words “sex” and “gender”;
- 10.3 common general knowledge;
- 10.4 text books on the subject (particularly the works of Professor Greenberg);
- 10 10.5 recognition in judicial and quasi-judicial authority, including:
- 10.5.1 *AB v Western Australia* (2011) 244 CLR 390 at 402 [23] (“**AB**”);
- 10.5.2 *In the Marriage of C & D (falsely called C)* [1979] 35 FLR 340 at 340, 342-343 (“**In the Marriage of C and D**”);
- 20 10.5.3 *Secretary, Department of Social Security v SRA* (1993) 43 FCR 299 at 315 (“**SRA**”);
- 10.5.4 *Bellinger v Bellinger* [2003] 2 AC 467 at 472[6] (“**Bellinger**”);
- 10.5.5 *Pant v Nepal* (2008) NJA Law Journal 262 (Supreme Court of Nepal); and
- 10.5.6 *Hogan v. Ontario (Health and Long-Term Care)* (2006) HRTO 32 at [123] - [127] (Human Rights Tribunal of Ontario); and
- 30 10.6 increasing legislative and parliamentary recognition, including:
- 10.6.1 *Sex Discrimination Act* 1984 (Cth), s 4 (definition of “intersex status”);
- 10.6.2 *Births, Deaths and Marriages Registration (Amendment) Bill* 2013 (ACT), s 24(1)(c)(ii); Schedule 1 Part 1.2;
- 40 10.6.3 *Legislative Act* 2001, s 169B (proposed definition of “intersex person” to be inserted by the previous bill); and
- 10.6.4 *Anti-Discrimination Act* 1977 (NSW) (“**Anti-Discrimination Act**”), s 38A(c).
11. Putting paragraphs 9 and 10 above together, one would not superimpose on a statute dealing with registration of births a requirement that the recording of a person's sex must be confined to male or female.

Textual considerations

12. It is an ordinary adjunct to a scheme whereby births, deaths and marriages are registered, with records retained, that facility is provided to permit alterations to records to reflect change. One of the particulars in respect to registration of the birth of a child is to specify the child's sex³.

10 13. Part 5A of the Act is concerned with circumstances arising from a change of sex. The essential pre-requisite is that the applicant has undergone a 'sex affirmation procedure'. It is to be recalled that the appeal to the Court of Appeal was conducted on the premise that Norrie had satisfied this requirement, but without any finding as to which of the two purposes of the surgical procedure referred to in s 32A(a) or (b) was applicable.

20 14. Section 32A evinces legislative recognition that there are persons who have ambiguities relating to their sex⁴. This was a reality previously reflected in a number of case law authorities⁵ which Parliament would be taken to have known of prior to the enactment of this legislation. This legislative recognition negates a binary definition of "sex".

15. Read literally, the legislation does not preclude the construction of s 32DC favoured by the Court of Appeal. There is no qualifying word of 'opposite' before 'sex' in s 32DA. Further, there is no express requirement that the sex which the person applies under s 32DA(1) to have registered as the person's sex in the 'Register' be either the purpose or the result of the 'sex affirmation procedure' defined in s 32A.

30 16. An illustration of the literal operation of Part 5A, not dissimilar from the present context, is as follows:

Take, the case of a person who is intersex; mis-identified and registered at birth as a 'male'. Assume that this person positively does not identify as a male, but is persuaded by friends, and the medical views of the time, to believe the person's gender is female and so might attain greater happiness by adopting the appearance, or obtaining physical characteristics associated with being a female. The person undergoes a surgical procedure to remove the penis and has a vagina created. However, following the surgery, the person no more identifies as a female than the pre-surgical identity of being a male. In terms of the pre-surgical objective, the person might have envisaged that undergoing this procedure might enable that person to apply to have sex registered as a female (the pre-surgery intended purpose), but in the result, this person does not subsequently (post-surgery) identify as a female.

³ Cl 5 of the Births, Deaths & Marriages Registration Regulation.

⁴ CA [243].

⁵ For example, the recognition of hermaphrodites in *In the Marriage of C & D* at 340, 342-343; and in *SRA* at 315.

In this hypothetical, the person (registered as a 'male') may be taken to have undergone a surgical procedure for the purpose of assisting that person to be considered a female. But there is nothing in s 32DA(1)(c) that mandates the criteria that the sex affirmation procedure must result in the person identifying as a female, following the surgical removal of the reproductive male organ.

17. The person in this example is not precluded by the terms of s 32DA(1) from applying for registration of the person's sex to a category other than female. A concomitant to any surgical procedure is the risk of failure of that surgery: in this example, either of being that the separate purposes in either s 32A(a) or (b), respectively, are not fulfilled in the result (CA [198], [244], [294]-[296]). In the context of beneficial legislation of this kind⁶, it should not lightly be inferred that Parliament would have intended to deprive this applicant, or this class of applicant of the benefit of having registered a change of the (pre-surgical) sex identification of male, the gender identity that the applicant does not relate to, to the true (post-surgical) position that the person does not identify exclusively as male or female.
18. By way of further example, read literally, Part 5A would not even preclude an intersex person, not born in New South Wales, who does not identify exclusively as male or female, but who identifies as an intersex person, who has surgery for the purpose of confirming that the person is a half way between male and female (that is, a hermaphroditus verus). Such surgery is to "correct" an ambiguity relating to sex, involving say, castration, satisfying the meaning of a sex affirmation procedure in s 32A(b) and having that designation recorded in the 'Register'. The same would apply if a male or female person desires for some reason to become intersex and undertakes a procedure for that purpose. The Registrar's proposition that such surgical procedures would actually be for the purpose of *creating* an ambiguity could only be correct if the starting premise is that a person's sex identity is binary. That premise is not applicable in every case.
19. (AS 21-24) The suggested implication of an exclusive binary classification contained in the expression 'sex affirmation procedure' should be rejected. As to s 32A(a), the express reference to the qualifying word 'opposite' does not implicitly limit the available options for the purpose of s 32DC (compare with East or West, or opposite sides of a square). It is notable, in contrast, that the *Births, Deaths and Marriages Registration Act* 1999 (Tas) indicates that when a birth certificate is issued after a registration of change of sex, it is to be registered with a notation that the person was previously registered as the 'other' sex⁷. The presence of opposite extremes does not negate the existence of a status lying between those extremes. Further, s 32A(a) relevantly speaks of a person's surgical purpose, but even if, say, a 'male' person undertook the surgery with the relevant purpose of being considered to be a 'female', there is no requirement in s 32A or s 32DA(1)(c) that such surgical purpose be fulfilled, in the sense that in that the pre-surgical male identifies as a post-surgical female (CA [296]). As to s 32A(b), as Sackville AJA correctly noted (at CA [243]-[244]), the language of that particular provision implies, firstly, that there are persons who, without surgery, actually have

⁶ *IW v City of Perth* (1997) 191 CLR 1 at 12, 39; *AB* at 402 [24].

⁷ S 28D of *Births, Deaths and Marriages Registration Act* 1999 (Tas).

ambiguities relating to sex⁸; and, secondly, the person may have surgery for the purpose of correcting or eliminating those ambiguities, yet still retain them following surgery.⁹

- 10 20. (AS 25-26) The expression ‘change of sex’ in s 32DC does not advance the Registrar’s position any further. Section 32DC does not provide that the ‘change’ of sex must be from male to female or vice versa. It simply means alteration of a person’s sex, in the sense of some difference (manifested, at least, by alteration of a person’s reproductive organs), relating to a person’s sex, between the past (prior to surgery) and the present (post-surgery).
- 20 21. In this regard, even with surgery, there are limits upon the extent to which a person’s physical sex characteristics may be altered: the result of the surgery is inherently relative in that regard¹⁰. There is no warrant for burdening this expression with any further implied limitation that the change represents movement from one polar extreme to another. To the contrary, the legislative recognition (in s 32A) that there are persons who are not unambiguously as male or female tells against such implication. Further, it would have been a simple matter for Parliament to have inserted the limitation for which the Registrar contends in s 32DC. The Registrar’s contention involves reading in words in s 32DC (and s 32DA) which do not appear and which could have simply been inserted.
22. The Registrar does not declare whether, following the surgical procedure involving alteration of Norrie’s reproductive organs, Norrie is, in fact, a male or a female. The true position for Norrie, after the surgery, is that, *physically*, she is not unequivocally male or female and, *psychologically*, she does not specifically identify as male or female. The record of alteration, or “change” of sex, following that surgery, on an official register should reflect that position.
- 30 23. (AS 27-28) The reasoning of Beazley ACJ (at CA [184]-[188], with whom Preston CJ of LEC agreed, at [294]-[296]) and Sackville AJA ([248]), for different reasons, correctly indicates why the ordinary tenet of statutory construction relied upon by the Registrar is, in this instance, inapposite. As to the former, as Beazley ACJ pointed out, s 32DA, by its terms, is not confined to registration of a person’s ‘opposite’ sex to that which the person had prior to or after the surgical procedure. As to the latter, Sackville AJA correctly noted that the two different purposes in s 32A(a) and (b) have different work to do, in respect to two different kinds of surgical procedure; and the latter may facilitate a change from a person’s sex from the ambiguities of intersex to that of being male or female: there is no scope for the notion of an ‘opposite’ sex in this example.
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⁸ Cf *AB* at [23], where the Court noted that the definition of ‘reassignment procedure’ in the legislation in question made it plain that a person’s gender characteristics may be ambiguous.

⁹ See also Preston CJ of LEC at [295]-[296].

¹⁰ *AB* at [21], [31] & [33]. Even at the level of a person’s pre-surgical ‘purpose’, the Appeal Panel of the ADT acknowledged that s 32A(b) encapsulated a surgical purpose that a person could “more definitively” - not unequivocally - be regarded as male or female (see AS 28).

24. If, as the Registrar later contends (AS 52), the existence of the intersex 'condition' persons is irrelevant for the construction of 'sex' in Part 5A, the Registrar's construction of s 32A would involve a superfluity: if everyone is born unequivocally male or female, but a person undertakes a sex affirmation procedure for the purpose of assisting the person to be a member of the opposite sex, there would be no need for s 32A(b), as the purpose of correcting or eliminating ambiguities relating to the sex of a person would be subsumed within the purpose already referred to in s 32A(a); that of assisting the person to be considered to be a member of the opposite sex.

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Ordinary language

25. (AS 29-32 and 47) The Registrar's contention that the 'ordinary' meaning of a person's 'sex' is exclusively confined to 'male' or 'female' merely posits a preference for the traditional, and perhaps conventional, meaning of the word. But traditional or conventional understandings of a word not defined in the Act are not determinative in this context¹¹.

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26. The notion that a person's 'sex' is exclusively male or female does not accord with the experience of the law, even before the enactment of Part 5A. It was already plain, before then, that *the law* recognised persons who did not fit within this exclusive binary classification. It is unnecessary to allude to dictionary definitions, academic materials or medical literature to be satisfied of *that* fact. As the Registrar acknowledges, the case of *In Marriage of C and D* recognised that the husband was intersex¹². The judgment of Lockhart J in *SRA* also recognised a variety of different sex identities, including, but not limited to, intersexuals (hermaphrodites and pseudo-hermaphrodites)¹³. The House of Lords in *Bellinger* recognised persons who could be conveniently and in shorthand described as 'intersexual'¹⁴. More recently, of course, the Court in *AB* noted after its survey of the relevant authorities:

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".. the sex of a person is not, and a person's gender characteristics are not, in every case unequivocally male or female. As the definition of 'reassignment procedure' makes plain, a person's gender characteristics may be ambiguous"¹⁵.

27. As the Court of Appeal held, the existence of intersex persons may help to explain, in part, the distinct kind of sex affirmation procedure referred to in s 32A(b) of the Act (CA [182]). Also, as Sackville AJA noted, the contemporaneous introduction into New South Wales ("NSW") law of the concept of a person of 'indeterminate sex' in the parallel amendments to state anti-discrimination legislation is also an

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¹¹ An analogy arises in respect to the inexact concept of a person's 'name': see *Avery v Registrar of Births, Deaths & Marriages* (2010) 79 NSWLR 354 at 365-366 ([51]-[55]) and 389 [179].

¹² Referred to in the case as a hermaphrodite at 340, 342 and 343.

¹³ (1993) 43 FCR 299 at 315.

¹⁴ [2003] 2 AC 467 at 472 [6].

¹⁵ (2011) 244 CLR 390 at 402 [23].

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indicia that sex is not always to be regarded as a binary concept (at CA [249]-[253]).

28. (AS 33-36) Once the premise is accepted that Parliament recognised that there are persons who, before or after the relevant surgery, may not be unambiguously male or female, it is not a 'radical' step to conclude that Parliament also intended that following such surgery, the person's sex may be altered so as to be *not specifically* male or female, since that designation is the most accurate description of the person's sex. What *would* be a radical conclusion would be that the official record of the person's altered sex would become factually inaccurate for the sake of a *priori* societal conceptions.

Consequences of construction

29. (AS 37-42) Section 32J, properly construed, supports Norrie's position. Whilst it erects a primary, if not default, position of a person's 'sex', for the purposes of NSW law, within its terms, that default position may be displaced. If, for the range of State statutes cited by the Registrar, many of which require interference with a person's bodily integrity, there is legislation that is avowedly premised on a binary classification, then it is simply a matter of construing the relevant legislation to the particular circumstances of the case (CA [191], [271]-272]). That might direct an outcome - involving a choice between one of two sexes - based upon a person's anatomical status. As cases such as *SRA* demonstrate, this choice may be difficult¹⁶, but they are cases where, unlike the meaning of 'sex' in the subject Act, there were words in legislation that expressly confined a choice to male or female. In some cases, it may further be noted, such as the *Crimes (Forensic Procedures Act) 2000* (NSW), the enforceability of provisions may depend upon the consideration of practicability.

30. But because s 32J effectively sets a default position of a person's sex, to suggest that it must harmonize with other statutory provisions expressly premised upon a binary construction is to turn the point of the default provision on its head: it should be the other statutory provisions which should, so far as practicable, accommodate the default position absent good reason and sometimes there will be good reason to depart from that position.

31. Whether or not a person's altered sex is recognised in other State or Territory jurisdictions is no more relevant than the recognition of the person's sex in NSW, for the same reasons. Still less is it appropriate to seek to 'harmonize' the Act with Commonwealth law.

32. (AS 43-46) Norrie's application was for her sex to be recognised as 'non-specific'; which, stated more fully, meant sex that was not specifically male or female. Because of the way that her dispute with the Registrar has progressed through the ADT, and then to the Court of Appeal, involving the determination of a preliminary question of law on the construction of s 32DC, it was no part of the Court of

¹⁶ In *SRA*, for example, the Federal Court had to make a choice on the basis of diverse criteria, including anatomical features of sex and psychological sex: 43 FCR 299 at 327.

Appeal's determination, should it (as it eventually did) reject the Registrar's construction, to explore the outer limits of what might, for the purposes of s 32DC, be recorded otherwise than by use of the designation of 'male' or 'female'. Such task required determination of factual findings relating to Norrie's application, influenced as well, by medical opinion.

33. This procedural course was urged upon, or acquiesced in, by the Registrar before the ADT below (before the Member and before the Appeal Panel) with the result that it may now be strictly unnecessary for the Court to supply an essentially advisory opinion on what else other than the 'male' or 'female' designations may be recorded for the purposes of s 32DC. At any rate, insofar as Norrie's personal position is apparent upon the evidence, to permit the specification of 'non-specific', in the sense described, would not appear to present an insuperable evaluative determination to be made by the Registrar. That supposition appears to be reflected in the Registrar's initial decision to approve of Norrie's application on 24 February 2010, which reflected the former belief that some specification other than 'male' or 'female' might be utilised to record a change of sex (albeit on the basis - not applied for by Norrie - that Norrie's sex might be described as 'not specified') (CA [8]). The Registrar's concern about indeterminate categories is overstated if, as Norrie submits, the power in s 32DC extends to recording the designation 'non-specific' as shorthand description of a sex that is not unambiguously male or female.

34. The repeated thematic reference in the Registrar's submissions to Norrie's preferred construction ushering in 'radical' change is, at base, an alarmist floodgates argument. In this case, Norrie genuinely believes (and has been found) not to identify specifically as a male or female and the statutory declarations of two medical practitioners supply medical support for Norrie's application and contention that following the sex affirmation procedure, she is not "specific(ally)" male or female. There should be no reason to fear that the Registrar will not have the means, in future cases, of discerning genuine applications from non-genuine cases. Where an applicant's perception of their gender accords with medical opinion (manifested in the statutory declaration) the Registrar need not concern himself or herself with making evaluative, subjective or controversial assessment. Indeed, as occurred in Norrie's case, should the Registrar be left in any doubt as to the applicant's status following a sex affirmation procedure, the Registrar may make further enquiry of the medical practitioners concerned, including ascertaining the basis or bases of the opinions expressed.

40 Intersex persons

35. The Registrar's submissions regarding the existence of intersex persons manifests (ironically) a marked ambivalence. On the one hand the Registrar apparently endorses (AS 28) the Appeal Panel's interpretation of s 32A(b), which identified intersex persons, and acknowledges (AS 60) that some indeterminacy in the sex of a person may have lain behind s 32A(b). On the other hand, the Registrar contends (at AS 52) that the existence of the intersex 'condition' is largely irrelevant to the construction of the term 'sex' in Part 5A of the Act notwithstanding that the existence of this condition, and its legislative recognition, clearly tells against the

suggested implications that 'sex', where it appears in Part 5A, must exclusively be a binary concept.

36. (AS 48-50) It is important to place the Court of Appeal's reference to intersex persons in its proper context. As indicated, it was not necessary for the purposes of the appeal to the Court of Appeal on the preliminary question of law to determine what other specification or specifications other than 'male' or 'female', could be used by the Registrar when exercising the power under s 32DC.
- 10 37. The Court of Appeal referred to, and used, the existence of 'intersex' persons in order to reject the Registrar's contentions that: (a) the current, ordinary meaning of 'sex' was confined to the binary classification it posits; and (b) the meaning of 'sex', within Part 5A of the Act in general and s 32DC in particular, was exclusively confined to this binary classification. In these respects, as the Court of Appeal held, the existence of intersex persons helps to explain in particular, the type of procedure referred to in s 32A(b) of the Act.
38. It is clear, for example, from the judgment of Sackville AJA (at CA [240]) that when a brief reference was made by his Honour to the specification of 'sex' other than 'male' or 'female' that might be inserted in s 32DC, the term 'intersex' (and, for that matter, the other terms identified by Beazley ACJ at CA [205]) was simply mentioned as another designation for a sex identity that is not male or female that may be registered.
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Terminology

39. It is not necessary in this appeal to deal with the precise terminology which is appropriate for Norrie. "Unspecified" is inappropriate because it suggests a mere omission to complete a form although this was the original term proposed by the Registrar. The order of the Court of Appeal left this to be determined. "Non-specific" is suitable, but "intersex" is another possible description. Despite Professor Greenberg's definition (CA [109]), there is no reason to confine it to congenital intersexuality and current and proposed legislative definitions of that expression do not so confine it¹⁷. Indeed, the mythological origins of the word "hermaphrodite" relate to a person who acquired that status as an adult.
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40. (AS 51-52) The Court of Appeal was correct to identify the significance of intersex persons to the operation of Part 5A. Referring back to the hypothetical indicated earlier in these submission, Part 5A of the Act should not preclude a person mis-identified as a male but who is an intersex person and who has a surgical procedure in the expectation or hope that by doing so, it may assist them to identify further as male or female, but who in the result, does not identify as male or female, from applying to register a change to 'intersex', since, as noted earlier, the criteria in s 32DA(1)(c) does not mandate the result that a person identifies exclusively as male or female. That person may, following the surgery, continue to have characteristics not univocally fitting the binary norm, and identify as an intersex person.
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¹⁷ See for example *Sex Discrimination Act 1984* (Cth), s 4 (definition of "intersex status") and the proposed amendment to the *Legislation Act 2001* (ACT) (definition of "intersex persons" in the *Births, Deaths and Marriages Registration (Amendment) Bill 2013* (ACT)).

Legislative history and objects

41. (AS 53-55) These submissions by the Registrar were considered and correctly rejected by Beazley ACJ (at CA [79]-[83]). As her Honour noted, the references to ‘the other sex’ cited by the Registrar (AS55) were directed to amendments to the *Anti-Discrimination Act*; not the subject Act. More fundamentally, the Registrar impermissibly seeks to use references in extrinsic material to substitute for the language of the statutory provisions.
- 10 42. (AS 56-59) These submissions by the Registrar were also considered and correctly rejected by Beazley ACJ (at CA [116]-[121]), essentially because the amendments to the *Anti-Discrimination Act* and the introduction of Part 5A into the subject Act are not inter-dependent¹⁸. Clearly, discrete legislative purposes were served by the 1996 amendments to the subject Act and to the Anti-Discrimination legislation.
- 20 43. (AS 60) If any significance is to be ascribed to the concept of ‘indeterminate sex’ in the amendments to the *Anti-Discrimination Act*, as Sackville AJA noted (at CA [249]-[253]) it is the acknowledgment by Parliament, in the very legislation introducing Part 5A, that ‘sex’ is not necessarily to be regarded as a binary concept; and that some, but not necessarily all persons of indeterminate sex may identify as a member of a ‘particular’ sex.
44. (AS 61) The reference to ‘opposite sex’ where that appears in the ‘Agreement in Principle’ speech that accompanied the 2008 amending Act, was clearly, but narrowly, directed towards only one of the two kinds of procedure in s 32A (being (a), but not (b)).
- 30 45. Even without the reference to persons of ‘indeterminate’ sex, as indicated, it would have been well known to Parliament at the time Part 5A was introduced that there were some in the community who could not be said to be unambiguously male or female. The broad purpose underlying the Act was to recognise the difficulties confronted by persons unable to conform to traditional notions of sex identification, and to improve their lives by providing them with legal recognition of the person’s perception of their gender¹⁹. Just as not everyone is born unambiguously male or female, so too not everyone perceives themselves or identifies, specifically, as male or female.
- 40 46. This is beneficial legislation, linked as it is with the protection or enforcement of human rights, such that it should be given a fair, large and liberal interpretation²⁰. As Sackville AJA correctly held (at CA [266]-[267]) the language of Part 5A, and s 32DC in particular, is consistent with permitting persons who do not wish to be recorded by the traditional classifications of male or female as neither, subject to the fulfilment of the statutory preconditions.

¹⁸ Citing, in particular, observations in *Certain Lloyds’ Underwriters Subscribing to Contract No IH00AAQS v Cross* [2012] HCA 56; (2012) 293 ALR 412 per Kiefel J at [94]-[104].

¹⁹ *AB* at [25], with reference to the provisions of the Western Australian legislation which, reasoning, in this regard, applies equally to the subject Act.

²⁰ *IW v City of Perth* (1997) 191 CLR 1 at 12, 39; *AB* at [24].

47. As the Court noted in *AB*, in its reference to *SRA*²¹, it is preferable to legally recognise a state which the law does not prevent from coming into existence, since to do so would facilitate a person's social adaptation by permitting the person to lead a more normal life than before.

Conclusion

- 10 48. At CA [89], Beazley ACJ noted that one of the current definitions of 'sex' (the 'extended' definition) of a third sex, falling between the male and female sexes, was referable to Lord Byron's works of 1821. The case law authorities note that the existence of intersex persons, formerly known as hermaphrodites, was acknowledged, in antiquity, by the Ancient Greeks. This Court has very recently acknowledged this class of person. It is a reality that there are persons who, by reason of a congenital condition, or by their sense of identity, cannot be categorised as exclusively male or female. By its limiting construction of Part 5A of the Act generally, and s 32DC in particular, the Registrar prefers to ignore that reality.
- 20 49. It is curious that amid the dire warnings that the Registrar makes as to what acceptance of Norrie's preferred specification of her sex would mean for a raft of State laws and regulations, the Registrar does not address how any of those provisions would apply to Norrie's present predicament, in the face of statutory declarations from medical practitioners that she is neither male nor female and Norrie's professed position (accepted below) that she does not identify as neither male or female.
- 30 50. Accepting that Norrie, born as a male, has undergone a sex affirmation procedure, the Registrar has said to her that if she wants to have a *change* of sex recorded, on the 'Register' (and thereafter as a default 'official' status under NSW law), Norrie must choose a sex identity that is not her own. This position is based only upon the preconception, long since debunked in medicine, ancient history, literature and more modern case law, that every person must be put into the male or female pigeonhole regardless of their physical characteristics or whether they are able to identify with either.
51. The proper construction of Part 5A, and specifically s 32DC, would not countenance the (implied) importation of such fiction.
- 40 52. The appeal should be dismissed and in any event (by reason of the condition attached to the grant of special leave) the appellant is to pay the respondent's costs of the appeal.

PART VII: ARGUMENT IN RESPECT TO NOTICE OF CONTENTION OR NOTICE OF CROSS-APPEAL

53. Not applicable.

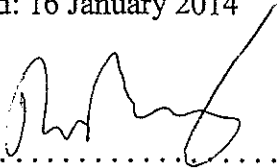
50 ²¹ *AB* at [37].

PART VIII: ORAL ARGUMENT

54. Norrie estimates that 1.5 to 2 hours will be required for the presentation of her oral argument in response.

Dated: 16 January 2014

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